Viewpoint Neutral Zoning of Adult Entertainment Businesses

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Zoning of strip clubs, adult video stores, and other adult entertainment businesses is a frequent source of controversy and litigation in many American cities. Community members often oppose strip clubs moving into their city and many cities try to keep these businesses as far from public life as possible. The Supreme Court's First Amendment law has not helped this struggle. In fact, the current "secondary effects" test used by the Supreme Court has actually made it more difficult for cities to zone adult businesses. Although a few commentators have expressed their disapproval of the secondary effects test, they have all complained that the test allows cities too much power or erodes constitutional freedoms. Surprisingly, no commentator has ever argued that the test actually does not defer enough to cities. This Article argues that the secondary effects test weakens the state zoning power and imposes an impossible task on cities in forcing them to ensure the economic success of adult businesses. After exploring the main flaws of the secondary effects test as demonstrated by lower court decisions following the Supreme Court's latest zoning decision in Alameda Books, *this Article demonstrates how the Court can adopt a new "viewpoint neutral" approach that allows cities to protect adult entertainment expression while maintaining broad discretion under their zoning power.*

Who wants to live next door to a strip club? Apparently, not many of us. Americans seem to love racy television and movies, but when it comes to adult entertainment businesses[1] ("sexually oriented

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1. Adult entertainment businesses include "peep shows, adult video stores, pornographic bookstores, special cabarets, rap parlors, liquor lounges, internet web sites, x-rated pay-per-view channels, massage parlors, and 1-900 sex phone lines." Dana M. Tucker, Comment, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?*, 12 J. LAND USE & ENVTL. L. 383, 392–93 (1997).

businesses" or "SOBs") moving to our communities, we put our foot down.[2] This is an ongoing controversy in American cities, and a frequent source of litigation, especially with the growth in popularity of adult businesses.[3] Many residents oppose adult businesses because they violate the "moral standards" of their community.[4] Others believe that these businesses are degrading to women and undermine healthy relationships.[5]

Since so many Americans oppose adult businesses moving in, why do they flourish? Simply put, because of the First Amendment to the United States Constitution.[6] While cities have the power to create zoning plans for the community, this zoning power is tempered by the First Amendment.[7] The First Amendment provides adult businesses a

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2. Tucker, *supra* note 1, at 408 (noting that "[p]ublic hearings have overflowed with . . . concerns about traffic, property devaluation, prostitution and other crimes" associated with adult entertainment businesses).

3. JULES B. GERARD, LOCAL REGULATION OF ADULT BUSINESSES § 1.02 (2004) (noting that "[a] July 1991 request to the Nexis Information Service for current articles about adult entertainment in major newspapers and magazines generated a list of 961 stories"). *See, e.g.,* Bill Pike, *Strip-club Controls May Be Added to Louisville Zoning Codes*, THE COURIER-JOURNAL (Louisville, KY), April 3, 2003, at 5B; Lisa Heyamoto, *Kenmore Extends Moratorium on Adult-Entertainment Shops*, THE SEATTLE TIMES, September 24, 2003, at B2 (noting the strong opposition to new strip clubs by community residents). *See also* JULIAN CONTRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION § 10.17 (2003) (noting New York City's "massive and successful effort to rid the Times Square area of adult businesses is but one . . . of the many municipal purges" of adult businesses in recent years) (citing Buzzetti v. City of New York, 140 F.3d 134 (2d Cir. 1998)).

The issue of adult entertainment has been a source of controversy for many years. FREDRIC A. STROM, ZONING CONTROL OF SEX BUSINESSES: THE ZONING APPROACH TO CONTROLLING ADULT ENTERTAINMENT (1977) (noting that since the 1970s "local government authorities and the general public have been concerned about the proliferation and higher visibility across the country" of adult businesses).

4. Mary Brooks, *Chuluota: Keep Out Adult Clubs: Seminole Commissioner Maloy to Speak on Controversy Tonight*, THE ORLANDO SENTINEL, Oct. 23, 1997, at D1 (describing an adult business zoning controversy where residents refuse to have adult businesses locate anywhere in their county and worry about the "health and safety" of their rural community).

5. *See, e.g.,* Ira E. Stoll, *Simi Residents Protest Adult Business Plan Demonstration: Hundreds Rally at Site of What Would be the City's First such Establishment: They Vow to Take Pictures of Customers*, THE L.A. TIMES, Aug. 2, 1995, at B5, *available at* 1995 WL 2070942 (describing a mother who claimed that, "Pornography doesn't just degrade women, it degrades and addicts men.").

6. The U.S. CONST. amend. I states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

7. States reserve the right to zone within their police power rights to regulate on behalf of the "health, safety, morals and general welfare" of the community. Scottsdale v. Sup. Ct., 439 P.2d 290 (1968).

constitutionally protected right to expression.[8] In order to mediate the rights of cities and adult businesses, the Court established the "secondary effects" test. Under the secondary effects test, cities are able to zone adult businesses in order to deal with the *effects* of these businesses rather than to regulate the content of the speech expressed by the businesses. So, cities can zone adult businesses because, for example, they cause a decline in the quality of urban neighborhoods and increase prostitution, but *not* because a city disapproves of nude dancing as entertainment.

Although the secondary effects test seems to create a reasonable constitutional compromise in the zoning of adult businesses,[9] this Article explores several underlying weaknesses in the test. Many of these weaknesses have surfaced in lower court decisions since the latest Supreme Court adult business zoning decision, *City of Los Angeles v. Alameda Books, Inc.*[10] These weaknesses include that the secondary effects test 1) undermines the state zoning power by inflicting greater evidentiary burdens on cities, thereby precluding cities from experimenting with different zoning solutions, 2) limits cities' ability to rely only on "quantifiable" secondary effects, rather than the broad range of quantifiable and "intangible" secondary effects relied on in the past, and 3) imposes a burden on cities to ensure economic viability of adult businesses, rather than recognizing that zoning invariably has negative economic effects. These weaknesses do not allow courts to defer to the state zoning power while protecting adult speech.

While commentators have expressed approval[11] and disapproval[12]

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8. California v. LaRue, 409 U.S. 109, 118 (1972) (recognizing that some adult entertainment should receive First Amendment "freedom of expression").

9. Dana M. Tucker, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?* 1998 ZONING AND PLANNING LAW HANDBOOK § 16.05[3] (Christine Carpenter ed., 1998) (asserting that zoning under the secondary effects test along with criminal prostitution statutes and modification of the definition of obscenity are necessary to combat the secondary effects of adult businesses).

10. 536 U.S. 921 (2002).

11. Mini M. Jelsema, Note, *Zoning Adult Businesses after* Los Angeles v. Alameda Books, 47 ST. LOUIS U. L.J. 1117 (2003) (expressing approval for Justice Kennedy's further explication of the secondary effects test in *Alameda*).

12. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19 at 952 (2d ed. 1988) (noting that the secondary effects test violates First Amendment freedoms); Stephanie Laskerbroad, *Sex and the City: Zoning "Pornography Peddlers and Live Nude Shows"*, 49 UCLA L. REV. 1139, 1144 (2002) (noting that cities have broad freedom to "create restrictive zoning schemes to combat questionable secondary effects"); David L. Hudson, Jr., *The Secondary Effects Doctrine "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 55 (1997) (disapproving of the secondary effects tests and arguing that its pervasive use "could well lead to an 'evisceration of First Amendment freedoms.'").

for the secondary effects test, most criticize the secondary effects test for deferring *too much* to cities[13] or eroding constitutional freedoms. This Article argues that the Supreme Court should reject the secondary effects test, not because it gives too much deference to cities, but because it does not give enough. It asserts that the Court should examine zoning of adult businesses as a *content based*, time, place, and manner speech regulation. This would avoid relying on the false premise that the regulations are "content neutral" because they target the effects of adult businesses rather than the speech itself. Although normally, content based speech regulation requires an ordinance to undergo strict scrutiny, the Court has made some exceptions to this rule with low-value speech, like defamatory and commercial speech. This Article proposes that the Court similarly analyze zoning of adult businesses in a subcategory of content based regulation. The Court should recognize adult business zoning as content based, but *viewpoint neutral*, time, place, and manner speech regulation. This "viewpoint neutral" approach avoids the false premise underlying the Court's adult business zoning cases and allows the Court to properly defer to states in zoning while meeting the constitutional demand to protect freedom of speech.[14]

Part I of this Article describes the broad nature of the state zoning power and the First Amendment limitations on this power. Part II

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13. *See* Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 293–94 (2003) (concluding "that the deferential approach that most courts take with regard to legislative judgments about the regulation of sexually oriented businesses unduly restricts adult entertainment and the First Amendment"); Christopher Thomas Leahy, Comment, *The First Amendment Gone Awry:* City of Erie v. Pap's A.M., *Ailing Analytical Structures, and the Suppression of Protected Expression*, 150 U. PA. L. REV. 1021, 1026 (2002) (arguing that the secondary effects doctrine must be "both restrained and reevaluated" before cities "exert increasing power to further suppress controversial expression"); Christopher L. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175 (2002) (noting that the Court should "take certain remedial measures [like scrutinizing legislative intent and "placing a stringent evidentiary burden"] to ensure that the secondary effects doctrine does not provide a means for governmental authorities to target and suppress unfavorable expression under the guise of alleviating deleterious secondary effects in other contexts").

14. Although no commentator has before advocated the "viewpoint neutral" approach asserted in this Article, one commentator has generally questioned the need for content neutral time, place, and manner regulations. *See* GERARD, *supra* note 3, § 2.03[1][c] (noting that the Court "has yet to articulate a principled way of distinguishing between those situations in which viewpoint neutrality will be enough and those in which content neutrality is enough" and that "[t]he Court has yet to offer an intelligible set of reasons why time, place, and manner regulations should have to be content, as well as viewpoint neutral").

explores the development of the secondary effects test in Supreme Court jurisprudence, including the changes brought by the recent *Alameda* decision.[15] It recognizes that the Court did not want adult business zoning regulations to undergo strict scrutiny, even though they were content based. Thus, the Court formulated the "secondary effects test" because it recognized that zoning was an important part of a state's police power and that adult business expression was of low-value under the First Amendment. Part III analyzes lower court decisions applying the secondary effects test and demonstrates how the test imposes an extensive evidentiary burden on cities even though it is intended to broadly defer to cities in experimenting with solutions to local zoning problems. It also demonstrates how the secondary effects test limits the types of secondary effects a city can consider and creates a burden on cities to ensure the economic viability of adult businesses in order to enact zoning ordinances. Part IV provides a new "viewpoint neutral" approach for analyzing adult business zoning cases. Part V further clarifies this approach and explains how it should be applied by courts. This new approach resolves the evidentiary burdens of the secondary effects test that erode the state zoning power, while conforming to early Supreme Court precedent and protecting freedom of expression. Part VI provides a brief conclusion.

I. The Zoning Power and the First Amendment

The state police power reserves to states the right to regulate for the health, safety, morals, and general welfare of its citizens.[16] As early as 1926, the Supreme Court recognized zoning as a proper use of the state police power.[17] The Supreme Court in *Euclid v. Ambler Realty Co.* recognized the power of local governments to enact zoning ordinances to preserve the quality of life of its citizens.[18] In general,

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15. The *Alameda* decision has been very influential. *See, e.g.*, World Wide Video of Wash., Inc. v. City of Spokane, 227 F. Supp. 2d 1143, 1149 n.3 (E.D. Wash. 2002) *aff'd*, 368 F.3d 1186 (9th Cir. 2004) (noting that *Alameda* changed the legal landscape of the First Amendment).

16. Brown v. Maryland, 25 U.S. 419, 443 (1827) (first noting that an aspect of criminal law is reserved to the states as part of their "police" power).

17. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (recognizing that the state police power extends to zoning).

18. *Id.* at 386–87 (noting that with increasing density of population, problems require regulations regarding "the use and occupation of private lands in urban communities). In addition, the Court held that a zoning regulation was proper under the police power as long as it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395.

the Court has interpreted the state zoning power broadly.[19] States are permitted to zone for aesthetic reasons,[20] to improve urban life,[21] to reduce noise and traffic,[22] to reduce crime,[23] and to increase the quality of neighborhoods.[24] In addition, cities are permitted to zone in order to protect public morals as defined by the community.[25]

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19. *Berman v. Parker*, 348 U.S. 26, 32–33 (1954) established this principle very broadly:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river. We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

The Supreme Court in *Village of Belle Terre v. Boraas* allowed a zoning ordinance that restricted land use in Belle Terre village to single-family homes and defined "family" to only include people related by blood. 416 U.S. 1, 9 (1974). The Court upheld this ordinance as a legitimate use of the police power in addressing "family needs." *Id.* Justice Marshall further stated that zoning is "the most essential function performed by local government . . . [as a means to protect] quality of life." *Id.* at 13 (Marshall, J., dissenting) (also pointing out that "the police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.").

20. *See* JUERGENSMEYER & ROBERTS, *supra* note 3, §§ 12.2, 10.16 (stating that "regulation of signs for reasons of . . . aesthetics has a long history" in the United States); ZONING AND LAND USE CONTROLS, §§ 16.03–05 (Rohan & Kelly eds., 1998). *See also* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 506 (1981) (agreeing that aesthetics is a "substantial" government interest for cities to regulate commercial billboards).

21. Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 71 (1976) ("[T]he city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."); *see also* JOHN J. DELANEY, ET AL., 1 LAND USE PRAC. & FORMS § 13:2 (2003) (noting that "[c]ourts have upheld zoning regulations of adult uses that are tied to public welfare goals, such as . . . the protection of the quality of city neighborhoods") (citing Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1159 (Wash. 1978), *cert. denied*, 441 U.S. 946 (1979)).

22. Grosz v. City of Miami Beach, 721 F.2d 729, 738 (11th Cir. 1983) (recognizing that cities zone to reduce traffic, noise, and litter), *cert. denied*, 469 U.S. 827 (1984).

23. *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) (noting that cities have the power to regulate in order to control crime rates).

24. *Id.*

25. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575 (1991) (Scalia, J., concurring) ("Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are . . . immoral."). In America, examples include "prohibitions . . . [of] sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy." *Id.* at 575. Justice Souter, in a *Barnes* concurrence, noted that it is ap-

However, the federal Constitution places limits on the state police power. For instance, when zoning threatens freedom of speech and expression, the First Amendment is invoked and states do not receive the same deference. The First Amendment protects a wide variety of "expressive conduct," including adult entertainment.[26]

Under certain conditions, states may regulate protected speech or expression. One of the few permissible categories of proper state regulation of speech is a time, place, and manner regulation.[27] Zoning regulations constitute time, place, and manner regulations. Therefore, cities are permitted to regulate adult entertainment "expression" under this rationale.[28]

The amount of deference provided to states when regulating speech or expression depends on whether a state regulation is content based or content neutral under the First Amendment. Content based zoning ordinances "limit communication because of the message conveyed."[29] In contrast, "[c]ontent-neutral restrictions limit communication without regard to the message conveyed."[30] Content based speech regulations must generally undergo strict scrutiny, unless it has been recognized as an exception.[31]

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propriate to rely on the justification of "protecting societal order and morality" in passing indecency ordinances but also secondary effects like increases in prostitution and sexual assault should also be considered. *Id.* at 582 (Souter, J., concurring). *See also* Miller v. California, 413 U.S. 15 (1973) (relying on a community standard to determine whether pornography was obscene).

26. For example, the Court considers nude dancing by a stripper "expression" under the First Amendment. *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (protecting dancing as expression under the First Amendment). *See also* Tucker, *supra* note 1, at 390–91 (explaining that "[t]he Supreme Court extended the First Amendment's protection of free speech to cover many types of expressive conduct that are not technically speech.") (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) and Spence v. Washington, 418 U.S. 405, 410–11 (1974)); Lisa Malmer, Comment, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1276 (1991). *Compare* Dallis v. Stanglin, 490 U.S. 19, 28 (1989) (holding that adult entertainment patrons watching strippers is not protected expression under the First Amendment).

27. *See, e.g.*, Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 93 (1977).

28. While the time, place, and manner test specifically requires regulations to be "content neutral," the Supreme Court has implicitly recognized some content based regulations as permissible. *See* Part IV.A.

29. Geoffrey R. Stone, *Content Regulation and the First Amendment,* 25 WM. & MARY L. REV. 189, 190 (1983) (discussing the evolution of and the "merits and limitations of the content-based/content-neutral distinction").

30. *Id.* at 189.

31. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 800 (1996) (Kennedy, J., concurring in part, dissenting in part). Exceptions to this rule include defamatory speech and commercial advertising. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66–69 (1976).

Viewpoint based regulations limit communication because of the viewpoint or idea expressed on a particular topic. Viewpoint based regulation of speech is never allowed because it is at the heart of First Amendment speech protection.[32] Adult business zoning cases have traditionally relied on the content-based/content-neutral distinction. Some cases have mentioned the importance of viewpoint neutral regulations; however, none have explicitly relied on this distinction in zoning SOBs.[33]

II. The Evolution of the Secondary Effects Test

The seminal Supreme Court case dealing with zoning of adult businesses is *Young v. American Mini Theaters, Inc.* [34] In *Young*, a plurality upheld Detroit's zoning ordinance that prohibited adult businesses from operating within 1,000 feet of other such businesses, or within 500 feet of a residential area.[35] The Court plurality, led by Justice Stevens, held that a city "may control the location" of adult theaters as well as "other commercial establishments."[36]

The Stevens plurality recognized this zoning ordinance as a time, place, and manner regulation.[37] However, Justice Stevens also recognized that the ordinance was content based because it was targeted only at adult businesses, not all businesses. To fall under the time, place, and manner test, an ordinance usually has to be content neu-

32. Stone, *supra* note 29, at 197. A viewpoint-based regulation is invalid because "the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others." Members of the City Council of the City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 803 (1984). *See also* Regan v. Time, Inc., 468 U.S. 641, 648–649 (1984).

33. *See, e.g.*, Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 292 (5th Cir. 2003) (noting that the "'principle inquiry in determining content neutrality, in speech cases . . . is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys*'") (emphasis added) (quoting Hill v. Colorado, 530 U.S. 703, 719 (2000)) (internal citations omitted).

34. 427 U.S. 50 (1976).

35. The types of businesses included under this ordinance included adult theaters, "adult book stores, cabarets, bars, taxi dance halls, and hotels." *Id.* at 50. Two adult theaters challenged the zoning ordinance as violating the First Amendment. *Id.* at 58. The adult theaters also alleged that the ordinances violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *Id.*

36. *Id.* at 62 (Justice Stevens said that cities may control the location "either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city.").

37. *Young*, 427 U.S. at 63 n.18.

tral. However, the Court plurality pointed out that in some instances content based regulations of speech are permitted.[38] A few examples include profanity, confidential government information, defamation, and commercial speech.[39] The Court explained that zoning of adult businesses also falls in this category because these regulations are unaffected by the *message or viewpoint*[40] expressed in the film.[41] Therefore, the Court recognized that zoning, along with commercial speech and profanity, may constitute a permissible exception within content based speech regulation.[42]

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38. *Id.* at 65–66 (The Court also held that the fact that the ordinance treated adult theaters differently than other theaters did not "offend the First Amendment.").

39. *Id.* at 66–68 (noting that these are examples where "difference[s] in content require a different governmental response"); *id.* at 66 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942)) (profanity like "a statute punishing the use of "damned Fascist(s)"); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (commercial speech regulation allowing a transit system to accept some advertisements and reject others); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) (important government information like the "sailing dates of [war] transports or the number and location of troops"); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation where courts rely on the content of an article being about a public official in order to require a higher standard of proof);. The Court also pointed out that obscenity cases also allow content based regulation. *Young*, 427 U.S. at 69–70 (pointing out that *Ginsberg v. New York* allows prohibiting distribution of obscene materials to minors and unconsenting adults even though the regulation is based on "an appraisal of the content of the material").

40. Further, the Court plurality explained that the key to government regulation is that the government cannot discriminate based on whether it agrees with the *viewpoint* expressed. *Young*, 427 U.S. at 67. The Court elaborated that the use of "streets and parks for the free expression of views on national affairs may not be conditioned upon a sovereign's agreement with what a speaker may intend to say." *Id.* at 63. Further, the Court noted that speech cannot be restricted because "it invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger." *Id.* at 63–64.

The Court plurality recognized that the ordinance was *viewpoint neutral,* but instead said that it was *content neutral.* It explained that the state's "agreement or disagreement with the *content of* what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech." *Id.* at 64 (emphasis added). To further evidence that the Court was referring to "viewpoint" neutral rather than "content" neutral government regulation, the Court also pointed out that "[t]he essence of that rule is the need for absolute neutrality by the government; its regulation of the communication may not be affected by *sympathy or hostility for the point of view being expressed* by the communicator." *Young*, 427 U.S. at 67 (emphasis added).

Although the Court plurality phrased this limitation in terms of "content," the right language to describe this concept is "viewpoint" neutral since the Court referred to *agreement* with the message of the speaker rather than the ability of the speaker to address that particular topic. In addition, the plurality recognized that like with commercial speech, zoning of adult businesses was content based—but fell into an exception. Therefore, a city could regulate it without invoking strict scrutiny.

41. *Id.* at 70 (noting that the "regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical *message* a film may be intended to communicate") (emphasis added).

42. *Id.*

After deciding that this ordinance was a content based regulation (though recognizing implicitly, that it was also viewpoint neutral) the Court examined whether the city's interest justified the regulations.[43] The Court deferred to the city council determination based on only a few expert opinions that this ordinance would "preserve the quality of urban life."[44]

Justice Powell who provided the fifth vote with his concurrence, agreed with Justice Stevens that the Detroit ordinances did not violate the First Amendment.[45] However, he did not defend the ordinance because it was viewpoint neutral or justify it based on the broad zoning power allowed to local governments. Instead, he claimed that the ordinance was *not* content based because it allowed the "city to treat certain movie theaters differently" because they have "*different effects upon their surroundings.*"[46] Justice Powell first articulated the secondary effects test. The secondary effects test was based on the premise that zoning ordinances can avoid being considered "content based" because their purpose is to limit negative secondary effects of adult businesses, rather than to suppress speech. Under the traditional definition of content based zoning, adult business zoning ordinances would have been considered content based because they limit communication based on the message conveyed. In other words, a city would zone all adult businesses in its boundaries and not supermarkets because of the message conveyed by adult businesses. Rather than recognize that the ordinance was content based and claim that it should be classified as an exception (that does not have to undergo strict scrutiny), like commercial speech, Powell relied on the secondary effects test.[47]

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43. *Id.* at 71.

44. *Id.* The plurality, interpreting the zoning power broadly, recognized that preservation of "quality of life" was a substantial enough government interest to justify the regulation.

45. *Young*, 427 U.S. at 73 (Powell, J., concurring) (He analyzed the case as an "innovative land-use regulation" which implicated the First Amendment "only incidentally and to a limited extent."). Powell disagreed with the dissent that this zoning ordinance was an impermissible content based time, place, and manner restriction. *Id.* at 82 n.6 (Powell, J., concurring).

46. *Id.* at 82 n.6 (Powell, J., concurring) (emphasis added).

47. Part of the problem was that the former option was not well-articulated by the *Young* Court. The Court presented the option of regulating adult business zoning as an exception along with commercial speech and defamation; however it did not articulate a principled reason *why* it should fall into this category. This may have been why this rationale did not win a majority over the secondary effects rationale. As this Article points out in Part IV, the principled distinction the Court should have articulated is that the content-based exceptions discussed all regulate low-value speech.

In *City of Renton v. Playtime Theatres, Inc.*, the Court obtained a majority to uphold a Renton city zoning ordinance prohibiting "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[48] The Court held that the ordinance was *content neutral* and explicitly adopted the secondary effects test.[49] However, the Court noted that the fundamental principle was that the government should not suppress "less favored or . . . controversial" regulations and favor acceptable views.[50] Again, the Court seemed to emphasize that the key to a valid ordinance is viewpoint neutrality, not content neutrality.

The *Renton* Court then set out a two factor inquiry to determine whether an ordinance is valid. The Court considered 1) whether the ordinance is "designed to serve a substantial governmental interest" and 2) whether it "allows for reasonable alternative avenues of communication."[51] In examining the government interest, the Court found

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In determining the effect of the ordinance, Justice Powell determined that the ordinance would have a minimal effect on limiting the production, regulating the content of, or limiting viewer's access to the adult films. *Id.* at 77. In this analysis, he mentioned that although some viewers would be "inconvenienced by this dispersal," some "may find it more convenient" and the "number of adult movie theaters in Detroit will remain approximately the same." *Young*, 427 U.S. at 79. Justice Powell analyzed the permissibility of the ordinance under the test of *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Young*, 427 U.S. at 79. The four factors considered were: 1) whether the regulation was "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." *Id.* at 79–80 (quoting *O'Brien*, 391 U.S. at 377).

48. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986).

49. *Id.* at 47 (noting that the ordinance was "completely consistent with our definition of content-neutral speech regulations as those that 'are justified without reference to the content of the regulated speech'" since the ordinance was justified by reference to the secondary effects) (internal quotations omitted).

The Court noted that it is irrelevant that "*a motivating factor*" of the city in passing an ordinance was to restrict free exercise rights. *Id.* at 47. Only the "'predominant' intent" of the city in passing an ordinance is relevant. *Id.* at 48. To determine predominant intent, the Court examined the terms of the ordinance and recognized that the city did not try to "close" or restrict the number of adult businesses but limited "their choice as to location." *Id.* Therefore, despite the fact that the findings demonstrate that many of the "stated reasons for the ordinance were no more than expressions of dislike for the subject matter" sold by the adult business, the ordinance was valid under the First Amendment. *Id.* at 59 (Brennan, J., dissenting) (internal citation omitted). The dissent required more evidence that the city's findings related to secondary effects and that the ordinance was not enacted based on improper motivations. *Id.* at 59–60 (Brennan, J., dissenting).

50. *Renton*, 475 U.S. at 48–49.

51. *Renton*, 475 U.S. at 50.

that the ordinances were passed after a "long period of study and discussion of the problems of adult movie theaters" and that there was testimony at trial on this topic.[52] Then, in determining whether reasonable alternative avenues existed, the Court determined that even though "practically none" of the land zoned for adult businesses was "for sale or lease" there still existed reasonable alternative avenues for speech.[53]

The *Renton* Court adopted the secondary effects test and the faulty premise that zoning regulations are content neutral. However, it maintained that courts must defer to local governments in zoning. In addition, the Court majority deferred to the city's broad zoning power in examining its government interest and the existence of alternative avenues for speech.

In *City of Los Angeles v. Alameda Books, Inc.*, two adult establishments challenged a city ordinance that prohibited more than one adult business from occupying the same building.[54] In analyzing the ordinance, Justice O'Connor, joined by three justices, again relied on *Renton* in determining that the ordinance was "content neutral" because it was aimed at the secondary effects of the adult businesses rather than at the expression.[55] Justice Scalia joined the Court's judgment but concurred noting that the "secondary effects" test is unnecessary and that the "Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex."[56]

Justice Kennedy concurred, creating a majority and the law in this case.[57] Justice Kennedy also relied on the secondary effects rationale, but pointed out that this ordinance was content based, not content neutral.[58] However, he still applied intermediate scrutiny under *Renton* (not strict scrutiny) even though the ordinance was con-

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52. *Id.* at 51 (quoting Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1155 (Wash. 1978)).

53. The Court was not concerned that the land was not commercially or economically viable. It only required that the land was *theoretically* open to adult businesses in the zoning scheme.

54. 535 U.S. 425, 429 (2002).

55. *Id.* at 440–41.

56. *Id.* at 443–44 (Scalia, J., concurring).

57. *Id.* at 444 (Kennedy, J., concurring); Marks v. United States, 430 U.S. 188, 193 (1977) (In a plurality opinion, the opinion of the Justice who supplies the fifth vote and concurs on grounds narrower than those put forth by the plurality is controlling).

58. *Alameda Books, Inc.*, 535 U.S. at 444 (Kennedy, J., concurring) (noting that, like billboards that "obstruct a view," speech may cause secondary effects).

tent based.[59] Kennedy added an additional requirement to the test: "the quantity and accessibility of the speech [must be left] substantially intact."[60]

In applying the secondary effects test, Justice Kennedy recognized an important point that has never been recognized by a majority of the Court: adult business zoning ordinances are *content based*, not content neutral regulations. However, Justice Kennedy did not recognize that adult business zoning can be an exception to content based regulations by making a parallel to commercial speech or defamation (as Justice Stevens did in *Young*), but instead claimed that it was an exception because the ordinances targeted secondary effects.

The secondary effects test evolved because the Court recognized that zoning ordinances targeted solely at adult businesses (rather than all businesses) were content based regulations. Under the First Amendment, unless they fall in an exception (like defamation or commercial speech), these regulations must undergo strict scrutiny.

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59. *Id.* at 447, 448 (Kennedy, J., concurring). Justice Kennedy claimed that these regulations did not deserve strict scrutiny because they have a "legitimate purpose: to limit the negative externalities of land use." *Id.* at 449 (Kennedy, J., concurring). Justice Kennedy also emphasized that cities must provide "very little evidence," *id.* at 451 (Kennedy, J., concurring), but must demonstrate that their ordinance has the purpose and effect not to reduce speech, *id.* at 445 (Kennedy, J., concurring).

In deciding whether the city satisfied the evidentiary burden, Justice Kennedy claimed there were two important questions. *Id.* at 449 (Kennedy, J., concurring) (noting that cities could provide evidence from other jurisdictions rather than studying the secondary effects itself). First, "what proposition does a city need to advance in order to sustain a secondary effect ordinance? Second, how much evidence is required to support the proposition?" *Id.* In response to the first question, Justice Kennedy required that the ordinance has the "purpose and effect of suppressing [the] secondary effects" of speech." *Id.* at 445–46. Further, Kennedy noted that if the two results of a city ordinance are that a business has to "move elsewhere or close," the "city's premise" cannot be the latter." *Id.* at 450–51. The city's proposition, then, must be that the two businesses must "split rather than one to close," so "that the quantity of speech will be substantially undiminished." *Id.* at 451. In describing the second proposition, Kennedy answered that "very little evidence" is required at the outset and in general "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Id.* at 451.

60. *Id.* at 445, 449 (Kennedy, J., concurring) (noting that "[t]he purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech" and further explaining that a "trivial decrease in the quantity of speech" is allowed if the ordinance "cause[s] a significant decrease in secondary effects" and again "[t]he challenge is to protect the activity inside [adult establishments] while controlling the side effects outside [like an ordinance restricting slaughterhouses to a "remote part of town"]). Justice Kennedy also clarified later that a "zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it." *Id.* at 447. He also criticized the O'Connor plurality for failing to "address how speech will fare under the city's ordinance." *Id.* at 450.

However, the Court did not want to force these regulations to undergo strict scrutiny for two reasons. First, because zoning is an important part of a state's police power.[61] Second, because the Court recognized early on that adult business speech was of low-value under the First Amendment. While the Supreme Court developed the secondary effects test partly to allow local governments room to develop zoning plans, lower courts often fail to accord proper deference to cities under the secondary effects test.

III. Weaknesses of the Secondary Effects Test

Several problems with the secondary effects test have come to light since *Alameda*. Lower courts seem to struggle most with the level of evidence to require of cities under the *Renton* test. *Alameda* requires that cities ensure that the "quantity" and "accessibility" of adult speech remain "substantially intact" after an ordinance. It also requires that cities do not enact zoning ordinances with the "purpose" of suppressing speech. However, this new standard leaves many unanswered questions. For example, what does it mean for an ordinance to leave the *quantity* of adult speech substantially intact? If most of the adult businesses are not commercially viable because of market conditions in the areas they are zoned to, does that make an ordinance invalid? Does this overrule *Renton*, which specifically holds that cities are not required to consider the commercial viability of adult establishments as a result of an ordinance? While Justice Kennedy in *Alameda* still emphasizes that the *Renton* standard requires a low level of evidence from cities, it has been used by many lower courts to impose great evidentiary burdens on local governments.

The weaknesses of the secondary effects test explored in this section relate to the increased evidentiary burden imposed on cities in lower court cases. First, the secondary effects test undermines the state zoning power by creating greater evidentiary burdens on cities, precluding cities from experimenting with different solutions. Second, it often limits cities to be able to rely only on "quantifiable" secon-

61. The Court recognized that broad deference is due to states in zoning for the protection of the quality of life. Like in *Young*, the *Renton* Court majority allowed broad deference to the local government in justifying its city ordinance. However, the dissent disagreed with the majority's deferential attitude toward the city council in enacting the Renton zoning ordinance. The dissent pointed out that the intent of the ordinance to "promote . . . protecting . . . the quality of [Renton's] neighborhoods, commercial districts, and the quality of urban life" was amended *"after* the lawsuit commenced." *Renton*, 475 U.S. at 58 (Brennan, J., dissenting). In addition, the dissent points out that there were "no indications" in the legislative history that the city council was concerned about remedying secondary effects. *Id.* at 59.

dary effects rather than the broad range of quantifiable and intangible secondary effects relied on in earlier cases. Third, it creates a burden on cities to ensure economic viability of adult businesses rather than recognizing that zoning inevitably has negative economic effects.

A. Greater Evidentiary Burdens on Local Governments

1. Evidentiary burdens imposed by the Supreme Court

The controlling Supreme Court cases all emphasize that local governments bear a low evidentiary burden in proving an important government interest. Under the secondary effects test, a city's important government interest must be to mitigate negative secondary effects, rather than to suppress speech. In examining a city's important government interest, the Court has deferred greatly to cities and has recognized the broad zoning power of cities to protect the quality of local communities.[62]

In *Young*, the Court plurality deferred to the city's interest in protecting the quality of urban life based only on a few expert opinions.[63] The *Young* dissent did not dispute the adequacy of this evidence. Similarly, in *Renton*, the Court upheld the city's justification for a zoning ordinance even though the preamble justifying the ordinance based on secondary effects was amended *after* the ordinance was challenged. The Court found that the evidence of a "long period of study" of this issue and evidence presented at trial on the secondary effects of adult theaters was adequate.[64] The Court majority did not require any *specific* preenactment evidence of secondary effects.[65] In *Alameda*, the Court majority agreed that the preamble, stating that the purpose of the ordinance was to remedy secondary effects, was adequate to demonstrate the city's important interest.[66] The *Alameda*

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62. *See* Part I, *supra* notes 16–21.

63. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 64 (1976).

64. *Renton*, 475 U.S. at 51. *Id.* at 59 (Brennan, J., dissenting) (quoting *Northend Cinema*, 585 P.2d at 1154–55).

65. *Id.* at 59 (Brennan, J., dissenting). The *Renton* dissent criticized this holding and insisted that although there was evidence that the city council studied this issue, there was no preenactment evidence that the city council relied on secondary effects.

66. In *Alameda*, Justice O'Connor rejected the Court of Appeals' requirement that the "city provide evidence that not only supports the claim that its ordinance serves an important government interest," but that its *interpretation* of the evidence produces the same results as the court's. *Alameda Books, Inc.*, 535 U.S. at 438. Justice O'Connor further recognized that a "city may rely on any . . . reasonably . . . relevant" evidence, *id.* at 438 (quoting *Renton*, 475 U.S. at 51–52) (not "shoddy data or reasoning" to demonstrate a

Court also agreed that the city did *not* have to rely on empirical evidence that their ordinance remedies secondary effects but that they could rely on "common sense."[67] Throughout Supreme Court precedent, the Court has emphasized that cities bear a low evidentiary burden in demonstrating an important government interest, despite the secondary effects test.

2. Evidentiary burdens imposed by lower courts

Although Supreme Court precedent allows broad deference to cities in adult business zoning, lower courts often require a much higher evidentiary standard to demonstrate an important government interest in remedying secondary effects.

A few circuit courts of appeals insist that a city prove the *existence* of secondary effects before it can demonstrate an important governmental interest.[68] In addition, the Fifth Circuit required a city to prove the *effectiveness* of a zoning ordinance in combating secondary effects in order for it to pass constitutional muster. In applying

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connection between speech and an important government interest).

67. Justice O'Connor explained in *Alameda* that the city's "evidence must fairly support . . . [its] rationale for its ordinance." 535 U.S. at 438. And if the plaintiffs do not demonstrate that the city's "evidence does not support its rationale or [cast doubt on this rationale] by furnishing evidence that disputes the municipality's factual findings," the city meets the standard. *Id.* at 438–39. However, if plaintiffs cast "doubt" on the city's rationale, "the burden shifts back to the . . . [city] to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439. This burden-shifting standard seems to require the city to bear a higher evidentiary burden than did *Young* or *Renton*, depending on how it is interpreted. The O'Connor plurality did point out though, that the evidence required by the city does not have to consist of empirical data and can be "an appeal to common sense" unless plaintiffs provide "actual and convincing evidence . . . to the contrary." *Alameda Books, Inc.*, 535 U.S. at 438. Justice O'Connor points out that Justice Souter would require that the city "verify[] that the ordinance *actually reduces* the secondary effects asserted [to] . . . ensure that [the ordinance is not] merely [a] content-based regulation[] in disguise." *Id.* at 441 (emphasis added). However, according to Justice O'Connor, that "proposal [is] unwise and is not what *Renton* requires." *Id.* at 441.

See also PATRICIA E. SALKIN, 2 N.Y. ZONING LAW & PRAC. § 18:07.1 (4th ed. 2003) (noting that the practical implication of *Alameda* is that "local governments may continue to use secondary effects studies to demonstrate the negative impacts on communities that face a concentration of adult business/entertainment uses").

68. Encore Videos Inc. v. City of San Antonio, 330 F.3d 288 (5th Cir. 2003); Flanigan's Enter., Inc. v. Fulton County, 242 F.3d 976, 985 (11th Cir. 2001) (requiring evidence that adult businesses result in "undesirable community conditions," (quoting Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982))); Phillips v. Borough of Keyport, 107 F.3d 164, 173 (3d Cir. 1997) (noting that cities must present "evidence of incidental adverse social effects" to prove an important government interest (quoting Mitchell v. Comm'n on Adult Entm't Establishments, 10 F.3d 123 (3d Cir. 1993))). *But see* Erie Blvd. Triangle Corp. v. City of Schenectady, 250 F. Supp. 2d 22, 30–31 (N.D.N.Y. 2003) (only requiring that the city's preamble demonstrate a *goal* to eliminate secondary effects).

the "important government interest" standard, the court did not only require the government to demonstrate an "important" interest.[69] The court also required that "the challenged statute . . . is *effective* in serving that interest."[70] Similarly, the Seventh Circuit in R.V.S., L.L.C. v. City of Rockford[71] struck down a zoning ordinance because the city did not provide evidence that it "significantly reduce[d] negative secondary effects."[72] Requiring that a statute is effective in mitigating secondary effects specifically contradicts what the Court required in *Alameda*.[73] Requiring proof of *existence* of secondary effects and *effectiveness* of an ordinance in combating secondary effects dramatically increases the evidentiary burden on a city in enacting zoning ordinances.

Some courts have required separate secondary effects evidence for two adult business ordinances passed at the same time and even for separate parts of one ordinance.[74] Other courts have also rejected zoning ordinances modeled after ordinances that have "survived judicial review," even though this is an important means for many under-

69. *Encore Videos Inc.*, 330 F.3d at 293. *But see* N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 175 n.5, 180 (5th Cir. 2003) (explaining that the Supreme Court does not require "proof of efficacy of an ordinance" in addressing secondary effects and pointing out that "municipalities [are not] required to prove, not merely by common sense, but empirically, that SOB ordinances will successfully reduce crime, as this would undermine *Renton*'s allowance of local experimentation in responding to secondary effects").

70. *Encore Videos Inc.*, 330 F.3d at 293. The court explained that "[o]ff-site businesses differ from on-site ones, because *it is only reasonable* to assume that the former are less likely to create harmful secondary effects." *Id.* at 295 (emphasis added) (explaining that "[i]f consumers of pornography cannot view the materials at the sexually oriented establishment, they are less likely to linger in the area and engage in public alcohol consumption and other undesirable activities") (citing World Wide Video Inc. v. City of Tukwila, 117 Wash. 2d 382, 816 (1991)). The *Encore* court, without any evidence, substituted its own judgment for that of the local government. *See also* J&B Entm't Inc. v. City of Jackson, 152 F.3d 362, 371 (5th Cir. 1998) (requiring evidence that the ordinance zoning on-site and off-site viewing of adult video establishments eliminates some secondary effects).

71. 361 F.3d 402 (7th Cir. 2004).

72. *Id.* at 411.

73. Justice O'Connor specifically points out that Justice Souter would require that the city "verify . . . that the ordinance *actually reduces* the secondary effects asserted [to] . . . ensure that [the ordinance is not] merely [a] content-based regulation . . . in disguise." *Alameda Books, Inc.*, 535 U.S. at 441 (emphasis added). However, according to the O'Connor plurality, that proposal is unwise and is not what *Renton* requires. *See id.* at 441–42.

74. Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1267 (11th Cir. 2003) (criticizing the district court for analyzing the two ordinances (zoning and public indecency) "and their accompanying evidence into a single analysis").

resourced cities to enact proper zoning ordinances.[75] Neither of these requirements were instituted by the Supreme Court but added by lower courts.

The Eleventh Circuit in *Peek-A-Boo* recently required the city to supplement secondary effects evidence because it relied on *older studies* from other cities when the SOBs provided local, empirical evidence contradicting the city's evidence.[76] Although the court claimed that this was not "a battle of competing experts," it would be difficult for the city to justify its interest without providing local empirical evidence refuting the SOB's.[77] This contradicts Supreme Court precedent which maintains that cities do not need to provide local evidence of secondary effects.[78]

Similarly, the Fifth Circuit Court of Appeals recently required that secondary effects studies document negative effects of the *same type* of SOB considered in the city passing an ordinance, even though

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75. SDJ, Inc. v. Houston, 837 F.3d 1268, 1274 (5th Cir. 1988) (noting that it is "not enough" to "tailor one ordinance to another that has survived judicial review"); *see also Peek-A-Boo*, 337 F.3d at 1267 n.15 (rejecting evidence in the record that the County cited a similar ordinance passed in Florida that upheld on appeal as "insufficient to satisfy the County's evidentiary burden under *Renton*."); *cf.* BAS Enterprize, Inc. v. City of Maumee, 282 F. Supp. 2d 673, 682 n.9 (N.D. Ohio 2003) (rejecting the argument that a small city cannot rely on evidence from a larger sized city). This requirement contradicts the logic of the Court in *Renton*, which allowed cities to rely on the studies of other cities in enacting zoning ordinances. If a city can rely on another city's evidence of secondary effects, why not be able to rely on other city's ordinance as a model? If the issue were that cities are diverse and different secondary effects are at issue in different cities, then the court would not allow cities to rely on other city's studies about secondary effects.

However, some cities have relied on model ordinances that have been successfully defended in court. *See* Anthony Millican, *Topless Bar Ruling Vote Delayed; St. Cloud Residents Planning Board Say City's Present Requirements Discourage Adult Entertainment,* OSCEOLA SENTINEL, April 30, 1994, at 1.

76. *Peek-A-Boo*, 337 F.3d at 1272 (casting doubt, under the *Alameda* standard, on the city's "outdated, foreign studies" after adult businesses presented local empirical studies "suggesting that plaintiff's businesses, which have operated continuously in Manatee County for over fifteen years, do not cause secondary effects") (relying on Flanigan's Enter., Inc. v. Fulton County, 242 F.3d 976, 986–87 (11th Cir. 2001)). However, in *Flanigan*, the court found adult businesses' "outdated" "foreign studies" unconvincing when faced with "the county's own current, empirical data [which] conclusively demonstrated that such studies were not relevant to local conditions." *Id.* at 986.

77. *Peek-A-Boo,* 337 F.3d at 1272.

78. *Renton*, 475 U.S. at 51–52 (1986) (noting that "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"). Although *Alameda* does not require empirical evidence by cities, Justice O'Connor's plurality opinion infers that the evidence required by cities is greater if the adult businesses have produced contrary evidence. *Alameda Books, Inc.*, 535 U.S. at 439.

Supreme Court precedent has always assumed that similar secondary effects accompanied all SOBs.[79] In *Encore Videos Inc.*, the city of San Antonio sought to zone adult entertainment establishments which allowed viewing of sexually explicit materials on-site and off-site.[80] The city relied on studies conducted by other cities demonstrating the secondary effects of adult businesses, which the Supreme Court permitted in *Renton*.[81] However, the court held that these studies were not adequate to support the zoning regulations because they did not distinguish between the secondary effects of *on-site* adult entertainment and *off-site* entertainment.[82] The Fifth Circuit held that since the studies did not examine the same type of adult entertainment that San Antonio was regulating, adequate evidence did not exist to create an important government interest.[83] The Ninth Circuit in *World Wide Video of Washington, Inc. v. City of Spokane* also assumed, without deciding, that there is a constitutional difference between different types of SOBs.[84]

Several courts have also required preenactment evidence and legislative history to demonstrate the city's interest, rather than just evidence produced at trial, like *Renton* required.[85] The Eleventh Cir-

79. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584 (1991) (Souter, J., concurring) (noting that the same secondary effects that may result from adult films may also result from nude dancing).

80. Encore Videos Inc. v. City of San Antonio, 330 F.3d 288, 294 (5th Cir. 2003).

81. *Id.* at 294; *see also Renton*, 475 U.S. at 51.

82. *Encore Videos Inc.*, 330 F.3d at 295 (The court concluded that "some substantial evidence of the secondary effects of establishments that sell adult products for off-site consumption" was necessary to support this ordinance.).

83. *Id.* (The court also specifically mentioned that this ordinance was especially expansive because it could potentially reach "ordinary bookstores and video stores with adult sections" like Barnes and Noble.).

Other courts have not required specific evidence of secondary effects for different types of adult businesses and have specifically rejected the relevance of the on-site/off-site distinction. *See* Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 687 (10th Cir. 1998) (holding that on-site/off-site viewing of sexually explicit materials is not relevant in determining whether secondary effects exist); ILQ Inv., Inc. v. City of Rochester, 25 F.3d 1413, 1418 (8th Cir. 1994) (same).

84. 368 F.3d 1186, 1197 (9th Cir. 2004) (assuming without deciding "that the distinction between retail-only stores and stores with preview booths is constitutionally relevant" but upholding the ordinance involved because the city heard specific testimony about the secondary effects of retail-only stores).

85. SOB, Inc. v. County of Benton, 317 F.3d 856, 862 (8th Cir. 2003) (examining whether a city considered *preenactment* secondary effects evidence in determining whether the *Renton* standard was satisfied); D.H.L. Assocs., Inc. v. O'Gorman, 199 F.3d 50, 57 (1st Cir. 1999) (same); *Z.J. Gifts D-2, L.L.C.*, 136 F.3d at 690 (same); Hickeson v. City of New York, 146 F.3d 99, 105 (2d Cir. 1998) (requiring some secondary effects evidence in the legislative record); *but see* N.W. Enters. Inc. v. City of Houston, 352 F.3d 162 (5th Cir.

cuit recently invalidated a zoning ordinance because it was not supported with studies demonstrating secondary effects of SOBs *at the time* of enactment.[86] The court was not satisfied with the "volumes of" secondary effects evidence produced on behalf of a public indecency ordinance passed *only four months later.*[87] This requirement imposes a greater burden than *Renton*, which upheld a zoning ordinance without any preenactment evidence, where secondary effects evidence was presented later at trial.[88] This is also a higher standard than *Alameda* where the Court was satisfied by reading the language of the preamble which explained that the ordinance targeted secondary effects.

3. Increased evidentiary burden reduces deference to local governments

The high evidentiary burden required by many lower courts demonstrates the difficulty of applying the secondary effects test while deferring to local governments.[89] For a city to demonstrate that

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86. Peek-A-Boo Lounge of Brandenton, Inc. v. Manatee County, 337 F.3d 1251, 1268–69 (11th Cir. 2003).

87. *Id.* at 1253, 1266, 1267 (noting that the zoning ordinance "failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the County's interest in combating secondary effects . . . *at the time of enactment*") (citing also Ranch House v. Amerson, 238 F.3d 1273, 1283 (11th Cir. 2001) (requiring "some" preenactment evidence under *Renton*)). The Eleventh Circuit was concerned that the evidence of secondary effects was specific to the public nudity ordinance, not the zoning ordinance. *Id.* at 1267.

88. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582 (1991) (Souter, J., concurring). Other courts have adopted *Renton's* logic. *See* N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 175 (5th Cir. 2003) (explaining that a local government "need not demonstrate that the City Council actually relied upon evidence of negative secondary effects when it enacted" a statute and can rely on evidence "developed prior to the ordinance's enactment and that adduced at trial" because the "appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest" which the ordinance supports) (citing J&B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 371–72 (5th Cir. 1998)); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 829–30 (7th Cir. 1999) (agreeing with the district court "that a municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted its ordinance"); Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997) (explaining that local governments do not need to rely on preenactment evidence of secondary effects). *See also* BGHA, LLC v. City of Universal City, 340 F.3d 295, 299, 300 (5th Cir. 2003) (allowing evidence that the city's interest in enacting a zoning ordinance was to eliminate secondary effects, even though supporting affidavits were drafted postenactment and "minutes do not specifically discuss the secondary effects of SOBs").

89. For instance, in *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 411 (7th Cir. 2004), the court determined that "evidence of a higher than average incidence of prostitution in the [area where SOBs were located], testimony from two local officials that police action had not been effective to curb prostitution activity, and testimony from a city al-

its interest is important, it may first have to demonstrate with evidence (from the city itself or other similarly-sized cities) that secondary effects *exist* as a result of existing SOBs and that the ordinance will be *effective* in mitigating secondary effects.[90] This evidence may have to be produced *preenactment* and for this ordinance *alone*, based on evidence of the *same type* of SOB regulated in a city, and the study may also have to be *up-to-date*.

For many cities to meet all of these heightened requirements, they will have to conduct new local studies demonstrating secondary effects. This evidentiary burden is much more than what *Renton* and *Alameda* require.[91] For instance, a city faces difficulty acting preventatively to avoid possible problems when it must first demonstrate that secondary effects exist because of SOBs. If a city without any existing SOBs wants to experiment by dispersing future SOBs throughout residential areas, it may first have to demonstrate with evidence from other cities or experts that negative secondary effects result from SOBs. However, since no SOBs exist in the city and since this zoning scheme has probably not been tried by any city before, the city would not have local evidence to prove *existence* of secondary effects.[92] A similar evidentiary burden results from forcing cities to justify regulations with up-to-date studies, studies based on the same type of SOB,

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derman that "strip clubs have negative secondary effects on adjoining residential properties" was not enough to meet the "minimal" evidentiary burden of *Alameda*.

90. In New York, for example, "courts have not yet recognized that municipalities can rely solely on studies from other municipalities." SALKIN, *supra* note 67, § 18:08 (citing Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 400 (1998)) (relying on the fact that New York City had conducted its own study and had not relied solely on others) and Town of Huntington v. Pierce Arrow Realty Corp., 627 N.Y.S.2d 787, 788 (App. Div. 1995) (noting that the "[t]own did not produce proof, by testimony or affidavit, as to whether, prior to its enactment of the ordinance in question, it had conducted any studies, or had even reviewed comparable studies, concerning the deleterious effect upon the quality of life in its business community caused by the presence of adult-use establishments")). However, New York federal courts have upheld ordinances without a local study. *Id.* (citing Tri-State Video Corp. v. Town of Stephentown, 1998 WL 72331 (N.D.N.Y. 1998)). Since both are applying federal constitutional law, however, the requirements under *Renton* and *Alameda* should be the same.

91. *See supra* note 76 and note 89. In addition these cases establish the importance of allowing cities to experiment with zoning solutions. *See Renton,* 475 U.S. at 52 (cities must be given a "reasonable opportunity to experiment with solutions").

92. The Supreme Court has emphasized that it does not require local governments to provide empirical studies when it requires the city to allow SOBs to exist in a community where they did not exist before. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) ("A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously"—as was the case with Los Angeles' municipal ordinance in *Alameda*.).

and the other heightened evidentiary requirements imposed by lower courts.[93] Lower courts impose these heightened requirements despite Supreme Court precedent that emphasizes that local governments are better suited to make zoning decisions than the judiciary.[94]

In contrast, ordinary zoning regulations only require cities to rationally believe that the regulation will improve the quality of community life.[95] The city can consider the opinions of local and state experts and interested members of the community[96] and then decide what is best for the city.[97] The city does *not* have to demonstrate that a problem already exists or rely on the experiences of other cities. As long as the city does not demonstrate an improper motive, the zoning regulation is valid. The city is permitted to respond preventatively as well as in reaction to land use issues that face the city. In addition, cities may respond to perceived problems with solutions that may never have been tried before.

If secondary effects evidence was not required for a city to prove an important government interest, local governments would have more room to experiment with solutions to land use problems. Rather

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93. SALKIN, *supra* note 67, § 18:08 (recognizing that "[t]he requirement for a secondary effects study can be difficult for small suburban municipalities or in municipalities with no existing adult uses").

94. Justice O'Connor in *Alameda* recognized the importance of deference to local governments because, for example she noted that "the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems." *Alameda Books, Inc.*, 535 U.S. at 440, 442 (also pointing out that "[m]unicipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts" and that intermediate (not strict) scrutiny is applied) (internal citations omitted).

95. N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 180 (5th Cir. 2003) (explaining that general zoning decisions are "upheld on a rational basis standard" and in SOB zoning cases the legislature must only provide evidence "reasonably believed to be relevant to the secondary effects in question") (internal citations omitted).

96. *But see N.W. Enters. Inc.*, where the court considered the opposition of the public relevant in evaluating the government's concern about secondary effects. 352 F.3d at 181 n.15 (pointing out that the public through various community and civic associations from "the wealthiest to the poorer neighborhoods" expressed concern about the secondary effects of SOBs and concern over the effect of SOBs on "efforts to renovate rundown or disadvantaged neighborhoods").

97. In *Center For Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1168 (9th Cir. 2003), for example, the court determined that it was appropriate that the Arizona legislature relied on evidence "reasonably believed to be relevant" which included "public hearings at which lawmakers heard citizen testimony concerning the late night operation of sexually-oriented businesses[.]" *See also* SALKIN, *supra* note 67, § 18:08 (In New York, for example, cities can consider "community opposition . . . to bolster [a] study and show the connection between the statistical evidence and negative effects" along with "testimony of real estate experts, planners and police personnel") (citing Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 400 (1998)).

than allowing a city's government interest to be based on a rational goal to improve the city, local governments must prove that their solution will be effective in solving the problems. Requiring proof of *effectiveness* limits cities in experimenting with solutions. Proving that problems *exist* already, as discussed above, also limits cities in acting preventatively to solve foreseeable problems. It forces cities to design a plan that will be "effective" in order to even *attempt* to solve the problem. This contradicts what the framers of the Constitution and the Supreme Court have established as the role of cities and states.[98] The framers and Court require that cities have room to experiment with different solutions to local problems. Certainly, some cities would implement unsuccessful zoning schemes. But cities would retain the right to experiment and develop better schemes as a result.[99] This would allow courts to provide broad deference to local governments as dictated by the Supreme Court.[100]

B. "Quantifiable" and "Intangible" Secondary Effects

The second weakness of the secondary effects test is that it only allows cities to consider "quantifiable" secondary effects rather than the broad range of quantifiable and intangible secondary effects relied on in earlier cases.

The Supreme Court has articulated two types of negative secondary effects. Some "secondary effects" are intangible and unquantifiable. These include deterioration of urban life and city neighborhoods,[101] decrease in quality and character of community life,[102] and

98. Printz v. United States, 521 U.S. 898, 919–20 (1997) (noting that the "Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'") (quoting THE FEDERALIST No. 15, at 109 (James Madison) (Clinton Rossiter ed., 1961)). *See also* New York v. United States, 505 U.S. 148, 161–66 (1997); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 169–70 (J. Mayer ed., 1966).

99. The *Young, Renton,* and *Alameda* Courts emphasized the importance of cities being allowed to "experiment with solutions to admittedly serious problems." *Alameda Books, Inc.*, 535 U.S. at 439; City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986) (Cities must be given a "reasonable opportunity to experiment with solutions[.]"); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976).

100. A city would still have to meet First Amendment scrutiny by demonstrating that the purpose of the ordinance was not to suppress speech. But rather than examining the city's interest by the negative secondary *effects* caused by adult businesses, the Court actually examines the city's *purpose* in enacting the ordinance to determine whether it has a valid interest. Whereas, currently cities are required to rely on the *effects* of SOBs, as well as the government's *purpose* in establishing an important government interest.

101. *See, e.g.*, N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 180 (5th Cir. 2003)

degradation of order and public morality.[103] Other secondary effects are quantifiable. These include increases in crime (including "racketeering, arson, murder, narcotics, bookmaking, pornography, profit skimming, and loan sharking"),[104] late night visitors,[105] traffic, noise, theft,[106] prostitution,[107] and sexual assault.[108]

1. Supreme Court considers both quantitative and intangible secondary effects

The Supreme Court has considered both quantitative and intangible secondary effects in establishing an important government interest under the *Renton* test. In *Young*, the Court plurality determined that the city's interest in protecting the quality of urban life was an important government interest.[109] Protection of the quality of urban life is an intangible secondary effect. The *Young* Court did not require any quantifiable secondary effects. In *Renton*,[110] the city articulated several intangible secondary effects including "degradation of the community standard of morality," a "degrading effect upon the relationship between spouses," and a "loss of sensitivity to . . . the concept of non-aggressive, consensual sexual relations."[111] The city also articulated several quantifiable secondary effects, including increases in crime, prostitution, rape, incest, and assaults in the area. The Court majority made no distinction between the two types of secondary effects. The Court only noted that the zoning ordinances

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(noting "neighborhood blight" as a secondary effect).

102. SALKIN, *supra* note 67, § 18.08 (noting that cities zone because of the "deterioration of community character and quality of life").

103. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582 (1991) (Souter, J., concurring) (noting that it is appropriate to rely on the justification of "protecting societal order and morality" in passing indecency ordinances); *see also id.* at 575 (Scalia, J., concurring).

104. Tucker, *supra* note 1, at 408.

105. SALKIN, *supra* note 67, § 18:08 (noting that smaller cities may be especially interested in controlling the "influx of rowdy outsiders, late night traffic and noise").

106. *Alameda Books, Inc.*, 535 U.S. at 430 (asserting "higher rates of prostitution, robbery, assaults, and thefts in surrounding communities").

107. Tucker, *supra* note 1, at 408.

108. *Barnes,* 501 U.S. at 582; Tucker, *supra* note 1, at 408 (noting that "the spread of HIV, increased prostitution, increased rape, and neighborhood deterioration are also adverse secondary effects attributed to adult businesses").

109. Young v. Am. Mini Theatres Inc., 427 U.S. 50, 56, 64 (1976).

110. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986).

111. *Id.* at 59 n.3 (Brennan, J., dissenting) (The city also claimed a "loss of sensitivity to the adverse effect of pornography on children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others" as intangible secondary effects.).

were passed after a "long period of study and discussion of the problems of adult movie theaters."[112] While the *Renton* dissent distinguished quantifiable secondary effects from intangible secondary effects, the majority of the Court made no such distinction.[113] Possibly because of the *Renton* dissent's rejection of intangible secondary effects in that case, in *Alameda*, the city did not rely on any intangible secondary effects. The city only asserted an increase in crime rates and a decrease in property values due to adult businesses.[114] Therefore, the Court did not consider the relevance of intangible as opposed to quantifiable secondary effects. However, Justice Kennedy noted briefly that "high concentrations of adult businesses" negatively affect "the integrity of . . . [a] neighborhood."[115] He also noted that these effects cause "measurable" damage that is "all too real."[116] While the O'Connor plurality did not comment on a city's ability to rely on intangible secondary effects, Justice Kennedy's mention of secondary effects like "integrity of the neighborhood" seems to support the continued relevance of intangible effects.[117]

2. Lower courts tend to consider only quantitative secondary effects

Like Los Angeles, many other cities nationwide no longer rely on intangible secondary effects to support zoning ordinances. This trend is also evident in lower court cases analyzing the constitutionality of SOB zoning ordinances. However, as demonstrated above, Supreme Court precedent does not dictate this result. The majority of the Supreme Court has never indicated that cities may not rely on intangible secondary effects as well as quantifiable secondary effects.

Many lower courts still consider quantifiable as well as intangible secondary effects in evaluating a city ordinance. These courts con-

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112. *Id.* at 51.

113. *Id.* at 60 (Brennan, J., dissenting) (criticizing the city of Renton for relying on "intangible findings").

114. *Alameda Books, Inc.*, 535 U.S. at 430.

115. *Id.* at 444 (Kennedy, J., concurring).

116. *Id.* (Justice Kennedy also noted that "[t]he law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech."). The city of Los Angeles did not focus on intangible secondary effects in its brief to the Supreme Court, but did rely on *Young* and *Renton* for the importance of deference to local governments. Petitioners' Brief at 16, *Alameda Books, Inc.* (No. 00-799), 2001 WL 535665, at *16 (2002).

117. *Alameda Books, Inc.*, 535 U.S. at 444 (also citing *Young* for the proposition that a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect"); *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion).

sider increased crime rates as well as "neighborhood blight" and "negative effects on family activities" important government interests.[118] However, some lower courts have only considered quantifiable secondary effects like increased crime, prostitution, and decreased property values.[119] Some courts only consider some secondary effects "relevant" in determining a city's governmental interest.[120] Although most cities are equally concerned with intangible and quantitative secondary effects, they often try to defend ordinances based on quan-

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118. *See* SOB, Inc. v. County of Benton, 317 F.3d 856, 862 (8th Cir. 2003) (The Ordinance states that its purpose is to "prohibit public indecency in order to deter criminal activity, to promote societal order and public health and to protect children," and considers intangible and tangible effects including "increase[s in] criminal activity, including prostitution, disorderly conduct and sexual assault; expos[ure of] children to an unhealthy and nurtureless environment; foster[ing] social disorder by disrupting the orderly operation of public events and public accommodations."); Jake's, Ltd., Inc. v. City of Coates, 284 F.3d 884, 888 (8th Cir. 2002) (stating that the city ordinance's purpose was to "reduce criminal activity, prevent the deterioration of residential neighborhoods, and eliminate the 'dehumanizing influence' that sexually oriented businesses may have on churchgoers, park users, and daycare clients"); Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 686 (10th Cir. 1998) (stating that the city's purpose in enacting the zoning ordinance was to "protect[ ][its] citizens from increased crime; preserve[ ] the quality of life, property values, and character of neighborhoods and businesses; deter[ ] the spread of urban blight; and protect[ ] against the spread of sexually transmitted diseases . . ."); Holmberg v. City of Ramsey, 12 F.3d 140, 143 (8th Cir. 1993) (noting secondary effects including "increased crime, diminished property values, and general neighborhood blight"); Cmty. Visual Communications, Inc. v. City of San Antonio, 148 F. Supp. 2d 764, 777 n.6 (W.D. Tex. 2000) (describing a city ordinance that targeted adverse impacts on property values as well as impacts on "family activities and children"); World Wide Video of Wash., Inc. v. City of Spokane, 227 F. Supp. 2d 1143, 1151 (E.D. Wash. 2002) *aff'd*, 368 F.3d 1186 (9th Cir. 2004) (noting that the intent of the Ordinance was to "control health, safety, and welfare issues, the decline in neighborhood conditions in and around adult retail establishments, and to isolate dangerous an[d] unlawful conduct associated within these facilities").

119. Heideman v. S. Salt Lake City, 348 F.3d 1182, 1186 (10th Cir. 2003) (noting that the city council was concerned with "negative secondary effects such as "crime, prostitution, and lowered property values; venereal disease, prostitution, general poor sanitation, criminality, and offenses against minors"); Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 291 (5th Cir. 2003) (noting that "relevant" harmful secondary effects of adult businesses include crime, reduction of economic activity, and lowered property values); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 829–30 (7th Cir. 1999) (noting that "undesirable secondary effects could include the spread of crime and sexually transmitted diseases, a decline in property value, or an increase in public sexual acts"); Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1257 (5th Cir. 1992) (noting that "bad" secondary effects include "crime, deterioration of their retail trade, and a decrease in property values"); DiMa Corp. v. High Forest Township, No. CIV.02-3800 (DWF/SRN), 2003 WL 21909571, at *3 (D. Minn. Aug. 7, 2003) (only considering the adverse secondary effects that adult entertainment business had on crime rates and property values).

120. In *Encore Videos, Inc.*, the court only recognized "[r]*elevant* harmful secondary effects" like "crime, reduction of economic activity, and lowered property values" as justifying a time, place, and manner zoning regulation. 330 F.3d at 291 (emphasis added) (citing *Lakeland Lounge of Jackson, Inc.*, 973 F.2d at 1255, 1257).

tifiable secondary effects.[121] This causes two difficulties for cities.

First, it is much more difficult for a city to demonstrate intangible secondary effects than quantifiable ones. For example, it would be much harder for cities to provide evidence that future SOBs will decrease public morality or adversely affect family activities than to prove that they lead to an increase in crime rates. It would be even more difficult for a city to prove the *effectiveness* of a zoning ordinance in upholding public morality. This prevents cities from relying *solely* on intangible interests (including quality of community life or protection of public morality) which were considered important to the Supreme Court in developing the secondary effects test.[122]

Second, cities may even face difficulty relying on quantifiable secondary effects evidence because much of this evidence has recently been placed in doubt. In a recent article, Bryant Paul et al. demonstrate that most of the secondary effects studies relied on by cities are either methodologically flawed or, if scientifically sound, show no evidence of secondary effects due to SOBs.[123] Basically, this recent study indicates that even with quantifiable secondary effects, it may

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121. Beverly Hills, Cal., Ordinance 98-0-2302 (July 2, 1998) (noting that the purpose of the ordinance "include[s] . . . depreciation of property values, increased vacancy rates in residential and commercial areas; increased criminal activity; increased litter, noise, and vandalism; and interference with the enjoyment of residential property in the vicinity of such businesses"); *see also* Essence, Inc. v. City of Federal Heights, 285 F.3d 1272, 1286 (10th Cir. 2002) (explaining that the City of Federal Heights' preamble noted that secondary effects included "increased rates of certain crimes, the spread of sexually transmitted diseases, and harmful effects on surrounding residences and businesses including decreased property values and parking and traffic problems").

While cities often only set forth quantifiable secondary effects to defend ordinances, cities are often just as concerned with intangible secondary effects. *See, e.g.*, Press Release, Wise County Sheriffs Department, Sexually Oriented Business Applies for License in Wise County (Jan. 10, 2001), *available at* http://www.sheriff.co.wise.tx.us/press/01-10-01.htm (last visited Feb. 26, 2005) (commenting that Sheriff Ryan vowed to fight against adult businesses because "it detracts from our citizen's quality of life" and because most citizens oppose these businesses), *available at* www.sheriff.co.wise.tx.us/press/01-10-01.htm (last visited Feb. 26, 2005).

122. Young v. Am. Mini Theatres Inc., 427 U.S. 50, 71 (1976).

123. Bryant Paul, et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355–56 (2001). This article concludes that:

> with few exceptions, that the scientific validity of the most frequently used studies is questionable and the methods are seriously and often fatally flawed. These studies, relied on by communities throughout the country, do not adhere to professional standards of scientific inquiry and nearly all fail to meet the basic assumptions necessary to calculate an error rate. Those studies that are scientifically credible demonstrate either no negative secondary effect associated with adult businesses or a reversal of the presumed negative effects.

Id. at 387.

be impossible for cities to rely on many of the classic studies from other cities.[124] One lower court and at least one appellate court have already cited to and relied on this study.[125] Cities may be forced either to fund improved, scientifically sound studies or conduct independent, local studies when passing zoning ordinances.

Under the current "secondary effects" test, lower courts sometimes limit relevant government interests to include only quantifiable secondary effects. It is much more difficult for cities to prove intangible secondary effects and courts are less likely to consider these relevant. In other instances of commercial zoning, cities can zone out businesses because they are an eye sore or because a community does not value that type of commercial business. However, this is often not permitted with adult businesses, because cities cannot rely on intangible concerns like community values or aesthetics in zoning these businesses. Cities have to demonstrate quantifiable secondary effects caused by the businesses. With recent studies, quantifiable secondary effects may be even harder to prove. In some cases, cities may be left with no choice but to conduct independent, local studies in order to pass a zoning ordinance. This creates a challenge for cities that often lack the resources to fund the kinds of scientific studies that SOBs are able to fund. Further, this erodes the police power by imposing a burden on what is otherwise a right reserved to state and local governments.[126]

C. Ensuring Economic Viability

Another weakness of the secondary effects test is that it creates a burden on cities to ensure economic viability of adult businesses rather than recognizing that zoning often has negative economic effects.

1. Supreme Court does not require cities to ensure economic viability in zoning

The Supreme Court has emphasized that cities do not have to

124. *Id.*

125. DiMa Corp. v. High Forest Township, No. CIV.02-3800 (DWF/SRN), 2003 WL 21909571, at *3 (D. Minn. Aug. 7, 2003) (relying partly on Bryant Paul study to deny city's summary judgment motion); GM Enters., Inc. v. Town of St. Joseph, 2004 WL 1090884, at *6, *petition for cert. filed* (U.S. May 10, 2004) (No. 03-1549) (pointing out that petitioners provided a copy of the Paul study to the district court); Brief for Appellant at 17, GM Enters., Inc. v. Town of St. Joseph, 2003 WL 22734113 (7th Cir. 2003) (using Paul's study to argue that the studies cited by the town could not "reasonably be relied on by any decision maker").

126. *See supra* Part I.

ensure that adult businesses remain economically viable after zoning ordinances.[127] In *Young*, Justice Powell noted that zoning often has detrimental economic effects.[128] In *Renton*, the Court majority pointed out that cities should not be concerned with SOBs being able to "obtain sites at bargain prices."[129] The Court also held that it was enough that SOBs could *theoretically* relocate in the city where no "commercially viable" locations existed.[130] However, in *Alameda*, Justice Kennedy took *Renton* a step further. He explained that when zoning SOBs, the "quantity and accessibility" of the speech must remain "substantially undiminished."[131]

Supreme Court precedent dictates that cities do not have to assure the economic viability of SOBs, but cities must leave reasonable alternative avenues for speech.[132] In *Alameda*, the Court has interpreted this to mean that zoning ordinances must leave the *quantity* of speech intact.

2. Lower courts often require cities to ensure economic viability in zoning

Alameda does not overrule *Young's* and *Rentons'* holdings that cities do not have to ensure that adult businesses remain economically viable after a zoning ordinance. However it is unclear what it means for cities to leave the "quantity" of SOBs intact. Also, how does a city

127. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986); *Young*, 427 U.S. at 78 (Powell, J., concurring) (noting that the "inquiry for First Amendment purpose is not concerned with economic impact"). *See also* David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1334 (11th Cir. 2000).

128. Justice Powell also focused more on the effect of the zoning ordinance than the plurality. He distinguished between the permissible "economic loss" that may be caused by zoning ordinances with the impermissible effect of suppression of production or restriction of "access to adult movies." *Young*, 427 U.S. at 77–78 (Powell, J., concurring). He further noted that the Court's concern was not "economic impact" but "the effect of this ordinance upon freedom of expression." *Id.* at 78 (Powell, J., concurring).

129. *Renton*, 475 U.S. at 53–54 (noting that the ordinance left "some 520 acres or more than five percent of the entire land area of Renton, open to use as adult theater sites"). The Court rejected the argument of the Court of Appeals that "practically none of the undeveloped land" was "for sale or lease" and that there were no "commercially viable adult theater sites . . . left open by the ordinance. *Id.* at 53. The Court held that businesses must "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *Id.* at 54. Further, the Court emphasized that the First Amendment does not "ensure that adult theaters" or other "speech-related businesses will be able to obtain sites at bargain prices." *Id.* at 54 (citing *Young*, 427 U.S. at 78) (Powell, J., concurring).

130. *Renton*, 475 U.S. at 54.

131. *Alameda Books, Inc.*, 535 U.S. at 425, 445, 449 (Kennedy, J., concurring) (In other words, a city may "not regulate the secondary effects of speech by suppressing the speech itself.").

132. *Renton*, 475 U.S. at 52.

provide reasonable alternative avenues while allowing SOBs to "fend for themselves" in the market? Lower courts struggle with these questions.[133]

While lower courts disagree on how to determine whether reasonable alternative avenues exist, many have applied tests that seem to require cities to ensure the economic viability of SOBs. Several lower courts use a "supply and demand" approach to determine whether alternative channels exist. Under this approach, the city must guarantee a specific number of sites that the existing number of SOBs can relocate to.[134] One court required a minimum of at least twelve sites, or 1% of the city acreage to be allocated to SOB sites.[135] While for some courts, even one more possible site than the existing number of SOBs is adequate.[136] Other courts, like Justice Kennedy infers is

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133. Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, 256 F. Supp. 2d 385, 395 (D. Md. 2003). The court considered four factors in determining whether there were reasonable alternative avenues of communication:

> 1) whether to consider the sites available to Bigg Wolf individually or to the group of adult entertainment businesses affected by the ordinance as a whole, 2) whether to consider the reasonableness of alternative avenues of communication at the time the ordinance was passed, at the time suit was filed, at present, or at a time looking forward and projecting the potential number of businesses that might need to locate in the designated zones, 3) whether the site needs to be economically feasible for an adult entertainment business or merely physically available, and 4) whether the sites need to be actually available for sale or rent or merely potentially available.

Id. at 395. In *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004), the court determined that whether reasonable alternative avenues of communication exist is determined by whether a zoning ordinance provides "no reasonable opportunity for adult businesses to operate anywhere within the city."

134. *See, e.g.*, Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1310 (11th Cir. 2003) (noting that the supply and demand test guarantees "that the number of sites available under a new zoning ordinance is not less than the existing sites" so that "the ordinance does not suppress speech, but merely relocates it"); N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 182–183 (5th Cir. 2003) (considering the number of possible SOB sites remaining relevant and finding city estimates of the number of sites too conclusory for summary judgment purposes); David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1336 (11th Cir. 2000) (noting that the number of sites should be correlated to the number of existing SOBs); Cam I, Inc. v. Louisville/Jefferson County Metro Gov't, 252 F. Supp. 2d 406, 413 (W.D. Ky. 2003). *But see Bigg Wolf*, 256 F. Supp. 2d at 398 (not requiring a "set number or ratio of sites" to satisfy reasonable alternative avenues).

135. Dia v. City of Toledo, 937 F. Supp. 673, 678 (N.D. Ohio 1996) (explaining that "courts have generally found the number [of SOB sites] to be inadequate if fewer than a dozen sites, or under 1% of city acreage, is potentially available"). Tri-State Video Corp. v. Town of Stephentown, 1998 WL 72331, at *8 (N.D.N.Y. Feb. 13, 1998) ("Because adult entertainment businesses can operate in 67% of the total amount of commercial/industrial land, with 17% currently vacant, the Court finds this to be a sufficient 'reasonable opportunity to open and operate.'") (internal citation omitted).

136. Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995) (holding that one more site than the existing number of adult businesses meets the *Renton* requirement for

appropriate in *Alameda*, require the exact same number of available sites before and after the ordinances.[137] Other courts have balanced factors such as the 1) the "size of the [city] population," 2) the "geographical size" of the city, 3) the "number of acres available to adult uses as a percentage of geographic size," 4) "the location of the sites within the municipality," 5) "the number of adult entertainment establishments currently in existence," and 6) "the number of adult entertainment establishments wishing to operate within the municipality."[138] Still other courts have considered the "most meaningful measure" to be the "relationship between the number of available sites and the size of the population."[139] These courts look for a specific ratio of SOBs per number of people in the population.[140] For example, "one site per 12,565 persons based on a population of 238,726" was determined to be sufficient for a Florida city.[141] But, one SOB for 28,257 people has been determined to not be enough for a Michigan city.[142]

A city may also have to present evidence that potential SOB sites

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alternative avenues of communication); Lakeland Lounge v. City of Jackson, 973 F.2d 1255, 1259, 1260 (5th Cir. 1992) (allowing eight to ten possible SOB locations when six SOBs currently exist, but noting that *Renton* does not require a certain proportion or number of available locations); *see also Fly Fish Inc.*, 337 F.3d at 1311–12 (while not explicitly adopting a bright line rule "that a zoning ordinance that does not provide sufficient sites for the relocation of all existing adult entertainment establishments is unconstitutional," invalidating an ordinance because it "provided only three sites for four lawfully [and long time] existing adult entertainment establishments").

137. *See, e.g.*, Buzzetti v. City of New York, 140 F.3d 134, 141 (2d Cir. 1998) (failing to uphold an ordinance unless it allows all "existing adult establishments to continue to operate" somewhere in the city); North Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 445 (7th Cir. 1996) (requiring that no individual tried to open an SOB and was precluded by a city zoning ordinance); Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1532 (9th Cir. 1993) (precluding a city ordinance from allowing less SOBs to exist in a city than the number of SOBs existing when the zoning ordinance was enacted).

138. Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1254 (11th Cir. 1999). *See also* Young v. City of Simi Valley, 216 F.3d 807, 822 (9th Cir. 2000).

139. Executive Arts Studio, Inc. v. City of Grand Rapids, 227 F. Supp. 2d 731, 754 (W.D. Mich. 2002) (citing BBI Enter., Inc. v. City of Chicago, 874 F. Supp. 890, 896 (N.D. Ill. 1995) ("stating that the relationship between the number of sites available in a city for adult uses and the size of the city's population is more relevant in determining supply and demand")).

140. *Executive Arts,* 227 F. Supp. 2d at 754, 755 (criticizing the city for not producing "any evidence regarding demand for [SOBs] within the city"). This often requires courts to determine the existing number of SOBs (supply) as well as whether the number accurately reflects the demographics and population (demand). *See also* Isbell v. City of San Diego, 258 F.3d 1108, 1114 (9th Cir. 2001).

141. Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1307 (M.D. Fla. 1997).

142. *Executive Arts,* 227 F. Supp. 2d at 754.

actually exist. Often the city must present not only a zoning map demonstrating that alternative sites exist, but also provide expert evidence that specifically demonstrates that the sites are viable alternatives.[143] This inquiry requires some guesswork because under the "supply and demand" test courts sometimes focus not only on how the ordinance impacts the specific SOB involved in the suit, but also on "hypothetical adult businesses that may or may not seek to locate within the City" after enacting the ordinance.[144]

The "supply and demand" approach to providing reasonable alternative sites has one major flaw. It does not recognize that zoning almost inevitably has some negative economic impact.[145] When businesses are forced to relocate, some may be forced out of business because of the relocation costs. Often a suboptimal location will also impact sales, as customers are deterred by the inconvenience of driving a farther distance to get to the SOB or because it is relocated in an unsafe neighborhood. Justice Kennedy's comments in *Alameda* that the "quantity" of speech should be left intact, as well as many lower courts applying the supply and demand approach, do not recognize the realities of zoning. They assume that if the city ensures an equal (or greater) number of SOB sites, that the quantity of speech will be left intact. There are three problems with this assumption.

First, this imposes an obligation on the government to ensure that there are viable places for the SOB to relocate. In a tight real estate market, this may be impossible. The government has no control over whether owners will sell or rent space to SOBs in the areas where SOBs are zoned. In addition, the government has no control over the competition that may arise in the adult business market of a city. Maybe adult business patrons will convert to accessing internet pornography sites rather than continuing to attend an SOB that is zoned outside the city center. However, under Justice Kennedy's ap-

143. *Id.* at 750. *See also* N.W. Enters. Inc. v. City of Houston, 352 F.3d 162, 182–83 (5th Cir. 2003) (requiring specific methodology or map to "verify conclusion" of city expert who provided an affidavit that there were 183 alternative sites with 128 existing SOBs in Houston).

144. *Executive Arts,* 227 F. Supp. 2d at 753. *See also* Diamond v. City of Taft, 215 F.3d 1052, 1057–58 (9th Cir. 2000) (where only one party is seeking to open a business, seven sites were sufficient); Hickerson v. City of New York, 146 F.3d 99, 108 (2d Cir. 1998) (city met its burden by showing land could accommodate 500 establishments, which was three times the number of current establishments); Red-Eyed Jack, Inc. v. City of Daytona Beach, 322 F. Supp. 2d 1361, 1375 (M.D. Fla. 2004) (A total of twenty-five sites available to adult businesses is constitutionally adequate when "only ten businesses are operating or seeking to operate in Daytona Beach[.]").

145. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (recognizing that a "zoning ordinance usually has an impact on the value of the property which it regulates").

proach, a local government cannot assume that any fewer patrons will attend the SOB in the new location.[146] Suppose that an SOB demonstrates to a city council that zoning it to another location will cut down its customer base. If the city still zones the SOB, does that mean that the city assumed that fewer patrons would frequent the SOB, therefore acting impermissibly? This line of reasoning imposes an obligation on the government to ensure a *viable* space[147] for an SOB when all government can do is to provide a *theoretical* space[148] in the zoning scheme.

Further, in rezoning other commercial businesses, the government never has to guarantee that an existing or future business will be viable in a new location.[149] The government has no obligation to consider this, unless the zoning regulation has actually deprived the land of all economic value.[150] Even in areas where the government regulates commercial speech, the government must only ensure that it does not suppress speech, not that it maintains the speech in the same quantity. For example, with a constitutional ordinance that banned all signs on city poles, the Supreme Court determined that there were adequate alternative avenues for speech available to city residents.[151]

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146. *See supra* note 59 for further discussion.

147. Some courts have recognized that all that is constitutionally required is a theoretical space, not a viable one. MJ Entm't Enters., Inc. v. City of Mount Vernon, 328 F. Supp. 2d 480, 484–85 (S.D.N.Y. 2004) (recognizing that even though the four sites currently available for the operation of an adult entertainment business are "already in use" and "would have to be acquired or leased, and even subdivided" they were available for constitutional purposes; but only considering "total commercial land area, rather than total land area," as reasonable alternative avenues). *See also Hickerson*, 146 F.3d at 106 (noting that even land that is already occupied, or undeveloped land that is not for sale or lease, is not to be automatically deemed unavailable); Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068, 1069–70 (5th Cir. 1994) (holding that zoning ordinance provided reasonable alternative avenues of communication even though 90% of prospective sites were on undeveloped land).

148. A theoretically viable space would be one that would not be impossible for the SOB to relocate to. For example, if a city zoned SOBs only to one area where there is already an airport, this would not be a theoretically viable space.

149. Besides, it seems illogical that SOBs would fight rezoning plans if they believed that they will have the same number of customers before and after the ordinance. Justice Kennedy infers that this would be proper in *Alameda*. *See supra* note 59. He states that the city's premise must not be that speech will be reduced in order to reduce secondary effects but he does not state that if the number of SOBs is reduced for factors out of the city's hands (like market availability, cost or willingness to sell/rent to SOBs) that the ordinance would not be valid. *Id.*

150. This would be considered a taking under the Takings Clause of the Constitution. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

151. *See* Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S.

However, the city did not have to find private store windows or poles that would allow the posters formerly posted on government utility poles to relocate to so that all of the previous posters would have a new place to be posted. This requirement seems burdensome in other zoning contexts, but this is exactly what the government is required to do in many cities when zoning SOBs.

Second, this assumption places the government in the role of a real estate manager rather than a regulator. Under the supply and demand approach, the government is given the obligation to ensure that the demand of the city for SOBs is met by the SOB supply. Matching up supply and demand has traditionally been a role of the market, not the government. Courts that require the local government to present comparisons of the number of available sites and the size of the population require an especially large government role in the management of the market. In order to get an accurate ratio of the supply and demand for SOBs, the government would have to consider not only zoning but evidence of frequency and number of visitors to SOBs, unless it assumed that the demand for SOBs was the same in every community. Also, requiring a minimum number of SOBs to exist in every community does not take into account the fact that different communities have different values and that the demand for SOBs is higher in some communities than others. This calculus would also have to consider that the demand for SOBs may be dynamic as technology and the make-up of city populations constantly change.

Third, it assumes that zoning does not have a negative impact on the quantity of speech. Courts have recognized that time, place, and manner restrictions may have some effect on the quantity of speech.[152] Courts have also recognized specifically that zoning regulations often have a negative economic impact. Even Supreme Court-approved zoning schemes (like dispersal of SOBs throughout a city) can prevent new SOBs from opening.[153] Concentrating SOBs, another consti-

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789, 815 (1984) (noting the existence of alternative channels of communication).

152. Young v. Am. Mini Theatres Inc., 427 U.S. 50, 77–78 (1976) (Powell, J., concurring) (noting that zoning ordinances may cause economic loss but this is no different than other economic enterprises that are confronted by land use regulations). Justice O'Connor also noted in *Alameda* that the Los Angeles ordinance was a proper "time, place and manner regulation" despite the fact that its may force the closing of all adult video arcades in the city. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 443 (2002).

153. Sam R. Collins, *Adults Only! Can We Zone Away the Evils of Adult Businesses?*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 177, 189 (1997) (citing JEROME A. SIEGAN & MAUREEN KELLY IVORY, THE REGULATION OF ADULT USES IN THE CITY OF

tutional zoning approach, has also been shown to reduce the number of SOBs in a city.[154] Without recognizing that zoning regulations inevitably have a negative economic impact, the Court imposes an impossible burden on local governments to maintain the quantity of speech.

As demonstrated, the supply and demand test places a large, if not impossible, burden on local governments. However, Justice Kennedy's statement and lower court opinions, which require a zoning regulation not to have an appreciable effect on the quantity of speech, make perfect sense under the current secondary effects test. The secondary effects test allows cities to regulate SOBs based on the premise that they are *only* targeting the negative effects of the speech, not the speech itself. Under this premise, it is logical that since the ordinance can only target the *negative effects*, then the city should leave the *quantity of speech* intact. And since the quantity of speech must be intact, then there must be approximately the same number of SOB sites after as existed before the ordinance. However, as illustrated above, zoning sometimes impacts the quantity of speech. Thus, the secondary effects approach that requires the same quantity of speech before and after an ordinance may set an economically unattainable result for many cities. Adding the problem of government intervention in the SOB market, this leads to a logistically and economically untenable regime where a local government has to ensure the economic viability of SOBs when enacting zoning ordinances—contravening the broad deference courts should allow states in zoning.

IV. A Viewpoint Neutral Exception to Content Based Zoning

This section articulates an alternative approach to zoning of adult businesses that replaces the secondary effects test. This test advocates a break from Supreme Court precedent in *Renton* and *Alameda*, but is consistent with the plurality's rationale in *Young*. This "viewpoint neutral" approach avoids the weaknesses of the secondary effects test that erode the state zoning power.

A. The Viewpoint Neutral Approach does not Completely Depart from Supreme Court Precedent

In conceptualizing adult business zoning, the Supreme Court in *Young* set forth two rationales under which cities could regulate adult businesses without violating the First Amendment. One rationale, of

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CHICAGO 25 (1983)).

154. *Id.* at 187.

course, was the secondary effects test that arose from Justice Powell's concurrence and was adopted by the Court in *Renton*. However, the other justification for cities to regulate adult businesses was because it is an exception like defamation and commercial speech.[155] The *Young* Court explained that adult business zoning was a proper content based regulation of speech, like commercial speech, defamation, and obscenity, and therefore was not subject to strict scrutiny. Then, the Court recognized two important similarities between these areas. The Court recognized that regulations in all four categories were viewpoint neutral and low-value speech.

The *Young* plurality recognized that viewpoint neutral, but content based, regulation was proper. The Court compared adult zoning to defamation, commercial speech, and obscene speech. In analogizing to commercial speech,[156] the Court pointed out that regulations of advertisements may be content based.[157] For example, "[a] public rapid transit system may accept some advertisements and reject others," or "[a] state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere."[158] However, these content based regulations must not violate "the government's paramount obligation of neutrality in its regulation of protected communication."[159] Applying this standard to the zoning regulation at hand, the Court pointed out that "the regulation of the places where sexually explicit films may be exhibited [must be] . . . unaffected by whatever social, political, or philosophical message a film may be intended to communicate.[160] The Court further noted that the "essence" of the content based standard is the need for the government in "its regulation of communication . . . [to] not be affected by *sympathy or hostility for the point of view* being expressed by the communicator."[161] The Court basically explained that a regulation can

155. The Court also analogized to obscene speech. *Young*, 427 U.S. at 66.

156. With reference to defamation, the Court pointed out that it is proper to apply different standards depending on the content of allegedly defamatory newspaper articles. *Young*, 427 U.S. at 66 (demonstrating that the "differences in content may require a different government response"). If the article is about a public official, the standard of proof for defamation is higher than for an ordinary person. *Id.* at 67.

157. *Id.* at 68.

158. *Id.* (citing Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976) and Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)).

159. *Id.* at 70.

160. *Id.* (The Court further pointed out that "whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.).

161. *Id.* at 67 (emphasis added).

be content based, as long as it is viewpoint neutral.[162]

After recognizing the importance of viewpoint neutrality, the Court further took into account that adult business speech is low-value speech under the First Amendment. It recognized adult speech may have some artistic value but society's interest in protecting this expression is less than in protecting "untrammeled political debate[.]"[163] This principle has resonated throughout Supreme Court opinions regulating zoning and other regulations on adult businesses.[164]

The *Young* plurality recognized several important points even though it did not gain a majority: 1) zoning of adult businesses is content based regulation; however, it falls into an exception, like commercial speech, so the government may regulate it, 2) a zoning regulation must be viewpoint neutral in that it does not prefer one viewpoint over another based on social or political preference, 3) adult speech is low-value speech, and finally, 4) local governments maintain broad zoning power. These are all important parts of the viewpoint neutral zoning approach advocated in this Article.

The viewpoint neutral approach does not stray too far from precedent because it applies the two-prong *Renton* test with intermediate scrutiny. This approach adopts the reasoning of the Stevens plurality in *Young* that adult business zoning is a permissible exception to content-based regulation, like commercial speech. It also verbalizes the implicit recognition by the Stevens plurality that viewpoint neutrality is the crucial requirement for zoning regulations. Further, it acknowledges, as Justice Kennedy did in *Alameda*, that calling adult business regulations "content neutral," is a fiction.[165] This approach

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162. For a distinction between viewpoint based/neutral and content based/neutral see Part I.

163. *Young*, 427 U.S. at 70 (The *Young* Court emphasized that although the "First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value . . . society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate[.]").

164. *Id.* (Justice Stevens in *Young* then pointed out in a famous quote that demonstrates the less-valuable nature of adult business expression that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice.").

165. Justice Kennedy disagreed with the *Alameda* Court's characterization of this ordinance as "content neutral" and described it as a "fiction." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 444–45, 448 (2002) (Kennedy, J., concurring) (explaining that an ordinance which "describes speech by content . . . is content based"). Justice Kennedy and three dissenters agree that adult business zoning is content based, not content neutral. *See also* Peek-A-Boo Lounge of Brandenton, Inc. v. Manatee County, 337 F.3d 1251, 1266 n.14 (11th Cir. 2003) (implicitly rejecting the content-neutral label attached to

agrees with Justice Scalia that the secondary effects test is unnecessary and that some communities can suppress adult businesses entirely.[166] However, it disagrees with Scalia's premise, brought out in earlier cases, that SOBs do not produce protectable "expression" under the First Amendment. It recognizes adult entertainment as low-value expression, which is less protectable under the First Amendment.

B. The Viewpoint Neutral Approach Avoids Erosion of the State Zoning Power

The viewpoint neutral approach allows courts to apply the two-prong *Renton* test without eroding the state's zoning power. It allows for broader deference as to what constitutes an "important government interest," under the first prong of *Renton*. With the secondary effects test, an important government interest must be that adult businesses cause negative secondary effects. This often forces cities to provide some evidence of secondary effects. The city may also have to demonstrate that negative secondary effects are caused by adult businesses or that the city's approach will be effective in reducing secondary effects. The specifics of the evidence required varies depending on the court, some requiring evidence specific to the type of SOB, size of city, or type of ordinance proposed.

In contrast, an important government interest under the viewpoint neutral approach does not require proof of any of the above. It recognizes that adult business zoning is a permissible content based regulation, but does not require evidence of secondary effects. The city must only demonstrate that the ordinance is viewpoint neutral and regulates low-value speech. The government must demonstrate first that the ordinance is viewpoint neutral and does not discriminate between adult businesses depending on whatever "social, political, or philosophical message" is expressed.[167] Once that is demonstrated, since adult speech is considered low-value speech,[168] the court must allow broad deference to the government to articulate an important government interest. The government's interest does not have to be a *quantifiable* interest, as often required under the secondary effects test. The government may regulate for the same reasons it regulates

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adult business zoning ordinances and instead calling it "intermediate scrutiny").

166. *Alameda Books, Inc.*, 535 U.S. at 443–44 (Scalia, J., concurring).

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

168. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973) (noting that "crass commercial exploitation of sex" has been determined to be a serious problem that warrants state and federal regulation).

other concerns under its police power, namely to uphold public morality,[169] preserve urban neighborhoods,[170] and prevent decay of family relationships.[171] In addition, cities could present more tangible concerns such as crime, drug use, prostitution, and sexual assault but would not be required to provide evidence that these problems already exist in their city or that the ordinance would be effective in reducing these problems. As long as the government interest did not aim to eliminate adult speech entirely, it would be valid.[172] At the same time, cities seeking the opposite image would be free to zone adult businesses more prominently in the city. Cities that want to draw adults seeking a vibrant nightlife, who want to appear more risqué and exciting, or simply want to capitalize on the market for adult entertainment are free to facilitate this through zoning. Under this approach, cities retain broad zoning power and can experiment with different solutions to adult business zoning, depending on their goals and visions for the city.

Although this approach would dramatically reduce the burden on cities to prove an important government interest under *Renton*'s first prong, the second prong of the *Renton* test would still ensure that speech received adequate protection. The second prong assures that the ordinance allows for reasonable alternative avenues of communication.

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169. Berman v. Parker, 348 U.S. 26, 32–33 (1954)

170. *Young*, 427 U.S. at 71.

171. The Ninth Circuit recently rejected SOBs argument that some secondary effects evidence was not "scientific" or tangible evidence in *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1197 (9th Cir. 2004). The court considered as relevant testimony by "a pedodontist working in a building less than a block away from a retail-only store [who] complained of pornographic litter, harassment of female employees, vandalism, and decreased business, all resulting from his proximity" to the adult business. *Id.* The court further approved of the city's goal in decreasing both "economic and aesthetic impacts upon neighboring properties and the community as a whole" with the adult zoning ordinance. *Id.*

172. As long as the government did not zone SOBs with the purpose of eliminating their expression entirely, this would be acceptable. *See* Part V.D.

Sometimes it is enough for a city ordinance to state in a preamble that the purpose of the ordinance is not to suppress speech but to target something else (such as deterioration of urban life, crime, etc.). As long as the statute is more like a "typical land use" regulation than a law suppressing speech, it is likely to pass the test. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 447 (2002) (Kennedy, J., concurring). Typical land use regulations allow cities to zone out unwanted stores if there is a rational basis for this. *See, e.g.*, Manalapan Realty v. Township Comm. of the Township of Manalapan, 658 A.2d 1230, 1237 (N.J. 1995). However, when speech is concerned the city must undergo intermediate scrutiny and demonstrate an important government interest (rather than simply a rational basis).

While adult zoning ordinances are considered time, place, and manner regulations,[173] because of the secondary effects test, they have not been analyzed like other time, place, and manner regulations.[174] In adult business zoning cases courts have imposed a greater burden to prove that alternative avenues of communication exist. This is because the premise under the secondary effects test is that cities regulate the negative effects of speech but do not harm the speech itself. Since this test requires that zoning regulations only harm speech incidentally, lower courts have imposed strict requirements on cities to ensure that the "quantity of speech" remains intact. As discussed above, many cities have set quotas for the number of SOBs that should exist in certain sized cities in order for a zoning ordinance to be valid. These quotas require the government to regulate the supply and demand for SOBs and do not recognize that sometimes, zoning regulations hurt SOBs economically and sometimes even cause SOBs to go out of business.

Under the viewpoint neutral approach, however, cities can regulate SOBs while recognizing that zoning regulations may have a nega-

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173. The standard requirements for a proper time, place, and manner regulation are that it is 1) *content neutral*; 2) narrowly drawn to promote an important government interest; and 3) it leaves alternative channels of communication open. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) Although the time, place, or manner test originated with public property, *Renton* expanded its application to private property. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

It is important to note though that adult business zoning is a unique type of time, place, or manner regulation because it is content based not content neutral. In *Renton*, the Court determined that due to the secondary effects test, adult zoning regulations were content neutral. This allowed the Court to analyze adult zoning ordinances under the time, place, and manner test. However, in *Alameda*, Justice Kennedy (whose opinion formed the law in this case) claimed that adult business zoning was content based. The majority of the Court (including Kennedy) still held that the ordinance was a proper regulation under the *Renton* secondary effects test. It seems as if Justice Kennedy's opinion implicitly overrules the requirement that time, place, and manner regulations must be content neutral. However, while Kennedy would probably justify adult business zoning as a content-based exception (to the time, place, and manner test) based on secondary effects, this Article argues that it is a proper exception because it regulates low-value speech and is viewpoint neutral. In other words, because adult zoning ordinances regulate low-value speech and are viewpoint neutral, they are not required to meet the first prong of the time, place, and manner test. Instead, the regulation must be 1) a viewpoint neutral regulation of 2) low-value speech, and 3) must promote an important government interest, and 4) leave alternative channels of communication open.

The only other remaining difference between the tests is that the time, place, and manner test specifically mentions that an ordinance "must be narrowly tailored" to the government interest and the *Renton* test never required narrow tailoring. Therefore, the viewpoint neutral approach proposed here also does not require narrow tailoring.

174. For a comparison of how other time, place, and manner regulations are analyzed, *see Ward*, 491 U.S. at 791.

tive economic impact. Although this may cause a decrease in the "quantity" of this kind of adult speech, this is in line with other time, place, and manner regulations that recognize that the government is not responsible for ensuring that the most favorable (or as many) channels of communication are available. In other time, place, and manner cases, government regulations can reduce the number of channels for speech or foreclose a channel of speech altogether.[175] This has been applied even to high-value political and social speech as well as low-value commercial speech.[176] For example, in *Clark v. Community for Creative Nonviolence*, the Court upheld a city ordinance that banned sleeping in certain parks, even though it prohibited a demonstration where activists planned to sleep in a public park to bring attention to the plight of the homeless.[177] The Court recognized that there were alternative avenues for communicating this speech, even though they may not be as effective, and upheld this ordinance as a proper time, place, or manner regulation. Similarly, in commercial speech cases, local governments have been permitted to exclude billboards and certain stores altogether, while still allowing reasonable alternative avenues of communication. Without the secondary effects test, cities can provide a theoretically viable alternative location in the zoning plan without assuring that the quantity of speech remains intact. If market conditions or even public pressure on sellers prevent SOBs from relocating after a zoning ordinance, the local government would not be responsible for assuring a viable location. Although, cities would not be permitted to eliminate SOBs altogether.[178]

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175. A time, place, and manner statute is valid if it strikes directly at the source of the problem, a problem "created by the medium of expression itself" even if it reduces the best avenue for speech. Taxpayers for Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810–11 (1984).

176. The Supreme Court explained that commercial speech was not "wholly outside" First Amendment protection, but also that it was not at the "core" First Amendment speech. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 761 (1976) (pointing out that several types of commercial speech such as religious literature, movies, and advertisements do not lack any First Amendment protection); JUERGENSMEYER & ROBERTS, *supra* note 3, § 10.16 (describing the early Supreme Court protection of commercial speech as "tepid").

177. Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 296 (1984) ("[T]he regulation [that prohibits overnight camping] narrowly focuses on the government's substantial interest in maintaining the parks in the heart of our capitol in an attractive and intact condition .... To permit camping—using these areas as living accommodation—would be totally inimical to these purposes."). It is important to note, however, that this ordinance prohibited all people from sleeping in public parks, so it was *content* neutral unlike many SOB zoning ordinances. *Id.* at 293–94.

178. Some members of the Supreme Court throughout the years have commented that residential communities should be able to zone out SOBs altogether. In *Schad v. Borough*

This section has provided a broad explanation of how "viewpoint neutral" zoning is consistent with Supreme Court precedent and how it may resolve some of the weaknesses of the secondary effects test. The next section carefully defines the various aspects of this test and demonstrates how courts may apply this test.

V. Application of the Viewpoint Neutral Zoning Test

This section defines various important terms in the viewpoint neutral zoning test and provides examples of how it should be applied by courts. First, it defends the use of the low-value/high-value distinction for adult entertainment expression. Second, it explains what it means for an adult business zoning ordinance to be "viewpoint neutral." Third, it provides examples of proper government interests in zoning adult businesses. Fourth, it explains how cities can leave reasonable alternative avenues of communication. Finally, this section indicates that the viewpoint neutral exception may not apply broadly to other content based speech regulations.

A. Low-value Speech

Nude dancing and other adult entertainment are considered low-value speech. Low-value speech is speech that does not comment on public affairs and is not of "social and political significance."[179] Adult expression should not be treated differently than other speech, *not* because of its negative effects, but because it contributes little of public importance.[180] Some commentators criticize that drawing a distinc-

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of Mount Ephraim, 452 U.S. 61, 76 (1981), Justice White, joined by two justices, held that a city must "leave open adequate alternative channels of communication" and cannot totally exclude nude dancing. Justice Blackman agreed in his concurrence. However, Justice Powell and Stewart disagreed and held that residential communities could limit commercial establishments (including "commercial public entertainment") if they so desired. *Id.* at 79. Justice Rehnquist and Burger agreed on this point. Justice Stevens' concurrence asserted that if the setting of the town was "tranquil" rather than a commercial setting, then he would agree that the Borough may prohibit nude dancing even though it "is a form of expressive activity protected by the First Amendment." *Id.* at 83 (Stevens, J., concurring). However, he was not sure in this case because the record was unclear. In total, five justices agreed that a residential community did not have to provide alternative channels of communication when prohibiting nude dancing.

Justice Scalia believes that *all* cities should be able to ban businesses "pandering sex." City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring).

179. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603–06 (arguing that pornography is low-value speech because it has "little to do with public affairs").

180. The Court has implicitly recognized that adult entertainment expression is low-value speech in placing it on "the borderline between pornography and artistic expres-

tion between low and high-value speech is incompatible with the First Amendment.[181] However, the Court does not seem to agree. The Supreme Court has recognized several types of low-value speech that receive little or no protection under the First Amendment. These include obscenity,[182] defamatory speech,[183] child pornography,[184] fighting words,[185] and commercial advertising.[186] Other commentators criticize this distinction because of the difficulty in drawing lines between low and high-value speech.[187] Although it may be difficult in some cases for courts to determine what is low and high-value speech, this is not much different than other types of line drawing that the Court has undertaken. For example, the Court has distinguished between artistic nude photography, which is protected under the First Amendment, and obscene pornography, which is unprotected.[188] Courts have also distinguished between noncommercial political billboards, which are protected, and commercial billboards, which are less protected.[189] In addition, courts have distinguished nude modern dance performances and nude dancing at SOBs.[190] In most cases, the line drawing problem is not as difficult as it may seem.

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sion." Young v. Am. Mini Theatres Inc., 427 U.S. 50, 61 (1976). The Court has also recognized that adult entertainment expression falls "within the outer border of the First Amendment's protection." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991).

181. *See, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 823–24 (2001) (criticizing the low-value speech distinction as contrary to the First Amendment).

182. Miller v. California, 413 U.S. 15 (1973).

183. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

184. New York v. Ferber, 458 U.S. 747, 762 (1982) (stating that "the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not *de minimis*").

185. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

186. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

187. *See, e.g.*, Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low-value Speech,* 58 WASH. & LEE L. REV. 195, 202 (2001).

188. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

189. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (the Court plurality agreeing that an ordinance completely banning commercial billboards but allowing noncommercial (political) billboards would be constitutional).

190. Ranch House, Inc. v. Amerson, 238 F.3d 1273, 1276, 1281 (11th Cir. 2001) (distinguishing between nude adult entertainment establishments that are businesses and nude performances for non-profit artistic purposes); Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249, 1257 n.6 (N.D. Ohio 1993) (pointing out that there is a difference between adult entertainment and "other nude dancing which includes the kind of artistic quality or social or political message anticipated by the third part of the *Miller* obscenity test").

B. Viewpoint Neutral

For a zoning ordinance to be viewpoint neutral it cannot express agreement or disagreement with the message conveyed by the communicator. Courts are often confused between content neutrality and viewpoint neutrality. Content based laws include laws that prohibit pamphleteering by religious groups, "forbid the hiring of teachers who advocate the violent overthrow of government, or outlaw the display of the swastika in certain neighborhoods."[191] In contrast, viewpoint based laws would allow pro-abortion picketers while excluding pro-life picketers from a public park, impose fees on Democratic campaign billboards but not Republican Party billboards or outlaw the display of anti-war yard signs but not pro-war yard signs.

An opponent may argue that adult speech is not even intended to express a viewpoint but to illicit a physical response. Thus, there is no such thing as viewpoint based or viewpoint neutral zoning of adult entertainment. There are two responses to this argument. First, if adult entertainment did not express a viewpoint, whether it be social, political or moral, it would not be as highly protected under the First Amendment. If adult entertainment's sole purpose is to elicit a physical response for money, it may be considered commercial speech, which is less protected under the First Amendment than adult entertainment expression.[192]

Second, the Supreme Court has always assumed that adult entertainment expresses some viewpoint. The *Young* plurality explained viewpoint neutrality in stating that zoning ordinances cannot express "sympathy or hostility for the *point of view* of the communicator."[193] Implicit in this statement is that adult entertainment speech *expresses different viewpoints*. In fact, a few commentators have suggested that cities should adopt ordinances that censor pornography that objectifies women but allow pornography that illustrates women as active participants.[194] This would be a viewpoint based law. Just as there are

191. Stone, *supra* note 29, at 190. Content neutral laws include "[l]aws that prohibit noisy speeches near a hospital, ban billboards in residential communities, impose license fees for parades and demonstrations, or forbid the distribution of leaflets in public places." *Id.* at 189–90.

192. The Court protects adult expression more than commercial speech. However, the distinction recognized between a strip club and an artistic nude performance is probably that the strip club is a business whereas the nude performance is art. Although courts have not clarified this distinction, maybe the similarity is that both types of dancing express an erotic message, which is protectable.

193. *Young*, 427 U.S. at 67.

194. Amy Adler, *What's Left: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1530–31 (1996); Stacy J. Cooper, *Sexual Harassment and the Swedish Bikini Team: A Reevaluation of the "Hostile Environment" Doctrine*, 26

different viewpoints expressed in pornography, there are different viewpoints expressed in adult films, nude dancing, and other adult entertainment. For example, a viewpoint based zoning ordinance may zone SOBs only if they express the view that women are sex objects for men to gratify themselves (but not if they express the view that women like sex). This ordinance expresses *sympathy* to SOBs with the view that women enjoy sex but *hostility* to SOBs that view women as reticent participants in sex. It would therefore be an impermissible viewpoint based law. However, if a city ordinance zones all SOBs to the outskirts of town because they are tacky, it would *not* be a viewpoint based ordinance. It would be content based, but it would not be viewpoint based because it does not distinguish between the SOBs based on the point of view expressed. Instead, it would zone all SOBs to a particular part of town. Therefore, it would be more like the zoning ordinances that banned *all* commercial billboards (content based) than an ordinance that outlaws display of anti-war yard signs but not pro-war yard signs (viewpoint based). This same rationale would apply to a city council that wanted to zone all adult businesses to a prominent location in a city because it wanted to promote the city's market for SOBs. As long as the city did not distinguish between the different adult businesses based on the message expressed, this would be constitutional.

C. Important Government Interest

The viewpoint neutral approach allows a broad array of important government interests to satisfy the first prong of the *Renton* test. Under this approach, cities are not restricted to a greater extent in zoning SOBs than they are in zoning other commercial businesses.[195] Cities may zone SOBs because they violate community values, for aesthetics (because of neon lights and gaudy signs), or to uphold the character of a neighborhood (whether it be a morally conservative or liberal character). Some communities may also want to zone SOBs because they degrade and silence women,[196] disrupt marriages or de-

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COLUM. J.L. & SOC. PROBS. 387, 430–31 (1993).

195. *See supra* note 173 for further discussion.

196. *See* Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED DISCOURSE ON LIFE AND LAW 155 (1987) (noting that pornography is a means of binding women); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (4th ed. 1989) (explaining that pornography is misogynous); Catharine A. MacKinnon, *Not a Moral Issue,* 2 YALE L. & POL'Y REV. 321, 323–24 (1984) (describing pornography as discrimination which defines the treatment of women and silences

stroy healthy sexual relationships. Allowing cities to zone SOBs for a broader array of purposes is a more honest approach than the secondary effects test. It recognizes the reality that cities are not only interested in the crime and effects on property values brought by SOBs, but the effects of SOBs on relationships and community values. Cities have had to hide some of the reasons for zoning ordinances behind statistical evidence of secondary effects caused by SOBs. Supreme Court precedent does not have to dictate such a result. Since adult speech is of low-value, cities should have broad deference in articulating an important government interest. Cities should be able to zone SOBs because they violate (or uphold) community values or because they degrade (or liberate) women in addition to any secondary effects they may cause.

One may argue that it is underinclusive to zone SOBs based on public morality. The argument would be that a city would have to *ban* SOBs to demonstrate an important government interest in public morality. If the city is interested in preserving community morals, then zoning SOBs to particular areas in the town does not satisfy this government interest. However, the city can allow some SOBs to exist away from the most frequently visited areas of town and still have an important interest in upholding public morality. A city may preserve the general character and values of the community even by keeping SOBs away from city centers and sensitive areas like churches, schools, and residential communities. If zoned in this manner, they may be avoided by the members of the community who do not want to be exposed to them. This would recognize the difference between zoning regulations and other types of government regulations on speech. In zoning, the city is presumed to be planning and creating a community of a certain character. While some communities may allow U-shaped concrete homes without any windows,[197] others can permissibly ban these types of homes. Some communities allow neon-laden strip malls and Wal-mart superstores, and others reject these[198]

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and "enslaves women's minds and bodies").

197. Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 70–71 (1963) (allowing a denial of a permit for a home that was a "flat-roofed complex of twenty modules, each of which is ten feet high, twelve feet square and arranged in a loosely formed 'U' which winds its way through a grove of trees").

198. *See, e.g.,* Coronadans Organized For Retail Enhancement v. City of Coronado, 2003 Cal. App. Unpub. LEXIS 5769, at *3 (4th Dist. June 13, 2003) (upholding a regulation that did not allow "formula retail establishments" preserved "the community's character and ambiance"). Wal-Mart stores have been rejected by communities nationwide for many reasons, including that they detract from the character of the community. A recent blow to the corporation is that New York City rejected a Wal-Mart store. Steven

and zone a city with a traditional urban feel with small shops and walkable commercial districts. These are the kinds of liberties provided to states under the zoning power. Just like cities can plan a community that rejects a Wal-mart superstore for aesthetic reasons or because it favors the look and feel of small shopping centers, a city should also be able to locate SOBs in the areas that best reflect a city's values. For a city like Las Vegas, this may mean that SOBs are reserved a prominent position in the center of town, but for some other cities, SOBs may best be located in the outskirts of the community.

D. Reasonable Alternative Avenues

While a city may zone for the broad array of reasons discussed above, it must still leave reasonable alternative avenues of speech, under *Renton's* second prong. Therefore, regardless of what community values dictate, a city cannot zone all existing SOBs out of the community. Since adult speech is protected by the First Amendment, a city must not "suppress" speech. A city does not suppress speech by zoning SOBs unless it zones SOBs entirely out of a community or provides only a "fictional" spot in the zoning plan to relocate a SOB. For example, if a city zones SOBs to one spot where there is already a city monument located, this would not allow a reasonable alternative avenue of communication.[199] However, an ordinance that zoned SOBs to the industrial section of town, even though there are no spots for sale there, would be appropriate.[200] The key is that the city should not have to guarantee adult businesses a new location when market conditions may dictate otherwise. A city should not have to create a quota of available sites for all of the SOBs that will be rezoned. Therefore, a zoning scheme that causes the number of SOBs to decrease may still be constitutional. As long as the decrease in SOBs is just like any other negative economic effect caused by a land use restriction, it would not constitute zoning with the "purpose of suppressing adult speech."

Greenhouse, *Developer Drops Plans for City's First Wal-Mart*, N.Y. TIMES, Feb. 25, 2005 at 1, *available at* http://www.nytimes.com/2005/02/24/nyregion/24walmart.html (last visited March 1, 2005).

199. *See also supra* note 147.

200. D.G. Rest. Corp. v. City of Myrtle Beach, 953 F.2d 140, 147 (4th Cir. 1991) (noting that while it may not be as "commercially desirable to operate" in an industrial area, the zoning ordinance, "it has not been demonstrated that the restriction . . . will impede the restaurant's ability to convey its message to those listeners who desire to be enlightened by it").

E. Application of the Viewpoint Neutral Exception

The viewpoint neutral exception to the time, place, and manner test may only apply to zoning cases. As discussed above, SOB zoning cases are similar to defamation and commercial speech cases because they are all exceptions to the general rule that content based regulations must undergo strict scrutiny. However, the viewpoint neutral exception does not apply to other permissible content based regulations mentioned in *Young*, including defamation, obscenity, and commercial speech. It probably also does not apply to other content based exceptions, like workplace harassment speech. There are several distinct categories of low-value speech. One category is content based *and* viewpoint based speech that can be banned completely. This includes workplace harassment speech. Workplace speech obviously does not fit within the viewpoint neutral exception because it is viewpoint based. In fact, it is often the viewpoint expressed that makes the speech impermissible. For example, "some of the speech that harassment law suppresses is suppressed precisely because of its point of view; saying that women make bad policemen can give rise to liability, but saying that men and women should be treated equally cannot."[201] Another category is content based *but* viewpoint neutral speech that can be banned altogether. In this category is defamatory speech and obscenity. This speech is not protected in any public setting. The last category is content based *but* viewpoint neutral speech that cannot be banned but can be *limited* by a time, place, or manner regulation. This category includes adult entertainment speech and profanity. It is unclear which category commercial speech falls into. Some commercial advertising cases indicate that this speech can be suppressed completely, and others disagree. Thus, it may fall in either of the latter two categories.

Low-value speech is much more diverse than it may appear. The various categories above demonstrate that the viewpoint neutral zoning exception does not apply broadly to other categories of speech. The only other type of speech that may fall in the same category as adult entertainment speech is profanity.

VI. Conclusion

The balance between providing deference to local governments in zoning and protecting speech is a difficult one. On its face, the sec-

201. Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1828 (1992) (arguing that many commentators have taken the constitutionality of work place speech regulations for granted).

ondary effects test seems to accomplish this balance. In theory, it provides broad deference to cities and requires very little evidence to support a local zoning ordinance. However, when applied by lower courts, it does not provide the appropriate balance. As this Article demonstrates, the secondary effects test often requires local governments to provide evidence that secondary effects exist and that a proposed ordinance will be effective in reducing these effects. It also requires cities to ensure the commercial viability of adult businesses and to take on the role of a real estate manager (rather than a regulator).

Even though a big part of the problem with the secondary effects test is the great evidentiary burden it imposes on cities, this Article does not argue that lower courts should simply provide broader deference to local governments. Instead, it posits that the evidentiary burdens are just symptoms of a larger problem with the entire secondary effects approach. In fact, it is actually logical that the secondary effects test requires cities to prove a high evidentiary burden. The premise of the secondary effects test is that cities can zone adult businesses in a *content neutral* manner because they are targeting the negative effects of the business and *not* the speech itself. Therefore, it makes sense that a city should prove that negative effects are caused by adult businesses before zoning these businesses. It is also logical for a city to have to demonstrate that its ordinance does not impact (the quantity of) speech, but only the secondary effects. Despite relying on the secondary effects rationale, the Supreme Court has insisted that broad deference is due to local governments. However, the secondary effects approach is not logically consistent with this goal.

The viewpoint neutral approach to adult business zoning, as set forth in this Article, may provide a logically consistent balance between speech and deference to local governments. Conceptualizing adult business zoning as content based, but viewpoint neutral regulation of low-value speech allows cities to zone adult businesses directly. Therefore, cities do not have to prove that adult businesses cause negative secondary effects or demonstrate that an ordinance does not impact speech. In addition, this approach does not depart completely from Supreme Court precedent. The *Young* plurality justified its content based regulation of an adult business based on this rationale. Although the Supreme Court majority has not adopted this viewpoint neutral approach, the Court has emphasized that the key for adult business zoning is viewpoint neutrality.

Under the viewpoint neutral approach, an important government interest under the *Renton* test may include preserving public morality *or* reducing crime. The city does not have to rely on negative secon-

dary effects caused by adult businesses. Similarly, under the *Renton* second prong, the Court does not have to demonstrate that a zoning ordinance does not reduce the number of adult businesses in a community. The city must only demonstrate that its zoning scheme leaves theoretically (but not commercially) viable locations for SOBs to relocate to.

Adopting the viewpoint neutral approach allows cities broader deference to experiment with zoning solutions and may also lead to more consistency in this area of First Amendment jurisprudence. Although the viewpoint neutral zoning exception will not apply broadly to other areas like defamation, workplace harassment, or obscenity, abandoning the secondary effects test in SOB zoning cases may lead to an abandonment of the test in closely related areas where it may be unnecessary[202] and has also created problems.[203]

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202. In *City of Erie v. Pap's A.M.*, the Court majority, including Justice O'Connor, Rehnquist, Kennedy, Breyer, and Souter (partially concurring) relied on the secondary effects test to justify an *indecency regulation* requiring nude dancers to wear pasties and g-strings. 529 U.S. 277, 290 (2000) (plurality opinion). Lower courts have also adopted the secondary effects rationale to justify public indecency statutes. *See, e.g.*, Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1309 (11th Cir. 2003) (explaining that "totally nude dancing in adult entertainment establishments generates undesirable secondary effects . . . [and the city] is entitled to combat these effects, so long as it does not ban, but merely regulates the erotic message").

In *Pap's A.M.*, the Court relied on the *O'Brien* test. 529 U.S. at 291. The Court noted that in *O'Brien* the government aimed to "maintain[] the integrity of the Selective Service System and not to suppressing the message of draft resistance." *Id.* Similarly, here, the Court reasoned that the ordinance prohibiting public nudity is "aimed at combating crime and other negative secondary effects" of adult entertainment businesses, not at suppressing erotic speech. *Id.* at 297. It was unnecessary for the Court to justify its reliance on the secondary effects rationale with *O'Brien*. The Court could have easily analogized to *O'Brien* based on the fact that in both cases the government maintained a legitimate interest (including public morality or the integrity of local communities), outside of suppression of speech.

This would have also avoided the evidentiary burden now imposed on indecency ordinances because the Court cannot take the government's word on its motive to combat secondary effects.

203. Lower courts may finally be able to reconcile public indecency and zoning regulation and determine the appropriate constitutional balance in regulating both areas. Government indecency regulations (indecency ordinances) require nude dancers to don pasties and g-strings. Indecency ordinances have often been analyzed similarly to adult business zoning cases. The first indecency cases applied the *O'Brien* test. *O'Brien* is the test that the Court adapted then adopted in *Renton*. For a description of the *O'Brien* test, see supra note 47. Both the *O'Brien* test and *Renton* test have been applied to both zoning and indecency regulation cases. The Supreme Court has noted several times that the *O'Brien* and *Renton* tests are similar. The *Renton* Court, in setting forth its test, cited *O'Brien*. Most Supreme Court cases analyzing indecency ordinances under the First Amendment have applied *O'Brien*. *Pap's A.M*, 529 U.S. at 279; Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991). The *O'Brien* test seems to be the preferred test among the

lower courts for indecency regulations.

Lower courts have also used the secondary effects rationale with both indecency and zoning regulations. However, there is a fundamental but unrecognized distinction between the two lines of cases. While it is a fiction to justify zoning ordinances as content neutral regulations, government regulations on public nudity can rightfully be justified as *content neutral* regulations. These are content neutral regulations when they ban all public nudity, regardless of whether it contains expression *and* regardless of the viewpoint it expresses. Justice O'Connor in *Pap's A.M.* held that the ordinance is content neutral because the ordinance is a general ban on public nudity and "bans conduct, not speech." *Pap's A.M.*, 529 U.S. at 289. In other words, the ban does not "target nudity that contains an erotic message" but "bans all public nudity, regardless of whether that nudity is accompanied by expressive activity." *Id.* at 290.

However, the public indecency regulations that *only* prohibit total public nudity *at adult establishments* are clearly content based. *See, e.g., Fly Fish, Inc.*, 337 F.3d at 1306. By expanding the secondary effects test, courts have upheld some content based public indecency regulations. *Id.* at 1308; *see also* SOB, Inc., et al. v. County of Benton, 317 F.3d 856, 862 (8th Cir. 2003) (explaining that a public indecency ordinance "is content-neutral if its purpose is to combat harmful secondary effects").

These indecency ordinances should be analyzed differently than adult business zoning, which is always content based speech regulation. Adult business zoning is content based because it only applies to adult businesses and not to all people and entities like the indecency regulations. However, government indecency regulations can properly be regulated as content neutral regulations under the *O'Brien* test. This would prevent courts from relying on the secondary effects test to justify public indecency ordinances, which impose great evidentiary burdens on cities (just like zoning ordinances).

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