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***City of Renton v. Playtime Theatres, Inc.:* Court-Approved Censorship Through Zoning**

I. Introduction

On February 25, 1986, in an opinion which only served to further obfuscate the already muddy waters surrounding applicable standards of judicial review for legislation which imposes on constitutionally-protected fundamental rights, the United States Supreme Court handed down its decision in *City of Renton v. Playtime Theatres, Inc.*¹ The *Renton* decision marks another attempt by the Court to balance the power of a municipality to impose zoning regulations aimed at improving the quality of life in a community against the right to freedom of expression guaranteed by the first amendment.² Moreover, *Renton* marks the first time that the Court has upheld the constitutionality of an ordinance which is content-based on its face, which seeks to restrict constitutionally-protected expression, and which effectively imposes a total ban on the restricted expression. In this regard, the *Renton* decision is inconsistent with previous Supreme Court decisions.

In *Renton*, the Court upheld a zoning ordinance which prohibited adult movie theaters³ from locating within 1000 feet of

1. 106 S. Ct. 925 (1986).

2. Prior to *Renton*, the leading case in which the Court was faced with this same issue was *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976). In *Young* the Supreme Court upheld the constitutionality of a Detroit ordinance which prohibited adult movie theaters from locating within 1000 feet of any two other "regulated uses" (i.e., bars, cabarets, and adult bookstores, as well as adult theaters) or within 500 feet of a residential area. *Id.* at 52. The *Renton* majority viewed the decision in *Young* as controlling. 106 S. Ct. at 928. See also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (zoning regulation excluding all live entertainment from borough but allowing a variety of other commercial uses held invalid under first and fourteenth amendments); *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490 (1980) (San Diego sign ordinance imposing a general ban on off-site billboards and limiting the content of on-site billboards to commercial messages held violative of first amendment).

3. The *Renton* ordinance broadly defines an adult movie theater as any enclosed structure used for the presentation of films, video cassettes, cable television, or any other

any residential area, single or multiple-family dwelling, church, park, or school.⁴ According to the Court, the *Renton* ordinance was merely a form of time, place, and manner regulation, aimed not at restricting expression but rather at the "secondary effects" of adult movie theaters on the surrounding community.⁵

Part II of this Note examines in detail the legal background against which *Renton* was decided, including permissible and impermissible restrictions on speech and the distinction between content-based and content-neutral regulation of speech. Part III reviews the factual background of *Renton* and sets forth both Justice Rehnquist's majority opinion and Justice Brennan's forceful dissent.⁶ Part IV analyzes the reasoning behind those opinions and suggests that the Court has significantly relaxed those standards of judicial review traditionally held to be applicable to legislation which imposes restrictions on constitutionally-protected speech.⁷

In Part V, this Note concludes that, even assuming that the *Renton* ordinance was properly viewed as content-neutral, it fails to satisfy the four criteria for determining the constitutional validity of a content-neutral regulation set forth in *United States v. O'Brien*,⁸ and, therefore, should have been

visual media "distinguished or characteri[z]ed by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein." 106 S. Ct. at 927 (citation omitted).

4. *Id.*

5. *Id.* at 928, 929.

6. Justice Rehnquist delivered the opinion of the Court; he was joined by Chief Justice Burger, and Justices White, Powell, Stevens, and O'Connor. Justice Blackmun concurred without opinion. Justice Brennan filed a dissenting opinion, in which Justice Marshall joined.

7. Since the challenged ordinance in *Renton* may properly be viewed as a subject-matter restriction (i.e., a regulation imposed on the basis of subject matter, but not on the basis of message content), and since subject-matter restrictions are neither clearly content-based nor content-neutral, Part IV of this Note examines the *Renton* ordinance under both content-based and content-neutral standards of review. See *infra* notes 23-26 and accompanying text.

8. 391 U.S. 367 (1968). The *O'Brien* Court set forth a four-part analysis for determining the constitutionality of a content-neutral regulation which indirectly restricts speech. *Id.* at 377. First, is the regulation within the constitutional power of the government to enact? Second, does the regulation further a substantial or compelling governmental interest? Third, is the asserted governmental interest unrelated to the suppression of free expression? Fourth, are the incidental restrictions on first amendment freedoms no greater than necessary to effectively further the asserted governmental interest? *Id.* See *infra* notes 64-76 and accompanying text. The tests for determining the

struck down by the Court. This Note rejects the Court's "secondary effects" rationale as a justification for regulations which impose restrictions on expression based on the subject matter of that expression. This Note also concludes that the *Renton* Court failed to adequately examine the City's motives for enacting the challenged ordinance, and that the Court erred by failing to require that the City establish that the ordinance was in fact aimed at furthering some substantial governmental interest.

The danger of the *Renton* decision is that it heralds a movement away from imposing any meaningful standard of judicial scrutiny on legislation which intrudes on fundamental first amendment freedoms. Instead, the Court seems to be headed towards a deferential, "rubber-stamp" approach to this kind of legislation. In *Renton*, the Court effectively abandoned previously-delineated tests for determining the validity of a constitutionally-challenged ordinance.⁹ Such an approach constitutes little more than tacit Court approval of governmental censorship through manipulation of a municipality's zoning power.

II. Background

A. *The Constitutional Right at Stake*

The seeds of the *Renton* controversy date back to 1791 and the adoption of the Bill of Rights. The first amendment reads, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech."¹⁰ Although the express language of the first amendment addresses only *congressional* action, it was held to apply to state and local actions as well in *Gitlow v. New York*.¹¹ Because the freedom to communicate one's ideas without government interference or censorship is held to be so essential to the democratic ideal, legislation which tends to restrict this freedom has traditionally received the strictest scrutiny from the

constitutionality of a content-based regulation are even more demanding. "[W]hether the Court evaluates such [content-based] restrictions by an 'absolute protection' approach, a 'clear-and-present-danger' test, a 'compelling government interest' standard, or some other formulation, it clearly applies a different and more stringent standard to content-based than to content-neutral restrictions." Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 196-97 (1983).

9. For examples of such tests, see *supra* note 8.

10. U.S. CONST. amend. I.

11. 268 U.S. 652, 666 (1925).

Supreme Court.¹²

In its role as the final interpreter of the Constitution,¹³ the Supreme Court has been called upon many times to more precisely define the scope of first amendment protections. "[A]bove all else," claimed Justice Marshall, writing for a unanimous Court¹⁴ in *Police Department of Chicago v. Mosley*,¹⁵ "the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁶ Continuing his broad interpretation of the first amendment, Marshall wrote:

To permit the continued building of our politics and culture, and to assure self-fulfillment for an individual, our people are guaranteed the right to express any thought, free from government censorship. *The essence of this forbidden censorship is content control.* Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁷

While Marshall's opinion in *Mosley* has been criticized as somewhat of an overstatement,¹⁸ it properly identifies the "essence" of the first amendment guarantee of freedom of speech as a prohibition of government regulation based on the *content* of the restricted speech.

12. See *infra* note 27 and accompanying text.

13. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

14. Justice Marshall delivered the opinion of the Court. Justices Blackmun and Rehnquist concurred in the result without opinion. Chief Justice Burger concurred separately in a single paragraph. See *infra* note 18.

15. 408 U.S. 92, 95 (1972) (ordinance permitting some but prohibiting other types of picketing in certain areas on the basis of content held violative of first amendment).

16. "Although this declaration has proved to be somewhat overstated, the Court has been remarkably true to its word, for except when low value speech is at issue, the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century." Stone, *supra* note 8, at 196 (footnotes omitted).

17. 408 U.S. at 95-96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (emphasis added).

18. Chief Justice Burger concurring in *Mosley* warned that "some of the language used in the [majority's] discussion of the First Amendment could, if read out of context, be misleading. . . . [T]he First Amendment does not literally mean that we 'are guaranteed the right to express any thought, free from government censorship.' This statement is subject to some qualifications" 408 U.S. at 102-03 (Burger, C.J., concurring). See *supra* note 16.

Four years after *Mosley*, in *Young v. American Mini-Theatres, Inc.*,¹⁹ the Court sharpened its definition of what constitutes impermissible "content control" by the government. "The essence of that rule [prohibiting regulation based on the content of protected speech] is the need for absolute neutrality by the government," wrote Justice Stevens. "[I]ts regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator."²⁰ The "absolute neutrality" language of *Young* served to leave the door open for government regulation of speech based on the subject matter of that speech, so long as that regulation was viewpoint-neutral.²¹

Though the *Young* Court treated a Detroit zoning ordinance requiring that adult movie theaters be dispersed throughout that city, rather than concentrated in limited areas,²² as essentially content-neutral, the Court in general has been less than consistent regarding whether to treat such subject-matter distinctions as content-based or content-neutral.²³ Since regulations which impose restrictions on an entire category of speech differentiate essentially on the basis of content, such regulations may prop-

19. 427 U.S. 50 (1976).

20. *Id.* at 67. The quoted passage appears in Part III of the Court's opinion. Stevens was joined in Part III by only Chief Justice Burger and Justices White and Rehnquist; Justice Powell declined to join in Part III, and filed a separate opinion concurring in part. Justices Stewart, Blackmun, Brennan, and Marshall dissented.

21. Viewpoint-neutrality is a less rigorous requirement than content-neutrality. For example, suppose that State A enacts an ordinance prohibiting political speech on public streets. Since the ordinance defines the restricted speech on the basis of its content (i.e., its "political" nature), it cannot meet the strict requirement of content-neutrality. However, since the ordinance is silent with regard to any particular viewpoint expressed in the prohibited political speech (i.e., it does not ban only "liberal" or only "conservative" political speech), it fulfills the requirement of viewpoint-neutrality. Subject-matter restrictions, simply stated, are those which differentiate on the basis of content, but not on the basis of viewpoint. See *infra* notes 23-26 and accompanying text.

22. The Detroit ordinance defined adult movie theaters based on the "character" of the films exhibited in those theaters. According to the ordinance, an "Adult Motion Picture Theater" is "[a]n enclosed building . . . used for presenting material distinguished or characterized by the emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' [defined elsewhere in the ordinance] for observation by patrons therein." 427 U.S. at 53 n.5.

23. "[Subject matter restrictions do] not fit neatly within the Court's content-based/content-neutral distinction Such restrictions are directed, not at particular ideas, viewpoints, or items of information, but at entire subjects of expression." Stone, *supra* note 8, at 239.

erly be viewed as content-based.²⁴ However, if the essence of the first amendment proscription on the abridgement of speech is merely the need for "absolute neutrality" on the part of the government (as per *Young*), then a regulation which imposes restrictions on an entire *field* of speech without regard for any particular point of view expressed therein, is properly viewed as content-neutral.²⁵ The significance of this otherwise purely academic exercise is this: if the regulation is content-based, then strict scrutiny will apply; if the regulation is viewed as content-neutral, then a less stringent standard of judicial review will apply.²⁶

Where strict scrutiny applies, a challenged regulation must be the least restrictive means of effectively furthering a substantial or compelling governmental interest in order to pass constitutional muster. Strict scrutiny carries with it a presumption of unconstitutionality; the burden of overcoming that presumption falls on the government or other authority responsible for promulgating the challenged regulation.²⁷ The Court has also defined several less stringent standards of review. Under an "intermediate" standard of review, a challenged regulation must be

24. See *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 447 U.S. 530 (1980) (regulation prohibiting utility from inserting in monthly bills literature discussing controversial public policy issues held violative of first amendment); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (ordinance prohibiting drive-in theaters from exhibiting films containing nudity struck down on first amendment grounds); *Mosley*, 408 U.S. 92.

25. See *Greer v. Spock*, 424 U.S. 828 (1976) (prohibition of political speech on military bases upheld by Court); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (prohibition of political advertising on city-owned buses upheld by Court).

26. Professor Stone explains why the subject-matter issue has "baffled" the Court: The confusion generated by subject-matter restrictions is hardly surprising, for such restrictions fall between viewpoint-based and content-neutral restrictions, sharing some of the characteristics of each. On the one hand, subject-matter restrictions are directed, not at particular ideas, viewpoints, or items of information, but at entire subjects of expression. They are thus less likely than viewpoint-based restrictions to distort public debate in a viewpoint-differential manner, to implicate constitutionally disfavored justifications, or to be the product of improper motivation. On the other hand, subject-matter restrictions are expressly directed at particular subjects. They are thus narrower than content-neutral restrictions, and more likely than content-neutral restrictions to threaten the concerns underlying the content-based/content-neutral distinction.

Stone, *supra* note 8, at 240-42 (footnotes omitted).

27. J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* § 14.3, at 530-31 (1986).

substantially related to an important governmental interest.²⁸ Finally, where “mere rationality” is determined to be the appropriate standard of review, a regulation will survive if it bears some minimal rational relationship to a legitimate governmental interest.²⁹

B. *Permissible Content-Based Restrictions on Speech*

Despite the presumption of unconstitutionality usually accorded content-based regulations by the Court,³⁰ there are several types of situations in which such content-based regulations will usually be upheld.³¹ The Court has long held, for example, that certain kinds of speech are “unprotected”; that is, they derive no security from the language or spirit of the Constitution. In *Chaplinsky v. New Hampshire*,³² the Court, per Justice Murphy, stated:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any expression of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.³³

In 1957, the Supreme Court specifically held that obscenity “was not within the area of constitutionally-protected speech.”³⁴ Sixteen years later, in *Paris Adult Theatre I v. Slaton*,³⁵ the Burger Court elaborated on that position, claiming that regula-

28. *Id.* at 531-32.

29. *Id.* at 530.

30. See *Carey v. Brown*, 447 U.S. 455, 462-63 & n.7 (1980) (statute prohibiting some but permitting other kinds of picketing on the basis of content held violative of first amendment); *Mosley*, 408 U.S. 92, 95, 98-99.

31. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 582 (1978).

32. 315 U.S. 568 (1942).

33. *Id.* at 571-72.

34. *Roth v. United States*, 354 U.S. 476, 485 (1957) (state and federal obscenity statutes upheld against claims that first amendment protects obscene materials).

35. 413 U.S. 49 (1973) (first amendment allows state regulation of obscene films exhibited at adult movie theaters).

tion of obscene materials serves legitimate state interests in maintaining "the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself."³⁶ The test for determining whether particular expressive activity qualifies as "obscene" was developed in *Miller v. California*,³⁷ a companion case to *Paris Adult Theatre I v. Slaton*.

The *Miller* obscenity test calls for a weighing of three inter-related inquiries. First, would an "average" person,³⁸ applying contemporary community standards,³⁹ find that the expression, taken as a whole, appeals to the "prurient interest"?⁴⁰ Second, does the expression depict or describe, in a "patently offensive" way,⁴¹ sexual conduct specifically defined by the applicable state law? Finally, does the expression, taken as a whole, lack serious literary, artistic, political, or scientific value?⁴² Material which qualifies as obscene expression under *Miller* is not entitled to first amendment protection;⁴³ content-based regulation of this material is, therefore, constitutionally permissible.⁴⁴

Even where the regulated speech is otherwise constitutionally protected, content-based regulations will be upheld where those regulations can survive examination under a standard of

36. *Id.* at 58.

37. 413 U.S. 15 (1973) (mailing of materials determined to be obscene not protected by first amendment).

38. The Court added meat to the bones of the *Miller* obscenity test several years later, in *Smith v. United States*, 431 U.S. 291 (1977). "[O]bscenity," said the *Smith* Court, "is to be judged according to the average person in the community, rather than the most prudish or the most tolerant." *Id.* at 304.

39. "[C]ommunity standards . . . provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness." *Id.* at 302.

40. The *Roth* Court defined "prurient interest" as a morbid or lascivious (but *not* a normal) interest in sex. 354 U.S. at 487 & n.20.

41. In *Miller*, the Court characterized the "patently offensive" as that which "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency." 413 U.S. at 31.

42. *Id.* at 24.

43. Note, however, that the *Miller* Court viewed their three-pronged test as limiting "obscene" expression to hard-core pornography. *Id.* at 27.

44. In other words, since material determined to be obscene under *Miller* derives no protection from the first amendment, a state may regulate or even prohibit such material without running afoul of the Constitution. Since the restricted material is unprotected, the state need not meet even the minimal requirements of "mere rationality." See *supra* note 29 and accompanying text.

strict judicial scrutiny; that is, content-based regulations on speech are permissible *if* they are narrowly-tailored to effectively further an overriding or compelling governmental interest.⁴⁵ In such cases, a "heavy burden of justification" is on the state to show that the challenged regulation is the least intrusive means of achieving the asserted compelling state interest.⁴⁶ The reviewing court in each case must effect an ad hoc "balancing test" approach, weighing the extent of the restriction on speech against the importance of the governmental interest at stake.

In *Consolidated Edison Company of New York, Inc. v. Public Service Commission*,⁴⁷ the Supreme Court, per Justice Powell, explained the necessity of strict judicial scrutiny for content-based regulations. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'"⁴⁸ Applying that standard of review, the *Con Ed* Court invalidated a New York Public Service Commission order prohibiting public utility companies from enclosing in monthly bills inserts which discuss controversial issues of public policy.⁴⁹

When the Court, then, perceives a regulation to be clearly content-based (and *not* within the "gray area" of subject-matter restrictions⁵⁰), it will properly evaluate that regulation under the "bright light" of strict judicial scrutiny.⁵¹ The state will then be required to overcome the presumption of unconstitutionality properly accorded legislation which infringes on fundamental rights guaranteed by the Constitution.⁵²

45. See *supra* note 27 and accompanying text.

46. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973) (strict scrutiny generally appropriate where fundamental constitutional rights are at stake, or where regulation is based on a "suspect" classification, such as race).

47. 447 U.S. 530 (1980).

48. *Id.* at 536 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

49. *Id.* at 544.

50. See *supra* note 23.

51. See *Erznoznik*, 422 U.S. 205; *Mosley*, 408 U.S. 92.

52. Professor Stone comments on the more rigorous standards clearly imposed by the Court in reviewing content-based regulations: "whether the Court evaluates such restrictions by an 'absolute protection' approach, a 'clear-and-present danger' test, a 'compelling government interest' standard, or some other formulation, it clearly applies a different and more stringent standard to content-based than to content-neutral restric-

C. Content-Neutral Restrictions on Speech

Traditionally, regulations which are clearly content-neutral (again, and *not* within the "gray area" of subject-matter restrictions⁵³) have proven to be less difficult for the Court to uphold. Still, a regulation which is content-neutral is subject to judicial review if it imposes indirect burdens on speech.⁵⁴ According to Professor Stone:

The Court's primary concern in the content-neutral realm is that such restrictions, by limiting the availability of particular means of communication, can significantly impair the ability of individuals to communicate their views to others. This is, of course, a central first amendment concern, for to the extent that content-neutral restrictions actually reduce the total quantity of expression, they necessarily undermine the "search for truth," impede meaningful participation in "self-governance," and frustrate individual "self-fulfillment."⁵⁵

The appropriate level of judicial review applicable to content-neutral regulations which impose indirect burdens on speech may be difficult to accurately ascertain.⁵⁶ It is generally agreed, however, that the Court applies a somewhat more lenient standard of judicial review to content-neutral than to content-based regulations.⁵⁷

tions." Stone, *supra* note 8, at 196-97. See also Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 121 (1981) (noting that "proponents of the content distinction advocate considerably stricter levels of judicial review for content-based than for content-neutral regulations").

53. See *supra* note 23.

54. *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961) (a majority of the Court (5-4) upheld California's denial of bar admission to an applicant who had refused to answer questions about Communist Party membership).

55. Stone, *supra* note 8, at 192-93 (footnotes omitted).

56. The Supreme Court has developed a number of different tests (whose criteria overlap significantly) for determining the constitutionality of content-neutral regulations which impose indirect burdens on speech. The most popular of these approaches is the four-part analysis developed in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See *infra* notes 64-76 and accompanying text. The waters are muddied even further by the application of these tests by the Court in various cases. Though the tests generally suggest some "intermediate" standard of review for content-neutral regulations, the Court in practice appears to fluctuate between this middle level of scrutiny and an even less-demanding "mere rationality" standard of review for determining the constitutionality of content-neutral regulations. See *supra* notes 28-29 and accompanying text.

57. While both Stone and Redish recognize that the Court has traditionally applied a more stringent standard of judicial review to content-based regulations and a more

With regard to the level of scrutiny due content-neutral regulations, some jurists argue for the existence of a "hierarchy of First Amendment values."⁵⁸ This position, which has not yet won majority support in the Supreme Court, claims that the judiciary may assign relative social value or importance to a particular kind of speech and protect (or deny protection to) such speech in accordance with its assigned value.⁵⁹ In *Young v. American Mini-Theatres, Inc.*,⁶⁰ Justice Stevens, in a section of his opinion in which he was joined by only three Justices,⁶¹ stated unequivocally that non-obscene erotic expression should enjoy a lesser degree of first amendment protection than should political speech.

Even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, *it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment.* Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.⁶²

lenient standard of judicial review to content-neutral regulations, however, Redish denies the utility of this distinction. Redish proposes a unified approach with a single "compelling interest" standard used to determine the constitutionality of both content-based and content-neutral regulations. Redish, *supra* note 52, at 150.

58. *FCC v. Pacifica Foundation*, 438 U.S. 726, 746 (1978) (FCC may properly sanction radio stations broadcasting profane, indecent, or obscene material).

59. Moreover, the "social value" of speech may vary according to the surrounding circumstances. Similarly, the constitutional protection afforded "low value" speech may vary, depending on the context. *Id.* at 747-48.

60. 427 U.S. 50 (1976). See *supra* notes 19-22 and accompanying text.

61. See *supra* note 20.

62. 427 U.S. at 70-71 (emphasis added). "Voltaire's immortal comment," referred to by Stevens, is: "I disapprove of what you say, but I will defend to the death your right to say it." S. TALLENTYRE, *THE FRIENDS OF VOLTAIRE* 199 (1907), quoted in *Young*, 427 U.S. at 63.

The corollary of this hierarchical approach to speech values may well be a diminution in the degree of judicial scrutiny applicable to regulations of speech which is, in the eyes of the Court, of low social value.⁶³

The most frequently used test for determining the constitutionality of content-neutral regulations that indirectly restrict freedom of speech was developed in 1968 in *United States v. O'Brien*.⁶⁴ As early as 1939, however, the Court recognized the need for an *O'Brien*-type approach. Justice Roberts, writing for the majority in *Schneider v. State*,⁶⁵ noted that:

Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify . . . [regulation which] diminishes the exercise of rights . . . vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [first amendment] rights.⁶⁶

The Court has held the *O'Brien* test applicable to zoning regulations which impose incidental restrictions on first amendment rights.⁶⁷

In its purest form, the *O'Brien* test weighs the answers to four distinct but interrelated questions to determine whether a content-neutral restriction on speech is permissible under the Constitution. First, is the regulation within the constitutional power of the government to enact?⁶⁸ Second, does the regulation

63. *But see* *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-15 (1981) (city may not distinguish between the relative values of different categories of non-commercial speech and thereby choose "appropriate subjects for public discourse").

64. 391 U.S. 367 (1968) (statute punishing willful destruction of draft cards upheld against claim that draft card burning is symbolic speech protected by the first amendment).

65. 308 U.S. 147 (1939) (government's interest in preventing littering held insufficient to justify a ban on the distribution of leaflets).

66. *Id.* at 161.

67. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984) (ordinance prohibiting posting of signs on public property upheld, using *O'Brien* criteria).

68. This initial inquiry is so basic and so rarely dispositive of any real issue that many jurists (and many scholars) simply ignore it.

further a substantial or compelling governmental interest?⁶⁹ Third, is the asserted governmental interest unrelated to the suppression of free expression?⁷⁰ Fourth, is the incidental restriction on first amendment freedoms no greater than is essential to the furtherance of the asserted governmental interest?⁷¹

Despite its apparent simplicity, the *O'Brien* test may actually raise more questions than it answers. For example, what constitutes a governmental interest properly characterized as "substantial," "compelling," "subordinating," "paramount," "co-gent," or "strong"?⁷² To what extent must the state demonstrate that such an interest actually exists?⁷³ Are the second and fourth tiers of the *O'Brien* analysis to be considered independently, or must the Court consider "whether the asserted governmental interest [tier two] is sufficiently 'substantial' to justify the 'incidental' impact on free expression [tier four]"?⁷⁴ Does this latter approach effect an ad hoc balancing, similar to what is required for judicial review of content-based regulations?⁷⁵ Or are the *O'Brien* criteria merely a ritual for "rubber-stamping" regulations which intrude on fundamental rights guaranteed by

69. Properly read, this second tier of *O'Brien* actually raises two issues. First, is the asserted governmental interest "substantial" or "compelling"? Second, does the regulation in question actually serve to further that interest? If this second half of the two-tier inquiry is ignored by the Court, fundamental rights may fall to a regulation substantially unrelated to its purported goal.

70. The third tier of the *O'Brien* analysis ensures that there is no "hidden agenda" lurking behind an innocuous-looking regulation — i.e., that the asserted governmental interest is not merely a pretext for allowing the state to unconstitutionally regulate or restrict speech.

71. 391 U.S. at 377.

72. *Id.* at 376-77. "To characterize the quality of governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." *Id.*

73. Again, the issue here is the possibility of pretext. See *supra* note 70. Is it enough for the state to simply say that their interest is real and substantial, or must it affirmatively show the existence of such an interest (i.e., through studies identifying the state's particular problem, or by presenting evidence of an overall plan or scheme designed to further the alleged state interest)?

74. Redish, *supra* note 52, at 127.

75. Recall that, where a regulation is viewed as content-based and where the speech restricted is *not* unprotected speech, see *supra* text accompanying note 32, the regulation will be constitutionally permissible only if it is narrowly-tailored to effectively further an overriding or compelling state interest. A reviewing court must weigh the extent of the restriction on speech against the importance of the governmental interest at stake. See *supra* text accompanying note 27.

the Constitution? At least one critic of the content restriction thinks so.⁷⁶

III. *City of Renton v. Playtime Theatres, Inc.*

A. *The Facts*

Renton, Washington, is a small city with a population of 32,000 people located approximately fifteen miles southeast of Seattle.⁷⁷ In May of 1980, the Mayor of Renton addressed the Renton City Council and requested that it consider enacting zoning legislation specifically addressed to the regulation of "adult entertainment uses." This request was made notwithstanding the fact that no such uses existed in Renton at that time.⁷⁸

The City Council referred the matter to Renton's Planning and Development Committee for further consideration. The Planning and Development Committee held public hearings on the subject of adult entertainment in Renton,⁷⁹ and "[w]hile none of this testimony was ever recorded or preserved, a city official reported that residents . . . objected to having adult movie theaters located in their community."⁸⁰ The committee also purportedly considered the recent experiences of Seattle⁸¹ and other cities⁸² with regard to adult entertainment uses.⁸³ Additionally, the committee received a report from the City Attorney's Office advising it of pertinent developments in other

76. See Redish, *supra* note 52, at 127 (inefficacy of *O'Brien* analysis for content-neutral regulations).

77. 106 S. Ct. 925, 927 (1986).

78. *Id.*

79. *Id.*

80. *Id.* at 935 (Brennan, J., dissenting). Notably, the city official referred to was "unable to recount any testimony as to how adult movie theaters would specifically affect the schools, churches, parks, or residences 'protected' by the ordinance." *Id.*

81. See *Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978) (adult theater zoning ordinance, supported by extensive research on City's part regarding effects of adult theaters on surrounding communities, upheld), *cert. denied*, 441 U.S. 946 (1979).

82. See *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

83. 106 S. Ct. at 927. Justice Brennan, however, writing in dissent in *Renton*, claimed that the City "never actually reviewed any of the studies conducted by [Seattle or Detroit]." Moreover, Renton had no basis for determining whether the Seattle or Detroit findings were "relevant to Renton's problems or needs." *Id.* at 936 (Brennan, J., dissenting) (emphasis in original).

cities.⁸⁴

Meanwhile, the Renton City Council adopted Resolution No. 2368, which imposed a general moratorium on the licensing of businesses engaged primarily in the selling, renting, or exhibition of sexually explicit materials.⁸⁵ The resolution was enacted to prevent the severe negative impact such adult entertainment uses would presumably have upon surrounding business and residences.⁸⁶

In April, 1981, the City Council enacted Ordinance No. 3526, a zoning regulation prohibiting any adult movie theater from locating within 1000 feet of any residential area, single or multiple-family dwelling, church, or park, or within one mile of any school.⁸⁷ (Later, the City Council amended Ordinance No. 3526 to reduce the minimum distance allowable between an adult movie theater and any school to 1000 feet.⁸⁸) The ordinance referred only to adult movie theaters; it did not extend to adult bookstores, topless bars, massage parlors, or any other potentially deleterious adult entertainment uses. According to the ordinance, an adult movie theater was any "enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein."⁸⁹ The effect of the newly-enacted zoning ordinance was to eliminate approximately ninety-five percent of the total land area of the City of Renton as potential sites for adult movie theaters.⁹⁰

In early 1982, Playtime Theatres, Inc. acquired two existing

84. 106 S. Ct. at 927.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* For additional information on the interim amendment process, see *infra* note 99 and accompanying text.

89. 106 S. Ct. at 927.

90. *Id.* at 938 (Brennan, J., dissenting). Justice Brennan noted that at trial the district court found that the Renton ordinance left approximately 520 acres, or about five percent of the total land area of the City of Renton, available for adult theater sites. Justice Brennan also noted, however, that "because much of this land was already occupied, '[l]imiting adult theater uses to these areas is a substantial restriction on speech.'" *Id.* (quoting *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984)).

theaters in downtown Renton with the intention of using them to exhibit adult motion pictures.⁹¹ The exhibition of such films in the two theaters was proscribed, however, by Ordinance No. 3526. Playtime Theatres, Inc. filed suit against the City of Renton in Federal District Court for the Western District of Washington, alleging that the zoning ordinance regulating the location of adult movie theaters was in violation of the guarantees of the first⁹² and fourteenth⁹³ amendments to the Constitution.⁹⁴ In addition, Playtime Theatres, Inc. sought declaratory and injunctive relief against enforcement of the ordinance. After obtaining a preliminary injunction from the district court,⁹⁵ Playtime Theatres, Inc. began exhibition of adult films at its two theaters in downtown Renton.⁹⁶

B. *Procedural History*

Shortly after Playtime Theatres, Inc. began exhibiting adult films in its two Renton theaters, both parties agreed to submit the case to the Federal District Court for the Western District of Washington for a final decision regarding whether a permanent injunction against enforcement of the ordinance should issue.⁹⁷ By this time, the City had amended the challenged ordinance in several important respects, reducing the minimum distance permissible between an adult movie theater and any school to 1000 feet,⁹⁸ and adding a statement of reasons for enactment of the ordinance.⁹⁹

91. 106 S. Ct. at 927.

92. The first amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

93. The fourteenth amendment provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

94. 106 S. Ct. at 927.

95. *Id.* The action was referred to a federal magistrate, who recommended the entry of a preliminary injunction against the enforcement of Ordinance No. 3526. The magistrate also recommended the denial of the City's motions to dismiss and for summary judgment. The district court adopted all of the magistrate's recommendations. *Id.*

96. *Id.*

97. *Id.* at 927-28.

98. See *supra* note 88 and accompanying text.

99. 106 S. Ct. at 927. Note that when the case reached the Supreme Court, Justice

The district court vacated the preliminary injunction, denied Playtime Theatres, Inc.'s request for a permanent injunction, and entered summary judgment for the City.¹⁰⁰ The district court found, inter alia: that the challenged ordinance did not impose substantial restrictions on speech;¹⁰¹ that the City was not required to demonstrate "specific adverse impact on Renton from the operation of adult theaters," but could reasonably rely on the experiences of other cities with regard to adult theaters;¹⁰² that the purposes of the Renton ordinance were unrelated to the suppression of free expression;¹⁰³ and that the restrictions on speech were no greater than necessary to further the asserted substantial governmental interests.¹⁰⁴ These findings clearly indicate that the district court relied on its interpretation of the four-part analysis developed in *United States v. O'Brien*¹⁰⁵ to declare the Renton ordinance constitutionally sound.¹⁰⁶

On appeal by Playtime Theatres, Inc., the Court of Appeals for the Ninth Circuit reversed the decision of the district court.¹⁰⁷ Also relying on the test set forth by the Supreme Court

Brennan, writing in dissent, expressed concern over the "suspiciously coincidental timing" of the interim amendments, adopted while the case was still before the district court. Brennan also expressed doubts as to the reliability of the City Council's "findings" (incorporated within the amendments) with regard to the "secondary effects" of adult movie theaters on the surrounding community. *Id.* at 935-36 (Brennan, J., dissenting).

100. 106 S. Ct. at 928.

101. *Id.* The district court found that the ordinance left approximately 520 acres, or about five percent of the total land area of Renton, available for adult theater uses. Those 520 acres, according to the court, consisted of "[a]mple, accessible real estate," including 'acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.'" *Id.* at 932 (citation omitted). *But see supra* note 90 and accompanying text.

102. *See supra* notes 81-82 and accompanying text.

103. 106 S. Ct. at 928. The district court concluded that the Renton ordinance was aimed

not at the *content* of the films shown at "adult motion picture theaters," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate concerns*" were with the secondary effects of adult theaters, and not with the content of adult films themselves.

Id. at 929 (citation omitted).

104. *Id.* at 928.

105. 391 U.S. 367 (1968). *See supra* notes 64-76 and accompanying text.

106. 106 S. Ct. at 928.

107. *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984).

in *O'Brien*,¹⁰⁸ the court of appeals held: that the Renton ordinance in fact constituted a substantial restriction on speech;¹⁰⁹ that the City could not properly rely on the experiences of other cities in lieu of specific evidence with regard to the effects of adult theaters on Renton;¹¹⁰ that the City failed to adequately demonstrate the existence of a substantial or compelling governmental interest;¹¹¹ and that the City did not sufficiently show that its asserted interests were in fact unrelated to the suppression of free expression.¹¹² The court of appeals remanded the case to the district court for reconsideration of the City's asserted substantial governmental interests, and the City subsequently appealed to the Supreme Court.¹¹³

C. *The Supreme Court Opinions*

1. *The Majority*

On appeal to the Supreme Court, the majority, led by Justice Rehnquist,¹¹⁴ reversed the judgment of the court of appeals and held the Renton ordinance to be constitutionally sound.¹¹⁵ The majority based its decision largely upon Justice Stevens' opinion in *Young v. American Mini-Theatres, Inc.*¹¹⁶ Relying on

108. 391 U.S. 367 (1968). See *supra* notes 64-76 and accompanying text.

109. 748 F.2d at 534. The court of appeals concluded that little if any of the remaining purportedly "available" land was suitable for adult movie theaters; therefore, the ordinance imposed a substantial restriction on this type of expression. *Id.*

110. *Id.* at 537. The court of appeals ruled that, in the absence of studies specifically relating to "the particular problems or needs of Renton," the justifications advanced by the City were "conclusory and speculative," and, therefore, wholly insufficient to sustain the ordinance under *O'Brien*. *Id.* at 537-38.

111. *Id.* at 537. The City's failure to prove the existence of the necessary substantial or compelling governmental interest is at the heart of the court of appeals' opinion in this case. Significantly, the court of appeals remanded the case to the district court for reconsideration of this issue *in spite of* the other findings of the court of appeals which clearly indicated the impermissibility of the ordinance under *O'Brien*. *Id.* at 537-38. See *supra* notes 69 & 73.

112. 748 F.2d at 537. The court of appeals held that, if "a motivating factor" in enacting the ordinance was to restrict first amendment rights, then the ordinance is unconstitutional, no matter how small a part such motivating factor may have played in the City's decision and no matter how many other constitutionally acceptable motivations entered into the decision-making process. *Id.* (emphasis in original).

113. *Id.* at 538.

114. See *supra* note 6.

115. 106 S. Ct. at 932-33.

116. 427 U.S. 50 (1976). See *supra* notes 19-22 and accompanying text.

Young, the *Renton* majority first held that, since the ordinance does not impose a total ban on adult movie theaters, it is properly analyzed as a form of time, place, and manner regulation.¹¹⁷ The majority then noted that such time, place, and manner regulations are constitutionally permissible if "they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."¹¹⁸

Moreover, the *Renton* majority, although recognizing that "the *Renton* ordinance . . . does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category,"¹¹⁹ agreed with the district court that the City Council's "predominate concerns" were with the *secondary effects* of adult movie theaters on the surrounding community, and not with the *content* of the films themselves.¹²⁰ Consequently, the Court held that, since the City's pursuit of its zoning interests is wholly unrelated to the suppression of free expression, the ordinance is "justified without reference to the content of the regulated speech,"¹²¹ and, therefore, is properly viewed as content-neutral.¹²²

The *Renton* majority further held that the challenged ordinance was in fact designed¹²³ to serve a substantial governmen-

117. 106 S. Ct. at 928.

118. *Id.* Note the softening of the language of the original criteria used in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). For a discussion of the *O'Brien* criteria, see *supra* notes 69, 71 and accompanying text. See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1975) (statute prohibiting pharmacists from advertising prescription drug prices held to be violative of first amendment, applying criteria similar to those used in *O'Brien*). Instead of demanding whether the ordinance "furthers an important or substantial governmental interest," Justice Rehnquist frames the inquiry as whether the ordinance is "*designed* to serve a substantial governmental interest" (emphasis added). Similarly, Justice Rehnquist asks not whether "ample alternative channels for communication [are left open]," but rather whether the ordinance "unreasonably limit[s]" such alternative channels. 106 S.Ct. at 928. These distinctions are subtle but important, as is evidenced by the outcome in this case.

119. 106 S. Ct. at 929. See *supra* notes 23-26 and accompanying text.

120. 106 S. Ct. at 929. The Court noted further that "[t]he ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* (citation omitted).

121. 425 U.S. at 771.

122. 106 S. Ct. at 929.

123. See *supra* note 118.

tal interest, i.e., the preservation of the quality of life in the community.¹²⁴ The Court recognized that the ordinance was enacted without the benefit of studies conducted by and for the City of Renton, and relating specifically to Renton's particular problems and needs. However, the majority held that the City could reasonably rely on the experiences of other cities and on the studies conducted in those other cities in drafting its own adult theater zoning ordinance.¹²⁵

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.¹²⁶

The Court found the *method*¹²⁷ chosen by the City to advance its substantial interests (i.e., concentration of adult movie theaters in given areas, rather than their dispersion throughout the City) to be constitutionally permissible.¹²⁸ Additionally, the majority rejected the theater owners' claim that the ordinance fails for "underinclusiveness."¹²⁹ Although the ordinance regulates only adult movie theaters and places no restrictions whatsoever on other "adult" businesses,¹³⁰ the majority explained that:

There is no evidence that, at the time the Renton ordinance was

124. 106 S. Ct. at 930.

125. *Id.* at 930-31. The City was ostensibly relying here on the experiences of two other cities in particular: Seattle and Detroit. See *Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978), *cert. denied*, 441 U.S. 946 (1979); *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

126. 106 S. Ct. at 931.

127. The fact that Renton ultimately chose a different method of adult theater zoning than that chosen by either Seattle or Detroit (the cities upon whose studies Renton purportedly relied in drafting its own adult theater zoning ordinance) was held by the *Renton* Court to be constitutionally irrelevant. *Id.*

128. *Id.*

129. "Underinclusiveness" occurs when legislation which classifies for the purpose of correcting some evil or social problem only affects a fraction of the class actually causing that problem. See *Tussman & tenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347-48 (1949). In *Renton*, the adult theater owners argued that the ordinance fails for underinclusiveness because it singles out adult movie theaters for regulation while leaving other equally deleterious "adult" uses, such as adult bookstores, topless bars, and massage parlors, unregulated. 106 S. Ct. at 931.

130. 106 S. Ct. at 931.

enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that "the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials." That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has "singled out" adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters.¹³¹

Finally, the *Renton* majority held that the challenged ordinance allows for reasonable alternative channels for communication of the restricted expression.¹³² The 520 acres of remaining available land in Renton, untouched by the strictures of the adult theater zoning ordinance, were found by the majority to consist of "[a]mple, accessible real estate."¹³³ The majority rejected Playtime Theatres, Inc.'s contention that little if any of this land is in fact "available" to them, and that the ordinance effectively bans adult movie theaters in Renton.¹³⁴ The Court concluded that the inequities of an open real estate market hardly give rise to a first amendment violation,¹³⁵ that "the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city," and that Renton's adult theater zoning ordinance "easily meets this [constitutional] requirement."¹³⁶

131. *Id.* at 931-32 (citations omitted).

132. *Id.* at 932.

133. *Id.* The Court simply accepted the findings of the district court on this point. See *supra* note 101.

134. 106 S. Ct. at 932.

135. *Id.* The majority, in a near-belligerent tone, stated that, "although we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to lawful speech,' we have never suggested that the First Amendment compels the Government to ensure that adult theaters . . . will be able to obtain sites at bargain prices." *Id.* (citations omitted).

136. *Id.*

2. *The Dissent*

Justice Brennan, writing in dissent in *Renton*,¹³⁷ advanced two separate arguments as to why the challenged ordinance is clearly unconstitutional under the first amendment.¹³⁸ First, Justice Brennan argued, the ordinance is content-based, and, therefore, is not properly analyzed as a content-neutral time, place, and manner restriction on speech.¹³⁹ That an ordinance *may* in fact be directed at the secondary effects of adult movie theaters on a surrounding community does *not* “magically” transform that ordinance from a content-based into a content-neutral regulation.¹⁴⁰ Moreover, wrote Justice Brennan, “[b]ecause the ordinance imposes special restrictions on certain kinds of speech on the basis of *content*, I cannot simply accept . . . Renton’s claim that the ordinance was not designed to suppress the content of adult movies.”¹⁴¹

Justice Brennan reasoned that, because the ordinance is content-based, the City’s motives for enactment “must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s views.’”¹⁴² He rejected the “secondary effects” justification offered by the City and unquestioningly adopted by the majority, arguing that:

Other motion picture theaters and other forms of “adult entertainment,” such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the “secondary effects” associated with adult businesses, but in discriminating against adult movie theaters based

137. *Id.* at 933-38 (Brennan, J., dissenting). Justice Brennan was joined in the dissent by Justice Marshall.

138. *Id.* at 933.

139. *Id.* at 933-34. See *supra* notes 45-52 and accompanying text (content-based regulations), and notes 64-76 and accompanying text (content-neutral regulations).

140. 106 S. Ct. at 933-34 (Brennan, J., dissenting). Justice Brennan has regularly opposed the Court’s treatment of subject-matter restrictions as content-neutral on the theory that such restrictions are neutral with regard to the particular *viewpoint* being expressed. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298, 316 (1974) (Brennan, J., dissenting); see also *supra* notes 23-26.

141. 106 S. Ct. at 934 (Brennan, J., dissenting) (emphasis in original).

142. *Id.* (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

on the content of the films they exhibit.¹⁴³

The dissent criticized the "suspiciously coincidental timing" of the City's amendments to the challenged ordinance,¹⁴⁴ and noted that many of the City Council's alleged "findings" (with regard to the secondary effects of adult movie theaters on surrounding communities) contained therein constitute little more than "expressions of dislike for the subject matter."¹⁴⁵ Justice Brennan added that these "findings," made without benefit of research studies or expert testimony on the issue, are not really "'findings' at all, but purely speculative conclusions."¹⁴⁶ Finally, Justice Brennan rejected the majority's conclusion that Renton was entitled to rely, without more, on studies conducted in other cities¹⁴⁷ in drafting its own adult theater zoning ordinance.¹⁴⁸

Justice Brennan's second argument in dissent claimed that, even if the Renton ordinance is properly viewed as content-neutral, it is still unconstitutional under the standards previously established by the Supreme Court.¹⁴⁹ Relying on the test set forth in *Heffron v. International Society for Krishna Consciousness, Inc.*¹⁵⁰ (a variant of the *O'Brien* analysis¹⁵¹), Justice Bren-

143. 106 S. Ct. at 934 (Brennan, J., dissenting). In the same context, Justice Brennan also commented on the City's failure to justify treating adult theaters differently from other, equally deleterious "adult" businesses. This "underinclusiveness," Justice Brennan claimed, "is cogent evidence that [the Renton ordinance is] aimed at the content of the films shown in adult movie theaters." *Id.* at 934-35 (emphasis in original). See *supra* note 129 and accompanying text.

144. 106 S. Ct. at 935 (Brennan, J., dissenting).

145. Justice Brennan adopted the opinion of the court of appeals on this point. *Id.* (quoting *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 537 (9th Cir. 1984)).

146. 106 S. Ct. at 936 (Brennan, J., dissenting).

147. See *supra* note 125.

148. 106 S. Ct. at 936 (Brennan, J., dissenting). According to Justice Brennan: [E]ven assuming that Renton was concerned with the same problems as Seattle and Detroit, it never actually reviewed any of the studies conducted by those cities. Renton had no basis for determining if any of the "findings" made by these cities were relevant to Renton's problems or needs . . . Renton cannot merely rely on the general experiences of Seattle or Detroit, for it must "justify its ordinance in the context of Renton's problems — not Seattle's or Detroit's problems." *Id.* (quoting *Playtime Theatres*, 748 F.2d at 536) (emphasis in original) (footnotes omitted).

149. 106 S. Ct. at 933, 937 (Brennan, J., dissenting).

150. 452 U.S. 640 (1981) (ordinance placing restrictions on solicitation within state fairgrounds upheld). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (prohibition against sleeping in public parks held not to violate first amendment rights of demonstrators who wanted to sleep in parks as a form of symbolic expression).

151. 391 U.S. 367, 377 (1968). See *supra* notes 64-76 and accompanying text.

nan argued that the Renton ordinance is neither precisely drawn to "serve a significant governmental interest" nor designed to "leave open ample alternative channels for communication of the [restricted] information."¹⁵² Again, Justice Brennan pointed to the City's failure to demonstrate through independent research that the challenged ordinance actually furthers some substantial governmental interest.¹⁵³ Additionally, Justice Brennan claimed that the ordinance "is invalid because it does not provide for reasonable alternative avenues of communication."¹⁵⁴ The 520 acres untouched by the Renton ordinance, Justice Brennan contended, is largely unavailable land or land wholly unsuited for adult theater uses.¹⁵⁵ According to Justice Brennan, the theater owners are not asking that the City "guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in [Renton]. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders."¹⁵⁶ Such a result, claimed Justice Brennan, is clearly unconstitutional.¹⁵⁷

IV. Analysis

While it is manifestly clear that the first amendment does *not* guarantee the right to communicate any idea at any time, in

152. 106 S. Ct. at 937 (Brennan, J., dissenting) (quoting *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)).

153. 106 S. Ct. at 937 (Brennan, J., dissenting). Justice Brennan claimed that the Renton ordinance is "clearly distinguishable" from the Detroit ordinance upheld in *Young* (which was "supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood") and from the Seattle ordinance upheld in *Northend Cinema* (which "was the 'culmination of a long period of study and discussion'"). *Id.* (quoting *Northend Cinema*, 90 Wash. 2d at 711, 585 P.2d at 1154-55).

154. 106 S. Ct. at 937-38 (Brennan, J., dissenting).

155. Justice Brennan adopted the opinion of the court of appeals on this issue. *Id.* at 938 (citing *Playtime Theatres*, 748 F.2d at 534).

156. 106 S. Ct. at 938 (Brennan, J., dissenting). For the majority's treatment of Renton's obligation to make available land for adult theater uses, see notes 135-36 and accompanying text. Justice Brennan's reference to adult films as "protected speech" emphasizes the fact that the City never contended that the restricted expression was obscene and therefore was not protected by the first amendment. See *supra* notes 32-44 and accompanying text.

157. 106 S. Ct. at 938 (Brennan, J., dissenting).

any place, or in any manner desired, it is equally clear that the first amendment *does* guarantee the right to be free from governmental censorship. By upholding the challenged zoning ordinance in *City of Renton v. Playtime Theatres, Inc.*,¹⁵⁸ the Supreme Court has defied this most basic constitutional precept and swung the door open wide for governmental censorship, albeit censorship realized through nice manipulation of established, necessary, and otherwise legitimate administrative powers.¹⁵⁹ Censorship, however, is no less menacing because it is subtly imposed; indeed, a mundane veneer renders it all the more insidious.

The judiciary has long recognized the danger of majoritarian censorship and has worked to develop a variety of tests designed to check governmental censorship without interfering with legitimate and necessary governmental functions.¹⁶⁰ Variations on a "balancing test" theme (i.e., balancing the importance of the governmental interests at stake against the extent of the restrictions on speech) have yielded a number of different analyses for both content-based and content-neutral restrictions, as well as for restrictions which are neither clearly content-based nor content-neutral.¹⁶¹ The success of these tests for constitutional validity, however, turns largely on their *application*. Applied superficially, these tests are ineffectual as checks against governmental censorship; they merely pay "lip service" to the guarantees of the first amendment, and amount to little more than a "rubber-stamping" of governmental attempts to censor through legitimate administrative powers.

In *Renton*, the Court failed to properly apply the tests on which it purportedly relied in upholding the adult theater zoning ordinance at issue in that case.¹⁶² The Renton ordinance, which regulates the location of adult movie theaters on the basis of the content of the films exhibited therein, should have been

158. 106 S. Ct. 925 (1986).

159. See *supra* text accompanying notes 87-90.

160. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968); see also *supra* notes 64-76 and accompanying text.

161. See *supra* notes 23-26 and accompanying text.

162. The *Renton* Court apparently applied a somewhat "watered down" version of the *O'Brien* test for content-neutral regulations to uphold the adult theater zoning ordinance at issue. 106 S. Ct. at 928, 930. See *supra* notes 64-76, 118 and accompanying text.

analyzed as a content-based restriction on speech requiring strict judicial scrutiny. Moreover, even assuming that the ordinance was properly viewed by the Court as content-neutral, it still should have failed under a proper application of the four-part *O'Brien* analysis.¹⁶³ Finally, the *Renton* Court's deference to the City in upholding a zoning ordinance which effectively bans adult movie theaters in that city was wholly inappropriate in light of the paramount importance of the constitutional right at stake in that case.

A. *Content-Based Regulations and Strict Judicial Scrutiny*

Renton's adult theater zoning ordinance is properly viewed as a content-based restriction on constitutionally protected speech, and, therefore, requires review under a standard of strict judicial scrutiny. Though the ordinance is neutral with regard to any particular viewpoint being expressed, it defines the restricted theaters by the subject matter of the films exhibited therein.¹⁶⁴ While debate continues over whether to treat such subject-matter restrictions as content-based or content-neutral,¹⁶⁵ the Court has often recognized the especial need to protect potentially "offensive" speech from majoritarian censorship. "[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment *strictly limits* this power."¹⁶⁶ In the absence of evidence to the contrary, the *Renton* ordinance must be viewed as an attempt to "shield the public" from "offensive" speech; it, therefore, merits a more stringent standard of review than would a "true" content-neutral restriction on speech.¹⁶⁷

163. See *supra* notes 64-76 and accompanying text.

164. See *supra* notes 23-26 and accompanying text (subject-matter restrictions).

165. See *supra* note 26.

166. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (emphasis added).

167. In *Cohen v. California*, 403 U.S. 15 (1971), the Court stated:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Id. at 21.

Despite some arguments to the contrary¹⁶⁸ — arguments which have never won majority support in the Supreme Court¹⁶⁹ — it is evident that the type of speech restricted by the Renton ordinance (i.e., non-obscene¹⁷⁰ erotic expression) comes entirely under the first amendment umbrella. Adult movies, at least in the absence of a showing that they are properly characterized as “obscene” expression,¹⁷¹ derive as much protection from the first amendment as do other forms of entertainment. In *Schad v. Borough of Mount Ephraim*,¹⁷² the Supreme Court stated unequivocally that “[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”¹⁷³

As Justice Stewart, writing in dissent in *Young v. American Mini-Theatres, Inc.*,¹⁷⁴ observed, “[I]t is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.”¹⁷⁵ The inherent wisdom of this warning becomes apparent in a case like

168. See *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 63-73 (1976) (Justice Stevens argued for a “hierarchy of First Amendment values” which would afford erotic expression a lesser degree of first amendment protection than would be afforded political or ideological expression); see also *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

169. Even in *Young v. American Mini-Theatres, Inc.*, Stevens mustered only a plurality for that portion of his opinion in which he proposed his theory of a “hierarchy” of protected speech. See *supra* notes 20 & 168.

170. Recall that the City made no showing that the restricted expression was “obscene” and, therefore, did not derive protection from the first amendment. See *supra* note 156.

171. See *supra* notes 32-44 and accompanying text.

172. 452 U.S. 61 (1981).

173. *Id.* at 65. See also *Winter v. New York*, 333 U.S. 507, 510 (1948) (noting that “[t]he line between the informing and the entertaining is too elusive for the protection of th[e] basic right [of free speech]”); *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 n.4 (9th Cir. 1983) (standing for the proposition that “free expression intended for entertainment purposes is generally entitled to the full panoply of first amendment protections”).

174. 427 U.S. 50 (1976).

175. *Id.* at 87 (Stewart, J., dissenting). Justice Stewart continued:

The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

Id. at 88.

Renton, where the character of the restricted expression apparently robbed it of all constitutional protection in the eyes of a not-so-vigilant Court, allowing a government to justify imposing a virtually total ban on such expression with only the flimsiest evidentiary support.¹⁷⁶ In *Police Department of Chicago v. Mosley*,¹⁷⁷ the Supreme Court recognized that "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."¹⁷⁸ The *Renton* Court seems to have abandoned this ideal.

Properly analyzed as a content-based restriction on wholly protected speech, then, the *Renton* ordinance must be narrowly-tailored to effectively further a substantial or compelling governmental interest in order to pass constitutional muster.¹⁷⁹ To overcome the presumption of unconstitutionality attending such content-based regulations,¹⁸⁰ the City is required to demonstrate that its asserted interests are, in fact, "overriding" or "compelling," that the challenged zoning ordinance effectively furthers these interests, and that the ordinance restricts no more speech than is necessary to effectively further the asserted governmental interests.¹⁸¹

In *City of Renton v. Playtime Theatres, Inc.*,¹⁸² the City produced no real evidence (i.e., no independent studies, no expert testimony) either tending to show the existence of a substantial governmental interest or demonstrating how the challenged ordinance effectively furthers that interest. Moreover, the district court found that the ordinance eliminates ninety-five percent of the total land area of *Renton* as potential sites for adult movie theaters,¹⁸³ and some question still exists as to

176. Recall that the City neither conducted independent research nor heard any expert testimony on the secondary effects of adult theaters on *Renton* before enacting the challenged zoning ordinance. 106 S. Ct. at 935 (Brennan, J., dissenting).

177. 408 U.S. 92 (1972).

178. *Id.* at 96 (quoting A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

179. See *supra* text accompanying note 26.

180. See *supra* text accompanying note 27.

181. These three steps represent a standard, ad hoc "balancing test" approach for judicial review of content-based restrictions on speech. See *supra* note 27 and accompanying text.

182. 106 S. Ct. 925 (1986).

183. *Id.* at 932.

whether *any* of the remaining five percent is actually available for adult theater uses.¹⁸⁴ Balancing the lack of evidentiary support on the City's part against the extent of the restriction on protected expression, it is clear that the Renton ordinance should have been struck down as violative of first amendment rights.

B. Content-Neutral Regulations and the Applicable Standards of Review

Even if Renton's "subject-matter based" adult theater zoning ordinance is properly analyzed¹⁸⁵ as a content-neutral time, place, and manner restriction on speech,¹⁸⁶ it still fails under the four-part test set forth in *United States v. O'Brien*.¹⁸⁷ In essence, the *O'Brien* inquiry considers whether the regulation is within the constitutional power of the government to enact, whether the regulation furthers a substantial or compelling governmental interest,¹⁸⁸ whether the asserted governmental interest is unrelated to the suppression of free expression,¹⁸⁹ and whether the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of the asserted governmental interest.¹⁹⁰ The next sections consider each of the four tiers of the *O'Brien* analysis in turn.¹⁹¹

184. *Id.* at 932, 938.

185. Recall that subject-matter restrictions may be viewed either as content-based or as content-neutral, depending somewhat on the predilection of the Court. See *supra* notes 23-26 and accompanying text.

186. 106 S. Ct. at 929-30.

187. 391 U.S. 367, 377 (1968). See *supra* notes 64-76 and accompanying text.

188. See *supra* note 69.

189. See *supra* note 70.

190. 391 U.S. at 377.

191. Some commentators question the utility of "relaxing" standards of judicial scrutiny for content-neutral restrictions on speech:

The most effective means of avoiding indirect suppression of particular viewpoints . . . is closely to scrutinize *all* content-neutral regulations. And the most appropriate method available to the judiciary to avoid indirect suppression of ideas is to assure itself of the compelling nature of the government's asserted noncontent-related justification for the restriction.

Redish, *supra* note 52, at 133 (footnotes omitted; emphasis in original). Redish proposes abandoning the content distinction in favor of a unified approach to judicial scrutiny of government regulations which place restrictions on first amendment freedoms. While such an approach may prove to be overly restrictive of governmental actions, the idea of requiring greater assurance of the "compelling nature" of the governmental interests at

1. *The Zoning Power*

It is well-established that a city may impose zoning regulations as part of the valid exercise of its police powers.¹⁹² However, at least "where protected First Amendment interests are at stake, zoning regulations have no . . . 'talismanic immunity from constitutional challenge.'"¹⁹³ In *Schad v. Borough of Mount Ephraim*,¹⁹⁴ Justice White, writing for the Court, noted:

The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it "must be exercised within constitutional limits." Accordingly, it is subject to judicial review; and [in most cases], the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.¹⁹⁵

Justice Blackmun, concurring in the *Schad* decision, commented that "the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment."¹⁹⁶ He added that, in such a case, "the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision."¹⁹⁷

In *City of Renton v. Playtime Theatres, Inc.*,¹⁹⁸ the City acted within its constitutional limits when it set out to create the adult theater zoning ordinance at issue in that case. The first tier of *O'Brien*, i.e., whether the regulation is within the consti-

stake is particularly attractive. This concept, however, may well be found in a proper reading of the four-part test proposed in *United States v. O'Brien*. See *infra* notes 240-45 and accompanying text.

192. See generally BLACK'S LAW DICTIONARY 1041, 1450 (5th ed. 1979) ("police power" and "zoning").

193. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring) (quoting *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 75 (1976) (Powell, J., concurring)).

194. 452 U.S. 61 (1981).

195. *Id.* at 68 (citations omitted).

196. *Id.* at 77 (Blackmun, J., concurring).

197. *Id.*

198. 106 S. Ct. 925 (1986).

tutional power of the government to enact, is, therefore, satisfied. The zoning power, however, is subject to several important limitations,¹⁹⁹ all of which are addressed in the remaining portions of the *O'Brien* analysis.

2. *Substantial Governmental Interests*

The second *O'Brien* inquiry is whether the challenged regulation furthers a substantial or compelling governmental interest.²⁰⁰ As noted earlier, a literal reading of this second tier demands a two-step analysis.²⁰¹ First, has the government adequately demonstrated that such a substantial or compelling governmental interest actually *exists*? Second, has the government shown, at least superficially, that the challenged regulation *further*s the asserted substantial governmental interest? The key to both these "sub-inquiries" is the requirement of some evidentiary support on the part of the government.

This evidentiary support need not be absolute, but it "must consist of more than '[c]onclusions alone.' Rather, there must be 'a factual basis for [the government's] conclusion that this kind of [zoning] restriction will have the desired effect.'"²⁰² In *Renton*, the Court appears to waive this requirement, choosing instead to accept as given the City's bald assertions, unsupported by independent studies or expert testimony, that a substantial governmental interest exists and that the challenged ordinance effectively furthers that interest.²⁰³

Justice Stevens, perhaps the most dangerous enemy of non-obscene erotic expression on the Court,²⁰⁴ writing in concurrence in *Schad v. Borough of Mount Ephraim*,²⁰⁵ suggested that, "[w]hile a municipality need not persuade a federal court that

199. See *supra* text accompanying notes 193-97.

200. 391 U.S. at 377.

201. See *supra* note 69.

202. *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (9th Cir. 1983) (citations omitted).

203. 106 S. Ct. at 930-31.

204. Recall that Justice Stevens is the chief purveyor of the "hierarchy of First Amendment values" theory that entitles non-obscene erotic expression to significantly less constitutional protection than political or ideological speech. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

205. 452 U.S. 61 (1981).

its zoning decisions are correct as a matter of policy, when First Amendment interests are implicated it must at least be able to demonstrate that a *uniform policy* in fact exists and is applied in a content-neutral fashion.”²⁰⁶ This minimal evidentiary requirement of the existence of a “uniform policy” is likewise not met in *Renton*. The Renton adult theater zoning ordinance regulates *only* adult movie theaters; other “adult” businesses (i.e., topless bars, massage parlors, and adult bookstores) remain wholly unrestricted.²⁰⁷ Since these other “adult” uses are likely to have the same potentially-deleterious effects on the surrounding community as adult movie theaters, the Renton ordinance evidences no overall “scheme” of regulation and no “uniform policy” tending to support the City’s claim that a substantial governmental interest in fact exists and that the challenged ordinance actually serves to further that interest.

The *Renton* majority draws broad support from a passage in *Young v. American Mini-Theatres, Inc.*²⁰⁸ stating that “[a] city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”²⁰⁹ However, the *Renton* majority ignores the surrounding circumstances which supported upholding the challenged Detroit zoning ordinance in *Young*. Detroit’s ordinance was part of an overall scheme of regulation,²¹⁰ enacted only after extensive research was conducted by the Detroit Common Council.²¹¹ (Additionally, the ordinance did not effect a total ban on adult movie theaters in Detroit; alternative channels for communication of the restricted expression remained available.²¹²) In short, Detroit demonstrated that its zoning ordinance was (at least) *designed* to further a substantial governmental interest; the *Young* Court, therefore, properly allowed it “reasonable opportunity to experiment.” The Renton

206. *Id.* at 84 (Stevens, J., concurring) (emphasis added).

207. 106 S. Ct. at 931. See *supra* note 129.

208. 427 U.S. 50 (1976).

209. *Id.* at 71.

210. *Id.* at 54.

211. *Id.* at 54-55, 55 n.8, 71 & n.34.

212. *Id.* at 62 & 71 n.35.

City Council, having made no equivalent demonstration,²¹³ never "earned" the kind of deference accorded the Detroit Common Council by the Court in *Young*.

3. "Secondary Effects" and the Possibility of Pretext

The third and perhaps single most critical tier of the *O'Brien* analysis requires that the governmental interest sought to be furthered is unrelated to the suppression of free expression.²¹⁴ The purpose of this requirement is to guard against the possibility of pretext on the part of the government.²¹⁵ Justice Powell, concurring in *Young v. American Mini-Theatres, Inc.*,²¹⁶ warned that "courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a *pretext* for suppressing expression."²¹⁷

The temptation to invoke disingenuous justifications for speech-restrictive measures is great. Indeed, "restrictions on free expression are seldom defended on the ground that the state simply didn't like what the defendant was saying: reference will generally be made to some danger beyond the message, such as the danger of riot, unlawful action, or violent overthrow of the government."²¹⁸ Any proffered justification — even, it appears, a spurious one — may breathe life into an otherwise *prima facie* unconstitutional regulation.²¹⁹

In *Renton*, the majority accepted the district court's finding that the City's "*predominate* concerns" were with the "secondary effects" of adult movie theaters on the surrounding community and *not* with the suppression of the expression contained in

213. 106 S. Ct. at 935-36 (Brennan, J., dissenting).

214. 391 U.S. at 377.

215. See *supra* note 70.

216. 427 U.S. 50 (1976).

217. *Id.* at 84 (Powell, J., concurring) (emphasis added).

218. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975). See also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

219. See *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 (9th Cir. 1983) (supporting the proposition that zoning decisions explicitly made for the purpose of restricting protected speech violate the first amendment).

adult films.²²⁰ However, the structure of the ordinance itself fairly demands the opposite conclusion. The Renton ordinance is directed only at adult movie theaters; other "adult" uses with predictably similar effects on the surrounding community remain unrestricted.²²¹ This "underinclusiveness"²²² compromises the City's claim that the ordinance is in fact aimed at the "secondary effects" of adult movie theaters on the surrounding community.²²³

A zoning ordinance truly aimed at the "secondary effects" on a surrounding community would attempt to address all the types of businesses known (or reasonably believed) to create such "secondary effects." Any less inclusive ordinance would be ineffective. This is not meant to suggest that, for Renton's ordinance to be constitutionally permissible, it must cover every conceivable kind of deleterious urban land use; rather, it is suggested that an ordinance which restricts *only* adult motion picture theaters, which is *not* part of an overall scheme of regulation, and which seeks to justify such restrictions on the basis of "secondary effects" on the surrounding community, should raise some degree of judicial suspicion with regard to its advertised goals. This is the purpose of *O'Brien* tier three: to ferret out governmental pretext with regard to restrictions on speech. The fundamental failure of the *Renton* Court is its inability (or unwillingness) to recognize such pretext.

The suspicion of pretext created by "singling out" adult movie theaters for regulation is strengthened further by the fact that the Renton ordinance effectively *bans* those theaters from

220. 106 S. Ct. at 929 (emphasis in original).

221. *Id.* at 934 (Brennan, J., dissenting).

Other motion picture theaters, and other forms of "adult entertainment," such as bars, massage parlors, and adult bookstores, are not subject to the same restrictions. This selective treatment strongly suggests that Renton was interested not in controlling the "secondary effects" associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit.

Id.

222. See *supra* note 129.

223. The City's claim is further compromised by the fact that no other "adult" businesses existed in the City of Renton at the time of enactment of the challenged zoning ordinance. 106 S. Ct. at 931-33. Adult movie theaters, therefore, appear to have been purposely "singled out" for regulation from an extensive menu of hypothetically deleterious "adult" land uses. For the majority's treatment of this issue, see *supra* text accompanying note 131.

Renton's borders by eliminating nearly all of the land in Renton as potential sites for adult movie theaters.²²⁴ This overreaching on the City's part, combined with the laser-like scope of the challenged zoning ordinance, provides cogent evidence that Renton's actual goal was the total suppression of adult films in that city. Where the possibility for pretext exists and the "legitimate" governmental interests at stake are evidenced only by broad, unsubstantiated assertions,²²⁵ a speech-restrictive ordinance should not be allowed to stand. The *Renton* Court therefore erred by failing to properly disqualify the City's adult theater zoning ordinance under the vital third criterion of the *O'Brien* analysis.²²⁶

4. *Alternative Channels for Communication of the Restricted Expression*

The fourth and final tier of *O'Brien* requires that the incidental restriction on speech be no greater than is essential to the furtherance of the asserted governmental interest.²²⁷ In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,²²⁸ the Court explained this requirement: "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate."²²⁹ Even Justice Stevens, writing in *Young v. American Mini-Theatres, Inc.*,²³⁰ recognized that "the First Amendment will not tolerate the total

224. 106 S. Ct. at 937-38 (Brennan, J., dissenting).

225. Recall that the City conducted no independent research and heard no expert testimony before enacting the adult theater zoning ordinance. There was some question as to whether the City even reviewed the results of research studies in Seattle and Detroit, on which it purportedly relied, before enacting the zoning ordinance at issue in *Renton*. See *supra* notes 81-83 and accompanying text.

226. Compare the situation in *Renton* with Detroit's similar problem in *Young v. American Mini-Theatres, Inc.* "It is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression. The ordinance was already in existence, and its purposes clearly set out, for a full decade before adult establishments were brought under it." *Young*, 427 U.S. at 80 (Powell, J., concurring).

227. 391 U.S. at 377.

228. 466 U.S. 789 (1984).

229. *Id.* at 812 (citation omitted).

230. 427 U.S. 50 (1976).

suppression of erotic materials that have some arguably artistic value."²³¹

The relevant inquiry is, therefore, what constitutes "total suppression"?²³² When do remaining channels of communication become "inadequate"?²³³ The *Renton* Court viewed its decision in *Young* as controlling, but a comparative study of the two cases reveals significant differences.

First, the *Young* Court noted that "[t]here is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually-explicit fare."²³⁴ According to the *Young* Court, the Detroit zoning ordinance left the adult theater industry largely untouched. "Viewed as an entity, the market for this commodity is essentially unrestrained."²³⁵

In *Renton*, however, Playtime Theatres, Inc. *did* claim denial of access to the market as a direct result of the City's adult theater zoning ordinance.²³⁶ Moreover, the ordinance, which plainly eliminates at least ninety-five percent of the total land area of the City of Renton for use as adult movie theater sites,²³⁷ places significant restrictions on the adult theater industry in that city. In 1976, the *Young* Court recognized that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."²³⁸ Ten years later, the *Renton* Court all but forgot this essential, qualifying phrase.²³⁹

231. *Id.* at 70.

232. *Id.*

233. 466 U.S. at 812.

234. 427 U.S. at 62.

235. *Id.*

236. 106 S. Ct. at 932.

237. *Id.* It was conceded that 95% of the total land area of Renton has been eliminated as potential sites for adult theaters due to the adult theater zoning ordinance. The remaining five percent was found by the district court to be available, but the theater owners claimed that even this land is unsuitable or unavailable for use as adult movie theater sites. *Id.*

238. 427 U.S. at 71 n.35.

239. Justice Powell, concurring in *Young*, observed:

Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [adult films] . . . Nor is there any significant overall curtailment of adult movie presentations, or the opportunity for a message to reach an audience . . . [I]f a sufficient market exists to support them

The rough guidelines laid out in *Young* force the conclusion that the Renton ordinance, which bans adult movie theaters from at least ninety-five percent of the total land area of that city, is more restrictive than necessary to further the asserted governmental interest (i.e., to preserve the quality of life in the community). The ordinance fails to leave open ample alternative channels for exhibition of the restricted matter, and, therefore, fails under the fourth *O'Brien* criterion.

C. *In Defense of O'Brien*

The arguments developed in the immediately preceding subsections have relied upon a "strong" reading of the four *O'Brien* criteria.²⁴⁰ A "strong" reading may be defined as one in which each of the four criteria is taken at its full face value, one in which the requisite inquiries are actually made by a reviewing court, one in which an interested party's conclusory statements are not asked to substitute for the reasoned findings of an impartial judicial body. It can never be enough to merely accept (as did the *Renton* Court) a bald governmental assertion that a challenged regulation actually serves to further a permissible, substantial interest of that government. Instead, the court must make reasoned findings based on all the evidence properly before it: *first*, that the asserted interest is constitutionally permissible, genuine, and substantial; and *second*, that the challenged regulation in fact serves to further that interest.²⁴¹

the number of adult movie theaters in Detroit will remain approximately the same, free to purvey the same message.

Id. at 78-79 (Powell, J., concurring).

Compare the "effects" described in the above quoted passage with the effects of the Renton adult theater zoning ordinance on the adult theater industry in that city.

240. 391 U.S. at 377. See *supra* notes 187-239 and accompanying text.

241. Professor Redish favors a single standard of judicial scrutiny for both content-based and content-neutral regulations. See *supra* note 191. However, at least with regard to content-neutral regulations, Redish's "unified standard" concept amounts to little more than a "strong" reading of *O'Brien* at points:

First, when the test asks whether the government interest is "compelling," it means exactly that — not in the sense that the term has been distorted in modern equal protection analysis to effectively mean a standard incapable of compliance, but in the common sense interpretation of the word: a matter of truly vital and important concern. Thus, government inconvenience or difficulty in dealing with certain kinds of expression is insufficient to justify regulation.

Redish, *supra* note 52, at 144 (footnote omitted).

Although the *O'Brien* analysis is not a "balancing test" per se, a "strong" reading of it necessarily requires some weighing of its four discrete, but interrelated, parts.²⁴² A less-than-compelling demonstration of the existence of a substantial governmental interest,²⁴³ for example, may be offset by a finding that alternate avenues for communication of the restricted expression abound.²⁴⁴ Or, as some members of the *Young* Court recognized, the total unavailability of alternative channels may work to disqualify even an ordinance which is justified by a real and substantial governmental interest.²⁴⁵

The single most important advantage of a "strong" reading of *O'Brien*, however, is that it refuses to let the test be reduced to a mere formality, an imprimatur of purportedly content-neutral regulations which restrict constitutionally-protected expression. So long as *O'Brien* remains good law, courts must be held to a "strong", *meaningful* reading of the four-part test developed therein. The first amendment, protector of our most cherished rights, requires no less.

V. Conclusion

Renton signals a new, relaxed standard of judicial scrutiny for viewpoint-neutral²⁴⁶ regulations which impose restrictions on

242. "The test nowhere asks whether the asserted governmental interest is sufficiently 'substantial' to justify the 'incidental' impact on free expression. Under these conditions, it is practically inconceivable that an asserted governmental purpose will not qualify." Redish, *supra* note 52, at 127. Redish's narrow reading of *O'Brien* reduces the four-part test to meaninglessness. In order to have any probative value at all — which we must assume the *O'Brien* analysis was designed to have — the four parts of the *O'Brien* test must be considered as a whole, and the substantiality of the asserted governmental interest must be considered in light of the extent to which the challenged regulation incidentally restricts speech.

243. See *supra* notes 200-13 and accompanying text.

244. See *supra* notes 227-39 and accompanying text.

245. See *supra* text accompanying notes 231, 234-35, & 238.

246. See *supra* notes 21, 23-26 and accompanying text. Since the *Renton* ordinance is properly viewed as a subject-matter restriction, and since such subject-matter restrictions are neither clearly content-based nor content-neutral, it seems as if the *Renton* decision may prove even more dangerous than it appears on its face. Not only does the *Renton* Court relax the standard of judicial review for content-neutral restrictions on speech, it also implicitly relaxes the standard for subject-matter restrictions which are neither clearly content-based nor content-neutral. To emphasize *Renton's* potentially wide-sweeping effects, the affected legislation is herein termed *viewpoint-neutral* rather than *content-neutral*.

the freedom of speech guaranteed by the first amendment. By accepting as fact the proposition that the Renton adult theater zoning ordinance furthers some substantial or compelling governmental interest, even in the absence of any showing by the City either that any such interest exists or that the ordinance as enacted will effectively further that interest, the Supreme Court has abdicated its responsibility as guardian of the fundamental rights guaranteed by the Constitution.²⁴⁷ The Court's failure to require the City to establish the requisite substantial governmental interest, compounded by its failure to measure that interest against the extent of the resulting restrictions on expression, reduces the four-part *O'Brien* analysis to meaninglessness.²⁴⁸

Similarly, the Court's reliance on the "secondary effects" rationale as a justification for intrusions on first amendment freedoms is misguided. Carried to its logical end, this reasoning could be employed to ban controversial public political debate on the ground that the "secondary effects" of such debate on the community (i.e., crowds, littering, and safety problems) would be undesirable. Moreover, it is too likely that resort to a "secondary effects" justification would often serve as a pretext for quashing unpopular views and banning "offensive" forms of expression. Such a result is antagonistic to the basic precepts upon which our Constitution is built.²⁴⁹

Finally, *Renton* demonstrates the danger of allowing any judicial or legislative body to develop a "hierarchy" of speech values and to "assign" appropriate degrees of first amendment protection to different kinds of speech. While erotic expression may not be as essential to our society as political or ideological speech,²⁵⁰ in the absence of a showing that the restricted material is unprotected "obscene" expression, it is improper for a court, a legislature, or even a majority of the people to dictate what is and what is not important or valuable expression. The Constitution aspires to protect us from such majoritarian cen-

247. See *supra* note 13 and accompanying text.

248. See *supra* notes 240-45 and accompanying text.

249. See *supra* note 175 and accompanying text.

250. I leave room open here for those persons who might argue, convincingly, that much political speech is utterly without social value.

sorship, but it cannot do so without the support of a vigilant and impartial Supreme Court.

William M. Sunkel