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Zoning Adult Entertainment: A Reassessment of *Renton*

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When called upon to evaluate adult-use zoning ordinances, the Supreme Court must address a clear conflict between free speech values and the social and economic life of a community. In one recent decision, City of Renton v. Playtime Theatres, *the Court approved subjecting such an ordinance to relaxed scrutiny, consistent with its approach to other restrictions on the time, place, or manner of speech. In this Comment, the author addresses a variety of critiques of the Supreme Court approach, disagreeing with the proposition that adult-use zoning restrictions should be treated like other content-based restrictions. The author examines the first amendment implications of zoning restrictions, tracing the Supreme Court's approach to these issues. The author argues that relaxed scrutiny is the correct approach, because zoning restrictions pose less risk of censorship than other types of content-based restrictions.*

In 1976, the Supreme Court decided *Young v. American Mini Theatres,*[1] a landmark case with far-reaching implications for the relationship between the first amendment and land-use regulation. In *American Mini Theatres,* the Court upheld a zoning ordinance that restricted the location of "adult uses," businesses offering sexually oriented merchandise and services.[2] To its proponents, the ordinance was a way to protect neighborhoods from the deterioration that often accompanies the proliferation of such businesses.[3]

American Mini Theatres revealed a tension between land use and free speech values that has continued to appear in a developing line of first amendment cases.[4] On one hand, zoning adult uses restricts speech

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1. 427 U.S. 50 (1976).

2. *Id.* at 52. Although the ordinance in *American Mini Theatres* also restricted the location of certain businesses other than those offering sexually oriented merchandise and services (such as bars and pool halls), *see, e.g., id.* at 52 n.3, this Comment focuses on zoning ordinances that restrict businesses selling sexually explicit books or movies.

3. *Id.* at 55 ("In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere.").

4. *See infra* notes 38-90 and accompanying text; *see also* Note, *Zoning "Adult" Movies: The*

because it limits the distribution of books and movies that are protected by the first amendment. On the other hand, failing to regulate such enterprises may endanger the economic and social vitality of the community. The courts' attempts to resolve this conflict provide a valuable window into the dynamics of first amendment jurisprudence.

In a line of cases culminating in *City of Renton v. Playtime Theatres,*[5] courts have treated adult-use zoning ordinances as if they were content-neutral restrictions on the time, place, or manner of speech.[6] Constitutional law scholars have criticized this approach, arguing that the restrictions are actually content-based and that the relaxed scrutiny they receive is therefore at odds with first amendment jurisprudence in other areas.[7] In fact, various aspects of the doctrine that developed in the adult-use zoning cases have appeared in other first amendment cases, with curious results.[8]

This Comment argues that the Supreme Court's relaxed scrutiny of adult-use zoning ordinances is justified because such regulations pose less risk of censorship than other types of content-based speech restrictions. Because the argument for lessened scrutiny rests on the unique charac-

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Potential Impact of Young v. American Mini Theatres, 28 HASTINGS L.J. 1293 (1977) (authored by Jane M. Friedman) (noting that "adult" law has emerged as a new legal phenomenon). Adult-use zoning ordinances differ from other regulations because they restrict nonobscene sexual speech. The Court has never appeared comfortable giving full first amendment protection to sexual speech, whether obscene or not. The adult-use zoning cases are marked by this inhibition. *See infra* notes 22-37 and accompanying text.

5. 475 U.S. 41 (1986).

6. *Id.* at 49 (adult-use zoning ordinances reviewed under standards applicable to "content-neutral" time, place, and manner regulations).

7. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3 n.17 (2d ed. 1988); Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. 46, 104 (1987) (criticizing *Renton* as a "recent and disturbing exception[ ]" to the Court's rejection of laws discriminating against communicative activity); *see also* Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113, 127-28 n.102 (1981) (implying that intermediate scrutiny was inappropriate in *American Mini Theatres,* even if the ordinance was viewed as a content-neutral subject-matter restriction). *But see* Farber, *Content Regulation of the First Amendment: A Revisionist View,* 68 GEO. L.J. 727, 737 (1980) (arguing that intermediate scrutiny of the Detroit ordinance in *American Mini Theatres* was justified because it was a viewpoint-neutral subject matter restriction).

There can be little doubt that adult-use zoning ordinances are content-based restrictions: They classify businesses based on the content of the material they sell. *See infra* text accompanying note 47. Such regulations have traditionally been scrutinized closely by the Court, *see infra* notes 9-13 and accompanying text, but adult-use ordinances have not met with this close scrutiny.

8. For example, in Boos v. Barry, 485 U.S. 312 (1988), the Supreme Court rejected the extension of *Renton*'s "secondary effects" doctrine to a regulation directed at harms caused directly by the prohibited speech. *Id.* at 320-21 (striking down a regulation that prohibited the display of signs within 500 feet of a foreign embassy, where the purpose of the regulation was to shield diplomats from speech "critical of their governments"). *See infra* notes 50-58 and accompanying text (discussion of "secondary effects" doctrine). In City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Court refused to extend *Renton*'s rule that cities may rely on studies of similar cities (to justify adult-use zoning ordinances) to the affirmative action context. *Id.* at 505; *see infra* notes 84-87 and accompanying text (describing *Renton*'s holding on the use of studies from other cities).

teristics of land-use regulations, however, the *Renton* test should not be extended to other content-based restriction cases. Moreover, because zoning ordinances are complex, applying the test even in the land-use area is problematic.

Part I outlines the development of adult-use zoning law since *American Mini Theatres* in the context of the Court's approach to restrictions on sexual speech in general. Part II argues that the usual criticisms of the *Renton* test are misplaced, and that the Supreme Court's approach can be justified on the basis of the unique characteristics of land-use regulations. Finally, Part III illustrates the difficulty in applying the *Renton* test and examines how various components of particular zoning ordinances can affect the first amendment inquiry.

I
THE DEVELOPMENT OF ADULT-USE ZONING LAW

Adult-use zoning law arises at the intersection of two trends in first amendment jurisprudence: the development of intermediate scrutiny for content-neutral time, place, and manner restrictions and the Court's unclear and ambivalent treatment of sexual speech.

A. The Genesis of Intermediate Scrutiny

As a rule, the Court subjects speech regulations to strict scrutiny, requiring that they be narrowly tailored to serve a compelling state interest.[9] As the number of first amendment challenges to government regulations has increased, the Court has retreated from strict scrutiny.[10] Instead, it has developed a two-tiered approach to regulations that ouly incidentally affect speech activities by regulating the time, place, or manner of expression.[11] The Court determines as a preliminary matter whether a time, place, and manner regulation is based upon the content

9. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980) (village may only serve its legitimate interests by "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms").

10. The Court apparently was concerned at the sheer number of governmental regulations that could be, and increasingly were, challenged on first amendment grounds. *See* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 HARV. L. REV. 1, 1-2 (1965) (noting that only since the beginning of this century has the first amendment become a lively issue). For example, while the Court was quick to extend first amendment protection to an individual distributing leaflets on a sidewalk, it balked at extending that protection to a person distributing commercial advertising. *Compare* Schneider v. State, 308 U.S. 147 (1939) (noncommercial leaflets) *with* Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial advertising). It was not until 1976 that the Court overcame this reluctance and extended first amendment protection to commercial speech. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

11. *See* Bigelow v. Virginia, 421 U.S. 809, 819 (1975) (adopting the time, place, and manner analysis in discussing *Valentine*).

of the speech;[12] these "content-based" restrictions continue to receive strict scrutiny. But regulations that are not based on the content of speech (content-neutral regulations) receive a lesser degree of scrutiny.[13]

The "intermediate" standard of scrutiny requires a court to determine whether the government's primary purpose is to suppress speech. If so, the regulation will be struck down as a violation of the first amendment. If the government's purpose was not to suppress speech, the regulation will be upheld if it is narrowly tailored to serve a substantial government interest and if it leaves open adequate alternative avenues of communication.[14]

The Court's justification for relaxed scrutiny of content-neutral time, place, and manner restrictions is twofold. First, such restrictions present less danger of government censorship than content-based restrictions. Time, place, and manner restrictions affect speech only incidentally, and apply equally to all voices. As a result, they are generally ineffective at suppressing a particular viewpoint.[15] Second, strict scrutiny of these restrictions would hamstring the government in its ability to pursue legitimate objectives. Most time, place, and manner restrictions are designed for such mundane governmental objectives as regulating traffic or preventing littering; the Court reasons that subjecting all such regulations to strict scrutiny would impose an excessive burden on the government's efforts to attain these objectives.[16] Therefore, content-

12. *See* Carey v. Brown, 447 U.S. 455, 460-62 (1980) (concluding that a regulation distinguishing between employment-related picketing and other types of picketing is a content-based regulation); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (distinguishing between neutral time, place, and manner restrictions and content-based restrictions); Stone, *Content Regulation and the First Amendment,* 25 WM. & MARY L. REV. 189, 189 (1983) (emphasizing the increasing importance of the content distinction in first amendment analysis).

13. *See Carey,* 447 U.S. at 461-62 (applying "careful scrutiny" to content-based restrictions); *Mosley,* 408 U.S. at 101 (striking down content-based restrictions); *see also* Redish, *supra* note 7, at 113 (criticizing the Court's use of "content distinction" as both theoretically questionable and difficult to apply).

14. City of Renton v. Playtime Theatres, 475 U.S. 41, 50, 52-53 (1976); United States v. O'Brien, 391 U.S. 367, 377 (1968) (articulating a different formulation of this test); *see infra* text accompanying note 61 (briefly describing *O'Brien* test).

15. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (restriction's neutrality demonstrates that the city had no intention to censor speech); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981) (noting that the content-neutral restriction presented no danger of overt or covert censorship); *see also* Stone, *supra* note 7, at 74-75 (noting that content-neutral restrictions are less likely to lead to censorship than content-based restrictions).

16. *See* Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) ("[n]o matter what its message, a roving sound truck that blares at 2 A.M. disturbs neighborhood tranquility" and may be regulated); Grayned v. City of Rockford, 408 U.S. 104, 115-16 (1972) ("reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted"); Schneider v. State, 308 U.S. 147, 160 (1939) (dicta) (city could prevent a person from exercising his freedom of speech by "taking his stand in the middle of a crowded street . . . and maintain[ing] his position to the stoppage of all traffic"); *see also* Stone, *supra* note 7, at 75-76. Stone

neutral restrictions call for an approach that balances the importance of the government's interest against the extent of the infringement on speech.[17] Intermediate scrutiny attempts to strike this balance.

The Court has been willing to subject a wide range of government regulations to intermediate scrutiny, including, for example, a state law restricting the distribution of merchandise to a particular location at a state fair,[18] an ordinance prohibiting the posting of signs on utility poles,[19] and an ordinance requiring that concerts at the city's bandshell use the city's sound system.[20] Because of these developments, the mechanics of intermediate scrutiny are a subject of growing importance.

Adult-use zoning ordinances, which regulate the location of speech activities, are among the time, place, and manner regulations that have come under judicial scrutiny. The tension between free speech and land use is particularly intractable in these cases.[21] Many conflicts between freedom of speech and other interests could be resolved by putting distance between the speech activity and the listener, or by appealing to the listener to tolerate the speech for its brief duration. Unfortunately, cities generally have only a limited amount of land available for adult uses. Furthermore, the activity subject to first amendment protection—the sale of goods or services—is an on-going enterprise. It will not eventually go away, like the streetcorner pamphleteer, and you cannot get away from it by turning the knob on a radio. Any regulation of adult uses must therefore fit into the general scheme of land use. The problem presented by adult-use zoning ordinances is how to formulate a land-use system that protects first amendment values.

B. *Adult-Use Zoning Ordinances and Regulations of Sexual Speech*

Adult-use zoning ordinances are not simply time, place, and manner

also suggests that strict scrutiny of content-neutral restrictions would encourage people to violate reasonably necessary laws by allowing them to assert the defense that the law infringes speech, as so many laws do to some extent. *Id.* at 76-77.

17. *See* Adderley v. Florida, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting) (it may be necessary to adjust fundamental rights to accommodate other state interests). *But see* Redish, *supra* note 7, at 128-50. Redish argues that content-neutral restrictions can lead to de facto censorship because they may have a disproportionately heavy impact on certain types of speech, and may distort public debate by reducing the total amount of information available to the listener. *Id.* at 131. These concerns have some force, but this slight risk of censorship presented by content-neutral restrictions is outweighed by the government's need to regulate activities involving speech. *See infra* text accompanying notes 152-71.

18. *Heffron*, 452 U.S. at 647-48 (applying intermediate scrutiny).

19. *Taxpayers for Vincent*, 466 U.S. at 804-05 (applying the *O'Brien* test, *see infra* text accompanying note 61, a different formulation of relaxed scrutiny).

20. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2754 (1989) (applying the *Renton* test).

21. In addition, land-use regulations have an immediate impact on the economic interests of the land-owning class, a powerful constituency. *See generally* Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 BUFFALO L. REV. 1 (1977) (describing the politics of zoning adult uses).

regulations, but are, in fact, unique regulations of sexual speech. Therefore, the Court's approach to these ordinances should be considered in light of its approach to regulations of sexual speech in general.

The Court's treatment of sexual speech, in contrast to its rather formulaic treatment of traditional time, place, and manner regulations, reveals a marked ambivalence. In 1957, the Court decided that obscenity fell outside the bounds of the first amendment.[22] This decision led to fifteen years of debate over the definition of "obscenity."[23] In *Miller v. California*,[24] the Court finally concluded that obscenity consisted of works that, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[25] While the Court debated the definition of obscenity, it also created a host of procedural guarantees to protect nonobscene sexual speech from infringement by overzealous government censors.[26] The result was an uneasy compromise between the acknowledged value of some sexual speech and the acknowledged legitimacy of society's desire to regulate it.

The Court's ambivalence toward sexual speech has crept into its reasoning in cases concerning nonobscene sexual speech. Such speech must have some social value—if it did not, it would be classified as obscene—and is therefore protected by the first amendment. But a number of Supreme Court decisions refer to this type of speech as less valuable than other types of speech that have traditionally been accorded first amendment protection.

Young v. American Mini Theatres[27] was the first Supreme Court decision in which the "low value" theory was offered as a justification for upholding a regulation of sexual speech.[28] There is little reason to believe that Justice Stevens, the author of the plurality opinion, intended to create a new system for classifying speech with his remark that "few of

22. Roth v. United States, 354 U.S. 476, 485 (1957). This decision relied on Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which included the "lewd and obscene," along with "the profane, the libelous, and the insulting or 'fighting words,' " in the category of unprotected speech. *Id.* at 571-72.

23. *See* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part) (referring to the "intractable obscenity problem"); *see also* New York v. Ferber, 458 U.S. 747, 754-55 (1982) (discussing the evolution of the Court's obscenity doctrine).

24. 413 U.S. 15 (1973).

25. *Id.* at 24.

26. *See* Freedman v. Maryland, 380 U.S. 51, 58-59 (1965); *see also* Brennan, *supra* note 10, at 7 (the Court has insisted on "procedural safeguards against suppressing or inhibiting the dissemination of material that is not obscene").

27. 427 U.S. 50 (1976).

28. *Id.* at 70-71. While recognizing that the first amendment prohibits total suppression of sexual speech, the Court asserted that sexual speech deserves less protection than political speech.

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."[29] Nevertheless, the idea that nonobscene sexual speech is less deserving of protection than other types of speech has continued to surface at the periphery of first amendment jurisprudence.[30] In *FCC v. Pacifica Foundation,*[31] for example, the Court held that the first amendment did not prohibit the FCC from censoring indecent language on radio broadcasts.[32] Justice Stevens' majority opinion is far from clear, but he did explicitly state that indecent speech is low in the hierarchy of first amendment values.[33] He acknowledged, however, that such speech is not entirely outside the protection of the first amendment,[34] suggesting perhaps that the Court is not prepared to embrace the "low-value" theory altogether.

Similarly, in *New York v. Ferber,*[35] the Court held that the first amendment did not prohibit states from regulating child pornography, even if the pornography is not obscene by the *Miller* standard. Rather than adopting Justice Stevens' approach of dismissing all sexual speech as low value, Justice White examined the speech in question on a case-by-case basis. For example, in *Miller,* he specifically referred to the minimal first amendment values attaching to live, rather than simulated, performances of children engaged in sexual conduct.[36] He did conclude, how-

29. *Id.* at 70. The "low-value" theory was only one of many justifications Justice Stevens offered for the Court's decision. *See infra* notes 48-58 and accompanying text.

30. One interpretation of the low-value theory is that the Court is reopening the debate over the definition of obscenity. By devaluing nonobscene pornography, the Court might expand the definition of obscenity to cover a wider range of material. If this is the Court's (or at least Justice Stevens') intention, however, neither has made any effort to say so explicitly. Indeed, the low-value theory seems to have its intellectual roots in Robert Bork's reinterpretation of the first amendment, rather than in the obscenity debate. Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 20-35 (1971) (arguing that only political speech should be constitutionally protected).

31. 438 U.S. 726 (1978).

32. *Id.* at 744-51.

33. *Id.* at 743. Characteristically, Justice Stevens presented a number of justifications for upholding the government's action. Although he characterized the speech as low value, he also assumed, arguendo, that it is protected in some contexts. *Id.* at 746. He then concluded that it is not protected in the context of a radio broadcast. *Id.* at 748. This conclusion was based on Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1967), which established the FCC's authority to regulate a limited resource, the airwaves, in the interest of promoting first amendment values. *Pacifica Foundation,* 438 U.S. at 748; *see Red Lion,* 395 U.S. at 386-90 (offering rationale underlying the fairness doctrine). Justice Stevens also referred to the intrusive quality of radio, which makes its listeners a captive audience. *Pacifica Foundation,* 438 U.S. at 748-49. Justice Stevens' analysis of adult-use zoning ordinances displays a similar reluctance to rest on one rationale. *See infra* notes 48-58 and accompanying text.

34. *Pacifica Foundation,* 438 U.S. at 746.

35. 458 U.S. 747 (1982).

36. *Id.* at 762-63. White's approach seems closer to an attempt to redefine obscenity than does Stevens'. *See supra* note 30. Justice White did not, however, explicitly characterize sexual speech as less valuable than other types of speech.

ever, that child pornography, as a class, has insufficient expressive value to outweigh the evil of promoting the exploitation of children.[37]

As the following Sections demonstrate, *Young v. American Mini Theatres* and its progeny reflect the Court's ambivalence about non-obscene sexual speech. The fact that *American Mini Theatres* concerned a time, place, and manner regulation, rather than a prior restraint on speech, also played a significant part in the development of adult-use zoning law.

C. *The* American Mini Theatres *Decision*

American Mini Theatres was the Court's first encounter with adult-use zoning ordinances. In that case, the Supreme Court upheld a Detroit zoning ordinance prohibiting the location of adult bookstores, motion picture theaters, and mini-theaters within 1,000 feet of any 2 other adult uses or within 500 feet of a residential area.[38]

The city asserted that its purpose in enacting the ordinance was to combat urban decay, in particular the neighborhood blight that usually accompanies the entry of adult businesses into an area.[39] Mini Theatres argued, among other things, that the ordinance violated the first amendment and the equal protection clause because it restricted speech activities, such as the distribution of adult books and movies, in a discriminatory manner.[40]

Justice Stevens wrote the Court's plurality opinion, which was joined by Chief Justice Burger and Justices White, Powell (except for Part III), and Rehnquist.[41] Justice Stevens characterized the ordinance as a time, place, and manner restriction on speech because it did not substantially restrict the number of locations at which adult businesses could operate.[42] He further reasoned that the government could regulate speech "on the basis of content without violating [its] paramount obliga-

37. *Ferber,* 458 U.S. at 762-63. Approving of the trend toward reduced protection of sexual speech, a few scholars have offered varying rationales for treating nonobscene sexual speech as low value. *See, e.g.,* MacKinnon, *Not a Moral Issue,* 2 YALE L. & POL'Y REV. 321 (1984) (arguing that pornography is central to the institutionalism of male dominance and should therefore be regulated in the interests of achieving equality); Sunstein, *Pornography and the First Amendment,* 1986 DUKE L.J. 589, 606 (arguing that the effect and intent of pornography are to produce sexual arousal, not to communicate ideas). These views are critiqued at *infra* notes 134-42 and accompanying text.

38. *American Mini Theatres,* 427 U.S. at 52-54. The ordinance was not directed solely at speech-related activities. Adult uses included adult bookstores, cabarets, bars, hotels or motels, pawnshops, pool halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. *Id.* at 52 n.3.

39. *Id.* at 55-56.

40. *Id.* at 56.

41. *Id.* at 51. Justice Powell also wrote a separate concurrence. *Id.* at 73. Justice Stewart, joined by Justices Brennan, Marshall, and Blackmun, dissented. *Id.* at 84.

42. *Id.* at 62.

tion of neutrality in its regulation of protected communication."[43]

Justice Stevens then examined the city's interest. He found that the city had presented persuasive evidence that the entry of adult businesses into a neighborhood is generally followed by deterioration of land values and escalation of sex-related crimes in that neighborhood.[44] He noted that the city's interest in preserving the quality of urban life must be accorded high respect,[45] concluding that this interest supported the classification of adult businesses.[46]

Justice Stevens never explicitly stated that the ordinance was content-neutral. It is clear, however, that he did not apply strict scrutiny, as he would have if he had found the ordinance to be content-based.[47] The decision to characterize adult-use zoning ordinances as "content-neutral" and subject them to intermediate scrutiny was not nearly as straightforward as the *American Mini Theatres* decision suggests. Adult-use ordinances impose restrictions based on the content of the speech activity involved because they affect only businesses dealing in sexual speech. Strictly speaking, therefore, they are "content-based" restrictions.

The opinion offered several justifications for treating the ordinance as content-neutral. First, Justice Stevens suggested that the ordinance was viewpoint-neutral because it applied regardless of the views espoused by the pornographic material.[48] He then asserted that sexual speech

43. *Id.* at 70.

44. *Id.* at 71 n.34.

45. *Id.* at 71. The city presented extensive evidence from real estate experts and urban planners that the concentration of adult businesses attracts "an undesirable quantity and quality of transients," affects property values, and causes increases in sex-related crimes such as prostitution. *Id.* at 55.

46. *Id.* at 71-73.

47. Justice Stevens did not make clear which standard of review he used. He clearly recognized the ordinance as a time, place, and manner restriction, *id.* at 71-72, and ultimately concluded that the ordinance did not affect the message the books or movies intended to communicate. *Id.* at 70. This suggests that he considered the ordinance a content-neutral time, place, and manner restriction, thus warranting intermediate scrutiny. On the other hand, he spent the bulk of the opinion discussing when the government may classify speech based on content, *id.* at 63-70, suggesting that he considered the ordinance content-based, thus requiring strict scrutiny.

Later decisions sometimes read *American Mini Theatres* as holding that the "adult" classification must have a "reasonable basis." *See, e.g.*, Castner v. City of Oakland, 129 Cal. App. 3d 94, 97, 180 Cal. Rptr. 682, 683-84 (1982) (quoting Walnut Properties v. City Council of Long Beach, 100 Cal. App. 3d 1018, 1023, 161 Cal. Rptr. 411, 414, *cert. denied*, 449 U.S. 836 (1980)). The majority of decisions, however, saw the *American Mini Theatres* analysis as more rigorous than simply a rational basis test. Most of the courts evaluating such ordinances have struck them down. *See, e.g.*, Ebel v. City of Corona, 767 F.2d 635 (*Ebel II*) (9th Cir. 1985) (ordinance held unconstitutional); Tovar v. Billmeyer, 721 F.2d 1260 (9th Cir. 1983) (summary judgment upholding ordinance reversed and remanded), *cert. denied*, 469 U.S. 872 (1984); CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983) (ordinance held unconstitutional); Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983) (ordinance held unconstitutional).

48. *American Mini Theatres*, 427 U.S. at 70.

deserves less protection than political speech: "[S]ociety's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."[49]

Justice Stevens' third rationale, the secondary effects doctrine, appears in a footnote.[50] This approach focuses on the government's justification for the restriction. According to Stevens' analysis, the government would have enacted the ordinance regardless of what types of books and movies the businesses sold, if selling them contributed to urban blight. Therefore, he concluded that the restriction was not aimed at the content of the books and movies. It was "this secondary effect which these ordinances attempt to avoid, not the dissemination of 'offensive' speech."[51] This reasoning, however, engendered considerable criticism.

Commentators noted that most restrictions on speech can be justified under this "secondary effects" doctrine. For example, a prohibition on speech criticizing the government could be justified as a way to promote government efficiency. Under the secondary effects doctrine, such a restriction would escape strict review.[52]

Justice Stevens appeared to be sensitive to this problem, however. He distinguished cases where the harmful effects flow from the content of the speech itself. For example, in *Erznoznik v. City of Jacksonville,*[53] the Court struck down an ordinance prohibiting drive-in theaters from showing films containing nudity where such films were visible from public areas.[54] The Court rejected the city's argument that it had the authority to institute an ordinance to protect its citizens from exposure to "offensive" speech. "[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."[55] The city also argued that the ordinance was aimed at preventing the films from distracting passing motorists.[56] It failed to prove, however, that this secon-

49. *Id.* He reiterates this reasoning in FCC v. Pacifica Foundation, 438 U.S. 726 (1978); *see supra* notes 31-34 and accompanying text.

50. *American Mini Theatres,* 427 U.S. at 71 n.34.

51. *Id.*

52. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482, 1496 (1975) (pointing out that speech restrictions are generally justified on the basis of "some danger beyond the message, such as a danger of riot, unlawful action or violent overthrow of the government"); Emerson, *First Amendment Doctrine and the Burger Court,* 68 CALIF. L. REV. 422, 472 (1980) ("Virtually all governmental controls of expression are directed, not at the expression itself, but at the harm thought to result from engaging in it."); *see also Renton,* 475 U.S. at 56-57 (Brennan, J., dissenting) (arguing that restrictions aimed at secondary effects are nonetheless content-based and must be closely scrutinized).

53. 422 U.S. 205 (1975).

54. *Id.* at 217.

55. *Id.* at 210.

56. *Id.* at 214.

dary effect was actually prevented by the ordinance, since films that do not contain nudity could be equally distracting.[57] Stevens referred to *Erznoznik* in *American Mini Theatres,* making it clear that the secondary effects doctrine applies only where the harm is not a direct result of the content of the speech.[58]

Justice Powell's concurrence in *American Mini Theatres* sustained the ordinance under a different formulation of intermediate scrutiny. He explicitly rejected the argument that sexual speech should receive less than full first amendment protection.[59] He reasoned that, because the ordinance imposed only an incidental and minimal burden on speech, it should be analyzed under the test formulated in *United States v. O'Brien.*[60] Under *O'Brien,* a regulation imposing an incidental burden on speech is justified if it is within the government's constitutional power, it furthers a substantial government interest that is unrelated to the suppression of speech, and the incidental restriction is no greater than essential to achieve the government's interest.[61] Justice Powell concluded that Detroit's ordinance met these requirements.[62]

All in all, the Court's reasoning in *American Mini Theatres* is somewhat confused. The decision does, however, illustrate both the trend toward less exacting scrutiny of traditional exercises of the police power and the Court's reluctance to give full first amendment protection to sexual speech. As we shall see in the remainder of this Part, these two trends continued to influence the Court in later cases.

D. From American Mini Theatres *to* Renton

The next Supreme Court decision involving a zoning ordinance with first amendment implications clarified the types of restrictions to which intermediate scrutiny would not apply. In *Schad v. Borough of Mount Ephraim,*[63] the Supreme Court stated initially that the *American Mini Theatres* decision does not control analysis of ordinances that

57. *Id.* at 215.

58. *American Mini Theatres,* 427 U.S. at 71 n.34; *see also* Boos v. Barry, 485 U.S. 312, 320-21 (1988) (rejecting the secondary effects doctrine where the harm sought to be regulated, potential offense to diplomats caused by picketing near an embassy, flowed from the content of the speech and the speech's direct impact on the listener). Stevens' distinction fails, however, to address the fundamental objection to the secondary effects doctrine. Even if the harm is a secondary effect, it nonetheless results from the content of the speech. *See infra* text accompanying note 143.

59. *American Mini Theatres,* 427 U.S. at 73 n.1 (Powell, J., concurring).

60. 391 U.S. 367 (1968).

61. *American Mini Theatres,* 427 U.S. at 79-80 (Powell, J., concurring) (quoting *O'Brien,* 391 U.S. at 377).

62. *Id.* at 80-82. The *O'Brien* test was developed as a test for regulations of conduct which incidentally burden speech. *O'Brien,* 391 U.S. at 376. Powell did not explain why he thought it appropriate to apply this test to a regulation aimed directly at speech activities, such as selling books and showing movies.

63. 452 U.S. 61 (1981).

"significantly limit[ ]" speech.[64] The zoning ordinance in question prohibited live entertainment anywhere in the city.[65] Reasoning that the prohibition constituted a prior restraint of speech, rather than a time, place, and manner restriction, the Court declined to follow *American Mini Theatres* and struck down the ordinance.[66]

The Court's decision to treat the ordinance as a complete prohibition of speech, and its rejection of the characterization of the ordinance as a reasonable time, place, and manner restriction, warrant some discussion. Chief Justice Burger, in his dissent, characterized the ordinance as an attempt by the residents to "maintain their town as a placid, 'bedroom' community."[67] He argued that the ban was not, in effect, a complete prohibition because there were ample locations for live entertainment outside the borough limits.[68] The majority, however, rejected this argument, stating that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' "[69]

Significantly, the Mount Ephraim ordinance banned all live entertainment, not just adult entertainment. Therefore, the Court could not rely on the argument that the speech activity being regulated had little value. This difference may explain why the Court was unwilling to accept Chief Justice Burger's argument that the ordinance was a reasonable time, place, and manner restriction.[70]

Critics of the intermediate standard of review for adult-use zoning ordinances welcomed *Schad* as an indication that the Court remained committed to strict review of speech restrictions.[71] Lower federal courts

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64. *Id.* at 71.

65. *Id.* at 65.

66. *Id.* at 74-76.

67. *Id.* at 85 (Burger, C.J., dissenting).

68. *Id.* at 87 (Burger, C.J., dissenting).

69. *Id.* at 76-77 (quoting Schneider v. State, 308 U.S. 147, 163 (1939)). The Court's reliance on *Schneider* is ironic, considering that the case involved a time, place, and manner restriction, not a complete prohibition.

70. Chief Justice Burger supported his argument by emphasizing that the issue in the immediate case was the use of the ordinance to ban an adult bookstore. "When, and if, this ordinance is used to prevent a high school performance of 'The Sound of Music,' . . . the Court can deal with that problem." *Schad,* 452 U.S. at 86. This attempt to focus the majority's attention on the sexual nature of the speech seems solely strategic, because the nature of the speech should not be relevant to the question of whether the ordinance is a prohibition or a time, place, and manner restriction.

71. *See, e.g.,* Note, Schad v. Borough of Mt. Ephraim: *A Pyrrhic Victory for Freedom of Expression?,* 15 LOY. L.A.L. REV. 321, 350 (1982) [hereinafter Note, *Pyrrhic Victory*] (authored by Terrence King) (approving the *Schad* Court's delineation of a specific area of first amendment rights where the presumption of validity for zoning ordinances will not prevail); Note, Schad v. Borough of Mt. Ephraim: *First Amendment Restrictions on Local Zoning Powers,* 9 OHIO N.U.L. REV. 121, 129 (1982) (authored by Steven Dean) (noting that *Schad* reaffirmed the limited scope of *American Mini Theatres*).

provided further hope; few of them upheld adult-use zoning ordinances between 1976 and 1986.[72] State courts, on the other hand, frequently upheld adult-use zoning ordinances,[73] often applying a less rigorous standard of review than federal courts or concentrating on different issues.[74] In the midst of this confusion, the Supreme Court decided *City of Renton v. Playtime Theatres.*[75]

In *Renton,* the Court upheld an adult-use zoning ordinance similar to the Detroit ordinance upheld in *American Mini Theatres.*[76] This time, the Court's opinion, written by Justice Rehnquist, commanded a clear majority. Only Justices Brennan and Marshall dissented.[77] The Court held that adult-use ordinances should be treated as content-neutral, time, place, and manner restrictions, provided that they are designed primarily to combat the secondary effects of adult businesses and are not related to the suppression of speech.[78] As Justice Rehnquist framed the test, the ordinance is constitutional if it is narrowly tailored to serve a substantial

72. *See, e.g.,* Ebel v. City of Corona (*Ebel II*), 767 F.2d 635 (9th Cir. 1985) (ordinance held unconstitutional); Tovar v. Billmeyer, 721 F.2d 1260 (9th Cir. 1983) (summary judgment upholding ordinance reversed and remanded), *cert. denied,* 469 U.S. 872 (1984); CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983) (ordinance held unconstitutional); Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983) (ordinance held unconstitutional); Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) (reversing summary judgment upholding ordinance, and remanding); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982) (ordinance held unconstitutional); Avalon Cinema v. Thompson, 667 F.2d 659 (8th Cir. 1981) (ordinance held unconstitutional); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981) (ordinance held unconstitutional); Entertainment Concepts v. Maciejewski, 631 F.2d 497 (7th Cir. 1980) (upholding permanent injunction against enforcement of ordinance), *cert. denied,* 450 U.S. 919 (1981); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981) (ordinance held unconstitutional); Bayside Enter. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) (zoning restrictions in ordinance found unconstitutional). *But see* Genusa v. Peoria, 619 F.2d 1203 (7th Cir. 1980) (portion of ordinance imposing distance requirements on adult bookstores upheld).

73. *See, e.g.,* Book-Cellar, Inc. v. City of Phoenix, 150 Ariz. 42, 721 P.2d 1169 (1986) (ordinance upheld); People v. Nadeau, 182 Cal. App. 3d Supp. 1, 227 Cal. Rptr. 644 (1986) (ordinance upheld); Castner v. City of Oakland, 129 Cal. App. 3d 94, 180 Cal. Rptr. 682 (1982) (ordinance upheld); Walnut Properties v. Long Beach City Council, 100 Cal. App. 3d 1018, 161 Cal. Rptr. 411 (ordinance upheld), *cert. denied,* 449 U.S. 836 (1980); ATS Melbourne, Inc. v. City of Melbourne, 475 So. 2d 1257 (Fla. Dist. Ct. App. 1985) (ordinance upheld); City of Chicago v. Scandia Books, Inc., 102 Ill. App. 3d 292, 430 N.E.2d 14 (1981) (ordinance upheld); City of Indianapolis v. Cutshaw, 443 N.E.2d 853 (Ind. 1983) (appellate court reversed summary judgment striking down ordinance and remanded case); City of Minot v. Central Ave. News, 308 N.W.2d 851 (N.D.) (upholding zoning provisions of ordinance), *appeal dismissed,* 454 U.S. 1117 (1981); Olmos Realty v. State of Texas, 693 S.W.2d 711 (Tex. Ct. App. 1985) (ordinance upheld).

74. *See, e.g.,* Strand Property v. Municipal Court, 148 Cal. App. 3d 882, 200 Cal. Rptr. 47 (1983) (court focused on the adequacy of the definition of "adult theater"), *overruled by* People v. Superior Court., 49 Cal. 3d 14, 774 P.2d 769, 259 Cal. Rptr. 740 (1989); *Castner,* 129 Cal. App. 3d at 97, 180 Cal. Rptr. at 683-84 (court applied rational basis scrutiny); *Olmos Realty,* 693 S.W.2d at 714 (court applied rational basis scrutiny).

75. 475 U.S. 41 (1986).

76. *Id.* at 54-55.

77. *Id.* at 55. Justice Blackmun concurred in the result. *Id.*

78. *Id.* at 49.

government interest and allows for reasonable alternative avenues of communication.[79] It is worth noting that in addition to the secondary effects rationale, Justice Rehnquist relied on Justice Stevens' language in *American Mini Theatres* that suggested that sexual speech is less valuable than political speech.[80]

The decision also discussed a number of issues related to the correct application of the test. First, Justice Rehnquist considered the rule, applied by some lower courts, that an ordinance is invalid if a desire to suppress speech was a motivating factor in its enactment.[81] He affirmed the relevance of the government's motive, but held that the desire to suppress speech will not render an ordinance unconstitutional unless it was the government's *primary* motive for enacting the ordinance.[82] This holding made clear that the purpose of inquiring into the government's motive is to ensure that an ordinance is justified without reference to the content of the speech; the purpose is not to open unrestrained debate on legislative motive.[83]

Second, the Court relaxed the burden on the city to provide a record to support its zoning scheme. It held that the city could use data from similar cities to justify regulating adult uses, provided it reasonably believed the data was relevant to the city's problems.[84] This holding responded to a series of cases striking down ordinances because the city had failed to provide evidence of neighborhood deterioration.[85] The Court did not disapprove these cases, however. Justice Rehnquist merely concluded that a city need not await deterioration in order to act.[86] He did not reject the argument that the city must provide some empirical basis that the presence of adult businesses will have deleterious effects.[87]

79. *Id.* at 50.

80. *Id.* at 49 n.2 (" '[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .' ") (quoting *American Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality opinion)).

81. *Id.* at 47 (citing Tovar v. Billmeyer, 721 F.2d 1260, 1266 (9th Cir. 1983), *cert. denied*, 469 U.S. 872 (1984)); *see also* Ebel v. City of Corona (*Ebel I*), 698 F.2d 390, 393 (9th Cir. 1983); Kuzinich v. Santa Clara, 689 F.2d 1345, 1348-49 (9th Cir. 1982). As these cases illustrate, the Ninth Circuit was the primary architect of this rule.

82. *Renton*, 475 U.S. at 48 (holding that the district court's finding that the city's predominant intent was unrelated to suppression of speech is sufficient to sustain the ordinance).

83. *Id.* (discussing the "familiar principle" that the Court should avoid the "guesswork" involved in an extensive inquiry into legislative motives) (quoting United States v. O'Brien, 391 U.S. 367, 383-84 (1968)).

84. *Id.* at 51-52.

85. *See, e.g.*, Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir. 1981); Ellwest Stereo Theatres v. Byrd, 472 F. Supp. 702, 706-07 (N.D. Tex. 1979); E&B Enter. v. City of Univ. Park, 449 F. Supp. 695, 696-97 (N.D. Tex. 1977).

86. This argument was first articulated in Genusa v. City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980).

87. Lower courts generally have required such an empirical basis. *See, e.g.*, cases cited *supra* note 85; Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661 (8th Cir. 1981) (emphasizing the

Finally, in evaluating the adequacy of the alternative locations for adult businesses, Justice Rehnquist rejected the argument accepted by many lower courts[88] that the city must prove that the locations available to adult businesses are commercially viable.[89] Reasoning that owners of adult businesses must fend for themselves in the real estate market, the Court held that the available sites must be suitable for a commercial enterprise, but need not be available "at bargain prices."[90]

Renton was a leading case on the power of cities to regulate speech activities. The Court's goal was to strike a balance between the desire to allow cities some flexibility in regulating adult businesses and the fear of censorship. The Court was ambivalent about sexual speech, and thus borrowed intermediate scrutiny from the content-neutral, time, place, and manner cases. The Court's choice of intermediate scrutiny is consistent with its tendency to give more deference to traditional exercises of the police power.

The next Section first evaluates the most serious criticism of the *Renton* test: that it should not be applied to adult-use zoning ordinances because they are not content-neutral. Second, this Section offers a justification for intermediate scrutiny of these regulations that rests on neither the fiction of content-neutrality nor on the premise that sexual speech is low value.

II
A RATIONALE FOR *RENTON*

A. A Critical Analysis of Intermediate Scrutiny

Before delving into the application of intermediate scrutiny to adult-use zoning ordinances, we should examine what intermediate scrutiny is and how it works. The elements of intermediate scrutiny have not been defined consistently.[91] An unclear formulation inevitably leads to inconsistent application and obscures the underlying rationale for the test itself. Therefore, this Section will develop a clear and consistent formulation of intermediate scrutiny. The importance of developing such a clear formulation will be apparent in Part III, when we examine the

need for some empirical basis for the ordinance); *see also* Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987) (interpreting *Renton* to require "more than a rational relationship" between the ordinance and the government interest), *cert. denied*, 484 U.S. 1059 (1988).

88. *See, e.g.*, Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1216-17 (N.D. Ga. 1981) (evaluating the commercial viability of available sites); *cf.* Basiardanes v. City of Galveston, 682 F.2d 1203, 1213-14 (5th Cir. 1982) (reviewing only the suitability, not the financial feasibility, of available sites).

89. *Renton*, 475 U.S. at 53-54.

90. *Id.*; *see infra* notes 156-57 and accompanying text (critiquing this holding).

91. *See infra* text accompanying notes 93-96.

courts' application of the *Renton* test.[92]

The proper formulation of intermediate scrutiny is the subject of extensive debate.[93] The confusion among commentators stems in part from the inconsistent application of intermediate scrutiny, but it is also largely due to the Court's failure to settle on one formulation of the test.

Despite the variety of formulations, however, we can identify the elements of intermediate review. Professor Stone identifies the two most common formulations of intermediate scrutiny, the *Renton* test and the *O'Brien* test.[94] The test articulated in *United States v. O'Brien*[95] contains four parts. Under this formulation, a speech regulation is constitutional if: (1) it is within the government's constitutional power; (2) it furthers a substantial government interest; (3) that interest is unrelated to the suppression of speech; and (4) the incidental restriction is no greater than is essential to achieve the government's interest.[96]

The *Renton* test is virtually identical. Under *Renton*, the regulation must be: (1) unrelated to the suppression of speech; (2) narrowly tailored to serve a substantial government interest; and (3) it must leave open adequate alternative means of communication.[97] In many adult-use zoning cases, the courts used both formulations, invariably reaching the same conclusion under each one.[98] The key elements of intermediate scrutiny are present in both tests: an inquiry into the government's motive, an evaluation of the importance of the government's ends, and an analysis of the means. The *Renton* test adds one more element: an inquiry into the adequacy of alternative avenues of communication.

92. *See infra* text accompanying notes 172-265.

93. *See, e.g.*, L. TRIBE, *supra* note 7, § 12-2 (characterizing intermediate scrutiny as a straightforward ad hoc balancing test, weighing the government's interest against the burden imposed on the speech activity in each particular case); Stone, *supra* note 7, at 52-53 (identifying two specific types of intermediate scrutiny termed "deferential review" and "intermediate review"); Emerson, *supra* note 52, at 448-49 (describing intermediate scrutiny as ad hoc balancing).

94. Stone, *supra* note 7, at 49. Stone misstates the *Renton* test, omitting the "narrowly tailored" prong, but accurately quotes the *O'Brien* test. He does not consider these tests to be intermediate scrutiny. Rather, he regards them as formulations of deferential review. *Id.* at 51-52.

95. 391 U.S. 367 (1968).

96. *Id.* at 377.

97. City of Renton v. Playtime Theatres, 475 U.S. 41, 50, 52 (1976); *cf.* Stein, *Regulation of Adult Businesses Through Zoning After* Renton, 18 PAC. L.J. 351, 364-67 (1987) (arguing that the *O'Brien* test requires more searching review of the government's interest and the means chosen to effect it than does the *Renton* test).

98. Young v. American Mini Theatres, 427 U.S. 50, 80-82 (1976) (Powell, J., concurring); Hart Book Stores v. Edmisten, 612 F.2d 821, 825 (4th Cir. 1979) (noting that the ordinance is valid under either analysis), *cert. denied*, 447 U.S. 929 (1980); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1223-27 (N.D. Ga. 1981) (concluding that the ordinance violates the first amendment under the *Renton* formulation and violates equal protection under the *O'Brien* test); Kaear, Inc. v. Zoning Hearing Bd. of Allentown, 432 A.2d 310, 313-15 (Pa. Commw. Ct. 1981) (concluding that the ordinance was valid under both Justice Stevens' analysis in *American Mini Theatres* and the *O'Brien* test).

Such an inquiry, however, is implicit in *O'Brien*'s requirement that the restriction be no greater than is essential to achieve the government's end. If the means are no greater than essential, they should leave open alternative avenues of communication. These elements form the core of intermediate scrutiny.

A frequent criticism of intermediate scrutiny is that it is indistinguishable from rational basis review.[99] But this view is simply not supported by the adult-use zoning cases. At least eleven of the ordinances reviewed under the *Renton* test in the past thirteen years were struck down.[100] This is hardly the result one would expect if intermediate scrutiny were as deferential as rational basis review.

The argument that the *Renton* test is no more demanding than rational basis scrutiny usually begins with the observation that the inquiry into whether the government's interest is "substantial" is meaningless. Professor Redish, for example, asserts that "it is practically inconceivable that an asserted governmental purpose will not qualify."[101] The cases suggest otherwise. Adult-use zoning ordinances are justified because they are necessary to protect neighborhoods from urban decay. In *American Mini Theatres,* the Court considered extensive evidence that the city suffered from urban decay. Among the evidence presented was testimony from real estate agents and studies of the effects of adult uses on a neighborhood.[102] Lower courts read *American Mini Theatres* as establishing a high evidentiary standard, and, as a result, struck down ordinances whenever a city failed to demonstrate that urban blight was a serious problem.[103] *Renton* relaxed the city's burden of proving a

99. *See, e.g.,* Ely, *supra* note 52, at 1484-85 (indicating that *O'Brien* requires "only that there be no less restrictive alternative capable of serving the state's interest *as efficiently as it is served by the regulation under attack*") (emphasis in original); Emerson, *supra* note 52, at 451 (asserting that the Court in *American Mini Theatres* "balanced merely to the extent of finding that 'the record disclosed a factual basis' for the government's decision") (quoting *American Mini Theatres,* 427 U.S. at 71 (plurality opinion)); Redish, *supra* note 7, at 127 ("Under [the *O'Brien*] conditions, it is practically inconceivable that an asserted governmental purpose will not qualify."); Stone, *supra* note 7, at 51 (the Court's test "purport[s] to require that the challenged restriction be 'no greater than is essential to the furtherance' of the governmental interest.").

100. *See supra* note 72 (collecting cases).

101. Redish, *supra* note 7, at 127; *see also* Ely, *supra* note 52, at 1484-85 (stating that any governmental interest, with the exception of "gratuitous inhibition of expression," would survive the *O'Brien* test); Stone, *supra* note 7, at 51 (stating that "the Court defines the governmental interest at the broadest possible level and then invariably terms any legitimate governmental interest 'substantial' ").

102. *American Mini Theatres,* 427 U.S. at 55.

103. Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir.) (finding no support for the city's assertion that the zoning ordinance was designed to prevent urban blight), *cert. denied,* 484 U.S. 1059 (1987); CLR Corp. v. Henline, 702 F.2d 637, 639 (6th Cir. 1983) (finding that the city failed to show that the ordinance was enacted to prevent urban blight); Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1348 (9th Cir. 1982) (finding insufficient evidence that the ordinance was designed to serve a legitimate government interest).

"substantial" interest, but only marginally. The *Renton* Court held that the city may use studies from other cities, but the Court still required detailed findings, supported by substantial evidence in the city's record, of the adverse effects of adult uses.[104] This inquiry, then, is far from meaningless.

Similarly, the frequent criticism that the means analysis has no more bite than rational basis review finds no support in the cases. The *Renton* test requires that the means be "narrowly tailored" to serve the government's interest.[105] Similarly, under the *O'Brien* formulation, the restriction on first amendment rights must be "no greater than is essential to the furtherance of that interest."[106] This is precisely the same inquiry required by strict scrutiny. While it is not conducted as rigorously as it is in a strict scrutiny analysis, it does require the court to examine whether the means chosen are likely to achieve the government's goal without unnecessarily burdening speech.[107]

Professor Stone points out that, in fact, the Court never undertakes the means analysis.[108] His point is well taken, if overstated. In some adult-use zoning cases, the courts have struck down ordinances that were not "narrowly tailored" to prevent urban decay.[109] In others, the courts never reached the question, striking down the ordinance on other grounds.[110] Even if the means analysis is frequently overlooked, however, this is a problem of inconsistent application rather than a weakness in the test itself.

Intermediate scrutiny also differs significantly from strict scrutiny.

104. *Renton,* 475 U.S. at 51-52; *see also Christy,* 824 F.2d at 493 (holding that the city must prove that there is more than a rational relationship between the ordinance and the government's interest).

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

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

107. Under intermediate scrutiny, the means analysis does not require that the city choose the "least restrictive alternative." *See* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757 (1989) (asserting that time, place, and manner analysis has never involved a "least intrusive means" analysis). While it abandoned the least restrictive means analysis, the *Ward* Court reaffirmed that the means chosen may not burden speech more than necessary to achieve the government's goals. *Id.* at 2758. For a more extended discussion of *Ward,* see *infra* note 112.

108. Stone, *supra* note 7, at 51.

109. *See, e.g.,* Basiardanes v. Galveston, 682 F.2d 1203, 1216-17 (5th Cir. 1982) (ordinance was not narrowly drawn); Ebel v. City of Corona (*Ebel II*), 767 F.2d 635, 638 (9th Cir. 1985) (finding that the ordinance was more restrictive than necessary to protect the city's interest); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1225-26 (N.D. Ga. 1981) (finding that there was not a very close fit between the state's interest and the means chosen to effect it).

110. Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987) (finding ordinance was not designed to serve a substantial government interest); CLR Corp. v. Henline, 702 F.2d 637, 639 (6th Cir. 1983) (striking down the ordinance because the city failed to show a compelling government interest); Alexander v. City of Minneapolis, 698 F.2d 936, 938 (8th Cir. 1983) (finding the ordinance too restrictive); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir. 1981) (striking down the ordinance because it effectively banned adult theaters and was unsupported by factual evidence).

First, strict scrutiny requires that the regulation be the least restrictive alternative, while intermediate scrutiny allows a regulation to be upheld as long as there are other avenues of communication.[111] If the regulation is not the least restrictive possible but does leave adequate alternate avenues open, it will be upheld.[112] Intermediate scrutiny thus allows a city to eliminate some fora completely as long as others are available. This flexibility is essential for cities, which have a limited amount of space and must accommodate non-speech-related values in allocating that space.

Second, intermediate scrutiny requires only a "substantial" government interest, in contrast to the "compelling" interest required by strict scrutiny.[113] The distinction between "substantial" and "compelling" is particularly appropriate in the context of land use laws.[114] A city regulates land use to protect property values and to protect the quality of life.[115] The state's purposes in zoning adult uses relate to economics

111. *Compare* Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980) (means chosen to serve the government's interest must do so "without unnecessarily interfering with First Amendment freedoms") *with Renton,* 475 U.S. at 50 (the means must serve a substantial government interest and allow for "reasonable alternative avenues of communication").

112. *See* Ward v. Rock Against Racism, 109 S. Ct. 2746, 2757-58 (1989) (holding that legitimate time, place, and manner regulations "need not be the least-restrictive or least-intrusive means" of serving the government's legimate interests); L. TRIBE, *supra* note 7, § 12-23 (arguing that content-neutral regulations are invalid if they leave "too little access to channels of communication"); Emerson, *supra* note 52, at 454 (suggesting that balancing analysis is beginning to undermine the traditional view that the existence of alternative channels of communication does not justify a restriction on speech). The least restrictive means analysis is generally impossible to satisfy, because an imaginative court can always come up with a less restrictive alternative. *Ward,* 109 S. Ct. at 2757. The least restrictive means analysis, however, is still a valuable method of determining whether the government is acting out of an improper motive.

Moreover, the Court's alternative means of communication analysis also has inherent drawbacks. Often, the means of expression are closely related to the message. Forcing the speaker to seek out alternative means of communication could effectively suppress the message. This danger, however, is not present in the adult-use zoning cases. In these cases, the Court has translated "alternative means" into "alternative locations," requiring that the city leave available an adequate number of sites for adult businesses to operate. *See infra* text accompanying notes 187-204. The location of adult businesses is irrelevant to the speech activity, so long as the public has access to it. Therefore, ensuring that adult businesses have alternative avenues of communication will adequately prevent state censorship.

113. The *American Mini Theatres* Court did not use the terms "substantial" or "compelling" in evaluating the city's interest. *American Mini Theatres,* 427 U.S. at 71 (referring simply to the "city's interest"). In many decisions preceding *Renton,* courts looked for a "compelling" interest. *See, e.g.,* Tovar v. Billmeyer, 721 F.2d 1260, 1264 (9th Cir. 1983) (holding that adult-use zoning ordinances are subject to strict scrutiny); *CLR Corp.,* 702 F.2d at 639 (holding that the city failed to show a compelling government interest).

114. The Court has had difficulty distinguishing between "substantial" and "compelling" interests. *See* Redish, *supra* note 7, at 127 (criticizing the *O'Brien* test as failing to clarify what a "substantial" government interest is); *see also* Quadres, *Content-Neutral Public Forum Regulation: The Rise of the Aesthetic State Interest, The Fall of Judicial Scrutiny,* 37 HASTINGS L.J. 439, 453 (1986) (noting that the Court has had difficulty distinguishing legitimate from substantial state interests).

115. *See, e.g., Purple Onion,* 511 F. Supp. at 1226 (noting that the zoning ordinance in question was intended to avoid "blight" and reduce noise and traffic congestion).

(protecting property prices), aesthetics (preventing urban blight), and regulatory efficiency (preventing sex-related crimes such as prostitution efficiently).[116] These are probably not compelling interests; they have never been adequate to sustain statutes infringing fundamental rights, such as the right to travel or vote.[117] But we consistently recognize that aesthetics and quality of life have some importance.[118] The *Renton* test allows us to recognize the importance of these values without overvaluing them by characterizing them as "compelling."

Thus, intermediate scrutiny reduces a city's burden to justify its regulation and allows a court to consider the availability of other fora. It retains the means analysis, albeit a less rigorous one, and focuses on the government's motivation as a central element of the analysis. The test strikes a fairly even balance between the need for land-use regulation and the need to protect speech. With this formulation in mind, we may now turn to the most serious criticism of *Renton*: that adult-use zoning ordinances should not be subjected to intermediate scrutiny because they are not content-neutral restrictions.

B. *Applying Intermediate Scrutiny to Adult-Use Zoning Ordinances*

Intermediate scrutiny of genuine content-neutral, time, place, and manner restrictions is relatively easy to justify within the existing framework of first amendment theory. Because time, place, and manner restrictions impose a lesser burden on speech than complete prohibitions, they may properly be justified by a less compelling government interest. Relaxed scrutiny ensures that time, place, and manner restrictions essential to the orderly functioning of society will not fall victim to a court that risks being overzealous in its protection of civil liberties.[119] This

116. *See American Mini Theatres*, 427 U.S. at 54-55 (discussing how the concentration of adult-use businesses adversely impacts neighborhoods: it attracts transients, adversely affects property values, and causes increases in crime); Marcus, *supra* note 21, at 35 (arguing that the city's interests are often aesthetic). Some courts reviewing adult-use zoning ordinances have considered the protection of community morals a legitimate state interest. Ebel v. City of Corona (*Ebel II*), 767 F.2d 635, 638 (9th Cir. 1985). This purpose, while it may support general exercises of the police power, can hardly be considered substantial. The Supreme Court has never endorsed this interest as substantial, and in *American Mini Theatres* and *Renton* the Court referred only to the city's interest in preventing urban blight and crime. *American Mini Theatres*, 427 U.S. at 54-55; *Renton*, 475 U.S. at 50.

117. *See* Oregon v. Mitchell, 400 U.S. 112, 238-39 (1970) (Brennan, J., concurring) (administrative efficiency insufficient to sustain statute restricting voting rights); Shapiro v. Thompson, 394 U.S. 618, 637-38 (1969) (encouragement of employment inadequate to sustain statute restricting right to travel).

118. *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (it is well-settled that the state may exercise its power to advance aesthetic values); Berman v. Parker, 348 U.S. 26, 32-33 (1954) (emphasizing the importance of aesthetic values to the quality of life). *But see* Quadres, *supra* note 114, at 463-68 (criticizing the elevation of aesthetics and quality of life values to "substantial" state interests).

119. *See* Quadres, *supra* note 114, at 453 (heightened scrutiny would probably invalidate most

reasoning, however, applies only to content-neutral restrictions. Content-based restrictions must be examined more closely because they pose the risk of either intentional or fortuitous censorship.[120]

The difficulty in applying intermediate scrutiny to adult-use zoning ordinances is that, notwithstanding the Court's language,[121] they are not content-neutral. They restrict speech activities only when the content of the speech is pornography.

1. *The Supreme Court's Justifications*

The Court has offered three justifications for subjecting adult-use zoning restrictions to intermediate scrutiny. The first is that sexual speech is less worthy of protection than political speech,[122] and this reasoning seems to animate the *American Mini Theatres* and *Renton* decisions.[123] It has some doctrinal support,[124] but ultimately we must reject it. The purpose of the first amendment is to protect speech that promulgates ideas and contributes to rational discourse.[125] Obscene speech may be regulated because the Court has determined that it does not serve these ends.[126] In contrast, nonobscene sexual speech, by definition, has some social value which places it under the protection of the first

forum regulations promoting purely aesthetic ends); Stone, *supra* note 7, at 75 ("Many content-neutral laws that could not satisfy the 'fortress' model's strict scrutiny are essential to the general well-being of society.").

120. *See supra* text accompanying notes 11-15; *see also* Stone, *supra* note 7, at 55-56. Stone's concern that the government may have an improper motive is equivalent to the intentional censorship concern, and his concern over distortion and communicative impact are equivalent to de facto censorship.

121. *Renton*, 475 U.S. at 49 (ordinances designed to combat the secondary effects of adult businesses "are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations"); *American Mini Theatres*, 427 U.S. at 70 (the government may distinguish between sexually oriented materials and other types of expression "without violating [its] paramount obligation of neutrality in its regulation of protected communication").

122. *American Mini Theatres*, 427 U.S. at 70.

123. *Renton*, 475 U.S. at 49 n.2 (quoting *American Mini Theatres*, 427 U.S. at 70).

124. *See supra* notes 27-37 and accompanying text (discussing Supreme Court opinions that treat sexual speech as low value). Sexual speech is not without its defenders, however. *See* Note, Young v. American Mini-Theaters, Inc.: *Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321, 358 (1977) (authored by Cynthia D. Stevenin) (criticizing the devaluation of sexual speech); *cf.* Note, *Pyrrhic Victory*, *supra* note 71, at 343 (criticizing *American Mini Theatres* for leaving the lingering inference that there may be varying levels of protection for various types of speech).

125. *Cf.* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 19-25 (1982) (exploring the question of whether "free and open discussion of ideas is the only rational way of achieving knowledge and discovering truth"). Schauer is skeptical that rational discourse leads to the discovery of truth. *Id.* He acknowledges, however, that this argument favoring freedom of speech presupposes a process of rational thinking, and that this argument weakens when rational thinking does not obtain. *Id.* at 30.

126. Miller v. California, 413 U.S. 15, 34-35 (1973) (obscenity demeans the first amendment goals of political debate and the free exchange of ideas); Roth v. United States, 354 U.S. 476, 484-85 (1957) (obscenity lacks social importance and is not essential to the exposition of ideas).

amendment.[127] The ideas it expresses may be harmful,[128] or may have little value, but the purpose of the first amendment is undermined if the government is allowed to determine the value of ideas.

The Court's occasional treatment of sexual speech as low value in other cases is deceptive. In *New York v. Ferber,*[129] for example, the Court created a class of sexual speech, child pornography, that falls outside the first amendment. It is clear, however, that the prohibition on distributing child pornography satisfied even the strictest scrutiny.[130] Justice White ultimately decided not that sexual speech has low value, but that the state's interest in protecting children outweighed the value of that speech.[131]

Similarly, in *FCC v. Pacifica Foundation,*[132] the Court offered the low-value theory as one justification for upholding the FCC's regulation of indecent speech on the radio. But the Court's reasoning ultimately turned on the FCC's responsibility for regulating the airwaves and the intrusive nature of the medium of radio.[133] It is a "captive audience" rationale, albeit possibly misapplied. In neither of these cases was it necessary for the Court to characterize sexual speech as less important than other categories of speech.

The scholarly support for the "low-value" rationale is similarly questionable. For example, Cass Sunstein has adopted this rationale to

127. Speech may convey ideas either explicitly or implicitly. Explicit discussion of ideas falls well within first amendment protection since it is aimed at the listener's rationality. Other types of speech, such as art and pornography, appeal to the listener's emotions and seem more remote from the central values of the first amendment. Nevertheless, such speech conveys ideas about the relationship between ourselves and the outside world. *See* J. BERGER, WAYS OF SEEING 8-9 (1972). As long as one's cognitive faculties are engaged, it is possible to think critically about such ideas. Only when the speech affects the listener on a completely noncognitive level, as some argue obscenity does, does rational reflection become impossible. First amendment values are not served by permitting such speech. But nonobscene pornography, having by definition some social value, does not communicate solely on a noncognitive level. *Cf.* Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein,* 1989 DUKE L.J. 420 (1989) (arguing that the assumption that pornography communicates on a "non-cognitive" level is based on an incoherent theory of cognition).

128. *See generally* MacKinnon, *supra* note 37 (discussing the harms generated by pornography).

129. 458 U.S. 747 (1982); *see supra* notes 35-37 and accompanying text (discussing the Court's reasoning in *Ferber*).

130. *Ferber,* 458 U.S. at 763-64 (Court viewed child pornography as an evil that "overwhelmingly outweighs the expressive interests, if any, at stake").

131. *Id.*; *see also* Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon,* 3 YALE L. & POL'Y REV. 130, 134-35 (1984) (pointing to *Ferber* as an example of the different rules the Court applies to regulations protecting children).

132. 438 U.S. 726, 743 (1978); *see supra* notes 31-34 and accompanying text (discussing the Court's reasoning in *Pacifica*).

133. *Pacifica Foundation,* 438 U.S. at 748-49. Justice Stevens argued that radio intrudes into a person's home and it is therefore more difficult to escape from than is offensive speech aired outside the home. In response to the argument that a person can turn off the radio, Justice Stevens stated that this is "like saying that the remedy for an assault is to run away after the first blow." *Id.* at 749. His reasoning is flawed, however. A streetcorner preacher may be just as offensive and just as difficult to avoid as a radio broadcast, but his activities are clearly protected by the first amendment.

justify a broader category of regulable sexual speech than the *Miller* standard allows.[134] He argues that the effect and intent of pornography are to produce sexual arousal, not to communicate ideas. Because its cognitive content is low, and it is not desigued to advance an ideology, he characterizes it as low value.[135] He goes on to acknowledge the argument of many feminist scholars that pornography represents an ideology of male dominance, but he concludes that first amendment protection should turn on the speaker's purpose and means of communicating the message, not on whether it contains an implicit ideology.[136]

The problem with Sunstein's reasoning is twofold. First, he defines "pornography" as depictions of women enjoying or deserving some form of physical abuse.[137] He therefore does not consider a vast portion of the market for sexually explicit materials.[138] This approach avoids a fundamental problem with classifying sexual speech as low value, namely, that the category is too broad and undefined for it to be evaluated in light of first amendment concerns.[139] Unfortunately, Sunstein's definition will not help us, since the businesses affected by adult-use zoning ordinances are unlikely to limit their trade to material depicting the subordination of women.

More importantly, Sunstein's reasoning that first amendment protection should turn on the speaker's purpose would require courts to

134. Sunstein, *supra* note 37, at 602-06.

135. *Id.* at 606-07.

136. *Id.* at 607 (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)).

137. *Id.* at 592.

138. A great deal of the pornography available in adult entertainment establishments is relatively tame. According to a report issued by the Attorney General, the predominant type of pornography can be characterized as degrading towards women (using an extremely broad definition of "degrading"), but nonviolent. THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 331, 334-35 (1986). One study found that the percentage of depictions of sexual violence in *Playboy* and *Penthouse* was around 5% in 1977. Malamuth & Spinner, *A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines*, 16 J. SEX RES. 226, 235 (1980). Later studies have detected a decrease in the amount of sexual violence in these magazines. *See* Linz, Penrod & Donnerstein, *The Attorney General's Commission on Pornography: The Gaps Between "Findings" and Facts*, 1987 AM. B. FOUND. RES. J. 713, 717 (citing data indicating a recent decrease in violent depictions of women in *Playboy* magazine).

139. Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 288-89 (1981) (noting that Justice Stevens' sexual speech category is ill-defined, and that this lack of definition led to the unfortunate *Pacifica* decision). This problem has been noted in other areas of first amendment jurisprudence. *See* Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 381-82 (1990) (authored by David F. McGowan). The author of that comment refers to the Court's commercial speech classification as a "talisman" it uses to avoid difficult first amendment issues. *Id.* at 402. Justice Stevens' sexual speech category in *American Mini Theatres* may similarly be seen as a talisman to avoid the difficult task of reconciling land-use values with the first amendment. *See also* Alexander, *Low Value Speech*, 83 NW. U.L. REV. 547, 552 n.19 (1989). Professor Alexander's article discusses in greater depth the difficulties inherent in creating a "low-value" class of speech. In particular, Alexander criticizes Sunstein's application of low-value theory.

evaluate the speaker's motivation, rather than the actual communicative value of the speech.[140] Motivation can never serve as a basis for classifying speech; it merely distinguishes classes of speakers.[141] If pornography does advance an ideology of male dominance or otherwise conveys messages about the relationship between sex and power,[142] it communicates ideas that are protected by the first amendment. In summary, the argument that sexual speech is less valuable than other types of speech will not support the Court's subjecting adult-use zoning ordinances to intermediate scrutiny.

The Court's second justification for subjecting adult-use zoning regulations to intermediate scrutiny is that they are directed only at the secondary effects of the speech. While this rationale is somewhat more palatable, it probably has no application outside the sphere of adult-use zoning law. Its flaw is that the distinction drawn between the harm that flows from the content of the speech and the secondary effects of that speech is a false one. The secondary effects addressed by adult-use zoning ordinances flow from the sexual content of the speech; the adult businesses would not have deleterious effects if they sold only chemistry textbooks.[143]

The *American Mini Theatres* Court, of course, was probably correct in determining that Detroit was interested not in suppressing pornography as such, but in revitalizing the inner city.[144] In fact, the ordinance also regulated a host of nonspeech activities that contribute to urban blight by attracting derelicts and criminals.[145] Given the unique relationship between adult-use businesses and urban blight, the secondary effects doctrine seems acceptable if restricted to adult-use zoning law. The danger is that the doctrine may be used to justify more and more creative and oppressive restrictions on speech in the name of protecting the qual-

140. *See* Comment, *supra* note 139, at 416 (noting that commercial speech is perceived to be less valuable and less important to the advancement of first amendment values). That author points out that first amendment values are furthered by speech regardless of the speaker's motive, and that emphasizing motive disregards the listener's interest. *Id.* at 416-29.

141. *Id.* at 400.

142. MacKinnon, *supra* note 37, at 326 (pornography "fuses the eroticization of dominance and submission with the social construction of male and female"); *see also* J. Berger, *supra* note 127, at 45-64 (images of women in art convey the idea of women as objects).

143. *See* Boos v. Barry, 485 U.S. 312, 316 (1988) (Brennan, J., concurring) (criticizing the secondary effects approach as based on a "fuzzy" and unworkable distinction); Stone, *supra* note 7, at 114-15 (criticizing the secondary effects doctrine as based on a constitutionally disfavored premise).

144. *American Mini Theatres,* 427 U.S. at 54-55.

145. *See supra* notes 2 & 38; *see also* Comment, *Regulating Adult Entertainment Establishments Under Conventional Zoning,* 19 URB. LAW. 125, 132-33 (1987) (authored by W.G. Roeseler) (examples of the deleterious effects of adult entertainment establishments may be found in every major American city).

ity of life.[146] This justification, therefore, has theoretical flaws as well as practical dangers.

Finally, Justice Stevens' opinion in *American Mini Theatres* suggests that while adult-use ordinances are content-based, they are viewpoint-neutral. As a result, they can be analyzed under a more relaxed standard.[147] Much scholarly literature supports the view that, because the central concern of the first amendment is censorship, a restriction that affects an entire subject without regard to a particular viewpoint should be treated as content-neutral.[148]

This position is difficult to defend. First, the characterization of adult-use restrictions as viewpoint-neutral is questionable.[149] More importantly, viewpoint-based restrictions are not the major concern in the realm of sexual speech, as they are in the realm of political speech. Restrictions on political speech are likely to be motivated by a desire to keep certain views from being aired. Restrictions on sexual speech, on the other hand, are likely to be motivated by a distaste for the entire subject, regardless of viewpoint. The perceived danger of sexual speech is not the view it espouses, but the words or symbols themselves. Our emotional reaction to sexual speech, like our reaction to the word "fuck," stems not from the idea it expresses, but from the violation of social taboos; it is a matter cultural effrontery.[150] There is a risk that this emotional reaction will motivate excessive government censorship of all discussion on the topic, regardless of the viewpoint expressed. Therefore, the Court should be more, rather then less, suspicious of subject-matter restrictions of sexual speech.[151]

146. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988) (rejecting exteusion of doctrine to include listener reactions as "secondary effects").

147. *American Mini Theatres*, 427 U.S. at 70; *see also* Redish, *supra* note 7, at 128 n.102 (discussing two Supreme Court decisions in which the Court applied a relaxed level of review to regulations it considered viewpoint-neutral).

148. *E.g.*, Farber, *supra* note 7, at 737.

149. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (Indianapolis ordinance banning erotic materials featuring the subordination of women characterized as "thought control"), *aff'd*, 475 U.S. 1001 (1986). Most adult-use zoning ordinances, in contrast to the infamous Indianapolis ordinance, are not directed toward a particular viewpoint.

150. *Cf.* West, *The Feminist-Conservative Anti-Pornography Coalition and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681. West accepts the argument that the harm pornography is thought to cause stems from its validation of "unconventional, non-reproductive, and unacceptable sexual relationships, values, lifestyles and techniques." *Id.* at 691. This argument sounds like post hoc justification, however. A pamphlet advocating uuconventional lifestyles and extolling the virtues of nonreproductive sex would hardly arouse the emotional reaction the average skin flick produces among the antipornography advocates.

151. The Court has rejected viewpoint-neutrality as a substitute for content-neutrality. Boos v. Barry, 485 U.S. 312, 319 (1988).

2. A Proposed Justification

To justify the application of intermediate scrutiny to adult-use zoning ordinances, we must return to the theoretical foundation of strict scrutiny. Strict scrutiny overprotects speech; it gives courts little opportunity to be influenced by their prejudices in the exercise of discretion.[152] This overprotection is justified where the restriction poses a danger of censorship, as most content-based restrictions do.[153] This Section argues that adult-use zoning ordinances are an unusual type of content-based restriction, because restricting the sale of merchandise to certain areas of the city is a particularly ineffective method of censorship. Therefore, the risk of censorship is relatively low, and intermediate scrutiny adequately guards against this risk.

Adult-use zoning ordinances place locational restrictions on adult businesses, and these restrictions may affect speech in three ways. First, the location may be critical to the impact of the message or may even change its meaning. For example, a group of homeless people sleeping on the steps of the White House sends a powerful message, which would be lost if the group were required to move to a public park. This concern is not implicated by adult-use zoning ordinances. The speech in question, sexually explicit books and movies, is unaffected by the location of the business.

Second, location restrictions may suppress speech by reducing the number of places the speech activity may take place. This concern, while admittedly present in adult-use zoning cases, is adequately addressed by the *Renton* test. *Renton* requires that a city leave adequate alternative locations for adult businesses.[154] The courts have applied this requirement rigorously to ensure that the ordinance does not have the effect of suppressing speech.[155] It must be noted, however, that the *Renton* Court's rejection of commercial viability as a factor in determining the availability of locations weakens the test's effectiveness.[156] Justice Rehnquist's argument that purveyors of adult material must fend for themselves in the real estate market overlooks an important fact; they are not on an equal footing with other buyers, because they are restricted to a limited area. Owners of available sites may create de facto censorship by refusing to sell to adult businesses, or by extracting extortionate prices. Courts should be aware of this danger in applying the *Renton* test.[157]

152. Stone, *supra* note 7, at 74 (characterizing strict scrutiny as based on a "fortress model" of judicial review).

153. *Id.* at 73-74.

154. *Renton*, 475 U.S. at 53-54.

155. *See infra* text accompanying notes 175-204.

156. *See supra* notes 88-90 and accompanying text.

157. Justicc Rehnquist's language in *Renton* is actually less definite than I have portrayed it. He noted that the court of appeals had rejected the trial court's findings that the available sites *were*

Finally, any state-imposed restriction of speech may inhibit speech by subjecting the speaker to punishment if he violates the restriction. Zoning ordinances generally do not pose this risk. They merely set up conditions under which an adult business may operate,[158] and the only consequence of failing to meet these conditions is denial of a use permit. Moreover, zoning ordinances, in general, contain clear, objective standards, much like building codes do.[159] Therefore, the owner of an adult business should have no difficulty determining whether he is in compliance with the regulation.

Opponents may argue further that, even if a restriction does not have the effect of censoring speech, the first amendment prohibits the government from imposing facially constitutional restrictions if they are based on an improper motive.[160] Adult-use zoning ordinances, because they are directed at speech that is particularly disfavored, are likely to arise out of an improper motive to suppress sexual speech. The *Renton* test, however, guards against this danger by requiring that the court investigate a city's motive in enacting an ordinance. In fact, courts have examined the government's motive extensively and effectively in several adnlt-use zoning cases.[161] In *Tovar v. Billmeyer,*[162] for example, the court found an illegitimate motive, relying on the testimony of the city's mayor that the primary purpose of the ordinance was to close down a

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commercially viable. *Renton,* 475 U.S. at 53 n.3. This may have contributed to his willingness to reject the commercial viability argument. He further acknowledged that, while the first amendment does not require the government to ensure that speech-related businesses will be able to obtain sites at bargain prices, the Court has cautioned against zoning regulatious that have the *effect* of restricting access to speech. *Id.* at 54.

158. One court noted that it is too early to be certain how sellers of pornography will react to these laws. Hart Book Stores v. Edmisten, 612 F.2d 821, 827 (4th Cir. 1979), *cert. denied,* 447 U.S. 929 (1980). In *Hart,* the Fourth Circuit reviewed an ordinance prohibiting a single building from housing more than one adult-use establishment. *Id.* at 822. The court noted that the ordinance in question appears to have had little effect on the overall availability of sexually explicit materials. *Id.* at 827.

Not only may an ordinance have little negative effect, but also it may, in fact, have a beneficial effect. An ordinance placing distance requirements on adult businesses might benefit existing businesses by protecting them from competition. *See* Genusa v. City of Peoria, 619 F.2d 1203, 1212 n.18 (7th Cir. 1980) (noting that the effect of an ordinance might be beneficial to existing adult businesses by giving them a competitive advantage over prospective adult business establishments).

159. The distance requirements are objective and stated explicitly. Identifying whether one's business is an "adult business" within the meaning of the ordinance does not appear to present signifieant difficulties. *See infra* notes 245-47 and accompanying text.

160. *Renton,* 475 U.S. at 48-49 (emphasizing that the government may not use speech regulations to suppress controversial views).

161. *See, e.g.,* cases cited *infra* text accompanying notes 162-70. The motivation analysis has become commonplace in some other arcas of constitutional law. *See* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (in the context of the establishment clause); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352 (1977) (commerce clause).

162. 721 F.2d 1260 (9th Cir. 1983).

specific adult theater.[163] The Court also reviewed the city's decisionmaking process, which included a meeting where the theater owner's application for a building permit was denied before he had even submitted the application.[164] In *Basiardanes v. Galveston,*[165] the court also found evidence of improper motive. The city of Galveston had enacted its ordinance just in time to prevent a particular adult theater from opening across from an opera house that was a major part of the city's redevelopment plan.[166] These cases demonstrate that courts have been conscientious in uncovering the true motive behind enactment of adult-use zoning ordinances.

The *Renton* decision relaxed the motive inquiry while at the same time affirming its importance. In *Renton,* the Court held that an adult-use ordinance will not be invalidated unless the city council's primary motive in enacting it was a desire to suppress speech.[167] The Court rejected the Ninth Circuit holding that an ordinance must be struck down if distaste for adult businesses was simply "a motivating factor" in enacting it.[168] The *Renton* Court emphasized that legislation will not be invalidated because of an "*alleged* illicit legislative motive."[169] The Court was reassured by the district court's finding that the "predominate intent" of the ordinance in that case was to prevent crime, protect the city's retail trade, guard property values, and generally protect and preserve the quality of urban life.[170] While *Renton* requires a stronger showing of illicit motive than the Ninth Circuit would, it does not relieve the court of the duty to examine that motive.

The limited scope of adult-use zoning ordinances prevents them from effectively censoring sexual speech, regardless of the community's desire to do so. Because these restrictions do not pose the same risk of censorship as most content-based restrictions, and because the *Renton* test adequately addresses the risks such restrictions do pose, it is unnecessary to subject them to strict scrutiny. Moreover, the importance of a

163. *Id.* at 1264.

164. *Id.* at 1265.

165. 682 F.2d 1203 (5th Cir. 1982).

166. *Id.* at 1208; *see also* Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1348 (9th Cir. 1982) (improper motive suggested by report identifying three adult businesses that were particularly objectionable); Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 662-63 (8th Cir. 1981) (suggestion of improper motive found in that ordinance was enacted as an emergency measure to prevent the opening of the town's first adult theater). *But see* L. TRIBE, *supra* note 7, § 12-6 (objecting to judicial scrutiny of motive).

167. *Renton,* 475 U.S. at 49.

168. *Id.* at 47.

169. *Id.* at 48 (emphasis added).

170. *Id.* The Court did not suggest that the results reached in the Ninth Circuit decisions were incorrect; in fact, in each decision by the Ninth Circuit resting on improper motive grounds, there was considerable evidence that the improper motive was the predominate one. The *Renton* holding does little more than refine the terminology.

city's interest, in comparison to the minimal burden a restriction imposes on speech, justifies a relaxed standard of review.

The *American Mini Theatres* ordinance probably would have failed under strict scrutiny, because Detroit did not offer any evidence that its novel solution would work.[171] It was an experiment, based on commonsense reasoning, that would be difficult to support with the scientific studies strict scrutiny requires. The Court's decision to apply intermediate scrutiny allowed the city freedom to experiment with new solutions for new and serious problems.

While intermediate scrutiny has a sound theoretical justification, it is incumbent upon us to evaluate whether the *Renton* test is justified in practice: that is, whether courts can apply it consistently and rigorously.

III
APPLYING THE *RENTON* TEST

Zoning restrictions are complex as they contain waivers, grandfather clauses, and a variety of definitions. Correct application of the *Renton* test requires careful attention to how these variables affect the underlying first amendment concerns. This Part demonstrates the analysis courts should apply in evaluating these ordinances. The analysis consists of an examination of the first amendment issues presented by three aspects of zoning adult uses: restricting the number of locations available to such establishments, terminating nonconforming uses, and defining "adult use."

A. Location Restrictions

All adult-use zoning ordinances limit the number of locations available to adult businesses. Some require adult businesses to scatter throughout the city,[172] while others cluster them in one location.[173] Under *Renton*, however, an ordinance may not limit access to adult entertainment unreasonably.[174] The courts are therefore left with the

171. Young v. American Mini Theatres, 427 U.S. 50, 71 (1976) (noting that the city must be given "a reasonable opportunity to experiment").

172. Ordinances like the one at issue in *American Mini Theatres* require adult uses to set up shop at least 1,000 feet from each other. *Id.* at 54. This has the effect of "scattering" adult uses, consistent with the ordinances' purpose: to prevent the formation of a "skid row." *Id.* at 54-55.

173. *See* Marcus, *supra* note 21, at 3 (Boston's zoning scheme limited adult uses to one area, the "Combat Zone"). The purpose of such ordinances is to concentrate the problems associated with adult businesses so that they affect a limited area of the city and can be more easily controlled. *Id.* One court expressed skepticism about the efficacy of this method of regulation. CLR Corp. v. Henline, 702 F.2d 637, 639 (6th Cir. 1983).

174. City of Renton v. Playtime Theatres, 475 U.S. 41, 50 (1986); *American Mini Theatres*, 427 U.S. at 71 n.35 (noting that the ordinance might be unconstitutional if it had "the effect of suppressing, or greatly restricting access to, lawful speech"); *see also CLR Corp.*, 702 F.2d at 639 (ordinance severely restricted free expression by leaving inadequate alternative locations);

unenviable task of deciding how much access is reasonable and how to determine whether a location is "available." A review of the case law reveals the extent to which the fear of government censorship colors the first amendment analysis.

1. *Effect on Adult Businesses*

The constitutionality of location restrictions depends on a factual finding of their effect on the adult business trade within the particular community.[175] But the first question in this inquiry is how to evaluate that effect: should a court look to the number of sites available to the owners of adult businesses, or to the customers' access to adult wares? Most courts have properly adopted the first approach, evaluating the amount of land available to the owner.

In *Renton,* the Supreme Court upheld restrictions that left 5% of the city's area (520 acres) open to adult businesses.[176] The Court offered no principle that might have guided its decision,[177] leaving the impression that 5% is to be a rule of thumb, subject to variation depending on other factors. Ordinances leaving less than 5% of a city's land open to adult businesses are generally considered too restrictive. For example, in *CLR Corp. v. Henline,* the Sixth Circuit struck down an ordinance leaving two to four sites open in a town of approximately twenty-five square miles.[178] Similarly, in *E&B Enterprises v. University Park,* a federal district court struck down an ordinance leaving available only two sites.[179] In *Walnut Properties v. City of Whittier,* the Ninth Circuit questioned whether an ordinance leaving at most 1.35% of the city open to adult businesses was constitutional.[180]

A few cities have suggested a second approach, the consideration of customer access to adult wares, as a suitable means for evaluating alternative locations. In *Christy v. City of Ann Arbor,*[181] the city argued that its ordinance would not significantly restrict access to adult wares because it applied only to businesses with inventories consisting of more

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Basiardanes v. Galveston, 682 F.2d 1203, 1214-15 (5th Cir. 1982) (if ordinance drastically impairs availability of locations, it must be evaluated under a more stringent standard); Bayside Enter. v. Carson, 450 F. Supp. 696, 700 n.5 (M.D. Fla. 1978) (it is crucial that the ordinance not restrict access, or else it must be treated as a prior restraint).

175. Ebel v. City of Corona (*Ebel II*), 767 F.2d 635, 638 (9th Cir. 1985); *Basiardanes,* 682 F.2d at 1214; *Bayside Enter.,* 450 F. Supp. at 702.

176. *Renton,* 475 U.S. at 53-54.

177. *Id.* at 53 (accepting the district court's finding that 520 acres was "ample").

178. 702 F.2d 637, 639 (6th Cir. 1983).

179. 449 F. Supp. 695, 697 (N.D. Tex. 1977).

180. 808 F.2d 1331, 1337 (9th Cir. 1986) (explicitly referring to the 5% figure in *Renton* to justify this conclusion), *cert. denied,* 109 S. Ct. 1640 (1989).

181. 824 F.2d 489 (6th Cir. 1987), *cert. denied,* 484 U.S. 1059 (1988).

than 20% of such merchandise.[182] Businesses could reduce their stock and thus avoid the location restriction.

Although the district court was apparently persuaded by the city's argument, the appellate court rejected it.[183] The court of appeals correctly recognized that such reasoning would allow the city to set arbitrary limits on the amount of adult material sold in bookstores, and would allow the city to condition the owner's right to speak in one way on his willingness to speak another way 80% of the time.[184] The first amendment prohibits such conditions.[185] Since this second approach is unconstitutional, the courts' inquiry properly begins with the first approach, which addresses the availability of sites to owners.[186]

2. *Availability of Alternative Locations*

Courts have recognized a wide variety of factors as relevant to the determination of the availability of alternative locations. In *Stanton v. Cox,*[187] a California Court of Appeal struck down an ordinance that left 5% of the city available to adult businesses, because that 5% included railroad rights of way and power line easements.[188] The court concluded that only six sites were actually available.[189] The difference between *Renton* and *Stanton* is critical: while *Renton* focuses on the amount of land that must be available to adult businesses, the *Stanton* decision rests on the principle that the land left open for these businesses must be suitable for that use.

Other courts also have recognized that a wide variety of factors are relevant to the determination of which sites are "available" as viable business locations. These factors usually are referred to collectively as whether the locations are "commercially viable."[190] For example, in *Basiardanes v. Galveston,* the court examined the practicality of the available sites as movie theater locations, finding that they were generally unsuitable locations for such use.[191] Similarly, the court in *Purple Onion,*

182. *Id.* at 492.

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* Alexander v. City of Minneapolis, 698 F.2d 936, 939 (8th Cir. 1983). The *Alexander* court offered a second justification for rejecting Ann Arbor's approach, noting that an adult business that reduces its stock of adult materials to less than 40% of its total inventory would face practical difficulties doing business. *But see* City of Minot v. Central Ave. News, 308 N.W.2d 851, 864 (N.D. 1981) (court emphasized access for buyers and sellers in general as the key element to the validity of zoning restrictions).

187. 207 Cal. App. 3d 1557, 255 Cal. Rptr. 682 (1989).

188. *Id.* at 1566, 255 Cal. Rptr. at 687.

189. *Id.*, 255 Cal. Rptr. at 687.

190. *See Renton,* 475 U.S. at 53 (noting the objection of respondent adult businesses to the ordinance's failure to supply "commercially viable" sites).

191. 682 F.2d 1203, 1214 (5th Cir. 1982).

Inc. v. Jackson[192] conducted an extensive inquiry into the characteristics of the available sites.[193] It found that of the 81 potential sites left open for adult businesses, only about 10 were actually commercially viable.[194] Many sites were unsuitable for retail use because they contained easements, were too small, were 20-30 feet below street level, were located in a flood plain or near noxious uses, or were not accessible to automobile traffic.[195] The court also considered whether the current owners were willing to sell to operators of adult businesses and whether the site was likely to become available in the foreseeable future.[196] The court concluded that the ordinance was too restrictive and struck it down.[197]

Renton, however, may have substantially altered the commercial viability inquiry. The Supreme Court explicitly rejected commercial viability as a proper consideration. In response to Playtime Theatres' objection that the alternative sites were already occupied,[198] the Court stated that simply because "[Playtime Theatres] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation."[199] The Court declined to follow the district court in *Purple Onion,* which accepted the argument that land could not be considered available if the current owners were not willing to sell it.[200] Instead, *Renton* established that the current owners' desire or reluctance to sell the sites that are technically available to adult businesses is irrelevant.[201]

On the other hand, the *Renton* Court *did* consider what it termed the "suitability" of alternative sites for a commercial enterprise.[202] It noted that the available land consisted of accessible real estate in all stages of development and criss-crossed by thoroughfares.[203] The available land did not consist of railway and power line easements, as was the case in *Stanton,* nor did it consist primarily of industrial areas, as in *Basiardanes.* The Court's analysis suggests that, while sites left open to adult businesses need not be currently available, they must be suitable for commercial enterprises.[204]

192. 511 F. Supp. 1207 (N.D. Ga. 1981).

193. *Id.* at 1216.

194. *Id.*

195. *Id.*

196. *Id.* at 1217.

197. *Id.* at 1225.

198. *Renton,* 475 U.S. at 53.

199. *Id.* at 54.

200. *Purple Onion,* 511 F. Supp. at 1217 (noting that many property owners of the available sites were unlikely to allow the land to be used for adult business purposes).

201. The effect and vitality of this holding is questionable. *See supra* notes 156-57 and accompanying text (criticizing the merits of this holding).

202. *Renton,* 475 U.S. at 53.

203. *Id.*

204. *See* Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987) (Brown, J., concurring

This line of cases provides an analytic framework for evaluating the degree of restrictiveness of a particular ordinance. A court should first evaluate the amount of land available for adult businesses. Then the court should evaluate the suitability of the land for a commercial enterprise, considering whether customers will have access to it and whether it is capable of being developed commercially. This simple inquiry, however, is complicated by additional provisions that may be present in a zoning ordinance, such as waiver or special use provisions.

3. *Relevance of Waiver or Special Use Provisions*

A waiver provision may allow adult businesses that are not in compliance with a zoning ordinance to continue to operate, subject to certain conditions. Some courts have taken the position that such a waiver provision permitting nonconforming uses, may save an otherwise overly restrictive ordinance.[205] Such waiver provisions can increase the amount of land available for adult uses, therefore making the ordinance somewhat less restrictive. This reasoning, unfortunately, overlooks the fact that the waiver is discretionary; it may not be granted and may, in fact, become a tool for censorship.

There are two types of waiver provisions, which differ in where they leave the discretion to grant a waiver: in some provisions, it is the permitting authority that has the discretion, and in others, it is the residents of the area. The first type is best illustrated in *Entertainment Concepts v. Maciejewski*,[206] a case involving a zoning ordinance that required adult theaters to obtain a special use permit.[207] The ordinance provided that a special use permit would be issued at the discretion of the Board of Trustees only after a public hearing.[208] The ordinance contained no guidelines indicating what the Board should consider in reviewing an application for a permit.[209] The court concluded that this system gave the Board of Trustees unbridled discretion to refuse permits,[210] and consequently, it struck down the ordinance as a violation of the first amendment.[211]

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in part and dissenting in part) (arguing that the ordinance does not severely restrict speech because the few sites available are commercially viable).

205. *See, e.g.*, Bayside Enter. v. Carson, 450 F. Supp. 696, 701 n.7 (M.D. Fla. 1978) (noting that the ordinance upheld in *American Mini Theatres* contained a waiver provision, unlike the ordinance struck down in this case).

206. 631 F.2d 497 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

207. *Id.* at 499.

208. *Id.* at 499, 505.

209. *Id.* at 505.

210. *Id.*

211. *Id.*; *see also* County of Cook v. World Wide News Agency, 98 Ill. App. 3d 1094, 1099, 424 N.E.2d 1173, 1177 (1981) (ordinance held invalid, in part, because it gave the county unbridled discretion to grant or deny a permit).

The ordinance in *Entertainment Concepts* was essentially a licensing statute in the guise of a zoning ordinance.[212] The crucial difference between a licensing statute and a zoning ordinance is the discretion vested in the permitting authority. Licenses may be denied on the basis of the permitting authority's distaste for the applicant's message, rather than a legitimate non-speech-related reason.[213] Any regulation that leaves the right to free speech as a discretionary matter carries the potential for government censorship.

Courts have guarded against the danger of censorship posed by discretionary licensing statutes by requiring such statutes to include extensive procedural safeguards.[214] For the same reasons, a zoning ordinance vesting discretion in the permitting authority should be subject to these safeguards. On the other hand, an *American Mini Theatres*-type zoning ordinance poses less risk of censorship, because the criteria for granting or denying a zoning permit are objective and nondiscretionary.[215] Therefore, it may be properly subjected to the more lenient *Renton* test, which merely requires an inquiry into the government's motive and the legitimacy of the government's purpose.[216]

Kacar, Inc. v. Allentown[217] illustrates the second type of waiver provision, which generally arises in the form of a special use provision. The ordinance in *Kacar* required adult businesses to be located in areas that were a specified distance from residential areas. However, it allowed them to locate near residential areas if they could obtain the approval of 51% of the residents.[218] The court upheld the ordinance, following a rather bizarre analysis. It concluded that the ordinance did not implicate the first amendment, in part because the ordinance did not prevent anyone from giving away adult material but rather merely precluded its sale.[219]

212. *See Entertainment Concepts,* 631 F.2d at 504 (comparing the special use procedure in question to the licensing procedure struck down in Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980)); *see also* City of Imperial Beach v. Escott, 115 Cal. App. 3d 134, 171 Cal. Rptr. 197 (1981) (evaluating adult-use ordinance as a licensing ordinance and subjecting it to strict scrutiny).

213. *See* Freedman v. Maryland, 380 U.S. 51, 57-58 (1965) (noting that a censor may be less responsive to the constitutionally protected interest in free expression).

214. The censor must bear the burden of proof, any prior restraint must be limited to preservation of the status quo, and a prompt final judicial determination must be assured. *Id.* at 58-59.

215. *See Entertainment Concepts,* 698 F.2d at 504-05 (comparing the ordinance at issue in this case, pursuant to which officials have absolute discretion to grant or deny a special use permit, with the ordinance at issue in *Genusa,* pursuant to which the issuance of a license was automatic); *Genusa,* 619 F.2d at 1212-13.

216. *See supra* text accompanying notes 152-71 (arguing that zoning ordinances affecting adult businesses pose a low risk of censorship).

217. 432 A.2d 310 (Pa. Commw. Ct. 1981).

218. *Id.* at 311-12.

219. *Id.* at 312-13.

Because the court did not analyze the restrictiveness of the ordinance, it overlooked the possibility that this ordinance presented the same problem as a licensing ordinance. Whether or not the ordinance left open adequate alternative locations as a matter of right, the ordinance ultimately conditioned the availability of any locations near residential areas on the approval of a majority of the residents. Like a licensing statute, therefore, the ordinance vested the residents (or at least 51% of them) with unbridled discretion to grant or deny a waiver. There was no guarantee that the residents would act out of legitimate motives, and there was no mechanism for reviewing their decision.

To guard against censorship prohibited by the first amendment, the courts must refuse to validate an ordinance that would otherwise be too restrictive merely because it contains a waiver. Such a provision only *appears* to make the ordinance less restrictive. In reality, there is neither assurance that a waiver will be provided nor a guarantee that a decision to grant or deny the waiver will be made on legitimate grounds.

B. Termination of Nonconforming Uses

Zoning ordinances commonly provide that existing businesses that do not conform to the ordinance's provisions may be terminated, usually after an amortization period.[220] In theory, such provisions should not invalidate an otherwise constitutional ordinance, but nevertheless, courts tend to be hostile towards termination provisions. The courts' treatment of amortization clauses reveals how lack of attention to the rationale underlying *Renton*—the risk of censorship—can lead to decisions at odds with the first amendment.

In *Ebel v. City of Corona (Ebel I)*,[221] the Ninth Circuit struck down a zoning ordinance similar to the one upheld in *American Mini Theatres.*[222] The *Ebel I* court distinguished the ordinance in question by pointing out that, unlike Detroit's ordinance, the *Ebel* ordinance contained an amortization clause.[223] In striking down the ordinance, the *Ebel I* court relied on a footnote in *American Mini Theatres* suggesting that the result in that case might have been different if the ordinance had affected the operations of existing businesses, rather than the locations of new ones.[224] The court also noted that Corona had only one adult

220. *See, e.g.*, Alexander v. City of Minneapolis, 698 F.2d 936, 937 (8th Cir. 1983) (ordinance provided that existing nonconforming uses must relocate within four years); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1027, 1212 (N.D. Ga. 1981) (describing amortization provision). *But see* Genusa v. City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980) (ordinance allowed existing nonconforming uses to continue).

221. 698 F.2d 390 (9th Cir. 1983).

222. *Id.* at 391.

223. *Id.* at 392.

224. *Id.* (discussing note 35 in *American Mini Theatres*, 427 U.S. 50, 71 n.35 (1976)).

business and concluded that the city's goal in enacting the ordinance was to close down that business.[225]

Similarly, in *Alexander v. City of Minneapolis,*[226] the Eighth Circuit struck down an adult-use ordinance providing for the termination of existing businesses.[227] The court found that the adult-use ordinance in question left only twelve sites available for the thirty-one to thirty-three adnlt businesses in the city.[228] The court did not inquire into the actual (rather than comparative) amount of land available, but nonetheless found this significant reduction in the number of adult businesses impermissible.[229] The court noted that the ordinance's effect on existing uses was "an important difference" between this ordinance and the one in *Young.*[230] Unlike the court in *Ebel I,* however, this court did not suggest that the motive behind the city's termination provision was to suppress speech.

In contrast to the *Ebel I* and *Alexander* decisions, in *City of Minot v. Central Avenue News,*[231] the state court upheld an ordinance containing an amortization clause.[232] Like the *Ebel I* court, the *Minot* court referred to the footnote in *American Mini Theatres* that suggested that an amortization clause could invalidate an otherwise acceptable ordinance.[233] But the *Minot* court interpreted the footnote to mean that the ordinance was valid as long as it merely affected the locations, and not the operations, of adult businesses.[234] Because the relevant inquiry was the extent to which the ordinance affected the operations of adult businesses, the amortization clause could not in itself render the ordinance invalid.

Adding to the doctrinal confusion are the frequent equal protection challenges to the amortization clauses. In *Northend Cinema v. City of Seattle,*[235] for instance, the court considered a claim that a ninety-day amortization provision in an adult-use ordinance violated the equal protection clause because no other nonconforming use was required to ter-

225. *Id.* at 393.
226. 698 F.2d 936 (8th Cir. 1983).
227. *Id.* at 937.
228. *Id.* at 938.
229. *Id.*
230. *Id.* at 937 n.4.
231. 308 N.W.2d 851 (N.D.), *appeal dismissed,* 454 U.S. 1117 (1981).
232. *Id.* at 855.
233. *Id.* at 865.
234. *Id.* The court interpreted the statement in *American Mini Theatres* as indicating that the Supreme Court was concerned with the location of the businesses only insofar as the location affected their operation. The *Minot* court concluded that the statement in *American Mini Theatres* "simply cannot be construed to stand for the proposition that a zoning ordinance such as the one in the instant case never may be applied retroactively." *Id.*
235. 90 Wash. 2d 709, 585 P.2d 1153 (1978), *cert. denied,* 441 U.S. 946 (1979).

minate.[236] Analyzing this claim under traditional land-use law, the court noted that the calculation of a reasonable termination period depends on the facts of the particular case, and therefore equal protection analysis does not apply.[237] The court thus did not consider the first amendment implications of the clause.

The courts' failure to explain the relevance of amortization clauses in cases such as *Alexander, Minot,* and *Northend Cinema* has led some to overestimate the importance of an amortization clause. The court in *Ebel v. City of Corona (Ebel II),*[238] for example, stated that "the presence of a grandparent clause may sustain an ordinance's constitutionality as applied where plaintiffs cannot otherwise show a significant effect on existing businesses."[239] This suggests that the converse would also be true: an ordinance that would provide adequate alternate locations for existing businesses may nevertheless be invalid if it does not grandfather nonconforming uses.

The courts' inconsistent treatment of amortization clauses results from inadequate understanding of the concerns animating the *Renton* test. Adult-use ordinances present a lesser risk of censorship than most content-based restrictions; thus, the court may apply intermediate scrutiny.[240] But the risk of censorship still exists, and courts must guard against it. Therefore, intermediate scrutiny will work properly only if the court analyzes the government's motive in depth. The motivation analysis is the primary guarantee that adult-use ordinances will not be used to censor speech.

The presence of an amortization clause is relevant to the motivation analysis, as the *Ebel I* decision illustrates. In *Ebel I,* the amortization provision supported the court's conclusion that the ordinance was intended to shut down one particular business.[241] But the presence or absence of an amortization clause is not relevant to whether the ordinance is too restrictive. Consistent with the reasoning underlying *Renton,* a court should determine whether an ordinance is too restrictive by examining the number of locations left available to adult businesses *as*

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236. *Id.* at 720, 585 P.2d at 1159.

237. *Id.*

238. 767 F.2d 635 (9th Cir. 1985).

239. *Id.* at 639. The court relied on Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980), for this proposition. *Genusa,* however, discussed the grandfather clause only insofar as it related to the plaintiffs' standing to raise the first amendment issue. *Genusa,* 619 F.2d at 1212 n.18; *see also* Purple Onion, Inc. v. Jackson, 511 F. Supp 1207, 1224 (N.D. Ga. 1981) (concluding that the amortization provision and tight zoning provisions made the ordinance too restrictive); Ellwest Stereo Theatres v. Byrd, 472 F. Supp. 702, 706-07 (N.D. Tex. 1979) (holding that the lack of a grandfather clause invalidated the ordinance).

240. *See supra* text accompanying notes 152-71.

241. Ebel v. City of Corona (*Ebel I*), 698 F.2d 390, 393 (9th Cir. 1983); *see supra* text accompanying note 225.

of right, excluding grandfathered businesses. If the court includes businesses that have been grandfathered in, the court may inadvertently sustain a highly restrictive ordinance; the grandfathered businesses may close down, and new adult businesses will not be allowed to take their places. Thus, the city will be left with substantially fewer such businesses than before the ordinance was enacted.[242]

On the other hand, an ordinance containing an amortization clause may not reduce the number of adult businesses in the city at all; it may merely require the existing businesses to relocate. In such a case, the amortization of existing businesses is clearly irrelevant to the court's analysis of the adequacy of alternative locations.

The courts' failure to analyze the relevance of amortization clauses properly illustrates the difficulties inherent in applying the broad principles outlined in the *Renton* test. Courts must consider an extensive body of facts, including the effect of waivers and amortization clauses on the operation of the ordinance. The courts have failed to refine their analysis sufficiently to be able to deal effectively with these variables. This difficulty surfaces again in the courts' consideration of the definition of "adult use."

C. *Defining "Adult Use"*

Application of the *Renton* test sinks from inconsistent to poor in evaluating an ordinance's definition of "adult use." The definition of "adult use" affects whether the ordinance satisfies the "narrowly tailored" prong of the *Renton* test.[243] To prove that an ordinance is narrowly tailored to combat the secondary effects of adult businesses,[244] a city must show that the regulated adult businesses actually cause these secondary effects. If the definition of "adult use" is too broad, the ordinance will restrict businesses which do not contribute to urban blight, and thus will not be narrowly tailored.

Courts usually avoid reaching the argument that the definition of "adult use" is too vague or overbroad by finding that the plaintiff lacks standing to challenge it.[245] A statute may not be challenged on overbreadth or vagueness grounds uuless it has a chilling effect on speech or

242. *See* Bayside Enter. v. Carson, 450 F. Supp. 696, 702 (M.D. Fla. 1981) (emphasizing the importance of preserving future access to the adult entertainment market).

243. *See supra* text accompanying note 105.

244. This is the proper inquiry. *Renton*, 475 U.S. at 52. Some courts overlook it. *See, e.g.*, Walnut Properties v. City of Whittier, 808 F.2d 1331, 1335 (9th Cir. 1986) (omitting the "narrowly tailored" language from its formulation of the *Renton* test); Northend Cinema v. City of Seattle, 90 Wash. 2d 709, 716 n.5, 585 P.2d 1153, 1157 n.5 (1978) (reasoning that because the ordinance does not place a substantial burden on speech, the city need not choose the least restrictive alternative).

245. *See, e.g.*, *American Mini Theatres*, 427 U.S. at 60-61.

its applicability to the plaintiff is a material issue in the case.[246] In most cases, because the business in question is admittedly an adult business, there is no question that the ordinance applies. Moreover, the Supreme Court has held that these ordinances do not presumptively chill speech.[247] Therefore, the definition of "adult business" generally evades review.

For a time, California courts were the exception to the rule. A series of California cases discussed the definition of "adult use" in depth. In *Pringle v. City of Covina*,[248] the California Court of Appeal was presented with a challenge to an adult-use zoning ordinance on vagueness and overbreadth grounds.[249] The ordinance defined an adult theater as one that is "*used* for presenting material *distinguished or characterized* by an *emphasis* on depicting or describing 'Specified Sexual Activities' or 'Specified Anatomical Areas.' "[250] The plaintiff's theater was not concededly an adult theater; it only occasionally showed films containing sexually explicit material.[251] Therefore, because the applicability of the ordinance was a material issue, the plaintiff had standing to raise the vagueness and overbreadth arguments.[252]

The court first considered the claim that the phrase "distinguished or characterized by an emphasis" on sexually explicit material was too vague. The court narrowly construed the phrase, holding that it did not apply to a film unless the predominant theme of the film was the depiction of sexual material.[253] This construction was consistent with the usual approach to vagueness and overbreadth challenges outside the adult-use zoning context.[254]

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246. *Id.* at 59; *see* Basiardanes v. City of Galveston, 682 F.2d 1203, 1210-12 (5th Cir. 1982); Genusa v. City of Peoria, 619 F.2d 1203, 1209 (7th Cir. 1980); *Northend Cinema,* 90 Wash. 2d at 715-16, 585 P.2d at 1157; *cf.* Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497, 503 (7th Cir. 1980) (plaintiff had standing to contest ordinance on vagueness grounds where the theater was not conceded to be an adult theater and plaintiff alleged that the ordinance had deterred him from engaging in speech activities), *cert. denied,* 450 U.S. 919 (1981). The Court in *American Mini Theatres* offered no rationale for its conclusion that adult-use ordinances do not chill speech. But one easily may be found in the observation that the owner of a business who crosses the line into adult entertainment may easily retreat by reducing his stock of pornographic material. There is unlikely to be any serious consequence from such an error. For a contrary view, see Note, *supra* note 4, at 1295 (predicting that the *American Mini Theatres* decision will lead to "a censorial nightmare for the *entire* motion picture industry") (emphasis in original).

247. *American Mini Theatres,* 427 U.S. at 62-63.

248. 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981).

249. *Id.* at 155, 171 Cal. Rptr. at 253.

250. *Id.,* 171 Cal. Rptr. at 252 (emphasis in original). This is essentially the same definition contained in the Detroit ordinance upheld in *American Mini Theatres.* 427 U.S. at 53 n.4.

251. *Pringle,* 115 Cal. App. 3d at 160, 171 Cal. Rptr. at 255.

252. *Id.,* 171 Cal. Rptr. at 255.

253. *Id.* at 160, 171 Cal. Rptr. at 256.

254. *See, e.g.,* Ward v. Illinois, 431 U.S. 767, 770-73 (1977); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 834 (4th Cir. 1979).

The *Pringle* court then analyzed the term "used for presenting sexually explicit material."[255] The court recognized the importance of the definition of "used" to the *Renton* analysis. It noted that, under one interpretation of "used" (the so-called "single-use" standard), the ordinance applied to theaters that only occasionally, or even once or twice, showed adult movies.[256] The court rejected this interpretation on the ground that such theaters do not present the same problems associated with adult-use theaters.[257] A single, isolated showing of an adult movie will not produce adverse effects destructive to the quality of urban life. The court instead opted to interpret the ordinance to apply to theaters that offer adult movies more than 50%, or a "preponderance," of the time.[258]

Later cases further refined the California analysis of the definition of "adult use." In *Kuhns v. Santa Cruz County Board of Supervisors,*[259] the appellate court upheld an ordinance defining adult bookstores as those with a "substantial and significant" portion of their stock devoted to sexually explicit material.[260] The court noted that the definition was vague but adopted the *Pringle* "preponderance" standard, holding that the ordinance applied only to bookstores whose stock consisted of more than 50% adult fare.[261] The court further indicated that the city could substitute its own standard, provided it supported its definition with evidence that the stores covered by the definition actually cause the problems the city is trying to prevent.[262]

Pringle and *Kuhns* established an analytic framework that would allow courts to subject a city's definition of "adult use" to the careful scrutiny called for by the *Renton* test—that is, a means analysis requiring that the ordinance be "narrowly tailored." Therefore, the California appellate court's approach, which creates a narrow definition of "adult use" and requires the city to justify its departure from that definition, was appropriate under *Renton.* It placed the burden on the city to justify the means chosen to combat urban decay. Unfortunately, the California Supreme Court has rejected this approach.

In *People v. Lucero,*[263] the California Supreme Court rejected the *Pringle* "preponderance" standard. Although the court agreed that a

255. *Pringle,* 115 Cal. App. 3d at 161, 171 Cal. Rptr. at 256.
256. *Id.,* 171 Cal. Rptr. at 256.
257. *Id.* at 161-62, 171 Cal. Rptr. at 256-57.
258. *Id.* at 162, 171 Cal. Rptr. at 257.
259. 128 Cal. App. 3d 369, 181 Cal. Rptr. 1 (1982), *overruled by* People v. Lucero, 49 Cal. 3d 14, 774 P.2d 769, 259 Cal. Rptr. 740 (1989); *see infra* notes 263-65 and accompanying text (discussing *Lucero*).
260. *Kuhns,* 128 Cal. App. 3d at 373, 181 Cal. Rptr. at 3.
261. *Id.* at 375, 181 Cal. Rptr. at 4-5.
262. *Id.,* 181 Cal. Rptr. at 4.
263. 49 Cal. 3d 14, 774 P.2d 769, 259 Cal. Rptr. 740 (1989).

"single use" standard is unconstitutional, it decided to adopt the less rigorous "regular and substantial" standard applied by the federal courts.[264] The court's reasoning is questionable. The *Lucero* court's first error was its interpretation of *Pringle*. *Pringle* did not hold that a city could not regulate businesses which did not have a preponderance of adult fare. Read with *Kuhns*, *Pringle* merely stands for the proposition that a city would have to justify its use of a broader definition of "adult use." This approach is entirely consistent with *Renton*'s requirement that a city justify the means chosen to effect its goal. The *Lucero* court's interpretation, on the other hand, is inconsistent with *Renton*. *Renton* requires that an ordinance be narrowly tailored. Consequently, a court cannot state that, as a rule, only businesses with a preponderance of adult fare cause the secondary effects of urban blight.

The *Lucero* court's second error was its adoption of a lesser standard, which effectively insulates an ordinance from review unless it adopts the "single use" standard. This decision is unsupported by any evidence that the "regular and substantial" standard is more appropriate than the "preponderance" standard.[265]

California's rejection of the *Pringle/Kuhns* approach was ill-advised and may substantially undermine the *Renton* test's efficacy in protecting speech.

CONCLUSION

The *Renton* test is appropriate for adult-use zoning ordinances because, although they are content-based speech restrictions, they present less danger of censorship than other content-based restrictions. Application of the test, however, raises considerable difficulties. Zoning restrictions come in a multiplicity of forms; they may contain waivers, grandfather clauses, and a variety of definitions. Correct application of the *Renton* test, therefore, requires a clear understanding of the first amendment issues implicated by adult-use ordinances. In the absence of this understanding, the test will fail to guard against censorship.

264. *Id.* at 26-27, 774 P.2d at 776-77, 259 Cal. Rptr. at 747-48. Thus, under this standard, the definition of "adult-use" will include businesses with a regular and substantial portion of stock devoted to sexually explicit materials.

265. *See id.* at 29, 774 P.2d at 779, 259 Cal. Rptr. at 750 (Mosk, J., dissenting). The *Lucero* court reasoned that *Pringle*'s high standard violated the spirit of the United States Supreme Court's decisions in *American Mini Theatres* and *Renton*, which "accord local government substantial discretion in defining the scope and nature of [regulations of adult entertainment establishments.]" *Id.* at 26, 774 P.2d at 776, 259 Cal. Rptr. at 747. This was apparently the basis of its rejection of *Pringle*. As discussed earlier, however, neither *American Mini Theatres* nor *Renton* granted local governments substantial discretion in choosing the means of regulating adult businesses. The *Renton* test requires that the means be narrowly tailored and, while later formulations reject the "least restrictive alternative" inquiry required by *O'Brien*, *see supra* notes 106-07 and accompanying text, the means inquiry in general has never been rejected.

This Comment demonstrates how courts should approach adult-use zoning ordinances, using the fear of censorship as a guide to resolving the difficult questions. For example, in evaluating the restrictiveness of the ordinance, the court should disregard waivers and grandfather clauses and consider only the amount of land available to businesses as of right. Such variables are relevant only insofar as they provide insight into the city's motive in enacting the ordinance. Furthermore, courts should give greater attention to the means analysis required by *Renton.* The analytic framework developed by the California courts provides an effective test of the adequacy of the city's chosen means, since it allows cities to regulate businesses that stock a preponderance of adult material, but requires the city to justify regulating businesses that do not meet this standard. Adoption of this approach will ensure that the *Renton* test will operate effectively to protect speech, but without unduly restricting the city's opportunities to experiment with this novel approach to combat urban decay.