Sexually Explicit Speech

by JERROLD J. KIPPEN*

"[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."[1]

I. Introduction

Our structure of rights and their limitations presupposes a society composed of autonomous moral actors. It also recognizes the need to continually strive towards a coherent expression of our common values. As circumstances change, the balance between these two fundamental interests requires constant re-evaluation. Quite simply, we, as a society, need to talk about them. The quality of that discourse, however, is diminished whenever equality is not ascribed to and protected for all its participants. It is crucial, therefore, that the courts not short-circuit this discourse by deciding ahead of time what the norms of civility should be.

In order to avoid this pitfall, the Supreme Court has traditionally distinguished between content-specific and content-neutral restrictions on speech.[2] Content-specific regulations, because they directly target the speech of an individual or group, presumptively violate the First Amendment and are subject to strict scrutiny.[3] In order to pass constitutional muster, these regulations must be narrowly tailored to further a compelling state interest.[4] In practice,

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1. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).

2. Stephan Redish, *The Content Distinction in First Amendment*, 34 STAN. L. REV. 113 (1981). The Supreme Court, however, has not always drawn this distinction. *See id.* at 121-23.

3. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 462-63 & n.7 (1980).

4. *Id.* at 461-62.

very few content-based restrictions on speech survive the strict scrutiny applied to them.[5]

Content-neutral regulations presumably target conduct. Because, however, these regulations have a limiting effect on speech, they are still subject to First Amendment scrutiny and are analyzed according to one of two tests.[6] Those that govern the time, place and manner of speech must be justified by a significant governmental interest and must leave open ample alternative channels of communication.[7] Regulations indirectly affecting speech must: (1) be enacted under constitutionally legitimate authority, (2) be unrelated to the suppression of free expression, (3) further a substantial state interest, and (4) be no greater than essential to achieve the state interest.[8] Where the limitations on speech under these regulations are considered merely incidental to the necessary regulation of the target conduct, they pass constitutional muster.

Unfortunately, not all regulations affecting speech are easily amenable to this analysis. This is due to the Court-created category of low-value speech, which expresses the view that "not all speech is of equal First Amendment importance."[9] Regulations affecting this type of speech are sometimes called content-based, yet are analyzed under the lower standards applied to non-content-based speech. At other times, regulations which are clearly content-based are simply considered non-content-based by the Court. Furthermore, exactly what kinds of speech the Court believes to be low in value are difficult to pinpoint because the Court's use of this theory has been marked by vacillation and uncertainty.[10] At one time or another, the

5. One commentator has noted that as of 1987, "outside the realm of low-value speech, the Court has invalidated almost every content-based restriction that it has considered in the past thirty years." Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987).

6. David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 200-01 (1987).

7. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981).

8. United States v. O'Brien, 391 U.S. 367, 377 (1968). These two approaches are not always distinct. Some opinions have treated them as interchangeable. *See* United States v. Albertini, 472 U.S. 675, 687-90 (1985); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Young v. American Mini Theaters, Inc., 427 U.S. 50, 79-80 (1976) (Powell, J., concurring).

9. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) (holding credit report a matter of purely private concern and therefore of lesser constitutional value than a matter of public concern).

10. Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298 (1995).

Court has held fighting words, child pornography, profanity, libel and commercial speech to be of low value.[11]

The status of another member of this category, non-obscene sexually explicit speech, is perhaps the most difficult to decipher. The Court has held that the government may ban obscenity, including obscene forms of adult entertainment.[12] Some members of the Court, though not quite a majority, would add non-obscene sexually explicit expression to the list.[13] On the other hand, the majority of the Court has held that non-obscene sexually explicit speech merits First Amendment protection.[14] Repeatedly, the Court has stated that nudity alone does not place otherwise protected material outside the mantle of First Amendment protection.[15]

In 1973, the Court announced the current standard for distinguishing between illegal obscenity and protected expression.[16] If (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (3) the work, as a whole, lacks serious literary, artistic, political, or scientific value, then the work constitutes obscenity and does not merit First Amendment protection.[17]

States, however, encountered difficulty in applying this test.[18] This became evident in *Jenkins v. Georgia*: the Court unanimously reversed the obscenity conviction of a movie theater owner who had shown a sexually explicit film.[19] Writing for the Court, Justice Rehnquist emphasized that, under *Miller*, only the most explicit, hard-core materials fall outside of constitutional protection.[20] As a

11. *Id.* at 299.

12. *See* Miller v. California, 413 U.S. 15, 24 (1973).

13. *See* Shaman, *supra* note 10 at 299 n.10.

14. *See, e.g.*, Roaden v. Kentucky, 413 U.S. 496, 504 (1973) (holding that the setting of an adult book store or commercial theater is presumptively protected by the First Amendment); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (holding that like political and ideological speech, adult entertainment is constitutionally protected); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (holding nude dancing entitled to First Amendment protection).

15. Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); *Erznoznik*, 422 U.S. at 211-12.

16. *Miller*, 413 U.S. at 24.

17. *Id.*

18. *See, e.g., Jenkins*, 418 U.S. 153.

19. *Id.* at 155.

20. *See id.* at 160.

result, only a small portion of the broad range of sexually explicit materials available to the public has been held "obscene." These include materials depicting flagellation,[21] bestiality,[22] and "hard core" sexual conduct.[23]

As a result, local governments have attempted to regulate non-obscene sexually explicit speech in a variety of ways.[24] The three most common regulations involve (1) licensing or permitting;[25] (2) zoning ordinances;[26] and (3) public nudity laws.[27] Given the supposed protected status of this category or "content" of speech one would expect that each of these types of regulation would be subject to strict scrutiny. In actuality, however, the Court's treatment of these cases has not been so clear cut and has instead reflected the Court's vacillation and uncertainty regarding the protected status of non-obscene sexually explicit speech.

In Parts II, III, and IV, this note will argue that the Court's treatment of non-obscene sexually explicit speech in the form of licensing , zoning, and nudity regulations has weakened the scrutiny applied to all speech regulations. Likewise, the Supreme Court's treatment of non-obscene sexually explicit speech provides a clear illustration of its failure to respect the equality principle of the First Amendment, inappropriately short-circuiting society's discourse by grounding the Court's decisions in notions of offense or morality.

The effort here is not to articulate a defense of non-obscene sexually explicit speech, but to expose the inconsistency in and damage to the First Amendment doctrine as a whole caused by the Court's improper infusion of notions of offense or morality into their holdings. If non-obscene sexual speech regulation is content-based, then the Court's treatment has weakened First Amendment strict scrutiny. Alternatively, where the Court has "treated" such regulations as non-content-based, it has reduced the scope of strict scrutiny protection and struck a damaging blow to the very heart of the content/non-content distinction. In either case, such lip-service protection of low-value speech has weakened First Amendment

21. *See, e.g.,* Ward v. Illinois, 431 U.S. 767, 771-72 (1977).

22. *See, e.g.,* United States v. Guglielmi, 819 F.2d 451, 453-54 (4th Cir. 1987).

23. *See, e.g.,* Hamling v. United States, 418 U.S. 87, 92-93, 100 (1974).

24. *See* John M. Armento, *Effective Regulation of Adult Entertainment Uses*, 26 Real Est. L.J. 69 (1997).

25. *See, e.g.,* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).

26. *See, e.g.,* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1985).

27. *See, e.g.,* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

protection and threatens even the traditional bastion of First Amendment guarantees—political speech. Finally, Part V will conclude that because notions of offense or indecency do not turn on the distinction between content and non-content, regulations limiting non-obscene sexually explicit speech should be analyzed as content-based and subject to strict scrutiny.

II. Li-"censoring" Sexually Explicit Speech

A. Background

A prior restraint exists where the government requires that a party comply with a regulational scheme before engaging in expressive conduct.[28] Prior restraints are not per se unconstitutional.[29] Traditionally, any prior restraint bears a heavy presumption against its constitutionality.[30] In the case of adult businesses, local governments can require a business to obtain a permit or license before engaging in or offering live adult entertainment.[31]

The constitutionality of these prior restraints, however, depends on two factors. "[A] law cannot condition the free exercise of First Amendment rights on the 'unbridled discretion' of government officials."[32] A prior restraint lacking narrow, objective and definite standards to guide administering authorities is unconstitutional.[33] Furthermore, unbridled discretion exists when a licensing scheme lacks adequate procedural safeguards to ensure a prompt decision.[34]

B. *Freedman v. Maryland*

The seminal case establishing procedural protections against prior restraints is *Freedman v. Maryland*.[35] In *Freedman*, the Court held that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of

28. *See* Near v. Minnesota, 283 U.S. 697, 713-15 (1931).

29. *FW/PBS*, 493 U.S. at 225.

30. Freedman v. Maryland, 380 U.S. 51, 57 (1965).

31. East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1268, 1273 (1996).

32. Gaudiya Vaishnava Society v. City of San Francisco, 952 F.2d 1059, 1065 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1991).

33. Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969).

34. *FW/PBS*, 493 U.S. 215 at 227; *East Foothill Blvd., Inc.*, 912 F. Supp. at 1274.

35. 380 U.S. 51 (1965).

a censorship system."[36] The Court mandated three procedural safeguards against such prior restraints.[37] "First, the burden of proving that a film is unprotected expression must rest on the censor."[38] Second, any restraint issued in advance of a final judicial determination must do no more than preserve the status quo for the shortest feasible period.[39] Finally, the procedure must provide for a prompt judicial decision.[40]

Freedman involved a Maryland law[41] requiring all motion picture exhibitors to submit films to the State Board of Censors before showing the films.[42] The statute created an invalid prior restraint on a protected form of expression because the initial decision of the Board of Censors effectively barred exhibition of any disapproved film, leaving exhibitors with the sole recourse of a successful appeal in Maryland court.[43] In subsequent applications, the Court demonstrated rigorous application of the *Freedman* test and great suspicion of any system of prior restraint[44] —rigorous and great, that is, until 1990, when the Court applied the test to an ordinance regulating sexually explicit speech.[45]

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36. *Id.* at 58.

37. *Id.* at 58-59.

38. *Id.* at 58.

39. *Id.* at 59.

40. Prompt judicial review would guard against both an administrative refusal to grant the license even after the expiration of a temporary restraint and the deterrent effect of an errant temporary denial of a license. *Id.* at 59. The Court provided what it believed to be an example of acceptable procedural safeguards in a statutory scheme. The Court explained a New York procedure for preventing the sale of obscene books: "That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after the joinder of issue; the judge must hand down his decision within two days after termination of the hearing." *Id.* (citing Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957)).

41. MD. CODE ANN. art. 66A, § 2 (1957).

42. A Baltimore theater owner challenged the statute by exhibiting the film, "Revenge at Daybreak" without first submitting it to the censorship board. The state conceded that the film did not violate the statutory standards and would have been approved if submitted. *Freedman*, 380 U.S. at 52.

43. *Id.* at 54-55.

44. *See, e.g.*, Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Sec'y of State v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

45. *See FW/PBS*, 493 U.S. 215.

C. *FW/PBS v. City of Dallas*

FW/PBS concerned a Dallas city ordinance which required sexually oriented businesses to submit to inspections before obtaining a license, moving into a new building, changing the use of a structure, changing the ownership of the business, or applying for annual permits.[46] The Chief of Police was required to approve the issuance of the license within thirty days of receipt of the application but the permit could not issue before the health department, fire department, and the building official approved the premises.[47] The ordinance neither set a time limit within which these inspections had to occur,[48] nor provided a means of recourse for the applicants if the license was not issued within thirty days.[49]

Because the prior restraint lacked the procedural safeguard of a time limit, Justice O'Connor found the Dallas ordinance unconstitutional.[50] The Justices, however, concluded that the regulatory scheme did not present the "grave 'dangers of a censorship system,'" and therefore, was not subject to the full protections of *Freedman*.[51] According to Justice O'Connor, *Freedman*'s underlying policy provides that a license for a business protected by the First Amendment must be issued within a reasonable period of time, because undue delay suppresses protected speech.[52]

Justice O'Connor distinguished the *Freedman* ordinance from the Dallas ordinance in two ways. First, the censor in *Freedman* engaged in direct censorship of particular expressive material. Such regulation is presumptively invalid,[53] and therefore required the censor to bear the burden of justifying its actions.[54] In contrast, Dallas did not review the content of or exercise discretion over particular expressive speech; instead, the city examined each license applicant's overall qualifications.[55] Justice O'Connor deemed that this

46. *Id.* at 225.

47. *Id.* at 227 (citing DALLAS, TEX., CITY CODE ch. 41A, Sexually Oriented Businesses § 41A-5(a)(6) (1986)).

48. *FW/PBS*, 493 U.S. at 227.

49. *Id.*

50. *Id.* at 229.

51. *Id.* (citing *Freedman*, 380 U.S. at 58).

52. *Id.* at 228.

53. *Id.* at 229.

54. *Id.*

55. *Id.*

"ministerial action" is not presumptively invalid.[56]

Second, in *Freedman*, the obstacles to litigating or appealing an adverse decision by the censor were so great that a censor's refusal was tantamount to complete suppression of speech.[57] In Dallas, however, the applicant had more at stake because the temporary restriction on speech threatened the applicant's entire livelihood, not merely one movie.[58] Therefore, Justice O'Connor posited that the Dallas licensing procedure would not deter applicants from appealing a license denial in the courts.[59] Thus, although the Dallas ordinance was subject to the second[60] and the third[61] prongs of the *Freedman* test, the city did not bear the burden of proving the speech was unprotected.[62]

Although Justice Brennan concurred in the judgment in *FW/PBS*, once again he disagreed with the Court's inconsistent application of constitutional analysis. Justice Brennan argued that the procedural protections guaranteed by *Freedman* do not vary with the facts of the case.[63] Justice Brennan argued that the Court's decision in *Riley v. National Federation of the Blind of North Carolina, Inc.*,[64] required the Court to apply all three prongs of the *Freedman* test.[65] In *Riley*, a licensing scheme applying only to professional fund-raisers did not provide for a specified period of time in which the licensor had to issue the license.[66] The Court held that the regulation was unconstitutional because the indefinite delay compelled the speaker's silence.[67] Justice Brennan found the ordinance in *Riley* indistinguishable from the Dallas ordinance.[68] Thus, he reiterated what he had previously stressed in *Riley*[69] and *Freedman*,[70] that the failure to make the licensor bear the burden in

56. *Id.*
57. *Id.*
58. *Id.* at 229-30.
59. *Id.*
60. *See supra* text accompanying note 39.
61. *See supra* text accompanying note 40.
62. *FW/PBS*, 493 U.S. at 230.
63. *Id.* at 239.
64. 487 U.S. 781 (1988).
65. *FW/PBS*, 493 U.S. at 238-39.
66. *Riley*, 487 U.S. at 801-02.
67. *Id.* at 802.
68. *FW/PBS*, 493 U.S. at 240-41.
69. 487 U.S. at 802.
70. 380 U.S. at 58-59.

court might discourage the speaker from asserting his First Amendment rights in that jurisdiction and, accordingly, protected speech would be improperly suppressed.[71]

Despite dropping the first *Freedman* requirement,[72] the plurality opinion held the scheme unconstitutional on the grounds that it did not limit restraint prior to judicial review to a "specified brief period" and that it failed to offer an applicant "expeditious judicial review" of an adverse decision.[73] In discussing these two requirements,[74] the Court noted that while licensing schemes do not present the same "grave dangers" of direct censorship, they do create the possibility that speech will be infringed upon unless there are adequate safeguards ensuring prompt review.[75] "Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion."[76]

The plurality failed, however, to offer any further elucidation on the meaning of "prompt judicial review" other than its vague directive that "[t]he core policy underlying *Freedman* is that the license for a First Amendment protected business must be issued within a reasonable period of time because undue delay results in the unconstitutional suppression of protected speech."[77] Justice O'Connor did, however, mention the prompt judicial review requirement three times in her opinion. In each case, she referred to the safeguard as requiring "the possibility of," or "an avenue for," or "availability of" prompt judicial review.[78]

This ambiguous language has created a sharp split of authority among the circuits. The First, Fifth, Seventh and Eleventh Circuits have held that prompt "access" to judicial review is sufficient.[79] The Fourth, Sixth and Ninth Circuits have held that *FW/PBS* requires a prompt "decision" on the merits.[80] Thus, the ambiguous language of

71. *FW/PBS*, 493 U.S. at 241-42.

72. *Supra* note 38 and accompanying text.

73. *FW/PBS*, 493 U.S. at 227, 229.

74. *See supra* notes 39 and 40.

75. *FW/PBS*, 493 U.S. at 228.

76. *Id.* at 227.

77. *Id.* at 228.

78. *Id.* at 228-30.

79. Jews for Jesus, Inc. v. Mass. Bay Transp. Auth., 984 F.2d 1319, 1327 (1st Cir. 1993); TK's Video, Inc. v. Denton County, Tex., 24 F.3d 705, 709 (5th Cir. 1994); Graff v. City of Chicago, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1256 (11th Cir. 1999).

80. 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988, 998-1001

the plurality in *FW/PBS* has caused confusion[81] and has gravely weakened the second *Freedman* requirement in the First, Fifth, Seventh and Eleventh Circuits.

In any event, the Court disregarded precedent when it ruled that *Freedman* did not have to be followed in its entirety. In so doing, the majority of the Court has assumed that a deprived licensee will try to vindicate a lost right to speak.[82] That assumption is improper because the First Amendment presumes the validity of speech.[83] Whereas the First Amendment does provide for the "right" of speech, it is first and foremost an "immunity" from government regulation of speech: "Congress shall make no law . . . abridging the freedom of speech."[84] In other words, the burden is on the government to show that its regulation of speech does not offend the Constitution. Where sexually explicit speech is concerned, however, the Court is merely paying lip-service to this presumption.[85] If a licensing ordinance, when challenged, is presumed to be "constitutionally invalid," it stands to reason that the licensor must prove the validity of the ordinance. The licensee should not be required to vigorously assert a right against a statute that is presumed to be invalid.[86] Until *FW/PBS*, a person had not been required to litigate her right to speak. Thus,

(4th Cir. 1995) (en banc); East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 225 (6th Cir. 1995); Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1101 (9th Cir. 1998). The Ninth Circuit recently revisited its holding in Baby Tam. Baby Tam & Co. v. City of Las Vegas 199 F.3d 1111 (2000) (Baby Tam II). The court held that a new Nevada statutory scheme providing for mandamus review of an adverse decision within twenty-five days and ruling within thirty days thereafter was constitutional. *Id.* at 1113-15. However, they held that the scheme still failed to meet the second *Freedman* requirement limiting the time officials have to issue licenses. *Id.* at 1114-15. California currently has legislation pending which addresses both *Freedman* requirements, as the Ninth Circuit has interpreted them. *See* S. 1165, 1999 Leg. (Cal. 1999).

81. The Second Circuit has advised legislatures to follow the lead of New York City and avoid the prior restraint perplexities altogether by establishing parameters for adult business operation within the zoning code proper and not requiring special operating permits. 801 Conklin St. Ltd. v. The Town of Babylon, 38 F. Supp. 2d 228, 249 (E.D.N.Y. 1999). Of course, this leads to the difficulties involved with zoning and the First Amendment. *See supra* section II.

82. *FW/PBS,* 493 U.S. at 229-30.

83. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). "Any system of prior restraints . . . comes to this Court bearing a heavy presumption against its constitutional validity." *Id. (See also infra* note 90 and accompanying text.)

84. U.S. CONST. amend. I.

85. *See* Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 728 (1980). "Obviously, there is a discrepancy between theory and practice in this area of first amendment law." *Id.*

86. *See* N.Y. Times, Co. v. Sullivan, 376 U.S. 254, 259 (1964).

the Court's treatment of sexually explicit speech has had a disastrous effect on the doctrine of prior restraint.[87]

III. Sticks and Stones . . . But "Words"?: Zoning Away Sexually Explicit Speech

A. Background

The outcome of the Court's deliberations over the definition of obscenity created a host of procedural guarantees to protect non-obscene sexual speech from overzealous government censors.[88] This resulted in an uneasy compromise between the acknowledged value of some sexual speech and the acknowledged legitimacy of society's desire to regulate it. This tension is reflected in the Court's reasoning. Rather than classify this type of speech as obscene, a number of the Court's decisions refer to this type of speech as less valuable than other types of speech. The practical effect of this analysis has been to afford a greater degree of deference to the state's policing powers than was traditionally accorded in cases involving speech meriting First Amendment protection. The line of cases involving zoning ordinances provides a particularly good example of this deterioration of First Amendment analysis.

B. *Young v. American Mini Theatres*

Young v. American Mini Theatres[89] was the first Supreme Court decision in which the "low value" theory was offered as a justification for upholding a regulation of sexual speech.[90] There is little reason to believe that Justice Stevens, the author of the plurality opinion, intended to create a new system for classifying speech with his remark that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[91] Nevertheless, the idea that

87. Interestingly, Justice White, joined by Chief Justice Rehnquist, opined that none of the *Freedman* safeguards were necessary, arguing that the ordinance was a valid time, place, and manner content-neutral restriction intended to address *Renton*-like secondary effects. *FW/PBS*, 493 U.S. at 244. This would do less harm to the prior restraint doctrine but adds judicial weight to the unfortunate secondary effects doctrine. *See supra* section II.

88. *See* Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

89. 427 U.S. 50 (1976).

90. *Id.* at 70-71.

91. *Id.* at 70. It should be noted that the "low-value" theory was only one of several rationales Justice Stevens offered for the Court's decision.

non-obscene sexual speech is less deserving of protection than other types of speech has continued to surface at the periphery of First Amendment jurisprudence.[92] In *FCC v. Pacifica Foundation,*[93] for example, the Court held that the First Amendment did not prohibit the FCC from censoring indecent language on radio broadcasts.[94] Justice Stevens' majority opinion is far from clear, but he did explicitly state that indecent speech is low in the hierarchy of First Amendment values:[95] "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."[96] He acknowledged, however, that such speech is not entirely outside of the protection of the First Amendment,[97] suggesting, perhaps, that "low-value" speech is not a separate category, meriting something less than strict scrutiny analysis.

A closer examination of *Young* reveals that Justice Stevens characterized the zoning ordinance involved as a time, place and manner restriction—a content-neutral analysis—on speech because it did not substantially restrict the number of locations at which adult businesses could operate.[98] He went on, however, to state that the ordinance was valid because the government could regulate speech "on the basis of content without violating its paramount obligation of

92. One interpretation of the low-value theory is that the Court is reopening the debate over the definition of obscenity. By devaluing non-obscene sexual speech, the Court might expand the definition of obscenity to cover a wider range of material. If this is the Court's intention, however, it certainly has made no effort to say so explicitly. Indeed, the low-value theory seems to have its intellectual roots in Robert Bork's reinterpretation of the First Amendment, rather than in the obscenity debate. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (arguing that only political speech should be constitutionally protected).

93. 438 U.S. 726 (1978).

94. *Id.* at 744-51.

95. *Id.* at 743. Characteristically, Justice Stevens presented a number of justifications for upholding the governor's action. Although he characterized the speech as low-value, he also assumed, arguendo, that it is protected in some contexts. *Id.* at 746. He then concluded that it is not protected in the context of radio broadcasts. *Id.* at 748. This conclusion was based on *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1967), which established the FCC's authority to regulate a limited resource, the airwaves, in the interest of promoting First Amendment values. Pacifica Foundation, 438 U.S. at 748; *Red Lion*, 395 U.S. at 386-90 (offering underlying rationale of the fairness doctrine). This suggests that the decision in Pacifica Foundation was not based so much on relegating the speech in question to any low-value category as it was on balancing the interests in one type of speech with the interests in encouraging speech in general.

96. Young v. American Mini Theatres, 427 U.S. 50 (1976) (Stevens, J.).

97. *Pacifica Foundation*, 438 U.S. at 746.

98. *Young*, 427 U.S. at 62.

neutrality in its regulation of protected communication."[99] Furthermore, Justice Stevens never explicitly stated that the ordinance was content-neutral. What is clear is that he did not apply the strict scrutiny test as content-based regulation demands.[100]

Justice Stevens did suggest that the ordinance was view-point neutral because it was applied regardless of the views espoused.[101] This may have been the rationale for a more relaxed standard.[102] Much scholarly literature supports the view that the central concern of the First Amendment is censorship; therefore, a restriction affecting an entire subject without regard to a particular viewpoint should be treated as content-neutral.[103]

This position, however, is difficult to defend. First, the characterization of adult-use restrictions as view-point neutral is questionable.[104] More importantly, view-point based restrictions are not the major concern in the realm of sexual speech, as they are in the realm of political speech. Restrictions on political speech are likely to be motivated by the desire to keep certain views from being aired. Restrictions on sexual speech, on the other hand, are likely to be motivated by distaste for the entire subject, regardless of the viewpoint expressed. The perceived danger of sexual speech is not the view it espouses, but the words or symbols themselves. Our emotional reaction to sexual speech, like our reaction to the word "fuck," stems not from the idea it expresses, but from the violation of

99. *Id.* at 70.

100. Justice Stevens did not make clear which standard of review he used. He clearly recognized the ordinance as a time, place, and manner restriction, *id.* at 71-72, and ultimately concluded that the ordinance did not affect the message the books or movies intended to communicate. *Id.* at 70. This suggests that he considered the ordinance a content-neutral time, place, and manner restriction, thus warranting intermediate scrutiny. On the other hand, he spent the bulk of the opinion discussing when the government may regulate speech based on content, *Id.* at 63-70, suggesting that he considered the ordinance content-based, thus requiring strict scrutiny.

101. *See id.* at 70.

102. *Id.*

103. *See, e.g.,* Farber, *Content Regulation of the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 737 (1980).

104. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (Indianapolis ordinance banning erotic materials featuring the "subordination of women" characterized as "thought control"), *aff'd*, 475 U.S. 1001 (1986). *See also* Barnes, *Regulations of Speech Intended to Affect Behavior*, 63 DEN. U.L. REV. 37, 53-54 (1985); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 109-111 (1978); L. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-3, at 800 n.23 (2d ed. 1988).

social taboos; it is a matter of cultural effrontery.[105] The risk is that this emotional reaction will motivate excessive government censorship of all discussion on the topic, regardless of the viewpoint. Therefore, the Court should be more, rather than less, suspicious of subject-matter restrictions of sexual speech.[106]

Justice Stevens also contributed a rationale that is considered the genesis of the "secondary effects" doctrine.[107] This approach focuses on the government's justification for the restriction. According to Stevens' analysis, the government would have enacted the ordinance regardless of what types of books and movies the business sold, if selling them contributed to urban blight. Therefore, he concluded that the restriction was not aimed at the content of the books and movies. It was "this secondary effect which these ordinances attempt[ed] to avoid, not the dissemination of 'offensive' speech."[108] Ten years later the Court would give full weight to the secondary effects doctrine.

C. *City of Renton v. Playtime Theatres, Inc.*

In *City of Renton v. Playtime Theatres, Inc.*,[109] the Court upheld an adult-use zoning ordinance similar to the Detroit ordinance upheld in *Young*.[110] This time, the Court's opinion, written by Justice Rehnquist, commanded a clear majority. Only Justices Brennan and Marshall dissented.[111] The Court held that adult-use ordinances should be treated as content-neutral time, place, and manner restrictions, provided that they are designed primarily to combat the secondary effects of adult businesses and are not related to the suppression of speech.[112] As Justice Rehnquist framed the test, the

105. *Cf.* Carla West, *The Feminist-Conservative Anti-Pornography Coalition and the 1986 Attorney General's Commission on Pornography Report*, 1987 Am. B. Found. Res. J. 681. West accepts the argument that the harm of pornography stems from its violation of "unconventional, non-reproductive, and unacceptable sexual relationships, values, lifestyles and techniques." *Id.* at 691. This argument sounds like a post hoc justification, however. It is doubtful that a pamphlet advocating unconventional lifestyles and extolling the virtues of non-reproductive sex would hardly arouse the emotional reaction the average skin flick produces among the antipornography advocates.

106. The Court has rejected viewpoint-neutrality as a substitute for content-neutrality. Boos v. Barry, 485 U.S. 312, 319 (1988).

107. *Young*, 427 U.S. at 71 n.34.

108. *Boos*, 485 at 319 (1988).

109. 475 U.S. 41 (1986).

110. *Id.* at 54-55.

111. *Id.* at 55. Justice Blackmun concurred in the result. *Id.*

112. *Id.* at 49.

ordinance is constitutional if it is narrowly tailored to serve a substantial government interest and allows for reasonable alternative avenues of communication.[113] It is significant that in addition to the secondary effects rationale, Justice Rehnquist relied on Justice Stevens' language in *Young* that implied that sexual speech is less valuable than political speech.[114] Further, although the Court recognized the content basis of the ordinance, the "low value" of the speech shifted the analysis to the lower degree scrutiny applied to non-content based regulation.

The decision also discussed a number of issues related to the correct application of the test. First, Justice Rehnquist considered the rule, applied by some lower courts, that an ordinance is invalid if a desire to suppress was a motivating factor in its enactment.[115] He affirmed the relevance of the government's motive but held that the desire to suppress speech will not render an ordinance unconstitutional unless suppression was the government's primary motive for enacting the ordinance.[116] Supposedly, the purpose of inquiring into the government's motive was to ensure that an ordinance was justified without reference to the content of the speech; the purpose was not open, however, to "unrestrained debate."[117] Thus, intent to suppress a specific category of speech was not enough to trigger strict scrutiny.

The Court also greatly relaxed the burden on the city to provide a record in support of its zoning scheme. It held that the city could use data from similar cities to justify regulating adult uses, provided it reasonably believed the data was relevant to the city's problems.[118] This holding responded to a series of cases striking down ordinances because cities had failed to provide evidence of neighborhood deterioration.[119] Justice Rehnquist did not directly disapprove of

113. *Id.* at 50.

114. *Id.* at 49 n.2 ("[I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .") (quoting *Young*, 427 U.S. 50, 70 (1976)) (plurality opinion).

115. *Id.* at 47 (citing Tovar v. Billmeyer, 721 F.2d 1260, 1266 (9th Cir. 1983), *cert denied*, 466 U.S. 872 (1984)). *See also* Ebel v. City of Corona (Ebel I), 698 F.2d 390, 393 (9th Cir. 1983); Kuzinich v. Santa Clara, 689 F.2d 1345, 1348-49 (9th Cir. 1982). As these cases suggest, the Ninth Circuit was the primary architect of this rule.

116. *Renton*, 475 U.S. at 48 (1985) (holding that the district court's finding that the city's predominant intent was unrelated to suppression of speech is sufficient to sustain the ordinance).

117. *See id.*

118. *Id.* at 51-52.

119. *See, e.g.*, Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98 (6th Cir.

these cases, concluding that cities need not await deterioration to act.[120]

Since *Renton*, however, courts have tended to require little, if any, evidence of deterioration in the city in question.[121] Further, the evidence courts have accepted as "empirical" has largely amounted to "studies" conducted by government-appointed commissions, relying on statistical correlation and anecdotal evidence.[122] The statistical correlations provide only for evidence of a relationship, not cause. While the anecdotal evidence has been almost exclusively provided by parties whose interest in regulating such speech is, at a minimum, suspect.

Although the Court has never addressed *Renton*'s applicability to non-sexually explicit communication, a plurality in *Boos v. Barry*[123] appears to have endorsed the extension of the secondary effects doctrine to political speech.[124] *Boos* dealt with a restriction on speech critical of foreign governments outside of their embassies.[125] While a majority of the Court held the restriction unconstitutional,[126] at least six Justices may have thought that analysis under the secondary

1981); Ellwest Stereo Theatres v. Byrd, 472 F. Supp. 702, 706-707 (N.D. Tex. 1979); E&B Enter. v. City of Univ. Park, 449 F. Supp. 695, 696-97 (N.D. Tex. 1977).

120. *Renton*, 475 U.S. at 51-52.

121. *See, e.g.*, Stringfellow's v. City of New York, 694 N.E.2d 407 (1998).

122. Steve McMillen, *Adult Uses and the First Amendment: The Stringfellow's Decision and Its Impact on Municipal Control of Adult Businesses*, 15 TOURO L. REV. 241, 251-260 (1998). It is possible, however, that this part of the *Renton* holding may be overturned in the near future. The Court, in *44 Liquormart, Inc., v. Rhode Island*, struck down a Rhode Island statute that prohibited retail price information in alcoholic beverage advertisements. 517 U.S. 484, 489 (1996). In *44 Liquormart*, the Court revisited the application of the long-standing test for determining the validity of a government regulation concerning commercial speech, a test virtually identical to time, place, and manner regulations of noncommercial speech, which was approved under *Renton*. *Id.* at 494-95. Under *Renton* and its progeny, the Court has long held that courts are to defer to the legislative judgment regarding the substantiality of the governmental interest and whether the regulation was narrowly tailored to serve those interests. However, in *44 Liquormart*, the Court suggested that it would "carefully examine" the substantiality of a governmental interest and the evidence relied on by the government to establish that the regulation substantially advances that interest. *See id.* at 504 (reviewing the price advertising ban with "special care"). Therefore, it may well be that a locality will have to do more in the future than merely rely on the experience and studies from other cities. Plainly, the enactment of a zoning ordinance supported solely by the concern of residents and public officials pertaining to the location of adult businesses in their community would fail to withstand this type of searching scrutiny.

123. 485 U.S. 312 (1988).

124. *See id.* at 321 (O'Connor, J.)

125. *Id.* at 315.

126. *Id.* at 329.

effects doctrine was relevant.[127]

Thus, despite its purpose, the secondary effects doctrine has had a corrosive impact on First Amendment protections. Any regulatory objective, whether it is inadvertent or deliberate, can constitute a secondary effect. Under the doctrine, a seemingly content-based law becomes analyzed as content-neutral if the speech restriction is "*justified* without reference to the content of the regulated speech."[128] The secondary effects rationale also waters down the level of constitutional protection for speech affected by a genuinely content-neutral law. If a court identifies certain secondary effects the regulation was designed to address, the content-neutral restriction on speech will pass constitutional muster.

Professor Tribe heavily criticized the *Renton* decision: "The *Renton* view should be quickly renounced. Carried to its logical conclusion, such a doctrine could gravely erode the First Amendment's protections."[129] Tribe warned: the danger in the *Renton* decision is that the "secondary effects" could subject "most, if not all, speech" to regulation.[130] Another commentator criticized the Court's first two adult entertainment zoning/secondary effects cases as creating new categories of speech.[131]

Nor did these difficulties go unnoticed by Justice Brennan, who

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127. Justice O'Connor emphasized two points: "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in Renton" and "[t]he emotive impact of the speech on its audience is not a 'secondary effect.'" *Id.* at 321. However, she implies the law would be constitutional if it focused on "the 'secondary effects' of picket signs" such as "congestion," "interference with ingress and egress," or "visual clutter." *See id. See also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 633 (1991).

128. *Renton*, 475 U.S. at 48 (quoting Virginia Pharm. Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)) (emphasis in the original).

129. Tribe, *supra* 104, § 12-19.

130. *Id. See also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975) (pointing out that speech restrictions are generally justified on the basis of "some danger beyond the message, such as a danger of riot, unlawful action or violent overthrow of the government"); Emerson, *First Amendment Doctrine and the Burger Court*, 68 Cal. L. Rev. 422, 472 (1980) ("Virtually all governmental controls of expression are directed, not at the expression itself, but at the harm thought to result from engaging in it.").

131. Gianni P. Servodidio, Comment, *The Devaluation of Non-obscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231, 1237 (1993). *See also* City of Colorado Springs v. 2354 Inc., 896 P.2d 272, 294 n.16 (Colo. 1995) ("It has been noted by many commentators that *Young-Renton* line of cases are aberrational in the sense that they apply a relaxed level of review to ordinances that could be characterized as making content-based distinctions, thus distorting traditional freedom of expression analysis in a questionable fashion.").

authored a poignant concurring opinion in the *Boos* decision.[132] Emphasizing the danger inherent in the plurality opinion he wrote "to register [his] continued disagreement with the proposition that an otherwise content-based restriction on speech can be recast as 'content neutral' if the restriction 'aims' at 'secondary effects' of the speech."[133]

Justice Brennan pointed out the "dangers and difficulties posed by the Renton analysis."[134] He rightly explained that there is no limit to the secondary effects rationale: "[t]he *Renton* analysis . . . creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech."[135] Justice Brennan accurately understood that the Court's opinion in *Boos* opened the door for the secondary effects rationale to be used beyond the adult entertainment field.[136] Indeed, the United States Court of Appeals for the First Circuit partially relied on the secondary effect of "visual clutter"— mentioned as a rationale by Justice O'Connor in *Boos*— to uphold a ban on newspaper distribution boxes in a historic district.[137]

Justice Brennan warned that the Court's use of the *Renton* analysis "could set the Court on a road that will lead to the evisceration of First Amendment freedoms."[138] Although the "direct emotive impact" exception has prevented some spillage of the doctrine,[139] Justice Brennan's fear has become a reality. The government has used the threat of secondary effects as the pretext to regulate many kinds of expression, including indecent speech,[140]

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132. *Boos*, 485 U.S. at 334 (Brennan, J., concurring).

133. *Id.*

134. *Id.* at 335.

135. *Id.*

136. *Id.*

137. Globe Newspaper Co. v. Beacon Hill Architectural, 100 F.3d 175, 185 (1st Cir. 1996). Interestingly, the First Circuit opinion cited *Renton* for its rationale, but not Justice O'Connor's opinion in *Boos*, which actually mentioned the secondary effect of "visual clutter." *Id.*; *Boos*, 485 U.S. at 321.

138. *Boos*, 485 U.S. at 338.

139. *Id.* at 314. *See also* Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). City officials attempted to justify an ordinance that allowed charging a parade organizer a variable sum based on the cost it took to provide proper protection as a content-neutral law. *Id.* at 126-27. The officials argued that "maintaining public order" was a secondary effect. *Id.* at 134. The Court disagreed, ruling that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Id.*

140. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 875-76 (1997) (Communications Decency Act enacted for the "important purpose of 'protecting children' from exposure to indecent

commercial speech,[141] and even political speech.[142] Government officials have been quick to catch on to the rationale and their use of it continues to proliferate.[143] The Supreme Court's failure to articulate clearly when an effect is primary or secondary and whether the analysis should be limited to adult entertainment zoning laws threatens speech in all arenas.[144]

Of course, not all courts have been so quick to assent to the secondary effects rationale. One state court found that a municipality's statement as to secondary effects was nothing more than "self-serving conclusory hearsay."[145] Another lower court stated, "[t]he obvious problem is that when a locational restriction is justified by only the secondary effects of showing or selling constitutionally protected materials, the restriction is unconstitutional if the feared effects do not exist."[146]

The threat to First Amendment freedom posed by the secondary effects doctrine may be alleviated by limiting its application to its original purview of geographic zoning laws. But this would leave the doctrine available for later attempts to re-extend it to other areas of First Amendment doctrine, and would fail to correct the doctrinal inconsistency the secondary effects doctrine has created with respect to content discrimination in converting content-based laws into content-neutral ones. The better solution would be to follow Justice

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or obscene material).

141. *See, e.g.*, Maryland II Entertainment, Inc. v. City of Dallas, 28 F.3d 492, 496 (5th Cir. 1994) (regulation of adult business advertising enacted to combat the "deleterious effects" of such establishments).

142. *See, e.g.*, Johnson v. Bax, 63 F.3d 154, 160 (2d Cir. 1995) (creation of separate area for "anti-Clinton" demonstrators which provided less favorable access to the dignitary by the New York Police based on the police and city's "safety concerns for the dignitary").

143. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (Tennessee state government officials arguing that a state law prohibiting the solicitation of voters within 100 feet of a polling place is content-neutral); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994); Schenck v. Pro-Choice Network, 117 S. Ct. 855 (1997) (state officials arguing that restrictions on anti-abortion protesters were justified because of the harmful secondary effects of their speech).

144. *See* Robert Post, *Recuperating the First Amendment Doctrine*, 47 STAN L. REV. 1249, 1267 (1995). "[T]he Court has so far failed to articulate any substantive First Amendment theory to guide its distinction between primary and secondary effects. The Court has produced only particular judgments, more or less convincing on their own facts. This failure of the First Amendment principle not only fundamentally impairs the usefulness of secondary effects doctrine, it also poses serious dangers for freedom of speech." *Id.*

145. Discotheque v. City Council of Augusta, 449 S.E.2d 608, 609 (Ga. 1994).

146. City of Portland v. Tidyman, 759 P.2d 242, 248 (Or. 1988).

Brennan's wisdom and do away with the doctrine altogether.[147]

IV. "Stripping" Away First Amendment Protections

A. *Barnes v. Glen Theatre, Inc.*

The final common attempt to regulate sexually explicit speech takes the form of public indecency or nudity laws. In *Barnes v. Glen Theatre, Inc.*,[148] the Court analyzed the constitutionality of an Indiana public indecency statute as it applied to nude dancing.[149] In an opinion delivered by Chief Justice Rehnquist, the Court reversed the decision by the court of appeals and held Indiana's public indecency statute constitutional as applied.[150] The Court agreed with the court of appeals that non-obscene nude dancing is a form of expression entitled to First Amendment protection.[151] However, unlike the court of appeals, the Court interpreted Indiana's public indecency statute as being a legitimate government regulation of a First Amendment right.[152] Because the Court had granted First Amendment protection to nude dancing, it then needed to determine the level of judicial scrutiny this protection would be afforded.[153] The plurality reasoned that Indiana's public indecency statute was a valid opportunity for application of the time, place, or manner restriction.[154]

The Court applied the four part content-neutral test developed in *United States v. O'Brien*[155] for analysis of symbolic speech regulation.[156] The *Barnes* plurality reasoned that the statute was "clearly" within the state's constitutional power[157] and furthered a substantial government interest: the protection of societal "order and morality."[158] The Court then determined that the third prong of the *O'Brien* test was satisfied because the State of Indiana was not proscribing nude dancing by enforcement of its indecency statute;

147. Boos v. Barry, 485 U.S. 312, 338 (1988).
148. 501 U.S. 560 (1991).
149. *Id.*
150. *Id.* at 572.
151. *Id.* at 566.
152. *Id.* at 565.
153. *Id.* at 566.
154. *Id.*
155. 391 U.S. 367 (1968).
156. *See Barnes*, 501 U.S. at 566.
157. *Id.* at 567.
158. *Id.* at 569.

rather it was proscribing public nudity.[159] The Court concluded "[i]t is without cavil that the public indecency statute is 'narrowly tailored'; Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose."[160]

Justice Scalia, concurring, agreed with the plurality that Indiana's public indecency statute was constitutional.[161] In his opinion, however, nude dancing is conduct.[162] Thus, it does not receive any First Amendment protection.[163] As a result, Justice Scalia would have required only a rational basis for the regulation, which he found was provided by the government's interest in regulating morality.[164]

Justice Souter casted the deciding vote. He agreed with the plurality that nude dancing was entitled to a degree of First Amendment protection[165] and that the *O'Brien* test was the proper test to be applied to nude dancing.[166] However, Justice Souter defined the government's substantial interest differently from the plurality.[167] He did not regard the state's interest as protecting society's moral beliefs, but as combating the negative "secondary effects" such as drug use, prostitution and rape, assertedly caused by nude dancing.[168]

The dissenting opinion, authored by Justice White and joined by Justices Marshall, Blackmun, and Stevens,[169] did not view the Indiana public indecency statute as a general prohibition of public nudity.[170] The dissent regarded the statute, as applied by the State of Indiana, to be directly related to the suppression of the expressive qualities that nude dancing intends to convey.[171]

The dissent disagreed that either morality or the secondary effects of nude dancing can be a sufficient purpose for justifying the

159. *Id.* at 570.
160. *Id.* at 572.
161. *Id.* (Scalia, J., concurring).
162. *Id.*
163. *Id.*
164. *Id.* at 580.
165. *Id.* at 581 (Souter, J., concurring).
166. *Id.* at 582.
167. *Id.*
168. *Id.* at 582, 584.
169. *Id.* at 587 (White, J., dissenting).
170. *Id.* at 592.
171. *Id* at 593. The dissent also granted First Amendment protection to nude dancing. *Id.*

proscription of an expressive activity.[172] Furthermore, the dissent reasoned that the enforcement of the public indecency statute was related to the expressive qualities of the nude dance.[173] "It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity . . . ."[174] According to the dissent, the statute was a content-based regulation and required the most exacting level of judicial scrutiny.[175] Under the dissent's analysis, the statute did not meet this heightened test.[176]

Additionally, the dissent was dissatisfied with Justice Souter's logic.[177] Justice White reasoned that if the state's aim was to decrease the secondary effects of nude dancing, and the means of achieving this end required "covering up" the nudity, then it follows that nudity's expressive value must have had some relation to the government's interest.[178] If the nudity was not a form of expression, then it would not have had an effect on criminal activity.[179]

Justice White also criticized both the plurality's and Justice Souter's conclusions that the statute was narrowly drawn.[180] He suggested alternative measures which the state could have implemented to regulate the dancing without broadly censoring an entire category of expressive behavior.[181]

Finally, the dissent focused upon specific defects in Justice Scalia's reasoning.[182] Justice White reiterated his disagreement with Justice Scalia's claim that the statute's prohibition was general in nature.[183] Further, he asserted that Indiana's reason for the prohibition was to prevent the customers of adult establishments from being exposed to the expressive elements of dance.[184] Therefore, Justice Scalia's observation was exactly on point: "Where the

172. *Id.* at 590, 594.

173. *Id.* at 592.

174. *Id.* "Nudity, as an expressive element of nude dancing, cannot be separated from the expressive qualities of the dance into the category of 'mere conduct.'" *Id.*

175. *Id.* at 593.

176. *Id.* at 595.

177. *Id.* at 594.

178. *Id.* at 591-92.

179. *Id.* at 591.

180. *Id.* at 594.

181. *See id.*

182. *Id.* at 595-96.

183. *Id.*

184. *Id.* at 591.

government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional."[185]

Justice White's criticisms illustrate well how, once again, the Court's ambiguous posture towards sexually explicit speech has affected the logic of its First Amendment analysis. If nude dancing is protected expression and its message is one of eroticism, as eight of the nine Justices held, then arguably it is precisely this erotic message that Indiana is targeting. If so, the statute is content-based as applied —unless it applies to all occurrences of public nudity.[186] Yet, enforcement is specifically applied in situations where the erotic messages of nude dancing are perceived to create negative moral and societal effects.[187] Thus, the law is not content-neutral, and to treat it as such is a fiction that harms content-neutral analysis.

Finally, the plurality in *Barnes* stated that nude dancing is expressive conduct within the realm of First Amendment protection, but specified that it is "only marginally so."[188] Just what this means is difficult to say. What is clear, is that the plurality further eroded the Constitution's protections as they apply to sexually explicit expression by emphasizing that they may be outweighed by "substantial government interest in protecting order and morality."[189] The decision elicits the fundamental question: Who determines which forms of expression are permissible under the public morality test? In other words, the problem with this reasoning is that it relies on an inherently majoritarian standard. This is contrary to the counter-majoritarian First Amendment immunity and its provision for the equality of minority speakers.[190]

Furthermore, if Justice Rehnquist's logic is extended, *Barnes* could enable the Court to revisit other cases. For example, if the Court balanced the value of flag burning against the state interest in order and morality, the Court could overturn *Texas v. Johnson*[191] on the grounds that such conduct is highly offensive to society's moral

185. *Id.* at 577 (Scalia, J., concurring); *See id.* at 596 (White, J., dissenting).

186. *See* Glen Theatre, Inc., v. Civil City of South Bend, 726 F. Supp. 728 (N.D. Ind. 1985). "Timothy J. Corbett, a sergeant with the South Bend Police Department and stationed in the South Sector of South Bend where all arrests at Chippewa Bookstore have occurred, stated in his affidavit that no arrests have ever been made for nudity as part of a play or ballet." *Id.* at 730.

187. *Barnes*, 501 U.S. at 592-94 (White, J., dissenting).

188. *Id.* at 566.

189. *Id.* at 569.

190. *See* U.S. CONST. amend. I.

191. 491 U.S. 397 (1989).

views. Ironically, just prior to *Barnes*, the Court founded its holding in *Johnson* on the notion that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[192] Thus, the *O'Brien* test was not satisfactorily applied in *Barnes* because the regulation of morality should not serve as a substantial governmental interest.[193]

B. *City of Erie v. Pap's A.M.*

City of Erie v. Pap's A.M.[194] concerned an ordinance virtually identical to the Indiana city ordinance upheld by the Court nine years ago in *Barnes*.[195] In fact, because the Court had upheld the *Barnes* ordinance, the City of Erie specifically modeled its ordinance prohibiting public nudity[196] after it.[197] Compliance with the ordinance by erotic dancers requires them to wear, at a minimum, "pasties" and a "G-string."[198]

Despite the fact that the Erie ordinance was virtually identical to that found in the *Barnes* case, the Court's holding was again fragmented, yet the Justices' opinions were substantially different. The plurality garnered four votes this time and was authored by Justice O'Connor. Once again, the *O'Brien* analysis was adopted by the entire Court. The plurality's analysis, however, adopted Justice Souter's secondary effects analysis in *Barnes*.[199] As such, the plurality concluded that Erie had the power to regulate such an important governmental interest, that these secondary effects were not related to free expression and that the regulation was no greater than

192. *Id.* at 414.

193. Apparently unsatisfied with the outcome of *Barnes*, the Court chose to revisit the issue. *City of Erie v. Pap's A.M.* involved a challenge to a Pennsylvania indecency statute virtually identical to the Indiana statute in *Barnes*. The Pennsylvania Supreme Court, recognizing that eight of nine Justices opined nude dancing protected by the First Amendment, held that the *Barnes* plurality was not binding and followed the dissent's reasoning in holding that the statute was unconstitutional. 719 A.2d 273 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999).

194. 529 U.S. 277 (2000).

195. 501 U.S. 560 (1991).

196. *Pap's A.M.*, 529 U.S. at 284 (citing ERIE, PA., CODE 75-1994, art. 711 (1994)).

197. *See Pap's A.M.*, 529 U.S. at 290.

198. *Pap's A.M.*, 529 U.S. at 284.

199. *Pap's A.M.*, 529 U.S. at 291. The stated rationale for doing so was the "Pennsylvania [Supreme] court's determination that one purpose of the ordinance is to combat harmful secondary effects . . . ." *Id.* at 292.

necessary to further the regulatory interest.[200]

Justice Scalia's opinion, joined by Justice Thomas, was virtually identical to the one he offered in *Barnes*. Justice Souter, however, had a significant change of heart. "I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted."[201]

Justice Souter now insists that where the asserted rationale for upholding a regulation is that it combats negative secondary effects, that rationale "demands some factual justification . . . ."[202] "In *Turner I*, for example, we stated that

> when the Government defends a regulation on speech as a means to address past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' 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.[203]

"[I]n *Turner II*, a majority of the Court reiterated those requirements, characterizing the enquiry into the acceptability of the Government's regulations as one that turned on whether they 'were designed to address a real harm, and whether those provisions will alleviate it in a material way.'"[204] "The 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."[205]

Thus, Justice Souter's version of a secondary effects analysis would require substantial evidence. Further, his definition of "substantial" would require that the evidence be "good", not merely "a lot."[206]

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200. *See id.* at 292-96.

201. *Id.* at 317.

202. *Id.* at 311.

203. *Id.* at 312 (quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664 (1994) (Turner I)).

204. *Id.* (quoting Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195 (1997) (Turner II)).

205. *Id.* at 313.

206. It is encouraging to note that the lower courts may be adopting Justice Souter's point of view. In a recent Ninth Circuit case involving a city ordinance banning the

> [H]owever accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism. The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge.... [I]t is one thing to accord administrative leeway as to predicative judgments in applying elusive concepts to circumstances where the record is inconclusive and 'evidence ... is difficult to compile,' and quite another to dispense with evidence of current fact as a predicate for banning a sub-category of expression.[207]

Justice Souter's position was further fueled by the fact that a "scientifically sound" study showing that nude dancing establishments do not cause secondary effects had been offered by an amicus curiae.[208] The plurality, however, flatly rejected this point. "'[T]he invocation academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government."[209] Incredibly, the plurality continued: "[I]t is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments ... a ban on such nude dancing would further Erie's interest in preventing such secondary effects."[210]

There is another interesting difference between the *Barnes* and *Pap's A.M.* ordinances; the Erie ordinance also prohibited "the exposure of any device, costume, or covering which *gives the*

operation of adult bookstores and relying on the secondary effects rationale, the court refused to allow the city to rely ONLY on an extraneous study which did not specifically address the possible secondary impacts in the actual city's situation. *See* Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (2000).

207. *Pap's A.M.*, 529 U.S. at 314.

208. *Id.* at 300.

209. *Id.* (citing Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)).

210. *Id.* at 300-01 (emphasis added). The position here articulates the traditional secondary effects analysis begun in *Young* and expanded in *Renton* allowing for "proof" to be based on the "experience" of other municipalities. *Cf.* "Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton* [and] *American Mini Theatres*, it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects." *Id.* at 296-97.

appearance of or simulates the genitals, pubic hair, natal cleft . . . or . . . *simulates and gives the realistic appearance of* nipples and/or aureole."[211] The constitutionality of this language was not raised, but it was made the object of some discussion among the opinions regarding the true intent of the ordinance and the applicability of secondary effects.[212] Justice Steven's dissent argued that the presence of the language revealed that the true intent of the ordinance was to regulate offensive speech, not its secondary effects.[213]

Given the *Pap's A.M.* holding, one may argue that the Court is moving in a direction away from supporting regulation of sexually explicit speech based on morality and towards demanding empirical evidence of the damage it assertedly causes.[214]

The *Pap's A.M.* plurality opinion's failure to demand such evidence, however, seems to be merely another form of regulation of speech based on notions of its moral unworthiness. The *Pap's A.M.* secondary effects rationale for regulating sexually explicit speech is little distance from the "social interest in order and morality" adopted in *Paris Adult Theatre I v. Slaton*.[215]

V. Conclusion

A lower standard of protection under the First Amendment for erotic material is clearly expressed in each of the cases this note has examined.[216] Such treatment, however, runs contrary to traditional

211. *Id.* at 284 (citing ERIE, PA., CODE 75-1994, art 711, §2 (emphasis added)).

212. *See generally Pap's A.M.*, 529 U.S. 277 (2000).

213. *See id.* at 317-32.

214. The Court has recently reaffirmed that regulations of sexually explicit speech are subject to strict scrutiny and that the secondary effects doctrine does not apply to the analysis of regulations targeting the "primary" effects of such speech. *See* United States v. Playboy Entertainment Group, Inc. 529 U.S. 803, 814-15 (2000). The confusion the doctrine has engendered, however, continues to proliferate. In striking down a public nudity regulation the Ninth Circuit stated that a regulation aimed at secondary effects is subject to content-neutral analysis but (siding with J. Souter) rejected the government's reliance on "bad" evidence requiring that the study be "reasonably believed to be relevant to the problem that the city addresses." Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 726 (9th Cir. 2000) (quoting *Renton*, 475 U.S. at 51-52). Is this truly an "intermediate scrutiny" or merely a "rational relation" test? On the other hand, the Seventh Circuit, faced with a similar ban on nudity, relied on the secondary effects doctrine in holding that the ordinance was content based but should be analyzed "as if" it were a content-neutral time, place or manner restriction. The court then struck down the ordinance because it was not "narrowly tailored." Schultz v. City of Cumberland, 228 F.3d 831, 840-48 (7th Cir. 2000).

215. 413 U.S. 49 (1973) (citing Roth v. United States, 354 U.S. 476, 485 (1957)).

216. *See supra* Parts II-IV.

First Amendment analysis and rationale. Traditionally, the main inquiry in free speech cases was whether a legislative body was able to conclusively establish a connection between a certain kind of speech activity and a regulable conduct evil.[217] Justice Brennan is correct in requiring that the Court cast a skeptical eye on categorical legislative judgments that conclusively establish the coincidence of sexually explicit speech with some regulable evil. He would require "governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects."[218]

What Justice Brennan implies is that the Court should uphold a restriction on speech only if the legislature can show the actual occurrence of the regulable evil, not just some possibility or probability that it might happen simultaneously with the speech, or as an inevitable result of it. "The traditional approach sets forth a bright-line rule: any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it."[219]

The analytic weakening of the Free Speech doctrine in diminished prior restraint requirements, illustrated by *FW/PBS*[220]; the deterioration of the traditional content/non-content distinction in cases like *Young*[221] and *Renton*;[222] and the increased acceptance and application of the negative secondary effects doctrine as shown by *Barnes*[223] and *Pap's A.M.*,[224] as applied to sexually explicit speech cases, creates a grave danger of courts upholding laws that purport to regulate non-speech evils, but are actually designed to restrict the

217. The connection between the kind of speech activity and regulable conduct evil is important because: "[T]he choice of the correct method of analysis [in free speech cases] is, to a large extent, a function of federalism and separation of powers concepts. Specifically, one must scrutinize the deference a court will show to a federal, state, or municipal legislative body when it attempts to regulate activity that includes or is a result of speech. The closer a legislature is able to connect regulable conduct with speech, the more likely a reviewing court will defer to the legislative judgment concerning the regulation of the speech which is a part of, or attendant to, the conduct." Prygoski, *Justice Sanford and Modern Free Speech Analysis: Back to the Future?*, 75 KY. L.J. 45, 46-47 (1986-87).

218. Boos v. Barry, 485 U.S. 312, 326 (1988).

219. *Id.* at 335-36.

220. 493 U.S. 215 (1990).

221. 427 U.S. 50 (1976).

222. 475 U.S. 41 (1986).

223. 501 U.S. 560 (1991).

224. 529 U.S. 277 (2000).

underlying speech activity.

This is why the analysis of the Court's treatment of sexually explicit speech is crucial. More than merely a "slippery slope," the Court's treatment of sexually explicit speech defines the boundaries and structure of First Amendment protections. The basic rationale for the First Amendment is to foster the dialogue crucial to the healthy functioning of a democratic society.[225] It does so by assuring everyone the ability to express themselves despite how contrary those expressions may be to the populist view. "Offensive" speech is by its nature "unpopular." Underlying the Court's conclusion that sexually explicit speech is of lower value is the public's disdain for it. As Justice Stewart reminds us, however, "[t]he guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty."[226]

225. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 271-72 (1964).

226. *Young*, 427 U.S. at 86 (Stewart, J., dissenting).