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NOTES

CITY OF NATIONAL CITY V. WIENER: THE FURTHER EROSION OF FIRST AMENDMENT PROTECTIONS FOR ADULT BUSINESSES

I. INTRODUCTION

The constitutional right of freedom of speech¹ protects the expression of non-obscene, adult erotic entertainment and businesses.² This constitutional protection has enabled adult entertainment to become one of the nation's growth industries.³ In the 1950s and '60s, adult businesses began establishing themselves in large numbers in commercial and business districts left vacant by migration to the suburbs.⁴ In recent years, these businesses have begun to encroach upon middle-class, residential neighborhoods.⁵ In response, municipalities have turned to their zoning power in an effort to restrict the establishment of adult businesses.⁶ Since the early part of the twentieth century, the Supreme Court has acknowledged that zoning constitutes a legitimate function of a state's police power.⁷ Municipalities provided as rationale, in part, that adult businesses increased

1. The First Amendment to the Constitution states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment is made applicable to state governments through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. See *Miller v. California*, 413 U.S. 15, 24-25 (1973).

3. Norman Marcus, *Zoning Obscenity: Or, The Moral Politics of Porn*, 27 BUFF. L. REV. 1, 4, 8 (1978). In 1965, for example, there were nine adult businesses in New York City. By 1976, the number had jumped to 245. *Id.* at 8. While there are no current, overall statistics, midtown Manhattan alone has experienced an increase in adult video stores from 5 to 25 in the past three years. Marvine Howe, *West Side Group Pressures City to Put Zoning Limits on X-Rated Shops*, N.Y. TIMES, Jan. 17, 1993, at 31.

4. Virginia M. Giokaris, *Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments*, 55 UMKC L. REV. 263, 267 (1987).

5. Rose Kim & Elaine Rivera, *Neighborhood Porn Wars; Residents Turn Up Heat On Local Smut Merchants*, NEWSDAY, Apr. 18, 1993, at 6.

6. Giokaris, *supra* note 4, at 270.

7. See *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 388-89 (1926).

crime, disrupted residential areas, and lowered property values in the community.⁸

Thus, conflicts often arise between a community's right to provide for the social welfare of its citizens and the First Amendment right of the owners of adult businesses. In the last two decades, however, the law has witnessed a steady erosion of constitutional protections as applied to adult businesses, allowing some municipalities to take legitimate exercises of police power and manipulate them so as to destroy the commercial viability of adult businesses.⁹

City of National City v. Wiener,¹⁰ a case recently decided by the California Supreme Court, illustrates the extent of this erosion. Basing its decision on two U.S. Supreme Court cases—*Young v. American Mini Theatres, Inc.*¹¹ and *Renton v. Playtime Theatres, Inc.*¹²—the California court upheld a restrictive ordinance that essentially precludes any adult business from opening up within National City.

This Note analyzes the reasoning of the California Supreme Court, arguing that the court inappropriately applies the precedent set by the U.S. Supreme Court by failing to adequately respond to certain distinctions between National City's ordinance and those at issue in *Young* and *Renton*.¹³ This Note also argues that the court improperly finds that National City's ordinance provides reasonable alternate avenues of communication,¹⁴ and that the court incorrectly interprets the economic analysis set forth by the Supreme Court in *Renton*.¹⁵ Finally, this Note suggests that the Ninth Circuit's approach to the precedent set by *Renton* offers a much more fair and workable test as to whether a city provides reasonable alternate avenues of communication.¹⁶

8. Charles H. Clarke, *Freedom of Speech and the Problem of the Lawful Harmful Public Reaction: Adult Use Cases of Renton and Mini Theatres*, 20 AKRON L. REV. 187, 192-93 (1986).

9. Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231, 1236 (1993).

10. 838 P.2d 223 (Cal. 1992).

11. 427 U.S. 50 (1976).

12. 475 U.S. 41 (1986).

13. See *infra* notes 101-18 and accompanying text.

14. See *infra* notes 119-47 and accompanying text.

15. See *infra* notes 159-72 and accompanying text.

16. See *infra* notes 175-98 and accompanying text.

II. BACKGROUND

A. *The Court's Traditional Approach to Claims of First Amendment Violations*

The Court has traditionally taken a two-track approach toward regulations that restrict expression protected under the First Amendment.¹⁷ Under the first track, regulations designed to limit communications which convey dangerous messages or produce harmful effects are considered content-based restrictions.¹⁸ Examples include laws that prohibit seditious libel or forbid the hiring of teachers advocating the violent overthrow of the government.¹⁹

In this instance, the Court first determines whether the speech occupies a subordinate position on the scale of First Amendment values.²⁰ Although obscene material is considered subordinate speech, the Court has determined that only the most explicit, hard-core materials can be labeled obscene.²¹ If the Court finds the speech to be subordinate, the Court adopts a very deferential view of a statute's constitutionality.²² But if the speech is not deemed subordinate, the Court accords it virtually absolute protection.²³

Under the second track, regulations which limit expression without consideration of its content or its communicative impact are considered content-neutral restrictions.²⁴ Some examples are laws that restrict noisy speeches near hospitals or ban all billboards in residential neighborhoods.²⁵ Although the Court has applied varying standards of review, once the Court determines that a statute is content-neutral, its review is often highly deferential.²⁶ The regulation will be upheld if it rationally furthers a stated government interest.²⁷

17. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 (2d ed. 1988).

18. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987).

19. *Id.*

20. *Id.*

21. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1973). Areas where the courts have had little trouble identifying material as obscene include bestiality, flagellation, sadomasochism and extreme violence. Servodidio, *supra* note 9, at 1234-35.

22. Stone, *supra* note 18, at 47.

23. *Id.* at 48. The Court has invalidated almost every content-based restriction in the past 30 years. *Id.*

24. *Id.*

25. *Id.*

26. Stone, *supra* note 18, at 50.

27. *Id.*

Two cases are especially important in demonstrating the Court's second track approach to content-neutral restrictions. In *United States v. O'Brien*,²⁸ the Court sustained the defendant's conviction for burning his draft card.²⁹ The Court rejected the defendant's First Amendment challenge, holding that Congress' purpose in prohibiting draft card burning was designed not to suppress free speech, but merely to promote an efficient administration of the draft.³⁰ The incidental restriction on expression was justified by the government's important interest in draft administration.³¹

In *Clark v. Community for Creative Non-Violence*,³² the Court upheld a prohibition of overnight camping in a national park against campers demonstrating on behalf of the plight of the homeless. The Court did not apply the *O'Brien* test but instead held the law to be a reasonable "time, place, and manner" restriction.³³ The Court held that the government had a substantial interest in maintaining its parks and, except for preventing overnight camping, the restriction left the right to demonstrate intact.³⁴

B. Alteration of the Law by Young and Renton

1. *Young v. American Mini Theaters, Inc.*

The first serious change in analyzing ordinances restricting First Amendment protections as applied to adult businesses occurred in *Young v. American Mini Theaters, Inc.*³⁵ The city of Detroit had enacted several

28. 391 U.S. 367 (1968).

29. *Id.* at 385.

30. *Id.* at 381-82. The Court in *O'Brien* employed a four-part test. A regulation is sufficiently justified:

[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

31. *Id.* at 378-80.

32. 468 U.S. 288 (1984).

33. *Id.* at 293. Restrictions are valid under this test so long as they are "[1] justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of the information." *Id.*

34. *Id.* at 295-96.

35. 427 U.S. 50 (1976).

"Anti-Skid Row" ordinances prohibiting "X-rated" theaters within 500 feet of residential areas and 1000 feet of each other.³⁶ The ordinances effectively spread such establishments throughout the city because studies showed that "some uses of property are especially injurious to a neighborhood when they are concentrated in limited areas."³⁷

The plurality opinion written by Justice Stevens³⁸ conceded that the ordinances were content-based³⁹ but stated that "society's interest in protecting this type of expression [erotic materials] is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate."⁴⁰ Thus, Justice Stevens seemed to add *non-obscene* but sexually explicit materials to the list of subjects in a subordinate position in the scale of First Amendment values.

However, even though *Young* certainly struck a blow to First Amendment protections for adult businesses, it was not the "'green light' sought by local political interests anxious to bring these uses under control."⁴¹ Justice Stevens still accepted that, since the ordinances were content-based, the appropriate standard for review is a test of close scrutiny,⁴² even though he relaxed that standard a bit. Also, he correctly observed, "[v]iewed as an entity, the market for this commodity is essentially unrestrained."⁴³

2. *City of Renton v. Playtime Theaters, Inc.*

In 1986, in *Renton v. Playtime Theaters, Inc.*,⁴⁴ the Supreme Court went far beyond the holding in *Young*. The ordinance in Renton, Washington was similar to Detroit's regulations, but whereas the *Young* Court conceded that the ordinances were content-based, the Court in *Renton*

36. *Id.* at 54.

37. *Id.*

38. Justice Stevens' opinion was joined by Chief Justice Burger and Justices White and Rehnquist. Justice Powell filed a separate concurring opinion. *Id.* at 51.

39. Justice Stevens stated "that the ordinances treat adult theaters differently from other theaters and . . . the classification is predicated on the content of material shown in the respective theaters." *Id.* at 63.

40. *Young*, 427 U.S. at 70. Justice Stevens continued to state that "every schoolchild can understand why our duty to defend the right to speak remains the same. But 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." *Id.*

41. Marcus, *supra* note 3, at 8.

42. *Young*, 427 U.S. at 56 n.12.

43. *Id.* at 62.

44. 475 U.S. 41 (1986).

expressly adopted a content-neutral time, place, and manner analysis.⁴⁵ The Court deemed the ordinance to be content-neutral because it was “not aimed at the *content* of the films shown at ‘adult motion picture theaters,’ but rather at the *secondary effects* of such theaters on the surrounding community.”⁴⁶

Furthermore, the Court held that Renton was not obligated to conduct its own studies in order to justify enacting the ordinance for the purpose of “promot[ing] the City of Renton’s great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning.”⁴⁷ Renton was entitled to rely on the experiences of other metropolitan cities, even though Renton was a much smaller municipality.⁴⁸ The City Council of Renton decided, relying on the experiences of Seattle, Detroit and other cities, that the presence of adult theaters would result in crime and urban blight within the surrounding neighborhoods.⁴⁹

Finally, the Court in *Renton* greatly relaxed the required showing by a municipality of reasonable alternative avenues of communication under the time, place, and manner test.⁵⁰ In *Renton*, the land area where adult businesses were permitted consisted of approximately five percent of the city’s total land area. However, existing businesses occupied some of the land in question, and much of the undeveloped land was not for sale or lease at that time.⁵¹ Respondents contended that there were no “commercially viable” sites in which to open and operate an adult business.⁵² The Court dismissed the contention, stating the fact that “respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.”⁵³ Although a city must refrain from suppressing lawful speech, it is not compelled “to ensure that adult theaters, or any other kinds of

45. *Id.* at 47.

46. *Id.*

47. *Id.* at 58-59 (Brennan, J., dissenting).

48. *Id.* at 51. Renton was a city of approximately 32,000 people, and at the time the ordinance was enacted, there was no evidence that any adult movie theaters were located in the city. *Id.* at 56 (Brennan, J., dissenting).

49. *Renton*, 475 U.S. at 50. The city’s purpose in enacting the ordinance was added only *after* the lawsuit began. Prior to the amendment, there was no mention of the ordinance being designed to address any secondary effects an adult theatre might create. *Id.* at 58-59 (Brennan, J., dissenting).

50. *Id.* at 53-54.

51. *Id.* at 53.

52. *Id.*

53. *Renton*, 475 U.S. at 54.

speech-related businesses for that matter, will be able to obtain sites at bargain prices."⁵⁴

III. STATEMENT OF THE CASE

A. *The Facts of City of National City v. Wiener*

National City is located approximately five miles from downtown San Diego.⁵⁵ Only 3196 acres, or 58% of the city's land, are available for any purpose. The city contains a large naval installation that occupies 787 acres of the city's available land.⁵⁶ Only 572 acres, or 17.9% of its total net acres, are zoned for commercial use.⁵⁷

In December 1986, Steven D. Wiener opened Chuck's Bookstore, an adult bookstore and arcade.⁵⁸ Wiener had previously operated another bookstore within the city, but it was closed by the city during redevelopment.⁵⁹ During the three years in which Chuck's Bookstore operated at the second location, there was continual tension between Wiener and the residents of the surrounding community.⁶⁰ The city had filed various suits—both civil and criminal—to force the store's closure, but Chuck's Bookstore continued to operate.⁶¹

When Wiener opened Chuck's Bookstore in 1986, there was a city ordinance in effect which prohibited an adult business from operating within 1500 feet of another adult business, 1500 feet of a school or public park, or 1000 feet of any residentially zoned property.⁶² The city enacted

54. *Id.*

55. *City of National City v. Wiener*, 838 P.2d 223, 225 (Cal. 1992).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 225 n.1.

60. Pam Lopez-Johnson, *National City's Brick Row; Neighbors Wage Limited War on Adult Bookstore*, L.A. TIMES, Dec. 16, 1988, at B9 (San Diego County Ed.). Wiener reported that "[t]here have been tires cut behind the store and the trash has been set on fire. Someone came here one night and burned up a car, but I've never seen the police help." *Id.*

61. *Id.* In 1989, Wiener was convicted in a criminal court for "having doors on stalls that show pornographic movies." He was sentenced to 30 days in jail and fined \$1000. After the verdict, Wiener removed the doors on the stalls and continued to operate. *Id.*

62. *National City*, 838 P.2d at 225 n.3. Relevant portions of the ordinance provide:

A. No person or entity shall own, establish, operate, control or enlarge, or cause or permit the establishment, operation, enlargement or transfer of ownership or control, except pursuant to Section 18.69.060, of any of the following adult entertainment establishments if such adult entertainment establishment is within one thousand five hundred feet of another adult entertainment establishment or within one thousand five hundred feet of any school or public park

the ordinance as part of its comprehensive scheme of urban redevelopment.⁶³ Before enacting the ordinance, the city had performed a study and conducted public hearings before the city's Planning Commission.⁶⁴ The study showed that National City had the second highest crime rate in San Diego County, and that "urban decay [was] rife throughout the city."⁶⁵

The city also employed "strip zoning," which consists of commercial zoning on either side of heavily trafficked streets.⁶⁶ Thus, commercial zones were generally in close proximity to residential areas. As a result, only 4.5 of the 572 commercially zoned acres were located more than 1000 feet from a residential area.⁶⁷ These 4.5 acres were located in the southern part of the city, which was then occupied in part by a 9000-square-foot building and a motorcycle shop.⁶⁸

The city's ordinance also contained a provision enabling an adult business to operate despite the 1000-foot distance requirement if located in a retail shopping center.⁶⁹ To qualify under this exception, the adult business had to be isolated from direct view of public streets and residentially zoned property.⁷⁰ Portions of three existing malls satisfied the ordinance's requirements under this exception.⁷¹

B. Procedural History

Shortly after the opening of Chuck's Bookstore, National City brought an action in superior court seeking a preliminary and permanent

within the city or within one thousand feet of any residentially zoned property in the city, measured along street frontages:

1. Adult bookstore; . . .
3. Adult mini-motion picture arcade (peep shows); . . .

Id.

63. *National City*, 838 P.2d at 226.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *National City*, 838 P.2d at 226.

69. *Id.* The shopping mall exception in the ordinance reads as follows:

C. Nothing in this chapter prohibits the location of adult entertainment establishments within retail shopping centers in all commercial zones wherein such activities will have their only frontage upon enclosed malls or malls isolated from direct view from public streets, parks, schools, churches or residentially zoned property.

Id. at 225-26 n.3.

70. *National City*, 838 P.2d at 226.

71. *Id.*

injunction against the continued operation of Chuck's Bookstore.⁷² The city claimed that the bookstore constituted a common law nuisance,⁷³ and that the bookstore was in violation of National City's recently enacted ordinance.⁷⁴ Wiener conceded that Chuck's Bookstore was in violation of the city ordinance's 1000-foot residential separation but claimed that the ordinance was unconstitutional.⁷⁵

After a three-day trial, the superior court granted the city's request for a permanent injunction against Chuck's Bookstore's operating at its current location.⁷⁶ The court found that the ordinance was a reasonable "time, place, and manner" regulation designed to serve a substantial government interest.⁷⁷ The court further found that the ordinance provided reasonable alternative avenues of communication.⁷⁸

The California Court of Appeal reversed the trial court's decision, concluding that the ordinance failed to provide reasonable alternate avenues of communication and thus constituted "an impermissible restriction on protected speech."⁷⁹ The court found that the distance requirements afforded too few alternative sites at which to locate an adult business.⁸⁰ It also found that the opportunity of locating within an enclosed mall was "illusive" because of "the apparent aversion shopping mall landlords have toward the presence of adult entertainment shops on the premises," and that the construction of a new shopping center "would not be economically feasible for the typical adult business entrepreneur."⁸¹

On October 29, 1992, the Supreme Court of California, in a 5-2 decision, reversed the judgment of the court of appeal, remanding the matter with instructions to reinstate the trial court's judgment.⁸²

72. *Id.* at 225.

73. Although National City's action was for both statutory violations and common law public nuisance, the superior court based its decision solely on the statutory violation. On appeal, the appellate court also addressed only the statutory violation. *Id.* at 225 n.2.

74. *Id.* at 225.

75. *National City*, 838 P.2d at 225-26.

76. *Id.* at 227.

77. *Id.*

78. *Id.*

79. *Id.*

80. *National City*, 838 P.2d at 227.

81. *Id.*

82. *Id.* at 234.

IV. THE CALIFORNIA SUPREME COURT'S OPINION

The California Supreme Court, defining the issue on appeal as “whether a zoning ordinance that combines both distance regulations and an exception for location of adult businesses in certain shopping malls conforms with First Amendment principles under the standard set forth in *City of Renton v. Playtime Theatres, Inc.*,” upheld National City’s ordinance as constitutional.⁸³ The court stated that it was guided in its analysis by both *Young* and *Renton*.⁸⁴ While acknowledging that the appellate court cited both U.S. Supreme Court cases, it concluded that the appellate court had “failed to apply their express language or heed their underlying rationale.”⁸⁵

Since the National City ordinance, like the one in *Renton*, did not ban adult businesses entirely, but merely placed limitations on where an adult business could be located, the court held the ordinance was properly analyzed as a form of time, place, and manner regulation.⁸⁶ The court further determined that the ordinance was content-neutral because it was aimed at the “secondary effects of adult businesses” on the surrounding community, rather than the content of the materials sold.⁸⁷ The court dismissed the respondent’s contention that the predominant purpose behind the ordinance was to prohibit the establishment of any adult business, relying on the testimony of the city’s Planning Director that the city was unaware of any reluctance on the part of landowners to rent to adult businesses.⁸⁸ The court also described the expert testimony of the respondent as “generalized, speculative evidence.”⁸⁹

Finding the ordinance to be content-neutral, the court proceeded to analyze its constitutionality under the two-part *Renton* test.⁹⁰ The court found that the ordinance served a substantial governmental interest based on the city’s evidence presented at trial “that adult businesses are a source of urban decay.”⁹¹ The distance regulation and shopping center exception were also held to serve substantial governmental interests “in decreasing blight and crime, [and] shifting part of the regulatory burden to the private

83. *Id.* at 225.

84. *Id.* at 228.

85. *National City*, 838 P.2d at 228.

86. *Id.* at 231.

87. *Id.*

88. *Id.*

89. *Id.* at 231 n.8.

90. *National City*, 838 P.2d at 232.

91. *Id.*

sector.”⁹² Although the written stated purpose of the ordinance⁹³ was inconsistent with the shopping center exception, which would allow a concentration of adult businesses, the court failed to address this problem because respondents did not specifically raise this contention, especially at the trial level.⁹⁴

The court also concluded that the ordinance provided reasonable alternate avenues of communication because, with the inclusion of the shopping center exception, it “makes available the entire commercially zoned area of the city . . . on which to locate an adult business.”⁹⁵ The court noted that there were vacancies at all three shopping centers, and that the evidence of landowners’ unwillingness to rent “consisted essentially of generalized responses by leasing agents to respondents’ expert’s telephone inquiry.”⁹⁶ It then entirely dismissed the issue by stating that even conclusive evidence of landowners’ unwillingness to rent would not be “dispositive of the issue of whether the ordinance provides a reasonable opportunity for such businesses to locate within National City.”⁹⁷

In taking this stance, the court relied on *Renton’s* rejection of an economic viability standard for determining whether an ordinance provides reasonable alternate avenues of communication.⁹⁸ The court viewed respondent’s contentions—that landowners were unwilling to rent to adult businesses and that the cost of constructing a mall was prohibitive for a small business owner—as mere economic considerations that have no place in First Amendment analysis.⁹⁹ The court stated that “[w]hile a city may not suppress protected speech, neither is it compelled to act as a broker or leasing agent for those engaged in the sale of it.”¹⁰⁰

92. *Id.*

93. “[T]he written stated purpose of the ordinance is to ‘prevent problems of blight and deterioration which accompany and are brought about by the concentration of adult entertainment establishments.’” *Id.* at 231 n.7 (emphasis added).

94. *National City*, 838 P.2d at 231 n.7.

95. *Id.* at 233.

96. *Id.*

97. *Id.*

98. *Id.* at 229. See *Renton*, 475 U.S. at 54; *Young*, 427 U.S. at 78 (Powell, J., concurring).

99. *National City*, 838 P.2d at 233-34.

100. *Id.* at 233. The court further stated that “[t]he Constitution does not saddle municipalities with the task of ensuring either the popularity or economic success of adult businesses.” *Id.* at 234.

V. ANALYSIS OF THE COURT'S OPINION

A. *National City's Reason For Enacting The Ordinance*

At first glance, under *Renton's* lax standards,¹⁰¹ it seems that National City provides sufficient evidence that its purpose in enacting the ordinance was to battle an important governmental interest—the negative effects caused by adult establishments.¹⁰² This stated reason closely mirrors those contained in ordinances in both *Young* and *Renton*. However, there are some inconsistencies both in National City's ostensible purpose and the court's support of the city's stated purpose.

1. Content-Neutrality

The first question to be answered under the *Renton* test is whether the ordinance is a content-neutral time, place, and manner regulation.¹⁰³ The stated purpose of the ordinance is to "prevent problems of blight and deterioration which accompany and are brought about by the *concentration* of adult entertainment establishments."¹⁰⁴ However, as the majority concedes, the shopping mall exception would allow just such a concentration that the ordinance seeks to avoid.¹⁰⁵ There is no limit placed on the number of adult entertainment establishments that may open up in any one shopping mall. The ordinance is judged content-neutral because it focuses on the secondary effects of adult establishments,¹⁰⁶ but there is a serious question as to whether the ordinance actually addresses such effects. In response, the court claims respondent never mentioned that the written statement of the ordinance failed to conform with the shopping mall exception, and thus concludes, without more said, that the stated purpose supports a substantial government purpose.¹⁰⁷

The court relies heavily on the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."¹⁰⁸ While this may be true, the inconsistency between the ordinance's stated purpose and its

101. See *supra* notes 44-49 and accompanying text.

102. See *supra* notes 86-94 and accompanying text.

103. *Renton*, 475 U.S. at 47.

104. *National City*, 838 P.2d at 231 n.7 (emphasis added).

105. *Id.*

106. *Id.* at 231.

107. *Id.* at 231 n.7.

108. *Id.* at 231 (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).

provision allowing a concentration of adult establishments within certain shopping malls adds weight to the respondent's claim that the predominant censorial purpose behind enacting the ordinance was prohibiting the establishment of such businesses.¹⁰⁹ This inconsistency also raises questions as to whether National City has a substantial governmental interest in passing this particular ordinance, as will be discussed below.¹¹⁰ Therefore, the court should at least seriously address this issue. In part, the court appears satisfied with such a cursory analysis of content-neutrality because it believes there to be sufficient alternate avenues of communication, although there is a strong question as to whether such alternatives actually exist.¹¹¹

2. Substantial Governmental Interest

Once the court finds that the ordinance is a time, place, and manner regulation, it must determine whether the ordinance is designed to serve a substantial governmental interest.¹¹² The court finds this prong of the test "easily satisfied" because the distance regulation and shopping center exception are said to help decrease blight.¹¹³ However, the discrepancy between the stated purpose to prevent concentration and the shopping center exception allowing such concentration once again becomes an issue.

The court defends the trial court's finding of a substantial governmental interest by stressing two main justifications raised by National City, neither of which succeeds in clearing up the discrepancy. First, by allowing adult businesses to operate in a permissible mall, the court states that they will be isolated from the public, "placing them in a location where they do not affect the moral climate of the community as a whole."¹¹⁴ However, as Justice Mosk states in his dissent, this clearly is not the reason for including the shopping mall exception. He points out that a "family-oriented shopping mall, with small children wandering about and adolescents congregating after school," would be the last place in which the city would wish an adult bookstore to be established.¹¹⁵ If anything, the shopping center exception would seem counter-productive to the city's

109. *National City*, 838 P.2d at 231.

110. See *infra* notes 112-18 and accompanying text.

111. See *infra* notes 119-47 and accompanying text.

112. *Renton*, 475 U.S. at 47.

113. *National City*, 838 P.2d at 232.

114. *Id.*

115. *Id.* at 241 (Mosk, J., concurring and dissenting).

stated purpose of reducing the secondary effects caused by adult establishments.

Second, the court states that placing adult businesses in shopping centers promotes the city's interest by shifting the regulatory burden to the owners of the shopping centers.¹¹⁶ A shopping center, the court notes, generally "exercises a high degree of control over its tenants" and "addresses such factors as hours of operation, parking, and security."¹¹⁷ However, these stated reasons contradict other statements of the court. In its analysis of alternate sites, the court relies on the fact that the ordinance does not limit the number of adult bookstores "*nor the hours they may operate.*"¹¹⁸ At one point, the court describes the ordinance as very unrestrictive. Later, when necessary, the court defends a finding of a substantial interest because the very same ordinance allows adult bookstores to be heavily regulated, including, in particular, their hours of operation. The court wants it both ways, thus leaving the true purpose behind the enactment of the ordinance in doubt.

B. Reasonable Alternate Avenues of Communication

The final prong of the *Renton* test requires that the city leave available to adult establishments reasonable alternative avenues of communication.¹¹⁹ This section of the analysis certainly reveals the greatest weaknesses in the court's reasoning. There are critical distinctions between the facts in *National City* and those in *Renton*. The court does not effectively handle these distinctions, and thus fails to successfully counter any of the three contentions raised by the respondent.

1. Lack of Sites Currently for Rent

It is important to initially draw some distinctions between the facts of *National City* and those of *Renton*. The Supreme Court in *Renton* upheld the ordinance in question, but the ordinance contained only a dispersal stipulation. It still left "some 520 acres, or more than five percent of the entire land area" open, consisting of "[a]mple, accessible real estate, including acreage in all stages of development."¹²⁰ *Renton* thus did not

116. *Id.* at 232.

117. *Id.*

118. *National City*, 838 P.2d at 226 (emphasis added).

119. *Renton*, 475 U.S. at 47.

120. *Id.* at 53.

limit adult establishments to particular physical facilities. Within those 520 acres, "an adult bookstore owner was free to build or buy a small mom-and-pop store, for example."¹²¹

Renton prevents a city "from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city."¹²² The city of *Renton* did not use its zoning power as a pretext for suppressing constitutionally protected expression.¹²³ However, as the majority in *National City* acknowledges, the particular way in which the city created its commercial zoning leaves only 4.5 of the 572 commercially zoned acres outside the distance requirements.¹²⁴ The city's planning director testified that the distance requirements, viewed by themselves, imposed a de facto ban.¹²⁵

There is a good indication that without the shopping center exception, the ordinance would be deemed unconstitutional. Absent this exception, it is almost certain that an adult bookstore could not open anywhere within the city. In *Walnut Properties, Inc. v. City of Whittier*,¹²⁶ the Ninth Circuit stressed that "merely mimicking the ordinance upheld in [*Young*] is not enough."¹²⁷ The Ninth Circuit stressed that the ordinance in *Young* allowed "myriad locations" in which an adult business could operate, and the "burden on First amendment rights is slight."¹²⁸ But the court went on to say that there is little doubt that the majority in *Young* would not uphold an ordinance putting all theatres out of business, and that there is no indication in the *Renton* opinion that the Court would uphold such an ordinance either.¹²⁹

Thus, the shopping center "exception," which the majority in *National City* views as allowing "a greater number of *alternative* sites for adult businesses,"¹³⁰ is in reality the *only* possibility. From the outset of its analysis, the court fails to accept the fact that the provision allowing adult establishments to locate in certain malls is, in fact, at the core of the regulation. This failure is especially pertinent, for it enables the court to

121. *National City*, 838 P.2d at 240 (Mosk, J., concurring and dissenting).

122. *Renton*, 475 U.S. at 54.

123. *Id.*

124. *National City*, 838 P.2d at 226. See *supra* notes 66-68 and accompanying text.

125. *Id.* at 238 (Mosk, J., concurring and dissenting).

126. 861 F.2d 1102 (9th Cir. 1988).

127. *Id.* at 1109 (quoting *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1213 (5th Cir. 1982)).

128. *Id.*

129. *Id.* at 1110.

130. *National City*, 838 P.2d at 226 (emphasis added).

avoid the higher level of scrutiny which would be required if the shopping center "exception" was viewed as the only real possibility of opening an adult establishment within the city.¹³¹

2. Unwillingness of Owners of Available Sites to Rent to Adult Establishments

Absent a realistic opportunity of opening an adult establishment outside the distance restrictions, anyone wishing to open such an adult establishment is left with two choices: locating rental property within an existing mall satisfying the shopping center exception, or financing the construction of a new mall. However, as will be seen, neither of these two are reasonable options.

The majority concedes that only three existing malls were identified as fulfilling the enclosed mall requirement.¹³² Furthermore, only 5000 to 6000 feet of space at one center and 12,000 feet at another center met the ordinance's requirements.¹³³ Thus, even if the owners of these malls were willing to rent to an adult business, it would leave much less than the entire 572 commercially zoned acres which the court suggests to be available.¹³⁴

However, Wiener presented strong evidence at trial that the owners of these three malls were unwilling to rent to an adult business.¹³⁵ The court refuses to address this serious contention, labeling the evidence of the landowner's unwillingness to rent as nothing more than "generalized responses by leasing agents."¹³⁶ But what stronger evidence does the court require? The expert witness for the respondent contacted each of the three existing malls and was told in no uncertain terms that they would not rent to an adult bookstore.¹³⁷ The lease at the second mall he visited even contained a provision forbidding the mall from leasing to such a business.¹³⁸ If the expert witness had only contacted a sampling of the available rental sites, his findings could possibly be deemed inconclusive, but that simply was not the case here. Even the trial court seemed to accept the evidence as solid, leading to its rhetorical remark: "Is there any

131. See *infra* notes 132-47 and accompanying text.

132. *National City*, 838 P.2d at 226.

133. *Id.* at 227.

134. *Id.* at 226.

135. *Id.* at 239 (Mosk, J., concurring and dissenting).

136. *Id.* at 233.

137. *National City*, 838 P.2d at 239 (Mosk, J., concurring and dissenting).

138. *Id.*

question in your mind that not in a million years would Plaza Bonita, or T & C, or South Bay Plaza rent to Mr. Wiener . . . ?”¹³⁹

Perhaps realizing the true strength of the evidence, the court reverts to an even more absurd stance, arguing that “any reluctance or outright refusal of private land owners to rent to adult businesses [is not] dispositive of the issue of whether the ordinance provides a reasonable opportunity for such businesses to locate within National City.”¹⁴⁰ This statement makes absolutely no sense. A total denial bans *any opportunity*, much less a reasonable one. The court might have been correct if obtaining a location in a mall were a true alternative, rather than an adult bookstore’s only possibility.¹⁴¹ But once again, the court convinces itself that nonexistent “alternatives” are available.

3. Cost of Building a Shopping Center in Compliance With the City Ordinance

Barring an opportunity to locate on the street or rent in an existing mall, building a mall would be the only possibility one would have to open an adult business within National City. The court once again fails to accept as conclusive expert testimony by the respondent regarding the prohibitive cost of such an undertaking,¹⁴² and once again, it is difficult to understand why. Respondent’s expert witness was a redevelopment consultant with 40 years of experience in shopping mall development.¹⁴³ He testified that it would cost \$6.5 million to build an appropriate mall and would require from two to five years merely to assemble the property and obtain financing.¹⁴⁴

Clearly this is not a reasonable option that would satisfy the *Renton* requirements. The money required is an exorbitant amount for a small business owner, although the majority would claim this is an impermissible economic consideration not allowed under *Renton*.¹⁴⁵ Furthermore, more than half a decade’s wait in order to open an adult establishment seems well beyond a reasonable period. At what length of time would the majority no longer view this as an “alternative”? As the Ninth Circuit

139. *Id.* (citations omitted).

140. *Id.* at 233.

141. *See supra* notes 120-31 and accompanying text.

142. *National City*, 838 P.2d at 227.

143. *Id.* at 239 (Mosk, J., concurring and dissenting).

144. *Id.*

145. *See infra* notes 148-61 and accompanying text.

stated, “[a]ny loss of First Amendment freedoms, even briefly, can constitute irreparable injury.”¹⁴⁶ If so, there can be no doubt that a five-year delay on constitutionally protected expression would be a devastating blow.

Finally, the court’s suggestion—once again—that the building of one’s own mall is but one more option available under the ordinance is plainly incorrect. The majority has, in fact, left an adult bookstore without *any* reasonable options. The Supreme Court in *Renton* stated that the city of Renton did not use the ordinance to suppress free speech, but rather sought “to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community.”¹⁴⁷ One might ask the majority in *National City* exactly what area has the city left available in which to open an adult business?

C. Economic Analysis

One major factor influencing the majority’s opinion, especially in its analysis of reasonable alternative avenues of communication, is the Supreme Court’s assertion in *Renton* that “[t]he inquiry for First Amendment purposes is not concerned with economic impact.”¹⁴⁸ However, the majority in *National City* grossly misapplies the Supreme Court’s reasoning.

The Supreme Court in *Renton*, in making the above assertion, was responding to the Ninth Circuit’s acceptance of the district court’s finding that a substantial part of the 520 acres on which an adult business could be located were occupied by existing businesses.¹⁴⁹ The Ninth Circuit found that limiting adult theater uses to those areas was a substantial restriction on speech.¹⁵⁰ The Supreme Court, however, rejected the conclusion made by the Ninth Circuit that the existence of competing commercial businesses imposed a substantial restriction on speech.¹⁵¹ The Court stated that “respondents must fend for themselves in the real estate market, on an *equal footing* with other prospective purchasers and lessees,” rejecting that government must “ensure that adult theaters, or any other kinds of speech-

146. *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993) (quoting *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984)).

147. *Renton*, 475 U.S. at 54.

148. *Id.* (quoting *Young*, 427 U.S. at 78 (Powell, J., concurring)).

149. *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 534 (9th Cir. 1984).

150. *Id.* at 534.

151. *Renton*, 475 U.S. at 54.

related businesses for that matter, will be able to obtain sites at *bargain prices*.”¹⁵²

The *Renton* Court was asserting that no business is guaranteed a place to do business within a locality, but only that it must have a reasonable opportunity of doing so. However, the Court did not intend to allow a city to ban an adult business from its municipality because the Court also stated that a city must “refrain from *effectively denying respondents a reasonable opportunity* to open and operate an adult theater within the city.”¹⁵³ The ordinance in *Renton* did not limit the location of adult businesses to specific facilities, and the Court felt secure that an adult business had a reasonable opportunity to open a store, as it had access to “[a]mple, accessible real estate,” including ‘acreage in all stages of development.’”¹⁵⁴

That particular set of facts differs substantially from the one presented in *National City*. Respondents contend, not that *bargain locations* are unavailable, but that no locations are available. The result of the ordinance in *National City* is a complete and total ban of all adult business uses within the city.¹⁵⁵

The limitations facing respondent in *National City* are not mere economic concerns. An adult business has no access to rent commercial space within the city. This limitation results not from fair competition with other businesses, but from a complete denial from the only three viable shopping centers in the city.¹⁵⁶ In addition, the cost of building one’s own mall is not a mere economic problem, but a completely exorbitant and unrealistic “alternative” to locating on the street.¹⁵⁷

If an adult bookstore were given a realistic number of acres from which to choose or a fair number of malls from which to possibly rent, but was unable to locate a site at a price enabling it to operate a lucrative business, it would have no complaint. Such a situation would truly be its own economic concern, unrelated to the suppression of First Amendment guarantees, as suggested by the California Supreme Court.¹⁵⁸

However, unlike the situation in *Renton*, respondent only has access to 4.5 acres beyond the ordinance’s distance requirement, none of which is

152. *Id.* (emphasis added).

153. *Id.* (emphasis added).

154. *Id.* at 53 (citations omitted).

155. See *supra* notes 119-47 and accompanying text.

156. See *supra* notes 132-41 and accompanying text.

157. See *supra* notes 142-47 and accompanying text.

158. *National City*, 838 P.2d at 233-34.

really available,¹⁵⁹ and is presented with illusive “alternatives” to locate within an approved shopping mall.¹⁶⁰ Therefore, National City’s ordinance does effectively deny “a reasonable opportunity to open and operate an adult theater within the city,” and provides no opportunity to obtain “[a]mpl[e], accessible real estate.”¹⁶¹ Respondent’s contention, that the ordinance suppresses constitutionally protected speech, is a valid one, and is not an improper attempt to employ an impermissible economic viability standard.

VI. AN ALTERNATIVE APPROACH TO INTERPRETING RENTON’S ECONOMIC ANALYSIS

A misapplication of *Renton*’s economic analysis is largely responsible for the California Supreme Court’s holding in *National City*. Fortunately, there is case law illustrating the possibility of taking another interpretive approach to the precedent set forth in *Renton*. Most notably, two cases decided in the Ninth Circuit—*Walnut Properties, Inc. v. City of Whittier*¹⁶² and *Topanga Press, Inc. v. City of Los Angeles*,¹⁶³ relying, in part, upon the approach adopted in the Fifth Circuit—illustrate a sound application of the *Renton* test. Taken together, these cases offer a straightforward, workable test to determine whether an adult business is truly offered a reasonable opportunity to locate within a municipality employing a restrictive ordinance. This approach also strongly suggests that the outcome of *National City* would have been very different if the case had been litigated in federal court.

A. Ninth Circuit’s Clarification of *Renton*’s Test of Reasonable Alternatives

The Ninth Circuit accepts that, under the *Renton* test, purely commercial viability considerations are not a factor, but points out that the Supreme Court has not stated what sorts of factors may be considered when deciding whether relocation sites provided by a city are reasonable.¹⁶⁴ The Ninth Circuit clarifies *Renton* on two very important issues: (1) how

159. See *supra* notes 120-31 and accompanying text.

160. See *supra* notes 132-41 and accompanying text.

161. *Renton*, 475 U.S. at 54, 53.

162. 861 F.2d 1102 (9th Cir. 1988).

163. 989 F.2d 1524 (9th Cir. 1993).

164. *Topanga*, 989 F.2d at 1529.

to handle the Court's prohibition on considering economic injury in determining whether a zoning restriction is unconstitutionally restrictive, and (2) how to accurately determine the amount of alternative sites that are actually available.

1. Permissible vs. Impermissible Economic Considerations

The Ninth Circuit asserts that the distinction between what is economically unsuitable, and what is physically or practically unsuitable, is difficult to maintain.¹⁶⁵ The court states that it is very easy to couch "[n]early all forms of *physical* and *legal* unsuitability,"¹⁶⁶ which a court may properly consider, "in terms of *economic* unsuitability," which the Court has ruled to be impermissible.¹⁶⁷ This can be seen very clearly in *National City*, where the court rejects respondent's valid claims of unconstitutional limitations by labeling them mere economic considerations.¹⁶⁸

The Ninth Circuit unravels the confusion by asserting that "[t]he Court [in *Renton*] obviously contemplated that there was a 'market' in which businesses could purchase or lease real property on which business could be conducted."¹⁶⁹ In other words, a viable market must exist in which an adult business can truly "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees."¹⁷⁰ Although *Renton* stresses that the First Amendment only requires a relocation site to be "potentially available rather than actually

165. *Id.*

166. *Id.* The Fifth Circuit, upon which the Ninth Circuit partly relies in developing its test, holds that land "with *physical characteristics* that render it unavailable for any kind of development, or *legal characteristics* that exclude adult businesses, may not be considered 'available' for constitutional purposes under *Renton*." *Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir. 1992) (emphasis added).

167. *Topanga*, 989 F.2d at 1529.

168. The Fifth Circuit recently struck down jury instructions, which consisted essentially of quoted portions of the *Renton* decision, because they were considered to be too confusing. *Woodall v. City of El Paso*, 950 F.2d 255 (5th Cir. 1992). The court stated that the "jury could easily take to mean all land made available to appellants is to be considered reasonable." *Id.* at 261. The jury in the trial court had concluded that 565 acres of desert that did not have roads, utilities, and structures qualified as a reasonable alternative avenue of communication for an adult business. *Id.* at 261-62.

169. *Topanga*, 989 F.2d at 1529 (quoting *Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir. 1992)). The quote from *Woodall* continued: "A real estate market that provides no opportunity to compete cannot provide a reasonable opportunity to do so." *Woodall*, 959 F.2d at 1306.

170. *Woodall*, 959 F.2d at 1306 (quoting *Renton*, 475 U.S. at 54).

available, the requirement of potentiality connotes *genuine possibility*.¹⁷¹ In considering whether a particular site provided to a business may be considered part of the market, the court must employ a test of reasonableness.¹⁷² Relevant factors in determining whether a site is reasonably a part of the market include its physical characteristics and "the cost of altering or developing . . . its physical characteristics."¹⁷³

Thus, the Ninth Circuit determines whether a relocation site is reasonable, rather than employing confusing and easily manipulatable categories such as "economic" and "non-economic" considerations. The Ninth Circuit is concerned with whether the city provides genuine possibilities of locating an adult business within the city. If permitted relocation areas contain "no 'impediments' except for the possibility that as a 'matter of *business judgment*' these relocation sites [are] undesirable,"¹⁷⁴ then they can truly be considered part of the market available to adult businesses.

2. Reasonableness of Number of Alternate Sites Provided

Once identifying which sites are reasonably to be considered part of the available "market," the court must determine whether the remaining available sites are sufficient to provide an adult business with a reasonable opportunity to relocate.¹⁷⁵ The court does not consider this question in the abstract, however, but strives to find the actual "number of potential sites the ordinance leaves available for the location of adult businesses."¹⁷⁶ This avoids vague assertions that adequate sites remain, without a solid finding, as practiced by the California Supreme Court in *National City*.

The Ninth Circuit offers some very valuable guidelines in making this determination. A stipulation enforcing a separation requirement between adult businesses, for example, makes the case "vastly different from *Renton*," where no such stipulation existed.¹⁷⁷ Once an adult business locates in one area, it creates a further prohibitive zone, reducing

171. *Topanga*, 989 F.2d at 1531 (emphasis added).

172. *Id.* at 1530.

173. *Id.*

174. *Id.* (quoting *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1071 (N.D. Tex. 1986) (emphasis added)).

175. *Id.* at 1532.

176. *Walnut*, 861 F.2d at 1108.

177. *Id.* at 1109.

the availability of remaining locations.¹⁷⁸ A rough estimation of the total acreage is next to meaningless, therefore, and a court must look to "how that acreage is dispersed throughout the City."¹⁷⁹ The Ninth Circuit also considers it relevant if the effect of enforcing a city ordinance "would then be a total exclusion of adult theaters in the City."¹⁸⁰

*B. Outcome of National City Under
the Ninth Circuit's Approach*

1. Land Sites Considered Within the Market

Under the Ninth Circuit's approach, one can quickly eliminate all of the California Supreme Court's "alternate locations." The option to open a business within an approved shopping mall¹⁸¹ can now easily be seen as illusive. Since none of the three malls are willing to rent to an adult business, this option does not provide a genuine possibility, even though the city claims them as potential sites.¹⁸² Thus, the three existing malls would not be considered part of the relevant market in which an adult business could rent.

The option of building one's own mall¹⁸³ would also not be considered a reasonable alternative. The cost of altering or developing an area is a permissible factor to be considered under the Ninth Circuit's approach.¹⁸⁴ Expert witness for the respondent in *National City* testified that constructing a suitable mall would cost \$6.5 million.¹⁸⁵ It seems safe to say that the Ninth Circuit would deem such a financial burden to

178. *Topanga*, 989 F.2d at 1533.

179. *Walnut*, 861 F.2d at 1108.

180. *Id.* at 1107. In *Walnut*, the Ninth Circuit held that a city ordinance that left 99.5 commercially zoned acres available and contained a 1000-foot separation requirement between adult businesses constituted an unconstitutional restriction on free speech. *Walnut*, 861 F.2d at 1113. In *Topanga*, the Ninth Circuit held that the trial court was within its discretion in determining that a city ordinance providing 7440.9 acres as realistically available for the location of an adult business, only 0.18% of which was located in a commercial zone, and containing a 1000-foot separation requirement between adult business, would place a serious hardship on such businesses. *Topanga*, 989 F.2d at 1533.

181. See *supra* notes 132-41 and accompanying text.

182. Under the Fifth Circuit's approach, a lease provision which forbid subletting to an adult business would be classified as a legal restriction, and such a location would be considered unavailable land. See *Woodall*, 959 F.2d at 1306.

183. See *supra* notes 142-47 and accompanying text.

184. *Topanga*, 989 F.2d at 1530.

185. *National City*, 838 P.2d at 239 (Mosk, J., concurring and dissenting).

preclude a genuine opportunity of opening an adult business. Therefore, under the Ninth Circuit's approach, all land within 1000 feet of a residentially-zoned area would not be considered part of the relevant market in which an adult business could operate.

2. Reasonableness of Number of Available Sites Within the Market

The only land remaining within the market would be the 4.5 acres which the city calculates to be beyond the 1000-foot distance requirement. However, National City's ordinance also proscribes a 1500-foot separation requirement between adult businesses, which substantially reduces the number of potential sites within the available land. Because these 4.5 acres are all located in the southern part of the city, most of the land would be consumed by the buffer zone surrounding each adult business.¹⁸⁶ The actual number of relocation sites available to Chuck's Bookstore dwindles to very few, if any at all.

Under the Ninth Circuit's test, National City's ordinance would easily be held as violative of the First Amendment protection on free speech. To uphold the California Supreme Court's assertion that there are adequate alternatives available for free expression would, as stated by the Ninth Circuit, "make a mockery of First Amendment protections and would render meaningless the Supreme Court's admonition that an ordinance must not 'effectively den[y] . . . a reasonable opportunity to open and operate an adult theater within the city.'"¹⁸⁷

VII. CONCLUSION

The California Supreme Court's decision in *National City* is an ominous warning for anyone wishing to establish an adult business within the state. The effect of National City's ordinance is a complete ban on the establishment of any adult business within the city. It is not difficult to imagine that other municipalities will soon pattern similar regulations.

The California Supreme Court goes much farther in eroding First Amendment protections for adult businesses than does the United States Supreme Court. Although *Renton* severely limited the constitutional rights accorded to adult businesses, the Supreme Court very strongly cautioned that a municipality could not effectively ban an adult business' opportunity

186. See *Walnut*, 861 F.2d at 1108.

187. *Id.* at 1109 (quoting *Renton*, 475 U.S. at 53-54).

of opening up within a city. This is precisely what *National City's* ordinance accomplishes, and it receives the full approval from the highest court in California.

This approach does not simply threaten free expression through erotic material. While today the court has limited its withdrawal of First Amendment protections to adult businesses, the ultimate threat to constitutional protections could ultimately be much greater. If this minimal (some may argue practically non-existent) scrutiny is justified by the supposedly less important value of erotic material, how will this precedent ultimately effect certain religious and political ideas that society and the courts feel are deserving of less constitutional protection?

Fortunately, not all courts have taken a virtually hands-off approach to First Amendment violations as practiced upon adult businesses—especially as evidenced by the analysis taken by the Ninth Circuit. The Ninth Circuit, working within the precedent set by the Supreme Court, offers an approach that ensures that adult businesses will not be stripped completely of First Amendment protections. One can hope that if *National City*, or some similar case, is considered by the Supreme Court, the Court will clarify its standard once and for all so as to ensure that future decisions such as the one in *National City* will not occur.

In the meantime, as practical advice to prospective adult business owners in California who can afford to form a corporation, it would be wise to incorporate in a state outside of California. If these businesses are sued in California state court, they can seek removal to federal court under diversity jurisdiction. For the present, adjudication in federal court is the only way that adult businesses can be assured of receiving any significant constitutional protection.

*Steven Ragona**

* The author dedicates this Note to his parents in appreciation for their years of love and support.

