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CITY OF LOS ANGELES v. ALAMEDA: THE FRACTURED EVIDENCE
STANDARD FOR PROVING A SUBSTANTIAL GOVERNMENTAL INTEREST

Christopher A. Khatami

I. Introduction

Fractured cases make bad evidence law. In *City of Los Angeles v. Alameda*,¹ the United States Supreme Court achieved minor success in clarification. The *Alameda* Court’s plurality opinion created a more concrete analytic framework in which to view both parties’ evidence, but produced an opaque rule as to how a court should determine the sufficiency of that evidence.² *Alameda* generated more sophisticated evidence questions than it laid to rest in response to the inchoate reasonable-relevance standard established in *Renton* for proving a substantial governmental interest.³ A fractured *Alameda* opinion and unclear evidence rules created conflicting lower court interpretations, causing circuit courts to render its own interpretative judgment where the *Alameda* Court failed to clarify.

Lower courts have split over key evidence questions.⁴ The Fifth and Tenth Circuits are divided over whether studies with a longer shelf life, often having tested for unrelated secondary effects, constitute “shoddy data or reasoning” under *Alameda*.⁵ Another circuit split in the wake of *Alameda* turns on whether a city can rely only on pre-enactment data or can the city rely on

¹ 535 U.S. 425 (2002).

² Daniel R. Aaronson, Gary S. Edinger, James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741, 755 (2009) (finding that lower courts agree that *Alameda*’s evidence standard does not require local governments to rely on *Daubert*-quality scientific evidence or studies, but that there is no lower court consensus or guidance from *Alameda* as to the weight or form of evidence sufficient to “cast direct doubt” on legislative findings that support the government’s secondary effects justification for state regulation of adult businesses).

³ Aaronson, Edinger, and Benjamin, *supra* note 2, at 755.

⁴ *Id.* at 750.

⁵ Brigman L. Harman, *Is a Strip Club More Harmful Than a Dirty Bookstore? Navigating a Circuit Split in Municipal Regulation of Sexually Oriented Businesses*, 2008 BYU L. REV. 1603, 1604–06 (2008) (noting that the Fifth Circuit has interpreted “shoddy data or reasoning” under *Alameda* to mean that cities cannot rely on “studies that do not differentiate between on-site sexually oriented businesses and off-site sexually oriented businesses.”). The Tenth Circuit, on the contrary, has read “shoddy data or reasoning” more conservatively. *Id.* Under the Tenth Circuit’s view, the plaintiff retains the burden of rebutting the presumption that on-site and off-site sexually oriented businesses are “‘reasonably similar businesses’ that will have reasonably similar effects.” This circuit split will be discussed in greater detail in Part IV of this paper. *Id.*

data compiled after enactment of the ordinance.⁶ Still another division answered differently within the same circuit hinges on whether foreign studies “trump actual local experience measured with reliable statistics?”⁷ More post-*Alameda* questions still persist: the extent of judicial deference to legislative evidence and the evidentiary weight to be afforded local scientific studies in comparison to older anecdotal accounts from other jurisdictions which “may or may not have much in common with the community at issue.”⁸

The *Alameda* Court succeeded, however, in creating a burden-shifting mechanism and a balancing test designed to afford plaintiffs an opportunity to rebut the city’s asserted evidence of secondary effects at the summary judgment stage of litigation.⁹ The balancing test sought to create a boundary framework to address First Amendment concerns raised in Justice Souter’s dissent in *Alameda*.¹⁰

Justice O’Connor’s formulation of the burden shifting standard failed to articulate with greater precision and clarity the weight and form of evidence that cities are required to produce in support of the link between asserted secondary effects and the ordinance’s restrictions.¹¹ Only spare mention of “shoddy data or reasoning” is offered as the blanket standard for unpalatable government evidence.¹² The plurality opinion, however, jettisoned elaboration of any kind as to the types of evidence constituting “shoddy data or reasoning.”¹³

Similarly, Justice Kennedy’s balancing test took a different analytical approach to reach the same conclusion with the same evidentiary flaws as the plurality opinion. The concurrence

⁶ Aaronson, Edinger, and Benjamin, *supra* note 2, at 756–58 (noting that the “*timing* of secondary effects evidence has also hopelessly divided the Courts.”) Some courts have concluded that the government must produce all evidence relied upon at any time and at any stage of the litigation. *Id.* at 758. Other courts, however, have held that the city must produce all evidence “made at the time of legislative enactment.” These circuit cases and the timing of evidence issue will be discussed in Part IV of this paper. *Id.*

⁷ *Id.* at 756.

⁸ *Id.* at 753–55.

⁹ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438–39 (2002) (plurality opinion).

¹⁰ *Id.* at 446 (Kennedy, J., concurring).

¹¹ *Id.* at 437 (plurality opinion).

¹² *Id.*

¹³ *Id.*

also failed to articulate the weight of evidence and the form of evidence required to be produced under *Alameda*. The burden-shifting mechanism fits hand in glove with the balancing test, but neither approach has proven instructive to lower courts on crucial evidence rules at the trial level.

The Seventh and Eleventh Circuits have read *Alameda* as permitting considerable judicial deference to legislative findings of asserted secondary effects in a line of cases to be discussed further in this paper. A much more recent Seventh Circuit decision in *Annex Books, Inc. v. City of Indianapolis*,¹⁴ however, retrenched a hitherto expansive reading of what evidence sufficiently sustained an adult zoning ordinance.

The *Annex* Court rejected the city's reliance on a data from a pre-enactment study conducted twenty years prior that tested for secondary effects unrelated to the ordinance at issue.¹⁵ Applying the burden-shift and balancing approaches, the *Annex* Court read *Alameda*'s "shoddy data or reasoning" standard as including data from studies unrelated to the asserted secondary effects.¹⁶ *Annex*, in other words, undergirded evidentiary sufficiency with the requirement that proffered evidence must be at least comparably related to the types of land-use externalities produced by operation of adult businesses.

This paper argues that the *Alameda* Court's fractured opinion left the sufficiency of evidence standard an unsettled area of law susceptible to unbridled legislative justifications for invasive adult zoning restrictions unrelated to purported secondary effects. Part II of this paper examines the broader constitutional landscape from which the sufficiency of evidence standard and the stakes surrounding it emerged. Part III provides a case analysis of *Alameda*, scrutinizes the three contending approaches of Justices O'Connor, Kennedy, and Souter. Part IV analyzes evidentiary issues raised in *Alameda* that caused circuit splits and whether the Seventh Circuit's

¹⁴ 581 F.3d 460, 461–63 (7th Cir. 2009).

¹⁵ *Id.* at 461.

¹⁶ *Id.* at 464–66.

decision in *Annex* constituted a game-changer for evidentiary sufficiency. Part V briefly argues that an evidence rule of comparable relatedness to asserted secondary effects is a vital safeguard that precludes city councils from abusing studies and other data to support unrelated ordinances in the name of combating secondary effects. Lastly, Part VI concludes that *Alameda*'s foggy empowerment of city councils to surmount First Amendment challenges without allowing plaintiff-business owners the benefit of making their case for constitutional defect beyond the summary judgment stage of litigation.

II. Constitutional Framework: Zoning Regulation of Adult Businesses and the First Amendment

State zoning regulation of adult businesses is a creature of nuisance law. State and municipal governments retain broad zoning authority to regulate adult business establishments subject to certain First Amendment limitations.¹⁷ First Amendment limitation on state police power encompasses protection over a “wide variety of ‘expressive conduct,’ including adult entertainment.”¹⁸ Supreme Court decisions have consistently extended First Amendment protections to adult books, sexually explicit movies, and live adult entertainment.¹⁹

The ambit of First Amendment protection of adult businesses in zoning and non-zoning cases alike has been frustrated by analytical difficulties in drawing sharp pliable distinctions

¹⁷ See, e.g., *Chicago v. Mosley*, 408 U.S. 92 (1971) (holding that zoning regulations must be content-neutral in their application and not infringe on speech protected by the First Amendment); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (holding that reasonable time, place, and manner restrictions upon First Amendment speech are permissible as long as the regulations are administered fairly); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that the state’s police power is broad enough to allow government zoning regulation that segregates industrial company sites from residential areas of the community); see also Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 451 (2004) (explaining that the recognized power of local governments to enact zoning ordinances to combat nuisances has been broadly interpreted by the Supreme Court to include zoning for aesthetic reasons, improvements to neighborhood quality and urban life, reduction in noise, traffic, and crime, and protection of public morals); Kenneth L. Turchi, Note, *Municipal Zoning Restrictions on Adult Entertainment: Young, Its Progeny, and Indianapolis’ Special Exception Ordinance*, 58 IND. L.J. 505, 506–10 (1983) (describing constitutional background for state zoning regulatory authority over businesses in the community and the basic limits of that regulatory authority as it confronts, generally speaking, First Amendment concerns).

¹⁸ Baradaran-Robison, *supra* note 17, at 451.

¹⁹ See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (citing a litany of prior Supreme Court cases that recognized extensions of First Amendment protection to sexually explicit speech through a variety of communicative mediums such as television, radio, print, and live entertainment).

between expressive conduct and speech content.²⁰ The Supreme Court first confronted this conduct-content bifurcation in *U.S. v. O'Brien*.²¹ The facts of *O'Brien*, however, do not lend themselves to easy analogy in the context of zoning adult businesses. *O'Brien* involved three defendants who burned their “Selective Service registration certificates,” or draft cards, on the steps of a local city courthouse in protest of the Vietnam War and in violation of a 1965 amendment to a federal statute.²² The statutory amendment imposed criminal liability on anyone who “‘knowingly destroys, [or] knowingly mutilates’” a draft card.²³

The defendants challenged the statute on First Amendment grounds, claiming that the act or conduct of burning a draft card in public fell within the First Amendment’s protection of free expression “because [the defendants] did it in ‘demonstration against the war and against the draft.’”²⁴ The Supreme soundly rejected the notion that all conduct containing a communicative element that could be labeled as speech received First Amendment protection.²⁵ Speech and non-speech elements combined in the same course of conduct are still subject to incidental First Amendment limitations if the restrictive law meets a four-part test adopted by the *O'Brien* Court.²⁶

Government regulation of expressive conduct is “sufficiently justified” if: 1) it is within the constitutional power of the Government; 2) if it furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater

²⁰ See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 457 (2002) (Souter, J., dissenting) (explaining that “[a]dult 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”); see also Philip J. Prygoski, *Content Neutrality and Levels of Scrutiny in First Amendment Zoning Cases*, 25 WHITTIER L. REV. 79, 88–89 (2003).

²¹ 391 U.S. 367 (1968).

²² *Id.*

²³ *Id.* at 374.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

than is essential to the furtherance of that interest.”²⁷ Although the Court categorized the defendant’s conduct as expressive, it concluded that Congress retained the proper authority to pass a draft card burning statute under its Article I constitutional power to raise armies.²⁸ In addition, the government’s substantial interest resided in furthering “the smooth and proper functioning of the system that Congress has established to raise armies.”²⁹ The draft card burning statute protects the government’s capability to control a functioning military conscription system essential to national defense.³⁰ Accordingly, the draft card burning statute is unrelated to suppressing any speech aspect of the conduct and the Court “perceived no reasonable alternative means that would more precisely and narrowly” assure the functional viability of the draft system.³¹

O’Brien essentially provided that government regulation of expressive conduct is content-neutral if the government can meet each prong of the four-part test.³² The factors in the *O’Brien* test for expressive conduct statutes are closely analogous to the multi-factor analysis the Supreme Court developed for determining whether zoning ordinances are content-based or content-neutral.³³ Unlike the *O’Brien* Court’s clear adoption of a test to determine a statute’s

²⁷ *Id.* at 374–77.

²⁸ *Id.* at 377.

²⁹ *Id.* at 379.

³⁰ *Id.*

³¹ *Id.* at 379–81.

³² Interestingly, by contrast, the Supreme Court refused to apply the four-part *O’Brien* test to a Congressional flag burning statute in *Texas v. Johnson*, 491 U.S. 397 (1989), finding that the flag burning ban was content-based and subject to strict scrutiny despite the fact that the act of flag burning was expressive conduct that would otherwise come under *O’Brien*. See Dana M. Tucker, *Preventing The Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?*, 12 J. LAND USE & ENVTL. L. 383, 395 (1987).

³³ Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1178 (2002) (noting that the Supreme Court has “commented that the tests regarding time, place, and manner restrictions and expressive conduct restrictions are nearly identical, and appears to use them interchangeably with only minor amounts of difficulty”). It is important to note, however, that the majority opinions have applied the *Renton* test to zoning cases only, and applied the *O’Brien* test to expressive conduct cases involving public indecency statutes banning nude dancing a la *Barnes* and *Erie*. Where the different tests seem to converge is in the Court’s application of the secondary effects doctrine as legal justification for expressive conduct statutes regulating adult businesses.

content-neutrality, however, the Supreme Court hiccupped twice before it developed a multi-factor test similar to *O'Brien*.

Confronted with its first adult zoning case in *Young v. American Mini Theatres*,³⁴ the Court sharply divided over the proper standard of review and whether the enterprise of adult zoning was content-based or content-neutral.³⁵ The facts in *Young* stood in stark contrast to the antiwar political speech in the act of draft card burning in *O'Brien*. In *Young*, two adult movie theater owners challenged on First Amendment grounds Detroit's zoning ordinance that prevented concentration of adult businesses within a 1,000 feet of each other or within 500 feet of any residential area.³⁶

At the time of enactment, the Detroit city council made a finding that "some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas."³⁷ Based upon this legislative evidence, the city decided to pass the ordinance. Subsequently, the city passed several amendments, the most important of which prevented clusters of adult businesses from operating within a certain range of each other.³⁸ The plaintiffs argued that the recent amendments to the ordinance offended First Amendment protected speech given that the ordinance aimed directly at movie theaters exhibiting sexually explicit films.³⁹ The plaintiffs further argued that the ordinance violated the Equal Protection clause of the Fourteenth Amendment as it applied restrictions to adult movie theaters only based on the sexually explicit content of the films being shown at the theater.⁴⁰

The Court upheld the ordinance and classified the land-use restriction as a content-neutral, constitutionally benign time, place, and manner regulation subject to intermediate

³⁴ 427 U.S. 50 (1976).

³⁵ See Andrew, *supra* note 33, at 1183.

³⁶ *Young*, 427 U.S. at 52–53.

³⁷ *Id.* at 54.

³⁸ *Id.* at 53.

³⁹ *Id.* at 55.

⁴⁰ *Id.* at 57.

scrutiny.⁴¹ Writing for the plurality, Justice Stevens concluded that “[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.”⁴² The fact that the ordinance treated adult theaters differently and classified them based on the content they exhibited also proved to be of little consequence to the plurality.⁴³ Justice Stevens distinguished the regulatory aims from the regulatory means of the ordinance.⁴⁴ The plurality concluded that land-use regulations governing the time, location, and manner of operations pertaining to a particular kind of business does not violate the First Amendment if the city can demonstrate a significant governmental interest in combating purported secondary effects produced by operation of these adult businesses.⁴⁵

Secondary effects became the constitutional end-run around persuasive arguments raised in Justice Stewart’s dissent that adult zoning regulated adult businesses for its content above all and that secondary effects obfuscated a clear distinction between content-based and content-neutral ordinances.⁴⁶ Accordingly, Justice Stewart argued that adult zoning constituted content-based regulation that demanded subjection to strict scrutiny.⁴⁷ Justice Powell’s concurrence, on the other hand, agreed with the plurality on content-neutrality, but viewed the ordinance as regulating the conduct of how adult movie theaters operate in a community.⁴⁸ Thus, the ordinance, under Justice Powell’s analysis, should be analyzed under the four-part *O’Brien* test.⁴⁹

The plurality passed on the *O’Brien* test and applied the significant governmental interest standard as the constitutional benchmark that cities must prove to sustain an adult zoning

⁴¹ *Id.* at 61.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 67.

⁴⁵ *Id.* at 61.

⁴⁶ *Id.* at 83–87.

⁴⁷ *Id.* at 85–86.

⁴⁸ *Id.* at 78–83.

⁴⁹ *Id.* at 80.

regulation.⁵⁰ The city’s interest in protecting its community from negative externalities generated by concentrations of adult movie theaters cloaked the ordinance in a content-neutral garb free from the glare of strict scrutiny.⁵¹ The plurality further concluded that the findings of the Detroit city council’s study provided a sufficient factual basis “for the [city council’s] conclusion that this kind of restriction will have the desired effect.”⁵² The study findings of purported secondary effects, in other words, proved the city’s significant interest in preserving the quality of neighborhoods in the community through zoning regulation of adult businesses.⁵³

The plurality in *Young* created several key components of the undeveloped evidence standard that would confront the *Alameda* Court years later: Judicial deference to legislative evidence,⁵⁴ data proffered from legislative studies to support secondary effects,⁵⁵ the notion of secondary effects as a doctrinal basis for characterizing zoning ordinances as content neutral,⁵⁶ and the city’s burden of proving a significant interest to sustain the constitutionality of the ordinance.⁵⁷ The plurality decision in *Young*, however, confounded the lower courts.⁵⁸ Lower courts struggled to articulate a clear standard of review as the doctrinal breadth and evidentiary scope of the secondary effects justification clouded hitherto starker distinctions between content-based and content-neutral ordinances.⁵⁹ Justice Powell’s characterization of time, place, and

⁵⁰ *Id.* at 70–72.

⁵¹ *Id.* at 70.

⁵² *Id.*

⁵³ *Id.* at 71; *see also* Andrew, *supra* note 33, at 1184.

⁵⁴ *Id.* at 71.

⁵⁵ *Id.* at 71 n.34.

⁵⁶ *Id.* at 71.

⁵⁷ *Id.* at 70–73.

⁵⁸ Andrew, *supra* note 33, at 1186.

⁵⁹ Ronald M. Stein, *Regulation of Adult Businesses Through Zoning After Renton*, 18 PAC. L.J. 351, 361 (1987) (noting that “the lack of a clearly articulated standard in Stevens’ plurality decision” confused lower courts causing Justice Powell’s *O’Brien* analysis to be largely followed by federal courts)(quoting *Purple Onion v. Jackson*, 511 F. Supp. 1207, 1226 (N.D. Ga. 1981)).

manner regulations as conduct-based and his invocation of the *O'Brien* test only compounded lower courts' perplexity.⁶⁰

Five years after *Young*, the Supreme Court in *Schad v. Borough of Mount Ephraim*⁶¹ refined its secondary effects analysis and reigned in the seemingly expansive writ of zoning authority over adult businesses.⁶² In *Schad*, two adult bookstore owners were criminally indicted and convicted for violating a local zoning ordinance that banned *all* live entertainment as a permitted use in a commercial zone.⁶³ The owners challenged the ordinance as violative of their rights of free expression under the First Amendment.⁶⁴ The bookstore sold sexually explicit books, magazines, and films.⁶⁵ In 1973, the bookstore obtained an "amusement" license from the Borough, permitting the store to install coin-operated video booths in which customers could pay to watch adult films on the commercial retail premises.⁶⁶ Three years later, in 1976, the store installed a coin-operated live nude dancing booth in which customers could pay to view a live nude dancer gyrating behind a glass panel.⁶⁷

The *Schad* Court attacked the blatant ambiguity in the language of the statute and its application. Borough officials' conflicting interpretation of the extent of entertainment banned under the ordinance highlighted the ambiguity.⁶⁸ The prosecutor construed the ordinance as banning all live entertainment, but the Borough building inspector "stated there was no basis for

⁶⁰ *Id.* at 361.

⁶¹ 452 U.S. 61 (1981).

⁶² Andrew, *supra* note 33, at 1187.

⁶³ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 62–64 (1981). § 99-15B of Mount Ephraim's ordinance listed permitted uses on land and in buildings. The list included: offices, banks, taverns, restaurants, luncheonettes, automobile dealerships, and retail stores, "such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry paint, wallpaper, appliances, flowers" . . . etc. *Id.* at 64. The list did not expressly mention exclusion of sexually oriented retail businesses. *Id.* As Justice White points out in the plurality opinion, the language of the ordinance is "ambiguous with respect to whether live entertainment is permitted." *Id.* at 66. The ordinance purports to list the "principal" permitted uses in a commercial zone, yet at the same time in a subsequent provision of the ordinance § 99-4 "declares that all uses not expressly permitted are forbidden." *Id.* at 67.

⁶⁴ *Id.* at 65.

⁶⁵ *Id.* at 62.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 68.

distinguishing between live entertainment and other entertainment under the ordinance.”⁶⁹ The Borough issued the amusement license to the adult bookstore, which permitted the live entertainment toll booths in the first place.⁷⁰

The Court seized upon the ordinance’s ambiguity to raise the evidentiary burden upon states to prove a substantial governmental interest.⁷¹ The *Schad* Court expounded upon the rough outlines of the evidentiary standard in *Young*. First, the Court acknowledged that the courts assumed the critical role of weigh the circumstances and appraising the “substantiality of the reasons advanced in support of the regulation.”⁷² Second, the Court required the government to provide evidence of the secondary effects that the ordinance purported to mitigate before the law could survive intermediate scrutiny.⁷³ Third, overbroad zoning regulations that operated as either an express or an effective total ban on expressive speech constituted an unreasonable time, place, and manner regulation.⁷⁴ On this point, the Court added that zoning regulations implicating First Amendment rights must be *narrowly tailored or drawn* to further the state’s substantial governmental interest and leave open “adequate alternative channels of communication.”⁷⁵

⁶⁹ *Id.*

⁷⁰ *Id.* at 62.

⁷¹ *Id.* at 68.

⁷² *Id.* at 69.

⁷³ *Id.* at 69–75.

⁷⁴ *Id.* at 74–76.

⁷⁵ *Id.* at 75–76; see also Matthew L. McGinnis, Note, *Sex, But Not the City: Adult-Entertainment Zoning, The First Amendment, and Residential and Rural Municipalities*, 46 B.C. L. REV. 625, 648–54 (2005) (making the astute observation that an alternative fair reading of *Schad* suggests that a total ban may “still be permissible in rural and residential communities” since the Court “explicitly declined to hold that every municipality, no matter how small, must allow such entertainment.”). The author notes “an unresolved conflict” between *Renton* and *Schad* regarding the available alternative avenues of communication requirement. *Renton* requires that municipal zoning regulations provide space for adult businesses within the city’s borders. *Schad* suggests, on the other hand, that small rural or residential communities may not have to preserve zoning space within its borders to meet the alternative avenues communication when other adult businesses are nearby but outside the municipality’s borders. *Id.* at 654. This unclear standard for available alternative avenues of communication requirement is an important component of First Amendment zoning jurisprudence, but beyond the scope of this note.

Justice Blackmun’s concurrence amplified the plurality’s articulation of the state’s heightened evidentiary burden.⁷⁶ The state must be prepared, Justice Blackmun wrote, “to articulate, and support, a reasoned and significant basis for its decision.”⁷⁷ Further, the city cannot rely on access to adult businesses in neighboring locales to satisfy the court’s concern with available alternative avenues of communication.⁷⁸

Justice Stevens, the plurality opinion author in *Young*, wrote a concurrence in *Schad* that shed new and interesting light in terms of the city’s evidentiary burden under *Young* and the constitutional parameters of how a state may justify future assertions of restrictive zoning authority over adult businesses.⁷⁹ In particular, Justice Stevens’ concurrence zeros in on the content-neutrality issue that raised analytical difficulties for lower courts in applying *Young*.⁸⁰ Narrowly tailored or drawn regulations, Justice Stevens’ argument implicitly acknowledged, reigned in the issue of overbroad ordinances, but also raised the opposite issue of ordinances narrowly drawn on the basis of content.⁸¹

The Borough could overcome over breadth charges by “showing that its ordinances were narrowly drawn and furthered ‘a sufficiently substantial governmental interest.’”⁸² Justice Stevens reasoned further that both the ambiguous ordinance language and a destitute evidentiary record demonstrating that the adult business created an “identifiable adverse impact on the neighborhood or on the Borough as a whole” proved fatal to the ordinance’s constitutional validity.⁸³ The municipal regulation could be sustained, in other words, if the ordinance language is clear and narrowly focused on mitigating asserted secondary effects, the existence of

⁷⁶ *Schad*, 452 U.S. at 77.

⁷⁷ *Id.*

⁷⁸ *Id.* at 78.

⁷⁹ *Id.* at 79.

⁸⁰ *Id.* at 83–84.

⁸¹ *Id.*

⁸² *Id.* at 79.

⁸³ *Id.* at 83.

which is supported by evidence. “Unbridled discretion of a municipal official” did not satisfy the evidentiary burden created in *Young* and refined in *Schad*.⁸⁴

The *Schad* Court left it up to subsequent courts to elaborate on the type or amount of evidence that either the government or the plaintiffs could adduce at trial. *Young* and *Schad* marked a clear swing of the pendulum.⁸⁵ States could use its zoning power to regulate adult businesses without the presumption of content-discrimination if the government premised its ordinance on ameliorating alleged secondary effects or negative externalities produced by operation of adult businesses.⁸⁶ States could not, on the other hand, simply ban all adult businesses from a commercial district or merely assert that the ordinance combated secondary effects and pass constitutional muster.⁸⁷ The state must produce evidence.⁸⁸ Part of that evidentiary burden included clear ordinance language that corresponded to proffered evidence of secondary effects, which rooted the ordinance’s legitimacy in a significant governmental interest.⁸⁹

Lower courts heeded *Schad*’s tougher evidentiary burden on the government.⁹⁰ The Eighth and Sixth Circuits in particular read the Supreme Court’s *Schad* opinion as a heightened evidentiary standard for proving that the ordinance aimed at combating secondary effects caused by the adult business location and not the content of the speech itself.⁹¹ Lower courts also scrutinized the government’s motivation in passing the ordinance as a factor in their evidentiary

⁸⁴ *Id.* at 84.

⁸⁵ Andrew, *supra* note 33, at 1187.

⁸⁶ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52–53 (1976).

⁸⁷ *Schad*, 452 U.S. at 75–76.

⁸⁸ *Id.* at 76.

⁸⁹ *Id.* at 76.

⁹⁰ Andrew, *supra* note 33, at 1187–88.

⁹¹ *See Avalon v. Thompson*, 667 F.2d 659, 661 (8th Cir. 1981) (finding that the ordinance was content-based and subject to strict scrutiny because the state produced insufficient evidence to justify a local dispersal ordinance similar to the one in *Young*); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 97 (6th Cir. 1981) (finding that the ordinance was content-based for lack of sufficient evidence that the regulation aimed at combating purported secondary effects).

analysis in the wake of *Schad*.⁹² Lower courts clearly interpreted *Schad* as sculpting reinforced evidentiary boundaries out of a vague and confusing mold in *Young*.

The disparate *application* of the evidentiary burden among lower courts, however, reflected the competing interests that the Supreme Court enlisted itself to balance in *Schad*.⁹³ Without a clear framework in hand, two different circuits could view an identically worded ordinance but reach opposite conclusions in light of how a particular court interpreted the evidence offered by the government.⁹⁴ Elements of the Court's evidence standard for proving a significant governmental interest were taking shape. The Supreme Court utilized its subsequent decision in *Renton* to reign in lower courts' analysis of the government's motivation in enactment of an adult zoning ordinance and to translate the *Young* and *Schad* decisions into a coherent framework of analysis.⁹⁵

If *Schad* constituted an increase in the government's evidentiary burden, the Supreme Court's decision in *City of Renton v. Playtime Theaters, Inc.*⁹⁶ abruptly dispelled that interpretation.⁹⁷ The *Renton* Court's opinion set to accomplish three objectives: clarification of its secondary effects rationale in *Young*, foreclosure of the government's motivation in enacting the ordinance as a factor in lower courts' analysis, and clear consensus articulation of the proper

⁹² Andrew, *supra* note 33, at 1189. Compare *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1206 (5th Cir. 1982) (finding that the legislative history of the ordinance revealed "the city's motive was to remove [the] adult theater from the vicinity of an opera house because of apprehension that an adult theater would drive patrons away," which "did not support the [the city's] claim that it was motivated by the crime and blight problem"), with *Grand Faloan Tavern, Inc. v. Wicker*, 670 F.2d 943, 949 (11th Cir. 1982) (finding that nature of evidence presented by the city to the district, including a police chief report citing numerous complaints and incidents of prostitution, assaults, acts of indecent exposure, and rape at the adult business establishment, justified the city ordinance banning nude dancing in places selling alcohol).

⁹³ Andrew, *supra* note 33, at 1188. Compare the Fifth Circuit's decision in *Basiardanes* with the U.S. Supreme Court's decision in *Young*. As the author noted, the ordinance in *Basiardanes* "textually mirrored the ordinance upheld in *Young*." *Id.* at 1189, n.93. The *Basiardanes* Court distinguished the dispersal ordinance at issue with the ordinance in *Young*. *Id.* The Court found that the ordinance dispersed adult theaters in "the most unattractive, inaccessible, and inconvenient areas of the city," thereby effectively cutting off adequate alternative channels of communication. *Id.*

⁹⁴ Andrew, *supra* note 33, at 1189.

⁹⁵ *Id.* at 1191.

⁹⁶ 106 S. Ct. 925 (1986).

⁹⁷ Andrew, *supra* note 33, at 1192.

formulation of the government’s evidentiary burden that proved elusive in the Court’s *Young* and *Schad* opinions.⁹⁸

In *Renton*, two adult theater owners challenged the City of Renton’s preexisting zoning ordinance that prohibited any adult motion picture theater from “locating within 1,000 feet of any residential zone, single-, or multiple-family dwelling, church, or park, and within one mile of any school.”⁹⁹ The City Council predicated its decision to pass the dispersal ordinance upon several modes of informational evidence. The ordinance became law after several public hearings, review of data from other cities regarding the negative externalities of adult businesses upon the community, and a recommendation to pass the ordinance from both the City Attorney’s Office and the city’s Planning and Development Committee.¹⁰⁰ The ordinance defined adult movie theaters broadly to include “ ‘[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or [characterized] by an emphasis on matter depicting, describing or relating to ‘specified sexual activities’ or ‘specified anatomical areas’ ...for observation by patrons therein.’ ”¹⁰¹

Chief Justice Rehnquist, writing for the majority, wasted no time establishing the Renton ordinance as identical in language, scope, and constitutional character with the dispersal zoning law in *Young*.¹⁰² Drawing a direct analogy with *Young*’s ordinance set the stage for the *Renton* Court’s amplified explanation of the proper constitutional analysis of time, place, and manner regulations. First, the ordinance is properly analyzed as a time, place, and manner regulation since it do not ban adult theaters altogether, but merely places restrictions on how, where, and when the adult theater can operate.¹⁰³ The time, place, and manner character of the Renton

⁹⁸ *Id.* at 1191–92.

⁹⁹ *Renton*, 106 S. Ct. at 927.

¹⁰⁰ *Id.* at 927.

¹⁰¹ *Id.*

¹⁰² *Id.* at 928.

¹⁰³ *Id.*

ordinance made it content-neutral subject to intermediate scrutiny, the Court explained, provided the government could show that the design of a given ordinance served “a substantial governmental interest and allow[ed] for reasonable alternative avenues of communication.”¹⁰⁴ This formulation addressed both the significant governmental interest prong in *Young* and the narrow tailoring requirement in *Schad*.

Second, the Court next addressed the sufficiency of evidence burden upon the government for proving a substantial governmental interest.¹⁰⁵ Relying on its secondary effects rationale in *Young*, the majority in *Renton* accorded “high respect” or high judicial deference to legislative attempts to combat asserted secondary effects of adult businesses in the form of restrictive zoning laws.¹⁰⁶ City governments, the Court elaborated, must have “a reasonable opportunity to experiment with solutions to admittedly serious problems.”¹⁰⁷ The Court dismissed the Ninth Circuit’s ruling that the city’s “justifications for the ordinance were ‘conclusory and speculative’ since the Renton ordinance was passed “without the benefit of studies *specifically relating* to ‘the particular problems or needs of Renton.’”¹⁰⁸

Chief Justice Rehnquist, writing for the majority in *Renton*, concluded that the state “was entitled to rely on the experiences of Seattle and other cities, and in particular on the ‘detailed findings’ summarized in the Washington Supreme Court’s *Northend Cinema* opinion, in

¹⁰⁴ *Id.* at 928–29, (citing to the Court’s opinion in *Young*, Chief Justice Rehnquist noted that “at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to ‘content-neutral’ time, place, and manner regulations” (i.e., zoning ordinances proven to be aimed at secondary effects produced by sex businesses are reviewed under an intermediate scrutiny standard)).

¹⁰⁵ *Id.* at 930.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 931.

¹⁰⁸ *Id.* at 930; *see also* Aaronson, Edinger, and Benjamin, *supra* note 2, at 754–56. The Ninth Circuit’s focus on the city’s reliance on evidence related to the particular city and its asserted secondary effects generated by adult businesses is a recurring legal point that the Ninth Circuit made in *Renton* and in *Alameda*. In both instances, the Supreme Court rebuffed that consideration in favor of judicial deference to city governments on the avowed basis that city governments are better positioned than the courts to know of the particular problems, needs, and secondary effects concerning their particular city. Before some refinement in *Alameda*, this generous judicial deference meant that almost any proffered evidence from other cities, towns, and zoning court cases constituted sufficient evidence for proving a substantial governmental interest. This unbridled sufficiency of evidence standard caused the *Alameda* Court to reign in the implication of the evidence ruling in *Renton*.

enacting its adult theater zoning ordinance.”¹⁰⁹ The First Amendment, the Court added, “does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities.”¹¹⁰ The next line etched *Renton*’s evidence standard into First Amendment zoning jurisprudence: “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”¹¹¹ Reliance, reasonableness, and relevance became the flashpoints of confusion and debate among the lower courts as to the extent of evidence sufficient to “justify reliance by a city and support a reasonable belief that the ordinance targeted secondary effects.”¹¹²

The *Renton* Court’s decision, put another way, constituted a constitutional patchwork of prongs from *Young* and *Schad* with an inchoate sufficiency of evidence standard that, on its face, appeared to permit all manner of evidence a city government could proffer in the name of combating secondary effects. The *Renton* Court extended the secondary effects reasoning in *Young* by holding that a city may rely on the studies of other cities, or detailed findings in judicial opinions from other courts, as opposed to conducting its own studies.¹¹³

Young’s secondary effects doctrine became an evidentiary proxy for proving a substantial governmental interest under *Renton*.¹¹⁴ Government could cherry pick bias, and in some cases wholly distinguishable and irrelevant, data to support its justification for passing the ordinance.¹¹⁵ More to the point, Justice Brennan’s dissent also zeroed in on the fact that some of the findings in the government’s evidence “do not relate to supposed ‘secondary effects’

¹⁰⁹ *Id.* (citing to *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153 (1978)).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Mindi M. Jelsema, Note, *Zoning Adult Businesses After Los Angeles v. Alameda Books*, 47 ST. LOUIS L.J. 1117, 1124–30 (2003).

¹¹³ David L. Hudson, Jr., *The Secondary Effects Doctrine: “The Evisceration of First Amendment Freedoms,”* 37 WASHBURN L.J. 55, 66 (1997).

¹¹⁴ *Id.* at 70.

¹¹⁵ *Id.*

associated with adult movie theaters.”¹¹⁶ Besides reliance on incomparable evidence, the Court, Justice Brennan insisted, “cannot, as it does, merely accept these *post hoc* statements at face value.”¹¹⁷ Citing to *Schad*, Justice Brennan’s argument strongly indicated that the narrow tailoring requirement in *Schad* demanded that governments adduce evidence comparable, or at the very least, related to, the purported secondary effects that the ordinance aimed to mitigate.¹¹⁸

Before giving a plaintiff the opportunity to challenge the government’s evidence or to offer evidence in front of a jury, the *Renton* Court, ironically, concludes that courts are in the best position to judge whether a particular plaintiff-adult business lodges sufficient legal arguments to strike down a particular city’s zoning ordinance under an intermediate standard of scrutiny, which “reduces a city’s burden to justify its regulation.”¹¹⁹

In the wake of *Renton*’s expansive evidence rule, some lower courts imposed certain minimum requirements on official in city government such as the requirement that the government can rely only on data or evidence utilized *before* the ordinance’s enactment.¹²⁰

Other lower courts enforced *Renton*’s evidence standard with full force, holding that the government can rely on evidence or data obtained before or after the ordinance’s passage.¹²¹

This nascent timing of evidence issue remains an unresolved legal issue even after the Court’s decision in *Alameda*.

¹¹⁶ *Renton*, 475 U.S. at 935.

¹¹⁷ *Id.*

¹¹⁸ *Id.* 935–36.

¹¹⁹ Kimberly K. Smith, *Zoning Adult Entertainment: A Reassessment of Renton*, 79 CALIF. L. REV. 119, 138 (1991).

¹²⁰ Compare *Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3d Cir. 1997) (holding that city officials must articulate the secondary effects against which the ordinance purports to combat *before* the legislation is enacted), with *T & D Video, Inc. v. City of Revere*, 670 N.E.2d 162, 165–66 (Mass. 1996) (ruling that an adult business ordinance is invalid because the city relied on the secondary effects rationale *after* the ordinance’s enactment; the timing of evidence constituted an insufficient showing that the zoning restriction served a substantial governmental interest). This legal controversy whether courts can admit pre-enactment versus post-enactment evidence of secondary effects remains unresolved even post-*Alameda*. See also *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 355 (Ga. 1997) (holding that the legislative body is required to “consider specific evidence of undesired secondary effects that it reasonably believes relevant” before enacting the ordinance).

¹²¹ See *Di Ma Corp. v. City of St. Cloud*, 562 N.W.2d 312, 321 (Minn. Ct. App. 1997) (concluding that despite plaintiff-expert testimony that no evidence existed as to increased criminal activity around adult businesses, the court would not question the trial court’s judgment of the facts or evidence offered in support of the ordinance because the trial court’s decision was not clearly erroneous).

The third and final major legal issue that the *Renton* Court addressed turned on whether an adult zoning ordinance was intrinsically content-based. Armed with the *Schad* Court’s narrow tailoring requirement as caution against overbroad ordinances, lower courts increasingly considered the government’s motivation in passing an adult business ordinance.¹²² This motivation factor clearly reflected lower court concerns that content-based restrictions could be easily justified as content-neutral time, place, and manner regulations combating alleged secondary effects.

Justice Brennan’s dissent in *Renton* gave superior judicial voice to that consideration. Justice Brennan wrote incisively that even if the ordinance legitimately aimed at combating real secondary effects, it does not necessarily “mean, however, that such regulations are content-neutral.”¹²³ The fact the ordinances are directed at legitimate legislative aims does not change the fact that government passes ordinances imposing special restrictions *because* of the speech content, not in spite of it.¹²⁴ Justice Brennan’s constitutional sentiments echoed the Ninth Circuit’s position that the city’s could not rely on unrelated data from other studies of cities with different problems and needs from *Renton* to prove a governmental interest.

The majority in *Renton* disagreed with Justice Brennan and the Ninth Circuit. The Court dismissed the Ninth Circuit’s *O’Brien* analysis regarding the city’s motivation as a factor in determining whether the ordinance is content-neutral.¹²⁵ The majority concluded that alleged legislative motives created an unfair and unjustifiably high threshold for city governments to overcome.¹²⁶ Therefore, the Court adopted the “predominate concerns”¹²⁷ test as a buffer against lower court analysis of governmental motivations in passing an ordinance. This way the

¹²² Andrew, *supra* note 33, at 1189–90.

¹²³ *Renton*, 475 U.S. at 934.

¹²⁴ *Id.* at 934–37.

¹²⁵ *Id.* at 929.

¹²⁶ *Id.*

¹²⁷ *Id.*

ordinance would pass constitutional muster under the *O'Brien* test, even if suppression of speech was a motivating factor in the ordinance's enactment provided the government's predominant concerns were secondary effects and not the speech content.¹²⁸

The *Renton* Court may have foreclosed governmental motivation as a decisive factor but failed to blunt Justice Brennan's cogent legal counterpoint that zoning regulation of adult businesses was inescapably based on the speech's content irrespective of whether they aimed to combat harmful secondary effects.¹²⁹ In particular, Justice Brennan pointed out that "other forms of adult entertainment" were not subject to the same restrictions as adult movie theaters under the *Renton* ordinance.¹³⁰ This disparate treatment of particular kinds of speech amounted to flagrant content-discrimination, requiring strict scrutiny as the proper standard of review for zoning regulations of sexual communicative conduct.¹³¹ In *Young*, the Supreme Court jettisoned disentanglement of the thorny distinction between the conduct and speech components of symbolic expression.¹³² On this point, the *Renton* Court only convinced critics that the conduct-content based distinction issue would remain unresolved.

Five years later the Court aggressively upended the conduct-content based distinction but outside the zoning context in *Barnes v. Glen Theatre, Inc.*¹³³ The *Barnes* line of cases involved a distinct breed of conduct regulation of adult businesses. In *Barnes*, the Indiana State Legislature sought to enforce its public indecency statute against two strip clubs that featured totally nude dancing and served alcohol.¹³⁴ The indecency statute required "that the dancers wear 'pasties'

¹²⁸ *Id.*

¹²⁹ *See id.* at 934 (Brennan, J., dissenting).

¹³⁰ *Id.* at 935–36.

¹³¹ *Id.* at 934–35 (arguing that since the city had not adduced any evidence *at the time of enactment* to justify disparate treatment between other adult entertainment establishments and adult movie theaters, which were not even in existence at the time of the ordinance's passage). "The ordinance's underinclusiveness is cogent evidence that it was aimed at the *content* of the films shown in adult movie theaters." *Id.* at 935.

¹³² *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–72 (1976).

¹³³ 501 U.S. 560 (1991).

¹³⁴ *Id.* at 560.

and ‘G-strings’ when they dance.’”¹³⁵ The two strip club owners challenged the statute on the grounds that prohibiting the performance of nude dancing impermissibly infringed on their First Amendment rights in symbolic expression.¹³⁶ In addition, the strip club respondents carefully distinguished between time, place, and manner restrictions on adult businesses and government imposed limits on conduct that qualifies as symbolic expression protected by the First Amendment.¹³⁷

Chief Justice Rehnquist, writing for the plurality, analyzed the statute under the *O’Brien* test, noting that the *Renton* test embodied “much the same standards as those set forth in [*O’Brien*].”¹³⁸ On that doctrinal basis, the plurality concluded that the Indiana statute fell within the purview of state police power to protect morality and the public order.¹³⁹ Conduct statutes designed to mitigate the harmful effects of conduct that threatened the public order or morality justifiably placed incidental curbs on symbolic expression.¹⁴⁰ This reasoning mirrored the broad secondary effects pretext on which the government could rely in passage of zoning regulation of adult businesses.¹⁴¹ Instead of elucidating the boundary line between conduct and content in symbolic expression, the *Barnes* plurality expanded the scope of the secondary effects doctrine into unprecedented legal terrain—the non-zoning context.¹⁴² The *Barnes* decision empowered states with the constitutional authority to directly regulate conduct in adult businesses

¹³⁵ *Id.*

¹³⁶ *Id.* at 566.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 570–72.

¹⁴⁰ *Id.* See also Kevin Case, Note, “Lewd and Immoral”: *Nude Dancing, Sexual Expression, and the First Amendment*, 81 CHI-KENT L. REV. 1185, 1192–95 (2006) (arguing that conduct statutes regulating nude dancing specifically requires “the same level of judicial scrutiny applied to political speech” because public sexual expression is not low value, mere conduct speech). Moreover, the government’s evidentiary burden to substantiate conduct based statutes is treated by the *Barnes* plurality as pro forma rather than a constitutional requirement with teeth. *Id.* at 1193.

¹⁴¹ Andrew, *supra* note 33, at 1199–1200.

¹⁴² *Id.* at 1199.

irrespective of the free speech implications or of any burden of proof to substantiate the content-neutrality of the conduct statute.¹⁴³

Justice Scalia’s concurrence agreed almost entirely with the plurality’s legal conclusions, but differed on the proper standard of review.¹⁴⁴ For Justice Scalia, nude dancing regulation not only warranted state regulation, but also required judicial deference to legislative prerogatives. The Court, Justice Scalia wrote, “should avoid wherever possible . . . a method of analysis that requires judicial assessment of the ‘importance’ of government interests—and especially of government interests in various aspects of morality.”¹⁴⁵

Justice Souter’s concurrence, however, reached the same legal conclusion on different grounds. Justice Souter assumed the more difficult analytical undertaking of responding to Justice White’s dissenting point that public indecency statutes are inherently content-based, as they are aimed to limit symbolic speech because of its content.¹⁴⁶ Justice Souter countered with two points. First, the nudity aspect of dance performance does not subtract from the expressive communicative quality freely conveyed in that form of expression.¹⁴⁷ Second, the fact that the legislature’s rationale for passing the statute is correlated with effects generated by the existence of adult businesses does not mean such statutes are content-based.¹⁴⁸ If the regulation is “justified without reference to the content of the regulated speech,”¹⁴⁹ in other words, the statute is content-neutral. Justice Souter, citing to the Court’s reasoning in *Renton*, added that under the *O’Brien* analysis the government’s evidentiary burden did not include an affirmative obligation to prove the existence of secondary effects in its city in particular.¹⁵⁰

¹⁴³ Hudson, *supra* note 113, at 70.

¹⁴⁴ *Barnes*, 501 U.S. at 579–80.

¹⁴⁵ *Id.* at 580.

¹⁴⁶ *Id.* at 585.

¹⁴⁷ *Id.* at 581.

¹⁴⁸ *Id.* at 585–86.

¹⁴⁹ *Id.* at 586.

¹⁵⁰ *Id.* at 583–84.

The Court’s subsequent opinion in *R.A.V. v. City of St. Paul*¹⁵¹ flew under the radar, as it did not involve any state regulation of adult businesses. *R.A.V.* involved a constitutional challenge to a statutory provision that criminalized derogatory verbal or symbolic speech aimed at persons ““on the basis of race, color, creed, religion or gender.””¹⁵² Writing for the plurality, Justice Scalia struck down the statute, but a kernel of his reasoning implicated First Amendment concerns for state regulation of adult businesses.¹⁵³ Justice Scalia concluded that the government could not discriminate against particular kinds of proscribable speech and not others.¹⁵⁴ For our purposes, Justice Scalia reasoned that secondary effects provided a valid basis on which to classify certain speech as containing proscribable content.¹⁵⁵ Therefore, the government could pass regulations that constitutionally discriminate against particular kinds of speech carrying negative secondary effects “*because of their constitutionally proscribable content.*”¹⁵⁶

The expansion of secondary effects reached its apogee in *R.A.V.* Justice Scalia’s reasoning suggested that speech producing harmful secondary effects was tantamount to other categories of speech not afforded First Amendment protections such as libel and obscenity.¹⁵⁷ To be fair, Justice Scalia may not have meant that speech engendering secondary effects constituted a new category of unprotected speech. The thrust of his reasoning, however, strongly indicated that courts should treat conduct and zoning state regulations of adult businesses as a category receiving no First Amendment protection.¹⁵⁸ Although the Court refused to take the secondary effects reasoning as far as denying the protected status of adult speech,¹⁵⁹ the Court’s

¹⁵¹ 505 U.S. 377 (1992) (quoting Minn. Stat. § 292.02 (1990)).

¹⁵² *Id.* at 380.

¹⁵³ *Id.* at 381.

¹⁵⁴ *Id.* at 383–84.

¹⁵⁵ *Id.* at 389.

¹⁵⁶ *Id.* at 383.

¹⁵⁷ *Id.* at 385–94.

¹⁵⁸ Hudson, *supra* note 113, at 82–83.

¹⁵⁹ *See* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 62, 66 (1981); *see also* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991).

vague evidence rule in *Renton* and the expansion of secondary effects into non-zoning cases suggested the Court's willingness to permit the state expansive power to regulate adult businesses with feeble limitations.¹⁶⁰

The Court retrenched its secondary effects analysis in non-zoning cases eight years later in *City of Erie v. Pap's A.M.*¹⁶¹ The facts of *Erie* were virtually identical to *Barnes*. In *Erie*, a strip club owner operating a nude dancing club challenged a Pennsylvania Ordinance enacted by the City of Erie.¹⁶² The ordinance required dancers to wear, "at a minimum, 'pasties' and a 'G-string.'"¹⁶³ The language of the ordinance broadly encompassed any nudity in public places, which included "all buildings and enclosed places owned by or open to the general public, . . . such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied."¹⁶⁴

Justice O'Connor, writing for the plurality, amplified the secondary effects analysis nascent in *Barnes*.¹⁶⁵ The *Erie* plurality referenced the facts of *O'Brien* throughout the opinion to demonstrate that if the Court curbed anti-war political speech in the name of furthering a governmental interest, the Court refused to carve out an exception for nude dancing in strip clubs, which is lower value symbolic expression.¹⁶⁶ Justice O'Connor held further that the government's evidentiary burden for proving whether the regulation furthers an important governmental interest is judged under the broad *Renton* reasonable-relevance standard.¹⁶⁷ The

¹⁶⁰ Andrew, *supra* note 33, at 1201.

¹⁶¹ 529 U.S. 277 (2000).

¹⁶² *Id.* at 283.

¹⁶³ *Id.* at 284.

¹⁶⁴ Penn. Ordinance 75-1994, Art. 711(3).

¹⁶⁵ *Erie*, 529 U.S. at 293.

¹⁶⁶ *Id.* at 299.

¹⁶⁷ *Id.* at 296-97.

plurality in *Erie* essentially applied the opaque evidence rule from its analysis in *Young, Schad*, and *Renton* to non-zoning statutes in *Barnes* and *Erie*.¹⁶⁸

For evidence purposes, *Barnes* and *Erie* failed to mark a watershed moment in the Court's clarification of the evidence rule established in *Renton*.¹⁶⁹ The opinions, however, represented a significant doctrinal expansion of the secondary effects justification in the state's ability to directly regulate expressive conduct as well as time, place, and manner of operation of adult businesses.¹⁷⁰ Furthermore, although silent in expounding on the meaning of the *Renton* evidence rule, the *Barnes*, *R.A.V.*, and *Erie* decisions highlighted the integral part that a clear evidence rule plays in protecting the First Amendment rights of adult speech from potent governmental power.

Interestingly, Justice Souter's dissenting opinion in *Erie* alluded to this same concern. Justice Souter sharply disagreed with the plurality's legal conclusions because "the record before us today is deficient in its failure to reveal any evidence on which *Erie* may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy."¹⁷¹ The plurality, in other words, rubber stamped the Erie City Council's "speculative supposition" without the benefit of any "demonstrated fact."¹⁷² Justice Souter's opinion underscored the meekness that opacity produced in the *Renton* evidence rule, and the need to clarify the rule to protect adult businesses' protected speech.

III. The Unclear Evidentiary Standard for Proving Substantial Governmental Interest: *Alameda Books*

¹⁶⁸ *Id.*

¹⁶⁹ Andrew, *supra* note 33, at 1203.

¹⁷⁰ Case, *supra* note 140, at 1200–07.

¹⁷¹ *Erie*, 529 U.S. at 313–14.

¹⁷² *Id.* at 314.

The Supreme Court’s renewed opportunity to squarely and directly address the vague *Renton* evidence rule arrived in *City of Los Angeles v. Alameda Books*¹⁷³ three years after *Erie* and seventeen years after *Renton*. In *Alameda*, two adult business owners operating two businesses—an arcade and bookstore— in a single building unit challenged the revised ordinance that the operation of more than one adult business in the same building.¹⁷⁴ The Ninth Circuit Court, much as it did in *Renton*, concluded that the city failed to “demonstrate that the prohibition was designed to serve a substantial governmental interest.”¹⁷⁵ In particular, the Ninth Circuit found that the city failed to adduce sufficient evidence on which it could reasonably rely to “demonstrate a link between multiple-use adult establishments and negative secondary effects.”¹⁷⁶

The *Alameda* Court produced another plurality opinion split in their approach to the government’s evidentiary burden for proving a substantial governmental interest. The opinions can be categorized into three competing approaches. First, Justice O’Connor, writing for the plurality, articulated a burden-shifting mechanism in which plaintiff-adult businesses could “cast direct doubt” on the government’s adduced evidence supporting its secondary effects justification.¹⁷⁷ Plaintiffs casted direct doubt on the city’s rationale “by demonstrating that the municipality’s evidence does not support its rationale, or by furnishing evidence that disputes the municipality’s factual findings.”¹⁷⁸ If the plaintiff fails to cast direct doubt, the government satisfies the *Renton* reasonable-relevance standard.¹⁷⁹

If the plaintiff succeeds, on the other hand, in casting direct doubt on the government’s rationale, the burden shifts back to the government to offer additional evidence “renewing

¹⁷³ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 426 (2002).

¹⁷⁴ *Id.* at 429.

¹⁷⁵ *Id.* at 430.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 438–39.

¹⁷⁸ *Id.* at 439.

¹⁷⁹ *Id.*

support for a theory that justifies its ordinance.”¹⁸⁰ Justice O’Connor reinforced, however, the Court’s holding in *Renton* that the government’s evidentiary burden did not include conducting its own empirical studies.¹⁸¹

Further, the government’s evidentiary burden also excluded “providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own.”¹⁸² The plurality also stated that the government could rely on evidence obtained after the original ordinance passed but preceded revision of the ordinance.¹⁸³ Besides the burden shifting mechanism, the plurality also provided that a municipality could not rely on “shoddy data or reasoning” to support its rationale.¹⁸⁴

The plurality’s evidence formulation is flawed in three key respects. First, the burden shifting mechanism remained silent as to how courts should weigh the plaintiff’s rebuttal evidence casting direct doubt on the government’s rationale. More importantly, the plurality also failed to address the type or form of evidence that a plaintiff could adduce to cast direct doubt upon the government’s rationale. The plaintiff’s evidentiary burden on rebuttal, in other words, remained unclear.

Second, the timing of evidence on which the government could *not* rely was left unresolved by the plurality. No less than the scope of permissible evidence was at stake. The plurality deficient explanation did not articulate a clear timeline of evidence. The government could clearly rely on pre-enactment evidence, but how far back and did older evidence or data carry less evidentiary weight than fresher evidence or data. Moreover, the plurality failed to address whether the government could rely on evidence or data obtained after enactment of the

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 439–40.

¹⁸² *Id.* at 437.

¹⁸³ *Id.* at 430.

¹⁸⁴ *Id.* at 438.

ordinance. Similarly, even if the government could rely on post-enactment evidence or data, the degree of evidentiary weight to be accorded different evidence over time was unclear.

Third, the “shoddy data or reasoning” requirement raised a hullabaloo of disagreement and confusion regarding what the requirement actually meant.¹⁸⁵ The plurality created a category without explaining the criteria for qualification or disqualification. At the very least, the Court seemed to suggest that “shoddy data or reasoning” included evidence completely unrelated to the purported secondary effects ailing the particular community. Suggestions of law, however, compounded an already unclear evidence rule.

Justice Kennedy’s concurring opinion sought to clarify how courts should properly measure the government’s evidentiary burden. Justice Kennedy formulized a cost-benefit approach or balancing test that weighed whether a given ordinance substantially reduced speech in the name of mitigating secondary effects.¹⁸⁶ Justice Kennedy predicated this approach on two legal questions. First, “what proposition does a city need to advance in order to sustain a secondary effects ordinance?”¹⁸⁷ Second, “how much evidence is required to support the proposition?”¹⁸⁸ On the appropriate proposition, Justice Kennedy concluded that “a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.”¹⁸⁹

This formulation aimed to address the encroaching and enlarging scope of acceptable evidence on which governments could rely to substantiate their secondary effects justification. Justice Kennedy’s cost-benefit approach, in other words, sought to reign in governmental reliance on thinly veiled attempts at overt regulation without strong evidentiary support. The broadening scope of admissible evidence, no matter how unrelated, began to water down the

¹⁸⁵ *Id.* at 438.

¹⁸⁶ *Id.* at 449–50.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 450.

purpose of having an evidence rule. The problem with Justice Kennedy's formulation, however, is that reads more like a template for writing ordinance language that will more likely overcome constitutional challenges.

On the second proposition, Justice Kennedy's concurrence falls way short. The sufficiency of evidence that the government must produce, Justice Kennedy insists, is explained in the *Renton* rule. The Court must accord broad judicial deference to legislative rationale. Citing to *Renton* and similar to Justice Scalia's position in *Barnes*, Justice Kennedy wrote, [a]s a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. The Los Angeles City Council knows the streets of Los Angeles better than we do."

Justice Kennedy's concurrence is defective in two key aspects. First, the concurrence conflates the sufficiency of asserting a related secondary effect with sufficiency of evidence in proving a substantial governmental interest. The cost-benefit approach is a reformulation of the narrow tailoring requirement in *Schad*. Second, the concurring opinion, similarly, punted on the question of the timing of evidence, the weight of evidence, the type or form of admissible evidence, and how much evidence is sufficient to defeat an ordinance.

Justice Souter's dissent makes two critical points regarding sufficiency of evidence. First, Justice Souter begins on the premise that zoning regulation of adult businesses is "content-correlated." Zoning regulations of adult businesses, in other words, have a "correlation with secondary effects." Second, as such, the sufficiency of evidence standard should also require a correlation between the purported secondary effects in a community and the particular type of operation of adult businesses in the community that gives rise to these alleged secondary effects.

IV. An Unclear Evidentiary Standard Emboldens Invasive State Zoning Regulation In the Spirit of *Barnes* and *Erie*

In the wake of *Alameda*'s unclear evidence standard, lower courts and commentators are split over what constitutes sufficient evidence to sustain or rebut the substantial governmental interest prong under *Renton*. The Eleventh Circuit Court of Appeals in *Daytona Grand, Inc. v. City of Daytona Beach*,¹⁹⁰ for example, reversed the District Court's finding that the city relied heavily on "pre-enactment evidence [consisting] either of purely anecdotal evidence or opinions based on highly unreliable data."¹⁹¹ The District Court construed *Alameda*'s "shoddy data or reasoning" sufficiency of evidence standard to exclude anecdotal evidence such as reliance on testimony from past and present law enforcement officials and appropriately comparable control studies for secondary effects.¹⁹²

The Eleventh Circuit sharply disagreed with the lower court's reading of *Alameda*, explaining that the *Alameda* Court did not raise the evidentiary bar "or [require] a city to justify its ordinances with empirical evidence or scientific studies."¹⁹³ The *Daytona* Court concluded further that anecdotal evidence sufficiently sustains an adult ordinance and that empirical studies are not required as part of the city's evidentiary burden under *Alameda*.¹⁹⁴

The Seventh Circuit's jurisprudence has paralleled the Eleventh Circuit's view on sufficiency of evidence until its most recent 2009 decision in *Annex Books v. City of Indianapolis*.¹⁹⁵ In *Annex*, Judge Easterbrook, writing for the majority measured the city's sufficiency of evidence under Justice Kennedy's cost-benefit approach. The revised ordinance expanded the amount of retail stores subject to zoning regulation as adult businesses.¹⁹⁶ The ordinance increased the number of retail stores by decreasing the threshold of adult material

¹⁹⁰ 490 F.3d 860, 862, 869 (11th Cir. 2007).

¹⁹¹ 521 F. Supp. 2d 1264, 1279 (M.D. Fla. 2006), *aff'd in part and rev'd in part*, 490 F.3d 860 (11th Cir. 2007).

¹⁹² *Id.*; see also Aaronson, Edinger, and Benjamin, *supra* note 2, at 749.

¹⁹³ *Daytona*, 490 F.3d at 880.

¹⁹⁴ *Id.* at 881.

¹⁹⁵ 581 F.3d 460 (7th Cir. 2009).

¹⁹⁶ *Id.* at 461.

inventory sold in the store necessary to come within the statute's scope.¹⁹⁷ Judge Easterbrook soundly rejected the government's position that "any empirical study of morals offenses near any kind of adult establishment in any city justifies every possible kind of legal restriction in every city."¹⁹⁸ The *Annex* Court, in other words, rejected the city's reading of *Alameda* that any and every study from other cities qualified as sufficient evidence.

The *Annex* decision reflected the Seventh Circuit's concern that city governments would read Justice Kennedy's concurrence in *Alameda* as a template for writing proper language in the ordinance to support its rationale and pass constitutional muster. *Annex* represents a yield sign more than a stop sign about the scope of evidence on which governments may rely to support its rationale under *Alameda*.

V. Not All Secondary Effects Are Created or Equal: Establishing Rules of Comparability In *Alameda Books* Evidence Standard

The *Alameda* evidence standard should adopt a rule of comparability standard regarding the sufficiency of evidence on which the government may rely. A recent study conducted an empirical comparison of purported secondary effects and the purported results produced in the community.¹⁹⁹ Justice Souter and Judge Easterbrook's opinions in *Alameda* and *Annex*, respectively, lay out the blueprint for an evidence standard that reign the broad scope of unrelated evidence on which the government may rely. The government should not shoulder the burden of producing new empirical studies of its own. But the government should be required to adduce evidence that tracks closely with the type of secondary effects its ordinance is designed to combat. This rule of comparable data or evidence as a requirement for sufficient evidence balances the interests of the government in protecting the community from actual negative

¹⁹⁷ *Id.* at 462.

¹⁹⁸ *Id.* at 464.

¹⁹⁹ See Daniel Linz, Bryant Paul, and Mike Z. Yao, *Peep Show Establishments, Police Activity, Public Place, and Time: A Study of Secondary Effects in San Diego*, 43 J. SEX RESEARCH 2, 190 (2006).

externalities produced by operation of adult businesses near schools or churches against the First Amendment speech rights of adult business owners.

VI. Conclusion

The United States Supreme Court has steadily expanded the writ of state and municipal *regulatory* authority over adult businesses.²⁰⁰ In its wake, the Court's decisions defanged First Amendment protections of adult businesses, conflated the applicability of the secondary effects doctrine in non-zoning cases, and confused lower courts' understanding of the proper evidentiary burden for proving a substantial governmental interest. Judicial expansion of state and municipal regulatory power over adult businesses has increasingly paved the way for legislative morality as states began passage of conduct statutes aimed at the sexual content adult businesses are selling.²⁰¹ A more balanced and efficient regulatory approach contemplates rules of comparable relatedness when it comes to the government's evidentiary burden for proving a substantial governmental interest.

Rules of comparable relatedness can narrow the inconsistency in lower court interpretations of *Alameda's* evidence standard which has become the basis for legislative abuse in adult zoning regulation. Protection of our families and communities is an essential legislative prerogative. But protection must be proportional to the threat and the threat must be fairly measured by a clear evidence standard that does not transform protection of the community into a legislative license to oppress First Amendment protected speech to which adult businesses are entitled.

²⁰¹ Christine MacDonald, *Detroit Passes New Rules On Strip Clubs*, DETROIT NEWS, February 23, 2010, available at <http://detnews.com/article/20100223/METRO/2230412/Detroit-passes-new-rules-on-strip-clubs> (reporting that the City of Detroit, the same city that passed a zoning ordinance for adult businesses at issue in the watershed zoning First Amendment case, *Young v. American Mini Theatres, Inc.*, recently passed new rules that would ban VIP rooms, require most employees (presumably including dancers) to obtain employment licenses from the city to work in the strip clubs, and limit dancers to eighteen inch stages, which effectively prohibits lap dances, and prohibits customers from touching dancers even if they are clothed).

