

APPLYING LEGAL EXPRESSIVISM TO MOTIVE REVIEW OF ADULT-USE ZONING

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INTRODUCTION

Under 2002's *City of Los Angeles v. Alameda Books*,¹ zoning laws that target so-called "adult uses"—usually, either sales of sexually-oriented books, videos, and novelties; nude or semi-nude dancing; or screening of sexually-oriented videos—may be held valid under the First Amendment only if the legitimate purposes of their enactment outweigh any suppressive purposes.² These legitimate purposes, the U.S. Supreme Court has explained, are concerned "not with the content of adult [speech]," but with its "secondary effects"—issues such as effects on property values, traffic, crime rates, or development.³ The concept draws a sharp line between content-related concerns and non-suppressive concerns—a dichotomy typically taken for granted by courts and commentators.⁴ On the ground, however, in the many grassroots campaigns against adult uses that take place every year,⁵ the distinction is far from clear.

In April of 2005, for example, a coalition of citizens in Cheboygan, Michigan, which the *Cheboygan Tribune* identified as including "[p]astors and members of nearly every Cheboygan religious congregation,"⁶ set out to try to convince their city council to intercede to prevent the issuance of a business license to Brad Vanatter, an outside developer who intended to open what would apparently be the city's first adult video store—

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¹ 535 U.S. 425 (2002).

² *Id.* at 440–41; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986).

³ *Id.* See also Bryant Paul et al., *Government Regulation of Adult Businesses through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Secondary Effects*, 6 COMM. L. & POL'Y 355, 256 (2001); Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 T.M. COOLEY L. REV. 1 (1989).

⁴ See *infra* Part II.

⁵ See Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1106–08 (2005).

⁶ See, e.g., Mike Fornes, *Citizens Oppose Video Store*, CHEBOYGAN DAILY TRIB., Apr. 28, 2005, available at <http://www.cheboygannews.com/articles/2005/04/28/news/news1.txt>.

“Fantasies Unlimited”—across from an established shopping center, the tenants of which included a Christian bookstore.⁷ The coalition repeatedly denounced pornography and its perceived immoral and destructive power. Reverend Gregory Timmins of the Cheboygan Seventh-Day Adventist Church called pornography “a terrible, terrible scourge,” proclaiming that it “destroys lives, it destroys marriages, it destroys communities.”⁸ Laura Derk, the operator of the aforementioned Christian bookstore implored that the possibility of Fantasies Unlimited coming to Cheboygan was “[u]ltimately . . . a spiritual issue,” but added that “if you’re not a believer it’s at least a moral issue.”⁹ An online poll administered by the *Cheboygan Tribune* garnered a 63.4% response opposing the licensing of any adult video stores within the city’s limits.¹⁰

At first blush, Timmins and Derk’s motives seem clearly to fall into the category of suppressive concerns. Their opposition was, by their own words, to pornography itself.¹¹ If a court had found their motives to be the motives of a municipal government, under the current doctrinal rubric,¹² they surely would be held to be suppressive.

However, Cheboygan’s story involves a twist that throws that assumption for a loop. Shortly after over seventy protesters gathered to express their concerns to the Cheboygan City Council,¹³ the *Tribune* revealed that a great volume of adult videos was already available for sale or rent in Cheboygan—yet this availability had created nothing comparable to the furor surrounding Fantasies Unlimited.¹⁴ A preexisting video store—interestingly called “Family Video”—already legally offered adult videos from its back room.¹⁵ Family Video stocked over 200 adult videos which customers could either purchase or rent, and adult video rentals

⁷ *Id.*

⁸ *Id.*

⁹ Mike Fornes, *City Issues License for Adult Store*, CHEBOYGAN DAILY TRIB., May 5, 2005, available at <http://www.cheboygannews.com/articles/2005/05/05/news/news2.txt>.

¹⁰ Mike Fornes, *Adult Videos Already Available*, CHEBOYGAN DAILY TRIB., Apr. 29, 2005, available at <http://www.cheboygannews.com/articles/2005/04/29/news/news1.txt>. The poll, of course, is extremely unscientific. However, it at least suggests that some Cheboyganites supported a total ban.

¹¹ See *supra* notes 8–9 and accompanying text.

¹² See *supra* notes 1–4 and accompanying text. See also Part IV.

¹³ Fornes, *supra* note 6.

¹⁴ Fornes, *supra* note 10.

¹⁵ *Id.*

comprised, according to the store's manager, "a big percentage of our business."¹⁶

To one interested in suppressing the speech in adult videos, Family Video's transgression should seem functionally nearly identical to Fantasies Unlimited's. Members of the coalition, however, saw a difference. Reverend Dale Duverney, of the Cheboygan Church of Christ, expressed disapproval of Family Video¹⁷ but concluded that its model of selling adult entertainment was "a whole lot different than out in the open and in your face."¹⁸ Reverend Duverney's specific aversion to the conspicuous availability of adult entertainment was echoed by others in his coalition. Cheboyganite Colette Davis complained, "I don't think that visitors to our town come here to see the flashing lights of an adult bookstore along U.S. 23."¹⁹ Reverend Timmins referred to the experience of driving through nearby Pellston and seeing their adult video store, calling it "a blotch on their community."²⁰

Why would individuals be so concerned with the *appearance* that pornography is available for purchase in their communities? The language of secondary effects²¹ suggests that this concern might simply be for a potential loss in property value or increase in crime. The language of the Cheboygan coalition, however, does not solely rely on assumptions about property values or crime control.²² Instead, it characterizes the visibility of Fantasies Unlimited as itself a harm.²³ This harm, it seems, goes beyond the simple availability of adult videos—yet is intimately tied to an antipathy toward pornography itself.

In recent years, several of the most prominent working legal scholars have contributed to a growing literature on "expressive" theories of law—theories that focus on the power of the law to express underlying attitudes, rather than simply to regulate.²⁴ However, there has been no thorough

¹⁶ *Id.*

¹⁷ *Id.* (arguing that "it should all be run out of town").

¹⁸ *Id.*

¹⁹ Fornes, *supra* note 6.

²⁰ *Id.*

²¹ See *supra* notes 1–4, 44 and accompanying text.

²² See *supra* notes 8–9, 19–20.

²³ See *supra* notes 8–9, 19–20.

²⁴ See generally, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (continued)

published treatment of these theories in the adult-use zoning context,²⁵ and no published examination of their implications for the Supreme Court's *Alameda Books* conception of motive review. As this Article will discuss, the theory, practice, and jurisprudence are a perfect fit. Understanding communities' expressive concerns, including the deep cultural ramifications that debates around pornography have for many communities' senses of collective identity, helps to make sense of communities' behavior and preferences in ways that the Supreme Court's dichotomy cannot. In turn, examining this blind spot reveals how and why courts have struggled to define and identify legitimate and illegitimate motives in their attempts at constitutional review.

I. ADULT-USE ZONING AND THE "PREDOMINATE PURPOSE" TEST

The practice of adult-use zoning enables municipalities to avoid two potential First Amendment hazards in their regulation of adult businesses. First, it allows them to sidestep the Supreme Court's notoriously vague test for the First Amendment obscenity exception by characterizing their regulations as valid time, place, and manner restrictions on concededly protected speech.²⁶ Second, it allows municipalities to avoid the strong

(1995); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

²⁵ *But see* Garnett, *supra* note 5, at 1123–24 (discussing land use as tool for expressing norms of appropriate behavior); Stephanie Lasker, Comment, *Sex and the City: Zoning "Pornography Peddlers and Live Nude Shows"*, 49 U.C.L.A. L. REV. 1139, 1170 (2002).

²⁶ *See* *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (holding that "States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded"); *see also* *Miller v. California*, 413 U.S. 15, 18–19 (1973). In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79–82 (1976), the Supreme Court relied on *United States v. O'Brien*, 391 U.S. 367 (1968), to uphold a zoning scheme targeting adult businesses that clearly reached the sale of some non-obscene erotic materials. The businesses fell within the ambit of the challenged ordinance not only for selling or exhibiting hardcore pornography, but for selling or exhibiting material that displayed, for example, "less than completely and opaquely covered" buttocks or female breasts "below a point immediately above the top of the areola." *Id.* at 53 n.4. The Supreme Court proceeded under the assumption that the ordinance did reach the sale or exhibition of protected material with some artistic value. *Id.* at 70–71.

risk of unconstitutionality that would accompany a true *de jure* ban on sales or exhibition of protected speech under *Schad v. Borough of Mt. Ephraim*,²⁷ while nevertheless enacting arguable *de facto* bans.²⁸ As the clearest path for navigating between these two areas of high constitutional risk, adult-use zoning has seen years of popularity—which have resulted in

²⁷ 452 U.S. 61, 68–72 (1981).

²⁸ For example, the zoning scheme upheld by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53–55 (1986), left approximately five percent of the city of Renton available to covered businesses, none of which was located in the primary downtown commercial district, and much of which was already developed and unavailable—some of it even covered by railroad tracks or occupied by an industrial park, a parking lot, or a sewage disposal and treatment plant. Brief of the American Civil Liberties Union et al. as Amici Curiae Supporting Appellees, at 13–14, *Renton*, 475 U.S. 41 (1986) (No. 84-1360). The Magistrate who heard the case initially described the situation as such: “The area is largely undeveloped and what development there is entirely unsuitable for retail purposes in general and for theater purposes in particular.” *Id.* The city council had, in the Magistrate’s words, “for all practical purposes exclude[d] adult theaters from the city.” *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 532 (9th Cir. 1984). In response to complaints that the scheme was a *de facto* ban, then-Justice Rehnquist quipped that “[t]hat 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,” and “we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain price,” *Renton*, 475 U.S. at 54, and held that Renton had fulfilled its obligation to allow for reasonable alternative venues for the restricted speech. *Id.* at 50. This approach strikingly allows many municipalities to pass ordinances that reduce access to protected speech much more greatly than the ordinance in *Schad*. The Borough of Mt. Ephraim had attempted to defend its ordinance on the ground that all restricted speech was available nearby, outside the borough’s boundaries. Justice Blackmun, in his concurrence, explained,

It would be a substantial step beyond *Mini Theatres* to conclude that a town or county may legislatively prevent its citizens from engaging in or having access to forms of protected expression that are incompatible with its majority’s conception of the “decent life” solely because these activities are sufficiently available in other locales.

Schad, 452 U.S. at 78 (Blackmun, J., concurring). Some jurisdictions, however, continue to pursue true bans on some adult businesses, to decidedly and dramatically mixed reactions from federal courts. *Compare* *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008, revised Mar. 10, 2008), *with* *Williams v. Morgan*, 478 F.3d 1316 (11th Cir. 2007).

repeated trips to the Supreme Court.²⁹ Consequently, layers of precedent have established the area as a unique subfield of First Amendment law, connected, but no longer confined, to the *United States v. O'Brien*³⁰ test for time, place, and manner restrictions.³¹ Under *O'Brien*, such a restriction is valid

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.³²

To determine the validity of adult-use zoning ordinances, however, courts look to a separate set of questions established by subsequent precedents.

The “predominate concerns” test—or a test like it—is one such question. The phrase “predominate concerns” first appeared in a district court order upholding an ordinance in *City of Renton v. Playtime Theatres, Inc.*³³ The court found evidence of mixed motives behind the ordinance but held that the municipality’s predominate concerns were legitimate.³⁴ At the time, the Ninth Circuit used a different motive test under its own precedent in *Tovar v. Billmeyer*,³⁵ which required invalidation if suppression was a “motivating factor.”³⁶ On appeal, the Ninth Circuit held that the “predominate concerns” finding failed to satisfy the “motivating factor” standard³⁷ and struck the ordinance.³⁸ The Supreme Court made its rejection of the “motivating factor” standard the centerpiece of its reversal.³⁹ The finding of “predominate intent” was, according to Justice Rehnquist’s opinion for the majority, “more than adequate to establish that

²⁹ See *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 425 (2002); *Renton*, 475 U.S. at 41; *Schad*, 452 U.S. at 61; *American Mini Theatres, Inc.*, 427 U.S. at 50.

³⁰ 391 U.S. 367 (1968).

³¹ See *infra* Part II.B.

³² *O'Brien*, 391 U.S. at 377.

³³ *Renton*, 475 U.S. at 47.

³⁴ *Renton*, 748 F.2d. at 538.

³⁵ 721 F.2d 1260 (9th Cir. 1983).

³⁶ *Id.* at 1266. See also *Lydo Enterprises v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984).

³⁷ *Renton*, 758 F.2d at 537–38.

³⁸ *Id.*

³⁹ *Renton*, 475 U.S. at 47.

the city's pursuit of its zoning interests here was unrelated to the suppression of free expression."⁴⁰ Thus, the Renton ordinance survived without any court above the district level endorsing the "predominate concerns" test.

However, in 2002's *City of Los Angeles v. Alameda Books*, Justice O'Connor drafted a lead opinion that turned this course of events on its head and treated the standard as codified by *Renton*. She stated the holding of *Renton* thusly:

In *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." The former requires courts to verify that the "predominate concerns" motivating the ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.⁴¹

The Court did not review the first of these prongs because it was not at issue in the litigation.⁴² Justice Kennedy filed a majority-completing concurrence on the grounds that he feared that Justice O'Connor's opinion might constitute an expansion of *Renton*, with which he did not concur, and that Justice O'Connor's opinion failed to repudiate the language of content neutrality, a term he considered facially inapplicable to ordinances that explicitly discriminated based on content.⁴³ He did not directly challenge Justice O'Connor's "predominate concerns" language and employed language similarly presupposing the need for one set of concerns to predominate over the other.⁴⁴ Justice Kennedy's proposed test built on

⁴⁰ *Id.* at 48.

⁴¹ 535 U.S. 425, 440–41 (2002) (quoting *Renton*, 475 U.S. at 47–54) (citations omitted). Again, the Court reversed the Ninth Circuit.

⁴² *Id.* at 441.

⁴³ *Id.* at 444–45 (Kennedy, J., concurring in judgment).

⁴⁴ *Id.* at 444, 447–50 (requiring that an ordinance be "designed to decrease secondary effects and not speech"; that the ordinance be "targeted not at the activity, but at its side effects"; and that "the rationale of the ordinance must be that it will suppress secondary effects").

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Justice O'Connor's, adding only an additional clearer requirement that courts consider the amount of potential suppression by an ordinance.⁴⁵ Thus, while the specific prevailing verbal formulation of the motive test is somewhat unclear, its content is less so—courts are expected at least to classify motivations as either suppression-related or unrelated to content, and to decide which of the two types of motivation to ascribe to the ordinance for constitutional purposes.

From the start, this intent inquiry has bred confusion and hostility in courts. The *Renton* Court, for example, based its determination of legitimate motive largely on a list of twenty “findings,” added to the challenged ordinance by the city council only after litigation began.⁴⁶ However, as the Ninth Circuit pointed out, “many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter.”⁴⁷ Lower courts have similarly relied heavily on explicit, enacted statements of purpose in reviewing statutes for purpose.⁴⁸ In so doing, courts have often rendered the First Amendment protection a mere drafting formality, arguably perversely rewarding strategically dishonest municipalities and punishing their similarly-situated but unwarily sincere counterparts.⁴⁹ Exasperated courts have, at times, complained that

effects—and not by suppressing speech” in order to be subject to strict scrutiny). There is no indication that Justice Kennedy's either-or test would be more favorable to municipalities than a test using the “predominate concerns” language, and he in fact characterizes his formulation as less forgiving. *Id.* at 450–53. *See also* *World Wide Video v. City of Spokane*, 368 F.3d 1186, 1193–94 (9th Cir. 2004) (“While Justice Kennedy did not dispute the plurality's burden-shifting gloss on *Renton*, he stressed that a city's rationale for passing an ordinance aimed at controlling the secondary effects of adult stores ‘cannot be that when [the ordinance] requires businesses to disperse (or to concentrate), it will force the closure of a number of businesses, thereby reducing the quantity of protected speech.’ Justice Kennedy thus concurred with the . . . plurality with the following cautionary caveat: ‘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.’”).

⁴⁵ *Alameda Books*, 535 U.S. at 450–53.

⁴⁶ *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 531 n.5 (9th Cir. 1984).

⁴⁷ *Id.* at 537.

⁴⁸ *See, e.g., City of Spokane*, 368 F.3d at 1191 (upholding district court application of intermediate scrutiny, because “the challenged Ordinances are explicitly intended to combat the secondary effects of adult stores' speech, not to suppress the speech itself”); *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 557 (5th Cir. 2006) (relying on stated purpose for content-neutrality determination).

⁴⁹ *Compare R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 415 (7th Cir. 2004) (striking the ordinance down for failure to point to any secondary effects), *with G.M.*

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municipalities make secondary effects arguments with no supporting evidence whatsoever.⁵⁰ Scholars have been more straightforward, openly claiming that the test allows municipalities to survive review through flimsy, unsupportable pretexts.⁵¹ Some courts have looked more searchingly at both context and state actors' individual mindsets.⁵² This step lessens the risk of strategic dishonesty or omission by enacting municipalities, but also greatly complicates the judicial inquiry, further necessitating a taxonomy of motive that can account for the complex concerns of political actors.⁵³

II. EXPRESSIVISM AND ZONING

A. *Descriptive versus Normative Expressivism*

"Expressive" or "expressivist" theories of law assume that laws and official actions have expressive dimensions, and attempt to account for and understand these dimensions.⁵⁴ Such theories may have both descriptive and normative components.⁵⁵ Descriptive treatments of expressivism explore the ways in which law expresses attitudes,⁵⁶ as well as the degree

Enterprises v. Town of St. Joseph, 350 F.3d 631, 633 (7th Cir. 2003) (upholding town's ordinance because the record supports town's claims and reasonable belief related to secondary effects).

⁵⁰ *R.V.S., L.L.C.*, 361 F.3d at 411; *Vaughn v. St. Helena Parish Police Jury*, 365 F. Supp. 2d 763, 772 (M.D. La. 2005) (complaining that findings did not demonstrate any relationship to parish's problems).

⁵¹ See Paul et al., *supra* note 3, at 386 (arguing that many of the studies relied upon are scientifically questionable); Prygoski, *supra* note 3, at 1 (arguing that the secondary effects analysis "allows legislatures to concoct spurious rationales for restricting speech").

⁵² See, e.g., *Doctor John's, Inc. v. City of Sioux City*, 305 F. Supp. 2d 1022, 1030–31, 1036 (N.D. Iowa 2004). There the court cited the lack of explicit purpose, the fact that the city council members were not told of secondary effects studies, and the fact that amendments were passed to target a single business to support the application of strict scrutiny. *Id.* at 1030–36. Both plaintiff store and defendant city were denied summary judgment in this case on the ground that the question of "personal or political animus" was a question of fact. *Doctor John's, Inc. v. City of Sioux City*, 438 F. Supp. 2d 1005, 1047–48 (N.D. Iowa 2006).

⁵³ See, e.g., *Doctor John's, Inc.*, 438 F. Supp. 2d at 1047–48.

⁵⁴ Adler, *supra* note 24, at 1364, 1377.

⁵⁵ Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1624–25 (1998).

⁵⁶ Lessig, *supra* note 24, at 1044–45; McAdams, *supra* note 24, at 389.

to which political actors might prefer or avoid such expression.⁵⁷ Lawrence Lessig has provided the fullest such descriptive account.⁵⁸ Lessig writes, in response to Justice Jackson's famous declaration that "[i]f there is one fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ."⁵⁹ that "[g]overnment has always and everywhere advanced the orthodox by rewarding the believers and by segregating and punishing the heretics"⁶⁰ and offers a convincing laundry list of areas in which governments, including the U.S. government, have used policy to engage in social construction, which he defines as changing or defending the social meaning of a particular subject.⁶¹ By Lessig's account, the state is an active participant in the creation and evolution of social meaning, especially in regard to creating or defending orthodoxy.⁶² Expression, unlike pure communication, need not be intentional—an actor may, for example, accidentally express an attitude that he wishes to hide.⁶³ Expression is simply an action manifesting a state of mind⁶⁴ or attitude,⁶⁵ and need not be either intentional or even accurate.⁶⁶ Just as an evocative musician can express an emotion she does not feel, so can a state action express a collective state of mind that the electorate does not hold.⁶⁷

Normative expressive theories of law focus on assuring that the law expresses appropriate values and attitudes. Normative expressivism has

⁵⁷ See Kahan, *supra* note 24, at 414 (arguing that while citizens may cite deterrence in arguments about punishment, their political motivations are expressive).

⁵⁸ See Lessig, *supra* note 24. See also McAdams, *supra* note 24, at 340 n.3; Sunstein, *supra* note 24, at 2021 n.3 (1996) (arguing that Lessig offers the best discussion of the idea of expressivism in law).

⁵⁹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942).

⁶⁰ Lessig, *supra* note 24, at 946.

⁶¹ *Id.* at 963. See *id.* at 973 (constructing meaning through education); *id.* at 987 (constructing meaning of masculinity through policies regarding homosexuals and military service); *id.* at 989 (constructing meaning through abortion regulation or lack thereof); *id.* at 990 (constructing meaning through antimiscegenation laws).

⁶² See *id.* at 1039.

⁶³ Elizabeth A. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1508 (2000).

⁶⁴ *Id.* at 1506.

⁶⁵ See McAdams, *supra* note 24, at 339.

⁶⁶ Anderson & Pildes, *supra* note 63, at 1508.

⁶⁷ *Id.* at 1550.

been most famously championed by Richard Pildes, who has identified strains of normative expressivism first in voting rights law⁶⁸ and later in areas such as Equal Protection and Establishment Clause jurisprudence⁶⁹ as well as the dormant Commerce Clause doctrine.⁷⁰ Pildes, writing with Elizabeth Anderson, argues that “state action should be wrong—and unconstitutional, if constitutional law tracks expressive concerns—when it expresses impermissible valuations, without regard to further concerns about its cultural or material consequences.”⁷¹ The validity of this controversial⁷² proposition is outside the scope of this Article.

Because the first step in the analysis prescribed by the Supreme Court is to examine and classify motivations,⁷³ descriptive expressivism is the initially more important tool. However, because the review is of motive rather than consequence, the inquiry must focus not on when adult-use zoning conceivably could express a state of mind, but on when it could do so effectively and unambiguously enough that the expressive function can be expected to be pursued intentionally. While this question is still largely unexplored,⁷⁴ its underlying issues are not—in fact, a well-developed body of literature already establishes that regulation of land use is among the more potentially expressive areas of law.

B. Regulated Land as Expressive – History and Misconceptions

History is littered with examples of Americans’ readiness to view the makeup of neighborhoods as expressions of deeper values or ideals. Often, different land use patterns have been read as expressing the complex sets of values and assumptions embodied in urban and anti-urban cultural ideals.⁷⁵ As documented by scholars such as legal academic Jerry Frug⁷⁶

⁶⁸ Pildes & Niemi, *supra* note 24, at 483. See also Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 744–47, 755–60 (1998).

⁶⁹ Anderson & Pildes, *supra* note 63, at 1532.

⁷⁰ *Id.* at 1551–64.

⁷¹ *Id.* at 1531.

⁷² See, e.g., Adler, *supra* note 24, at 1462.

⁷³ See *supra* notes 35–36 and accompanying text.

⁷⁴ But see Garnett, *supra* note 5; Lasker, *supra* note 25.

⁷⁵ But see Garnett, *supra* note 5, at 1123–24 (discussing land use as tool for expressing norms of appropriate behavior).

⁷⁶ Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048 (1996).

and sociologist Richard Sennett,⁷⁷ these ideals implicate far more than simple questions of land use and population density.⁷⁸ They appeal to deep divisions over culture, races, class, and personal identity.⁷⁹ This tension has even appeared in the Supreme Court's adult use zoning jurisprudence, most obviously in Chief Justice Burger's dissent in *Schad v. Borough of Mt. Ephraim*, in which he defends the town's right to defend its status as a "placid, 'bedroom' community," citing Justice Douglas's opinion in *Village of Belle Terra v. Borres*⁸⁰ for its proposition that the power to zone is sufficiently great to enable municipalities "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."⁸¹ Chief Justice Burger dismissed arguments that appellant adult bookstore's message would be chilled by sarcastically quipping that "the appellants' 'message' will [hardly] be prohibited in nearby—and more sophisticated—cities."⁸² As Stephanie Lasker has pointed out, Chief Justice Burger's statement does not only contain an implicit value judgment about the content of the regulated speech—it also contains an endorsement of what Lasker calls "the traditional conception of the antiurban, sentimental, pastoral ideal."⁸³

Before proceeding, it is necessary to address a potential misconception. Treating public spaces as crafted, expressive texts does not mean that one must deny the chaotic, organic nature of such spaces' growth. Jane Jacobs famously makes this mistake in *The Life and Death of Great American Cities*.⁸⁴ Responding to efforts by the American Garden City, Radiant City, and City Beautiful movements to impose cohesive expressive order on cities,⁸⁵ Jacobs exhorts, "[w]hen we deal with cities we are dealing with life at its most complex and intense. Because this is so, there is a basic esthetic limitation on what can be done with cities: *A city cannot be a work of art.*"⁸⁶ To Jacobs, cities are both too complex to embody a singular

⁷⁷ RICHARD SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY & CITY LIFE* xvii (Alfred A. Knopf, Inc. 1970).

⁷⁸ See Frug, *supra* note 76, at 1051–55.

⁷⁹ *Id.* at 1053–67. See also *infra* Part. III.

⁸⁰ 416 U.S. 61, 85 (1981) (Burger, C.J., dissenting).

⁸¹ *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 86 (1981) (citing *Village of Belle Terra v. Borres*, 416 U.S.1, 9 (1974)).

⁸² *Id.* at 87.

⁸³ Lasker, *supra* note 25, at 1170.

⁸⁴ JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 372–91 (1961).

⁸⁵ *Id.* at 375.

⁸⁶ *Id.* at 372.

artistic vision and too diverse to embody an artistic vision by consensus, and ultimately attempts to achieve such ideals are “a life-killing (and art-killing) abuse of art.”⁸⁷ Instead of being driven by abstract expressive vision, she argues, the visual order of a city should be driven by a desire to illuminate the vitality and variety of its uses.⁸⁸

Jacobs presents a false dichotomy between functional, use-oriented visual order and visual order designed to live up to a singular artistic vision. It may be true that no high-population area can be fully tailored to meet an exacting artistic vision of a single individual, and it is likely equally true that most communities are too diverse to reach consensus on any such vision as well. These conclusions, however, elide two important points. First, planners with expressive motives need not necessarily attempt to totally supersede a city’s vital uses as chief determinants of visual order. On the contrary, this use-generated visual order may serve as the raw material to be largely unobtrusively tailored to serve expressive motives. In other words, population centers may not be blank canvasses, but very little expression requires one. Second, by focusing on consensus, Jacobs ignores the actual methods by which municipal visual order is imposed. Planning and zoning—two strong determinants of visual order—do not require consensus. Most often, they are the products of majoritarian rule, domination by small, disproportionately interested parties, or a combination of these two forces.⁸⁹ This governance is collaborative, but it is not consensus-based. Art and expression may similarly be collaborative without being consensus-based.

C. Regulated Land as Expressive – A Semiotic Account

The language of semiotics provides tools helpful in understanding how exactly the visual order of land use patterns might express important traits or values of communities. Roland Barthes famously wrote that a city may be seen “as a true text, as an inscription of man in space.”⁹⁰ Barthes and other semioticians study the functioning of signifiers as they relate to each other, readers/observers, and the objects which they signify.⁹¹ Semiotics traditionally classifies signifiers according to three types of signification.

⁸⁷ *Id.* at 373–74.

⁸⁸ *Id.* at 375–76.

⁸⁹ See RICHARD BABCOCK, *THE ZONING GAME* 19–61 (1966).

⁹⁰ Roland Barthes, *Semiology and the Urban*, in *THE CITY AND THE SIGN: AN INTRODUCTION TO URBAN SEMIOTICS* 87, 90 (M. Gottdiener & Alexandros Ph. Lagopoulos eds., 1986).

⁹¹ See Lasker, *supra* note 25, at 1145.

“Iconicity” refers to actual depictions of a signified object, such as in a pictogram.⁹² “Indexicality” refers to pointing to a signified object, as with an arrow or a nametag.⁹³ “Symbolism” refers to instances where a sign has no relation to the signified object except via an invented lexical system such as written language.⁹⁴ These three types of signifier-signified relationships can be applied to describe and understand the relationship between a signifier land use pattern and a signified set of community values, traits, or commitments.

Specifically, let us imagine a small town with a single concentration of shops and businesses, all emanating from a two-lane state highway by which most visitors enter the town and many travelers pass through. What relationship might the pattern of uses in this concentrated area have to the values, traits, or commitments of the town’s population? First, it is crucially important to recognize that a land use pattern is an aggregate of many potential signifiers, all of which have dialogical relationships with each other. “Dialogicality” refers to signifiers’ capacity to change in meaning due to their interaction with each other.⁹⁵ Individual land uses are dialogical within a land use pattern because the addition, subtraction, or alteration of a single use can radically alter the meaning expressed by any and all surrounding uses.⁹⁶ A McDonald’s, for example, signifies something different about a community if there is a health food store down the block. This dialogicality is particularly important when considering attention-grabbing, heavily meaning-laden uses such as adult businesses. A single adult business may have the capacity to change the perceived meaning of an entire downtown, enhancing, overshadowing, or altering the information perceived to be signified by other uses.

This hypothetical concentration of businesses should be viewed as holding both strongly iconic and strongly indexical relationships with the town’s population. First, it is iconic because the businesses directly reflect a catalog of business relationships and thus a catalog of demands and consumption patterns. The uses, taken in the aggregate, are likely to be viewed by residents, visitors, and passersby as a more or less accurate depiction of the desires and consumption of the town itself. Second, the relationship is highly indexical because the location of the businesses

⁹² See RON SCOLLON & SUZIE WONG SCOLLON, DISCOURSES IN PLACE: LANGUAGE IN THE MATERIAL WORLD 26 (2003).

⁹³ *Id.* at 31–32.

⁹⁴ *Id.* at 133.

⁹⁵ *Id.* at 23.

⁹⁶ *Id.*

points to a specific population. The sub-field of geosemiotics studies the way in which the placement of signifiers in space creates meaning.⁹⁷ Geosemiotics suggests that sign location is a strong and pervasive form of indexicality. Street signs, for example, gain their specific meaning by being placed above streets; their meaning is quite different in the back of a truck or on a dorm room wall.⁹⁸ Similarly, the hypothetical concentration of businesses would mean something very different if located in the middle of Chicago. There, it would not implicate the hypothetical small town's population at all. By being located in the town center, however, it is clear that it is that town's desires and consumption that the aggregate of the businesses iconically signifies.

D. Who is the Expresser?

If, then, municipal zoning is so well-suited to expressing attitudes, whose attitudes does it express? The traditional answer is that it expresses the attitudes of the state. Under *Hunter v. City of Pittsburgh*,⁹⁹ municipal governments act and exist at the "absolute discretion of the State" as nothing more than "political subdivisions . . . created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."¹⁰⁰ Under this traditional view, a municipality is merely an agent of the sovereign, and thus the expression of an attitude by a municipality should, by logical extension, be treated more or less identically to an expression by the state.

Heather Gerken's 2005 "Dissenting by Deciding" takes issue with this assumption and adds an additional wrinkle to earlier expressivist accounts.¹⁰¹ Neither Pildes nor Lessig's conception takes full account of the multifariousness of the state in the American system.¹⁰² Because Pildes focuses primarily on a handful of forbidden expressive harms, he is able to pose prohibitions that may be applied to the state's atomistic elements without significant consideration for their potential tension with other elements (save, of course, the federal judiciary and the Constitution).¹⁰³ Lessig, on the other hand, assumes that the state will be an instrument with

⁹⁷ *Id.* at 19.

⁹⁸ *See id.* at 31.

⁹⁹ 207 U.S. 161 (1907).

¹⁰⁰ *Id.* at 178.

¹⁰¹ Gerken, *supra* note 24, at 1747.

¹⁰² *See* Pildes, *supra* note 24; Lessig, *supra* note 24.

¹⁰³ Pildes, *supra* note 24, at 725–26.

which to construct or defend orthodoxy¹⁰⁴—eliding the possibility that a heterogeneous state could be an agent of heterodoxy. Gerken, however, proposes that the expressive action of small state units may be read as “decisional dissent” from broader orthodoxy,¹⁰⁵ and that smaller units of government may be a tool to give voice to groups that are left out of other sectors of political culture.¹⁰⁶ Because Gerken’s model allows for the possibility of many different government units expressing different attitudes, she envisions that the value of such cacophonous, often contradictory, expression can be evaluated with the same tools used by scholars to evaluate the value of the cacophonous, often contradictory, nature of free private speech in a First Amendment framework.¹⁰⁷

The realities of municipal government support this conclusion. Despite the formal constraints of *Hunter* and traditional state hostility to broad municipal powers, municipalities have long enjoyed expansive power as lawmakers and policy entrepreneurs.¹⁰⁸ Also, unlike the state and federal governments, local governments are extremely numerous and may often be recently formed by actions of citizens.¹⁰⁹ Between 1952 and 2002, there was a net increase of more than 2600 municipalities in the United States.¹¹⁰ These municipalities, once formed, may often share more features and purposes with private firms than state governments or the federal government do.¹¹¹ In these ways, municipal governments, though undeniably state actors, also share key features with private organizations such as clubs, firms, or neighborhoods. Thus, per Gerken’s model, their expressive possibilities should be considered and treated at least somewhat differently than the expressive possibilities of lawmaking by larger, more dominating governments in the federal system.¹¹² While municipalities

¹⁰⁴ Lessig, *supra* note 24, at 946.

¹⁰⁵ Gerken, *supra* note 24, at 1747. This Article, like Gerken’s original, uses the terms “dissenting by deciding” and “decisional dissent” interchangeably.

¹⁰⁶ *Id.* at 1752.

¹⁰⁷ *Id.* at 1759–98.

¹⁰⁸ See Richard Briffault, *Our Localism: Part 1—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 13–18 (1990).

¹⁰⁹ See, e.g., *White v. Lorings*, 623 S.W.2d 837, 839 (Ark. 1981) (stating that 150 registered voters petitioned the county court for incorporation).

¹¹⁰ RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 165–66 (6th ed. 2004).

¹¹¹ See NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* 100–08 (1994).

¹¹² Gerken, *supra* note 24, at 1760.

may express the attitudes of the state, they may also express the collective attitudes of specific communities, which may or may not be endorsed by the state or outsiders. As this Article has discussed, zoning is the perfect setting for such expression, because of its high visibility and the uniquely locality-focused character of its message.¹¹³

III. EXPRESSIVISM AND ADULT USES

A. *The Importance of the Content of Expressive Zoning*

The normative expressivists argue—and this Article agrees—that when determining appropriate judicial attitudes toward expressive lawmaking, we must consider precisely which attitudes might be expressed.¹¹⁴ Regimes for regulating pornography and adult uses most obviously express policy preferences on the very question of regulation of pornography and adult uses.¹¹⁵ Gerken points out that one of the greatest strengths of decisional dissent is the opportunity to “remap the politics of the possible”—to change perceptions about what policies are sustainable or achievable by providing a “real-life instantiation of an idea.”¹¹⁶ She provides as an example the effects of successful local integration in developing support for integration nationwide.¹¹⁷ The appropriate legal response to potentially offensive, sexually explicit speech is an important issue, and an articulation of a community’s position on that question is valuable. However, as Pildes and others recognize, policies may express more than policy preferences and, at times, express broader attitudes on issues such as, for example, race.¹¹⁸ Zoning, as this Article has discussed, is capable of not only expressing those attitudes but of tying them into a larger sense of community identity.¹¹⁹

Many sometimes-conflicting narratives surround pornography in the United States. Pornography may be viewed as an instrument of social and political subjugation;¹²⁰ it may be seen as a tool for personal resistance,

¹¹³ See *supra* Part II.

¹¹⁴ Anderson & Pildes, *supra* note 63, at 1508 (2000).

¹¹⁵ See *supra* Part II.A (discussing descriptive expressivism).

¹¹⁶ Gerken, *supra* note 24, at 1766.

¹¹⁷ *Id.*

¹¹⁸ See Pildes & Niemi, *supra* note 24, at 483.

¹¹⁹ See *supra* Part II.

¹²⁰ See, e.g., Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, in FEMINISM AND PORNOGRAPHY, 19, 26–27, 29–32, 35–38 (Drucilla Cornell ed., 2000); Andrea Dworkin, *Pornography and Grief*, in FEMINISM AND PORNOGRAPHY, *supra*, at 39, 39–42; Norma Ramos, *Pornography is a Social Justice Issue*, in FEMINISM AND
(continued)

growth, and reaffirmation in the face of repressive social norms;¹²¹ it may be seen as an important site of creativity and cultural expression;¹²² or it may be seen as a socially corrosive source of moral degradation.¹²³ It is possible that each of these conceptions could fuel expressive land use strategies on the municipal level.¹²⁴ Assembling an encyclopedic account of different communities' attitudes is beyond the scope of this Article. Instead, it will narrowly focus on the last of these paradigms, the view of pornography as a moral vice, with particular emphasis on criticism from a religious perspective. This choice, though by its nature providing only an incomplete account of the possibilities and complex motives of opposition to adult uses, will allow the analysis to address many of the most controversial and aggressive anti-pornography efforts, as well as to examine how zoning may be intended to be oppositional, rather than simply orthodoxy-reinforcing. It will also provide one account of the full weight of the attitudes expressed by communities' expression of an anti-pornography message, and the implications these attitudes have far beyond the context of regulating adult land uses.

B. One Anti-Pornography Movement in Context

Some sociologists have suggested that religious conservatives often focus on a few symbolic issues, such as pornography, in order to articulate a broader critique reaching a wide variety of cultural and political issues. Some anti-pornography advocates agree. Donald Wildmon explains:

What we are up against is not dirty words and dirty pictures. It is a philosophy of life which seeks to remove

PORNOGRAPHY, *supra*, at 45, 45–47; Diana E. H. Russell, *Pornography and Rape: A Causal Model*, in FEMINISM AND PORNOGRAPHY, *supra*, at 48, 50–51; Catherine MacKinnon, *Only Words*, in FEMINISM AND PORNOGRAPHY, *supra*, at 94, 96–100.

¹²¹ See, e.g., Angela Carter, *Polemical Preface: Pornography in the Service of Women*, in FEMINISM AND PORNOGRAPHY, *supra* note 120, at 527, 527; Amber Hollibaugh, *Seducing Women into 'A Lifestyle of Vaginal Fisting': Lesbian Sex Gets Virtually Dangerous*, in FEMINISM AND PORNOGRAPHY, *supra* note 120, 445, at 445–48; Kobena Mercer, *Just Looking for Trouble: Robert Mapplethorpe and Fantasies of Race*, in FEMINISM AND PORNOGRAPHY, *supra* note 120, at 460, 460–62.

¹²² See, e.g., Laura Kipnis, *The Eloquence of Pornography*, <http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/eloquence.html> (last visited Sept. 7, 2008).

¹²³ See, e.g., BEN SHAPIRO, *PORN GENERATION: HOW SOCIAL LIBERALISM IS CORRUPTING OUR FUTURE* 6 (2005).

¹²⁴ See, e.g., *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328–29 (7th Cir. 1985).

the influence of Christians and Christianity from our society. Pornography is not the disease, but merely a visible symptom. It springs from a moral cancer in our society, and it will lead us to destruction if we are unable to stop it.¹²⁵

What Wildmon and others espouse is a form of what has been described as “status politics.”¹²⁶ The “status politics” concept builds on Max Weber’s assertion that communities contain two interacting but distinct hierarchies¹²⁷: an economic hierarchy based on wealth, and a status hierarchy based on social standing and prestige.¹²⁸ Just as economic politics focuses on using the political process to build, protect, or acquire wealth, status politics focuses on using the political process to build, protect, or acquire status.¹²⁹ Some have suggested that status politics often attracts traditionalists who feel that their worldview is devalued or becoming devalued by society as a whole.¹³⁰ Such actors seek to protect or increase their threatened status by securing state endorsement of their moral universe.¹³¹ This protected or increased status in turn protects the

¹²⁵ Beth A. Eck, *Cultural Conflict and Art: Funding of the National Endowment for the Arts*, in *THE AMERICAN CULTURE WARS CURRENT CONTESTS AND FUTURE PROSPECTS* 89, 110 (James L. Nolan Jr. ed., 1996) [*hereinafter* AMERICAN CULTURE WARS].

¹²⁶ MATTHEW C. MOEN, *Status Politics and the Political Agenda of the Christian Right*, 29 *SOCIOLOGICAL QUARTERLY* 429, 433–34 (1988); Louise J. Lorentzen, *Evangelical Life Style Concerns Expressed in Political Action*, 41 *SOCIOLOGICAL ANALYSIS* 144, 147 (1980); Kenneth D. Wald et al., *Evangelical Politics and Status Issues*, 88 *J. FOR THE SCIENTIFIC STUDY OF RELIGION* 1, 2 (1989); Charles L. Harper & Kevin Leicht, *Religious Awakening and Status Politics: Sources of Support for the New Religious Right*, 45 *SOCIOLOGICAL ANALYSIS* 339, 341. *See also* Eck, *supra* note 125, at 89, 91–92; John H. Evans, *Worldviews or Social Groups as the Source of Moral Attitudes: Implications for the Culture War Thesis*, 12 *SOCIOLOGICAL FORUM* 371–76 (1997).

¹²⁷ Lorentzen, *supra* note 126, at 146 (discussing the interaction between wealth and status).

¹²⁸ *Id.*; Moen, *supra* note 126, at 429.

¹²⁹ Moen, *supra* note 126, at 430 (discussing “offensive” and “defensive” status politics).

¹³⁰ Wald et al., *supra* note 126, at 2; Moen, *supra* note 126, at 430.

¹³¹ Wald et al., *supra* note 126, at 2. *See also* James Davison Hunter, *Reflections on the Culture Wars Hypothesis*, in *AMERICAN CULTURE WARS*, *supra* note 125, at 243, 251 (discussing the law as an arbiter of moral disagreements).

continued vitality of the traditionalists' lifestyle, which they may perceive as threatened.¹³²

The presence of this perceived threat is crucial to understanding the broad status discourse implicated by pornography. Religious traditionalists opposed to pornography are arguably often not simply articulating a social order, but are doing so in a clear response to their belief that they must defend themselves against other countervailing, incompatible social orders.¹³³ Popular representations of this threat frequently characterize it as originating from a secular, liberal cultural elite with profound contempt for both religion and non-elites.¹³⁴ In Laura Ingraham's 2003 *Shut Up and Sing: How Elites from Hollywood, Politics, and the UN are Subverting America*, the pundit asserts, "Cultural elites regard American values, traditions, and principles as low, embarrassing, and inferior compared to 'higher' European ones."¹³⁵ Ingraham asserts that these elites are "theophobic," but counsels that "[n]othing threatens elites so much as true faith."¹³⁶ Radio host Tammy Bruce's *The Death of Right and Wrong: Exposing the Left's Assault on Our Culture and Values*¹³⁷ accuses the "Left Elite" not of narrow instances of moral weakness or wrongheadedness, but of wholesale rejection of even the concept of moral imperative—and contempt for Americans who do not share this rejection.¹³⁸ Bruce explains, "[t]he Cultural Elite do not want you to feel comfortable about your values. They want you to question whether or not your values are relevant in today's multicultural society."¹³⁹

Issues of sexuality feature prominently in such critiques. Bruce highlights the supposed depravity of cultural elites by recounting the story of a performance piece from the Art Institute of San Francisco that

¹³² Lorentzen, *supra* note 126, at 147.

¹³³ *Id.* at 144–47.

¹³⁴ See William Hoynes, *Public Television and the Culture Wars*, in AMERICAN CULTURE WARS, *supra* note 126, at 61, 73 (citing George Will's discussion of an out-of-touch liberal elite); MICHAEL MEDVED, HOLLYWOOD VERSUS AMERICA: POPULAR CULTURE AND THE WAR ON TRADITIONAL VALUES 1, 3 (1993); S. ROBERT LICHTER ET AL., THE MEDIA ELITE: AMERICA'S NEW POWER BROKERS 2 (1986).

¹³⁵ LAURA INGRAHAM, SHUT UP AND SING: HOW ELITES FROM HOLLYWOOD, POLITICS, AND THE UN ARE SUBVERTING AMERICA 17 (2003).

¹³⁶ *Id.* at 113.

¹³⁷ TAMMY BRUCE, THE DEATH OF RIGHT AND WRONG: EXPOSING THE LEFT'S ASSAULT ON OUR CULTURE AND VALUES (2003).

¹³⁸ *Id.* at 24–27.

¹³⁹ *Id.* at 37.

involved bondage, oral sex, and coprophilia,¹⁴⁰ and faults the National Organization of Women for its supposed abdication of the responsibility to resist and denounce pornography.¹⁴¹ In his book *Porn Generation: How Social Liberalism is Corrupting Our Future*, young conservative Ben Shapiro blames the popularity of pornography partially on the “chaotic existential subjectivis[t]”¹⁴² agenda of elites and the phenomenon of “professors as parents” for university-aged individuals.¹⁴³ He includes remarks from David Limbaugh blaming the popularity of pornography on “secular intellectuals”¹⁴⁴ and bolsters his case with a deluge of anecdotes about promiscuity at Harvard.¹⁴⁵ Many like-minded critics have placed particular focus on the battle over state legitimation of disapproved-of sexual behavior in seemingly elitist venues such as public television¹⁴⁶ and public funding for the fine arts.¹⁴⁷

The threat from liberal elites, then, is characterized as a broad, existential one; issues of pornography and sexual morality are viewed as simply a part of this broader struggle.¹⁴⁸ What does it mean to be a member of the cultural elite? The concept is best understood as focusing on the beneficiaries of the so-called “brow-level hierarchy”—which distinguishes between highbrow, lowbrow, and, sometimes, middlebrow culture. The highbrow ideal allows cultural elites to take a pedagogic stance toward non-elites.¹⁴⁹ This forces non-elites to interact with culture and even public space¹⁵⁰ in the inherently subjugated role of pupil, and provides elites with a form of cultural currency often best received through largely class-segregated venues¹⁵¹ and educational institutions. This may at least partially explain why the sexual content of the fine arts and public

¹⁴⁰ *Id.* at 21–22.

¹⁴¹ *Id.* at 73–74.

¹⁴² SHAPIRO, *supra* note 123, at 6.

¹⁴³ *Id.* at 41.

¹⁴⁴ *Id.* at 192.

¹⁴⁵ *Id.* at 33–46.

¹⁴⁶ Hoynes, *supra* note 134, at 70.

¹⁴⁷ Eck, *supra* note 125, at 92.

¹⁴⁸ See *supra* notes 138–39 and accompanying text.

¹⁴⁹ LAWRENCE W. LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 202–03 (1988).

¹⁵⁰ *Id.* at 202–06.

¹⁵¹ *Id.* at 85–104 (discussing opera attendees and differences in social and economic class).

television have so often been targets.¹⁵² Under the brow-level hierarchy, the constituencies of the fine arts and public television are arguably superior to the bulk of Americans, including most religious traditionalists. It is in this sense that aspects of the conservative anti-pornography movement may be viewed as a part of a broad campaign of cultural dissent. Cultural elites have spent over a century using philanthropy,¹⁵³ elite publications,¹⁵⁴ and sometimes even state power¹⁵⁵ to so entrench the brow-level paradigm that it may seem natural or mandatory.¹⁵⁶ On this background, resisting the brow-level paradigm in the name of a virtue-centered hierarchy could reasonably be seen as a form of valid contestation or even dissent regarding norms of cultural value.¹⁵⁷

These issues are highly salient to the issues of community identity often so heavily in play in the case of expressive land use regulation. Ingraham explicitly ties the divide between cultural elites and moral elites to issues of regional identity, characterizing cultural elites' attitude as such:

Let's face it, if you don't live in New York, Los Angeles, San Francisco, or D.C., then what's the point? Remember, our only real experience with the "fly-over" people was watching *Fargo*, or CNN's coverage of twisters ripping through a trailer park in Tennessee. It's better not to be subjected to those people on a regular basis. They shop at Wal-Mart. They don't go to the gym. They flew flags *before* September 11. How can it be that their vote counts as much as ours?¹⁵⁸

One Republican pollster similarly described the "colliding forces" of cultural politics in terms of explicitly geographic identities: "One is rural, Christian, religiously conservative. [The other] is socially tolerant, pro-

¹⁵² See Hoynes, *supra* note 134 at 70. See also Eck, *supra* note 125, at 91–92.

¹⁵³ LEVINE, *supra* note 149, at 127 (discussing Henry Lee Higginson's philanthropic support of opera).

¹⁵⁴ *Id.* at 207 (citing a 1914 *Atlantic Monthly* article expressing the hope that the popularity of films would allow "the art of the stage . . . [to] escape from the proletariat, and again truly belong to those who in a larger, finer sense are 'the great ones of the earth'").

¹⁵⁵ *Id.* at 202–07 (discussing the pedagogic stance intended in the creation of New York City's Central Park).

¹⁵⁶ *Id.* at 1–9.

¹⁵⁷ *Id.* at 7.

¹⁵⁸ INGRAHAM, *supra* note 135, at 6.

choice, secular, living in New England and the Pacific Coast.”¹⁵⁹ Such a statement is no doubt a gross oversimplification. However, it captures the way in which the supposed conflict between cultural elites and moral elites has embedded itself in the issues of geographic identity that may often inform community identity and thus may motivate expressive zoning.

Furthermore, issues of cultural value and sexual morality have long been salient to not only regional identities but urban and anti-urban identities. Many religious leaders have staunchly denounced city life as breeding sin and alienating inhabitants from their spiritual identities.¹⁶⁰ Proponents of cities reply that cities may be a “high-density repository of culture.”¹⁶¹ Writers such as James Thurber and Granville Hicks have touted the value of urban sophistication, particularly in relation to New York City.¹⁶² One study of students found that those who hoped to eventually live in suburbs were comparatively uninterested in elite cultural and intellectual features of their communities.¹⁶³ Small suburbs, on the other hand, have been characterized as a haven for families¹⁶⁴ and a setting where individuals may see their own virtue confirmed to them by their settings.¹⁶⁵ The main streets of small towns—which might be precisely the kind of place from which individuals might wish to exclude adult businesses—have grown to be viewed as embodying a sense of traditionalism¹⁶⁶ and as creatures of the “heartland.”¹⁶⁷ Urban nightlife, in contrast, has become a recognized site for the challenging of traditional

¹⁵⁹ MORRIS P. FIORINA, *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* 5 (2006).

¹⁶⁰ Jeffrey K. Hadden & Josef J. Barton, *The Image that Will Not Die*, in *NEW TOWNS AND THE SUBURBAN DREAM: IDEOLOGY AND UTOPIA IN PLANNING AND DEVELOPMENT* 23, 30, 54 (Irving Lewis Allen ed., 1977) [hereinafter *NEW TOWNS*] (discussing Jacques Ellul and A.D. Mayo).

¹⁶¹ *Id.* at 54. See also RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* 1, 7 (2004).

¹⁶² Atcheson L. Hench, *The Melioration of ‘Sophisticated’ and ‘Sophistication’*, 35 *AM. SPEECH* 73, 74 (1960).

¹⁶³ Sylvia F. Fava, *The Pop Sociology of Suburbs and New Towns*, in *NEW TOWNS*, *supra* note 160, at 106, 110.

¹⁶⁴ Hadden & Barton, *supra* note 160, at 47–50.

¹⁶⁵ RICHARD SENNETT, *THE USES OF DISORDER* 27–29 (1970).

¹⁶⁶ RICHARD V. FRANCAVIGLIA, *MAIN STREET REVISITED: TIME, SPACE, AND IMAGE BUILDING IN SMALL TOWN AMERICA* xviii (1996).

¹⁶⁷ *Id.* at 66.

sexual norms and the legitimization of new paradigms of sexual behavior and propriety.¹⁶⁸

It is not difficult, then, to see how adult-use zoning, especially *de facto* bans¹⁶⁹ in small communities, could have a highly-charged expressive character. The presentation of a particular moral order via public space implicates far-reaching concepts of cultural value and community identity, not simply questions of sexual propriety. Such questions of value may have broad implications for both private decision-making and any number of critical political issues.¹⁷⁰ It seems inevitable that at least some communities act with these issues in mind, zoning out pornography as an act of implied dissent from cultural norms that community members see as devaluing individuals in their social position, and as an act of affirmation of cultural norms that elevate their status and protect their lifestyle.¹⁷¹ Thus, the crucial doctrinal and conceptual questions arise: how do courts treat such motives, and how should they?

IV. ADULT-USE ZONING AS EXPRESSIVE AND THE SUPREME COURT'S REVIEW OF MOTIVE

A. *Introducing Expressive Zoning to the Framework*

Despite the considerable confusion created by the dissonance between Justice O'Connor's and Justice Kennedy's *Alameda Books* opinions, it appears that, at least for the time being, inquiries into municipal motivation will remain relevant to scrutiny of adult-use zoning, and that zoning governments will be required to establish both the existence of a government interest unrelated to the suppression of speech and establish something akin to predominance over a motivation to suppress. While the specific standard may seem distressingly malleable, if the Court is to be taken at its word, doctrine must be read to the effect that while zoning governments need not prove complete freedom from a motive to suppress—and, in fact, such a motive may clearly exist without requiring invalidation—there is some point of *proportional* motivation after which suppressive motivations must be concluded to be so dominant that the

¹⁶⁸ PAUL CHATTERTON & ROBERT HOLLANDS, URBAN NIGHTSCAPES: YOUTH CULTURES, PLEASURE SPACES AND CORPORATE POWER 147–74 (2003) (discussing the role of urban nightlife on “shifts in gender relations and impact of gay and queer cultures”).

¹⁶⁹ See *infra* Part IV.A.

¹⁷⁰ See, e.g., *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d. 527, 530–31 & n.3 (9th Cir. 1984).

¹⁷¹ See, e.g., *id.* See also *supra* notes 6–20 and accompanying text.

Renton test has been failed. In every case the Court has considered,¹⁷² this battle for dominance has been waged between only two motivations—the motivation forbidden by *O'Brien*, suppression;¹⁷³ and the so-called “secondary effects” of the presence of adult businesses in the circumscribed manner.¹⁷⁴

If, however, expressive motives exist, they do not fall easily into either category. Clearly, a desire to denounce pornography is not independent from the content of the pornography and thus does not fall into the traditional “secondary effects” conception.¹⁷⁵ However, the desire to express an anti-pornography message does not necessarily demonstrate any desire to immediately reduce adult-oriented erotic speech, or to punish or burden those who engage in it.¹⁷⁶ Thus, it falls outside of the dictionary definition of “suppressive.”¹⁷⁷

Communities’ behavior confirms the existence of such expressive desires. For example, it was clear from the Cheboygan organizers’ statements that while their opposition to Fantasies Unlimited was grounded in antipathy to pornography, the full extent of their fervor was directed at its conspicuous availability, not simply the availability itself.¹⁷⁸ The findings drafted by the Renton City Council confirm similar concerns.¹⁷⁹ The council embraced some rationales that fit well with the Supreme Court’s assumptions—it suggested a concern with increased levels of crime, or the loss of businesses.¹⁸⁰ Other rationales, however, mirrored the language of the Cheboygan leaders. The fourth finding worried that adult theaters would undermine “[t]he image of the City of Renton as a pleasant

¹⁷² *United States v. O'Brien*, 391 U.S. 367 (1968); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 425.

¹⁷³ *O'Brien*, 391 U.S. at 377.

¹⁷⁴ *Alameda Books*, 535 U.S. at 440–41.

¹⁷⁵ 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 9:13 (1996).

¹⁷⁶ *Id.*

¹⁷⁷ BLACK’S LAW DICTIONARY (8th ed. 2004) (defining suppress as “[t]o put a stop to, put down, or prohibit; to prevent (something) from being seen, heard, known, or discussed”).

¹⁷⁸ See *supra* notes 6–20 and accompanying text.

¹⁷⁹ *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d. 527, 530–31 & n.3 (9th Cir. 1984).

¹⁸⁰ *Id.* at 531.

and attractive place to reside.”¹⁸¹ The eighteenth similarly suggested that the community “will be an undesirable place to live if it is known on the basis of its image as the location of adult entertainment land uses.”¹⁸² The second, and perhaps most telling, finding was even more explicit, expressing a worry that the presence of adult businesses on the “main commercial thoroughfares of the City gives an impression of legitimacy to” pornography itself.¹⁸³ The Ninth Circuit, the District Court, and the federal magistrate all agreed that “many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter.”¹⁸⁴ They failed, however, to follow their wise observation to its conclusion: that expression of dislike for the subject matter—independent of any suppressive desires—was, in fact, *itself* one of the city council’s reasons. The analytic tool of expressive zoning allows us to take that step.

B. How Expressive Motive Has Been Hidden in the Court’s Analyses

If this third strand of motivation exists, why has the Court not noticed it? A partial answer may be that it has noted instances of its presence, but that those instances have been misidentified and subsumed into the court’s two existing categories, largely thanks to the malleability of many of the core terms used not only by the Court but also by municipalities and ordinances’ challengers themselves. For example, while discussions of secondary effects typically touch on such concrete and genuinely pressing concerns as crime rates and property values, equally prevalent are references to “blight” and “community character.”¹⁸⁵ In light of the Cheboygan leaders’ comments, it is worth asking: is it accurate to characterize adult businesses’ opponents as believing that blight is a secondary effect of the businesses, or do they believe that the businesses *themselves* are blight because of the content of the speech they provide? If the latter is the case, references to blight are best understood as the fusion of two sets of concerns. First are the effects that fall reasonably into the category of content-neutral secondary effects as traditionally conceived, potentially including an area’s loss of businesses that prefer not to be near adult uses, any decrease or increase in recreational pedestrian traffic associated with retail shopping, increase in rates of prostitution, or an

¹⁸¹ *Id.* at 530.

¹⁸² *Id.* at 531.

¹⁸³ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 59 n.3 (1986).

¹⁸⁴ *Renton*, 748 F.2d at 537.

¹⁸⁵ *See supra* notes 6–20, 179–82 and accompanying text.

increase in instances of other crime.¹⁸⁶ Second are the deleterious effects that a thriving, unchastened industry in erotic, adult-oriented speech appearing prominently in central, visible community space might have on a community's sense of identity, especially regarding what cultural value systems it embraces and where it stands in those systems.¹⁸⁷ When a community attempts to address this second set of concerns, it cannot be said to be using content-based distinctions merely as a proxy for targeting other concerns—rather, the content itself is central to the rationale. One should expect the Court, then, to carefully distinguish between these two substantively different types of community interest, despite the fact that both could be grouped under the common definition of blight.

The Court, however, makes no such distinction; instead, it has embraced the term's ambiguity. Justice Kennedy's *Alameda* concurrence, for example, explains secondary effects as such:

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.¹⁸⁸

To what is Justice Kennedy referring? “Value” is a capacious term. It could, in this instance refer only to monetary value—after all, few other forms of value can actually be measured, even if they can be described or observed. The study on which the City of Los Angeles had relied, however, explicitly addressed the possibility that adult-oriented businesses had a deleterious effect on property values and failed to establish the existence of any such link.¹⁸⁹ To what, then, does the word refer? The simplest explanation is that it refers to the kind of noneconomic—but still very real—subjective value that individuals regularly ascribe to their communities.¹⁹⁰ Easily included in this definition of value is community

¹⁸⁶ *Renton*, 748 F.2d at 530–31 & n.3. See reasons 11 and 12 as outlined by the City of Renton in its ordinance.

¹⁸⁷ See *supra* Part III.

¹⁸⁸ *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 444 (Kennedy, J., concurring). The scientific community, presumably, would be excited to hear Justice Kennedy's new method for measuring community integrity.

¹⁸⁹ *Id.* at 435.

¹⁹⁰ Cf. Avery Katz, *Law, Economics, & Norms: Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1750–51 (1996).

valuation of a public space without conspicuous availability of pornography. This value could include fulfillment of a community's desire to articulate what cultural vision the it embraces, in light of the crucial role opposition to pornography has played such in to dissent from perceived social norms about cultural hierarchy.

Even if one chooses to read Justice Kennedy's invocation of value narrowly, it is difficult to conceive of any definition of community integrity that would not accommodate the Cheboygan concerns. He further loads his analysis with obscure, ambiguous, and value-loaded terms. He explains that *Renton* held "that while the material inside adult bookstores and movie theaters is speech, the consequent sordidness outside is not."¹⁹¹ The statement, on first glance, comes quite close to forming an accurate assessment of conspicuousness-focused concerns in the Cheboygan mold—certainly, it is the closest any opinion from the Court has come. On examination, however, the statement collapses on itself. There is much hypothetical sordidness that certainly isn't speech. There is also a good deal that would qualify as sordid that undoubtedly is speech, although such speech could perhaps be constitutionally punished if spoken on a sidewalk. If, then, Justice Kennedy's statement cannot mean what it literally says, what does it mean? He suggests that dispersing adult businesses might be justified because two businesses in proximity might attract "a critical mass of unsavory characters."¹⁹² This statement shares the same cardinal flaw as the references to sordidness, value, and integrity. What is an unsavory character? Is it a criminal? Surely a municipality can legitimately pursue policies to avoid attracting criminals. But is a regular consumer of adult videotapes also an unsavory character? Many Americans might agree that she is. All the terms Justice Kennedy invokes contain a core of concerns that fall well within what a reader could consider a legitimate, content-neutral state interest; yet in each instance, Justice Kennedy eschews the opportunity to confine himself to precise language invoking only those interests, choosing instead to utilize terms that are equally accommodating to concerns founded centrally on disapproval of content.¹⁹³ He is not the first Justice or litigant to do so. Justice Powell's *American Mini-Theaters* concurrence justified restrictions as defense against deterioration of

¹⁹¹ *Alameda Books*, 535 U.S. at 445.

¹⁹² *Id.* at 452.

¹⁹³ *See, e.g., id.* at 444 (likening speech's tangible consequences to pollution from a factory and the obstruction of a road from a billboard, followed by measurable damage to neighborhoods from high concentration of adult businesses).

“social, environmental, and economic values” and stressed the validity of adult-use zoning undertaken to “preserve the character of specific areas of a city.”¹⁹⁴ Even the ACLU, in its amicus brief for *Renton*, conceded the validity of the “community character” rationale.¹⁹⁵ Why, though, should truly content-neutral concerns be lumped with concerns that are entirely content-dependent? Even if both should, in some circumstances, be tolerated, their implications in a First Amendment analysis seem distinct enough to warrant separation. A willingness to acknowledge the existence of content-based but non-suppressive motivations would make this move possible.

Non-suppressive content-based motivation is not only misidentified as concern for content-neutral secondary effects; it can also be misidentified as intent to suppress. As discussed above, the Ninth Circuit in *Renton* considered it damning that so many of the city’s findings were simple statements of disapproval of subject matter.¹⁹⁶ But the *Renton* test does not ask courts to identify disapproval—it asks courts to identify intent to suppress.¹⁹⁷ It is completely possible, though, that a municipality could be motivated entirely by disapproval of the content of protected speech and pass a law with no suppressive intent. What if, for example, the Renton City Council, motivated entirely by disapproval of the content of speech offered in a new adult bookstore, bought a series of ads in national and local publications declaring “Renton is for families?” There, the motivation is disapproval of speech, but there is no motive to suppress. The analytic tools of expressivism remind us that some state actions can be viewed as similar expressive outputs.¹⁹⁸ One might caution that the zoning ordinance, unlike the advertising campaign, regulates the very speech of which the municipality disapproves.¹⁹⁹ This is a meaningful distinction—but it is not a distinction about whether the programs were implemented with suppressive motive. It is a distinction about whether the strategy is unduly suppressive. This question is addressed separately from the motivation inquiry in the *O’Brien*, *Renton*, and *Alameda* formulas.²⁰⁰ The relevant point to the intent inquiry is that proving disapproval as a

¹⁹⁴ 427 U.S. 50, 80 (1976) (Powell, J., concurring).

¹⁹⁵ Brief of the American Civil Liberties Union et al., *supra* note 28, at 42.

¹⁹⁶ See *supra* note 47 and accompanying text.

¹⁹⁷ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

¹⁹⁸ See *supra* Part III.A.

¹⁹⁹ *Renton*, 475 U.S. at 57 (Brennan, J. dissenting).

²⁰⁰ *Id.* at 54 (majority opinion); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring); *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

motivational component brings a court only partway to establishing suppressive intent. State actors, like individuals, have various reactions to disapproved-of speech; they may try to suppress or they may try to rebut.

V. EXPRESSIVE ADULT-USE ZONING AND THE PURPOSES OF THE FIRST AMENDMENT

It is unclear, after *Alameda*, what level of interest a municipality must establish to justify adult-use zoning; if the *Renton* line of cases is still to be understood as an application of *O'Brien*, the interest would have to be “substantial,” but practice and the rhetoric of the *Alameda* opinions both seem to suggest that the Court now demands that the interest only be legitimate.²⁰¹ Both terms are sufficiently malleable that it is unnecessary to this inquiry to determine which controls. Because the Court has not yet even acknowledged the existence of non-suppressive desire to express cultural attitudes through land use regulation,²⁰² it is free to find the interest both substantial or insubstantial, legitimate or illegitimate. The relevant question is whether the non-suppressive desire to express cultural attitudes should be grouped with the interests that must be shown to predominate over the desire to suppress. If that motivation is found to be permissible, the next question is whether the strategy—in this case, the zoning—is sufficiently narrowly tailored.²⁰³

Here, our doctrinal and conceptual inquiries converge. If the Supreme Court is to refashion its test to account for the features revealed by this Article’s model, it should do so in light of a full examination of the ways in which expressive adult-use zoning serves First Amendment values. If zoning bodies’ actions map well onto the most positive features of decisional dissent, it would make sense to endorse judicial tolerance of municipal attempts to express their cultural dissent through zoning. Choosing otherwise would rob municipalities of a potent tool for providing the robust benefits of free discourse. Additionally, if the advantages unique to decisional dissent are applicable, it will be evidence that there truly is no more narrowly-tailored alternative that would be equally effective in accomplishing the municipalities’ goals. However, if adult-use zoning does not provide many of the unique strengths of decisional dissent, and if it succumbs to many of its potential pitfalls, it would be difficult to

²⁰¹ *Renton*, 475 U.S. at 47 (majority opinion); *Alameda Books*, 535 U.S. at 438 (opinion of the court).

²⁰² See *supra* Part IV.

²⁰³ *O'Brien*, 391 U.S. at 377.

argue that the Court should countenance the incidental suppressive effects of a restrictive ordinance.

A. How Expressive Adult-Use Zoning Improves Democratic Decision-Making

Likely the most conventional rationale for encouraging a robust system of expression is the belief that it will improve democratic decision-making.²⁰⁴ Such arguments typically rely on the Millian assumption that, through regular contestation, a society may test its preconceptions against critical competitors, creating opportunities to “exchang[e] error for truth.”²⁰⁵ As Gerken notes, however, contestation can only improve democratic decision-making if it is sufficiently visible, and high visibility is often only available to a handful of elite dissenters with access to resources, education, and prominence that many disempowered individuals lack.²⁰⁶ Nowhere is this fault more salient and damaging than when dissent is itself a direct challenge to the structures and assumptions by which cultural and political elites maintain power. Gerken points out that decisional dissent can serve as an equalizer, because it allows average, non-elite dissenters to engage in high-visibility dissent by capturing small, local governing authorities that elites often ignore.²⁰⁷ As discussed above, the desire to stigmatize pornography can often be understood as part of a radical rejection of the cultural hierarchies that bolster and glorify

²⁰⁴ See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 302 (1978); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

²⁰⁵ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 10 (Filibarian Publishing 2007) (1689); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1 DUKE L.J. 1, 86 (1984). See also *Whitney v. California*, 274 U.S. 357, 375 (1927) (arguing that “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies”) (Brandeis, J., & Holmes J., concurring); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 601–64 (1982); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

²⁰⁶ Gerken, *supra* note 24, at 1759–98.

²⁰⁷ *Id.* at 1763.

perceived cultural elites.²⁰⁸ Because this message alleges to threaten cultural elites, it would be a serious and potentially counterproductive step to allow the federal judiciary—a highbrow institution if ever there were one—to deny access to an avenue as apparently populist as grassroots-enabled local movements such as occurred in Cheboygan.²⁰⁹ Even if the full degree of anti-pornography advocates' disempowerment is itself highly contestable, it is at least clear that allowing individuals such as the angry Cheboyganites to express their attitudes through their main street adds an additional voice in a unique medium to an important and highly contested debate.

B. How Expressive Adult-Use Zoning Pollutes Democratic Decision-Making

Visibility alone, however, is not enough to make decisional dissent a successful vehicle for improving democratic decision-making; if, as Gerken cautions might sometimes be the case, the signal sent is unclear or confusing, decisional dissent will offer no advantage in agenda-setting.²¹⁰ The struggles of the federal judiciary to comprehend the motivations of municipalities should be enough to establish that the signal is, in fact, considerably unclear. Courts have, so far, read community motivations in one of two ways: either as a desire to suppress pornography; or as a desire to address some wholly unrelated problem.²¹¹ Courts have been reluctant to recognize that motivations might be expressive and cultural, rather than regulatory and political. It is an understandable failing—legal professionals are trained to think of laws as policies, not as expressive acts, and especially not as expressive acts with cultural, rather than political, targets.²¹² But identifying cognitive error does not magically correct it, and there is no reason to think that this confusion will not continue to persist,

²⁰⁸ See *supra* Parts III.B, IV.

²⁰⁹ Fornes, *supra* note 6–20 and accompanying text.

²¹⁰ Gerken, *supra* note 24, at 1768.

²¹¹ See *supra* Part IV.A.

²¹² Cf. Robert W. Gordon, Modes of Legal Education and the Conditions that Sustain Them, Address at SELA Conference—Law as Object of Transformation (June 8, 2002), available at <http://islandia.law.yale.edu/sela/gordone.pdf> (discussing the nature of the American legal education system and the need to broaden that education to include “the norms and ideal social and economic conditions that . . . legal sciences and techniques must serve. Social vision without technique . . . is ineffectual; but technique without vision is a menace”).

and that a Court's reframing of the issue wouldn't lead to further confusion in the populace.

More dangerous than a simple lack of clarity, however, is the possibility of sending a signal that appears clear but is, in fact, wrong, and it is here that tolerance for adult-use zoning as a dissenting strategy presents the most serious problems. Gerken points out that one of the greatest strengths of decisional dissent is the opportunity to “remap[] the politics of the possible”—to change perceptions about what policies are sustainable or achievable by providing a “real-life instantiation of an idea.”²¹³ She provides as an example the effects of successful local integration in developing support for integration nationwide.²¹⁴ Adult-use zoning regulations, however, are particularly problematic in this regard, largely due to the potential for mixing of signals that occurs when dissent may implicate both cultural and political norms.²¹⁵ The danger is that the ordinances, which gain their popularity in part as dissent regarding broad cultural struggles, may be incorrectly read as a real-life instantiation of a specific sustainable policy preference—a peril greatly magnified by the features of the market for pornography in the digital age.

A simple thought experiment illustrates how a community's combined desire for a product and aversion to its conspicuousness might express itself accurately over space—and how one simple added variable can destroy that accuracy.

Our hypothetical Rentonia is a square-shaped island nation consisting of twenty-five counties, each one square unit in size. Rentonians live in homes spaced evenly throughout each county. In Rentonia, there is a product, X, for which there is considerable demand but also considerable ill repute—Rentonians would much prefer that X not be visible within their counties, as long as they did not have to give up their consumption of the product. In fact, all Rentonians share a single, static preference set: each will support a countywide ban of sales of X, unless that ban would require her to travel farther than one unit, round trip, to obtain it. Each year, each county populace meets and votes on if they wish to ban sales of X. If the vote is unanimous for a ban, a ban will begin (or, if one preexisted, continue) for the next year; if not, X sales will be legal. None of the counties' votes occur on the same day, so each county is aware of the status quo it will be legislating within. At the start of our experiment, bans

²¹³ Gerken, *supra* note 24, at 1766.

²¹⁴ *Id.*

²¹⁵ *See supra* Part II.

and non-bans are distributed randomly among counties. When the voting cycle begins, some counties will enact bans because no resident would be required to travel more than a half-unit to reach another county with X available. Other bans will lapse because residents in the center, corner, or edges of the county cannot obtain X without traveling farther than they are willing. Each county's decision will form the backdrop of X availability that will determine the next county's vote. We would expect years of flux within counties as the counties around them changed policy, enabling or disrupting unanimity. Eventually, however, the ever-shifting policies of the counties of Rentonia could reach this stable configuration:

1	2	3	4	5
6	7	8	9	10
11	12	13	14	15
16	17	18	19	20
21	22	23	24	25

Grey = X readily for sale.

At that point, the fluctuation would stop. Each county above would be expected, in perpetuity, to vote the same way in each upcoming election, because no county with a ban has individuals who are more than one half-unit away from a non-banning county, and no county without a ban would enact a new one, as any such ban would leave some resident too far from available X. One can imagine, then, what it would be like to be a tourist in Rentonia at any point during our experiment. One would either witness a state of widespread fluctuation in the availability of X, or a checkerboard of bans and open markets. Either way, the perception would be the same: that the people of Rentonia had strong negative feelings about X but that they also wished to consume it—a completely accurate perception.

Imagine, now, that X is an information good that can be downloaded for the same cost from a distant server in the faraway nation of Alameda. Counties could then enact sales bans without imposing prohibitive transportation costs on consumers. Within a single round of voting, a tourist visiting Rentonia would see this:

1	2	3	4	5
6	7	8	9	10
11	12	13	14	15
16	17	18	19	20
21	22	23	24	25

Alameda

Grey = X readily for sale.

Despite an unchanged set of preferences, the consumption of X is all but invisible, observable only within homes and in Alameda. Close analysis would reveal that demand was unchanged, but to the casual observer, it would be completely reasonable to think that there was overwhelming consensus in Rentonia that X could and should be banned.

The real world, of course, is not so simple. Nevertheless, the central principle that the experiment demonstrates is accurate—that when there exist, simultaneously, a strong market for a particular good, a desire to achieve or maintain the absence of outlets selling that good within specific jurisdictions, and limited but real willingness to travel to obtain the goods, patchworks of availability and spatially-limited bans will arise reflecting the conflicting desires of the populace. However, this accurate expression

is disrupted by transforming the good into electronically-transmittable information. When the need for expensive travel to obtain the goods is eliminated, the patchworks will disappear and bans will become nearly costless.

This is the situation brought on by the rise of internet pornography. Websites can offer content identical to—and more various than—adult bookstores or theaters.²¹⁶ While the internet cannot offer the kind of physical proximity that adult dancing can provide, there is considerable evidence that many customers prefer adult dancing to other adult entertainment not solely because of the physical proximity but because of the opportunity for personal interaction with dancers.²¹⁷ This desire can be met by websites that feature individual, recurring adult stars who interact with their customers electronically.²¹⁸ The result is that every municipality has the luxury to effectively ban adult businesses without overwhelmingly frustrating its residents' access to markets in adult materials. Here, the decisional dissent paradigm helps to understand the municipalities' behavior. Why would they choose to enact such baldly ineffective bans? The answer may often be that effectiveness is beside the point, because the municipality is acting in its expressive, rather than its regulatory, capacity. The danger, though, is that in doing so they will give two dangerous, false impressions. First, national political actors may read widespread local antipathy to adult businesses as indicative of a broad genuine, unconflicted and uncomplicated desire to eliminate pornography, rather than simply a portion of a broader discourse on other issues. As discussed above, this assumption could be mistaken.²¹⁹ Second and more dangerously, widespread adult-use zoning may create the false impression that aggressive nationwide restriction on pornography would be feasible and sustainable. There are already hints that such regulation may be coming back into vogue.²²⁰ Adult-use zoning, however, offers all the expressive

²¹⁶ For example, adult bookstores and websites may generally offer similar erotic movies, images, and text, but websites often provide additional services, including live chat and video feed. *See, e.g.*, Cyber Xstream, <http://www.cyberxstream.com/> (last visited Sept. 7, 2008).

²¹⁷ *See* KATHERINE FRANK, G-STRINGS AND SYMPATHY: STRIP CLUB REGULARS AND MALE DESIRE xxiii (2002).

²¹⁸ *See, e.g., supra* note 216.

²¹⁹ *See infra* Part V.B.

²²⁰ *See, e.g.*, Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/19/AR2005091901570.html>.

value and all the feel-good benefits of a pornography ban without actually banning any pornography. A full ban would be quite a different story—and might even be a debacle on par with national Prohibition, considering the size of the national market.²²¹

VI. A COMPROMISE: EXPRESSION AS LICIT BUT INSUFFICIENT MOTIVE FOR ZONING

Because the use of expressive adult-use zoning presents both considerable risks and considerable benefits,²²² we do not have the option to simply embrace or denounce it outright. It does seem to provide some individuals who apparently feel threatened or disempowered with a rewarding and meaningful opportunity for both collective self-expression and collective articulation of a potentially competitive ideal.²²³ The dangers of expressive adult-use zoning, however, are enough to dampen our enthusiasm for its possibilities. The possibility of cultural disempowerment and political disempowerment failing to correspond is grave. While subjugation within a cultural hierarchy is a real burden with real harms, it is hard to argue that the desire to dissent from it justifies use of potentially suppressive state power on behalf of an already politically powerful group.

Moreover, expressive adult-use zoning may present a double-edged sword. If a *de facto* ban on adult businesses reduces the availability of adult-oriented erotic speech in such a severe quantity and manner that online outlets cannot provide a sufficient alternative, then it will not merely have expressed an attitude disapproving of pornography; it will also have materially disadvantaged alternative points of view. On the other hand, if a *de facto* ban can be offset sufficiently with online alternatives, this offsetting will increase the risk of false signaling—the possibility that the mishmash of implicated cultural and political norms, combined with the cost-reducing inefficacy of geographically limited *de facto* bans, might create a false impression that national policing of sexual expression is more widely desired, less widely opposed, and more feasible than it actually would be.

²²¹ Andrew Gilden, Note, *Sexual (Re)Consideration: Adult Entertainment Contracts And The Problem Of Enforceability*, 95 GEO. L.J. 541, 543 (2007) (stating that adult entertainment industry is a \$4–12 billion industry).

²²² See Kimberly K. Smith, Comment, *Zoning Adult Entertainment: A Reassessment of Renton*, 79 CALIF. L. REV. 119, 144–46 (1991) (discussing the risks and benefits of adult use zoning).

²²³ See *supra* notes 6–20 and accompanying text.

This Article proposes a compromise. Courts, under current Supreme Court doctrine, are bound to determine if legitimate or substantial government motive is dominant over suppressive motive.²²⁴ Different courts have lumped some expressive motivations in with both suppressive and legitimate motives.²²⁵ However, courts could attempt to identify such motives and remove them from the calculus altogether—in other words, to include them neither in the motives that may be aggregated to be found to be predominate, nor in the motives that must be dominated. The Court's current test could be illustrated as such:

Desire to eliminate availability of materials, opportunities to engage in some types of expression	Explicit community disapproval of certain materials or types of expression	Objectively unmeasurable quality of life concerns, community character, integrity	Reduction of crime, traffic, noise
Suppressive		Legitimate/Substantial	

This Article's proposed test would change that dynamic to this—where only the outer two motivations would be pitted against each other, and the dominant motivation between the two would determine the constitutional outcome:

Desire to eliminate availability of materials, opportunities to engage in some types of expression	Explicit community disapproval of certain materials or types of expression	Objectively unmeasurable quality of life concerns, community character, integrity	Reduction of crime, traffic, noise
Suppressive	Discounted from inquiry		Legitimate/ Substantial

²²⁴ See *supra* Part IV.A.

²²⁵ See *supra* Parts I, IV.B.

This compromise would allow communities considerable freedom to use adult-use zoning as decisional dissent. However, this freedom would be tempered by the requirement that they cannot pursue it in the absence of other, more traditional regulatory concerns, providing a needed safeguard to keep cultural motivations from overpowering the agenda of governance. Throughout, the desire to suppress would retain its traditional disfavored place.

The current doctrine is marred by its propensity to reward the charade, pointed out by Justice Souter, that zoning authorities are being illogically motivated by largely unsubstantiated theories about secondary effects, not simple community disapproval.²²⁶ Because this Article's analysis separates suppressive motive from merely disapproving motive, such fictions will no longer be necessary. Courts would not need to deny the powerful role of community disdain for pornography—or rely excessively on speculative theories to manufacture motive to overcome it. Instead, courts would weigh apparent motive to actually eliminate or burden protected expression against apparent motive to address issues such as crime and property values. As a result, for example, small communities whose limited territorial control render them virtually incapable of actually effectively suppressing speech—and thus unlikely to intend to do so, even if motivated strongly by disapproval of pornography—would not need to hide their motivations or engage at length in mandatory formalities to obscure their concerns. Nevertheless, communities would, in many ways, find themselves in a position similar to their current one, in which they possess a qualified right to enact stringent adult use zoning regimes. They would, however, face less need to hide their disapproving attitude toward pornography. As a counterbalance, they would lose the option to deceptively invoke vague “quality of life” categories as secondary effects – and instead be forced to rely on actual evidence of the sort Justice Souter described in his *Alameda* dissent.²²⁷

CONCLUSION

It should be no surprise to anyone that governing bodies sometimes adopt regulations to “send a message” as much as to achieve any meaningful or coherent policy outcome.²²⁸ However, there are

²²⁶ *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 458–59 (2002) (Souter, J., dissenting).

²²⁷ *Id.*

²²⁸ *See supra* Part II.A.

considerable prudential concerns that might suggest that courts should view policy creation as motivated purely by policy preference, even if such an account is descriptively flawed.²²⁹ To do otherwise might lend legitimacy to such symbolic regulation and further incentivize wielding the heavy hammer of state power to make simple rhetorical points, which could prove both dangerous and inefficient.²³⁰ Acknowledging motivations other than policy preference might also cause problems for purpose-based hermeneutics; how could a judge craft a purposive interpretation of a statute's terms as statements of policy if that judge acknowledged that the motivations for passing the statute had little or nothing to do with policy outcomes? It is this Article's position that introducing a limited acknowledgment of expressive motive in the adult-use zoning setting would be a sufficiently minor and isolated step to avoid bringing any particular judicial house of cards crashing to the ground. The Supreme Court would merely need to state that while it is legitimate for a community to want to use zoning to express its cultural values, such a motivation alone is insufficient to justify a burden on speech. Furthermore, doing so would simply entail acknowledging the preexisting but obscured status quo that, when it comes to the narrow issue of zoning for the purpose of community cultural self-definition, regulating with expressive motivation is legitimate. Thus, the change in doctrine would present only minimal risk of spreading that assumption to other policy arenas. Under the new doctrine, litigants would not need to try to mask their animating antipathy toward pornography, and courts would not need to pretend not to notice it—creating a much more honest and politically straightforward process.

²²⁹ See *supra* Part II.B.

²³⁰ See *supra* Part V.