AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

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City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002)

In 1977, the city of Los Angeles commissioned a study that found that adult businesses are associated with greater criminal activity in the surrounding area. The city responded by passing an ordinance barring adult businesses (including arcades, bookstores, theaters, motels or massage parlors) from being placed within 1,000 feet of another or within 500 feet of a church, school, or public park. In 1983, the city supplemented that ordinance by further prohibiting "the establishment or maintenance of more than one adult entertainment business in the same building," with "business" being defined by type of service or activity rather than by ownership or organization.

Alameda Books was an adult business operating within Los Angeles. It was in compliance with the 1978 ordinance, but it mixed a variety of services (e.g., sold sexually themed products and provided booths for viewing pornographic videotapes) within the same store. In 1995, Alameda Books was cited for operating both an adult bookstore and an adult arcade within the same building. Alameda sought an injunction from a federal district court on the grounds that the zoning ordinance violated the First Amendment. The court found in favor of Alameda, and the circuit court affirmed that decision. In a 5–4 decision, the U.S. Supreme Court reversed the lower courts and upheld the ordinance as constitutionally valid. The majority and dissenters disagreed over how much deference to show city officials when they adopt policies motivated by the content of protected speech.

JUSTICE O'CONNOR delivered the opinion of the Court,

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In *Renton v. Playtime Theatres* (1986), this Court considered the validity of a municipal ordinance that prohibited any adult movie theater from locating within 1,000 feet of any residential zone, family dwelling, church, park, or school. Our analysis of the ordinance proceeded in three steps. First, we found that the ordinance did not ban adult theaters altogether, but merely required that they be distanced from certain sensitive locations. The ordinance was properly analyzed, therefore, as a time, place, and manner regulation. We next considered whether the ordinance was content neutral or content based. If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny. We held, however, that the *Renton* ordinance was aimed not at the content of the films shown at adult theaters, but rather at the secondary effects of such theaters on the surrounding community, namely at crime rates, property values, and the quality of the city's neighborhoods. Therefore, the ordinance was deemed content neutral. Finally, given this finding, we stated that the ordinance would be upheld so long as the city of *Renton* showed that its ordinance was designed to serve a substantial government interest and that reasonable alternative avenues of communication remained available. We concluded that *Renton* had met this burden, and we upheld its ordinance.

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. . . It was therefore consistent with the findings of the 1977 study, and thus reasonable, for Los Angeles to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult

consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity. The assumption behind this theory is that having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity, much as minimalls and department stores similarly attract the crowds of consumers. Under this view, it is rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates.

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Respondents make the same logical error as the Court of Appeals when they suggest that the city's prohibition on multiuse establishments will raise crime rates in certain neighborhoods because it will force certain adult businesses to relocate to areas without any other adult businesses. Respondents' claim assumes that the 1977 study proves that all adult businesses, whether or not they are located near other adult businesses, generate crime. This is a plausible reading of the results from the 1977 study, but respondents do not demonstrate that it is a compelled reading. Nor do they provide evidence that refutes the city's interpretation of the study, under which the city's prohibition should on balance reduce crime. If this Court were nevertheless to accept respondents' speculation, it would effectively require that the city provide evidence that not only supports the claim that its ordinance serves an important government interest, but also does not provide support for any other approach to serve that interest.

In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest. . . . This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. . . .

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Our deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. One the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC* (1994). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech.

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Reversed.

JUSTICE SCALIA, concurring.

I join the plurality opinion because I think it represents a correct application of our jurisprudence concerning regulation of the "secondary effects" of pornographic speech. As I have said elsewhere, however, in a case such as this our First Amendment traditions make "secondary effects" analysis quite unnecessary. The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex. . . .

JUSTICE KENNEDY, concurring.

Speech can produce tangible consequences: It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary

effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect."

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In *Renton*, the Court determined that while the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not. The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside--that is, even if the measure is in that sense content based.

On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. . . . Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

A zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech. It is well documented that multiple adult businesses in close proximity may change the character of a neighborhood for the worse. Those same businesses spread across the city may not have the same deleterious effects. At least in theory, a dispersal ordinance causes these businesses to separate rather than to close, so negative externalities are diminished but speech is not.

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[Z]oning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

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. . . The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary effects. . . .

. . . If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. . . .

. . . The city may next infer--from its study and from its own experience--that two adult businesses under the same roof are no better than two next door. The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another. . . .

These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny. . . .

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

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This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation of expression. The variants of middle-tier tests cover a grab-bag of restrictive, statutes, with a corresponding variety of justifications. While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict, and zoning of businesses based on their sales of expressive adult material receives mid-level scrutiny, even though it raises a risk of content-based restriction. It is worth being clear, then, on how close to a content basis adult business zoning can get, and why the application of a middle-tier standard to zoning regulation of adult bookstores calls for particular care.

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Although this type of land-use restriction has even been called a variety of time, place, or manner regulation, equating a secondary-effects zoning regulation with a mere regulation of time, place, or manner jumps over an important difference between them. A restriction on loudspeakers has no obvious relationship to the substance of what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does. And while it may be true that an adult business is burdened only because of its secondary effects, it is clearly burdened only if its expressive products have adult content. Thus, the Court has recognized that this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said.

It would in fact make sense to give this kind of zoning regulation a First Amendment label of its own, and if we called it content correlated, we would not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses. The risk lies in the fact that when a law applies selectively only to speech of particular content, the more precisely the content is identified, the greater is the opportunity for government censorship. Adult speech refers not merely to sexually explicit content, but to speech reflecting a favorable view of being explicit about sex and a favorable view of the practices it depicts; a restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove.

This risk of viewpoint discrimination is subject to a relatively simple safeguard, however. If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations.

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The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. In this case, however, the government has not shown that bookstores containing viewing booths, isolated from other adult establishments, increase

crime or produce other negative secondary effects in surrounding neighborhoods, and we are thus left without substantial justification for viewing the city's First Amendment restriction as content correlated but not simply content based. By the same token, the city has failed to show any causal relationship between the breakup policy and elimination or regulation of secondary effects.

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[T]he city apparently assumes that a bookstore selling videos and providing viewing booths produces secondary effects of crime, and more crime than would result from having a single store without booths in one part of town and a video arcade in another. But the city neither says this in so many words nor proffers any evidence to support even the simple proposition that an otherwise lawfully located adult bookstore combined with video booths will produce any criminal effects. . . .

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