

Chapter 2: Basic Constitutional Considerations

Quick Guide to Chapter 2:

Doesn't the First Amendment prevent you from singling out a certain type of speech, like pornography, for stricter regulation?

The Supreme Court has ruled that regulations of sex businesses are constitutional so long as they are not aimed at preventing speech ("unrelated to the suppression of free expression"), but rather are directed at stopping the "negative secondary effects" associated with "adult" establishments. Thus, if your intent is to protect neighborhoods, keep crime down and preserve property values, and if you still allow the pornographic speech to occur subject to certain regulations, there is no constitutional violation. (2.2)

Why can't you just "zone these places out of businesses?"

There is a presumption of First Amendment protection for all establishments that deal in "speech-related" materials. Given that presumption, you must allow them some "reasonable alternative avenue of communication" within your community. (2.1)

But aren't they usually selling illegal, obscene material?

Yes, but that is a separate legal matter. Even in obscenity law, you presume the material is First Amendment protected until an obscenity conviction is obtained. But for purposes of a city's attempt to regulate a sex business, you must presume that establishments with thousands of books, magazines and videos are engaged in some protected speech activities. (2.1)

2.1 - Content Neutral v. Content Based; Connection to Obscenity Laws

The time, place and manner regulations discussed in this book are constitutionally permissible because they are "content neutral" in their application. This means they are not directed at suppressing speech because of its content; rather, they are intended to prevent the negative secondary effects associated with peripherally speech-related businesses. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50, 84 (Powell, concurring)

Most laws that regulate or prohibit speech based on its content are unconstitutional because they serve as impermissible prior restraints on speech. Content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700, 1716 (2002) (Kennedy J. concurring); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000), and are constitutional only if they promote a "compelling interest" and use "the least restrictive means to further articulated interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Several categories of speech, including obscenity and child pornography, are outside the protection of the First Amendment and therefore are exceptions to the rule of content neutrality; we prohibit obscenity and child pornography precisely because of their content, and without any need to prove that they cause specific harms.

Obscenity was defined in the 1973 case of *Miller v. California*, 413 U.S. 15 (1973), and can be summarized as material that: (1) depicts specific sex acts in a patently offensive way; (2) appeals to the prurient interest in sex as a whole; and (3) lacks serious literary, artistic, political or scientific value. *See also Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700, 1708 (2002) (adopting the Miller standard and upholding the use of "community standards" to define materials harmful to minors on the Internet). Child pornography is any photograph or video of a real child being exploited in a lewd, sexual manner or of a child actually being sexually molested. Other categories of speech, such as false advertising, sedition, incitement, perjury under oath, using words to bribe someone, etc., also lack protection of the First Amendment. *See Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1399 (2002); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 827 (7th Cir. 1999).

Many citizens fail to understand the distinction between obscenity regulation and content-neutral time, place and manner regulation. In their justifiable anger about the encroachment of an "adult bookstore" into their community, one of the most often repeated questions is this: "If these places are all selling material that is obscene and unprotected by the First Amendment, why can't we just zone them out of existence in our town?"

The answer to that lies with obscenity law, where the Supreme Court has been clear in ruling that sexually explicit material is presumed to be protected by the First Amendment until there is an adjudication of obscenity. (*See generally* B. Taylor, B. Bull, A. Sears, L. Munsil, *The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney*) (CDL

1989)(Available at: <http://www.communitydefense.org>). See *Miller v. California*, 413 U.S. 15 (1973) (sexually explicit material protected by the First Amendment unless determined to be obscene). The presumption of First Amendment protection, combined with the fact that in most sexually oriented businesses there is some material that as a matter of law does not meet the test for obscenity, requires local communities to use great caution in regulating sex businesses. However, we must point out that our experience and the "experience of other cities has demonstrated that vigorous and sustained enforcement of obscenity statutes can sharply reduce or virtually eliminate sexually oriented businesses." *Working Group Report* at 23. Consistent enforcement of state and local obscenity statutes,¹ combined with stringent time, place and manner regulation, is still the best and most effective method of fighting SOBs in any community.

2.2 - Content Neutrality in *Young* and *Renton*

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Supreme Court was faced with a dilemma -- were zoning regulations that only applied to businesses that sold pornography a prior restraint on a certain form of speech, or were they constitutionally permissible because they were motivated by a concern for the negative secondary effects created by those businesses?

The court of appeals split over the issue:

The majority opinion concluded that the ordinances imposed a prior restraint on constitutionally protected communication and therefore "merely establishing that they were designed to

Serve a compelling interest" provided an insufficient justification for a classification of motion pictures theaters on the basis of the content on the materials they purvey to the public. ... [T]he court held the ordinance invalid under the Equal Protection Clause. Judge Celebrezze, in dissent, expressed the opinion that the ordinance was a valid "time, place and manner regulation" rather than a regulation of speech on the basis of its content.

427 U.S. at 57-58.

The Supreme Court came down strongly on the side of local governments in Justice Stevens' plurality opinion:

Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude the city's interest in the present and future

¹ Morality in Media, Inc. maintains a lengthy list of links to federal and state statutes that regulate obscenity. (visited Aug. 18, 2002) <<http://www.moralityinmedia.org/nolc/statutesIndex.htm>>.

character of its neighborhoods adequately supports its classification of motion pictures.

427 U.S. at 71-72.

Justice Powell provided the fifth vote to uphold the ordinance in *Young*, and therefore his opinion is significant. He rested his support for the ordinance on its content neutrality, and analyzed it under the four-part test from *United States v. O'Brien*, 391 U.S. 367, 377 (1968):

Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view ["adult" films]. The ordinance addresses only to the places at which this type of expression may be presented a restriction that does not interfere with content. Nor is there any significant overall curtailment of adult movie presentations, or the opportunity to reach an audience.

* * *

Under [the *O'Brien*] test, a governmental regulation is justified, despite its incidental impact upon First Amendment interests, " if it is within the constitutional power of the government; if it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on ... First Amendment freedoms is no greater than essential to the furtherance of that interest."

427 U.S. at 78-80.

Powell, whose opinion became the holding because it was the narrowest grounds on which the ordinance was upheld, concluded that it met the *O'Brien* test. Powell wrote that the ordinance was within the power of the Detroit Common Council, and that it furthered the important and substantial governmental interest of protecting "stable neighborhoods" from "tragic consequences to social, environmental and economic values." 427 U.S. at 80.

Powell concluded that the "third and fourth tests of *O'Brien* are also met on this record. It is clear ... that Detroit has not embarked on an effort to suppress free expression." and that "the degree of incidental encroachment upon such expression was the minimum necessary to further the purpose of the ordinance." 427 U.S. at 81-82. Powell went on to warn against "the possibility of using the power to zone as a pretext for suppressing expression," an admonition courts have taken seriously in subsequent years. 427 U.S. at 84.

Ten years after *Young*, the Supreme Court faced a similar issue in the case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Once again the Court upheld the constitutionality of a city's zoning ordinance against a First Amendment challenge.

Relying on the *Young* precedent, the Court held that the City of Renton's ordinance "does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation." 475 U.S. at 46.

After recognizing the presumption against the constitutionality of regulations "enacted for the purpose of restraining speech on the basis of its content," the Court noted that "so-called 'content-neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." 475 U.S. at 46-47.

Relying on the district court's determination that the "predominate" intent of the city was to protect against "the secondary effects of such theaters on the surrounding community," the Court concluded that "the city's pursuit of its zoning interest here was unrelated to the suppression of free expression." 475 U.S. at 48. "In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" 475 U.S. at 48 [quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)].

2.3 - Content Neutrality Since *Renton*

Several Supreme Court cases since *Renton* have dealt with the issue of content neutrality. In all of these cases, the Court's inquiry on the issue of content neutrality has focused on the governing body's intent in enacting legislation. In other words, the Court has focused on whether the government regulation is justified by reasons that are unrelated to a desire to suppress the particular content of the speech. In regulating sex businesses, the focus of government efforts is on stamping out crime and decreasing blighting, not on the pornographic material being sold in SOBs.

In *Boos v. Barry*, 485 U.S. 312, 320 (1988) the Court summarized the content-neutrality decision in *Renton*:

So long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside the adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.

In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) the Supreme Court acknowledged that "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task." But the determinative factor in concluding that cable TV regulations were content neutral was that:

Congress' overriding objective in enacting [the statute] was not to favor programming of a particular subject matter, viewpoint, or format, but

rather to preserve access to free television programming for the 40 percent of Americans without cable.

512 U.S. at 646.

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 763 (1994), the Court stated that "[w]e thus look to the government's purpose as the threshold consideration" on the issue of content neutrality.

Similarly, in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Court held that:

The principle inquiry ... in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speaking or messages but not others.

Citing some of the above cases, the U.S. Court of Appeals for the District of Columbia Circuit held that recordkeeping and disclosure requirements for the producers of sexually explicit material were content neutral:

There can be no question but that Congress's sole purpose in adoption [the statute] was to address what the Attorney General's Commission on Pornography found to be an important deficiency in the existing child protection laws ...

* * *

Cases like *Renton* make clear ... that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech [exists when] the subclass happens to be associated with particular 'secondary effects' of the speech...." *R.A.V.*, 112 S. Ct. at 2546. Our analysis here thus focuses upon whether the Act is "justified without reference to the content of the ... speech" *Id.* (quoting *Renton*, 475 U.S. at 48; emphasis in original). Here it is clear that Congress enacted the Act not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography.

That conclusion is reinforced by "[t]he design and operation of the challenged provisions." *Turner Broadcasting*, 114 S.Ct at 2461.

More recently, upholding a ban on nude dancing and utilizing a content-neutral analysis in *City of Erie v. Pap's A.M. TDA "Kandyland"*, 529 U.S. 277, 293-96 (2000), the Court found that:

[The] State's interest in preventing harmful secondary effects [such as crime and other deleterious effects] is not related to the suppression of expression... Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing. We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishment like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing.

Even more recently, *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), the Court held that an ordinance requiring permits of groups wanting to hold rallies in city parks was content neutral. Looking at the purpose of the ordinance, the Court determined that the regulation sought to protect the people and maintain order, not suppress speech.

All of these subsequent cases have clarified what the Court said in *Young* and in *Renton* -- that treating sexually oriented businesses differently than other businesses in zoning and licensing regulations is constitutionally permissible, so long as the government's motivation is not to suppress the pornographic speech but rather to protect communities from negative secondary effects.

2.4 - Analyzing Content-Neutral Regulations

Regardless of a content-neutral statute's focus on the secondary effects of sexually oriented businesses, there is no doubt that its terms will have an incidental impact on expression that is protected by the First Amendment. See, e.g. *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981). In *Erie*, the Court acknowledged that even content-neutral statutes will intrude on some free expression:

If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based. *Erie v. Pap's A.M. TDA "Kandyland,"* 529 U.S. 277, 294 (2000).

To pass constitutional muster, a sexually oriented business ordinance must satisfy the previously mentioned four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). See *Renton*, 475 U.S. at 45; *Young*, 427 U.S. at 79 (Powell, J., concurring).

Under the *O'Brien* test, a regulation is justified despite its impact on First Amendment interests "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on ... First Amendment freedoms is no

greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. *Renton*, 475 U.S. at 45. The first three elements may be considered without reference to the specific requirements of a statute. A determination of whether a statute's particular terms follow the least restrictive means available must, however, be made independently by reviewing the particular features of a statute.

Such laws will generally be ordinances adopted by cities, counties and towns. The overwhelming majority of local governments today are vested with the police power which encompasses the power to enact a zoning and regulatory ordinance, therefore satisfying the first prong of *O'Brien*. See *Renton*, 475 U.S. at 44; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (zoning may promote "family values [and] youth values"); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (zoning may promote values that "are spiritual as well as physical, aesthetic as well as monetary"); *Stansberry v. Holmes*, 613 F.2d 1285, 1288 (5th Cir. 1980), *cert. denied*, 449 U.S. 886 ("zoning provides one of the firmest and most basic of the rights of local control").

The second prong of the *O'Brien* test requires that the ordinance "furthers an important or substantial governmental interest." *O'Brien*, 391 U.S. at 377. Meeting this requirement is rarely a problem. The interests of local governments furthered by such ordinances include crime control, protection of property values, and prevention of urban blight. These concerns are both important and substantial. See *Young*, 427 U.S. at 79-80 (Powell, J. concurring), quoting *Village of Belle Terre v. Boraas*, 416 U.S. at 13.

The third prong relates to the intent of the local legislative body. This examines whether "the governmental interest is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. This intent is generally garnered from reports or studies of the local planning commission, zoning administrator, or local council itself. It may also be found in the record and transcripts of local legislative hearings. It is essential that the intent of the legislative body in enacting the ordinance is not to ban all sexually oriented businesses. Rather the intent must focus on the secondary effects of such establishments, leaving alternative avenues open for such expression, while lessening the effects of sexually oriented businesses on the surrounding community.

The final prong of the *O'Brien* test requires a review of the specific regulations of a particular ordinance. It requires that the incidental restriction on First Amendment freedoms be no greater than is essential to further the governmental interest. *O'Brien*, 391 U.S. at 377. The courts will use this prong in determining whether an "adult" use zoning ordinance "unreasonably limit[s] alternative avenues of communication." *Renton*, 475 U.S. at 47. Location provisions of "adult" use zoning ordinances must be examined individually to determine compliance with this requirement, as will be discussed in Chapter 6.

2.5 - Vagueness and Overbreadth

The issues of vagueness and overbreadth will be discussed in more detail as specific types of time, place and manner regulation are addressed in subsequent chapters. However, a brief summary of these constitutional concerns is appropriate here.

Vagueness concerns arise from the Constitution's due process requirement that notice be given such that a person of normal intelligence would be able to determine what conduct is prohibited by a law. Courts are particularly sensitive to vagueness challenges to statutes with First Amendment ramifications because of the potential chilling effect on legitimate speech.

Overbreadth occurs when laws intended to regulate speech or conduct in a constitutional manner sweep within their ambit and thereby prohibit or chill speech that is fully protected by the Constitution. A law that is "facially" overbroad is one that a court can determine violates the First Amendment simply by reading its terms, without knowing how the law might be applied. A law that prohibited handing out pamphlets without prior approval from a city is an example of such a law. If the statute is not facially unconstitutional, it may still be unconstitutional "as applied." In that circumstance, the government's use of an otherwise valid statute could violate the First Amendment rights of a particular group. For example, a law that required speakers at a park to obtain permits would be unconstitutional as applied if it was used as a vehicle for refusing permission to speakers with particular political or religious viewpoints.

2.6 - Conclusion

Because sexually oriented businesses sell material that is presumed to be protected by the First Amendment, communities must regulate them with great caution to avoid constitutional defects. The best course to follow is to adhere closely to the guidelines laid down by the Supreme Court and other courts for enacting content-neutral and constitutional time, place and manner restrictions on SOBs.