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Judicial Review of the Zoning of Adult Entertainment: A Search for the Purposeful Suppression of Protected Speech

ALFRED C. YEN*

The conflict surrounding the zoning of adult entertainment is not novel. The antagonism stems from a community's right to provide for its social welfare and the adult entertainment provider's right to freedom of speech and expression. This article examines the evolution of the federal courts' analysis in this area. The author concludes by stating that the current method of review is not the most efficient. In its place, he proposes a new method that makes analysis simpler for both laypersons and the courts.

I. INTRODUCTION

The Supreme Court firmly established the broad power of zoning in Village of Euclid v. Ambler Realty Company.1 Municipalities were given the power to further the public health, safety, morals, and welfare by restricting the permissible uses of land.2 Since that decision, zoning has developed into a powerful tool for controlling and shaping urban life. Zoning now affects much more than the location of ob-

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1. 272 U.S. 365 (1926). For a history of the establishment of the power to zone in this country, see generally 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 3.01-.13 (2d ed. 1978).

2. One commentator has described the methodology of zoning as follows:

Zoning ordinances are designed to regulate the complexities of modern land usage by separating incompatible uses, by limiting the density and scale of various neighborhoods, and by prohibiting or restricting the development of underdeveloped lands. Under a zoning system, every type of land use is classified with regard to its benefits and its harmful effects. Uses are then allowed to locate in areas where their benefits to society are maximized and prohibited where their harmful effects outweigh the benefits.

noxious land uses. It preserves historical landmarks, encourages development, and controls disorderly growth. Such efforts have contributed immensely to the quality of modern life.

However, zoning also contains the potential for the abuse of constitutional rights. The same tool which assures controlled community development can be used to exclude racial minorities or effectively deprive land owners of their property. Zoning may collide with first amendment rights as well. Any zoning of churches, outdoor signs, or entertainment raises questions about the separation of church

3. See, e.g., New York City's Landmarks Preservation Law (codified at N.Y.C. ADMIN. CODE, ch. 8-A, §§ 205-1.0-207-10.0 (1978)). This ordinance was enacted pursuant to New York State's enabling act (codified at N.Y. GEN. MUN. LAW § 96-a (McKinney 1977)), and was upheld in the landmark case of Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

4. 1 R. ANDERSON, supra note 1, at § 7.01. See also Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed, 409 U.S. 1003 (1972). This case held that an amendment to a town zoning ordinance was constitutional where it provided that subdivision development would not be permitted until, according to the town's 18-year capital plan, the availability of proposed municipal services reached a specified level.

5. See, e.g., Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975), in which a local ordinance, neutral on its face, was struck down because it had a disparate impact on minority groups. The ordinance involved permitted only single family detached dwellings and was so restrictive in its minimum lot size, lot frontage, and building size requirements as to preclude even moderate income families from moving there. The result of the ordinance was to effectively deny minority groups the opportunity to live in the area since they almost always fell within the low to moderate income classification.

6. In Nectow v. City of Cambridge, 277 U.S. 183 (1928), the Supreme Court struck down a zoning ordinance requiring residential building only, based on the finding of a special master that plaintiff's land was of no practical use for residential purposes because, among other reasons, "there would not be adequate return on the amount of any investment for the [residential] development of the property." Id. at 187. See also Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). The two major issues in that case were 1) did the zoning law enacted in New York City amount to a taking of private property for public use under the fifth amendment and, if so, 2) was adequate compensation paid to the property owner for that taking.

7. See, e.g., Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954). This case involved an offstreet parking requirement that effectively prohibited the building of a proposed church. The Supreme Court of Indiana found that enforcement of this ordinance against the church organization would "restrict the right of freedom of worship and assembly to an extent that outweighs any benefit to the safety, health and general welfare of the public, and in such a situation the police power must yield to the constitutional right of freedom of worship and assembly." Id. at 94, 117 N.E.2d at 121.

8. See, e.g., San Diego, Cal., Ordinance No. 10795 (Mar. 14, 1972). This ordinance prohibited off-premises outdoor advertising signs, including billboards, for the purpose of eliminating hazards to pedestrians and motorists brought about by distracting signs. A divided United States Supreme Court struck down the law in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), on the ground that it constituted an abridgment of first amendment rights.

9. See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). The Court in this case struck down a zoning law which banned any type of live entertainment from operation within the town. For further discussion of this case, see infra notes 53-54, 67-70 and accompanying text.
and state or freedom of speech. In the extreme, it may be contended that zoning laws may never be constitutionally enforced against a land use which can invoke some sort of first amendment protection. Intuitively, such complete protection is impossible. Land uses associated with the exercise of first amendment rights may be incompatible with other land uses. For example, billboards may be considered eyesores which detract from the appearance of neighborhoods.\textsuperscript{10} Society has a strong interest in regulating obnoxious land uses even when the first amendment is involved, so regulation should be permitted as long as constitutional rights are not unnecessarily infringed.\textsuperscript{11}

The zoning of establishments which offer adult, non-obscene entertainment\textsuperscript{12} illustrates the tension between the zoning power and the first amendment. Like many commercial land uses, adult establishments create litter, noise, traffic congestion and bright lights during evening hours. Additionally, adult establishments are often associated with neighborhood decay and crime.\textsuperscript{13} Towns legitimately zone both adult and non-adult uses in an effort to eliminate these complications of modern urban life. Occasionally adult establishments are properly singled out for special zoning to better regulate these problems.\textsuperscript{14} However, the issue of adult zoning\textsuperscript{15} does not end here. Local communities are often hostile to the sexually explicit nature of adult entertainment. These towns may zone adult establishments not in an effort to regulate community problems, but in an effort to restrict or suppress adult speech itself.\textsuperscript{16} Such use of the...

\textsuperscript{10} Metromedia, 453 U.S. at 510-11.

\textsuperscript{11} For example, in Decatur, Ind. Co. of Jehovah’s Witnesses, 233 Ind. at 94, 117 N.E.2d at 121, the zoning ordinance was invalidated because first amendment rights significantly outweighed any benefit to the health, safety, and welfare of the public. See supra note 7. Presumably it is possible for health and safety concerns to outweigh first amendment rights in other situations.

\textsuperscript{12} All adult entertainment is not necessarily constitutionally obscene. Only obscene entertainment is speech not entitled to first amendment protection. All other adult entertainment would receive just as much first amendment protection as any other entertainment. See Paris Adult Theater I v. Slaton, 413 U.S. 49, 54 (1973).

\textsuperscript{13} For example, Boston has created a so-called “combat zone” by limiting adult establishments to a two-block downtown area. F. Strom, Zoning Control of Sex Businesses 7 n.26 (1977).


\textsuperscript{15} The term “adult zoning” will be used to refer to the zoning of adult establishments.

\textsuperscript{16} See, e.g., Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981), mod-
zoning power is hostile to the first amendment because adult speech is entitled to constitutional protection.

In 1976, the Supreme Court addressed this specific conflict between zoning power and the protection of speech under the first amendment in *Young v. American Mini Theatres*. The case involved a zoning ordinance adopted by the city of Detroit which prohibited adult theaters and bookstores from locating within a thousand feet of any two other regulated uses or within five hundred feet of a residential area. "Regulated uses" were defined to include adult theaters, adult bookstores, cabarets, bars, pawnshops, hotels, and second hand stores, among others. Adult theaters and bookstores were defined primarily by reference to "Specified Sexual Activities" and "Specified Anatomical Areas." The plaintiff raised three constitutional claims: 1) that the statute's vagueness resulted in a violation of due process; 2) that the statute infringed upon protected speech in violation of the first amendment; and 3) that the classification of theaters on the basis of the content of their exhibitions violated the equal protection clause of the fourteenth amendment.

A plurality of the Court rejected all three claims. Justice Powell concurred, joining the plurality on claims one and two, but avoiding the issue of equal protection entirely. Powell viewed the case primarily as one concerning land use regulation and the first amendment. Thus, a majority of the Court ruled that the Detroit ordinance was valid under the first amendment.

After the Court's decision in *Young*, many municipalities felt that they were free to zone adult establishments as they wished. How-
ever, in 1981, the Supreme Court again considered the question of adult zoning in *Schad v. Borough of Mount Ephraim* and indicated that localities did not have as much freedom as some had originally thought after the *Young* decision. The Court applied the first amendment to strike down a zoning law which banned live entertainment, particularly nude dancing, from town. The law had been used to convict and fine the owners of an adult bookstore which offered live nude dancing to its patrons. The Court made it clear that *Young* was not the last word on zoning which regulates protected speech, and that all non-obscene entertainment, including nude dancing, was protected under the first amendment.

Lower courts quickly followed the leadership provided by the Supreme Court in *Schad*. Since 1981, the Fifth, Sixth, and Eighth Circuit Courts of Appeals have invalidated zoning laws which regulated non-obscene adult speech. It is now clear that mere imitation of the Detroit law upheld in *Young* will not insulate zoning from close first amendment scrutiny.

This paper will examine first amendment judicial review of adult zoning, particularly from 1981 to the present. Close attention will be given to the analysis developed by the Supreme Court in *Young* and *Schad*. The Court’s analysis will be evaluated and criticized, and it will be shown that the federal appellate courts are aware of such analytical problems and are attempting to rectify them. Lastly, this article will propose a revision of the Supreme Court’s analysis which is designed to give adult speech full constitutional protection while simplifying the courts’ task as reviewers of adult zoning.

II. CONSTITUTIONAL ANALYSIS OF ADULT ZONING UNDER THE FIRST AMENDMENT: THE TRADITIONAL APPROACH

A. Organization of Analysis along Two Tracks

The Supreme Court has organized first amendment review of regulative ordinances were struck down in Alexander v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1983); Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982); and Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981).

29. 452 U.S. at 71.
30. See supra note 26. The Ninth Circuit has also handed down decisions which have limited the power of adult zoning laws. See, e.g., *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir. 1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982).
lations affecting speech along two tracks. First, if the law is aimed directly at the content of the speech itself ("content based"), then a strict categorization test is used. The regulation is invalid unless the suppressed speech can be placed into a few selected categories. This is the track I analysis. Second, if the law is aimed at harm unrelated to the content of the message conveyed, then the infringement upon speech is balanced against the governmental interest furthered by the regulation. This is the track II analysis.

The difference between the types of regulations which trigger each track can be easily illustrated. If a law prohibits the use of foul language, then the strict categorization test would be used because the law is aimed directly at the content of the speaker's message. On the other hand, if a law merely restricts the use of loudspeakers, the balancing test would be used because the law is not aimed directly at the content of the speaker's message. Instead, the law may be justified as reasonably necessary to prevent excessive noise in the surrounding neighborhood.

The choice of which track to employ in the review of adult zoning regulations is a difficult one. Non-obscene adult speech is entitled to first amendment protection, however, adult zoning ordinances often single out adult establishments for harsh treatment, sometimes driving the adult speech out of town. When especially harsh treatment of adult establishments is based on the nature of speech expressed in those establishments, then a track I strict categorization test would be appropriate since the regulation is aimed at the content of protected speech. On the other hand, adult establishments occasionally do warrant special treatment. Adult uses are associated with violent crime, sexual offenses, and neighborhood decay, and cities should be able to regulate adult uses for the purpose of fighting these evils.


32. See, e.g., Slaton, 413 U.S. at 49 (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). See also supra note 31.

33. See, e.g., Schneider v. New Jersey, 308 U.S. 147 (1939) (an attempt to curtail littering by banning handbills is not directed at communicative impact because the harm would arise even if the handbills were blank). See supra note 31.

34. See, e.g., Cohen v. California, 403 U.S. 15, 21-22 (1971) (the banning of a display of obscene language on a jacket was a constitutional infringement).

35. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949) (the banning of a sound track on public streets was not a violation of first amendment freedoms).

36. See supra note 12.

37. See, e.g., Basinrdanes, 682 F.2d at 1205, in which a zoning ordinance was invalidated as unconstitutional because it completely banned adult theater street advertising and was far more restrictive than necessary to achieve its purported goals.

38. See Young, 427 U.S. 50. As indicated supra at note 23, there is a legitimate state interest in regulation for the purpose of preserving the quality of life in the community.
The goals of such regulation would not be the suppression of speech, but the promotion of the public welfare. This suggests a track II balancing test.

For the most part, courts have chosen to review adult zoning laws under the track II balancing test. However, judges are uncomfortable as balancers. In order to ascertain the "weight" of the factors in a balancing equation, judges must make detailed inquiries on an ad hoc basis. These ad hoc inquiries invite inherently arbitrary determinations by the court in assigning "weights" to the various factors to be balanced. Even if quantitative figures for those weights could be firmly established, no definitive calculus for balancing those factors could possibly be developed. Each judge must rely on his own sense of balance.

Such balancing contrasts sharply with the judge's role in analysis along track I, where the courts are far less arbitrary. Regulations aimed at the content of speech are invalidated with very few small, well-defined exceptions. Courts are generally more comfortable with this analysis, for judicial review is legitimated by its adherence to the requirements of the Constitution. Use of strict rules of the track I type makes such adherence easier for the court when rules will properly serve the Constitution. Balancing invites judges to substitute their own values for those of the Constitution, and this jeopardizes the legitimacy of judicial review.

As shown above, track II balancing is far from an ideal method of analysis for the judicial review of adult zoning. However, balancing is still the primary tool used in scrutinizing constitutionally suspect zoning regulations; therefore, this paper's proposed revision must be postponed until after a closer look at balancing along track II.

39. The Supreme Court in Young, 427 U.S. 50, used the track II balancing test in its analysis, resulting in a similar approach in subsequent adult zoning cases. The ultimate outcome in most cases will be a holding that the law is valid, since it is likely that there will be other legitimate purposes served by the law. See L. Tribe, supra note 30, at 583.

40. See supra note 32. See also L. Tribe, supra note 30, at 583. Tribe indicates that if a track I analysis is employed, the statute or ordinance will almost always be invalidated as an impermissible abridgment of free speech.


42. In other words, when rules are well-designed to serve the Constitution, judges know that judicial review pursuant to those rules will be theoretically legitimate. On the other hand, when a judge is forced to use her own set of values, there can be no guarantee of constitutional support for those values or their application. "[B]alancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing . . . ." Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1501 (1975).
B. Judicial Review of Adult Zoning along Track II

Once a court decides that a zoning regulation is not clearly aimed at the content of protected speech, analysis proceeds along track II. This analysis involves the weighing of three factors: 1) the extent to which the zoning infringes upon protected speech; 2) the extent to which the zoning fails to serve a substantial governmental interest; and 3) the extent to which alternative or less restrictive regulations could serve the same governmental interest.43

1. The Extent of Infringement upon Protected Speech

The first problem a court must confront is whether or not a challenged zoning law restricts protected adult speech, and if so, the significance of that infringement. Intuitively, any zoning which affects adult establishments restricts protected speech to some extent.44 A zoning ordinance regulating the location of an adult theater does affect the rights of the theater owner and moviegoers, but this seems different from a law which completely prohibits a number of adult theaters from opening or continuing to operate.

The Supreme Court focused on precisely this distinction in Young.45 The Court held that the key inquiry was not whether the regulation affected speech in any way, but whether or not access to adult speech was impaired.46 Detroit’s scheme of dispersing adult establishments through zoning was found not to significantly alter the ability of supply to meet the demand for adult speech.47 The ordinance did not affect the location of existing uses, and it left ample space for the introduction of new adult establishments. Thus, the market for adult speech was not impaired.48 The Court specifically noted, however, that the situation would be quite different if “the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech.”49 Having found no such restriction on first amendment protected speech, the Court ruled in favor of the constitutionality of Detroit’s zoning ordinance.50

43. Case Comment, supra note 31, at 240.
44. In addition to prohibiting the mere existence of adult uses, a zoning law may infringe upon free speech by merely affecting the economic viability of adult uses, thereby effectively prohibiting their establishment. For a discussion of economic viability as a factor in the judicial review of adult zoning, see Note, supra note 2, at 293.
46. Id. at 62, 78. Indeed, the Court acknowledged that the ordinance was not being challenged on the basis that it denied access to the market but rather on the basis that it denied access to adult speech entirely.
47. Id.
48. Id. at 71 n.35. The ordinance did not affect the operation of existing establishments, only the locations of new ones.
49. Id.
50. Id. at 72-73.
The importance of this holding is underscored by later cases in which other towns imitated Detroit's dispersal scheme, but with the effect of severely restricting the market for adult speech.\textsuperscript{51} For example, in \textit{Alexander v. City of Minneapolis},\textsuperscript{52} the court invalidated an ordinance which effectively eliminated two-thirds of the adult bookstore locations in the city of Minneapolis. This was held to be a severe restriction on the market for first amendment protected adult speech.\textsuperscript{53} Similarly, courts have struck down laws which effectively banned adult uses from town,\textsuperscript{54} as well as ordinances which explicitly banned all live entertainment.\textsuperscript{55} Each of these cases was distinguished from \textit{Young} in the same way: the zoning restricted the market for adult speech.\textsuperscript{56}

The cases show that federal courts are primarily concerned with restrictions on the supply of and demand for adult speech where first amendment rights are concerned. However, this inquiry is complicated by problems with defining the market for adult speech. In general, the most logical choice is the city or town whose zoning laws are under review. This makes sense for most cities since the patrons of adult establishments will presumably come primarily from the city responsible for the regulation. However, smaller communities have argued that considering only the market for adult speech found within the city whose zoning is being reviewed is inappropriate since city residents often go out of town to find entertainment.\textsuperscript{57} Thus, an ample adult speech market may exist within easy reach just beyond the city limits. Smaller towns contend that this "out of town" market must be considered in determining whether or not a restriction upon the market for adult speech exists. This argument, however, is susceptible to attack on three grounds.

\textsuperscript{51} See Special Project, \textit{Developments in the Law—Zoning}, 91 HARV. L. REV. 1427, 1557 (1978) ("In the wake of Mini Theatres, many municipalities enacted pornography zoning laws, usually imitating Detroit by requiring adult business to be dispersed.").
\textsuperscript{52} 698 F.2d 938 (8th Cir. 1983).
\textsuperscript{53} \textit{Id.} at 938-39. The Eighth Circuit affirmed the district court's finding that the challenged zoning ordinance would "greatly suppress access to adult theatres and bookstores." \textit{Id.} at 939.
\textsuperscript{54} See, \textit{e.g.}, \textit{Basiardanes}, 682 F.2d at 1203 (zoning ordinance banned adult theaters from much of the city, leaving only areas completely unsuited for such use); \textit{Keego Harbor}, 657 F.2d at 94 (under the terms of the ordinance, no place was provided within the confines of the city to locate an adult theater).
\textsuperscript{55} See \textit{Schad}, 452 U.S. at 61 (live entertainment, including nude dancing, protected by the first and fourteenth amendments).
\textsuperscript{56} \textit{Schad}, 452 U.S. at 76; \textit{Alexander}, 698 F.2d at 939; \textit{Basiardanes}, 682 F.2d at 1214.
\textsuperscript{57} See, \textit{e.g.}, \textit{Playtime Theatres, Inc. v. City of Renton}, 748 F.2d 527, 538 (9th Cir. 1984); \textit{Keego Harbor}, 657 F.2d at 94.
First, the existence of an ample market for adult speech outside the city does not justify the city's suppression of the market within its borders. The only way a city can show that there is no need for its contribution to the adult speech market is for the city to open its borders to the speech. If the city's contribution to the market is not needed, then no adult establishments will flourish.

Second, if cities successfully plead the existence of adult speech in nearby communities as a justification for their own significant restrictions on the speech, and if all towns take similar measures, then only the last town in a given area to restrict adult speech through zoning will be prohibited from doing so. Other neighboring towns will have already eliminated adult speech from their communities, making the last town's adult speech the only such speech in the immediate area. The ensuing result is an anomalous one in which only those slowest to restrict protected speech will fall under judicial scrutiny, i.e., the last one to the well receives no water. These cities will be forced to police all of the adult establishments their neighbors were unwilling to accept within their own borders. This result is unfair.

Third, successful pleading of the small town argument would force the courts to articulate standards for determining just how much of the surrounding area to include in the relevant market for adult speech.58 Such a task would complicate the courts' task in an already difficult area, thus increasing the likelihood of erroneous results.

The Supreme Court implicitly recognized these arguments against the small town position in *Schad.*59 The *Schad* majority rejected Mount Ephraim's argument that nude dancing was readily available in nearby areas and struck down the borough's ban on live entertainment.60 The Court intimated that the borough's argument might prevail if county-wide zoning existed, but since there was no such scheme, the independence of each borough would require the court to consider each community as a separate market for adult speech.61

Thus, under current doctrine, the market for adult speech will be the area governed by the community whose zoning laws are under review.62 Those laws will then be examined to determine whether they significantly interfere with the supply of and demand for adult

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58. In other words, standards for whether zoning should be reviewed on a county-wide, statewide, or some other geographical basis.
59. 452 U.S. 61 (1981). Indeed, the Court noted that "[o]ne 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." *Id.* at 76-77 (citing Schneider v. State, 308 U.S. 147, 163 (1939)).
60. 452 U.S. at 76.
61. *Id.*
62. *Id.*
Any significant infringement will require proper justification if the zoning is to pass constitutional muster. The search for this justification is the second problem the court must face.

2. The Justification of Serving a Substantial Governmental Interest

Once a court finds that an adult zoning law significantly interferes with protected speech, it must invalidate the law unless the zoning can be justified as furthering a substantial governmental interest. The court begins by identifying a "substantial governmental interest." This is fairly easy to do. The limits of the police power are very broad, and consequently goals such as the prevention of crime, the preservation of neighborhoods, and the regulation of nuisances have long been considered proper objectives of zoning. Adult establishments are often associated with crime, neighborhood decay, and the like, so cities' attempts to justify their adult zoning laws as necessary to combat these evils inevitably sound proper. This means that the court must decide if the interests asserted by municipalities to justify adult zoning are actually served by the regulations under review. In other words, the court must determine if the regulation is warranted by the facts.

The groundwork for this requirement was laid out in Young. The city of Detroit found that concentrations of adult establishments caused neighborhood decay, and the Court held that the record contained an adequate factual basis to support the city's conclusions. Thus Detroit's dispersal of adult establishments served the substantial governmental interest of preventing urban decay and was therefore justified.

Many municipalities misread Young as holding that an assertion of neighborhood preservation would justify a restriction on the number

63. Id. at 68-71.
64. Id. at 69-71.
65. Id. at 68.
66. See, e.g., Berman v. Parker, 348 U.S. 26, 32 (1954); Euclid, 272 U.S. at 373.
67. See, e.g., Young, 272 U.S. at 55 (opinions from urban planners and real estate experts).
68. In other words, any city regulating adult uses through zoning simply claims that it is merely attempting to fight decay, crime and nuisances. If true, such assertions likely bring the city within the guidelines of cases like Euclid and Berman.
70. Id. at 55.
71. Id. at 71 n.34.
72. Id. at 71-73.
of adult establishments in town as long as a dispersal type scheme was used.\textsuperscript{73} The facts of \textit{Young} do not warrant such a broad reading. First, the Court approved neither a restriction on the number of adult establishments nor a blanket use of dispersal.\textsuperscript{74} The Detroit zoning law was upheld because it did not interfere with the number of adult establishments which could locate in Detroit.\textsuperscript{75} Furthermore, the factual basis which justified the ordinance consisted of much more than municipal assertions or conclusions about the effects of adult uses. Detroit relied heavily on extensive testimony from sociologists and urban planners on the effects of concentrations of adult uses.\textsuperscript{76} This narrow reading of \textit{Young} is completely justified by subsequent cases.\textsuperscript{77}

In \textit{Schad}, the Supreme Court invalidated a zoning law which banned all live entertainment, including nude dancing.\textsuperscript{78} The Court clearly distinguished the greater burden upon protected speech in \textit{Schad} from the lesser burden upon protected speech in \textit{Young}.\textsuperscript{79} The Court also found no factual justification for a special zoning ordinance directed at live entertainment.\textsuperscript{80} Mount Ephraim's zoning laws permitted a wide range of commercial uses within city limits, and the borough failed to establish any incompatibility between the use of land for live entertainment, particularly nude dancing, and the use of land for other normal commercial purposes.\textsuperscript{81}

In \textit{Basiardanes v. City of Galveston},\textsuperscript{82} the Fifth Circuit followed \textit{Schad}'s lead and struck down a zoning law which clearly attempted to imitate the Detroit law upheld in \textit{Young}. The law provided that:

- First, a theater must be more than 500 feet from an area zoned residential, or from any two, or any combination of two, “pool halls, liquor stores, or bars.”
- Second, an adult theater must be more than 1,000 feet from another adult theater or adult bookstore.
- Third, an adult theater must be more than 1,000 feet from any “church, school, public park, or recreational facility where minors congregate.”\textsuperscript{83}

The court found that this zoning effectively banned adult theaters from Galveston.\textsuperscript{84} Thus, \textit{Young} could not sustain Galveston’s

\begin{itemize}
  \item \textsuperscript{73} See supra notes 51-56 and accompanying text.
  \item \textsuperscript{74} 427 U.S. at 71. The Court approved only a “limitation on the place where adult films may be exhibited.” Id.
  \item \textsuperscript{75} Id. at 71 n.35.
  \item \textsuperscript{76} Id. at 81 n.4 (Powell, J., concurring).
  \item \textsuperscript{77} See supra notes 51-64 and accompanying text.
  \item \textsuperscript{78} 452 U.S. at 76-77.
  \item \textsuperscript{79} Id. at 71. Mount Ephraim banned all live entertainment from the town. In contrast, Detroit did not actually restrict the number of establishments in the city.
  \item \textsuperscript{80} Id. at 72-73.
  \item \textsuperscript{81} Id. at 73.
  \item \textsuperscript{82} 682 F.2d 1203 (5th Cir. 1982).
  \item \textsuperscript{83} Id. at 1209. Imitation of the Detroit law upheld in \textit{Young} can be seen in the attempt to “disperse” the adult uses in town.
  \item \textsuperscript{84} Id. at 1214. The ten to fifteen percent of the city not categorically banned to adult uses was completely unsuited to such use.
\end{itemize}
Galveston also attempted to justify the ordinance as necessary to fight crime and curtail deterioration of the downtown neighborhood. The mayor and other city officials testified that they felt that the mere existence of adult theaters created crime and urban decay. No other evidence was offered at trial. The court frowned upon the weak factual basis for the ordinance, and noted the sharp difference in the facts from those in Young:

This paucity of evidence stands in sharp contrast to the facts of American Mini Theatres. In that case, the Detroit Common Council had heard extensive testimony before it enacted an adult theater ordinance. Here, the empty record before the Galveston City Council when it decided to regulate adult theaters undermines its contention that the ordinance in fact furthers the goal of rehabilitating the downtown area. No evidence was introduced to supplement or bolster the City Council’s assumption that one adult theater located downtown and urban blight are linked.

The court further distinguished the case from Young, noting that Galveston’s ordinance applied only to adult theaters while Detroit’s applied to a wide range of uses. This difference raised doubt in the court’s mind about whether the city’s true motivation was the control of urban decay. Indeed, the history of the ordinance’s enactment suggested that the city was really attempting to protect the newly renovated Grand Opera House which was located across the street from the theater owned by Basiardanes. The protection of the Grand Opera House was held not to be a weighty enough governmental interest to justify Galveston’s infringement upon protected speech.

The Sixth Circuit used this same reasoning in Keego Harbor Co. v. City of Keego Harbor to invalidate another ordinance which used a dispersal scheme to effectively ban adult theaters from town. The zoning prohibited adult theaters from locating within 500 feet of a liquor store, church, or school, or within 250 feet of a residential area. The court cited Schad to distinguish the case from Young.

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85. Id. at 1213-14. The Galveston ordinance drastically impaired the availability of films protected for adult viewing by the first amendment, and as such could not be sustained as a reasonable time, place, and manner regulation under Young. See supra note 75 and accompanying text.
86. Id. at 1215.
87. Id.
88. Id. at 1215-16.
89. Id. at 1216.
90. Id.
91. Id.
92. 657 F.2d 94 (6th Cir. 1981).
93. Id. at 96.
94. Id. at 97-98. Again, the court noted that the Young ordinance did not suppress
and then went on to search for factual justification in support of the zoning:

Keego Harbor attempts to justify the zoning restrictions as necessary to prevent “blight” and to control traffic. The City enacted this “pornography ordinance,” however, with little discussion. There appears to have been no objective information presented to the City at the time of enactment of the ordinance. At trial the bulk of the evidence was presented by a City Planner who admitted having no special expertise with the effects of placement of adult theatres. In light of the dearth of information considered by the City when it enacted this ordinance, it is not surprising that the ordinance is poorly-tailored to meet the justifications given at trial . . . . There is no evidence, other than the City Planner’s assertion, that the traffic pattern for adult theatres is any different from that for traditional movie theatres . . . . It is “not immediately apparent as a matter of experience,” that adult movie theatres would have a deleterious effect on a town that already has many bars and few of the attributes of a quiet residential community.\(^95\)

The cases previously discussed illustrate the difficult task a town faces when it wants to restrict the market for adult speech through zoning.\(^96\) Once a court finds an infringement of protected speech, the city must come forward with factual justification for the zoning under review.\(^97\) Mere suppositions and assertions on the part of the city will not suffice. Justifications for restrictions on speech must be substantial and independently corroborated.\(^98\)

However, despite the requirement of strong and independent justification, it is still possible for a town to restrict the market for adult speech. Schad held that if a city permits uses compatible with adult entertainment, then it may not restrict the market for such en-

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95. Id. at 98 (quoting Schad, 452 U.S. at 73).
96. See supra notes 51-95 and accompanying text.
97. See, e.g., Schad, 452 U.S. at 72; Basiardanes, 682 F.2d at 1215, Keego Harbor, 657 F.2d at 98.
98. This can be implied from the fact that in Schad, Basiardanes and Keego Harbor, the adult zoning laws were overturned because the towns involved were unable to come up with the factual justification required by the courts. Schad, 452 U.S. at 73; Basiardanes, 682 F.2d at 1215-16; Keego Harbor, 657 F.2d at 98. For further examples of zoning ordinances that were overturned due to lack of proper justification, see Playtime Theatres, 748 F.2d at 527 (city’s justification was conclusory and speculative, and its use of other cities’ experiences with respect to adult theatres was not sufficient to sustain the burden of showing a significant governmental interest); CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983) (city failed to make any factual justifications for the severe infringement of first amendment rights caused by city zoning which called for special application procedures and spacing requirements for adult bookstores located in the city); Avalon, 667 F.2d at 659 (city failed to provide adequate factual justifications); Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981) (village did not even attempt to advance a legitimate governmental interest to support its adult moving zoning ordinance).

By contrast, in Young, the adult zoning was upheld because the law was less restrictive on adult speech and because Detroit was able to introduce the testimony of sociologists and urban planners to corroborate the city’s contention that concentrations of adult establishments would be detrimental to the city. Young, 427 U.S. at 71, 81 n.4 (Powell, J. concurring).
tertainment within its borders unless the city can show that the unrestricted existence of adult establishments will harm the town.99 Keego Harbor underscores the general hostility to severe restrictions upon speech, but also acknowledges the possibility that a town may be able to justify some restriction of speech.100 No flat rule against bans has been set forth.101 Thus, a town will be able to restrict the market if proper justification can be found.102

3. The Requirement of Narrowly Drawn Ordinances

A balancing analysis which considers only the degree of infringement upon speech and the factual justifications offered is incomplete, for a regulation whose infringement on speech is justified may be invalidated if it is not narrowly drawn.103 A zoning regulation is not narrowly drawn if it restricts speech more broadly than is necessary to achieve its purpose.104 Zoning can fail this requirement in either of two ways. The law may restrict more types of speech than is necessary,105 or the law can place a greater burden than is necessary upon speech that it properly regulates.106 Schad107 and Basiardanes108 il-

99. Schad, 452 U.S. at 72-74 (Mount Ephraim was not able to present evidence in justification of its selectively excluding live entertainment from the broad range of commercial uses permitted in the Borough).
100. 657 F.2d at 99. See also Young, 427 U.S. at 70-71 (content of the speech may justify placing it in a different category).
101. Schad, 452 U.S. at 75 n.18. See also Keego Harbor, 657 F.2d at 99.
102. For example, a city permitting commercial uses must probably permit some adult speech within its borders because Schad indicates that an adult use (at least live entertainment such as nude dancing) is generally compatible with normal commercial uses. 452 U.S. at 73. However, the city need not allow for an unlimited number of adult establishments. This is because once a high enough number of adult uses move into the town’s commercial areas, those uses would become concentrated enough to cause urban decay of the type regulated in Young. At that time the city would be justified in using dispersal to fight the decay. This would necessarily imply some justifiable limit upon the market for adult speech. Of course, the burden will be on the municipality to show that the adult establishments were becoming too numerous to avoid harmful concentrations.

For examples of zoning ordinances that were upheld, see Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982) (city ordinance requiring that coin operated adult film viewing booths be visible from a continuous main aisle was a reasonable regulation in the manner in which films may be viewed); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert denied, 447 U.S. 929 (1980) (North Carolina statute merely a regulation of the place and manner of expression regarding sexually explicit material).

103. Case Comment, supra note 31, at 240.
104. Schad, 452 U.S. at 68, 74; Basiardanes, 682 F.2d at 1216.
105. See infra notes 107-10 and accompanying text for a discussion of cases concerning overbroad restrictions on speech.
106. See infra notes 111-12 and accompanying text.
lustrate the first kind of failure under the requirement, while *Keego Harbor*\(^\text{109}\) illustrates the second kind of failure.

In *Schad*, Mount Ephraim had banned all forms of live entertainment from town.\(^\text{110}\) The Supreme Court held that even if some live entertainment was justifiably banned, the entire zoning law was invalid because it banned certain kinds of live entertainment unnecessarily.\(^\text{111}\) Similarly, in *Basiardanes*, the Fifth Circuit noted that Galveston's ordinance severely restricted modes of expression other than the pornography the city was trying to control. Galveston had defined "adult theater" to include any theater which regularly displayed movies which the state of Texas prohibited minors from seeing.\(^\text{112}\) Thus, many R-rated films and the theaters which exhibited them would have been banned from town under the zoning ordinance; therefore, Galveston regulated more speech than was necessary to further the alleged governmental interest.\(^\text{113}\)

In contrast, the *Keego Harbor* court did not criticize the city's zoning as overinclusive. Instead, the court held that less burdensome regulations could adequately serve the city's interest in traffic control.\(^\text{114}\) The court suggested the increased ticketing of violators as a less intrusive means of serving the governmental interest involved.\(^\text{115}\)

Interestingly, strong use of the narrowly drawn requirement forces cities to be creative in their regulation of adult uses. For example, in *Ellwest Stereo Theatres, Inc. v. Wenner*,\(^\text{116}\) the Ninth Circuit upheld a clever method of controlling the sexual offenses which sometimes occur at adult theaters. The city of Phoenix, Arizona required all adult theaters to make their film viewing booths generally visible to others in the theater who were not watching the film. By eliminating the privacy which gave film viewers the opportunity to sexually stimulate themselves, the ordinance effectively curbed criminal sexual ac-

\(^{107}\) 452 U.S. at 61.
\(^{108}\) 682 F.2d at 1203.
\(^{109}\) 657 F.2d at 94.
\(^{110}\) 452 U.S. at 64. Section 99-4 of Mount Ephraim's zoning ordinance prohibited all uses not expressly provided for by the city's zoning scheme. Live entertainment was among the uses excluded from the scheme.
\(^{111}\) *Id.* at 74-75. The Court cited Graynard v. City of Rockford, 408 U.S. 104, 116-17 (1972), in stating that a "regulation must be narrowly tailored to further the state's legitimate interest." *Id.*
\(^{112}\) 682 F.2d at 1208-09.
\(^{113}\) *Id.* at 1208-09, 1216-17. The court attached great importance to the recurring requirement that an ordinance must be "narrowly drawn to serve a legitimate governmental interest with only minimal intrusion upon First Amendment freedoms." *Id.* at 1216.
\(^{114}\) 657 F.2d at 98-99. In *Keego Harbor*, the zoning ordinance effectively banned adult theaters from the jurisdiction instead of merely dispersing them or restricting them to specified areas as in *Young*, 427 U.S. 50.
\(^{115}\) 657 F.2d at 98.
\(^{116}\) 681 F.2d 1243 (9th Cir. 1982).
tivity without affecting the location or availability of protected adult speech.  

III. CONSTITUTIONAL ANALYSIS OF ZONING UNDER THE FIRST AMENDMENT: REEXAMINATION AND REINTERPRETATION

A. Judicial Discomfort with the Balancing Test of Track II

As part II has shown, the Supreme Court has generally analyzed the problem of adult zoning along the second of two tracks described by leading constitutional scholars. Consequently, the track II analysis has developed into a powerful limit upon zoning power. Adult zoning regulations will now be reviewed in light of three factors: the extent of infringement upon protected speech; the extent to which the zoning fails to serve a proper governmental interest; and the extent to which the zoning law is narrowly drawn. The courts have used this analysis to invalidate many improper zoning laws.

Despite the power of the balancing test, the courts are uncomfortable as the arbiters of conflict between zoning power and the first amendment. The 4-1-4 decision in Young is symptomatic of the disagreement in the Supreme Court over how the problem of adult zoning should be handled. Some of this discomfort is unavoidable.

117. Id. at 1246-47. The court cited Young, 427 U.S. at 63 n.18, in support of its statement that an ordinance which merely regulates the "time, place, or manner of protected speech will be upheld if necessary to further significant governmental interests." 682 F.2d at 1246.

118. See L. TRIBE, supra note 31 and accompanying text. Schad, 452 U.S. at 61, and Young, 427 U.S. at 50, were analyzed along track II of the two track test.

119. See Schad, 452 U.S. at 68-70 (Court must assess whether the governmental interest is substantial, whether there are means that may be less intrusive on an activity protected by the first amendment, whether the law infringes upon a protected liberty, and whether the law is narrowly drawn); Case Comment, supra note 31, at 240 ("Three separate factors must carefully be weighed: The importance of the interests served by the law, the extent to which it abridges free speech, and the extent to which alternative regulations could substantially satisfy the same interests while intruding less on protected speech.").

120. See, e.g., Schad, 452 U.S. at 61 (invalidation of ordinance designed to exclude live entertainment throughout the borough of Mount Ephraim); Basiardanes, 682 F.2d at 1203 (invalidation of ordinance restricting the operation of adult theatres to certain areas and prohibiting adult theater street advertising); Avalon, 667 F.2d at 659 (invalidation of ordinance prohibiting exhibition or sale of any sexually explicit film, whether or not obscene, within one hundred yards of specific areas); Keego Harbor, 657 F.2d at 94 (invalidation of ordinance which effectively prohibited "adult" movie theatres in town).

121. 427 U.S. at 50. See supra notes 17-25 and accompanying text for a synopsis of the Young decision.

122. Further evidence of discord in the high Court over the review of zoning and the first amendment can be seen in Metromedia, 453 U.S. at 490, a 4-2-1-1-1 opinion.
Adult zoning represents a clash between two of society's most heartfelt desires: the desire to exercise freedom of expression, and the desire to live in a community free from distasteful activity. As long as people disagree over what speech is tasteful, this clash will be present. Sexually explicit speech will always offend somebody. However, some of the discomfort can be avoided because it arises not from the clash of values, but from two difficulties with the balancing analysis currently used by most courts.

First, balancing is flexible, but it is not sensitive enough to the purposeful suppression of free speech. Balancing looks at the effects of regulation. If an infringement of adult speech is found, it is balanced against the justifications offered. The municipality's possible intent to suppress speech is not part of the balancing equation. True, the question of intent may be partially considered when a court triggers the track II balancing test in favor of the track I categorization test, but there is a tendency for courts to immediately balance without careful prior consideration of intent, largely because the Supreme Court did so in Young and Schad. As will be shown, the circuit courts are aware of this problem, and will sometimes compensate for it.

The second difficulty with balancing is that it offers no hard and fast legal rule upon which a court can rely. This is particularly problematic when a judge reviews a thorny problem like adult zoning. Most people are torn between their belief in free speech and their sympathy for towns which must deal with the problems posed by adult establishments. The courts are similarly torn, and their indecision concerning the zoning of billboards. One might point to Schad, 452 U.S. at 61, as evidence of an emerging consensus because Schad was a 6-2 decision. However, Schad was an easy case for the Court to decide because the degree of infringement upon protected speech was so large and the degree of justification so small.

123. See supra note 43 and accompanying text.

124. The courts, in their evaluation of the first amendment claims, will inquire into whether the law is aimed at the communicative or noncommunicative impact of a particular act. The purported purpose of the law determines the particular test to be used. See L. Tribe, supra note 31, § 12-2, at 582; Case Comment, supra note 31, at 235-39.

125. In both Schad, 452 U.S. at 61, and Young, 427 U.S. at 50, it was unclear whether the challenged ordinance was aimed at regulating the content of the material affected, or was aimed at the undesirable side effects created by the availability of such material to the public. The Court in each case, however, determined the constitutionality of the ordinance using the track II balancing test without inquiring into the purpose for the law.

The ambiguity concerning the use of the two tracks is examined in Case Comment, supra note 31, at 237-38. That note discusses the need to define the differences between which regulations are content-based, and therefore to be analyzed along track I, and which regulations are aimed only at the side effects of speech and therefore to be analyzed along track II. An interesting possibility is that an inquiry into the content-based nature of a regulation may be seen as an inquiry into the intent of the regulator. See infra notes 129-58.
sion causes them to reach out for some kind of tangible legal rule which offers guidance. Furthermore, courts realize that unless they base their review of adult zoning on more than the individual values of judges, the very legitimacy of their review may collapse.126

One way courts demonstrate their desire for a tangible legal rule is by balancing less and focusing more on one element of the balancing equation. If that element becomes large enough, then the regulation involved will be invalidated. Alexander127 provides an excellent example. The Eighth Circuit discussed only the extent of infringement upon protected speech throughout its entire opinion. No mention was made of the city's justification for a zoning law which dispersed adult uses throughout Minneapolis with the effect of eliminating two-thirds of the locations for adult bookstores. The court simply held that the extent of adult speech permitted by the ordinance was constitutionally insufficient.128

Another, and perhaps more fruitful, method of gaining the security of legal rules is for the courts to introduce the question of intent into the analysis. Without admitting it, some courts have used facts which suggest, but do not prove, an intent to suppress adult speech to tip their balancing scales in favor of the invalidation of an adult zoning ordinance.129 Other courts have openly turned to a careful and explicit search for intent to eliminate the need for balancing.130

The use of facts which are probative of intent to tip the scales in

126. See supra note 42 and accompanying text.
127. 698 F.2d at 936.
128. Id. at 938-39. The direction taken by the Alexander court has its attractions. Focusing strictly upon the degree of infringement is easy to apply because a court can simply determine what number or percentage of adult uses may be properly eliminated by looking at previous cases. For example, if town A successfully restricts the market for adult speech by 5%, then so may town B, and so on. This eliminates the uncomfortable task of balancing. However, such a test seems too rigid to be successful. Some towns may have more compelling reasons for restricting speech than others.
129. See Basiardanes, 682 F.2d at 1216 (court discussed the timing of the passage of the ordinance, the sequence of events leading to its passage, the history of the ordinance, and the narrow focus of the ordinance to show an improper motive to "squelch free speech"); Keego Harbor, 657 F.2d at 98 (court pointed to the scarcity of objective evidence supporting the city's justification for the zoning ordinance implying an improper motive on the part of the city).
130. See Kuzinich, 689 F.2d at 1347-49 (court, in reviewing summary judgment in favor of constitutionality of ordinance, emphasized "that zoning may not be employed for the purpose of restricting the content of speech, including that which is sexually explicit"); Avalon, 667 F.2d at 662 (court invalidated zoning ordinance expressly on grounds that it fails the test requiring the governmental interest to be unrelated to the suppression of free expression).
favor of invalidation can be seen in *Keego Harbor*\textsuperscript{131} and *Basiardanes*.\textsuperscript{132} In *Keego Harbor*, the Sixth Circuit focused on the fact that the city tried to justify its adult zoning law on the basis of facts raised after the enactment of the law.\textsuperscript{133} Although the court never mentioned intent as a factor in its decision, it seems that the court regarded the city’s failure to consider factual support for the ordinance before its enactment as probative of the city’s desire to regulate adult speech for illegitimate purposes.\textsuperscript{134} At the very least, the failure to carefully consider the facts before enactment meant that the city’s decision could not have been the product of careful deliberation. Such hasty decisions should not be permitted where precious first amendment rights are at stake. Towns should be encouraged to tread upon protected speech only when necessary and only after careful deliberation.\textsuperscript{135}

The *Basiardanes* court made the same observation regarding the consideration of facts before the enactment of the zoning.\textsuperscript{136} The Fifth Circuit held that pre-enactment justification was a requirement for constitutional approval.\textsuperscript{137} It also probed more deeply into facts probative of intent.\textsuperscript{138} The history of the zoning’s enactment cast doubt upon the city’s motives. Galveston did not regulate adult theaters until Basiardanes announced the opening of his theater across the street from the newly renovated Grand Opera House. Such action on the part of the city certainly suggests a desire to suppress adult speech because of its offensiveness to opera patrons.\textsuperscript{139} Similarly, the narrow focus of the zoning suggested official hostility to adult speech. For example, no restrictions were placed on pool halls, massage parlors or bars. The zoning affected only adult theaters and bookstores.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{131} 657 F.2d at 94.
\item \textsuperscript{132} 682 F.2d at 1203.
\item \textsuperscript{133} *Keego Harbor*, 657 F.2d at 98. The city attempted “to justify the zoning restrictions as necessary to prevent ‘blight’ and to control traffic.” *Id.* The court noted, however, that there appeared to be no objective evidence supporting this justification at the time Keego Harbor enacted the ordinance. *Id.* See supra notes 92-96 and accompanying text for a synopsis of the *Keego Harbor* opinion.
\item \textsuperscript{134} 657 F.2d at 98.
\item \textsuperscript{135} See *id.* at 99. The court stated that where “an ordinance effectively bans material that is entitled to at least some degree of First Amendment protection, . . . that ordinance must be justified and drawn to further those justifications.” *Id.*
\item \textsuperscript{136} See supra notes 82-91 and accompanying text for a synopsis of the *Basiardanes* opinion.
\item \textsuperscript{137} *Basiardanes*, 682 F.2d at 1215. The court stated that “[t]he city must buttress its assertion with evidence that the factual basis was considered by the city in passing the ordinance.” *Id.*
\item \textsuperscript{138} *Id.* at 1216.
\item \textsuperscript{139} *Id.* The court concluded that the city’s motive in passing the ordinance was to force the adult theater away from the opera house for fear that the theater would deter patrons from attending the opera.
\item \textsuperscript{140} *Id.*
\end{itemize}

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The explicit use of a search for intent and the discarding of balancing can be seen in *Avalon Cinema Corp. v. Thompson* as well.\(^{141}\) In the fall of 1980, Avalon obtained a permit to operate an adult bookstore and movie theater in North Little Rock, Arkansas. The theater and bookstore would have been the only adult establishments in town. The day the permit was issued, the city council convened a special meeting to enact an emergency zoning ordinance which prohibited placement of adult uses within a hundred yards of a church, school, park, or residential area. The Eighth Circuit found that the ordinance restricted the market for adult speech,\(^{142}\) but it did not begin a search for justification. Instead, the court focused on the city’s reaction to the impending opening of the bookstore to find an intentional suppression of protected speech.\(^{143}\)

The Ninth Circuit has also indicated that it will carefully consider a town’s intent in regulating adult speech before balancing. In *Kuzinich v. County of Santa Clara*,\(^{144}\) the court considered an appeal from summary judgment in favor of the county. At issue was a zoning amendment which rendered unlawful an adult movie theater and an adult bookstore owned by the plaintiff. In its decision to reverse, the court spent one paragraph considering the factual bases for the zoning while writing at length on the evidence which indicated the intentional suppression of speech.\(^{145}\) The court indicated that the evidence supported the conclusion that the basic purpose of the ordinance was to control pornography.\(^{146}\)

Similarly, in *Ebel v. City of Corona*,\(^{147}\) the Ninth Circuit ordered a preliminary injunction against the enforcement of an adult zoning law similar to the one overturned in *Avalon*.\(^{148}\) The court noted that Ebel owned the only adult bookstore in town and that testimony at

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141. 667 F.2d at 659.
142. *Id.* at 662. The court focused on the fact that the ordinance had the effect of "virtually suppressing public access to sexually oriented (but nonobscene) adult entertainment." *Id.*
143. *Id.* at 662-63. The court seemed to support its conclusion that the ordinance was an unconstitutional content-based regulation by placing emphasis on evidence showing official hostility to adult speech. Alderman Duke testified that he had hoped the ordinance would keep the theater from opening. *Id.* at 663 n.9.
144. 689 F.2d at 1345.
145. *Id.* at 1348. The court focused on a report prepared by an intern to the board of supervisors recommending the elimination of the adult establishments. The report stated that the establishments were a "public nuisance," and would create public alienation from the board unless they were eliminated. *Id.*
146. *Id.*
147. 698 F.2d 390 (9th Cir. 1983).
148. *Id.* at 391.
public hearings was specifically aimed against it.\textsuperscript{149} The chairman of the planning commission had stated that the zoning law would "'remove the bookstore,'" and a planning commissioner had said that he "'would like to see the bookstore out of Corona.'"\textsuperscript{150} The court went on to consider the possibility of balancing at trial, but its consideration of the actual purpose or intent of the ordinance was clear.\textsuperscript{151}

As discussed above, courts are uncomfortable with the role of balancer in reviewing adult zoning laws. Courts have reacted to the inherent uncertainty of balancing by reaching for firm legal rules.\textsuperscript{152} In Alexander,\textsuperscript{153} Keego Harbor,\textsuperscript{154} and Basiardanes,\textsuperscript{155} this reaching was done by modifying the usual balancing test, while in Avalon,\textsuperscript{156} Kuzinich,\textsuperscript{157} and Ebel,\textsuperscript{158} the usual balancing test was discarded. All of these efforts have been at least partially successful in helping judges sort out the difficulties inherent in first amendment review of adult zoning, and they lead to a proposed revision of the current method of review.

IV. A PROPOSED REVISION OF FIRST AMENDMENT ANALYSIS OF ADULT ZONING AND THE EFFECTS OF THIS REVISION

A. A Proposed Revision of the First Amendment Analysis of Adult Zoning

The primary purpose of this proposed revision is to fully defend first amendment rights without some of the judicial discomfort associated with balancing. Consequently, it will rely more upon firm legal rules and rely less upon balancing.

The first rule of this revision is the invalidation of any zoning ordinance which is intended to restrict protected speech. Naturally, the town whose regulation is under review will contend that the zoning is motivated by some proper purpose, but the court should hear evidence from the litigants which is probative of the actual intent of the municipality. If the evidence demonstrates an intentional suppression of speech, the zoning is invalidated without further inquiry.\textsuperscript{159}

\textsuperscript{149} Id. at 393.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} See supra notes 118-51 and accompanying text.
\textsuperscript{153} 698 F.2d at 936.
\textsuperscript{154} 657 F.2d at 94.
\textsuperscript{155} 682 F.2d at 1203.
\textsuperscript{156} 667 F.2d at 1345.
\textsuperscript{157} 689 F.2d at 1345.
\textsuperscript{158} 698 F.2d at 390.
\textsuperscript{159} See, e.g., Ebel, 698 F.2d at 393 (court held ordinance banning adult bookstores unconstitutional because its actual purpose was to obstruct the exercise of the first amendment); Kuzinich, 689 F.2d at 1348 (court held unconstitutional an ordinance banning adult movie theaters because its basic purpose was to control pornography);
This rule is slightly different from the threshold test currently used. Under current doctrine, courts look to see if the challenged regulation focuses on the content of protected speech. Under the suggested rule, a court would ignore the regulatory focus and consider instead motivation. This would result in the invalidation of regulations which did not focus on the content of speech but were designed to suppress speech.

The second rule relied upon looks to the effects of adult zoning. If adult uses are banned or effectively banned, the ordinance is held unconstitutional unless the city comes forward with compelling justification for its action.

Avalon, 667 F.2d at 661 (court held that the city must submit specific empirical findings of deleterious effect upon the surrounding neighborhood in order to support its stated reasons for enacting an ordinance prohibiting adult movie theaters). See also Comment, supra note 2, at 305, 309 for a brief consideration of motivation as a key factor in reviewing adult zoning.

160. See, e.g., Slaton, 413 U.S. at 57 (court held that states have a legitimate interest in regulating the sale and exhibition of obscene materials because such markets result in crime); Chaplinsky, 315 U.S. at 574 (court held that a statute prohibiting the use of offensive words tending to cause a breach of the peace was within the state's constitutional power).

161. This test is broader than the content-based test for track I. It arises from the fact that content-based regulations are improper because they generally intend to suppress speech. See Case Comment, supra note 31, at 237-38. However, if the purpose of invalidating content-based regulation of speech is to assure government neutrality in the "free marketplace of ideas," then it makes sense to promptly invalidate all laws which are not intended to be neutral in that marketplace. Thus, the key inquiry should not be whether the law under scrutiny categorizes speech on the basis of content, but whether the law intends to suppress protected speech. Under the proposed intent-based test, content-based regulations would still be invalidated, since they intend to suppress speech. Additionally, laws not based upon the content of speech which intend to suppress speech would be invalidated. An example of such a law would be one levying extremely heavy licensing fees upon all entertainment establishments with the intent of eliminating certain less profitable forms of entertainment from town. Such a law would not be invalidated under a content-based test, but it would be invalidated under an intent-based test as the government would not be acting in a neutral fashion. Thus, an intent based test gives broader protection to the constitutional value of government neutrality in the free speech market.

Recent cases may indicate that an intent-based test is already emerging in the federal courts because zoning ordinances are being declared unconstitutional due to an intent to suppress protected adult speech. See Ebel, 698 F.2d at 393 (city's intent to harass and obstruct); Kuzinich, 689 F.2d at 1348 (intent to control pornography improper purpose); Avalon, 667 F.2d at 663 (city must bear burden of justifying its purpose).

162. This is intended to emulate the strict scrutiny applied to suspect racial classifications under the equal protection clause of the Constitution. See, e.g., Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (Court applied strict scrutiny to strike down racial segregation in public schools); Korematsu v. United States, 323 U.S. 214, 216 (1944) (concept of strict scrutiny for racial classifications was introduced). The application of strict scrutiny to zoning laws banning all adult uses from a town would probably inval-
Lastly, if the zoning under review passes the two tests described above, the court will be forced to balance. If this is the case, the question of constitutionality is probably close. Therefore, the sensitivity of a balancing test will be needed. However, one factor will be added to the balancing equation: the factor of intent. If the court finds evidence which indicates, but does not prove, purposeful suppression of speech, then that evidence should weigh in favor of invalidation.163

B. Evaluation and Effect of the Proposed Revision

The proposed revised method of reviewing adult zoning offers several advantages over the old method.

First, by insisting upon a careful determination of the intent of the regulating city, the proposed revised analysis is likely to better protect constitutional values by invalidating all purposeful suppression of adult speech. Under the old method of analysis, cities generally attempt to suppress protected speech (a clearly unconstitutional act) by claiming that their efforts seek only to regulate the effects of speech. This shifts judicial review of the challenged law to a balancing test, which in turn increases the likelihood that unconstitutional acts will go unimpeded. By contrast, a detailed inquiry into the motivation of the regulating town would immediately invalidate all attempts to suppress protected speech, no matter how they were disguised or characterized.164

Second, the new analysis protects speech by holding any ban of adult establishments unconstitutional unless the zoning city presents compelling justification for the ordinance.165 Critics may contend that adult uses present problems of a special nature which justify

idate such a law, as courts are generally reluctant to make a finding of compelling justification in the context of strict scrutiny. Thus, cities will generally be unable to ban adult speech. However, a city which is zoned as 100% residential may be able to come forward with compelling justification for a ban of public adult establishments. Such a city might be able to show that the presence of any adult establishment would sufficiently destroy the residential nature of the town to justify a ban. This possible justification for banning adult speech has been suggested by the Supreme Court in Schad: “Our decision today does not establish that every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which live entertainment is permitted.” 452 U.S. at 75 n.18 (emphasis added). See also Note, Schad v. Borough of Mount Ephraim: A Pyrrhic Victory for Freedom of Expression?, 15 Loy. L.A.L. Rev. 321 (1982), for an in-depth discussion of how communities may exclude protected expression by manipulating their zoning power.

163. See supra notes 131-40 and accompanying text. This is analogous to the situations in the Keego Harbor and Basiardanes cases.

164. Balancing always gives a court an opportunity to ignore or lightly regard evidence of intentional suppression of speech.

165. See Ebel, 698 F.2d at 393, where the court held that the city must show that the adult zoning ordinance furthers an important governmental interest and does not purposefully suppress free expression.
banning them from town. However, the Supreme Court is clearly unwilling to accept this notion:

Mount Ephraim contends that it may selectively exclude commercial live entertainment from the broad range of commercial uses permitted in the Borough for reasons normally associated with zoning in commercial districts, that is, to avoid the problems that may be associated with live entertainment, such as parking, trash, police protection, and medical facilities. The Borough has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses; nor does it appear that the Borough's zoning authority has arrived at a defensible conclusion that unusual problems are presented by live entertainment. 166

This reluctance is further demonstrated in Young, where the Court noted that the concentration, and not the presence, of adult uses created the urban blight which justified the regulation upheld in that case. 167

The clear implication of Schad and Young is that even if adult uses do pose special problems (and this is open to debate), their mere presence alone does not necessarily create those problems. 168 In turn, this determination means that a properly regulated adult use is no more incompatible with general commercial or industrial land uses than is the hypothetical restaurant of Schad. 169 Therefore, the legitimate goals of zoning may be reached by regulating, and not banning, adult uses. Since a ban on adult uses can serve no purpose which could not be served by well-conceived regulation, these bans should be held unconstitutional in light of first amendment guarantees. 170

The requirement of compelling justification for bans of adult uses makes good public policy as well. Some cities may be able to disguise their intent to restrict protected speech. The test proposed provides a valuable function in that a town which has successfully hidden its intent to suppress speech will find itself faced with a difficult choice. It will have to choose between a law which permits at least some adult speech in town or strict scrutiny by the courts and probable invalida-

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166. Schad, 452 U.S. at 73-74.
167. Young, 427 U.S. at 60-61, 71 n.35.
168. See supra notes 166-67 and accompanying text.
169. To clarify, there is no reason why a properly regulated adult use should cause any greater land use problem than a normal commercial use.
170. In other words, Schad and Young imply that it is neither necessary nor constitutionally proper to ban adult uses from a town in order to achieve the legitimate police power goals of eliminating crime and urban blight. Of course, it is theoretically possible that a situation justifying such a ban might be presented to a court, but this justification should be compelling. Hence the use of a strict scrutiny test.
tion of a law which permits no adult speech in town. Few, if any, communities would choose to undergo strict scrutiny, so the second rule curbs purposeful suppression of protected adult speech by reducing the efficacy of any hidden suppression of speech.

Third, the new analysis would promote judicial economy by the use of firm legal rules. Both methods of analysis require detailed fact-finding by the courts, but the new method saves the courts the trouble of balancing unless it is absolutely necessary. Under the old analysis, balancing would probably have been performed regardless of the intent or effect of the zoning under review. Under the new analysis, balancing would take place only if the zoning neither intends to suppress nor bans protected adult speech.

Fourth, the use of firm legal rules would provide city planners with a better understanding of the permissible uses of the zoning power. Under the old analysis, planners had only the balancing preferences of individual judges to guide them in drafting zoning laws. The firm rules of the new analysis would give city officials more guidance. Planners would be careful to leave room for adult uses because most bans of adult speech will not survive a strict scrutiny analysis. This in turn would result in imaginative and innovative regulation within the bounds of the Constitution as planners sought new ways to regulate adult uses. Furthermore, less litigation would occur because fewer owners of adult establishments would have grievances to press.

Fifth, the proposed use of intent as a factor in balancing would make the courts more sensitive to the spirit of the Constitution. The Constitution should not tolerate infringement of protected speech when the motivation for the infringement is questionable. Stronger, weightier justification should be required to uphold the zoning under review.

This new proposal, however, might generate four areas of criticism. The first criticism would be that the courts already consider intent before any balancing takes place by considering the issue of content neutrality, and that therefore a major part of the proposal adds nothing new. This criticism is plausible, but in practice, the Supreme Court has not examined the intent behind adult zoning as rigorously as it should. At the very least, courts should explicitly consider facts probative of intent. Even if no conclusive finding is made, the evidence discovered can be used in balancing at a later stage of the reviewing process. Furthermore, courts should be reminded that all intentional suppression of speech is unconstitutional. The difficulties of balancing divert judicial attention from this fundamental rule.

171. *See supra* note 162 and accompanying text.
The proposal curbs this problem by making the defense of the rule the court's first duty in reviewing adult zoning laws. The second criticism might be that the new proposal's use of firm rules in lieu of balancing would trap the courts into unjust results. This can be answered by noting that the new analysis is flexible when necessary because it resorts to balancing when the question of a zoning law's constitutionality is close. The two rules which a law must pass to reach a balancing test only screen out regulations whose constitutional validity is highly improbable. Other regulations will be tested by balancing.

A third attack might be that the proposal improperly introduces intent into the balancing equation. However, a balancing equation which utilizes intent as a factor is more sensitive to the Constitution. Laws of questionable motivation should be overturned. Failure to insist upon judicial scrutiny of the motives behind adult zoning will invite clever and unjustified suppression of protected speech.

The fourth and final attack could be that the proposal defends free speech, but not to a great enough extent. Others might argue that the proposal grants too much protection to speech. This is a legitimate criticism. However, the purpose of this proposal is not to reform the contours of constitutional protection. Instead, the proposal is designed to preserve current constitutional values while removing excess baggage associated with present-day analysis. Thus, if a clear change from current constitutional doctrine is required, a different proposal must be put forward.

V. CONCLUSION

Zoning has a role in modern society, but it also has the potential for abuse. This possible misuse has created tension between the zoning power and the first amendment, particularly in the zoning of adult establishments which offer constitutionally protected speech. The current manner of review utilized by the courts in determining the validity or invalidity of zoning ordinances regulating adult speech has troubled judicial comfort and ad hoc analysis. The judiciary itself, either consciously or instinctively, has sought to develop a

172. This argument is based on the premise that firm rules are too inflexible.
173. Even then, a compelling justification may justify measures as extreme as a ban on adult speech.
clearer and more efficient method of review. This article's proposal suggests a new method which would provide ample protection to constitutional rights and make analysis easier for both courts and laypersons. It also encourages innovative, non-restrictive regulation of adult speech. Although the revision makes use of firm rules, it is flexible when necessary, thus allowing the law to grow and change as new problems arise. As such, it is an improvement over the current analysis utilized in the judicial review of adult zoning.