Government Litigation Strategy after *Daytona Grand*: *Renton* Undone?

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Let us examine, you and I, the impact of the recent 11th Circuit decision *Peek-A-Boo Lounge of Bradenton v. Manatee County* and the more recent federal district court decision of *Daytona Grand v. City of Daytona Beach* on the litigation strategy of government against the adult entertainment industry. In the course of this intellectual exercise we will also be reviewing the effect of the aforementioned cases in possibly conflating the Supreme Court decision of *City of Los Angeles v. Alameda Books* and perhaps compelling a reworking of the seminal case of *Renton v. Playtime Theaters.*

In 20 years of doing successful battle with the adult entertainment industry, this writer never thought that the industry would be able to breach the judicial construct for analyzing the evidentiary burden to support adult entertainment regulation which was established and ensconced in the law in the ground breaking case of *Renton v. Playtime Theaters*. The Supreme Court in *Renton* gave much needed comfort to government attorneys and legislators when it placed its *imprimatur* on the use of foreign studies, originating from vastly dissimilar jurisdictions, in the enactment process for adult entertainment regulatory legislation. In eschewing the necessity of local studies to support the regulatory legislation the Supreme Court in *Renton* wisely opined that

> [t]he Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of Renton,' the city's justifications for the ordinance were 'conclusory and speculative.' 748 F.2d. at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle.

City of Renton v. Playtime Theatres, Inc. 475 U.S. 41, 50 106 S.Ct. 925, 930 - 931 (1986)

Among other import, an extremely significant feature of this case was that Renton with a population then of approximately 32,000 and a rural character of a bed room community was permitted to rely on a study from a much larger, more sophisticated and diverse city, Seattle, to enact a zoning measure to regulate adult entertainment within its borders. Perhaps desiring to further government's long held ability to have a hand in regulating the health, safety and welfare of the environment of its citizens, the Supreme Court continued in *Renton* to instruct that

> [w]e hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here.

Id. at 51 - 52. Thus, not only could a relatively small city like Renton (with presumably concomitantly limited financial and, therefore, legal resources) rely on studies done by other dissimilar cities as pre-enactment support for ordinances regulating adult entertainment but the city could rely on judicial opinions describing the evidentiary basis of the secondary effects. Setting forth those secondary effects as a pre enactment predicate, adequately buttressed by the record, could have the salutary effect of transforming the scrutiny of the subject ordinances from strict to intermediate.[1]

All of these rulings from the highest court in the land acted, naturally, to relieve the troubling burden on government looking to create an adequate record to support ordinances regulating the adult entertainment industry. Government was not required to "conduct new studies" or "produce evidence independent of that already generated by other cities." The only

[1]It is well beyond the scope of this article to describe the difference between intermediate and strict scrutiny. Suffice to say that the government's burden is made vastly more obtainable if the former standard can be applied.

caveat expressly set forth by the Supreme Court in *Renton* was that whatever the evidence by study or case law upon which government relied had to be "reasonably believed to be relevant to the problem that the city addresses." *Ibid.*

Those were the good old days of well defined parameters and bright line law in this subject area with nary a slippery slope in sight. However, beginning with Justice Souter's opinion in the case of *Erie v. Paps* a certain number of the Justices of the Supreme Court have taken an increasing amount of interest in the nature of the supporting evidence for adult entertainment regulatory ordinances. In his concurring and dissenting opinion in *Erie* written in the year 2000, Justice Souter admitted his mistake in not more carefully examining the evidentiary support for the public nudity ordinance reviewed in the case of *Barnes v. Glen Theaters* nine years earlier.[2] He pledged to rectify his oversight and compel the government to "toe the mark more carefully than I first insisted.." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316-317, 120 S.Ct. 1382, 1405 - 1406 (2000).

As precedent and a benchmark for prospective analysis of pre-enactment evidence in his opinion in *Erie,* Justice Souter stated that the Court has held that

> "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ''posit the existence of the disease sought to be cured.'' *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (C.A.D.C.1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*, at 664, 114 S.Ct. 2445 ... Most recently, in *Nixon*, we repeated that ""[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden,""528 U.S., at 392, 120 S.Ct. 897, and we examined the ""evidence introduced into the record by petitioners or cited by the lower courts in

[2]In a humbling example of self effacement, Justice Souter explains the cause of what he considers his lapse of judgement with the simple phrase, quoting Samuel Johnson, "Ignorance, sir, ignorance." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316, 120 S.Ct. 1382, 1405 - 1406 (2000); *Boswell, Life of Samuel Johnson, in 44 Great Books of the Western World* 82 (R. Hutchins & M. Adler eds. 1952).

> this action ……,"

Id. at 312 . Repeating, and presumably thereby adopting, *Renton's,* analysis that excused the small community from having to initiate its own local studies, Justice Souter then concludes that

> [t]he upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed. See, *e.g., Edenfield v. Fane,* 507 U.S. 761, 770-773, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)

Id. at 313.

As the old saw goes, there is nothing as zealous as a convert. Justice Souter continued his self proclaimed judicial repentance in his dissent in the case of the *City of Los Angeles v. Alameda Books, Inc*. In *Alameda,* Justice Souter focused on the quality of evidence needed to support the passage of adult entertainment regulation, that is, pre enactment evidence, and said that

> [e]qual stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. See, *e.g., Renton, supra,* at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440. And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction.

City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 458-459, 122 S.Ct. 1728,1746-1747 (2002). Tellingly, he continued to give superficial deference to *Renton's* teachings but the plurality in its criticism of Justice Souter's approach saw beneath the attempt. They reasoned that

> Justice SOUTER would have us rethink this balance, and indeed the entire *Renton* framework. 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.' 475 U.S., at 47-54, 106 S.Ct. 925. 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]."" *Id.*, at 47, 106 S.Ct. 925 (emphasis deleted) 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. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects.

Id. at 440-441. Ultimately, the *Alameda* plurality rebuffed Justice Souter's efforts to rewrite *Renton* and wrote that

> [o]ur deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an 'obligation to exercise independent judgment when First Amendment rights are implicated' *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion); see also *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843-844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner, supra,* at 665-666, 114 S.Ct. 2445; *Erie, supra,* at 297-298, 120 S.Ct. 1382 (plurality opinion). We are also guided by the fact that *Renton* requires that municipal ordinances receive only intermediate scrutiny if they are content neutral. 475 U.S., at 48-50, 106 S.Ct. 925. There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech.

Id. at 440. Clinging to the teachings of the *Renton* court, the plurality in *Alameda* refused to raise the bar for the evidentiary burden required of government regarding pre enactment evidence in support of adult entertainment regulation. The Court ruled that

> [i]n effect, Justice SOUTER asks the city to demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary. See, *e.g., Barnes, supra,* at 583-584, 111 S.Ct. 2456 (SOUTER, J., concurring in judgment). Such a requirement would go too far in undermining our settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech. *Renton, supra,* at 52, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously.

Id. at 439.

But, after *Alameda*, something was different; the legal landscape had changed. From government's point of view, the Supreme Court in *Alameda* had injected an ominous, novel feature into the analytical mix that courts had to consider when examining the quality of evidence supporting enactment of adult entertainment regulation. Justice Souter's insistence had at last had an effect on the way that the Supreme Court was going to prospectively analyze the government's evidentiary burden of proof. The Supreme Court had not altered the government's admittedly easy standard of pre enactment record evidentiary support for adult entertainment regulation as set forth in *Renton*. But, for the first time the Supreme Court now laid out a road map for the adult entertainment industry to challenge and cast doubt on the pre enactment record evidence after a lawsuit was filed. If the adult entertainment industry successfully impugned the studies and other pre enactment record evidence presented in support of the subject legislation at the time of its adoption, then the burden shifted to the government to supplement its record with additional evidence to support the regulation. The plurality in *Alameda* ruled that

> [i]n *Renton,* we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925; see also, *e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (SOUTER, J., concurring in judgment) (permitting municipality to use evidence that adult theaters are correlated with harmful secondary effects to support its claim that nude dancing is likely to produce the same effects). This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438. From the government's prospective, the Supreme Court had taken the first step down the slippery slope. Even though the plurality in *Alameda* had ruled in favor of the government and reversed the Ninth Circuit's summary judgment government attorneys saw a gathering of dark legal storm clouds on the horizon and roundly predicted a future of doom and gloom.

Well, attorneys, especially government ones like us, are not usually known for our perspicacity, routinely predicting some bleak end or other but in this instance, we were right. With its ruling, the *Alameda* plurality opened Pandora's Box and "out flew plagues innumerable, sorrow and mischief for mankind."[3] The adult entertainment industry lawyers, never known to look the proverbial gift horse in the mouth have taken full advantage of the opportunity to challenge the oft vilified studies which in times past have caused them so much grief.[4] I suppose that because of the doctrine of *stare decisis,* the Supreme Court has thus far refrained from revisiting *Renton* entirely but adult entertainment industry lawyers have gleefully seized the initiative, aided at times by hapless government counsel trying to stem the tide.[5]

In the 11th Circuit, the most significant application of the new *Alameda* standard occurred in the recent case of *Peek-a-Boo Lounge of Bradenton v. Manatee County,* 331 F.3rd 1251 (11th Cir. 2003). At an early juncture in the opinion, the court set out what it considered the importance of *Alameda* when it stated that

> [t]he significance of *Alameda Books* is that it clarifies how the court is to interpret the third step of the *Renton* analysis ... the standard we apply is the one described

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[3]*Mythology*, Edith Hamilton, pg. 70, The New American Library, copyright renewal 1969

[4]Studies from Amarillo, Austin, Beaumont, Garden Grove, Houston (1 page.missing), Indianapolis, Islip, Los Angeles, Minneapolis, New York City, Oklahoma City, Phoenix, St. Paul, Tucson, to name a few.

[5]The best example of unwitting or unwise aiding and abetting the adult industry cause by government is the notorious case of *Flanigans Enter., Inc. v. Fulton County,* 242 F. 3rd 976 (11th Cir. 2001).

> in *Renton* and utilized in *Barnes, Pap's, A.M.*, and *Alameda Books.* According to this standard, the government need not conduct local studies or produce evidence independent of that already generated by other municipalities to demonstrate the efficacy of its chosen remedy, 'so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that [it] addresses.' *Pap's, A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (quoting *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925). However, the government's evidence 'must fairly support [its] rationale.' *Alameda Books*, 122 S.Ct. at 1738 (plurality opinion); *see also id.* at 1743 (Kennedy, J., concurring). Further, plaintiffs challenging the ordinance after passage must be given opportunity to 'cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale, or by furnishing evidence that disputes the municipality's factual findings.' *Id.*

Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla. 337 F.3d 1251, 1264 -1265 (11th Cir., 2003).

At issue in *Peek-a-Boo* was adult entertainment regulation consisting of both a zoning ordinance and a public nudity ordinance.[6] The zoning ordinance had no pre enactment supporting evidence whatsoever.[7] The 11th Circuit ruled that the district court erred when it considered the pre enactment evidence for the zoning ordinance and the public nudity ordinance together rather than requiring distinct evidence for each ordinance. *Id.* at 1266. In *Peek-a-Boo,* the court dealt the government a heavy blow. It reversed the district court's summary judgement in favor of Manatee County with regard to the zoning ordinance. Further, applying the *Alameda* analytical framework, the 11th Circuit reversed and remanded the case concerning the public nudity ordinance back to the district court for further findings. The appellate court stated that

> the County may rely upon any evidence that is 'reasonably believed to be relevant' to its interest in preventing secondary effects. *Renton*, 475 U.S. at 51-52, 106 S.Ct.

[6]*Id.*, at 1253-1255. The Supreme Court has ruled that public nudity ordinances have to be analyzed using the four part test set forth in *O'Brien v. United States,* 391 U.S. 367 while zoning ordinances regulating adult entertainment are examined pursuant to *Renton* as traditional time, place and manner legislation. *Id.* at 1264.

[7]The 11th Circuit has ruled that *Renton* requires at least some pre enactment evidence. *Ranch House v. Amerson,* 238 F.3d 1273, 1283 (11th Cir.2001); *Flanigan's Enterprises, Inc. v. Fulton County, Ga.*, 242 F.3d 976, 986 (11th Cir.2001).

> 925. However, the County cannot rely on 'shoddy data or reasoning' and its 'evidence must fairly support [its] rationale.' *Alameda Books,* 122 S.Ct. at 1736. Further, plaintiffs must be given the opportunity to ""cast direct doubt on this rationale"" with evidence of their own. *Id.* If plaintiffs succeed in doing so, the burden shifts back to the [County] to supplement the record with evidence renewing support for a theory that justifies its evidence. *Id.* (citing *Pap's A.M.,* 529 U.S. at 298, 120 S.Ct. 1382).

Id. At 1262.

In *Peek-a-Boo,* Manatee County relied upon, *inter alia,* testimony from a law enforcement official, a health official and a report from the Florida Family Association incorporating 19 studies from various municipalities or other entities. The adult lounge plaintiffs countered by submitting much of the same evidence that they had previously submitted to the Manatee County Commission, including but not limited to a study by study refutation of each of the 19 studies relied upon by Manatee County as pre enactment support for the legislation. *Id.* at 1271. The 11th Circuit ruled that while Manatee County had satisfied the *Renton* pre enactment evidentiary burden which admittedly was not a rigorous one, the adult industry plaintiffs had succeeded in casting doubt on the validity of the pre enactment evidence. Accordingly, now government had an additional burden since the advent of *Alameda's* "clarification" of *Renton* and that was to

> supplement the record with evidence renewing support for a theory that justifies its ordinance. *Alameda Books,* 122 S.Ct. at 1736 (plurality opinion) (citing *Pap's A.M.,* 529 U.S. at 298, 120 S.Ct. 1382); *see also id.* at 1742-44 (Kennedy, J., concurring). Thus, the County must be given the opportunity to supplement the record in this manner, and the District Court, which did not have the benefit of *Alameda Books* when it granted the County's motion for summary judgment, should consider any additional evidence in the first instance. At trial, in keeping with *Alameda Books'* burden-shifting analysis, the District Court must determine whether the County's additional evidence renew[s] support for a theory that justifies its ordinance. 122 S.Ct. at 1736.

Id. at 1272-1273. The court continued that the burden rests with the county in this regard and that the district court must weigh the renewed support against the evidence produced by the adult industry plaintiffs based upon a preponderance of the evidence standard. The court concluded,

almost apologetically, that of course the district court should not substitute its judgment for that of the county legislators which was small solace indeed. *Id.* at 1273 .

Actually, after the *Peek-a-Boo* decision, the decision in *Daytona Grand* seems almost anti climactic. After all, the federal district court judge was simply following the road map set forth in *Peek-a-Boo,* which means that as the trial court he was doing his job. But, the significance of *Daytona Grand* is what lies at the end of the road. As the court noted, the factual premise in *Daytona Grand* "bears a remarkable similarity to *Peek-a-Boo." Daytona Grand, Inc. v. City of Daytona Beach, Fla.,* Case No. 6:02-cv-1469-Orl-28KRS at pg.20, (M.D. Fla. 2004) . The ordinances at issue were a public nudity ordinance and an alcohol and nudity ordinance. The court ruled that the city had satisfied its pre enactment burden with the evidence that it submitted in support of the legislation. *Id,* at 21. As in *Peek-a-Boo*, the plaintiff adult industry submitted an expert study which "cast direct doubt" on the city's pre enactment evidence. The conclusion of the adult industry expert study, *inter alia,* was that the city's pre enactment evidence was "shoddy." *Ibid*. The city responded not by creating a "battle of the experts" but rather obliquely by attacking the methodology of the adult industry's expert studies. *Id.* at 22.

What the trial court did at the procedural signpost of summary judgment was eminently reasonable and predictable. He ruled that the adult industry plaintiffs had, indeed, cast direct doubt on the city's pre enactment evidence. The judge also ruled that while the city did not frontally defend the attack by the adult industry expert study, if the expert study which cast doubt on the city's pre enactment evidence is "plagued with methodological flaws, as the city seems to contend, its capacity to call the evidentiary bases for the city's ordinances is obviously called into question. Thus, there clearly remains a material dispute in this case that is central to the Plaintiff's challenge .... Accordingly, neither side in this case is entitled to an award of summary judgment." *Id.* at 22.

At this point, the trial court in *Daytona Grand* had arrived at the end of the road map set forth

by the 11th Circuit in *Peek-a-Boo.* The court now was heading into uncharted territory. The 11th Circuit had clearly articulated the *Alameda* framework of burden shifting that the appellate court required trial courts in this circuit to follow. But, what qualitative body of evidence was required of government once the burden had shifted; that was the theoretical question that trial judges in the trenches at the front lines had to answer.[8]

It is worthy to note in detail the trial evidence that the city presented at trial to satisfy its burden once the adult industry had successfully cast direct doubt on the city's pre enactment evidence. First, however, it might be useful to revisit and synopsize what the *Alameda* plurality had to say about what it required. The *Alameda* court said that

> [i]n *Renton,* we specifically refused to set ... a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is ""reasonably believed to be relevant"" for demonstrating a connection between speech and a substantial, independent government interest. 475 U.S., at 51-52, 106 S.Ct. 925 ... This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. .... If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 438-439, 122 S.Ct. 1728,1736 (2002). The government in *Daytona Grand* refused to participate in a "battle of the experts" similar to *Peek-a-Boo* and chose instead to present the following evidence to supplement the record renewing

[8]Perhaps the best characterization of the daily burden of trial judges is found in a joke. Two friends, one an appellate court judge and one a trial judge went duck hunting one day and agreed to a friendly wager to see who bagged one first. First, in deference to his position, the appellate judge took a turn. He saw some birds flying overhead, and ruminated aloud whether they were ducks or not. Alas, while he was contemplating, the birds flew out of sight. Next came the trial judge's turn and here again came some birds flying overhead. "Bam, bam, bam," the trial judge's rifle rang out. He hit one. "Sure hope they were ducks," he said.

support for theories that justified its ordinances

> (1) testimony from Daytona Beach detective Harry Oakley regarding his observations of oral sex between dancers, drug activity, and propositions for oral sex at adult entertainment establishments in Daytona Beach; (2) a sworn statement from a citizen that he was offered sex at an adult entertainment establishment in Daytona Beach; (3) testimony from another citizen that upon observing sexual acts at Plaintiffs' establishment she was accosted by bouncers and physically removed from the premises; (4) reports of at least three more possible batteries at Plaintiffs' establishment; and (5) the testimony of the City's urban planner, Richard Preoletti, that prostitution does not exist in the parts of Daytona Beach where there are no adult entertainment establishments.

Daytona Grand, Inc. v. City of Daytona Beach, Fla. 410 F.Supp.2d 1173, 1185 (M.D.Fla.,2006). The adult industry expert responded that the supplemental evidence provided by the city was "essentially meaningless." *Ibid*.

In its ruling, the *Daytona Grand* trial court commented on the nature of the city's evidentiary response at trial to the shift in burden and said that

> [w]hile Plaintiffs have submitted a sophisticated and detailed expert study that both critiques the City's pre-enactment evidence and empirically examines the relationship between adult businesses and crime in Daytona Beach, the City has consistently maintained that it need not perform any such study. The City instead rests the fate of its ordinances on two arguments: (1) that Plaintiffs' study fails to cast direct doubt on the rationales underlying the ordinances; and (2) that even if Plaintiffs have succeeded in casting direct doubt, the City's evidence at trial renews support for a theory justifying the ordinances.

Id. at 1186. The trial court then struck the city's ordinances as unconstitutional and perhaps signaled a sea change in adult entertainment regulatory law presaged years ago by Justice Souter's dissent in *Erie.* The *Daytona Grand* court held that

> The evidence the City offered at trial to renew support for a theory justifying its ordinances suffers from the same flaws as its pre-enactment evidence. Owing perhaps to a stubborn refusal to accept the evolution in the law effected by *Alameda Books* and *Peek-A-Boo,* the City's post-enactment evidence, like its pre-enactment evidence, consists of either anecdotal evidence or opinions based on highly unreliable data. As Dr. Fisher observed, the City fails, once more, to compare any of its data of incidents occurring in and around nude dancing establishments with data of such incidents occurring in and around similarly situated establishments. In

> failing to renew support for a theory justifying its ordinances, the City leaves the Court with only one option: to declare Ordinances 81-334 and 02-496 unconstitutional and strike them accordingly. To reach a contrary result would be at clear odds with the plain import of *Peek-A-Boo* that gone are the days when a municipality may enact an ordinance ostensibly regulating secondary effects on the basis of evidence consisting of little more than the self-serving assertions of municipality officials.

Id. at 1188.

In trenching new ground, perhaps the trial court went too far and unwittingly rewrote *Renton,* which certainly will gratify Justice Souter, if not some of his colleagues. Remember with me what the *Alameda* plurality of the Supreme Court warned would be the consequences of requiring more than *Renton* did of government when it rebuffed Justice Souter's attempt to rewrite the framework of *Renton.* The *Alameda* plurality rejected Justice Souter's call for more empirical data by government to support its adult entertainment regulation said that

> [s]uch a requirement would go too far in undermining our settled position that municipalities must be given a ''reasonable opportunity to experiment with solutions" to address the secondary effects of protected speech. *Renton, supra,* at 52, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion)). A municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously.

City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 439-440, 122 S.Ct. 1728,1736 (2002). It was the Supreme Court in *Erie* which said that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Erie v. Pap's AM,* 529 U.S. 277, 300-301 (2000). Despite introducing new analytical criteria into the rough and tumble fray of adult entertainment regulatory review, the Supreme Court in *Alameda* remained deferential to government's attempt to provide solutions to urban problems while maintaining precious First

Amendment rights.[9] The *Alameda* court stated that

> [o]ur deference to the evidence presented by the city of Los Angeles is the product of a careful balance between competing interests. On the one hand, we have an "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 666, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion); see also *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843-844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). On the other hand, we must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. See *Turner, supra,* at 665-666, 114 S.Ct. 2445; *Erie, supra,* at 297-298, 120 S.Ct. 1382 (plurality opinion).

City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 440-441, 122 S.Ct. 1728,1737

(2002) The Court in *Alameda* went on to say that

> [m]unicipalities will, in general, have greater experience with and understanding of the secondary effects that follow certain protected speech than will the courts. See *Erie,* 529 U.S., at 297-298, 120 S.Ct. 1382 (plurality opinion). For this reason our cases require only that municipalities rely upon evidence that is ''reasonably believed to be relevant'' to the secondary effects that they seek to address. *Id.,* at 296.

Id. at 442. In his concurring opinion in *Alameda*, Justice Kennedy said that municipal zoning regulation of the adult entertainment industry was not impermissible content discrimination but "sensible urban planning." To illustrate his point, Justice Kennedy then quoted the seminal case of *Village of Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926) in which the Supreme Court more than appropriately said that

> A nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

Id. at 446*;Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388, 47 S.Ct. 114, 71 L.Ed. 303

[9]Sometimes, unfortunately, I think that judges denigrate the importance of adult entertainment analysis because of its "earthy" subject matter. When that occurs, I think that jurists fail to remember that First Amendment permutations of rulings in adult entertainment cases can migrate to other areas. See e.g. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (use of secondary effects doctrine in *Renton* to justify time, place and manner of musical production)

(1926).

The fiction of pre enactment evidence as opposed to post enactment supplemental evidence that the Supreme Court introduced into the jurisprudence in *Alameda* will ultimately most assuredly undo the central holdings of the *Renton* case. What good is the knowledge that government can enact adult entertainment regulation under the less rigorous *Renton* standard if everyone realizes that the industry will force government to undertake local or, at least, empirical studies once the industry experts "cast doubt" on the government's "pre enactment" evidence? *Peek-a-Boo* and *Daytona Grand* have illustrated exactly what sort of "plagues innumerable, sorrow and mischief" flew out of the Pandora's Box that the *Alameda* plurality opened. Government has been stripped in this circuit of precisely the latitude that *Renton* gave it to deal with the admitted[10] problems associated with the adult entertainment industry. Ultimately, the Supreme Court will have to either reestablish its teachings in *Renton* or let Justice Souter have his way, at last.

[10]"Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real. The law does not require a city to ignore these consequences if it uses its zoning power in a reasonable way to ameliorate them without suppressing speech. A city's ""interest in attempting to preserve the quality of urban life is one that must be accorded high respect."" *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) *City of Los Angeles v. Alameda Books, Inc*. 535 U.S. 425, 444, 122 S.Ct. 1728, 1739 (2002)(Justice Kennedy concurring)