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Abstract

This article examines New York City’s first attempt to regulate adult entertainment establishments through zoning provisions. Specifically, it discusses whether the adult-use zoning provisions comply with federal and state constitutional requirements, and it examines whether the adult-use amendments would cause a reduction in adult-use establishments in New York City, which would render the amendments constitutionally suspect, and whether its inclusion of topless bars renders the amendments overbroad. The author concludes that the adult-use amendments are consistent, with both federal and state constitutional requirements, and that the adult-use amendments will survive judicial scrutiny.

KEYWORDS: zoning, adult entertainment

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ZONING ADULT ESTABLISHMENTS IN NEW YORK: A DEFENSE OF THE ADULT-USE ZONING TEXT AMENDMENTS OF 1995

James E. Berger*

Introduction

On October 25, 1995, the New York City Council approved a series of amendments to the Zoning Resolution of the City of New York to regulate adult entertainment establishments (the "adult-use amendments").1 Although many municipalities nationwide have sought to regulate the location of adult entertainment establishments (such as topless and nude bars, adult video and book stores, and adult theaters and peep shows), these amendments represent New York City's first attempt to regulate adult-uses through specific zoning provisions.2 Mayor Rudolph W. Giuliani and the New York City Council proposed the adult-use amendments in response to the dramatic proliferation of adult entertainment establishments throughout New York City in the last ten years. The goal of the proposal was to limit the adverse secondary impacts of adult establishments while safeguarding the constitutionally protected rights to provide and procure adult-oriented goods and services.3

The adult-use amendments were submitted for formal public review pursuant to Sections 200 and 201 of the New York City Charter on March 22, 1995. During the seven months that followed, the city's fifty-nine community boards, five borough boards and borough presidents, the City Planning Commission, and the City

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2. NEW YORK CITY DEPARTMENT OF CITY PLANNING, ADULT ENTERTAINMENT STUDY I (1994) [hereinafter DCP STUDY].

3. See NEW YORK CITY PLANNING COMMISSION, REPORT NO. N 950384 1, Cal. No. 8 (Sept. 18, 1995) [hereinafter CPC REPORT].
Council reviewed the amendments. Over the course of these reviews, three distinct lines of opposition emerged. The first group of opponents objected to the adult-use amendments on the ground that they would result in a considerable influx of adult establishments into their communities because of their displacement from existing locations. The second group believed that the amendments did not go far enough to protect communities. Proponents of this view generally advocated even more restrictive provisions or an outright ban on adult entertainment establishments. The third group felt that the adult-use amendments were overly restrictive and violative of constitutional free speech guarantees.

All but the last of these objections were resolved conclusively through the political process, as both the City Planning Commission and City Council voted to approve the adult-use amendments. However, the final objection, concerning the validity of the adult-use amendments under the United States and New York Constitutions, will have to be resolved in the courts. Indeed, on February 27, 1996, the New York Civil Liberties Union (the New York State chapter of the American Civil Liberties Union) filed suit in Supreme Court, New York County, alleging that the adult-use amendments violated the Constitutions of the United States and the State of New York.

In a Note published in this journal, Rachel Simon argued that the adult-use amendments suffered from two fundamental flaws that undermined their ability to withstand judicial review. First, Ms. Simon suggested that the adult-use amendments would reduce the number of adult-use establishments in New York City, and that any ordinance that causes such a reduction is constitutionally suspect. Second, she maintains that the adult-use amendments' inclu-

4. See New York, N.Y. Charter § 201 (public review process for zoning text amendments); see also New York, N.Y. Charter § 197-C (detailing the public review procedure for uniform land use).
5. CPC REPORT, supra note 3, at 13-15 (summarizing resolutions of community boards, borough boards, and borough presidents).
6. The City Planning Commission voted to approve the amendments by a vote of seven to six, see CPC REPORT, supra note 3, at 78, while the Council voted to approve by a vote of forty-one to nine.
sion of topless bars has no empirical basis in the record, thus rendering the amendments overbroad.  

This Article limits its scope to a discussion of whether the adult-use amendments comply with federal and state constitutional requirements, and addresses the specific arguments put forth by Ms. Simon. Part I of this article examines the adult entertainment industry in New York City. Part II summarizes the findings contained in the study of adult entertainment impacts completed by the New York City Department of City Planning in 1993 and outlines the provisions of the adult-use amendments. Part III discusses the federal and state constitutional provisions protecting adult entertainment establishments. Part IV concludes that the adult-use amendments are consistent with both federal and state constitutional requirements, and that the adult-use amendments will survive judicial scrutiny.

I. The Adult Entertainment Industry in New York City

In 1965, there were only nine adult entertainment establishments in New York City, largely because state and local obscenity laws imposed severe restrictions on the sale and distribution of pornographic material. By 1976, however, these restrictions had largely been repealed, and the number of adult establishments increased to 151. Following a decrease between 1976 and 1984, the number rose again to an all-time high of 177 adult entertainment establishments in 1993.

A. The Nature of the Adult-Use Industry in New York

Sexually-oriented, or "adult," entertainment constitutes a multi-billion dollar industry encompassing a wide array of goods, services, and activities. Recent developments within the industry include a marked increase in the use of telecommunications media (such as the internet and telephone toll lines) for adult purposes, and a decrease in the number of adult motion picture theaters. From a land use and zoning perspective, however, two trends are most noteworthy—the dramatic increase in the sale and rental of

9. DCP STUDY, supra note 2, at 19.
10. See, e.g., 1974 N.Y. Laws ch. 989 (refining definition of obscenity to conform to standards established in Miller v. California, 413 U.S. 15 (1974)).
11. DCP STUDY, supra note 2, at 15.
12. Id.
adult videos, and the increased popularity of topless bars and clubs. These latter types of uses, together with more "traditional" adult entertainment establishments such as peep shows and adult theaters, have been the focus of attempts to regulate the adult entertainment industry through zoning.

1. Industry Trends

Technological advances and decreased production costs have caused the video segment of the adult entertainment industry to grow considerably in recent years. An industry source reported that adult video sales and rentals from general-interest video stores have increased by seventy-five percent since 1991, totalling approximately $2.1 billion nationwide. This increased popularity and the lower cost of adult videos has also spurred a rapid increase in the number of adult-only video stores, which have located in residential areas of New York City that had not historically been home to adult entertainment uses. In 1993, there were eighty-six adult book, video, and peep show establishments in New York City, an increase of 197 percent since 1984.

Topless entertainment constitutes another growing segment of the adult-use industry, accounting for approximately $50 million in business annually in New York City. Some newer topless clubs have marketed themselves to a more affluent consumer base, and have attempted to shed the unseemly image associated with strip clubs and topless bars by attempting to operate as more mainstream establishments offering amenities found in non-adult bars and clubs (such as giant screen televisions and pool tables). Like adult video stores, these clubs have proliferated in local commercial strips adjacent to residential areas. In 1993, there were sixty-eight topless and nude bars in New York City, an increase of twenty-six percent.

2. Locational Trends

Historically, the adult entertainment industry was concentrated in the Times Square and West 42nd Street areas of Midtown Manhattan. While Midtown continues to have the highest concentra-

13. DCP STUDY, supra note 2, at 15.
14. Id. at 18.
15. Id. at 22.
16. Id. at 17.
17. Id.
18. DCP STUDY, supra note 2, at 22.
tion of adult entertainment establishments, concentrations of adult businesses have appeared in the outer boroughs since 1984. Specifically, while the number of community districts with at least one adult business has remained stable over the 1984-1993 period, the number of districts with seven or more adult businesses nearly tripled over the same period, from three to eight. This proliferation of adult uses in new areas is likely attributable to the technological changes discussed above and the shift within the industry away from adult theaters to smaller establishments (such as video and book stores) that require less capital and can be started and managed by a single entrepreneur.

II. The DCP Study and the Adult-Use Amendments

Prompted by growing concern about the increase in the number of adult businesses and their proliferation into previously unaffected communities, the Department of City Planning undertook a study of the impacts of adult businesses on urban life (the "DCP Study"). This study, published in 1994, provided the empirical foundation for the adult-use amendments. The findings set forth in the study, as well as the provisions of the adult-use amendments, are summarized below.

A. The DCP Study

The DCP Study offered a two-tiered analysis. The first part of the study discussed the impacts of adult entertainment establishments identified in other jurisdictions. The second part discussed previous studies of these establishments in New York City, and analyzed data compiled independently from a number of study and control areas around the city.

1. Studies and Regulations in Other Jurisdictions

The DCP Study first analyzed data concerning adult-use impacts identified in the following nine jurisdictions: Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California;
Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota. The studies in these jurisdictions included the following findings:

* Islip: Concentrations of adult entertainment uses give rise to "dead zones" avoided by shoppers and pedestrians;\(^\text{21}\)

* Los Angeles: Areas with concentrations of adult entertainment uses have higher rates of certain crimes; concentrations of adult entertainment uses have an adverse impact on the value of nearby commercial and residential properties;\(^\text{22}\)

* Indianapolis: Major crimes occurred in areas with at least one adult entertainment use at rates significantly higher than in control areas and the city as a whole; adult-use establishment located in middle-income residential or commercial area would have an adverse impact on property values;\(^\text{23}\)

* Whittier: Commercial and residential areas adjacent to adult uses had higher turnover rates; a study area containing adult entertainment uses had much higher increases in crime than the city as a whole; adult uses are associated with excessive noise, drunkenness, and pornographic litter;\(^\text{24}\)

* Austin and Phoenix: A direct positive correlation existed between the number of adult entertainment establishments and the rate of sex-related crime;\(^\text{25}\)

* Minnesota: Areas with concentrations of adult entertainment uses showed a statistically significant positive relationship between adult entertainment uses, crime, and neighborhood blight.\(^\text{26}\)

The DCP Study also summarized the findings of other municipalities that relied exclusively on studies from other jurisdictions to conclude that adult entertainment establishments resulted in negative secondary impacts, such as increased crime rates, decreased property values, and deterioration in the quality of life and overall character of communities.\(^\text{27}\) The DCP Study concluded that data from the jurisdictions discussed above provided ample evidence that adult entertainment establishments have adverse negative secondary impacts on adjacent communities.\(^\text{28}\)

21. DCP Study, supra note 2, at 3 (discussing Islip study).
22. Id. at 4 (discussing Los Angeles study).
23. Id. at 5 (discussing Indianapolis study).
24. Id. at 6 (discussing Whittier study).
25. DCP Study, supra note 2, at 6-7 (discussing Phoenix and Austin studies).
26. Id. at 8 (discussing Minnesota study).
27. Id. at 67-68.
28. DCP Study, supra note 2, at 67.
Furthermore, the DCP Study reviewed the types of zoning provisions used by other municipalities to regulate the location of adult entertainment establishments. The Study identified two types of regulations: the "concentration" model and the "dispersion" model. The concentration model was developed in Boston, Massachusetts, which established a two-block "adult entertainment district" in a downtown area known as the "Combat Zone." Approximately ninety percent of adult entertainment establishments in Boston are located in this district, which was established to prevent adult uses from proliferating in other areas of the city, and to facilitate police monitoring of such uses. Other cities utilizing the concentration model include Seattle, Washington and Camden, New Jersey.

Dispersion models operate in the opposite manner from concentration models. Dispersion adult entertainment regulations follow the regulations enacted by Detroit, Michigan in 1972. Detroit prohibited adult entertainment establishments from locating within 1,000 feet of another adult use, or within 500 feet of a residential area. Dispersal regulations seek to prevent concentrations of adult uses and to limit them to areas remote from residential neighborhoods, thus reducing their impact on residences and other sensitive uses (such as schools and houses of worship). Other municipalities with dispersal requirements include Atlanta, Georgia; Los Angeles, California; Islip, New York; and Chicago, Illinois. New York City has chosen to follow this model as well.

2. DCP's Study of Adult Entertainment Impacts in New York City

The second part of the DCP Study sought to identify the specific impacts of adult entertainment establishments in New York City. It did so by examining a number of impact studies conducted previously in New York, and by collecting and examining independent data from six study and control areas throughout the city.

29. Id. at 11.
30. Id. at 12.
31. Id.
32. DCP STUDY, supra note 2, at 12-14. Chicago also imposed a licensing requirement on adult uses, seeking to eliminate the influence of organized crime on the adult entertainment industry. While Islip's ordinance contained a similar permitting provision for adult uses, this provision of the ordinance was ruled unconstitutional. Id. at 14. See Town of Islip v. Caviglia, 532 N.Y.S.2d 783, 793-94 (2d Dept. 1988), aff'd, 540 N.E.2d 215 (N.Y. 1989).
33. See infra Part II(B).
The DCP Study first summarized analyses of adult entertainment impacts conducted by (1) the City Planning Commission in 1977; (2) the Mayor's Office of Midtown Enforcement in 1983; (3) the Chelsea Action Coalition and Manhattan Community Board Four in 1993; (4) the Task Force on the Regulation of Sex-Related Businesses in 1993; (5) the Times Square Business Improvement District in 1993; and (6) a survey compiling media accounts of specific incidents and effects and complaint correspondence with city agencies and officials since 1993. Each of these studies found negative impacts attributable to adult entertainment establishments, including increased rates of crime and prostitution, increased levels of disinvestment and tax arrearage in the Times Square area (where many adult uses clustered), decreased property values and business levels, and quality of life complaints such as litter, noise, and offensive signage.

DCP concluded its study by analyzing conditions in six study areas containing at least one adult entertainment establishment. Within each area, the study compared business conditions, property values, criminal complaints, and sanitation conditions of "survey" blockfronts (blockfronts with an adult entertainment establishment) with those of control blockfronts (without any adult-use establishment). DCP's independent analysis found impacts relating to community character, signage, property values (as viewed by real estate brokers), and business levels. DCP's independent analysis failed, however, to find a statistically significant relationship between adult entertainment establishments and assessed valuations, criminal complaints, or sanitation problems.

34. DCP Study, supra note 2, at 35-47.
35. Id. In response to its 1977 study, the City Planning Commission proposed specific zoning regulations for adult uses. The proposal was withdrawn, however, due to the Board of Estimate's inability to reach a consensus on the proper reach of the regulations and a recognition that new regulations might force adult uses to relocate to different areas of the city.
36. Id. at 49-58. The study areas included two blockfront areas in Manhattan and one each in the Bronx, Queens, Brooklyn, and Staten Island. Id. at 50 (providing map). Despite having the greatest concentration of adult uses in the city, Times Square was not selected as a study area, since the 1993 Times Square Business Improvement District's study was ongoing. Id. at 49. As noted previously, however, the Times Square Business Improvement District Study did find significant adverse impacts relating from the concentration of adult entertainment establishments in the Times Square area. Id. at 40-42.
37. Id. at 51-54.
38. Id. at 54-58.
B. The Adult-Use Amendments

The adult-use amendments were drafted to address, as narrowly as possible, the impacts identified in the DCP Study. Prior to the enactment of the amendments, adult entertainment establishments had only to satisfy the zoning requirements for the "use group" into which they were classified.\textsuperscript{39} For example, bookstores are listed in use groups 6 and 12, and are allowed in a wide range of commercial and light manufacturing zones.\textsuperscript{40} Thus, prior to enactment of the adult-use amendments, an adult-only bookstore would have been treated no differently from another bookstore, and could have located in a commercial area abutting a residential district.

The adult-use amendments, however, establish special definitions for adult entertainment establishments, and require them to comply with a more stringent set of zoning criteria. Under the amendments, a commercial establishment is an adult establishment if a substantial proportion of the establishment (based on total floor area) is devoted to the sale of books, films, other media, or performances characterized by an emphasis on sex, and if minors are excluded because of age.\textsuperscript{41} Pursuant to the amendments, adult establishments are permitted only in manufacturing and certain central commercial districts.\textsuperscript{42} In addition, adult establishments

\textsuperscript{39} All permitted land uses in New York City are sorted into "use groups" based upon common functional and/or nuisance characteristics. See \textsc{New York City Department of City Planning, Zoning Handbook} 3 (1990).

\textsuperscript{40} \textsc{Zoning Res. of the City of New York}, app. A, at A-4 (1961). The city is divided into three basic zoning districts—residential (R), commercial (C), and manufacturing (M). Each basic district is divided further into zones based on density, parking, and other requirements. \textit{Id.}

\textsuperscript{41} Council Res. No. 1322, \textit{supra} note 1, \S 12-10. Specifically, adult establishments are defined in the following manner: an "adult book store" is a book store having "a substantial portion of its stock-in-trade in any . . . books, magazines . . . or other printed matter . . . or films, video cassettes . . . or other visual representations . . . characterized by an emphasis upon the depiction or description of 'specified sexual activities' or 'specified anatomical areas.'" \textit{Id.} \S 12-10(a).

An "adult eating or drinking establishment" is an eating or drinking establishment not open to minors that "regularly features live performances [or films] . . . characterized by an emphasis on 'specified anatomical areas' or 'specified sexual activities,' . . . or [features] employees who . . . regularly expose to patrons 'specified anatomical areas.'" \textit{Id.} \S 12-10(b).

An "adult theater" shares substantially the same definition as an adult eating or drinking establishment. \textit{Id.} \S 12-10(c). "Specified sexual activities" and "specified anatomical areas" are defined in the legislation as well. \textit{Id.} \S 12-10(d).

\textsuperscript{42} \textit{Id.} \S 32-01. Specifically, the adult-use amendments permit adult establishments to operate in C6-4, C6-5, C6-6, C6-7, C6-8, C6-9, C7, C8, and all M-designated zones that do not permit new residences.
may not locate within 500 feet of any house of worship, school, residential zoning district, any manufacturing district that allows development of new residences, or any other adult establishment. The adult-use amendments also prohibit more than one adult establishment from locating on a single zoning lot, and limit adult establishments to 10,000 square feet of floor area. Adult establishments that fail to satisfy these criteria are subject to termination under the adult-use amendments, with one significant exemption and an amortization provision.

In addition to the foregoing zoning criteria, the adult-use amendments set forth additional criteria for accessory business signs used by adult uses. In commercial zones where adult establishments are allowed to operate, accessory business signs must comply with the signage regulations applicable in C1 (local shopping and service) districts, and no more than one-third of the maximum allowable sign area may be illuminated. In manufacturing zones, where the size and nature of signs generally are not regulated, adult establishments’ signs may not exceed 150 square feet, of which only fifty square feet may be illuminated. These zoning and signage restrictions were designed to address specifically the impacts identified in the DCP Study.

43. Id. Churches or schools which later locate within 500 feet of a complying adult-use establishment cannot force it to move, however. Id.

44. Id. § 42-01. A “zoning lot” is a tract of land within one block that is designated as the lot to be developed for building permit purposes. A zoning lot may be comprised of more than one tax (ownership) lot. Id. § 12-10.

45. Non-conforming adult establishments are required to terminate the adult nature of their business within one year of their becoming non-conforming (in the case of most existing adult establishments, this means within one year of the effective date of the adult-use amendments). Zoning Resolution No. 1322, supra note 1, § 52-77. The termination provision does not, however, apply to adult uses existing as of the effective date that are non-compliant as a result of their being in excess of 10,000 square feet, location on a zoning lot with another adult establishment, or location less than 500 feet from another adult establishment. Id. § 32-01(f).

46. Existing adult establishments may also escape the terms of the termination provision by filing an application with the city’s Board of Standards and Appeals, which may allow continued operation for a limited time in order for the owner of the adult establishment to amortize any substantial and un-recouped financial expenditures attributable to the adult nature of the business. Id. § 72-40. However, because most capital expenditures (such as property acquisition or improvements) are unrelated to the adult nature of the business, it is considered unlikely that many adult establishments will avoid termination for substantial periods pursuant to the amortization provision.

47. Zoning Resolution No. 1322, supra note 1, § 32-69.

48. Id. § 42-55.
III. Constitutional Protections Applicable to Adult Entertainment Establishments and the Constitutionality of Adult-Use Zoning Provisions

Zoning is the most widespread land use control in the United States today.\(^49\) New York City enacted the nation’s first comprehensive zoning resolution in 1916, and over ninety-seven percent of cities having a population of 5,000 or more now use zoning as the primary land use control.\(^50\) While courts were initially skeptical of early zoning provisions on constitutional grounds as abridging individual property rights,\(^51\) the United States Supreme Court recognized states’ and municipalities’ authority to control land uses through zoning in 1926.\(^52\) While the Court construed the power to zone narrowly in the years immediately following this recognition,\(^53\) recent lower court decisions have made clear that municipalities possess a broad power to “implement land use controls to meet the increasing encroachments of urbanization on the quality of life,”\(^54\) and that legislatively enacted zoning provisions enjoy a presumption of constitutionality as a valid exercise of the state’s police power to advance the public health, safety, and welfare.\(^55\)

When a New York municipal government attempts to regulate land uses such as bookstores or theaters, however, free speech concerns arise under both the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution, as sexually explicit material that is not obscene\(^56\) constitutes


\(^{50}\) Id. at 163-64.

\(^{51}\) Id.


\(^{53}\) See, e.g., Nectow v. City of Cambridge, 277 U.S. 183 (1928).


\(^{56}\) The Supreme Court has held that material is obscene where the average person, utilizing community standards, would find that the material (taken as a whole) appeals to a prurient interest in sex, offensively depicts sexual conduct, and lacks any
protected speech. Specifically, the United States Supreme Court has held that any regulations seeking to restrict speech on the basis of its content are presumptively invalid and subject to strict scrutiny review. However, regulations having an impact on protected speech will be upheld where they are content-neutral, are narrowly tailored to serve a substantial governmental interest, and leave open reasonable alternative avenues of communication.

In light of these competing doctrines allowing government to regulate land use on the one hand and protecting sexually explicit material on the other, the United States Supreme Court and the New York Court of Appeals have developed discrete sets of standards by which to analyze adult-use zoning provisions. Ms. Simon argues in her Note that both federal and state caselaw require that there be no reduction in the total number of adult entertainment establishments as a result of a restrictive zoning ordinance. I will address these issues in turn.

A. Federal Standards

I. Supreme Court Caselaw

The United States Supreme Court first addressed the issue of a municipality’s power to regulate adult uses through zoning in Young v. American Mini Theatres, Inc. At issue in Young was the City of Detroit’s amendment of its “Anti-Skid Row Ordinance” (the “Detroit amendments”) to prohibit adult theaters from locating within 1,000 feet of a series of “regulated uses” or within 500 feet of a residential area. For purposes of the Detroit amendments, Detroit defined an adult theater as one which is used to present “material characterized by an emphasis on . . . ‘Specified


60. Simon, supra note 8, at 209.
62. Id. at 52 n.3 (quoting Detroit ordinance list of uses including, inter alia, adult motion picture theaters, mini-theaters of under 50 seats, establishments selling alcohol for consumption on the premises, hotels, pawn shops, secondhand stores and shoeshine parlors).
63. Id. at 52 n.2.
Sexual Activities" or 'Specified Anatomical Areas.' Like New York and other cities, the Detroit Common Council enacted these changes in light of findings that concentrations of certain land uses (such as adult theaters) have a deleterious impact on the surrounding community.

The plaintiffs in Young attacked the Detroit amendments on a variety of grounds. Specifically, they maintained that the amendments (1) were predicated on definitions that were so vague as to violate the Due Process Clause of the Fourteenth Amendment; (2) violated the First Amendment as a prior restraint on protected speech; and (3) created a classification of theaters based on the content of films shown, violating the Equal Protection Clause of the Fourteenth Amendment. After dismissing the vagueness argument on both substantive and standing grounds, the Court turned to the First Amendment and equal protection aspects of the case.

With regard to the plaintiffs' prior restraint argument, Justice Stevens opened his plurality opinion by noting that under Detroit's zoning ordinance, all motion picture theaters—not just those devoted to adult fare—were required to satisfy certain locational and other requirements, and that there was no dispute as to the city's power to impose these requirements. Stated simply, the plurality held that there was no constitutional impediment to the application of zoning laws to the "commercial exploitation of material protected by the First Amendment," and held that classifying theaters based on the content of their films was not prohibited as a prior restraint on speech where the classification was reasonable and necessary to further significant governmental interests.

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64. Id. at 53 n.4 (defining "Specified Sexual Activities" to include human genitals in a state of arousal, acts of human masturbation, intercourse or sodomy, and erotic touching of genitals, buttocks, pubic region and female breast).

65. Id. (quoting Detroit ordinance defining "Specified Anatomical Areas" to include human genitals, pubic region, buttocks and female breast below the top of the areola if such areas are not "completely and opaquely" covered, as well as the human male penis in erect state, regardless of whether it is covered). This definition, as well as that of "Specified Sexual Activities," is almost indistinguishable from the definitions included in New York's adult-use amendments. See Council Res. No. 1322, supra note 1, § 12-10.

66. Young, 427 U.S. at 54 & n.6.

67. Id. at 58.

68. Id. at 58-60.

69. Id. at 62.

70. Id.

71. Young, 427 U.S. at 63 n.18 (citing Kovacs v. Cooper, 336 U.S. 77 (1948)).
Justice Stevens then turned to the plaintiffs' argument that the distinction between adult and non-adult theaters violated the Equal Protection Clause. He started his analysis by noting that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Having set forth this broad principle, however, Justice Stevens noted that the Court had, in many instances, ruled that the level of protection afforded by the First Amendment varies based on the content of the speech and/or the setting in which it is delivered, and took specific notice of decisions holding that based on their content alone, commercial speech and obscene sexual materials enjoyed a lesser level of protection under the First Amendment.

Based on these decisions and his observation that "the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intending to communicate," Justice Stevens concluded that while a total suppression of non-obscene erotic material would be impermissible, such material warrants less protection than "untrammeled political debate" and ruled that Detroit was authorized to differentiate, on the basis of content, sexually explicit and non-sexually explicit films.

Justice Stevens concluded his opinion with a determination of whether Detroit's interest in preserving the character of its neighborhoods justified the zoning classifications made by the Detroit amendments. Finding that the administrative record revealed an empirical basis for the amendments, he ruled that it was not the Court's function to "appraise the wisdom of [Detroit's] decision to require adult theaters to be separated rather than concentrated in the same areas." He further noted that municipalities' interest in

72. Id. at 64 (citations omitted).
73. Id. at 66-68 & nn.23-24. Specifically, Justice Stevens took note of the Court's rulings declining to give protection to "fighting words," see Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942); speech that compromises national security, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931); and limiting the states' power to enforce libel laws in cases involving public figures, see New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
75. Id. at 70.
76. Id. at 70-71.
77. Id. at 71.
preserving the quality of life “must be accorded high respect,” and held that this interest adequately supported Detroit’s classification.78

As noted previously, Justice Stevens’s opinion in *Young* failed to persuade a majority of the Court, and the portion of his opinion devoted to the Equal Protection Clause was joined by only three other members of the Court.79 Any lack of clarity or authority on the question was resolved ten years later, however, by the Court’s decision in *City of Renton v. Playtime Theaters, Inc.*,80 a case involving an attempt by the City of Renton, Washington to regulate adult theaters through zoning.

*Renton* concerned a substantially identical situation to that in *Young*. In April 1981, at the behest of its Mayor and following a review of the experiences of Seattle and other cities,81 the City of Renton enacted a zoning ordinance prohibiting any adult motion picture theater from locating within 1,000 feet of any residential zone, dwelling, church, park, or school.82 At the outset of his opinion for the Court, then-Justice Rehnquist established the critical threshold test for whether an adult-use zoning ordinance will survive review—where the ordinance was designed to prevent secondary impacts attributable to adult uses (such as crime, a decline in property values, or a deterioration in the quality of urban life), it would be analyzed as a content-neutral time, place, and manner restriction. Where, however, the ordinance could not be justified without reference to the content of the regulated speech, it would be presumptively invalid as content-based.83 In agreement with the district court, Justice Rehnquist found that the Renton ordinance, which by its terms was devoted to combatting the secondary im-

78. *Id.* at 71-72.

79. Chief Justice Burger, Justice Rehnquist, and Justice White joined Justice Stevens’s opinion. *Id.* at 53. Justice Powell concurred in the judgment, but specifically disassociated himself from the Equal Protection discussion. See *Young*, 427 U.S. at 73 (Powell, J., concurring in the judgment).


81. *Id.* at 44. At the time the Renton ordinance was considered and enacted, the City had no adult theaters within its boundaries. *Id.*

82. *Id.* Like the Detroit amendments and the New York City adult-use amendments, Renton defined an adult theater as any building used for presenting visual displays (by any media) “distinguished or characterized by an emphasis on... ‘specified sexual activities’ or ‘specified anatomical areas.’” *Id.*

83. *Id.* at 46-48 (citations omitted). Justice Rehnquist expressly repudiated the Court of Appeals’s analysis, which focused on the legislature’s intent in enacting the ordinance, noting that courts may not inquire into a legislative body’s motivation in enacting a statute. *Id.* (citing United States v. O’Brien, 391 U.S. 367 (1968)).
pacts associated with adult theaters, fit the definition of a content-neutral ordinance.84

Having made this threshold determination, the Court held that the “appropriate inquiry” was whether the Renton ordinance was designed to serve a substantial governmental interest while leaving available reasonable alternative avenues for the regulated communication.85 Relying on Justice Stevens’s opinion in Young, the Court expressed little doubt that it met this standard. Specifically, Justice Rehnquist restated the Young Court’s finding that a city’s interest in attempting to preserve the quality of urban life was to be accorded high respect, and termed that interest “vital.”86 In addition, the Court rejected the Court of Appeals’s ruling that Renton’s failure to conduct an independent study rendered its findings concerning the relationship between adult uses and neighborhood blight “conclusory and speculative,”87 and ruled instead that the Renton City Council was entitled to rely upon the studies conducted by other cities as a basis for enacting the ordinance, so long as it reasonably believed the other cities’ studies to be relevant to the problems Renton sought to address.88 Justice Rehnquist concluded his opinion for the Court in the following manner:

In sum, we find that the Renton ordinance represents a valid governmental response to the ‘admittedly serious problems’ caused by adult theaters [citation omitted]. Renton has not used ‘the power to zone as a pretext for suppressing expression, [citation omitted], but rather has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning. Here, as in American Mini Theaters, the city has enacted a zoning ordinance that meets these goals while also satisfying the dictates of the First Amendment.89

Based upon the Court’s decisions in Young and Renton, the federal constitutional test for adult-use zoning amendments is clear. First, the reviewing court must be satisfied that the subject ordinance is content-neutral, i.e., designed expressly not to suppress

84. Renton, 475 U.S. at 48.
85. Id. at 50.
86. Id. (quoting Young, 427 U.S. at 71).
88. Renton, 475 U.S. at 50-51.
89. Id. at 54-55.
sexually-oriented speech, but rather to combat the secondary effects of sex businesses. If this first requirement is met, the city will then be required to show—based on empirical evidence that is reasonably relevant to the city at issue—that the ordinance is designed to serve a substantial governmental interest (such as preservation of the quality of urban life in the community) while providing reasonable alternative avenues for communication.

Ms. Simon's analysis concerning the reduction in the number of adult-use establishments begins by noting that in *Young*, Justices Stevens (writing for the plurality) and Powell (who concurred, providing the fifth vote) concluded that the Detroit adult-use ordinance was constitutional because "it did not reduce the public's access to adult entertainment, nor did it 'affect the operation of existing establishments but only the location of new ones.'"90 However, neither Justice Stevens's plurality nor Justice Powell's concurring opinion in *Young* may be read so broadly as to conclude that they would have invalidated the Detroit ordinance solely on the basis that it reduced the number of adult establishments. To be sure, after noting that "what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited," Justice Stevens noted that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."91 Similarly, Justice Powell based his conclusion on the fact that the Detroit ordinance did not cause a "significant overall curtailment" of adult movie presentations.92 Neither of these statements, however, may reasonably be read to require municipalities regulating adult entertainment establishments somehow to guarantee that the number of such establishments will remain constant or even increase in the post-regulation period.

Neither *Young* nor *Renton* included any statement indicating that a reduction in the number of adult entertainment establishments occasioned by an adult-use zoning ordinance would affect that ordinance's ability to withstand constitutional review. This fact undermines Ms. Simon's argument that the Supreme Court's decision in *Schad v. Borough of Mt. Ephraim*93—which struck down the Borough of Mt. Ephraim, New Jersey's ordinance prohibiting nude dancing or live entertainment—requires a finding

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90. Simon, supra note 8, at 209 (citing *Young*, 427 U.S. at 71 n.35).
91. *Young*, 427 U.S. at 71 & n.35 (emphasis added).
92. *Id.* at 79.
of unconstitutionality for New York's regulations. While the borough had argued that its action was consistent with the Court's ruling in Young, the Court found the situation distinguishable, noting that the Detroit ordinance "did not affect the number of movie theaters that could operate in the city; it merely dispersed them."\footnote{Id. at 71.} Notwithstanding this language, the fact remains that Schad, which was decided prior to Renton and involved a totally distinguishable factual scenario—namely, a total ban on a constitutionally protected activity—cannot be viewed as binding caselaw where locational criteria are involved.

2. Applications of Renton

While the Second Circuit has not been called upon to construe the Supreme Court's holding in Renton, lower federal courts in various other circuits have offered relatively consistent analyses reflective of the Supreme Court's apparent desire to afford states and localities significant latitude in combatting the adverse secondary effects of adult establishments through zoning requirements.

Ms. Simon finds additional support for her argument that a reduction in the number of adult establishments is unconstitutional in decisions by the Courts of Appeals for the Sixth\footnote{Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987), cert. denied, 484 U.S. 1059 (1988).} and Ninth\footnote{Walnut Properties v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).} Circuits invalidating municipal adult-use ordinances for failing to provide reasonable alternative opportunities for expression under Renton. Both of these cases, however, involved clear violations of Renton's requirement that reasonable alternative avenues of expression exist for the adult-oriented speech or conduct being regulated,\footnote{Renton, 475 U.S. at 50.} in that the ordinances went beyond reducing the number of adult-use establishments to make them virtually impossible to establish or continue. The first of these cases, Walnut Properties v. City of Whittier,\footnote{861 F.2d 1102 (9th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).} struck down Whittier, California's ordinance mandating a 1000 foot minimum distance between adult uses, and between adult uses and sensitive uses. Finding that the ordinance left just under 100 acres available for adult entertainment establishments—only 1.4% of the available land in the city—the Court of Appeals found that the ordinance would force the closing of all then-existing adult theaters in Whittier and deny any reasonable

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\footnote{Id. at 71.} \footnote{Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987), cert. denied, 484 U.S. 1059 (1988).} \footnote{Walnut Properties v. City of Whittier, 861 F.2d 1102 (9th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).} \footnote{Renton, 475 U.S. at 50.} \footnote{861 F.2d 1102 (9th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).}
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opportunity to open any new ones. Taken together, the minimal amount of land left available and the ordinance's effect of forcing all existing theaters out of business led the court to strike the ordinance down as unconstitutional.

The Court of Appeals for the Sixth Circuit faced an even more glaring violation of the Renton standard in Christy v. City of Ann Arbor. In that case, the City of Ann Arbor, Michigan left just over one-half square mile—or .023% of the city's land area—available to adult entertainment establishments. The overly restrictive nature of the Ann Arbor zoning measure led the Sixth Circuit to find that it created a situation equivalent to the one at issue in Schad, in that it effectively banned adult entertainment establishments in the city.

Neither of these cases involved ordinances similar to New York City. The decisions in Walnut Properties and Christy involved clear and unmistakable violations of the Renton standard in that they imposed a virtual ban on adult uses within cities, and cannot be read so broadly as to support Ms. Simon's proposition that any reduction in the number of adult uses in a city as a result of an adult-use ordinance renders that ordinance unconstitutional.

More persuasive and relevant to any analysis of the New York City adult-use amendments are the federal cases, such as O'Malley v. City of Syracuse and Ambassador Books & Video, Inc. v. City of Little Rock, which upheld adult-use zoning provisions that resemble the New York provisions. In Ambassador Books, the Court of Appeals for the Eighth Circuit upheld a Little Rock, Arkansas ordinance on a straightforward application of Renton. Specifically, the court found that Little Rock's ordinance (which closely resembled, but was slightly more restrictive than the New York City adult-use amendments) was content neutral, as it ad-

99. Id. at 1108-09.
100. 824 F.2d 489 (6th Cir. 1987), cert. denied, 484 U.S. 1059 (1988).
101. Id. The court also found that Ann Arbor neither indicated an intent to combat the negative secondary impacts of adult uses nor included any evidence demonstrating that the ordinance would prevent them, leading it to rule that Ann Arbor had violated Renton's basic requirement of showing that its adult-use ordinance was designed to achieve a legitimate governmental objective. Id. at 493. For another example of an ordinance that clearly failed to meet the Renton criteria, see Janra Enterprises, Inc. v. City of Reno, 818 F. Supp. 1361 (D. Nev. 1993) (ordinance not based on any empirical evidence; city official testified that ordinance designed in part to keep adult uses away from children, although included establishments with liquor license as sensitive receptor).
103. 20 F.3d 858 (8th Cir.), cert. denied, 115 S. Ct. 186 (1994).
104. See supra notes 80-94 and accompanying text.
dressed the secondary impacts of adult entertainment establishments but not the content of the speech promoted therein. In addition, the court ruled that the 520 acres remaining available in the city for adult uses—equal to 6.75% of the land in areas where adult uses would continue to be permitted under the ordinance—provided reasonable alternative avenues of communication. The Court of Appeals therefore upheld the Little Rock ordinance.

The federal district court for the Northern District of New York reached a similar conclusion under Renton in O'Malley v. City of Syracuse. Syracuse’s adult-use ordinance included a separation provision requiring adult uses to locate a minimum of 1000 feet from any sensitive use. The ordinance was predicated on the city’s findings, based exclusively on its collection of data from other municipalities, that the ordinance would prevent crime, maintain property values, protect retail trade, and preserve community character.

The Syracuse ordinance left approximately 4% of the city available to adult entertainment establishments. The district court noted that this estimate resulted from a conservative analysis that excluded sites unlikely to become available. It upheld the ordinance, finding that the 4% figure was sufficient under the circumstances to satisfy the Renton standard. Again, sufficient remaining land area available for adult uses, not the overall number of such establishments that could remain in the post-regulation period, was the determining factor.

The Court of Appeals for the Ninth Circuit applied the Renton test to Los Angeles’ adult-use ordinance in Topanga Press, Inc. v. City of Los Angeles. The most significant part of the Ninth Circuit’s decision in Topanga Press dealt with Renton’s requirement that municipalities regulating adult uses leave reasonable avenues of communication available for adult entertainment establishments forced into noncompliance by restrictive zoning ordinances. While it found that the Los Angeles ordinance was content neutral, the
Court enjoined enforcement of the ordinance on the ground that reasonable alternative avenues for sexually-explicit speech were not available.

In *Renton*, the Supreme Court had ruled that courts were foreclosed from questioning whether relocation sites left available in a particular adult-use ordinance were "economically viable" sites for relocation, holding instead that adult businesses must "fend for themselves" in the relevant real estate market. In *Topanga Press*, the Ninth Circuit sought to clarify further the concept of "potentially available" relocation sites without violating the Supreme Court's injunction against analyzing the economic viability of individual sites. Specifically, the Court, utilizing the Fifth Circuit's decision in *Woodall v. City of El Paso* as a starting point, identified several criteria that reviewing courts could use to determine whether land represented by the regulating municipality as available to adult uses actually constituted a potential relocation site. These criteria were: (1) whether the land would ever become available to any commercial enterprise; (2) whether the land was reasonably accessible to the general public; (3) whether the land was improved with proper infrastructure for development (such as sidewalks, street lamps, roads, etc.); (4) whether the land is "generically suitable" to commercial development; and (5) whether the property is zoned to permit commercial development. According to the court, only land meeting all five of these criteria could be considered as available for relocation by newly regulated adult uses.

A considerable portion of the land that Los Angeles represented would continue to be available for adult uses under its ordinance (which, like all the other ordinances described herein, set forth minimum distance requirements between adult businesses and enumerated "sensitive receptors") failed to satisfy one or more of the court's criteria. Substantial portions of the land were submerged beneath the Pacific Ocean or were being used as either runways in the Los Angeles International and Van Nuys Airports, landfills, or petroleum storage facilities. After subtracting these properties (which accounted for 36% of the land initially identified by Los

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111. 959 F.2d 1305 (5th Cir.), modifying 950 F.2d 255 (5th Cir.), cert. denied, 506 U.S. 908 (1992).
113. Id.
114. Id. at 1532.
Angeles as available) and then calculating the amount of land that was zoned for commercial use, the court found that only 0.18% of the "realistically available" land in Los Angeles was available for adult uses.\footnote{115} The court therefore affirmed the district court's order enjoining the ordinance's enforcement.

In light of the foregoing, it is clear that \textit{Renton} will continue to be construed in a straightforward manner, and that adult-use ordinances that seek to address the adverse secondary impacts of adult uses will be upheld where (1) those impacts have been identified and (2) a reasonable amount of realistically-available land—probably no less than 5%—remains available to adult uses.\footnote{116}

Ms. Simon's second argument that the New York City adult-use zoning resolution violates the First Amendment to the United States Constitution contends that the adult-use amendments are unconstitutionally overbroad because they cover topless dancing establishments, which she claims the city has not shown to cause adverse secondary impacts.\footnote{117} This argument flows from an overly restrictive reading of the empirical evidence utilized by the Department of City Planning in developing the adult-use amendments.

The DCP Study noted that "upscale topless clubs have become a booming segment of the adult entertainment industry."\footnote{118} The DCP Study also found that these newer topless clubs are successful because they have shed their "sleazy image" and have moved to the mainstream by "providing topless entertainment in safe, 'elegant' surroundings" furnished with amenities such as large-screen televisions and air hockey.\footnote{119} However, while the DCP Study noted that thirty of these "upscale" clubs existed in the City in 1992, there were a total of sixty-eight topless or nude bars, meaning that more than half of the City's topless bars fail to meet DCP's definition of "upscale." These remaining bars likely do not share

\footnote{115. \textit{Id.}}
\footnote{116. For other decisions upholding similar adult-use zoning provisions, see also \textit{Grand Brittain, Inc. v. City of Amarillo}, 27 F.3d 1068 (5th Cir. 1994) (1000 foot separation from sensitive receptors upheld); \textit{ILQ Investments, Inc. v. City of Rochester}, 25 F.3d 1413 (8th Cir.), \textit{cert. denied}, 115 S. Ct. 578 (1994) (750 foot separation provision from sensitive receptors upheld based entirely on data from neighboring municipality); \textit{Holmberg v. City of Ramsey}, 12 F.3d 140 (8th Cir. 1993) (1000 foot separation provision from sensitive receptors upheld), \textit{cert. denied}, 115 S. Ct. 59 (1994); \textit{T-Marc, Inc. v. Pinellas County}, 804 F. Supp. 1500 (M.D. Fla. 1992) (400 foot separation provision from sensitive receptors and other adult uses upheld).}
\footnote{117. Simon, \textit{supra} note 8, at 214.}
\footnote{118. DCP \textit{STUDY}, \textit{supra} note 2, at 18.}
\footnote{119. \textit{Id.} at 18-19.
their "upscale" siblings' devotion to "elegant surroundings" and air hockey.

Zoning is a blunt regulatory tool, ill-equipped to address specific aesthetic and operational aspects of the uses it regulates. And while it is safe to assume that certain topless bars operate in a tasteful and "elegant" manner, there is no way for a zoning scheme to distinguish between such bars and those that choose not to operate in such a "dignified" fashion. In short, the DCP Study—based on independent data collection and analysis and reliance on other studies conducted in New York City and nationwide—concluded that adult entertainment establishments result in a variety of negative secondary impacts on their host communities.

Certain topless bars have contributed significantly to this problem, just as some others are doubtless free from blame. As one federal appellate court has already ruled, such individualized evidence is irrelevant when analyzing the constitutionality of a zoning ordinance of general application that is supported by evidence that adult uses generate unwanted secondary impacts. Because the adult-use industry's record, taken as a whole, provides ample justification for the adult-use amendments, and because it would be impossible for a zoning scheme to differentiate between "elegant" and "non-elegant" topless bars, it is legally irrelevant that a small subclass of the industry operates in a manner that (arguably) does not contribute to the City's problems with the adult entertainment industry as a whole.

120. See International Eateries of America, Inc. v. Broward County, 941 F.2d 1157 (11th Cir. 1991) (fact that adult entertainment establishment has proven that it does not generate negative secondary impacts is irrelevant in determining constitutionality of adult-use ordinance or application of that ordinance to impact-free establishment), cert. denied, 503 U.S. 920 (1992).

121. Ms. Simon's argument appears to stand on the premise that only the independent data and analysis contained in the DCP Study—as opposed to that data taken in connection with the studies conducted in other municipalities and states, as well as previous studies within New York—constitute the empirical basis against which the adult-use amendments will be reviewed for their sufficiency. Such a premise, however, provides a shaky foundation in light of the standards set forth by the Supreme Court in \textit{Renton} and the Court of Appeals in \textit{Islip}. The Court in \textit{Renton} was quite clear on the subject, ruling that the City of Renton (which had not conducted an independent study of any kind, but relied exclusively on a study conducted by Seattle) "was entitled to rely on the experiences of Seattle and other cities," and noting that "the First Amendment does not require a city, before enacting [an adult-use ordinance], to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." \textit{Renton}, 475 U.S. at 51-52. The Court of Appeals's decision in Town of Islip v. Caviglia, 73 N.Y.2d 544, 555, 540 N.E.2d 215, 220, 542 N.Y.S.2d 139, 144 (1989), supports the same proposi-
B. State Standards

While the First and Fourteenth Amendments\textsuperscript{122} to the United States Constitution set forth the basic restrictions on governmental regulation of expression, states remain free to impose additional restrictions through their own constitutions.\textsuperscript{123} The New York State Court of Appeals has held that in light of "recognized principles of federalism" and the state's "history and tradition of fostering freedom of expression," the state constitution may in certain circumstances afford additional protections to speech beyond the federal minimum.\textsuperscript{124}

The New York Court of Appeals developed its analytical framework for adult zoning ordinances in \textit{Town of Islip v. Caviglia}.\textsuperscript{125} At issue in \textit{Islip} was the Town of Islip's zoning ordinance prohibiting adult uses from locating within 500 feet of a number of sensitive receptors (such as residential zones, houses of worship, parks, and schools) or within one half-mile of another adult use. After finding that the Islip ordinance satisfied the federal constitutional standards established by the Supreme Court in \textit{Renton}.\textsuperscript{126} the Court of Appeals turned to the plaintiff's argument that the New York State Constitution provided a heightened level of protection.

The Court of Appeals began its discussion of state constitutional issues in a fashion similar to the federal analysis, by noting that the

\footnotesize{\textsuperscript{122} In a series of cases, the United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment serves as a vehicle through which many provisions of the first eight Amendments apply to the states. For an explanation of the incorporation doctrine's development, see Laurence H. Tribe, American Constitutional Law § 11-2, at 772-74 (2d ed. 1988).


\textsuperscript{125} \textit{Id.} at 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989).

\textsuperscript{126} \textit{Id.} at 555, 540 N.E.2d at 220-21, 542 N.Y.S.2d at 144-45.}
Islip ordinance was justified by concerns unrelated to speech.\footnote{127 Id. at 558, 540 N.E.2d at 222, 542 N.Y.S.2d at 146.} The court noted, however, that this finding was not dispositive, identifying the relevant analysis under state constitutional law as whether "the Town went too far and enacted an ordinance that had an impermissible incidental effect abridging free expression,"\footnote{128 Id. (citation omitted).} and applied the standard set forth in \textit{People ex rel. Arcara v. Cloud Books}.\footnote{129 Arcara II, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986).} The issue in \textit{Arcara} was whether the Erie County District Attorney could order the closing of a bookstore based on patrons' engaging in illegal sexual acts on the premises. The bookstore itself was never accused of any wrongdoing, and no effort was ever made to prevent the customers from engaging in unlawful activity. The bookstore owner therefore challenged the District Attorney's action on the ground that the First Amendment mandated less drastic action (such as arresting those responsible for the illegality or seeking an injunction against such activities) before the bookstore could be closed. The Court of Appeals agreed, and vacated the District Attorney's actions on federal constitutional grounds.\footnote{130 People ex rel. Arcara v. Cloud Books, Inc., 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (1985), rev'd sub nom. Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986) [hereinafter Arcara I].}

The United States Supreme Court reversed, finding that the District Attorney's actions were indeed consistent with First Amendment standards.\footnote{131 Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986).} On remand, however, the Court of Appeals ruled that the District Attorney's conduct ran afoul of the state constitution, and held that even where regulations that have an incidental impact on speech are justified by legitimate and important governmental interests, those regulations must be no broader than necessary to achieve the purpose behind the regulation.\footnote{132 Arcara II, 503 N.E.2d at 495.}

Applying this test to the Islip ordinance, the Court of Appeals had little difficulty in distinguishing the cases and finding that the ordinance satisfied the more rigorous state law test. Specifically, the court ruled that while the problem at issue in \textit{Arcara)—unlawful sexual activity in a bookstore—could have been addressed through direct intervention, the adverse effects caused by the adult establishments in Islip—such as a decline in property values and neighborhood deterioration—could not be addressed in such a direct manner. The court therefore concluded that "the Town's use of its
zoning powers was the most appropriate means” to address the problems caused by the establishments, and was not subject to judicial second-guessing.\textsuperscript{133} This conclusion was based on the court’s finding that “ample space” remained for adult uses after the ordinance took effect, and that adult uses were not “unduly restricted... to limited or unsuitable areas of the Town.”\textsuperscript{134} The court therefore sustained the Islip ordinance on state constitutional grounds as well.

Ms. Simon argues that Islip supports her contention that the adult-use amendments violate the state constitution because they seek to regulate topless bars, which she believes the DCP Study failed to prove had deleterious secondary impacts as a class. She claims that “the court stressed that had the facts shown that by enforcing the ordinance ‘the total number of adult bookstores will decline or that fewer potential customers will be able to conveniently patronize them,’ the ordinance would not have met the strict requirements of the New York State Constitution.”\textsuperscript{135} Specifically, however, the Court said the following:

Manifestly, the zoning regulations are less restrictive than banning adult uses altogether, and more compatible with free speech values than a licensing scheme which arguably could present opportunities for the improper abuse of discretion. Significantly, the stipulated facts demonstrate that there remains ample space available for adult uses after the rezoning and it is neither claimed nor established that if the ordinance is enforced the total number of adult bookstores will decline or that fewer potential customers will be able to conveniently patronize them.\textsuperscript{136}

While this language makes it clear that the Court of Appeals, like the United States Supreme Court in Young, was concerned that no significant reduction in the availability of adult material occur as a result of the ordinance, the fact remains that neither the Court of Appeals nor any federal court has ruled that the government must show that the number of adult entertainment establishments will remain unchanged following enactment of an ordinance that restricts the location of adult entertainment uses through zoning.

\textsuperscript{133} Islip, 73 N.Y.2d at 559-60, 540 N.E.2d at 223, 542 N.Y.S.2d at 147.
\textsuperscript{134} Id.
\textsuperscript{135} Simon, supra note 8, at 212.
\textsuperscript{136} Islip, 73 N.Y.2d at 559-60, 540 N.E.2d at 223, 542 N.Y.S.2d at 147.
The essence of zoning makes clear why this is. Zoning serves a broad purpose, and in most instances it does nothing more than create basic rules to govern locational decisions that are made ultimately by the prospective user of land based on economic and myriad other subjective considerations. Because the private real estate market and the market for services ultimately determine what land uses will take root and where, it is usually impossible to determine what the precise impact—in terms of numbers of uses—of a zoning change will be.\textsuperscript{137} In light of the imprecise and blunt nature of zoning as a regulatory tool, any constitutional mandate that it guarantee the existing number of uses in a land use category—even one with First Amendment protection—would impose a standard of exactitude unlikely ever to be realized.\textsuperscript{138}

Even if federal and/or state constitutional standards did require the city to maintain the number of adult entertainment establishments, it is clear that a sufficient number of sites will exist to accommodate that number. The DCP Study found that 177 adult entertainment establishments existed in New York City in 1993.\textsuperscript{139} However, as noted earlier, the Department of City Planning found that over 400 sites in central commercial and manufacturing districts would continue to be available for adult uses under the adult-use amendments.\textsuperscript{140} Clearly, enough sites will remain available for existing adult entertainment establishments to continue their operations, albeit in new locations and with a potential increase in competition for available sites.\textsuperscript{141} In short, Ms. Simon’s assertion that

\textsuperscript{137} New York City’s recent experiences with manufacturing provide a useful illustration of this fact. Having experienced a dramatic decline in the number of manufacturing jobs beginning in the 1960’s, the city implemented zoning changes intended to reduce competition for land in manufacturing districts by restricting the types of uses that could locate there. While the zoning changes were unsuccessful in reviving the city's industrial economy, they also resulted in blocking almost all new development in manufacturing districts, leaving those districts with considerable amounts of vacant, abandoned, and underutilized land. See \textit{New York City Department of City Planning, Comprehensive Retail Strategy for New York City}, Winter 1995, at 9.

\textsuperscript{138} Indeed, were a standard as strict as Ms. Simon suggests to exist, the entire New York City Zoning Resolution would be subject to constitutional attack. For it seems unquestionable that uses such as bookstores, theaters, and assembly halls—all land uses with significant First Amendment value—would exist in higher numbers were it not for the fact that they are restricted to operating in specified zoning districts.

\textsuperscript{139} DCP \textit{Study}, \textit{supra} note 2, at ii.

\textsuperscript{140} See \textit{supra} note 114.

\textsuperscript{141} The number of available relocation sites and administrative accounting for unsuitable sites distinguishes this situation from the one in \textit{Topanga Press, Inc. v. City of Los Angeles}, 989 F.2d 1524 (9th Cir. 1993), where the Ninth Circuit found that the City’s identification of 120 potential relocation sites for 102 existing adult-use businesses was insufficient. Most obviously, the existence of 400 sites for under 200 busi-
the adult-use amendments are unconstitutional because they will reduce the number of existing adult businesses is unfounded both factually and legally, rendering unnecessary her proposed remedy to that impediment: that the adult-use amendments should be amended further to allow adult uses to locate as-of-right in all commercial zones.\textsuperscript{142}

IV. Analysis of the Adult-Use Amendments Under Applicable Constitutional Principles

The cases discussed in the foregoing section set forth the standards that any governmental attempt to regulate adult establishments in New York must satisfy to avoid constitutional nullification. This section explains how the adult-use amendments indeed satisfy the tests set forth by the federal and state courts.

It seems clear that, on their face, the adult-use amendments satisfy federal constitutional standards as enunciated in \textit{Renton} and applied by both federal and state courts. All of the official documentation and memoranda supporting the adult-use amendments make clear that the amendments were formulated and proposed for the purpose of combating the secondary adverse impacts of adult entertainment establishments, rather than suppressing sexually explicit speech per se.\textsuperscript{143} Under the rule set forth in \textit{Renton}, the adult-use amendments qualify as a content-neutral ordinance.\textsuperscript{144} Having established that the ordinance is designed to combat the secondary impacts of adult uses and thus content-neutral, the next inquiry is whether the ordinance is designed to serve a substantial governmental interest while providing reasonable alternative avenues for communication.

\begin{itemize}
  \item \textsuperscript{142} It is worth noting that Ms. Simon herself concedes that adult uses have a significant negative impact in commercial areas, citing evidence that adult uses typically lower the rental value of upper-floor commercial space in buildings containing a ground-floor adult use. \textit{See} Simon, \textit{supra} note 2, at 2-5 & n.191.
  \item \textsuperscript{143} \textit{See} Memorandum from Paul A. Crotty, Corporation Counsel, to Members of the City Council Land Use Committee, at 2 (describing intent of adult-use amendments) (copy on file with the author) [hereinafter “Crotty Memorandum”]; CPC REPORT, \textit{supra} note 3, pp. 1-5, 33-43; testimony of Joseph B. Rose, Chair, City Planning Commission, before the City Council Land Use Committee, October 19, 1995 (on file with the author). \textit{See also} Statements of Walter L. McCaffrey, Chair, before the City Council Subcommittee on Zoning & Franchises, October 19, 1995, and June Eisland, Chair, before the City Council Committee on Land Use, October 19, 1995 (on file with the author).
  \item \textsuperscript{144} \textit{See} \textit{supra} notes 72-73 and accompanying text.
\end{itemize}
The City Planning Commission’s Report (the “CPC Report”) approving the adult-use amendments was based upon a variety of data demonstrating that adult entertainment establishments have significant adverse impacts on their host communities. Specifically, the Planning Commission considered analyses conducted by other states and municipalities, examined data and conclusions from previous studies measuring the impact of adult uses in New York City, and commissioned the Department of City Planning to conduct its own study prior to its consideration and adoption of the adult-use amendments. All of these studies confirm, albeit to varying degrees, that adult entertainment establishments have negative impacts on their communities in the form of decreased property values, higher crime, and diminished commercial viability.

This administrative record clearly supports the City Planning Commission’s decision to subject adult entertainment establishments to increased zoning regulation in an effort to combat these secondary impacts and preserve the quality of urban life.

The final determination to be made under Renton is whether the ordinance at issue provides sufficient alternative avenues of communication. It is in this area where there has been some disagreement within the courts, and where the most spirited challenge to the ordinance is likely to arise with regard to federal constitutional law.

The Department of City Planning concluded that the adult-use amendments would leave 11.1% of the land in New York City, or more than 400 individual sites, available for use by adult entertainment establishments. These percentages significantly exceed the percentages approved by the Supreme Court in Renton (“over five percent”) and the Eighth Circuit in Ambassador Book & Video (6.75%).

In addition, the Department of City Planning took the Ninth Circuit’s analysis in Topanga Press into account when calculating the amount of land available for adult uses under the adult-use amendments. Specifically, the Department excluded property that was unlikely ever to become available for use by adult entertainment establishments, such as publicly owned land, wetlands, airport and

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145. See supra notes 21-47 and accompanying text.
146. See supra notes 21-28 and accompanying text.
147. See supra notes 77-78 and accompanying text.
148. Statement of Walter L. McCaffrey, supra note 143, at 9; Crotty Memorandum, supra note 143, at 6.
149. See Renton, 475 U.S. at 53; Ambassador Book & Video, 20 F.3d at 864.
other transportation-related property, tank farms, or property owned or used by public utilities.\textsuperscript{150} The Department also calculated the accessibility of the remaining sites via public transportation, and found that 80\% of the sites would be located less than a ten-minute walk from a subway or major bus line.\textsuperscript{151} In short, it is clear that the adult-use amendments meet the \textit{Renton} requirements and are no more restrictive than other similar ordinances approved by lower federal courts in recent years.

The adult-use amendments satisfy New York State constitutional standards as well. As noted above, the pertinent inquiry under Article I, Section 7 of the state constitution is whether the adult-use amendments "go too far" by giving rise to incidental effects abridging free expression.\textsuperscript{152} However, the New York Court of Appeals's ruling in \textit{Islip} disposes of the inquiry easily. Recall that the Court of Appeals contrasted the adult-use zoning ordinance at issue in \textit{Islip} with the District Attorney's decision to close a bookstore in \textit{Arcara} by noting that while the District Attorney could have pursued direct and less drastic remedies against the bookstore (such as arresting patrons who engaged in unlawful sexual activity on the premises), \textit{Islip}'s problem with the secondary impacts of adult uses was not remediable through such direct action. Indeed, the \textit{Islip} court found specifically that "the Town's use of its zoning powers was the most appropriate means" through which to address the secondary impacts,\textsuperscript{153} and found that where adult establishments were left with "ample space" not "unduly restrict[ed] . . . to limited or unsuitable areas" of the Town, the ordinance was not susceptible to judicial reconsideration.\textsuperscript{154} Certainly 11\% of the property within New York City—discounting sites that lack proper infrastructure or are unlikely to become available for other reasons—constitutes ample space. And in light of the fact that a considerable portion of that space is located in central commercial or abutting manufacturing districts, it cannot fairly be argued that this space is unsuitable. The adult-use amendments thus satisfy the heightened requirements of the New York State constitution.

\textsuperscript{150} Crotty Memorandum, \textit{supra} note 143, at 11.
\textsuperscript{151} \textit{Id.} at 6.
\textsuperscript{152} \textit{Islip}, 73 N.Y.2d at 558, 540 N.E.2d at 222, 542 N.Y.S.2d at 146.
\textsuperscript{153} \textit{Id.} at 223.
\textsuperscript{154} \textit{Id.}
The adult-use amendments constitute the culmination of almost twenty years of effort to combat and control the adverse secondary impacts of adult entertainment establishments. During the lengthy public hearing process that preceded their enactment, the adult-use amendments were debated vigorously, with both the City Planning Commission and City Council concluding in the end that the amendments would serve the city well by eliminating the present concentrations of adult uses and ensuring that they continue to operate only in areas where their impacts will no longer undermine the vitality of local commercial strips and residential communities.

Those whose view failed to carry the day in the political arena have promised to continue the battle in court. However, it is clear that the adult-use amendments were developed in a reasoned and careful manner, designed not to suppress speech and sexually-explicit conduct but to protect communities from the adverse secondary impacts described above. More importantly, it is clear that the amendments were drafted with a view toward satisfying the straightforward criteria developed by the federal and state courts.