

SEX, BUT NOT THE CITY: ADULT-ENTERTAINMENT ZONING, THE FIRST AMENDMENT, AND RESIDENTIAL AND RURAL MUNICIPALITIES

Abstract: Adult entertainment's status as protected First Amendment speech has resulted in a confusing series of U.S. Supreme Court cases evaluating the zoning of adult businesses. Cases discussing the requirement that municipalities provide alternative avenues of communication for adult businesses have raised many questions as to how rural and residential municipalities may satisfy this obligation. This Note identifies three solutions that would help frame this inquiry. First, state or county legislative bodies should adopt countywide or statewide location restrictions on adult businesses. Second, courts should employ a regional analysis of the alternative avenues requirement when evaluating adult-entertainment zoning restrictions. Third, courts should undertake a supply-and-demand analysis when assessing what constitutes sufficient alternative avenues of communication. Adoption of these solutions would help to ensure that the First Amendment obligations of rural and residential municipalities reflect the unique burdens of such municipalities while maintaining appropriate protection for free speech.

INTRODUCTION

The topic of adult-entertainment zoning remains a controversial subject in municipal politics.¹ Few zoning issues inspire as much legal and political hand-wringing as the locations of adult businesses in a municipality.² Much of this controversy can be attributed to adult entertainment's status as protected First Amendment speech, which requires municipalities to be especially careful in their regulation and restriction of such businesses.³

¹ See Ben Z. Hershberg, *Courts Struggle to Balance Rights of Adult Stores, Cities*, CURIER-J. (Louisville, Ky.), Oct. 19, 2004, at 1A. For purposes of this Note, "adult-entertainment business" and "adult business" are used interchangeably and include live nude and semi-nude dancing establishments, adult movie theaters, adult bookstores, and other sexually oriented businesses.

² See *id.*

³ See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (holding that adult entertainment for commercial purposes "is expressive conduct within the outer parameters of the First Amendment, though . . . only marginally so"); Hershberg, *supra* note 1, at 1A.

In recent years, many cities have engaged in well-publicized zoning action to regulate and even to eliminate the presence of adult-entertainment businesses within their borders.⁴ These efforts are largely a response to the adverse impacts adult businesses have on surrounding communities.⁵ A 1989 survey of studies done on the topic, for example, showed that the presence of adult-entertainment businesses in a neighborhood leads to decreases in property values, increases in property crimes and sex crimes, and general neighborhood deterioration.⁶ When several adult businesses are concentrated in a particular area, these effects are often worse.⁷

Rural and predominantly residential municipalities are especially susceptible to the negative effects of adult businesses.⁸ The same 1989 study found that the negative impacts of adult businesses on communities are closely related to the businesses' proximity to residential areas.⁹ In rural and residential municipalities, where most land is residential, adult businesses may be necessarily closer to residential areas.¹⁰ Accordingly, adult businesses arguably pose a greater risk to the quality of life in rural and residential municipalities than they do to the quality of life in large cities, where there exists a greater amount of commercially zoned acreage in which adult businesses may locate.¹¹

Despite these greater risks, zoning restrictions on adult businesses in rural and residential municipalities are evaluated under a First Amendment analysis developed primarily in consideration of cities with large amounts of commercially zoned acreage.¹² The U.S. Supreme Court's most complete discussion of this analysis took place in 1986 in *City of Renton v. Playtime Theatres, Inc.*, in which the Court upheld the

⁴ See Dan Barry & David Rohde, *Giuliani Begins to See Results in Battle Against Sex Shops*, N.Y. TIMES, Aug. 9, 1998, at A29; Scott S. Greenberger, *Combat Zone's Demise Foreseen*, BOSTON GLOBE, July 5, 2003, at B1.

⁵ See MINN. ATTORNEY GEN., REPORT OF THE ATTORNEY GENERAL'S WORKING GROUP ON THE REGULATION OF SEXUALLY ORIENTED BUSINESSES (1989), reprinted in JULES B. GERARD, LOCAL REGULATION OF ADULT BUSINESSES app. B, at 522-28 (2004 ed.).

⁶ *Id.*

⁷ *Id.* at 524. Some municipalities nevertheless have chosen to minimize the overall adverse effects of adult businesses by concentrating them in one area, thereby eliminating them from other neighborhoods entirely. See BOSTON, MASS., ZONING CODE § 3-1A(d) (2004); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 52 (1986) (holding constitutional a zoning scheme that concentrated adult businesses in 5% of a city's land area).

⁸ See MINN. ATTORNEY GEN., *supra* note 5, at 529-30; see also Karen DeMasters, *Is a Buffer-Zone Law Fair if There Is No Room for a Buffer?*, N.Y. TIMES, Jan. 3, 1999, § 14, at 6.

⁹ See MINN. ATTORNEY GEN., *supra* note 5, at 529-30.

¹⁰ See *id.*; DeMasters, *supra* note 8, at 6.

¹¹ See MINN. ATTORNEY GEN., *supra* note 5, at 529-30; DeMasters, *supra* note 8, at 6.

¹² See *Renton*, 475 U.S. at 50, 53.

zoning ordinance of Renton, Washington, which effectively concentrated all adult-entertainment businesses in certain areas of the city.¹³ Under *Renton*, an adult-entertainment zoning restriction is upheld if it is (1) intended to serve a substantial governmental interest and (2) permits reasonable alternative avenues of communication.¹⁴ To satisfy the second, "alternative avenues" requirement of this test, the city must show that a business owner has a reasonable opportunity to operate an adult business elsewhere within municipal boundaries.¹⁵

The two-pronged *Renton* test was created for a city with large percentages of commercially zoned land, and thus applying the second prong of the test to rural and residential municipalities, which have substantially less commercially zoned land, has been problematic.¹⁶ Courts have encountered great difficulty in determining how such communities may satisfy *Renton's* alternative avenues requirement.¹⁷ In these instances, the Supreme Court's case law as applied to rural and residential communities is an uncertain guide.¹⁸

Consider the following hypothetical scenario.¹⁹ A city attorney for Blackacre Village, a small town surrounded by larger commercial cities, is tasked with drafting the city's first adult-entertainment zoning ordinance.²⁰ Because it is a primarily residential municipality, only 5% of Blackacre's total land area is zoned for commercial use.²¹ To ensure Blackacre meets its constitutional obligations under the First Amendment, the attorney reviews *Renton* to determine what constitutes sufficient alternative avenues of communication, the second requirement of the *Renton* test.²² In doing so, the attorney encounters some significant, unanswerable questions.²³ If *Renton* requires cities to allow adult businesses to locate on 5% of the municipality's available land, does this mean Blackacre essentially must allow adult businesses throughout its small commercial core?²⁴ Should the fact that other

¹³ *Id.* at 50.

¹⁴ *Id.*

¹⁵ *See id.* at 54.

¹⁶ *See id.* at 53; *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 96 (6th Cir. 1981); *Township of Saddle Brook v. A.B. Family Ctr., Inc.*, 722 A.2d 530, 532 (N.J. 1999).

¹⁷ *See Keego Harbor Co.*, 657 F.2d at 96; *Saddle Brook*, 722 A.2d at 532.

¹⁸ *See Saddle Brook*, 722 A.2d at 534.

¹⁹ The facts from this scenario are loosely based on *Keego Harbor Co.*, 657 F.2d at 96, and *Saddle Brook*, 722 A.2d at 532.

²⁰ *See Keego Harbor Co.*, 657 F.2d at 96; *Saddle Brook*, 722 A.2d at 532.

²¹ *See Keego Harbor Co.*, 657 F.2d at 96; *Saddle Brook*, 722 A.2d at 532.

²² *See Renton*, 475 U.S. at 50, 53.

²³ *See id.* at 53; *Saddle Brook*, 722 A.2d at 532, 535-36.

²⁴ *See Renton*, 475 U.S. at 53.

nearby cities provide a wealth of adult-entertainment businesses lessen Blackacre's obligation, at least for purposes of the First Amendment?²⁵ What if a 1000-foot distancing requirement between adult businesses and churches, schools, and residential areas effectively bans these businesses from Blackacre entirely?²⁶ The Supreme Court case law offers few answers to these questions, leaving the city attorney little direction in drafting the ordinance.²⁷

In response to these difficult questions, this Note argues that the Supreme Court's adult-entertainment zoning jurisprudence leaves unanswered the following four problems facing rural and residential municipalities: the undetermined constitutionality of a total ban, vague standards for evaluating the alternative avenues requirement, an inability to enact sufficient distancing requirements, and a lack of regional zoning of adult businesses.²⁸ To address these problems, this Note proposes three solutions: regional zoning of adult businesses, a regional analysis of *Renton's* alternative avenues requirement, and a supply-and-demand analysis of *Renton's* alternative avenues requirement.²⁹

Part I.A of this Note reviews the Supreme Court's First Amendment jurisprudence on content-neutral laws as it applies to adult-entertainment zoning cases.³⁰ Parts I.B, I.C, and I.D review in detail three Supreme Court cases that discuss the requirement of adequate alternative avenues of communication for adult-entertainment zoning laws.³¹ Part I.E analyzes three subsequent lower court cases that struggled to apply Supreme Court case law to rural and residential communities.³² Part II identifies and discusses the four problems that adult-entertainment Supreme Court case law creates for rural and residential municipalities and their adult-entertainment zoning laws.³³ Part III proposes three solutions to these problems, which legislators, judges, and lawyers may adopt to ensure a more equitable application of First Amendment case law to rural and residential municipalities.³⁴

²⁵ See *Saddle Brook*, 722 A.2d at 535-36.

²⁶ See *id.* at 532.

²⁷ See *Renton*, 475 U.S. at 50, 53; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71-73 (1976) (plurality opinion).

²⁸ See *infra* notes 219-264 and accompanying text.

²⁹ See *infra* notes 265-305 and accompanying text.

³⁰ See *infra* notes 35-61 and accompanying text.

³¹ See *infra* notes 62-174 and accompanying text.

³² See *infra* notes 175-212 and accompanying text.

³³ See *infra* notes 213-264 and accompanying text.

³⁴ See *infra* notes 265-305 and accompanying text.

I. THE SUPREME COURT'S FIRST AMENDMENT JURISPRUDENCE CONCERNING ADULT-ENTERTAINMENT ZONING AND ITS APPLICATION BY LOWER COURTS

A. *The Content-Neutrality Doctrine*

Central to the Supreme Court's adult-entertainment case law is the interpretation of adult-entertainment zoning ordinances as content-neutral rather than content-based.³⁵ A content-neutral law controls expression without regard to the speech itself or the speech's impact.³⁶ In this sense, laws that regulate the time, place, and manner of speech, but not the actual speech itself, are content-neutral.³⁷ Therefore, an adult-entertainment zoning law that regulates the location of a business is said to regulate only the secondary effects of such speech, rather than the speech itself.³⁸ In contrast, a content-based law singles out certain messages, topics, or forms of expression for regulation and restriction.³⁹

Although the theoretical distinction between content-neutral and content-based laws may be clear, scholars have noted that the practical

³⁵ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). The prevailing scholarly consensus is that adult-entertainment zoning ordinances are, in most instances, not content-neutral, despite Supreme Court holdings to the contrary. See, e.g., Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 McGEORGE L. REV. 69, 103 (1997); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59 (2000); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115 (1987). Despite this problematic application, the Court continues to apply the content-neutrality doctrine. See *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 434, 441 (2002) (plurality opinion). *Contra* Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803, 810-12, 846 (2004) (discussing a new "constitutional calculus" test based on Justice John Paul Stevens's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*). There is growing discontent with the doctrine among the Justices, however. See *Los Angeles*, 535 U.S. at 444-45 (Kennedy, J., concurring). In 2002, in *Los Angeles* the Court upheld Los Angeles's adult-entertainment zoning ordinance enacted in reliance on a twenty-year-old study. *Id.* at 430 (plurality opinion). Justice Anthony Kennedy, who was the fifth vote in a five-to-four decision, wrote a concurring opinion in which he disagreed with the majority's contention that the zoning ordinance was content-neutral. *Id.* at 445-46 (Kennedy, J., concurring). Noting that "the designation is imprecise," Justice Kennedy stated that the Court should acknowledge that the law was content-based, but still subject it to the intermediate scrutiny usually reserved for content-neutral laws. *Id.* at 444-45, 447 (Kennedy, J., concurring). Under this interpretation, content-based adult-entertainment zoning laws would be treated as an exception to the content-neutrality doctrine. See *id.* at 447 (Kennedy, J., concurring).

³⁶ See *Renton*, 475 U.S. at 48.

³⁷ See Calvert, *supra* note 35, at 74.

³⁸ See *Renton*, 475 U.S. at 46.

³⁹ See Calvert, *supra* note 35, at 76.

categorization of most laws is not.⁴⁰ In theory, the controlling question for determining whether a law is content-neutral should be whether the application of the law turns on the message or content of the speech.⁴¹ The Supreme Court's analysis, however, is often inconsistent with this approach.⁴² Instead of analyzing the law on its face to determine whether it singles out certain speech, the Court often considers the intent or purpose of the legislation.⁴³ In these instances, a content-based law that is motivated by an apparent content-neutral purpose—such as the regulation of only the time, place, and manner of speech—is considered content-neutral, even if the law is facially content-based.⁴⁴

For instance, a law that identifies particular areas of a city where adult businesses may locate is content-based because, on the face of the law, adult entertainment as a form of speech is singled out for differential treatment.⁴⁵ If that law, however, were motivated by a desire to limit the negative effects of adult entertainment on surrounding communities, but not to eliminate the speech altogether, a court may find the law content-neutral.⁴⁶ In finding as much, the court would be ignoring facial evidence to the contrary.⁴⁷

As a result of this arguably inconsistent approach to content neutrality, some scholars have advocated abandoning the doctrine.⁴⁸ They argue that most laws have both content-based and content-neutral elements, making categorization arbitrary.⁴⁹ Many scholars nevertheless see merit in the distinction, noting that the problem with the content-neutrality doctrine is really one of application, not theory.⁵⁰ Under this

⁴⁰ See Huhn, *supra* note 35, at 803.

⁴¹ See Chemerinsky, *supra* note 35, at 51.

⁴² See Calvert, *supra* note 35, at 103; Chemerinsky, *supra* note 35, at 59–60.

⁴³ See Chemerinsky, *supra* note 35, at 59–60. Scholars advocate an emphasis on the effects of the given restriction, rather than its intent, in evaluating content neutrality. See Calvert, *supra* note 35, at 108–09; Chemerinsky, *supra* note 35, at 60–61; Huhn, *supra* note 35, at 803. Under this analysis, an ordinance restricting the locations and operations of adult-entertainment businesses clearly restricts speech, making it content-based. See Chemerinsky, *supra* note 35, at 60–61.

⁴⁴ See Chemerinsky, *supra* note 35, at 59–60.

⁴⁵ See *id.* at 60.

⁴⁶ See, e.g., *Renton*, 475 U.S. at 48.

⁴⁷ See Chemerinsky, *supra* note 35, at 60.

⁴⁸ See, e.g., Huhn, *supra* note 35, at 826; Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 139–40 (1981).

⁴⁹ See, e.g., Huhn, *supra* note 35, at 826.

⁵⁰ See Calvert, *supra* note 35, at 110.

rationale, the Court has complicated the issue by considering legislative intent when it should be looking at the law on its face.⁵¹

According to these commentators, a consistent application of the content-based/content-neutral distinction permits the Court to focus its strictest scrutiny on content-based laws, which suppress speech most severely, and to apply a more deferential level of scrutiny to less-threatening content-neutral laws.⁵² Whereas content-based laws presumptively violate the First Amendment,⁵³ content-neutral laws are upheld so long as they satisfy the two-pronged test outlined in *City of Renton v. Playtime Theatres, Inc.*⁵⁴ First, the content-neutral law must serve a substantial governmental interest.⁵⁵ This is commonly satisfied by the municipality showing it regulates only the negative secondary effects of speech, such as crime or diminished property values, by restricting the locations of adult-entertainment businesses rather than the content of adult entertainment itself.⁵⁶

Second, the content-neutral law must leave open adequate alternative avenues of communication.⁵⁷ This alternative avenues requirement is included because the First Amendment guarantees citizens the right to share their message with those interested.⁵⁸ As a result, in the adult entertainment context, a content-neutral law must ensure adult businesses are afforded space to operate.⁵⁹

Three Supreme Court cases discuss municipalities' obligations to provide sufficient alternative avenues of communication when enacting adult-entertainment zoning.⁶⁰ Each has significantly influenced lower court decisions regarding adult-entertainment zoning in residential and rural communities.⁶¹

⁵¹ See *id.* at 108-09.

⁵² See *id.* at 74-75; Stone, *supra* note 35, at 54.

⁵³ *Renton*, 475 U.S. at 46-47; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (holding unconstitutional a restriction on hate speech based on race, color, religion, or gender).

⁵⁴ See *Renton*, 475 U.S. at 46-47.

⁵⁵ See *id.* at 47.

⁵⁶ See *id.* at 50.

⁵⁷ See *id.*

⁵⁸ See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (holding constitutional a Minnesota state fair rule prohibiting the sale or distribution of printed or written material except from fixed locations).

⁵⁹ See *Renton*, 475 U.S. at 54.

⁶⁰ See *id.* at 53-54; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (plurality opinion).

⁶¹ See, e.g., *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 96-97 (6th Cir. 1981); *Township of Saddle Brook v. A.B. Family Ctr., Inc.*, 722 A.2d 530, 533-34 (N.J. 1999). Two other frequently cited Supreme Court cases considering restrictions on adult

B. *The U.S. Supreme Court Upholds a Zoning Ordinance Dispersing Adult Businesses: Young v. American Mini Theatres, Inc.*

In 1976, in *Young v. American Mini Theatres, Inc.*, the U.S. Supreme Court upheld a Detroit, Michigan, zoning ordinance that required dispersal of adult-entertainment businesses.⁶² As the first Supreme Court adult-entertainment zoning case, *Young* established the authority of cities to restrict the locations in which adult businesses may operate.⁶³ At issue were amendments to an "Anti-Skid Row Ordinance" aimed at preventing the concentration of adult-entertainment businesses in Detroit.⁶⁴ The ordinance placed two primary restrictions on adult businesses.⁶⁵ First, it prohibited adult theaters from being located within 1000 feet of any two other "regulated uses."⁶⁶ In addition to adult theaters, "regulated uses" included adult bookstores, cabarets, bars, dance halls, and hotels.⁶⁷ Second, the ordinance prohibited adult theaters from locating within 500 feet of a residential area.⁶⁸ Combined, these restrictions had the effect of dispersing adult businesses.⁶⁹

In *Young*, operators of two adult theaters in Detroit filed suit against Detroit city officials, contending the ordinances were unconstitutional.⁷⁰ The United States District Court found for the city and the U.S. Court of Appeals for the Sixth Circuit reversed.⁷¹ The adult theater operators made three primary arguments before the U.S. Supreme Court.⁷² First, they contended that the definition of adult theaters was unconstitutionally vague.⁷³ Second, they argued the restric-

entertainment are not discussed here. See *Los Angeles*, 535 U.S. at 433 (plurality opinion); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283-84 (2000). *Los Angeles* considers only the governmental interest requirement of the *Renton* test in reviewing *Los Angeles's* adult-entertainment zoning law. See *Los Angeles*, 535 U.S. at 433 (plurality opinion). In *City of Erie v. Pap's A.M.*, the Supreme Court upheld a city ordinance banning nudity in public places, but it did not consider a zoning ordinance, and thus did not apply the *Renton* test. See *Pap's A.M.*, 529 U.S. at 283-84.

⁶² 427 U.S. at 72-73 (plurality opinion).

⁶³ See *id.* (plurality opinion).

⁶⁴ *Id.* at 52-54 (plurality opinion).

⁶⁵ *Id.* at 52 (plurality opinion).

⁶⁶ See *id.* (plurality opinion).

⁶⁷ *Young*, 427 U.S. at 52 n.3 (plurality opinion).

⁶⁸ *Id.* at 52 (plurality opinion).

⁶⁹ See *id.* (plurality opinion).

⁷⁰ *Id.* at 55 (plurality opinion).

⁷¹ See *id.* at 55-57 (plurality opinion); *Am. Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014, 1021 (6th Cir. 1975); *Nortown Theatre Inc. v. Gribbs*, 373 F. Supp. 363, 371 (E.D. Mich. 1974).

⁷² *Young*, 427 U.S. at 58 (plurality opinion).

⁷³ See *id.* at 61 (plurality opinion).

tions were unconstitutional as prior restraints on free speech.⁷⁴ Finally, they questioned the content neutrality of the law and its suppression of protected First Amendment speech.⁷⁵

The plurality opinion by Justice John Paul Stevens quickly dispensed with the adult theater operators' first two arguments.⁷⁶ Stevens stated that there was no question that adult theaters were within the scope of the supposedly vague definition.⁷⁷ A claim of vagueness was, in reality, a hypothetical issue, with no real bearing on the interested parties' situation.⁷⁸ As a result, the first argument was rejected.⁷⁹ In response to the second argument, Justice Stevens noted that the operators had not contended that the ordinance placed a limit on the total number of theaters, denied exhibitors access to the market, or prevented the demand of the "viewing public" from being met.⁸⁰ Consequently, the market for adult entertainment was "essentially unrestrained,"⁸¹ and a restriction on the location where adult films could be shown did not violate the First Amendment.⁸²

In response to the claim that the law was content-based, the Court first acknowledged the fundamental importance of content neutrality to the Court's jurisprudence, noting that content-based restrictions on expression would undermine the importance of a national forum and public debate.⁸³ Nevertheless, Justice Stevens held adult-entertainment zoning was an instance where the value of free speech and public debate had to be balanced against at least two competing interests.⁸⁴

First, some laws can protect the "government's paramount obligation of neutrality," and therefore remain constitutional, so long as they are viewpoint-neutral, even if they are content-based.⁸⁵ Laws falling into this category include adult-entertainment zoning ordinances because they identify only the locations where such speech may occur but do not express an opinion of endorsement or disapproval about

⁷⁴ See *id.* at 62 (plurality opinion).

⁷⁵ See *id.* at 63-66 (plurality opinion).

⁷⁶ See *id.* at 58-63 (plurality opinion).

⁷⁷ See *Young*, 427 U.S. at 61 (plurality opinion).

⁷⁸ See *id.* (plurality opinion)

⁷⁹ See *id.* (plurality opinion)

⁸⁰ See *id.* at 62 (plurality opinion).

⁸¹ *Id.* (plurality opinion)

⁸² See *Young*, 427 U.S. at 62 (plurality opinion).

⁸³ *Id.* at 65-66 (plurality opinion).

⁸⁴ See *id.* at 70 (plurality opinion).

⁸⁵ See *id.* (plurality opinion)

the speech itself.⁸⁶ Detroit's ordinance, in other words, had the same effect on the location of adult businesses regardless of an adult film's particular message or viewpoint, and therefore the government remained neutral as to viewpoint.⁸⁷ Second, society has a lesser interest in protecting commercial material, such as borderline pornography, than in protecting important political or philosophical debate.⁸⁸ As Justice Stevens famously noted, "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."⁸⁹

In short, these opposing concerns reflect a city's valid interest in preserving "the quality of urban life."⁹⁰ Given Detroit's countervailing interests, the Court held the city was justified in restricting the location of adult businesses because it intended only to limit the secondary effects of such businesses.⁹¹ The *Young* Court did not clarify, however, whether other communities, including rural and residential ones, possess a similar interest in maintaining the quality of urban life, given that urban life is not a fundamental attribute of those communities.⁹²

C. *The U.S. Supreme Court Strikes Down a Ban on Live Entertainment:*
Schad v. Borough of Mount Ephraim

In 1981, in *Schad v. Borough of Mount Ephraim*, the Supreme Court struck down Mount Ephraim, New Jersey's zoning ordinance prohibiting any live entertainment, adult or otherwise.⁹³ Whereas *Young* had considered a large city's interest in maintaining the quality of urban life, *Schad* considered a small, primarily residential community's interest in maintaining the character of its community.⁹⁴ Mount Ephraim's zoning ordinance identified various permitted uses in commercial zones and further noted that any uses not expressly permitted were prohibited.⁹⁵ Live entertainment, nude or otherwise, was implicitly among the prohibited uses.⁹⁶ The appellants in *Schad* operated an adult bookstore that, in 1976, violated the ordinance by adding a coin-

⁸⁶ See *id.* (plurality opinion).

⁸⁷ See *Young*, 427 U.S. at 70 (plurality opinion).

⁸⁸ See *id.* (plurality opinion).

⁸⁹ *Id.* (plurality opinion).

⁹⁰ See *id.* at 71 (plurality opinion).

⁹¹ *Id.* at 71-72 (plurality opinion).

⁹² See 427 U.S. at 71-72 (plurality opinion).

⁹³ See 452 U.S. at 72 (plurality opinion).

⁹⁴ See *Schad*, 452 U.S. at 72; *Young*, 427 U.S. at 71 (plurality opinion).

⁹⁵ *Schad*, 452 U.S. at 63-64.

⁹⁶ See *id.*

operated peep show where a customer could watch a live nude dancer performing.⁹⁷ They were found criminally guilty of violating the ordinance, a decision which they appealed to the U.S. Supreme Court.⁹⁸

The *Schad* Court delivered five opinions.⁹⁹ The majority opinion written by Justice Byron White represented six Justices, including himself, William Brennan, Potter Stewart, Thurgood Marshall, Harry Blackmun, and Lewis Powell.¹⁰⁰ Justices Blackmun, Powell and Stevens each wrote concurring opinions, with Justice Stewart joining in Justice Powell's opinion.¹⁰¹ Chief Justice Warren Burger and Justice William Rehnquist were the only dissenters.¹⁰²

Justice White's majority opinion contained two primary holdings.¹⁰³ First, the Court held the appellants could challenge the ordinance as being overly broad.¹⁰⁴ As Justice White noted, the ordinance in question implicitly prohibited not only nude dancing, but also all live entertainment in the city.¹⁰⁵ Although he acknowledged that nude dancing does possess some form of First Amendment protection, Justice White focused instead on the fact that the ordinance on its face also prohibited other activities protected by the First Amendment, such as commercial theater, musical concerts, and other performances.¹⁰⁶ Such a broad ordinance accordingly required equally expansive justification.¹⁰⁷

Second, Mount Ephraim did not sufficiently justify the breadth of its ordinance, and thus failed to identify a substantial governmental

⁹⁷ *Id.* at 62.

⁹⁸ *Id.* at 64-65.

⁹⁹ *Id.* at 62-77; *id.* at 77-79 (Blackmun, J., concurring); *id.* at 79 (Powell, J., concurring); *id.* at 79-85 (Stevens, J., concurring); *id.* at 85-88 (Burger, C.J., dissenting).

¹⁰⁰ See *Schad*, 452 U.S. at 62-79. Professor Jules B. Gerard concludes otherwise, claiming that White's opinion represented only three Justices (Justices White, Brennan, and Marshall) because Justices Blackmun, Powell, and Stevens wrote separate concurring opinions. JULES B. GERARD, *LOCAL REGULATION OF ADULT BUSINESSES* 209 (2004 ed.). This argument ignores the fact that both Justice Blackmun's and Justice Powell's opinions explicitly note that they "join the Court's opinion." *Schad*, 452 U.S. at 77 (Blackmun, J., concurring); *id.* at 79 (Powell, J., concurring). As a result, Justice Stevens is the only concurring Justice not to join Justice White's opinion because he only concurs in the judgment, not the opinion. See *id.* at 79 (Stevens, J., concurring).

¹⁰¹ See *id.* at 77-79 (Blackmun, J., concurring); *id.* at 79 (Powell, J., concurring); *id.* at 79-85 (Stevens, J., concurring).

¹⁰² *Id.* at 85 (Burger, J., dissenting).

¹⁰³ *Id.* at 65-67.

¹⁰⁴ *Id.* at 66.

¹⁰⁵ *Schad*, 452 U.S. at 65.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 67.

interest, which was required to uphold the content-neutral law as constitutional.¹⁰⁸ This was evident from the fact that the ordinance on its face failed to offer anything in the way of a justification.¹⁰⁹ Because the ordinance only implicitly prohibited live entertainment, it was impossible to glean anything about the motives underlying the prohibition.¹¹⁰

The majority further reasoned that *Young* did not control the facts of *Schad*.¹¹¹ In *Young*, Detroit had implemented only a zoning scheme to disperse adult entertainment, whereas Mount Ephraim in *Schad* attempted to ban it altogether.¹¹² Moreover, Detroit had provided clear justification for its dispersal ordinance and had identified clear negative secondary effects deriving from a concentration of adult businesses.¹¹³ In this sense, Mount Ephraim had learned none of the lessons of *Young*—the town offered no justifications and no evidence for the claim that live entertainment, much less live adult entertainment, created any negative secondary effects.¹¹⁴ As a result, Mount Ephraim could not claim its ordinance was a valid restriction on time, place, or manner of communication.¹¹⁵

Although this holding alone was sufficient to strike down the ordinance and reverse appellants' conviction, Justice White's majority opinion further discussed the alternative avenues requirement of the content-neutrality doctrine.¹¹⁶ The Court held that Mount Ephraim's ordinance ensured no alternative avenues of communication could exist because the ordinance was an outright ban on live entertainment in the commercial zone of the Borough.¹¹⁷ *Young* permitted only the restrictive zoning of adult businesses in such a way that the market was left "essentially unrestrained."¹¹⁸ In contrast, Mount Ephraim attempted to prohibit the operation of adult businesses altogether, en-

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *Schad*, 452 U.S. at 67.

¹¹¹ *Id.* at 71-72; see *Young*, 427 U.S. at 72-73 (plurality opinion).

¹¹² *Schad*, 452 U.S. at 71; *Young*, 427 U.S. at 72-73 (plurality opinion).

¹¹³ See *Young*, 427 U.S. at 71 (plurality opinion).

¹¹⁴ See *Schad*, 452 U.S. at 73.

¹¹⁵ See *id.* at 75. More recently, the Supreme Court has expanded on what evidence is sufficient to justify a time, place, and manner restriction on adult entertainment. See *Los Angeles*, 535 U.S. at 430 (plurality opinion). In *Los Angeles*, the Court held that Los Angeles could rely on a twenty-year-old study showing the negative secondary effects of adult business to justify its ordinance as a valid content-neutral adult-entertainment zoning ordinance. *Id.*

¹¹⁶ See *Schad*, 452 U.S. at 75-76.

¹¹⁷ See *id.* at 76.

¹¹⁸ 427 U.S. at 62 (plurality opinion).

tirely foreclosing the market for adult entertainment.¹¹⁹ This reasoning alone was enough to strike down the law.¹²⁰

Nevertheless, the Court offered some support for residential communities attempting to justify a total prohibition on adult entertainment.¹²¹ In response to Mount Ephraim's claim that nearby municipalities offered live adult entertainment, and that this availability should satisfy the alternative avenues requirement, Justice White offered the following analysis:

[Mount Ephraim's] position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim. *This may very well be true*, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning in Camden County, and Mount Ephraim is free under state law to impose its own zoning restrictions, within constitutional limits.¹²²

Justice White thus seems to suggest that there may be instances in which primarily residential communities may be able to rely on the existence of adult entertainment in other locales as evidence that alternative avenues for communication exist.¹²³ The prerequisite of such an exception to the alternative avenues requirement, however, is countywide—or perhaps statewide—zoning.¹²⁴

Justices Blackmun, Powell, and Stevens each wrote concurring opinions in response to Justice White's discussion of the alternative avenues requirement.¹²⁵ Justice Blackmun reasoned that municipalities should not be able to sidestep their First Amendment obligations by

¹¹⁹ See *Schad*, 452 U.S. at 76. Justice White noted that "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." *Id.* at 75 n.18.

¹²⁰ See *id.* at 76-77.

¹²¹ See *id.* at 76.

¹²² *Id.* (emphasis added). Those cases that have evaluated countywide zoning ordinances restricting adult entertainment involve ordinances that apply only to unincorporated areas of a county. See, e.g., *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1327, 1329 (11th Cir. 2000); *Int'l Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1165 (11th Cir. 1991).

¹²³ See *Schad*, 452 U.S. at 76.

¹²⁴ See *id.*

¹²⁵ See *id.* at 77-79 (Blackmun, J., concurring); *id.* at 79 (Powell, J., concurring); *id.* at 79-85 (Stevens, J., concurring).

pointing to the actions of other cities, even in the same county.¹²⁶ Justice Powell, with Justice Stewart joining, reasoned instead that some communities—those primarily residential in character—should be able to ban live adult entertainment altogether.¹²⁷ Justice Stevens agreed, noting that at the very least Mount Ephraim could show that adult entertainment is available nearby, outside the limits of the Borough.¹²⁸

Likewise, Chief Justice Burger, joined by Justice Rehnquist, dissented primarily because of Justice White's analysis of the alternative avenues requirement, arriving at the same conclusion as the concurring Justices.¹²⁹ Chief Justice Burger asserted that small communities like Mount Ephraim should be able to justify their adult-entertainment zoning law by pointing to the availability of adult entertainment nearby.¹³⁰ Such a justification could hardly be thought to chill protected speech in any given region because, as Chief Justice Burger stated, "[c]hilling" this kind of show business in this tiny residential enclave can hardly be thought to show that the appellants' 'message' will be prohibited in nearby—and more sophisticated—cities."¹³¹ Unlike Justice White, Chief Justice Burger stopped short of requiring countywide zoning to permit this arrangement.¹³² Rather, Chief Justice Burger argued that the natural distinction between smaller residential communities and larger, "more sophisticated" cities permits a modified First Amendment analysis for smaller, less urban locales.¹³³

Read together, eight of nine Justices in *Schad* suggest, either implicitly or explicitly, that residential and rural municipalities may possess more flexibility as to the alternative avenues requirement than do other municipalities.¹³⁴ *Schad* thus reveals that the Burger Court experienced some anxiety regarding the burdens the First Amendment placed on adult-entertainment zoning in rural and residential com-

¹²⁶ See *id.* at 78 (Blackmun, J., concurring).

¹²⁷ See *id.* at 79 (Powell, J., concurring).

¹²⁸ See *Schad*, 452 U.S. at 84 n.11 (Stevens, J., concurring).

¹²⁹ See *id.* at 85 (Burger, C.J., dissenting).

¹³⁰ See *id.* at 87 (Burger, C.J., dissenting).

¹³¹ *Id.* (Burger, C.J., dissenting).

¹³² See *id.* (Burger, C.J., dissenting).

¹³³ See *Schad*, 452 U.S. at 87 (Burger, C.J., dissenting).

¹³⁴ See *id.* at 76; *id.* at 79 (Powell, J., concurring); *id.* at 84 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).

munities.¹³⁵ What *Schad* did not do, however, was identify how later courts were to respond to these anxieties.¹³⁶

D. *The Supreme Court Upholds a Zoning Ordinance Concentrating Adult Businesses: Renton v. Playtime Theatres, Inc.*

In upholding a zoning ordinance that concentrated adult businesses in certain areas of the city, Justice Rehnquist's majority opinion in *Renton* offers the Court's fullest discussion of the alternative avenues requirement to date.¹³⁷ The Renton, Washington, ordinance in question was enacted in April 1981 and restricted the locations in which adult movie theaters could operate.¹³⁸ Renton, a suburb southeast of Seattle with a population of approximately 32,000, had no adult-entertainment businesses at the time of the ordinance's enactment.¹³⁹ The city's ordinance prohibited such theaters from locating less than 1000 feet from residential zones, single- or multiple-family dwellings, churches, or parks, and less than one mile from schools.¹⁴⁰ These restrictions effectively left 520 acres, or 5% of the land area of Renton, available to such businesses.¹⁴¹

A Renton property owner who had plans to open two adult movie theaters in the prohibited areas filed suit, challenging the law as violative of the First and Fourteenth Amendments.¹⁴² In 1986, the U.S. Supreme Court upheld the ordinance.¹⁴³ A key issue in the Court's analysis of the Renton zoning ordinance was determining whether the law was content-neutral or content-based.¹⁴⁴ The Court acknowledged that the ordinance did "not appear to fit neatly into either the 'content-based' or the 'content-neutral' category."¹⁴⁵ Nevertheless, as in *Young*, it held the law to be content-neutral because the City Council intended only to regulate the negative secondary effects of adult entertainment,

¹³⁵ See *id.* at 76; *id.* at 79 (Powell, J., concurring); *id.* at 84 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).

¹³⁶ See *id.* at 76; *id.* at 79 (Powell, J., concurring); *id.* at 84 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).

¹³⁷ See 475 U.S. at 53-55.

¹³⁸ *Id.* at 44.

¹³⁹ *Id.*

¹⁴⁰ *Id.* The ordinance was later amended to restrict such businesses to locations less than 1000 feet from schools instead of one mile. *Id.* at 45.

¹⁴¹ *Id.* at 53.

¹⁴² *Renton*, 475 U.S. at 45.

¹⁴³ See *id.* at 54-55.

¹⁴⁴ See *id.* at 47.

¹⁴⁵ *Id.*

rather than the actual expression, by restricting the locations in which such businesses operated.¹⁴⁶ In other words, the legislative intent, rather than the statutory language, contributed to the law's content neutrality.¹⁴⁷

Having established that the ordinance was content-neutral, the Court then turned to the two-part test for content-neutral laws—whether the law was designed to serve a substantial government interest, and whether it permitted adequate alternative avenues of communication.¹⁴⁸ It was clear to the Court that the ordinance served a substantial government interest because the Court emphasized, as it had in *Young*, that “a city’s ‘interest in attempting to preserve the quality of urban life is one that must be accorded high respect.’”¹⁴⁹ The City of Renton claimed, and the Court accepted, that the experiences of nearby Seattle showed that widespread dispersion of adult-entertainment businesses led to negative secondary effects on community and neighborhood improvement efforts and contributed to blight.¹⁵⁰ The fact that the experiences of Seattle, and its recommendation to concentrate adult business, conflicted directly with the experiences of Detroit, which dispersed them, was not problematic to the Court.¹⁵¹ Rather, the Court reasoned, cities must be accorded great flexibility in the regulation of such businesses and the “admittedly serious problems they engender,” especially with regard to their goals of preserving the quality of urban life.¹⁵² As a result, the Court held the Renton ordinance served a substantial governmental interest, thus satisfying the first prong of the First Amendment test for content-neutral ordinances.¹⁵³

The Court next considered whether the Renton ordinance ensured reasonable alternative avenues of communication for adult-entertainment businesses.¹⁵⁴ The situation the Court faced in *Renton*, however, differed from that in *Young* and *Schad*.¹⁵⁵ In *Young*, the law satisfied the alternative avenues requirement because the market was

¹⁴⁶ See *id.* at 48.

¹⁴⁷ See *Renton*, 475 U.S. at 48; see also Chemerinsky, *supra* note 35, at 59–60.

¹⁴⁸ See *Renton*, 475 U.S. at 50.

¹⁴⁹ *Id.* (quoting *Young*, 427 U.S. at 71 (plurality opinion)).

¹⁵⁰ See *id.* at 51.

¹⁵¹ See *id.* at 51–52; *Young*, 427 U.S. at 71 (plurality opinion).

¹⁵² *Young*, 427 U.S. at 71 (plurality opinion).

¹⁵³ See *Renton*, 475 U.S. at 51.

¹⁵⁴ See *id.* at 53.

¹⁵⁵ See *id.* at 52–53; *Schad*, 452 U.S. at 76; *Young*, 427 U.S. at 62 (plurality opinion).

unrestrained.¹⁵⁶ In *Schad*, the law failed the alternative avenues requirement because adult businesses were totally precluded from locating in Mount Ephraim.¹⁵⁷ In *Renton*, however, the market was somewhat restrained by virtue of businesses' concentration, but it was not totally eliminated.¹⁵⁸

The Court first analyzed the land-use scenario in Renton for adult businesses.¹⁵⁹ Even with the ordinance in effect, the Court noted that there were 520 acres, greater than 5% of Renton's total land area, where adult-entertainment businesses could legally locate.¹⁶⁰ Justice Rehnquist further rejected respondents' argument that most of this land either was not available or was commercially unviable.¹⁶¹ He reasoned that the commercial viability of the available land is irrelevant for a First Amendment analysis because this fact goes only to the issue of marketability of the business, not the business's free expression.¹⁶² As a result, all 520 acres were considered available to adult-entertainment businesses wishing to locate in Renton.¹⁶³

The Court did not offer a clear explanation of the connection between the amount of available acreage, or even the percentage of land available, and the determination of whether alternative avenues of communication were adequate.¹⁶⁴ It noted, however, that the city had made "some areas" open to adult-entertainment businesses wishing to engage in protected expression and that these areas provided a "reasonable opportunity" to operate such businesses.¹⁶⁵ The Court therefore held that the City of Renton had satisfied the alternative avenues requirement of the test for content-neutral laws, and the ordinance therefore passed First Amendment muster.¹⁶⁶

Lower courts have struggled to apply *Renton's* alternative avenues analysis to other situations, but they have generally employed two different tests.¹⁶⁷ One test concludes that a city's available land for adult-

¹⁵⁶ 427 U.S. at 62 (plurality opinion).

¹⁵⁷ See 452 U.S. at 76.

¹⁵⁸ See 475 U.S. at 52-53.

¹⁵⁹ See *id.* at 53.

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at 53-54.

¹⁶² See *id.*; see also *A.F.M., Ltd. v. City of Medford*, 704 N.E.2d 184, 186 n.4 (Mass. 1999) (holding that information about whether available property was for sale or lease is irrelevant to the constitutionality of a zoning restriction).

¹⁶³ See *Renton*, 475 U.S. at 53-54.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 54.

¹⁶⁶ See *id.* at 54-55.

¹⁶⁷ See *infra* notes 168-174 and accompanying text.

entertainment businesses may be considered adequate by a court if it is a reasonable percentage of the city's total land area.¹⁶⁸ This approach relies heavily on *Renton's* analysis of the percentage of land available, and attempts to determine whether the 5% found there is constitutionally mandated.¹⁶⁹ As interpreted by courts, the reasonableness of the percentage varies greatly depending on the size and urban qualities of the municipality.¹⁷⁰ For example, courts have differed over whether the appropriate denominator in such an equation should be the city's total land area—as used in *Renton*—or only commercially zoned areas.¹⁷¹

Alternatively, the second test concludes that a municipality's available land for adult businesses may be considered adequate if the total number of sites meets the demand as measured by population size, the number of existing adult businesses, or the number of existing and potential adult-entertainment businesses.¹⁷² This approach is, at its base, a supply-and-demand analysis, in which the analysis itself only varies depending on how supply (the amount of land available) and demand

¹⁶⁸ Compare *Specialty Malls of Tampa v. City of Tampa*, 916 F. Supp. 1222, 1231 (M.D. Fla. 1996) (holding an ordinance leaving 7.5% of the city of Tampa's land available for adult entertainment was constitutional because it exceeded the 5% figure found constitutional in *Renton*), *aff'd*, 109 F.3d 770 (11th Cir. 1997), with *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 59–60 (1st Cir. 1999) (holding an ordinance leaving 0.09687% of land available for adult businesses in Tyngsborough, Massachusetts, (population 9500) was constitutional because the percentage of acreage available is "relevant but not dispositive"), *cert. denied*, 529 U.S. 1110 (2000).

¹⁶⁹ See *Specialty Malls of Tampa*, 916 F. Supp. at 1231.

¹⁷⁰ Compare *Specialty Malls of Tampa*, 916 F. Supp. at 1231 (holding that leaving 7.5% of the city of Tampa's land available for adult entertainment was constitutional because it exceeded the 5% figure found constitutional in *Renton*), with *O'Gorman*, 199 F.3d at 59–60 (holding that leaving 0.09687% land available for adult businesses in Tyngsborough, Mass., (population 9500) was constitutional because the percentage of acreage available is "relevant but not dispositive").

¹⁷¹ Compare *Renton*, 475 U.S. at 54, with *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 864–65 (8th Cir. 1994) (holding that 6.75% of zoned business acreage constituted sufficient alternative avenues).

¹⁷² See *O'Gorman*, 199 F.3d at 60–61. Courts have held adequate avenues of communication existed where as few as two sites were available. See, e.g., *Northlake Blvd. Corp. v. Vill. of N. Palm Beach*, 753 So. 2d 754, 758 (Fla. Dist. Ct. App. 2000); see also *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) (holding that "[a]s a matter of arithmetic," a city has provided a sufficient number of sites if the current number of adult-entertainment businesses is less than the available sites); *Alexander v. City of Minneapolis*, 698 F.2d 936, 938–39 (8th Cir. 1983) (holding an ordinance unconstitutional when it created only twelve sites for thirty existing businesses); *Centerfold Club, Inc. v. City of St. Petersburg*, 969 F. Supp. 1288, 1305–06 (M.D. Fla. 1997) (holding that nineteen sites for a population of 238,726—or one business per 12,565 persons—constituted insufficient alternative avenues of communication).

(the number of persons wishing to open or visit adult businesses) are defined.¹⁷³ Under either test, however, the constitutional sufficiency of a municipality's adult-entertainment zoning will depend largely on how the test is framed and how the requirements are determined.¹⁷⁴

E. Lower Courts and Rural or Residential Communities

Lower courts, both state and federal, have struggled with how to apply the Supreme Court's holdings in *Young*, *Schad*, and *Renton* to rural and residential communities.¹⁷⁵ Some cases in particular have interpreted these opinions and reached their own holdings as to rural and residential communities' responsibilities in providing adequate alternative avenues of communication.¹⁷⁶

For example, in 1981, in *Keego Harbor Co. v. City of Keego Harbor*, the U.S. Court of Appeals for the Sixth Circuit struck down Keego Harbor, Michigan's prohibition on adult movie theaters.¹⁷⁷ As the Sixth Circuit noted in its decision, Keego Harbor was "an unusual community" and a "largely recreational town" of about 3000 people.¹⁷⁸ The United States District Court for the Eastern District of Michigan had upheld, in an

¹⁷³ See *O'Gorman*, 199 F.3d at 60–61.

¹⁷⁴ See *Renton*, 475 U.S. at 54; see also *Young v. City of Simi Valley*, 216 F.3d 807, 822 (9th Cir. 2000) ("Data regarding the number of sites available for adult use is meaningless without a contextual basis for determining whether that number is sufficient for a particular locale."). The author of a 2002 student comment offered a differing interpretation of the alternative avenues requirement. See Ashley C. Phillips, Comment, *A Matter of Arithmetic: Using Supply and Demand to Determine the Constitutionality of Adult Entertainment Zoning Ordinances*, 51 EMORY L.J. 319, 322 (2002). The author suggests there are actually three distinct tests employed by courts: a "population proportion" test, a "total acreage" test, and a "supply and demand" test. See *id.* The interpretation of the case law in this Note differs in that it collapses the author's second and third tests into one, but makes further distinctions based on to what the total acreage is being compared. See *id.*; *supra* notes 167–173 and accompanying text.

¹⁷⁵ See, e.g., *Keego Harbor Co.*, 657 F.2d at 98; *Saddle Brook*, 722 A.2d at 534.

¹⁷⁶ See *Keego Harbor Co.*, 657 F.2d at 98; *Diamond v. City of Taft*, 29 F. Supp. 2d 633, 646 (E.D. Cal. 1998), *aff'd*, 215 F.3d 1052 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001); *Saddle Brook*, 722 A.2d at 535–36. In contrast to this case law discussing residential and rural municipalities, in 2001, the U.S. District Court for the Southern District of Florida in *University Books & Video, Inc. v. Miami-Dade County* discussed a larger geographical unit's responsibilities as to adult-entertainment zoning in holding that 0.0092% of city acreage zoned for adult businesses was insufficient given Miami-Dade County's status as a "large metropolitan area with a population of well over one million." 132 F. Supp. 2d 1008, 1014 (S.D. Fla. 2001). The court noted that cities in major urban areas must provide more than "a few dozen acres" to ensure adequate avenues of communication for adult businesses. See *id.*

¹⁷⁷ 657 F.2d at 95. *Keego Harbor Co.* was decided more than two months after the decision in *Schad*. *Schad*, 452 U.S. at 61; *Keego Harbor Co.*, 657 F.2d at 94. The *Keego Harbor Co.* court discusses *Schad* in detail. See *Keego Harbor Co.*, 657 F.2d at 97–98.

¹⁷⁸ *Keego Harbor Co.*, 657 F.2d at 96.

oral opinion, Keego Harbor's ordinance after evaluating it under the content-neutrality doctrine.¹⁷⁹ After finding its purpose sufficiently justified by the city, the district court judge evaluated the alternative avenues requirement on a region-wide basis, finding that "the market [for adult entertainment] embraces most if not all of Oakland County. There is nothing in the law that should[,] nor should there be[,] that requires each and every hamlet, no matter how small, to provide a space for explicit sex films."¹⁸⁰

On appeal, the Sixth Circuit reversed.¹⁸¹ Its holding, however, addressed only the first prong of the content-neutrality doctrine, concluding only that Keego Harbor had failed to justify the ordinance sufficiently.¹⁸² The holding left untouched the district court's findings as to the alternative avenues requirement.¹⁸³ Moreover, the court explicitly noted that it did not intend to reverse the district court as to these issues: "We do not hold that every unit of government, however small, must provide an area in which adult fare is allowed."¹⁸⁴ The Sixth Circuit thus explicitly declined to address, either positively or negatively, the district court's holding as to alternative avenues, while it simultaneously preserved the district court's analysis and emphasis on a regionalized approach to alternative avenues.¹⁸⁵

In 2000, in *Diamond v. City of Taft*, the U.S. Court of Appeals for the Ninth Circuit affirmed a finding by the Eastern District of California that the California city's zoning ordinance provided a sufficient

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *See id.* at 95.

¹⁸² *See id.* at 98-99.

¹⁸³ *See Keego Harbor Co.*, 657 F.2d at 99.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* In 1998, in *Wolfe v. Village of Brice*, the U.S. District Court for the Southern District of Ohio interpreted *Renton* as overruling the Sixth Circuit's decision in *Keego Harbor Co.* *See* 997 F. Supp. 939, 944-45 (S.D. Ohio 1998). The court noted that *Keego Harbor Co.*'s interpretation of *Schad* "appears to have been closed by the *Renton* Court, when that Court held that the First Amendment requires that a city refrain from effectively denying citizens a reasonable opportunity to open and to operate an adult theater within the city." *Id.* at 945. Although *Renton* does require most communities to permit adult businesses, it stops short of requiring all communities to do so. *See Renton*, 475 U.S. at 48-50. It further permits all communities to protect their quality of life against the negative secondary effects of such businesses. *See id.* at 50. As such, *Renton*'s holding leaves open the possibility that some small communities that are less sophisticated in nature may ban adult uses entirely under the First Amendment. *See id.* at 48-50. Chief Justice Burger endorsed this precise notion in his dissenting opinion in *Schad*, which Justice Rehnquist, author of the majority opinion in *Renton*, joined. *See Renton*, 475 U.S. at 43; *Schad*, 452 U.S. at 87 (Burger, C.J., dissenting).

number of alternative sites for adult entertainment when there were seven available sites for a town of 6800 people.¹⁸⁶ What is significant about *Diamond*, however, is the means by which the district court judge determined what sites were available to adult businesses in the area.¹⁸⁷ After noting that Taft was a "rural town" and that it "is possible to travel from one end of the developed area of the city to the other in a matter of minutes," the court analyzed in detail the sites the city identified as available to adult-entertainment businesses.¹⁸⁸ Among those analyzed were five sites in a commercially zoned area located on state highways.¹⁸⁹ As the court noted, the sites were outside Taft's city limits but within Taft's "Sphere of Influence."¹⁹⁰ Although unclear from the opinion, this comment presumably responds to an argument made by the City of Taft that sites outside city limits should qualify as part of the available market if they are perceived as part of the general city area.¹⁹¹

The court ultimately found these five sites unavailable by virtue of their location within a required 1000-foot buffer of establishments frequented by minors.¹⁹² In so holding, however, the court did not decide whether sites within a city's "Sphere of Influence," but outside city limits, could be considered alternative avenues for such businesses.¹⁹³ Although it sidestepped this issue, the court noted that smaller towns and communities deserve different treatment when it comes to the alternative avenues requirement.¹⁹⁴ Its rationale for this premise was twofold.¹⁹⁵ First, smaller communities possess smaller economic markets and correspondingly smaller demands for commercial First Amendment speech like adult entertainment.¹⁹⁶ Second, rural communities typically have smaller commercial zones in comparison to residentially zoned land, and thus should be permitted to provide comparatively less space to adult businesses.¹⁹⁷ Although the court's ultimate decision as to these five lots was on separate grounds, the

¹⁸⁶ 215 F.3d 1052, 1058 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001).

¹⁸⁷ See *Diamond*, 29 F. Supp. 2d at 638.

¹⁸⁸ See *id.* at 636-39.

¹⁸⁹ See *id.* at 638.

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² See *Diamond*, 29 F. Supp. 2d at 642.

¹⁹³ See *id.* at 643 n.12.

¹⁹⁴ See *id.* at 646.

¹⁹⁵ See *id.* at 642, 646.

¹⁹⁶ See *id.* at 646.

¹⁹⁷ See *Diamond*, 29 F. Supp. 2d at 642.

court's fundamental premise identifies a separate means of handling smaller communities when it comes to zoning for adult businesses.¹⁹⁸

In 1999, in *Township of Saddle Brook v. A.B. Family Center*, the Supreme Court of New Jersey relied on similar justifications to hold that a region-wide analysis of the alternative avenues requirement is appropriate.¹⁹⁹ The court reversed a trial court's finding of unconstitutionality of a state statute requiring dispersal of adult businesses.²⁰⁰ The state law imposed a ban on adult businesses within 1000 feet of any place of worship, school, school bus stop, playground, or residential area.²⁰¹ The effect of this statute was a prohibition on the operation of any adult bookstores in Saddle Brook, New Jersey.²⁰² In upholding the statute, the court reasoned that the alternative avenues requirement can be evaluated on a region-wide, rather than municipality-wide, basis.²⁰³

Central to the court's reasoning on this issue was the U.S. Supreme Court's decision in *Schad*.²⁰⁴ The New Jersey court quoted at length *Schad*'s suggestion that a region-wide analysis of alternative avenues may be sufficient, and further justified this by pointing to later federal cases coming to a similar conclusion.²⁰⁵ This precedent thus led the court to decide that, when evaluating the alternative avenues available, the

¹⁹⁸ See *id.* at 646; see also *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225, 230-31 (Minn. Ct. App. 1997) (holding that 0.9% of Crystal's overall land and 15% of its industrial and commercial zones satisfied the alternative avenues requirement because of the city's "overwhelmingly residential character and conservative planning practices").

¹⁹⁹ See 722 A.2d at 536.

²⁰⁰ *Id.* at 531-32.

²⁰¹ *Id.* at 532.

²⁰² *Id.* at 531. The state statute in question provides in pertinent part as follows:

Except as provided in a municipal zoning ordinance adopted pursuant to N.J.S.2C:34-2, no person shall operate a sexually oriented business within 1,000 feet of any existing sexually oriented business, or any church, synagogue, temple or other place of public worship, or any elementary or secondary school or any school bus stop, or any municipal or county playground or place of public resort and recreation, or any hospital or any child care center, or within 1,000 feet of any area zoned for residential use.

N.J. STAT. ANN. § 2C:34-7(a) (West 2004). New Jersey's distancing statute is relatively unique for adult-entertainment zoning in the United States. See DeMasters, *supra* note 8, at 6. Nevertheless, as the court in *Saddle Brook* noted, the statute "is not a statewide zoning regulation for sexually oriented businesses, [but] it does constitute a statewide restriction on their location." 722 A.2d at 535. The statute also authorizes municipalities to override the restriction by enacting their own more permissive ordinance. *Id.*

²⁰³ See *Saddle Brook*, 722 A.2d at 535.

²⁰⁴ See *Schad*, 452 U.S. at 76; *Saddle Brook*, 722 A.2d at 533-34.

²⁰⁵ See *Saddle Brook*, 722 A.2d at 533-34.

lower court should consider "areas located in other municipalities 'within reasonable proximity to the Saddle Brook location.'"²⁰⁶

The New Jersey Supreme Court's holding in this case, however, was limited to the evaluation of state statutes, not local zoning ordinances.²⁰⁷ In this sense, the court advocated only a scope of analysis consistent with the scope of the law in question.²⁰⁸ It did not, however, advocate an analysis of the alternative avenues requirement that considered availability beyond the geographic coverage of the law itself, as would be the case when considering countywide availability to assess a municipal ordinance.²⁰⁹

Keego Harbor Co., *Diamond*, and *Saddle Brook* illustrate the ways in which lower courts have interpreted the alternative avenues requirement for rural and residential communities.²¹⁰ In each, there is a common question, first articulated by Chief Justice Burger in *Schad*: if the alternative avenues requirement truly considers only the availability of other opportunities for protected speech, why should nearby areas, beyond municipal boundaries, not qualify?²¹¹ Although this question is definitively answered only in *Saddle Brook*, all three cases indicate a particular sensitivity to the needs of rural and residential communities in relation to adult businesses.²¹²

II. PROBLEMS FACING RURAL AND RESIDENTIAL MUNICIPALITIES IN ZONING ADULT-ENTERTAINMENT BUSINESSES CONSISTENT WITH THE FIRST AMENDMENT

Courts have struggled to apply the Supreme Court's adult-entertainment zoning jurisprudence to rural and residential municipalities.²¹³ In 1981, in *Keego Harbor Co. v. City of Keego Harbor*, the U.S.

²⁰⁶ See *id.* at 535 (quoting *Township of Saddle Brook v. A.B. Family Ctr., Inc.*, 704 A.2d 81, 89 (N.J. Super. Ct. App. Div. 1998)). Reasonable proximity is to be determined by "evidence of regional marketing patterns, availability of public transportation and access by automobiles, geographical distribution of customers at comparable sexually oriented businesses, and other factors deemed relevant by the parties and the court." *Id.* at 536.

²⁰⁷ *Id.* at 532-33.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *Keego Harbor Co.*, 657 F.2d at 99; *Diamond*, 29 F. Supp. 2d at 646; *Saddle Brook*, 722 A.2d at 535.

²¹¹ See *Schad*, 452 U.S. at 87 (Burger, C.J., dissenting); *Keego Harbor Co.*, 657 F.2d at 99; *Diamond*, 29 F. Supp. 2d at 646; *Saddle Brook*, 722 A.2d at 535.

²¹² See *Keego Harbor Co.*, 657 F.2d at 99; *Diamond*, 29 F. Supp. 2d at 646; *Saddle Brook*, 722 A.2d at 535.

²¹³ See *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94, 99 (6th Cir. 1981); *Diamond v. City of Taft*, 29 F. Supp. 2d 633, 646 (E.D. Cal. 1998), *aff'd*, 215 F.3d 1052, 1058

Court of Appeals for the Sixth Circuit struck down Keego Harbor's zoning ordinance while declining to hold that every municipality must provide alternative avenues of communication within their borders.²¹⁴ Similarly, in 2000, in *Diamond v. City of Taft*, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision that declined to decide whether sites outside municipal boundaries but within a city's "Sphere of Influence" could be considered under the alternative avenues requirement.²¹⁵ In contrast, in 1999, in *Township of Saddle Brook v. A.B. Family Center, Inc.*, the Supreme Court of New Jersey held constitutional a state statute that effectively banned adult businesses from a residential municipality so long as there were nearby alternative avenues of communication.²¹⁶ Read together, these cases suggest the difficulties courts confront in applying the U.S. Supreme Court's First Amendment case law on adult-entertainment zoning to rural and residential municipalities.²¹⁷ In response to this case law, this Note suggests four distinct problems rural and residential municipalities face in zoning adult-entertainment businesses consistent with the First Amendment.²¹⁸

A. Undetermined Constitutionality of a Total Ban

The principal problem relative to adult-entertainment zoning cases is that it is unclear whether rural and residential municipalities may enact a total ban on adult entertainment.²¹⁹ In 1986, in *City of Renton v. Playtime Theatres, Inc.*, the U.S. Supreme Court held that the First Amendment required Renton, Washington—a city of 32,000 people—to refrain from denying adult businesses "a reasonable opportunity to

(9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001); *Township of Saddle Brook v. A.B. Family Ctr., Inc.*, 722 A.2d 530, 535 (N.J. 1999). These cases are, of course, by no means the only attempts at applying this case law. *See, e.g.*, *Young v. City of Simi Valley*, 216 F.3d 807, 822–23 (9th Cir. 2000) (holding that four available sites for adult businesses was adequate for a city of 100,000 when no such businesses currently existed and only one application was pending, but acknowledging the "chilling effect" some ordinances may have on prospective adult businesses); *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225, 230–31 (Minn. Ct. App. 1997) (holding that 0.9% of Crystal's land area constituted adequate alternative avenues of communication, given Crystal's "overwhelmingly residential character and conservative planning practices").

²¹⁴ See 657 F.2d at 99.

²¹⁵ 215 F.3d at 1058; *Diamond*, 29 F. Supp. 2d at 638, 646.

²¹⁶ 722 A.2d at 535–36.

²¹⁷ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986); *Keego Harbor Co.*, 657 F.2d at 99; *Diamond*, 29 F. Supp. 2d at 646; *Saddle Brook*, 722 A.2d at 535–36.

²¹⁸ See *infra* notes 219–264 and accompanying text.

²¹⁹ See GERARD, *supra* note 100, at 214–16.

open and operate."²²⁰ A broad reading of *Renton's* holding suggests that every municipality must provide space for adult businesses.²²¹ Such a reading, moreover, is consistent with the Court's interpretation of the First Amendment as prohibiting the suppression of speech in one locale merely because such speech is allowed elsewhere.²²²

Nevertheless, there are two primary reasons that a total ban may still be permissible in rural and residential communities.²²³ In 1981, in *Schad v. Borough of Mount Ephraim*, the U.S. Supreme Court struck down a city's zoning ordinance prohibiting adult entertainment, but explicitly declined to hold that every municipality, no matter how small, must allow such entertainment.²²⁴ Furthermore, five of nine justices in *Schad*—including Justice Rehnquist, the author of the *Renton* majority opinion—believed that some small communities should be able to exclude adult entertainment completely when such entertainment is available nearby.²²⁵ As a result, there remains an unresolved conflict between *Renton* and *Schad* as to the particular obligations of smaller rural and residential communities in permitting adult businesses when space for such businesses is nearby but outside a town's borders.²²⁶ Although larger cities clearly must provide alternative avenues of communication within their borders, it is still unclear whether rural and residential municipalities must do the same.²²⁷

B. Unclear Standards for *Renton's* Alternative Avenues Requirement

The second problem is that, even assuming that rural and residential municipalities must provide alternative avenues of communi-

²²⁰ 475 U.S. at 54.

²²¹ See *id.*

²²² See *id.*; see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76–77 (1981).

²²³ See *Schad*, 452 U.S. at 75 n.18.

²²⁴ *Id.* ("[O]ur 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.").

²²⁵ See *id.* at 79 (Powell, J., concurring); *id.* at 84 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting). Justices supporting such a ban were Justices Powell, Stewart, and Stevens in their concurring opinions and Chief Justice Burger and Justice Rehnquist in Chief Justice Burger's dissenting opinion. *Id.* at 79 (Powell, J., concurring); *id.* at 79 (Stevens, J., concurring); *id.* at 85 (Burger, C.J., dissenting); see also GERARD, *supra* note 100, at 215. State court case law also supports this position. See e.g., *Saddle Brook*, 722 A.2d at 531. For instance, the immediate effect of the state statute upheld in *Saddle Brook* was a total ban on adult businesses within Saddle Brook. *Id.* The New Jersey Supreme Court impliedly upheld this statute on the understanding that space for adult-entertainment businesses was available in nearby municipalities. See *id.* at 535–36.

²²⁶ See *Renton*, 475 U.S. at 54; *Schad*, 452 U.S. at 75 n.18.

²²⁷ See *Renton*, 475 U.S. at 54; *Schad*, 452 U.S. at 75 n.18.

cation within their borders, there are few standards guiding them as to what constitutes sufficient alternative avenues of communication.²²⁸ This situation arises primarily as a result of *Renton*.²²⁹ In *Renton*, the Supreme Court upheld an ordinance allowing adult businesses on 5% of Renton's total land area, but did not hold that such a percentage was constitutionally mandated.²³⁰

Subsequent lower court opinions have further complicated the issue by interpreting *Renton* differently.²³¹ Some appear to view the 5% figure from *Renton* as constitutionally mandated.²³² For instance, in 1997, in *Specialty Malls of Tampa, Inc. v. City of Tampa*, a Florida district court upheld a Tampa law making 7.5% of the city's land available to adult business because this percentage exceeded the 5% found constitutional in *Renton*.²³³ Consistent with this, in 2001, in *University Books & Videos, Inc. v. Miami-Dade County*, another Florida district court held that 0.0092% of Miami-Dade County acreage zoned for adult businesses was insufficient given the county's status as a "large metropolitan area with a population of well over one million."²³⁴

Other courts, however, have upheld laws that make less than 5% of a municipality's land available to adult businesses on the theory that the size and character of a municipality should influence what constitutes an appropriate percentage.²³⁵ For instance, in 1999, in *D.H.L. Associates v. O'Gorman*, the U.S. Court of Appeals for the First Circuit upheld an ordinance that left only 0.09687% of the land in Tyngsborough, Massachusetts, (population 9500) available to adult businesses.²³⁶ In holding as much, the court noted that "an analysis [of the alternative avenues requirement in *Renton*] should encompass a variety of factors," one of which was Tyngsborough's status as a rural town with very little commercially zoned land.²³⁷ Thus, disparate interpretations reveal the lack of guidance afforded to rural and resi-

²²⁸ See Phillips, *supra* note 174, at 321.

²²⁹ See *id.*; see also *Renton*, 475 U.S. at 54.

²³⁰ See 475 U.S. at 53-54.

²³¹ See, e.g., *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 60 (1st Cir. 1999); *Univ. Books & Videos, Inc. v. Miami-Dade County*, 132 F. Supp. 2d 1008, 1014 (S.D. Fla. 2001); *Specialty Malls of Tampa v. City of Tampa*, 916 F. Supp. 1222, 1231 (M.D. Fla. 1996).

²³² See, e.g., *Specialty Malls of Tampa*, 916 F. Supp. at 1231.

²³³ See *id.*

²³⁴ See 132 F. Supp. 2d at 1014.

²³⁵ See *O'Gorman*, 199 F.3d at 59-60.

²³⁶ See *id.* Five available sites were located within this available area. *Id.* at 60.

²³⁷ *Id.*

dential municipalities as to what constitutes adequate alternative avenues of communication under *Renton*.²³⁸

C. Inability to Enact Sufficient Distancing Requirements

The uncertainty with respect to what constitutes sufficient alternative avenues of communication is complicated by an additional drafting problem—namely, an inability to enact sufficient distancing requirements.²³⁹ In *Young v. American Mini Theatres, Inc.*, the U.S. Supreme Court upheld a zoning ordinance requiring dispersal of adult-entertainment businesses.²⁴⁰ Municipalities that choose to enact a distancing requirement must determine what constitutes an appropriate buffer zone between adult businesses and other adult businesses, places of worship, schools, or residential areas.²⁴¹ Rural and residential municipalities that attempt to enact a buffer zone similar to that of larger cities, however, may often find that the buffer effectively precludes any adult businesses from operating within their borders or leaves too little space to be considered adequate alternative avenues of communication.²⁴²

This scenario is aptly illustrated by a situation resulting from New Jersey's statewide adult business location restriction, as upheld in *Saddle Brook*.²⁴³ The law required a 1000-foot buffer between any adult business and places of worship, school and school bus stops, municipal or county playgrounds, and residential areas.²⁴⁴ A buffer of this size is consistent with those employed by cities whose ordinances the Supreme Court has reviewed and upheld.²⁴⁵ In a town the size of Saddle Brook, however, a buffer zone of 1000 feet effectively banned any adult businesses from legally operating within city limits, even though the ban was no more restrictive than adult-entertainment zoning laws

²³⁸ See *Renton*, 475 U.S. at 54; GERARD, *supra* note 100, at 214–16.

²³⁹ See *Crystal*, 569 N.W.2d at 227.

²⁴⁰ 427 U.S. 50, 72–73 (1976) (plurality opinion).

²⁴¹ See *id.* (plurality opinion).

²⁴² See *Crystal*, 569 N.W.2d at 227.

²⁴³ See 722 A.2d at 531; DeMasters, *supra* note 8, at 6.

²⁴⁴ *Saddle Brook*, 722 A.2d at 532.

²⁴⁵ See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002) (plurality opinion); *Renton*, 475 U.S. at 43. The law in *Renton*, for instance, placed a 1000-foot buffer between adult businesses and churches, parks, schools, or residential areas. See *Renton*, 475 U.S. at 43; see also *Los Angeles*, 535 U.S. at 430 (plurality opinion) (holding constitutional an ordinance that placed a 1000-foot buffer between adult businesses and a 500-foot buffer between such businesses and churches, schools, and parks).

upheld by the Supreme Court.²⁴⁶ Thus, a buffer zone or distancing requirement that is acceptable in larger cities may fail to provide any space for adult-entertainment businesses in rural and residential municipalities—a result problematic under *Renton*'s alternative avenues requirement.²⁴⁷

For rural and residential municipalities that lack statewide zoning of adult businesses,²⁴⁸ this may mean that they are forced to enact adult-entertainment zoning laws with smaller distancing requirements to ensure available space for adult-entertainment businesses.²⁴⁹ Smaller buffer zones, however, are less restrictive of the location of adult businesses, and consequently less protective of residential areas.²⁵⁰

This was the situation that faced Crystal, Minnesota, a largely residential municipality, which was forced to enact a less restrictive distancing requirement because of its small size.²⁵¹ In 1997, in *City of Crystal v. Fantasy House, Inc.*, the Court of Appeals of Minnesota upheld an ordinance requiring a 250-foot buffer zone between prohibited businesses and residential areas, daycares, libraries, parks, places of worship, and playgrounds.²⁵² Crystal had enacted this requirement only after realizing that a 1000-foot buffer zone effectively precluded all adult businesses from operating in the municipality.²⁵³ Crystal's decision to reduce its adult business buffer zone is indicative of the problem rural and residential municipalities face.²⁵⁴ Such municipalities must enact

²⁴⁶ See *Saddle Brook*, 722 A.2d at 532; see also *Los Angeles*, 535 U.S. at 430 (plurality opinion); *Renton*, 475 U.S. at 43; *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976) (plurality opinion).

²⁴⁷ See *Saddle Brook*, 722 A.2d at 532.

²⁴⁸ All states but New Jersey lack a statewide restriction on the location of adult entertainment. N.J. STAT. ANN. § 2C:34-7(a) (West 2004); DeMasters, *supra* note 8, at 6.

²⁴⁹ See *Crystal*, 569 N.W.2d at 227.

²⁵⁰ See *id.*; MINN. ATTORNEY GENERAL, *supra* note 5, at 529-30. This approach is consistent with the prevailing view that the concentration of adult businesses produces harmful secondary effects to the surrounding areas, including prostitution, theft, and other violent and nonviolent crime. See, e.g., *Los Angeles*, 535 U.S. at 430 (plurality opinion); *Renton*, 475 U.S. at 51. *Contra* Bryant Paul et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355, 391 (2001).

²⁵¹ See *Crystal*, 569 N.W.2d at 227.

²⁵² *Id.*

²⁵³ See *id.* Crystal realized this through the enactment of an ordinance referred to in *Crystal* as the "interim ordinance." See *id.* It is unclear from the opinion if the ordinance was intended as interim when it was enacted, or only later when it was discovered to have created a total ban on adult businesses. See *id.* The interim ordinance was upheld by the Court of Appeals of Minnesota because it was considered a valid moratorium on zoning while studies were conducted and permanent zoning was adopted. *Id.* at 231.

²⁵⁴ See *id.*

smaller buffer zones than larger cities to satisfy the alternative avenues requirement, even if they are more susceptible than larger cities to the negative secondary effects of adult-entertainment businesses.²⁵⁵

D. Lack of Regional Zoning of Adult Businesses

The inequity and inconsistency created by buffer zones of varying sizes is evident in the fourth and final problem facing rural and residential municipalities: a general, though not universal, lack of regional zoning of adult businesses.²⁵⁶ When no regional zoning restriction on adult businesses exists, courts limit themselves to examining the alternative avenues of communication available within the municipality.²⁵⁷ In doing so, they may ignore significant nearby opportunities for adult entertainment that would satisfy the alternative avenues requirement of *Renton* and lessen a rural or residential municipality's burden to provide space for adult businesses.²⁵⁸

The value of regional zoning is evident in the New Jersey Supreme Court's decision in *Saddle Brook*.²⁵⁹ In *Saddle Brook*, the court evaluated a statewide, rather than municipal, restriction on the location of adult businesses.²⁶⁰ Because it was evaluating a statewide zoning statute rather a municipal ordinance, the court's analysis of potential alternative avenues of communication was not restricted to municipal boundaries, but rather included available alternative locations in the surrounding region.²⁶¹ Although the court in *Saddle Brook* limited its holding to statewide statutes, the fundamental premise of the case arguably applies to countywide or region-wide zoning restrictions as well.²⁶² In contrast to *Saddle Brook*, residential and rural municipalities that lack countywide or statewide zoning are left to their own devices to identify alternative locations within their boundaries, even if such sites already exist in nearby locations.²⁶³ Given the already

²⁵⁵ See *id.*; MINN. ATTORNEY GENERAL, *supra* note 5, at 529-30.

²⁵⁶ See *DeMasters*, *supra* note 8, at 6; see also *Saddle Brook*, 722 A.2d at 532. New Jersey, as discussed in *Saddle Brook*, is a notable exception. See *Saddle Brook*, 722 A.2d at 532.

²⁵⁷ See *Schad*, 452 U.S. at 76. *Contra Diamond*, 29 F. Supp. 2d at 638 (suggesting that areas outside of Taft's city limits were within the city's "Sphere of Influence").

²⁵⁸ See *Renton*, 475 U.S. at 53-54; *Schad*, 452 U.S. at 76; *Diamond*, 29 F. Supp. 2d at 638.

²⁵⁹ See 722 A.2d at 531.

²⁶⁰ See *id.* at 532-33.

²⁶¹ See *id.* at 532.

²⁶² See *id.* at 532-33; see also *Schad*, 452 U.S. at 76 (holding that Mount Ephraim cannot point to sites beyond city boundaries as alternative avenues of communication because "[t]here is no countywide zoning in Camden County").

²⁶³ See *Diamond*, 29 F. Supp. 2d at 638, 646.

identified complications such municipalities face in zoning adult businesses, the lack of a broader regional approach is only an additional hindrance.²⁶⁴

III. ZONING ADULT-ENTERTAINMENT BUSINESSES CONSISTENT WITH THE FIRST AMENDMENT: SOLUTIONS FOR RURAL AND RESIDENTIAL MUNICIPALITIES

Short of a new U.S. Supreme Court opinion clarifying some of the issues within the alternative avenues requirement as applied to adult-entertainment businesses, regional and rural municipalities face difficult problems when zoning adult entertainment.²⁶⁵ This Note has identified four problems with the Supreme Court's First Amendment jurisprudence as applied to adult-entertainment zoning creates for such municipalities.²⁶⁶ First, the Court's adult-entertainment zoning case law leaves unclear whether some municipalities may enact a total ban on adult entertainment.²⁶⁷ Second, there is contradicting precedent as to what constitutes sufficient alternative avenues of communication.²⁶⁸ Third, rural and residential municipalities are often forced to enact less restrictive distancing requirements than larger cities, arguably increasing the risk to security and quality of life in the municipality.²⁶⁹ Finally, rural and residential municipalities are disadvantaged by a general lack of countywide or statewide zoning of adult-entertainment businesses.²⁷⁰ This Note now proposes three solutions which, when combined or adopted independently, will address these problems.²⁷¹

A. Adopt Countywide or Statewide Location Restrictions on Adult Businesses

State and county legislatures should consider regionalized approaches to restrictions on the location of adult-entertainment businesses.²⁷² New Jersey's statewide statute requiring the distancing of

²⁶⁴ See *id.*; *Crystal*, 569 N.W.2d at 227.

²⁶⁵ See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986); *Diamond v. City of Taft*, 29 F. Supp. 2d 633, 646 (E.D. Cal. 1998), *aff'd*, 215 F.3d 1052 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001); *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225, 227 (Minn. Ct. App. 1997).

²⁶⁶ See *supra* notes 219-264 and accompanying text.

²⁶⁷ See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75 n.18 (1981).

²⁶⁸ See *Phillips*, *supra* note 174, at 321; see also *Renton*, 475 U.S. at 54; *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 59-60 (1st Cir. 1999).

²⁶⁹ See *Crystal*, 569 N.W.2d at 227.

²⁷⁰ See *Diamond*, 29 F. Supp. 2d at 638.

²⁷¹ See *infra* notes 272-305 and accompanying text.

²⁷² See *Township of Saddle Brook v. A.B. Family Cir., Inc.*, 722 A.2d 530, 532 (N.J. 1999).

adult businesses from each other and from places of public worship, schools, playgrounds, and residential areas is an example of this.²⁷³ As discussed earlier, this statute requires a 1000-foot buffer zone between such businesses unless the municipality in question chooses to "override the statutory limitation by [enacting] a local zoning ordinance more permissive than the state statute."²⁷⁴

Assuming the municipality in question chooses not to enact a more permissive restriction, the benefits of a state statute restricting the location of adult-entertainment businesses are clear in light of the Supreme Court's case law.²⁷⁵ In *Schad v. Borough of Mount Ephraim*, the Court struck down a city's ordinance prohibiting adult entertainment.²⁷⁶ In so holding, the Court rejected the argument that a regionalized approach to the alternative avenues requirement is justified when there is no countywide zoning in the area.²⁷⁷ The implication of *Schad's* reasoning is that the presence of a countywide or statewide zoning restriction, instead of a municipal restriction, should permit a more regionalized analysis of the area's alternative avenues of communication.²⁷⁸ A regionalized approach to adult-entertainment businesses ensures that the community as a whole bears the burden of secondary effects equally, while still permitting some municipalities to increase their burden through a local ordinance if they foresee potential benefits from adult businesses.²⁷⁹

B. *Employ a Regional Analysis of the Alternative Avenues Requirement*

Absent countywide or statewide zoning restrictions on adult businesses, courts should apply a broader analysis of the alternative avenues requirement.²⁸⁰ In *City of Renton v. Playtime Theatres, Inc.*, the U.S. Supreme Court held that an adult-entertainment zoning ordinance is constitutional if it (1) is intended to serve a substantial governmental interest and (2) permits reasonable alternative avenues of communication.²⁸¹ As *Renton* made clear, the alternative avenues requirement is

²⁷³ N.J. STAT. ANN. § 2C:34-7(a) (West 2004); see also *Saddle Brook*, 722 A.2d at 532.

²⁷⁴ *Saddle Brook*, 722 A.2d at 535; see N.J. STAT. ANN. § 2C:34-7(a).

²⁷⁵ See *id.* at 535-36; see also *Schad*, 452 U.S. at 76-77.

²⁷⁶ See *Schad*, 452 U.S. at 76-77.

²⁷⁷ See *id.*

²⁷⁸ See *id.*; see also *Saddle Brook*, 722 A.2d at 532-33.

²⁷⁹ See *Saddle Brook*, 722 A.2d at 535-36.

²⁸⁰ See *Schad*, 452 U.S. at 79 (Powell, J., concurring); *id.* at 85 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).

²⁸¹ See 475 U.S. at 50.

crucial because the First Amendment guarantees a citizen's right to share his or her message with others—a right, moreover, that cannot be suppressed merely on the grounds that it can be exercised elsewhere.²⁸² Accordingly, adult businesses must be guaranteed space to operate where patrons may visit if they choose.²⁸³ Arguably, whether or not that space is within the municipal city limits of a rural or residential community or directly outside seems less significant so long as adult businesses continue to retain reasonable—and therefore nearby—opportunities to open and operate.²⁸⁴

This regionalized approach to the alternative avenues requirement, moreover, is arguably permissible under *Schad* so long as the municipality can demonstrate the locations and proximity of these nearby alternative avenues.²⁸⁵ In *Schad*, the U.S. Supreme Court rejected the city's argument for a region-wide analysis of the alternative avenues requirement largely because the record failed to show any evidence of availability in nearby areas.²⁸⁶ This rationale thus leaves open the possibility that a record providing evidence of nearby locations for adult businesses could satisfy the alternative avenues requirement.²⁸⁷ Accordingly, *Schad* should be viewed not as foreclosing the opportunity for a regional analysis of the alternative avenues requirement, but rather, only as setting a high standard for its use.²⁸⁸

Furthermore, to address *Schad's* concern that cities not shirk their obligation to ensure alternative avenues of communication for adult businesses, courts should place the burden of proof for the alternative avenues requirement on the municipality.²⁸⁹ Municipalities

²⁸² See *id.*; *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 654–55 (1981); *Schad*, 452 U.S. at 76–77.

²⁸³ See *Renton*, 475 U.S. at 53–54.

²⁸⁴ See *Renton*, 475 U.S. at 53–54; *Schad*, 452 U.S. at 79 (Powell, J., concurring); *id.* at 85 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting). But see *Schad*, 452 U.S. at 78 (Blackmun, J., concurring) ("Were I a resident of Mount Ephraim, I would not expect my right to attend the theater or to purchase a novel to be contingent upon the availability of such opportunities in 'nearby' Philadelphia, a community in whose decisions I would have no political voice.").

²⁸⁵ See 452 U.S. at 76, 79 (Powell, J., concurring); *id.* at 85 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).

²⁸⁶ See *id.* at 76 ("[T]here is no evidence in [the] record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas.").

²⁸⁷ See *id.*

²⁸⁸ See *id.* at 76; *id.* at 79 (Powell, J., concurring); *id.* at 85 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).

²⁸⁹ See *id.* at 76–77; *Saddle Brook*, 722 A.2d at 536 ("[W]e believe it to be consistent with First Amendment decisional law that recognizes the fairness of imposing on the public

will then retain responsibility for ensuring nearby, available, and sufficient alternative avenues of communication, regardless of whether those avenues are located within or outside the municipality.²⁹⁰ With this safeguard in place, courts could employ a broader analysis of the alternative avenues requirement without forgoing any of the accountability provided by a citywide analysis.²⁹¹

*C. Adopt a Supply-and-Demand Analysis of the Alternative
Avenues Requirement*

A third and final solution to the problems rural and residential municipalities face likewise involves the analysis a court may use when considering the alternative avenues requirement.²⁹² Courts should apply a supply-and-demand analysis when determining whether a municipality has provided adequate alternative avenues of communication.²⁹³ A supply-and-demand approach would stipulate that a restriction on adult-entertainment business provides alternative avenues of communication if the available number of sites exceeds the demand for those sites coming from current and prospective adult-entertainment businesses.²⁹⁴ This approach thus would ensure that municipal ordinances do not prevent adult-entertainment businesses from identifying legitimate locations in which to operate.²⁹⁵ This is in contrast to methods of analysis that look purely at the percentage of land available or the number of sites available without regard to demand.²⁹⁶

The simplicity of the supply-and-demand approach is appealing.²⁹⁷ All that must be known to analyze the alternative avenues requirement is the number of existing sites and the demand by adult businesses for sites in the municipality.²⁹⁸ Moreover, this method en-

body that elects to restrict protected speech the obligation of demonstrating that its restrictions are reasonably tailored to achieve its objectives . . . and provide adequate available alternative avenues of communication.").

²⁹⁰ See *Schad*, 452 U.S. at 76-77; *Saddle Brook*, 722 A.2d at 536.

²⁹¹ See *Saddle Brook*, 722 A.2d at 536.

²⁹² See Phillips, *supra* note 174, at 322-23.

²⁹³ See *id.*

²⁹⁴ See *Lakeland Lounge of Jackson, Inc. v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992).

²⁹⁵ See Phillips, *supra* note 174, at 341.

²⁹⁶ See *Renton*, 475 U.S. at 53-54; *O'Gorman*, 199 F.3d at 60.

²⁹⁷ See *Diamond*, 29 F. Supp. 2d at 646 ("Without considering both producer supply and consumer demand, there can be no meaningful determination of whether the First Amendment's purposes in guaranteeing reasonable alternative avenues of communication are satisfied."); Phillips, *supra* note 174, at 340-42.

²⁹⁸ See *Lakeland Lounge*, 973 F.2d at 1260.

tures that residential and rural communities are not forced to provide more space than the market requires.²⁹⁹

Problems with the supply-and-demand approach are minimal.³⁰⁰ Demand for available sites by current and prospective adult businesses arguably can be determined in a number of ways, and some of this uncertainty undoubtedly leads to some indeterminacy in the analysis.³⁰¹ Additionally, the demand for sites coming from adult businesses likely changes in a community over time, making the supply-and-demand method a less than ideal long-term approach.³⁰² As a result, adult-entertainment zoning restrictions would still need to be revisited over time.³⁰³ Nevertheless, the supply-and-demand approach ensures that rural and residential communities are required to offer alternative avenues of communication only to actual and prospective adult businesses.³⁰⁴ Given the inherently changing role of adult businesses in any community, this flexibility is desirable.³⁰⁵

CONCLUSION

Every community faces the difficult problem of restricting, but nevertheless allowing, adult-entertainment businesses. Given the varied concerns about the secondary effects of such businesses, municipalities both large and small have struggled over the years to determine how best to allow them while minimizing their potential negative impacts to neighborhoods and community institutions. In these respects, rural and residential communities are no different than larger cities like Detroit, New York, and Boston, and suburban cities like Renton. Rural and residential communities, however, do face a unique burden in determining what will satisfy their constitutional obligations as to alternative avenues of communication. Courts

²⁹⁹ See *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995).

³⁰⁰ See Phillips, *supra* note 174, at 340-42.

³⁰¹ See *Lim v. City of Long Beach*, 12 F. Supp. 2d 1050, 1066 (C.D. Cal. 1998) (determining that courts compare the number of available sites to (1) the municipality's population, (2) the existing number of adult businesses, or (3) the number of businesses wishing to offer adult entertainment); see also *N. Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996) (determining the number of businesses wishing to offer adult entertainment by the number of inquiries Chicago's zoning department received in a year regarding potential adult businesses).

³⁰² See Phillips, *supra* note 174, at 351 ("[O]ver time, a community's demand for adult entertainment may change.").

³⁰³ See *id.*

³⁰⁴ See *id.* at 340.

³⁰⁵ See *id.* at 352-53.

should be sensitive to these burdens, and should seek out new approaches—within the scope of the U.S. Supreme Court's precedent—to evaluate rural and residential communities' First Amendment obligations. Short of such changes, some communities will continue to be burdened unfairly by a constitutional analysis primarily developed in consideration of larger and more commercial cities.

MATTHEW L. MCGINNIS