

Beneath Oceans, Airstrips, and Sports Stadiums: Negative Solution to the Alternative Avenues Timeframe Debate

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NOTE

BENEATH OCEANS, AIRSTRIPS, AND SPORTS STADIUMS: NEGATIVE SOLUTION TO THE “ALTERNATIVE AVENUES” TIMEFRAME DEBATE

*Peter T. Cavallaro**

The First Amendment provides sanctuary for unpopular forms of speech, but its protections are not absolute. One hotbed issue in recent years involves the degree to which adult entertainment speech merits protection in light of the municipal zoning prerogative. Under the Supreme Court’s jurisprudence, a zoning law must leave open “reasonable alternative avenues of communication” for such expression to take place; yet federal jurisdictions have split over the relevant timeframe for assessing the adequacy of these alternative sites: should the analysis focus on the circumstances that exist at the time the ordinance is enacted or at the time it is challenged? This dispute, although simply stated, implicates a host of profound concerns such as the philosophical justification for a free speech right, the proper means by which that right (as enshrined in the constitutional text) should be interpreted, the judiciary’s role in refereeing the protections afforded by that right, and the desirable bounds of majoritarian action in this sphere (as a policy matter). Negative theory—a mode of constitutional interpretation that justifies the protection of speech by focusing on the pitfalls of government regulation—is a normatively ideal solution to this timeframe debate and suggests the embrace of a time-of-enactment regime. Furthermore, we can use the principles of negative theory to construct a sound blueprint for safeguarding the municipal zoning power.

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INTRODUCTION

Rousseau observed amidst the deceptive calm of prerevolutionary France that “[m]an is born free, and he is everywhere in chains.”¹ Perhaps in similar spirit, today’s First Amendment advocate might lament that man is born naked and yet is everywhere in clothes. The freedom of speech represents one of America’s hallmark values, yet delineating its proper scope can be a tricky business; it is a task that demands mastery over those twin judicial arts: distinction-drawing² and the balancing of rights against harms.³ In this regard, perhaps the hottest arena of recent controversy features the expressive rights of adult entertainment businesses pitted against the prerogative of local governments to regulate the time, place, and manner of that expression through zoning.⁴

¹ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* bk. I, at 49 (Maurice Cranston trans., Penguin Books 1968) (1762).

² Compare *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (“In order for . . . school officials to justify prohibition of a particular expression of opinion, [they] must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”), with *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“A school need not tolerate student speech that is inconsistent with its ‘basic educational mission’ . . .”). A bedrock distinction employed by the Court to evaluate speech restrictions is that of time, place, and manner. See *Cox v. New Hampshire*, 312 U.S. 569, 575–76 (1941).

³ See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre . . .”).

⁴ See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

The Second Circuit recently faced one such case in *TJS of New York, Inc. v. Town of Smithtown*, which considered the zoning ordinance of a Long Island town that restricted the locations available to adult entertainment businesses.⁵ As mandated by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, a zoning ordinance that restricts where adult entertainment businesses can operate must leave open “reasonable alternative avenues of communication” for such expression to take place within the municipality.⁶ *TJS*, however, featured an unresolved derivative question: is the availability of those alternative sites to be evaluated at the time the zoning ordinance is *enacted* or at the time it is being *challenged*?⁷ The Second Circuit resolved this issue by embracing the latter, time-of-challenge option; yet in so doing, the court acknowledged that its holding was apparently at odds with two other federal jurisdictions,⁸ namely the Eleventh Circuit and the District of Maryland.⁹

This dispute over the inquiry’s relevant timeframe—an “interesting and surprisingly unanswered question,” according to the Second Circuit¹⁰—raises profound issues regarding both the philosophical justification for a free speech right as well as the proper judicial role in preserving that right. At the outset of our investigation, however, it is important to clarify what constitutes “adult entertainment” for the purposes of this Note. The operative definition used herein is drawn from the zoning ordinance at issue in *TJS*:

A public or private establishment which presents topless dancers, strippers, male or female impersonators, exotic dancers or other similar entertainments and which establishment is customarily not open to the public generally and excludes any minor by reason of age. This includes adult massage parlors, peep shows and adult theaters and similar types of businesses.¹¹

As a starting point for this analysis, the jurisprudence that has emerged from the federal circuit courts in the wake of *Renton* articulates a critical limitation on the “alternative avenues” requirement. The case law makes clear, on the one hand, that a qualifying site cannot be so blatantly unfeasible as to be, say, underwater or beneath a sports sta-

⁵ 598 F.3d 17, 21 (2d Cir. 2010).

⁶ *Renton*, 475 U.S. at 50.

⁷ *TJS*, 598 F.3d at 18–19.

⁸ *See id.* at 24.

⁹ *See* *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860 (11th Cir. 2007); *Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery Cnty., Md.*, 256 F. Supp. 2d 385 (D. Md. 2003).

¹⁰ *TJS*, 598 F.3d at 18.

¹¹ *Id.* at 30 n.1.

dium;¹² at the same time, however, the case law makes equally certain—building off of the self-limiting language of *Renton* itself¹³—that the alternative venues a municipality must provide do not have to be commercially viable or even economically feasible.¹⁴ The impression one receives, therefore, is that the alternative avenues requirement, as construed by *Renton* and its progeny, is not a de facto-focused mandate that compels a municipality to guarantee a set quantity of actual sites but rather a more modest dictate for the preservation of *theoretical* space.¹⁵

This Note contends that *Renton*'s limitation on the alternative avenues requirement is eminently compatible with—and indeed, best explained by—a so-called “negative theory” of the First Amendment. Negative theory premises the sanctity of free speech not on any particular positive good that is secured through speech but rather on the special dangers attaching to the government's improper regulation of it.¹⁶ In other words, what guides the negative constitutional analysis is whether the government's *motive* for placing a given restriction on speech is proper.¹⁷ This Note thus advocates for applying a negative framework to resolve the jurisdictional quarrel at hand. Specifically, this Note argues that negative theory yields an interpretive rejoinder to the Second Circuit's *TJS* ruling and favors evaluating constitutionality at the time of *enactment*.

Part I of this Note sketches the operative case law on the topic. Subsection I.A explores the parameters of the alternative avenues requirement and the implications of *Renton*'s self-limiting language as it has been applied in the federal circuits. Subsection I.B zooms inward to investigate the specific jurisdictional dispute at hand by summarizing the authorities lined up on both sides. Part II then introduces negative theory as a mode of First Amendment interpretation. Subsection II.A provides a descriptive account of the theory's doctrinal underpinnings, and Subsection II.B discusses the historical and philosophical realities that render negative theory normatively optimal as a mode of constitutional analysis. Part III then applies this theory to the present controversy. Subsection III.A examines how negative theory convincingly accounts for the federal judiciary's approach in other First Amendment contexts and proceeds to apply the theory to the sphere of adult entertainment businesses, offering a resolution to the jurisdictional split highlighted in *TJS*. Subsection III.B then goes on to employ the negative framework to suggest a

¹² See, e.g., *Topanga Press v. Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993).

¹³ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

¹⁴ See, e.g., *Woodall v. City of El Paso*, 49 F.3d 1120, 1126 (5th Cir. 1995).

¹⁵ See *infra* note 56 and accompanying text.

¹⁶ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 80–81 (1982).

¹⁷ See Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 15–16 (1989).

blueprint for safeguarding municipal zoning rights justified as a defense of majoritarian processes and rooted in the value of legislative repose. A brief Conclusion follows.

I. THE “ALTERNATIVE AVENUES” TIMEFRAME DEBATE

A. *The Evolution of the Court’s “Alternative Avenues” Jurisprudence*

“Congress shall make no law . . . abridging the freedom of speech”¹⁸ So reads the First Amendment, whose hallowed protections have been incorporated against the states through the Due Process Clause of the Fourteenth Amendment.¹⁹ Yet delineating the scope of this succinct command has often proven difficult, especially amidst the technological boom of the twentieth century that gave rise to a new array of expressive mediums.²⁰ The Supreme Court responded to this challenge by broadly extending constitutional coverage to art forms such as motion pictures, television and radio broadcasts, and live stage performances.²¹ The Court also emphasized that the mere display of nudity “does not place [this] otherwise protected material outside the mantle of the First Amendment.”²² As a result, adult entertainment expression qualifies as protected speech under the First Amendment and is immunized from outright silencing by the government.²³

The protection afforded to adult entertainment is not unlimited, however: the second edge of the constitutional sword, concomitantly sharpened by the Court’s jurisprudence, is the municipal prerogative to subject that industry to stringent regulation through zoning.²⁴ The Court

¹⁸ U.S. CONST. amend. I.

¹⁹ See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²⁰ See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (string-citing a progression of cases where the First Amendment was applied to new communicative mediums).

²¹ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (holding the content of motion pictures to be subject to First Amendment protection); *Schacht v. United States*, 398 U.S. 58, 63 (1970) (holding the content of live stage performances to be subject to First Amendment protection); *Schad*, 452 U.S. at 65 (“[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”). See generally *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”).

²² *Schad*, 452 U.S. at 66; see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (finding that mere nudity does not itself constitute obscenity and thus invalidating a municipal ordinance that banned all films depicting nudity).

²³ See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 285 (2000) (classifying nude dancing as expressive conduct that is “entitled to some quantum of protection under the First Amendment”).

²⁴ One analysis identifies *California v. LaRue*, 409 U.S. 109, 114–16 (1972) as the genesis of this jurisprudence, wherein the Court held under the Twenty-first Amendment that municipalities could ban nude dancing in establishments where alcoholic beverages were being sold. See Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The*

first endorsed this prerogative in *Young v. American Mini Theatres* (1976), where it upheld a Detroit ordinance that prohibited adult theaters from locating within 500 feet of a residential zone or within 1,000 feet of any two other “regulated uses.”²⁵ Writing on behalf of the plurality, Justice Stevens affirmed the propriety of imposing special location-specific burdens on adult theaters by categorizing such requirements as valid restrictions on time, place, and manner.²⁶ Justice Stevens anchored this view in a determination that adult entertainment speech fell outside the core nucleus of First Amendment protections (unlike, for example, political speech), so as to render it susceptible to being outweighed by countervailing government interests.²⁷ In sum, *Young* held that although the First Amendment assuredly prevents municipalities from suppressing adult entertainment speech altogether, they could nonetheless “legitimately use the content of [those] materials as the basis for placing them in a different classification from other motion pictures.”²⁸

Young’s critical pronouncement—that municipalities could target the ancillary effects of speech, which naturally inhere by virtue of what that speech *is* (and are thus eminently bound up with the *content* of that speech), without discriminating against such speech on the *basis* of its content²⁹—set the stage for subsequent elaboration of how local governments might wield the zoning power to curb adult entertainment. Five years after *Young*, in *Schad v. Borough of Mount Ephraim*, the Court struck down a New Jersey borough’s ordinance banning all forms of live entertainment,³⁰ which was precisely the sort of “total suppression” that *Young* proscribed.³¹ In so holding, however, the Court reemphasized that the municipal prerogative to regulate speech-related land use was “undoubtedly broad”³² and once again fastened this power to a concern over the speech’s peripheral impact, noting how the exercise of zoning

Legislative Assault on Sexually Oriented Businesses, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287, 294–95 (2004).

²⁵ *Young v. American Mini Theatres*, 427 U.S. 50, 52 (1976).

²⁶ *See id.* at 71–72 (plurality opinion).

²⁷ *See id.* at 70 (plurality opinion) (“[E]ven though . . . the First Amendment will not tolerate the total suppression of erotic materials . . . it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate [F]ew of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”).

²⁸ *Id.* at 70–71 (plurality opinion).

²⁹ *See id.* (plurality opinion).

³⁰ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72 (1981).

³¹ *Young*, 427 U.S. at 70 (plurality opinion).

³² *Schad*, 452 U.S. at 68.

authority was an “essential aspect of achieving a satisfactory quality of life.”³³

Five more years passed before the Supreme Court decided *City of Renton v. Playtime Theatres* and set forth the operative test for analyzing the constitutionality of a law that restricts the sites available to adult entertainment businesses.³⁴ There, the Court upheld an ordinance that prohibited adult theaters from being located within 1,000 feet of any residential zone, family dwelling, church, park, or school.³⁵ Because this law did not constitute an outright ban (in contrast to *Schad*), the Court, citing *Young*, analyzed it under the framework of time, place, and manner restrictions.³⁶ With this threshold distinction drawn, Justice Rehnquist, for the Court, located the primary analytical fault-line with the existence (or lack thereof) of content discrimination: laws inhibiting adult entertainment speech on the basis of its content (however understood) “presumptively violate the First Amendment.”³⁷ If, however, an ordinance is facially content-neutral, it will be upheld so long as (1) it is “designed to serve a substantial governmental interest” and (2) it does not “unreasonably limit alternative avenues of communication.”³⁸

Renton’s identification of content neutrality as the analytical pivot for this inquiry draws its decisiveness from how the Court then proceeded to articulate the meaning of that term. Justice Brennan, in dissent, disputed that the “content-neutral” label even applied to the law at hand, noting that the restrictions pertained exclusively to businesses voicing a particular form of speech (sexually explicit films).³⁹ The majority, however, embraced a broader definition of neutrality, grounded not on the law’s consequent impact but rather on the scienter that lay behind its enactment. While conceding that the *Renton* ordinance singled out adult theaters for special treatment, the Court rejected Justice Brennan’s conclusion that doing so thereby rendered it content-based⁴⁰ and asserted that content neutrality exists whenever an ordinance can be

³³ *Id.* (“Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns . . .”). Echoing this point is *Young*, 427 U.S. at 71 (plurality opinion).

³⁴ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986).

³⁵ *Id.* at 43.

³⁶ *See id.* at 46 (“The *Renton* ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation.”).

³⁷ *Id.* at 46–47; *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (reaffirming this principle).

³⁸ *Renton*, 475 U.S. at 47.

³⁹ *See id.* at 57–58 (Brennan, J., dissenting).

⁴⁰ *See id.* at 47.

“justified without reference to the content of the regulated speech.”⁴¹ Armed with this definition, the Court hereupon invoked the critical pronouncement of *Young* and found Renton’s ordinance to be content-neutral because, by its own terms, it was aimed “not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community.”⁴²

The upshot of *Renton*’s scienter-focused scrutiny is that a zoning law enacted with the self-stated aim of curtailing the harmful secondary effects of adult entertainment thereby secures for itself the coveted status of content neutrality,⁴³ which, in turn, shields it from constitutional challenge (subject to satisfying *Renton*’s two-part test).⁴⁴ Subsequent case law from the federal circuits has recognized “secondary effects” to encompass, *inter alia*, the prevention of crime, the maintenance of property values, and the preservation of residential quality of life.⁴⁵

Critical for our purposes, however, is how the Court cabined the scope of the “alternative avenues” prong of its test. The *Renton* plaintiffs contested the adequacy of the venues preserved under the ordinance by arguing that most of the sites identified by the Court in its determination that the second prong had been met were either not in fact available or else commercially non-viable.⁴⁶ The Court, however, brushed aside this contention by explaining that a municipality’s obligation under the requirement was far more limited: “[W]e 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 prices.”⁴⁷ Adult entertainment businesses, the Court continued, “must fend for themselves in the real estate market, on an equal footing with other prospective purchasers.”⁴⁸ In sum, the Court concluded, “the First Amendment requires only that Renton refrain from effectively denying respondents a *reasonable opportunity* to open and operate an adult theater within the city.”⁴⁹

⁴¹ *Id.* at 48 (emphasis omitted) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976)) (internal quotation marks omitted).

⁴² *Id.* at 48–49.

⁴³ *See, e.g., id.* at 48 (“The ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, . . . not to suppress the expression of unpopular views.”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 291 (2000) (“[T]he ordinance does not attempt to regulate the primary effects of the expression, *i.e.*, the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare.”).

⁴⁴ *See Renton*, 475 U.S. at 47.

⁴⁵ *See, e.g., Buzzetti v. City of New York*, 140 F.3d 134, 140 (2d Cir. 1998).

⁴⁶ *Renton*, 475 U.S. at 53–54.

⁴⁷ *Id.* at 54 (citing *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring)).

⁴⁸ *Id.*

⁴⁹ *Id.* (emphasis added).

The full implications of *Renton*'s self-imposed caveat are elucidated by investigating the lower federal jurisprudence that has emerged to address the adequacy of alternative avenues. Four major tenets emerge. First, building directly off of *Renton*'s language, a site's commercial viability or economic feasibility is irrelevant to the First Amendment analysis.⁵⁰ As a corollary, the mere fact that a given site might require some additional development to render it suitable for adult entertainment businesses does not necessarily disqualify that site.⁵¹ According to the Eleventh Circuit, "[e]xamples of impediments to the relocation of an adult business that may not be of a constitutional magnitude include having to build a new facility instead of moving into an existing building; having to clean up waste or landscape a site; bearing the costs of generally applicable lighting, parking, or green space requirements; making [do] with less space than one desired; or having to purchase a larger lot than one needs."⁵²

A second tenet that emerges, closely linked to *Renton*'s apathy toward economic feasibility, is a liberal conception of what types of venues pass constitutional muster. On the one hand, "the finder of fact may exclude land under the ocean, airstrips of international airports, [and] sports stadiums."⁵³ Short of these intuitive extremes, however, courts have readily deemed acceptable sites that are functionally undesirable such as industrial or manufacturing zones, even when these districts are the sole venues left open under the ordinance.⁵⁴

Third, the behavior of private actors is wholly irrelevant to the First Amendment inquiry. Courts have repeatedly stressed that it is of no import if sites deemed part of the general commercial real estate market are

⁵⁰ See, e.g., *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 871 (11th Cir. 2007) ("[T]he economic feasibility of relocating to a site is not a First Amendment concern." (quoting *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1334 (11th Cir. 2000))); *Woodall v. City of El Paso*, 49 F.3d 1120, 1126 (5th Cir. 1995) (same); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir. 1993) ("[I]t is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business."); *Alexander v. City of Minneapolis*, 928 F.2d 278, 283 (8th Cir. 1991).

⁵¹ See *David Vincent*, 200 F.3d at 1334.

⁵² *Daytona Grand*, 490 F.3d at 871 (alteration in original) (quoting *David Vincent*, 200 F.3d at 1334–35).

⁵³ *Woodall v. City of El Paso*, 49 F.3d 1120, 1124 (5th Cir. 1995) (citing *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993)); accord *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1334 (11th Cir. 2000).

⁵⁴ See *Tollis, Inc. v. County of San Diego*, 505 F.3d 935, 941–42 (9th Cir. 2007) (upholding an ordinance that restricted adult entertainment businesses to industrial zones); *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 685–87 (10th Cir. 1998) (same); see also *Hickerson v. City of New York*, 146 F.3d 99, 106 (2d Cir. 1998) ("[L]and that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable." (citation omitted) (internal quotation marks omitted)).

currently occupied by other businesses, even if such sites are held by private owners who are explicitly unwilling to sell to sexually oriented businesses.⁵⁵

Finally, as *a fortiori* from the preceding tenets, the alternative avenue requirement really imposes a burden upon municipalities to secure *theoretical*, as opposed to *de facto*, alternative sites.⁵⁶ The inquiry is focused solely on physical and legal availability—that is, whether the proffered venues are part of an actual commercial real estate market.⁵⁷ Mere acreage hardly plays a role in the analysis, as ordinances are frequently upheld notwithstanding leaving less than one percent of the land within the city’s limits available.⁵⁸ Significantly, however, this downsized requirement of theoretical space is tempered by an implied condition of good faith on the part of the municipality. According to the Ninth Circuit, “[A]lthough *Renton* stressed that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility.”⁵⁹

⁵⁵ See *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1335 (11th Cir. 2000); *Woodall v. City of El Paso*, 49 F.3d 1120, 1125–26 (5th Cir. 1995); see also *Bronco’s Entm’t, Ltd. v. Charter Twp. of Van Buren*, 421 F.3d 440, 452 (6th Cir. 2005) (including in its assessment of available alternative sites those currently occupied or held by private owners who might be unwilling to sell to sexually oriented businesses).

⁵⁶ See *North Ave. Novelties v. City of Chi.*, 88 F.3d 441, 445 (7th Cir. 1996) (“The constitution does not mandate that any minimum percentage of land be made available for certain types of speech. What it does require is that zoning schemes that regulate the location of speech provide a ‘reasonable opportunity’ to disseminate the speech at issue.”); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1531 (9th Cir. 1993) (observing how the First Amendment requires only that a relocation site be “potentially available rather than actually available”); see also Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 479 & n.147 (2004). Indeed, the preceding language of *Topanga Press* is quoted by the Second Circuit in *TJS* itself. See *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 27 (2d Cir. 2010).

⁵⁷ See *TJS*, 598 F.3d at 27 (citing *Hickerson*, 146 F.3d at 106–07); cf. *Woodall v. City of El Paso*, 49 F.3d 1120, 1125–26 (5th Cir. 1995) (“[L]and cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there.”).

⁵⁸ See, e.g., *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1240 (10th Cir. 2002), *rev’d on other grounds*, *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) (upholding an ordinance that left available “just under” one percent of the city’s land); *North Ave. Novelties v. City of Chi.*, 88 F.3d 441, 445 (7th Cir. 1996) (upholding an ordinance that left open “less than one percent” of the land within the city limits); *M.J. Entm’t Enters. v. City of Mount Vernon*, 328 F. Supp. 2d 480, 485, 488–89 (S.D.N.Y. 2004) (granting summary judgment to city-defendant where its zoning ordinance left open .67% of the land within the city limits zoned for commercial use).

⁵⁹ *Topanga Press*, 989 F.2d at 1531; see also *Isbell v. City of San Diego*, 258 F.3d 1108, 1113 (9th Cir. 2001) (finding that the city-defendant’s list of potential sites suffered from a “fatal flaw” in that it failed to account for the city’s own 1,000-foot spacing requirements); *Lim v. City of Long Beach*, 217 F.3d 1050, 1055 (9th Cir. 2000) (“The city’s duty to demonstrate the availability of properties is defined, at a bare minimum, by reasonableness and good faith.”); *Young v. City of Simi Valley*, 216 F.3d 807, 822 (9th Cir. 2000) (listing, as one of several factors that a court should analyze when determining whether an adult business has a

The significance of this final tenet will become apparent when the contours of negative theory are discussed in Part II.

B. *The Timeframe Dispute*

In *TJS of New York v. Town of Smithtown*, the Second Circuit confronted an “interesting and surprisingly unanswered question”⁶⁰ pertaining to the alternative avenues requirement, namely “whether the constitutionality of a zoning ordinance should only be evaluated with regard to the alternative avenues of communication it leaves open at the time it is *passed*, or also those it leaves open at the time it is *challenged*.”⁶¹ At issue in that case was a run-of-the-mill ordinance enacted by a town in Long Island, New York that restricted the sites available to adult entertainment businesses to certain industrial and commercial districts and also imposed a 500-foot spacing requirement.⁶² Writing for the court, Judge Calabresi answered his self-posed query by embracing the time-of-challenge option and thereby vacated an earlier judgment of the Eastern District of New York (E.D.N.Y.) that was premised on the opposite view.⁶³

The Second Circuit offered several justifications for why it endorsed the time-of-challenge position. First, Judge Calabresi emphasized the need for courts to render their verdicts in conformity with the “circumstances as they exist at the time the court issues its judgment, or as close as is practicable to that time.”⁶⁴ This view was in turn critically hinged upon a conviction that “the First Amendment does not allow courts to ignore post-enactment, extralegal changes.”⁶⁵ In so pronouncing, the Second Circuit lent its blessing to an ever-evolving, fluid arrangement wherein a law’s constitutionality might wax and wane with the emergence or decline of available sites: a once-constitutional enactment might cease to be so upon the vanishing of enough such sites, while conversely, “if a municipality opens up new land to development, the availability of alternative sites might very well increase, . . . thus rendering constitutional zoning ordinances previously enacted.”⁶⁶ A second

reasonable opportunity to open and operate, “the goals of the city plan”); *Univ. Books & Videos v. Miami-Dade Cnty.*, 132 F. Supp. 2d 1008, 1011, 1014 (S.D. Fla. 2001) (striking down a zoning ordinance where a number of proffered relocation sites could not be used due to the spacing requirements established by the county’s own ordinance).

⁶⁰ *TJS*, 598 F.3d at 18.

⁶¹ *Id.* at 18–19 (internal quotation marks omitted).

⁶² *Id.* at 19–20.

⁶³ *Id.* at 19 (vacating the judgment of *TJS of New York v. Town of Smithtown*, No. 03CV4407, 2008 WL 2079044, at *6 (E.D.N.Y. May 13, 2008), which had evaluated the adequacy of alternative sites existing “on the date of enactment”).

⁶⁴ *Id.* at 23.

⁶⁵ *Id.*

⁶⁶ *Id.*

justification offered by the court was that such a concern for the “continuing impact of zoning regulations . . . as applied, rather than on their facial constitutionality when passed,” was most faithful to the spirit of *Renton*.⁶⁷ Finally, Judge Calabresi defended his time-of-challenge election by issuing a normative pronouncement on the intrinsic value of free speech itself: “If the only relevant question were whether an ordinance provided adequate alternatives on the day of its passage, any law that did so would thereafter be immune from First Amendment challenge. And speech that the Supreme Court has held to be protected by that Amendment would be silenced.”⁶⁸

Notwithstanding these justifications, the Second Circuit observed that its holding was seemingly at odds with those of at least two other federal jurisdictions: the Eleventh Circuit and the U.S. District Court of Maryland.⁶⁹ At this point, then, it is perhaps worthwhile to examine the full array of authorities assembled in both camps of this dispute—which is not so herculean a task, considering that these may be counted on one hand!

Prior to its being vacated by the Second Circuit, the E.D.N.Y.’s *TJS* decision lent its voice to a small choir of authority crooning for time-of-enactment without any rejoinder coming from the opposing side.⁷⁰ The E.D.N.Y. verdict relied specifically upon two such prior cases.⁷¹ The first, *Daytona Grand v. City of Daytona Beach*, did not squarely address the timeframe question, but the Eleventh Circuit presumed the applicability of a time-of-enactment framework by noting without elaboration that “the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence *at the time the new zoning regime takes effect*.”⁷²

The second authority invoked by the E.D.N.Y., *Bigg Wolf Discount Video Movie Sales v. Montgomery County*, offered the most in-depth treatment of the timeframe issue prior to the Second Circuit’s intervention.⁷³ Unlike in *Daytona Grand*, the parties in *Bigg Wolf* actively disputed the relevant timeframe for assessing the adequacy of alternative sites.⁷⁴ In upholding the zoning law, the District of Maryland resolved

⁶⁷ *Id.* (emphasis omitted).

⁶⁸ *Id.* at 26.

⁶⁹ *See id.* at 24.

⁷⁰ *See TJS of N.Y. v. Town of Smithtown*, No. 03CV4407, 2008 WL 2079044, at *6 (E.D.N.Y. May 13, 2008), *vacated*, 598 F.3d 17 (2d Cir. 2010).

⁷¹ *See id.* at *7 (citing *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 870 (11th Cir. 2007); *Bigg Wolf Discount Video Movie Sales v. Montgomery Cnty., Md.* 256 F. Supp. 2d 385, 395 (D. Md. 2003)).

⁷² *Daytona Grand*, 490 F.3d at 870 (emphasis added) (quoting *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1310–11 (11th Cir. 2003)) (internal quotation marks omitted).

⁷³ *Bigg Wolf*, 256 F. Supp. 2d at 395.

⁷⁴ *See id.*

the aforesaid dispute by embracing time-of-enactment, observing: “The situation will always be fluid, with businesses moving in and out, and the courts should not be involved repeatedly with litigation determining the validity of a zoning ordinance.”⁷⁵ The court then claimed that “[a]lthough many courts have not explicitly said so, most have logically analyzed the number of available sites in relation to the number of adult businesses that would need to relocate at the time the ordinance is passed.”⁷⁶ In support of this proposition, the court cited and quoted from a Northern District of Alabama case, *Ranch House v. Amerson*, which contains the following language: “The test is whether the restrictions allow for reasonable alternative avenues of communication *currently*, not whether they *always will allow* for reasonable alternative avenues of communication.”⁷⁷

Against this authority, the Second Circuit’s time-of-challenge position is buttressed by at least one other source—unacknowledged in the *TJS* opinion—namely a 2009 case from the Illinois Appellate Court.⁷⁸ Predating the Second Circuit’s *TJS* by several months, this case offered the first rebuttal to the thin time-of-enactment monopoly. Therein, the Illinois court harshly assailed the reasoning of *Bigg Wolf* and the E.D.N.Y.’s *TJS* (then good law) for being fatally unsound⁷⁹ and suggested that both were premised on “a fundamental and inexplicable misreading” of *Ranch House* (the Northern District of Alabama case).⁸⁰ As the Illinois Appellate Court read that decision, “*Ranch House* was clearly concerned with ‘the availability of alternate avenues of communication *in the here-and-now*,’ not in the past.”⁸¹ In other words, argued the Illinois court, by crafting its test to discern whether a law “currently” preserved sufficient alternative sites, the Northern District of Alabama could

⁷⁵ *Id.* at 397.

⁷⁶ *Id.*

⁷⁷ *Ranch House, Inc. v. Amerson*, 146 F. Supp. 2d 1180, 1212 (N.D. Ala. 2001), *rev’d in part, vacated in part*, 85 F. App’x 191 (11th Cir. 2003). The District of Maryland also cited, without elaboration, *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532–33 (9th Cir. 1993) for its proposition that most courts have implicitly embraced time-of-enactment. See *Bigg Wolf*, 256 F. Supp. 2d at 397. However, as the Second Circuit noted in *TJS*:

[T]he language of *Topanga*—which considered the alternatives available to adult businesses that are ‘now in operation’—is fully consistent with the approach we take here, which, as we have emphasized, may well permit courts *also* to consider an ordinance’s constitutionally at the time it is passed. Because *Topanga* found that the challenged ordinance did *not* provide adequate alternatives at the time it was passed, the court did not find it necessary to consider whether it also failed to provide adequate alternatives at some later date.

TJS of N.Y. v. Town of Smithtown, 598 F.3d 17, 26 (2d Cir. 2010). Accordingly, I exclude *Topanga* from my analysis of the authorities that have weighed in on this issue.

⁷⁸ See *Cnty. of Du Page v. Lake St. Spa, Inc.*, 916 N.E.2d 1240 (Ill. App. Ct. 2009).

⁷⁹ See *id.* at 1247–49.

⁸⁰ *Id.* at 1248.

⁸¹ *Id.* (quoting *Ranch House*, 146 F. Supp. 2d at 1212–13).

not possibly have meant *historically*; rather, that court intended precisely what the plain meaning of “currently” denotes: *contemporaneous* with the litigation process.⁸²

To the extent that the District of Maryland was invoking *Ranch House* to dispel the proposition that an ordinance’s constitutionality must be evaluated based on whether it will *always* ensure adequate alternative avenues, *Ranch House*’s use of “currently” harmonizes with *Bigg Wolf*’s purposes because an ordinary definition of that word indeed implies reference to the present moment *at the exclusion of* any points in the future.⁸³ *Bigg Wolf*’s mistake, however, was its assumption that “currently” therefore had to connote “historically,” at the time of enactment—which, as the Illinois Appellate Court points out, is equally inapposite to the plain meaning of the term. In other words, *Bigg Wolf* glimpsed the interpretive question through the prism of a nonexistent dichotomy: that constitutionality must be determined either at the moment of enactment or else based upon whether the ordinance appears hardy enough to withstand any and all prospective challenges ad infinitum. In truth, however, as the Illinois Appellate Court exposed,⁸⁴ *Ranch House* stands for the proposition that the constitutional assessment should be made at the time of *each* challenge, on the basis of currently existing realities yet with full knowledge that those realities might someday shift so as to permit a *fresh* constitutional attack.⁸⁵

Such is the current status of the timeframe debate. Most jurisdictions have yet to weigh in on this issue, and thus the extent to which *TJS* will find acceptance remains unclear. Yet perhaps, at first blush, it would appear as though *Bigg Wolf*’s fatal misreading of *Ranch House* has deflated our jurisdictional squabble—and that time-of-challenge should carry the day. Upon further contemplation, however, discomfiture remains: for must a zoning ordinance’s constitutionality really be placed at the mercy of supra-governmental forces, *i.e.*, those beyond the command of the state? Such is the implication of the time-of-challenge position.

After all, the specific concern voiced by the *Ranch House* plaintiff, which prompted the Northern District of Alabama to foray into its timeframe discourse in the first place, was that the contested ordinance “[did] not contain sufficient safeguards . . . against the ‘purposeful encroachment’ of churches, schools, and private residences that would

⁸² See *id.*

⁸³ See 4 THE OXFORD ENGLISH DICTIONARY 151 (2nd ed. 1989).

⁸⁴ See *Du Page*, 916 N.E.2d at 1247–48.

⁸⁵ To corroborate this interpretation of *Ranch House*, the curious reader is urged to examine that court’s timeframe discussion in its entirety. See *Ranch House, Inc. v. Amerson*, 146 F. Supp. 2d 1180, 1212–13 (N.D. Ala. 2001).

‘knock-out’ adult entertainment establishments” due to the law’s spacing requirements.⁸⁶ It was expressly in response to *this* concern—over the consequent behavior of *private* actors—that the *Ranch House* court engaged in its timeframe discussion.⁸⁷ And it was indeed that very language from *Ranch House*—assuaging its plaintiff’s concern by announcing a model of *volatile constitutionality*—that was so readily embraced by the Illinois Appellate Court as correlative with the time-of-challenge view.⁸⁸ The Second Circuit likewise endorsed this volatile arrangement when Judge Calabresi observed how an ordinance’s constitutionality might ebb and flow with the shifting availability of qualifying sites.⁸⁹ Yet this model extinguishes any hope of repose for a municipality’s well-intentioned statutes and, more alarmingly, empowers as calibrator of the scale a host of private actors whose activities lie beyond the government’s reach. Is such an arrangement truly optimal, much less mandated by the First Amendment? The focus of this Note will now shift into a theoretical analysis of this question.

II. NEGATIVE THEORY AS A MODE OF FIRST AMENDMENT INTERPRETATION

A. Doctrinal Underpinnings

At the outset, several observations should guide how we approach the constitutional text. First, judicial decision-making impacts the lives of civic actors in a way that is more burdensome than other governmental mechanisms, due to its inherently “retroactive” effects.⁹⁰ This retroactivity—which necessarily imposes obligations on civic actors *after* the legislative fact—makes it especially difficult for those affected to reorder their activities to conform with the new rule.⁹¹ To militate against this phenomenon, Professor Ronald Cass encourages courts “to use interpretive methods that maximize the predictability of judicial decisions.”⁹² Achieving such a result in a non-arbitrary manner, however, requires courts to adopt a decision-making model that is grounded by “some realistic anchor in the constitutional text and initial constitutional intent.”⁹³

⁸⁶ *Id.* at 1212.

⁸⁷ *See id.* at 1212–13.

⁸⁸ *See Du Page*, 916 N.E.2d at 1247–48.

⁸⁹ *See TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 23 (2d Cir. 2010); *see also supra* notes 64–66 and accompanying text.

⁹⁰ Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317, 1350 (1988).

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Id.* at 1351. Negative theory construes “intent” in a narrow and empirically reliable sense, urging courts to focus on the more historically ascertainable “initial problems with which the constitution-makers were concerned, rather than on the aspirations that may have informed any of the drafters.” *Id.* (emphasis omitted). Compare this advantage with the flim-

In sum, an interpretive approach that is anchored in *some original constitutional reality* is necessary for minimizing the caprice that otherwise inheres to constitutional adjudication.⁹⁴ And, to the extent that one concedes the utility of an interpretive mode anchored in some original reality, I argue that the so-called “negative theory” emerges as an attractive option.⁹⁵ Notice here that I am using the un-technical phrase “original reality” to convey a generalized preference for an originalist outlook, without specifically hitching the wagon to any of the nuanced species identified by Professor Jack Balkin: “original public meaning,” “original intent,” and “original application.”⁹⁶ These terms are linked by a common denominator, namely a conscientiousness toward the constitutional text vis-à-vis *some* original reality existing at the time of its inception (whether it be, respectively, the plain meaning of the words, the specific intent of the Framers, or the popular understanding of how the words would be applied).⁹⁷ Most importantly, each breed aspires to the decisive virtue for our purposes: the assurance of interpretive stability.⁹⁸

Professor Frederick Schauer, whose scholarship first applied negative theory to the First Amendment,⁹⁹ describes the dichotomy between

siness of positive theories, which place all of their eggs into the lone basket of some normative ideal and thereby detach the inquiry from its historical anchor. See Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1417 (1987).

⁹⁴ See Cass, *Commercial Speech*, *supra* note 90, at 1350–51.

⁹⁵ See *id.* at 1352. In Subsection B of this Part, I explore why negative theory aptly accounts for these “original realities.”

⁹⁶ Jack M. Balkin, *Original Meaning and Original Application*, BALKINIZATION (June 23, 2005), <http://balkin.blogspot.com/2005/06/original-meaning-and-original.html>.

⁹⁷ See *id.*

⁹⁸ Addressing the comparative merits of these approaches is beyond the scope of this Note; it suffices to observe that putting originalism into practice is a tricky endeavor. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (“[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.”).

⁹⁹ See SCHAUER, *FREE SPEECH*, *supra* note 16, at 81 (“[I]f the regulation of speech is either less efficient or more likely to produce unpleasant side-effects than the regulation of other forms of conduct, then a Free Speech Principle will emerge by negative implication.”); Schauer, *The Second-Best First Amendment*, *supra* note 17, at 14–15; Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 780 (1985) (“[T]he focus of the first amendment is on the motivations of the government.”); Frederick Schauer, *Must Speech Be Special?*, 78 N.W. U. L. REV. 1284, 1301 (1983) (arguing that “the dangers of excess governmental regulation are a self-

positive and negative conceptions of liberty as follows: a *positive* justification for a right is grounded in notions of “why the activity covered by the particular right is especially valuable, and therefore deserving of special protection.”¹⁰⁰ In contrast, a *negative* justification does not focus on the intrinsic value of the protected activity itself but rather on the peculiar dangers attaching to the improper regulation of it.¹⁰¹ As Schauer explains, “[such an] argument is negative in the sense that it highlights evils rather than goods.”¹⁰²

Positive interpretations of the First Amendment deem speech worthy of protection by identifying a particular positive value that free speech serves to promote or safeguard.¹⁰³ Conversely, the driving concern for negative theorists to justify protecting free speech is skepticism over the government’s capacity to not abuse its regulatory function.¹⁰⁴ Thus, negative theorists frame their approach to the First Amendment right—and inform their understanding of what ought to be protected

sufficient justification” for protecting free speech, “without [us] having to resort to notions of self-expression, self-fulfillment, or self-realization”).

¹⁰⁰ SCHAUER, *FREE SPEECH*, *supra* note 16, at 80.

¹⁰¹ *Id.* Negative rights theory builds upon the famous distinction between positive and negative liberty sketched by political theorist Isaiah Berlin. See ISAIAH BERLIN, *Two Concepts of Liberty* (1958), in *FOUR ESSAYS ON LIBERTY* 118, 118–22 (1969) (pioneering this dichotomy and defining a negative conception of political liberty as “the area within which a man can act unobstructed by others”). As one scholar notes, “Berlin’s dichotomy between positive and negative liberty sharpens First Amendment analysis by distinguishing between a positive question (What does freedom of speech *allow us to do*?) and a negative question (What does the freedom of speech *protect us from*?).” Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 86–87 (1994). *But see* Ronald Dworkin, *Do Values Conflict? A Hedgehog’s Approach*, 43 ARIZ. L. REV. 251, 255–56 (2001) (criticizing as “flat” Berlin’s conception of liberty).

¹⁰² SCHAUER, *FREE SPEECH*, *supra* note 16, at 80.

¹⁰³ See *id.* at 81. See generally Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 676–88 (1991) (surveying various positive theories that have been advanced to justify why speech is entitled to special protection, including: “truth theory,” which conceptualizes the protection of speech as a way of maximizing the opportunities for listeners to discern truth (however understood) amidst the bustling marketplace of ideas; “democracy theory,” which considers the exercise of free speech as essential for the healthy functioning of a democratic system; and “self-expression” or “self-realization theory,” which justifies protecting free speech by the important role it plays in facilitating individual self-fulfillment). Some scholars, however, critique both positive and negative theories, contending that it is impossible to arrive at any single justification for bestowing speech with special protection. See Daniel A. Faber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617–27 (1986) (surveying the shortcomings of the various positive theories and arguing for the nonexistence of a singular principle justifying the free speech right); Lawrence A. Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 N.W. U. L. REV. 1319, 1346–52 (1983) (same).

¹⁰⁴ See Schauer, *The Second-Best First Amendment*, *supra* note 17, at 15–16; Williams, *supra* note 103, at 693; see also Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 26 (2003) (“Speech value and its furtherance of universal autonomy become minor if not neglected factors in [the negative theory] analysis.” (citing Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 86 (1994))).

under that rubric—by assuming *ab initio* a high risk that regulatory officials will abuse their power.¹⁰⁵

Two common tendencies of human nature corroborate this prospect for abuse: first, regulation can be tainted by the personal biases and self-interest of the censors themselves.¹⁰⁶ Professor Schauer notes that regulatory officials might develop biases in favor of, or against, certain forms of speech for a variety of different reasons, foremost among which is the basic desire to retain their power.¹⁰⁷ Take, for example, the branding of speech as “seditious,” where a determination of the proscription’s scope must necessarily be made by those who, as agents of the incumbent regime, are the intended targets of the controlled expression.¹⁰⁸ In such a context, regulatory officials might be tempted to draw the line of prohibition far more generously than they would if acting behind a Rawlsian veil of ignorance. Negative theorists label regulation stemming from such parochial interests as “illegitimate” and would thus extend First Amendment coverage to speech that is likely to fall prey to such abuse.¹⁰⁹

The second proclivity that underlies negative theory’s distrust of government motives is the natural human desire for unanimity or consensus, which yields an “urge toward intolerance” on the part of regulators.¹¹⁰ Schauer quotes the famous observation of Justice Holmes on this point: “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”¹¹¹ While this threat attaches to all spheres of government regulation, Schauer suggests that it is most pronounced with regard to speech because of the unique impact that speech can have on shaping political and social ideas.¹¹² Negative theorists would thus confer special protection on speech that is particularly susceptible to this procrustean impulse, such as speech voicing political dissent.¹¹³

¹⁰⁵ See Cass, *Commercial Speech*, *supra* note 90, at 1354; see also Williams, *supra* note 103, at 692.

¹⁰⁶ SCHAUER, *FREE SPEECH*, *supra* note 16, at 81–82; see also Cass, *Commercial Speech*, *supra* note 90, at 1354.

¹⁰⁷ SCHAUER, *FREE SPEECH*, *supra* note 16, at 81–82.

¹⁰⁸ See *id.* at 81.

¹⁰⁹ See Cass, *Commercial Speech*, *supra* note 90, at 1354.

¹¹⁰ Williams, *supra* note 103, at 692; see also SCHAUER, *FREE SPEECH*, *supra* note 16, at 82; Cass, *Commercial Speech*, *supra* note 90, at 1354.

¹¹¹ SCHAUER, *FREE SPEECH*, *supra* note 16, at 82 (quoting Holmes).

¹¹² See *id.* at 82–83.

¹¹³ See *id.* at 83.

There is no question that negative theory relies for its cogency upon a pessimistic portrait of human nature.¹¹⁴ The doctrine builds off of a distrust in the judgment of regulators to make “particularistic, case-sensitive determinations regarding what forms of activity will promote the search for truth and what forms will not.”¹¹⁵ But does this cynicism necessarily render the theory relativistic in its conception of what positive values can derive from speech? Professor Schauer’s analysis suggests not: negative theory is animated not by a belief that speech fails to secure positive goods but rather by the more threshold premise that the government is not the most competent agent to discern what those goods are.¹¹⁶ To use the example of truth-promotion: negative theory’s hesitation to entrust regulators with the task of identifying what forms of speech are conducive to “truth” reflects the doctrine’s preference for allowing other, nongovernmental entities to parse out the content and boundaries of the subject.¹¹⁷

The effect of this theoretical shift—glimpsing speech through a prism that does not champion it affirmatively for what it achieves—might appear strange as applied to one of the American polity’s most hallowed entitlements: pegging the legal worth of this cherished right to a phenomenon so sapped of romanticism as the menace of overregulation seems almost to dilute it. Yet negative theorists are simply responding to the untenable fluidity of positive alternatives, which convert the Constitution into a reflection pool wherein viewers observe only that which they most want to see. By justifying the protection of speech “without

¹¹⁴ One analysis suggests that this pessimism can be traced to the philosophy of Edmund Burke. See Werhan, *supra* note 101, at 95. In a complimentary vein to this pessimism is Professor Vincent Blasi, who, in sketching his positive justification for free speech rooted in the so-called “checking value,” observes that “[a] premise underlying the checking value is an essentially pessimistic view of human nature and human institutions.” Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 541 (1977). Despite being a positive justification for speech, Blasi’s checking value thesis accords with negative theory at least insofar as it places a primary emphasis on the special dangers of government abuse. See *id.* at 538. But see Cass, *Commercial Speech*, *supra* note 90, at 1343–44 (critiquing Blasi’s checking value thesis from the perspective of negative theory).

¹¹⁵ Schauer, *The Second-Best First Amendment*, *supra* note 17, at 15–16; see also SCHAUER, *FREE SPEECH*, *supra* note 16, at 83 (“The hypothesis here is that ‘slippery slope’ and ‘where do you draw the line?’ arguments may have special relevance with respect to regulating speech.”); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1388 (2002).

¹¹⁶ See SCHAUER, *FREE SPEECH*, *supra* note 16, at 34 (expressing skepticism regarding the government’s capacity to distinguish truths from falsity rather than arguing that no ascertainable truths exist); see also Kitrosser, *supra* note 115, at 1387 (“[Negative] theory posits, in short, that surrendering to the government the power to pick and choose between the substantive worthiness or unworthiness, and hence fitness or unfitness for legal protection, of particular instances of expression, leaves little principled basis to distinguish between ‘correct’ and ‘incorrect’ government choices as to what may be expressed.”).

¹¹⁷ See SCHAUER, *FREE SPEECH*, *supra* note 16, at 34. But see Alexander & Horton, *supra* note 103, at 1332.

having to resort to notions of self-expression, self-fulfillment, or self-realization,”¹¹⁸ negative theory sets its baseline much lower but is more secure in its footing; and thereby, the theory achieves interpretive stability.

B. Historical Realities that Render Negative Theory Optimal for Constitutional Analysis

We have presented a descriptive account of negative First Amendment theory—but now we must ask: is it normatively sound for our purposes? Professor Cass, a leading proponent of negative theory, contends that the theory is an optimal mode of interpretation because the Framers themselves were negatively oriented in their concerns when drafting the Constitution.¹¹⁹

Historical experience corroborates negative theory’s core assumption: that a government left to its own devices tends to abuse its regulatory power.¹²⁰ A venerable lineage of political philosophy echoes this empirical finding.¹²¹ Even apart from cases of iniquitous motives, and in spheres where some intervention is concededly necessary, the plain reality is that even well-intentioned government actors fall prey to the temptation of regulatory overkill.¹²² Such abuse presents two serious causes for concern. First, the societal impact of government activity far exceeds that of private action, thereby amplifying the harm wrought by abusive regulatory measures.¹²³ Second, because the government is a unique vessel of public trust, regulatory malfeasance can compromise its political legitimacy.¹²⁴

This fear of regulatory abuse was among the primary motivations of the Constitution’s Framers.¹²⁵ The Framers were well-acquainted with the vast corpus of philosophical thought cautioning against the misuse of power;¹²⁶ they also possessed firsthand knowledge from living under British tyranny. The political pamphlets circulating in the Colonies dur-

¹¹⁸ Schauer, *Must Speech Be Special?*, *supra* note 99, at 1300–01; *see also* Cass, *Perils*, *supra* note 93, at 1440–41 (expressing skepticism that the Constitution’s substantive constraints on federal power can be distilled into any generally agreed-upon, positive conception of liberty).

¹¹⁹ *See* Cass, *Perils*, *supra* note 93, at 1449.

¹²⁰ *See* SCHAUER, *FREE SPEECH*, *supra* note 16, at 81; Blasi, *supra* note 114, at 540.

¹²¹ *See* Blasi, *supra* note 114, at 529 (surveying, *inter alia*, the works of Aristotle, Montesquieu, and John Stuart Mill and remarking how “[t]he tendency of officials to abuse their public trust is a theme that has permeated political thought from classical times to the present”); *see also* Werhan, *supra* note 101, at 94 (linking negative theory with Edmund Burke’s call for limited government).

¹²² *See* Werhan, *supra* note 101, at 90.

¹²³ *See* Blasi, *supra* note 114, at 538–39.

¹²⁴ *See id.* at 540.

¹²⁵ *See* Cass, *Perils*, *supra* note 93, at 1439–40.

¹²⁶ *See* Blasi, *supra* note 114, at 532.

ing the Revolution reveal a fixation with developing methods to neutralize government's "essential characteristic of aggressiveness: its endlessly propulsive tendency to expand itself beyond legitimate boundaries."¹²⁷ These same concerns lingered post-independence, such that "[t]he First Amendment was an outgrowth of this body of thought."¹²⁸ James Madison, the First Amendment's architect,¹²⁹ explicitly criticized the British analogue of freedom of the press because it did not protect against seditious libel and thereby evinced a naïve confidence in the fair-mindedness of the regime.¹³⁰ In contrast to this, Madison observed how "[i]n the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent."¹³¹ A similar view is reflected in the writings of John Adams and Thomas Jefferson.¹³² For example, in a letter to Madison, Jefferson revealingly labeled the Bill of Rights as "the text whereby to try all the acts of the federal government."¹³³

The Framers were thus motivated by negative-style concerns when crafting the dividing lines between proper and improper government intrusion. The men who debated and ratified the First Amendment shaped their understanding of what sort of regulation qualified as "presumptively illegitimate" from their experience with press licensing and seditious libel under British tyranny.¹³⁴ As Cass observes, the forms of intrusion regarded as particularly suspect were those which clearly implicated a "potential for speech regulation to be shaped by the personal interests of the officials exercising regulatory authority" or which involved a "significant likelihood that the regulation systematically would discriminate against ideas that were disliked for reasons not strongly related to any consequential concern separate from concern that acceptance of the ideas might increase."¹³⁵

The key point, as Cass notes, is that the Founders were animated by motive-oriented concerns.¹³⁶ The early deliberations over government's

¹²⁷ *Id.* at 533 (quoting from an exhaustive study of colonial political pamphlets conducted by Professor Bernard Bailyn) (internal quotation marks omitted).

¹²⁸ *Id.*

¹²⁹ *Id.* at 535.

¹³⁰ *See id.* at 536 (citing Madison).

¹³¹ *Id.* (alteration in original) (quoting Madison) (internal quotation marks omitted).

¹³² *See id.* at 537. For a further discussion of Jefferson's views on this subject, see Cass, *Perils*, *supra* note 93, at 1444–45 & n.124.

¹³³ LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 164 (1988).

¹³⁴ Cass, *Commercial Speech*, *supra* note 90, at 1354.

¹³⁵ *Id.*; *see also* Cass, *Perils*, *supra* note 93, at 1449–50 ("[P]ast incidents of wrongful suppression or punishment of speech had been born of officials' intolerance: distaste for the message rather than realistic concern for its practical effects. This sort of intolerance for ideas accounted for much of the censorship that governments had effected.")

¹³⁶ *See* Cass, *Commercial Speech*, *supra* note 90, at 1352 ("The root concern for first amendment prohibitions on abridgment of speech and press freedom is official bias. . . . [T]he

proper purview “emphasize[d] not the need to proscribe generally government interference with personal liberty . . . but the need to curb *wrongful* interference.”¹³⁷ Likewise, the Bill of Rights emerged from a desire among skeptical states for a mechanism to restrain the federal government from going too far.¹³⁸ According to one historian, “[t]he Framers intended the First Amendment as an added assurance that Congress would be limited to the exercise of its enumerated powers and therefore they phrased it as an express prohibition against the possibility that Congress might use those powers to abridge freedom of speech or press.”¹³⁹

How, then, do the abovementioned historical realities render negative theory an optimal mode of constitutional interpretation? To answer this question, we ought to consider the socio-historical realities that inhere to the process of constitution formation itself. First, because a constitution is the product of multifarious (and often divergent) viewpoints—all converging for the sake of a common enterprise—the constitution formation process necessarily involves the watering-down of the drafters’ individual concerns into their broadest forms to achieve consensus. As a result, “[t]he substantive prohibitions . . . are not the triumph of any [single] philosophy.”¹⁴⁰ Instead, the need for dispute resolution renders a constitutional document “more focused on process than . . . on substance.”¹⁴¹ Moreover, insofar as substantive provisions like the First Amendment are included, “they are likely themselves to be abstractions from particular concerns.”¹⁴²

These realities of constitution formation, and the etiology of substantive provisions contained therein, “suggest[] a narrower focus than most positive theories of speech.”¹⁴³ The most that can be said of the Founders’ unitary intentions—the least common denominator—is, as Cass asserts, a united concern over the menace of tyranny.¹⁴⁴ It is in *this* context that Cass urges for an interpretive model “focus[ing] on the ini-

speech and press clauses reflect the constitution-makers’ concerns that, absent some constitutional constraint, (federal) officials would overregulate expression.”); *see also* Schauer, *The Second-Best First Amendment*, *supra* note 17, at 2 (“Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers. Once we understand this, we are able to understand as well that the first amendment is not the reflection of a society’s highest aspirations, but rather of its fears . . .”).

¹³⁷ Cass, *Perils*, *supra* note 93, at 1439–40; *accord* Blasi, *supra* note 114, at 538.

¹³⁸ *See* LEVY, *supra* note 133, at 163.

¹³⁹ *Id.* at 209; *see also* Cass, *Perils*, *supra* note 93, at 1441–42 (“The phrasing of the amendments in the negative—as limitations on government rather than as self-contained guarantees of liberty—is emblematic of their genesis.”).

¹⁴⁰ Cass, *Perils*, *supra* note 93, at 1442–43.

¹⁴¹ Cass, *Commercial Speech*, *supra* note 90, at 1348.

¹⁴² *Id.*

¹⁴³ Cass, *Perils*, *supra* note 93, at 1443.

¹⁴⁴ *See id.*

tial problems with which the constitution-makers were concerned, rather than on the aspirations that may have informed any of the drafters.”¹⁴⁵

Given these historical realities, which illustrate the prevalence of negative concerns in the Framers’ unitary mindset—and given, as asserted above, the benefits of pegging our interpretive approach to some original reality of the Constitution’s inception—negative theory emerges as a legitimate and optimal mode of First Amendment interpretation.¹⁴⁶ Negative theory provides a constructive response to the need for interpretive stability by eliminating the quandary that the interpreter is otherwise faced with: namely, whose justifying values ought we to impute into the document’s provisions? Negative theory escapes this predicament by answering the question in the only way that is defensible from an objective perspective: those of the document’s *designers*, which can only be extrapolated in the broadest of strokes. In short, then, to the extent that we aspire to anchor our interpretive approach in some original constitutional reality, negative theory is ideal for the task.

III. APPLYING NEGATIVE THEORY TO THE TIMEFRAME DEBATE AND EMPLOYING THAT FRAMEWORK TO SUGGEST A BLUEPRINT FOR PRESERVING MUNICIPAL ZONING RIGHTS

A. *Applying Negative Principles to the Timeframe Question*

Having shown negative theory to be an optimal mode of constitutional analysis,¹⁴⁷ we are now justified in applying its principles to resolve the issue at stake in *TJS*, namely whether the relevant timeframe for assessing alternative avenues should be at the time of enactment or at the time of challenge.¹⁴⁸ As argued below, *Renton* and its progeny are classic products of a negative understanding of the First Amendment right. This Note further contends that upon applying negative principles to this issue, the interpreter is led to favor the time-of-enactment approach.

In applying negative theory to this question, we are not left purely to conjecture: many commentators have suggested that, in practice, the judiciary already relies on negative principles to adjudicate a wide variety of other First Amendment questions.¹⁴⁹ For example, in crafting its

¹⁴⁵ Cass, *Commercial Speech*, *supra* note 90, at 1351 (emphasis omitted).

¹⁴⁶ See Cass, *Perils*, *supra* note 93, at 1449 (“Because the conceptions of the framers were negatively oriented, the unifying, abstract concept of freedom of speech must be defined as freedom from the sorts of official speech restraints that seemed problematic.”).

¹⁴⁷ See *supra* Part II.B.

¹⁴⁸ See *supra* Part I.B.

¹⁴⁹ See Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L. J. 309, 311 (1999) (referencing the Supreme Court’s “apparently operative negative theory of free speech”); Morant, *supra* note 104, at 5 (“The . . . judicial adherence to a negative theory [has] ensure[d] the failure of most restrictions on the media’s expressive

prior restraint doctrine, the Court sanctions restrictive means in “only the rarest circumstances”¹⁵⁰ and often denies the government such a prerogative where the likelihood of regulatory self-interest or intolerance is particularly high.¹⁵¹ Conversely, courts will usually permit controversial speech restraints that include mechanisms curbing the personal discretion of enforcement agents.¹⁵² Another First Amendment arena where negative theory has influenced the judicial approach is that of hate speech ordinances: one analysis of the Court’s landmark decision in *R.A.V. v. City of St. Paul* observes how, in safeguarding the right to express odious forms of speech, the Court did not attempt to justify its ruling by identifying a positive value attaching to such a right but was instead simply reacting against clear-cut content discrimination by city officials.¹⁵³

From these contexts, a broad trend is discernible: negative theory prompts courts to balance the social harm the regulation purports to address against the likelihood of regulatory impropriety.¹⁵⁴ Underlying this procedure is a quest to uncover whether the government is acting with proper motives. The regulating entity bears the burden of advancing a rationale that justifies its intervention on grounds other than aversion to the speech itself.¹⁵⁵

The Supreme Court’s analysis in *Renton* adheres to this balancing framework.¹⁵⁶ By defining content neutrality as that which can be “justified without reference to the content of the regulated speech,”¹⁵⁷ the Court identifies the scienter behind the zoning law as the key constitutional concern.¹⁵⁸ In other words, the judicial inquiry focuses on the

rights.”); Werhan, *supra* note 101, at 91 (“I contend that the negative perspective of the First Amendment has played the dominant role in shaping the Court’s recent approach to free speech problems. . . .”); *see also* Cass, *Perils*, *supra* note 93, at 1416 (observing how positive, value-promoting theories of free speech “have not predicted judicial opinions very well”).

¹⁵⁰ Morant, *supra* note 104, at 28 (identifying the prior restraint doctrine as “[p]erhaps the most significant and effective manifestation of the judiciary’s negative approach”).

¹⁵¹ *See* Cass, *Perils*, *supra* note 93, at 1482 (citing several prior restraint cases).

¹⁵² *See id.* at 1482–83.

¹⁵³ *See* Werhan, *supra* note 101, at 92; *see also* Morant, *supra* note 104, at 27 (citing and concurring with Werhan’s analysis).

¹⁵⁴ *See* Cass, *Perils*, *supra* note 93, at 1473.

¹⁵⁵ Cass, *Commercial Speech*, *supra* note 90, at 1352–53.

¹⁵⁶ *But see* STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 177 n.35 (1990) (expressing skepticism about whether negative theory provides the sole explanation of why courts employ the content-based/content-neutral distinction); Williams, *supra* note 103, at 694 (noting the Supreme Court’s “consistent refusal in the free speech context to examine the types of evidence (such as legislative history and common sense) that would allow one to determine actual motive”).

¹⁵⁷ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (emphasis omitted) (quoting *Va. Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

¹⁵⁸ *See* Matthew L. McGinnis, Note, *Sex, But Not the City: Adult-Entertainment Zoning, the First Amendment, and Residential and Rural Municipalities*, 46 B.C. L. REV. 625, 630 (2005).

mindset of the lawmaker rather than on the (positive) entitlement of the restricted speaker. Furthermore, by determining content neutrality based on the cogency of the secondary effects that the law is responding to,¹⁵⁹ *Renton* instructs courts to gauge the genuineness of a municipality's intentions: secondary effects which are insufficiently harmful to outweigh the speech right suggest themselves to be a smokescreen for illegitimate regulatory motives.

This motive-oriented framework extends to the alternative avenues analysis because the sole judicial concern is whether the law denies adult entertainment businesses a *reasonable opportunity* to operate.¹⁶⁰ The economic feasibility of alternative sites is irrelevant precisely because the Constitution is not concerned with whether, in practical effect, the law precludes affected businesses from actually persisting in operation.¹⁶¹ Likewise, it is not dispositive if the only type of sites left available are functionally undesirable,¹⁶² or if an ordinance preserves less than one percent of land within the municipality.¹⁶³ The inquiry is focused exclusively on motive. And moreover, the concern is on the *government's* motive: the intentions of private actors are of no import, even if their behavior overtly evinces a discriminatory attitude toward the purveyed speech.¹⁶⁴

The ultimate corollary of these tenets—that the alternative avenues requirement really imposes an obligation to furnish *theoretical*, as opposed to *de facto*, space¹⁶⁵—is hence the offspring of negative principles. It is therefore unsurprising that the sole caveat to this limited requirement is an implied expectation of good faith on the part of the ordinance-drafter.¹⁶⁶ Such a command essentially functions as a proxy to divine rectitude of intent: for example, courts will reject an ordinance if the spacing requirements imposed by that very law vitiate the actual availability of the proposed alternative sites¹⁶⁷—an oversight that smacks of disingenuousness. Likewise, courts might examine “the goals of the city plan” to assess whether the alternative sites are sufficient to constitute a “reasonable opportunity.”¹⁶⁸ Why would such a factor as the

¹⁵⁹ See *Renton*, 475 U.S. at 47.

¹⁶⁰ See *id.* at 54.

¹⁶¹ See *supra* notes 50–51 and accompanying text.

¹⁶² See *supra* note 54 and accompanying text.

¹⁶³ See *supra* note 58 and accompanying text.

¹⁶⁴ See *supra* note 55 and accompanying text.

¹⁶⁵ See Baradaran-Robison, *supra* note 56, at 479 n.147. See also *supra* note 56 and corresponding text.

¹⁶⁶ See *supra* note 59 and corresponding text.

¹⁶⁷ See *Isbell v. City of San Diego*, 258 F.3d 1108, 1113 (9th Cir. 2001); *Univ. Books & Videos, Inc. v. Miami-Dade Cnty.*, 132 F. Supp. 2d 1008, 1011, 1018 (S.D. Fla. 2001).

¹⁶⁸ *Young v. City of Simi Valley*, 216 F.3d 807, 822 (9th Cir. 2000).

city's overarching planning goals enter into the analysis, if not to police for ulterior motivation?

In sum, the alternative avenues jurisprudence shaped by *Renton* and its progeny bears the deep imprint of negative theory. We must now apply these principles to the timeframe issue at stake in *TJS*, whereupon we are compelled to embrace the time-of-enactment approach. As the Second Circuit's *TJS* opinion reveals, the time-of-challenge position relies on a fundamentally positive conception of the First Amendment right for its normative appeal. In the words of Judge Calabresi: "If the only relevant question were whether an ordinance provided adequate alternatives on the day of its passage, any law that did so would thereafter be immune from First Amendment challenge. And speech that the Supreme Court has held to be protected by that Amendment would be silenced."¹⁶⁹ This statement implicitly locates the starting point of the analysis with the special value of the speech itself, not with the regulating entity—an inversion demanded by a positive conception of the First Amendment. Moreover, by explicitly rejecting time-of-enactment because of its mere potential to silence protected speech, the court presupposes that the Amendment guarantees an *actual*, de facto venue for covered forms of expression. Presumably, then, the Second Circuit's view would impose on municipalities a continuing obligation to preserve actual venues for communication, even if the situation on the ground becomes transformed solely by the workings of *private* actors.¹⁷⁰

The Second Circuit's premise, however, is flatly at odds with the consistently negative contours of *Renton*-influenced jurisprudence: since the relevant concern is simply whether the government is acting with a proper motive, the analysis must begin—and end—with the scienter of the regulator, which is clinched as soon as the regulatory scheme is imposed. The relevant constitutional window is, therefore, at the time of enactment; the subsequent maneuverings of private actors are irrelevant to the constitutional analysis,¹⁷¹ and the subsequent regulatory acts of the municipality can be policed by applying the negative framework anew.

B. *A Negative Blueprint for Enhancing the Municipal Zoning Power*

How high are the stakes in this jurisdictional dispute? Although none of the cases make reference to any overarching philosophical ramifications, the timeframe question in fact awakens a classic debate in our political system: the competing alternatives are divided neatly along majoritarian–counter-majoritarian lines. A time-of-enactment regime will, in practical effect, safeguard the majoritarian exercise of zoning

¹⁶⁹ *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 26 (2d Cir. 2010).

¹⁷⁰ *See id.* at 23.

¹⁷¹ *See supra* note 55 and corresponding text.

powers by bestowing popularly enacted legislation with validity and finality. Consequently, the application of negative theory yields a blueprint for championing the municipal zoning prerogative.

For definitional purposes: the majoritarian–counter-majoritarian dichotomy refers to an endemic tension that exists in our republic between majority and minority coalitions as they compete to advance their political interests through the apparatuses of government.¹⁷² Popularly elected legislatures designedly advance the will of citizen-majorities, whereas the judiciary exists to safeguard the rights of minority groups by exercising of judicial review.¹⁷³ In any given policy sphere, the law tends to apportion latitude of varying degrees amongst both of these forces; but the fault-lines between them are ever active.

The zoning prerogative is a quintessential exertion of majoritarian power because it represents an attempt by elected lawmakers to mold local circumstances into what (presumably) the public desires them to be.¹⁷⁴ A time-of-challenge regime, however, severely undermines this prerogative—and thus infringes upon the majoritarian will—by imposing a state of affairs that we might call “volatile constitutionality.” Consider the fluid scenario endorsed by the court in *TJS*, wherein a law’s constitutionality might ebb and flow with the emergence or decline of available sites: a statute could be dislodged from its constitutionality upon the vanishing of enough such sites, whereas a hitherto unconstitutional ordinance might be cured of its defect if additional sites emerge onto the market.¹⁷⁵ Professor Hans Linde provides a fuller illustration of this volatile phenomenon, albeit in a context that is unrelated to the current thesis:

[A] member of the 76th Congress presumably might stand up in 1940 and demand to know whether H.R. 5138 was not a bill ‘abridging the freedom of speech, or of the press’ contrary to the Constitution. Constitutional law, in its original function antecedent to judicial review, owes him an answer. The Congressman’s decision must be constitutionally right or wrong, in that place and at that time—not only a prosecutor’s, a jury’s, or a judge’s decisions at the time of a later trial. The answer the

¹⁷² For a good discussion of this dynamic, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 2–4 (1971); Michael Klarman, *What’s So Great About Constitutionalism?*, 93 *Nw. U. L. REV.* 145, 160–63 (1998).

¹⁷³ Judicial review is born out of a “distrust of the legislature.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 21 (1962).

¹⁷⁴ The Supreme Court considers municipal zoning laws to be “an essential aspect of achieving a satisfactory quality of life.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

¹⁷⁵ *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 23 (2d Cir. 2010).

Congressman would get in 1940, of course, would be that in 1925 the Supreme Court had held [in *Gitlow v. New York*] that the New York legislature could reasonably have believed in 1902 that advocacy of violent overthrow of government was too dangerous to be permitted. That theory . . . simply accepts a lawmaker's judgment of danger intrinsic in the content of such advocacy, quite independent of any extrinsic conditions. This answer would not pretend to anticipate in 1940 the external dangers in an atomic age that were invoked to sustain the act of 1951, nor would it need to. The *Gitlow* option was disavowed in *Dennis*. But is the answer Holmes and Brandeis would give a member of the 76th Congress more satisfactory—that it all depended on the circumstances; that the constitutionality of H.R. 5138 could be determined only in the context of future eventualities of clear and present danger which he might now be unable to foresee; that the danger would justify his law to suppress revolutionary speech and organization might shift from indigenous rampages to foreign military menaces and back again, so that the bill presently before him for enactment might well be unconstitutional now but might be constitutional in the light of diverse events in 1945, in 1948, in 1951, in 1957, and in 1961, perhaps not in 1966, but again in 1968?¹⁷⁶

Characteristic of this volatile model is the fleetingness of legislative achievement; there lingers a debilitating uncertainty as to the permissible bounds for popular action.¹⁷⁷ And amidst such uncertainty, it becomes especially difficult for valid, bona fide majoritarian processes to operate.¹⁷⁸ This, then, is the chief sin of a time-of-challenge regime: that it functionally cripples municipal lawmaking. In contrast, negative theory

¹⁷⁶ Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 STAN. L. REV. 1163, 1178 (1970).

¹⁷⁷ This undesirable fluidity parallels the ever-evolving criteria of history, tradition, collective conscience, and perceptions of "liberty and justice" that the Court has used to announce the existence of fundamental rights. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) ("In determining which rights are fundamental, judges . . . must look to the traditions and collective conscience of our people to determine whether a principle is so rooted there as to be ranked as fundamental." (citation omitted) (internal quotation marks and alterations omitted)).

¹⁷⁸ By stretching the girth of the First Amendment right beyond its enumerated core, the time-of-challenge regime mirrors other instances where courts have seen fit to abrogate popularly enacted laws in the name of evanescent, dubiously situated substantive rights. See, e.g., *Lochner v. New York*, 198 U.S. 45, 57–58 (1905) (vitiating a state's law by announcing the now-repudiated doctrine of economic substantive due process).

ensures repose for permissible majoritarian action by drawing a firm line in the constitutional sand: time-of-enactment, from whence the government's motives can be tested. If the law proves not to have sprung from iniquitous intent, then it is a valid fruit of the legislative process; and if it be such, then the law should be undone only through the alike workings of statutory devices. Such an approach, apart from respecting the separation of powers, will curtail the judicial discovery of novel rights that are dislodged from a tested understanding of the human good.¹⁷⁹

Some scholars, including Professor Cass, might object to this thesis and argue that negative principals instead favor *counter-majoritarian* interests.¹⁸⁰ One commentator observes, for instance, how negative theorists “should be wary of ‘secondary effect’ justifications because of their potential to mask government censorship.”¹⁸¹ Yet there is a valid distinction that ought to be drawn between courts (a) focusing on the propriety of government motives and (b) simultaneously imposing a lenient burden in the context of zoning by liberally construing negative secondary effects. The two are not rivalrous alternatives. Negative theory posits simply that courts should police for illegitimate regulatory motives—yet this hardly preordains the extent to which lawmakers might in good faith construe which secondary effects are legitimately injurious to society; nor, therefore, does negative theory foreclose the possibility that such a conception be vast.¹⁸²

CONCLUSION

Jurisdictions have split over whether the constitutionality of a zoning law that targets adult entertainment should be evaluated based on the alternative avenues preserved at the time of its enactment or at the time of challenge. The Second Circuit became the highest authority to squarely address this question in *TJS of New York v. Town of Smithtown* and therein embraced time-of-challenge.¹⁸³ Indeed, from the sparse pre-

¹⁷⁹ See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7–8 (1974); cf. *Lochner*, 198 U.S. at 57; *Adkins v. Children's Hospital*, 261 U.S. 525, 560–61 (1923). See generally 3 JOHN FINNIS, *Human Rights and their Enforcement* (1985), in HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS 39 (2011); ERNEST L. FORTIN, HUMAN RIGHTS, VIRTUE, AND THE COMMON GOOD 22–23 (1996); PIERRE MANENT, THE CITY OF MAN 138–39, 145 (Marc A. LePain trans., 1998).

¹⁸⁰ See Cass, *supra* note 90, at 1355–56; Werhan, *supra* note 101, at 90, 92–93.

¹⁸¹ Werhan, *supra* note 101, at 93.

¹⁸² Unlikely support for this proposition can be found in Schauer's critics, who note with displeasure how, in the First Amendment context, negative theory has the effect of equipping the government with enormous regulatory power. See Alexander & Horton, *supra* note 103, at 1332.

¹⁸³ See *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 18–19 (2d Cir. 2010).

cedent that exists, such a position appears to be the stronger.¹⁸⁴ No court, however, has considered the theoretical ramifications of each option; and in particular, the drawbacks of volatile constitutionality have been wholly missed.

Undergirding the time-of-challenge position is an implicitly positive conception of the free speech right, which is analytically out of synch with the negative-influenced jurisprudence that has emerged in the wake of *City of Renton v. Playtime Theatres*. The *Renton* test demands merely that adult entertainment businesses be afforded a “reasonable opportunity” to exist.¹⁸⁵ As such, the alternative avenues requirement is best construed not as a de facto-focused mandate that demands a set quantity of actual sites but rather as compelling only the preservation of *theoretical* space.

By thus applying, as we ought to, negative principles to resolve the question at hand, we are led to favor a time-of-enactment regime. Negative theory premises the need for protecting free speech solely on the special dangers attaching to the government’s improper regulation of it.¹⁸⁶ Conducting the constitutional inquiry at the time of enactment suffices for us to inspect the government’s interest and thereby gauge its motives in so regulating. Moreover, a time-of-enactment regime ensures the integrity of majoritarian processes, which are imperiled by time-of-challenge. In sum, negative theory preserves the validity and finality of popular laws and equips municipalities with an interpretive blueprint for restrictively zoning adult entertainment businesses.

¹⁸⁴ See *supra* Part I.B for a comprehensive analysis of the authorities on both sides of this split.

¹⁸⁵ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

¹⁸⁶ See SCHAUER, *supra* note 16, at 80–81.