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Constitutional Law - First Amendment - Municipal Zoning - Pornography

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CONSTITUTIONAL LAW—FIRST AMENDMENT—MUNICIPAL ZONING— PORNOGRAPHY—The Supreme Court has held that a municipal zoning ordinance prohibiting adult motion picture theatres from locating within 1,000 feet of any residential zone single-or multiple- family dwelling, church, park, or school, does not violate the first amendment.

City of Renton v. Playtime Theatres, Inc. __U.S.__, 106 S. Ct. 925 (1986).

The City of Renton, Washington is located south of Seattle and has a population of 32,000.[1] Prior to the establishment of any sexually-oriented businesses in the city, "the Mayor of Renton suggested to the City Council that it consider the advisability of enacting zoning legislation" which would impose location restrictions on so-called adult motion picture theatres.[2] The City Council then referred the Mayor's suggestion to the Planning and Development Committee.[3] In the interim, the Council adopted a resolution which imposed a moratorium on the licensing of "any business . . . which . . . has as its primary purpose the selling, renting or showing of sexually explicit materials," because such businesses "would have a severe impact on the surrounding businesses and residences."[4]

In April 1981, the City Council, pursuant to the Planning and Development Committee's recommendation,enacted an ordinance which prohibited any adult motion picture theatre[5] from being estab-

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1. City of Renton v. Playtime Theatres, Inc., __U.S.__, 106 S. Ct. 925 (1986). *See also* Ziegler, *City of Renton v. Playtime Theatres, Inc.*: Supreme Court Reopens The Door for Zoning of Sexually Oriented Businesses, Vol. 9, No. 5; Zoning & Plan. L. Rep. 33 (1986). (hereinafter referred to as Ziegler.) The City of Renton has an area of 16 square miles or 10,240 acres. Ziegler at 37.

2. 106 S. Ct. at 927.

3. *Id.* The Planning and Development Committee held public hearings, and received a report from the City Attorney's Office advising them as to the developments in other cities. *Id.*

4. *Id.* City Council Resolution No. 2368. *Id.*

5. *Id.* City Council Resolution No. 3526. *Id.*

The first ordinance defined an "adult motion picture theatre" as enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized

lished within 1,000 feet of any residential zone, single-or multiple-family dwelling, church, or park and within one mile of any school.[6] Under the ordinance's distance restrictions the city's two existing movie theatres were not "allowed" locations for adult theatre uses.[7]

In January 1982, Playtime Theatres, Inc. "acquired the two existing theatres with the intent to use them to exhibit adult films."[8] At the same time, they brought suit in United States District Court challenging the ordinance on first and fourteenth amendment grounds, and requested declaratory and injunctive relief.[9] While this action was pending, the City Council amended the ordinance, "adding a statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet."[10]

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by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

The Ordinance defined these terms as follows:

2. "*Specified Sexual Activities*":
(a) Human genitals in a state of sexual stimulation or arousal;
(b) Acts of human masturbation, sexual intercourse or sodomy;
(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.
3. "*Specified Anatomical Areas*":
(a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and
(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

The second ordinance expanded the defined term of "used" as:

a continuing course of conduct of exhibiting "specific [sic specified?] sexual activities" and "specified anatomical area ["] in a manner which appeals to a prurient interest.

748 F.2d 527, 529 (9th Cir. 1984).

6. 106 S. Ct. at 927.
7. Ziegler, at 37.
8. 106 S. Ct. at 927.
9. *Id.*
10. *Id.*

The City gave the following reasons in the amended ordinance:

1. Areas within close walking distance of single and multiple family dwellings should be free of adult entertainment land uses.
2. Areas where children could be expected to walk, patronize or recreate should be free of adult entertainment land uses.
3. Adult entertainment land uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks and other public facilities, and schools.

In November 1982, the Federal Magistrate recommended the entry of a preliminary injunction against the enforcement of the Renton

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4. The image of the City of Renton as a pleasant and attractive place to reside will be adversely affected by the presence of adult entertainment land uses in close proximity to residential land uses, churches, parks and other public facilities, and schools.
5. Regulation of adult entertainment land uses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than in response to an existing problem.
6. Commercial areas of the City patronized by young people and children should be free of adult entertainment land uses.
7. The Renton School District opposes a location of adult entertainment land uses within the perimeters of its policy regarding bussing of students, so that students walking to school will not be subjected to confrontation with the existence of adult entertainment land uses.
8. The Renton School District finds that location of adult entertainment land uses in areas of the City which are in close proximity to school, and commercial areas patronized by students and young people, will have a detrimental effect upon the quality of education which the School District is providing for its students.
9. The Renton School District finds that education of its students will be negatively affected by location of adult entertainment land uses in close proximity to location of schools.
10. Adult entertainment land uses should be regulated [sic] by zoning to separate it from other dissimilar uses just as any other land use should be separated from uses with characteristics different from itself.
11. Residents of the City of Renton, and persons who are non-residents but use the City of Renton for shopping and other commercial needs, will move from the community or shop elsewhere if adult entertainment land uses are allowed to locate in close proximity to residential uses, churches, parks and other public facilities, and schools.
12. Location of adult entertainment land uses in proximity to residential uses, churches, parks and other public facilities, and schools, may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of such adult entertainment land uses.
13. Merchants in the commercial area of the City are concerned about adverse impacts upon the character and quality of the City in the event that adult entertainment land uses are located within close proximity to residential uses, churches, parks and other public facilities, and schools. Location of adult entertainment land uses, churches, parks and other public facilities, and schools, will reduce retail trade to commercial uses in the vicinity, thus reducing property values and tax revenues to the City. Such adverse affect [sic] on property values will cause the loss of some commercial establishments followed by a blighting effect upon the commercial districts within the City, leading to further deterioration of the commercial quality of the City.
14. Experience in numerous other cities, including Seattle, Tacoma and Detroit, Michigan, nas shown that location of adult entertainment land uses degrade the quality of the area of the City in which they are located and cause a blighting effect upon the City. The skid row effect, which is evident in certain parts of Seattle and other cities, will have a significantly larger affect [sic] upon the City of Renton than other major cities due to the relative sizes of

ordinance.[11] Additionally, he denied Renton's motions to dismiss and for summary judgment.[12] This recommendation was adopted by the district court and the theatres began to show adult films.[13] Shortly thereafter, both parties agreed to submit the case for a final decision on whether a permanent injunction should issue on the basis of the record as already developed.[14]

The district court then "vacated the preliminary injunction, denied Playtime's requested permanent injunction, and entered summary judgment in favor of the City of Renton."[15] "The court found that the ordinance did not substantially restrict first amendment interests, that Renton was not required to show specific adverse impact on the city from the operation of adult theatres but could rely on the

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the cities.

15. No evidence has been presented to show that location of adult entertainment land uses within the City will improve the commercial viability of the community.

16. Location of adult entertainment land uses within walking distance of churches and other religious facilities will have an adverse effect upon the ministry of such churches and will discourage attendance at such churches by the proximity of adult entertainment land uses.

17. A reasonable regulation of the location of adult entertainment land uses will provide for the protection of the image of the community and its property values, and protect the residents of the community from the adverse effects of such adult entertainment land uses, while providing to those who desire to patronize adult entertainment land uses such an opportunity in areas within the City which are appropriate for location of adult entertainment land uses.

18. The community will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.

19. A stable atmosphere for the rearing of families cannot be achieved in close proximity to adult entertainment land uses.

20. The initial location of adult entertainment land uses will lead to the location of additional and similar uses within the same vicinity, thus multiplying the adverse impact of the initial location of adult entertainment land uses upon the residential, [sic] churches, parks and other public facilities, and schools, and the impact upon the image and quality of the character of the community.

748 F.2d at 530.

11. 106 S. Ct. at 927.

12. *Id.* The Federal Magistrate found that the ordinance "for all practical purposes excludes adult theatres from the City," that only 200 acres were not restricted by the ordinance, and that all of these areas were "entirely unsuited to movie theatre use." He also found that the City of Renton had not established a factual basis for the adoption of the ordinance and that the motives behind the ordinance reflected "simple distaste for adult theatres because of the content of the films shown." 748 F.2d at 532.

13. 106 S. Ct. at 927.

14. *Id.* at 928.

15. *Id.*

experiences of other cities, that the purposes of the ordinance were unrelated to the suppression of speech, and that the restrictions on speech imposed by the ordinance were no greater than necessary to further the governmental interests involved."[16] The court found that the ordinance did not violate the first amendment based on *Young v. American Mini Theatres*[17] and *United States v. O'Brien.*[18]

The Court of Appeals for the Ninth Circuit reversed the decision of the trial court,[19] finding that the "Renton ordinance constituted a substantial restriction on first amendment interests."[20] Using the standards set forth in *United States v. O'Brien,* the court of appeals held that Renton had improperly relied on the experiences of other cities and therefore it had failed to establish the existence of a substantial governmental interest in support of the ordinance.[21] The purposes for enactment, set out in the amended ordinance relating to controlling the secondary effects of adult theatres, were found by the court to be "conclusory and speculative"[22] justifications for enactment.

The court of appeals also held the ordinance unconstitutional because a "motivating factor"[23] in Renton's enactment of the ordinance appeared to be the intent of the city to suppress speech. An

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16. *Id.*
17. 427 U.S. 50 (1976).
18. 391 U.S. 367 (1968).
19. 748 F.2d at 527.
20. *Id.* at 536.
21. *Id.* Renton City officials claimed to have relied upon the experiences of Seattle as enunciated in Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1153 (1978), *cert. denied,* 441 U.S. 945 (1979). *See supra* note 120 and accompanying text.
22. 748 F.2d at 537. *See* Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) (Zoning ordinance regulating adult theatres and bookstores invalidated because of lack of evidence on adverse effects of concentration of adult enterprises); Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983) (Zoning ordinance regulating adult bookstores remanded to make "factual findings on the validity of the city's assertions of harm."); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982) (Zoning ordinance regulating adult theatres invalidated because "empty record" revealed no factual basis for the ordinance); Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) (Ordinance regulating coin-operated motion pictures remanded for factual findings to support city's assertions, stating, "the government bears the burden of proving some empirical basis for the projections on which it relies."); Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981) (en banc) (Zoning ordinance regulating adult theatres required city to present evidence to justify restrictions); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981) (Zoning ordinance regulating adult theatres invalidated because city's post hoc justifications failed to support ordinance).
23. 748 F.2d at 537.

"inference" was drawn from several statements of purpose in the ordinance relating to the offensiveness of such speech and the lack of specific factual basis for the ordinance.[24] The court ruled that where "mixed motives" were present an ordinance would be held unconstitutional even if the city's primary concern was to control the "secondary effects" of adult theatres.[25]

The court of appeals further held that the Renton ordinance constituted a "substantial" restriction on speech, since the effect of the ordinance would be to greatly restrict public access to adult theatres.[26] Specifically, the court found that the land available for adult theatres was not suitable because much of it was already occupied by other facilities.[27] Thus, because the city had failed to meet its burden of proof, had enacted the ordinance with the intention of suppressing speech, and had greatly restricted access to adult theatres, the court of appeals held the Renton ordinance unconstitutional.

The United States Supreme Court, in a 7-2 decision,[28] reversed the court of appeals and expressly rejected all three of its findings on the constitutionality of the ordinance.[29] The first part of the Supreme Court's analysis begins with the consideration of whether the Renton ordinance was enacted with the intent to suppress speech.[30] The Court found that the ordinance does not completely ban adult theatres

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24. *Id.*

25. *Id. See supra* note 10 and accompanying text.

26. *Id.* at 538. The court of appeals relied on the decision in Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (convictions, pursuant to zoning ordinance prohibiting live entertainment, of operators of adult bookstores featuring live nude dancing, held invalid under first and fourteenth amendments).

27. 748 F.2d at 534. The "other facilities" included:

(1) a sewage disposal site and treatment plant;
(2) a horseracing track and environs;
(3) a business park containing buildings suitable only for industrial use;
(4) a warehouse and manufacturing facilities;
(5) a Mobil Oil tank farm; and,
(6) a fully-developed shopping center.

Id.

28. 106 S. Ct. at 926. "REHNQUIST, J., delivered the opinion of the Court in which BURGER, C.J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., concurred in the result. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined." *Id.*

29. *Id.* at 928-32. Appeal was taken under 28 U.S.C. § 1254(2)(1982), which provides the Supreme Court with appellate jurisdiction at the behest of a party relying on a state statute or local ordinance held unconstitutional by a court of appeals. *Id. See also* Ziegler, at 37.

30. 106 S. Ct. at 928.

within the city but merely restricts their location.[31] Thus, the Court concluded that the ordinance should be analyzed as a form of time, place and manner regulation.[32]

The Court found that since the ordinance was not directed at the "content" of the adult films but rather at the "secondary effects" of adult theatres on the surrounding community, the ordinance was a "content neutral" time, place and manner regulation, even though it treated adult theatres differently from other types of theatres.[33] While the district court found the Renton City Council's "predominate concerns" to be the secondary effects of adult theatres and not the content of the films, the court of appeals held that this was insufficient to sustain the ordinance.[34] The Supreme Court rejected the court of appeals ruling that an ordinance is unconstitutional when the suppression of speech is a "motivating factor" in the enactment of the zoning ordinance.[35] The Court held that as long as the city's "predominate concerns" were unrelated to the suppression of speech the zoning ordinance would be valid.[36] The Court stated that it would not "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . .".[37] The Supreme Court concluded that the appropriate test for validity is whether the Renton ordinance is designed to serve a substantial governmental interest and allows reasonable alternative avenues of communication.[38] The Renton ordinance met this test.

The second part of the Supreme Court's analysis considered the city's burden of proof.[39] The Court rejected the court of appeals'

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31. *Id. See Young,* 427 U.S. at 72-73.

32. 106 S. Ct. at 928. *See Young,* 427 U.S. at 63 note 18.

33. 106 S. Ct. at 929.

34. 748 F.2d at 537. *See* Tovar v. Billmeyer, 721 F.2d 1260 (9th Cir. 1983), *supra* note 112 and accompanying text.

35. 106 S. Ct. at 929.

36. *Id.*

37. *Id. See O'Brien,* 391 U.S. 367, 382.

38. 106 S. Ct. at 930. *See e.g.,* Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984) (the Supreme Court held that "expression" is subject to reasonable time, place and manner restrictions provided they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (the Supreme Court held that restrictions are justified without reference to the content of the regulated speech, if they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication).

39. 106 S.Ct. at 930.

ruling that the Renton ordinance was unconstitutional because it was enacted without the benefits of studies specifically relating to the "particular problems or needs of Renton," and thus the justification for the ordinance was "conclusory and speculative."[40] According to the Supreme Court, this standard of constitutionality was an "unnecessarily rigid" burden of proof on the city.[41] The Court ruled that Renton was entitled to rely on the experiences of other cities, with regard to the secondary effects of adult theatres, when enacting its adult theatre zoning ordinance.[42] The Court stated that:

> [t]he 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.[43]

The Court found no constitutional defect in the method of zoning chosen by Renton even though it differed from the method of zoning chosen by Seattle whose experiences Renton had relied upon when enacting its ordinance.[44] Cities should be allowed to "experiment with solutions to serious problems of adult theatres by dispersing them or concentrating them and it is not the Court's function to appraise the wisdom of the city's decision."[45]

The final part of the Supreme Court's analysis considered the question of whether the Renton ordinance allows for reasonable alternative avenues of communication.[46] The Court accepted the district court's finding that 520 acres consisted of "ample, accessible real estate," and expressly rejected the court of appeals' ruling that the 520 acres left open by the ordinance were not truly "available" areas of land, and therefore imposed a substantial restriction of speech by greatly limiting public access to adult theatres.[47] The Court also rejected Playtime's argument that the ordinance is unconstitu-

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40. 748 F.2d at 537. *See supra* note 22 and accompanying text.
41. 106 S. Ct. at 930.
42. *Id. See supra* note 21.
43. 106 S. Ct. at 931.
44. *Id.* Seattle had chosen to concentrate the adult theatres in one location while Renton chose to disperse them. 748 F.2d at 536.
45. 106 S. Ct. at 931, *citing Young,* 427 U.S. at 71.
46. 106 S. Ct. at 932.
47. *Id.* The 520 acres were more than five percent of the entire land area of Renton and included "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.*

tional because there was no "commercially viable" adult theatre sites with the acreage left open by the ordinance because "practically none" of the undeveloped land is currently for sale or lease.[48]

The Court found that merely because Playtime had to "fend for themselves in the real estate market . . . with other prospective purchasers and lessees, does not give rise to a first amendment violation."[49] Relying on *Young*, the Court cautioned against zoning regulations which suppress or greatly restrict access to lawful speech.[50] The Court concluded that the first amendment does not compel the government to ensure that adult theatres will be able to obtain sites at bargain prices.[51] The Court ruled that Renton had met its first amendment requirements by giving Playtime a reasonable opportunity to open and operate an adult theatre within the city.[52] Having met its burden of proof, the Court found the Renton ordinance constitutional, in that it did not suppress lawful speech and did not greatly restrict access to adult theatres, and reversed the decision of the court of appeals.[53]

The dissenters[54] in *Renton* contended that the ordinance was incorrectly analyzed as content neutral, or in the alternative, that if the ordinance was content neutral, prior decisions render it unconstitutional.[55] Justice Brennan found that because the ordinance regulated only adult theatres and not other forms of "adult entertainment" it was a restriction on speech because of its content, and thus a content neutral analysis was "misguided."[56]

Brennan concluded that this "selective treatment" contained in the Renton ordinance was not concerned with the "secondary effects" associated with adult theatres but discriminated against them because of the content of the films they exhibited.[57] Pointing to the legislative history of the ordinance and the court of appeals decision, Brennan

48. 106 S. Ct. at 932. *See supra* note 27.
49. *Id.*
50. *Id. See Young*, 427 U.S. at 71 note 35.
51. 106 S. Ct. at 932. *See Young*, 427 U.S. at 78 (Justice Powell, concurring) ("The inquiry for first amendment purposes is not concerned with economic impact"). *Id.*
52. 106 S. Ct. at 932.
53. *Id.* at 933. The Supreme Court also rejected Playtime's alternate arguments that the ordinance violated the equal protection clause of the fourteenth amendment and that it was unconstitutionally vague. 106 S. Ct. at 933 note 4.
54. 106 S. Ct. at 933. Brennan, J., joined by Marshall, J., dissenting. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 934.

found that the "reasons for the ordinance were no more than expressions of dislike for the subject matter"[58] and that the content of the films could not form the basis of the regulation of speech.[59] Further, because the Renton City Council conducted no studies, heard no expert testimony and did not consider less intrusive restrictions on adult theatres, the "findings" regarding the "secondary effects" of adult theatres were not findings at all but were "purely speculative conclusions", which did not justify the burdens the ordinance imposed upon constitutionally protected expression.[60]

Justice Brennan also disagreed with the majority's conclusion with regard to the city's burden of proof. He found that since Renton had never reviewed any of the studies done by Seattle and Detroit it had no basis to determine if these "findings" were relevant to Renton's problems, and thus its ordinance could not be justified based on the details of those studies.[61]

Justice Brennan concluded that since Renton had failed to meet its burden of proof and the ordinance discriminated against speech because of its content such ordinance was designed with the intent to suppress expression and thus should be analyzed as a content neutral restriction.[62] Brennan feared the Court's decision would "immunize" similar municipal ordinances from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always justifying special zoning regulations for adult theatres.[63] For Brennan, a content restrictive ordinance should be constitutional "only if the [city] can show that [it] is a precisely drawn means of serving a compelling [governmental] interest."[64] Here, the Renton

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58. *Id.* at 934-35.

59. *Id.* at 935. *See e.g.,* Terminiello v. Chicago, 337 U.S. 1 (1949) (defendant's conviction of breach of peace ordinance because of speech that stirred people to anger, invited public dispute or brought about a condition of unrest found unconstitutional as a violation of the first amendment).

60. 106 S. Ct. at 935-36. *See Schad* 452 U.S. at 74.

61. 106 S. Ct. at 936.

62. *Id.* Justice Brennan found that Renton's enactment of an amended ordinance which included a statement that it intended to rely on the Washington Supreme Court's decision in *Northend Cinema* was suspiciously coincidental to the commencement of the lawsuit. Brennan also found that since Renton did not adopt the Seattle or Detroit zoning schemes they could not rely on these "studies" as a basis for their ordinance. *Id.*

63. 106 S. Ct. at 936. *See* Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions,* 46 U. Chi. L. Rev. 81, 106 note 1. (1978).

64. 106 S. Ct. at 937.

ordinance failed this test because it has not shown the harmful "secondary effects" of locating adult theatres near churches, schools, parks and residences, or that these "effects" could not be "addressed by less intrusive restrictions."[65]

In the second part of the dissenting opinion Justice Brennan analyzes the Renton ordinance as if it were a content neutral restriction and again finds it to be unconstitutional.[66] According to Justice Brennan, Renton-like ordinances are only valid if they "are narrowly tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication of the information."[67] Here, the Renton ordinance had received the appropriate judicial scrutiny to ensure first amendment protection.[68] Brennan also distinguishes the Renton ordinance from the one found in *Young* on the basis that the latter ordinance was the product of detailed studies supported by the testimony of urban planners and real estate experts regarding the "secondary effects" of adult theatres.[69] To the contrary, the Renton City Council was only aware of complaints about the theatres and the fact that other municipalities had enacted special zoning ordinances for them.[70] These "facts" were insufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.[71]

Finally, Justice Brennan found that the Renton ordinance was unconstitutional because it did not provide for reasonable alternative avenues of communication.[72] He relied on the court of appeals' finding that much of the 520 acres available for adult theatres were already occupied, thus limiting adult theatre uses to these areas is a substantial restriction on speech.[73] In his view, such unusable locations amount to no locations at all.[74] Adult theatres are not able to fend for themselves in the real estate market on equal footing with other purchasers because of the restrictive ordinance and thus it effectively

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65. *Id.*
66. *Id.*
67. *Id. See supra* note 38 and accompanying text.
68. 106 S. Ct. at 937.
69. *Id. See Young,* 427 U.S. at 55.
70. 106 S. Ct. at 937. *See supra* note 21 and accompanying text.
71. 106 S. Ct. at 937.
72. *Id.* at 937-38.
73. *Id.* at 938. *See supra* note 27 and accompanying text.
74. 106 S. Ct. at 938. *See* Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981) (proposed sites for adult entertainment uses were either "unavailable, unusable or so inaccessible to the public that . . . they amount to no locations").

bans a form of protected speech and is plainly unconstitutional.[75]

The majority in *Renton* relies heavily on the United States Supreme Court's decision in *Young v. American Mini Theatres, Inc.*[76] and its progeny. In *Young,* the Court reversed the Sixth Circuit's decision[77] and held, that a Detroit anti-clustering ordinance which prohibited the location of an "adult theatre"[78] within 1,000 feet of any two other "regulated uses"[79] or within 500 feet of any residential zone was constitutionally valid.[80] The Court rejected the theatre's claim that the ordinance was a violation of the due process clause of the fourteenth amendment by reason of vagueness.[81] The Court stated that the inherent vagueness contained in the ordinance had not affected the theatre nor would it have a demonstrably significant effect on the exhibition of films protected by the first amendment. Thus, the Court concluded that the due process argument must be rejected.[82]

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75. 106 S. Ct. at 938. *See Young*, 427 U.S. at 71 note 35.

76. 427 U.S. 50 (1976). *See* Strom, *Zoning Control of Sex Businesses, The Zoning Approach To Controlling Adult Entertainment* (1977). Strom, *Young v. American Mini Theatres: Zoning of Sexually Oriented Businesses,* 1 Zoning & Plan. L. Rep. 1 (1977).

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

78. 427 U.S. at 53 note 5. The Detroit ordinance contained the following definitions:

> "Adult Motion Picture Theatre—An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,' (as defined below) for observation by patrons therein.
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> For the purpose of this Section, 'Specified Sexual Activities' is defined as:
>
> 1. Human Genitals in a state of sexual stimulation or arousal;
>
> 2. Acts of human masturbation, sexual intercourse or sodomy;
>
> 3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.
>
> And 'Specified Anatomical Areas' is defined as:
>
> 1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
>
> 2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered."

Id.

79. 427 U.S. at 52 note 3. As defined in the Detroit ordinance

> regulated uses include adult bookstores; cabarets (group "D"); establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels; pawnshops; pool or billiard halls; public lodging houses; secondhand stores; shoeshine parlors; and taxi dance halls.

Id.

80. 427 U.S. at 73.

81. *Id.* at 58.

82. *Id.* at 60.

The Court next rejected the claim that the ordinance constituted an invalid prior restraint on free speech in violation of the first amendment.[83] The Court found that a city usually does impose licensing restrictions on all motion picture theatres without violating the prior restraint doctrine and as long as the location restriction does not create an impermissible restraint on protected communication it will not offend the first amendment.[84]

The theatre's final argument was that the ordinance was not a content neutral regulation of speech and thus was in violation of the equal protection clause of the fourteenth amendment.[85] The Court conceded that the location restriction seemingly violated the literal language of previous decisions[86] requiring content neutrality but it distinguished and upheld the Detroit ordinance.[87] The Court found that it is the duty of government to remain neutral in the regulation of protected communication.[88]

This duty was not violated by the Detroit ordinance because sexually explicit materials are wholly different and of lesser magnitude than the interest in the untrammeled political debate and thus, do not invoke the same protections.[89] Justice Stevens concluded by stating, "even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures."[90]

Justice Powell, the fifth member of the majority, wrote a separate concurring opinion.[91] He agreed with the majority that the anti-

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83. *Id.* at 62. Respondent's claimed that the ordinance prohibits theatres which are not licensed as "adult motion picture theatres" from exhibiting films which are protected by the first amendment and this is an invalid prior restraint. *Id.*

84. *Id.* at 62-63.

85. *Id.* at 62-73. Respondent's claimed the ordinance was vague because they could not determine how much of the described activity would be permissible before the exhibition was "characterized by an emphasis" on such matter and because the ordinance did not specify adequate procedures or standards for obtaining a waiver of the 1,000-foot restriction. *Id.*

86. *See e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

87. 427 U.S. at 65-73.

88. *Id.* at 70.

89. *Id.* at 61, 70. The majority stated "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 theatres of our choice." *Id.*

90. *Id.* at 71-72.

91. *Id.* at 73.

clustering ordinance was constitutional but disagreed with their holding that nonobscene erotic expression is entitled to less protection under the first amendment than political or philosophical expression.[92] Powell applied a balancing test and weighed the government's interest in regulating conduct against its impact on freedom of expression.[93] He found that the city had a substantial interest in preserving neighborhood stability and preventing its deterioration and that the ordinance was only an incidental encroachment upon expression and not an effort to suppress free speech.[94]

The dissenters in *Young*[95] would have held the ordinance invalid on almost every ground urged by the respondents.[96] They found the ordinance had violated the content neutral rule,[97] was unconstitutionally vague[98] and was an invalid prior restraint on constitutionally protected expression based on it's content.[99]

The Court's decision in *Young* was reaffirmed five years later in *Schad v. Borough of Mount Ephraim.*[100] In *Schad,* the majority[101] held a zoning ordinance unconstitutional which excluded from the community all live entertainment in general and nude dancing in particular.[102] Unlike the "incidental encroachment" of the anti-clustering ordinance in *Young* the Court found the zoning restriction in *Schad* imposed a "substantial restriction on protected activity."[103] The majority found that the Borough had presented no evidence that the ordinance would further a sufficiently substantial government interest.[104] The Court also rejected the Borough's claim that it could "selectively exclude live entertainment . . . to avoid problems[105] associated with it. . . ."[106] The Court found that it was not immediately

92. *Id.* at 73 note 1.

93. *Id.* at 79. The balancing test is based on the four-part test of *United States v. O'Brien, see supra* note 120 and accompanying text.

94. 427 U.S. at 80-81.

95. *Id.* at 50. The dissenters in *Young* included: Stewart, Brennan, Marshall and Blackmun, JJ.. *Id.*

96. 427 U.S. at 84-86.

97. *Id.* at 84. (Stewart, J., dissenting) *Id.*

98. *Id.* at 88. (Blackmun, J., dissenting). *Id.*

99. *Id.* at 85. (Stewart, J., dissenting) *Id.*

100. 452 U.S. 61 (1981).

101. *Id.* at 62. White, J., delivered the opinion of the Court, in which Brennan, Stewart, Marshall, Blackmun and Powell, JJ., joined. *Id.*

102. 452 U.S. at 65, 76.

103. *Id.* at 72.

104. *Id.* at 68.

105. *Id.* at 73. The "problems" included parking, trash, police protection and medical facilities. *Id.*

106. *Id.*

apparent as a matter of experience[107] nor self evident[108] that live entertainment posed unusual or unique problems and concluded that the restrictive ordinance was not "narrowly drawn to respond to what might be the distinctive problems . . . of live entertainment."[109] Also, the Borough had not established that its interests could not be met by restrictions that are less intrusive on protected forms of expression.[110]

The Supreme Court in *Renton* also relied upon the standards enumerated in *United States v. O'Brien*[111] in determining whether the ordinance was constitutional even though a "motivating factor" in its enactment was the intent to suppress speech.[112] In *O'Brien*, a draftee burned his Selective Service registration certificate on the steps of the South Boston Courthouse so as to influence others to adopt his antiwar beliefs. He was indicted, tried, convicted and sentenced to six years in jail for his actions.[113] The draftee argued that the 1965 amendment[114] was unconstitutional because it abridged free speech, and additionally served no legitimate legislative purpose.[115] The United States District Court for the District of Massachusetts rejected these arguments and held that the statute on its face did not abridge first amendment rights, that the court should

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107. *Id.*
108. *Id.* at 74.
109. *Id.*
110. *Id.*
111. 391 U.S. 367 (1968). *See* Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 Sup. Ct. Rev. 1; Velvel, *Freedom of Speech and the Draft Card Burning Case*, 16 Kan. L. Rev. 149 (1967). On symbolic speech generally, *see* Shugrue, *An Inquiry into a Principle of "Speech Plus,"* 3 Creighton L. Rev. 267 (1973); Comment, *Symbolic Conduct,* 68 Colum. L. Rev. 1091 (1968).
112. 106 S. Ct. at 929. The court of appeals had held that if a "motivating factor" in the enactment of the ordinance was the intention to suppress the exercise of protected speech the ordinance would be invalid. 748 F.2d at 537. The court of appeals based this holding on its earlier decision in Tovar v. Billmeyer, 721 F.2d 1260, 1266 (9th Cir. 1983) (zoning ordinance validity required determination of whether a motivating factor in zoning decision was to restrict plaintiff's exercise of first amendment rights).
113. 391 U.S. at 370. O'Brien had violated 50 U.S.C. App. § 462 (b) by "willfully and knowingly . . . change by burning . . . his Registration Certificate." Section 462 (b) was part of the Universal Military Training and Service Act of 1948, of which § 462 (b)(3) was amended by Congress in 1965, P.L. 89-152, 79 Stat. 586 Aug. 1965, so that at the time O'Brien burned his certificate an offense was committed by any person, "who forges, alters, knowingly mutilates, or in any manner changes any such certificate . . . ." *Id.* He was sentenced to six years under the Youth Corrections Act, 18 U.S.C. § 5010 (b). 391 U.S. at 369.
114. *See supra* note 113 and accompanying text.
115. 391 U.S. at 370.

not inquire into the motives for the enactment of the statute, and that the statute was a reasonable exercise of the power of Congress to raise armies.[116] On appeal, the Court of Appeals for the First Circuit held the 1965 amendment unconstitutional as a violation of the first amendment, because it singled out persons engaged in protests for special treatment.[117]

The Supreme Court granted the government's petition for certiorari and O'Brien's cross-petition to resolve the conflict in the circuits.[118] The Court rejected O'Brien's argument that the first amendment protects all modes of communication of ideas by conduct by stating that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on first amendment freedoms."[119] The Court then enunciated the standards by which government regulations would be justified.[120] Relying on Congress' constitutional power to raise and support armies and to make all laws necessary and proper to that end, the Court found that the 1965 amendment met all of the requirements and was therefore constitutional.[121] O'Brien's argument that the 1965 amendment was unconstitutional because it was enacted for the purpose of suppressing freedom of speech was also rejected by the Court.[122] The Court stated that "it will not strike down an otherwise constitutional

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116. *Id.* at 370-71.

117. O'Brien v. United States, 376 F.2d 538, 541 (1st Cir. 1967) The court of appeals nevertheless affirmed O'Brien's conviction on other grounds and remanded the case for resentencing. 376 F.2d at 542.

118. 391 U.S. at 372. The Court of Appeals for the Second Circuit upheld the 1965 amendment in United States v. Miller, 367 F.2d 72 (2nd Cir. 1966), *cert. denied,* 386 U.S. 911 (1967). The Court of Appeals for the Eighth Circuit had also upheld the 1965 Amendment in Smith v. United States, 368 F.2d 529 (8th Cir. 1966). The Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional in O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967). *Id.*

119. 391 U.S. at 376.

120. *Id.* at 377. The Court stated that:

> [w]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

121. *Id. See* Lichter v. United States, 334 U.S. 742 (1948); Selective Draft Law Cases, 245 U.S. 366 (1918); *See also* Ex parte Quirin, 317 U.S. 1 (1942).

122. 391 U.S. at 383.

statute on the basis of an alleged illicit legislative motive."[123] By upholding the 1965 amendment on these two bases, the Supreme Court reversed the court of appeals and found the conviction of O'Brien constitutional.[124]

When the *Young, Schad* and *O'Brien* decisions are combined, they establish the analytical framework for determining the constitutionality of zoning ordinances regulating the location of protected forms of sexually explicit expression.[125] *Young* established the municipality's burden of proof by requiring that the ordinance be supported by a factual basis, including the testimony of sociologists, urban planners and planning studies, that would demonstrate how the ordinance as drafted would be likely to control the secondary effects of adult uses in view of location conditions existing in a particular community.[126] Some courts have adopted this view of the city's burden of proof[127] while some have held that municipalities "might rely on the experiences of other cities . . . as the basis for regulation."[128] *Young* also adopted the *O'Brien* test to determine if the government's purpose for enacting the regulation is "unrelated to the suppression of free speech."[129] A number of post-*Young* court decisions have held ordinances invalid on the ground that the regulation was motivated in part by simply a desire to suppress sexually explicit speech.[130] Other courts found that where mixed motives existed the fact that improper intent to suppress was simply a motivating factor would by itself be sufficient to invalidate the ordinance.[131] The Court in *Schad* stated

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123. *Id.*

124. *Id.* at 386. Mr. Justice Douglas dissented, finding that the ultimate issue for resolution was whether "conscription is permissible in the absence of a declaration of war." This issue had not been briefed or argued by either party but Douglas thought the case should be reargued because he felt the defendant and the country were "entitled" to have this issue resolved. *Id.* at 389.

125. Ziegler, at 34.

126. 427 U.S. at 71 note 35. *See* Ziegler, at 35.

127. Ziegler, at 35. *See e.g.,* 754 Orange Ave., Inc. v. City of New Haven, 761 F.2d 105, 112 (2nd Cir. 1985); Krueger v. City of Pensacola, 759 F.2d 851, 852 (11th Cir. 1985); Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981). *Id.*

128. Ziegler, at 35. *See e.g.,* Genusa v. City of Peoria, 619 F.2d 1203, 1211 (1980); Strand Property Corp. v. Municipal Court, 200 Cal.Rptr. 47, 148 Cal. App. 3d 882 (1984); International Food v. City of Fort Lauderdale, 614 F. Supp. 1517, 1521 (D.C. Fla. 1985). *Id.*

129. 391 U.S. at 377. *See supra* note 120 and accompanying text.

130. Ziegler, at 36. *See e.g.,* Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983); C.L.R. Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983); Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981). *Id.*

131. Ziegler, at 36. *See e.g.,* Krueger v. City of Pensacola, 649 F.2d 851, 855-56 (11th Cir. 1985); Tovar v. Billmeyer, 721 F.2d 1260, 1266 (9th Cir. 1983). *Id.*

that an ordinance which restricts the locations of adult businesses would impose a heavy burden on the municipality to show that such a restriction furthers a substantial governmental interest.[132] In post-*Young* litigation, a few courts have ruled adult use ordinances unconstitutional finding that regulation would unnecessarily confine adult uses to only a few locations, prohibit new uses or would reduce the number of existing uses.[133] Other decisions have examined the availability or suitability of potential locations under an ordinance and have held that the ordinances suppress expression or greatly restrict access to adult uses where the locations are not "realistically" available from the point of view of a "reasonably prudent investor."[134] The general effect of post-*Young* litigation has been to close the door on local zoning of sexually oriented businesses.

The most immediate effect of the Supreme Court's decision in *Renton* will be to reopen the door for zoning of sexually oriented businesses that had been partially closed by post-*Young* litigation.[135] The precedential value of those cases which found zoning ordinances unconstitutional based on "mixed motives" in the enactment of the ordinance or on the basis that locations were unavailable based upon the reasonably prudent investor standard have now been eliminated.[136] Municipalities can now arm themselves with the experiences of other cities as described in *Young* and *Northend Cinema*[137] and enact equally restrictive Renton- like ordinances that concentrate or disperse adult theatre locations.[138] Municipalities could also rely on the *Renton* decision to expand location restrictions to other adult uses, such as adult bookstores.[139]

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132. 452 U.S. at 80. *See* Ziegler, at 36.

133. Ziegler, at 36. *See e.g,* C.L.R. Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983); Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1982); Adultword Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985). *Id.*

134. Ziegler, at 36. *See e.g.,* International Foods v. City of Fort Lauderdale, 614 F. Supp. 1517 (D.C. Fla. 1985); North Street Book Shoppe, Inc. v. Village of Endicott, 582 F. Supp. 1428 (N.D.N.Y. 1984); Basiardines v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981). *Id.*

135. Ziegler, at 39. *See supra* notes 127-34 and accompanying text.

136. Ziegler, at 39. *See supra* notes 130, 131, 134 and accompanying text.

137. *See supra* note 21 and accompanying text.

138. Ziegler, at 39.

139. *Id.*