LOCAL GOVERNMENT LAW

Fifth Edition

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Chapter 23

LOCAL REGULATION OF TRADE, BUSINESS, AND OTHER ENTERPRISES

Analysis

§ 23.1 Trade Regulation—Basic Principles

Along with controlling the use of property, and attempting to rejuvenate decaying areas, one of the most important activities of local government is the regulation of trades and businesses. As with land-use control, trade regulation usually involves an exercise of the police power. Overall, four main limitations on municipal regulation of trades and businesses may be noted: (1) The municipality can only exercise power that is expressly or impliedly delegated to the municipality by the state;[1] thus, the police power, some other general power, or some specific delegated power will normally have to justify any regulation of business. (2) The power must then be exercised in a reasonable manner; there must be a rational connection between the restriction and some legitimate end of government policy. (3) Due-process standards must be met; there must be no "taking" of property interests (including a license to do business) without fair compensation, and no

[1] See Priddy v. City of Tulsa, 882 P.2d 81 (Okl.Cr.1994) (ordinances required all sign painters to be licensed and to obtain permit for each sign painted; held unconstitutional as unsupported by any local power). Compare Thomas v. Oklahoma City, 955 P.2d 747 (Okl. Civ. App. 1998) (home rule city had power to regulate taxi drivers; by granting all municipalities limited authority to regulate taxicabs, state statute did not impliedly prohibit home-rule cities from also regulating them under their general police powers). See generally Chapter 8 *supra*. As to the problems created by Uber and other largely unregulated enterprises that compete with licensed businesses, see Note, Share and Share Dislike: The Rise of Uber and Airbnb and How New York City Should Play Nice, 24 J. L. & Pol'y 205 (2015); Note, Need a Ride? Uber: The Trendy Choice That Could Turn Threatening, 17 Nev. L. J. 239 (2016). See also Calo and Rosenblat, The Taking Economy: Uber, Information, and Power, 117 Colum. L. Rev. 1623 (2017); Hackett, The Latest Victim of Uber's Bold Disruption May Be Itself, Time magazine, March 20, 2017, at 22 (noting that Uber is not governed by common carrier laws as are traditional cabs and thus does not guarantee services to all comers); Laird, When Sharing Isn't Caring, 103 A.B.A.J. 16 (May, 2017); Newcomer and Stone, The Fall of Travis Kalanick, Bloomberg Businessweek, Jan. 22, 2018, at 46; Comment, Uber; The Superlative Example in the Class of Transportation Network Companies—Why Pennsylvania's New Bill Regulating TNCs Is the Key to Their Continued Success in the Sharing Economy, 19 Duq. Bus. L. J. 51 (2017); Section 23.2, note 38, on pedicabs and other ride-sharing companies, *infra*.

penalties assessed without according the penalized person all rights of procedural and substantive due process. (4) Any classifications made and distinctions drawn—by which, for instance, one category of businesses is treated differently from another—must at least be reasonable, and must meet all applicable requirements of equal protection. A complete prohibition of a business activity may often be found so severe as to be unreasonable (thus not meeting the second-mentioned test);[2] classifications or exceptions must then necessarily be created, and these will generally be upheld if based on some rational distinction—as in a U.S. Supreme Court case upholding a New Orleans ordinance that banned the sale of foodstuffs from pushcarts in the French Quarter, *except* by vendors who had continually operated the same business within the Quarter 8 years or more.[3]

§ 23.2 Trade Regulation—Valid Purposes

Much municipal regulation of business is attempted under the police-power purposes of promoting public safety or health (or a combination of these two), or under the "catch-all" purpose of promoting the general welfare. Such terms as "safety" and "welfare," of course, cover a wide area, and can include protecting the public from fraudulent activity or price-gouging. Thus, rather strict licensing, or other, requirements for pawnbrokers have often been sustained due to fear of criminal activity by such persons.[4] The prospective pawnbroker can be required by the city to furnish proof of good

[2] Thus, in Good Humor Corp. v. City of New York, 290 N.Y. 312, 49 N.E.2d 153 (1943), a nearly total prohibition of street vending was invalidated as not reasonably necessary. See New Jersey Good Humor v. Board of Commissioners, 124 N.J.L. 162, 11 A.2d 113 (1940). But prohibitions of peddling, curb service, etc. in particular areas, such as those with heavy traffic, may be upheld. See People v. Dmytro, 280 Mich. 82, 273 N.W. 400 (1937) (prohibition of curb service on public streets in commercial areas). As to prohibitions of and limitations on door-to-door solicitation, see Section 23.6, notes 82–99 *infra* and accompanying text.

[3] City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511, on remand 537 F.2d 856 (5th Cir.1976). See Riley v. Rhode Island, 941 A. 2d 198 (R. I. 2008) (fishing regulations prohibited only *new* fishermen from access to depleted species of fish; statute found to have rational basis and not to violate the Due Process and Equal Protection clauses of either the U.S. or Rhode Island Constitution). Compare Reed, Pro-business or Anti-gay? Disguising LGBT Animus as Economic Legislation, 9 Stan. J. Civil Rights & Civil Liberties 153 (2013). See generally Annot., Governmental Regulation of Place of Amusement, Entertainment, or Recreation as Violating Rights of Owner or Operator Under Equal Protection Clause of Federal Constitution's Fourteenth Amendment—Supreme Court Cases, 104 L.Ed.2d 1078 (1991). Certain "suspect" classifications can, under U.S. Supreme Court authority, be justified only if a compelling state interest is shown, while most classification can be justified merely by a showing of rational purpose. See Houle, Compelling State Interest vs. Mere Rational Classification: The Practitioner's Equal Protection Dilemma, 3 Urban Law. 375 (1971). If a business is singled-out for enforcement of a municipal ordinance against it when similarly situated businesses are not required to comply with the ordinance, the "victim" of the law's enforcement may have a claim against the city for discrimination, based on violation of Equal Protection. See Brander's Club, Inc. v. City of Lawton, 918 P.2d 69 (Okl.1996) (city found to have no immunity for constitutional violations; court indicates relief could be granted under Federal Civil Rights Act).

Some cases, without even referring to "equal protection," declare in general that discrimination is fatal to trade-regulation ordinances. See Crawford's Clothes, Inc. v. Board of Commissioners, 131 N.J.L. 97, 35 A.2d 38 (1944) (invalidating restriction on hours that certain businesses could stay open, but with exceptions for a number of businesses); Siciliano v. Neptune Township, 83 N.J.L. 158, 83 A. 865 (1912).

[4] See Provident Loan Soc. v. City & County of Denver, 64 Colo. 400, 172 P. 10 (1918); Medias v. City of Indianapolis, 216 Ind. 155, 23 N.E.2d 590 (1939) (sustaining ordinance requiring pawnbrokers to take thumbprints of all persons from whom they purchased or received goods); City of Wichita v. Wolkow, 110 Kan. 127, 202 P. 632 (1921); City of Hobbs v. Biswell, 81 N.M. 778, 473 P.2d 917 (1970), cert. denied 81 N.M. 772, 473 P.2d 911; Solof v. City of Chattanooga, 180 Tenn. 296, 174 S.W.2d 471 (1943), reh. denied 180 Tenn. 296, 176 S.W.2d 816 (sustaining regulation of pawnshop hours). Cf. Holsman v. Thomas, 112 Ohio St. 397, 147 N.E. 750 (1925) (upholding ordinance restricting jewelry auctions to sixty days in one year and imposing restrictions on jewelry auctioneers). See generally Annot., Validity of Statutes or Ordinances Which Impose Duties Upon Pawnbrokers as Regards Identity of Persons With Whom They Deal or Other Means of Enforcing Criminal Law Against Theft, 125 A.L.R. 598 (1940).

character and to photograph every person who does business with him.[5] But regulation of business is normally an area of statewide concern, and municipal pawnbroking ordinances may be invalidated if in conflict with state statutes;[6] they also will be struck down if they provide for revocation of a license, or imposition of other penalty, without providing such "due process rights" as notice of specific charges and opportunity to cross-examine witnesses.[7]

Similarly, municipal licensing and regulation of sellers of secondhand goods is usually sustained because of the need to protect the public from fraudulent sales.[8] The scope of permissible regulation extends to used car dealers;[9] and here, additional safety and health considerations may also be relied upon, as in justifying a requirement that all open lots for the sale of cars be enclosed with a fireproof fence.[10] The prevention of fraud has also been an important factor in justifying state and local restrictions on astrologers and fortune-tellers.[11] Where short supply, a monopoly situation, or other

[5] Liberman v. Cervantes, 511 S.W.2d 835 (Mo.1974) (photographs of customers had to be made available to police on request).

[6] See Lakewood Pawnbrokers, Inc. v. City of Lakewood, 183 Colo. 370, 517 P.2d 834 (1973), invalidating portions of a statutory city's ordinance that were in conflict with state law—but finding the ordinance a reasonable exercise of the police power and declaring that the valid portions of the ordinance would remain in effect. Cf. Asakura v. City of Seattle, 265 U.S. 332, 44 S.Ct. 515, 68 L.Ed. 1041 (1924), invalidating—as in conflict with a treaty between the U.S. and Japan—an ordinance which excluded Japanese nationals from pawn broking.

[7] See Wolfenbarger v. Hennessee, 520 P.2d 809 (Okl.1974).

[8] See Iscoff v. Police Commission, 222 Cal.App.2d 395, 35 Cal.Rptr. 189 (Dist.Ct.1963) (police chief had power to issue licenses for pawnbrokers—adequate standards provided); City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N.W. 29 (1895); Sherman, Clay & Co. v. Brown, 142 Wash. 37, 252 P. 137 (1927). But cf. City of Guthrie v. Pike & Long, 206 Okl. 307, 243 P.2d 697 (1952), invalidating as discriminatory an ordinance regulating the sale of distressed goods or damaged merchandise.

In order to prevent gambling, fraud, etc., statutes and ordinances restricting or prohibiting businesses from conducting lotteries and other promotional games have generally been sustained also. See Bullock, Merchandising Through Use of Lotteries, 19 Clev.St.L.Rev. 620 (1970); Note, Promotional Games and the Ohio Lottery Laws, 39 U.Cin.L.Rev. 163 (1970); Annot., Validity and Construction of Statute or Ordinance Prohibiting Promotional Games in Connection with Sale of Gasoline, 57 A.L.R.3d 1288 (1974). See generally Annot., Promotion Schemes of Retail Stores as Criminal Offense Under Antigambling Laws, 29 A.L.R.3d 888 (1970); Annot., Scheme for Advertising or Stimulating Legitimate Business as a Lottery, 113 A.L.R. 1121 (1938) (citing prior annotations on same subject). See also Annot., Advertising of "Free Gifts" and Representations as to Price of Goods as Unfair Method of Competition or Practice Within § 5(a) of the Federal Trade Commission Act, 15 L.Ed.2d 865 (1966). Statutes and ordinances have occasionally regulated the use of trading stamps, too. See Annot., Constitutionality of Statutes Prohibiting Giving of Premiums or Trading Stamps, 133 A.L.R. 1087 (1941) (citing prior annotations on same subject).

To provide protection against fraud, municipalities may even enact general "consumer protection" laws, though much enactment of such legislation has been at the *state* level. See McClellan v. Kansas City, 379 S.W.2d 500 (Mo.1964). Cf. Blackman v. County Court, 169 Colo. 345, 455 P.2d 885 (1969) (municipal regulation of weights and measures sustained).

[9] See Vaughn v. City of Los Angeles, 59 Cal.App.2d 771, 140 P.2d 130 (Dist.Ct.1943) appeal dism'd 321 U.S. 751, 64 S.Ct. 639, 88 L.Ed. 1052; People v. Sturgeon, 272 Mich. 319, 262 N.W. 58 (1935); State v. H.J. Minar Co., 249 Minn. 116, 81 N.W.2d 268 (1957) (specifying written statement that dealer must give each purchaser); Ring v. Mayor & Council of North Arlington, 136 N.J.L. 494, 56 A.2d 744 (1948) aff'd 1 N.J. 24, 61 A.2d 508, appeal dism'd 335 U.S. 889, 69 S.Ct. 250, 93 L.Ed. 427.

[10] See Chaiet v. City of East Orange, 136 N.J.L. 375, 56 A.2d 599 (1948) (city could require license though state did also; fence was justified in order to keep cars from driving across sidewalk except at designated entrances and exits). Municipal prohibitions of self-service gas stations have been sustained on safety grounds. Shell Oil Co. v. City of Revere, 383 Mass. 682, 421 N.E.2d 1181 (1981); Town of North Hempstead v. Exxon Corp., 53 N.Y.2d 747, 439 N.Y.S.2d 342, 421 N.E.2d 834 (1981). See cases cited note 38 *infra*.

[11] See Annot., Regulation of Astrology, Clairvoyancy, Fortunetelling, and the Like, 91 A.L.R.3d 766 (1979), noting that restrictions on these practices have usually been upheld—the courts believing that many such practices are inherently deceptive. A leading case is Davis v. State, 118 Ohio St. 25, 160 N.E. 473 (1928),

special circumstances make price-gouging a real danger, municipal price controls can be sustained;[12] and reasonable ceilings on rent charged tenants will similarly be upheld,[13]

error dism'd per curiam, 277 U.S. 571, 48 S.Ct. 432, 72 L.Ed. 993. But see Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa, 39 Cal.3d 501, 217 Cal.Rptr. 225, 703 P.2d 1119 (1985) (city ordinance prohibiting fortune-telling for consideration ruled an unconstitutional restriction on free speech; court declared that other methods of preventing fraudulent fortune-telling were available that would impose less drastic restrictions on protected speech). Cf. Argello v. City of Lincoln, 143 F.3d 1152 (8th Cir.1998) (ordinance prohibiting practices such as clairvoyancy, fortune-telling, and mind-reading invalidated as a content-based regulation that was not supported by a compelling state interest). And an occasional law has been struck down as discriminatory. See Daniel v. Cruz, 268 S.C. 11, 231 S.E.2d 293 (1977) (state statute requiring licenses for itinerant fortunetellers). Cf. Canale v. Steveson, 224 Tenn. 578, 458 S.W.2d 797 (1970) (state statute forbidding fortunetelling in certain counties invalidated as class legislation). Many restrictions in this field have been at the state level.

[12] See Anthony v. City of Atlanta, 66 Ga.App. 506, 18 S.E.2d 82 (1941). Cf. People v. Cook, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974) (city could regulate retail price of cigarettes in order to require price differential between brands with high tar-and-nicotine content and those with lower such content). Wartime conditions have been held to justify municipal price controls. See People v. Sell, 310 Mich. 305, 17 N.W.2d 193 (1945); People v. Lewis, 295 N.Y. 42, 64 N.E.2d 702 (1945). A few cases—mostly in the 1930s or before—invalidated municipal price controls in broad terms, finding a lack of power. City of Mobile v. Rouse, 27 Ala.App. 344, 173 So. 254 (1937), cert. denied 233 Ala. 622, 173 So. 266; Duncan v. City of Des Moines, 222 Iowa 218, 268 N.W. 547 (1936). And an occasional ordinance has been invalidated as involving an unlawful delegation of power. City of Cleveland v. Piskura, 145 Ohio St. 144, 60 N.E.2d 919 (1945). See Note, Municipal Corporations—Price Control—Invalid Delegation of Municipal Legislative Power to Federal Agency, 9 U.Det.L.J. 43 (1945). See generally, on delegation of power, Chapter 9 *supra*.

Municipal minimum-wage ordinances are valid if they do not conflict with state laws but merely supplement any existing state measures. See City of Atlanta v. Associated Builders & Contractors, 240 Ga. 655, 242 S.E.2d 139 (1978). See generally Gillette, Local Redistribution, Local Wage Ordinances, and Judicial Intervention, 101 N.W.U.L. Rev. 1057 (2007). See also Section 6.4, note 50, *supra*.

[13] See Stoneridge Apartments Co. v. Lindsay, 303 F.Supp. 677 (S.D.N.Y.1969); Lifschitz v. City of Miami Beach, 339 So.2d 232 (Fla.App.1976); Gardens v. City of Passaic, 130 N.J.Super. 369, 327 A.2d 250 (1974); Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973), appeal after remand 72 N.J. 412, 371 A.2d 34; 8200 Realty Corp. v. Lindsay, 27 N.Y.2d 124, 313 N.Y.S.2d 733, 261 N.E.2d 647 (1970), appeal dism'd 400 U.S. 962, 91 S.Ct. 367, 27 L.Ed.2d 381; Plaza Management Co. v. City Rent Agency, 25 N.Y.2d 630, 306 N.Y.S.2d 11, 254 N.E.2d 227 (1969); Matter of Hartley Holding Corp. v. Gabel, 13 N.Y.2d 306, 247 N.Y.S.2d 97, 196 N.E.2d 537 (1963); Warren v. City of Philadelphia, 382 Pa. 380, 115 A.2d 218 (1955). Cf. Kennedy v. City of Seattle, 94 Wash.2d 376, 617 P.2d 713 (1980) (rent-control provisions of city's houseboat ordinance upheld though eviction provisions found unconstitutionally confiscatory). But cf. Meyerstein v. City of Aspen, 282 P.3d 456 (Colo. App. 2011) (property owner could pursue rent-control challenge by way of declaratory judgment action; amended *anti*-rent control statute was remedial in nature and could be applied retroactively); Property Owners Association v. Township of North Bergen, 74 N.J. 327, 378 A.2d 25 (1977) (ordinance invalidated as in effect requiring that either landlords or other tenants subsidize needy senior citizens). Some rent-control ordinances have been invalidated as not authorized by state law. City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla.1972) (no power in absence of legislative enactments); Marshal House, Inc. v. Rent Review & Grievance Board, 357 Mass. 709, 260 N.E.2d 200 (1970); Tietjens v. City of St. Louis, 359 Mo. 439, 222 S.W.2d 70 (1949). Or as inconsistent with state law. Heubeck v. City of Baltimore, 205 Md. 203, 107 A.2d 99 (1954). Cf. Old Colony Gardens v. City of Stamford, 147 Conn. 60, 156 A.2d 515 (1959) (contrary to public policy of state as declared in legislation). See also Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal.4th 1232, 63 Cal.Rptr.3d 398, 163 P.3d 89 (2007) (city's "tenant harassment" ordinance, addressing a landlord's malicious efforts to terminate a tenancy through legal proceedings, found pre-empted by state law). Or as pre-empted by federal regulations. See Hill Manor Apartments v. Stokes, 154 N.J.Super. 496, 381 A.2d 1224 (1977) (regulation of Department of Housing and Urban Development exempting all unsubsidized insured housing projects from local rent control). Some rent-stabilized apartments have been boughtout by landlords. See Note, Paying for Pushout: Regulating Landlord Buyout Offers in New York City's Rent-Stabilized Apartments, 50 Harv. Civ. Rights-Civ. Liberties L. Rev. 491 (2015). Or have been targeted for demolition. See Note, Historically Affordable: How Historic Preservationists and Affordable Housing Advocates Can Work Together to Prevent the Demolition of Rent-Stabilized Housing in Los Angeles, 25 J. Affordable Housing & Commun. Dev. L. 103 (2016). But rent regulation has been credited with helping make affordable housing available. See Note, Welcome to the Jungle, Where the Rent Is Too High: Using Rent Regulation in New York City to Maintain an Affordable Housing Stock, 16 Cardozo J. Conflict Resol. 939 (2015).

It is agreed that any rent-control measure must allow landlords the possibility of a reasonable rate of return, or the measure will be invalidated as confiscatory. See Hall v. City of Santa Barbara, 797 F.2d 1493 (9th Cir.1986), cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) (rent-control ordinance applied to mobile home park would amount to a taking if owners not allowed to obtain reasonable return on their

with only some rational basis for the regulation, not necessarily a true emergency, being required by reviewing courts.[14]

investment); Troy Hills Village v. Township Council, 68 N.J. 604, 350 A.2d 34 (1975); Brunetti v. Borough of New Milford, 68 N.J. 576, 350 A.2d 19 (1975); Hutton Park Gardens v. Town Council, 68 N.J. 543, 350 A.2d 1 (1975). But see Sandpiper Mobile Village v. City of Carpinteria, 10 Cal.App.4th 542, 12 Cal.Rptr.2d 623 (1992), cert. denied 507 U.S. 1032, 113 S.Ct. 1850, 123 L.Ed.2d 473 (1993) (mobile-home-park rent-control ordinance upheld as not a taking). Cf. Kavanau v. Santa Monica Rent Control Bd., 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (Sup.Ct.1997), cert. denied 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998) (even where rent ceiling violated landlord's due process rights, he had no taking action as he had not been deprived of all economically beneficial or productive use of property or suffered interference with investment-backed expectations). See generally Radford, Regulatory Takings Law in the 1990s: The Death of Rent Control?, 21 Sw. U.L. Rev. 1019 (1992). In Galland v. City of Clovis, 24 Cal.4th 1003, 103 Cal.Rptr.2d 711, 16 P.3d 130 (2001), cert. denied 534 U.S. 826, 122 S.Ct. 65, 151 L.Ed.2d 32 (2001), owners of a rent-controlled mobile home park filed an action seeking damages under Section 1983 of the Federal Civil Rights Act for alleged due process violations. The court held that costs associated with obtaining rent increases could be the basis of a Section 1983 claim if a landlord suffers confiscation as a result of such costs, thus answering a question left open in the *Kavanau* case, *supra*. But cf. Cacho v. Boudreau, 40 Cal.4th 341, 53 Cal.Rptr.3d 43, 149 P.3d 473 (2007), holding that the California Mobilehome Residency Law, unlike the city ordinances involved in the *Galland* and *Kavanau* cases, *supra*, was not a rent control law. See generally Note, It's the End of the World as We Know It (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society, 72 Fordham L. Rev. 1125 (2004).

A rent-control ordinance may validly provide a method by which a hearing officer or body is allowed to consider a tenant's hardship, or lack thereof, in fixing a reasonable rent. Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), aff'g 42 Cal.3d 365, 228 Cal.Rptr. 726, 721 P.2d 1111 (1986). (The U.S. Supreme Court did not, however, reach the merits of the claim that the "tenant hardship clause" constituted a "taking" of property in violation of the landlord's due process, since there was no evidence that the clause had ever been used to reduce the rent owed a landlord. See Hill, Reflections, Refractions, and Regulations: Variation on the Takings Theme, 12 Urban, State & Local L. Newsletter, No. 3, at 1 (Summer, 1989).) Cf. Yee v. City of Escondido, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (rent-control ordinance as applied to mobile home park owners did not amount to physical taking of property, but issues of whether ordinance violated due process or constituted a regulatory taking found not properly before Court). See generally Baar, The Right to Sell the "Im" mobile Manufactured Home in Its Rent Controlled Space in the "Im" mobile Home Park: Valid Regulation or Unconstitutional Taking?, 24 Urban Law. 157 (1992).

[14] See Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976) (also upholding use of the initiative process to enact rent-control amendment to city charter, but voiding the particular procedure as not providing for prompt and adequate adjustments). Cf. Troy Hills Village v. Township Council, *supra* note 13 (judicial review of rent control is limited to determining if rational basis exists). Rent control legislation purely for the benefit of *elderly* tenants has also been upheld. See Annot., Validity and Construction of Statute or Ordinance Establishing Rent Control Benefit or Rent Subsidy for Elderly Tenants, 5 A.L.R. 4th 922 (1981).

A "rent-holdback" ordinance—allowing tenants to hold back rent and pay the amount into escrow until the landlord has remedied building deficiencies or ordinance violations—can also be upheld if a reasonable need exists. See State ex rel. Michalek v. LeGrand, 77 Wis.2d 520, 253 N.W.2d 505 (1977). Cf. Small Property Owners v. City of San Francisco, 141 Cal.App.4th 1388, 47 Cal. Rptr. 3d 121 (Dist.Ct. 2006) (ordinance requiring landlords to pay tenants interest on security deposits at a rate exceeding then-existing money market rates did not constitute an unconstitutional taking of property).

In Fisher v. City of Berkeley, 37 Cal.3d 644, 209 Cal.Rptr. 682, 693 P.2d 261 (1984), reh. denied 475 U.S. 1150, 106 S.Ct. 1806, 90 L.Ed.2d 350 (1986), a rent-control ordinance was upheld against the claim it conflicted with the Sherman Anti-Trust Act. The court found the ordinance to be rationally related to police power purposes and held that plaintiff-landlords had not demonstrated that the municipality's purposes could be achieved as effectively by a means having a less intrusive impact on federal anti-trust policies. The U.S. Supreme Court affirmed on the ground that the rent controls lacked the concerted action required for a per se violation of Section 1 of the Sherman Act. Fisher v. City of Berkeley, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), reh. denied 475 U.S. 1150, 106 S.Ct. 1806, 90 L.Ed.2d 350 (1986). But cf. South Hamilton Assoc. v. Mayor & Council of Morristown, 99 N.J. 437, 493 A.2d 523 (1985) (rent-control ordinance could not be applied retroactively so as to impair contract rights).

The municipal power to control rent has been held separate and distinct from the power to regulate land use by zoning. All Peoples Congress of Jersey City v. Mayor of Jersey City, 195 N.J.Super. 532, 480 A.2d 948 (1984) (rent-control ordinance exempting large, new apartment complexes built in redevelopment areas did not come within restrictions on exclusionary zoning that had been established by New Jersey Supreme Court). See generally Downs, Residential Rent Controls: An Evaluation (Urban Land Institute 1988). See also Drobak,

Protection of public *health* is the strongest ground on which regulation of purveyors of food and drink can be justified. If not in conflict with state law,[15] most municipal restrictions on such purveyors have been upheld—including inspection[16] and licensing[17] requirements. Thus, local health regulations as to meat markets and butcher shops, with provision for regular inspections, have been sustained,[18] as have such regulations as

Constitutional Limits on Price and Rent Control: The Lessons of Utility Regulation, 64 Wash. U.L.Q. 107 (1986).

Rent control remains highly controversial. In 1982, a Presidential Commission on Housing recommended that local regulations on rent be ended as quickly as possible and that the federal government pre-empt rent controls on all rental housing financed by insured institutions or by federally insured mortgages. See "Presidential Panel Calls for Ban on Rent Control," 68 A.B.A.J. 903 (1982). See also Comment, San Francisco's Owner Move-In Legislation: Rent Control or Out of Control?, 34 U. San Francisco L. Rev. 537 (2000). Rent regulation has also sometimes been applied to mobile homes. See Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 548 F.3d 1184 (9th Cir. 2008) (property owner's "as applied" takings claim challenging mobile home rent control ordinance was barred where claimant failed to avail itself of possible remedy of just compensation under state law).

Another type of charge that has been considered appropriate for possible regulation is the surcharge often imposed by banks on ATM transactions. As to whether such surcharges can, and should, be regulated by cities, see Note, The Legality of Local ATM Surcharge Bans: The Case for the Cities of Santa Monica and San Francisco, 74 So. Cal. L. Rev. 1353 (2001). Statutes and ordinances have also sometimes been passed forbidding merchants from imposing a surcharge on customers who pay by credit card, but the U. S. Supreme Court has declared these unconstitutional. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (New York statute violated First Amendment protection of speech and was unconstitutionally vague). But cf. Comment, Why Anti-Surcharge Laws Do Not Violate a Merchant's Freedom of Speech, 66 Am. U. L. Rev. 1459 (2017). See also Note, Payday Loan Regulation: Any Interest?, 11 DePaul Bus. & Commercial L. J. 417 (2013).

[15] See Town of Honea Path v. Flynn, 255 S.C. 32, 176 S.E.2d 564 (1970) (void if conflict with state law). Cf. Application of Tenny v. Sainsbury, 7 A.D.2d 514, 184 N.Y.S.2d 185 (1959) (void if state has preempted the field); 7-Eleven, Inc. v. McClain, 422 P.2d 455 (Okl.1967) (regulation of beer-sales pre-empted by state except where municipalities expressly given power).

On the effect that fear of bioterrorism has had on municipal use of power to control public health (especially since the terrorist attacks of September 11, 2001), see Richards, O'Brien & Rathbun, Bioterrorism and the Use of Fear in Public Health, 34 Urban Law. 685 (2002). On municipal food ordinances based on public health, see generally Marks, A New Governance Recipe for Food Safety Regulation, 47 Loy. U. Chi. L. J. 907 (2016); Comment, The Real Toy Story: The San Francisco Board of Supervisors Healthy Food Incentives Ordinance, 8 J. Food L. & Pol'y 347 (2012). See also Note, Food Ordinances: Encouraging Eating Local, 37 Wm. & Mary Envtl. L. & Pol'y Rev. 511 (2013).

[16] City of Dayton v. Jacobs, 120 Ohio St. 225, 165 N.E. 844 (1929). This includes the power to charge inspection fees, but only if they are reasonable in amount. See City of Chicago v. R. & X. Restaurant, 369 Ill. 65, 15 N.E.2d 725 (1938). See generally Annot., Reasonableness of Fee Required of Places Where Food Is Served for Consumption Upon the Premises, and Basis for Fixing Amount, 117 A.L.R. 1313 (1938).

[17] Arms v. City of Chicago, 314 Ill. 316, 145 N.E. 407 (1924). This includes power to charge a reasonable license fee. See Larson v. City of Rockford, 371 Ill. 441, 21 N.E.2d 396 (1939). But if the fee is levied under the municipal power of regulation, rather than the power to raise revenue, the amount must bear a reasonable relationship to the regulatory expenses involved. See Crackerjack Co. v. City of Chicago, 330 Ill. 320, 161 N.E. 479 (1928).

[18] Trigg v. Dixon, 96 Ark. 199, 131 S.W. 695 (1910); Ex parte Banta, 25 Cal.App.2d 622, 78 P.2d 243 (Dist.Ct.1938); Cosby v. City of Washington, 72 Ga.App. 146, 33 S.E.2d 446 (1945) (holding that permit from U.S. did not exempt from municipal requirements); Kinsley v. City of Chicago, 124 Ill. 359, 16 N.E. 260 (1888); Cronin v. People, 82 N.Y. 318 (1880). Cf. Ex parte Lowenthal, 92 Cal.App. 200, 267 P. 886 (Dist.Ct.1928) (regulation of sale of uncooked meats allowed). The power to inspect includes, as is usual, the power to charge reasonable inspection fees, but unreasonable ones will be held invalid. See City of Baton Rouge v. Sanchez, 161 La. 320, 108 So. 552 (1926) (city exceeded power in assessing inspection fee clearly in excess of expenses of inspection). Cf. Hoefling v. City of San Antonio, 85 Tex. 228, 20 S.W. 85 (1892) (tax on butchers invalidated where collected only from those selling meat at private stalls, not from those renting stalls from city).

Municipalities have also been found to have power to inspect and mark canned meat products. City of Baltimore v. Bloecher & Schaff, 149 Md. 648, 132 A. 160 (1926), aff'd per curiam 275 U.S. 490, 48 S.Ct. 33, 72 L.Ed. 389. And regulations of slaughterhouses have long been upheld. See City of Albany v. Newhof, 256 N.Y. 661, 177 N.E. 183 (1931) (forbidding slaughterhouses in certain districts of city); Simon v. Cleveland Heights, 46 Ohio App. 234, 188 N.E. 308 (1933) (inspection of slaughterhouses); Sitterle v. Victoria Cold Storage Co., 33 S.W.2d 546 error dism'd (Tex.Civ. App.1931).

applied to groceries.[19] *Specific* restrictions will be upheld if reasonable, as, for example, requirements of adequate refrigeration[20] and of adequate protection of foodstuffs from dirt and insects.[21] Licensing and inspection of restaurants by municipalities is ordinarily sustained,[22] as are such specific requirements as that drinking glasses be sterilized by

[19] Justesen's Food Stores, Inc. v. City of Tulare, 43 Cal.App.2d 616, 111 P.2d 424 (Dist.Ct.1941). See Natal v. Louisiana, 139 U.S. 621, 11 S.Ct. 636, 35 L.Ed. 288 (1891) (license can be required). But cf. Brown v. City of Seattle, 150 Wash. 203, 272 P. 517 (1928) mod. 150 Wash. 203, 278 P. 1072 (hours regulation of meat market held unconstitutional as not promoting public health or safety).

Wholesale dealers in groceries can also be regulated by municipalities. See Ritter v. City of Pontiac, 276 Mich. 416, 267 N.W. 641 (1936); American Grocery Co. v. Board of Commissioners of New Brunswick, 126 N.J.L. 367, 19 A.2d 696 (1941).

[20] City of Chicago v. Arbuckle Brothers, 344 Ill. 597, 176 N.E. 761 (1931); State v. Witt's Market House, Inc., 191 Minn. 425, 254 N.W. 596 (1934); S. H. Cranston v. Department of Health, 168 Misc. 749, 6 N.Y.S.2d 275 (1938).

[21] State ex rel. Bacigalupo v. O'Connor, 115 Minn. 339, 132 N.W. 303 (1911). Cf. DeCarlo v. Jefferson County Board of Health, 274 Ala. 506, 150 So.2d 374 (1963) (ordinance required that passage from living or sleeping quarters into area where food was handled could only be via outside; upheld).

[22] See Western Pennsylvania Restaurant Association v. City of Pittsburgh, 366 Pa. 374, 77 A.2d 616 (1951); Nance v. Mayflower Tavern, 106 Utah 517, 150 P.2d 773 (1944). Cf. Del Vecchio v. Mayor & Township Committee of South Hackensack, 49 N.J.Super. 44, 138 A.2d 839 (1958) (upholding ordinance requiring windows, doors, etc. of restaurants to be certain distance from property line); City of Rochester v. Schonleber, 9 Misc.2d 160, 168 N.Y.S.2d 412 (1957) (reasonable controls on catering businesses allowed). See generally Note, Constitutional Law—Municipal Corporations—Restaurant Licensing and Grading, 12 U.Pitt.L.Rev. 623 (1951). See also Annot., Discrimination as Between Restaurants or Eating Places in Statute or Ordinances Respecting Them, 169 A.L.R. 976 (1947); Annot., What Constitutes a Restaurant, 122 A.L.R. 1399 (1939). A number of local governments—such as New York City, Philadelphia, and Montgomery County, Maryland—, as well as the state of California, have enacted laws banning trans fats in restaurants. See Steinhauer, California Bars Restaurant Use of Trans Fats, N.Y. Times, July 26, 2008, at A1. In New York State Restaurant Ass'n v. New York City Bd. Of Health, 509 F. Supp. 2d 351 (S.D.N.Y. 2007), aff'd, 556 F.3d 114 (2d Cir. 2009), the courts upheld a law that required all restaurants that voluntarily disclose nutritional information and all chain restaurants that sell standardized meals in 15 or more locations nationwide to post the calorie content of their menu items. See Note, Cheeseburger in Paradise? An Analysis of How *New York State Restaurant Association v. New York City Board of Health* May Reform Our Fast Food Nation, 59 DePaul L. Rev. 733 (2010), noting that the law was intended to encourage healthful eating and to fight obesity. See generally McCann, Economic Efficiency and Consumer Choice Theory in Nutritional Labeling, 2004 Wis. L. Rev. 1161 (discussing, at 1233–44, various nutritional disclosure methods); Comment, Fast Food: Oppression Through Poor Nutrition, 95 Cal. L. Rev. 2221 (2007); Note, Putting Calorie and Fat Counts on the Table: Should Mandatory Nutritional Disclosure Laws Apply to Restaurant Foods?, 73 Geo. Wash. L. Rev. 377 (2005) (proposing federal legislation requiring restaurants to make various nutritional items of information available to customers, though not necessarily on the menu); Note, Combating Obesity One Step at a Time: Why Indiana Should Implement Statewide Complete Streets Legislation, 12 Ind. Health L. Rev. 385 (2015). National legislation does now require retailers with more than 20 locations to post calorie counts. See Park, Health—The Big Gulp, Time magazine, June 18, 2012, at 20.

Limits on the size of sweetened beverages that may be sold have been attempted in some municipalities including New York City. See Note, The New York City Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic, 46 Conn. L. Rev. 807 (2013); Note, Large-sized Soda Ban as an Alternative to Soda Tax, 23 Cornell J. L. & Pub. Pol'y 187 (2013). As to increasing taxes on sweetened beverages, see DeSantis, Formulating a Soda Tax Fit for Consumption: A Pragmatic Approach to Implementing the Failed New York Soda Tax, 16 Mich. St. U. J. Med. & L. 363 (2012). But see Comment, Philadelphia's Soda Tax: A Violation of the Uniformity Clause, 90 Temple L. Rev. 97 (2017). See generally Fry, Zimmerman & Kappagoda, Healthy Reform, Healthy Cities: Using Law and Policy to Reduce Obesity Rates in Underserved Communities, 40 Fordham Urb. L. J. 1265 (2013). See also Hsu, A Cost-Benefit Analysis of Sugary Drink Regulation in New York City, 10 J. Food L. & Pol'y 73 (2014); Comment, Big Brother Takes a Bite Out of the Big Apple and Gets a Worm: Can *Any* Government Body Regulate Portions?, 55 S. Tex. L. Rev. 553 (2014).

Regulation of bakeries has often been sustained. Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924); Ward Baking Co. v. City of Chicago, 340 Ill. 212, 172 N.E. 171 (1930). As has regulation of manufacturers and sellers of candy. See People v. Greenberg, 134 App.Div. 599, 119 N.Y.S. 325 (1909) (adulterated food law applied to middleman). And of soft drinks. City of Chicago v. Chicago Beverage Co., 372 Ill. 33, 22 N.E.2d 708 (1939). And municipalities can regulate and inspect vending machines selling products for human consumption. Larson v. City of Rockford, 371 Ill. 441, 21 N.E.2d 396 (1939).

restaurants[23] or that employees be required to pass regular medical examinations.[24] The regulation of dairy facilities[25] and of local distributors of milk[26] is similarly justifiable on grounds of protecting public health. As to containers for beverages, one type of law has become common: a requirement that return-deposits be made on such containers. This type of restriction has been generally upheld, mainly as necessary to prevention of litter and as thus promoting a clean environment.[27] A combination of health and

[23] Donahue v. City of Portland, 137 Me. 83, 15 A.2d 287 (1940).

[24] Langley v. City of Dallas, 252 S.W. 203 (Tex.Civ.App.1923).

[25] See Natural Milk Producers Association v. City of San Francisco, 20 Cal.2d 101, 124 P.2d 25 (1942); Koy v. City of Chicago, 263 Ill. 122, 104 N.E. 1104 (1914); Nelson v. City of Minneapolis, 112 Minn. 16, 127 N.W. 445 (1910) (tuberculin test required); Stephens v. Oklahoma City, 150 Okl. 199, 1 P.2d 367 (1931). The power extends to regulation and inspection of dairy herds. See Carpenter v. City of Little Rock, 101 Ark. 238, 142 S.W. 162 (1911); City of Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903). This necessarily involves some extraterritorial exercise of the city's regulation, and extraterritorial power has been found in this regard if expressly or impliedly conferred by statute or charter, but not otherwise. See Dean Milk Co. v. City of Waukegan, 403 Ill. 597, 87 N.E.2d 751 (1949) (city could not prohibit sale of milk other than that produced and pasteurized in that county); City of Rockford v. Hey, 366 Ill. 526, 9 N.E.2d 317 (1937) (extraterritorial effect of ice cream ordinance held void). See generally, on extraterritorial exercise of city powers, Chapter 8 *supra*.

A municipality may regulate the temperature at which milk can be transported into the city. City of Chicago v. Chicago & Northwestern Railway, 275 Ill. 30, 113 N.E. 849 (1916).

[26] Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N.E.2d 827 (1949); Kansas City v. Henre, 96 Kan. 794, 153 P. 548 (1915); City of Newport v. Hiland Dairy Co., 291 Ky. 561, 164 S.W.2d 818 (1942); City of St. Louis v. Kellmann, 295 Mo. 71, 243 S.W. 134 (1922), error dism'd 263 U.S. 679, 44 S.Ct. 132, 68 L.Ed. 503 (city may require milk sellers to take out permits—no defense to failure to obtain permit that milk was clean and sanitary); Stracquadanio v. Department of Health, 285 N.Y. 93, 32 N.E.2d 806 (1941). Clearly, the municipal regulation can extend to the requirement that all milk sold in the city be pasteurized. See Koy v. City of Chicago, *supra* note 25. As to regulation of unpasteurized ("raw") milk, see Ozersky, Taste of America—Got Raw?, Time magazine, Sept. 20, 2010, at 69 (under federal law, it's illegal to sell consumers unpasteurized milk that has been transported across state lines; ten states forbid such milk from being sold at all, and 30 others restrict such sales). See generally Note, Striking a Balance: Regulation of Raw Milk and a New Approach for Indiana, 11 Ind. Health L. Rev. 399 (2014). See also Note, Township Makes "Moo"ves Against Dairy: The Nebraska Supreme Court Recognizes Local Government Regulation of Agriculture in Butler County Dairy, L.L.C. v. Butler County, 827 N.W. 2d 267 (2013), 93 Neb. L. Rev. 196 (2014). And the city can impose restrictions on the method of pasteurization allowed. Pacific Coast Dairy v. City of San Francisco, 214 Cal. 668, 8 P.2d 140 (1932). See generally Note, Constitutional Law—Municipal Corporations—Police Power, 16 St. John's L.Rev. 124 (1941); Annot., Constitutionality of Regulations as to Milk, 80 A.L.R. 1225 (1932). The processing and distribution of other dairy products can also be regulated. See Simco Sales Service v. Brackin, 344 Pa. 628, 26 A.2d 323 (1942) (ice cream); City of Spokane v. Arnold, 73 Wash. 256, 131 P. 815 (1913) (butter).

A leading U.S. Supreme Court case—Nebbia v. State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934)—upheld sweeping state restrictions on the milk business, including regulation of retail prices. The dairy industry is one of the most thoroughly regulated of all businesses in America. See Note (on state-court decision in *Nebbia*), Constitutional Law—Public Utilities—Police Power—Emergency, 2 Geo. Wash.L.Rev. 96 (1933); Recent Case (on state-court decision in *Nebbia*), Note, Constitutional Law—Due Process of Law—Fixing of Minimum Milk Prices, 47 Harv.L.Rev. 130 (1933); Comment, Constitutional Law—Regulation of the Price of Milk in Interstate Commerce, 1 Mo.L.Rev. 64 (1936); Legislation Note, Milk Regulation: A Problem in Economics, Legislation, and Administration, 40 W.Va.L.Q. 247 (1934). See generally Note, Nebbia v. People: A Milestone, 82 U.Pa.L.Rev. 619 (1934).

[27] Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975) (requirement held not arbitrary); American Can Co. v. Oregon Liquor Control Commission, 15 Or.App. 618, 517 P.2d 691 (1973) (no violation of commerce clause); Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954) (reasonable relation to a police-power purpose found). See Gargan, New York's New Deposit Law on Bottles and Cans Will Take Effect Tomorrow, N.Y. Times, Sept. 11, 1983, at A19, noting that New York was becoming the ninth state to adopt a return deposit law. The most discussed law of this nature is the Oregon statute requiring beverage retailers to accept empty beverage containers and pay the consumer the statutory refund value, and requiring distributors to accept the empty containers from the retailer for the refund value. See Beals, Comment: Oregon's Bottle Law: A Model for Comparable Legislation?, 11 Cal.West. L.Rev. 537 (1975); Note, American Can: Judicial Response to Oregon's Nonreturnable Container Legislation, 4 Ecology L.Q. 145 (1974); Note, The Oregon Bottle Bill, 54 Or.L.Rev. 175 (1975). See generally Greef & Martin, Beverage Container Legislation: A Policy and Constitutional Evaluation, 52 Tex.L.Rev. 351 (1974); Gudger & Walters, Beverage Container Regulation: Economic Implications and Suggestions for Model Legislation, 5 Ecology L.Q. 265 (1976); Slade, Wilson & Wilson, State and Local Regulation of Nonreturnable Beverage Containers, 1972 Wis.L.Rev. 536; "A Stepped-up Drive to Smash Bottle Bills," Bus. Week, July 12, 1982, at 30 (noting the efforts of the container and beverage industries to defeat or repeal return-deposit laws); Annot., Validity and Construction of Statute or Ordinance Requiring Return Deposits on Soft Drink or Similar Containers, 73 A.L.R.3d 1105 (1976). See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), upholding a statute banning retail sale of milk in plastic non-returnable, non-refillable containers, though permitting sale of milk in *non*-plastic, non-returnable, non-refillable containers; Wisconsin Association of Food Dealers v. City of Madison, 89 Wis.2d 311, 278 N.W.2d 481 (1979), upholding an ordinance requiring retailers of milk to offer this product in returnable containers. On problems of garbage disposal, see generally Section 23.5, notes 73–81 of this chapter *infra*, and accompanying text.

environmental factors have also been cited by courts in sustaining municipal regulation of junkyards and wrecking yards, which are considered potentially dangerous sources of fire and disease.[28] It is also sometimes noted that such places are often used for the disposition of stolen goods.[29] For these reasons, licensing requirements as to such yards have been sustained,[30] as have requirements that records be kept of all purchases.[31] Fencing requirements as to junkyards have been sustained as providing protection to children in the neighborhood and minimizing the dangers of vandalism.[32] Increasingly, aesthetic reasons are being accepted as legitimate grounds for fencing requirements and even for exclusion of junk yards from entire areas.[33]

Some businesses are recognized as posing special dangers to customers, to persons in the neighborhood, or to both such groups; and thus strict regulation is justified. Laundries, for instance, may be made subject to licensing requirements,[34] and may be

[28] See Vermont Salvage Corp. v. Village of St. Johnsbury, 113 Vt. 341, 34 A.2d 188 (1943); Lerner v. Delavan, 203 Wis. 32, 233 N.W. 608 (1930). See generally State ex rel. Keener v. Serr, 53 Ohio App.2d 143, 372 N.E.2d 360 (1976); City of Enid v. Ramer, 556 P.2d 646 (Okl.App.1976) (with review of cases), both noting the sustaining of many local restrictions on junkyards and salvage yards.

[29] See City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N.W. 29 (1895); Bologno v. O'Connell, 7 N.Y.2d 155, 196 N.Y.S.2d 90, 164 N.E.2d 389 (1959). Cf. Mansbach Scrap Iron Co. v. City of Ashland, 235 Ky. 265, 30 S.W.2d 968 (1930) (owner can be required to let police search the premises); State v. Wybierala, 305 Minn. 455, 235 N.W.2d 197 (1975) (same).

[30] See Levi v. City of Anniston, 155 Ala. 149, 46 So. 237 (1908); Levine v. Board of Adjustment, 125 Conn. 478, 7 A.2d 222 (1939); Shurman v. City of Atlanta, 148 Ga. 1, 95 S.E. 698 (1918); Grossman v. City of Indianapolis, 173 Ind. 157, 88 N.E. 945, reh. denied 173 Ind. 157, 89 N.E. 862 (1909); Knack v. Velick Scrap Iron & Machinery Co., 219 Mich. 573, 189 N.W. 54 (1922); Price v. Smith, 416 Pa. 560, 207 A.2d 887 (1965); Village of St. Johnsbury v. Aron, 103 Vt. 22, 151 A. 650 (1930); City of Milwaukee v. Ruplinger, 155 Wis. 391, 145 N.W. 42 (1914).

[31] See Shurman v. City of Atlanta, *supra* note 30 (bond requirement also imposed); City of St. Louis v. Baskowitz, 273 Mo. 543, 201 S.W. 870 (1918). Cf. Levi v. City of Anniston, *supra* note 30 (dealer must notify police of intent to purchase items, with description of the property and of person from whom to be bought).

[32] See Vermont Salvage Corp. v. Village of St. Johnsbury, *supra* note 28. Cf. Levine v. Board of Adjustment, *supra* note 30 (5-foot high fence).

[33] See Rotenberg v. City of Fort Pierce, 202 So.2d 782 (Fla.App.1967); State v. Buckley, 16 Ohio St.2d 128, 243 N.E.2d 66 (1968), appeal dism'd and cert. denied 395 U.S. 163, 89 S.Ct. 1647, 23 L.Ed.2d 174; Lenci v. City of Seattle, 63 Wash.2d 664, 388 P.2d 926 (1964), all sustaining—largely on aesthetic grounds—fencing requirements as to junkyards and salvage yards. As to exclusion of such uses from a city, see Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255 (1965), sustaining a total ban on automobile wrecking yards in a city. See generally Comment, Municipal Regulation of Junk Yards, 12 Syracuse L.Rev. 79 (1960); Annot., Validity, Construction, and Application of Zoning Ordinance Relating to Operation of Junkyard or Scrap Metal Processing Plant, 50 A.L.R.3d 837 (1973). As to the application of zoning laws to junkyards and comparable land-uses, see also Section 18.4, note 52 *supra*, and accompanying text.

[34] Ex parte Le Protti, 68 Cal. 635, 10 P. 113 (1886); City of Newnan v. Atlanta Laundries, Inc., 174 Ga. 99, 162 S.E. 497 (1932); Ruban v. City of Chicago, 330 Ill. 97, 161 N.E. 133 (1928); State v. Dirnberger, 152 Minn. 44, 187 N.W. 972 (1922); Yee Bow v. City of Cleveland, 99 Ohio St. 269, 124 N.E. 132 (1919), error dism'd 255 U.S. 578, 41 S.Ct. 320, 65 L.Ed. 794 (upholding broad standards to be used by licensing authority). A reasonable license fee can be imposed. See Soon Hing v. Crowley, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145 (1885); Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885). See generally 50 Am.Jur.2d Laundries, Dyers & Dry Cleaners §§ 5–6 (1970). See also Annot., Application of City Ordinance Requiring License for a Laundry to Supplier of Coin-Operated Laundry Machines Intended for Use in Apartment

required to meet certain standards for fire-protection and sanitation purposes.[35] Laundromats may be required to keep an attendant on the premises, particularly if the business remains open at night.[36] Similarly, a municipality may establish a system of licensing gasoline stations if, and only if, they meet designated safety standards.[37] Some authority has even upheld municipal prohibitions of self-service gasoline stations.[38]

Building, 65 A.L.R.3d 1296 (1975); Annots., Public Regulation of Dry Cleaning and Dyeing Establishments, 128 A.L.R. 678 (1940); 49 A.L.R. 110 (1927).

[35] See Ex parte Sing Lee, 96 Cal. 354, 31 P. 245 (1892); Ex parte Moynier, 65 Cal. 33, 2 P. 728 (1884); Yee Bow v. City of Cleveland, *supra* note 34 (upholding right of municipality to conduct inspections). Cf. Ex parte White, 67 Cal. 102, 7 P. 186 (1885) (upholding requirement that laundries be of brick and stone). While some types of regulation of laundries are less common today than in the past, a related type of restriction that has now appeared is regulation of the phosphate content of detergents that may be used in the locality, due to fear of "cultural eutrophication" of the waters, causing increased production of algae and aquatic plants. See Niehoff, Phosphates in Detergents: The Chicago-Type Ordinance and Other Remedies, 40 U.Cin.L.Rev. 548 (1971) (noting the Chicago ordinance, which provides a 2-stage phase-out of phosphates); Annot., Validity, Under Federal Constitution, of State Statute or Local Ordinance Regulating Phosphate Content of Detergents, 21 A.L.R.Fed. 365 (1974). See generally the discussion of water-pollution control Section 23.4 *infra*. As to regulation of nail salons, see Note, Beyond the Polish: An Examination of Hazardous Conditions in Nail Salons and Potential Solutions for the Industry in New York City, 21 J. L. & Pol'y 243 (2012).

[36] See Gibbons v. City of Chicago, 34 Ill.2d 102, 214 N.E.2d 740 (1966), cert. denied 385 U.S. 829, 87 S.Ct. 63, 17 L.Ed.2d 65 (attendant required after 6 P.M., and laundromats required to close from 11:30 P.M. until 6:30 A.M.; upheld); Township of Little Falls v. Husni, 139 N.J.Super. 74, 352 A.2d 595 (1976); Schacht v. City of New York, 30 Misc.2d 77, 219 N.Y.S.2d 53 (1961), mod. 14 A.D.2d 526, 217 N.Y.S.2d 278 (upholding portion of ordinance requiring that attendant be present after 6 P.M. and that laundromats close between midnight and 6 A.M.). But cf. Heard v. Bolton, 107 Ga.App. 863, 131 S.E.2d 835 (1963) (ordinance requiring self-service laundry to close between 11 P.M. and 7 A.M. unless it had attendant on duty found unreasonable and void). See generally Annot., License, Regulation, and Taxation of Self-Service Laundries, 87 A.L.R.2d 1007 (1963).

In People v. Raub, 9 Mich.App. 114, 155 N.W.2d 878 (1967), the court upheld a requirement that *car* washes close between 10 P.M. and 7 A.M.

[37] See Appeal of Holley, 110 Conn. 80, 147 A. 300 (1929); City of Ottawa v. Brown, 372 Ill. 468, 24 N.E.2d 363 (1939); Scott v. City of Waterloo, 223 Iowa 1169, 274 N.W. 897 (1937); Fletcher Oil Co. v. Bay City, 247 Mich. 572, 226 N.W. 248 (1929); Hyma v. Seeger, 233 Mich. 659, 207 N.W. 834 (1926). The licensing standards can be fairly broad, not necessarily spelling out all requirements in detail. See City of Fordyce v. Dunn, 215 Ark. 276, 220 S.W.2d 430 (1949); Starkey v. City of Longmont, 91 Colo. 387, 15 P.2d 620 (1932) (gasoline station required to have attendant in charge; valid). But the standards cannot be so vague or general as to leave licensing authorities with nearly unbridled discretion. See D-X Sunray Oil Co. v. City of Stevens Point, 173 F.Supp. 431 (W.D.Wis.1959). See generally Phillips v. Town of Belleville, 135 N.J.L. 271, 52 A.2d 441 (1947) (ordinance concerning building of automobile service stations was invalid where it contained no norm for granting or refusing permits). A reasonable fee to cover costs of licensing and inspection may be levied. Fletcher Oil Co. v. Bay City, *supra*.

Closing-hour requirements as to gasoline stations have been upheld if found reasonable. See Bi-Lo Stations, Inc. v. Alsip, 22 Ill.App.3d 514, 318 N.E.2d 47 (1974).

[38] J & L Oil Co. v. City of Carrollton, 230 Ga. 817, 199 S.E.2d 190 (1973); Shell Oil Co. v. City of Revere, 383 Mass. 682, 421 N.E.2d 1181 (Mass. 1981); Town of North Hempstead v. Exxon Corp., 53 N.Y.2d 747, 439 N.Y.S.2d 342, 421 N.E.2d 834 (1981). Cf. Hawkins v. City of Red Cloud, 123 Neb. 487, 243 N.W. 431 (1932), appeal dism'd 289 U.S. 704, 53 S.Ct. 660, 77 L.Ed. 1461 (1933) (ordinance prohibiting coin-operated gasoline pumps upheld); Southern Wasco County Ambulance Serv., Inc. v. State, 156 Or.App. 543, 968 P.2d 848 (1998) (rational basis found for legislative classifications exempting certain consumers and sellers from general prohibition on self-service dispensing). But see Oil City Discount Center, Inc. v. City of Yonkers, 53 Misc.2d 191, 277 N.Y.S.2d 945 (1967) (ordinance prohibiting operation of self-service gasoline station void as not reasonably related to public health, safety, or welfare). Some ordinances allow self-service pumps only if an attendant is kept on duty. The "energy crunch" of recent times has resulted in discontinuance of operation of many gasoline stations—and conversion of many into other businesses. In Sun Oil Co. v. Goldstein, 453 F.Supp. 787 (D.Md.1978), aff'd without opinion 594 F.2d 859 (4th Cir.), the court upheld a Maryland statute declaring a two-year moratorium on conversion of full-service gas stations to lesser service facilities; the statute was passed due to concern about the availability of automotive repair facilities. Taxi companies and other providers of transportation have long been subject to government safety regulation; and such regulation, particularly at the municipal level, has sometimes now been extended to pedicabs. See Note, The Rise of the Pedicab: Municipal Regulation of an Emerging Industry, 53 Ariz. L. Rev. 255 (2011). Ride-sharing companies

§ 23.3 Restrictions on Hours and Days of Business Operation

Particularly controversial forms of municipal regulation of business are those that limit the hours of business operation. Courts tend to scrutinize such limitations closely to make sure there is some valid police-power purpose, such as protection of health, aid in lessening or detecting criminal activities, or prevention of noise that might be disturbing to neighboring residents. Ordinances reasonably aimed at some such purpose will normally be sustained, but not those that merely limit competition—and, in any case, not those that unreasonably discriminate against certain business. Thus, restrictions on restaurant hours have been upheld if reasonably necessary to noise-prevention;[39] limits on the business-hours of taverns have been sustained if necessary to enforcement of the liquor laws and/or to help curb violent and criminal activity;[40] closing hours for billiard halls may be justified if these places are reasonably regarded as breeding-grounds of crime;[41] and pawn-brokers and second-hand stores may be required

are also being regulated in some cities. See Rhodan, Hack Attacks—Cities Take Aim at Fast-growing Ride Services, Time magazine, March 31, 2014, at 18.

[39] State v. Grant, 107 N.H. 1, 216 A.2d 790 (1966); City of Burlington v. Jay Lee, Inc., 130 Vt. 212, 290 A.2d 23 (1972). But see City of Jackson v. Murray-Reed-Slone & Co., 297 Ky. 1, 178 S.W.2d 847 (1944). A closing-hour restriction on restaurants based on a desire to prevent sub rosa sale of intoxicating liquor was upheld in Churchill v. City of Albany, 65 Or. 442, 133 P. 632 (1913); but such a purpose was held an indirect and unreasonable means of dealing with the problem in Fincher v. City of Union, 186 S.C. 232, 196 S.E. 1 (1938). See Annot., Validity of Municipal Ordinance Regulating Time During Which Restaurant Business May be Conducted, 53 A.L.R.3d 942 (1973). See generally Reynolds, A Time to Open and a Time to Close—Municipal Regulation of Business Hours, 55 J. Urban & Contemp. L. 41 (1999); Annot., Validity of Statute or Ordinance Fixing Closing Hours for Certain Kinds of Business, 55 A.L.R. 242 (1928). See also Annot., What Constitutes a "Restaurant," 122 A.L.R. 1399 (1939); Annot., What Amounts to "Restaurant" or "Restaurant Business" Within Intoxicating Liquor Law, 105 A.L.R. 566 (1936). Many restrictions on restaurants are also imposed, of course, in order to insure that they serve healthful, uncontaminated food. See notes 22–24 *supra* and accompanying text. And zoning laws often forbid restaurants in many areas of a community. See Annot., Zoning Regulations as Forbidding or Restricting Restaurants, Diners, "Drive-ins," or the Like, 82 A.L.R.2d 989 (1962). Occasionally, restaurants are allowed in a certain zone only if they agree to restrictions on their hours of operation. See Annot. Imposing Restriction as to Hours or Days of Operation of Business as Condition of Allowance of Special Zoning Exception or Variance, 99 A.L.R.2d 227 (1965). Cf. City of Burlington v. Jay Lee, Inc., *supra* (ordinance prohibited restaurants in residential areas from being open during designated night-time hours; sustained). Compare New Hampshire Motor Transp. Ass'n v. Town of Plaistow, 67 F.3d 326 (1st Cir. 1995), upholding, as not pre-empted by federal laws, an ordinance limiting night-time access to a truck terminal in order to reduce noise, odors, dust, vibration, etc.; David E. Shelton Productions, Inc. v. City of Chicago, 167 Ill.App.3d 54, 117 Ill.Dec. 722, 520 N.E.2d 1073 (1988), upholding an ordinance barring "juice bars" from operating during early morning hours in order to curtail noise and prevent violations of curfew by youthful patrons.

[40] See The Other Place of Miami, Inc. v. City of Hialeah Gardens, 353 So.2d 861 (Fla.App.1977); State v. Calloway, 11 Idaho 719, 84 P. 27 (1906); City of Charleston v. Jenkins, 243 S.C. 205, 133 S.E.2d 242 (1963). The sale of liquor is often much regulated by the *state*; and state regulations will normally prevail over those of a municipality (even a home-rule municipality) in cases of *conflict*, though not if the local rule merely sets a higher standard. In some jurisdictions, the state is found to have totally pre-empted the field of liquor control; *then* its laws will prevail over local laws even in the absence of conflict. See Annot., Validity of Municipal Regulation More Restrictive Than State Regulation as to Time for Selling or Serving Intoxicating Liquor, 51 A.L.R.3d 1061 (1973). See also Annot., Validity, Construction, and Application of Statute or Ordinance Requiring Closing, During Certain Hours, of Places Where Intoxicating Liquor Is Sold, as Affected by Fact that Such Places Are Also Used for Other Business, 139 A.L.R. 756 (1942).

[41] Purvis v. City of Ocilla, 149 Ga. 771, 102 S.E. 241 (1920) (operation of pool or billiard room admits of strict regulation); City of Tarkio v. Cook, 120 Mo. 1, 25 S.W. 202 (1894); Ex parte Brewer, 68 Tex.Cr.R. 387, 152 S.W. 1068 (1913) (same reasoning that justified closing saloons between midnight and dawn justified closing billiard halls during those hours). Cf. State ex rel. Baylor v. City of Hinton, 109 W.Va. 653, 155 S.E. 912 (1930), upholding a total ban on pool halls on grounds of promoting morality. The hours of operation of massage parlors are also sometimes limited because such places are thought to be the scene of criminal or immoral activities. See City of Spokane v. Bostrom, 12 Wn.App. 116, 528 P.2d 500 (1974). But cf. Hart Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978) (no reason to set different hours for masseurs who were sole practitioners; ordinance invalid). On massage parlors, see generally notes 127–129 *infra*, and

to close at night because of the use of these places to dispose of stolen property and the difficulty of apprehending such persons when they do this under cover of darkness.[42] But closing-hour legislation will often be invalidated as unreasonable if applied to such quiet, innocuous businesses as barbershops,[43] or to mercantile businesses in general.[44] And such legislation will be invalidated as discriminatory if it exempts certain members of a particular trade,[45] or if it applies to some types of businesses, but not to other very similar types—such as an ordinance restricting the hours of clothing stores but not shoe stores.[46] Thus, closing-hour legislation must pass the twin tests of being (1) reasonably related to a valid police-power purpose, and (2) not unreasonably discriminatory as to certain businesses or classes of business.

Many of the same considerations enter the picture when local governments attempt to limit the *days* of operation of certain businesses (or the days on which certain commodities may be sold). The most common type of such restriction has been the "Sunday blue law." The U.S. Supreme Court has sustained such laws as not violative of the First Amendment of the U.S. Constitution;[47] and most courts have sustained such measures against arguments that they are not reasonably related to a police-power purpose, since some contribution to public health and general welfare can usually be found.[48] Occasional cases have failed to find sufficient purpose for a Sunday closing-

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accompanying text. In Star Satellite, Inc. v. City of Biloxi, 779 F.2d 1074 (5th Cir.1986), a zoning ordinance limiting an adult bookstore (as well as bars, nightclubs, massage parlors, and pool halls serving liquor) to certain days and hours of operation was held not to violate the operator's First and Fourteenth Amendment rights. Cf. Ben Rich Trading, Inc. v. City of Vineland, 126 F.3d 155 (3d Cir.1997), upholding against First Amendment attack ordinances limiting the operating hours of sexually oriented businesses.

[42] See Hyman v. Boldrick, 153 Ky. 77, 154 S.W. 369 (1913) (second-hand stores); Circle D Pawn No. 2, Inc. v. City of Norman, 956 P.2d 931 (Okl.Civ.App. 1998) (pawn shops); Solof v. City of Chattanooga, 180 Tenn. 296, 174 S.W.2d 471 (1943), reh. denied 180 Tenn. 296, 176 S.W.2d 816 (pawnbrokers). Cf. Davidson v. Phelps, 214 Ala. 236, 107 So. 86 (1926) (auctions); City of Butte v. Paltrovich, 30 Mont. 18, 75 P. 521 (1904) (pawnshops, loan offices, and second-hand stores); Biddles, Inc. v. Enright, 239 N.Y. 354, 146 N.E. 625 (1925) (auctions); City of Roanoke v. Fisher, 137 Va. 75, 119 S.E. 259 (1923) (jewelry auctions). It has been observed that there is a general tendency of the courts to be more willing to uphold "hours restrictions" on businesses if the social utility of those businesses is considered slight or doubtful. 1 Antieau, Municipal Corporation Law § 6.177, at 6–311 (1998).

[43] Ganley v. Claeys, 2 Cal.2d 266, 40 P.2d 817 (1935); City & County of Denver v. Schmid, 98 Colo. 32, 52 P.2d 388 (1935) (closing regulation as to barbershops but excepting beauty parlors; held arbitrary and unreasonable); City of Miami v. Shell's Super Store, 50 So.2d 883 (Fla.1951); Chaires v. City of Atlanta, 164 Ga. 755, 139 S.E. 559 (1927); City of Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930) (unconstitutional to require barber shops to close at 6:30 p. m.); Eanes v. City of Detroit, 279 Mich. 531, 272 N.W. 896 (1937); Pavlik v. Johannes, 194 Minn. 10, 259 N.W. 537 (1935); Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); Ernesti v. City of Grand Island, 125 Neb. 688, 251 N.W. 899 (1933); Tomasi v. Township of Wayne, 126 N.J.Super. 169, 313 A.2d 229 (1973) (unconstitutional to require barber shops to close at 6:30 p.m. on weekdays); Oklahoma City v. Johnson, 183 Okl. 430, 82 P.2d 1057 (1938). An Ohio case once sustained an hours regulation as to barber shops on the ground that they may be lounging places for the idle and may serve as "fronts" for gambling and other illegal activities. Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N.E. 187 (1935). But the court soon reversed its position and invalidated such a closing measure. City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943). See Fordham & Asher, Home Rule Powers in Theory and Practice, 9 Ohio St.L.J. 18, 64 (1948). See generally Annot., Validity of Statute or Ordinance Regulating Barbers, 98 A.L.R. 1088, 1093–96 (1935), noting that the majority of cases have invalidated closing-hour restrictions on barber shops.

[44] See Ex parte Harrell, 76 Fla. 4, 79 So. 166 (1918). Cf. Southland Corp. v. Township of Edison, 217 N.J.Super. 158, 524 A.2d 1336 (1986), judgment aff'd 220 N.J.Super. 294, 531 A.2d 1361 (1987) (township ordinance enacted to reduce late-night robberies by restricting the hours of many retail businesses invalidated as in violation of state constitutional guarantees of right to acquire, possess, and protect property and of the right to pursue lawful vocations); Fasino v. Mayor & Borough Council of Montvale, 122 N.J.Super. 304, 300 A.2d 195 (1973), aff'd 129 N.J.Super. 461, 324 A.2d 77 (ordinance requiring closing of all businesses for off-premises consumption from 11 p. m. to 6:30 a. m. unconstitutional); Crawford's Clothes, Inc. v. Board of Commissioners, 131 N.J.L. 97, 35 A.2d 38 (1944) (clothing stores); Cowan v. City of Buffalo, 247 App.Div. 591, 288 N.Y.S. 239 (1936) (markets); Dave Abrams, Inc. v. City of Buffalo, 276 N.Y. 494, 12 N.E.2d 174 (1937) (shoe stores); State v. Ray, 131 N.C. 814, 42 S.E. 960 (1902) (dry goods stores). Closing-hour regulations as to laundries are generally invalid. See Yee Gee v. City & County of San Francisco, 235 F. 757 (N.D.Cal.1916); Spann v. Gaither, 152 Md. 1, 136 A. 41 (1927) (laundry not obnoxious or unwholesome business). But as to self-service laundromats, they are often upheld. See Section 23.2, note 36 *supra* and cases cited therein. An ordinance forbidding soliciting between 6 p.m. and 9 a.m. was found to violate First Amendment free speech rights in Ohio Citizen Action v. City of Englewood, 671 F.3d 564 (6th Cir. 2012), because it was not narrowly tailored to protect privacy, prevent crime, or conserve public resources. On other restrictions on solicitors, see Section 23.6 *infra*.

Even if *some* restriction on hours might be justified as to a particular business, the closing-hour requirement specifically applied must be *reasonable*; and evidence of financial loss by a business is relevant to this question of reasonableness. See People ex rel. Pinello v. Leadbitter, 194 Misc. 481, 85 N.Y.S.2d 287 (1948). And if an ordinance is not uniformly applicable to all commercial enterprises but singles-out for regulation a First-Amendment-protected activity, the government must show that the regulation is narrowly and explicitly drawn and is necessary to further a legitimate government interest. See People v. Glaze, 27 Cal.3d 841, 166 Cal.Rptr. 859, 614 P.2d 291 (1980) (hours regulation of "picture arcades" invalid; not justified as preventing masturbation).

[45] Heil v. Kauffman, 354 Mo. 271, 189 S.W.2d 276 (1945) (ordinance invalidated as not equally applicable to all gasoline stations in city).

[46] Crawford's Clothes, Inc. v. Board of Commissioners, *supra* note 44. Cf. McCulley v. City of Wichita, 151 Kan. 214, 98 P.2d 192 (1940) (ordinance applied to groceries and meat markets but exempted hotels, restaurants, etc.); Ernesti v. City of Grand Island, *supra* note 43 (ordinance applied to barber shops but not beauty parlors); Hart v. Teaneck Township, 135 N.J.L. 174, 50 A.2d 856 (1947) (ordinance applied to lunch wagons but not restaurants).

[47] Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), reh. denied 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed.2d 70; Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961), reh. denied 368 U.S. 869, 82 S.Ct. 21, 7 L.Ed.2d 69; McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). See Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536 (1961); Green Star Supermarket v. Stacy, 242 Ark. 54, 411 S.W.2d 871 (1967); City of Mount Vernon v. Julian, 369 Ill. 447, 17 N.E.2d 52 (1938) (good discussion of the arguments and cases).

[48] Opyt's Amoco, Inc. v. Village of South Holland, 209 Ill.App.3d 473, 154 Ill.Dec. 260, 568 N.E.2d 260 (1991) (upholding against a wide range of constitutional attacks an ordinance requiring the Sunday closing of most businesses); City of Harlan v. Scott, 290 Ky. 585, 162 S.W.2d 8 (1942); People v. Derose, 230 Mich. 180, 203 N.W. 95 (1925); GEM of St. Louis, Inc. v. City of Bloomington, 274 Minn. 471, 144 N.W.2d 552 (1966); Mack Paramus Co. v. Mayor & Council of Paramus, 103 N.J. 564, 511 A.2d 1179 (1986) (upholding a borough ordinance providing that no worldly employment, including computer use, could be practiced on Sunday; state blue law found to leave room for such local prohibitions); Masters-Jersey, Inc. v. Borough of Paramus, 32 N.J. 296, 160 A.2d 841 (1960); Town of West Orange v. Carr's Department Store, 53 N.J.Super. 237, 147 A.2d 97 (1958); Town of West Orange v. Jordan Corp., 52 N.J.Super. 533, 146 A.2d 134 (1958); Auto-Rite Supply Co. v. Mayor & Township Committeemen of Woodbridge, 25 N.J. 188, 135 A.2d 515 (1957) (municipalities may control and regulate Sunday activity, but particular ordinance void as conflicting with state law); S.S. Kresge Co. v. Tomlinson, 275 N.C. 1, 165 S.E.2d 236 (1969); State v. Solomon, 245 S.C. 550, 141 S.E.2d 818 (1965), appeal dism'd 382 U.S. 204, 86 S.Ct. 396, 15 L.Ed.2d 270; Bookout v. City of Chattanooga, 59 Tenn.App. 576, 442 S.W.2d 658 (1969). The valid purpose of such laws is usually said to be their assurance of a day of rest and quiet in the community. See Auto-Rite Supply Co. v. Mayor & Township Committeemen of Woodbridge, *supra*. Sometimes the laws are justified as preventing the harm that comes to persons from uninterrupted labor. See Hertz Washmobile System v. Village of South Orange, 41 N.J.Super. 110, 124 A.2d 68 (1956), aff'd 25 N.J. 207, 135 A.2d 524 (physical and moral debasement might otherwise occur—but particular ordinance found invalid as in conflict with state policy). Occasionally, courts mention that the laws may protect those who worship on Sunday from interruption of their services. See Pacesetter Homes, Inc. v. Village of South Holland, 18 Ill.2d 247, 163 N.E.2d 464 (1959), voiding a law as not contributing to this goal. See generally Annot., Validity, Construction, and Effect of "Sunday Closing" or "Blue" Laws—Modern Status, 10 A.L.R.4th 246 (1981) (noting that such laws have a long history in the United States but have been rare in the Far Western states); Annot., Constitutionality of Discrimination by Sunday Law or Ordinance as Between Different Kinds of Business, 119 A.L.R. 747 (1939). See also Annot., Validity, Under Establishment of Religion Clause of Federal or State Constitution, of Provision Making Day of Religious Observance a Legal Holiday, 90 A.L.R.3d 752 (1979); Annot., Establishment and Free Exercise of Religion Clauses of Federal Constitution's First Amendment as Applied to Governmental Regulations or Activities Allegedly Supporting Public Observance of Sabbath or of Religious Holiday, 106 L.Ed.2d 752 (1991).

law,[49] or have invalidated a municipal measure as in conflict with state law.[50] But if and when such laws are invalidated, it is usually on equal protection grounds; most of the laws contain classifications and exceptions, and the law will be invalidated if such categories serve no rational purpose. Exemptions of drug stores have generally been sustained,[51] as have exceptions for hotels and restaurants.[52] When the exception is expressed in terms of particular commodities, it may well be sustained if it covers such products as food, drugs, and gasoline.[53] But a law may be found violative of equal protection if it discriminates against larger businesses by allowing only small ones to remain open;[54] if it is so riddled with exceptions that it serves no general purpose;[55] or if it is so little, and so unevenly, enforced that it serves only to discriminate against isolated persons.[56] The history of such laws has been one of lax enforcement and considerable unpopularity,[57] and there are trends toward (1) providing additional exceptions in the existing laws, and (2) repealing, or invalidating (often because of the denial of equal

[49] See Pacesetter Homes, Inc. v. Village of South Holland, *supra* note 48 (saying that ordinary businesses don't disturb people in their worship or injure the peace of the community); Skag-Way Department Stores v. City of Omaha, 179 Neb. 707, 140 N.W.2d 28 (1966). Cf. S.E. Nichols Herkimer Corp. v. Village of Herkimer, 34 A.D.2d 371, 312 N.Y.S.2d 22 (1970), voiding an ordinance that required businesses to close on Memorial Day and Independence Day.

[50] National Food Stores, Inc. v. Cefalu, 280 So.2d 903 (La.1973); Schacht v. City of New York, 30 Misc.2d 77, 219 N.Y.S.2d 53 (1961), mod. 14 A.D.2d 526, 217 N.Y.S.2d 278.

[51] State v. Burbage, 172 N.C. 876, 89 S.E. 795 (1916) (against public policy of state for one to pursue his ordinary business on Sunday); Kirk v. Olgiati, 203 Tenn. 1, 308 S.W.2d 471 (1957).

[52] Re Sumida, 177 Cal. 388, 170 P. 823 (1918) (hotels); State v. Towery, 239 N.C. 274, 79 S.E.2d 513 (1954), appeal dism'd 347 U.S. 925, 74 S.Ct. 532, 98 L.Ed. 1079. See generally Annot., What Is "Restaurant," "Cafe," or "Victualing House" Within Sunday Law, 9 A.L.R. 428 (1920).

[53] See Humphrey Chevrolet v. City of Evanston, 7 Ill.2d 402, 131 N.E.2d 70 (1955), discussing the various kinds of Sunday-closing legislation; noting that in this instance certain commodities were forbidden to be sold, while the sale of others was allowed; and pointing out that all car dealers (the class to which plaintiff belonged) were treated alike under such a law. Cf. State v. Haase, 97 Ohio App. 377, 116 N.E.2d 224 (1953) (exception for "works of necessity" valid as not violating equal protection, but hardware business not a work of necessity). But see Skaggs Drug Centers, Inc. v. Ashley, 26 Utah 2d 38, 484 P.2d 723 (1971), striking down as void for vagueness a Sunday-closing law that contained exceptions for "goods or services necessary for maintenance of health, safety, or life."

[54] See Piggly-Wiggly of Jacksonville, Inc. v. City of Jacksonville, 336 So.2d 1078 (Ala.1976) (statute exempted food stores in which not more than four persons regularly worked; held to create unreasonable classification). But some cases have upheld Sunday-closing laws that allow smaller businesses to remain open, since these businesses are thought not to disturb the peace and quiet of the "day of rest." City of Bismarck v. Materi, 177 N.W.2d 530 (N.D.1970) (grocery stores regularly employing no more than 3 persons could remain open). See City of Jackson v. Luckett, 336 So.2d 776 (Miss.1976). Cf. Caiola v. City of Birmingham, 288 Ala. 486, 262 So.2d 602 (1972) (upholding law permitting Sunday operation of grocery stores having on duty four or less employees), which was distinguished in the *Piggly-Wiggly* case *supra*.

[55] Kroger Co. v. O'Hara Tp., 481 Pa. 101, 392 A.2d 266 (1978). See Millikan v. Jensen, 4 Ill.App.3d 580, 281 N.E.2d 401 (1972) (prohibition of public dances on Sunday void where no prohibition of other kinds of business); Spartan's Industries v. Oklahoma City, 498 P.2d 399 (Okl.1972), invalidating a Sunday-closing law as discriminating against some classes of merchants.

[56] People v. Acme Markets, 37 N.Y.2d 326, 372 N.Y.S.2d 590, 334 N.E.2d 555 (1975), where the court noted a history of disuse and no policy of general enforcement, and held that under those circumstances, a prosecution at the instance of a group for its private purposes constituted a violation of equal protection.

[57] See "Closing Up the Sunday Merchants," Bus. Week, Dec. 23, 1972, at 22, noting the non-enforcement of many "blue laws"; "Folks Blue Over Sunday Sales Law," Dallas Morning News, Jan. 31, 1977, at 1, noting a poll showing the unpopularity of such a law. With the repeal of North Dakota's "Sunday blue law" in 1991, no state remains in which Sunday shopping is totally prohibited. See "For North Dakota Shoppers, No More Minnesota Sundays," N.Y. Times, Feb. 12, 1991, at A12. For a discussion of the advantages of restrictions on Sunday activities, see Gibbs, And on the Seventh Day We Rested?, Time, Aug. 2, 2004, at 90.

Sunday blue laws, being penal in nature, are usually strictly construed and will not be enlarged by implication. See Denton v. Winner Communications, Inc., 726 P.2d 911 (Okl. App. 1986) (Sunday sale of stallion's stud services held not forbidden by Sabbath-breaking statute).

protection created by the exceptions), the laws entirely. Where such laws remain, they often now provide an exception for persons wishing to observe—and close their business on—a day other than Sunday,[58] and the validity of such an exception has been sustained.[59]

§ 23.4 Local Regulation of Water and Air Pollution

Two problems of great modern importance are water pollution and air pollution. Regulation to reduce such pollution has been undertaken by the federal government; but there is generally still room, and often the need, for state and local regulation—some of which pre-dates the federal activity. While laws in this area can apply to all persons, businesses are particularly affected by many restrictions.

It has long been held that local governments can enact and enforce laws to reduce pollution of their water supply,[60] to protect waters within the locality in which people

[58] See Berman's Petition, 344 Mich. 598, 75 N.W.2d 8 (1956), applying a Detroit ordinance with such an exception. Cf. Gibson Products Co. v. Texas, 545 S.W.2d 128 (Tex.1976), cert. denied 431 U.S. 955, 97 S.Ct. 2677, 53 L.Ed.2d 272, upholding the constitutionality of a law forbidding businesses to sell certain items on *both* Saturday and Sunday. See also 21 Okl. Stat.1981, § 909, allowing as a defense to the crime of "Sabbath-breaking" a person's honoring of another day-of-rest. But cf. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), finding no violation of federal civil rights laws in an airline's refusal to allow clerks to work a four-day week if necessary in order to avoid working on their Sabbath.

[59] Marks Furs, Inc. v. City of Detroit, 365 Mich. 108, 112 N.W.2d 66 (1961). But cf. Thornton v. Caldor, Inc., 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985), holding that a Connecticut statute which provided workers with an unqualified right not to work on their Sabbath violated the Establishment Clause, where it imposed on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee, provided no exception for special circumstances, and allowed no consideration of whether the employer had made reasonable accommodation proposals.

[60] See Shumaker v. Borough of Dalton, 51 F.2d 793 (M.D.Pa.1931) (interment of dead bodies near municipal water supply can be forbidden); State v. Finney, 65 Idaho 630, 150 P.2d 130 (1944) (ordinance forbidding the anchoring or maintaining of any craft, if used as a residence, on waters of lake); City of Shreveport v. Conrad, 212 La. 737, 33 So.2d 503 (1947) (vessels can be banned from municipal reservoir, and plane flights over it can be prohibited); City of New Rochelle ex rel. Conlon v. Burke, 288 N.Y. 406, 43 N.E.2d 463 (1942) (in interest of consumer's health and welfare, city has jurisdiction over water distribution system); Salt Lake City v. Young, 45 Utah 349, 145 P. 1047 (1915) (animals can be kept out of municipal water supply). Cf. City of West Frankfort v. Fullop, 6 Ill.2d 609, 129 N.E.2d 682 (1955) (city can prohibit drilling for oil and gas near source of water supply). But see Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956) (city could not ban swimming, etc. on lake which supplied city's water as would unconstitutionally deprive lake-front property owners of their property rights). On problems with some cities' drinking water, see "Troubled Water," Time, Aug. 31, 1970, at 40; "Warning: Your Drinking Water May Be Dangerous," U.S. News & World Rep., Jan. 16, 1984, at 51. See generally Hines, Nor any Drop to Drink: Public Regulation of Water Quality, 52 Iowa L.Rev. 186 (1966); Jacks, Local and Regional Water Pollution Control in Texas, 48 Tex.L.Rev. 1286 (1970); Robinson, Drinking Water Regulation, 10 Real Property, Probate & Trust J. 675 (1975). In Ayers v. Jackson Township, 106 N.J. 557, 525 A.2d 287 (1987), it was held that residents of a town whose water was contaminated by toxic pollutants had a claim against the township for infringement of their "quality of life" and for costs of medical surveillance. The claim was brought as a nuisance action under the New Jersey Tort Claims Act. See generally Owen, Urbanization, Water Quality, and the Regulated Landscape, 82 U. Colo. L. Rev. 431 (2011); Note, Privatization as a Potential Drinking Water Reform, 34 Quinnipiac L. Rev. 515 (2016). Compare the problems of Flint, Michigan, described in Davis, Who's to Blame?, A.B.A.J., Nov, 2016, at 44, and Comment, The Flint Water Crisis, A National Warning of Failing Infrastructure, 19 Marq. Benefits & Soc. Welfare L. Rev. 85 (2017) (when Flint switched its water source from Lake Huron to Flint River, the river water proved so corrosive it ate away at the city pipes, causing lead to leach into the water supply, poisoning the drinking water and causing illness in many city residents, especially children). As to the shared responsibility of federal, state and local governments for the Flint water crisis, see Section 7.1, note 6 *supra*. A detailed description of the Flint crisis is Hanna-Attisha, What the Eyes Don't See: A Story of Crisis, Resistance, and Hope in an American City (One World, Penguin Random House 2018). See also Hoffer, The New York City Watershed Memorandum of Agreement: Forging a Partnership to Protect Water Quality, 18 U. Baltimore J. Envtl. L. 113 (2011). Some authorities recognize a human right to water. See Beail-Farkas, The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects, 30 Wis. Int'l L. J. 761 (2013).

swim,[61] and to control discharge of waste and sewage into municipal sewers.[62] Those using a municipal sewer system may be required to pay reasonable charges to cover the cost of pollution control.[63] Local regulations designed to lessen or prevent water pollution must meet two tests in order to be upheld: (1) They must be authorized by state law, and (2) they must be reasonably designed to achieve the hoped-for goal.[64]

Municipalities, in operating the city water works, may *fluoridate* the city water supply. See Schuringa v. City of Chicago, 30 Ill.2d 504, 198 N.E.2d 326 (1964), cert. denied 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed.2d 558 (with review of cases); Wilson v. City of Council Bluffs, 253 Iowa 162, 110 N.W.2d 569 (1961); Rogowski v. City of Detroit, 374 Mich. 408, 132 N.W.2d 16 (1965); Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.2d 609 (1955), appeal dism'd, 351 U.S. 935, 76 S.Ct. 833, 100 L.Ed. 1463 (1956); Dowell v. City of Tulsa, 273 P.2d 859 (Okl.1954), cert. denied 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715, noted 8 Okl.L.Rev. 472 (1955); Hall v. Bates, 247 S.C. 511, 148 S.E.2d 345 (1966); Kaul v. City of Chehalis, 45 Wash.2d 616, 277 P.2d 352 (1954) (with review of authorities); Froncek v. City of Milwaukee, 269 Wis. 276, 69 N.W.2d 242 (1955). Cf. Attaya v. Town of Gonzales, 192 So.2d 188 (La.App.1966) (ordinance ordering fluoridation valid; invalidity of prior motion or resolution on the subject was immaterial). Even where the city's water is supplied by a privately operated utility, it is probable that the city may require that the water be fluoridated, unless there is conflicting state law or state pre-emption of the field. See Wilson v. City of Mountlake Terrace, 69 Wash.2d 148, 417 P.2d 632 (1966) (city purchased water district's water system within city limits and redelivered water received from district to district for distribution to users outside city limits; city could adopt water-fluoridation program). See generally Annot., Validity, Construction, and Effect of Statute, Ordinance, or Other Measure Involving Chemical Treatment of Public Water Supply, 43 A.L.R.2d 453 (1955). In some jurisdictions, regulation of *privately* owned water utilities is entirely occupied by state legislation. See New Haven Water Co. v. City of New Haven, 152 Conn. 563, 210 A.2d 449 (1965) (state commission has exclusive control). And in some jurisdictions, the state has pre-empted the *entire* field of water-pollution control. See Staiger v. Madill, 328 Mich. 99, 43 N.W.2d 77 (1950). On regulation of utilities, see generally Chapter 17 *supra*.

In recent years, the *federal* government has entered the field of regulating the quality of drinking-water supplies. The Safe Drinking Water Act of 1974, 42 U.S.C.A. § 300f, establishes a timetable for the setting of nationwide drinking-water standards. See Wheatley & Castaneda, Protection of Underground Drinking Water Supplies—The Gonzalez Amendment to the Safe Drinking Water Act, 8 St. Mary's L.J. 40 (1976) (summarizing entire Act and noting especially an amendment thereto applicable to communities which draw their drinking water from an aquifer). See generally Baroni, Whose Drop Is It, Anyway? Legal Issues Surrounding Our Nation's Water Resources (ABA Section of State & Local Government Law 2011). See also Renwick, The Effects of the Federal Safe Drinking Water Act on Oil, Gas, and Mining Operations: An Oil and Gas Lawyer's View, 23 Rocky Mt. Mineral L. Institute 975 (1977); Sanderson, The Effects of the Federal Safe Drinking Water Act on Oil, Gas, and Mining Operations: Bittersweet or Unpalatable?, 23 Rocky Mt. Mineral L. Institute 941 (1977).

[61] See State v. Finney, *supra* note 60 (houseboats can be banned from lakes where swimming occurs). Cf. City of Springfield v. Mecum, 320 S.W.2d 742 (Mo.App.1959) (use of certain types of outboard motors can be banned on lake where public swims).

[62] A. E. Staley Manufacturing Co. v. Environmental Protection Agency, 8 Ill.App.3d 1018, 290 N.E.2d 892 (1972); Village of Fox River Grove v. Aluminum Coil Anodizing Corp., 114 Ill.App.2d 226, 252 N.E.2d 225 (1969); Larsen Baking Co. v. New York City, 30 A.D.2d 400, 292 N.Y.S.2d 145 (1968) aff'd 24 N.Y.2d 1036, 303 N.Y.S.2d 80, 250 N.E.2d 356 (upholding code providing that certain pollutants could not be discharged into sewer system without permission of designated official and according to rules promulgated by him). The lead content of effluents deposited in the sewers by local industries can be limited by a municipality. See Rauland Division, Zenith Radio Corp. v. Metropolitan Sanitary District, 2 Ill.App.3d 35, 275 N.E.2d 756 (1971). On ordinances or regulations banning sale within a locality of detergents containing phosphorus, see Section 23.2, note 35 *supra*. On the problems that Cleveland, Ohio, once had with sewage discharge into the Cuyahoga River—and efforts to modernize the sewage system and clean up the river—, see "The Cities—The Price of Optimism," Time, Aug. 1, 1969, at 41. See also Wood, Ecological Drama Along the Cuyahoga; Students Fight Pollution in Cuyahoga River Watershed Region, Am.Educ., Jan., 1973, at 15.

[63] See Ivy Steel & Wire Co. v. City of Jacksonville, 401 F.Supp. 701 (M.D.Fla.1975). Cf. Larsen Baking Co. v. New York City, *supra* note 62 (surcharges can be levied for excess pollutants discharged into city sewers).

[64] See Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 297 N.Y.S.2d 129, 244 N.E.2d 700 (1969) (municipal power to deal with problem of inadequate treatment of sewage); Larsen Baking Co. v. New York City, *supra* note 62. On federal, state, and local efforts to combat water pollution, see generally Fisher, New York's SEQR—Its Importance for Water Pollution Control, 50 N.Y.S.B.J. 572 (1978); Kuchenbecker & Long, Will Municipal Sewage Continue to Threaten Private Water-Control Recreation?: An Appraisal of the 1972 Water Pollution Control Act, 4 Rutgers Camden L.J. 260 (1973); Phillips, Developments in Water Quality and Land Use Planning: Problems in the Application of the Federal Water Pollution Control Act Amendments of 1972, 10 Urban L.Ann. 43 (1975).

Just as controls on water pollution promote public health and welfare, so do controls on polluted air. It has been held that the federal government has not pre-empted the field of air-pollution control;[65] but occasionally, state pre-emption may be

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The Federal Water Pollution Control Act of 1972, 33 U.S.C.A. §§ 1251–1376, provides a comprehensive program (including federal financial assistance—but not preempting the field; Askew v. American Waterways Operators, Inc., 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973), reh. denied 412 U.S. 933, 93 S.Ct. 2746, 37 L.Ed.2d 162) for controlling and abating water pollution. See Train v. City of New York, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975) (Administrator of Environmental Protection Agency could not allot to the states less than the entire amounts authorized to be appropriated under the Act). Cf. Environmental Protection Agency v. National Crushed Stone Association, 449 U.S. 64, 101 S.Ct. 295, 66 L.Ed.2d 268 (1980) (Environmental Protection Agency not required to include economic ability as factor in granting variances from 1977 effluent limitations). See generally Symposium, Water Quality Control: Federal Water Pollution Control Act Amendments of 1972, 7 Natural Resources Lawyer 225–56 (1974). See also Note, Clean Water Act of 1977: Great Expectations Unrealized, 47 U.Cin.L.Rev. 259 (1978). On the applicability of the federal water pollution legislation to nuclear facilities, see Miskovsky, Griffith, Bullerdick & Donnelly, Recent Developments in Urban Environment Law, 16 Urban Law. 821 (1984). On litigation over allocation of the cost of upgrading water and sewage treatment facilities to achieve compliance with federal laws, see Griffith, Fleming, Zeller & McCarthy, Recent Developments in Urban Environment Law, 19 Urban Law. 1093, 1101–03 (1987). See also United States v. City of Hoboken, 675 F.Supp. 189 (D.N.J.1987) (impossibility of compliance not a defense in enforcement action brought under Clean Water Act of 1977); Miller, Plain Meaning, Precedent, and Metaphysics: Lessons in Statutory Interpretation From Analyzing the Elements of the Clean Water Act Offense, 46 Envtl. L. Rep. News & Analysis 10297 (2016). As to the scope of federal authority under the Clean Water Act,.see Note, Muddying the Waters: *United States v. Cundiff* Adds Confusion and Complexity to the Ongoing Debate Over the Scope of Federal Jurisdiction Under the Clean Water Act, 22 Vill. Envtl. L. J. 285 (2011), discussing United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009). See generally Schempp, At the Confluence of the Clean Water Act and Prior Appropriation: The Challenge and Ways Forward, 43 Envtl. L. Rep. News & Analysis 10138 (2013); Comment, Did We Miss the Boat? The Clean Water Act and Sustainability, 47 U. Rich. L. Rev. 1267 (2013). A good overview of the federal law on water pollution is Evans (ed.), The Clean Water Handbook (American Bar Ass'n 1994). A good summary of developments concerning control of both water and air pollution (with emphasis on air pollution) is the Cato Symposium, 2 Cato J. 1–333 (Spring, 1982). A particularly thoughtful article, within that symposium, on water pollution is Milliman, Can Water Pollution Policy Be Efficient?, 2 Cato J. 165 (1982). As to regulation of water pollution from underground storage tanks, see Annot., State and Local Government Control of Pollution from Underground Storage Tanks, 11 A.L.R.5th 388 (1993). As to the effects of hydro fracking on *water* resources, see Rawlins, Planning for Fracking on the Barnett Shale: Soil and Water Contamination Concerns, and the Role of Local Government, 44 Envtl. L. 135 (2014); Comment, Hydraulic Fracturing in the United States and the European Union: Rethinking Regulation to Ensure the Protection of Water Resources, 30 Wis. Int'l L. J. 881 (2013).

[65] Houston Compressed Steel Corp. v. State, 456 S.W.2d 768 (Tex.Civ.App.1970). See Kalen, Policing Federal Supremacy: Preemption and Common Law Damage Claims as a Ceiling to the Clean Air Act Regulatory Floor, 68 Fla. L. Rev. 1597 (2016). On local efforts to combat air pollution, see Note, Local Governments and Air Pollution, 33 Ohio St.L.J. 924 (1972); Recent Decision Note, Local Government—A Municipality Has the Power to Regulate by Local Ordinance the Emission of Air Pollutants, 22 Syracuse L.Rev. 1173 (1971); Comment, Know Your Role: Exploring the Ability of Local Governments to Clean Up the Air, 46 Tex. Envtl. L. J. 123 (2016). On special problems and efforts of some cities with particularly troublesome situations, see Chernow, Implementing the Clean Air Act in Los Angeles: The Duty to Achieve the Impossible, 4 Ecology L.Q. 537 (1975); Gartenberg, Air Pollution—The Landlords and New York City's New Air Code, 9 Colum.J.L. & Soc.Prob. 495 (1973); Walpole, Another Look at the Air Pollution Crisis in Birmingham, 3 Environmental Affairs 243 (1974). Air pollution has even invaded many areas of the Western U.S. See Gottschalk, Many Areas in West, Once Famed for the Air, Befouled by Pollution, Wall St. J., April 21, 1970, at 1. See also, on the air pollution problems of Beijing, China, and efforts to correct them, Ramzy, Airing Out Beijing, Time, Jan. 21, 2008, at Global 1.

Machinery for a unified federal-state battle against air pollution is set forth in the 1970 Clean Air Amendments to the Air Quality Act of 1967, 42 U.S.C.A. §§ 7401–7626. See Comment, Enforcement of the Clean Air Amendments of 1970, 10 Urban L.Ann. 297 (1975). Cf. Michigan v. Environmental Protection Agency, 135 S. Ct. 2699 (2015) (agency must consider cost including, most importantly, cost of compliance, before deciding whether regulation of power plants by it under the Clean Air Act is appropriate and necessary). The Act grants considerable rule-making power to the Administrator of the Environmental Protection Agency, and also permits the various states to submit plans for implementation and enforcement of emission standards. See Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607, on remand 35 Colo.App. 207, 534 P.2d 796, aff'd 191 Colo. 455, 553 P.2d 811 (1976) (state health inspector who entered outdoor premises, without knowledge or consent of owner, to observe smoke emission held not to have violated Fourth Amendment of U.S. Constitution); Annot., Air Pollution Control: Validity of Legislation

found.[66] If there is no pre-emption, a local government may make reasonable and clear restrictions on activities likely to result in pollution of the air.[67] This power has been recognized for many decades,[68] and has been upheld by the U.S. Supreme Court even when exercised against vessels operating in interstate commerce under licenses from the United States.[69] While localities sometimes pass legislation specifically dealing with air

Permitting Administrative Agency to Fix Permissible Standards of Pollutant Emission, 48 A.L.R.3d 326 (1973). See generally Currie, Air Pollution: Federal Law and Analysis (Callaghan & Co. 1981). Kramer, 1970 Clean Air Amendments: Federalism in Action or Inaction?, 6 Tex.Tech. L.Rev. 47 (1974); Luneberg, Federal-State Interaction Under the Clean Air Amendments of 1970, 14 Boston College Ind. & Comm.L.Rev. 637 (1973); Mandelker & Rothschild, Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970, 3 Ecology L.Q. 235 (1973); Strelow, Reviewing the Clean Air Act, 4 Ecology L.Q. 583 (1975); Comment, State Implementation Plans and Air Quality Enforcement, 4 Ecology L.Q. 595 (1975); "The Drive for Clean Air," U.S. News & World Rep., June 25, 1973, at 39; Annot., Orders or Penalties Against State or Its Officials for Failure to Comply with Regulations Directing State to Regulate Pollution-Creating Activities of Private Parties, Under § 113 of Clean Air Act, 31 A.L.R.Fed. 79 (1977). See also Annot., Validity and Construction of Statute or Ordinance Allowing Tax Exemption for Property Used in Pollution Control, 65 A.L.R.3d 434 (1975); Annot., Necessity of Showing Scienter, Knowledge, or Intent in Prosecution for Violation of Air Pollution or Smoke Control Statute or Ordinance, 46 A.L.R.3d 758 (1972) (intent or knowledge generally need *not* be shown). On municipal obligations and liabilities under federal law, see Smith & Grillo, Let's Clear the Air Once and For All: Municipal Liability for Failing to Comply with Section 110 of the Clean Air Act, 44 Catholic U.L. Rev. 1103 (1995). See generally Reitze, Air Pollution Control Law: Compliance & Enforcement (Environmental Law Institute 2001). See also Symposium, Clean Air, 43 Ariz. St. L. J. 665–949 (2011). On dealing with air pollution as a public nuisance, see Note, Tarheel Smokestack Blues: The Clean Air Act, Public Nuisance Law, and Abatement of Interstate Air Pollution, 30 Temple J. Sci. Tech. & Envtl. L. 311 (2011), noting North Carolina ex rel. Cooper v. Tennessee Valley Auth., 615 F.3d 291 (4th Cir. 2010).

There have at times been complaints of too many agencies, at too many levels of government, being involved in the fight against pollution, and of frequent changes in the standards. See MacGregor, Companies Complain That Pollution Laws Conflict, Change Often, Wall St. J., Dec. 23, 1970, at 1. As to air-pollution regulation in Indian Country, see Reitze, The Control of Air Pollution on Indian Reservations, 46 Envtl. L. 893 (2016); Comment, Elusive Goal, Enduring Benefits: Regulation of Air Quality in Indian Country as a Tool to Promote Small Business Development, 8 Entrepreneurial Bus. L. J. 25 (2013).

As to federal pre-emption of some aspects of air pollution regulation, see Pacific Merchant Shipping Ass'n v. Goldstene, 517 F.3d 1108 (9th Cir. 2008) (California state regulations limiting emissions from the auxiliary diesel engines of ocean-going vessels are pre-empted by federal Clean Air Act). On federal pre-emption, see generally Chapter 7 *supra*.

[66] See Village of Union v. Southern California Chemical Co., 59 Ill.App.3d 373, 16 Ill.Dec. 616, 375 N.E.2d 489 (1978) (state pre-emption). Cf. Borough of Verona v. Shalit, 92 N.J.Super. 65, 222 A.2d 145 (1966) aff'd 96 N.J.Super. 20, 232 A.2d 431 (conflict with state act, which allowed municipal regulations *not* in conflict with state law).

[67] Lees v. Bay Area Air Pollution Control District, 238 Cal.App.2d 850, 48 Cal.Rptr. 295 (Dist.Ct.1965); Marshall Field & Co. v. City of Chicago, 44 Ill.App. 410 (1892); City of New Orleans v. Lambert, 14 La.Ann. 247 (1859); People v. Lewis, 86 Mich. 273, 49 N.W. 140 (1891); Hudson Valley Light Weight Aggregate Corp. v. Schovel, 64 Misc.2d 814, 316 N.Y.S.2d 477 (1970); People v. Prince Jagendorf Greene, Inc., 7 N.Y.2d 42, 194 N.Y.S.2d 498, 163 N.E.2d 325 (1959) (any accurate test could be used to determine volatile content of coal); City of Portland v. Lloyd A. Fry Roofing Co., 3 Or.App. 352, 472 P.2d 826 (1970) (with review of cases). See Oriental Boulevard Co. v. Heller, 58 Misc.2d 920, 297 N.Y.S.2d 431 (1969) aff'd 27 N.Y.2d 212, 316 N.Y.S.2d 226, 265 N.E.2d 72 (1970), appeal dism'd 401 U.S. 986, 91 S.Ct. 1234, 28 L.Ed.2d 527 (upholding ordinance regulating use of fuel burners and refuse incinerators). See generally Annot., Validity of State and local Air Pollution Administrative Rules, 74 A.L.R.4th 566 (1989). On the ways that local governments can deal with air pollution, see Elsom, Managing Urban Air Quality (Island Press 1996). On the 20-year anti-pollution plan adopted by a regional authority for the Los Angeles area in 1989, see "A Drastic Plan to Banish Smog," Time, March 27, 1989, at 65, noting that the plan was designed to curtail automobile use and to convert almost all vehicles to nonpolluting fuels by the year 2009. As to the possible effects of hydrofracking on *air* quality, see Rawlins, Planning for Fracking on the Barnett Shale: Urban Air Pollution, Improving Health-Based Regulation, and the Role of Local Governments, 31 Va. Envtl. L. J. 226 (2013).

[68] See City of Rochester v. Macauley-Fien Milling Co., 199 N.Y. 207, 92 N.E. 641 (1910) (ordinance could prescribe density of smoke allowed to issue from stacks within city limits); Department of Health v. Ebling Brewing Co., 78 N.Y.S. 11 (Mun.Ct.1902).

[69] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). Cases have long upheld the general power of municipalities to regulate smoke emissions from vessels. Harmon v. City of Chicago, 110 Ill. 400 (1884). And from locomotives. See People ex rel. Greene v. Long Island Railroad,

pollution, it has been recognized that the power to terminate or curtail pollution-producing activities within the locality exists also under the general power to abate nuisances.[70] Comprehensive air-pollution-control ordinances have now been enacted by many municipalities; and they have been upheld as applied to businesses and to individuals; as with water-pollution restrictions, they must simply meet the tests of being authorized by the state, and being reasonable in nature.[71]

§ 23.5 Local Control of Trash and Garbage

A growing problem for many municipalities is the disposing of their residents' trash and garbage. As population grows, so does the amount of refuse that must be disposed of—in some manner that does not pose a threat to health or safety. Although a state may occasionally be found to have pre-empted the field,[72] most municipalities have express or implied authority to control the keeping, collection, and disposition of garbage.[73] Any regulations must be reasonable, as must any classifications or distinctions created thereby.[74] And there must be no undue burden on interstate commerce: The U.S. Supreme Court invalidated a New Jersey law that totally banned the sending into that state of waste that originated outside.[75] Many municipalities, of course, not only regulate

31 N.Y.S.2d 537 (Ct.Spec.Sess.1941). Modern cases have upheld municipal controls on emissions from automobiles and other motor vehicles. See City of St. Louis v. Eskridge, 486 S.W.2d 648 (Mo.App.1972) (air pollution control ordinance, as applied to motor vehicles, upheld as not too indefinite).

[70] See Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 36 S.Ct. 206, 60 L.Ed. 396 (1916). On the other hand, air pollution may be regulated by a locality even though the pollution is not yet bad enough to constitute a nuisance. Barber's Super Markets, Inc. v. City of Grants, 80 N.M. 533, 458 P.2d 785 (1969) (incinerator prohibited though not yet a nuisance). Cf. People v. Detroit Edison Co., 16 Mich.App. 423, 168 N.W.2d 320 (1969) (ordinance sustained making it unlawful for anyone to emit smoke greater than a designated density).

[71] See Hudson Valley Light Weight Aggregate Corp. v. Schovel, *supra* note 67; Oriental Boulevard Co. v. Heller, *supra* note 67; City of Portland v. Lloyd Fry Roofing Co., *supra* note 67.

Local governmental regulations are increasingly being enacted in other areas of environmental concern—for instance, biodiversity. See Tarlock, Local Government Protection of Biodiversity: What Is Its Niche?, 60 U. Chi. L. Rev. 555 (1993).

For discussion of regulation of greenhouse gases in order to lessen global warming, see Note, If Not Now, When? The California Global Warming Solutions Act of 2006: California's First Steps Toward Comprehensive Mandatory Greenhouse Gas Regulation, 13 Hastings W.-Nw. J. Envtl. L. & Pol'y 249 (2007). See generally Symposium, Reducing Greenhouse Gases: State Initiatives and Market-Based Solutions, 17 Fordham Envtl. L. Rev. 101–286 (2006); Symposium, Global Warming: Causes, Effects and Mitigation Strategies for States and Localities, 12 Penn St. Envtl. L. Rev. 1–217 (2004). See also Brower & Vespa, Thinking Globally, Acting Locally: The Role of Local Government in Minimizing Greenhouse Gas Emissions from New Development, 44 Idaho L. Rev. 589 (2008).

[72] See Town of Kearny v. Jersey City Incinerator Authority, 140 N.J.Super. 279, 356 A.2d 51 (1976); Ringlieb v. Township of Parsippany-Troy Hills, 59 N.J. 348, 283 A.2d 97 (1971). Compare Freiberg, (Don't) See More Butts: Preemption and Local Regulation of Cigarette Litter, 37 Hamline L. Rev. 205 (2014).

[73] See California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S.Ct. 100, 50 L.Ed. 204 (1905) (private firms permitted to haul garbage can be regulated by municipality to insure sanitary conditions in city); City of Malden v. Flynn, 318 Mass. 276, 61 N.E.2d 107 (1945); Boulevard Apartments v. Borough of Lodi, 110 N.J.Super. 406, 265 A.2d 838 (1970). Again, as with air pollution (see Section 23.4 *supra*), regulation may come partly in the form of declaring the keeping of garbage a nuisance where it is not done under proper controls. See Board of Health v. Vink, 184 Mich. 688, 151 N.W. 672 (1915).

[74] See Campbell v. City of Frontenac, 527 S.W.2d 643 (Mo.App.1975), invalidating an ordinance that prohibited parking or storage of garbage trucks within the municipality. For a model ordinance, see Connolly, Small Town Trash: A Model Comprehensive Solid Waste Ordinance for Rural Areas of the United States, 53 Catholic U.L. Rev. 1 (2003).

[75] City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), noted 64 A.B.A.J. 1280 (1978); 92 Harv.L.Rev. (1978; part of summary of 1977 Supreme Court term); 18 Natural Resources J. 925 (1978). And some laws forbidding the bringing of garbage or trash into the community from outside its limits have been invalidated as outside the locality's power and/or as discriminatory. See Fort

Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992), appeal after remand 71 F.3d 1197 (6th Cir.1995) (Michigan statute that generally prohibited private landfill operators from accepting solid waste that originated outside the county in which the landfill was located invalidated as violative of the commerce clause of U.S. Constitution); Boone Landfill, Inc. v. Boone County, 51 Ill.2d 538, 283 N.E.2d 890 (1972); Lutz v. Armour, 395 Pa. 576, 151 A.2d 108 (1959) (attempted distinction between local garbage and garbage from outside township is unrelated to township's health and general welfare). Cf. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), on remand 208 A.D.2d 612, 617 N.Y.S.2d 482 (1994), invalidating as discriminating against interstate commerce a town ordinance that required all solid waste processed or handled within the town to be processed or handled at the town's transfer station; Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), on remand 319 Or. 251, 876 P.2d 749 (1994), finding that Oregon's imposition of a higher surcharge on disposal of out-of-state waste than was imposed on in-state waste was discriminatory on its face and thus violative of the commerce clause; Yaworski v. Canterbury, 21 Conn. Sup. 347, 154 A.2d 758 (1959), invalidating, as in conflict with state law, an ordinance prohibiting the transportation of garbage through a town. But see Wiggins v. Town of Somers, 4 N.Y.2d 215, 173 N.Y.S.2d 579, 149 N.E.2d 869 (1958), upholding a local prohibition on importation of garbage into the community. Compare State v. Wittenberg, 50 N.J.Super. 74, 141 A.2d 52 (1957), aff'd 26 N.J. 576, 141 A.2d 57 (1958), upholding a prohibition on importation of garbage into the community for the purpose of feeding pigs. See generally Gold, Solid Waste Management and the Constitution's Commerce Clause, 25 Urban Law. 21 (1993); Houpt, Roddewig & Sechen, The Commerce Clause and Waste Disposal Management Plans, 24 Urban Law. 907 (1992); Comment, State and Local Attempts to Restrict the Importation of Solid and Hazardous Waste: Overcoming the Dormant Commerce Clause, 40 U. Kan. L. Rev. 465 (1992).

After the *C & A Carbone* case, *supra*, it was widely believed that local governments had lost much of their power to control the movement of trash because it amounted to interference with the movement of an article of commerce. But in United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Auth., 261 F.3d 245 (2d Cir. 2001), cert. denied, 534 U.S. 1082, 122 S.Ct. 815, 151 L.Ed.2d 699 (2002), the Second Circuit held that local governments *can* permissibly direct the flow of waste to *public waste facilities* without running afoul of the U.S. Constitution's Commerce Clause. This helped revive flow control of solid waste by local governments. See Diederich, Municipalities Regain Control Over Trash, 35 Urban Law. 687 (2003). Cf. Sandlands C & D LLC v. Horry County, 737 F.3d 45 (9th Cir. 2013), noted 46 Urban Law. 704 (2014). Subsequently the Supreme Court granted cert. in the *United Haulers* case *supra*, found no discrimination against interstate commerce, and then applied to other prong of the relevant test: weighing the benefits and burdens of the ordinance as required by Pike v. Bruce Church, 397 U.S. 137 (1970). Public benefit was found, and the Second Circuit decision affirmed. 550 U.S. 330, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007).

On modern methods of, and problems with, garbage disposal, see generally Note, Garbage, the Police Power, and the Commerce Clause, 8 Capital U.L.Rev. 613 (1979); "The Garbage Can Crisis," Life, Nov. 7, 1969, at 32. See also Neal & Mealy, Recycling: Problems and Proposals, 2 Golden Gate L.Rev. 507 (1972). On provisions of the Refuse Act of 1899 prohibiting discharge of refuse into navigable waters except as permitted by the Army Corps of Engineers, see Note, The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation, 46 N.Y.U.L.Rev. 304 (1971). On water pollution, see also Section 23.4 *supra*. *Air* pollution can also be a problem arising from garbage disposal, as where waste material is burned. See "Nashville's Trash Crisis," Bus. Week, Feb. 23, 1976, at 52, discussing Nashville's efforts to run an incinerator-plant to burn garbage and, in the process, produce steam and chilled water for sale. Many cities are running out of landfill sites on which to bury garbage, and thus need to use incinerators—and modern incinerators *are* available that produce little pollution. See "Stamford Mines a Garbage Lode," Bus. Week, Sept. 25, 1971, at 142, on Stamford, Connecticut's, incinerator, using electrostatic precipitators and scrubbers. Sometimes, useful energy is even obtained from the destroying of garbage, either through incineration or through converting the garbage into liquid or gaseous fuel. See "Converting Garbage Into Energy," Bus. Week, March 30, 1974, at 44. On the effect of 1990 federal clean-air legislation on municipal waste incineration, see Kenderick-Hands, The Clean Air Act Amendments of 1990: New Standards for Municipal Solid Waste Incineration and Detroit's Resource Recovery Facility, 1991 Detroit C.L. Rev. 1. See generally Symposium, The Clean Air Act Amendments of 1990, 21 Environmental L. i–iii, 1549–2257 (1991). On problems with locating solid waste disposal facilities, see Houpt, Roddewig & Sechen, Report of the Subcommittee on Land Use and Solid Waste, 23 Urban Law. 753 (1991). See generally Comment, Taking Out the Trash—Where Will We Put All This Garbage?, 10 Pace Envtl. L. Rev. 925 (1993). On special regulation of hazardous waste, see Annot., Validity of Local Regulation of Hazardous Waste, 67 A.L.R.4th 822 (1989). See also Annot., Validity, Construction, and Application of State Hazardous Waste Regulations, 86 A.L.R.4th 401 (1991). A good overview of state and local regulation of waste disposal is O'Reilly, State & Local Government Solid Waste Management (Clark Boardman Callaghan 1994).

A possible alternative to traditional methods of disposing of solid waste is gasification: the conversion of solid waste into synthesis gas composed primarily of carbon monoxide and hydrogen via high temperatures. See Dudley & Collins, Gasification: Could It be an Answer to the Problem of Municipal Solid Waste Disposal?, 35 Urban Law. 693 (2003).

garbage accumulation and collection, but themselves engage in collecting and disposing of their inhabitants' garbage; power for a local government to do this is readily found in most states, even if the municipality exercises a monopoly on all garbage collection,[76] or grants an exclusive contract to a private company for such collection.[77] Where the municipality itself engages in collection of garbage and/or trash, it can charge a reasonable fee to those receiving the service.[78] Many of the same principles apply as with other utility-type services offered by local governments: Any classifications or differentials as to rates are constitutional only if rationally based on real differences;[79]

Another "waste control" problem is created by animals on city streets, etc. Some statutes (as in New York state—applicable to certain cities) and ordinances (as in Boston and Chicago) require owners of dogs to "clean up after them" if the canines defecate in any public area. See "Keeping New York Tidy," Time, Aug. 14, 1978, at 73.

[76] Cassidy v. City of Bowling Green, 368 S.W.2d 318 (Ky.1963); City of Hobbs v. Chesport, Limited, 76 N.M. 609, 417 P.2d 210 (1966). See Wheeler v. City of Boston, 233 Mass. 275, 123 N.E. 684 (1919) (farmers can be prohibited from transporting garbage through city streets to their farms); Pantlind v. City of Grand Rapids, 210 Mich. 18, 177 N.W. 302 (1920) (persons may be prohibited from transporting garbage from their own businesses). Cf. Laidlaw Waste Systems, Inc. v. City of Phoenix, 168 Ariz. 563, 815 P.2d 932 (App. 1991) (city garbage collection services in annexed area held lawful competition and not a "taking" of property of private trash haulers previously serving the area); Borough of Avalon v. Neithammer, 23 N.J.Super. 385, 93 A.2d 65 (1952) (homeowners can be forbidden to bury garbage on their premises, even if they do it for purpose of enriching the soil); City of Portsmouth v. McGraw, 21 Ohio St.3d 117, 488 N.E.2d 472 (1986) (city's requirement that every resident use, and pay a fee for, municipal garbage collection held a proper exercise of police power).

[77] See Gardner v. Michigan, 199 U.S. 325, 26 S.Ct. 106, 50 L.Ed. 212 (1905); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S.Ct. 100, 50 L.Ed. 204 (1905); Ponti v. Burastero, 112 Cal.App.2d 846, 247 P.2d 597 (Dist.Ct.1952); Ex parte Sozzi, 54 Cal.App.2d 304, 129 P.2d 40 (Dist.Ct.1942); Ex parte Zhizhuzza, 147 Cal. 328, 81 P. 955 (1905); State v. Orr, 68 Conn. 101, 35 A. 770 (1896); Strub v. Village of Deerfield, 19 Ill.2d 401, 167 N.E.2d 178 (1960); Schultz v. State, 112 Md. 211, 76 A. 592 (1910); City of Grand Rapids v. De Vries, 123 Mich. 570, 82 N.W. 269 (1900); State ex rel. City of Macon v. Belt, 561 S.W.2d 117 (Mo.1978); McKim v. Village of South Orange, 133 N.J.L. 470, 44 A.2d 784 (1945); Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E.2d 651 (1939); State ex rel. Moock v. City of Cincinnati, 120 Ohio St. 500, 166 N.E. 583 (1929); Dunn v. Gray, 238 Or. 71, 392 P.2d 1018 (1964); Wallis v. Fidelity & Deposit Co., 155 Wash. 618, 285 P. 656 (1930). Cf. Jansen Farms, Inc. v. City of Indianapolis, 202 Ind. 138, 171 N.E. 199 (1930) (food left from tables at restaurants, purchased for hog food, held not "garbage" under statute prohibiting collection of garbage except by department of sanitation); Troje v. City Council of Hastings, 310 Minn. 183, 245 N.W.2d 596 (1976) (city could properly refuse to grant more than one license for garbage collection); City of Spokane v. Carlson, 73 Wash.2d 76, 436 P.2d 454 (1968) (fact that garbage carted by defendant was harmless did not render unconstitutional, as to defendant, ordinance reserving to city the exclusive right to collect garbage in city). In Gomez v. City of Las Vegas, 61 N.M. 27, 293 P.2d 984 (1956), it was held that an exclusive contract for garbage collection could be entered into by a municipality despite a constitutional ban on exclusive privileges to any person or corporation. See Ventenbergs v. City of Seattle, 163 Wash.2d 92, 178 P.3d 960 (2008) (waste hauler did not have fundamental right to haul waste in city, and thus exclusive contracts granted to other haulers did not violate privileges and immunities clause of state constitution). But see Porter v. Suburban Sanitation Service, Inc., 283 N.C. 479, 196 S.E.2d 760 (1973).

[78] City of Naples v. Scatena, 240 So.2d 837 (Fla.App.1970); Mayor & Aldermen of Milledgeville v. Green, 221 Ga. 498, 145 S.E.2d 507 (1965), conf. to 112 Ga.App. 653, 145 S.E.2d 720; City of Lake Charles v. Wallace, 247 La. 285, 170 So.2d 654 (1964); Alexander v. City of Detroit, 392 Mich. 30, 219 N.W.2d 41 (1974). In City of Hobbs v. Chesport, Limited, *supra* note 76, it was held that such a fee could be imposed even on a resident who did not himself receive the municipality's garbage-collection service since he benefited from the service being performed for others. But in Montgomery v. City of Galva, 41 Ill.2d 562, 244 N.E.2d 193 (1969), it was held that a garbage-collection fee could not be added to the water bills of city residents since some who received water did not receive the garbage-collection service.

[79] See Pinellas Apartment Association, Inc. v. City of St. Petersburg, 294 So.2d 676 (Fla.App.1974); Alexander v. City of Detroit, 392 Mich. 30, 219 N.W.2d 41 (1974) (arbitrary classification is unconstitutional); Big Bear of North Carolina, Inc. v. City of High Point, 294 N.C. 262, 240 S.E.2d 422 (1978) (businesses, but not individual residents, had to pay fee for refuse collection; upheld). Cf. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), reh. denied 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981) (to promote conservation and to ease waste disposal, state banned retail sale of milk in plastic, but not non-plastic containers if non-returnable and non-refillable; upheld). As to bans on plastic bags, see Comment, The Evolution of San Francisco's Plastic-bag Ban, 1 Golden Gate U. Envtl. L. J. 439 (2007). See

the government cannot perform the service for *some* residents and arbitrarily deny it to others;[80] and reasonable controls (as on the type of garbage container used by residents) may be imposed in order to facilitate the local collection operation.[81]

§ 23.6 Local Regulation of Solicitors, Street Vendors, Etc.

Another municipal problem—over which there has been a great amount of litigation—is the regulation of door-to-door salespersons, solicitors, canvassers, etc. Control of these persons' activities is often thought necessary to the health and well-being of the community. Some regulations distinguish among various categories of these persons, and thus a few definitions are helpful: *Peddlers* are usually said to be those who travel from place to place, selling and delivering their merchandise at the same time; *solicitors* or canvassers travel from place to place (or residence to residence) also, but don't carry goods with them—they merely take orders for future delivery; and *transient or itinerant merchants* occupy a temporary but fixed location (such as a stall or wagon) from which they conduct business in a manner similar to that in which a permanent establishment would.[82]

One noted form of restriction on solicitors is the "Green River ordinance," which takes its name from one of its places of origin—Green River, Wyoming. Such an ordinance makes criminally punishable (often by declaring such action to be a nuisance) going in or upon private residential property without request or invitation of the owners. Such an ordinance has been sustained by the U.S. Supreme Court, and by some other courts, against constitutional objections;[83] but a majority of state courts have invalidated

generally Frazier, The Bag Bill, The New Yorker, May 2, 2016 (with discussion of fees for plastic bags vs. total ban); Romer & Foley, A Wolf in Sheep's Clothing: The Plastic Industry's "Public Interest" Role in Legislation and Litigation of Plastic Bags in California, 5 Golden Gate U. Envtl. L. J. 377 (2012); Romer & Tamminen, Plastic Bag Reduction Ordinances: New York City's Proposed Charge on All Carryout Plastic Bags as a Model for U.S. Cities, 27 Tulane Envtl. L. J. 237 (2014). See also Parker, Pervasive Plastics, Natl. Geographic, June, 2018, at 40; Note, San Francisco's Checkout Bag Fee Ordinance and the Problem of Proposition 26, 41 Hastings Const. L. Q. 151 (2013).

[80] Teagen Co. v. Borough of Bergenfield, 119 N.J.Super. 212, 290 A.2d 753 (1972); Boulevard Apartments v. Borough of Lodi, *supra* note 73 (garbage-collection service could not be denied residents of garden-type apartments). See generally Shean, The Politics of Trash, 16 Buffalo Envtl. L. J. 55 (2008–09).

[81] See Gardner v. Michigan, *supra* note 77 (recipients of service could be required to supply watertight container); Gardner v. City of Dallas, 81 F.2d 425 (5th Cir.1936), cert. denied 298 U.S. 668, 56 S.Ct. 834, 80 L.Ed. 1391; O'Neal v. Harrison, 96 Kan. 339, 150 P. 551 (1915); Pleasure Bay Apartments v. City of Long Branch, 66 N.J. 79, 328 A.2d 593 (1974) (garbage had to be left at curbside in approved containers; sustained); Sheek v. City of Newport News, 214 Va. 288, 199 S.E.2d 519 (1973) (businesses, including mobile home parks, had to put garbage in dumpmaster containers; sustained).

On the implementation of recycling programs by many local governments, see Copelan & Anderson, Government Recycling Objectives Frustrated by Lack of Demand, 15 Urban, State & Local L. Newsletter, No. 1, at 1 (Fall, 1991). See also O'Reilly, Recycling and Municipal Liability: Environmental Benefits and U.C.C. Risks, 23 Urban Law. 97 (1991).

[82] See Rhyne, Burton, & Murphy, Municipal Regulation of Peddlers, Solicitors & Itinerant Merchants 79 (Nat'l Institute of Municipal Law Officers, Report No. 118) (1947); Montgomery, Municipal Regulation of the Itinerant Salesman, 10 Okl.L.Rev. 37 (1957). See generally Note, Streets of Wrath: The Constitutionality of the Town of Jupiter's Non-solicitation Ordinance, 37 Stetson L. Rev. 471 (2008). See also Kagan v. City of New Orleans, 753 F.3d 560 (5th Cir. 2014) (law requiring tour guides in the city to have a license upheld).

[83] Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233, reh. denied 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637 (1951) (considering the community interest involved in promoting privacy in the home, this type of restriction is not a violation of due process and does not violate the Commerce Clause or infringe on free speech); Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933) (upholding the Green River, Wyoming, ordinance); Larsen v. City of Colorado Springs, 142 F.Supp. 871 (D.C.Colo.1956); City of Shreveport v. Cunningham, 190 La. 481, 182 So. 649 (1938); Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941); People v. Bohnke, 287 N.Y. 154, 38 N.E.2d 478 (1941), cert. denied 316 U.S. 713, 62 S.Ct. 1306, 86 L.Ed. 1778; Village of West Jefferson v. Robinson, 1 Ohio St.2d 113, 205 N.E.2d 382 (1965); Ex parte Lewis, 141 Tex.Cr.R. 83, 147 S.W.2d 478 (1941); Town of Green River v. Bunger, 50 Wyo. 52, 58 P.2d 456 (1936), appeal dism'd 300 U.S. 638, 57 S.Ct. 510, 81 L.Ed. 854, reh. denied 300 U.S. 688, 57 S.Ct. 752, 81 L.Ed. 889 (upholding the Green River, Wyoming, ordinance). See McCormick v. City of Montrose, 105 Colo. 493, 99 P.2d 969 (1939). Such ordinances were particularly popular during the 1930s and 1940s; reportedly, over 400 municipalities adopted such ordinances from 1935 to 1939. McIntire & Rhyne, Municipal Legislative Barriers to a Free Market, 8 Law & Contemp. Prob. 359, 374 (1941).

As to the popularity of door-to-door soliciting, it has been reported to be on the increase again, due largely to the increased use of caller-ID and other devices that frustrate attempts at telephone solicitations. See Spencer, Ignore That Knocking: Door-to-Door Sales Make a Comeback, Wall St. J., April 30, 2003, at D.

In Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002), the Court, in an action brought by religious organizations, struck down as violative of the First Amendment an ordinance that required individuals to obtain a permit prior to engaging in door-to-door advocacy and required such solicitors to display the permit upon demand. See Comment, Constitutional Law—Freedom of Speech: Door-to-Door Permit Requirements for Noncommercial Canvassers, Domestic Threat or Freedom of Speech?, 79 N. Dak. L. Rev. 369 (2003); Note, U.S. Supreme Court Slams the Door on Small Town's Ordinance Requiring Solicitor Permits, 12 Widener L.J. 633 (2003). The *Watchtower* case, *supra*, was the latest in a line of cases that, for over 50 years, have invalidated restrictions on door-to-door canvassing and pamphleteering by Jehovah's Witnesses. See Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).

[84] Prior v. White, 132 Fla. 1, 180 So. 347 (1938); De Berry v. City of La Grange, 62 Ga.App. 74, 8 S.E.2d 146 (1940); City of Osceola v. Blair, 231 Iowa 770, 2 N.W.2d 83 (1942); City of Mount Sterling v. Donaldson Baking Co., 287 Ky. 781, 155 S.W.2d 237 (1941); Jewel Tea Co. v. City of Geneva, 137 Neb. 768, 291 N.W. 664 (1940); City of Washington v. Thompson, 160 N.E.2d 568 (Ohio Com.Pl.1949); City of Orangeburg v. Farmer, 181 S.C. 143, 186 S.E. 783 (1936) (ordinance declaring soliciting of sale of merchandise at private residences to be a nuisance held unreasonable); Ex parte Faulkner, 143 Tex.Cr.R. 272, 158 S.W.2d 525 (1942); White v. Town of Culpeper, 172 Va. 630, 1 S.E.2d 269 (1939). See New Jersey Good Humor, Inc. v. Board of Commissioners of Bradley Beach, 124 N.J.L. 162, 11 A.2d 113 (1940) (statute permitted municipality to *regulate* peddling; total *prohibition* by seashore community was not justified); Houston Credit Sales Co. v. City of Trinity, 269 S.W.2d 579 (Tex.Civ.App.1954) (city may regulate, but not prohibit, practice of solicitors going in and on private residences). Cf. City of McAlester v. Grand Union Tea Co., 186 Okl. 487, 98 P.2d 924 (1940) (house-to-house canvassing without permission of owners could not be *public* nuisance; at most was private nuisance as to individuals). The nuisance rationale was also partially relied on by the *Prior*, *Mount Sterling*, and *White* cases *supra*. See generally Note, Constitutional Law—Due Process—Freedom of Expression—Commerce Clause—"Green River" Ordinance as Applied to Door to Door Solicitation for Magazine Subscriptions, 50 Mich.L.Rev. 576 (1952); Note, Municipal Law—Ordinance Barring Uninvited Transient Vendors from City Residential Areas, 27 Miss.L.J. 148 (1956); Annot., Validity of Municipal Ordinance Prohibiting House-to-House Soliciting and Peddling Without Invitation, 35 A.L.R.2d 355 (1954); Annot. Validity of Municipal Regulation of Solicitation of Magazine Subscriptions, 9 A.L.R.2d 728 (1950). See also Comment, Political Speech in the Nonpublic Forum: Can Public Housing Facilities Limit Access to Political Canvassers?, 53 Case W. Reserve L. Rev. 569 (2002).

"Green River ordinances," because of the limitations they impose on free speech, may be invalidated if they are found not to be the least restrictive means of accomplishing a city's goals. See Project 80's, Inc. v. City of Pocatello, 857 F.2d 592 (9th Cir.1988), where a municipal ban on uninvited residential door-to-door solicitation was invalidated as not the least restrictive means available. The judgment was vacated and remanded, City of Idaho Falls v. Project 80's, Inc., 493 U.S. 1013, 110 S.Ct. 709, 107 L.Ed.2d 730 (1990), for further consideration in light of Board of Trustees of State University v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), on remand 764 F.Supp. 747 (N.D.N.Y.1991) (governmental restrictions on commercial speech need not be the absolutely least restrictive means to achieve a desired end). On remand, however, the Ninth Circuit again invalidated the ordinance as not sufficiently narrow. Project 80's, Inc. v. City of Pocatello, 942 F.2d 635 (9th Cir.1991). Such ordinances may also be given a strict construction. See MacLeod v. City of Los Altos, 182 Cal.App.2d 364, 6 Cal.Rptr. 326 (Dist. Ct.1960) (held inapplicable to members of a voluntary political group soliciting funds). And it has been argued that the burden should be on the property owner to post a "no-soliciting" notice, not on the solicitor to inquire whether such soliciting is wanted. See Reynolds, "Green River Ordinances": Where Does the Burden Belong?, 11 Fordham Urban L.J. 427 (1983).

[85] City of Washburn v. Ellquist, 242 Wis. 609, 9 N.W.2d 121 (1943), reh. denied 242 Wis. 609, 10 N.W.2d 292. Cf. The National Foundation v. City of Fort Worth, 307 F.Supp. 177 (N.D.Tex.1967), aff'd 415 F.2d 41, cert. denied 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684 (solicitors for charities had to make accounting

such measures—usually on the ground that they are unreasonably severe, amounting to practically total prohibitions.[84] Less extreme methods of regulation are usually upheld: Municipalities may require solicitors to register and give relevant information, including address and occupation.[85] Licenses can be required before a person is allowed to go door-

to-door as a solicitor or canvasser,[86] but reasonably definite standards must be laid down so that those who wish to qualify may have a clear idea of the requirements.[87] A license fee may be charged if it is reasonable in amount;[88] but greater difficulty is presented by the question of charging such a fee to solicitors who operate in interstate commerce. Clearly if a fee or tax discriminates, or is likely to be applied so as to discriminate, against interstate commerce, it will be invalid.[89] But even where no discrimination is

of funds; sustained); Acuff v. Mueller, 93 F.Supp. 146 (W.D.Mo.1950) (deposit of reasonable bond sustained); Mogolefsky v. Schoem, 50 N.J. 588, 236 A.2d 874 (1967) (requirement of supplying photograph, fingerprints, information on criminal record, etc. sustained); Moyant v. Borough of Paramus, 30 N.J. 528, 154 A.2d 9 (1959) (licensing requirement sustained, but fee and bond requirements held invalid; no statutory authority to raise revenue through such fees); Village of Mogadore v. Coe, 197 N.E.2d 570, 29 O.O.2d 44 (Ohio Com.Pl.1963) (solicitors can be required to reveal criminal record and obtain identification card, which they must carry when soliciting); Ex parte Killam, 144 Tex.Cr.R. 606, 162 S.W.2d 426 (1942), cert. denied sub nom. Killam v. Floresville, 317 U.S. 668, 63 S.Ct. 72, 87 L.Ed. 537, reh. denied 318 U.S. 801, 63 S.Ct. 826, 87 L.Ed. 1164 (regulations as to peddlers can be applied to minister of gospel selling books). But see Carolina Action v. Pickard, 420 F.Supp. 310 (W.D.N.C.1976) (solicitation license would be denied any charity whose cost of collection exceeded 25% of amount to be raised; unconstitutionally vague and overbroad); Pictorial Review Co. v. City of Alexandria, 46 F.2d 337 (W.D.La.1930) (bond of $100, and furnishing of such references as the mayor required; invalid); Robert v. City of Norfolk, 188 Va. 413, 49 S.E.2d 697 (1948) (regulation of solicitors found to violate freedom of press as applied to those soliciting magazine subscriptions). Cf. Ohio Citizen Action v. City of Englewood, 671 F.3d 564 (6th Cir. 2012), where a curfew on soliciting between 6 p.m. and 9 a.m. was invalidated as violating free-speech rights, though a requirement that solicitors carry a copy of the city's do-not-solicit list was upheld. Regulations may sometimes be upheld as to solicitation of or upon private residences but not as applied to business premises. See Day v. Klein, 225 Miss. 191, 82 So.2d 831 (1955) (ordinance upheld as applied to private residences—exception for sales of milk, dairy items, and certain other food products found reasonable).

[86] People v. Mobin, 237 Cal.App.2d 115, 46 Cal.Rptr. 605 (Dist.Ct.1965); Clifton v. Weber, 84 N.J.Super. 333, 202 A.2d 186 (1964) aff'd 44 N.J. 266, 208 A.2d 401 (permit required; was $3 fee); Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153 (1949). Cf. Re Hartmann, 25 Cal.App.2d 55, 76 P.2d 709 (Dist.Ct.1938) (magazine solicitors had to obtain permit if they had no established place of business in city; upheld). Sometimes ordinances imposing licensing, and related, requirements on solicitors are loosely termed "Green River ordinances"; but the term originally referred to regulations such as discussed in notes 83–84 *supra* and accompanying text.

[87] See Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), invalidating an ordinance requiring solicitors and canvassers to give written notice to police; coverage was unclear, and ordinance did not specify what was necessary for compliance (what had to be included in notice, etc.); Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958), invalidating—as lacking definitive standards—an ordinance that allowed a mayor to decide whether or not to grant permits to solicit membership in organizations; the ordinance merely instructed the mayor to consider the applicant's character, the nature of the organization, and the effects on the general welfare of citizens. But some equally broad standards have sometimes been sustained, especially if First Amendment rights were not involved. See Moyant v. Borough of Paramus, *supra* note 85 (solicitor could be denied license if local official didn't find applicant "satisfactory").

[88] See Acuff v. Mueller, *supra* note 85 ($3 a day, $30 a month, or $75 a year reasonable). An unreasonable fee will be invalidated. Olan Mills, Inc. v. City of Nicholasville, 280 S.W.2d 522 (Ky.1955) (annual license fee of $50 found unreasonable); State v. Kromer, 34 N.J.Super. 465, 112 A.2d 804 (1955). A fee requirement may also be invalidated, on equal protection grounds, if it unreasonably discriminates against a particular class of sellers, but will be upheld if there is a reasonable basis for the different treatment. See Edwards v. City of Reno, 103 Nev. 347, 742 P.2d 486 (1987) (ordinance setting higher fees for peddlers than for solicitors upheld on basis of legitimate government purpose in preventing fraud by peddlers, whom the court regarded as a more transient class of sellers).

[89] Nippert v. City of Richmond, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760 (1946) (license tax of $50 per year plus one-half of 1% of gross earnings (in excess of $1000) for preceding license year). Some jurisdictions have invalidated regulations as to solicitors that apply only to non-residents of the regulating locality. See Wilkins v. City of Harrison, 218 Ark. 316, 236 S.W.2d 82 (1951), noted 5 Ark.L.Rev. 429 (1951). Cf. Nafziger Baking Co. v. City of Salisbury, 329 Mo. 1014, 48 S.W.2d 563 (1932) (higher annual license fee for nonresident sellers than for residents; held void); Muhlenbrinck v. Long Branch Commissioners, 42 N.J.L. 364 (1880) (higher license fee charged some non-residents; found invalid). But some authority has sustained regulation of solicitors that exempts residents, or establishments having a permanent place of business in the locality. See Re Albrecht, 25 Cal.App.2d 750, 76 P.2d 713 (Dist.Ct.1938); People v. Bohnke, 287 N.Y. 154, 38 N.E.2d 478 (1941), cert. denied 316 U.S. 713, 62 S.Ct. 1306, 86 L.Ed. 1778. See also Goldberg v. Sweet, 488 U.S. 252, 109

present, a license fee or bond requirement will be invalidated if it imposes a material burden on interstate commerce, and the U.S. Supreme Court found such a burden in a 1925 case involving an ordinance requiring a bond of $500 and license fees of $12.50 (for salespersons on foot) or $25 (for those using a vehicle).[90] The case seems to indicate that any fee on solicitors involved in interstate commerce would be unconstitutional; and several cases have found that an "undue burden" was imposed on such commerce by even fairly low fees.[91] Soliciting and canvassing for political support or charitable contributions may be regulated by municipalities in addition to their regulation of commercial solicitation; but courts will look with particular care at any restrictions on such activities, since important First Amendment rights are involved. Thus, the U.S. Supreme Court has invalidated a licensing requirement as applied to a candidate for public office and his supporters when the coverage of the ordinance, and the exact actions necessary for compliance, were unclear.[92] The same Court has invalidated as over-broad an ordinance prohibiting door-to-door or on-street solicitation by charities not using at least 75% of their receipts for charitable purposes.[93]

S.Ct. 582, 102 L.Ed.2d 607 (1989) (Illinois tax on interstate telecommunications, which taxed only those calls originated or terminated in Illinois and charged to an Illinois service address, did not discriminate in favor of intrastate commerce at expense of interstate commerce).

[90] Real Silk Hosiery Mills v. City of Portland, 268 U.S. 325, 45 S.Ct. 525, 69 L.Ed. 982 (1925).

[91] *Id.* at 335–36. Cf. Village of Bel-Nor v. Barnett, 358 S.W.2d 832 (Mo.1962) (license cost $15 for 90 days; struck down as undue burden on interstate commerce); Moyant v. Paramus, *supra* note 85 ($25 for six months; were also requirements of a surety bond and certificate of freedom from disease; undue burden on interstate commerce found). See generally Jensen, Burdening Interstate Direct Selling Under Claims of State Police Power, 12 Rocky Mt.L.Rev. 257 (1940).

[92] Hynes v. Mayor & Council of Oradell, *supra* note 87.

[93] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), reh. denied 445 U.S. 972, 100 S.Ct. 1668, 64 L.Ed.2d 250 noting that, while soliciting financial support is subject to reasonable regulation, any regulation must be undertaken with due regard for the informative and persuasive speeches, seeking support for particular causes or views, that often accompany the solicitation. The Court held that even if the 75% requirement were valid as to some types of solicitation, it was unreasonable on its face as applied to advocacy-oriented organizations because it barred solicitation by them even where the funds would be used for reasonable salaries of those who gathered and disseminated information about the organization's purpose. See Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), where the Court invalidated a Maryland statute which prohibited charitable organizations from paying expenses of more than 25% of the amount raised in connection with any fund-raising activity. The Court ruled that such a limitation was too imprecise a tool to achieve the legislative purpose of preventing mismanagement and that the statute was thus overbroad and created an unnecessary risk of chilling free speech because of its effect on the First Amendment rights of charities. Cf. Larson v. Valente, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), reh. denied 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1323 (1982), invalidating a Minnesota statute that imposed certain registration and reporting requirements only on those religious organizations that solicit more than 50% of their funds from nonmembers; this was found to violate the Establishment Clause's clear command that one religious denomination not be officially preferred over another.

In Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), a charitable solicitation statute's licensing requirement that professional fund raisers await a determination regarding their license application before engaging in solicitation, while volunteer fund raisers could solicit immediately upon submitting an application, was invalidated. A strict scrutiny standard was applied since restriction of free speech was involved, and the statute was thus found unconstitutional as permitting unlimited delay in issuing licenses to professional fund raisers. Cf. Green v. Village of Schaumburg, 676 F.Supp. 870 (N.D.Ill.1988) (ordinance making it unlawful for charitable organization to use a convicted felon as a solicitor held to violate First Amendment). See generally Strauss, First Amendment Protection of Charitable Solicitation, 13 Whittier L. Rev. 669 (1992).

Restrictions on the hours during which solicitation may occur have sometimes been invalidated as unnecessarily infringing on First Amendment rights considering the less restrictive alternatives available to achieve the goals of protecting privacy and preventing crime. City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547 (7th Cir.1986), aff'd without opinion 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987) (three Justices dissenting); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248 (7th Cir.1985); Association

Where use of the public streets and ways is made for selling goods—as by transient merchants or hawkers—, some courts have said there can be no total ban, since such areas are by definition open to the public and there is no danger involved in such activities sufficient to justify a complete prohibition.[94] But what is probably the weight of authority supports the view that total prohibitions *can* be justified due to the traffic hazards otherwise presented, the need to keep pedestrian and vehicular traffic flowing smoothly, and—where sale of foodstuffs and certain other products is involved—the

of Community Organizations for Reform Now v. City of Frontenac, 714 F.2d 813 (8th Cir.1983). See, discussing the *Watseka* case *supra*, Kamen, High Court Restricts Curbs on Canvassing, Wash. Post, Jan. 21, 1987, at A8. Cf. New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3d Cir.1986), cert. denied 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 186 (1987), where an ordinance forbidding noncommercial door-to-door canvassing and solicitation during evening hours and requiring that canvassers be fingerprinted was held violative of the First Amendment.

As to restrictions on "panhandling" or begging, see Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir.1990), cert. denied 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990), noted 57 Brooklyn L. Rev. 525 (1991), upholding restrictions imposed within the New York City Subway system. See generally Fleming, The New York Subway Cases: On or Off Track—*Young v. New York City Transit Authority*, 22 Urban Law. 919 (1990); Note, *Young v. New York City Transit Authority*: Silencing the Beggars in the Subways, 12 Pace L. Rev. 359 (1992). On enforcement of New York City's ordinance against begging within the subway system, see Henneberger, Subways Starting Panhandler Curb, N.Y. Times, Jan. 11, 1994, at A12. But in Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993), the same court that had upheld the general ban on begging in the subway system ruled that a statute criminalizing panhandling in the streets violated the First Amendment—a result that has been criticized as differing from the *Young* holding without offering any justification. See Nichols, The Panhandler's First Amendment Right: A Critique of *Loper v. New York City Police Department* and Related Academic Commentary, 48 S. Car. L. Rev. 267 (1997); Note, *Loper v. New York City Police Department* Begs the Question: Is Panhandling Protected by the First Amendment?, 60 Brooklyn L. Rev. 587 (1994); Note, Panhandling and the First Amendment: How Spider-Man Is Reducing the Reality of Life in New York City, 81 Brooklyn L. Rev. 1167 (2016); Note, Begging Underground? The Constitutionality of Regulations Banning Panhandling in the New York City Subway System, 27 Cardozo L. Rev. 1517 (2006); Comment, The Demise of Anti-Panhandling Laws in America, 48 St. Mary's L. J. 543 (2017); Comment, Examining a Beggar's First Amendment Right to Beg in an Era of Anti-begging Ordinances: The Presence and Persistence Test, 26 U. Dayton L. Rev. 155 (2000). See generally Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning, 105 Yale L.J. 1165 (1996); Annot., Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons, 7 A.L.R.5th 455 (1992). Restrictions on soliciting money in a public forum may not survive the constitutional test, required as to any regulation based on content of speech, of having to be narrowly drawn to serve a compelling governmental interest. See State v. Boehler, 228 Ariz. 33, 262 P.3d 637 (App. 2011) (city's provision in anti-solicitation ordinance banning solicitors from orally asking passersby for cash after dark was not narrowly drawn to achieve its legitimate purpose of promoting safety in public areas after dark), discussed in Comment, Begging the (First Amendment) Question: The Constitutionality of Arizona's Prohibition of Begging in a Public Place, 45 Ariz. St. L. J. 1227 (2013). As to the effect some other speech-related cases may have on anti-panhandling laws, see Note, The Constitutionality of Panhandling Ordinances: Making "Cents" Out of *Reed v. Town of Gilbert*, 35 J. L. & Com. 255 (2017) (*Reed* invalidated a content-based restriction on signs, applying strict scrutiny). Cf. Barmore, Panhandling After *McCullen v. Coakley*, 16 Nev. L. J. 585 (2016). As to the "public forum" cases, see generally Section 23.9, note 153, para. 2, *infra*. See also Clatterbuck v. City of Charlottesville, 708 F.3d 549 (4th Cir. 2013), where the court dealt with an ordinance prohibiting solicitation of immediate donations of things of value within 50 feet of two streets that run through the downtown mall. The court found that the mall was a public forum and remanded the complaint, brought by homeless persons who wanted to beg at that location, for determination of whether the city enacted the ordinance with a censorial purpose in violation of the First Amendment.

[94] See City of Alexandria v. Jones, 216 La. 923, 45 So.2d 79 (1950); New Jersey Good Humor, Inc. v. Board of Commissioners, 124 N.J.L. 162, 11 A.2d 113 (1940); Good Humor Corp. v. City of New York, 290 N.Y. 312, 49 N.E.2d 153 (1943) (invalidating ordinance forbidding itinerant peddling on streets of city); Frecker v. City of Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949), aff'd 153 Ohio St. 14, 90 N.E.2d 851. Cf. Higgins v. Krogman, 140 N.J.Eq. 518, 55 A.2d 175 (1947), aff'd 142 N.J.Eq. 691, 61 A.2d 444 (state law providing for issuance of hawkers' and peddlers' licenses to war veterans overrides local prohibition of peddling on beach and boardwalk); City of Eugene v. Miller, 318 Or. 480, 871 P.2d 454 (1994) (ordinance creating exception from general prohibition of sidewalk vending only for vendors selling "food, beverages, flowers, or balloons" violated free expression rights of vendor selling books on city sidewalks).

danger of contamination of the products being sold.[95] Most "prohibitions," however, are not really total, but only forbid selling in certain areas—such as ones particularly subject to traffic congestion. It is clear that many types of regulation less extreme than outright prohibition will be upheld: (1) Peddlers and hawkers can be prohibited from disrupting a neighborhood by too much noise, if the limitations are drawn with sufficient clarity.[96] (2) Parking on the street and attempting to sell goods from the parked vehicle, or other activities contributing to traffic congestion, can be forbidden.[97] (3) Licenses can be

[95] See Shelton v. City of Mobile, 30 Ala. 540 (1857) (ban on peddling foodstuffs and meats on street); Kleiber v. City of Idaho Falls, 110 Idaho 501, 716 P.2d 1273 (1986) (issuance of business license to hot dog vendor did not confer on him any right to use public sidewalks for conduct of his business); Good Humor Corp. v. Village of Mundelein, 33 Ill.2d 252, 211 N.E.2d 269 (1965) (ban on peddling of ice cream on streets); State v. Perry, 151 N.C. 661, 65 S.E. 915 (1909) (ban on peddling fish); X-Cel Dairy v. City of Akron, 63 Ohio App. 147, 25 N.E.2d 700 (1939), appeal dism'd 136 Ohio St. 340, 25 N.E.2d 680 (ban on peddling of ice cream); Commonwealth v. Dunham, 191 Pa. 73, 43 A. 84 (1899); Dooley v. City of Cleveland, 175 Tenn. 439, 135 S.W.2d 649 (1940) (ban on selling food on streets); Ex parte Hogg, 70 Tex.Cr.R. 161, 156 S.W. 931 (1913) (general ban on selling merchandise on streets); Re Camp, 38 Wash. 393, 80 P. 547 (1905). Cf. John v. State, 577 S.W.2d 483 (Tex.Cr.App.1979) (ban on sale of tickets on city property). See generally Kettles, Regulating Vending in the Sidewalk Commons, 77 Temple L. Rev. 1 (2004). See also Meek, Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level, 75 Ohio St. L. J. 1 (2014).

[96] See City of New Orleans v. Fargot, 116 La. 369, 40 So. 735 (1906) (peddlers prohibited from making loud outcries); Mister Softee v. Mayor and Council of Hoboken, 77 N.J.Super. 354, 186 A.2d 513 (1962) ("gong bells" and similar devices forbidden). But some courts may strike down, as not sufficiently definite and certain, ordinances prohibiting "loud" noises and not offering a clear definition of "loud." See Ex parte Westellison, 38 Okl.Cr. 207, 259 P. 873 (1927) (unlawful to announce contents of newspaper in a "loud voice"; ordinance held void).

[97] See City of Shreveport v. Dantes, 118 La. 113, 42 So. 716 (1907) (upholding prohibition of peddlers and hucksters stopping on streets and sidewalks unless making a sale); Borough of Harrington Park v. Hogenbirk, 52 N.J.Super. 223, 145 A.2d 161 (1958) (upholding ordinance providing that no one can park a vehicle on a public street and use it to sell goods to the occupants of other vehicles moving or standing on the road). Cf. Pittsford v. City of Los Angeles, 50 Cal.App.2d 25, 122 P.2d 535 (Dist.Ct.1942) (no vested right to do business in the public streets). See generally Comment, Location, Location, Location—The Food Truck's Battle for Common Ground, 44 Cumb. L. Rev. 283 (2013). In International Soc'y for Krishna Consciousness v. City of Baton Rouge, 668 F.Supp. 527 (M.D.La.1987), judgment aff'd 876 F.2d 494 (5th Cir.1989), a city's ordinance prohibiting solicitation of occupants of motor vehicles at traffic lights was upheld even as applied to religious solicitation, since the law was found to serve important public safety and traffic-flow concerns. Cf. United States v. Kokinda, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990), noted 25 Suffolk U.L. Rev. 772 (1991) (Postal Service Regulation prohibiting solicitation on postal premises, including postal sidewalk, upheld as applied to members of political advocacy group who were soliciting contributions, selling books, and distributing political literature); City of Seattle v. Webster, 115 Wash.2d 635, 802 P.2d 1333 (1990), cert. denied 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991) (ordinance prohibiting intentional interference with pedestrian or vehicular traffic upheld; did not violate equal protection rights of homeless persons). But cf. Brown v. City of Newark, 113 N.J. 565, 552 A.2d 125 (1989) (court upheld most portions of an ordinance regulating street peddlers, but—contrary to the *Shreveport* case *supra*—invalidated, as not rationally related to the purpose of relieving sidewalk congestion, a portion that required venders to keep moving when not actually making sales). Special precautions may be required as to street-sales of goods attractive to children, since special dangers are then posed by the traffic hazards. See Trio Distributor Corp. v. City of Albany, 2 N.Y.2d 690, 163 N.Y.S.2d 585, 143 N.E.2d 329 (1957) (sustaining ordinance requiring street peddlers selling goods attractive to children to have along an attendant to guard the children from injury in the streets). Cf. Mister Softee v. Mayor and Council of Hoboken, *supra* note 96 (city can forbid sale of ice cream and similar products near schools during school hours). But unless some rational relationship to a police-power purpose is shown as to the distinction, an ordinance distinguishing vendors of goods likely to be appealing to children from vendors of other goods will be invalidated as discriminatory. See Frecker v. City of Dayton, *supra* note 94, criticized on the ground that such classification is reasonable in Note, Constitutional Law: Provisions in Ordinances Constituting Equal Protection of the Laws, 4 Okl.L.Rev. 494 (1951).

Restrictions on solicitation and/or peddling in certain limited areas of a city may well be found reasonable and thus upheld. See Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153 (1949) (business district). Cf. Re Mares, 75 Cal.App.2d 798, 171 P.2d 762 (Dist.Ct.1946) (ordinance prohibited solicitation for magazines or periodicals on any public street or sidewalk or any area abutting thereon; sustained). See also Annot., Peddlers: Right of Owner of Housing Development or Apartment Houses to Restrict Canvassing, Peddling, Solicitation of Contributions, etc., 3 A.L.R.2d 1431 (1949).

required of all peddlers or hawkers within a locality.[98] Classifications will be upheld if reasonable; and in general, peddlers and itinerant merchants have been unsuccessful when they have attacked legislation on the ground that it unreasonably discriminates against them and in favor of persons who operate businesses from permanent locations.[99]

It has been suggested that restrictions on street-peddlers and solicitors might provide a model for ordinances prohibiting "panic-peddling": the practice of real-estate brokers or others to induce the sale of real property by making the owners of such property fearful of an influx of minority or low-income persons into the area, and consequent lowering of property values.[100] A number of local ordinances do now make this activity unlawful, and such ordinances have been upheld.[101] But the U.S. Supreme Court invalidated, as unduly restrictive of the right of free speech, an ordinance banning "For Sale" and "Sold" signs from a township—the ordinance having been enacted to help stem a flight of home-owners from a racially integrating area.[102] There is an increasing movement toward state and local legislation limiting "junk phone calls"—unsolicited

[98] See Slater v. Salt Lake City, *supra* note 97. Reasonably definite standards must, as always, be provided those who are given power to grant or deny the licenses. Mister Softee v. Mayor and Council of Hoboken, *supra* note 96. A reasonable license fee may be charged. Jewel Tea Co. v. City of Troy, 80 F.2d 366 (7th Cir.1935); City of Joliet v. O'Sullivan, 303 Ill.App. 108, 24 N.E.2d 751 (1940). But if the fee is imposed under a municipality's *regulatory* power (as opposed to the separate power which may exist for tax for *revenue*), that fee must bear a reasonable relationship to the costs of policing; and in any case, a fee can be invalidated if it imposes an undue or material burden on interstate commerce. See ns. 7–10 *supra* and accompanying text.

[99] See Jewel Tea Co. v. City of Troy, *supra* note 98. Cf. Hixon v. State, 523 S.W.2d 711 (Tex.Cr.App.1975) (ordinance prohibited sidewalk sales, but exempted vendors of flowers and ice cream; exemption held reasonable); Town of Sumner v. Ward, 126 Wash. 75, 217 P. 502 (1923) (courts will give great deference to municipal legislature in its classification as to peddlers). But cf. City of Eugene v. Miller, *supra* note 94 (ordinances under which sidewalk vending was generally prohibited but with exceptions for certain kinds of merchandise held invalid under state constitution as applied to sales of published matter).

[100] Mandelker, Managing Our Urban Environment 852 (1st ed. 1966), noting an ordinance then proposed in Detroit making it unlawful to solicit by phone after the prospective customer has clearly requested the solicitor to cease. Mandelker notes that (1) the cited ordinance goes further than typical regulations of solicitors in that it applies to mail and phone solicitations, and the argument may be made that this is too restrictive, and (2) the panic-peddling problem might be solved by an ordinance applying only to real-estate agents, and a more sweeping regulation may be found unnecessarily broad—but an ordinance dealing only with realtors might be considered discriminatory. Cf. Mandelker, Managing Our Urban Environment 1030–32 (2d ed. 1971), noting similar *state* laws, and the origin of such measures in "Green River ordinances." Such a law was applied in Abel v. Lomenzo, 25 A.D.2d 104, 267 N.Y.S.2d 265 (1966), aff'd 18 N.Y.2d 619, 272 N.Y.S.2d 771, 219 N.E.2d 287. There is a federal anti-blockbusting law also. 42 U.S.C.A. §§ 3604(e), 3612. See generally Note, Blockbusting, 59 Geo.L.J. 170 (1970); Statute Note, An Anti-Blockbusting Ordinance, 7 Harv.J.Legis. 402 (1970).

[101] Chicago Real Estate Board v. City of Chicago, 36 Ill.2d 530, 224 N.E.2d 793 (1967); Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969) (no need for a single state-wide solution; may be useful to permit municipalities to act independently). See Brown v. State Realty Co., 304 F.Supp. 1236 (D.Ga.1969) (sustaining federal anti-blockbusting regulation); People v. C. Betts Realtors, Inc., 66 Ill.2d 144, 5 Ill.Dec. 258, 361 N.E.2d 581 (1977) (state anti-blockbusting statute sustained). Cf. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (complaint by area residents and village that real-estate brokers "steered" prospective home buyers to different residential areas according to race; village and residents held to have standing under federal Civil Rights Act); Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) (real-estate broker denied injunction against distribution of literature alleging he was engaging in "block-busting" and "panic-peddling" activities). See generally Annot., Validity and Construction of Anti-Blockbusting Regulations Designed to Prevent Brokers from Inducing Sales of Realty Because of Actual or Rumored Entry by Racial Group into Neighborhood, 34 A.L.R.3d 1432 (1970).

[102] Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). Cf. Campagna v. Shaffer, 73 N.Y.2d 237, 538 N.Y.S.2d 933, 536 N.E.2d 368 (1989) (order of New York Secretary of State prohibiting real estate brokers and salespersons from soliciting for sale residential realty in a particular area held to exceed authority granted that official by anti-blockbusting statute).

calls in which the caller seeks to sell goods or services—, as, for instance, by banning robot devices that place calls automatically.[103]

§ 23.7 Local Regulation of "Obscenity"

While free speech issues are raised in many of the cases involving local limitations on peddlers and solicitors,[104] even more difficult questions of this nature appear when a local government attempts to ban or censor publications. Since such attempted bans often occur because the publications are considered obscene or detrimental to morals, cases of this nature also raise the thorny issue of how far a government can go in legislating for the protection of "morality." Some moral basis is occasionally asserted for other restrictions on business activities—such as the restriction imposed by "Sunday blue laws"[105]—; but additional grounds for those restrictions can often be found. In the cases of alleged obscenity, the morality-regulating, and the free-speech, issues are most clearly raised.

In 1957, in deciding the *Roth* case,[106] the U.S. Supreme Court ruled that local governments could forbid and prevent the sale of "obscene" materials if, and only if, the following test for obscenity was met: The material must be such that, to the average person, applying contemporary community standards, the dominant theme, taken as a whole, appeals to prurient interest. The Court emphasized that all ideas having even the slightest redeeming social importance are protected by the First Amendment so that their publication cannot be enjoined or published. In 1973, the Court, in the *Miller* case,[107] modified somewhat the definition of "obscenity" by laying down three

[103] See "A Revolt Against 'Junk Calls,'" Bus. Week, Feb. 20, 1978, at 26. On possible legal solutions to the problem of "junk calls," see Note, Unwanted Telephone Calls—A Legal Remedy?, 1967 Utah L.Rev. 379, noting (at 403 n. 137) a few municipal attempts to control telephone soliciting. But see Moser v. Frohnmayer, 315 Or. 372, 845 P.2d 1284 (1993) (statute prohibiting the use of automatic telemarketing devices for commercial solicitations invalidated as violative of free speech clause of Oregon Constitution). And one attempt by a law student to require the telephone company to indicate, by an asterisk beside his name in the telephone directory, that he did not want commercial or charitable calls soliciting his business or donation proved unsuccessful. McDaniel v. Pacific Tel. & Tel. Co., 60 P.U.R.3d 47 (Cal.Pub.Util.Comm'n 1965). See generally Seiler, Right of Privacy and Direct-Response Solicitation, 12 Forum 782 (1977). Federal legislation, the Fair Debt Collection Practices Act passed in 1978, forbids certain phone calls (as well as other conduct) engaged in by debt collectors. 15 U.S.C. § 1592.

[104] See Section 23.6, notes 83–87 & 92–98 *supra*, and accompanying text. On the special problems of restricting free speech, see Sunset Amusement Co. v. Board of Police Commissioners, 7 Cal.3d 64, 101 Cal.Rptr. 768, 496 P.2d 840 (1972), appeal dism'd 409 U.S. 1121, 93 S.Ct. 940, 35 L.Ed.2d 254, noting the difference between regulation involving exercise of First Amendment rights and regulation not concerning such rights, and upholding a licensing ordinance as to roller skating rinks, though a similar ordinance on motion-picture licensing had been invalidated for lack of sufficiently definite standards.

[105] See Section 23.3, notes 47–59 *supra*, and accompanying text.

[106] Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) reh. denied 355 U.S. 852, 78 S.Ct. 8, 2 L.Ed.2d 60. See Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), indicating a standard of the average adult rather than the unusually susceptible person. Cf. Manual Enterprises, Inc. v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962), holding that certain magazines designed to appeal to homosexuals could not be denied access to the mails. Among state cases applying *Roth*, good examples are Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800, 383 P.2d 152 (1963), cert. denied 375 U.S. 957, 84 S.Ct. 445, 11 L.Ed.2d 315; Attorney General v. Book Named "Tropic of Cancer", 345 Mass. 11, 184 N.E.2d 328 (1962); People v. Richmond County News, Inc., 9 N.Y.2d 578, 216 N.Y.S.2d 369, 175 N.E.2d 681 (1961); State v. Miller, 145 W.Va. 59, 112 S.E.2d 472 (1960). The "average person" of the *Roth* test was sometimes compared to the "reasonable person" of tort law. See State v. Nelson, 168 Neb. 394, 95 N.W.2d 678 (1959); State ex rel. Beil v. Mahoning Valley Distributing Agency, 84 O.L.A. 427, 169 N.E.2d 48 (Com.Pl.1960), aff'd 116 Ohio App. 57, 186 N.E.2d 631. See generally Comment, Obscenity—What Is the Test?, 5 Ariz.L.Rev. 265 (1964).

[107] Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), reh. denied 414 U.S. 881, 94 S.Ct. 26, 38 L.Ed.2d 128, noted 6 Conn.L.Rev. 165 (1973); 23 Emory L.J. 551 (1974); 87 Harv.L.Rev. 160 (1973; part of summary of 1972 Supreme Court term); 51 J. Urban L. 314 (1973). See Jenkins v. Georgia, 418 U.S.

requirements. Material was said to be obscene if (1) it describes or depicts sexual conduct in such a way that, taken as an entirety, it appeals to prurient interest in sex. (2) It describes or depicts the conduct in a patently offensive manner. And (3) it lacks, taken as an entirety, any serious literary, artistic, scientific, or political value. The proscribed conduct or publication must be specifically defined by the applicable state or local law, as written or authoritatively construed. The Court clearly allowed application by a community of *local* standards in determining whether the tests are met, and thus the decision was widely viewed as an invitation to local "crackdowns" on pornographic literature.[108] The manner in which a publication is advertised and sold can also be considered in determining if that publication is obscene.[109] Before the *Miller* case, the Court had specifically addressed the question of how the obscenity standard could be applied to a publication available to minors:[110] It could constitutionally be found obscene

153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974), holding the film *Carnal Knowledge* not obscene under the *Miller* test; City of Portland v. Jacobsky, 496 A.2d 646 (Me.1985) (city ordinance defining "obscenity" in line with elements listed in the *Miller* case and specifying use of contemporary community standards held not to infringe on freedom of expression as guaranteed by either federal or state constitution); Hildahl v. State, 536 P.2d 377 (Okl.Cr.App.1975), holding a state obscenity statute constitutional in light of the *Miller* decision. See generally Note, Community Standards, Class Actions, and Obscenity under *Miller v. California*, 88 Harv.L.Rev. 1838 (1975); Comment, Obscenity: Determined by Whose Standards?, 26 U.Fla. L.Rev. 324 (1974).

In Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), the Supreme Court added to the *Miller* definitions by stating that material that only provokes normal, healthy sexual desires cannot be characterized as obscene but ruled that a statute which included any material inciting lust within its definition of "prurient" (thus making such material obscene) should not have been invalidated in its *entirety* where it contained a severability clause and could, without the offending provision on incitement of lust, be a valid and effective regulation. Cf. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir.1985), aff'd without opinion 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986), reh. denied 475 U.S. 1132, 106 S.Ct. 1664, 90 L.Ed.2d 206 (1986), holding that an Indianapolis ordinance defining "pornography" as a practice that discriminates against women; declaring pornography to consist, under various designated circumstances, of the graphic, sexually explicit subordination of women in pictures or words; and not including in the definition any reference to prurient interests, offensiveness, or community standards violated the First Amendment; the court held that both offensiveness and an appeal to something other than normal sexual desires are essential to obscenity.

In Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), on remand 162 Ill.App.3d 299, 113 Ill.Dec. 547, 515 N.E.2d 356 (1987), appeal denied 118 Ill.2d 549, 117 Ill.Dec. 229, 520 N.E.2d 390 (1988), the Court ruled that the proper inquiry in deciding whether allegedly obscene matter has "literary, artistic, political, or scientific value" is not whether the ordinary member of any given community would find such value in the work but whether the *reasonable* person would find it in the material taken as a whole.

[108] See "Hard-Nosed About Hard-Core," Time, July 2, 1973, at 42. See generally Weaver, Supreme Court Tightens Rule Governing Obscenity, Gives States New Power, N.Y. Times, June 22, 1973, at 1, col. 8, with continuation and related articles at 42. But local ordinances dealing with obscenity are still sometimes invalidated, of course; to be valid, they must now be in line with the *Miller* standards. See U. T. Inc. v. Brown, 457 F.Supp. 163 (W.D.N.C.1978). On the effects of *Miller*, see generally Project: An Empirical Inquiry into the Effects of *Miller v. California* on the Control of Obscenity, 52 N.Y.U.L.Rev. 810 (1977). On the standard of proof required in an obscenity case, see Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 102 S.Ct. 172, 70 L.Ed.2d 262 (1981), reh. denied 456 U.S. 920, 102 S.Ct. 1779, 72 L.Ed.2d 181 (1982) (federal Constitution does not require standard of proof beyond reasonable doubt; that choice is solely a matter of state law). On local efforts to curb pornography, see "Give-and-Take on Pornography," Time, March 10, 1986, at 67; "Porn Wars: Do's and Don'ts," U.S. News & World Rep., March 10, 1986, at 8. As to the differences between pornography and prostitution, see Anders, Why Pornography Is Not Prostitution: Folk Theories of Sexuality in the Law of Vice, 60 St. Louis U. L. J. 243 (2016).

[109] Splawn v. California, 431 U.S. 595, 97 S.Ct. 1987, 52 L.Ed.2d 606 (1977).

[110] Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), reh. denied 391 U.S. 971, 88 S.Ct. 2029, 20 L.Ed.2d 887. Cf. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), reh. denied 361 U.S. 950, 80 S.Ct. 399, 4 L.Ed.2d 383 (books cannot be kept from the adult reading public merely because they tend to corrupt the morals of youth); Katzev v. County of Los Angeles, 52 Cal.2d 360, 341 P.2d 310 (1959), noted 33 S.Cal.L.Rev. 325 (1960) (ordinance prohibiting sale and circulation of "crime comic books" to children under 18 ruled unconstitutional as overbroad, not justified by proof of clear and present danger to society, etc.).

if (1) it has a predominant appeal to the prurient interests of minors; (2) it is patently offensive to the prevailing standards of the local adult community regarding what is suitable material for minors; and (3) it is without redeeming social importance for minors. Clearly, *Miller* modified the third requirement to provide that the material must lack serious literary, artistic, scientific, or political value for minors. And since *Miller*, the Supreme Court (in an opinion which, because of the time when the case arose, still applied the *Roth* test) ruled that children are not part of the relevant "community" for judging obscenity *if* children are not intended recipients of the material nor reasonably likely to receive the material.[111] It seems that it remains true, as held in a pre-*Miller* case,[112] that conviction for the sale or transfer of obscene materials requires a showing

[111] Pinkus v. United States, 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978), on remand 579 F.2d 1174 (9th Cir.) cert. dism'd 439 U.S. 999, 99 S.Ct. 605, 58 L.Ed.2d 674, noting that in this case there was an affirmative representation that children were not involved; the Court also held that inclusion of "sensitive persons" as among the community to be considered was not error. Compare Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir.1985), where the court considered an ordinance making it unlawful to display for commercial purposes any material "harmful to minors" unless the material was in a sealed wrapper or otherwise segregated so that minors could not view it. The court held that, even though the law might be a content-based restriction impinging on the rights of adults, it was permissible as a reasonable means of controlling the merchandising to minors of sexually explicit material that was obscene as to them. For application of the *Miller* standards to a law attempting to protect minors from harmful material on the Internet, see Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (challenged provisions found facially overbroad in violation of the First Amendment to extent those provisions prohibited transmission of speech that was indecent but not obscene). On laws giving special protection to minors, see also City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), upholding against equal protection attack a city ordinance restricting admission to certain dance halls to persons between the ages of 14 and 18. The Court found this rationally related to a legitimate effort to protect those in that age group from the possibly corrupting influence of older teenagers and young adults.

In Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Court invalidated an ordinance prohibiting the showing of films containing nudity by a drive-in theatre with a screen visible from a public street or place. The Court stated that more stringent controls could be adopted as to materials accessible to minors, but that even as to minors, it could not be ruled that all nudity is obscene. See generally, on regulation of drive-in movie theatres, notes 120–122 *infra*, and accompanying text. On regulation of adult businesses, see generally Gerard, Local Regulation of Adult Businesses (Clark Boardman Callaghan 1994).

As to the Child Online Protection Act, intended to protect children from harmful material on the Internet, see Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (Internet content providers and civil liberties groups were likely to prevail on claim that statute violated First Amendment; preliminary injunction upheld); Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (statute's reference to contemporary community standards in defining what was harmful to minors did not alone render statute unconstitutionally broad under First Amendment).

As to regulation of the sale or rental of video games to minors, see Entertainment Software Ass'n v. Blagojevich, 469 F.3d 641 (7th Cir. 2006) (Illinois law barring sale or rental of "sexually explicit" video games to minors held unconstitutional as not narrowly tailored to serve a compelling governmental interest under the strict scrutiny test). In Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011), the Court, noting that the law restricted speech based on content, struck down a California statute prohibiting the sale or rental of "violent video games" to minors, finding that the law was not justified by a compelling government interest nor narrowly drawn to serve such an interest. See generally Note, *Video Software Dealers Association v. Schwarzenegger*: Defining the Constitutional Perimeter Around State Regulation of Violent Video Games, 13 S.M.U. Sci. & Tech. L. Rev. 219 (2010); Selected Material From 2010 International Summit on the Law and Business of Video Games, 13 S.M.U. Sci. & Tech. L. Rev. 139 (2010). See also Chemerinsky, Not a Free Speech Court, 53 Ariz. L. Rev. 723 (2011), citing the *Brown* case, *supra*, as one that was "protective of speech," but concluding that overall the current U.S. Supreme Court is "not a free speech Court." *Id.* at 734.

In United States v. Williams, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008), the Supreme Court upheld as not overbroad or impermissibly vague the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, criminalizing the pandering or solicitation of child pornography.

[112] Smith v. People of State of California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), reh. denied 361 U.S. 950, 80 S.Ct. 399, 4 L.Ed.2d 383. Thus, in Pinkus v. United States, *supra* note 111, the Court applied

of the seller's scienter—*i.e.*, knowledge of the obscene nature; and it would seem to remain true that possession of obscene materials in the privacy of one's home cannot be made criminal.[113] In 1982, the U.S. Supreme Court recognized that child pornography is, like obscenity, outside the scope of First Amendment protection and that its distribution or promotion may be banned and punished, provided the prohibited conduct is adequately defined by relevant state law. The Court limited "child pornography" to descriptions or depiction of sexual conduct involving live performance, or photographic or other visual reproduction of live performance, by children.[114]

Within those limits, local government may act to prevent the sale and dissemination of obscene materials and may provide for criminal punishment of those who engage in such sale or dissemination—unless, as has occurred in a few jurisdictions, the state is held to have pre-empted the field, leaving no room for local regulation.[115] The same basic

a scienter requirement in dealing with the issue of availability to children of allegedly obscene materials: The defendant did not know or have reason to know that children were likely to receive the materials, and this fact was relied on in determining that children should not be included as part of the relevant community.

[113] See Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) on remand 225 Ga. 273, 167 S.E.2d 756 (government may prohibit or regulate certain *public* actions respecting obscene material, but mere *private* possession of obscene matter cannot be made a crime). See generally Note, Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for *Stanley v. Georgia*(?), A National Obscenity Standard, and Other Miscellany, 33 Wm. & M.L. Rev. 949 (1992). In New York v. P.J. Video, Inc., 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986), on remand 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556 (1986), the Court held that an application for a warrant authorizing seizure of materials presumptively protected by the First Amendment (*i.e.*, protected unless found obscene or otherwise within one of the limited categories of speech not enjoying First Amendment protection) should be evaluated under the same standard of probable cause used to review warrant applications generally. No "higher" probable-cause standard is applied, but only the requirement that there be a "fair probability" that evidence of a crime will be found in the particular place to be searched.

[114] New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), on remand 57 N.Y.2d 256, 455 N.Y.S.2d 582, 441 N.E.2d 1100 (1982), noted 16 Creighton L. Rev. 509 (1983), 96 Harv. L. Rev. 141 (1982), 19 Wake Forest L. Rev. 95 (1983). See generally "The Court's Final Flurry," Time, July 12, 1982, at 52. In Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), reh. denied 496 U.S. 913, 110 S.Ct. 2605, 110 L.Ed.2d 285 (1990), Ohio's prohibition against possessing and viewing child pornography was upheld as complying with the First Amendment. See generally United States v. X-Citement Video, Inc., 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994), on remand 77 F.3d 491 (9th Cir.1996), applying the federal criminal statute on sexual exploitation of children and holding that conviction thereunder requires a showing of defendant's knowledge of the elements of the crime, including minority of performers and sexually explicit nature of the material. In Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), the Child Pornography Prevention Act of 1996 was held, in its ban on virtual child pornography, to abridge the freedom to engage in a substantial amount of lawful speech and thus to be overbroad and unconstitutional under the First Amendment.

[115] Pierce v. City and County of Denver, 193 Colo. 347, 565 P.2d 1337 (1977); Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372 (Iowa 1977); People v. Llewellyn, 401 Mich. 314, 257 N.W.2d 902 (1977), cert. denied 435 U.S. 1008, 98 S.Ct. 1879, 56 L.Ed.2d 390; Dover News Inc. v. City of Dover, 117 N.H. 1066, 381 A.2d 752 (1977) (state had not pre-empted *entire* field of regulating sexually explicit materials, but present city ordinance was invalid because it prohibited display of materials the state had not currently determined to be detrimental to children); City of Grafton v. Four G's, Inc., 252 N.W.2d 879 (N.D.1977) (state obscenity control statute pre-empted the field even as to regulation of obscene acts in places licensed by city for sale of alcoholic beverages). See City of Lynchburg v. Dominion Theatres, Inc., 175 Va. 35, 7 S.E.2d 157 (1940) (field of film censorship occupied by state). Cf. City of Spokane v. J-R Distributors, Inc., 90 Wash.2d 722, 585 P.2d 784 (1978) (some provisions of ordinance found in conflict with state statute; invalidated).

In addition to regulating or proscribing dissemination of obscene materials, states and localities may take steps against obscene speech or displays of obscene language. But the word "fuck" has been held not obscene because not erotic. Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), reh. denied 404 U.S. 876, 92 S.Ct. 26, 30 L.Ed.2d 124. See Hess v. Indiana, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973), holding the words "We'll take the fucking street later (or again)" not obscene or otherwise punishable (as spoken to a crowd). Penalties may also be assessed for speaking or displaying language advocating use of force or of illegal action—but only if the advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such conduct. See Hess v. Indiana, *supra*; Gooding v. Wilson, 405 U.S. 518, 92

rules apply to films as to written publications: A locality may prevent and/or punish the showing of obscene films or obscene parts of films,[116] but it cannot censor films, or punish their showing, for reasons other than obscenity.[117] If a locality provides for screening and approval of films by some officer or agency before they may be shown in that locality, two requirements must be met: (1) The burden of proving that the film is obscene, and thus not protected by the First Amendment, rests with the censor. (2) The censor must—within a specified, brief period—either issue a license for the film to be shown or else go to court to restrain its showing; and there must be assurance of a prompt judicial decision if the censor takes the latter alternative.[118] Thus, although local administrators may

S.Ct. 1103, 31 L.Ed.2d 408 (1972); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) on remand 24 N.Y.2d 1026, 302 N.Y.S.2d 848, 250 N.E.2d 250; Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), reh. denied 337 U.S. 934, 69 S.Ct. 1490, 93 L.Ed.2d 1740 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); Annot., Supreme Court's View as to the Protection or Lack of Protection, Under the Federal Constitution, of the Utterance of "Fighting Words," 39 L.Ed.2d 925 (1975). See generally Rutzick, Offensive Language and the Evolution of First Amendment Protection, 9 Harv.Civ. Rights—Civ. Liberties L.Rev. 1 (1974); Note, "Offensive Speech" and the First Amendment, 53 Boston U.L.Rev. 834 (1973); Comment, Violence and Obscenity—*Chaplinsky* Revisited, 42 Fordham L.Rev. 141 (1973).

In City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004), it was held that where a city's "adult business" licensing procedure simply conditioned operation of adult business on compliance with neutral and nondiscretionary criteria and did not seek to censor content, the language in the ordinance providing for judicial review of adverse licensing decisions in accordance with the state's ordinary review procedures was sufficient to satisfy the First Amendment. Cf. Midvale City Corp. v. Haltom, 2003 Utah 26, 73 P.3d 334 (2003), cert. denied 540 U.S. 1049, 124 S.Ct. 826, 157 L.Ed.2d 698 (2003) (sale of sexual devices did not amount to expressive conduct protected by First Amendment; city's licensing system for a sexually oriented business was content-neutral time, place and manner restriction unrelated to expression).

[116] See Miller v. California, *supra* note 107; Motion Picture Appeal Board v. S. K. Films, 65 Ill.App.3d 217, 21 Ill.Dec. 809, 382 N.E.2d 103 (1978); Salt Lake City v. Piepenburg, 571 P.2d 1299 (Utah 1977) (city could punish showing of obscene film), noted 1978 Utah L.Rev. 375, defendant's conviction again aff'd, 602 P.2d 702 (Utah) (ordinance not unconstitutionally broad). Among the outstanding pre-*Miller* cases on films were Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961), reh. denied 365 U.S. 856, 81 S.Ct. 798, 5 L.Ed.2d 820; City of Atlanta v. Columbia Pictures Corp., 218 Ga. 714, 130 S.E.2d 490 (1963) (films had to be submitted for censorship; upheld); Janus Films, Inc. v. City of Fort Worth, 354 S.W.2d 597 (Tex.Civ.App.1962) ref. n. r. e. 163 Tex. 616, 358 S.W.2d 589 (upholding power of municipal government to delete obscene portions from films). See generally Waples & White, Choice of Community Standards in Federal Obscenity Proceedings: The Role of the Constitution and the Common Law, 64 Va.L.Rev. 399 (1978). In Wall Distributors, Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir.1986), an ordinance making it a criminal offense to exhibit films in enclosed booths was held a valid restriction on manner of speech that did not substantially impair the availability of constitutionally protected materials and that thus did not violate First Amendment rights. The court assumed the films in question were entitled to constitutional protection since, although erotic in nature, they had not been found obscene. Cf. Postscript Enterprises v. City of Bridgeton, 905 F.2d 223 (8th Cir. 1990), upholding an ordinance prohibiting doors or curtains on movie—arcade booths used by fewer than six persons; Berg v. Health & Hosp. Corp., 667 F.Supp. 639 (S.D.Ind.1987), judgment aff'd 865 F.2d 797 (7th Cir.1989), upholding a county ordinance—designed to decrease the spread of AIDS—that prohibited doors, curtains, or partitions on individual "entertainment booths."

[117] See Kingsley International Pictures Corp. v. Regents of University, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959); Superior Films v. Department of Education, 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329 (1954); Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002, 96 L.Ed. 1359 (1952); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). See also Forrester, Lights, Camera, Action, The New Yorker, Sept. 26, 2016, at 64, saying that most people who watch pornographic films now do so on the Internet, where the films are often short and hard-core, showing penetrative sex.

[118] See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Thus, in Vance v. Universal Amusement Co., 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), reh. denied 446 U.S. 947, 100 S.Ct. 2177, 64 L.Ed.2d 804 (1980), a Texas nuisance statute was ruled unconstitutional because it authorized restraints of indefinite duration on the showing of motion pictures that had not been finally adjudicated as obscene.

Ordinances attempting to punish the showing of obscene films have also been invalidated if found not reasonably definite and certain. Rabe v. Washington, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972), reh.

temporarily delay the showing of a film, the film cannot be banned from the community until there is a final *judicial* determination. Stage and theatrical performances are, like films, forms of protected First Amendment expression, and may be banned and/or punished only if they meet the Supreme Court definition of "obscenity."[119] Of course,

denied 406 U.S. 911, 92 S.Ct. 1604, 31 L.Ed.2d 822; Interstate Circuit v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968).

[119] See Southeastern Promotions, Limited v. Conrad, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (denial of use of municipal facilities for production of the rock musical *Hair* amounted to unconstitutional prior restraint; same procedural safeguards must be accorded stage productions as films); State v. Walker, 568 P.2d 286 (Okl.Cr.App.1977) (statute pertaining to crime of outraging public decency did not mention sexual conduct, much less specifically define it; thus, under *Miller* guidelines, nude dancer could not constitutionally be charged with violation). But see, all upholding local government bans on indecent exposure in public, Yauch v. State, 109 Ariz. 576, 514 P.2d 709 (1973) (ordinance banning topless and bottomless performances); Davis v. State, 430 S.W.2d 217 (Tex.Cr.App.1968); City of Seattle v. Marshall, 83 Wash.2d 665, 521 P.2d 693 (1974), cert. denied 419 U.S. 1023, 95 S.Ct. 499, 42 L.Ed.2d 297 (conviction of stage performer under indecent exposure statute upheld; act of exposing her private parts to an all-male audience held obscene per se). Cf. New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (New York statute prohibiting topless dancing in establishment licensed by state to serve liquor held constitutional); Crownover v. Musick, 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497 (1973), cert. denied 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (ordinance prohibited nudity by performers, waiters, and waitresses in places where food or beverages were served, but was exception for theatres; upheld); City of Seattle v. Buchanan, 90 Wash.2d 584, 584 P.2d 918 (1978) (ordinance punishing women who exposed themselves above the waist; upheld though didn't apply to men). In Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), on remand 941 F.2d 1212 (7th Cir.1991), the Court held that enforcement of a public indecency statute to require that dancers at adult entertainment establishments wear pasties and a G-string did not violate the First Amendment. The Court was, however, sharply divided, with the five Justices in the majority issuing three separate opinions; the four dissenters united in a single opinion. See Note, Nude Dancing and the First Amendment Question, 45 Vand. L. Rev. 237 (1992). Then in City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), an ordinance forbidding nudity in public places was upheld as applied to nude erotic dancing; the ordinance was treated as a content-neutral regulation of symbolic speech. But see Triplett Grille v. City of Akron, 40 F.3d 129 (6th Cir.1994) (ordinance prohibiting nude dancing invalidated as overbroad). The Court in *City of Erie* was again badly split. The opinion of Justice O'Connor was joined by Rehnquist, Kennedy, and Breyer, upholding the ordinance and finding that it was aimed at combating crime and other negative secondary effects of adult entertainment. Justices Scalia and Thomas concurred in the judgment but did so on the ground that the ordinance prohibited the act of going nude in public and thus was not subject to First Amendment scrutiny. Justice Souter concurred in part and dissented in part, finding the evidentiary record deficient as to the undesirable secondary effects. Justices Stevens and Ginsburg dissented. See generally Note, Constitutional Law—Freedom of Expression—Nude Dancing Conveying a Message of Eroticism and Sexuality Is Protected by the First Amendment But Can Be Limited Under State Police Powers Provided the Government Establishes a Content-Neutral Purpose, 23 St. Mary's L.J. 563 (1991). Compare Note, A Right to Bare All? Female Public Toplessness and Dealing With the Laws that Prohibit It, 8 Cardozo Pub. L. Pol'y & Ethics J. 453 (2010). See also Comment, Regulation of Nude Dancing in Bring Your Own Bottle Establishments in the Commonwealth of Pennsylvania: Are the Commonwealth's Municipalities Left to Fend for Themselves?, 99 Dickinson L. Rev. 169 (1994).

In American Bush v. City of South Salt Lake, 2006 Utah 40, 140 P.3d 1235 (2006), a city ordinance prohibiting nude dancing was held not to violate the free speech guarantees of the Utah Constitution. As to ordinances prohibiting physical contact between erotic dancers and patrons, compare City of Las Vegas v. Eighth Judicial Dist. of Nev., 122 Nev. 1041, 146 P.3d 240 (2006) (ordinance prohibiting certain physical contact between erotic dancers and patrons upheld as content-neutral and not unconstitutionally vague or overbroad), with City of Nyssa v. Dufloth, 339 Or. 330, 121 P.3d 639 (2005) (city ordinance that required nude dancers to remain at least four feet from audience violated free expression guarantees of Oregon Constitution; ordinance focused on restraining a particular variety of expression). See, focusing on the *City of Erie v. Pap's* case, *supra*, Note, *City of Erie v. Pap's A.M.*: Contorting Secondary Effects and Diluting Intermediate Scrutiny to Ban Nude Dancing, 30 Capital U.L. Rev. 823 (2002); Comment, The First Amendment Gone Awry: *City of Erie v. Pap's A.M.*, Ailing Analytical Structures, and the Suppression of Protected Expression, 150 U. Pa. L. Rev. 1021 (2002). For a discussion of the place of the *City of Erie v. Pap's* case in First Amendment law, see Mitchell, Comment: Nude Dancing and First Amendment Scrutiny, 34 Urban Law. 277 (2002). See generally Note, "Lewd and Immoral": Nude Dancing, Sexual Expression, and the First Amendment, 81 Chi.-Kent L. Rev. 1185 (2006).

Prior to the Supreme Court cases on obscenity in the 1960s and '70s convictions of stage performers were fairly common under statutes or ordinances (some of which might not pass constitutional muster today) prohibiting lewd, immoral, and/or indecent performances. See Brooks v. City of Birmingham, 32 F.2d 274

theatres, like other businesses, may be required to obtain a license from the local government and to abide by certain health and safety standards—particularly in order to prevent fire dangers.[120]

Drive-in movie theatres pose special problems because they may constitute a danger if they distract those driving in traffic and because films therein exhibited may be viewed by minors even if those minors do not attend the theatre. Reasonable requirements that showings be screened from the view of drivers and pedestrians may be sustained.[121] But the U.S. Supreme Court invalidated an ordinance, as discriminatory on the basis of content, which prohibited the showing of films containing nudity by any drive-in theatre whose screen was visible from a public street or place.[122] The Court noted that more stringent controls on communicative materials available to youths may be justified than would be allowed as to materials for adults;[123] but it ruled that all nudity cannot be

(N.D.Ala.1929); City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N.W. 6 (1892); City of St. Louis v. Mikes, 372 S.W.2d 508 (Mo.App.1963); Bonserk Theatre Corp. v. Moss, 34 N.Y.S.2d 541 (Spec. Term 1942).

Any statute or ordinance punishing "obscene" stage performances must not only meet current Supreme Court standards on what can be declared "obscene," but must also be reasonably definite and certain as to exactly what acts are criminally punishable. See Birkenshaw v. Haley, 409 F.Supp. 13 (E.D.Mich.1974).

[120] See Hollywood Theatre Corp. v. City of Indianapolis, 218 Ind. 556, 34 N.E.2d 28 (1941) (inspection of theatres to reduce fire dangers upheld); Kalbfell v. City of St. Louis, 357 Mo. 986, 211 S.W.2d 911 (1948) (same); Ormsby v. Bell, 218 N.Y. 212, 112 N.E. 747 (1916) (theatre could be denied license because of proximity to fire hazard—dry cleaners storing benzine); William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 N.Y.S. 594 (1909). But cf. Re Walker, 84 Misc. 118, 146 N.Y.S. 519 (1914) (license cannot be denied arbitrarily); City of Seattle v. Bittner, 81 Wash.2d 747, 505 P.2d 126 (1973) (city could not deny motion-picture theatre licenses to all who had been convicted of certain crimes within past 5 years; ordinance did not purport to restrain only the showing of obscene movies, and it did not provide procedural safeguards necessary to prior restraints).

[121] Variety Theatres, Inc. v. Cleveland County, 282 N.C. 272, 192 S.E.2d 290 (1972), appeal dism'd 411 U.S. 911, 93 S.Ct. 1548, 36 L.Ed.2d 303. But see Olympic Drive-In Theatre v. City of Pagedale, 441 S.W.2d 5 (Mo.1969), voiding an ordinance requiring that the screen be so located that the picture could not be seen from public streets, where the protesting theatre showed it would cost them $252,000 to comply. As always, any penal or licensing ordinances as to drive-ins must be reasonably definite and certain. Thus, the *Olympic Drive-In* case, *supra*, also invalidated language that allowed revocation of theatre permits if a business was conducted so as to constitute a nuisance because of noise or immoral activity on the premises.

[122] Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), ruling that all nudity cannot be considered obscene, even as to minors. Cf. State v. Jones, 177 Ariz. 94, 865 P.2d 138 (App. 1993) (ordinance requiring a special-use permit prior to operation of an establishment featuring "topless or bottomless dancers, strippers or similar entertainers" invalidated as unconstitutionally vague and overbroad); Wortham v. City of Tucson, 128 Ariz. 137, 624 P.2d 334 (App.1980) (nude or partially nude dancing subject to First Amendment protection); People v. Hardy, 77 Misc.2d 1092, 357 N.Y.S.2d 970 (1974) (per curiam) mere proof of public nudity—sunbathing on public beach—held not to establish violation of anti-lewdness statute; no evidence defendant exposed herself in a lewd manner or committed a lewd act). But see Chapin v. Town of Southampton, 457 F.Supp. 1170 (E.D.N.Y.1978) (upholding ordinance prohibiting nudity on public beaches); Crownover v. Musick, *supra* note 119, upholding an ordinance that prohibited nudity by performers, waiters, and waitresses in places where food or beverages are served.

[123] Erznoznik v. City of Jacksonville, *supra* note 122, at 212–14. Cf. Interstate Circuit, Inc. v. City of Dallas, *supra* note 118 (ordinance attempting to control exhibition of films to minors voided as impermissibly vague and unclear). See generally, on controls as to materials available to minors, notes 110–111 *supra*, and accompanying text. See also Annot., Supreme Court's Views as to Validity of Laws Restricting or Prohibiting Sale or Distribution to Minors of Particular Types of Goods or Services Otherwise Available to Adults, 52 L.Ed.2d 892 (1978).

Many localities now leave the "rating" of motion pictures—as to whether or not children are allowed, allowed only with parents, or not allowed at all—to the Motion Picture Association of America (representing the largest motion picture distributors in the country), the International Film Importers & Distributors of America (representing many importers of foreign films), and the National Association of Theatre Owners, representing most theatre-owners in the nation. Together, these operate the Motion Picture Rating System. See Friedman, The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry, 73 Colum.L.Rev. 185 (1973), criticizing the system; Note, Private Ratings of Motion Pictures as a Basis for State Regulation, 59 Geo.L.J. 1205 (1971), also noting inadequacies of the system, and exploring

considered obscene even as to minors. Therefore, the ordinance was overbroad. Viewed as a traffic-safety measure, it was also overbroad in that sufficient justification was not offered for distinguishing movies containing nudity from all other movies.

§ 23.8 Local Regulation of Prostitution and Other "Immoral" Activities

Some attempts by local governments to regulate "morality" have (unlike the above-discussed regulations on reading materials and movie theatres) little or no connection with restrictions on "free speech." For instance, many localities have long prohibited prostitution and houses of prostitution, and have been held to have the power to enact such bans.[124] A prohibition on *solicitation* for prostitution will also generally be upheld.[125] But occasionally, particular local ordinances aimed at prostitutes and their activities will be invalidated as void for vagueness—for instance, an ordinance stating that no prostitute or lewd woman should wander the streets at night.[126]

legislative attempts to build or expand on its restrictions. See also Note, X-Rated Motion Pictures: From Restricted Theatres and Drive-Ins to the Television Screen, 8 Valparaiso U.L.Rev. 107 (1973). But a few cities retain their own reviewing boards. See Note, The Censorship of Violent Motion Pictures: A Constitutional Analysis, 53 Ind.L.J. 381 (1977–78), discussing a Chicago ordinance. Compare, as to the system in England, Note, Film Censorship—Something for Everyone, 40 Mod.L.Rev. 74 (1977). See generally Note, Constitutional Law—Procedural Guidelines Involved in Municipal Control of Motion Pictures, 41 Miss.L.J. 611 (1970). See also Alexander, Blue-Movie Blues, Newsweek Oct. 29, 1973, at 56; Stevenson, Aunt Julia's Movie Code, Am.Heritage, Dec., 1974, at 74; "Mysterious New Film Ratings" America, Jan. 15, 1972, at 33. On effects of and problems with the rating system over the years, see "Give the Rating System an X," Time, Aug. 27, 1990, at 56.

[124] See Yarbrough v. City of Birmingham, 353 So.2d 75 (Ala.Cr.App.1977); Rubey v. City of Fairbanks, 456 P.2d 470 (Alaska 1969); Atkinson v. Powledge, 123 Fla. 389, 167 So. 4 (1936); City of Evanston v. Hopkins, 330 Ill.App. 337, 71 N.E.2d 209 (1947); City of Chicago v. Clark, 359 Ill. 374, 194 N.E. 537 (1935); People v. Hanrahan, 75 Mich. 611, 42 N.W. 1124 (1889); State v. Poague, 245 Minn. 438, 72 N.W.2d 620 (1955); City of Farmington v. Phillips, 92 N.M. 304, 587 P.2d 451 (Ct.App.1978). Even where maintaining a house of prostitution is not *specifically* made a crime, it may be punishable as a kind of nuisance. See West v. State ex rel. Matthews, 233 Ala. 588, 173 So. 46 (1937); Griffith v. City of Hapeville, 182 Ga. 333, 185 S.E. 522 (1936). Certainly such establishments may be either public or private nuisances, or both. See generally Section 18.1 notes 1–5 *supra* and accompanying text.

But there has been some recent effort toward legalizing prostitution, and merely applying appropriate regulations to it; so far, such proposals have not resulted in much actual legislation. See "Prostitution Laws Under Attack in N.Y.C.," 66 A.B.A.J. 711 (1980) (noting argument that sex between consenting adults should be a private matter, not controlled by the government—but also noting that courts have rejected invasion-of-privacy arguments against prostitution laws); Essay, "Reflections on the Sad Profession," Time, Aug. 23, 1971, at 34 (noting that all states except Nevada have some laws against prostitution). Nevada actually permits prostitution, with restrictions, only in certain counties of the state. In other counties, prostitution is illegal, and even advertising of the brothels lawfully operating in other counties is not there allowed. See Princess Sea Indus., Inc. v. State, 97 Nev. 534, 635 P.2d 281 (1981), cert. denied 456 U.S. 926, 102 S.Ct. 1972, 72 L.Ed.2d 441 (1982), upholding the restriction on advertising within counties where prostitution is illegal.

[125] Junction City v. White, 2 Kan.App.2d 403, 580 P.2d 891 (1978). See Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), on remand 68 N.Y.2d 553, 510 N.Y.S.2d 844, 503 N.E.2d 492 (1986) (Court upholds, against First Amendment attack, closing, pursuant to statute, of adult bookstore on premises on which it had been determined that solicitation of prostitution was taking place); City of Seattle v. Jones, 79 Wash.2d 626, 488 P.2d 750 (1971), upholding an ordinance against loitering for the purpose of soliciting prostitution. Cf. Salt Lake City v. Allred, 20 Utah 2d 298, 437 P.2d 434 (1968) (upholding ordinance punishing the directing of persons to a certain place to obtain sexual intercourse for hire); City of Seattle v. Slack, 113 Wash.2d 850, 784 P.2d 494 (1989) (city's prostitution loitering ordinance permitted police officer to consider whether suspect was "known prostitute" in order to infer suspect's intent; upheld). See also FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), on remand 896 F.2d 864 (5th Cir.1990) (city could declare motels renting rooms for less than ten hours to be "sexually oriented businesses" and subject them to special regulation).

[126] City of St. Louis v. Burton, 478 S.W.2d 320 (Mo.1972). See Brown v. Municipality of Anchorage, 584 P.2d 35 (Alaska 1978); City of Detroit v. Bowden, 6 Mich.App. 514, 149 N.W.2d 771 (1967) (ordinance that

Reasonable regulations of the hours and/or methods of operation of massage parlors may be validly enacted by local governments, on the basis of protecting public health and morality.[127] Ordinances that prohibit the administration of massages, at public massage parlors or bath houses, by members of one sex to members of the other sex are fairly common and are obviously enacted largely in reliance on the "public morality" portion of the police power. Such ordinances are controversial and have been invalidated in a number of cases as violating equal protection through the use of invidious classifications.[128] But most authority, usually indicating that there is no "sex

known prostitutes or panderers could not stop motorists or pedestrians by making bodily gestures to them held void for vagueness). Restrictions on escort services have usually been upheld against constitutional attack. See IDK, Inc. v. County of Clark, 836 F.2d 1185 (9th Cir.1988) (county regulation of such services upheld, the court finding the services to be primarily commercial and therefore finding no impermissible burden on freedom of intimate association); Starlets International, Inc. v. Christensen, 106 Nev. 732, 801 P.2d 1343 (1990) (ordinance requiring person who provides outcall services to hotels and motels to satisfy licensing provisions, and requiring managers and entertainers to be similarly licensed, upheld as sufficiently clear and not violative of due process; said to facilitate legitimate governmental interest in controlling prostitution). But see Treants Enterprises, Inc. v. Onslow County, 83 N.C.App. 345, 350 S.E.2d 365 (1986), motion to dismiss appeal denied by 319 N.C. 411, 354 S.E.2d 730 (1987), aff'd by 320 N.C. 776, 360 S.E.2d 783 (1987) (city ordinance regulating businesses that offered male and/or female companions invalidated as vague, overbroad, and not rationally related to any legitimate governmental objective). See generally Annot., Laws Prohibiting or Regulating "Escort Services," "Outcall Entertainment," or Similar Services Used to Carry on Prostitution, 15 A.L.R.5th 900 (1993). On the requirement that all penal laws be reasonably definite and certain, see generally Chapter 10 *supra*.

Occasionally, a municipal ordinance on prostitution may be voided because the state is found to have pre-empted the field of such regulation. See Farmer v. Behmer, 9 Cal.App. 773, 100 P. 901 (Dist.Ct.1909); Pace v. City of Atlanta, 135 Ga.App. 399, 218 S.E.2d 128 (1975). On state pre-emption, see generally Chapter 6 *supra*. Certainly, this is an area where state law will prevail over all local laws (even those of home-rule cities) in cases of *conflict*; see Chapter 6 *supra*. See also Note, Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform, 30 Law & Ineq. 19 (2010).

[127] See Pollard v. Cockrell, 578 F.2d 1002 (5th Cir.1978) (with review of cases); Rogers v. Miller, 401 F.Supp. 826 (E.D.Va.1975) (upholding regulation and annual license tax of $5000; tax not valid because it exceeded cost of regulation since local government also had power to tax); Wes Ward Enterprises, Limited v. Andrews, 42 Ill.App.3d 458, 355 N.E.2d 131 (1976); City of Indianapolis v. Wright, 267 Ind. 471, 371 N.E.2d 1298 (1978) appeal dism'd 439 U.S. 804, 99 S.Ct. 60, 58 L.Ed.2d 97; Caesar's Health Club v. St. Louis County, 565 S.W.2d 783 (Mo.App.1978), cert. denied 439 U.S. 955, 99 S.Ct. 353, 58 L.Ed.2d 346; Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972), appeal dism'd 409 U.S. 907, 93 S.Ct. 237, 34 L.Ed.2d 169; City of Spokane v. Bostrom, 12 Wn.App. 116, 528 P.2d 500 (1974) (prohibition of massage parlors operating between 10 p. m. and 6 a. m.). Cf. Hollingsworth v. City of South Salt Lake, 624 P.2d 1149 (Utah 1981) (provision of city "massage parlor" ordinance making it unlawful for a masseur to touch or offer to touch the genitalia of customers was not void for vagueness). Ordinances regulating public bath houses, as to hours and methods of operation, have also been sustained. See Garaci v. City of Memphis, 379 F.Supp. 1393 (W.D.Tenn.1974); City of Spokane v. Bostrom, *supra*.

In Hart Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978), the general power of state and local governments to regulate massage parlors was affirmed, but the court struck down ordinances setting different business-hours for masseurs who were sole practitioners and for those who were not, finding such a distinction arbitrary and unreasonable. Tattoo parlors may be regulated for purposes of health and safety, but total bans may run afoul of the First Amendment. See Note, Preserving Access to Tattoos: First Amendment Trumps Municipal Ban in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010), noted 2011 B.Y.U. L. Rev. 131. See generally Hudson, You Gotta Fight for the Right to Tattoo, 98 A.B.A. J., Nov. 2012, at 12 (most state courts, but not Arizona's, have ruled that tattoos are not protected speech).

[128] Valley Health Systems, Inc. v. City of Racine, 369 F.Supp. 97 (E.D.Wis.1973); Joseph v. House, 353 F.Supp. 367 (E.D.Va.1973), aff'd 482 F.2d 575 (4th Cir. 1973). See Wheeler v. City of Rockford, 69 Ill.App.3d 220, 25 Ill.Dec. 702, 387 N.E.2d 358 (1979) (sex classifications in such ordinances should be voided unless a compelling interest is shown to support them). Cf. Bell v. Arlington County, Virginia, 673 F.Supp. 767 (E.D.Va.1987) (county ordinance prohibiting cross-sexual massages for pay held unconstitutionally vague); Cheek v. City of Charlotte, 273 N.C. 293, 160 S.E.2d 18 (1968) (unreasonable classifications found in particular ordinance—applied to massage parlors and health salons but not to beauty shops, barber shops, etc.); J.S.K. Enterprises v. City of Lacey, 6 Wn.App. 43, 492 P.2d 600 (1971), adhered to 6 Wn.App. 433, 493 P.2d 1015 (ordinance found unreasonable). In Cianciolo v. City of Knoxville, 376 F.Supp. 719 (E.D.Tenn.1974), an

discrimination" involved and that a rational purpose (which generally can be found) will suffice to uphold these restrictions, supports the validity of such measures.[129]

The hours and manner of operation of pool and billiard halls can be regulated, largely on the basis of the possible detrimental effect of such establishments on morality.[130] The local restrictions can include requirements that operators of these establishments obtain licenses,[131] and limitations on those eligible for such licenses.[132] Even total bans on pool and billiard establishments in some communities have been upheld,[133] though regulation, rather than prohibition, seems more common in recent decades.

The suppression of gambling, or certain types of gambling activity, is occasionally pre-empted by a state government.[134] And, even in the absence of state pre-emption,

ordinance prohibiting members of one sex from massaging members of the opposite sex was held violative of the Federal Civil Rights Law.

[129] Tomlinson v. City of Savannah, 543 F.2d 570 (5th Cir.1976); Aldred v. Duling, 538 F.2d 637 (4th Cir.1976); Colorado Springs Amusements v. Rizzo, 524 F.2d 571 (3d Cir.1975), cert. denied 428 U.S. 913, 96 S.Ct. 3228, 49 L.Ed.2d 1222, noted 62 A.B.A.J. 233 (1976); Brown v. Haner, 410 F.Supp. 399 (W.D.Va.1976); Massage Parlors, Inc. v. City of Baltimore, 284 Md. 490, 398 A.2d 52 (1979); Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203 (1974), appeal dism'd 419 U.S. 1043, 95 S.Ct. 613, 42 L.Ed.2d 636; Patterson v. City of Dallas, 355 S.W.2d 838 (Tex.Civ.App.1962) ref'd n. r. e. appeal dism'd 372 U.S. 251, 83 S.Ct. 873, 9 L.Ed.2d 732; Redwood Gym v. Salt Lake County Comm'n, 624 P.2d 1138 (Utah 1981); Kisley v. City of Falls Church, *supra* note 127. Cf. City of Chicago v. Geraci, 30 Ill.App.3d 699, 332 N.E.2d 487 (1975), ruling that "masturbatory massage parlors" may be enjoined as public nuisances. Cf. Techtow v. City Council of North Las Vegas, 105 Nev. 330, 775 P.2d 227 (1989) (court upheld ordinance regulating massage parlors' hours of operations, advertising, and other practices as not violative of First Amendment freedoms, and sustained a prohibition of massages by persons of the opposite sex, but invalidated as violative of freedom of association and rights of privacy the portions of the law which required windows on all doors and the keeping of records of the names of all patrons). See generally Annot., Validity and Construction of Statute or Ordinance Forbidding Treatment in Health Clubs or Massage Salons by Persons of the Opposite Sex, 51 A.L.R.3d 936 (1973).

[130] Purvis v. City of Ocilla, 149 Ga. 771, 102 S.E. 241 (1920); State ex rel. Baer v. City of Milwaukee, 33 Wis.2d 624, 148 N.W.2d 21 (1967) (persons under 18 banned from premises, and no card-playing allowed on premises). Cf. B & B Vending Co. v. City of El Paso, 408 S.W.2d 545 (Tex.Civ.App.1966) (ordinance regulated ownership, location, and hours of operation of billiard halls and set standards for owners and employees upheld). But see Callaway v. City of Edmond, 791 P.2d 104 (Okl.Cr.App. 1990) (ordinance prohibited admission of minors to pool halls, snooker parlors, billiard parlors, or similar places of business; invalidated under Equal Protection as not rationally related to proper public purpose of inhibiting gambling since was no indication that the establishments in question were particularly prone to gambling activity by minors). On regulation of the playing of video games by minors, see Rothner v. City of Chicago, 725 F.Supp. 945 (N.D.Ill.1989), aff'd 929 F.2d 297 (7th Cir.1991), sustaining an ordinance making it unlawful for anyone under 17 to play any automatic amusement device during school hours at any location except airports. See generally Note, Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance that Passes Constitutional Muster, 37 Valparaiso L. Rev. 429 (2002); Note, Insert Coins to Slay: Regulating Children's Access to Violent Arcade Games, 10 Villanova Sports & Entertainment L.J. 69 (2003).

[131] See Wysong v. City of Lebanon, 163 Ind. 132, 71 N.E. 194 (1904) (reasonable license fee can also be charged); State ex rel. Reedhead v. City of Olympia, 122 Wash. 239, 210 P. 371 (1922) (proof of good moral character can be required of applicants for license). Cf. Purvis v. City of Ocilla, *supra* note 130 (license fee can be charged).

[132] See Feinstein v. City of Whitehall, 198 N.E.2d 479 (Ohio Com.Pl.1964) (licenses denied those convicted of felony within the past 7 years); B & B Vending Co. v. City of El Paso, *supra* note 130 (requirement of good moral character held not too vague); State ex rel. Reedhead v. City of Olympia, *supra* note 131 (good moral character can be required of applicant). But a license cannot be denied arbitrarily or capriciously. Tillberg v. Kearney Township, 103 N.J.Super. 324, 247 A.2d 161 (1968). And if a license is so denied, mandamus will lie to compel issuance. State ex rel. Hardman v. Common Council of Glenville, 102 W.Va. 94, 134 S.E. 467 (1926); State ex rel. Hoffman v. Town of Clendenin, 93 W.Va. 618, 115 S.E. 583 (1923). Cf. Assaid v. City of Roanoke, 179 Va. 47, 18 S.E.2d 287 (1942) (opportunity for hearing must be given applicant).

[133] State ex rel. Baylor v. City of Hinton, 109 W.Va. 653, 155 S.E. 912 (1930). Cf. Botes v. City of Franklin, 203 Ky. 357, 262 S.W. 282 (1924); Arms v. Vine Grove, 203 Ky. 213, 262 S.W. 11 (1924), both upholding license fees despite their being prohibitory in amount.

[134] City of Piggott v. Eblen, 236 Ark. 390, 366 S.W.2d 192 (1963). See State v. Linn, 49 Okl. 526, 153 P. 826 (1915). Cf. In re Portnoy, 21 Cal.2d 237, 131 P.2d 1 (1942) (county anti-gambling ordinance conflicted

state law will prevail over local regulations and prohibitions (even those of home-rule cities) in cases of *conflict*, since this is an area of state-wide concern.[135] But aside from those qualifications, local governments have power to enact legislation aimed at suppression of gambling, since this activity tends to corrupt public morals.[136] Thus, cities and towns have been upheld in banning particular gambling devices and games, so long as these were not sanctioned by state law;[137] and, on the other hand, local governments

with state penal code; invalid). See generally Howard, Skill, Dumb Luck, and the Legal Ambiguity of North Carolina Sweepstakes Law: Why Municipal Ordinances and Not State Statutes Should Provide the Framework for Regulating Illegal Gambling, 5 UNLV Gaming L.J. 161 (2014). See also Edmonds Shopping Center Associates v. City of Edmonds, 117 Wash.App. 344, 71 P.3d 233 (2003) (city ordinance prohibiting expansion of existing cardrooms beyond numbers authorized by gambling license was pre-empted by state law allowing cities to ban cardrooms but prohibiting them from changing scope of gambling license).

[135] State ex rel. Sergi v. City of Youngstown, 68 Ohio App. 254, 40 N.E.2d 477 (1941) (where certain acts of gambling outlawed by state, locality cannot authorize them); City of Bartlett v. Hoover, 571 S.W.2d 291 (Tenn.1978) (where certain acts of gambling specifically allowed by state, locality cannot prohibit); Smith Amusement Co. v. City of Chattanooga, 205 Tenn. 712, 330 S.W.2d 320 (1959) (same).

[136] On regulation of gambling as a nuisance, see People v. Lim, 18 Cal.2d 872, 118 P.2d 472 (1941); Approximately Fifty-Nine Gambling Devices v. People ex rel. Burke, 110 Colo. 82, 130 P.2d 920 (1942); Goose v. Commonwealth ex rel. Dummit, 305 Ky. 644, 205 S.W.2d 326 (1947); Garvey v. McNulty, 270 Mass. 260, 170 N.E. 58 (1930); People ex rel. Roberts v. Reille, 50 N.Y.S.2d 196 (City Ct. 1944). Cf. State ex rel. Dowling v. Tate, 306 Mich. 667, 11 N.W.2d 282 (1943) (upholding statute declaring any vehicle used for gambling purposes a public nuisance). A premises where gambling is conducted is often classified as a public nuisance even though there is no showing of excessive noise or boisterous conduct. See Ehrlick v. Commonwealth, 125 Ky. 742, 102 S.W. 289 (1907); Commonwealth v. Ciccone, 85 Pa.Super. 316 (1925). But cf. People v. Robbin, 53 Cal.App.2d 579, 128 P.2d 422 (Dist.Ct.1942) (premises must be frequented by disorderly or dissolute persons or be operated in a disorderly manner to be enjoinable as nuisance). See generally C.J.S. Nuisances § 48, at 800 (1950). See also Hunter v. Mayor & Council of Teaneck Township, 128 N.J.L. 164, 24 A.2d 553 (1942) (if no pre-emption by state, local government can prohibit gambling though state also has laws against such activity). On regulation and suppression of nuisances, see generally Chapter 18 *supra*. The power of municipalities to terminate gambling enterprises as nuisances may be considered comparable to the well-recognized power of such local units to destroy dangerous or harmful structures as nuisances. See McMahon v. City of Telluride, 79 Colo. 281, 244 P. 1017 (1926) (structural nuisance); Albert v. City of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959) (same); Sings v. City of Joliet, 237 Ill. 300, 86 N.E. 663 (1908) (buildings infected with disease); Rothenhoefer v. City of St. Louis, 410 S.W.2d 73 (Mo.1966) (burned-out building). But cf. Cole v. Kegler, 64 Iowa 59, 19 N.W. 843 (1884) (town and its authorities could be liable if destroyed structure was not actually a nuisance). See generally Section 18.1 *supra*. On the effect of recent legalization of gambling (discussed in Section 15.12 *supra*) on municipal power to regulate this activity, see Comment, The Promises and Perils of Legalized Gambling for Local Governments: Who Decides How to Stack the Deck?, 68 Temple L. Rev. 847 (1995).

[137] See Sharpe v. Johnson, 81 Cal.App.2d 939, 185 P.2d 340 (Dist.Ct.1947) (table games and marble games); Williams v. Mayor & Council of Athens, 122 Ga.App. 465, 177 S.E.2d 581 (1970) (pinball machines); Wallace v. City of Cartersville, 203 Ga. 63, 45 S.E.2d 63 (1947), cert. denied 333 U.S. 843, 68 S.Ct. 661, 92 L.Ed. 1126 (same); Kitt v. City of Chicago, 415 Ill. 246, 112 N.E.2d 607 (1953) (bagatelle); Coven Distributing Co. v. City of Chicago, 346 Ill.App. 448, 105 N.E.2d 137 (1952) (pinball machines); In re Albert Simon, Inc. v. Myerson, 36 N.Y.2d 300, 367 N.Y.S.2d 755, 327 N.E.2d 801 (1975), appeal dism'd 423 U.S. 908, 96 S.Ct. 209, 46 L.Ed.2d 137 (same); Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), cert. denied 357 U.S. 904, 78 S.Ct. 1147, 2 L.Ed.2d 1155 (same); Westerhaus Co. v. City of Cincinnati, 165 Ohio St. 327, 135 N.E.2d 318 (1956) (bagatelle); Myers v. City of Cincinnati, 128 Ohio St. 235, 190 N.E. 569 (1934) (slot machines). Cf. People v. Mason, 261 Cal.App.2d 348, 68 Cal.Rptr. 17 (Dist. Ct.1968) (city could prohibit those pinball machines which are not predominantly games of skill; only those that are games of skill, not chance, were legalized by state statute); American Shuffleboard & Music Corp. v. City of Springfield, 40 Ill.App.3d 745, 353 N.E.2d 1 (1976) (coin-operated amusement devices can be licensed, with limit on the number); Columbus Legal Amusement Association v. City of Columbus, 50 O.L.A. 353, 79 N.E.2d 915 (1947) (mechanical amusement devices can be regulated; those readily convertible into gambling devices can be seized and destroyed); Dallmann v. Kluchesky, 229 Wis. 169, 282 N.W. 9 (1938) (ordinance prohibiting any device upon which money may be won or lost is valid—at least if construed to apply only to places in which numbers of people might gather). But cf. Curtis v. Hutchingson, 125 Fla. 435, 170 So. 134 (1936) (reasonable regulation of slot machines allowed, but prohibition of such machines more than 5 feet above or 3 feet below ground level of entrance of building held unreasonable). Even a gum-vending machine that also dispenses chances can be banned. State v. La Due, 198 Minn. 255, 269 N.W. 527 (1936). As can lotteries in general. See Glover v. City of Birmingham, 255 Ala. 596, 52 So.2d 521 (1951). Cf. Hagen v. City of Rock Island, 18 Ill.2d 174, 163 N.E.2d

can authorize, regulate, and/or license particular forms of gambling that are not prohibited by state law.[138]

Much the same situation exists with local attempts at liquor controls as with local regulation of gambling: The state may occasionally be found to have pre-empted the field;[139] and despite a lack of state pre-emption, local regulations must yield to any *conflicting* state laws,[140] since this is an area of state-wide, general concern—indeed, an area where uniform state legislation is often thought essential to adequate enforcement of the law. But within these limits, localities have unquestioned power to regulate the sale and distribution of liquor—not only for protection of morality, but for health and safety purposes.[141] Thus, taverns and liquor stores selling alcoholic beverages can be required to obtain licenses by local communities,[142] and can be banned from certain

495 (1959) (horse-racing machine can be prohibited); City of Wichita v. Stevens, 167 Kan. 408, 207 P.2d 386 (1949) ("punchboard" prohibited). On billiards, slot machines, etc., as "games of chance," see generally Annot., What Is Game of Chance, 60 A.L.R. 343 (1929); Symposium, The New Era of Gaming Law, 42 N. Ky. L. Rev. 419–570 (2015). See also Fichtner, Carnival Games: Walking the Line Between Gambling and Amusement, 60 Drake L. Rev. 41 (2011).

[138] Sternall v. Strand, 76 Cal.App.2d 432, 172 P.2d 921 (1946); Ex parte Lawrence, 55 Cal.App.2d 491, 131 P.2d 27 (1942); Hallandale v. Broward County Kennel Club, 153 Fla. 302, 14 So.2d 397 (1943); Silfen v. City of Chicago, 299 Ill.App. 117, 19 N.E.2d 640 (1939); People v. Hess, 85 Mich. 128, 48 N.W. 181. (1891); Savoy Vending Co. v. Valentine, 178 Misc. 1, 33 N.Y.S.2d 324 (1942). See State ex rel. Grimes v. Board of Commissioners, 53 Nev. 364, 1 P.2d 570 (1931) (power to restrict number of gambling licenses inferred from statutory power to license and regulate gambling). See also Note, Unstacking the Deck: The Legalization of Online Poker, 50 Am. Crim. L. Rev. 519 (2013). As to sports gambling, see Symposium, Daily Fantasy Sports and Sports Gambling, 66 DePaul L. Rev. 1 (2016), especially Fielkow, Werly, and Sensi, Tackling PASPA: The Past, Present, and Future of Sports Gambling in America, *id.* at 23. See also on state-sanctioned sports wagering and the unconstitutionality of laws prohibiting it, Section 15.12, note 144.

[139] See Los Angeles Brewing Co. v. City of Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71 (Dist.Ct.1935) (under constitutional provision, state had exclusive right to license liquor dealers for revenue purposes; city could not impose license tax); 7-Eleven, Inc. v. McClain, 422 P.2d 455 (Okl.1967) (sale of alcoholic beverages was a field "reserved" for *state* regulation; city zoning ordinance forbidding sale of beer in certain areas invalid). Cf. Mayor & Common Council of Prescott v. Randall, 67 Ariz. 369, 196 P.2d 477 (1948) (statute created state-wide control over traffic in liquor; city could license and tax any liquor-dealer licensed by the state, but could not refuse to issue license or limit number of licenses).

[140] See City of Canton v. Imperial Bowling Lanes, Inc., 7 Ohio Misc. 292, 220 N.E.2d 151 (Mun.Ct.1966); Town of Honea Path v. Flynn, 255 S.C. 32, 176 S.E.2d 564 (1970); City of Wichita Falls v. Abell, 566 S.W.2d 336 (Tex.Civ.App.1978), error dism'd ref'd n. r. e. Cf. Williams v. City of Jackson, 82 O.L.A. 177, 164 N.E.2d 195 (Com.Pl.1959) (city could not forbid sale of beer at hours when state allowed); Sparger v. Harris, 191 Okl. 583, 131 P.2d 1011 (1942) (city could not prohibit Sunday sale of beer, which was authorized by state statute).

[141] See Foster v. Police Commissioners, 102 Cal. 483, 37 P. 763 (1894); Nelson v. State ex rel. Gross, 157 Fla. 412, 26 So.2d 60 (1946); Cowan v. City of St. Petersburg, 149 Fla. 470, 6 So.2d 269 (1942); Mutchall v. City of Kalamazoo, 323 Mich. 215, 35 N.W.2d 245 (1948); State ex rel. Hewlett v. Womach, 355 Mo. 486, 196 S.W.2d 809 (1946); Greiner v. City of Hoboken, 68 N.J.L. 592, 53 A. 693 (1902); Driggs v. City of Denison, 420 S.W.2d 446 (Tex.Civ.App.1967). But local controls on liquor distribution will be invalidated if not reasonably definite and certain. See City of Canton v. Imperial Bowling Lanes, Inc., *supra* note 140. On various types of local controls over liquor, see generally Annot., Validity of Statute or Ordinance Making It an Offense to Consume or Have Alcoholic Beverages in Open Package in Motor Vehicle, 57 A.L.R.3d 1071 (1974); Annot., Validity of Municipal Regulation More Restrictive Than State Regulation as to Time for Selling or Serving Intoxicating Liquor, 51 A.L.R.3d 1061 (1973); Annot., Construction of Statute or Ordinance Making It an Offense to Possess or Have Alcoholic Beverages in Open Package in Motor Vehicle, 35 A.L.R.3d 1418 (1971). See also Annot., Degree or Nature of Intoxication for Purposes of Statute or Ordinance Making It a Criminal Offense to Operate Automobile While in That Condition, 142 A.L.R. 555 (1943).

[142] See Ex Parte Sikes, 102 Ala. 173, 15 So. 522 (1894) (license fee can be charged); Bumball v. Burnett, 115 N.J.L. 254, 179 A. 307 (1935) (local government need not issue maximum number of licenses authorized by ordinance); State ex rel. Boroo v. Town Board, 10 Wis.2d 153, 102 N.W.2d 238 (1960) (denial of license will be upheld if not arbitrary or capricious). See generally Note, The Power of Municipalities in Colorado to Levy an Occupational Tax on Liquor Dealers, 21 Rocky Mt.L.Rev. 209 (1948). Reasonably definite licensing standards must be provided or a license ordinance will be invalidated as denying due process. See Barnes v.

areas—as within a designated distance from a church, other places of worship, or school.[143] The powers of states and local governments to control liquor have been held so broad that entertainment in places serving alcoholic beverages can be regulated or prohibited even though that entertainment does not qualify as "obscene" under U.S. Supreme Court definitions—there must simply be a reasonable relationship of the regulation or prohibition to some police-power purpose.[144]

Merritt, 428 F.2d 284 (5th Cir.1970). See generally Chapter 10 *supra*. See also Weeks, Issuing or Revoking Liquor Licenses: State and Local Authority under Recent Federal Decisions, 15 Urban Law. 379 (1983).

[143] Borough of Fanwood v. Rocco, 33 N.J. 404, 165 A.2d 183 (1960). See Barnes v. City of Dayton, 216 Tenn. 400, 392 S.W.2d 813 (1965) (license from Board of Commissioners, required for sale of beer, could be denied if would increase traffic congestion or be hazardous to public health; upheld); City of Clute v. Linscomb, 446 S.W.2d 377 (Tex. Civ.App.1969) (ordinance can restrict sale of beer to certain areas of city). Even the sale of beer may be banned near schools and churches, and within other designated districts of a municipality. See Harrison v. Buckhalt, 364 So.2d 283 (Ala.1978) (city can prohibit sale of beer within reasonable distance of school or church, but "grandfather clause" here found invalid as arbitrary; whole ordinance therefore ruled invalid). But see Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), where it was held that a law vesting the governing bodies of churches and schools with the power to veto applications for liquor licenses amounted to a delegation of governmental power to private entities and violated the Establishment Clause of the First Amendment. Cf. Gas 'N Shop v. Nebraska Liquor Control Comm'n, 229 Neb. 530, 427 N.W.2d 784 (1988) (city ordinance prohibiting liquor sales on premises not separate from those on which other businesses are operated, but containing exceptions for certain establishments such as hotels and restaurants, held violative of equal protection); City of Clute v. Linscomb, *supra*. See generally Note, That's What I Like About Utah: *Larkin v. Grendel's Den* and the Alcoholic Beverage Control Act, 37 Columbia J.L. & Soc. Probs. 239 (2003).

Local restrictions on the hours of operation of taverns are quite common and are generally sustained. See South Daytona Restaurants v. City of South Daytona, 186 So.2d 78 (Fla.App.1966); State ex rel. Floyd v. Noel, 124 Fla. 852, 169 So. 549 (1936).

[144] California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), reh. denied 410 U.S. 948, 93 S.Ct. 1351, 35 L.Ed.2d 615. See City of Newport v. Iacobucci, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986), reh. denied 479 U.S. 1047, 107 S.Ct. 913, 93 L.Ed.2d 862 (1987) (states' regulatory authority over intoxicating liquors includes power to ban nude dancing as part of its liquor license control program; state statutory delegation to city electorate of power to decide whether or not liquor could be served in local establishments did not prevent city legislative body from enacting a ban on nude dancing in local establishments licensed for sale of liquor for consumption on the premises); Geaneas v. Willetts, 911 F.2d 579 (11th Cir.1990), cert. denied 499 U.S. 955, 111 S.Ct. 1431, 113 L.Ed.2d 484 (1991) (city ordinance prohibiting exposure of certain body parts in establishments serving alcohol is valid exercise of police power under Twenty-First Amendment); Ranch House, Inc. v. City of Anniston, 678 So.2d 745 (Ala.1996) (city could prohibit nudity, partial nudity, or nude dancing in establishments where alcoholic beverages are sold or consumed); Crownover v. Musick, 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497 (1973), cert. denied 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (nudity banned in bars and taverns; upheld); City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla.1985) (ordinance applicable to establishments selling alcoholic beverages prohibited any female from exposing her breasts "below the top of the areola"; upheld); Olson v. City of West Fargo, 305 N.W.2d 821 (N.D.1981) (ordinance applicable to licensed liquor establishments prohibited any live performances that included dancing, removing of clothing, or performance or simulation of sexual acts; upheld); City of Portland v. Derrington, 253 Or. 289, 451 P.2d 111 (1969), cert. denied 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (topless dancing prohibited in establishment serving liquor; upheld); Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974) (same); City of Milwaukee v. Piscuine, 18 Wis.2d 599, 119 N.W.2d 442 (1963) (female entertainers prohibited from sitting or standing at bar; upheld). Cf. Lanier v. City of Newton, Alabama, 842 F.2d 253 (11th Cir.1988) (town had authority under Twenty-First Amendment to ban nude dancing in liquor establishments and had not singled-out one bar owner for discriminatory treatment); Leverett v. City of Pinellas Park, 775 F.2d 1536 (11th Cir.1985) (court, while invalidating as overbroad an ordinance which prohibited nude or seminude entertainment in any commercial establishment, upheld ordinance which prohibited nude service of any food or drink). Even a ban on music in places where liquor is sold has been sustained; City of De Ridder v. Mangano, 186 La. 129, 171 So. 826 (1936). Cf. Mallach v. City of Mount Morris, 287 Mich. 666, 284 N.W. 600 (1939) (ban on dancing where alcohol sold; upheld); Zinn v. City of Steelville, 351 Mo. 413, 173 S.W.2d 398 (1943) (ban on juke boxes in places where liquor sold; upheld). But see Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir.1985), where an ordinance banning topless dancing in establishments serving alcoholic beverages was invalidated for lack of evidence that any legitimate government interest motivated the city to impose such a restriction on communication; State of Arizona v. Western, 168 Ariz. 169, 812 P.2d 987 (1991), where an ordinance prohibiting striptease dancing in establishments serving food or alcohol was held unconstitutionally vague and overbroad. See also Annot.,

Some municipalities regulate the sale of cigarettes and other smoking materials. The power of local governments to do this, as by requiring licenses of those who engage in such sales, has been upheld as based on legitimate police-power purposes.[145] Prohibitions on sale of cigarettes to minors have also been sustained when enacted at the local level.[146] A number of states and municipalities have also now passed legislation prohibiting smoking throughout, or in certain portions of, designated public places, such as auditoriums and restaurants; while controversial, these ordinances are being enacted with increasing frequency and seem likely to be sustained by the courts.[147]

Validity, Construction, and Effect of Statutes, Ordinances, or Regulations Prohibiting or Regulating Advertising of Intoxicating Liquors, 20 A.L.R.4th 600 (1983), noting that under the states' regulatory powers, coupled with the broad grant of power vested in the states by the Twenty-First Amendment, state regulatory agencies have the power to restrict advertising, or forbid it entirely, when it concerns alcoholic beverages. But see Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (state regulation of retransmission by cable television stations pre-empted by federal regulations; state could not require cable television operators to delete all advertisements for alcoholic beverages). Cf. Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (federal law prohibiting beer labels from displaying alcoholic content violated First Amendment's protection of commercial speech).

[145] See Gundling v. City of Chicago, 176 Ill. 340, 52 N.E. 44 (1898), aff'd 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725 (license required); Detroit Retail Druggists' Association v. City of Detroit, 267 Mich. 405, 255 N.W. 217 (1934) (same); Ex parte Nash, 55 Nev. 92, 26 P.2d 353 (1933). Cf. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (Massachusetts regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with salesperson before they are able to handle such products upheld against First Amendment attack, though some regulations governing advertising of tobacco products invalidated—see Section 23.9, note 151, *infra*). See also U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428 (2d Cir. 2013) (city ordinance prohibiting the sale of flavored tobacco products held not pre-empted by federal statute).

[146] State v. Crabtree Co., 218 Minn. 36, 15 N.W.2d 98 (1944) (saying need for regulation is presented partly because of dangers of marijuana cigarettes). Cf. Illinois Cigarette Service Co. v. City of Chicago, 89 F.2d 610 (7th Cir.1937), upholding a ban on cigarette-vending machines as a means of controlling sales to minors. See generally Annot., Supreme Court's Views as to Validity of Laws Restricting or Prohibiting Sale or Distribution to Minors of Particular Types of Goods or Services Otherwise Available to Adults, 52 L.Ed.2d 892 (1978). As to bans on, or regulation of, marijuana, see Symposium, Regulating Marijuana at Home and Abroad, 49 U. Pac. L. Rev. 1–206 (2017). As to allowing use and sale of marijuana for medical purposes vs. allowing it even for recreational use, see Pepin, Public Use of Recreational Marijuana: A Legal Landscape of State Law, 41 Seton Hall Legis. J. 283 (2017). See also Leff, Tax Benefits of Government-owned Marijuana Stores, 50 U. C. Davis L. Rev. 659 (2016). As to regulation of *cultivation* of marijuana, see Chumbler, Land Use Regulation of Marijuana Cultivation: What Authority Is Left to Local Government?, 49 Urban Law. 505 (2017) (only Florida expressly pre-empts all regulation of marijuana cultivation, but other states may have *impliedly* pre-empted the field or may have statutes that conflict with local regulation); Stoa, Marijuana Agriculture Law: Regulation at the Root of an Industry, 69 Fla. L. Rev. 297 (2017).

[147] See Swanson v. City of Tulsa, 633 P.2d 1256 (Okl.Cr.App.1981) (ordinance not impermissibly vague); "Huffing Over All That Puffing," Time, April 24, 1978, at 59, observing that 30 states by then had legislation barring smoking in at least some public places. See generally Hostetler, Tobacco Pollution and the Nonsmoker's Rights, 4 Environmental Law 451 (1974); Comment, The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights, 7 San Fernando U.L.Rev. 141 (1979). See also Garner, Cigarettes and Welfare Reform, 26 Emory L.J. 269 (1977); Note, Torts—Non-smokers' Rights—Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area, 9 Texas Tech.L.Rev. 343 (1977–78). Some legislation requires that non-smoking areas be provided in certain public places, such as restaurants; but there is doubt as to the validity of such measures. See Alford v. City of Newport News, 220 Va. 584, 260 S.E.2d 241 (1979), discussed N.Y. Times, Nov. 24, 1979, at 10, col. 2, invalidating an anti-smoking ordinance as unreasonable; the ordinance required non-smoking areas in restaurants, and the court commented that smoke cannot be effectively segregated in an open room. And in the absence of legislation, non-smokers have been unsuccessful in attempts to force officials to ban smoking in public places. See Federal Employees for Non-Smokers' Rights v. United States, 446 F.Supp. 181 (D.D.C.1978), aff'd 598 F.2d 310 (D.C. Cir.) cert. denied 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (Federal Constitution does not require that smoking in federal buildings be confined to designated areas; plaintiffs alleged that their right to petition for redress of grievances was infringed by buildings' smoke-filled corridors); Gasper v. Louisiana Stadium & Exposition District, 418 F.Supp. 716 (E.D.La.1976) aff'd, 577 F.2d 897 (5th Cir.1978), cert. denied, 439 U.S. 1073, 99 S.Ct. 846, 59 L.Ed.2d 40 (1979) (nonsmokers stated no cause of action in attempt to enjoin Stadium District from allowing smoking in New Orleans Superdome). On possible judicial and legislative remedies for the nonsmoker bothered by tobacco smoke, see Reynolds, Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco, 53 U. Cin. L. Rev. 435 (1984); Comment, Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air, 3 Colum. J. Envtl. L. 62 (1976); Comment, The Legal Conflict Between Smokers and Non-smokers: The Majestic Vice Versus the Right to Clean Air, 45 Mo. L. Rev. 444 (1980); Comment, The Resurgence and Validity of Antismoking Legislation, 7 U. Calif. Davis L. Rev. 167 (1974). See also Ranii, Tobacco's Legal Road, Nat'l L.J., April 9, 1984, at 1, col. 3. On the continuing trend toward restrictions on smoking, adopted both by legislative bodies and by private businesses, see "A Cloudy Forecast for Smokers," Time, April 7, 1986, at 45. By the late 1980s, some anti-smoking regulations were taking the form of *total* bans on smoking in restaurants and retail stores, such as the ban enacted in Beverly Hills, California. See "Hands Up and Butts Out," Time, April 27, 1987, at 78. A strict ban on smoking in many public places took effect in New York City in April, 1995. See "Marlboro Country It Ain't—Will an Anti-smoking Law Burn Big Apple Eateries?," Bus. Week, April 24, 1995, at 44. See generally "No Smoking Sweeps America," Bus. Week, July 27, 1987, at 40. On the validity and construction of such regulations, see Annot., Validity, Construction, and Application of Nonsmoking Regulations, 65 A.L.R.4th 1205 (1988). On the State of California's advertising campaign to discourage smoking, financed by a cigarette tax, see Mydans, California Opens All-Out War on Tobacco and Its Marketing, N.Y. Times, April 11, 1990, at A1. On municipal regulation of the sale, advertisement and use of tobacco products, see generally Hermer, Municipal Home Rule in New York: Tobacco Control at the Local Level, 65 Brooklyn L. Rev. 321 (1999). As to regulation of electronic cigarettes, see Note, Let's Clear the Air: Regulating Electronic Cigarettes in New York City, 81 Brook. L. Rev. 301 (2015).

Some municipalities have long restricted smoking in certain confined places and have been upheld in so doing. See State v. Heidenhain, 42 La.Ann. 483, 7 So. 621 (1890) (ordinance prohibiting smoking in streetcars, declaring it a nuisance, is valid). Compare Goodpaster v. City of Indianapolis, 736 F.3d 1060 (7th Cir. 2013) (ban on smoking in bars upheld under rational basis scrutiny), with Paul Stieler Enterprises, Inc. v. City of Evansville, 2 N.E. 3d 1269 (Ind. 2014) (attempt to exempt riverboat casinos from general smoking ban on restaurants and bars held to violate state constitution's equal privileges and immunities clause). Smoking has also been prohibited where there is a high degree of fire danger, such as near large quantities of combustible material. See City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914) (but ordinance invalid where it prohibited carrying or using tobacco in streets or parks; such use could not reasonably offend others since streets wide and parks large). But older authority maintained that, except under such special circumstances, municipalities could not prohibit smoking in public places. See City of Zion v. Behrens, *supra*; Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911) (ordinance prohibiting smoking of cigarettes within city limits void).

For discussion of particular state and local smoking bans, see Note, Smoked Out: Massachusetts Bans Smoking in Restaurants and Bars, 31 New England J. on Crim. & Civ. Confinement 401 (2005); Note, The Calabasas Smoking Ban: A Local Ordinance Points the Way for the Future of Environmental Tobacco Smoke Regulation, 80 So. Cal. L. Rev. 393 (2007); Comment, Why Smoking Bans are a Butt to Texas: The Impact of Smoking Bans on Private Property Rights and Individual Freedom, 39 Tex. Tech L. Rev. 345 (2007). See generally Note, Examining the Underlying Purposes of Municipal and Statewide Smoking Bans, 80 Ind. L.J. 923 (2005). See also Comment, Indoor Air Quality: Options for Regulating Environmental Tobacco Smoke, 13 Mo. Envtl. L. & Pol'y Rev. 114 (2005–06). As to efforts to hold the tobacco industry liable for harm done by smoking, see Sokol, Smoking Abroad and Smokeless at Home: Holding the Tobacco Industry Accountable in a New Era, 13 N.Y.U. J. Legis. & Pub. Pol'y 175 (2010). As to possible nuisance liability of smokers, see Note, Smokers: Nuisances in Belmont City, California—In Their Homes, But Not in Public, 10 Minn. J. L. Sci. & Tech. 413 (2009).

Municipal smoking bans are sometimes attacked on grounds of violating state pre-emption or of being unconstitutionally vague, but these attacks are likely to fail. See Steffes v. City of Lawrence, 284 Kan. 380, 160 P.3d 843 (2007). Exceptions to smoking bans for particular businesses may, however, run afoul of equal protection or of prohibitions on special laws. See Comment, Atlantic City Special: Whether the Casino Exception to the New Jersey Smoke-Free Air Act Comports with the New Jersey Constitution's General Prohibition of Special Laws, 38 Seton Hall L. Rev. 359 (2008). As to whether state and/or local regulation of smoking is preferable to federal legislation, see Note, Anti-Smoking Legislation: Why Strong Local Legislation & Action Better Protect the Consumer Than Federal Legislation & Action, 23 Loyola Consumer L. Rev. 459 (2011).

§ 23.9 Local Regulation of Advertising

What about local restraints on advertising—such as limitations on the distribution of handbills, on billboards, and on the use of sound trucks? Cases decided some decades ago by the U.S. Supreme Court indicated that prohibitions on distribution of religious or other noncommercial literature (or restrictions that entrusted the granting of permission to distribute such literature to the unbridled discretion of some official) would be

invalidated,[148] but that commercial *advertising* would be treated on a different footing, and thus that the latter's distribution on public streets could be entirely forbidden.[149] But later, the Court clearly extended First Amendment protection to advertising.[150] Finally, the Court has come to the position that (1) commercial speech *is* within the First Amendment; (2) but such speech has a special character, is less likely (because of its importance to business profits and because it is carefully calculated in advance) to be inhibited by reasonable regulations than are other types of communication, and is particularly in need of, and subject to, regulation to prevent deception; and (3) reasonable restrictions on time, place, and manner of expression may be permissible as to commercial speech even where impermissible as to non-commercial expression.[151]

[148] Lovell v. City of Griffin, 303 U.S. 444 58 S.Ct. 666, 82 L.Ed. 949 (1938), conf. to 57 Ga.App. 901, 197 S.E. 347 (dissemination of religious literature involved). Cf. Dulaney v. Municipal Court, 11 Cal.3d 77, 112 Cal.Rptr. 777, 520 P.2d 1 (1974) (ordinance declaring it unlawful to affix any notice or poster to utility pole without permission from person owning or controlling such pole invalidated as prior restraint on free speech; notice concerning an anti-war rally had sparked the case). But cf. Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), reh. denied 321 U.S. 804, 64 S.Ct. 784, 88 L.Ed. 1090, upholding, even as applied to distribution of religious literature, a statute forbidding *children* under certain ages from selling in the streets and in public places, and making it unlawful for parents to allow their children to work in violation of the law.

[149] Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942) (prohibition on distribution of commercial advertising matter on streets upheld; Court said commercial handbills could be prohibited despite some inclusion—as in this case—of opinion on a civic matter therein). Cf. State ex rel. Department of Transportation v. Pile, 603 P.2d 337 (Okl.1979), cert. denied 453 U.S. 922, 101 S.Ct. 3158, 69 L.Ed.2d 1004 (1981) (statute prohibiting billboards on rural roads held inapplicable to those used for purposes of noncommercial speech; "pure speech" said to be protected in all public forums, though commercial speech is not).

[150] See Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (complete ban on promotional advertising by utility invalidated); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), reh. denied 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed.2d 164 (commercial speech entitled to some First Amendment protection; total ban on lawyer advertising invalid); Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (prohibition of any advertisement or display of contraceptives held unconstitutional); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (prohibition on pharmacists' advertising price of prescription drugs held unconstitutional). Cf. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (ban on newsracks for commercial newspapers held not content-neutral and thus in violation of First Amendment); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988), on remand 763 S.W.2d 126 (Ky.1989) (state cannot absolutely prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful, nondeceptive letters to potential clients known to have particular legal problems); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (prohibition on inclusion by public utilities, in monthly bills, of inserts discussing controversial issues of public policy; held an invalid infringement on free speech); Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (Virginia advertisements of New York organization engaged in arranging abortions were constitutionally protected); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (state law could not forbid use of contraceptives, or aiding or counseling therein); AIDS Action Committee v. Massachusetts Bay Transp. Auth., 42 F.3d 1 (1st Cir.1994) (transit authority's ban on condom advertisements enjoined as content-based discrimination); Centro de la Communidad Hispana de Locust Valley v. Town of Oyster Bay, 2015 U.S. Dist. LEXIS 117926 (E.D.N.Y. 2015) (ordinance prohibiting a person from soliciting employment from a public right of way violates First Amendment; applying *Central Hudson* case, *supra*); Anderson, Clayton & Co. v. Washington State Department of Agriculture, 402 F.Supp. 1253 (W.D.Wash.1975) (invalidating a statute prohibiting the use of any "dairy" words in the advertising of margarine). See generally Elman, The Constitutional Right to Advertise, 64 A.B.A.J. 206 (1978); Heller, The End of the "Commercial Speech" Exception—Good Riddance of More Headaches for the Courts, 67 Ky. L.J. 927 (1978–79); Stern, In Defense of the Imprecise Definition of Commercial Speech, 58 Md. L. Rev. 55 (1999); Comment, A Doctrine in Disarray—Why the First Amendment Demands the Abandonment of the *Central Hudson* Test for Commercial Speech, 27 Seton Hall L. Rev. 1626 (1997); Note, Commercial Speech in the Street: Regulation of Day Labor Solicitation, 9 S. Cal. Interdisc. L.J. 499 (2000). Annot., Applicability to Advertisements of First Amendment's Guaranty of Free Speech and Press—Federal Cases, 37 L.Ed.2d 1124 (1974). See also Annot., Statute or Ordinance Regulating or Prohibiting Advertising as Unconstitutional Burden on Interstate Commerce—Federal Cases, 10 L.Ed.2d 1386 (1964).

On the numerous legal clashes between advertisers and governments that refuse to allow certain ads on government property, see Ayers, What Rudy Hasn't Taken Credit For: First Amendment Limits on Regulation of Advertising on Government Property, 42 Ariz. L. Rev. 607 (2000), criticizing the public forum doctrine, and the commercial/noncommercial speech dichotomy with which it is often linked, as failing to uphold the First Amendment's prohibition of government censorship. Television advertising of children's toys has been criticized for gender bias. See Smith, Built for Boyhood? A Proposal for Reducing the Amount of Gender Bias in the Advertising of Children's Toys on Television, 17 Vander. J. Ent. & Tech. L. 991 (2015).

[151] See Board of Trustees of State University v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), on remand 764 F.Supp. 747 (N.D.N.Y. 1991) (governmental restrictions on commercial speech need not be the absolutely least restrictive means to achieve desired end); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (federal statute prohibiting unsolicited mailing of contraceptive advertisements invalidated as overbroad, but Court noted that even content-based restrictions on commercial speech are sometimes permissible); Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979), reh. denied 441 U.S. 917, 99 S.Ct. 2018, 60 L.Ed.2d 389, upholding a prohibition, by a Texas statute, of the practice of optometry under a trade name, since the prohibition was reasonably aimed at protecting the public from deceptive and misleading use of such names; Federal Election Comm'n v. Furgatch, 807 F.2d 857 (9th Cir.1987), cert. denied 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987) (newspaper advertisement advocating defeat of a political candidate is subject to reasonable regulation). Cf. Warner-Lambert Co. v. Federal Trade Commission, 562 F.2d 749 (D.C.Cir.1977), cert. denied 435 U.S. 950, 98 S.Ct. 1575, 55 L.Ed.2d 800 (corrective advertising order upheld); Robert L. Rieke Bldg. Co. v. City of Overland Park, 232 Kan. 634, 657 P.2d 1121 (1983) (court assumed that operation of searchlights for promotional purposes was a form of symbolic commercial speech, but municipal regulation of searchlights nonetheless upheld as protecting public interests); Oklahoma Alcoholic Beverage Control Board v. Burris, 626 P.2d 1316 (Okl.1980) (Alcoholic Beverage Control Board could predicate right to license on compliance with the rules governing advertisement, and this limitation does not violate First Amendment). Even the states' broad power to regulate liquor under the Twenty-First Amendment does not necessarily justify sweeping bans of advertising for liquor. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (state's complete statutory ban on price advertising for alcoholic beverages abridged First Amendment rights and was not saved by Twenty-First Amendment). See Comment, Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 *Liquormart, Inc. v. Rhode Island*, 47 Case Western Res. L. Rev. 681 (1997); Note, A First Amendment Look at the Statutory Ban on Tobacco Advertisements and the Self-regulation of Alcohol Advertisements, 65 Fed. Comm. L. J. 99 (2013). Compare Comment, Commercial Speech Doctrine and Virginia's "Thirsty Thursday" Ban, 27 Geo. Mason U. Civ. Rts. L. J. 207 (2017); cf. Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (federal law prohibiting beer labels from displaying alcoholic content violated First Amendment's protection of commercial speech). See generally Note, Constitutional Law—Freedom of Speech—No Longer That Crazy Aunt in the Basement, Commercial Speech Joins the Family, 20 U. Ark. Little Rock L.J. 163 (1997); Note, The First Amendment, Commercial Speech, and the Future of Tobacco Advertising After *44 Liquormart, Inc. v. Rhode Island*, 43 Wayne L. Rev. 1505 (1997). States do, however, have wide powers to protect their residents against advertisements for activity that is illegal in the particular state or area. See United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), on remand 5 F.3d 63 (4th Cir.1993) (federal statutes prohibiting broadcast of lottery advertising to state not permitting lotteries, though allowing such broadcast to state that permits lotteries, upheld); Princess Sea Indus., Inc. v. State, 97 Nev. 534, 635 P.2d 281 (1981), cert. denied 456 U.S. 926, 102 S.Ct. 1972, 72 L.Ed.2d 441 (1982) (state could prohibit advertisements by legal brothels from appearing in those counties in which prostitution was illegal), discussed in Note, Chicken Ranch Cries Foul: Limitations on Commercial Expression—Why Can't Legal Prostitutes Advertise?, 4 Detroit C.L. Rev. 1613 (1983), with good review of cases concerning restrictions on commercial speech. Compare Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999), noted 20 Loyola L.A. Ent. L. Rev. 605 (2000) (federal prohibition on broadcasting of lottery information could not be applied to advertisements of lawful private casino gambling that were broadcast by radio and television stations located in Louisiana, where such gambling was legal).

Some cases emphasize that not all bans or restrictions on commercial speech are unconstitutional. See, *e.g.*, City of Skagway v. Robertson, 143 P.3d 965 (Alaska 2006) (city ordinance that confined person-to-person solicitation activities within the historic district of city to enclosed structures or to areas containing at least 200 square feet of vending space applied only to commercial speech and was thus not unconstitutionally overbroad). But many restrictions on commercial advertising have nonetheless been ruled unconstitutional. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001) (Massachusetts regulations prohibiting outdoor advertising of smokeless tobacco or cigars within 1000 feet of school or playground violated First Amendment); Thompson v. Western States Medical Center, 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (provisions of federal Food and Drug Administration Modernization Act that exempted compounded drugs from Food and Drug Administration's drug approval requirements if providers of such drugs refrained from advertising, promoting, or soliciting prescriptions for particular compounded drugs were unconstitutional restrictions of commercial speech). See generally Caplan, The Embattled 1st

Courts have in recent years tended to invalidate prohibitions, or unduly restrictive licensing ordinances, applying to the distribution, on public property or throughout a locality, of commercial or non-commercial literature.[152] The U.S. Supreme Court has applied basically the same protection to distributors of such literature on the streets of a "company town"—and even some areas of a military base—as would apply to such distributors on the public property of any incorporated municipality.[153] For many years

Amendment, 84 American Scholar 18 (Spring 2015), saying that the Supreme Court used to treat commercial speech as less important than political speech, but protection of commercial speech has become "a formidable tool for American enterprise." *Id.* at 21. In the *Lorillard* case, *supra*, many of the restrictions were also found pre-empted by the Federal Cigarette Labeling and Advertising Act. In any case, in a "Master Settlement Agreement" entered into by the tobacco industry in 1998, the participating tobacco manufacturers agreed to remove and discontinue most outdoor advertising, such as billboards. See Clisham, Commercial Speech, Federal Preemption, and Tobacco Signage: Obstacles to Eliminating Outdoor Tobacco Advertising, 36 Urban Law. 713 (2004), pointing out that there are exceptions to the "Master Agreement," as well as doubts as to its validity. *Id.* at 714–15. See generally Bonnie, The Impending Collision Between First Amendment Protection for Commercial Speech and the Public Health: The Case of Tobacco Control, 29 J. L. & Politics 599 (2014).

As to the federal legislation on tobacco warning labels, see Note, Smoke and Mirrors: Preventing Deception of Consumers in the Tobacco Market Through Graphic Warning Labels, 7 Albany Gov't L. Rev. 291 (2014); Note, Joe Camel v. Uncle Sam: The Constitutionality of Graphic Cigarette Warning Labels, 81 Fordham L. Rev. 2811 (2013); Comment, Enough Smoke and Mirrors!—Why the Graphic-warning Mandate Under the Family Smoking Prevention and Tobacco Control Act Is Speech Consumers Don't Want to Hear, 44 U. Toledo L. Rev. 659 (2013). See generally Note, Clarifying Commercial Speech: Restructuring and Refining the *Zauderer* and *Central Hudson* Standards in Light of the Family Smoking Prevention and Tobacco Control Act, 48 Valparaiso U. L. Rev. 1093 (2014). See also Comment, "Natural" Food Labeling: False Advertising and the First Amendment, 16 Marq. Elder's Advisor 173 (2014).

A Vermont statute restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors was invalidated in Sorrell v. IMS Health, Inc., 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011) (abrogating the 1st Circuit's opinion in IMS Health, Inc. v. Ayotte, 550 F.3d 42 (2008), cert, denied, 557 U.S. 939, 129 S.Ct. 2864, 174 L.Ed.2d 578 (2009), noted 25 Berkeley Tech. L. J. 649 (2010)). The Court applied heightened judicial scrutiny in finding violation of First Amendment protections because the statute was held to impose a specific content- and speaker-based restriction on protected expression. The Court observed that the government's legitimate interest in protecting consumers from commercial harm explains why commercial speech can be subject to greater governmental regulation than noncommercial speech, but here the state failed to show a "neutral justification" for its law. *Id.* at 2672. See Comment, Balancing the Harms Done in Advertising Through Effective Regulation of the Commercial Speech Doctrine, 2014 Freedom Center J. 223. See generally Symposium, Commercial Speech and the First Amendment: Past, Present, and Future, 25 Wm. & Mary Bill Rts. J. 761–979 (2017).

As to the nature of "compelled commercial speech," such as mandatory disclosures and labeling, see Adler, Compelled Commercial Speech and the Consumer "Right to Know," 48 Ariz. L. Rev. 421 (2016), saying compelled commercial speech should be treated the same as other commercial speech and be subject to the same level of protection.

[152] See In re Philipie, 82 Nev. 215, 414 P.2d 949 (1966) (ordinance banning distribution of noncommercial handbills invalid); City of Elizabeth v. Sullivan, 100 N.J.Super. 51, 241 A.2d 41 (1968) (ordinance requiring permit for distribution of literature held unconstitutional as applied to distribution of commercial handbills in community). Cf. Welton v. City of Los Angeles, 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119 (1976) (ordinance could not validly punish selling of maps showing location of movie stars' homes); Koffler v. Joint Bar Association, 51 N.Y.2d 140, 432 N.Y.S.2d 872, 412 N.E.2d 927 (1980) (direct mail solicitation of clients by lawyers is commercial speech, which may be regulated but not proscribed); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash.2d 63, 455 P.2d 350 (1969) (city, which contracted to display advertising signs on exterior of city buses, could not refuse ads protesting the Vietnam War). But see Cardarella v. City of Overland Park, 228 Kan. 698, 620 P.2d 1122 (1980) (ordinance restricting sale or display of items identified with drug usage upheld; display of such items was not "commercial speech"). Cf. United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981), upholding a statute, applicable to both commercial and noncommercial materials, that prohibited the deposit of unstamped, mailable matter in a letter box.

In Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998), cert. denied 527 U.S. 1037, 119 S.Ct. 2397, 144 L.Ed.2d 797 (1997), the court invalidated as overbroad an ordinance prohibiting anyone from putting leaflets on cars parked on city streets unless someone in the car gave permission. The case involved members of a church who were distributing religious information.

[153] On company towns, see Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (Jehovah's Witness could not be criminally punished for distributing literature on street of unincorporated

town). Cf. Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946) (federal defense housing village). As to a military base, see Flower v. United States, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972), conf. to 462 F.2d 1133 (5th Cir.) (street of military reservation was open to public; base commandant could not order defendant off the street for distributing leaflets). But see Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), holding that there is no generalized constitutional right to make political speeches or distribute leaflets on a military reservation, and distinguishing the *Flower* case, *supra*, because military authorities had there abandoned any claim of special interest in who walked or talked on the street.

Public streets and sidewalks have sometimes been regarded as "public forums" in which free speech is entitled to special protection. See United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), on remand 717 F.2d 1480 (D.C.Cir.1983) (public sidewalks forming perimeter of U.S. Supreme Court grounds are public forums for First Amendment purposes); Lewis v. Colorado Rockies Baseball Club, Ltd., 941 P.2d 266 (Colo.1997) (sidewalks and walkways around baseball stadium were a traditional public forum for First Amendment purposes). See also Snyder v. Phelps, 562 U.S. 443, 131 S.Ct. 1207, 179 L.Ed.2d (2011) (public place adjacent to a public street treated as a public forum; *id.* at 1218). But apart from these special situations of streets and sidewalks surrounding certain properties, streets and sidewalks have often been ruled *not* public forums. See United States v. Kokinda, 497 U.S. 720, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990), noted 25 Suffolk U. L. Rev. 772 (1991) (sidewalk at a post office is not a public forum); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), on remand 738 F.2d 353 (9th Cir.1984) (property covered by ordinance which prohibited posting of signs on any sidewalk, crosswalk, curb, street lamp-post, hydrant, etc. was not public forum subject to special First Amendment protection). Cf. McCullen v. Coakley, 134 S. Ct. 2518 (2014) (state statute creating buffer zone around abortion clinics violates free speech rights because law is not narrowly tailored to serve a significant government interest); Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (governmental interests in ensuring public safety and order, prompting free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services justified preliminary injunction appropriately tailored to assure unimpeded physical access to abortion clinics); Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), on remand 857 F.2d 1175 (7th Cir.1988) (ordinance prohibiting picketing, even on public streets, before or about the dwelling of any individual upheld as narrowly tailored to serve significant government interest in protecting residential property). Compare Vittitow v. City of Upper Arlington, 43 F.3d 1100 (6th Cir.1995), cert. denied 515 U.S. 1121, 115 S.Ct. 2276, 132 L.Ed.2d 280 (1995) (ordinance against all residential picketing enjoined as overbroad). On the nature of public streets as forums for the expression of ideas, see generally Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939). A parking lot of a medical facility has been held not a public forum. Fardig v. Municipality of Anchorage, 785 P.2d 911 (Alaska App.1990), on reh. 803 P.2d 879 (1990) (trespassing ordinance could be enforced against anti-abortion protesters). Cf. Hill v. Colorado, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (upholding statute that prohibited any person from knowingly approaching within 8 feet of another person near health care facility without latter person's consent). And the U.S. Supreme Court has held an airport not to be a public forum. International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (prohibition on solicitation of contributions upheld). Cf. as to state fairgrounds Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), on remand 311 N.W.2d 843 (Minn.1981), upholding a state fair rule prohibiting the sale or distribution of any merchandise, including printed or written material, except from fixed locations, in order to maintain orderly movement of crowds. A license plate has been declared not a public forum. See Commissioner of Indiana Bureau of Motor Vehicles v. Vawter, 45 N.E. 3d 1200 (Ind. 2015) (content on license plates is government speech, using test from Walker v. Texas Division, Sons of Confederate Veterans, 135 S. Ct. 2239 (2015). A high-school newspaper has been held not a public forum. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), on remand 840 F.2d 596 (8th Cir.1988) (school officials could impose any restrictions that met test of reasonable relation to legitimate pedagogical concerns); Planned Parenthood of S. Nev., Inc. v. Clark County School Dist., 941 F.2d 817 (9th Cir.1991), criticized in Note, 38 Wayne L. Rev. 1897 (1992). But cf. Burch v. Barker, 861 F.2d 1149 (9th Cir.1988) (First Amendment prohibits school policies that require all student-written material to be submitted for school approval prior to distribution even if the distribution is not school-sponsored); Thompson v. Waynesboro Area School Dist., 673 F.Supp. 1379 (M.D.Pa.1987) (school district violated students' freedom of speech by severely restricting distribution of religious literature). On problems of student rights and responsibilities that are raised by the *Hazelwood* and *Burch* cases *supra*, see generally Bittle, Bartlett & Hardt, Recent Developments in Public Education Law, 20 Urban Law. 1071, 1071–84 (1988). It has been held that the area surrounding a polling place *is* a public forum. Burson v. Freeman, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (Tennessee statute prohibiting solicitation of votes and displays or distributions of campaign materials within 100 feet of entrance to polling place was content-based regulation of political speech in a public forum and thus subject to strict scrutiny, but upheld as narrowly tailored to serve compelling interest). See generally Buchanan, The Case of the Vanishing Public Forum, 1991 U. Ill. L. Rev. 949, noting the changing nature of the public forum concept; Note, Closing the Door on the Public Forum, 26 Loyola L.A.L. Rev. 241 (1992). See also Bradburn v. North Central Regional Library Dist., 168 Wash. 2d 789, 231 P.3d 166 (2010) (Internet access in public libraries held neither a traditional nor a designated public

now, public streets and traditional "downtowns" have, however, been rivaled or surpassed as public gathering-places by shopping centers—often located in largely residential or suburban areas and typically having a "mall" along which a great variety of retail establishments are located.[154] Thus, the question has also now arisen of the degree of protection afforded "free speech" within these malls. At one time, it seemed the Court would treat a shopping-center mall as equivalent to a public street of a municipality so far as rights of speech are concerned;[155] but the Court soon reconsidered this position and now treats shopping centers as basically private property, the owners of which may limit free speech without, at least, violating any *Federal* constitutional guarantees against governmental abridgment thereof.[156]

forum). Where a public forum *is* found to exist, a content-based restriction on political speech can be upheld only if supported by a compelling governmental interest. See Burson v. Freeman, *supra* (statute restricting solicitation of votes or political advertising within 100 feet of polling place upheld); Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (District of Columbia law prohibiting signs or displays critical of foreign governments within 500 feet of embassies was not narrowly tailored to serve compelling government interest and was thus invalid). As to a possible cause of action for "street harassment" if a person is insulted while on a public street, see Comment, My Name Is Not "Beautiful," and No, I Do Not Want to Smile: Paving the Path for Street Harassment Legislation in Illinois, 65 De Paul L. Rev. 831 (2016).

In Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018), the Court summarized much of the law on public forums: In *traditional* public forums, such as streets and parks, the government may impose reasonable time, place and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. In *designated* public forums—places not traditionally regarded as public forums but which the government has intentionally opened as such—the rules on speech restriction are the same as for the traditional public forums. But a polling place in Minnesota was a *nonpublic* forum, set aside for the sole purpose of voting and thus is a special enclave, subject to greater restrictions. Thus, Minnesota's ban on the wearing of political apparel within a polling place pursued a permissible objective of establishing an island of calm on Election Day, but was found incapable of reasoned application due to the undefined nature of its terms, and thus violative of Free Speech.

[154] See "How Shopping Malls Are Changing Life in U.S.," U.S. News & World Rep., June 18, 1973, at 43, referring to shopping malls as a "new kind of civic center." Compare Comment, Shopping in the Marketplace of Ideas: Why *Fashion Valley Mall* Means Target and Trader Joe's Are the New Town Squares, 39 Golden Gate U. L. Rev. 261 (2009), discussing Fashion Valley Mall, LLC v. NLRB, 42 Cal. 4th 850, 69 Cal Rptr. 3d 288, 172 P.3d 742 (2007). On the different kinds of shopping centers, and trends apparent in the kinds that are now being built, see generally Creswell and Bray, Acquisition Signals Hope for the Future of U.S. Malls, N. Y. Times, Dec. 13 2017, at B1 & B4 (European company Unibail-Rodamco, which owns some upscale shopping centers in Europe, acquired Westfield Corporation, which owns malls in the U.S.); Sanburn, The Death and Life of the Shopping Mall, Time magazine, July 31, 2017, at 40; Trillin, U.S. Journal: New Orleans, The New Yorker, July 28, 1980, at 88, discussing "regionals," "specialty centers," and other kinds of shopping malls; "Malls: Now More Like Downtown," Bus. Week, July 14, 2003 at 14 (many large malls have failed, and some of them are being remade as outdoor shopping plazas, reminiscent of the town centers they replaced); "Call It Mall-mart," Bus. Week, July 14, 2003, at 40 (Wal-Mart and other discount stores are increasingly locating in malls); "The Discount Twist in Suburban Shopping Malls," Bus. Week, July 7, 1980, at 95 (an increasing number of malls consist largely or entirely of "discount" stores in various lines); "Shopping Centers of the Future: Smaller, More Fun," U.S. News and World Rep., Sept. 30, 1974, at 67 (there is some tendency toward building shopping centers in close-in locations, even the old downtowns); Queenan, All of America and Parking Too, N.Y. Times, Jan. 25, 2008, at D1 (shopping malls are becoming suitable travel destinations); "Melancholy Mall," Time magazine, Oct. 20, 1980, at 77 (some slowdown in construction of suburban malls, but continued growth in shopping centers within old "downtown" areas). Shopping centers have generated some controversy since they pose a threat, if located in suburban areas, to traditional city-center shopping areas, and since some critics feel they contribute to traffic congestion and air pollution; see "A Pall Over the Suburban Mall," Time, Nov. 13, 1978, at 116.

Controversy has also developed over the tendency in some communities of street vendors simply to set up "business"—in a stall beside a public way or just on the sidewalk itself. See " 'Free Enterprise' Stirs Storm on Sidewalks," U.S. News & World Rep., Jan. 10, 1977, at 59, noting opposition to such vendors because of the congestion they create and because they pay no rent, and often no sales or business taxes. Municipal regulations and prohibitions of the use of sidewalks and other public ways for vending have generally been upheld. See Annot., Authorization, Prohibition, or Regulation by Municipality of the Sale of Merchandise on Streets or Highways, or Their Use for Such Purpose, 14 A.L.R.3d 896 (1967). Cf. People v. Dmytro, 280 Mich. 82, 273 N.W. 400 (1937) (ordinance forbidding curb service upheld as reasonable in areas where congestion likely). It has been held that express statutory authority is necessary for a municipality to allow the use of a public way for commercial purposes, since such ways are ultimately under the control of the state. See Cowin v. City of Waterloo, 237 Iowa 202, 21 N.W.2d 705 (1946). On regulations applying to solicitors, peddlers, vendors, etc., see generally notes 82–99 *supra*, and accompanying text.

[155] Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968) (often called "the Logan Valley case"); the Court in this case affirmed the right of peaceful picketing within a shopping mall by members of a union who were protesting the non-union status of a store within the mall. The picketing took place in the immediate vicinity of the store involved in the controversy.

[156] See Hudgens v. National Labor Relations Board, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), on remand 531 F.2d 1342 (peaceful picketing of retail store in shopping mall; held that rights and liability of parties were exclusively dependent on the National Labor Relations Act); Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), conf. to 463 F.2d 1095 (9th Cir.), noted 5 Urban Lawyer 598–604 (1973) (right of free speech in shopping center guaranteed only if expression's purpose is related to shopping center's business and no reasonable alternative forum is available). Cf. Steffel v. Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), conf. to 494 F.2d 691 (5th Cir.) (petitioner, threatened with arrest for distributing literature in shopping center, brought suit for injunctive and declaratory relief, claiming his constitutional rights were being violated; case held to present an "actual controversy"). The *Hudgens* case, *supra*, stated that the rationale of *Logan Valley*, *supra* note 155, had not survived the *Lloyd* case, *supra*. And *Hudgens* indicated clear disapproval of *Lloyd* to the extent that the latter seemed to make the right of speech partly dependent on content of that speech. Thus, the *Logan Valley* case, *supra* note 155, seems effectively overruled, and *Lloyd*, *supra*, seems partly discredited; the law now is as stated in *Hudgens*: The shopping center is basically private property, and the rights of the parties are governed by relevant statutes. See Lechmere, Inc. v. National Labor Relations Bd., 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992) (barring union organizers from distributing handbills in employer's parking lots at shopping center did not constitute unfair labor practice); Cologne v. Westfarms Associates, 192 Conn. 48, 469 A.2d 1201 (1984) (rights of free speech and petition may not be exercised at regional shopping center contrary to wishes of its owners); SHAD Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 498 N.Y.S.2d 99, 488 N.E.2d 1211 (1985) (under New York law, owner of a shopping mall was not required to permit distribution of anti-nuclear leaflets on its property but could enforce a blanket no-handbilling policy). Cf. State of Hawaii v. Viglielmo, 105 Hawai'i 197, 95 P.3d 952 (2004) (peaceful protesting activities in privately owned shopping center; Hawaii Constitution afforded no greater free speech protections than federal constitution and did not preclude prosecution). On the *Hudgens* case *supra*, see Schauer, *Hudgens v. N.L.R.B.* and the Problem of State Action in First Amendment Adjudication, 61 Minn. L. Rev. 433 (1977); Note, Shopping Center Picketing: The Impact of *Hudgens v. National Labor Relations Board*, 45 Geo. Wash. L. Rev. 812 (1977); Comment, Hudgens v. NLRB—A Final Definition of the Public Forum?, 13 Wake Forest L. Rev. 139 (1977).

But it has also been held that a *state* constitution *may* validly provide that individuals are entitled to exercise free-speech and -petition rights on the property of a privately owned shopping center to which the public is invited. PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), noted 66 A.B.A.J. 1118 (1980) (California constitutional provision did not violate Federal Constitutional rights of owner of shopping center); Lloyd Corp., Ltd. v. Whiffen, 315 Or. 500, 849 P.2d 446 (1993), noted 30 Willamette L. Rev. 195 (1994) (implied right found under Oregon Constitution to gather signatures for initiative petitions in privately owned shopping centers). But cf. Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W.2d 337 (1985) (shopping mall could prohibit collection of signatures on its property for petition to put initiative question on ballot; state constitutional guarantee of free speech applies only to restrictions on speech by government, not by private landowners); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 512 Pa. 23, 515 A.2d 1331 (1986) (under Pennsylvania Constitution, individuals do not have right to solicit signatures for a political candidate's nomination petition at a privately owned shopping mall without the mall owner's consent). See generally Berger, *PruneYard* Revisited: Political Activity on Private Lands, 66 N.Y.U.L. Rev. 633 (1991); Note (on state court opinion in *PruneYard* case), Federalism and State Protection of Free Speech, 10 Golden Gate U.L.Rev. 805 (1980); Comment, Constitutional Law—First Amendment—Distribution of Handbills in Mall of Private Shopping Center Is Not Constitutionally Protected When Purpose of Handbilling Is Unrelated to Shopping Center's Operation, 25 Ala.L.Rev. 76 (1972); Note, The Shopping Center as a Forum for the Exercise of First Amendment Rights, 37 Albany L.Rev. 556 (1973); Note, Lloyd Corp. v. Tanner: The Demise of Logan Valley and the Disguise of Marsh, 61 Geo.L.J. 1187 (1973); Note, Constitutional Law—First Amendment—Shopping Centers and the "Quasi-Public" Forum, 51 N.C.L.Rev. 123 (1972); Note, Constitutional Law—Free Speech Regulated in Shopping Centers, 8 Wake Forest L.Rev. 590 (1972); Comment, Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?, 64 Wash. L. Rev. 133 (1989); Comment, The Exercise of First Amendment Rights in Privately Owned Shopping Centers, 1973 Wash.U.L.Q. 427; Note, Constitutional Law—Free Speech on Premises of Privately Owned Shopping Center, 1973 Wis. L.Rev. 612. See also Korngold, Land Use Regulation as a Framework to Create Public Space for Speech and Expression in

Regulations on billboards and other advertising signs—and even complete prohibitions in certain areas—have been upheld if reasonably related to a police-power purpose. Increasingly, aesthetic factors are found sufficient to support such limitations;[157] but often, as in the case of regulations aimed at signs overhanging public streets or ways, other factors—such as safety—may be cited as also supporting the restrictions.[158]

the Evolving and Re-conceptualized Shopping Mall of the Twenty-First Century, 68 Case W. Res. J. Int'l L. 429 (2017).

In Sanders v. City of Seattle, 160 Wash.2d 198, 156 P.3d 874 (2007), a government easement through a privately owned shopping mall, created to provide access to a monorail, was held a nonpublic forum, and protestors using the easement to access the monorail were held validly subject to the shopping center's oral policy requiring them not to display their signs in that area. The requirement was held reasonable and viewpoint-neutral and thus not violative of the protestors' freedom of expression. See generally Note, Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of *Pruneyard*, 13 Cornell J.L. & Pub. Pol'y 533 (2004). See also Fuchs, Free Exercise of Speech in Shopping Malls: Bases that Support an Independent Interpretation of Article 40 of the Maryland Declaration of Rights, 69 Albany L. Rev. 449 (2006); Peltz, Limited Powers in the Looking-glass: Otiose Textualism, and an Empirical Analysis of Other Approaches, When Activists in Private Shopping Centers Claim State Constitutional Liberties, 53 Clev. St. L. Rev. 399 (2005–06). Compare Sisk, Returning to the *PruneYard*: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech, 32 Harv. J. L. & Pub. Pol'y 389 (2009). In ACLU of Nevada v. City of Las Vegas, 466 F.3d 784 (9th Cir. 2006), it was held that a city could not prohibit all solicitation on a formerly public street that had been converted into a pedestrian shopping mall.

[157] See Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), on remand 738 F.2d 353 (9th Cir.1984) (ordinance banning the affixing of handbills or signs to utility poles, lamp-posts, trees, hydrants, sidewalks, curbs and other designated objects in public places upheld as reasonably necessary to aesthetic goal of avoiding visual clutter); United Advertising Corp. v. Borough of Metuchen, 42 N.J. 1, 198 A.2d 447 (1964) (total ban on advertising signs); Cromwell v. Ferrier, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967) (upholding limits on location of billboards); Preferred Tires, Inc. v. Village of Hempstead, 173 Misc. 1017, 19 N.Y.S.2d 374 (1940) (upholding ordinance prohibiting signs extending over public ways). Cf. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), on remand 32 Cal.3d 180, 185 Cal.Rptr. 260, 649 P.2d 902 (1982) (seven Justices indicated that a prohibition on outdoor billboards would be upheld, though Court ruled that city could not limit the contents of billboards to commercial messages or permit some noncommercial messages but not others); Department of Transp. v. Shiflett, 251 Ga. 873, 310 S.E.2d 509 (1984) (statute prohibiting erection or maintenance of all outdoor advertising within 660 feet of right-of-way and visible from main travelled part of road held not to violate freedom of expression nor to constitute a taking without just compensation); Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn. 271, 42 N.W.2d 809 (1950) (noting that aesthetic factors may at least play an important and legitimate role in the prohibition of signs overhanging the street); Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn.App.1994), cert. denied 514 U.S. 1036, 115 S.Ct. 1402, 131 L.Ed.2d 289 (1995) (content-neutral ordinance allowing a resident to post one noncommercial opinion sign on his or her property at any time and additional political signs at election season upheld). But see City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), invalidating an ordinance banning residential signs with only narrow exceptions; the ordinance was held to violate residents' right of free speech due to the sweeping nature of the prohibition. Cf. Metromedia, Inc. v. City of San Diego, 32 Cal.3d 180, 185 Cal.Rptr. 260, 649 P.2d 902 (1982) (on remand after U.S. Supreme Court opinion *supra*) (sign ordinance could not be fairly construed so as to preserve its constitutionality where limiting its scope to commercial signs would be inconsistent with ordinance's language and would invite constitutional difficulties with respect to distinguishing between commercial and noncommercial signs); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52 (Colo.1981) (zoning ordinance confining permissible messages on "political" signs to information or advocacy concerning electoral issues and candidates was unconstitutional); State v. Calabria, Gillette Liquors, 301 N.J.Super. 96, 693 A.2d 949 (N.J.Super. Law Div. 1997) (ban on neon signs invalid where no showing that the ban served government interest in aesthetics); Miller v. City of Laramie, 880 P.2d 594 (Wyo.1994) (city may not ban distribution of all non-commercial speech which it views as litter). See generally Kramer, *Members of the City Council v. Taxpayers for Vincent*: A Step Backward for Political Campaigning, 17 Urban Law. 91 (1985).

As to regulation of the distribution of commercial handbills, which is often attempted in order to lessen litter, see Annot., Validity and Construction of Statutes or Ordinances Prohibiting or Restricting Distribution of Commercial Advertising to Private Residences—Modern Cases, 12 A.L.R. 4th 851 (1982), noting a split of authority on the validity of such regulation. See generally Note, Constitutional Law—Municipal Regulation of Commercial Handbilling, 9 Memphis St. U.L. Rev. 661 (1979). See also Comment, Windshield Leafleting Ordinances: A Permissible Use of Local Government Authority?, 79 U. Cinc. L. Rev. 749 (2010).

[158] See State v. Wightman, 78 Conn. 86, 61 A. 56 (1905); City of Nampa v. Swayne, 97 Idaho 530, 547 P.2d 1135 (1976); Ver Hoven Woodward Chevrolet, Inc. v. Dunkirk, 351 Mich. 190, 88 N.W.2d 408 (1958);

§ 23.10 Local Regulation of Noise

As noise has become an increasingly severe problem of modern times, many communities have enacted ordinances regulating the degree of noise allowed in the community and/or banning from the community certain particularly noisy activities. The authority of local governments to enact and enforce such measures has been upheld, so long as the measures are reasonable and are within the powers given those governments by the state.[159] The

Costopoulos v. Zoning Board of Adjustment, 23 Pa.Cmwlth. 159, 351 A.2d 318 (1976). See generally Annot., Validity and Construction of Provision Prohibiting or Regulating Advertising Sign Overhanging Street or Sidewalk, 80 A.L.R.3d 687 (1977); Annot., Validity and Construction of Zoning Ordinance Prohibiting Roof Signs, 76 A.L.R.3d 1162 (1977); Annot., Validity of Regulations Restricting Size of Freestanding Advertising Signs, 56 A.L.R.3d 1207 (1974); Annot., Power of Municipality as to Billboards and Outdoor Advertising, 72 A.L.R. 465 (1931), supplemented 58 A.L.R.2d 1314 (1958). See also Annot., Billboards and Other Outdoor Advertising Signs as Civil Nuisance, 38 A.L.R.3d 647 (1971).

[159] See Ex parte Hall, 50 Cal.App. 786, 195 P. 975 (Dist.Ct.1920) (can be no question of city's authority to enact ordinances designed to prevent boisterous conduct and loud sounds); City of Tampa v. Islands Four, Inc., 364 So.2d 738 (Fla.App.1978); State v. Holland, 132 N.J.Super. 17, 331 A.2d 626 (1975) (upholding ordinance prohibiting unreasonably loud, disturbing, or unnecessary noise); Mister Softee v. Mayor & Council of Hoboken, 77 N.J.Super. 354, 186 A.2d 513 (1962) (citing cases); People v. Matherson, 64 Misc.2d 680, 315 N.Y.S.2d 596 (1970) (upholding ordinance providing that music played in any place of public assembly shall not be so loud as to be audible beyond the premises where the assembly is located); State v. Dorsett, 3 N.C.App. 331, 164 S.E.2d 607 (1968) (ordinance banning loud or unnecessary noise valid as applied to motorcycles); City of Portland v. Aziz, 47 Or.App. 937, 615 P.2d 1109 (1980) (ordinance applied to amplified sounds during specified night-time hours; upheld as reasonable). Cf. Einarsen v. City of Wheat Ridge, 43 Colo.App. 232, 604 P.2d 691 (Colo.App.1979) (noise abatement statute did not forbid residential development of property impacted by excessive noise and was not confiscatory). Noise ordinances have usually withstood constitutional attack. See Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), reh. denied 492 U.S. 937, 110 S.Ct. 23, 106 L.Ed.2d 636 (1989) (municipal noise regulation designed to ensure that music performances in city band-shell did not disturb surrounding residents held not violative of free speech rights of performers); Stokes v. City of Madison, 930 F.2d 1163 (7th Cir.1991) (requirement of a "street use permit" for amplified sound, except during stated hours, held a valid time, place, and manner restriction on expression). But cf. United States Labor Party v. Pomerleau, 557 F.2d 410 (4th Cir.1977) (anti-noise ordinance found too vague and overbroad). Sometimes, the power to control noise is treated as part of the power to enjoin nuisances. See State v. Dorsett, *supra*. Cf. Town of Davis v. Davis, 40 W.Va. 464, 21 S.E. 906 (1895) (town council could abate noisy merry-go-round as nuisance). On noise problems in modern cities, see generally "Crusader for Quiet," Time, Dec. 5, 1969, at 85.

Some aspects of noise control have been pre-empted by the Federal government. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973) (noise made by aircraft in flight); Loma Portal Civic Club v. American Airlines, Inc., 61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548 (1964) (commercial flights conducted in strict compliance with federal regulations may not be enjoined as nuisances). But the city as operator or landlord of an airport may still take steps to lessen noise from aircraft, and may be held liable in tort by neighboring landowners for failure to do so. Greater Westchester Homeowners Association v. City of Los Angeles, 26 Cal.3d 86, 160 Cal.Rptr. 733, 603 P.2d 1329 (1979), cert. denied 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d 22 (observing that city, though to some extent relying on federal advice in operating airport, had not been compelled by federal government to choose particular location for airport or to expand the facility; also, city could install ground barriers to deflect noise, and could condemn an "aircraft noise easement"), noted 12 Urban Law. 617–20 (1980). See Comment, Federal Pre-Emption and Airport Noise Control, 8 Urban L.Ann. 229 (1974); "New Legal Squalls over Jet Noise," Bus.Week, Nov. 24, 1980, at 144. See generally Comment, Noise Pollution: Attempted Federal Control of Airplane Noise, 18 Natural Resources J. 621 (1978). The basic federal statute on noise control—the Noise Control Act of 1972, 42 U.S.C.A. §§ 4901–18—does not pre-empt the field but leaves room for state and local controls. See Note, Environmental Law: The Noise Control Act of 1972, 27 Okl.L.Rev. 55 (1974). On federal preemption see generally Section 7.4 *supra*.

A number of anti-noise ordinances have survived attacks based on vagueness and/or overbreadth. See Munn v. City of Ocean Springs, 763 F. 3d 437 (5th Cir. 2014) (city ordinance prohibiting noise that "annoys a reasonable person of normal sensitivities" is not unconstitutionally vague); Stevens v. Matanuska-Susitna Borough, 146 P.3d 3 (Alaska App. 2006) (did not unduly burden protected speech, and was not vague because it placed specific geographic and time limitations on forbidden noise); State of Idaho v. Medel, 139 Idaho 498, 80 P.3d 1099 (App. 2003) (not overbroad because was content-neutral in restricting all excessive sound levels). But see Survivors Network of Those Abused by Priests v. Joyce, 779 F. 3d 785 (8th Cir. 2015) (state statute prohibiting use of profane discourse, rude or indecent behavior, or making noise in a house of worship violates First Amendment because it attempts to regulate content of speech). See generally Note, A Line in the Sand:

restrictions have been upheld as applied to industrial noise.[160] And the U.S. Supreme Court, while invalidating a total ban on sound trucks,[161] has ruled that reasonable regulations on the intensity, time, and place of operation of such trucks (and of other sound-amplifying equipment) are valid.[162]

Florida Municipalities Struggle to Determine the Line Between Valid Noise Ordinances and Unconstitutional Restrictions, 35 Stetson L. Rev. 461 (2006).

On particular problems of noise regulation at the local level, see Comment, Come On Feel the Noise: The Problem with Municipal Noise Regulation, 15 U. Miami Bus. L. Rev. 47 (2006). Compare Note, The Great Mash Up Debate: A Holistic Approach to Controlling Noise Pollution in Florida's Downtown Districts, 14 Ave Maria L. Rev. 222 (2016). As to attempts to restrict noise in New Orleans, especially on Bourbon Street, see Robertson, In Rowdy New Orleans, a Noisy Fight Over Quiet, N. Y. Times, March 14, 2014, at 1 & 3 (International Ed.). As to New York City, see Hu, Welcome to the City That Never Sleeps (and Never Shuts Up), N.Y. Times, July 20, 2017, at A1 & A20 (city put into effect an overhauled noise code in 2007, but complaints of excessive noise pollution continue to grow). Compare Hoagland, Spaced Out in the City, 79 American Scholar 16 (Summer 2010).

[160] See Singer v. Ben How Realty, 160 Fla. 53, 33 So.2d 409 (1948), reh. denied 160 Fla. 57, 34 So.2d 553 (industries using machinery that makes considerable noise can be restricted to operating in certain hours); Dube v. City of Chicago, 7 Ill.2d 313, 131 N.E.2d 9 (1955), cert. denied 350 U.S. 1013, 76 S.Ct. 658, 100 L.Ed. 873 (upholding ordinance prohibiting factory to be operated or maintained within 200 feet of a residence in such a way that loud and unusual noises were emitted, thus creating a nuisance). Cf. Southern Rock Products Co. v. Board of Zoning Adjustment, 282 Ala. 186, 210 So.2d 419 (1968) (applying ordinance prohibiting uses of property which cause noise, dust, or vibration affecting considerable portion of city). See also Gilbert v. Davidson Construction Co., 110 Kan. 298, 203 P. 1113 (1922) (rock crusher found nuisance—largely on basis of dust created). But cf. Reynolds v. Vulcan Materials Co., 279 Ala. 363, 185 So.2d 386 (1966) (rock-crushing plants could not be entirely prohibited, but could be regulated); In re Kelso, 147 Cal. 609, 82 P. 241 (1905) (rock quarries could not be forbidden in prescribed section of city).

[161] Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948). Cf. City of Eugene v. Powlowski, 116 Or.App. 186, 840 P.2d 1322 (1992) (city ordinance, adopting state statute, which restricted all hornhonking except as a warning invalidated as unconstitutionally overbroad).

[162] Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), reh. denied 336 U.S. 921, 69 S.Ct. 638, 93 L.Ed. 1083, upholding use of words "loud and raucous" as sufficiently clear, without the need for reference to decibel levels. Cf. City of Farmington v. Wilkins, 106 N.M. 188, 740 P.2d 1172 (App. 1987), cert. denied 106 N.M. 174, 740 P.2d 1158 (1987) (conviction of operator of sound truck, broadcasting music, upheld under general noise control ordinances, which made no reference to decibel levels, even though sound was within the permissible decibels specified in another city ordinance). A number of limits on sound trucks and amplifiers—as to hours and places of operation, decibels of sound that may be emitted, etc.—have been upheld in state courts. See Brinkman v. City of Gainesville, 83 Ga.App. 508, 64 S.E.2d 344 (1951) (citing cases); State v. Smedberg, 31 N.C.App. 585, 229 S.E.2d 841 (1976), cert. allowed 291 N.C. 715, 232 S.E.2d 207. But cf. Wollam v. City of Palm Springs, 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481 (1963) (ordinance prohibited use of sound trucks unless they were moving at speed of at least 10 miles per hour; void as unreasonable limit on free speech). See generally Annot., Public Regulation of Use of Sound Trucks in Streets or Highways—Federal Cases, 93 L.Ed. 532 (1950). See also Annot., Public Regulation and Prohibition of Sound Amplifiers or Loudspeaker Broadcasts in Streets or Other Public Places, 10 A.L.R.2d 627 (1950); Annot., Public Regulation of Advertising by Vehicles in Streets or Highways—Federal Cases, 93 L.Ed. 543 (1949). On municipal noise-abatement enactments, see generally Hollister & Leigh, Authority of Municipal Corporations to Abate Unwanted Sounds, 10 Sw.U.L.Rev. 267 (1978); Comment, Toward the Comprehensive Abatement of Noise Pollution: Recent Federal and New York City Noise Control Legislation, 4 Ecology L.Q. 109 (1974); Comment, The New York City Noise Code: Not with a Bang, but a Whisper, 1 Fordham Urban L.J. 446 (1973); Comment, Noise Abatement at the Municipal Level, 7 U.San Francisco L.Rev. 478 (1973). See also Consalo, With the Best of Intentions: First Amendment Pitfalls for Government Regulation of Signage and Noise, 46 Stetson L. Rev. 533 (2017) (part of Local Government Law Symposium, *id.* at 481–626).

In City of Wichita v. Smith, 31 Kan.App.2d 837, 75 P.3d 1228 (2003), it was held that a music club's cabaret license did not exempt it from compliance with the city's noise ordinance. See also Laven, Turn Down the Volume: The Constitutionality of Ohio's Municipal Ordinances Regulating Sound From Car Stereo Systems, 51 Cleveland St. L. Rev. 1 (2004).

Another type of interference, particularly with astronomical activities, that some municipalities are now attempting to regulate is "light pollution." See Note, Light Pollution in the United States: An Overview of the Inadequacies of the Common Law and State and Local Regulation, 36 New England L. Rev. 985 (2002).

Chapter 24

LOCAL CONTROLS ON CRIMINAL ACTIVITY

Analysis

§ 24.1 The Problem of Urban Crime

The definition, prevention, detection, and punishment of criminal activity are all considered primarily functions of the *state,* rather than of local governments. Municipalities thus possess only such powers in this area as are clearly delegated by the state; and municipal police officers actually serve the whole state, not merely their own municipality.[1] State laws defining crimes and their punishment will, in cases of conflict, prevail over municipal laws to the contrary—even municipal laws of home-rule cities.[2] But much of the responsibility for keeping the peace within incorporated areas is commonly delegated to municipalities, and it has generally been held that an express delegation of the police power to a municipality carries with it the implied authority to put such power into effect by using proper means—including the imposition of reasonable penalties—to enforce municipal ordinances.[3]

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[1] See City of Los Angeles v. Gurdane, 59 F.2d 161 (9th Cir.1932); Griffin v. City of Los Angeles, 134 Cal.App. 763, 26 P.2d 655 (Dist.Ct.1933). See generally 56 Am. Jur.2d Municipal Corporations § 131 (1971). See also Miller, Community Rights and the Municipal Police Power, 55 Santa Clara L. Rev. 675 (2015).

[2] See Mayor and Common Council of Prescott v. Randall, 67 Ariz. 369, 196 P.2d 477 (1948) (liquor control); Los Angeles Brewing Co. v. City of Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71 (Dist.Ct.1935) (same); Farmer v. Behmer, 9 Cal.App. 773, 100 P. 901 (Dist.Ct.1909) (prostitution); State ex rel. Smith v. City of International Falls, 132 Minn. 298, 156 N.W. 249 (1916); State v. Linn, 49 Okl. 526, 153 P. 826 (1915) (gambling); Van Gilder v. City of Madison, 222 Wis. 58, 267 N.W. 25 (1936), reh. denied and adhered to 222 Wis. 58, 268 N.W. 108. In Colorado, the state has effectively pre-empted the field as to all acts made criminal by state law; cities (even home-rule cities) cannot provide punishment for such acts. See Gazotti v. City and County of Denver, 143 Colo. 311, 352 P.2d 963 (1960); Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958). On conflicts between state and municipal laws, and on state pre-emption of some fields, see generally Chapter 6 *supra.*

[3] See Ulrich v. City of St. Louis, 112 Mo. 138, 20 S.W. 466 (1892) (an ordinance without a penalty would be nugatory, and thus municipal corporations have implied power to provide for enforcement through fines); City of Detroit v. Fort Wayne & Belle Isle Railway, 95 Mich. 456, 54 N.W. 958 (1893); Ogden v. City of Madison, 111 Wis. 413, 87 N.W. 568 (1901). Cf. Denver City Railway v. City of Denver, 21 Colo. 350, 41 P. 826 (1895) (city has power to prescribe a penalty for failure to pay a lawful license tax); City of Tarkio v. Cook, 120 Mo. 1, 25 S.W. 202 (1894) (charter authorized fines of up to $100; ordinance imposing fine of not less than $25 and not more than $100 held reasonable). Clearly, a municipality in most jurisdictions may be given the power to imprison, for violation of its ordinances, by delegation from the state. In re Guerrero, 69 Cal. 88, 10 P. 261 (1886). But see State ex rel. Keefe v. Schmiege, 251 Wis. 79, 28 N.W.2d 345 (1947) (municipal and county authorities may be given power by state to impose fines, and to imprison in order to enforce fines, but no other power to imprison may be given). Some older authority refused to find *implied* power in a municipality to imprison ordinance-violators, where such power was not clearly spelled out by statute or home-rule charter. See State v. Bright, 38 La.Ann. 1 (1886) (infliction of punishment appertains exclusively to the sovereign). But the modern trend is toward inferring the power to imprison from broad grants of authority to do what is necessary for the general welfare of the municipality. See Dunn v. Mayor and Council of Wilmington, 59 Del.