CONSTITUTIONAL LAW—ZONING AND FIRST AMENDMENT—ORDINANCE PROHIBITING OPERATION OF AN ADULT THEATER IN A RESIDENTIAL COMMUNITY DOES NOT VIOLATE THE FIRST AMENDMENT—*City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986).

Prohibiting governmental action which suppresses the free expression of ideas is a fundamental tenet of democracy.[1] Voltaire aptly characterized our country's adherence to this principle when he said "I disapprove of what you say, but I will defend to the death your right to say it."[2] The importance accorded the free dissemination of ideas that inspired Voltaire's immortal comment was recently tempered in *City of Renton v. Playtime Theatres, Inc.*[3] In *City of Renton*, the United States Supreme Court balanced a theater owner's right to operate an adult theater against the community's desire to preserve the quality of its neighborhood.[4] The *Renton* Court held that the community's ability to isolate the location of adult theaters did not abrogate the first amendment rights of the theater owners.[5]

The city of Renton has a population of 32,000 and is located south of Seattle, Washington.[6] In May 1980, Renton's City Council considered the advisability of enacting zoning legislation intended to restrict the location of adult entertainment facilities.[7] The Council submitted the issue to the city's Planning and Development Committee and public hearings were initiated.[8] As part of its research, the Committee reviewed studies conducted in Seattle and other cities confronted with similar zoning dilemmas.[9]

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1 A.N. WHITEHEAD, ADVENTURES OF IDEAS (1933).

2 Young v. American Mini Theatres, 427 U.S. 50, 63 (1976) (quoting S. TALLENTRYE, THE FRIENDS OF VOLTAIRE 199 (1907)).

3 106 S.Ct. 925, 932 (1986). The City of Renton prohibited an adult motion picture theater from locating within 1000 feet of a residential community. *Id.*

4 *See id.* at 930.

5 *Id.* at 932. The *Renton* majority restricted an adult theater from operating in proximity to a residential community by upholding the city's zoning interests as unrelated to the suppression of free expression. *Id.* U.S. CONST. amend. I. provides in pertinent part that "Congress shall make no law . . . prohibiting the free exercise [of speech]. . . ."

6 *City of Renton*, 106 S. Ct. at 927.

7 *Id.* For more detailed information, see Joint Appendix at 35-37, City of Renton v. Playtime Theaters, Inc., 106 S.Ct. 925 (1986) [hereinafter cited as Joint Appendix] (affidavit of Jack R. Burns, Jan. 27, 1982).

8 *City of Renton*, 106 S. Ct. at 927.

9 *Id.* For more detailed information regarding the public hearings and the studies conducted, see Joint Appendix, *supra* note 7, at 161-209 (deposition of David R. Clemens, March 4, 1982).

In April 1981, the City Council, acting pursuant to the Planning and Development Committee's recommendation, enacted an ordinance which, *inter alia*, prohibited adult theaters from locating within 1000 feet of any residential zone.[10] There were no adult theaters located in Renton when the ordinance was passed nor were any contemplated.[11] The effect of the ordinance was to confine adult theaters to a 520-acre area already occupied by a sewage disposal site and treatment plant, a horse racing track, an industrial park, an oil tank farm, and a shopping center.[12]

In early 1982, Playtime Theaters, Inc. [Playtime] purchased two existing theaters in Renton where they intended to show adult films.[13] The theaters were situated within the area prohibited by the ordinance.[14] Thereafter, Playtime attacked the ordinance on first and fourteenth amendment grounds.[15] The theater owners sought to establish the unconstitutionality of the ordinance and to permanently enjoin its enforcement.[16] Following a magistrate's recommendation, the district court granted a preliminary injunction which permitted the respondents to show adult films at the theaters.[17] The court stated that there was no factual basis showing a need for the ordinance and that it merely reflected the community's distaste for adult films.[18] Shortly

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10 *City of Renton*, 106 S. Ct. at 927. The Renton ordinance prohibited adult theaters from locating within 1000 feet of any residential zone or single or multiple family dwelling, any school or religious institution, or any public park or area zoned for such use. *Id.* For similar zoning ordinances as that adopted by Renton, see Appendix to Jurisdictional Statement at 78a-80a, 99a-139a, City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925 (1986) [hereinafter cited as Jurisdictional Statement] (Detroit and Seattle zoning ordinances are set forth in their entirety).

11 *City of Renton*, 106 S. Ct. at 927. Resolution No. 2368, enacted in October, 1980, states that the City does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials. *See* Joint Appendix, *supra* note 8, at 42.

12 *See* City of Renton v. Playtime Theaters, 748 F.2d 527, 534 (9th Cir. 1984), *rev'd*, 106 S. Ct. 925 (1986). The court of appeals noted that a substantial part of the 520 acres zoned for adult theaters was already occupied.

13 City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925, 927 (1986). Playtime was the same company that had operated adult theaters in Seattle, Tacoma, and at least three other cities in the State of Washington. *See* Joint Appendix, *supra* note 8, at 294.

14 *City of Renton*, 106 S.Ct. at 927.

15 *Id.* U.S. CONST. amend. XIV provides in pertinent part that "no state shall . . . abridge the privileges of citizens . . . nor deprive any person of life, liberty, or property, without due process of law; nor deny . . . equal protection of the laws. . . ."

16 *City of Renton*, 106 S. Ct. at 927.

17 *See id.* at 928.

18 *Id.*

thereafter, the district court vacated the preliminary injunction, denied the respondent's requested permanent injunction, and entered summary judgment in favor of Renton.[19]

The district court held that the Renton ordinance did not substantially restrict first amendment interests because the restrictions on speech were no greater than necessary to further the governmental interest involved.[20] The court stated that in formulating its ordinance, Renton was justified in relying on the zoning experiences of other cities.[21] The court further noted that the ordinance was not meant to censor films, but to mitigate the impact of adult theaters on the community.[22]

The Court of Appeals for the Ninth Circuit reversed and ruled that the Renton ordinance substantially restricted first amendment interests.[23] The court stated that the city could not justify its substantial infringement of expression by relying on studies performed by other cities in regulating adult theaters.[24] In order properly to establish a substantial governmental interest, the court asserted that Renton should have studied the effects of such theaters on their own community.[25] Moreover, the court opined that Renton's motivating factor was to control the content of the films.[26]

On appeal, the United States Supreme Court reversed the court of appeals and held that the ordinance did not ban adult theaters altogether.[27] The Court held that the city's pursuit of zoning interests was unrelated to the suppression of free expres-

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19 *Id.* Playtime asserted that summary judgment was improper because they had relied on the district court's findings on the preliminary injunction in entering into a stipulation. Playtime further argued that when the district court altered its findings of fact, it created a material issue of fact which would render summary judgment improper. The court of appeals did not sustain Playtime's argument. *See* Jurisdictional Statement, *supra* note 11, at 15a, n.12.

20 *See City of Renton*, 106 S.Ct. at 928.

21 *Id.*

22 *Id.*

23 City of Renton v. Playtime Theaters, Inc., 748 F.2d 527, 537 (9th Cir. 1984), *rev'd*, 106 S.Ct. 925 (1986). The court found that Renton's justifications for the restriction were "conclusory and speculative" since it neither studied the effects of adult theaters nor did it apply such findings to the city's problems. *Id.*

24 *Id.* at 537. The court observed that the experiences of Detroit and Seattle were not sufficiently relevant because the purpose of the Detroit ordinance was to disperse adult theaters throughout the city, while the Seattle ordinance was intended to concentrate such theaters in one area. *Id.*

25 *Id.*

26 *Id.*

27 *City of Renton*, 106 S.Ct. at 925. *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 n.18 (1976).

sion.[28] The Court further held that Renton was entitled to rely on studies and experiences produced by other cities despite the fact that such studies did not specifically relate to Renton's unique problems.[29] Finally, the Court recognized that the ordinance also allowed for reasonable alternative avenues of communication since there remained a limited area of land left open for such theaters.[30]

In determining the validity of a regulation that arguably impinges upon first amendment rights, the United States Supreme Court has traditionally engaged in a two-part analysis.[31] First, the reviewing court should ascertain whether the regulation is an attempt to suppress one's freedom of expression.[32] Even if the court determines that a form of expression is in fact being repressed, the restriction will still be upheld if that form of expression is unprotected by the first amendment.[33] If, however, the regulated expression carries first amendment protections, a court should analyze whether the incidental restrictions on speech are outweighed by significant governmental interests.[34] Second, a court should determine whether the restriction leaves open ample, alternative means for communicating the message.[35]

In *United States v. O'Brien*,[36] the Court fashioned a four-part test to determine when a governmental interest is sufficiently important to justify a restriction on expression.[37] In *O'Brien*, the defendant burned his draft card in protest of the Vietnam War.[38] He subsequently was convicted of violating a statute which prohibited the destruction of draft cards.[39] The defendant appealed his conviction on the ground that the statute restricted his free-

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28 *City of Renton*, 106 S.Ct. at 929. The decision of the Court of Appeals for the Ninth Circuit was reversed by the Supreme Court in a 7-2 decision. *Id.*

29 *Id.* at 931.

30 *Id.* at 932.

31 N. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW, § 16.47 at 970 (1986) [hereinafter cited as Nowak, Rotunda & Young].

32 *See* NOWAK, ROTUNDA & YOUNG, *supra* note 31, at 970.

33 *Id.*

34 *Id. See also* United States v. Grace, 461 U.S. 171 (1983).

35 *See* NOWAK, ROTUNDA & YOUNG, *supra* note 31, at 970.

36 391 U.S. 367 (1968).

37 *Id.* at 377.

38 *Id.* at 369. FBI agents witnessed O'Brien and his three companions burning small white cards. *Id.* They subsequently discovered that the card burned was O'Brien's registration certificate. *Id.* at n.1.

39 *Id.* at 370. O'Brien violated § 462(b) of the Universal Military Training and Service Act of 1948 which was directed to any person "who forges, alters, knowingly destroys or knowingly mutilates, or in any manner changes any such certificate. . . ."

dom of expression.[40] The United States Supreme Court upheld the conviction asserting that the government's interest in preserving documentation regarding armed service's eligibility was paramount to the defendant's interest of freedom of expression.[41]

The Court created a four-part test to determine when expression justifiably may be regulated by a governmental interest.[42] The Court explained that a regulation may suppress expression if: "it is within the constitutional power of the Government; it furthers an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free-expression; and the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of that interest."[43] Applying this time, place, and manner test,[44] the Court recognized that since the Military Training and Service Act was designed to maintain and to support the armed forces, the first and second requirements of the test were satisfied.[45] The Court was also convinced that the third and fourth prongs of the test were not violated because the statute was designed to facilitate the functioning of the Selective Service, and not to suppress communication.[46]

The Court has employed the time, place and manner analysis of *O'Brien* when free expression is arguably impinged by a municipality's zoning ordinance.[47] In *Nortown Theaters Inc. v. Gribbs*,[48] theater owners challenged Detroit's ordinance which prohibited "adult" businesses within 500 feet of a single unit

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40 *O'Brien*, 391 U.S. at 370. The issue of the constitutionality of the Act was raised by O'Brien's counsel at a pretrial motion. At trial and upon sentencing, O'Brien appeared *pro se. Id.*

41 *Id.* at 377.

42 *Id.*

43 *Id.*

44 *Id.* at 378-80. Under traditional time, place, and manner analysis, the initial inquiry is whether a regulation affecting protected expression is content-based or content-neutral. If content-based, the regulation is strictly scrutinized and upheld only if it serves a compelling state interest. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 (1980) (Public Service Commission order that prohibited Consolidated Edison from including in their bill inserts discussing controversial issues violated first amendment). If content-neutral, the regulation receives lesser scrutiny and is upheld if it serves a substantial government interest and leaves open alternative channels of communication. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-2 (1978).

45 *O'Brien*, 391 U.S. at 378-79.

46 *Id.* at 379-80.

47 *See, e.g.*, Nortown Theatre Inc. v. Gribbs, 373 F. Supp. 363 (1974).

48 373 F. Supp. 363 (1974).

dwelling room.[49] The intended purpose of the ordinance was to prevent the deleterious effects of such businesses on surrounding neighborhoods.[50] The United States District Court for the District of Michigan found that this interest did not qualify as a compelling state interest and, accordingly, held the ordinance violative of the equal protection clause.[51] The court also observed that the ordinance restricted first amendment freedoms more than necessary to maintain and to preserve residential neighborhoods.[52] The court highlighted the fact that adult theaters and bookstores often were found to affect neighborhoods adversely.[53] Accordingly, the *Gribbs* court held that a municipality has a right to require that particular businesses be located at specified distances from one another.[54]

Two years later, in 1976, the Court decided the landmark case of *Young v. American Mini Theatres Inc.*[55] In *Young*, the operator of an adult movie theater challenged an ordinance which mandated dispersed locations of adult entertainment establishments and prohibited their operation within 500 feet of a residential area.[56]

The *Young* majority initially recognized that the ordinance categorized adult entertainment establishments by their subject matter.[57] The Court, however, stated that there would be no significant restriction of the access to such theaters and that the city's interest in deterring urban decay was a legitimate reason for the regulation of theater location.[58] The *Young* Court further noted that the ordinance only imposed a minimal burden on protected speech.[59] The Court next asserted that a municipality may control the location of commercial establishments either by confining them to specified commercial zones or by dispersing them

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49 *Id.* at 366.

50 *Id.*

51 *Id.* at 371.

52 *Id.*

53 *Id.* at 369.

54 *See, e.g.*, Young v. American Mini Theatres Inc., 427 U.S. 50 (1976) (ordinance which dispersed the location of adult movie theaters upheld).

55 427 U.S. 50 (1976).

56 *Id.* at 52 n.2.

57 *Id.* at 63.

58 *Id.* at 60-63.

59 *Id.* at 62-63. *See, e.g.*, People ex rel Carey v. Starview Drive-In Theater, Inc., 100 Ill. App. 3d 624, 427 N.E.2d 201, *appeal dismissed*, 457 U.S. 1113 (1981) (county ordinance provision forbade outdoor theater licensee from projecting scenes portraying sexually explicit nudity).

throughout the city.[60] Accordingly, the Court found that reasonable regulation of time, place, and manner of protected speech is permitted by the first amendment where such regulations are reasonably necessary to further significant interests.[61]

In 1978, the Court again elaborated the time, place, and manner test set out in *O'Brien*.[62] In *Northend Cinema, Inc. v. City of Seattle*,[63] an ordinance mandated the concentration of all adult motion picture theaters in certain downtown areas.[64] Theater owners sought to have the ordinance declared unconstitutional and alleged violations of their first amendment rights.[65] The City of Seattle asserted that it had a significant interest in maintaining the character of its neighborhoods.[66] The Court weighed Seattle's interest in preserving neighborhood character against the restrictions on free speech and held in favor of the city.[67] The Court also relied on studies conducted by Seattle concerning the pernicious effects of adult theaters on surrounding communities and, as a result, concluded that the ordinance served a significant governmental interest.[68] As evidenced by the *Northend Cinema* Court, a city may demonstrate their compelling interest in regulating adult entertainment facilities by relying on past empirical studies concerning the problematic effects of adult theaters in communities.[69]

Shortly after *Northend Cinema*, the Court considered the constitutionality of a zoning ordinance that banned all live entertainment in a commercial zone.[70] In *Schad v. Borough of Mount*

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60 *Young*, 427 U.S. at 58-61.

61 *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (ban on noise near school which disturbs school session); Cox v. Louisiana, 379 U.S. 559 (1965) (ban on demonstrations in or near courthouse designed to obstruct justice); Kovacs v. Cooper, 336 U.S. 77 (1949) (limitation on use of sound trucks).

62 *See* Northend Cinema, Inc., v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978).

63 *Id.*

64 *Id.* at 710, 585 P.2d at 1154.

65 *Id.* at 712, 585 P.2d at 1156.

66 *Id.* at 715, 585 P.2d at 1159.

67 *Id.*

68 *Id.*

69 *Id.* at 712 n.2, 585 P.2d at 1156, n.2. *But see* Evansville Book Mart, Inc. v. City of Indianapolis, 477 F. Supp. 128 (S.D. Ind. 1979) (discretion of city controller to consider the effects of adult theaters on surrounding communities was unconstitutional without more definite guiding standards).

*70 *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). The purpose of the ordinance was to encourage shopping-center developments and to concentrate commercial uses into few locations. *Id.* at 64.

Ephraim,[71] an adult bookstore wanted to install a coin-operated machine which would allow a customer to view a live, nude dancer.[72] The Court initially observed that there was insufficient evidence to justify the conclusion that live entertainment posed significant problems to surrounding communities.[73] The Court also noted that even if the ordinance served a significant interest, it failed to provide an alternative forum for the entertainment.[74] Accordingly, the *Schad* Court invalidated the ordinance on the ground that it was both overbroad and violative of the first amendment.[75]

The Ninth Circuit Court of Appeals has held that if a motivating factor in enacting a regulation is to suppress expression, the restriction presumptively violates the first amendment.[76] In the 1983 case *Tovar v. Billmeyer*,[77] the petitioners attempted to open an adult bookstore in a commercial zone.[78] At a special meeting held without notice to the prospective store owners, the city council passed two zoning enactments.[79] These enactments prevented the petitioners from operating their adult theater and bookstore.[80] The petitioners alleged that the city's zoning enactments were motivated by a desire to suppress first amendment expression.[81] The ninth circuit observed that the enactment was per se unconstitutional because its real purpose was to obstruct the exercise of protected first amendment rights.[82] The court noted that any decision designed to restrict first amendment freedoms should be strictly scrutinized.[83] Applying this rationale, the *Tovar* court concluded that communication cannot be cur-

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71 452 U.S. 61 (1981).

72 *Id.* at 62.

73 *Id.* at 73. The Court also noted that the ordinance excludes all live entertainment and not simply nude dancing. *Id.* at 74. The Court concluded that the regulation therefore was not narrowly-tailored. *Id.*

74 *Id.* at 75-76. Although nude dancing was available in near-by towns, the Court noted that there was no evidence to support the proposition that the theater owners offered the same kind of entertainment. *Id.* at 76.

75 *Id.* at 74.

76 *See* Tovar v. Billmeyer, 721 F.2d 1260 (9th Cir. 1983).

77 721 F.2d 1260 (9th Cir. 1983).

78 *Id.* at 1262.

79 *Id.*

80 *Id.*

81 *Id.* at 1264.

82 *Id.* at 1265.

83 *Id. See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (Public Service Commission order that prohibited Consolidated Edison from including inserts discussing controversial issues in their bills violated first amendment).

tailed simply because public officials disagree with the speaker's views.[84]

In 1983, the Supreme Court restructured the *O'Brien* test in a case unrelated to zoning.[85] In *United States v Grace*,[86] two individuals were arrested for distributing leaflets and carrying picket signs on the sidewalk in front of the United States Supreme Court building.[87] The arrestees sought declaratory relief, alleging that the statute which prohibited their actions violated their first amendment rights.[88] The *Grace* majority announced a three-part test to determine the constitutionality of the statute,[89] which resembled the test used in *O'Brien* to analyze similar time, place and manner regulations.[90] The *Grace* Court succinctly stated that a regulation is constitutional if the restrictions are "content-neutral,[91] are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication".[92] The Court then found that the statute banned constitutionally protected activity on the public sidewalks and, therefore, would leave the petitioners with no effective means to convey their view.[93] The majority further recognized that while the statute was content-neutral, it did not serve a significant governmental interest.[94] Accordingly, the Court held the statute to be unconstitutional.[95]

In *City of Whittier v. Walnut Properties, Inc.*,[96] a California appellate court in a zoning case reiterated the tripartite test of

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84 *Tovar*, 721 F.2d at 1265. *See, e.g.*, Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1347 (1982) (evidence demonstrated that basic purpose of zoning ordinance was to control expression).

85 *See* United States v. Grace, 461 U.S. 171, 177 (1983).

86 461 U.S. 171

87 *Id.* at 173.

88 *Id.* at 174. The statute provided that "it shall be unlawful to parade, stand, or move in procession or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." *Id.* at 173 n.1.

89 *Id.* at 177.

90 *Compare* United States v. Grace, 461 U.S. 171, 177 (1983) (statute which banned petitioners from distributing leaflets on public sidewalk found unconstitutional) *with* United States v. O'Brien, 391 U.S. 367, 377 (1968) (statute which prohibited burning of draft card found constitutional).

91 *See supra* note 44 and accompanying text (discussion of content-neutrality).

92 *Grace*, 461 U.S. at 177.

93 *Id.* at 181.

94 *Id.* at 181 n.10.

95 *Id.* at 183.

96 149 Cal. App. 3d 633, 197 Cal. Rptr. 127 (Cal. Ct. App. 1983).

Grace.[97] In *City of Whittier*, Walnut Properties owned a theater whose intended use was arguably "adult."[98] The city brought suit to compel Walnut Properties' compliance with a zoning ordinance that prohibited the operation of *any* adult business located within city limits.[99] Using the guidelines formally announced in *Grace*, the court observed that the first step would be to determine whether the ordinance preserved alternative methods of communication.[100] The court noted that if the city required the theater to relocate and did not ban the theater entirely, the first amendment would not be violated.[101] However, the court found that no evidence was introduced on the issue of an alternative site for the theater.[102] In addition, the court asserted that the city had failed to prove that the ordinance was narrowly drawn to advance a significant governmental interest without impinging on the freedom of speech.[103] The court remanded the case leaving open the issue of whether other areas for theater operation existed.[104]

It was against this background of development and change in the zoning of adult entertainment facilities that the *City of Renton v. Playtime Theatres, Inc.*[105] litigation arose. In *Renton*, the Court endorsed the rationale of *Young*.[106] The Court examined whether the Renton ordinance was designed to serve a substantial governmental interest and whether it allowed for reasonable

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97 *Id.* at 640, 197 Cal. Rptr. at 132. The court stated that "the regulation must be narrowly tailored to further the state's legitimate interest." *Id.* "[It] must also leave open alternative channels of communication." *Id.*

98 *Id.* at 643, 197 Cal. Rptr. at 133. The theater owner had argued that the dominant theme of the films was not "adult" and was not proscribed by the ordinance. *Id.* The court remanded the case leaving open the issue of whether the status of the theater was in fact "adult". *Id.* at 643, 197 Cal. Rptr. at 134.

99 *Id.* at 647, 197 Cal. Rptr. at 129 (emphasis added).

100 *Id.* at 640, 197 Cal. Rptr. at 132. The parties had filed a "Stipulation" regarding the availability of other locations for the theater. *Id.* However, the record on appeal indicated no ruling as to the "Stipulation." *Id.* at 643, 197 Cal. Rptr. at 133.

101 *Id.* at 640, 197 Cal. Rptr. at 132. The court observed the holding of *American Mini Theatres* which rejected the notion that if adult theaters are dispersed throughout the city, the first amendment was violated.

102 *Id.* at 643, 197 Cal. Rptr. at 133.

103 *Id.* at 646, 197 Cal. Rptr. at 137. The court succinctly stated that "the city must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered in passing the ordinance." *Id.*

104 *Id.*

105 106 S. Ct. 925 (1986).

106 *City of Renton*, 106 S. Ct. at 928. Renton's ordinance targeted adult theaters while the ordinance in *Young* only added adult theaters to a list of other regulated adult establishments which included hotels, pool halls, and public lodging houses. *See* Young v. American Mini Theatres, 427 U.S. at 52 n.3.

alternative avenues of communication.[107] Moreover, the Court extended the rationale of *Northend Cinema, Inc. v. Seattle*[108] to entitle Renton to rely on the experiences of nearby Seattle and other cities in enacting its adult theater zoning ordinance.[109]

Writing for the majority,[110] Justice Rehnquist observed that the *Renton* ordinance should be properly analyzed as a time, place and manner regulation since it did not prohibit adult theaters altogether.[111] The Justice began his analysis of the Renton ordinance by using the *Grace* three-part test.[112] The majority declared that the line drawn by the Renton ordinance was justified by the city's interest in preserving the character of its neighborhood.[113] The *Renton* Court stated that the ordinance merely limited the place where adult films could be exhibited and did not focus on the nature of the films.[114] Justice Rehnquist opined that the predominate intent behind the ordinance was to prevent crime, to protect trade, and to maintain property values,[115] and as such concluded that these objectives were unrelated to the suppression of speech.[116] Accordingly, the Court held that the ordinance furthered the substantial governmental interest in maintaining residential neighborhoods.[117] In so finding, the *Renton* Court accepted the district court's conclusion that the Renton ordinance was not directed at the content of films shown at adult theaters, but rather, at the secondary effects such theaters have on the surrounding community.[118]

The *Renton* majority next addressed the question of whether

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107 *City of Renton*, 106 S.Ct. at 927-28.

108 90 Wash. 2d 709, 585 P.2d 1153 (1978). The record in *Northend Cinema* provides extensive testimony regarding the pernicious effects of adult movie theater locations on residential neighborhoods. *Id.* at 719, 585 P.2d at 1159.

109 *City of Renton*, 106 S.Ct. at 930-31.

110 Chief Justice Burger and Justices White, Powell, Stevens, and O'Connor joined in Justice Rehnquist's opinion; Justice Brennan filed a dissenting opinion in which Justice Marshall joined. *Id.* at 926.

111 *Id.* at 928-29.

112 *Id.* at 928.

113 *Id.* at 930.

114 *Id.* at 929-31.

115 *Id.* at 932. For an elaborate statement of reasons for enacting the ordinance, see Jurisdictional Statement, *supra* note 10, at 5a.

116 *City of Renton*, 106 S.Ct. at 929.

117 *Id.* at 929-31.

118 *Id.* at 929. Although the Court disregarded whether the ordinance regulated obscene speech, the Court's failure to rely on any obscenity case is demonstrative that the holding only addresses sexually explicit, non-obscene speech. In addition, the court of appeals recognized that the obscenity issue was moot. *City of Renton*, 748 F.2d at 534 n.10.

Renton's ordinance permitted reasonable alternative avenues of communication.[119] Justice Rehnquist noted that the area zoned for adult uses was arguably not commercially viable,[120] but stated, however, that the first amendment only required that the respondent be afforded a reasonable opportunity to operate an adult theater within the city.[121] The *Renton* Court was not concerned with the economic impact of the ordinance, but the effect it had upon the freedom of expression.[122] Accordingly, the Justice found that the ordinance did not unreasonably limit alternate avenues of communication.[123]

The *Renton* majority next rejected the court of appeals' assertion that a motivating factor behind the City Council's decision to enact the ordinance was to restrict the respondents' first amendment rights.[124] The majority observed that Renton could have either limited the number of adult theaters or banned them entirely if it desired to restrict the message the theaters purveyed.[125] Although the Renton ordinance failed to regulate other kinds of adult businesses and was arguably underinclusive,[126] the *Renton* Court asserted that the city had not singled out adult theaters for discriminatory treatment.[127] The Court pointed out that *no* adult theaters, other than Playtime Theaters, Inc., were located in Renton, or were contemplated at the time the ordinance was adopted.[128] The Court, therefore, speculated that if other adult businesses were established, Renton could amend its ordinance.[129]

Finally, the *Renton* Court asserted that the city was entitled to rely on the experiences of nearby Seattle regarding the deterioration of residential neighborhoods in which adult theaters are present.[130] The Court concluded that as the evidence Renton relied upon was reasonably relevant to its specific problem, new

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119 *City of Renton*, 106 S.Ct. at 932.
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 929.
125 *Id.*
126 *Id.* at 931. The Renton ordinance regulated only adult theaters and failed to regulate other kinds of adult businesses, which arguably would produce similar effects on neighborhoods. *Id.*
127 *Id.*
128 *Id.*
129 *Id.* at 931-32.
130 *Id.* at 930-31.

studies or independent evidence were unnecessary.[131] Although Renton chose a different remedy than Seattle, the Court stated that the remedy was immaterial if the studies relied upon were relevant.[132] Accordingly, the *Renton* Court found Renton's ordinance not to be violative of the United States Constitution.[133]

Justice Brennan authored a dissenting opinion, in which Justice Marshall joined, wherein he concluded that Renton's zoning ordinance discriminatorily imposed restrictions on the location of movie theaters.[134] Justice Brennan stated that the discrimination was based entirely on the content of the film.[135] The Justice believed that the language of the ordinance, as well as a "dubious legislative history," supported this contention.[136] The dissent conceded that Renton may arguably have a compelling reason to regulate adult theaters, but that its method of implementation was discriminatory.[137] In Justice Brennan's view, the selective treatment accorded adult theaters evidenced Renton's greater concern with the content of the film than with their secondary effects.[138]

Although the majority held that Renton was entitled to rely on the experiences of other cities, Justice Brennan pointed out that Renton never actually reviewed any of those studies.[139] Justice Brennan criticized the majority for its reliance on *Northend Cinema*,[140] since Renton had not provided a sufficient basis for ascertaining whether Seattle's experience was relevant.[141] Justice Brennan also found the Renton ordinance distinguishable from the Detroit zoning ordinance upheld in *American Mini Theatres*.[142] The dissent believed that the city failed to adequately demonstrate how the community would be affected by the presence of

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131 *Id.* at 931.

132 *Id.*

133 *Id.* at 933.

134 *Id.* at 933 (Brennan, J., dissenting).

135 *Id.*

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

137 *Id.*

138 *Id.* at 934-35 (Brennan, J., dissenting).

139 *Id.* at 935-36 (Brennan, J., dissenting).

140 *Id.* at 935-37 (Brennan, J., dissenting). *See, e.g.*, Northend Cinema, Inc. v. Seattle, 90 Wash.2d 709, 711, 585 P.2d 1153, 1154-55 (1978) (describing Seattle zoning ordinance as culmination of extensive study and discussion).

141 *City of Renton*, 106 S. Ct. at 935-36 (Brennan, J., dissenting).

142 *Id.* at 937 (Brennan, J., dissenting). The purpose of Detroit's ordinance was to disperse adult theaters throughout the city, while the Seattle ordinance was intended to concentrate such theaters in one area. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976).

an adult theater.[143]

Finally, Justice Brennan asserted that even if the ordinance was a valid content-neutral time, place, and manner regulation, under *Grace*, it was not narrowly tailored to serve a significant governmental interest.[144] In addition, Justice Brennan noted that the ordinance did not leave open alternative channels for communication.[145] Justice Brennan observed that the Detroit zoning ordinance scrutinized in *Young*, by contrast, contained no indication that the locations available for adult businesses would be seriously limited.[146] Justice Brennan distinguished these facts from the Renton ordinance which greatly limited the locations available for adult businesses,[147] and concluded that the aggrieved theater owners would be forced to conduct their business under a severe handicap not imposed upon other establishments.[148]

The United States Supreme Court has continually wrestled with city zoning ordinances that attempt to regulate the location of adult establishments. The *Renton* Court relied primarily upon the rationale of *Young*.[149] The four separate opinions in *Young*,[150] however, had previously cast doubt upon its precedential force. Indeed, since *Young*, only one federal circuit had sustained the validity of a *Renton*-style ordinance on the merits.[151] Unlike the Court in *Young*, the Renton majority concluded that a zoning or-

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143 *City of Renton*, 106 S.Ct. at 936-37 (Brennan, J., dissenting).

144 *Id.* at 937 (Brennan, J., dissenting).

145 *Id.* at 937-38 (Brennan, J., dissenting).

146 *Id.* at 938 (Brennan, J., dissenting).

147 *Id.*

148 *Id.*

149 *See supra* note 106 and accompanying text.

150 Justice Stevens' opinion was joined by Chief Justice Burger and Justices White and Rehnquist. Although Justice Powell concurred, he found the regulation was unrelated to the suppression of expression under the *O'Brien* test. *See supra* notes 36-46 and accompanying text for a discussion of *O'Brien*; *see also O'Brien*, 427 U.S. at 80-81 (Powell, J., concurring). Justice Stewart, in dissent, interpreted the *Young* decision as a variation of the Court's previous first amendment holdings. *See O'Brien*, 427 U.S. at 87 (Stewart, J., dissenting).

151 *Compare* Genusa v. City of Peoria, 619 F.2d 1203, 1210-12 (7th Cir. 1980) (upholding ordinance requiring that adult establishments be separated by at least 500 feet) *with* CLR Corp. v. Henline, 702 F.2d 637, 638-39 (6th Cir. 1983) (striking down ordinance as severely restricting first amendment expression) *and* Alexander v. City of Minneapolis, 698 F.2d 936, 937-39 (8th Cir. 1983) (striking down ordinance as substantially restricting access to adult theaters and bookstores) *and* Basiardanes v. City of Galveston, 682 F.2d 1203, 1212-17 (5th Cir. 1982) (striking down ordinance as not narrowly tailored to achieve its purported goals because adult theaters were confined to unattractive and inconvenient areas).

dinance aimed solely at adult theaters was content-neutral.[152] In addition, the *Renton* majority appeared willing to afford nonobscene, sexually explicit expression less first amendment protection than other types of communication.[153]

The *Renton* Court created the presumption that zoning ordinances which in fact regulate content may be classified as content-neutral if their goal is to deter the secondary effects of the expression.[154] Assuming *arguendo* that the *Renton* ordinance was facially content-neutral, it still regulated content for two reasons. First, the motivating factor behind the ordinance was the City's general distaste for the content of the expression.[155] Second, since the ordinance was directed only at adult theaters, it was arguably underinclusive for failing to regulate other types of expression having similar deleterious effects.[156]

The *Renton* majority dismissed the motivating factor test endorsed by the court of appeals and relied alternatively on the test of *United States v. O'Brien*.[157] *O'Brien*, however, was a symbolic speech case and is thus questionable authority for the Court's position.[158] The *Renton* Court further rejected the facial underinclusiveness of the ordinance when it asserted that Renton subsequently could amend its ordinance to cover other adult establishments.[159] From this reasoning, it is clear that the *Renton* Court has departed from traditional first amendment analysis. The Court, through circuitous reasoning, assumed that the facially underinclusive Renton ordinance would subsequently be

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152 *City of Renton*, 106 S.Ct. at 929.

153 *Id.* at n.2.

154 The case cited by the Court to support its argument that the ordinance was content-neutral were not precisely on point. For example, Clark v. Community for Creative Non-Violence, 468 U.S. 299 (1984), dealt with symbolic speech and was analyzed under the *O'Brien* test. *See supra* notes 36-46 and accompanying text for a discussion of *O'Brien*. In addition, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), dealt with commercial speech where a content-based regulation was struck down.

155 *City of Renton*, 748 F.2d at 537. *See, e.g.*, Tovar v. Billmeyer, 721 F.2d 1260 (9th Cir. 1983) (ordinance with intent to suppress expression presumptively violated first amendment).

156 *City of Renton*, 106 S.Ct. at 931.

157 *Id.* at 929. *See supra* notes 36-46 and accompanying text for a discussion of *O'Brien*.

158 *City of Renton*, 106 S.Ct. at 929. Legislative motive aside, the Renton ordinance on its face was content-based, whereas the *O'Brien* statute on its face was content-neutral. See *supra* note 44 for a discussion of content-neutrality. This point strongly suggests that *O'Brien* is questionable authority for the Court's position.

159 *City of Renton*, 106 S.Ct. at 931-32.

amended to remedy its selectivity.[160] In reality, an ordinance aimed exclusively at an adult theater is illustrative evidence of a content-based regulation.[161]

In addition to the majority's unique holding regarding content-neutrality, it inferred that nonobscene, sexually explicit expression should be afforded less first amendment protection. The Court, albeit in a footnote, suggested that the interest of society in protecting sexually explicit expression is less than the interest in protecting untrammeled political debate.[162] The majority's statement can be interpreted to suggest a less stringent content-neutrality standard for ordinances regulating adult theaters.[163] Thus, a zoning ordinance directed as some contrived secondary effect may be reviewed as content-neutral. Alternatively, the footnote may be interpreted to suggest that in the future courts may evaluate content-neutrality similarly to the *Renton* Court.[164] The *Renton* majority disregarded the facial underinclusiveness of the ordinance and its questionable legislative intent.[165] This is indicative of a Supreme Court that may be wavering in its commitment to treating all first amendment expression equally.

Justice Brennan was correct in observing that a zoning ordinance aimed exclusively at adult theaters could not be content-neutral. The majority, through circuitous reasoning, has fashioned a "special" rule for unpopular methods of expression. If a city can support their restrictive ordinances with an arguably legitimate secondary effect, the majority will apply a lower level of scrutiny. As Justice Brennan noted, this is clearly an abrogation of the theater owner's first amendment rights.

The dissent persuasively asserted that the Renton ordinance was clearly a content-based regulation. Justice Brennan's dissent was a logical progression of the cases since *United States v. O'Brien*.

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160 *See, e.g.*, Erzonznik v. City of Jacksonville, 422 U.S. 205, 214 (1972) (striking down ordinance that barred drive-in theaters from showing movies containing nudity when visible from the street).

161 *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50 (1976) (striking down an ordinance restricting proximity between adult theaters and residential neighborhoods). *See supra* notes 55-61 and accompanying text for a discussion of *Young*.

162 *City of Renton*, 106 S.Ct. at 929 n.2 (quoting Young v. American Mini Theatres, 427 U.S. 50, 70 (1976)).

163 The dissent recognized this possible interpretation when it noted that the Court's analysis is limited to businesses that show sexually explicit materials, and does not affect prior holdings involving state regulation of other types of expression. *Id.* at 933 (Brennan, J., dissenting) (citation omitted).

164 *City of Renton*, 106 S.Ct. at 929 n.2.

165 *Id.* at 929, 931-32.

The Renton ordinance should have been struck down for two reasons. First, as Justice Brennan aptly pointed out, Renton had not demonstrated sufficiently the deleterious effects of adult theaters on *its* neighborhoods to establish a substantial governmental interest. Second, as Justice Brennan vehemently argued, the ordinance failed to provide for alternative channels of communication as it effectively banned adult theaters from any appropriate site.

Since the first amendment was drafted, Americans have believed that in many respects it was paramount to all other constitutional interests. The United States Supreme Court in many prior decisions has embraced this notion. Curiously, the nation's highest Court has departed from precedent and determined that certain modes of expression are unworthy of first amendment protection. One would hope that this interpretation is limited to the particular facts occurring in *City of Renton* and that there will be no cross-over effect in other areas of first amendment jurisprudence.

Christopher L. Musmanno