

KENNEDY, J., concurring in judgment

**SUPREME COURT OF THE UNITED STATES**

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No. 00–799

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CITY OF LOS ANGELES, PETITIONER *v.*  
ALAMEDA BOOKS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[May 13, 2002]

JUSTICE KENNEDY, concurring in the judgment.

Speech can produce tangible consequences. It can change minds. It can prompt actions. These primary effects signify the power and the necessity of free speech. Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.

Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech. A city’s “interest in attempting to preserve the quality of urban life is one that must be accorded high respect.” *Young v. American Mini Theatres, Inc.*, 427 U. S. 50, 71 (1976) (plurality opinion).

The question in this case is whether Los Angeles can seek to reduce these tangible, adverse consequences by separating adult speech businesses from one another—even two businesses that have always been under the same roof. In my view our precedents may allow the city to impose its regulation in the exercise of the zoning

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impose its regulation in the exercise of the zoning authority. The city is not, at least, to be foreclosed by summary judgment, so I concur in the judgment.

This separate statement seems to me necessary, however, for two reasons. First, *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986), described a similar ordinance as “content neutral,” and I agree with the dissent that the designation is imprecise. Second, in my view, the plurality’s application of *Renton* might constitute a subtle expansion, with which I do not concur.

## I

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

On the other hand, a city may not regulate the secondary effects of speech by suppressing the speech itself. A city may not, for example, impose a content-based fee or tax. See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U. S. 221, 230 (1987) (“[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment’s guarantee of freedom of the press”). This is true even if the government purports to justify the fee by reference to secondary effects. See *Forsyth County v. Nationalist Movement*, 505 U. S. 123, 134–135 (1992). Though the inference may be inexorable that a city could reduce secondary effects by

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reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

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

The calculus is a familiar one to city planners, for many enterprises other than adult businesses also cause undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods. With careful urban planning a city in this way may reduce the costs of pollution for communities, while at the same time allowing the productive work of the factories to continue. The challenge is to protect the activity inside while controlling side effects outside.

Such an ordinance might, like a speech restriction, be “content based.” It might, for example, single out slaughterhouses for specific zoning treatment, restricting them to a particularly remote part of town. Without knowing more, however, one would hardly presume that because the ordinance is specific to that business, the city seeks to discriminate against it or help a favored group. One would presume, rather, that the ordinance targets not the business but its particular noxious side effects. But cf. *Slaughter-House Cases*, 16 Wall. 36 (1873). The business might well be the city’s most valued enterprise; nevertheless, because of the pollution it causes, it may warrant special zoning treatment. This sort of singling out is not

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impermissible content discrimination; it is sensible urban planning. Cf. *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388 (1926) (“A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control”).

True, the First Amendment protects speech and not slaughterhouses. But in both contexts, the inference of impermissible discrimination is not strong. An equally strong inference is that the ordinance is targeted not at the activity, but at its side effects. If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content discrimination. A zoning law need not be blind to the secondary effects of adult speech, so long as the purpose of the law is not to suppress it.

The ordinance at issue in this case is not limited to expressive activities. It also extends, for example, to massage parlors, which the city has found to cause similar secondary effects. See Los Angeles Municipal Code §§12.70(B)(8) (1978), 12.70(B)(17) (1983), 1270(C) (1986), as amended. This ordinance, moreover, is just one part of an elaborate web of land-use regulations in Los Angeles, all of which are intended to promote the social value of the land as a whole without suppressing some activities or favoring others. See §12.02 (“The purpose of this article is to consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan . . . in order to encourage the most appropriate use of land . . . and to promote the health, safety, and the general welfare . . .”). All this further suggests that the ordinance is more in the nature of a typical land-use restriction and less in the nature of a law suppressing speech.

For these reasons, the ordinance is not so suspect that we must employ the usual rigorous analysis that content-

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based laws demand in other instances. The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny, as we held in *Renton*.

## II

In *Renton*, the Court began by noting that a zoning ordinance is a time, place, or manner restriction. The Court then proceeded to consider the question whether the ordinance was “content based.” The ordinance “by its terms [was] designed to prevent crime, protect the city’s retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views.” 475 U. S., at 48 (internal quotation marks omitted). On this premise, the Court designated the restriction “content neutral.” *Ibid.*

The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. And the ordinance in *Renton* “treat[ed] theaters that specialize in adult films differently from other kinds of theaters.” *Id.*, at 47. The fiction that this sort of ordinance is content neutral—or “content neutral”—is perhaps more confusing than helpful, as JUSTICE SOUTER demonstrates, see *post*, at 4 (dissenting opinion). It is also not a fiction that has commanded our consistent adherence. See *Thomas v. Chicago Park Dist.*, 534 U. S. 316, 322, and n. 2 (2002) (suggesting that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral). These ordinances are content based and we

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should call them so.

Nevertheless, for the reasons discussed above, the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny. Generally, the government has no power to restrict speech based on content, but there are exceptions to the rule. See *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 126–127 (1991) (KENNEDY, J., concurring in judgment). And zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. For this reason, we apply intermediate rather than strict scrutiny.

### III

The narrow question presented in this case is whether the ordinance at issue is invalid “because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions.” Pet. for Cert. i. This question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must be given to the first.

At the outset, we must identify the claim a city must

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make in order to justify a content-based zoning ordinance. As discussed above, a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with JUSTICE SOUTER. See *post*, at 5. The rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech.

The plurality's statement of the proposition to be supported is somewhat different. It suggests that Los Angeles could reason as follows: (1) "a concentration of operations in one locale draws . . . a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity"; (2) "having a number of adult operations in one single adult establishment draws the same dense foot traffic as having a number of distinct adult establishments in close proximity"; (3) "reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce crime rates." *Ante*, at 8–9.

These propositions all seem reasonable, and the inferences required to get from one to the next are sensible. Nevertheless, this syllogism fails to capture an important part of the inquiry. The plurality's analysis does not address how speech will fare under the city's ordinance. As discussed, the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech. For this reason, it does not suffice to say that inconvenience will reduce demand and fewer patrons will lead to fewer secondary

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effects. This reasoning would as easily justify a content-based tax: Increased prices will reduce demand, and fewer customers will mean fewer secondary effects. But a content-based tax may not be justified in this manner. See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U. S. 221 (1987); *Forsyth County v. Nationalist Movement*, 505 U. S. 123 (1992). It is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech.

The analysis requires a few more steps. If two adult businesses are under the same roof, an ordinance requiring them to separate will have one of two results: One business will either move elsewhere or close. The city's premise cannot be the latter. It is true that cutting adult speech in half would probably reduce secondary effects proportionately. But again, a promised proportional reduction does not suffice. Content-based taxes could achieve that, yet these are impermissible.

The premise, therefore, must be that businesses—even those that have always been under one roof—will for the most part disperse rather than shut down. True, this premise has its own conundrum. As JUSTICE SOUTER writes, “[t]he city . . . claims no interest in the proliferation of adult businesses.” *Post*, at 9. The claim, therefore, must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute.

Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g.*, *Renton*, 475 U. S., at 51–52 (“The First Amendment does not require a city, before

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enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses”); *Young*, 427 U. S., at 71 (“[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems”); *Erie v. Pap’s A. M.*, 529 U. S. 277, 300–301 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton*, *supra*, at 51–52. The Los Angeles City Council knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 665–666 (1994); *Erie*, *supra*, at 297–298 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion.

In this case the proposition to be shown is supported by a single study and common experience. The city’s study shows a correlation between the concentration of adult establishments and crime. Two or more adult businesses in close proximity seem to attract a critical mass of unsavory characters and the crime rate may increase as a result. The city, therefore, sought to disperse these businesses. Los Angeles Municipal Code §12.70(C) (1983), as amended. This original ordinance is not challenged here, and we may assume that it is constitutional.

If we assume that the study supports the original ordinance, then most of the necessary analysis follows. We may posit that two adult stores next door to each other attract 100 patrons per day. The two businesses split apart might attract 49 patrons each. (Two patrons, perhaps, will be discouraged by the inconvenience of the separation—a relatively small cost to speech.) On the other hand, the reduction in secondary effects might be dramatic, because secondary effects may require a critical

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mass. Depending on the economics of vice, 100 potential customers/victims might attract a coterie of thieves, prostitutes, and other ne'er-do-wells; yet 49 might attract none at all. If so, a dispersal ordinance would cause a great reduction in secondary effects at very small cost to speech. Indeed, the very absence of secondary effects might increase the audience for the speech; perhaps for every two people who are discouraged by the inconvenience of two-stop shopping, another two are encouraged by hospitable surroundings. In that case, secondary effects might be eliminated at no cost to speech whatsoever, and both the city and the speaker will have their interests well served.

Only one small step remains to justify the ordinance at issue in this case. The city may next infer—from its study and from its own experience—that two adult businesses under the same roof are no better than two next door. The city could reach the reasonable conclusion that knocking down the wall between two adult businesses does not ameliorate any undesirable secondary effects of their proximity to one another. If the city's first ordinance was justified, therefore, then the second is too. Dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little.

#### IV

These propositions are well established in common experience and in zoning policies that we have already examined, and for these reasons this ordinance is not invalid on its face. If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny. The ordinance does, however, survive the summary judgment motion that the Court of Appeals ordered granted in this case.