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Restricting Adult Access to Material Obscene as to Juveniles

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Restricting Adult Access to Material Obscene as to Juveniles

Within the morass of Supreme Court rulings regarding the relation of the first amendment to pornography,[1] the Court's opinion in *Ginsberg v. New York*[2] created a paradox unparalleled even by its other pornography decisions. In *Ginsberg* the Court upheld a novel speech classification: material obscene as to juveniles but protected as to adults.[3] The paradox thus created is that a judicial declaration that a thing is "obscene" defoliates that thing's first amendment protection;[4] yet in the absence of that classification — and assuming no other constitutional infirmities — speech is accorded the full battery of first amendment privileges. The peculiarity of *Ginsberg* is that it allows speech to be at once immune from restriction as to some (adults) and completely prohibitable as to others (juveniles).

Although the *Ginsberg* Court acknowledged the state's right to deny juvenile access to material[5] that could not be denied to adults, it did not indicate the extent to which — or even whether — a state's right to withhold may infringe upon the adult's right to obtain. The statute at issue in *Ginsberg* proscribed only the *sale* of specified pornography to minors;[6] hence, it was a relatively easy case because laws

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1. For the purposes of this Note, nothing hinges on the precise coverage of the term "pornography." *Webster's Third New International Dictionary* will suffice: "1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement — compare *erotica*." For that matter Justice Stewart's test for material of a saltier character is adequate: "I shall not today attempt further to define the kinds of material I understand to be embraced within [the description 'hardcore' pornography] .... But I know it when I see it ...." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964). "Obscenity," on the other hand, is a term of art meaning material that

> "the average person, applying contemporary community standards" would find ... taken as a whole, appeals to the prurient interest; depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and ... taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). Obscenity, thus defined, is not protected by the first amendment.

2. 390 U.S. 629 (1968).

3. *See* Part I *infra*.

4. Roth v. United States, 354 U.S. 476 (1957).

5. For simplicity, material obscene as to juveniles will also be referred to as "juvenile obscenity."

6. The Court held that the state may "defin[e] obscenity on the basis of its appeal to minors." *Ginsberg*, 390 U.S. at 638. Unqualified obscenity retains no access rights; therefore, to define a thing as "obscene" as to a specified sub-group is necessarily to grant the state a right to prohibit that sub-group's access to the thing. Moreover, the Court states elsewhere:

> [Appellant] insists that the denial to minors under 17 of *access* to material condemned by [the challenged statute], insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty.
>
> ... We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.

Ginsberg, 390 U.S. at 636-37 (footnote omitted; emphasis added).

that prohibit only the actual sale of juvenile obscenity cause, at worst, quite minor inconvenience for adults.[7] However, state laws that also forbid juvenile access to the same material starkly illustrate the uncertainty created by the *Ginsberg* holding. When a state forbids juvenile *access* to the same material, the incidental effects upon adults are greater, and the case is not so easy.

Indeed, faced with basically indistinguishable statutes,[8] federal courts of appeals have split. The Eighth and Tenth Circuits, in *Upper Midwest Booksellers Association v. City of Minneapolis*[9] and *M.S. News Co. v. Casado*[10] respectively, upheld state statutes outlawing commercial displays that permitted juvenile access to sexually oriented material deemed "harmful to minors."[11] More recently, however, the Fourth Circuit in *American Booksellers Association v. Virginia*[12] struck down the same sort of statute on two grounds. First, the regulation "impose[d] restrictions based on the content of publications" and therefore, the court reasoned, violated the familiar axiom that speech regulations must be content-neutral.[13] But the statute's "most serious flaw," according to the court, was its breadth.[14] Although acknowledging the state's interest in limiting the availability of sexually related material to minors, the court held that any display method fit to the task was "unduly burdensome on the first amendment rights of

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7. The statute at issue in *Ginsberg* provided:

1. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

2. A violation of any provision hereof shall constitute a misdemeanor.

N.Y. PENAL LAW § 484-h (McKinney 1967), *quoted in Ginsberg*, 390 U.S. at 645-47 (currently codified in N.Y. PENAL LAW § 235.21 (McKinney 1980)). "Minor" was defined as a person under seventeen years of age and the definition of "harmful to minors" tracked the Supreme Court's standard for obscenity. *See* text at note 17 *infra*.

8. In fact, the resulting inconvenience for adults is so meager that the *Ginsberg* Court ignored it. Yet despite the fact that the Supreme Court acknowledged none, some first amendment rights of adults are implicated by the *Ginsberg* ruling. Adults, particularly those of pubescent appearance, may be compelled to furnish identification before purchasing material to which they have constitutional rights. Moreover, the preliminary requirement of having to prove one's majority might "for a variety of reasons," deter an adult from purchasing the material. *Cf.* American Booksellers Assn. v. Virginia, 802 F.2d 691, 696 (4th Cir. 1986), *prob. juris. noted*, 107 S. Ct. 1281 (1987) (No. 86-1034). That these are actual infringements becomes clear when one imagines the probable reaction of the Court to a state law that required identification for the purchase of, *e.g.*, *The Communist Manifesto*.

9. 780 F.2d 1389 (8th Cir. 1985).

10. 721 F.2d 1281 (10th Cir. 1983).

11. *M.S. News*, 721 F.2d at 1295-97 (Appendix); *Upper Midwest Booksellers*, 780 F.2d at 1406-08 (Appendix).

12. 802 F.2d 691 (4th Cir. 1986), *prob. juris. noted*, 107 S. Ct. 1281 (1987) (No. 86-1034).

13. *American Booksellers Assn.*, 802 F.2d at 695. See Part II.B *infra* for a discussion of content-neutrality.

14. *American Booksellers Assn.*, 802 F.2d at 695. The overbreadth charge is discussed at notes 84-90 *infra* and accompanying text.

adults."[15]

This Note considers whether state regulations that restrict juvenile access to material that is obscene as to minors unconstitutionally encroach upon the first amendment rights of adults. Part I briefly describes the Court's opinion in *Ginsberg*. Part II introduces the "*O'Brien*[16] analysis" and discusses the aspects of juvenile access restrictions that tend to make *O'Brien* scrutiny applicable. In this context the frequently relaxed judicial review of governmental restrictions on sexually related material will be discussed. Having concluded that the *O'Brien* analysis is applicable to access restrictions, Part III applies the test and ultimately concludes that juvenile access restrictions survive *O'Brien* scrutiny.

I. THE BACKDROP: *GINSBERG V. NEW YORK*

The *Ginsberg* opinion itself resolves perhaps the most difficult question posed by juvenile access restrictions by sustaining a separate standard of obscenity for juveniles. In *Ginsberg* the Court considered the constitutionality of a New York statute that forbade the sale of material "harmful to minors." The statutory definition of "harmful to minors" modified the Supreme Court's definition of obscenity by adapting it to minors:

> "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient . . . interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.[17]

Justice Brennan's majority opinion approved the concept of "variable obscenity," noting that the statute at issue "simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . .' of such minors."[18]

Although the Court did not constrain legislatures to a particular definition of "obscene as to minors," the statute upheld by the Court was a reconciliation of the prevailing standard of obscenity with a lower standard for minors.[19] A statutory definition of "obscene as to

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15. *American Booksellers Assn.*, 802 F.2d at 696.

16. United States v. O'Brien, 391 U.S. 367 (1968).

17. N.Y. PENAL LAW § 484-h (McKinney 1967), *quoted in Ginsberg*, 390 U.S. at 645-47 (currently codified in N.Y. PENAL LAW § 235.20 (McKinney 1980)).

18. *Ginsberg*, 390 U.S. at 638 (quoting Mishkin v. New York, 383 U.S. 502, 509 (1966)).

19. The Court's test for obscenity when *Ginsberg* was decided was the one announced in Roth v. United States, 354 U.S. 476 (1957). However, that definition has since been replaced by the standard established in Miller v. California, 413 U.S. 15 (1973). Adapting the current obscenity definition to the sensibilities of juveniles suggests that material is obscene as to juveniles

juveniles" that simply modifies the current criteria for obscenity by attaching the addendum "as to juveniles" is, therefore, constitutional.

Each of the three statutes that have come before the federal courts of appeals basically conforms to this standard; which, because it is " 'virtually identical to the Supreme Court's most recent statement of the elements of obscenity,'. . . gives 'men in acting adequate notice of what is prohibited' and does not offend the requirements of due process."[20] Therefore, arguments of the "slippery slope" genre, at least regarding the breadth of the "juvenile obscenity" classification, are not germane. If "obscene as to juveniles" improperly sweeps within its scope *Lady Chatterley's Lover,*[21] it does so irrespective of whether the bookseller must prevent juvenile access to the book or, as *Ginsberg* allows, only refuse to sell it to juveniles.[22]

Ginsberg also establishes that the states have a substantial interest in making the designated material unavailable to minors. The state's interest in "the well-being of its children" and, in particular, its interest in placing "limitations upon the availability of sexual material to minors"[23] was a necessary antecedent to the Court's approval of a juvenile standard of obscenity in *Ginsberg.*[24] Acknowledging that the

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whenever (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest of minors; (b) the work depicts or describes, in a patently offensive way with respect to what is suitable for juveniles, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. *Cf. Miller,* 413 U.S. at 24. While it is not clear that a more expansive definition of "obscene as to juveniles" would be unconstitutional, the analysis of this Note will proceed on the assumption that the access restrictions in question define juvenile obscenity within the constitutional demarcation announced in *Ginsberg.*

20. *Ginsberg,* 390 U.S. at 643 (quoting Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 76, 271 N.Y.S.2d 947, 953, 218 N.E.2d 668, 672, *appeal dismissed sub nom.* Bookcase, Inc. v. Leary, 385 U.S. 12 (1966), and Roth v. United States, 354 U.S. 476, 492 (1957)).

21. *See* Kingsley Intl. Pictures Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684 (1959) (reversing the Regents' denial of a license to show the motion picture version of *Lady Chatterley's Lover*). *But see* Justice Harlan's dissent in *Roth,* 354 U.S. at 506 ("The fact that the people of one State cannot read some of the works of D.H. Lawrence seems to me, if not wise or desirable, at least acceptable.").

22. That is, the routine objection to any definition of obscenity — that it will render *Huckleberry Finn* naked before the censors — is relevant only to the *Ginsberg* decision itself, not to cases dealing with access restrictions. *See generally, e.g., Miller,* 413 U.S. at 37-47 (Douglas, J., dissenting) (objecting that the announced obscenity test "would make it possible to ban any paper or any journal or magazine in some benighted place," 413 U.S. at 44). If state enforcement officers demand blinder racks for *Huckleberry Finn,* the Constitution will have been violated not by the restriction of access to juvenile obscenity, but rather by the misapplication of the juvenile obscenity standard itself. But the *Ginsberg* definition of juvenile obscenity is a settled constitutional issue. Access restrictions should not reignite definitional objections.

23. The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, . . . justifies] the limitations in [the juvenile obscenity statute] upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful.

Ginsberg, 390 U.S. at 639.

24. "We . . . cannot say that [the statute], in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm." 390 U.S. at 643.

sexually explicit material at issue did not qualify as pure obscenity and therefore retained constitutional protection as to adults, the Court observed:

> That the State has power to [create a distinct standard of obscenity for minors] seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ."[25]

To the extent that the Court permits an "invasion" of freedoms otherwise guaranteed by the Constitution it abrogates their status as "protected freedoms."[26] The state's interest partially ejects this material from the category of first amendment speech. Consequently, as to minors, juvenile obscenity has the constitutional status that outright obscenity has with regard to the population at large: it is not "speech" of the first amendment. Absent the adult world, state prohibitions on juvenile access to *Ginsberg*-type material would be constitutionally flawless.

On the other hand, absent the juvenile population and the attendant state interest in the welfare of its children, juvenile access restrictions would unquestionably fall.[27] Access restrictions inevitably impose inconveniences on adult pornography purchasers. Blinder racks, sealed covers, or separate rooms for adults obstruct adult access to material that is fully protected as to adults. Thus, *Ginsberg* creates a category of expression that is simultaneously "speech" and "nonspeech." Laws that seek to regulate the nonspeech element — juvenile access — inescapably touch the speech element — adult access.

II. THE *O'BRIEN* TEST

A. *The Test*

In *United States v. O'Brien,*[28] the Court announced a test of constitutionality for regulations that affect both speech and nonspeech. O'Brien had burned his draft card publicly "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place[s] in the culture of today, to hopefully consider [O'Brien's] position."[29] He was immediately arrested and ultimately convicted of violating the Universal Military Training

25. 390 U.S. at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

26. "Obscenity" and "free speech" are mutually exclusive categories and the Court held this material obscene as to juveniles. *See generally* Schauer, *Speech and "Speech" — Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language,* 67 GEO. L.J. 899 (1979).

27. The requisite countervailing state interest is not limited to a concern with the well-being of its youth. *See, e.g.,* Young v. American Mini Theaters, 427 U.S. 50 (1976) (city's interest in the quality of its neighborhoods justifies a restriction on the exercise of first amendment rights).

28. 391 U.S. 367 (1968).

29. 391 U.S. at 370.

and Service Act.[30]

Noting that the violation was not premised on the public or expressive character of the card's destruction, the Court compared the putative abridgement of free speech to "a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records."[31] Yet, O'Brien's expressive activity did suffer, and this is what the Court's test addressed. A governmental regulation of conduct that involves both "speech" and "nonspeech" elements will not be invalidated, the Court held, "[1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[32] Although first amendment rights were closely intertwined with the activity regulated, the Court concluded that the governmental interest in the regulation was limited to "insur[ing] the continuing availability of issued certificates." Thus, the Court upheld the law under which O'Brien was convicted.

The peculiarly disjointed nature of juvenile obscenity — nonspeech as to the direct regulatees, speech as to those incidentally regulated — seems to track the *O'Brien* speech/nonspeech paradigm.[33] In fact, the strict language of *O'Brien* suggests that the *O'Brien* analysis controls whenever there is a nonspeech object in a governmental regulation affecting speech. However, the Court may have claimed a broader range for its test than it would be willing to apply in practice. Determining whether access restrictions fit within the more limited range of practice requires that the unspoken prerequisite to *O'Brien* analysis be exposed.

B. *The Latent Exception to the Applicability of the* O'Brien *Test*

It is possible to imagine governmental regulations of speech that would clear each of the *O'Brien* hurdles but which would be held unconstitutional, nonetheless. Professor John Hart Ely suggests that an

30. Codified at 50 U.S.C. app. § 462(b) (1982) (construed in 391 U.S. at 370).

31. 391 U.S. at 375.

32. 391 U.S. at 377. As originally stated, the test also includes the requirement that the regulation be "within the constitutional power of the Government." This segment of the test is omitted from the text because, as Professor Ely has observed, "[I]t is superfluous in light of the most natural reading of what is designated criterion [1]." Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1483-84 n. 10 (1975).

33. Commentators have generally agreed that the *O'Brien* approach is not limited to symbolic speech. *See, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-601 (1978); Ely, *supra* note 32; Emerson, *First Amendment Doctrine and the Burger Court,* 68 CALIF. L. REV. 422, 470-74 (1980); Farber, *Content Regulation and the First Amendment: A Revisionist View,* 68 GEO. L.J. 727, 742-47 (1980); Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113, 126-27 (1981).

anti-handbilling ordinance intended to reduce litter would be such a law.[34] The governmental interest is substantial, unrelated to the suppression of free expression, and arguably promoted by no less restrictive alternative.

In *Schneider v. New Jersey (Town of Irvington),*[35] however, the Court struck down an anti-handbilling ordinance on first amendment grounds. Commentators have explained the *Schneider* case as an exception to the *O'Brien* test for speech in "traditional" or "public" fora.[36] Public forum speech, unlike the symbolic speech involved in draft card burning, is at the core of first amendment freedoms. It has been argued, therefore, that an implicit prerequisite to the *O'Brien* test is that the speech incidentally affected be outside this core.[37] Alternatively, it might be argued that even if there is no formal "exception" to *O'Brien,* the Court nonetheless reserves *O'Brien* analysis for regulations that by their nature warrant lenient scrutiny.[38]

There is little doubt of the Supreme Court's view that juvenile obscenity is not at the core of first amendment freedoms nor otherwise deserving of special protection, at least since *Young v. American Mini Theaters.*[39] *Young* concerned the constitutionality of a Detroit zoning ordinance which prohibited adult theaters, bookstores, and cabarets from locating within certain distances from other regulated businesses or residential areas.[40] The city justified the ordinance with the argu-

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34. Ely, *supra* note 32, at 1484-90.

35. 308 U.S. 147 (1939).

36. *See, e.g.,* Ely, *supra* note 32 at 1486-87. Thus, according to Ely, state regulations of speech in conventional fora will not be subject to *O'Brien* analysis, even if the restriction of expression is incidental. Instead, such regulations will receive a "serious balancing version of less restrictive alternative analysis." *Id.* at 1488.

37. *See* Ely, *supra* note 32, at 1488-89. The public forum exception itself has never been acknowledged by the Court. Instead the Court has reconciled the anti-handbilling ordinance at issue in *Schneider* with *O'Brien* analysis by claiming that the anti-handbilling ordinance violates *O'Brien*'s requirement that statutes incidentally restraining speech be the least restrictive alternative. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808-10 (1984). It is violated by an anti-handbilling ordinance, according to the Court, because the government could simply "eliminate the exact source of the evil it sought to remedy" by proscribing littering. 466 U.S. at 808.

38. The Court has never failed to uphold a regulation analyzed as an incidental restriction under *O'Brien. See* Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications,* 26 WM. & MARY L. REV. 779, 787-88 (1985); *see also* Arcara v. Cloud Books, 106 S. Ct. 3172 (1986); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Heffron v. International Socy. for Krishna Consciousness, Inc., 452 U.S. 640 (1980); California v. LaRue, 409 U.S. 109 (1972).

39. 427 U.S. 50 (1976).

40. The ordinance classified a bookstore or theater as an "adult establishment" if it presented "material distinguished or characterized by an emphasis on matter depicting, decribing, or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.'" The ordinance defined "Specified Sexual Activities" as:

1. Human Genitals in a state of sexual stimulation or arousal;
2. Acts of human masturbation, sexual intercourse or sodomy;
3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

ment that a concentration of adult establishments leads to a general deterioration of the neighborhood.[41] The Court, speaking through Justice Stevens, upheld the ordinance as a "[r]easonable regulation[ ] of the time, place, and manner of protected speech,"[42] noting that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."[43]

The more interesting part of Justice Stevens' opinion is the portion joined by only three other justices.[44] There, Justice Stevens responded to the theaters' challenge under the equal protection clause by pointing out that "[t]he question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech."[45] As for expression "on the borderline between pornography and artistic expression,"[46] Stevens asserted that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."[47] Stevens noted that the restrictions applied irrespective of "whatever social, political, or philosophical message" the designated material conveyed, and concluded from this fact that "the government's paramount obligation of neutrality" was fulfilled.[48] Because the speech regulated in *Young* was of little value, or in Stevens' colorful phrase, because "few of us would

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And "Specified Anatomical Areas" was defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and
2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Detroit Zoning Ordinance, effective Nov. 2, 1972, *quoted in Young*, 427 U.S. at 53-54 nn. 4 & 5. These definitions of sexual motifs resemble the statutory description of material obscene as to juveniles upheld in *Ginsberg*. *Cf.* note 7 *supra*.

41. *Young*, 427 U.S. at 54-55.

42. 427 U.S. at 63 n. 18.

43. 427 U.S. at 62.

44. Chief Justice Burger, Justice White, and Justice Rehnquist joined all of Justice Stevens' opinion. Justice Powell joined the holding as to time, place, and manner regulation, but declined to join part III of Justice Stevens's opinion, which deals with distinctions among types of protected speech. Instead, Justice Powell concurred on the ground that reasonable zoning regulations should be analyzed under *O'Brien*, and that under that analysis the Anti-Skid Row ordinance was constitutional.

45. 427 U.S. at 66. Justice Stevens elaborated:

> Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment." And in time of war "the publication of the sailing dates of transports or the number and location of troops" may unquestionably be restrained, *see Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, although publication of news stories with a different content would be protected.

427 U.S. at 66 (footnotes omitted).

46. 427 U.S. at 61.

47. 427 U.S. at 70.

48. 427 U.S. at 70.

march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theater of our choice"[49] — the Detroit ordinance was upheld.[50]

Regardless of whether one agrees that first amendment protection ought to diminish as one drifts away from a conceptual "core,"[51] the *Young* plurality opinion can at least be taken to confirm that pornographic material is not at that core.[52] Consequently, even if the Court is discriminating in its application of *O'Brien,* juvenile access restrictions present precisely the type of issue which should receive *O'Brien* scrutiny. The idea that protected speech can be stratified according to its value, and that sexual speech occupies a lower stratum, was flatly asserted in *Young*. Moreover, the definition of juvenile obscenity parallels that of the "Specified Sexual Activities" in *Young*.[53] It, too, "is

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49. 427 U.S. at 70.

50. The holding in *Young* was recently affirmed by a majority of the Court in Renton v. Playtime Theaters, 106 S. Ct. 925 (1986). For additional examples of lenient first amendment review of state regulations of sexually oriented speech, see Arcara v. Cloud Books, 106 S. Ct. 3172 (1986) (first amendment not violated by enforcement against adult bookstore of New York statute allowing closure of premises found to be used as place for prostitution and lewdness); New York v. Ferber, 458 U.S. 747 (1982) (distribution of child pornography held not entitled to first amendment protection provided the conduct to be prohibited is adequately defined by the applicable state law); FCC v. Pacifica Found., 438 U.S. 726 (1978) (first amendment does not prohibit FCC regulation of broadcast dealing with sex and excretion); California v. LaRue, 409 U.S. 109 (1972) (state regulations prohibiting explicitly sexual live entertainment and films in bars and other establishments licensed to dispense alcoholic beverages by the drink sustained against first amendment challenge); Mishkin v. New York, 383 U.S. 502 (1966) (material not obscene as to the "average person" may nonetheless be unprotected by the first amendment where the material is designed for and distributed primarily to a clearly defined deviant sexual group if the theme of the material taken as a whole appeals to the prurient interest of the members of that group).

51. The proposition that first amendment protection for constitutional "speech" can vary based on the value of speech is hotly contested within both the Court and the academic community. One opponent of speech valuation, Justice Stewart, dissented in *Young,* insisting that no speech may be deemed "less worthy of constitutional protection." Indeed, Stewart asserted, "[I]n the absence of a judicial determination of obscenity, it is by no means clear that the speech is not 'important' even on the Court's terms." 427 U.S. at 87 (Stewart, J., dissenting). For commentary critical of speech valuation, see, *e.g.,* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions,* 46 U. CHI. L. REV. 81, 82-83 (1978); Farber, *supra* note 33, at 746-47; Karst, *Equality as a Central Principle in the First Amendment,* 43 U. CHI. L. REV. 20, 31 n.55 (1975).

52. Taken alone, *Young* might be precedent for upholding juvenile access restrictions solely on the basis of their low — albeit extant — first amendment value, thus functioning as an alternative to *O'Brien* analysis. Like Detroit's "Anti-Skid Row Ordinance," access restrictions circumscribe, but do not suppress outright, the availability of nonobscene sexually explicit material. In *Young,* the city's interest in the character of its neighborhoods, without more, sufficed to sustain the Detroit zoning ordinance. If *Young* formed the sole precedent for limited regulation of sexually related speech, then the governmental interest in limiting the availability of sexual material to juveniles, which received explicit constitutional sanction in *Ginsberg,* might be sufficient to sustain juvenile access restrictions without reference to the *O'Brien* test.

It is beyond the purpose of this Note to enter the speech valuation fray by positing *Young* and its progeny as an alternative to *O'Brien* analysis. However, it is significant that the Court tends to relax its scrutiny of regulations of sexual speech even when the effect on speech is not merely incidental.

53. *Compare* note 7 *supra with* note 40 *supra.*

on the borderline between pornography and artistic expression," and therefore, according to *Young,* implicates "surely a less vital interest . . . than . . . the free dissemination of ideas of social and political significance."[54] Recognition that the Court has on occasion acknowledged the low value of nonobscene sexually explicit material makes the case for *O'Brien* analysis extremely strong even if the *O'Brien* precedent is taken at its weakest.

Access restrictions undoubtedly do not fit the implicit public forum exception to sustenance under *O'Brien* — the commercial display of books and magazines is not a traditional forum for exercising free speech rights.[55] Indeed, access restrictions implicate a form of speech for which the Court has shown strikingly little solicitude.[56] Thus, any implicit prerequisites to the application of *O'Brien* are met with respect to statutes restricting access to juvenile obscenity.

III. APPLYING *O'BRIEN*

The first of *O'Brien*'s three criteria requires that a regulation further an "important or substantial governmental interest."[57] *Ginsberg* establishes beyond cavil that a statute restricting juvenile access to material that is obscene as to minors satisfies this criterion.[58] Only the second and third criteria remain to be analyzed.

A. *Unrelated to the Suppression of Free Expression*

The second criterion, that the governmental interest be "unrelated to the suppression of free expression,"[59] is the heart of the *O'Brien* test.[60] Its mandate can be broken down into two separate inquiries: whether the regulation advances a genuinely nonspeech object and whether this nonspeech object forms the rationale for the regulation. A skeletal version of the first inquiry must, of course, have been satisfied in order to merit *O'Brien* scrutiny in the first instance. But even the most egregious speech infringements can claim *some* nonspeech purpose such as "danger of riot, unlawful action or violent overthrow

54. 427 U.S. at 61.

55. In fact, commercial advertising had little first amendment protection until the 1970s. *Compare* Valentine v. Chrestensen, 316 U.S. 52 (1942), *with* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

56. *But see* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), in which the Court struck down an ordinance that prohibited drive-in movie theaters from displaying any film containing nudity if the screen was visible from a public street. In that case, however, the Court found that the proscribed nudity "cannot be deemed obscene even as to minors." 422 U.S. at 213.

57. *O'Brien,* 391 U.S. at 377. The full *O'Brien* test is quoted in the text accompanying note 32 *supra.*

58. *See Ginsberg,* 390 U.S. at 639-43. *See also* Part I *supra.*

59. 391 U.S. at 377.

60. Professor Ely refers to this portion of the *O'Brien* analysis as "what is obviously intended as the definitive statement of [the Court's] test." Ely, *supra* note 32, at 1496.

of the government."[61] Under the second criterion the Court must determine whether a genuine nonspeech object animates the regulation: criterion two is the nonspeech requirement in earnest.

The crucial inquiry under the second criterion according to Professor Ely is "whether the harm that the State is seeking to avert is one that grows out of the fact that the defendant is communicating . . . or rather would arise even if the defendant's conduct had no communicative significance whatsoever."[62] Thus, for example, the *O'Brien* Court found that because the prohibition on draft card burning did "not distinguish between public and private destruction, and . . . [did] not punish only destruction engaged in for the purpose of expressing views," it was not the communicative aspect of O'Brien's conduct that the government sought to regulate.[63] Rather, the purpose of the regulation was to ensure the "smooth and efficient functioning of the Selective Service System."[64]

The nonspeech object of the regulation upheld in *O'Brien* seems fundamentally different from the nonspeech object of juvenile access restrictions. Far from unrelated to the communicative impact of the regulated conduct, access restrictions *define* the material regulated on the basis of its content. Only material that "appeals to the prurient interest" of juveniles, "depicts sexual conduct in a patently offensive way" with respect to what is suitable for juveniles, and "lacks serious literary, artistic, political or scientific value" is subject to regulation.[65] The sole rationale for restriction is that the expressive content of this material is harmful to juveniles.[66]

At the base of this "communicative impact" inquiry is the content-neutral doctrine which underlies much first amendment analysis. The content-neutral precept holds that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[67] All of this seems to bode ill for state restrictions on juvenile access to pornography — the communicative content of juvenile pornography provides the exclusive justification for access restrictions.

Yet the content-neutral canon is of questionable relevance to regulations on juvenile obscenity. If content discrimination were uniformly unconstitutional, it is the Court's "obscene as to juveniles"

61. *Id.*

62. *Id.* at 1497.

63. *O'Brien,* 391 U.S. at 375.

64. 391 U.S. at 382.

65. *See* text at note 17 *supra.*

66. Indeed, it is the communicative impact of juvenile obscenity that both places it outside the protection of the first amendment as to children and inside the first amendment's scope as to adults.

67. Police Dept. v. Mosley, 408 U.S. 92, 95 (1972).

holding itself that would be invalid, not the resulting state regulations. And that argument not only comes too late, but also misconceives the content-neutrality requirement.

Content neutrality assumes that the regulated expression is protected; it does not govern the determination of protection in the first instance.[68] Otherwise every governmental regulation would be potentially subject to first amendment scrutiny. Robbery, treason, and withholding one's tax returns might all conceivably contain expressive content, but laws proscribing these activities do not violate the first amendment. The reason that laws against robbery do not violate the first amendment is not because they survive the *O'Brien* test, but rather because robbery — based on its content or "communicative impact" — is excluded from first amendment protection.[69] Thus, content neutrality is required only when the regulated activity is within the ambit of the first amendment.

Juvenile obscenity is banished from the realm of first amendment protection — with regard to juveniles. And it is exclusively to minors that access restrictions direct their attention: juvenile obscenity shall not be displayed where minors may have access.[70] With respect to juveniles, these regulations have the same first amendment status as laws against full-fledged obscenity, robbery, or the nonspeech element of draft card burning: they do not implicate first amendment speech. Although access restrictions *incidentally* affect the protected speech interests of adults, they primarily affect the nonspeech interests of juveniles. The governmental interest in circumscribing a minor's access to juvenile obscenity is therefore an interest "unrelated to the suppression of free expression."[71]

Analysis of juvenile access restrictions under the second criterion would end here if the second criterion required that the *asserted* governmental interest be "unrelated to the suppression of free expression." By adverting only to the governmental interest, however, the *O'Brien* test seems to invite inquiry into legislative motive. Yet, notably, Chief Justice Warren's opinion for the Court in *O'Brien* explicitly rejected consideration of legislative motive for the purpose of invalidating an otherwise constitutional statute: "We decline to void essentially on the ground that it is unwise legislation which Congress had

68. On the distinction between coverage and protection, see, *e.g.*, F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89-92, 134-35 (1982); Schauer, *supra* note 26, at 920. *See generally* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

69. That is, if the communicative impact of the formulation, "This is a stick-up" is that the statement is in jest or part of a theatrical production, then the expression is not a robbery and, absent other disabilities, is probably protected by the first amendment. But if the communicative impact reveals that the speaker intends a compulsory transfer of funds, his expression is simply not first amendment speech. *See* Schauer, *supra* note 26, at 905 n.34 (citing cases in which the Supreme Court has denied first amendment coverage to communication as part of an illegal act).

70. *See* text at notes 75-77 *infra*.

71. *O'Brien*, 391 U.S. at 377.

the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."[72] According to *O'Brien,* the Court would look to legislative history only as an aid in interpreting the legislation.[73] In determining whether the governmental interest furthered by access restrictions is unrelated to the suppression of free speech, therefore, the Court presumably will look no further than to the interest apparent on the face of the statute.[74]

A constitutionally permissible objective is necessarily embodied in the language of juvenile access restrictions. For example, the disputed regulation in *American Booksellers* provided, "It shall be unlawful for any person . . . to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse [material obscene as to juveniles]."[75] In *Upper Midwest Booksellers* the regulation at issue stated, "It is unlawful for any person commercially and knowingly to exhibit [or] display . . . any material which is [obscene as to

72. 391 U.S. at 384. In the context of the *O'Brien* case, Warren's statement was not mere dictum: a cursory glance at the legislative history of the Selective Service regulation at issue would have been likely to reveal an improper legislative motive. *See, e.g.,* L. TRIBE, *supra* note 33, at 596-97.

73. To be sure, Supreme Court examinations of legislative history have resulted in the invalidation of otherwise constitutional statutes often enough to call Warren's disclaimer into question. *See, e.g.,* Wallace v. Jaffree, 472 U.S. 38 (1985) (state statute authorizing a moment of silence for prayer or meditation struck down solely on the basis of legislative history indicating an intent to promote school prayer). However, close examinations of legislative motives have tended to be restricted to equal protection cases. For example, in Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court invalidated a tax on newspaper advertisements based on the circulation of the newspaper because, "in the light of its history and of its present setting, [the tax was] seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled." 297 U.S. at 250.

Moreover, in no case analyzed under *O'Brien* has the Court "void[ed] a statute . . . constitutional on its face, on the basis of what [the legislators] said about it." *O'Brien,* 391 U.S. at 384. Indeed, in Renton v. Playtime Theaters, 106 S. Ct. 925 (1986), the Court cited *O'Brien* in explicitly rejecting the court of appeals' theory that "if *'a motivating factor'* in enacting the ordinance was to restrict [the] exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision." 106 S. Ct. at 929, quoting Playtime Theaters v. Renton, 748 F.2d 527, 537 (9th Cir. 1984). Thus, because the *"predominate* concerns" of the City Council "were found to be with the secondary effects of adult theaters, and not with the content of adult films themselves," 106 S. Ct. at 929, the ordinance was sustained. Even in *Grosjean,* the Court's appraisal of the legislative animus derived not from any legislative history of the tax but from the face of the provision itself: "The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication . . . ." 297 U.S. at 251.

At least in the context of incidental restrictions on speech, it seems that Warren's prescription for the proper use of legislative history in adjudication survives.

74. Even if one were to conclude that the Court were willing to inquire into legislative motive in spite of Chief Justice Warren's admonition to the contrary, the question of whether juvenile access restrictions result from impure motives could not be answered in the abstract. Arguably access restrictions *could* result from improper motives, but one could only discover that by examining an *actual* legislature's *actual* legislative enactment and legislative history. *Cf.* note 78 *supra.*

75. *American Booksellers Assn.,* 802 F.2d at 693 n.2.

juveniles]."[76] The contested provision in *M.S. News* declared, "No person having custody, control or supervision of any commercial establishment shall knowingly: . . . display material which is [obscene as to juveniles] in such a way that minors . . . will be exposed to view such material."[77] The similarity is not coincidental: this phraseology represents the simplest manner of effecting the governmental purpose of limiting juvenile access to sexually explicit material, a purpose legitimated in *Ginsberg*. Because the language of the access restrictions that have come before the federal courts of appeals most naturally suggests a governmental interest "unrelated to the suppression of free expression," the second part of the *O'Brien* test is satisfied by these statutes.[78]

B. *No Greater Than Is Essential to the Furtherance of the Governmental Interest*

Once it is established that a particular regulation is supported by a "substantial governmental interest that is unrelated to the suppression of free expression," the restriction on first amendment rights must be shown to be "no greater than is essential to the furtherance of that interest."[79] Herein lies the final hurdle posed by *O'Brien*.

This least-restrictive-alternative analysis presupposes that the legislature has chosen a particular alternative from among a number of measures which might have advanced the legislative purpose. However, none of the access restrictions considered by the federal courts of appeals mandate a particular means to the end of preventing a minor's access to juvenile pornography.[80] Unlike statutes that ban specific con-

76. *Upper Midwest Booksellers*, 780 F.2d. at 1407 (Appendix).

77. *M.S. News*, 721 F.2d. at 1296 (Appendix).

78. Conceivably, a legislature could enact a statute which on its face revealed an intent to constrain *adult* access to juvenile obscenity. But the *face of the statute* would betray such an improper motive only if it included restraints superfluous to restricting the access of minors — in which case it would be something more than a juvenile access restriction.

Moreover, even in the face of evidence that a legislative body thought the adventitious impediment to adults' first amendment freedoms a happy consequence of prohibitions on juvenile access, it is difficult to believe that this effect of the statute could actually be *more* important to the legislators than the effect on juvenile access, or that the interest in regulating *juvenile* access to pornography could be a mere pretext for restraining *adult* access. The *preeminent* objective inevitably furthered by such laws is to place the material out of the reach of minors. Hence, such statutes necessarily further a nonspeech governmental interest untainted by improper legislative motives.

79. *O'Brien*, 391 U.S. at 377.

80. The access restrictions at issue in the *M.S. News* and *Upper Midwest Booksellers* cases did prescribe measures that would be deemed compliant, but these were not exclusive and were largely redundant in any case. For instance, the statute considered in *Upper Midwest Booksellers* excepted from its purview material enclosed in opaque covers, elaborating: "The requirement of an opaque cover shall be deemed satisfied concerning such material if those portions of the cover, covers, or packaging containing such material harmful to minors are blocked from view by an opaque cover." MINNEAPOLIS, MINN. ORDINANCE § 385.131(6)(a), *quoted in* 780 F.2d at 1407-08 (Appendix).

duct as an intermediate step toward advancing the governmental interest, these statutes simply state the governmental purpose and place the chosen means to that end in the hands of the bookseller. Incidental restrictions on speech that do "no more than eliminate the exact source of the evil [the legislature] sought to remedy"[81] allow no less restrictive alternative analysis. If the state is permitted to eliminate the perceived evil, such regulations will be upheld.

Moreover, a legislature could presume that the self-regulating bookseller would choose the least restrictive method of compliance — be it a separate room for adults, opaque covers, or blinder racks — on account of his profit motive.[82] Particular bookstores and types of juvenile obscenity may be amenable to different sorts of restrictions, and a general prohibition on juvenile access permits the storekeeper to choose any combination of restraints that furthers the governmental interest. The sole alternative is to specify a single or several permissible display methods which would limit the available modes of compliance. In other words, the only other means of furthering the government's interest would very likely be more restrictive.[83]

On the other hand, broadly phrased prohibitions arguably constitute a greater restriction because of their potential to "chill" speech. If particular compliance methods are not enumerated, a bookseller might opt for maximum restriction, or discontinue the sale of juvenile obscenity altogether. In discussing the difficulty a bookseller would have in attempting to comply with Virginia's access restriction the Fourth Circuit implicitly raised the danger that nonspecific access restrictions pose to the first amendment rights of adults.[84] The court

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81. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).

82. The bookseller's remunerative incentive resembles that presumed to goad the "orator" of commercial speech. In the commercial speaker's case, the assumed profit motive justifies, in part, the limited first amendment protection accorded his expression. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976) ("[C]ommercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely."). Obviously, it will be in the bookseller's interest to adopt the display method that sells the most juvenile obscenity to adults, and it seems reasonable to assume that this will be the method that infringes least on the first amendment rights of adults.

83. Particularity could only approximate the range of options available to the bookseller under a general statute if the enumeration of compliance methods were exhaustive or reduce his options if the enumeration were less than exhaustive.

84. *American Booksellers,* 802 F.2d at 695-96. Oddly, the court indicates that one of the problems with the statute is that the definition of the affected material is not clear. For instance, the court discusses the divergent opinions of the bookstore owners and the government as to the amount of the booksellers' inventory that would be covered concluding that "[i]t cannot be gainsaid . . . that book retailers face a substantial problem attempting to comply with the [regulation] in ordering, [and] reviewing . . . publications for sale." 802 F.2d at 696. But because this portion of the statute mimics the law sustained in *Ginsberg,* it is immune from constitutional challenge and any alleged definitional ambiguities are irrelevant. *Compare* VA. CODE ANN. §§ 18.2-390, 18.2-391, 18.2-391.1 (Supp. 1987), *with* N.Y. PENAL LAW § 484-h, *supra* note 7.

Moreover, the restriction struck down was an amendment to a Virginia law that forbids the sale of the same material to juveniles. Thus, Virginia booksellers face precisely the same "sub-

declared that the access restriction's breadth constituted its "most serious flaw."[85] Because, in the words of the court, the statute required that material obscene as to juveniles "not be displayed so that minors *may* have access to [it],"[86] the court interpreted the regulation to mandate displays impenetrable by "any determined juvenile."[87] A uniquely determined juvenile, however, will not jeopardize a merchant's compliance method because the statute includes a scienter requirement: "It shall be unlawful . . . to *knowingly* display for commercial purpose in a manner whereby juveniles may examine and peruse [material obscene as to minors]."[88] The rare juvenile incursion into prohibited territory will not give the bookseller "reason to know or a . . . ground for belief"[89] that his method is inadequate.[90]

Whether the unequivocal notice provided by specificity is less restrictive than the latitude afforded by generality in an access restriction is, at best, a close call. Close calls require judicial deference to the legislative choice. As the Court said when addressing the claim that the National Park Service's prohibition on sleeping in Lafayette Park was not the least speech-restrictive means of preventing damage to the Park:

> We do not believe . . . that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.[91]

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stantial problem . . . in ordering [and] reviewing . . . publications for sale" irrespective of the display restriction since they must be able to identify the material that they cannot sell to minors.

85. 802 F.2d at 695.

86. 802 F.2d at 696 (emphasis in original).

87. 802 F.2d at 696.

88. VA. CODE ANN. § 18.2-391(a) (Supp. 1987).

89. The Virginia access restriction defines "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry." VA. CODE ANN. § 18.2-390(7) (Supp. 1987).

90. On the other hand, an access regulation that simply required particular display methods — while clear enough to guide a law-abiding merchant — might not prevent juvenile access in fact. If the ordinance were lawfully complied with even as hordes of minors flipped through material on the "adults only" shelf, it would not serve its intended purpose. *Cf.* Procunier v. Martinez, 416 U.S. 396, 425 (1974) (Marshall, J., concurring) ("Indeed, the State's claim of concern over this problem is undermined by the general practice [which allows evasion of the purported interest]"). Absent a rational relation to a constitutionally permissible state interest — in this case, shielding juveniles from sexually explicit material — the state cannot randomly regulate a bookstore owner's display methods.

The access restrictions upheld by the Eighth and Tenth Circuits proffered suitable compliance methods but these were defined in terms of their actual capacity to shield juveniles from exposure to the material. *See, e.g.*, note 80 *supra*. Thus, a bookseller who adopted one of the suggested measures would not be deemed in compliance unless his display method actually prevented juvenile access in any event.

91. Clark v. Community For Creative Non-Violence, 468 U.S. 288, 299 (1984) (footnote omitted). *See also Young*, 427 U.S. at 71 ("It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas."); Renton v. Playtime Theaters, 106 S. Ct. 925, 931 (1986) ("We . . . find no constitutional

Neither specificity nor generality in access restrictions seems clearly "greater than is essential to the furtherance of [the governmental] interest." Both types, therefore, satisfy the last of the *O'Brien* test's requirements. Restrictions on juvenile access to material obscene as to minors are constitutional under the *O'Brien* analysis.

IV. CONCLUSION

Although declamations that the first amendment is blind to the value of speech punctuate the Court's first amendment rulings, many of the Court's opinions explicitly or implicitly rely on the relative value of the affected speech. The most salient class of speech toward which the Court tends to disregard the content-neutrality dictum is nonobscene pornography — speech that teases the prurient appeal standard while remaining constitutionally chaste. Material obscene as to juveniles is unquestionably speech of this type; as to minors, it goes so far as to satisfy the prurient interest criterion. Clearly that fact alone does not end the inquiry. Speech valuation at its strongest means that, as to adults, this material is of *low* first amendment value — not *no* first amendment value.

But because restrictions on sexually related nonobscene speech are frequently accorded lenient first amendment scrutiny, the *O'Brien* test is uniquely apposite. Although the Supreme Court may hesitate before applying *O'Brien* analysis to some incidental restrictions on expression, regulation of material obscene as to juveniles and on the edge of obscenity as to adults is not one of those.

Moreover, the *O'Brien* test does not require that the speech affected be of a type that "few of us would march our sons and daughters off to war to preserve."[92] Rather, *O'Brien* requires only that the regulation further an "important or substantial governmental interest . . . unrelated to the suppression of free expression" in a manner least restrictive of first amendment rights.[93] *O'Brien* scrutiny thus obviates the need for an acknowledgement that material obscene as to juveniles is of low first amendment value.

O'Brien's three-part analysis provides an effective filter against the principal hazard posed by such regulations: that they will become vehicles for the suppression of protected speech. State laws that prohibit juvenile access to material that is obscene as to minors, however, serve the same important governmental interest that the Court relied upon in *Ginsberg*. And because juvenile obscenity is nonspeech as to juveniles, the governmental interest primarily advanced by juvenile ac-

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defect in the method chosen by Renton to further its substantial interests. . . . '[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' " (quoting *Young*, 427 U.S. at 71)).

92. *Young*, 427 U.S. at 70.

93. 391 U.S. at 377.

cess restrictions is unrelated to the suppression of free speech. Finally, when juvenile access restrictions state their commands in general terms which directly advance the governmental interest, there exists no less restrictive alternative.

Future legislative enactments regulating material obscene as to minors, however, may be less circumspect in their mandates. The first amendment demands that juvenile access restrictions, though primarily affecting nonspeech, be tailored as narrowly as possible, to avoid abridging the legitimate speech rights of adults. For such a purpose was the *O'Brien* test designed.

—Ann H. Coulter