IRRESISTIBLE FORCE MEETS IMMOVABLE OBJECT: WHEN THE ZONING POWER COMES UP AGAINST FREEDOM OF EXPRESSION

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INTRODUCTION

When state and local governments establish land use restrictions that hinge, at least in part, on the nature of expression made on the premises, the police power cases and First Amendment precedents are both implicated. Yet the standards in the two areas are vastly different. This conflict often arises in the context of a challenge to a zoning law that restricts adult entertainment establishments. Beginning with *Euclid v. Ambler Realty*,[1] the Supreme Court has developed standards for reviewing exercises of the police power in the form of land use restrictions. The Court has shown great deference to the states in this area, defining broadly the goals which it will consider permissible for state action and viewing tenuous connections between purpose and action as sufficient to pass constitutional muster. In the area of free expression, the precedents are much less favorable to the government. Speech, including conduct that is equivalent to speech, is generally afforded substantial protection.

How is the Court to analyze a case to which both of these lines of cases apply? Should it view the problem as a possible infringement on free expression and apply a high level of scrutiny? Is it more appropriate to determine the level of review and the questions to be asked by making reference to the power being exercised and, thus, give deference to the state?

This paper will briefly examine the history and development of each of these two areas of the law. It will then examine those cases that have come before the Court that have involved both areas. Finally, there will be a discussion of possible flaws in the Court's treatment of these cases and recommendations for resolving the conflict between these areas of the law.

Suggested changes in the Court's analysis include adoption of standards from First Amendment law rather than only the generally deferential tests that are found in the police power cases, abandonment of the "secondary effects" test for content-neutrality and a more realistic approach to the question of the availability of alternative avenues of communication.

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[1] 272 U.S. 365 (1926).

THE ZONING POWER: ITS HISTORY AND ITS LIMITS

A BRIEF HISTORY WITH SELECTED PRECEDENTS

The first comprehensive land use regulation was that of the City of New York in 1916.[2] The genesis of the statute was a conflict between the owners of fashionable shops and the owners of factories in the garment district. The garment district, historically confined to the southern part of the city, had been expanding and encroaching on the shop areas. The shop owners lobbied for legislation to confine the factories.[3]

On March 25, 1911, the Triangle Shirt Waist Company fire killed over 140 garment workers. An investigation revealed that the factory had been poorly constructed and that all means of escape from the building had been locked from the outside to prevent employees from avoiding their work. This event turned the political tide in favor of the shop owners.[4] The state legislature quickly gave the city zoning power and the ordinance came soon thereafter.[5]

The Supreme Court did not address the validity of the power to zone for ten years after the passage of the New York ordinance. When it did, it was not the metropolis of New York that was challenged, but the Village of Euclid.[6] The Ambler Realty Company had, for fifteen years, bought and sold land in Euclid. When it sold a parcel for residential use, it inserted a restrictive covenant in the deed, so that the land could only be used for residential purposes. At the same time, Ambler was keeping an island of unrestricted land. Ambler would eventually have had a stranglehold on the market for land that was available for commercial use.[7]

Unfortunately for Ambler, Euclid passed an ordinance which, *inter alia*, restricted the uses of the land in some parts of the village. Potential uses of land were placed in a hierarchy. Parks and single-family residences were among the highest uses. The lowest class of uses included such things as garbage incineration facilities and prisons.[8] The statutory plan was a "cumulative" one, meaning that land could be put to a higher use than it was zoned for, but not a lower one. If an area was zoned for the

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[2] S. KURTZ & H. HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 884 (1987).

[3] *Id.* at 884.

[4] *Id.*

[5] *Id.*

[6] Euclid v. Ambler Realty, 272 U.S. 365 (1926).

[7] *See generally* S. KURTZ & H. HOVENKAMP, *supra* note 2.

[8] *Euclid*, 272 U.S. at 381 (there was another class of uses excluded completely).

highest uses, most commercial activities were prohibited.[9] Significant restrictions were placed on some of the tracts owned by Ambler.[10]

Ambler brought suit, alleging that it had held the land for years for the purpose of industrial development, that the land was especially adapted to such uses, and that its market value would be reduced by sixty-five to seventy-five percent by the restrictions.[11] The Supreme Court held, 6-3, that the ordinance was a valid exercise of the state's police power and was not a taking without due process of law.[12] The extent of legitimate power to zone depended on the circumstances in which it was exercised. Unable to draw a precise boundary, the Court pointed to the common law of nuisance as a guide.[13] Justice Sutherland, writing for the Court, noted, "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[14] Deference was to be accorded to the judgment of the legislature. In fact, before the Court would declare a land use ordinance unconstitutional, it would have to be shown that the ordinance was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[15]

The result in this case is somewhat surprising, coming as it did during the "liberty of contract" or "Lochner" era. The Court had struck down many statutes that regulated employment on the theory that individuals had a right to make their own contracts.[16] Yet in *Euclid*[17] and in *Welch v. Swasey*,[18] a case involving a challenge to a restriction on the heights of buildings, the Court upheld significant restrictions on the right to contract for construction and for the full use of one's land.

The cases in the two areas (land use and employment) could be distinguished on the basis of greater externalities in the land use context.[19] The Court may have believed that an employment contract did not have substantial effects on non-parties,

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[9] *Id.* at 380-81.

[10] *Id.* at 383.

[11] *Id.* at 384-84.

[12] *Id.* at 397.

[13] *Id.* at 387.

[14] *Id.* at 388.

[15] *Id.* at 395.

[16] S. KURTZ & H. HOVENKAMP, *supra* note 2, at 882.

[17] *Euclid*, 272 U.S. at 365.

[18] 214 U.S. 91 (1909).

[19] S. KURTZ & H. HOVENKAMP, *supra* note 2, at 883. Theories of externalities had become well-developed by 1926. The Court's apparent appreciation of the difficulty of the "free rider" problem (apartments that took advantage of the lower density of surrounding areas) lends more credibility to the suggestion that these theories motivated the Court. However, it is more likely that the observations as to "free riders" were based on common sense and intuition, not a conceptual theory.

while decisions as to land use did. A more likely explanation of the greater deference shown by the Court in the cases involving restrictions on land use is the long history of governmental regulations affecting land use. There have been such regulations in England for over 600 years.[20] After the *Euclid* decision, many municipalities imitated the statute that was challenged in that case. Cumulative zoning was widely used.[21] Planners felt that residential areas needed protection from encroachment by commercial uses. However, the reverse, that commercial uses might need protection from encroachment by residential areas, was not a widely held view.[22] Thus, the ideal system was one that kept commercial uses from burdening residential areas with their unwanted presence, but did not keep an individual or family from building a home among the factories.

In 1928, the Court decided *Nectow v. Cambridge*,[23] a case that was similar to *Euclid* in several respects: the plaintiff had land that had been zoned residential and he wanted to sell it for commercial use.[24] Here, in contrast to the result in *Euclid*, the Court found that the plaintiff's Fourteenth Amendment rights had been violated.[25] The plaintiff's land, a narrow strip, was surrounded by industrial facilities. As zoned, it was worthless.[26] Unlike *Euclid*, this was a challenge to the statute as applied, not a facial challenge.[27] The Court found that the application of the statute in this instance was not integral to the general plan and bore no substantial relation to the public health, safety, morals, or general welfare.[28]

The trend today is away from "cumulative" zoning and toward "exclusive" restrictions. Under an "exclusive" zoning statute there is no hierarchy of uses. For each area certain uses are permitted. All others are excluded.[29] Planners now believe that some of the uses that were thought of as lower under the cumulative schemes need protection from uses that were thought of as higher; that, for instance, some commercial uses need protection from residential development.[30]

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[20] D. MANDELKER, LAND USE LAW 1 (1988). "Public control of land use has a long history." According to Mandelker, the Romans had building site restrictions in the fourth century, B.C. *Id.*

[21] S. KURTZ & H. HOVENKAMP, *supra* note 2, at 887.

[22] *Id.* at 887.

[23] 277 U.S. 183 (1928).

[24] *Id.* at 187.

[25] *Id.* at 188-89.

[26] *Id.* at 187.

[27] *Id.* at 185.

[28] *Id.* at 188-89.

[29] S. KURTZ & H. HOVENKAMP, *supra* note 2, at 887.

[30] *Id.* at 887.

In the 1970's, the Court dealt with challenges to statutes restricting those who could live together. The Village of Belle Terre passed an ordinance that allowed only one "family" to live in the same house. A "family" could include any number of related persons, but could not include more than two unrelated persons.[31] In *Village of Belle Terre v. Boraas*, the Court heard a challenge to the ordinance on the grounds of equal protection and the rights of association, travel and privacy.[32] The majority analyzed the case as an exercise of the police power.[33] It specifically found that no fundamental right guaranteed by the Constitution was involved.[34]

In *Moore v. City of East Cleveland*, the plaintiff attacked a statute that made it illegal for her to live with her grandson.[35] The Court distinguished the facts before it in *Moore* from *Belle Terre* on the ground that the *Belle Terre* statute affected only unrelated persons.[36] The Court explicitly refused to extend the "usual judicial deference" to the legislature in *Moore* because the case dealt with a regulation of the family. Finding that such an intrusion threatened the right to due process under the Fourteenth Amendment, the Court held that neither *Belle Terre* nor *Euclid* governed this case.[37] Although the facts of *Belle Terre* are quite similar to those of *Moore*, the Court's analysis in *Moore* was much more searching and less deferential. The reason for this difference is that the Court found that a fundamental right was implicated in *Moore*, while it explicitly found that none was involved in *Belle Terre*.

SUMMARY OF THE CONSTITUTIONAL LIMITS ON ZONING

States can delegate to their subdivisions the power to regulate the uses of land as part of their police power.[38] This power can only be used for certain purposes, but these purposes are defined very broadly -- the public health, safety, morals, or general welfare.[39] Such a broad definition does not make fertile ground for facial challenges

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[31] Village of Belle Terre v. Boraas, 416 U.S. 1, 2 (1973).

[32] *Id.* at 7.

[33] *Id.* at 7-9.

[34] *Id.* at 7.

[35] 431 U.S. 494, 497 (1977).

[36] *Id.* at 498.

[37] *Id.* at 498-99.

[38] Euclid v. Ambler Realty, 272 U.S. 365 (1926).

[39] *Id.* at 395.

to zoning laws,[40] but the possibility remains that the Court will find that no relation exists between a particular application of a law and one of the permissible purposes.[41] A statute is also vulnerable if it infringes on a fundamental right.[42]

FREE EXPRESSION

INTRODUCTION

The First Amendment protects, *inter alia*, freedom of speech and freedom of the press.[43] These freedoms, when considered together, shall be referred to as "freedom of expression." Where the protection of these guarantees is sought, the Court must first determine whether there has indeed been any expression. This becomes an issue where a litigant engages in nonverbal conduct which he alleges is expression. If the Court finds that there has been expression which has been restricted, it must then decide if that expression is obscene and thus deserving of no First Amendment protection. If the expression is not obscene it may still be offensive, in which instance it will receive some protection, but not full protection.

ARGUABLY EXPRESSIVE CONDUCT

David Paul O'Brien burned his Selective Service registration certificate (draft card) on the steps of the South Boston Courthouse.[44] Destruction of the certificate was a violation of federal law.[45] In *United States v. O'Brien*, the Court expressly rejected the view that all sorts of conduct could be labelled speech even if the actor intended for the conduct to express an idea.[46] The Court viewed the conduct in this case as having both communicative and non-communicative elements.[47] Where such elements were found in the same conduct, "a sufficiently important governmental interest in regulating the non-speech elements can justify incidental limitations on" the speech elements.[48] For

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[40] *Id.*

[41] *See Nectow v. Cambridge*, 277 U.S. 183 (1928).

[42] *See Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1976). *But cf. Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-10 (1974) (scrutinizing claim that rights of association, travel, privacy and due process were violated by a zoning ordinance). The Court ultimately found that no fundamental right was violated.

[43] U.S. CONST. amend. I

[44] United States v. O'Brien, 391 U.S. 367, 369 (1968).

[45] *Id.* at 370-71.

[46] *Id.* at 376.

[47] *Id.* at 376, 381-82.

[48] *Id.* at 376.

a government regulation under the police power that affects freedom of expression to be permissible, it must be within the constitutional power of the government and further a substantial state interest which is unrelated to the suppression of free expression. Any incidental restriction on First Amendment rights must be no more than what is necessary to further that state interest.[49]

The Court, in upholding O'Brien's conviction, distinguished the case from *Stromberg v. California*.[50] In *Stromberg*, the Court struck down a statute that made it illegal to express opposition to organized government by displaying a flag, badge, banner or device.[51] Chief Justice Warren, writing for the Court in *O'Brien*, found that the *Stromberg* case was distinguishable because the statute in that case was aimed at suppressing communication and could not, therefore, be upheld as a regulation of noncommunicative conduct.[52]

A year after *O'Brien*, the Court invalidated the suspensions of high school students for wearing black arm bands as a protest to United States policy in Vietnam.[53] The Court found that such symbolic action was "closely akin to 'pure speech'" and therefore entitled to "comprehensive protection."[54] The Court acknowledged that the school environment has special characteristics,[55] but as long as the expressive conduct was not disruptive, it was entitled to First Amendment protection.[56] "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble."[57]

Thus, arguably expressive conduct may either be "symbolic" or it may be a mix of communicative and non-communicative elements. In the former case, the Court will view the conduct as virtually "pure speech" and afford it commensurate constitutional protection.[58] In the latter case, the Court will apply the test of *O'Brien*, determining if the restriction at issue is within the power of the government under the Constitution, whether it furthers a substantial governmental interest, whether that interest is unrelated to the suppression of free expression, and whether any incidental restriction

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[49] *Id.* at 377.

[50] *Id.* at 382 (distinguishing Stromberg v. California, 283 U.S. 359 (1931)).

[51] 283 U.S. at 361, 369-70.

[52] *O'Brien*, 391 U.S. at 382.

[53] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

[54] *Id.* at 505-06.

[55] *Id.* at 506.

[56] *Id.* at 508.

[57] *Id.*

[58] *Tinker*, 393 U.S. at 503.

on constitutionally protected expression is limited to that which is necessary to further that interest.[59]

UNPROTECTED SPEECH

Not all expression is protected by the First Amendment. Some expression is considered of too little value to be protected.[60] In *Roth v. United States*,[61] the Court heard two cases involving First Amendment claims. In the first case, Roth published and sold books, photographs and magazines. He was convicted of mailing obscene materials in violation of the federal obscenity statute.[62] Alberts, the appellant in the other case, was convicted of violating a California statute by keeping obscene books for the purpose of selling them and by writing and publishing an obscene advertisement of them.[63] In affirming the convictions, the Court declared that "ideas having even the slightest redeeming social importance...have the full protection of the [First Amendment] unless excludable because they encroach upon...more important interests."[64] However, the Court specifically excluded obscenity from the area of constitutional protection.[65] This holding required the Court to define obscenity.

That task proved to be quite difficult for the Court. In *Roth*, the Court offered a test: if to the "...average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeal[ed] to the prurient interest" in sex, the material was obscene.[66]

The members of the Court could not, however, reach any lasting agreement as to the standard. In the ten years following *Roth*, the thirteen obscenity cases that came before the Court produced fifty-five separate opinions. Five different views developed.[67] One was shared by three justices. Warren, Brennan and Fortas laid out their test in *Memoirs v. Massachusetts*.[68] In their view, for material to be considered obscene, the government had to show that the dominant theme of the material, taken as a whole, appealed to the prurient interest in sex; that the material was patently

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[59] *O'Brien*, 391 U.S. at 377.

[60] *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[61] 354 U.S. 476 (1957).

[62] *Id.* at 480.

[63] *Id.* at 481.

[64] *Id.* at 484.

[65] *Id.* at 485.

[66] *Id.* at 489.

[67] *See generally* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1121 (1986).

[68] 383 U.S. 413, 419 (1966).

offensive because it affronted contemporary community standards relating to description or representation of sexual matters; and that it was utterly without socially redeeming value.[69] This was the test generally followed by the lower courts.[70]

Redrup v. New York[71] marked the beginning of the Court's practice of issuing per curiam reversals of convictions for the sale or exhibition of materials which five or more members of the Court found not to be obscene. From 1967 to 1973, thirty-one cases were disposed of in this fashion. This became known as the *Redrup* approach.[72]

Miller v. California was decided in 1973. The Court's opinion laid out a new, three-part test. Material was obscene if: the average person, applying contemporary community standards, would find the work as a whole appealing to the prurient interest; the work depicted or described, in a patently offensive way, sexual conduct that was specifically defined by the applicable state law; and the work as a whole lacked serious literary, artistic, political or scientific value.[73]

Two facets of the *Miller* test are especially noteworthy. First, it rejects the "utterly without socially redeeming value" test of *Memoirs*.[74] The standard it uses, lack of serious literary, artistic, political or scientific value, makes it much easier to find material obscene. Second, it allows local standards to enter the determination -- there is no national definition of obscenity.[75] The *Miller* test is now the standard for obscenity.

OFFENSIVE SPEECH

If expression is not found to be obscene under the *Miller* test, it is entitled to constitutional protection. However, the Supreme Court has recognized a category of expression which is not obscene, but which is, because of its offensive nature, of too little value to receive the full protection of the First Amendment. In *Chaplinsky v. New Hampshire*, the Court listed the types of expression for which a citizen could be punished. Among these types were the "lewd" and the "profane." The Court found that such utterances were not needed for the communication of ideas and were of "slight social value as a step to the truth."[76]

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[69] *Id.* at 419-20.

[70] G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 66, at 1121.

[71] 386 U.S. 767 (1967).

[72] G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 66, at 1122-23.

[73] Miller v. California, 413 U.S. 15, 24 (1973).

[74] *Id.* at 24-25.

[75] *Id.* at 30.

[76] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

In 1968, Paul Robert Cohen was arrested for wearing a jacket with the words "Fuck the Draft" written on it. He was convicted of disturbing the peace by offensive conduct.[77] The Supreme Court overturned the conviction.[78] The state clearly could not punish Cohen for the underlying content of his message.[79] Further, the state, in its role as guardian of the public morality, could not be allowed to remove from the public vocabulary words it deemed offensive.[80] Because "[o]ne man's vulgarity is another's lyric," "the Constitution leaves matters of taste and style largely to the individual."[81] A truly captive audience might have been entitled to protection from Cohen's expression,[82] but the "ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is...dependent upon a showing that substantial privacy interests are being invaded in an ...intolerable manner."[83] This was so even though "[w]e are often 'captives' outside...the home."[84] The emotive function of words was often the most important element of the overall message,[85] so that a finding that the same cognitive thought could be expressed without that particular word would not extinguish a First Amendment claim.

In *FCC v. Pacifica Foundation*, the Court heard a challenge to the power of the Federal Communications Commission to enforce a content-based regulation against a radio broadcast that was "indecent but not obscene."[86] The broadcast was a satirical monologue by George Carlin entitled "Filthy Words."[87] The FCC prevailed.[88] Offensive expression was "not entitled to absolute constitutional protection under all circumstances."[89] Context was an essential consideration.[90] Broadcasts entered the home, and because the audience could tune in at any moment, prior warnings could not

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[77] Cohen v. California, 403 U.S. 15, 16-17 (1971).

[78] *Id.* at 26.

[79] *Id.* at 18.

[80] *Id.* at 23-25.

[81] *Id.* at 25.

[82] *See id.* at 21-22.

[83] *Id.* at 21.

[84] *Id.*

[85] *Id.* at 26.

[86] 438 U.S. 726, 729 (1978).

[87] *Id.*

[88] *Id.* at 750-51.

[89] *Id.* at 747-48 (opinion of three justices).

[90] *Id.*

provide complete protection to an unwitting listener. Nor was it a complete remedy that the listener could turn off the radio if he heard indecent language.[91]

If the Court determines that expression is not obscene under *Miller*, but is offensive, lewd or profane, it will examine the context in which the expression is found. If the audience is "captive," the Court is more likely to find that regulation of the expression is permissible. If there are youths present in the audience, particularly if they are able to be exposed to the expression without parental consent, the Court will be more willing to uphold a regulation of the expression.

WHEN WORLDS COLLIDE: THE POLICE POWER MEETS FREE EXPRESSION

The Court has issued a few landmark decisions in cases involving conflict between the police power, in the form of land use restrictions, and First Amendment values as embodied in adult entertainment. The variation in the analysis used in these cases and the inconsistency in the outcomes reveal that the conflict between police power precedents and the jurisprudence of free expression is a perplexing one for the Court.

Jacksonville, Florida passed an ordinance which declared that it was a public nuisance for a drive-in theater to show a movie which displayed any of several specified parts of the human anatomy if the picture was visible from any public place.[92] The Court closely examined the arguments offered by the city in defense of the ordinance in *Erznoznik v. Jacksonville*. The Court focused on the nature of the speech being regulated and used language from First Amendment jurisprudence.[93] The Court declared that the ordinance was unconstitutional.[94]

The ordinance could not be upheld as a time, place and manner regulation because it was not content-neutral; nor was there a sufficiently captive audience to justify state intervention.[95] The ordinance swept too broadly to be upheld as an exercise of the state's police power to protect children. The scope of the ordinance was not restricted to nudity which would be obscene, even as to children.[96] The scope was too narrow for Jacksonville to successfully defend the statute on the ground that it was necessary to prevent motorists from being distracted. The Court found "...no reason to think that a wide variety of other scenes in the customary screen diet...would be any less distracting to the passing motorist."[97]

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[91] *Id.* at 748-49.

[92] Erznoznik v. Jacksonville, 422 U.S. 205, 206-7 (1975).

[93] *See id.*

[94] *Id.* at 217-18.

[95] *Id.* at 209-12.

[96] *Id.* at 212-14.

[97] *Id.* at 214-15.

A deeply divided Court upheld a Detroit zoning ordinance against a First Amendment challenge in *Young v. American Mini-Theatres.*[98] The challenged statute classified certain enterprises, including adult theaters, as "regulated uses." It required that an adult theater not be located within 1000 feet of any two other "regulated uses" or within 500 feet of a residential area.[99] Justice Stevens, writing for four members of the Court, noted, "[f]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[100]

Although the state could not validly enact a total suppression of this type of communication, "[t]he State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."[101] The remaining question was whether this classification was justified by any interest of the city. Stating that "[t]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect," and that the city should be allowed to "... experiment with solutions to admittedly serious problems,"[102] Justice Stevens found that the classification was justified.[103] The plurality opinion admitted that the restriction was content-based, but found it constitutionally permissible because it was viewpoint neutral.[104]

Justice Powell concurred and found that First Amendment concerns were implicated only incidentally.[105] He saw no denial of a full opportunity for expression to convey its desired message nor of a full opportunity for everyone to receive it.[106] The rest of Powell's opinion provided a look at things to come.[107] He found that Detroit had made no effort to suppress free expression.[108] The case, he argued, was not to be seen as involving a content-based restriction on the time, place or manner of

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[98] 427 U.S. 50 (1976).

[99] *Id.* at 52. *See also id.* at 53-54.

[100] *Id.* at 70.

[101] *Id.* at 70-71.

[102] *Id.* at 71.

[103] *Id.* at 71-72.

[104] *Id.* at 70.

[105] *Id.* at 73 (Powell, J., concurring).

[106] *Id.* at 78-9 (Powell, J., concurring).

[107] *Compare id.* at 73-84 (Powell, J., concurring) *with* Renton v. Playtime Theaters, 475 U.S. 41 (1986) (each giving deference to state actor and lending credence to claims of neutrality toward content).

[108] *Id.* at 80-81 (Powell, J., concurring).

communication. Rather, the city had decided to treat certain movies differently because they had a different effect on their surroundings.[109]

The dissenting opinion of four of the justices argued that if First Amendment protection applied only to expression which more than a few of us would go to war to defend, then popular opinion would define the scope of an essential part of the Bill of Rights.[110] This was counter to the purpose of the Bill of Rights, which, according to the dissenters, was "designed to protect against precisely such majoritarian limits on individual liberty." [111] The dissent also noted the significant similarities between the facts of this case and those of *Erznoznik*, decided only one year earlier.[112]

The statute challenged in *Schad v. Borough of Mount Ephraim* excluded all live entertainment from the borough.[113] The appellants operated an adult bookstore. The store contained coin-operated devices which showed adult films. When the operators of the store added a coin-operated device that allowed a customer to see a live performance by a nude dancer behind a glass panel, they were convicted of violating the prohibition on live entertainment.[114]

The Court found the convictions unconstitutional.[115] Entertainment, including nude dancing, was entitled to First Amendment protection.[116] The right assertedly threatened, not the power being exercised, determined the standard of review.[117] When a zoning law infringed on a First Amendment right, it had to be narrowly drawn and had to further a sufficiently substantial state interest.[118]

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[109] *Id.* at 80-82 (Powell, J., concurring).

[110] *Id.* at 86 (Stewart, J., dissenting).

[111] *Id.*

[112] *Id.* at 88 (Stewart, J., dissenting)
("The factual parallels between that case and this one are striking. There, as here, the ordinance did not forbid altogether the 'distasteful' expression but merely required an alteration in the physical setting of the forum. There, as here, the city's principal asserted interest was in minimizing 'undesirable' effects of speech having a particular content. And, most significantly, the particular content of the restricted speech at issue in *Erznoznik* precisely parallels the content restriction embodied in...Detroit's..." ordinance. "In short, *Erznoznik* is almost on 'all fours' with this case."). *Id.*

[113] 452 U.S. 61, 63, 64 (1981).

[114] *Id.* at 62-64.

[115] *Id.* at 65, 77.

[116] *Id.* at 65-66.

[117] *Id.* at 68 (citing Thomas v. Collins, 323 U.S. 516, 529-530 (1945)).

[118] *Id.* at 68.

The Borough claimed that the ordinance was part of its plan to create a commercial area that catered only to immediate needs of residents.[119] However, many of the permitted uses went well beyond such a purpose.[120] Under Mt. Ephraim's statutory scheme, "[v]irtually the only item or service that [could] not be sold in a commercial zone [was] entertainment...."[121] Further, the Borough failed to show that problems associated with live entertainment were greater than those associated with permitted uses, so that the ordinance could not be upheld as a reasonable restriction on time, place or manner.[122]

In addition, the ordinance did not leave open adequate alternative avenues of communication, a requirement for it to be upheld as a valid time, place or manner restriction.[123] The Court suggested in dicta that if the county had been the zoning authority and it had excluded live entertainment from the Borough, but not from the entire county, the restriction might have been upheld. The Court also indicated that its ruling might have been different if the Borough had established that live entertainment was available in reasonably nearby areas.[124]

The Court made its most recent pronouncement on the state of the law in this area when it handed down *City of Renton v. Playtime Theatres, Inc.*[125] The ordinance was designed to concentrate on adult theaters[126] by forbidding them to locate within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park or school.[127] Writing for the six-member majority (Blackmun concurred in the result), Rehnquist viewed the resolution of the case as being largely dictated by *Young v. American Mini-Theatres*.[128] Because the ordinance did not ban adult theaters completely, the Court decided that it should be analyzed as a time, place or manner restriction.[129] Finding that the ordinance was aimed only at "...the secondary effects of such theaters on the surrounding community," and "...not at the content of the films," the majority ruled that the regulation was content-neutral and, as such, was acceptable if it was

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[119] *Id.* at 72.

[120] *Id.* at 73.

[121] *Id.*

[122] *Id.* at 73 ("[P]roblems that may be associated with live entertainment, such as parking, trash, police protection, and medical facilities.").

[123] *Id.* at 75-77.

[124] *Id.* at 76.

[125] 475 U.S. 41 (1986).

[126] *Id.* at 52.

[127] *Id.* at 43.

[128] *Id.* at 46.

[129] *Id.*

designed to serve a substantial government interest and did not unreasonably limit alternative avenues of communication.[130]

The Court found that the ordinance was designed to serve a substantial state interest.[131] The ordinance stated that its purpose was to "prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life'...."[132] Rehnquist noted that the ordinance did not declare its purpose to be the suppression of free expression. He also opined that the city would have tried to close the theaters or restrict their number instead of just restricting their location if it had been trying to suppress their message.[133] The majority opinion buttresses its assertion that the purposes of the ordinance were permissible by pointing to Renton's reliance on the experiences of Seattle and Detroit and on its own "findings" from public hearings.[134]

Playtime Theatres contended that the ordinance was underinclusive because it did not regulate other adult businesses that were likely to produce secondary effects similar to those of adult theaters. To rebut this contention the majority pointed to the lack of evidence of any such businesses in Renton. The Court found no reason to assume that Renton would not amend its ordinance if the need arose.[135]

The majority found that the ordinance easily met the constitutional requirement of providing for adequate alternative avenues of communication. The ordinance left 520 acres, about five of the area of the city, as potential sites for adult theaters. The majority was not persuaded by the appellants' arguments that much of the land was already occupied, that almost none of it was for sale or lease and that there were no commercially viable adult theater sites within the specified 520 acres. "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a first amendment violation."[136] The government does not have to ensure that a speech-related business will be able to get a site at a bargain.[137]

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[130] *Id.* at 47-50.

[131] *Id.* at 50-51.

[132] *Id.* at 48.

[133] *Id.*

[134] *Id.* at 50-52.

[135] *Id.* at 52-53.

[136] *Id.* at 54.

[137] *Id.*

A MORE COMPREHENSIVE STANDARD

SOURCE OF STANDARDS

The standards for review of government actions should be both those raised by the right implicated and those tied to the power exercised. Different powers of government pose different dangers and potentials for abuse. Thus, challenged exercises of those powers should be held to a minimum standard, regardless of the context in which they are exercised. In addition, different rights have different roles, different levels of importance and different vulnerabilities. In recognition of this, when an exercise of governmental power infringes on a constitutionally protected right, a standard of review commensurate with that right should be imposed.

To be more specific, the zoning power is broad. The purposes for which it may be employed are broad. However, if a statute, or a particular application of a statute, does not serve these purposes, it should be struck down. Where the exercise of zoning power infringes on a constitutional liberty, such as freedom of expression, a "permissible purpose" should be a necessary, but not sufficient, condition for upholding the state action.

Imposing only the standard attached to the power involved, without reference to the freedom infringed, would allow the government, by being selective about how it enforces its will, to select a low standard of review for its own actions, even where the most vital guarantees for personal liberty are involved.

To impose only the standard connected with the right implicated might allow the government to employ its powers in dangerous ways. It would also give government a free reign in areas which involve no freedom for which the Court acknowledges constitutional protection.

SUGGESTED ANALYSIS[138]

POLICE POWER. When the Court encounters a case in which a zoning ordinance impacts an adult entertainment establishment,[139] it should first determine whether the ordinance is a valid exercise of the police power. The Court should require the individual challenging the statute to show that the statute is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[140] If the person making the challenge can make this showing, then the

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[138] The proposed analysis begins from the premise that the precedents in each area are correct interpretations of the Constitution.

[139] The proposed analysis is suitable for any case in which an exercise of the police power is alleged to infringe on free expression. Challenges to restrictions on adult entertainment establishments are simply a common context for such to arise.

[140] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (quoting Cusack Co. v. City of Chicago, 242 U.S. 526, 530-1 (1917)).

case should be over -- the statute should be declared unconstitutional. If the person making the challenge can make this showing as to a particular application of the statute then the Court should enjoin that application.[141]

DOES THE ORDINANCE RESTRICT "SPEECH"? If the statute survives the "police power" test above, then the Court should inquire whether the conduct affected by the statute is, in fact, speech. If the conduct is verbal, the Court should generally have no difficulty finding that it is speech. If the conduct is nonverbal, the Court may find either that it is not speech at all, that it has both communicative and noncommunicative elements,[142] or that it is symbolic -- nearly "pure speech."[143] If it is not speech, the statute should be upheld.

If the conduct has both communicative and noncommunicative elements, the Court should apply the three-point test of *O'Brien*: whether the statute is within the constitutional power of the government; whether the purpose of the statute is unrelated to the suppression of free expression; and whether any incidental restriction on First Amendment rights is no more than is necessary to further that governmental interest.[144] If the statute passes all three prongs of this test, the Court should uphold it. If it fails any of them, or if the conduct is symbolic, then the Court should progress to the next step in the analysis.

OBSCENITY. If the case has not been resolved by the foregoing analysis, the Court should determine whether the speech involved is obscene. It should make this determination by applying the test put forth in *Miller v. California*: whether the average person, applying contemporary community standards, would find that the work as a whole appealed to the prurient interest; whether the work is a patently offensive depiction of sexual conduct that has been specifically defined by the relevant state law; and whether the work as a whole lacks serious literary, artistic, political or scientific value.[145] If the communicative conduct that is restricted meets all of these criteria, it is unprotected.[146] The person challenging the statute has no more claim than he or she would if there was no speech. The statute should be upheld.

OFFENSIVE SPEECH. If the Court finds that the expression is not obscene, it should decide whether it is profane, libelous, or insulting.[147] If it is not, the Court should

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[141] Nectow v. Cambridge, 277 U.S. 183 (1928).

[142] United States v. O'Brien, 391 U.S. 367, 376 (1968).

[143] Tinker v. Des Moines Independent School District, 393 U.S. 503, 505 (1969).

[144] *O'Brien*, 391 U.S. at 377.

[145] Miller v. California, 413 U.S. 15, 24 (1973).

[146] *Id.* at 23.

[147] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

proceed to the next step which is in the next paragraph. If the expression is offensive, lewd or profane, the Court should examine the context of the expression.[148] The factors that the Court examines would include the presence of youths in the audience, the existence of a "captive" or unwilling audience and the expectations of those who are exposed to the expression unwittingly.

In the usual adult entertainment setting there will presumably be no youths exposed to the expression. No one will have the expression thrust upon them, and it is unlikely that anyone entering the establishment will be surprised by the nature of what they observe. Such a set of facts do not make a case for regulation.

CONTENT-NEUTRALITY. If the case has still not been resolved, the Court should determine whether the statute can be upheld as a valid restriction on time, place or manner. The Court should first ask whether the statute is content-neutral. Perhaps the most glaring error in the Court's analysis in *Renton* was its use of legislative cognizance of the "secondary effects" of a type of speech as a basis for finding that the regulation enacted was content-neutral. The ordinance in *Renton* was content-based on its face. Only "adult" theaters were restricted. A theater was only an "adult" theater if the films it showed were "distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or "specified anatomical areas...." The lawmakers' concern for secondary effects is relevant -- it goes to the magnitude of the government interest involved and possibly to how narrowly tailored the law is as well. But it has nothing to do with classifying what type of ordinance it is that has been passed. Judicial use of legislative concern for secondary effects of communication with a certain content should be limited accordingly. If the statute is not content-neutral, it is not a valid time, place or manner restriction and should be struck down.

GOVERNMENTAL INTEREST. If the statute is content-neutral, the Court should decide whether it is designed to serve a governmental interest that is significant. Secondary effects are relevant to this determination.[149] Of course, it would be naive to suppose that the city would state an impermissible purpose in the statute itself. Yet

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[148] *Cf.* FCC v. Pacifica Foundation, 438 U.S 726, 742, 744-45, 746-50 (1978).

[149] Many of the "secondary effects" that the Court has shown concern for are actions of those who receive the communication. There are limited instances in which the tendency of a communication to cause those who receive it to take certain actions can serve as the basis for restricting that communication. The "fighting words" doctrine of *Chaplinsky* is an obvious example. A more relevant example is Kingsley Int'l Pictures Corp. v. Regents of University of New York, 360 U.S. 684 (1959), striking down a statute that prohibited the issuance of a license to show non-obscene movies that "portray 'acts of sexual immorality [as] desirable, acceptable, or proper patterns of behavior'". *Id.* at 687. "The state, quite simply, has struck at the very heart of constitutionally protected liberty." *Id.* at 688. "Advocacy of conduct proscribed by law is not . . . 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.'" *Id.* at 689. Most adult entertainment is at least arguably not advocacy at all, but this should only serve to weaken the argument for making the communicator subject to restrictions based upon the actions of the recipient of the communication.

this is precisely what the Court did in *Renton*. The Court's credulity should certainly have been overcome by the fact that the provision explaining the purpose of the Renton ordinance was added to the ordinance after the lawsuit was instituted. It is also naive to believe, as the Court claimed to, that city lawmakers are so unsophisticated that they will not try to pursue impermissible purposes through indirect means where the direct means are plainly more likely to be successfully challenged. Such deference is inappropriate in this analysis. Further, before giving weight to *post hoc* claims of reliance on the experiences of other communities, the Court should weigh the relevance of those experiences to the situation at hand, the similarity of the measure at issue to the measures adopted by the communities whose experiences are allegedly relied on and the evidence that those who claim reliance actually knew of the experiences.

NARROWLY TAILORED AND ADEQUATE ALTERNATIVES. If a significant government interest is served, the Court must decide whether the statute is narrowly tailored to serve that interest. If it is not, the statute is unconstitutional.

If the statute is narrowly tailored to serve a significant state interest the Court must ask whether it leaves open adequate alternatives for communication. Theoretical availability of alternative avenues should be deemed insufficient. Even practical alternatives should not always be enough. If, for instance, an adult theater may open, but it must pay a great deal more for rent because of government restrictions, or it can get an economically feasible site, but the site is inferior (in terms of location, size and suitability for the type of structure needed) to what would be available absent content-based regulations, there must come a point where the alternative is not "adequate."[150] "'One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'"[151]

The Court's treatment of this issue in *Renton* was sorely lacking. The Court assumed away the issue by stating "[t]hat [adult entertainment establishments] must fend for themselves in the real estate market, on an equal footing with other prospective buyers and lessees, does not give rise to a First Amendment violation"[152] assumed away the issue. The operators of adult theaters are not on an equal footing with other prospective land users when they are subject to ordinances that restrict the possible

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[150] *See generally* Note, *Zoning and the First Amendment Rights of Adult Entertainment*, 22 VAL. U. L. REV. 695, 717-23 (1988). The author suggests that after determining that there is some land which an adult entertainment establishment could operate on within the ordinance, a court should determine whether the sites are commercially viable. If the zoning ordinance unreasonably restricts access to commercially viable sites, it should be struck down. If the ordinance does not have an unreasonable effect on access to commercial viability, a court should determine whether land is economically available -- whether it can be purchased or leased for a reasonable price. Although the author of the note refuses to say that any of these factors -- geographic availability, commercial viability or economic availability -- is dispositive, he asserts that they should all be considered.

[151] Young v. American Mini-Theatres, 427 U.S. 50, 86 n.6 (1976) (Stewart, J., dissenting, quoting Schneider v. State, 308 U.S. 147, 163 (1939)).

[152] *Renton*, 475 U.S. at 54.

locations for their businesses and which do not apply to the same extent to other possible land users.