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Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert

Leslie Gielow Jacobs

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**MAKING SENSE OF SECONDARY EFFECTS ANALYSIS
AFTER *REED V. TOWN OF GILBERT***

Leslie Gielow Jacobs*

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INTRODUCTION

Forty years ago, the Supreme Court created what has become Secondary Effects Analysis. It is a deferential type of review, established by the Court in the context of zoning regulations of sexually-oriented businesses,¹ but now applied by lower courts to all types of regulations of sexually-oriented businesses.² Erotic entertainment is expression protected by the Free Speech Clause of the First Amendment,³ and regulations targeting sexually-oriented businesses that sell it classify expression according to its content.⁴ Such facially content-sensitive government actions would ordinarily be highly suspect and subject to strict scrutiny review, whether they prohibited the speech entirely or only regulated the time, place, or manner of its delivery.⁵ According to Secondary Effects Analysis, however, a time, place, or manner regulation that targets sexually-oriented businesses for regulation need only pass more deferential, “intermediate” scrutiny if its purpose is to reduce the negative “secondary” effects of erotic entertainment, rather than the “primary” or “direct” effects of the speech.⁶ When the government aims to reduce secondary effects it aims at something different from the content of the expression, according to the Court, because secondary effects are “unrelated to the impact of the speech on its audience”⁷ and “merely”⁸ “happen to be associated with [a] type of speech.”⁹ In the Court’s words, such regulations are “completely consistent with [the] definition of ‘content-neutral’ speech regulations as those that ‘are *justified*

1. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 44, 47–48, 50–52 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

2. See *infra* Part I.B.2. – Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 *FORDHAM L. REV.* 1187, 1189 (“Modern commentary suggests most scholars agree that the secondary effects doctrine has been largely cabined to sexually-explicit speech.”).

3. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 811 (2000) (“Playboy’s programming has First Amendment protection”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (noting that “nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment’s protection”) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1990) and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981)).

4. *Playboy*, 529 U.S. at 811 (“The speech in question is defined by its content; and the statute which seeks to restrict it is content based.”).

5. *Id.* (citing *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

6. *Alameda Books*, 535 U.S. at 434 (citing *Renton*, 475 U.S. at 46, 47–49, 50); *id.* at 444, 448 (Kennedy, J., concurring).

7. *Id.* at 444 (Kennedy, J., concurring).

8. *Id.* at 438 (no high proof bar for municipalities that “want to address merely the secondary effects of protected speech”).

9. *Boos v. Barry*, 485 U.S. 312, 320 (1988).

without reference to the content of the regulated speech,’” and so “the [review] standards applicable to ‘content-neutral’ time, place, and manner regulations” apply.¹⁰

But despite the repeated assertions of the Court and individual Justices, it has never been clear how the “secondary effects” recited in the various Court opinions—such as crime, blight, and public health dangers—meet the description of “unrelated to the impact” of or “happen to be associated” with the content of the speech. Many of these effects quite obviously trace to viewers’ reactions to the sexually-stimulating content of the expression, which would condemn regulations aimed at other types of speech and at erotic expression outside the context of the operation of sexually-oriented businesses.¹¹ The Court has not faced up to this “link” between the content of the regulated expression and the “secondary effects” that render a content-based regulation akin to content-neutral, nor has it explained how this link can exist consistent with constitutional principle.¹² Following the Court’s lead, lower courts have gone through the motions of verifying that entry into Secondary Effects Analysis is appropriate, while skipping the question of how the “secondary effects” that fill the growing lists submitted by regulators meet the supposedly constitutionally crucial requirement that they be “unrelated to the impact of the speech on its audience.”¹³

10. *Renton*, 475 U.S. at 48–49 (quoting *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

11. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813–14 (2000) (applying strict scrutiny to content-based FCC requirement to scramble the signals of channels showing adult content to prevent “signal bleed;” “[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211–12, 213, 214–15 (1973) (applying strict scrutiny to a local ordinance that banned all films depicting nudity of any kind from being shown at a drive-in theater where the screen was visible from the street; ordinance was not justified based on offense to users of the public streets, protection of children, or potential distraction to motorists).

12. *Alameda Books*, 535 U.S. at 437 (requiring that the city provide evidence to support a link between concentrations of adult operation and secondary effects to justify its regulation but failing to acknowledge that the “correlation” with high crime rates traces to reactions of erotic entertainment patrons to the content of the speech); *id.* at 445 (Kennedy, J., concurring) (material inside adult bookstores and movie theaters is speech, but “the consequent sordidness outside is not”).

13. *Id.* at 444 (Kennedy, J., concurring); Connie B. Cooper & Eric Damian Kelly, Tex. City Attorneys Ass’n, *Survey of Texas Appraisers: Secondary Effects of Sexually-Oriented Businesses on Market Values* iii, iv (2008), https://www.tml.org/p/StudyofSecondaryEffectsCrime_Final.pdf. “Documenting measurable, negative secondary effects is the most practical and most widely accepted method of establishing such a purpose. Courts once appeared to accept a mere recitation of negative secondary effects and later were willing to allow a community to rely on studies of

Now, however, the Supreme Court has shot a missile into its own reasoning. In *Reed v. Town of Gilbert*,¹⁴ the Court struck down a local ordinance that regulated the placement of signs depending upon the type of message sent.¹⁵ The Court of Appeals had determined the ordinance to be content neutral and subject to intermediate scrutiny review because “the Town ‘did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed,’ and its justifications for regulating temporary directional signs were ‘unrelated to the content of the sign.’”¹⁶ The Court rejected this methodology and emphasized in seemingly absolute terms that if a regulation distinguishes speech according to content on its face, strict scrutiny review applies “regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”¹⁷

It could be that the six Justices in the *Reed* majority¹⁸ meant to sweep away four decades of precedent¹⁹ and subject the full range of detailed zoning, public health and safety regulations imposed by localities across the country on the operations of sexually-oriented businesses to the most demanding level of Free Speech Clause scrutiny.²⁰ But this conclusion would ignore the Justices’ steadfast

such effects from other communities; today, in the context of often-effective legal challenges by the sex industry, courts have raised their expectations. Today they expect more.”

14. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

15. *Id.* at 2227 (“The Town’s Sign Code . . . defines “Temporary Directional Signs” on the basis of whether a sign conveys the message of directing the public to church or some other “qualifying event.” Glossary 25. It defines “Political Signs” on the basis of whether a sign’s message is “designed to influence the outcome of an election.” *Id.* at 24. And it defines “Ideological Signs” on the basis of whether a sign “communicat[es] a message or ideas” that do not fit within the Code’s other categories. *Id.* at 23. It then subjects each of these categories to different restrictions.”).

16. *Id.* (quoting *Reed v. Town of Gilbert*, 707 F.3d 1057, 1071–72 (9th Cir. 2013)), and noting that “[i]n its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign’s communicative content—if those distinctions can be “‘justified without reference to the content of the regulated speech.’” Brief for United States as *Amicus Curiae* 20, 24 (quoting *Ward v. Rock Against Racism*, 109 S. Ct. 2746). (emphasis deleted).

17. *Id.* at 2228.

18. Justice Thomas wrote the Court’s opinion, joined by Justices Roberts, Scalia, Kennedy, Alito and Sotomayor. Justices Breyer, Ginsberg and Kagan concurred in the judgment.

19. *RCP Publ’ns Inc. v. City of Chi.*, No. 15 C 11398, 2016 WL 4593830, at *4 (N.D. Ill. Sept. 2, 2016) (agreeing with another district court “that Reed does not overrule decades of jurisprudence regarding commercial speech.”).

20. Minch Minchin, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL’Y 123 (2017) (suggesting that the Court “minimize[], if not eradicate[]” secondary effects doctrine in light of Reed); Eugene Volokh, *Supreme Court Reaffirms*

cultivation, development, and embrace of Secondary Effects Analysis, in the face of persistent and persuasive external²¹ and internal²² criticism over many years. At last count, albeit fifteen years ago, all nine Justices considering the matter confirmed that it, or some other sort of deferential review of some class of erotic entertainment regulations, was here to stay.²³ Far more likely than the conclusion that the *Reed* Court implicitly repealed its secondary effects precedents, is the conclusion that its failure to mention or cite them²⁴ implicitly validated their fundamental premise—that some difference of constitutional significance distinguishes “content-correlated” regulations aimed at reducing the “secondary effects” of sexually-oriented businesses²⁵ from laws that “appl[y] to particular speech

Broad Prohibition on Content-Based Speech Restrictions, in Today's Reed v. Town of Gilbert Decision, WASH. POST, June 18, 2015, <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/06/18/supreme-court-reaffirms-broad-prohibition-on-content-based-speech-restrictions-in-todays-reed-v-town-of-gilbert-decision/> (noting a “conflict between the logic of *Reed* and the logic of the secondary effects precedents”).

21. See, e.g., Mark Rienzi & Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 FORDHAM L. REV. 1187, 1200–01 (2013); David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL'Y REV. 19, 29 (2012); Daniel R. Aaronson, Gary S. Edinger & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741, 743 (2009); Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 325–26 (2003–2004); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1118–23 (2005); but see John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291 (2009).

22. *Renton v. Playtime Theatres*, 475 U.S. 41, 52 (1986) (Brennan, J., joined by Marshall, J., dissenting) (“*Renton's* zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions”); *Young v. American Mini Theatres*, 427 U.S. 50, 84 (1976) (Stewart, J., joined by Brennan, Marshall and Blackmun, dissenting) (“The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit nonobscene but sexually-oriented films. I dissent from this drastic departure from established principles of First Amendment law.”).

23. In *Alameda Books*, all nine justices joined opinions applying secondary effects analysis. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 436–42 (2002) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, J.J., for the plurality), 444–52 (Kennedy, J., concurring); 453–66 (Souter, J., joined by Stevens and Ginsburg, J.J., dissenting).

24. The majority opinion failed to respond to the concurring Justices' contention that “Our cases have been far less rigid than the majority admits,” accompanied by examples including citation to secondary effects precedent. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2238 (2015) (Kagan, J., concurring) (citing *Renton*, 475 U.S. at 41).

25. Some lower courts have cited the Court's secondary effects precedents and purported to apply secondary effects analysis outside the context of sexually-oriented

because of the topic discussed or the idea or message expressed.”²⁶

This Article is the first to reevaluate the potential grounding and principled justification for this entrenched doctrinal anomaly in light of the Court’s strong statements in *Reed*. Critics concerned that Secondary Effects Analysis leaves open the possibility of pretextual justifications for regulations of sexually-oriented businesses may never be satisfied, and perhaps they should not be.²⁷ But this Article is not primarily about application of Secondary Effects Analysis. It is about the justification for the move into Secondary Effects Analysis in the first place. Regulators that must continue to make and enforce land-use

businesses. For the most part, and to the extent it is apparent from the opinions, the “secondary effects” that exist in these contexts are truly secondary, like the effects of a time, place or manner regulation, in that they are not caused in part by listeners’ reactions to the content of the expression. *Church v. City of St. Michael*, Civil No. 15-1575 (DWF/JSM), 2016 WL 4545310, at *4 (D. Minn. Aug. 31, 2016) (church produced secondary effects of traffic caused by a single, large service and lack of “retail synergy”); *Yvon v. City of Oceanside*, Case No. 16-CV-1640-AJB-WVG, 2016 WL 4238539, at *5 (S.D. Cal. Aug. 11, 2016) (“[T]he City has proffered says nothing that ties tattooing itself to the secondary effects that the City seeks to avoid.”); *New York Youth Club v. Town of Harrison*, 150 F.Supp.3d 264, 272 (S.D. N.Y. 2015) (citing secondary effects precedents in reviewing a door-to-door solicitor licensing requirement that did not distinguish according to the content of speech).

26. *Reed*, 135 S. Ct. at 2231; *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (“We don’t think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection.”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 292 (2000) (plurality opinion); Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 THE URB. LAW. 569 at 601 (2015) (reviewing the stances of the current Justices and concluding that “only Justice Thomas is likely interested in overturning the secondary effects doctrine since the doctrine raises concerns about the risk of censorship identical to those he noted in *Reed*.”); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 514 (4th Cir. 2002) (explaining that in the “limited context” of time, place or manner restrictions imposed on sexually-oriented businesses, “the Supreme Court does not equate reference to content with the suppression of content”). *But see* Kyle Langvardt, *The Doctrinal Toll of “Information as Speech,”* Loy. U. Chi. L.J. (2016) (“[T]he Supreme Court has indicated in its 2015 decision in *Reed v. Gilbert* that secondary effects arguments are no longer valid.”); Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1477 n.54 (“The Court cast considerable doubt on the continuing vitality of the “secondary effects” test.”).

27. *See, e.g.*, David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL’Y REV. 19, 29 (2012) (“In an ideal world, the secondary-effects distortion of First Amendment law should be abandoned.”); Daniel R. Aaronson, Gary S. Edinger & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741, 758 (2009) (“The lack of clarity from the Supreme Court on these issues has led to a point where there appears to be little or no scrutiny given to whether an articulated governmental problem can truly be tied to “adult” entertainment and where, irrespective of the Supreme Court’s comments in *Pap’s* and *Alameda Books*, there really is little ability to challenge the mere pretext assertion of the governmental interest of adverse secondary effects.”).

rules, and courts that must continue to resolve challenges to them after the Court's decision in *Reed*, must base their analyses on a more robust understanding than what currently exists of the characteristics of "secondary" effects that justify application of less-than-strict scrutiny review to regulations that quite obviously classify speech by its content. Although the Court has never undertaken the task, it is possible to tighten and focus the prerequisites for entry into the analysis by identifying the attributes of the effects that it has accepted as "secondary" and understanding why those attributes may support a principled departure from strict review. Regulators and courts urgently need this understanding to explain their continuing embrace and guide their applications of Secondary Effects Analysis after the Court's decision in *Reed*.

Part I briefly describes the genesis of the concept of "secondary effects" and the application of Secondary Effects Analysis. Part II reviews the possible simple definitions of secondary effects that lead to deferential scrutiny. Although some causal connection between the content of erotic speech and the secondary effects that justify regulation must exist, this Part explains that "secondary" effects can plausibly be divorced from listener offense at the content of the speech. This recognition begins the process of identifying the attributes of "secondary effects," which can support a constitutionally principled move into deferential Secondary Effects Analysis. Part III sets out these attributes and explains them. Secondary effects are the foreseeable, likely and immediate result of the operation of businesses that make money selling speech aimed at producing sexual stimulation. They are caused in part by the responses of speakers or willing listeners to the speech content, but are also caused by the means of operation modified by the regulation. The latter cause must appear on the face of the regulation to be its exclusive target, rather than the content of the speech. This modified understanding of secondary effects is not simple, but neither is it unworkable. Instead, it provides principle and structure to the important inquiry into whether departure from the strict scrutiny that usually applies to regulations that distinguish speech according to its content is justified.

I. A SHORT HISTORY OF SECONDARY EFFECTS ANALYSIS

A. *The Genesis of "Secondary Effects"*

Secondary Effects Analysis began in *Young v. Am. Mini Theatres, Inc.*,²⁸ in which a majority of the Court upheld a Detroit zoning ordinance identifying adult movie theaters according to the content of the films they sold and restricting them to certain parts of the city.²⁹ *Young* posed a quandary for the Justices in the majority. A number of strains of free speech doctrine, which had just recently solidified, seemed to indicate that a regulation, such as the Detroit ordinance, which classifies speech according to its content could be valid only if it survived strict judicial scrutiny.

One strain of doctrine defines the limited circumstances in which offense to public sensibilities, or more generally, public morals, can be used as the basis for restricting speech according to its content. Just three years prior to the *Young* decision, the Court had finally coalesced in *Miller v. California*³⁰ to articulate the definition of "obscenity," the legal term of art for sex speech that regulators can prohibit entirely. The *Miller* test identifies obscenity by three factors that relate to its content.³¹ The Court's affirmation of the unprotected "obscenity" category of speech is notable because it preserved the ability of government regulators to criminalize speech on a ground no more compelling than that its content undermines public morals. At the same time, the articulation of this limited category of unprotected sex speech seemingly liberated any sex speech that does not meet all three prongs of the *Miller* test from restriction absent a government interest more compelling than upholding public morality and a showing that no alternate means to achieve the government interest are available.³² Cases decided as the Court's definition of unprotected obscenity was developing confirmed that absent special circumstances, public offense is not a sufficient justification to restrict the use of bad words,³³

28. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

29. *Id.* at 52–55.

30. *Miller v. California*, 413 U.S. 15 (1973).

31. *Id.* at 24 (to be obscene, the speech must (a) appeal to the prurient interest, as determined by the average person, applying contemporary community standards; (b) depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) when taken as a whole, lack serious literary, artistic, political, or scientific value).

32. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811–13, 815 (2000) (subjecting restriction of pornography that is not obscene to strict scrutiny).

33. *Cohen v. California*, 403 U.S. 15, 18–21 (1971) (arrest of protester for wearing jacket bearing the words "Fuck the Draft" could not be justified on basis of offense to unwilling observers, as words were not directed at an individual and were not designed to

nudity,³⁴ or sex scenes in books or films that do not meet the limited definition of obscenity.³⁵

Another strain of doctrine identifies the extent to which the potential persuasive force of the content of speech can justify restrictions of it. In *Brandenburg v. Ohio*,³⁶ the Court came together to define incitement, which the government may prohibit entirely because it may persuade listeners to engage in bad behavior. The incitement category protects advocacy of dangerous ideas unless bad conduct is likely, imminent, and intended to be provoked by the speaker.³⁷ The test protects entertainment vendors and others from liability for various types of copy-cat behaviors³⁸ and protects positive portrayals of sexual behaviors that a majority of the public may consider immoral.³⁹

A third strain of doctrine established that content-based speech distinctions pose the core danger of government censorship even if they result in only partial, time, place, or manner restrictions and not a total prohibition of the message. In *Police Dep't of Chicago v. Mosley*,⁴⁰ the Court relied on the Equal Protection Clause to invalidate an ordinance that allowed only labor-related picketing around schools during certain hours. In *Erznoznik v. City of Jacksonville*,⁴¹ the Court relied on the free speech right to invalidate a regulation that required drive-in movie theater to shield films with nudity from view from the street. Both cases emphasized that “[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴²

The Court inaugurated what has become Secondary Effects

incite violence).

34. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (mainstream film, “Carnal Knowledge,” is not obscene and cannot be restricted because it offends public morality).

35. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488, 502–03 (S.D.N.Y. 1959) (*Lady Chatterley’s Lover* not obscene and ban on distribution lifted); Moreover, exceptions are intrusions into the home, *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (radio broadcast); *Rowan v. Post Office Dep’t*, 397 U.S. 728, 738–39 (1970) (pandering advertisements sent through the mail); or limiting access by minors, *Ginsberg v. N.Y.* 390 U.S. 629, 634–37 (1968) (magazines could be considered nonobscene for adults but obscene for minors, and thus the state could restrict their sale to those under 17).

36. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

37. *Id.* at 447 n.2.

38. *See, e.g., Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803–05 (S.D. Tex. 1983) (suicide provoked by Hustler piece on auto-erotic asphyxiation); *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580, 582–83, 583 n.3 (1981) (injury by child copying gun trick on The Mickey Mouse Club).

39. *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 688–89 (1959).

40. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 94–95 (1972).

41. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211–12 (1975).

42. *Id.* at 215 (quoting *Mosley*, 408 U.S. at 95).

Analysis just a year after its decision in *Erznoznik*. In *Young*, the Court reviewed amendments to Detroit's Anti-Skid Row Ordinance, which had been adopted by the city ten years earlier. The original ordinance required that certain types of businesses disperse and prohibited them from being located within 500 feet of residential areas.⁴³ In enacting the ordinance and identifying businesses subject to it, the city council relied on findings that some land uses "because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas."⁴⁴ The 1972 amendments added adult businesses, including movie theaters, to the list of covered uses. The number of such businesses had jumped significantly in the previous five years.⁴⁵ The "deleterious effect[s] upon the adjacent areas" of congregating adult businesses were that such a concentration "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."⁴⁶

The *Young* plurality acknowledged the "principal question" that it faced: "whether the statutory classification [which differentiates between motion picture theaters which exhibit sexually explicit "adult" movies and those which do not] is unconstitutional because it is based on the content of the communication protected by the First Amendment."⁴⁷ The Court of Appeals majority had viewed the *Mosley* decision as controlling, and had held the Detroit zoning ordinance to be the same type of content-based time, place, or manner restriction on fully protected speech, which violates the Constitution unless it can survive strict judicial scrutiny.⁴⁸ The four dissenting Justices in *Young* agreed. They viewed Detroit's efforts to reduce the "distasteful effects" of adult theaters through zoning to be no different from other efforts by other regulators, such as the City of Jacksonville in

43. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976).

44. *Id.* at 54 n.6; *see also* *Am. Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975) (Celebrezze, J., dissenting) (the uses covered by the original Ordinance were "bars, hotels, pawnshops, billiard halls, secondhand stores, taxi dance halls, and other establishments which in proximity to each other gave areas a "skid row" appearance and thereby contributed to the decline of nearby residential communities").

45. *Young*, 427 U.S. at 54–55, 55 n.8 (number of adult theaters jumped from two to 25, and other adult businesses experienced "a comparable increase").

46. *Id.* at 54 n.6, 55.

47. *Id.* at 52.

48. *Gribbs*, 518 F.2d at 1020–21 (*rev'd sub nom.* *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

Erznoznik, to protect members of the public from “offensive” speech.⁴⁹ In the dissent’s view, applying less than strict scrutiny to review the Detroit ordinance represented a “drastic departure from established principles of First Amendment law.”⁵⁰

The Justices in the *Young* majority⁵¹ viewed the paradigm presented by the Detroit zoning ordinance differently, and refused to “mechanically apply the doctrines developed in other contexts.”⁵² They identified features of the regulation which, in their views, removed the suspicion of unconstitutional message censorship that the content distinction would otherwise arouse. One feature crucial to the constitutional validity of the Detroit ordinance, and to any other regulation to which secondary effects are relevant, is that it qualifies as a time, place, or manner restriction and does not result in the “total suppression” of a type of erotic speech.⁵³ But this feature, while necessary, is not sufficient to distinguish regulations such as the Detroit ordinance from content-based time, place, or manner regulations that are properly subject to strict scrutiny. It is the “secondary” nature of the “distasteful effects” that the regulator seeks to avoid that does this work. Although Justice Stevens, writing for the plurality, merely mentioned the term in a footnote,⁵⁴ the concept has blossomed into the defining attribute that moves facially “content-based” regulations from strict scrutiny into deferential “intermediate” level review.

In fact, the roots of the secondary effects concept trace to Judge Anthony Celebrezze’s opinion dissenting from the Court of Appeals’ conclusion that the Detroit ordinance violated the Constitution because it classified films and printed materials on the basis of their content.⁵⁵ Both the majority and dissenting opinions located the key question as to the constitutionality of the Detroit ordinance in the third prong of the expressive conduct test set out in *United States v. O’Brien*.⁵⁶ This prong requires that a regulation be “unrelated to the suppression of free expression” to escape strict scrutiny.⁵⁷ In Judge Celebrezze’s view, the

49. *Young*, 427 U.S. at 84–85, 87–8 (Stewart, J., joined by Brennan, Marshall, and Blackmun, J.J., dissenting) (citing *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975)).

50. *Id.* at 84.

51. *Id.* at 52, 73 (Justice Stevens wrote the plurality opinion for four Justices and Justice Powell concurred).

52. *Id.* at 76 (Powell, J., concurring).

53. *Id.* at 70 (majority opinion).

54. *Id.* at 71 n.34.

55. *Am. Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014, 1023 (6th Cir. 1975) (Celebrezze, J., dissenting).

56. *United States v. O’Brien*, 391 U.S. 367 (1968).

57. Under the *O’Brien* test, a government regulation that restricts expressive conduct is constitutional if: (1) it is within the constitutional power of government, (2) it furthers an

Detroit ordinance met this requirement. Rather than being “a regulation of speech on the basis of its content,” the ordinance was properly characterized as “a regulation of the right to locate a business based on the *side-effects* of its location.”⁵⁸ Lesser judicial scrutiny is appropriate because “[t]he interest in preserving neighborhoods [by reducing side-effects] is not a subterfuge for censorship.”⁵⁹ Judge Celebrezze distinguished *Mosley*, on which the circuit court majority had relied, by noting that “a justifiable distinction in neighborhood impact [] underlies the differential treatment between adult and non-adult businesses” in the Detroit ordinance, whereas in *Mosley*, “the City was unable to justify a differential treatment of peaceful labor picketing and peaceful non-labor picketing.”⁶⁰ He noted that the concentration prohibition did not significantly affect publishers or consumers of adult materials.⁶¹ Rather, it diminished the profits of businessmen who sought to gain the advantage of locating near other such businesses, which was not of constitutional concern.⁶² Judge Celebrezze rejected the notion that the Constitution requires cities like Detroit to zone all businesses offering the same type of speech product evenhandedly.⁶³ In his view, the record in the case “belie[d] th[e] conclusion [that adult and non-adult bookstores and theaters pose similar threats to the stability of neighborhoods]” and instead “establishe[d] the legitimate reasons for treating adult establishments in the same manner as pool rooms and bars, without treating non-adult theaters and bookstores similarly.”⁶⁴

In upholding the partial restrictions of the Detroit ordinance, the *Young* plurality relied significantly on a judgment that the Constitution does not protect sexually explicit speech as fully as it protects other types of speech.⁶⁵ Justice Powell, the fifth vote to form the majority, did not agree.⁶⁶ The point of intersection among the members of the majority was the determination that Detroit’s purpose to reduce the

important or substantial governmental interest, (3) that interest is unrelated to the suppression of speech, and (4) the restriction it incidentally imposes on speech is no greater than necessary to further that interest. *Id.* at 377.

58. *Gibbs*, 518 F.2d at 1023 (Celebrezze, J., dissenting) (emphasis added).

59. *Id.*

60. *Id.* at 1024 (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

61. *Id.* at 1025 (Celebrezze, J., dissenting).

62. *Id.*

63. *Id.*

64. *Am. Mini Theatres, Inc. v. Gibbs*, 518 F.2d 1014, 1025 (6th Cir. 1975).

65. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–71 (1976).

66. *Id.* at 73 n.1 (Powell, J., concurring) (disagreeing that “nonobscene, erotic [expression] may be treated differently under First Amendment principles from other forms of protected expression.”).

secondary effects of adult businesses removed the ordinance from strict judicial review. Justice Stevens, writing for the plurality, noted that the Detroit zoning ordinance was directed at avoiding the effect of the area surrounding adult movie theaters “deteriorat[ing] and becom[ing] a focus of crime” and not at “the dissemination of ‘offensive’ speech.”⁶⁷ He contrasted the regulation in *Erznoznik* by noting that requiring theaters to screen away nude scenes was aimed primarily at “protecting . . . citizens from exposure to unwanted, ‘offensive’ speech,” not at reducing negative secondary effects of the speech.⁶⁸ In Justice Powell’s words, comparison of the Detroit ordinance to invalid content-based time, place, and manner restrictions was inapposite because adult movie theaters, as compared to non-adult movie theaters, “have markedly different effects upon their surroundings.”⁶⁹ He distinguished the ordinance in *Erznoznik* as a “misconceived attempt directly to regulate content of expression.”⁷⁰ By contrast, the Detroit zoning ordinance “affect[ed] expression only incidentally and in furtherance of governmental interests wholly unrelated to the regulation of expression.”⁷¹ Justice Powell acknowledged that “courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression,” but “it is clear that this is not such a case.”⁷²

In *City of Renton v. Playtime Theatres, Inc.*,⁷³ a majority of the Court upheld another zoning ordinance that limited the places where adult movie theaters could be located. The Court distinguished content-based time, place, and manner restrictions “enacted for the purpose of restraining speech on the basis of content,” which are subject to strict scrutiny, from “so-called ‘content-neutral’ time, place and manner regulations” that must only undergo a form of intermediate scrutiny.⁷⁴ The Court held that the zoning ordinance before it, like the

67. *Id.* at 71 n.34.

68. *Id.* (“The only secondary effect relied upon to support [the] ordinance was the impact on traffic—an effect which might be caused by a distracting open-air movie even if it did not exhibit nudity.”) (citing *Erzoznik v. Jacksonville*, 422 U.S. 205, 214–15 (1972)) The Court in *Erzoznik*, noted that the traffic regulation justification was raised for the first time in oral argument, and had no support in the record or in the text of the ordinance. *Erzoznik*, 422 U.S. at 214.

69. *Young*, 427 U.S. at 82 n.6 (Powell, J., concurring).

70. *Id.* at 84.

71. *Id.*

72. *Id.*

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

74. *Id.* at 46–47 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984);

one in *Young*, was properly subject to more deferential review because it was “aimed not at the *content* of the films,” but rather “at the *secondary effects* of such theaters on the surrounding community.”⁷⁵ In response to a claim by the erotic entertainment business that some members of the regulating body had aimed to restrict the sex speech because it was offensive, the Court held that the City Council’s *predominate* intent was controlling.⁷⁶ In reiterating the district court’s finding of the regulator’s *predominate* intent, the Court recited various “effects” that, in its view, qualified as “secondary.”⁷⁷ According to the Court, the regulation was appropriately designed to “prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protect and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life.’”⁷⁸ It adopted what it characterized as *Young*’s holding, “that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to ‘content-neutral’ time, place, and manner regulations.”⁷⁹ Although Justice Brennan, joined by Justice Marshall in dissent, did not credit the city’s “*post hoc* statements” that the ordinance was aimed at reducing secondary effects, he acknowledged the distinction between “secondary” effects and effects more closely tied to the content of expression.⁸⁰ While the adverse effects of pornography on children, spouses, and community standards of morality were, in his view, synonymous with public offense at the content of adult films, “increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity of [] adult entertainment land uses” were appropriately classified as “secondary” effects.⁸¹

In two subsequent cases involving challenges to local nudity bans applied to erotic dancing, the Justices discussed the secondary effects concept and rationale. In *Barnes v. Glen Theatre, Inc.*,⁸² a majority of

Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981)).

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

76. *Id.* at 47–48.

77. *Id.* at 4748, 50–51.

78. *Id.* at 48 (citing *Young v. Am. Mini Theatres, Inc.*, 472 U.S. 50, 70, 71 n.34, 72–73 (1976)).

79. *Id.* at 49.

80. *Id.* at 59–60 & nn.3 & 4 (Brennan, J., dissenting) (noting that *Renton* had not amended its ordinance to add findings related to secondary effects until after the lawsuit was commenced; prior to the amendment, the ordinance had not indicated it was designed to address any secondary effects of adult theaters).

81. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 59–60 & nn.3 & 4 (1986).

82. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

Justices upheld a public nudity restriction applied to require erotic dancers to wear at least pasties and a G-string. Finding that the public nudity ban incidentally limited expressive activity, a plurality of three Justices applied the *O'Brien* test and found the state's interest in "protecting societal order and morality" by prohibiting all types of public nudity to be substantial.⁸³ It found that interest to be "unrelated to the suppression of free expression" because the state sought to address the "perceived evil" of public nudity in any public place for any reason, not only nude dancing.⁸⁴

Justice Souter concurred, writing separately to rely on "the State's substantial interest in combating . . . secondary effects."⁸⁵ In his view, the city's interest in "preventing prostitution, sexual assault, and other criminal activity" was "unrelated to the suppression of free expression" as required by the third prong of the *O'Brien* test.⁸⁶ He responded to the dissent's claim that this interest was, in fact, related to suppressing the expression, and the regulation should be subject to strict scrutiny, because the crimes the city sought to remedy were caused by viewers reacting to the erotic content of the nude dancing.⁸⁷ He agreed that "regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression."⁸⁸ He disagreed, however, that the "pernicious secondary effects" of nude dancing were necessarily caused by the persuasive effect of the expression.⁸⁹ Rather, the cause could be "the concentration of crowds of men predisposed to such activities" or the stimulating effect of viewing nude bodies without respect to the expression.⁹⁰ This would mean that the speech and effects were correlated, but the effects would be appropriately classified as "secondary" because they were not necessarily the result of viewers' reactions to the content of the speech.⁹¹

In *City of Erie v. Pap's A.M.*,⁹² a majority of Justices upheld a

83. *Id.* at 567–68, 569 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

84. *Id.* at 570, 571.

85. *Id.* at 582 (Souter, J., concurring).

86. *Id.* at 583, 585 (citing *O'Brien*, 391 U.S. at 377).

87. *Id.* at 560, 585–86 (1991) (Souter, J., concurring) (citing *id.* at 592 (White, J., dissenting)).

88. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 (1991) (Souter, J., concurring) (citing *id.* at 592 (White, J., dissenting)).

89. *Id.* at 585–86 (Souter, J., concurring).

90. *Id.* at 586.

91. *Id.* (drawing a distinction between the state's interest arising from a simple correlation between nude dancing and "other evils" rather than "from a relationship between the other evils and the expressive component of the dancing").

92. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 278 (2000).

“general prohibition on public nudity” that was “almost identical” to the statute in *Barnes*.⁹³ Under one line of reasoning, the plurality found the fact that the ordinance on its face was a content-neutral restriction on conduct led directly into *O’Brien*’s mid-level scrutiny.⁹⁴ Evidence in the record, however, indicated that the city council had aimed particularly at the expressive activity of nude dancing, rather than “[b]eing ‘in a state of nudity’” generally.⁹⁵ So, under an alternate line of reasoning, the plurality found that the regulation was still properly evaluated as a content-neutral restriction because its purpose was to reduce the negative secondary effects of nude dancing.⁹⁶ The plurality distinguished the city’s legitimate purpose to reduce “secondary” effects such as “crime” and other “impacts on public health, safety and welfare” caused by the presence of adult entertainment establishments⁹⁷ from what would be an illegitimate purpose to regulate speech because of its “primary” effects, meaning “the effect on the audience of watching nude erotic dancing.”⁹⁸ Justice Stevens, joined by Justice Ginsburg, criticized the Court for improperly extending Secondary Effects Analysis beyond regulations of the place where expression may occur—zoning—to restrictions on the means of expression—totally nude dancing—that apply everywhere within the regulating jurisdiction.⁹⁹ The dissent characterized this effect as a “total suppression of protected speech” that no longer qualified for deferential intermediate scrutiny.¹⁰⁰ Although the dissenters disagreed with the plurality’s use of Secondary Effects Analysis, they agreed with the distinction between the two types of effects. According to the

93. *Id.* at 289–90.

94. *Id.*

95. *Id.* at 289, 290–91 (being in a state of nudity “is not an inherently expressive condition”).

96. *Id.* at 297.

97. *Id.* at 290 (The preamble to the ordinance stated the negative effects to include “provid[ing] an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, [and] the spread of sexually transmitted diseases” (quoting *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998)); see also *id.* at 297 (“[C]ertain lewd, immoral activities carried on in public places for profit are highly detrimental to public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.”).

98. *Id.* at 291.

99. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 317–18 (2000) (Stevens, J., dissenting) (“Until now, the ‘secondary effects’ of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State’s interests may provide the basis for censorship.”).

100. *Id.* at 317–318, 322 n.5 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)).

dissent, “A secondary effect on the neighborhood that ‘happen[s] to be associated with’ a form of speech is, of course, critically different from ‘the direct impact of speech on its audience.’ . . . The primary effect of speech is the persuasive effect of the message itself.”¹⁰¹

The *Pap’s A.M.* dissent quoted *Boos v. Barry*,¹⁰² which addressed a Washington, D.C. regulation that prohibited displaying signs critical of a government outside its embassy. In that case, the Court distinguished the “secondary effects” relied upon by erotic entertainment regulators from the “effect” of interfering with the dignity of foreign officials, which the D.C. regulation sought to avoid, and which the Court characterized as primary.¹⁰³ According to the Court, “the desire to suppress crime” outside of adult movie theaters is a purpose to reduce secondary effects because it “has nothing to do with the actual films being shown inside.”¹⁰⁴ By contrast, “if the ordinance [] was justified by the city’s desire to prevent the psychological damage it felt was associated with viewing adult movies, then . . . [t]he hypothetical regulation [would] target[] the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.”¹⁰⁵ Similarly, according to the Court, defenders of the D.C. ordinance did not point to “secondary effects” of picket signs in front of embassies, such as “congestion, [] interference with ingress or egress, [] visual clutter, or [interference with] the security of embassies.”¹⁰⁶ Rather, they relied upon the need to avoid “[t]he emotive impact of speech on its audience,” which is a “primary impact.”¹⁰⁷ For this reason, the Court applied strict scrutiny instead of the more deferential Secondary Effects Analysis.¹⁰⁸

In other cases following *Renton*, reviewing regulations imposed on the sale of sex speech, the Court declined to rely on secondary effects to lower the level of scrutiny. In *Sable Commc’ns of Cal., Inc. v. FCC*,¹⁰⁹ the Court applied strict scrutiny to invalidate what it characterized as a “total ban” on interstate transmission of indecent telephone messages for pay. The Court confirmed that “[s]exual expression which is indecent but not obscene is protected by the First

101. *Id.* at 324 n.6 (quoting *Boos v. Barry*, 485 U.S. 312, 320–21 (1988)).

102. *Boos*, 485 U.S. at 312.

103. *Id.* at 320, 321.

104. *Id.* at 320.

105. *Id.* at 321.

106. *Id.*

107. *Id.*

108. *Boos v. Barry*, 485 U.S. 312, 320, 321 (1988).

109. *Sable Commc’ns of Cal. v. FCC*, 492 U.S. 115 (1989).

Amendment.”¹¹⁰ The government’s purpose was to protect children from the influence of the erotic messages. Although the Court found the interest compelling, it found the total ban insufficiently tailored to protect adult access to protected speech.¹¹¹ In *Reno v. ACLU*,¹¹² the Court specifically rejected the government’s claim that Internet access restrictions should be subject to less than strict scrutiny because they were aimed at reducing negative secondary effects. The Court viewed the purpose of the restrictions to be “to protect children from the primary effects of “indecent” and “patently offensive” speech, rather than any “secondary” effect of such speech.”¹¹³ Similarly, the Court in *United States v. Playboy Entm’t Grp.*,¹¹⁴ refused to apply Secondary Effects Analysis to a statute that required television stations offering erotic entertainment to scramble their programs or limit broadcasts to certain hours. The Court found it of no consequence that the regulation limited only the time, place, or manner of broadcast because “the overriding justification for the regulation is concern for the effect of the subject matter on young viewers,” which is not a secondary effect.¹¹⁵ Instead, the regulation “focuse[d] *only* on the content of the speech and the direct impact that speech has on its listeners,” which “is the essence of content-based regulation.”¹¹⁶

A fifth case provides the last word from the Supreme Court on the features that qualify a regulation for deferential Secondary Effects Analysis. In *City of Los Angeles v. Alameda Books, Inc.*,¹¹⁷ all nine Justices agreed that no greater than mid-level Secondary Effects Analysis applied to a city zoning ordinance that dispersed adult businesses.¹¹⁸ The plurality drew from *Renton* the steps leading into

110. *Id.* at 126.

111. *Id.* at 126–27, 130–31.

112. *Reno v. ACLU*, 521 U.S. 844 (1997).

113. *Id.* at 868. The Court also viewed the statute as imposing a “blanket” restriction that applied to the entire Internet, and not as a type of time, place, or manner regulation.

114. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803 (2000).

115. *Id.* at 811.

116. *Id.* at 811–12.

117. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

118. *Id.* at 438–39, 441 (plurality) (noting that none of the parties requested to depart from the *Renton* framework); *id.* at 443–44 (Scalia, J., concurring) (noting that the plurality’s analysis constituted a correct application of secondary effects analysis, but he would interpret the Constitution to provide no protection to the “business of pandering sex”); *id.* at 444–45, 447 (Kennedy, J., concurring) (noting that the secondary effects test was the appropriate one; however, he agreed with the dissent that the test was imprecise and disagreed with the plurality’s “subtle expansion” of *Renton*); *id.* at 454–55, 456, 458 (Souter, J., dissenting) (characterizing the “variants of middle-tier tests” of intermediate scrutiny applied to adult entertainment zoning regulations as covering “a grab bag of restrictive statutes, with a corresponding variety of justifications”; while he would apply the

Secondary Effects Analysis.¹¹⁹ First, a court must determine that the regulation is appropriately characterized as a time, place, and manner regulation and not a complete ban on the mode of entertainment.¹²⁰ Next, the court must verify that the regulation is appropriately characterized as “content neutral” because it aims to reduce negative secondary effects.¹²¹

Justice Kennedy concurred. He disagreed with the plurality’s terminology.¹²² Like the dissent, he thought that the proper label for laws like the one at issue was “content-based,” but agreed with the plurality that the appropriate analysis was deferential scrutiny so long as the regulation was aimed at reducing negative secondary effects.¹²³ Justice Kennedy began his concurrence by distinguishing between the primary effects of speech—“chang[ing] minds” and prompt[ing] actions”—and secondary effects, which are “unrelated to the impact of the speech on its audience.”¹²⁴ As examples of “secondary effects” produced by speech, he noted that a newspaper factory may cause pollution or a billboard may obstruct a view, and zoning laws may address these effects even though they are produced by speech.

Justice Kennedy agreed with the two requirements to enter Secondary Effects Analysis set out by the plurality—that the regulation must qualify as a time, place, or manner restriction and that it must be aimed at reducing secondary effects. His point in writing separately was to qualify further the “proposition” that a regulator must advance, at the outset, for an ordinance to be subject to Secondary Effects Analysis.¹²⁵ According to Justice Kennedy, “The rationale of the ordinance must be that it will suppress secondary effects—and not by suppressing speech.”¹²⁶ This means that by operation of the regulation “the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced.”¹²⁷ He contrasted

intermediate-scrutiny test, he would require Los Angeles to produce empirical justification for the regulation rather than relying on a two-decade-old study).

119. *Id.* at 433–34 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 47–49, 50, 51–54 (1986)).

120. *Id.* at 434 (citing *Renton*, 475 U.S. at 46).

121. *Id.* (citing *Renton*, 475 U.S. at 47–49).

122. *Id.* at 444–45, 448 (Kennedy, J., concurring).

123. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (“These ordinances are content based, and we should call them so.”).

124. *Id.* at 444 (Kennedy, J., concurring).

125. *Id.* at 450 (Kennedy, J., concurring) (“[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech.”).

126. *Id.* at 449–50.

127. *Id.* at 451.

a permissible zoning regulation, which a government regulator may reasonably believe will reduce negative secondary effects without necessarily reducing the production or demand for the speech, with a content-based tax, which would reduce secondary effects by the impermissible means of reducing demand for the speech.¹²⁸ He found the regulation at issue to be supported by such a proposition because the regulating entity could reasonably believe that dispersing erotic entertainment businesses could reduce the concentration of criminals that create negative secondary effects while not reducing the amount or content of erotic entertainment available throughout the city.¹²⁹

B. Secondary Effects Analysis

1. As Articulated by the Court

The Court calls the analysis it applies to regulations aimed at reducing secondary effects “intermediate scrutiny.”¹³⁰ But its genesis, articulations and applications reveal that once a regulation qualifies for Secondary Effects Analysis, the Court expects that lower courts will review local determinations with a high degree of deference. The statements of the test have morphed over time. In *Young*, the plurality asked “whether the line drawn by the ordinances is justified by the city’s interest in preserving the character of its neighborhoods,” without specifically identifying a level of review.¹³¹ Justice Powell, concurring, viewed the speech restrictions as “incidental and minimal,” and applied the expressive conduct test from *O’Brien*.¹³² The Court

128. *Id.* at 445 (“Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.”).

129. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 449-50, 452-53 (2002); *see also* *Ocello v. Koster*, 354 S.W.3d 187, 213 (Mo. 2011) (“Justice Kennedy explained that the government is not permitted to reduce secondary effects by the simple expedient of reducing the amount of protected speech that occurs, even though it may be logical to assume that fewer sexually-oriented businesses will mean fewer customers and so fewer secondary effects.”).

130. *See, e.g.*, *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-50 (1986)).

131. *Young v. Am. Mini Theatres Inc.*, 427 U.S. 50, 71 (1976) (finding that the record “disclosed a factual basis for the [city’s] conclusion” that the regulation would be effective, noting it was not the Court’s “function to appraise the wisdom of its [choice of means to achieve the end],” and that the city “must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”).

132. *Id.* at 78 (Powell, J., concurring) (“At most the impact of the ordinance on [speech] interest is incidental and minimal.”); *see also id.* at 80 (“The factual distinctions between a prosecution for destruction of a Selective Service registration certificate, as in *O’Brien*, and this case are substantial, but the essential weighing and balancing of competing interests are

also used the *O'Brien* test to evaluate blanket public nudity bans that incidentally prohibit nude dancing, with various Justices writing opinions finding a purpose to reduce secondary effects to address one of the prongs of the test. In *Renton*, the Court drew from “the standards applicable to ‘content-neutral’ time, place, or manner regulations” to establish what is now Secondary Effects Analysis. According to the Court, the appropriate inquiry is whether a regulation “is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.”¹³³ Oddly, and almost casually, the *Alameda Books* plurality repeated this truncated version of the test, which omits the tailoring prong of the time, place, or manner test.¹³⁴ In application, however, the Justices inquired about the means/end fit.¹³⁵

The first prong of the analysis is easily satisfied by any regulator that qualifies for Secondary Effects Analysis. A city’s interest in “attempting to preserve the quality of urban life” is substantial,¹³⁶ and this is the ultimate goal of regulations aimed at reducing negative secondary effects. More of the Court’s discussion has focused on the type and quantity of evidence a regulator must produce to show its rule is “designed” to serve that interest. As to the type of evidence, the regulator must show a “link” between the aspect of the erotic entertainment business modified by the regulation and the existence of the negative secondary effects the regulator aims to reduce.¹³⁷ Regulators may rely on any evidence they “reasonably believe to be relevant” to “fairly support” their conclusions that the mode of operation of the businesses they seek to regulate produce negative secondary effects, including evidence from other jurisdictions and, where appropriate, “common sense.”¹³⁸ As to the amount of evidence, there is no “high bar for municipalities that want to address merely the

the same.”) (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

133. *Renton*, 475 U.S. at 47, 50.

134. *Alameda Books*, 535 U.S. at 456 (citing *Renton*, 475 U.S. at 47–54). A content neutral regulation must be “narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Although the test uses the same “narrowly tailored” language as the strict scrutiny test, the Court has made clear that the intermediate scrutiny requirement of means/end “fit” is less demanding than in strict scrutiny. *Ward*, 491 U.S. at 791, 794.

135. *Renton*, 475 U.S. at 52; *Alameda Books*, 535 U.S. at 440–41.

136. *Renton*, 475 U.S. at 48, 50; *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976); *Alameda Books*, 535 U.S. at 444 (Kennedy, J., concurring).

137. *Alameda Books*, 535 U.S. at 437.

138. *Id.* at 438–39.

secondary effects of protected speech.”¹³⁹ As Justice Kennedy has said most bluntly, “[V]ery little evidence is required.”¹⁴⁰ The means chosen by the regulator must only be plausible. The regulator need not prove that they will work.¹⁴¹ Courts should accord “deference to the evidence presented by the [regulator]” because local entities are “in a better position to gather and evaluate data on local problems.”¹⁴²

Although the Court has emphasized that the evidentiary burden on a regulator is very light, it has left some room for regulated businesses to demonstrate that the evidence relied upon by the regulator does not “reasonably support” its determination that negative secondary effects exist.¹⁴³ Regulators may not “get away with shoddy data or reasoning.”¹⁴⁴ To shift the burden of production back to the government, the regulated businesses must “cast direct doubt” on the regulator’s rationale, either by undermining the validity of the regulator’s evidence or presenting evidence of its own that disputes the regulator’s factual findings.¹⁴⁵

As to the means/end fit, the content classification is the crucial attribute that demonstrates that a regulation is “narrowly tailored”¹⁴⁶ to serve its purpose of reducing secondary effects,¹⁴⁷ rather than being overbroad. The *Renton* Court also addressed a claim that the zoning regulation before it was unconstitutionally under-inclusive because it did not regulate other types of adult businesses that produce similar negative secondary effects. The Court noted that the city could choose “first to address the potential problems created by one particular kind of adult business” without raising an inference of unconstitutional discrimination, and cited *Williamson v. Lee Optical Co.*, its quintessential deferential rational review case.¹⁴⁸

139. *Id.* at 438 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

140. *Id.* at 451 (Kennedy, J., concurring).

141. *Id.* at 437-38 (plurality opinion).

142. *Id.* at 440 (citing *Turner Broad. Syst., Inc. v. FCC*, 512 U.S. 622, 666 (1994) and *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)).

143. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 436 (2002).

144. *Id.* at 438.

145. *Id.* at 439-40.

146. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (the narrow tailoring requirement does not incorporate the “no alternate means” requirement that it does when it is part of the strict scrutiny test).

147. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (the ordinance is narrowly tailored because it applies to “only that category of theaters shown to produce the unwanted secondary effects”). *See also* *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 81-82 (Powell, J., concurring) (the “degree of incidental encroachment” on protected speech was the “minimum necessary” because the regulation only applied to adult movie theaters).

148. *Renton*, 475 U.S. at 52-53 (citing *Williamson v. Lee Optical*, 348 U.S. 483, 488-89

As to the final prong of the test, regulations may leave open reasonable alternative avenues of communication even though they dramatically restrict the places where adult theaters may locate. The theaters' financial burden is not constitutionally relevant, since there is no constitutional right to "obtain sites at bargain prices."¹⁴⁹ Regulators are required only to "refrain from effectively denying [adult businesses] a reasonable opportunity to open and operate."¹⁵⁰

2. As Applied by the Lower Courts

State and local governments have seized on the possibility of regulating erotic entertainment businesses and defending the regulations by means of Secondary Effects Analysis. The types of regulations have moved well beyond the locational requirements and full nudity restrictions reviewed by the Court in the zoning and nude dancing lines of cases. These include requirements that sexually-oriented businesses be licensed,¹⁵¹ regulations that address the exterior of the business, such as lighting or signage,¹⁵² and regulations

(1955)). This acceptance of underinclusion is in marked contrast to its rejection of the same type of reasoning in *Erznoznik*. See *Erznoznik v. City of Jacksonville*, 472 U.S. 205, 215 (1972) ("This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it . . . This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression.").

149. *Renton*, 475 U.S. at 54 (citing *Young*, 427 U.S. at 71); 427 U.S. at 78 (Powell, J., concurring) ("[T]he inquiry for First Amendment purposes is not concerned with economic impact.").

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

151. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223–24, 227–30 (1990) (City's licensing scheme for adult entertainment establishments unconstitutional under facial challenge, as the city had rested unbridled discretion in decision maker by setting no time limits on time for decision); *Richland Bookmart, Inc. v. Knox Cnty., Tenn.*, 555 F.3d 512, 518–19 (6th Cir. 2009) (County ordinance enacting licensing requirements and other regulations, including limitations on operating hours, on sexually-oriented businesses); *Dream Palace v. County of Maricopa*, 384 F.3d 990, 996–97, 997 nn.2, 3 (9th Cir. 2003) (County ordinance requiring licensing of adult entertainment businesses, work permits or licenses for owners, managers, and employees, and restricting hours); *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 385–86 (6th Cir. 2001) (Metropolitan government ordinance requiring sexually-oriented businesses to obtain a license and adult entertainers to obtain a permit from the metro's Sexually Oriented Businesses Licensing Board), *cert. denied*, 535 U.S. 1073 (2002); *Schultz v. City of Cumberland*, 228 F.3d 831, 836–39 (7th Cir. 2000) (comprehensive municipal licensing and regulation scheme targeted at town's sole sexually-oriented business), *reh'g and reh'g en banc denied* (Dec. 1, 2000); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 405–06 (6th Cir. 1997) (ordinance requiring licensing of facilities and permitting of employees), *reh'g and suggestion for reh'g en banc denied* (Apr. 15, 1997); *Kev, Inc. v. Kitsap Cnty.*, 793 F.2d 1053, 1055–56 (9th Cir. 1986) (County ordinance regulating topless clubs which did not serve alcohol).

152. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 461 n.4 (2002) (Souter, J.,

concerning the inside of the business, dictating such things as stage height and distance from customer requirements for nude performances,¹⁵³ and that viewing booths be open.¹⁵⁴ Recently, the Ninth Circuit Court of Appeals applied Secondary Effects Analysis to uphold the County of Los Angeles Safer Sex in the Adult Film Industry Act, which mandates, among other things, that adult film actors wear condoms during intercourse.¹⁵⁵ A common type of regulation limits the combination of erotic entertainment and the sale of alcohol.¹⁵⁶

dissenting) (L.A.'s regulation of adult entertainment establishments included lighting requirements); *Annex Books, Inc. v. City of Indianapolis, Ind.*, 581 F.3d 460, 461, 462–63 (7th Cir. 2009) (Premises of adult businesses required to be well-lit); *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 406 (7th Cir. 2004) (Among the city's concerns were sexually-oriented businesses creating "unattractive appearances due to neon lights, gaudy window displays, and unsavory clientele"); *N.W. Enters., Inc. v. City of Houston*, 352 F.3d 162, 186–88 (5th Cir. 2003) (City's sexually-oriented business regulations included limitations on signage), *on reh'g in part*, 372 F.3d 333 (5th Cir.), *cert. denied*, 543 U.S. 958 (2004); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1253 n.1, 1265–66 (11th Cir. 2003) (physical requirements for adult businesses included lighting standards), *reh'g and reh'g en banc denied*, 85 F. App'x 728 (11th Cir. 2003), *and cert. denied*, 541 U.S. 988 (2004); *Excalibur Grp., Inc. v. City of Minneapolis*, 116 F.3d 1216, 1218–19 (8th Cir. 1997) (City signage requirements); *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1280 (5th Cir. 1988) (City signage restrictions on sexually-oriented businesses), *reh'g denied*, 841 F.2d 107 (5th Cir. 1988), *and cert. denied sub nom.* *M.E.F. Enters., Inc. v. Houston*, 489 U.S. 1052 (1989).

153. *G.M. Enters., Inc. v. Town of St. Joseph, Wis.*, 350 F.3d 631, 634, 638 (7th Cir. 2003) (buffer zone of five feet and minimum stage height of 18 inches), *cert. denied*, 543 U.S. 812 (2004); *Colacurcio v. City of Kent*, 163 F.3d 545, 549, 554 (9th Cir. 1998) (requiring a minimum distance of ten feet and a stage height of at least 24 inches; less restrictive "no-touch" rules without a buffer zone had proven unenforceable), *cert. denied*, 529 U.S. 1053 (2000); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1250, 1253–54 (5th Cir. 1995) ("no-touch" rule forbidding contact between patrons and nude performers).

154. *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1002–04 (9th Cir. 2007); *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1264–65 (11th Cir. 2003), *reh'g and reh'g en banc denied*, 85 F. App'x 728 (11th Cir. 2003), *and cert. denied*, 541 U.S. 988 (2004); *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1003–04 (7th Cir. 2002); *Mitchell v. Comm'n on Adult Entm't Establishments of Del.*, 10 F.3d 123, 141–42 (3rd Cir. 1993); *Stadium Book & Video, Inc. v. Miami-Dade Cnty.*, Nos. 04-20537-CIV JORDAN, 04-20553-CIV-JORDAN, 04-21156-CIV-JORDAN, 2006 WL2374740, at **3, 11, 13 (S.D. Fla., Jul. 31, 2006), *aff'd*, 253 F. App'x 840 (11th Cir. 2007).

155. *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 578 (9th Cir. 2014).

156. *See, e.g., California v. LaRue*, 409 U.S. 109, 118 (1972); *Legend Night Club v. Miller*, 637 F.3d 291, 298 (4th Cir. 2011); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 741, 743 (4th Cir. 2010); *Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 727 (7th Cir. 2003); *Metro Pony, LLC v. City of Metropolis*, No. 11-CV-144-JPG, 2012 WL 1389656, at **2, 5 (S.D. Ill. Apr. 20, 2012); *City of Chi. v. Pooh Bah Enters.*, 865 N.E.2d 133, 147–49 (Ill. 2006), *cert. denied*, 552 U.S. 941 (2007); *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 121 Cal.Rptr.2d 729, 735–37 (Cal. App. 2002), *cert. denied sub nom.* *Vicary v. Cal. Dep't of Alcoholic Beverage Control*, 538 U.S. 924 (2003); *see also* HAW. REV. STAT. ANN. §371-20 (West 2014) Live Adult Entertainment Facility Surcharge Act, 35 ILL. COMP. STAT. ANN. 175/1-175/99 (West 2014); TEX. BUS. &

Regulators have prohibited the possession, consumption or sale of alcohol in an erotic entertainment business entirely,¹⁵⁷ banned the sale of mixed drinks in businesses that offer live nude entertainment,¹⁵⁸ and have taxed the nude entertainment/alcohol combination, directing the proceeds into a special fund to address various public objectives, including aiding victims of sexual assault.¹⁵⁹

Regulators routinely rely on “reducing negative secondary effects” to justify the restrictions imposed on sexually-oriented businesses. Newly enacted regulations commonly recite this aim in a preamble, and courts cite these as probative.¹⁶⁰ In addition to the

COM. CODE ANN. §§102.051-102.056 (West 2013).

157. See, e.g., *Curves, LLC v. Spalding Cnty., Ga.*, 685 F.3d 1284, 1289–90 (11th Cir. 2012) (upholding city ordinance prohibiting nude dancing on licensed premises); *181 South Inc. v. Fisher*, 454 F.3d 228, 230, 233–34 (3d Cir. 2006) (upholding Alcoholic Beverage Control regulation that banned “any lewdness or immoral activity” on licensed premises); *Sammy’s of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 994–95, 995 n.2, 997 (11th Cir. 1998) (upholding city ordinance that ban the sale of alcohol to any place “knowingly to exhibit, suffer, allow, permit, engage in, participate in, or be connected with, any motion picture, show, performance, or other presentation upon the licensed premises, which, in whole or in part, depicts nudity or sexual conducts of any simulation thereof”), *reh’g and suggestion for reh’g en banc denied*, 156 F.3d 188 (11th Cir. 1998) and *cert. denied*, 529 U.S. 1052 (2000); *Metro Pony, LLC v. City of Metropolis*, No. 11-CV-144-JPG, 2012 WL 1389656, at *2 (S.D. Ill. Apr. 20, 2012) (reviewing city ordinance that prohibited “the possession, use and consumption of alcohol on the premises of a sexually oriented business”); *City of Chi. v. Pooh Bah Enters.*, 865 N.E.2d 133, 139–40, 165 (Ill. 2006) (upholding ordinance prohibiting “establishments licensed to serve alcoholic beverages from permitting any employee, entertainer or patron from engag[ing] in any ‘live act, demonstration, dance or exhibition which * * * exposes to public view * * * [h]is or her genitalia, public hair, buttocks * * * or [a]ny portion of the female breast at or below the areola thereof”), *cert. denied*, 552 U.S. 941 (2007). The Third Circuit struck down as overbroad a Pennsylvania statute and rule prohibiting “lewd, immoral or improper entertainment” on licensed premises. *Conchatta, Inc. v. Miller*, 458 F.3d 258, 264–65 (3d Cir. 2006), *cert. denied*, 549 U.S. 1246 (2007). Pennsylvania currently has no statute specifically regulating nude dancing on licensed premises.

158. *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 740 (4th Cir. 2010) (reviewing regulations of the Virginia Alcoholic Beverage Control Board prohibiting establishments that offer live erotic dancing from obtaining a license to sell mixed drinks).

159. Live Adult Entertainment Facility Surcharge Act, 35 ILL. COMP. STAT. ANN. 175/1-175/99 (West 2014) (imposing a surcharge on live adult entertainment facilities, to be paid into the Sexual Assault Services and Prevention Fund); TEX. BUS. & COM. CODE ANN. §§102.051-102.056 (West 2013) (imposing a \$5 per entry per customer fee on sexually-oriented businesses, the first \$25 million of which per fiscal biennium is credited to the state sexual assault program fund). While Hawaii does not impose a fee on holders of liquor-dispenser or cabaret licenses, or employers of nude dancers, it does require that such parties post in an area accessible by employees the number for the National Human Trafficking Resource Center Hotline. HAW. REV. STAT. ANN. §371-20 (West 2014).

160. See, e.g., *Metro Pony, LLC v. City of Metropolis*, No. 11-CV-144-JPG, 2012 WL 1389656, at *2 (S.D. Ill. Apr. 20, 2012) (“It is the purpose of this chapter to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the

“crime” and “neighborhood degradation” effects primarily relied on by the Court as secondary effects,¹⁶¹ the effects have expanded in the lower courts to include “lewdness, public indecency, prostitution, potential spread of disease, illicit drug use and drug trafficking, personal and property crimes, negative impacts on surrounding properties, blight, litter, and sexual assault and exploitation,”¹⁶² and the list continues to grow.¹⁶³

deleterious secondary effects of sexually oriented businesses within the City. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.”) (quoting Ord. § 117.01(a)).

161. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 435–36 (2002) (accepting a 1977 planning report that indicated “certain crime rates” grew faster and property values declined further in areas with high concentrations of adult businesses than in the rest of the city); *see also id.* at 445 (Kennedy, J., concurring) (“If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection.”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 290, 291 (2000) (“[T]he ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments;” the ordinance mentions “violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 571 (1991) (upholding a public nudity ban on the basis of the state’s power to regulate public morals); *Barnes*, 501 U.S. at 583 (Souter, J., concurring) (“In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity . . . is sufficient under *O’Brien* to justify the State’s enforcement of the statute against the type of adult entertainment at issue here”); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986) (“The ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protect and preserve the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life,’ not to suppress the expression of unpopular views”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (“The Common Council’s determination was that a concentration of ‘adult’ movie theaters causes the area to deteriorate and become a focus of crime.”).

162. *84 Video/Newsstand, Inc. v. Sartini*, 455 F. App’x 541, 545 (6th Cir. 2011) (quoting S.B. 16, 127th Gen. Assemb., Reg. Sess. (Ohio 2007), § 3768.03(B)(1)).

163. *See, e.g., Alameda Books*, 535 U.S. at 436 (dense foot traffic where adult establishments are concentrated, which attracts or generates criminal activity); *84 Video/Newsstand*, 455 F. App’x at 545 (“lewdness, public indecency, prostitution, potential spread of disease, illicit drug use and drug trafficking, personal and property crimes, negative impacts on surrounding properties, blight, litter, and sexual assault and exploitation”); *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 560–61 (7th Cir. 2009) (pornographic litter); *181 South, Inc. v. Fischer*, 454 F.3d 228, 230 (3d Cir. 2006) (“overconsumption of alcohol and inappropriate physical contact between customers and dancers”); *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 406 (7th Cir. 2004) (“unattractive appearances due to neon lights, gaudy window displays, and unsavory clientele”); *BBL, Inc. v. City of Angola*, No. 1:13-CV-76-RLM, 2014 WL 26093 at *4 (N.D. Ind. Jan. 2, 2014) (“personal and property crimes, prostitution, potential spread of

Lower courts have attempted to follow the various directions of the Justices in applying Secondary Effects Analysis.¹⁶⁴ Where the regulation involves zoning, they apply the *Renton* test.¹⁶⁵ Where the regulated business sells live nude entertainment, the courts read the Court's directions differently. Some apply the *Renton* test.¹⁶⁶ Others apply the *O'Brien* expressive conduct test.¹⁶⁷ Where the regulation restricts the sale of alcohol, the courts have had a particularly difficult time deciphering the Court's directions.¹⁶⁸ Courts apply the *Renton*

disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault, and exploitation"); *Cricket Store 17, LLC v. City of Columbia*, 996 F. Supp.2d 422, 425 (D.S.C. 2014) ("personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation"); *Keepers, Inc. v. City of Milford*, 944 F. Supp.2d 129, 142–43 (D. Conn. 2013) ("personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, illicit drug use and drug trafficking, negative impacts on property values, urban blight, pornographic litter, and sexual assault and exploitation"); *Showtime Entm't LLC v. Ammendolia*, 885 F. Supp. 2d 507, 520–21 (D. Mass 2012) ("increased crime, and adverse impacts on public health, the business climate, the property values of residential and commercial property [,] and the quality of life" as well as preserving "the historically rural atmosphere of the town" and providing "an opportunity for all elementary school buses to finish student bus routes").

164. *Sutton v. Chanceford Township* United States District Court, M.D., 2016 WL 7231702 ("Although there have been many decisions in this field that have shaped the legal landscape with respect to the validity of zoning regulations that place some degree of burden on protected First Amendment activity or business, the law in this field can be difficult to synthesize with clarity.").

165. See, e.g., *Showtime Entm't, LLC v. Town of Mendon*, 769 F.3d 61, 72 (1st Cir. 2014); *Abilene Retail # 30, Inc. v. Bd. of Comm'rs of Dickinson Cnty., Kan.*, 492 F.3d 1164, 1173 n.5 (10th Cir. 2007).

166. *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 742 (4th Cir. 2010); see also *Entm't Prods., Inc. v. Shelby Cnty., Tenn.*, 721 F.3d 729, 734–36 (6th Cir. 2013), cert. denied, 134 S. Ct. 906 (2014); *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 21–22 (2d Cir. 2010); *Doctor John's v. G. Blake Wahlen*, 542 F.3d 787, 789 (10th Cir. 2008); *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 870 (11th Cir. 2007), cert. denied, 552 U.S. 1183 (2008); *Fantasyland Video, Inc., v. Cnty. of San Diego*, 505 F.3d 996, 1001 (9th Cir. 2007); *Ocello v. Koster*, 354 S.W.3d 187, 207–09 (Mo. 2011).

167. *84 Video/Newsstand, Inc. v. Sartini*, 455 F. App'x 541, 547–48 n.6 (6th Cir. 2011); see also *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 169–70 (2d Cir. 2007); *Conchatta, Inc., v. Miller*, 458 F.3d 258, 267 nn. 7, 8 (3d Cir. 2006), cert. denied, 549 U.S. 1246 (2007); *Keepers, Inc. v. City of Milford, Conn.*, 944 F. Supp. 2d 129, 143 (D. Conn. 2013); *Combs v. Texas Entm't Ass'n, Inc.*, 347 S.W.3d 277, 288 (Tex. 2011).

168. The uncertainty is due to a confusing series of cases. Prior to *Young*, the Court used the rational basis test to uphold a restriction on serving alcohol in nude dancing establishments. *California v. LaRue*, 409 U.S. 109, 115–16 (1972). Language in the opinion suggested that the 21st Amendment weakened free speech protections. *Id.* at 114–15, 118–19. After the *Young* decision, the Court in *44 Liquormart, Inc.*, disavowed that conclusion, but also stated that states have ample inherent police power to restrict "grossly sexual exhibitions" and "bacchanalian revelries" "regardless of whether alcoholic beverages were involved." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). In support

test,¹⁶⁹ the *O'Brien* test,¹⁷⁰ a hybrid analysis designed specifically for alcohol/erotic entertainment regulations.¹⁷¹ The different statements of the test do not particularly matter, since the Court has said that the standard time, place, or manner test and the *O'Brien* test are basically the same.¹⁷² But they illustrate the distraction from constitutional principle and the obsession with detail that characterizes Secondary Effects Analysis. The multiple prongs of the tests and the parsing of the various Justices' opinions occupy pages while the core question never gets asked or addressed: what is the constitutionally principled justification for applying deferential analysis to regulations aimed at reducing "secondary effects?"

II. THE IMPACT OF REED V. TOWN OF GILBERT

The Court ratcheted up the doctrinal tension surrounding Secondary Effects Analysis through its reasoning and strong language in *Reed v. Town of Gilbert*.¹⁷³ At issue was the town's outdoor sign code, which treated temporary directional signs, ideological signs, and

of this statement, it cited both *Young* (applying rational basis and *O'Brien*) and *Barnes* (applying *O'Brien*). *Id.* at 515 (1996) (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 79-82 (1976) (Powell, J., concurring); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-68 (1991)). Although *Renton* had been decided, in which a majority of the Court chose the time, place, and manner version of the intermediate scrutiny test to apply to regulations that specifically target erotic entertainment, the 44 *Liquormart* Court did not cite it at all.

169. *Imaginary Images*, 612 F.3d at 742; *see also Entm't Prods., Inc. v. Shelby Cnty.*, Tenn., 721 F.3d 729, 734-36 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 906 (2014); *TJS of N.Y., Inc. v. Town of Smithtown*, 598 F.3d 17, 21-22 (2d Cir. 2010); *Doctor John's v. G. Blake Wahlen*, 542 F.3d 787, 789 (10th Cir. 2008); *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 870 (11th Cir. 2007), *cert. denied*, 552 U.S. 1183 (2008); *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1001 (9th Cir. 2007); *Ocello v. Koster*, 354 S.W.3d 187, 207-09 (Mo. 2011).

170. *84 Video/Newsstand, Inc. v. Sartini*, 455 F. App'x 541, 547-48, 548 n.6 (6th Cir. 2011); *see also White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 169-70 (2d Cir. 2007); *Conchatta, Inc. v. Miller*, 458 F.3d 258, 267 nn. 7, 8 (3d Cir. 2006), *cert. denied*, 549 U.S. 1246 (2007); *Keepers, Inc. v. City of Milford, Conn.*, 944 F. Supp. 2d 129, 143 (D. Conn. 2013); *Combs v. Texas Entm't Ass'n, Inc.*, 347 S.W.3d 277, 288 (Tex. 2011).

171. *Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 722 n.27 (7th Cir. 2003); *see also Richland Bookmart, Inc. v. Knox Cnty., Tenn.*, 555 F.3d 512, 520-21 (6th Cir. 2009); *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 311 (5th Cir. 2007); *181 South, Inc. v. Fischer*, 454 F.3d 228, 233-34 (3d Cir. 2006).

172. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984) (the two tests are "little, if any, different" from each other). The *Barnes* Court reiterated the conclusion that the two tests "embody much the same standards," noting that the *Renton* plurality had applied the time, place, and manner test, but choosing to apply the *O'Brien* test to the public nudity ban. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986)).

173. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

political signs differently.¹⁷⁴ Clyde Reed, the pastor of a small church, contested the disadvantageous treatment of the temporary signs used to direct members of the public to services, as compared to signs that fell within the other classifications. The Court granted certiorari to determine whether the distinction drawn by the code was content-neutral and subject to intermediate time, place and manner review, as the court of appeals had determined, or content-based and subject to strict scrutiny.¹⁷⁵

The Court found the distinction to be content-based.¹⁷⁶ The Court of Appeals had acknowledged that a “cursory examination” of a sign’s content would be required to apply the code’s distinctions but held that “distinctions based on the speaker or the event” do not require treating a law as content-based where there is “no discrimination among similar events or speakers”¹⁷⁷ or evidence that the disadvantageous treatment of some types of signs is “because of [] disagreement with the message [they] convey[.]”¹⁷⁸ By contrast, the Court emphasized that “the crucial first step in the content-neutrality analysis” is to determine “whether the law is content neutral on its face.”¹⁷⁹ The Court explained that a law is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.”¹⁸⁰ If a law is content-based on its face, it is “subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech.”¹⁸¹ This “clear and firm rule” to determine whether a law is content-based, the Court emphasized, is “an essential means of protecting the freedom of speech.”¹⁸²

Although the reasoning and strong language in the *Reed* opinion could appear to rip away the underpinnings of Secondary Effects Analysis, the Court did not mention this possibility.¹⁸³ This is true

174. *Id.* at 2224–25.

175. *Id.* at 2225–26.

176. *Id.* at 2227 (“The Town’s Sign Code is content based on its face.”). Justice Thomas wrote the opinion for the Court, joined by Justices Roberts, Scalia, Kennedy, Alito and Sotomayor. Justice Alito wrote a concurring opinion, joined by Justices Kenney and Sotomayor.

177. *Reed v. Town of Gilbert*, 707 F.3d 1057, 1069 (9th Cir. 2013).

178. *Id.* at 1072.

179. *Reed*, 135 S. Ct. at 2228.

180. *Id.* at 2227, 2230 (“[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”).

181. *Id.* at 2228.

182. *Id.* at 2231.

183. *RCP Publications Inc. v. City of Chi.*, No. 15 C 11398, 2016 WL 4593830, at *4 (N.D. Ill. Sept. 2, 2016) (noting, with respect to established commercial speech precedent,

even though Justice Kagan, joined by Justices Ginsberg and Breyer, concurring in the judgment, explicitly pointed out the contradiction between the Court's "clear and firm rule" and the doctrine that it has developed in other contexts, specifically noting Secondary Effects Analysis.¹⁸⁴ Justice Kagan noted that the Town of Gilbert's defense of its haphazard sign law distinctions did not pass "strict scrutiny, or intermediate scrutiny, or even the laugh test,"¹⁸⁵ and predicted that the Court "and others" will regret the chaos provoked by the majority in local sign law.¹⁸⁶ Three Justices joined the majority opinion, but wrote a concurring opinion acknowledging that "what we have termed 'content-based' laws must satisfy strict scrutiny."¹⁸⁷ They wrote separately, however, to emphasize that *Reed* left room for localities to "enact and enforce reasonable sign regulations,"¹⁸⁸ and offered examples, which may or may not be consistent with the "clear and firm rule."¹⁸⁹

As predicted, local sign law is "coping with uncertainty" in the wake of *Reed*.¹⁹⁰ And *Reed's* impact has extended beyond sign regulations, to other areas.¹⁹¹ As one pertinent example, the Seventh Circuit reversed its characterization of a local ordinance prohibiting aggressive panhandling in light of *Reed*,¹⁹² and other courts have interpreted *Reed* to dictate this outcome as well.¹⁹³ But, no court has read *Reed* to do away with Secondary Effects Analysis. Some courts

"Reed did not even cite to *Central Hudson*, let alone expressly modify or overrule it.").

184. *Reed*, 135 S. Ct. at 2238 (The Court has shown that it can "administer [its] content-regulation doctrine with a dose of common sense," applying intermediate scrutiny to laws that distinguish speech based on subject matter but where the law's enactment and enforcement reveal "not even a hint of bias or censorship.") (citing and explaining *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) as justified by negative secondary effects).

185. *Id.* at 2239.

186. *Id.* ("This Court may soon find itself a veritable Supreme Board of Sign Review.").

187. *Id.* at 2233 (Alito, J., concurring).

188. *Id.*

189. Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65, 68 (2017) (noting that some of Justice Alito's examples "quite obviously did in fact make facial references to content").

190. Brian J. Connolly & Alan C. Weinstein, *Sign Regulation After Reed: Suggestions for Coping with Legal Uncertainty*, 47 THE URB. LAW. 569 at 587 (2015) (noting "unanswered questions after Reed"); Lisa Harms Hartzler, *Sign Regulation after Reed v. Town of Gilbert, Arizona: Greater Clarity or More Confusion?*, ILLINOIS REALTORS, <http://www.illinoisrealtor.org/node/3961> (noting that "[u]nfortunately" the *Reed* decision is "divided," "opaque," and "like reading tea leaves").

191. Armijo, *supra* note 189, at 69 (areas include panhandling, intellectual property and criminal law).

192. *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).

193. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 185 (D. Mass. 2015) ("*Reed* makes earlier cases, which had split over what forms of regulation of panhandling were content-based, of limited continuing relevance.").

have applied Secondary Effects Analysis without noting or distinguishing *Reed*.¹⁹⁴ The Court of Appeals for the Seventh Circuit explicitly rejected a reading of *Reed* that would “upend[] established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment.”¹⁹⁵ Courts have reached this same conclusion with respect to the category of commercial speech, which has been established by Court precedent for approximately the same amount of time as Secondary Effects Analysis and similarly, for reasons particular to the content of the speech, leads the Court to apply less than strict scrutiny to regulations of it.¹⁹⁶ These developments confirm that,

194. *E.g.*, *Cricket Store 17, L.L.C. v. City of Columbia*, No. 16-1065, 2017 WL 360545 (4th Cir. Jan. 25, 2017); *Sutton v. Chanceford Township*, Civil No. 1:14-CV-1584, 2016 WL 7231702, at *9 (M.D. Pa. Dec. 14, 2016) (denying motion to dismiss because the city failed to “make a threshold showing” to distinguish adult-oriented businesses from others); *7421 West 100th Place Corp. v. Vill. of Bridgeview*, No. 13 C 4336, 2016 WL 5373062 (N.D. Ill. Sept. 26, 2016); *Chi. Joe’s Tea Room, LLC v. Vill. of Broadview*, No. 07-CV-2680, 2016 WL 1270398 (N.D. Ill. Mar. 31, 2016); *see also Boardroom Entertainment MKE, LLC v. City of Milwaukee*, 158 F. Supp. 3d 743, 747 n.4 (E.D. Wis. 2016) (applying secondary effects analysis and noting that the issues in the case were briefed before *Reed*).

195. *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (2015).

196. *RCP Publications Inc. v. City of Chi.*, No. 15 C 11398, 2016 WL 4593830, at *4 (N.D. Ill. Sept. 2, 2016) (“This Court . . . does not see *Reed* as overturning the Supreme Court’s consistent jurisprudence subjecting commercial speech regulations to a lesser degree of judicial scrutiny. The case says nothing of the kind.”); *Peterson v. Vill. of Downers Grove*, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) (“[A]bsent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny—which are directly applicable to the commercial-based distinctions at issue in this case—binding.”); *Mass. Ass’n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) (“Although only a small number of courts have addressed First Amendment challenges to commercial-speech regulations since *Reed*, almost all of them have concluded that *Reed* does not disturb the Court’s longstanding framework for commercial speech under *Central Hudson*.”); *id.* (citing with parentheticals *Contest Promotions, LLC v. City & Cnty. of S.F.*, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015) (appeal pending) (“*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test.”); *id.* at 193; *Citizens for Free Speech, LLC v. County of Alameda*, 114 F. Supp. 3d 952, 968–69, 2015 WL 4365439, at *13 (N.D. Cal. 2015) (holding that *Reed* does not alter the analysis for laws regulating off-site commercial speech); *California Outdoor Equity Partners v. City of Corona*, No. CV 15–03172 MMM (AGRx), 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) (“*Reed* does not concern commercial speech, let alone bans on off-site billboards. The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it.” (emphasis deleted)); *see also Chiropractors United for Research & Educ., LLC v. Conway*, Civil Action No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015) (appeal pending) (“Because the [challenged] [s]tatute constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite.”); *CTIA—The Wireless Ass’n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061, (N.D. Cal. 2015) (“[Plaintiff] completely ignores the fact that the speech rights at issue here are its members’ commercial speech rights The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech . . . and nothing in its recent opinions, including *Reed*,

absent further action by the Court, Secondary Effects Analysis survives its holding and strong statements in *Reed*. *Reed*'s "clear and firm rule" thus crystalizes, rather than extinguishes, the fundamental question at the root of the doctrinal anomaly that appears bound to stay: in what constitutionally significant sense are the effects that justify deferential analysis of sexually oriented business regulations "secondary"?

III. DISTINGUISHING "SECONDARY" EFFECTS

Secondary Effects Analysis is extraordinary. A facially content-based regulation may qualify for deferential scrutiny based on two prerequisites: that it is "a form of" time, place, or manner regulation¹⁹⁷ and it is "aimed" at the secondary effects of expression and not at the content of the expression itself.¹⁹⁸ But a content-based time, place, or manner restriction is not usually a "form" of regulation that evades strict scrutiny.¹⁹⁹ The aim of the regulation at "secondary" effects is supposed to neutralize the content sensitivity that the rule displays on

even comes close to suggesting that well-established distinction is no longer valid.") (emphasis in original)).

197. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986).

198. *Id.* at 47, 50 ("The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood.") (citing *Northend Cinema, v. Seattle*, 585 P.2d 1153 (Wash. 1978)); see also *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 433, 434–35, 438 (2002) (analogizing the ordinance and study at issue to the ordinance and study in *Renton* as similarly aimed at negative secondary effects of nude dancing rather than expression); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) ("[T]he ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects cause by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed.").

199. *Alameda Books*, 535 U.S. at 454–55 (Souter, J., dissenting) ("This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny, generally contrasted with the demanding standard applied under the First Amendment to a content-based regulation While spoken of as content neutral, these regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict"); see also *Renton*, 475 U.S. at 56–57, 58 (Brennan, J. dissenting) ("The fact that adult movie theaters may cause harmful 'secondary' land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. . . . '[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.' . . . '[B]efore deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing' secondary land-use effects associated with adult movie theaters. . . . [B]ecause of the First Amendment interests at stake here, this one-step-at-a-time analysis is wholly inappropriate.") (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980) and *Metromedia, Inc., v. San Diego*, 453 U.S. 490, 531 (1981) (Brennan, J., concurring)).

its face.²⁰⁰ This is true despite the fact that content-based time, place, or manner restrictions that the Court has subjected to strict scrutiny seem to aim to reduce the same type of “secondary” effects.²⁰¹ The Justices clearly believe that there is a distinction between “primary” and “secondary” effects that is rooted in constitutional principle. The constitutional principle forbids content censorship.²⁰² So, in the Justices’ views, “primary” and “secondary” effects track to the content of speech in ways that are different in a constitutionally significant way. This view is appealing in its simplicity. But review of the simple distinctions between primary and secondary effects reveals that none of them are consistent with free speech jurisprudence or with the types of effects the Court has accepted as secondary in the erotic entertainment regulations it has reviewed deferentially.²⁰³

A. *Psychic vs. Concrete Effects*

The Justices agree that whatever the cognitive or psychological impact of the expression may be – persuasive, pleasing, informative, distasteful or damaging – a speech regulation that has the purpose of reducing this inner, psychic impact on listeners or viewers aims at the primary effects of the speech and prompts strict scrutiny.²⁰⁴ The Court has distinguished regulations that target the primary effect, or “direct

200. *Renton*, 475 U.S. at 47–48; see also *Alameda Books*, 535 U.S. at 448, 449 (Kennedy, J., concurring) (“[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based. . . . The zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional.”).

201. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (sidewalk congestion); *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975) (traffic safety); *Police Dep’t of Chi. v. Mosely*, 408 U.S. 92 (1972) (school disruption).

202. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015) (noting “the danger of censorship presented by a facially content-based statute”).

203. John Fee undertook a similar review of possible distinctions between primary and secondary effects. See John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291 (2009). His review of the descriptive and normative problems with a simple distinction between primary and secondary effects is thorough and convincing. Where we differ is in how we would revise Secondary Effects Analysis to make some sense of it.

204. *Alameda Books*, 535 U.S. at 443; *id.* at 448–49 (Kennedy, J., concurring); *id.* at 455–56 (Souter, J., dissenting); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 291 (2000); *id.* at 310 (Scalia, J., concurring); *id.* at 326–28 (Stevens, J., dissenting); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570–71 (1991); *id.* at 577 (Scalia, J., concurring); *id.* at 585 (Souter, J., concurring); *id.* at 591 (White, J., dissenting); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49–50 (1986); *id.* at 56–57 n.1 (Brennan, J., dissenting); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 69–70 (1976); *id.* at 85–86, 86 n.5 (Stewart, J., dissenting); see also *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (“Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”).

impact” of a particular category of speech, from those that aim to reduce “a secondary feature that happens to be associated with that type of speech.”²⁰⁵

The problem with this distinction is that it does not seem to acknowledge or address the status of concrete effects that bear more than a happenstance relationship to the content of the regulated speech. In a number of contexts, the Court has held that a government purpose to restrict speech for the purpose of avoiding conduct listeners may engage in because they are provoked by the psychic impact of the speech is so directly connected to the content of the speech that it signals unconstitutional censorship and requires strict scrutiny. A purpose to avoid violent conduct by listeners because they disagree with the content of speech is a purpose to suppress speech because of its content,²⁰⁶ which presumptively violates the free speech guarantee. A purpose to avoid bad conduct by listeners because they agree with the message of the speech also requires strict review.²⁰⁷ A government purpose to reduce these listener-perpetrated effects, whether they are labeled primary or secondary, does not support a move into deferential review.²⁰⁸ So, secondary effects that justify the move into deferential Secondary Effects Review do not include all effects other than the psychic impact of speech.

205. *Boos v. Barry*, 485 U.S. 312, 321, 322 (1988) (“To take an example factually close to *Renton*, if the ordinance there were justified by the city’s desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.”).

206. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (“[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”). *But see City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 444–45 (2002) (Kennedy, J., concurring) (noting that when speech “produce[s] tangible consequences [like] prompt[ing] actions,” the actions are primary effects, but also referring to the hostile audience reaction in Forsyth County as a secondary effect, but one which did not qualify for secondary effects analysis).

207. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (establishing incitement test for restricting speech because it persuades listeners to engage in bad conduct); *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328–30 (7th Cir. 1985) (applying strict scrutiny to pornography regulates aimed at reducing negative societal effects from portrayals of women as subordinate), *aff’d*, 475 U.S. 1001, *and reh’g denied*, 475 U.S. 1132 (1986).

208. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (restricting violent video games because the content will cause harm to children or cause them to act aggressively is subject to strict scrutiny).

B. No Causal Relationship to Listener Reactions to Speech Content

Another possible distinction between effects that prompt strict scrutiny and Secondary Effects Analysis is that the latter are not caused at all by the psychic impact of the speech on listeners. This assumption seems to underlie a number of explanations offered by the Court and individual Justices. In *Boos v. Barry*, the Court distinguished the primary effect of wounded dignity due to offensive speech from secondary effects such as “congestion, [interference with ingress or egress, [visual clutter, or [interference with] the security of embassies.”²⁰⁹ Most recently, Justice Kennedy, in his controlling concurring opinion in *Alameda Books*, echoed the definition offered by the Court in *Boos*, describing secondary effects as “unrelated to the impact of the speech on its audience.”²¹⁰ His analogies to pollution produced by a newspaper factory and the view obstruction caused by billboards suggest that the “unrelated to the impact of the speech on its audience” requirement means that to qualify for Secondary Effects Analysis, the effects of erotic speech must, like these examples, not be caused in any way by the content of the speech.²¹¹

It is true that in some instances, the secondary effects of a speech regulation may be “unrelated to the impact of the speech on its audience” because they are not caused at all by the content of the speech. Secondary effects that are the targets of content-neutral time, place, or manner regulations and of regulations that incidentally restrict expressive conduct are caused exclusively by the means of delivery, not by the content of the speech.²¹² Because these types of secondary effects bear no causal relationship to the content of the speech, a government purpose to reduce them does not signal a government purpose to suppress the speech because of its message. Although the move from strict to intermediate scrutiny with these types of regulations is not typically explained as being because of a purpose aimed at “secondary effects,” the fact that these effects are not caused at all by the message of the speech drives the constitutional analysis, which hinges on the core principle that an apparent government purpose to censor speech because of its message requires strict judicial

209. *Boos v. Barry*, 485 U.S. 312, 321, 322 (1988).

210. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring).

211. *Id.*

212. *Ward v. Rock Against Racism*, 491 U.S. 781, 792, 794 (1989) (disturbance caused by noise levels); *United States v. O'Brien*, 391 U.S. 367, 376, 378–80 (1968) (disruption to efficient operation of Selective Service caused by not having a valid card).

review.²¹³

But the lack of causal relationship between the psychic impact of the speech and the secondary effects does not generally remove time, place, or manner restrictions from strict scrutiny if the regulation identifies its targets according to the content of the speech. In fact, the lack of relationship proves the regulation's unconstitutionality. For example, the rule in *Police Department of Chicago v. Mosley* that restricted all picketing outside schools except during labor disputes was a time, place, or manner regulation aimed at reducing effects that qualify as secondary.²¹⁴ But the mode of delivery modified by the regulation did not interact with the content of the speech subject to the regulation to create negative secondary effects peculiar to the combination of the content of the speech and the mode of delivery.²¹⁵ Consequently, restricting the mode of delivery discriminated against speech on the basis of its content, because the content of the speech did not contribute to the secondary effects the government sought to eliminate.²¹⁶ In *City of Cincinnati v. Discovery Network, Inc.*, similarly, there was no showing that commercial news racks created more sidewalk congestion than news racks distributing other types of speech.²¹⁷ And, the *Young* plurality distinguished the Court's prior

213. *Ward*, 491 U.S. at 792 (explaining that "[t]he principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park," noting that "the guideline 'ha[s] nothing to do with content,'" (referencing *Boos*, 108 S. Ct. at 1163), and "satisfies the requirement that time, place, or manner regulations be content neutral" without explicit reference to secondary effects).

214. *Police Dep't of Chi. V. Mosley*, 408 U.S. 92, 99 (1972) (City justified the ordinance as "a device for preventing disruption of the school").

215. *Id.* at 99–101 (City could not pick and choose which picketing should be allowed based on potential for disruption tied to the message: "Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject.").

216. *Id.* at 100, 101 ("Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school No labor picketing could be more peaceful or less prone to violence than Mosley's solitary vigil. In seeking to restrict nonlabor picketing that is clearly more disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum"); see also *Carey v. Brown*, 447 U.S. 455, 465 (1980) ("[N]othing in the content-based labor-nonlabor distinction [of the residential picketing ordinance] has any bearing whatsoever on [the state's asserted interest in protecting residential privacy]").

217. *Cincinnati v. Discovery Network*, 507 U.S. 410, 429–30 (1993) (city's ban on newsracks distributing commercial handbills while allowing newsracks selling newspapers was based on "the content of the publication resting inside [the] newsrack" and thus content-based; moreover, despite the city's assertion that the ordinance was justified in limiting the total number of newsracks due to aesthetic concerns, the ordinance did not lower the total

decision in *Erznoznik*, noting that although traffic impact is a secondary effect, deferential analysis was not appropriate because that impact was not particularly caused by the content of the speech.²¹⁸ So, regulators generally may not impose a time, place, or manner restriction on speech with a particular content without justifying the selectivity by linking the speech content to the harms they seek to avoid. Without the link, the speech burden appears as censorship or, at least, irrational.²¹⁹

The same is true of erotic entertainment and its secondary effects. Regulations that aim to reduce the negative secondary effects of businesses that sell erotic, but not other, expression must be justified by a “link” between the expressive product and the effects or the distinction will not pass even minimal rational basis scrutiny.²²⁰ Scores of studies currently exist documenting the secondary effects produced by various types of sexually-oriented businesses in various locations, and offering evidence and arguments as to particular attributes of the businesses that cause these effects.²²¹ Regulators must offer some basis to support their assertions that their aim is to reduce secondary effects to enter Secondary Effects Analysis and, once in it, they may have to offer some evidence to demonstrate that they could reasonably believe that their chosen means will do so. The Court has made clear that regulators may generalize about these effects from evidence gathered about other types of sexually-oriented businesses and from different locations, confirming that regulators may reasonably conclude that the documented secondary effects are caused by the sexually-oriented businesses and not by happenstance.

In fact, after offering the examples of pollution and obstructed views as secondary effects, Justice Kennedy, in his *Alameda Books* concurrence, noted that the reason why regulators may “identify [erotic] speech based on content” is that it is “a shorthand for

number of newsracks, only those distributing commercial handbills).

218. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 215 (1975)).

219. *Mosley*, 408 U.S. at 100–101 (“Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis.”).

220. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002).

221. SECONDARY EFFECTS RESEARCH, <https://web.archive.org/web/20170316033750/http://www.secondaryeffectresearch.com/biblio>.

identifying the secondary effects outside.”²²² These effects occur because “a critical mass of unsavory characters” is attracted to the vicinity “and the crime rate may increase as a result.”²²³ This acknowledgement highlights a crucial difference between the “secondary effects” of content-neutral time, place, or manner regulations and secondary effects that prompt deferential review of sexually-oriented business regulations. This is that the secondary effects of sexually-oriented businesses are, for the most part, not generated by the speakers’ actions of producing or disseminating the speech,²²⁴ but rather by third parties (“unsavory characters”), who are either listeners or others attracted to the vicinity because listeners will be there. These third party actions are the result of human choices that must be provoked in some way by the content of the expression sold by the sexually-oriented businesses or singling them out for regulation would not be rational.²²⁵ Consequently, in the circumstances where Secondary Effects Analysis applies, the “unrelated to the impact of the speech on its audience” description must have a more precise meaning than that the effects and the content of the speech lack any causal relationship.

222. *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring).

223. *Id.* at 452.

224. The adverse public health effect of disease caused by the production of sex films, and which provoked California’s various efforts to impose condom-use requirements, is a secondary effect of sexually oriented businesses analogous to the secondary effects addressed by content neutral time, place or manner regulations. Victoria Colliver, *Health & Human Services: Porn Industry Defeats Condom Requirements in California*, GOVERNING THE STATES AND LOCALITIES (Feb. 19, 2016), <http://www.governing.com/topics/health-human-services/tns-california-porn-condoms.html>; Bill Chappell, *Condom Mandate For Porn Industry Falls Short In California*, CAPITAL PUBLIC RADIO; THE TWO-WAY (Nov. 9, 2016 10:05 AM), <http://www.npr.org/sections/thetwo-way/2016/11/09/501405749/condom-mandate-for-porn-industry-falls-short-in-california>; *See, e.g.*, *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014) (refusing to enjoin a Los Angeles County ordinance requiring that performers in adult films who engaged in anal or vaginal intercourse obtain a public health permit prior to filming within the county and to use condoms during filming of such acts).

225. *Alameda Books*, 535 U.S. at 438–39 (plurality opinion) (“The [government’s] evidence must fairly support [its] rationale for its ordinance;” if the plaintiff succeeds in casting doubt on the rationale, the burden shifts back to the government to supplement the record with evidence supporting the theory justifying the ordinance); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 516–17 (4th Cir. 2002) (sufficient evidence existed that “bars and clubs that present nude or topless dancing” spawn “deleterious effects,” including “prostitution and the criminal abuse and exploitation of young women,” but “no evidence, no judicial opinion, not even any argument . . . suggest[s] that these mainstream entertainments, to which . . . the restrictions apply, produce the kind of adverse secondary effects that the state seeks to prevent. . . . Thus, the restrictions burden these performances, and the right of North Carolinians to view them, without any justification at all [, which renders the restrictions unconstitutionally overbroad.]”).

C. Distant Causal Relationship to Listener Reactions to Speech Content

The dissenters in *Barnes* argued that the crimes and sex-related misconduct that the city allegedly aimed to reduce, through its nude dancing ban, were properly classified as effects that should provoke strict scrutiny because they were necessarily provoked by the persuasive effect of the “emotions and feelings of eroticism and sensuality among the spectators” generated by the constitutionally protected expression.²²⁶ The connection cannot be denied, but it is possible to create distance between listeners’ reactions to the content of the speech and the negative conduct so that the connection between the two is less obvious.²²⁷ The Supreme Court cases generally rely on “crime” and “blight,” including reduced property values and quality of life, as secondary effects.²²⁸ The considerable evidence available documenting the secondary effect of “crime” in the vicinity of sexually-oriented businesses creates this type of distance and obscurity. Although it cannot be broken entirely, it is possible to expand the

226. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 592 (1991) (White, J. dissenting).

227. *Id.* at 585–86 (Souter, J., concurring) (responding that it was not clear “what the precise causes of the correlation [between the content of the speech and the effects] actually are,” and that the Renton Court had determined that the ordinance at issue was “justified without reference to the content of the regulated speech” and there was no need to “decide whether the cause of the correlation might have been the persuasive effects of the adult films that were being regulated” (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986))).

228. *Alameda Books*, 535 U.S. at 435–38 (accepting a 1977 planning report that indicated “certain crime rates” grew faster and property values declined further in areas with high concentrations of adult businesses than in the rest of the city); *see also id.* at 445 (Kennedy, J., concurring) (“If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection.”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 290, 291 (2000) (“[T]he ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments”; the ordinance mentions “violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects” (quoting *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998))); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 571 (1991) (upholding a public nudity ban on the basis of the state’s power to regulate public morals); *id.* at 583 (Souter, J., concurring) (“In my view, the interest asserted by petitioners in preventing prostitution, sexual assault, and other criminal activity . . . is sufficient under *O’Brien* to justify the State’s enforcement of the statute against the type of adult entertainment at issue here”); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–49 (1986) (“The ordinance by its terms is designed to prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protect and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life,’ not to suppress the expression of unpopular views.”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (“The Common Council’s determination was that a concentration of ‘adult’ movie theaters causes the area to deteriorate and become a focus of crime.”).

distance between “crimes” listed as secondary effects and viewers’ reactions to erotic speech first, by identifying the negative conduct as committed by someone other than an erotic entertainment patron and second, to the extent the patron is involved in the conduct, to identify the patron’s conduct in a way that it does not appear prompted by the sexually stimulating content of the speech. Studies and expert testimony have done this by correlating the negative “effect” of many types of “crime” in the vicinity of sexually-oriented businesses to the characteristics of patrons that make them high quality crime victims and likely crime consumers.²²⁹ Specifically,

[T]he targets found at adult businesses are exceptionally attractive to offenders. This reflects the presumed characteristics of adult business patrons. They are disproportionately male, open to vice overtures, and carry cash. Most important of all, when victimized, they are reluctant to involve the police. From the offender’s perspective, they are “perfect” victims.²³⁰

The Court appears to adhere to this type of distance theory. In describing its reasoning in *Renton*, it stated that the regulator’s “desire to suppress crime ha[d] nothing to do with the actual films being shown

229. There are a number of experts who are frequent flyers in the area of secondary-effects testimony, as governments increasingly rely on “prepackaged” studies from other areas; two of the most active, frequently on opposing sides of the issue, are Daniel Linz and Richard McCleary; *Abilene Retail # 30, Inc. v. Bd. of Comm’rs of Dickinson Cnty., Kan.*, 492 F.3d 1164, 1170 (10th Cir. 2007) (“Neither Linz nor McCleary are strangers to litigation challenging municipal zoning ordinances that target adult businesses – both have testified in many such cases”); see also Christopher Seaman & Daniel Linz, *Are Adult Businesses Crime Hotspots? Comparing Adult Businesses to Other Locations in Three Cities*, J. CRIMINOLOGY, (2014), <http://www.hindawi.com/journals/jcrim/2014/783461/cta/>; Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO ARTS & ENT. L. J. 565 (2011).

230. Richard McCleary, *Rural Hot Spots: The Case of Adult Businesses*, 19 CRIM. JUST. POL’Y REV., 153, 156 (2008); see also *Entm’t Prods., Inc. v. Shelby Cnty., Tenn.*, 721 F.3d 729, 741 (6th Cir. 2013) (expert report submitted by Duncan Associates suggested that “the combination of drinking [‘to the point of total inebriation’] and sexual stimulation increased the risk of patrons becom[ing] targets for crime, as these individuals are likely to ‘have their guard down’”), *cert. denied*, 134 S. Ct. 906 (2014). However, not all lower courts agree that patrons should be protected from themselves. “The ‘theft’ line of argument starts with the premise that many customers of adult establishments pay in cash, which makes them a target for thieves. . . . The theft argument is paternalistic. Why can’t customers make their own assessments of risk? The norm under the [F]irst [A]mendment is that government must combat harm to readers with disclosures rather than prohibitions of speech. Just as there is no hecklers’ veto over speech, there is no ‘thieves’ veto. The police must protect the readers from the hecklers or thieves, rather than ease their workload by forbidding the speech.” *New Albany DVD, LLC v. City of New Albany, Ind.*, 581 F.3d 556, 560 (7th Cir. 2009) (second emphasis added) (citations omitted), *cert. denied*, 560 U.S. 978 (2010).

inside adult movie theaters.”²³¹ More recently, the plurality and concurring opinions in *Alameda Books* described the secondary effect of “crime” in ways that are consistent with causal distancing.²³² And Justice Souter in his *Barnes* concurrence relied upon it even with respect to sex crimes.²³³ Regulators and their experts have also documented the other major category of negative secondary effects, “blight,” which includes adverse effects on property values, in ways that plausibly distance these effects from the direct public reaction of “offense” to the content of the erotic speech.²³⁴ Although the distance theory is not an entirely satisfying way to implement the Constitution’s core anti-censorship principle,²³⁵ it seems like what the Justices have in

231. *Boos v. Barry*, 485 U.S. 312, 320–21 (1988) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

232. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 436 (2002) (it was “reasonable, for [the city] to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws, for example, a greater concentration of adult consumers to the neighborhood, and a high density of such consumers either attracts or generates criminal activity.”); *Id.* at 452 (Kennedy, J., concurring) (the evidence showed that “[t]wo or more adult businesses in close proximity seem to attract a critical mass of unsavory characters, and the crime rate may increase as a result.”).

233. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991) (Souter, J. concurring) (“the State of Indiana could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre’s ‘bookstore’ furthers its interest in preventing prostitution, sexual assault, and associated crimes.”).

234. CONNIE B. COOPER & ERIC DAMIAN KELLY, TEX. CITY ATTORNEYS ASS’N, *SURVEY OF TEXAS APPRAISERS: SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES ON MARKET VALUES* iii, iv (June 2008), SECONDARY EFFECTS RESEARCH, <http://www.secondaryeffectsresearch.com/node/83> (“Although it is certainly possible to provide expert and other evidence of such concepts as “blight” and “downgrading,” it is much safer for a local government to use evidence that is easily measurable. The two types of secondary effects that are most often associated with sexually-oriented businesses and that are also measurable are effects on crime rates and effects on property values at and near such a business. This study takes place in that context. . . . Documenting measurable, negative secondary effects is the most practical and most widely accepted method of establishing such a purpose. Courts once appeared to accept a mere recitation of negative secondary effects and later were willing to allow a community to rely on studies of such effects from other communities; today, in the context of often-effective legal challenges by the sex industry, courts have raised their expectations. Today they expect more. In this study, city attorneys and other officials in Texas will find substantial evidence of measurable negative secondary effects of retail-only sex businesses on both crime rates and property values, and additional evidence of the negative effects of other sex businesses on property values.”).

235. John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 307 (2009) (“[I]t is typically because of the downstream social consequences that government officials often wish to regulate dangerous speech If all downstream consequences of dangerous or negative speech counted as secondary effects, then many of the classic First Amendment cases, including those involving subversive speech, offensive speech, false statements, and speech harmful to the political process, for example, should have been decided under the standard of intermediate scrutiny. Because government could always look further down the chain of causation to find a secondary effect for its justification, strict

mind when they describe the secondary effects of erotic entertainment as “unrelated to the impact of the speech on its audience.”²³⁶

The causal distance theory can distance and obscure the cause-and-effect relationship between erotic entertainment and negative effects in the context of zoning. But with other types of erotic entertainment regulations now routinely subject to Secondary Effects Analysis, its plausibility breaks down. In no instance is this more evident than with the class of regulations that restrict the combination of erotic entertainment and the sale of alcohol. To be sure, it is possible to articulate a theory of alcohol/erotic entertainment negative effects that creates distance between the reaction of the audience and the conduct the government seeks to reduce. To the extent that a regulator’s reasoning is that alcohol consumption makes adult business patrons even better crime victims, who attract more criminals, the negative effect of “crime” may be secondary according to the distance theory.²³⁷ Similarly, “crime” may plausibly be a “distant” secondary effect where the regulator relies on evidence that patrons of erotic entertainment establishments engage in crimes that are not apparently provoked by the sexual stimulation or gratification message of the speech, such as theft, assault or battery against someone who is not a potential sex partner, or drug crimes.²³⁸

But distant effects are not what regulators and courts are talking about when they unabashedly rely on the “common sense” and “confirmed by human experience” consequences of the “explosive combination” of alcohol and erotic entertainment.²³⁹ As one court summarized the testimony of one expert, “[A]lcohol consumption facilitates sexual and aggressive impulses and impairs social judgment. When combined with sexual stimulation, it produces an effect ‘associated with an increase in violent sexual acting out, acts of criminal behavior.’”²⁴⁰ According to this theory, the sexual stimulation

scrutiny would cease to exist as a meaningful restraint on content-based speech regulations.”).

236. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J. concurring).

237. *Entm’t Prods., Inc. v. Shelby Cnty., Tenn.*, 721 F.3d 729, 741 (6th Cir. 2013); see also Richard McCleary, *Rural Hot Spots: The Case of Adult Businesses*, 19 CRIM. JUST. POL’Y REV. 153, 156 (2008).

238. *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1270–71, 1270 n.19 (11th Cir. 2003).

239. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002); *City of Chi. v. Pooh Bah Enters., Inc.*, 865 N.E.2d 133, 157 (Ill. 2006); *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 745 (4th Cir. 2010) (quoting *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001)).

240. *Pooh Bah Enters.*, 865 N.E.2d at 157.

delivered by the erotic entertainment directly provokes the negative “effect” of “violent sexual acting out” that the government aims to reduce through its regulation.²⁴¹ Courts have included on their lists of negative secondary effects of the erotic entertainment/alcohol combination “unwanted interactions between patrons and entertainers.”²⁴² This causal relationship between the reaction of erotic entertainment viewers and the negative effect the government seeks to eliminate is very difficult to square with the “unrelated to the impact on [the] audience” concept of secondary effects, at least as thus far explained by the Court.²⁴³

This open acknowledgement by regulators, experts and courts that the viewers’ reactions to the sexual stimulation of the erotic speech directly cause the conduct labeled “secondary effects” forces a review of so-called “secondary effects” outside the context of alcohol restrictions. The crime-victim theory relies on the proclivities and behaviors of sexually-oriented business patrons, who are “listeners,” and who are attracted to or influenced by the content of the speech sold by the business. The speech prompts the patrons, and the patrons prompt the criminal conduct.²⁴⁴ Despite the slight distance between speech and conduct, it is quite clear that restricting business operations for the purpose of reducing the number of criminals attracted to the vicinity traces to the content of the speech. Moreover, almost every list of secondary effects includes explicit references to sex crimes, and more or less oblique references to sex acts.²⁴⁵ Patrons engage in most

241. *Id.*

242. *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 742 (4th Cir. 2010) (citing *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 513 (4th Cir. 2002)). A study commissioned by the Texas City Attorneys Association found that courts had recognized that patrons were responsible for the bad acts committed in the neighborhoods surrounding “on-site” adult businesses, but argued that the same restrictions should apply to the kind of “off-site” businesses where patrons did not linger to consume the pornography they had purchased. CONNIE B. COOPER & ERIC DAMIAN KELLY, TEX. CITY ATTORNEYS ASS’N, SURVEY OF TEXAS APPRAISERS: SECONDARY EFFECTS OF SEXUALLY-OWNED BUSINESSES ON MARKET VALUES 30 (June 2008), SECONDARY EFFECTS RESEARCH, <http://www.secondaryeffectsresearch.com/node/83>.

243. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J. concurring).

244. Eric S. McCord & Richard Tewksbury, *Does the Presence of Sexually Oriented Businesses Relate to Increased Levels of Crime? An Examination Using Spatial Analyses*, 59 CRIME & DELINQ. 1108, 1112-13 (2012) (“Crime can be expected at and in the vicinity of SOB’s due to the presence of motivated offenders as well. Motivated offenders may be drawn to the SOB because of the presence of suitable victims, and they too are often under the influence of alcohol.”).

245. *Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee Cnty., Fla.*, 630 F.3d 1346, 1355-56 (11th Cir. 2011) (secondary effects put forward by county include “personal and property crimes, public safety risks, prostitution, potential spread of disease, lewdness,

of these sex acts concurrently or after viewing the sexually-stimulating speech.²⁴⁶ With “manner” regulations reviewed by lower courts, such as minimum-distance, no-touch, and open-viewing booth requirements, the causal link between the audience’s reaction to the sexual stimulation delivered by the erotic entertainment and the conduct “effects” that regulators seek to reduce is too obvious to ignore.²⁴⁷ Beyond the obvious, all secondary effects used to justify sexually-oriented business regulations trace to behaviors that are sympathetic to the content of the erotic expression. Most trace to patron behaviors in

public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, negative impacts on surrounding properties, litter, and sexual assault and exploitation”), *cert. denied*, 131 S. Ct. 2973 (2011); Imaginary Images, Inc., v. Evans, 612 F.3d 736, 742 (4th Cir. 2010) (“public sexual conduct”); Gammoh v. City of La Habra, 395 F.3d 1114, 1125 (9th Cir. 2005) (secondary effects include “increased threat of the spread of sexually transmitted diseases” and the ordinance sought “the protection of the peace, welfare, and privacy of persons who patronize adult businesses”), *amended on denial of reh’g*, 402 F.3d 875 (9th Cir. 2005); Colacurcio v. City of Kent, 163 F.3d 545, 554 (9th Cir. 1998) (buffer zone requirements are “a narrowly tailored means of controlling illegal sexual contact and narcotics transactions” and no-touch rules without accompanying buffer zones “would fail to provide sufficient line-of-vision for law enforcement personnel” and “would permit verbal communication between dancers and patrons, thereby failing to curtail propositions for drugs or sex”); Mitchell v. Comm’n on Adult Entm’t of Del., 10 F.3d 123, 143 (3rd Cir. 1993) (“the legislature [did not] arbitrarily and irrationally [believe] that closed booths contribute to serious public health problem”).

246. A study commissioned by the Texas City Attorneys Association found that courts had recognized that patrons were responsible for the bad acts committed in the neighborhoods surrounding “on-site” adult businesses, but argued that the same restrictions should apply to the kind of “off-site” businesses where patrons did not linger to consume the pornography they had purchased. CONNIE B. COOPER & ERIC DAMIAN KELLY, TEX. CITY ATTORNEYS ASS’N, SURVEY OF TEXAS APPRAISERS: SECONDARY EFFECTS OF SEXUALLY-OWNED BUSINESSES ON MARKET VALUES, 30 (June 2008), SECONDARY EFFECTS RESEARCH, <http://www.secondaryeffectsresearch.com/node/83>.

247. Colacurcio v. City of Kent, 163 F.3d 545, 554 (9th Cir. 1998) (upholding a minimum distance rule because a simple “no-touch” rule was unenforceable and permitted illicit contact between patrons and dancers); Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253 (5th Cir. 1995) (upholding no-touch rule because “intentional contact between a nude dancer and a bar patron is conduct beyond the expressive scope of the dancing itself. The conduct at that point has overwhelmed any expressive strains it may contain. . . . Similarly, patrons have no First Amendment right to touch a nude dancer.”); Mitchell v. Comm’n on Adult Entm’t Establishments of Del., 10 F.3d 123, 142 (3rd Cir. 1993) (supporting an open-booth amendment because “the booths are little more than masturbation booths” and “the legislation was intended to stop the spread of sexually related diseases”); Fantasyland Video, Inc. v. Cty. of San Diego, 373 F. Supp. 2d 1094, 1113 (S.D. Cal. 2005) (rejecting plaintiff’s argument that an open-booth requirement was unconstitutional because “most customers disfavor viewing sexually oriented motion pictures in an open setting” since “an open-booth requirement does not reduce speech because it does not limit what movies can be shown, and does not preclude anyone from using the booths as a means for viewing movies”), *aff’d in part, rev’d in part and remanded sub nom.* Tollis, Inc. v. Cty. of San Diego, 505 F.3d 935 (9th Cir. 2007), and *aff’d*, 505 F.3d 996 (9th Cir. 2007).

response to the content of the expression,²⁴⁸ or to patron proclivities.²⁴⁹ In any of these situations, the effects trace to listeners' reactions to the content of the expression. In other contexts, where the government seeks to regulate speech because of listener behaviors, strict scrutiny applies to determine when the government may act.²⁵⁰ If Secondary Effects Analysis is to credibly implement constitutional principle, something other than the degree of causal distance between expression, audience reaction and conduct must explain what makes an effect "secondary," such that deferential scrutiny applies.

D. No Causal Relationship to Negative Listener Reactions to Speech Content

By directly analogizing regulations subject to Secondary Effects Analysis to regulations that are facially content neutral, the Justices have suggested that something about the secondary effects at which erotic entertainment regulations aim breaks the link to the audience reaction to the content of the speech in the same way as the effects aimed at by content-neutral regulations. This can be plausible when viewed from the negative side of the listener reaction spectrum, which has been the predominate focus of the Justices when describing how "secondary effects" differ from "primary" or "direct" effects.²⁵¹

It is possible to describe the speech content provocation of all of the effects accepted by the Court as "secondary" in ways that divorce the effects from listener reactions of "dislike," "offense," or "psychic harm." The effect of "crime" occurs either because erotic entertainment speakers or viewers are perpetrators or victims. Whatever the particular combination, one of the actors engaged in the conduct was attracted to or reacting consistently with the sexually-

248. Minimum-distance, no-touch, and opening-viewing requirements address patron behaviors of touching performers or service staff, or engaging in sex acts in closed booths while viewing erotic performances. *See supra* note 247.

249. *See* SECONDARY EFFECTS RESEARCH, <https://web.archive.org/web/20170316033750/http://www.secondaryeffectsresearch.com/biblio>.

250. *See* discussion *supra* Part II.A.

251. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (secondary effects are distinct from "suppress[ing] the expression of unpopular views"); *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (a purpose to reduce secondary effects shows ordinances will not be used "to discriminate against unpopular speech" (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298–99 (2000)); *id.* at 458 (Souter, J., dissenting) (secondary effects must be "distinct from disagreement"); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (the justification in *Erznoznik*, which led to strict scrutiny, was "protecting [] citizens from exposure to unwanted, 'offensive' speech" (citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 214–15 (1975)); *id.* at 83, 84 (Powell, J., concurring) ("offense" justification "directly [] regulate[s] the content of expression").

stimulating content of the speech. This is evidently true with sex crimes, but is true of non-sex crimes as well, since perpetrators prey on patrons who are attracted to or distracted by the content of the speech.²⁵² So, the many particular effects that comprise the general secondary effect of “crime” can plausibly be understood as “unrelated” to negative viewer reactions to the content of erotic entertainment. The same is true of negative public health effects, which are another type of commonly listed secondary effect. People engage in the conducts that produce negative public health effects, such as sex acts and drug use, because they are attracted to or reacting consistently with the content of the speech.

The other major group of secondary effects—declining property values, reduced “quality of life,” and blight—could trace to public offense at the content of erotic speech. It is difficult to pinpoint precisely why residents, customers or business owners avoid areas with sexually-oriented business. It could be distaste for the content of the speech or for the conduct that the speech, in one way or another, provokes. Likely both types of reactions are involved, at least to some extent. It is plausible, however, to understand these effects as provoked primarily by public offense at the conduct that occurs in the vicinity of sexually-oriented businesses—crimes and activities that adversely affect public health and safety. Understood in this way, the public reaction that underpins the “blight” effects traces to offense at conduct, not speech content, and to the extent that the conduct is rooted in some viewers’ reactions to speech content, those reactions are sympathetic, rather than negative. So, viewed from a perspective generous to the regulator, secondary effects that could be the result of public offense at the content of erotic speech could alternatively be the result of public offense at the conduct of people who are attracted to the speech or reacting consistently with its messaging.²⁵³ This does not

252. McCord & Tewksbury, *supra* note 244, at 1112 (“[T]he suitability of SOB patrons as potential crime victims is due to the fact that SOB patrons are disproportionately male, open to vice overtures, and carry cash. Most important of all, when victimized, they are reluctant to involve the police. From the offender’s perspective, they are ‘perfect’ victims.”).

253. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991) (Souter, J., concurring) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)) (adopting himself and describing the Court in *Renton* as having adopted a generous view of the possible causal relationships between erotic entertainment and secondary effects, under which there was no “need to decide” the precise reason for the correlation between the two); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002) (“[W]e conclude that one purpose of [the challenged regulations] is to address the secondary effects that follow from lewd conduct on licensed premises, and that hostility to erotic expression, if a purpose of the restrictions at all, does not constitute the predominant purpose.”).

remove the free speech problem, but it relocates it.²⁵⁴ The question becomes whether it is possible to define a constitutionally principled category of secondary effects, while still acknowledging that they trace to sympathetic reactions to the content of the speech.

III. MAKING SENSE OF SECONDARY EFFECTS

Secondary Effects Analysis will always be an odd fit within a Free Speech Clause framework that equates a content classification on the face of a regulation with a government purpose to censor speech.²⁵⁵ Despite implications by the Justices that the “secondary” nature of the effects targeted by a regulation divorces them from the “direct” impact of the speech on its audience, a connection between attraction or reaction to the speech content and the effects does, and must, exist. Something other than a neat division between the effects and the content of the speech exchange must explain the unanimous hunch among the Justices that deferential review of some class of regulations imposed on sexually-oriented businesses is appropriate.²⁵⁶ Secondary Effects Analysis began with a messy listing of factors that justified deferential review of the erotic entertainment zoning law at issue²⁵⁷ and, to be transparent and explanatory, it is to a more complicated combination of considerations that the Court has yet explicated that a principled justification must return. Unearthing the unstated attributes of the “secondary effects” that prompt the move into deferential Secondary Effects Analysis can make some sense of the label and locate the analysis within established Free Speech Clause doctrine.

254. That is, there may be a constitutionally significant difference between a “heckler’s veto” and a “thieve’s veto.” See *New Albany DVD, LLC v. City of New Albany, Ind.*, 581 F.3d 556, 560 (7th Cir. 2009), *cert. denied*, 560 U.S. 978 (2010).

255. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (“[S]trict scrutiny applies . . . when a law is content based on its face”); *Alameda Books*, 535 U.S. at 440 (“We are also guided by the fact that Renton requires that municipal ordinances receive only intermediate scrutiny if they are content neutral [because they are aimed at reducing secondary effects].” . . . There is less reason to be concerned that municipalities will use these ordinances to discriminate against unpopular speech.”); *Id.* at 449 (Kennedy, J., concurring) (“[Z]oning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use.”).

256. In *Alameda Books*, all nine justices joined opinions applying secondary effects analysis. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 426–44 (2002) (O’Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, J.J., for the plurality); *id.* at 444–53 (Kennedy, J., concurring); *id.* at 453–66 (Souter, J., joined by Stevens and Ginsburg, J.J., dissenting, and Breyer, J., dissenting in part).

257. *Young v. Am. Mini Theaters*, 427 U.S. 50 (1976) (plurality opinion); *id.* at 73 (Powell, J., concurring).

A. Caused (In Part) by Positive Listener Reactions to Speech Content

Although it is possible to divorce secondary effects from listeners' negative reactions to erotic entertainment, it is not possible to eliminate entirely the causal link between the effects and the content of the speech. Most types of secondary effects of sexually-oriented businesses trace to human actions provoked to some extent by the content of the speech. If the provocation cannot constitutionally be dislike of the speech, it must be some type of positive attitude toward it. Most of these behaviors result either from the proclivities of viewers attracted to the speech or the reactions of viewers to the speech. These include the direct public health effects of unsanitary conditions and the spread of disease, and of sex crimes provoked by the sexual stimulation of the speech. These also include the less direct effects of crimes perpetrated against erotic entertainment patrons, and the property degradation effects that follow from the increased number of crimes and concentration of criminals. All of these qualify as secondary effects that provoke deferential review yet, viewed most generously to the regulator, all of them originate with positive listener responses to the content of the speech. It must be that this causal link between speech and effects that trace to positive viewer responses does not raise the same level of suspicion of unconstitutional censorship as effects that stem from viewer offense.²⁵⁸

Regulating to reduce the direct, psychic effect of speech on listeners raises a suspicion of unconstitutional censorship whether that effect is negative or positive. The government may not restrict offensive speech even when the purpose is to reduce negative listener reactions that are so severe as to be psychologically or physically harmful.²⁵⁹ And, absent a direct connection to regulable conduct, restricting willing listeners' access to speech to prevent the positive or persuasive effect it may have upon them, is unconstitutional "thought

258. *Cf. Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring) (noting that it is the zoning context that makes an "inference of impermissible discrimination [] not strong").

259. *Snyder v. Phelps*, 562 U.S. 443, 448, 454-55 (2011) (First Amendment fully protected the right of members of the Westboro Baptist Church to picket the funeral of a serviceman who was killed in action, even though the church's signs bore deliberately offensive messages such as "Thank God for Dead Soldiers" and "Thank God for IEDs," because protest was of public, rather than private, concern); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (Televangelist, a public figure, could not be awarded damages for a clearly-labeled parody advertisement that caused him offense, embarrassment and distress but neither held itself out as fact nor damaged his reputation); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43-44 (1977) (per curiam) (the Supreme Court of Illinois must allow a stay of a lower court order prohibiting Illinois Nazis from marching in uniform, distributing pamphlets or displaying materials "which incite or promote hatred" against Jews or others).

control.”²⁶⁰ In fact, when the government regulates speech to prevent its direct, psychic impact, the goals of preventing both negative and positive listener reactions may be present. That is, the regulating public may want to avoid contact with the speech because it finds it offensive and also want to restrict the access of others to the speech out of concern that they will find it persuasive. The Court has found both of these interests to be present, and to support restriction of sex speech that qualifies as obscenity.²⁶¹ When sex speech does not qualify as obscenity, neither of these interests supports regulation and either purpose translates to unconstitutional censorship.²⁶²

Regulating to prevent the conduct that listeners may engage in because they are offended or convinced by the content of the speech raises somewhat different constitutional concerns. The Constitution requires strict review of, and generally does not permit, government regulations aimed at reducing negative effects perpetrated by listeners hostile to a speaker.²⁶³ Implementing the offense of a hostile audience

260. *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985) (ordinance which sought to restrict pornography that showed women in subordinate or submissive positions and was designed to prevent the perception of women as servile struck down as content-based restriction), *aff’d*, 475 U.S. 1001, and *reh’g denied*, 475 U.S. 1132 (1986).

261. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–61 (1973) (rejecting, on the basis of a lowering of the tone of society, the argument that there is no reason to regulate obscene material consumed by consenting adults even though “there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature [] could quite reasonably determine that such a connection does or might exist.”).

262. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253–54 (2002) (striking down as overbroad federal law making distribution and possession of virtual child pornography a felony; when there were no children involved in the production of the materials, there is no reason to classify it as obscene, or to justify a ban on the grounds that even virtual depictions of children can cause harm to real children; “[t]here is here no attempt, incitement, solicitation or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct”); *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (“Georgia asserts that exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion”); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989) (plaintiffs showed no direct evidence that the “expressive activity [of] non-obscene ‘pornography’ ” led to rape, murder, or brutalization of women).

263. “Heckler’s veto” occurs when the public expression of ideas is “prohibited merely because the ideas are themselves offensive to some of the hearers, or simply because bystanders object to peaceful and orderly demonstrations.” *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (citations omitted); *see also Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134–35, 135 n.12 (1992) (County could not base its fee for a parade or speaking permit on the anticipated reaction to the speech or expression; “[s]peech cannot be

by force of law signals government censorship of the speaker's message, and likely has the effect of majority speech values silencing disliked minority speakers. These rules stem from political protests in public forums, but the principles apply in other contexts.²⁶⁴ The category of obscenity defines the extent to which public offense can be the basis for restricting sexually-explicit speech, and so regulating speech to reduce effects caused by listener offense to sex speech that is not obscene would constitute an end-run around the delimited category.

By contrast, the Constitution does not prohibit the government from restricting speech because listeners may be convinced by it to engage in regulable conduct. In fact, where direct persuasion by a speaker to action by a listener is present, the free speech guarantee does not protect the speech from restriction or the speaker from punishment.²⁶⁵ In *Brandenburg v. Ohio*, the Court held that a government may criminalize speech that is "directed to produce imminent unlawful action and likely to produce it."²⁶⁶ Where the three elements of the incitement test coexist, criminalizing persuasive speech is not unconstitutional censorship of ideas because the means are narrowly tailored to the government's purpose to avoid harmful listener conduct. Crucial to the government's ability to restrict the speech because of the conduct is that the speaker intend to incite it. Numerous lower courts have found the intent requirement to protect media defendants from tort liability for speech products that provoke readers or viewers to do harmful things.²⁶⁷

financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob"); *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't.*, 533 F.3d 780, 787–88, 788 n.4 (9th Cir. 2008) (Anti-abortion group that parked truck on public street outside school showing pictures of aborted fetuses could not be prosecuted under criminal statute prohibiting disruptive conduct on school grounds when any disruptive conduct occurred due to students' reactions to group's message; "the government cannot silence messages simply because they cause discomfort, fear, or even anger"), *cert. denied*, 555 U.S. 1098 (2009).

264. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 391 (1992) (ordinance prohibiting display of symbols that "arouse[] anger, alarm or resentment in others" facially unconstitutional; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (mere offense is not sufficient to regulate non-defamatory, non-obscene speech)).

265. *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (drawing a distinction between mere advocacy of violence, which is protected speech, and "incitement to imminent lawless action," which is not).

266. *Id.* at 447.

267. *James v. Meow Media, Inc.*, 300 F.3d 683, 698–99 (6th Cir. 2002) (producers of violent video games and movie with violent scenes could not be held liable for violent acts perpetrated by teenager who opened fire in his high school, killing several; it could neither be said that the makers of the videos and games intended to incite violence nor that the link between the killer's consumption of the media and his violent actions showed that any threat of harm was either imminent or likely), *cert. denied*, 537 U.S. 1159 (2003); *Herceg v.*

To the extent that erotic entertainment meets the requirements of the incitement category, because, for example, it constitutes persuasion to engage in prostitution, government regulators can restrict it entirely.²⁶⁸ But the erotic entertainment regulated under secondary effects reasoning lacks a provable intent to incite viewers to engage in regulable behavior. Although sexually-oriented businesses must acknowledge that they intend their speech products to incite sexual stimulation, this is not the same as intending to incite regulable sex acts.²⁶⁹ Under the incitement standard, this difference in shades of speaker intent is critical.²⁷⁰

The incitement standard developed in the context of absolute criminal prohibitions imposed on speakers because the content of their speech persuades listeners to engage in unlawful conduct. Secondary Effects Analysis applies in the context of time, place, or manner regulations imposed on speakers at least in part because the content of their speech attracts listeners who tend to engage in or provoke antisocial conduct. As explained above, a presumption of

Hustler Magazine, Inc., 814 F.2d 1017, 1022–23 (5th Cir. 1987) (plaintiffs argued that Hustler Magazine's article discussing the practice of autoerotic asphyxia incited a fourteen-year-old adolescent to attempt the practice, which resulted in his death; even if the article painted the practice “in glowing terms . . . no fair reading of it can make its content advocacy, let alone incitement to engage in the practice”); *Walt Disney Prods. Inc. v. Shannon*, 276 S.E.2d 580, 582–83, 583 n.3 (Ga. 1981) (claim that “The Mickey Mouse Club” was a “pied piper” that provided an invitation to children to do something posing a foreseeable risk of injury).

268. *United States v. Williams*, 553 U.S. 285 (2008) (government may criminalize offers to sell child pornography, including digital child pornography).

269. In *Barnes*, Justice Souter has a conversation with the dissenters about the link between secondary effects and what they both termed the persuasive effect of the erotic speech. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585–86 (1991) (Souter, J., concurring); *id.* at 592–93, 593 n.2 (White, J., dissenting). Justice Souter's explanation was not convincing, and the dissent pointed that out. *Id.* at 585–86 (Souter, J., concurring) (“To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of such establishments offering such dancing, without deciding what the precise causes of the correlation actually are.”); *Id.* at 593 n.2 (White, J., dissenting) (“If Justice Souter is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive.”). But the dissent presumed that crimes like prostitution and sexual assault were the result of the constitutionally significant persuasive effect of the speech. *Id.* at 592. This is not correct. The message is, “Get sexually stimulated.” It is not “Go hire a prostitute” or “Let your guard down so you become an easy crime victim.”

270. *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 688 (1959) (film does not meet incitement standard when it “advocates [the] idea . . . that adultery under certain circumstances may be proper behavior”).

unconstitutional censorship attaches to government regulations aimed at reducing conduct listeners engage in because they find speech content offensive. More leeway exists, however, for regulators to burden speech because listeners find it attractive. Even in a public forum, speakers can incur additional burdens because of the number of people they attract and the public cost of reducing the harms they present.²⁷¹ Although the rule is neutral, in application, the burdens imposed by the rule will rise with the popularity of the speech.²⁷² This means that speakers may be required to bear the public costs of ensuring that their speech may be presented safely and effectively to a willing audience. It is true that imposing regulatory burdens on sexually-oriented businesses to avoid conduct caused by the traits and reactions of willing listeners, rather than only their number, links more to the content of the speech. Nevertheless, security firms and localities presume that taking precautionary measures based on the anticipated demographics and proclivities of the audience is basic prudent crowd control to assist public safety.²⁷³ There is some indication that

271. *MacDonald v. City of Chi.*, 243 F.3d 1021, 10231 (7th Cir. 2001) (interpreting Supreme Court precedent to uphold fees on speakers to deal with traffic), *cert. denied*, 534 U.S. 1113 (2002); *Brandt v. Vill. of Winnetka*, No. 06 C 588, 2007 WL 844676 (N.D. Ill. Mar. 15, 2007) (same); *see also* FEMA, SPECIAL EVENTS CONTINGENCY PLANNING: JOB AIDS MANUAL 22 (2005), <http://training.fema.gov/emweb/downloads/is15specialeventplanning-jamanual.pdf>.

“Most public sector agencies have adopted a “User Pays” policy for services provided at sporting and entertainment events. The purpose of this policy is to improve the allocation of statute resources in the general community by providing a means of charging for services deployed to plan for, and respond to, sporting and entertainment events. Event promoters should consult local and State authorities to determine relevant fee structures and charges for services provided, including payment of overtime costs for personnel. Promoters may be required to post a bond or provide liability insurance to cover the costs of response to emergencies, subsequent venue cleanup, traffic and crowd control, and other policing functions.”

272. ADMINISTRATIVE POLICY ON THE USE OF GRAND TRAVERSE COUNTY PROPERTY FOR A PUBLIC EVENT, DEMONSTRATION OR DISPLAY (Aug. 19, 2013), <http://www.co.grand-traverse.mi.us/DocumentCenter/View/47>. “Any and all areas affected by the event, demonstration or display shall be cleaned and returned to its original condition which existed prior to the event. Requestor must agree to pay any damages or clean-up costs incurred by the County as a result of the event.”; Santa Clara County Parks, *Addendum to Park use Permit Conditions for Special Events* (April 2015), <https://www.sccgov.org/sites/parks/AboutUs/Documents/addendum-special-event.pdf> (special event permit fee goes up with the number of expected participants).

273. Ralph Witherspoon, *Security for Bars, Taverns, Lounges and Nightclubs*, WITHERSPOON SECURITY CONSULTING (Jan. 31, 2013) <http://www.security-expert.org/nightclubs.htm> (“A key factor [in determining security risks and needs] is knowing your guests/patrons – who you are attracting”); TAMARA D. MADENSEN & JOHN E. ECK, U.S. DEPT. OF JUST.: OFFICE OF CMTY. ORIENTED POLICING SERVICES, GUIDE NO. 54, SPECTATOR VIOLENCE IN STADIUMS at 42 (Aug. 2008), http://www.popcenter.org/problems/pdfs/spectator_violence. (ways to reduce situational

imposing permit requirements based on listener proclivities is acceptable even with political speech in a public forum.²⁷⁴ These rules suggest that in some instances where willing listeners are the source of the regulable conduct, speakers who reach out to attract these listeners may be subject to regulations designed to limit the public damage that the listeners may do, consistent with the Constitution's free speech guarantee.²⁷⁵

Although the Court has not explicitly suggested this attribute of secondary effects, it is consistent with descriptions the Justices have offered of why deferential review is appropriate and, embracing it rather than ignoring it, helps make sense of Secondary Effects Analysis. A direction to verify that the "effects" on the expanding lists relied upon by regulators as "secondary" do not trace to public dislike of the content of the expression is implicit in the Court's direction that courts verify that the predominate concerns motivating a regulation "[are] with the secondary effects of adult [speech], and not with the content of adult [speech]." ²⁷⁶ Courts currently verify that regulators are motivated to reduce concrete effects and not by outright or acknowledged offense at the content of erotic entertainment.²⁷⁷ Understanding that secondary effects must trace to the content of speech and that the forbidden causal connection is between *negative* listener reactions and regulable conduct allows courts to take the second part of the Court's direction seriously, and verify that effects listed by regulators properly qualify as secondary effects that lead to deferential analysis. As noted above, most negative effects, old or

instigators of violence include reducing heat and noise levels, trading t-shirts bearing obscene messages for those with socially acceptable messages, and prohibiting bands from playing songs that encourage the audience to shout vulgarities); Roman Wolfe, *Security Measures Upped for Snoop Show; Gang Violence Feared*, ALLHIPHOP (May 7, 2008), <http://allhiphop.com/2008/05/07/security-measures-upped-for-snoop-show-gang-violence-feared/> (measures agreed to by the promoter included a ban on firearms in the venue, metal detectors, and extra security searches of the performer, his entourage, and vehicles).

274. *Potts v. City of Lafayette, Ind.*, 121 F.3d 1106, 1111–12 (7th Cir. 1997) (upholding special weapons screening at KKK rally, which included tape recorders).

275. *Church v. City of St. Michael*, Civil No. 15-1575 (DWF/JSM), 2016 WL 4545310, at *15 (D. Minn. Aug. 31, 2016) (upholding different zoning of churches based, in part, on safety concerns caused by "traffic generated by an assembly with a single start time"); *Yvon v. City of Oceanside*, Case No. 16-CV-1640-AJB-WVG, 2016 WL 4238539, at *4 (S.D. Cal. Aug. 11, 2016) (quoting zoning regulation that treat uses differently "because of certain factors such as nature of operation, type of clientele, and hours-of-operation, [which] create conditions harmful to the public health, welfare, and safety").

276. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 441 (2002) (emphasis added).

277. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002) (verifying that hostility to erotic expression was not the predominant purpose for a sexually oriented business regulation).

new, can reasonably be understood to trace to the broad category of “crime,” so this verification should not be difficult. But the question should at least be asked and answered to lend legitimacy to the analysis.

Additionally, acknowledging the required connection between the content of erotic entertainment and secondary effects would allow courts more transparently to look into the other side of the pretext question, which is whether the alleged negative effects trace to the speech content at all.²⁷⁸ That is, not only *may* secondary effects trace to positive responses to the speech content but, if a regulation classifies sexually-oriented businesses for treatment different from other speech vendors, such a causal link *must* exist. Ideally, courts would verify this connection as a precondition to entering Secondary Effects Analysis.²⁷⁹ Currently, courts intermittently ask versions of the question as part of the substantive review. The Court has noted a regulation should be drawn to affect “only that category of [adult business] shown to produce the unwanted secondary effects.”²⁸⁰ Lower courts have inquired into the other side, finding that a regulator’s failure to isolate negative effects to erotic entertainment businesses, when such businesses are singled out for restriction, can be fatal as well.²⁸¹

Most regulations will survive this inquiry, which is not rigorous as an initial matter or as part of the substantive review. In some cases at the edges, however, this inquiry can more clearly identify the constitutional defect with a regulation. For example, in *Annex Books v. City of Indianapolis*,²⁸² the court invalidated a regulation that required

278. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (power to zone cannot be used as a “pretext for suppressing expression”) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 84 (1976) (Powell, J., concurring)); *Alameda Books*, 535 U.S. at 447 (Kennedy, J., concurring) (if an ordinance is directed at reducing secondary effects, Court should not presume it to be a “covert attack on speech”).

279. The inquiry whether alleged secondary effects plausibly trace to positive responses to the content of the speech is different than the initial requirement to produce evidence showing that the means employed by the regulator will reduce them, proposed by the dissent in *Alameda Books* and rejected by the Court. *Alameda Books*, 535 U.S. at 457 (Souter, J., dissenting); *id.* at 439–40 (plurality opinion).

280. *Renton*, 475 U.S. at 52.

281. *Showtime Entm’t, LLC v. Town of Mendon*, 769 F.3d 61, 73 (1st Cir. 2014) (when “secondary effects flow in equal measure from other businesses, which nonetheless are left untouched by the regulation in question, it stands to reason that such underinclusiveness raises questions as to whether the proffered interest is truly forwarded by the regulation, or is in fact substantial enough to warrant such regulation”); *Annex Books, Inc. v. City of Indianapolis, Ind.*, 740 F.3d 1136, 1137 (7th Cir. 2014) (“[A]dults may decide for themselves what risks to run by the literature they choose, and cities must protect readers from robbers rather than reduce risks by closing bookstores.”).

282. *Annex Books*, 740 F.3d at 1136.

adult bookstores to close between midnight and 10 a.m. every day and all day on Sundays. Obviously frustrated with a flimsy justification, the court reasoned that “the Supreme Court has not endorsed an approach under which governments can close bookstores in order to reduce crime directed against businesses that knowingly accept the risk of being robbed, or persons who voluntarily frequent their premises.”²⁸³ But this conclusion is not correct. Governments may regulate to protect people against their own decisions to assume risks.²⁸⁴ Many of the secondary effects accepted by the Court flow from risky decisions.

The problem with the justification is that the negative effect of armed robberies does not plausibly appear to be provoked by positive responses to the content of the expression to the minimal extent required to dispel the inference that public distaste for the content of the expression is the cause. Although armed robbery is certainly a crime, it is not the type of persistent, ambient, vice-related crime that has been widely documented to occur in the vicinity of erotic entertainment businesses. And, evidence presented by the regulator did not support a connection between patron behaviors and this type of crime.²⁸⁵ In cases such as this, acknowledging that a causal link between effects and speech is necessary to diffuse an inference of pretext, can allow courts to more clearly address it.

B. Foreseeable, Likely, and Imminent

As noted above, businesses that sell erotic entertainment can credibly assert that they do not intend to persuade patrons to engage in conduct that constitutes the secondary effects that support the regulations imposed upon them. For this reason, the secondary effects engaged in by third parties are not sufficiently connected to the speech product sold by sexually-oriented businesses to fall within the incitement exception to the general prohibition on content-based speech regulation. Significant parallels exist, however, between the speaker-conduct connection that justifies the complete prohibition of speech under the incitement exception and the connection between

283. *Id.* at 1137.

284. *See, e.g.,* Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486 (9th Cir. 1996) (California’s mandatory motorcycle helmet law not unconstitutionally vague); *City of Bremerton v. Spears*, 949 P.2d 347, 356-58 (Wash. 1998) (Washington helmet law not unconstitutionally vague); *Estevez v. United States*, 72 F. Supp. 2d 205, 208 (S.D.N.Y. 1999) (Passengers have a common-law duty to mitigate damages by wearing seatbelts).

285. The court noted this problem, but did not rely on it exclusively. *Annex Books*, 740 F.3d at 1137 (“The data do not show that robberies are more likely at adult bookstores than at other late-night retail outlets, such as liquor stores, pharmacies, and convenience stores, that are not subject to the closing hours imposed on bookstores.”).

erotic entertainment and secondary effects that justify lesser time, place and manner regulation of sexually-oriented businesses.

First, secondary effects are the foreseeable result of selling speech from a business occupying a particular physical location. Sexually-oriented businesses intend to use a speech product to attract customers with certain behavior patterns and to provoke sexual stimulation in those customers. Theories explain the connection between the sexually-stimulating content and the secondary effects and studies from numerous locations and court decisions document that they are likely to occur.²⁸⁶ So, although they may not specifically intend to provoke regulable conduct, sexually-oriented business speakers can reasonably foresee that listeners will be provoked by the speech product they provide to engage in behavior that creates negative secondary effects.²⁸⁷

In the contexts of criminal or tort liability for speech, foreseeability that the content of speech may provoke others to do harm is not enough to justify government action against the speaker to avoid listeners' negative conduct.²⁸⁸ Although preventing the harm may be a strong government interest, the free speech concern with punishing or imposing monetary liability on speakers who can foresee that listeners may misinterpret what they say as a call to illegal action is that speakers may censor their potentially valuable speech entirely out of fear of liability.²⁸⁹ Thus, the speaker intent requirement helps to tailor application of the sanctions to prevent overbroad application to suppress valuable speech. But when the speech restriction takes the form of time, place, or manner regulations, as it does with regulations aimed at reducing the negative secondary effects of selling sex speech, the chilling effect, at least in theory, does not operate against the content of the speech. Instead, it should be that speakers change the time, place or manner or offering the very same speech, to avoid provoking negative secondary effects.²⁹⁰ This type of chill presents a

286. McCord & Tewksbury, *supra* note 244, at 1108 (reviewing studies).

287. A significant number of sexually oriented business owners specifically intend to provoke, promote and profit from prostitution. COMBATING HUMAN TRAFFICKING: A MULTIDISCIPLINARY APPROACH 135 (MICHAEL J. PALMIOTTA, ED., 2014) (explaining that many so-called gentlemen's clubs create a facilitating environment for prostitution within the business or by directing patrons to nearby motels).

288. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

289. *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("(t)he threat of sanctions may deter . . . almost as potently as the actual application of sanctions") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

290. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 449-50 (2002) (Kennedy, J.,

free speech danger because it limits the opportunities for speakers to offer their speech, but this danger is of lesser magnitude than the potential of content-based self-censorship of valuable speech.²⁹¹ For this reason, foreseeability of negative secondary effects establishes a connection between speaker and listener conduct that may justify imposition of time, place or manner regulations on sexually-oriented businesses and tailor imposition of the regulations to circumstances in which speech results in harm in a way similar to the intent requirement for the category of incitement.

In addition to speaker intent, the incitement category requires that conduct produced by persuasive speech be likely to occur to justify restricting the speech to reduce the conduct.²⁹² The likelihood requirement imposes a prospective and contextual causation inquiry, which tests the strength of the government's need to restrict the speech because of the bad conduct its content is likely to cause, rather than mere disagreement with the message of the speech.²⁹³ This is a major hurdle in instances of both political speech and media entertainment because the lack of apparent incitement to produce the result reduces the likelihood that reasonable listeners will misinterpret the message.²⁹⁴ But sexually-explicit speech, while not delivered with a provable intent to provoke regulable conduct, is certainly delivered with apparent incitement to produce sexual stimulation. It is the sexual stimulation, or the anticipation of it, which provokes the listener behaviors that lead to regulable conduct.²⁹⁵ Empirical evidence exists that links the

concurring) ("The rationale of [a potentially constitutional] ordinance must be that it will suppress secondary effects-and not by suppressing speech.").

291. This conclusion flows from the lower standard of review applied to time, place, or manner regulations as compared to content-based regulations of speech.

292. *Brandenburg*, 395 U.S. at 448-49.

293. "Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had "a 'tendency to lead to violence.' " *Hess v. State*, 297 N. E.2d 413, 415 (Ind. 1973), *rev'd* 414 U.S. 105 (1973).

294. *Id.* And even if some viewers misinterpret the message and commit unlawful acts, the lack of speaker intent to persuade viewers to engage in the conduct protects the speaker from punishment under the incitement standard. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 266 (4th Cir. 1997) ("[I]n virtually every "copycat" case, there will be lacking in the speech itself any basis for a permissible inference that the "speaker" intended to assist and facilitate the criminal conduct described or depicted.").

295. *McCord & Tewksbury*, *supra* note 244, at 1112 ("[T]ypical patrons of SOB's can easily be seen as highly suitable for victimization. These are not individuals who are scanning their environment or attending to copresent others; hence, they are focused on one set of activities and largely unmindful and unaware to other actions in their midst.").

content of sexually-stimulating entertainment to regulable content in the vicinity of where it is sold.²⁹⁶ Assuming that the evidence is accurate and relevant,²⁹⁷ it shows that negative secondary effects are likely to occur in the vicinity of sexually-oriented businesses.²⁹⁸

Finally, the imminence requirement tests whether the bad actions will occur so close in time to the speech, that the government must act against the speaker to eliminate the conduct. It asks whether other remedies, such as counterarguments or law enforcement directed at the perpetrators, can reduce the effects in lieu of restricting the speech.²⁹⁹ Secondary effects that the Court has accepted stem from the behaviors that occur on or in the immediate vicinity of erotic entertainment businesses. Despite existing laws and penalties, and in the presence of ordinary levels of law enforcement, these effects occur very close in time to the purchase or consumption of erotic entertainment.³⁰⁰ The persistence of these effects in the presence of law enforcement demonstrates the inefficacy of this alternate remedy,³⁰¹ at the level of public resources ordinarily devoted to protect business operations.³⁰²

296. *See id.* at 1110-12.

297. Daniel R. Aaronson, Gary S. Edinger, & James S. Benjamin, *The First Amendment in Chaos: How the Law of Secondary Effects is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741, 754 (2009) (noting that the Court has given no clear guidance how to reconcile conflicting evidence about the existence of negative secondary effects, specifically: “What happens, for instance, when a community has actual experience with adult entertainment establishments operating for many years and reliable data are available that show conclusively—to a scientific certainty—that those businesses cause no unique harms in their communities? Can foreign studies trump actual local experience measured with reliable statistics? Or put in the terms of Renton analysis, can foreign studies and anecdotal information ever be “reasonably believed” in light of local scientific evidence of Daubert quality showing that the government’s information is factually incorrect?”).

298. McCord & Tewksbury, *supra* note 244.

299. *Whitney v. California*, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

300. McCord & Tewksbury, *supra* note 244, at 1112 (Secondary effects occur around sexually oriented businesses because of the combination of motivated offenders, suitable targets and lack of effective guardianship. With respect to guardianship, it is “lacking at SOBs as such rarely have on-site security. Even when bouncers are present and responsible for social control and rule enforcement, there are strong disincentives for aggressively patrolling and intervening in activities that may be leading to criminal events—Strict control is bad for business. In addition, SOB patrons typically arrive and leave alone [], leaving them without guardians in their presence. Both property and violent offenses may be facilitated as well (via the absence of capable guardians) because some customers park away from the business to avoid having their vehicle identified causing them to have to walk alone to their vehicles late at night.”) (internal citations omitted).

301. JERRY H. RATCLIFFE, INTELLIGENCE-LED POLICING 106 (2008) (noting “concerns of people in local neighborhoods can often focus on people who fly under the radar of local police but present a persistent nuisance”).

302. McCord & Tewksbury, *supra* note 244, at 1112 (noting that employees of

Most secondary effects will meet the requirements that they are foreseeable, likely and imminent, but understanding that these attributes are required to lend legitimacy to the move into deferential scrutiny makes explicit the limit to the negative effects on the lengthening lists relied upon by regulators.³⁰³ The limit to secondary effects, and the one that must be present in the evidence relied upon by the regulator, is that these acts occur predictably and in close physical and temporal proximity to the sale of the erotic entertainment product.

C. Generated by the Operations of Sexually-Oriented Businesses

Secondary Effects Analysis has only been applied by the Court in the context of sex speech. Justice Stevens, writing for the *Young* plurality, relied, in part, on a judgment that sex speech is less valuable than other types of fully-protected speech to apply deferential scrutiny to the ordinance despite the content classification evident on its face.³⁰⁴ But Justice Powell and the dissenters did not agree.³⁰⁵ Justice Powell emphasized that the context of the challenge, to a commercial zoning ordinance, was critical to establishing the method of review.³⁰⁶ Subsequent references to secondary effects have frequently added a qualification, consistent with Justice Powell's concurrence, that secondary effects occur as the result of the operations of sexually-oriented *businesses*.³⁰⁷ The conclusion that the lesser value of sex speech alone leads to less critical scrutiny is inconsistent with subsequent cases reviewing media and communication access

sexually-oriented businesses hired to keep order experience "strong [financial] disincentives for aggressively patrolling and intervening in activities that may be leading to criminal events").

303. *E.g.*, *BBL, Inc. v. City of Angola*, No. 1:13-CV-76-RLM, 2014 WL 26093 at *4 (N.D. Ind. Jan. 2, 2014) ("personal and property crimes, prostitution, potential spread of disease, lewdness, public indecency, obscenity, illicit drug use and drug trafficking, negative impacts on surrounding properties, urban blight, litter, and sexual assault and exploitation").

304. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70–71 (1976). Pluralities have also said that nude dancing "falls only with the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 60, 61 (1981)).

305. *Young*, 427 U.S. at 76 (Powell, J., concurring); *id.* at 84–85 (Stewart, J., dissenting); *id.* at 96 (Blackmun, J., dissenting).

306. *Id.* at 76 (Powell, J., concurring).

307. *Boos v. Barry*, 485 U.S. 312, 320 (1988) (sexually-oriented businesses are almost unique in producing secondary effects); *City of Renton v. Playtime Theatres*, 475 U.S. 41, 49 (1986) (Secondary Effects Analysis appropriate "at least with respect to businesses that purvey sexually explicit materials"). *But see Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 n.3 (1991) (Souter, J., concurring) ("protection of sexually explicit expression may be of lesser societal importance"); *Renton*, 475 U.S. at 49 n.2 (quoting *Young*, 427 U.S. at 70, stating that sex speech is of lesser social value).

restrictions to protect minors.³⁰⁸

So, the Court has only applied Secondary Effects Analysis in the more narrow context of the operation of sexually-oriented businesses. These businesses exist in physical space and choose to produce, market, and sell their products in particular ways. These businesses sell products, including speech products, which exist primarily for the purpose of producing sexual stimulation. Attraction or reaction to this product is at the core of the chain of events that lead to secondary effects.³⁰⁹ The secondary effects are the result of the proclivities and behaviors of the people selling the product and the people consuming it.³¹⁰ So, positive listener responses to the content of the speech in part “cause” the secondary effects. But an important additional cause of the secondary effects is the facilitating environment set up by the sexually-oriented business to attract customers and reap the maximum profit from the erotic entertainment they sell.³¹¹

The business operation context distinguishes the erotic entertainment subject to secondary effects regulations from speech of the same type offered via various forms of media. Vendors that create business environments to attract customers with certain attributes prior to purchasing a speech product or to facilitate their misbehavior after consuming it bear some non-speech responsibility for causing the negative public health and safety effects that occur on or in the vicinity of the property. This recognition does not remove the connection of the effects to the listeners’ reactions to the content of the speech, but it diffuses the connection in a way that has some constitutional significance. When an Internet pornography viewer repeats a sexual assault he has paid to see, the causal contribution of the film producers

308. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815 (2000) (“The statute now before us burdens speech because of its content; it must receive strict scrutiny,” unlike “zoning cases” that sought to control secondary effects); *Reno v. ACLU*, 521 U.S. 844, 867–68 (1997) (Communications Decency Act could not be analyzed as time, place, or manner restriction because it was a content-based blanket restriction on speech and sought to protect children from the speech itself, not the secondary effects); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127–28 (1989) (complete ban on indecent “dial-a-porn” service could not be justified by potential harm to children because it denied the communication to willing adults based on the content of the speech).

309. Patrons attracted to sexually oriented businesses and who react to the sexually stimulating speech engage in conduct that creates negative secondary effects and are “perfect victims” who, in turn, attract third parties who engage in conduct that creates negative secondary effects. *McCord & Tewksbury*, *supra* note 244, at 1112.

310. *Id.* (Sexually oriented businesses provide a setting where “motivated offenders, suitable targets, and a lack of effective guardianship converge in time and space, [which creates an environment where] criminal activities are likely to occur.”)

311. *Id.* at 1113 (“Strict control [of criminal behavior by bouncers or other sexually oriented business employees] is bad for business.”).

is speech only.³¹² By contrast, when a sexually-oriented business patron watches erotic dancing and purchases sex on-site or in the immediate vicinity, the sexually-oriented business's causal contribution is for the speech *plus* the facilitating environment, both of which are important parts of the product it sells. In this type of environment, deliberately created by the business for the purpose of generating a profit, the "effects" are not unexpected misinterpretations of the speech product, but routine, predictable by-products of doing business in a particular way.

Additionally, and importantly, the operation of a regulation subject to Secondary Effects Analysis must be to modify the facilitating aspect of the environment, not just to restrict delivery of the speech.³¹³ Local governments have broad discretion to regulate the businesses to serve the health, safety, and welfare of the community in which they operate.³¹⁴ Businesses may also be regulated according to generalized category without proof that each and every business of that type poses the same type and level of risk of harm as the group. Although it is possible to argue around the edges,³¹⁵ a core category of sexually-oriented businesses sell a combined product of sexually-stimulating speech and facilitating environment.³¹⁶ The gist of Secondary Effects Analysis is that the foreseeable externalities that result from this business decision to sell this combined product may justify a greater scope of regulation than externalities that result from the sale of speech alone.

312. *Olivia N. v. Nat'l Broad. Co.*, 178 Cal. Rptr. 888 (1981) (NBC program in which a girl is raped with a "plumber's helper" did not incite four youths, who raped a girl on a beach with a bottle shortly after viewing the episode).

313. See discussion *infra* Part III.D.

314. *Vill. of Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926).

315. Sexually-oriented businesses that offer erotic entertainment for off-site consumption only can argue that they created a different, and less facilitating, environment. *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336, 339 (5th Cir. 2007) ("On-site businesses (i.e., adult theaters or strip clubs) pose a greater threat of secondary effects than off-site sexually oriented businesses (i.e., adult bookstores)"); Richard McCleary & Alan C. Weinstein, *Do "Off-Site" Adult Businesses Have Secondary Effects? Legal Doctrine, Social Theory, and Empirical Evidence*, 31 L. & POLICY 217 (2009) (finding that patrons linger at off-site bookstores, which generates secondary effects).

316. MICHAEL J. PALMIOTTO, *COMBATING HUMAN TRAFFICKING: A MULTIDISCIPLINARY APPROACH* 135 (2014) (many so-called gentlemen's clubs provide space for prostitution on-site or direct patrons to nearby motels); McCord & Tewksbury, *supra* note 244, at 1112 (sexually oriented businesses create a facilitating environment by intentionally failing to act as effective guardians against criminals).

D. Caused (In Part) by the Time, Place, or Manner Variable Modified by the Regulation

From the beginning, the fact that a regulation constitutes a partial limit, rather than a total ban, has been a critical element to invoking Secondary Effects Analysis.³¹⁷ This has evolved into the first requirement of the two-step test to enter Secondary Effects Analysis.³¹⁸ The Justices have implied that the partial restriction of a zoning ordinance works on its own to render the burden of the regulation on free speech interests “minimal.”³¹⁹ They have also said that the means of regulation works in combination with a “content-neutral” purpose to reduce secondary effects to make deferential time, place, or manner scrutiny appropriate.³²⁰

In his *Alameda Books* concurrence, Justice Kennedy explained most explicitly how the means of regulation and the purpose to reduce secondary effects must work together to qualify the regulation for Secondary Effects Analysis. Justice Kennedy placed emphasis on identifying precisely “the claim a city must make in order to justify a content-based zoning ordinance.”³²¹ This claim must be that the ordinance “will suppress secondary effects—and not by suppressing speech.”³²² That is, the regulator’s rationale must be that the means of regulation will reduce secondary effects without significantly reducing the quantity of speech emanating from the speaker or listener demand

317. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434, 443 (2002) (noting that the Court of Appeals had held that the city’s prohibition was not a ban, and that issue was not part of respondents’ petition for review); *id.* at 449–50 (Kennedy, J., concurring) (in order for a city to justify a content-based ordinance, it “must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 319–20, 320 n.2 (2000) (Stevens, J., dissenting) (characterizing Erie’s ordinance as a total ban on a certain type of speech and distinguishing it from the Detroit ordinance in *Young*: “[e]ssential to our holding, however, was the fact that the ordinance was ‘nothing more than a limitation on the place where adult films may be exhibited’ and did not limit the size of the market in such speech” (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 46, 48 (1986) (ordinance at issue not a complete ban, but instead a restriction on their choice of location); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 73–75 (1981) (because ordinance was a total ban on live entertainment and borough had not identified the municipal interests supporting a ban when other commercial uses were permitted, ban was not a valid time, place, or manner restriction); *Young*, 427 U.S. at 71–73, 73 n.35 (noting that the zoning requirements in Detroit were only applicable to new locations rather than existing ones, and that there were “myriad” locations within the city that met the 1,000-foot restriction).

318. *Alameda Books*, 535 U.S. at 434.

319. *Young*, 427 U.S. at 78.

320. *Alameda Books*, 535 U.S. at 434.

321. *Id.* at 449 (Kennedy, J., concurring).

322. *Id.* at 449–50.

for the speech.³²³ This is the same rationale that underpins the constitutionality of content-neutral time, place or manner regulations. Any burden imposed by the regulation may reduce the quantity of speech or demand for it, but because it is imposed without respect to the content of the speech, there is no obvious indicator of message-motivated censorship. With regulations imposed on sexually-oriented businesses, the secondary effects result from the combination of the listeners' reactions to the content of the speech and the time, place, or manner variable.³²⁴ Any burden imposed by the regulation will likewise trace to the speech content. For this reason, the government must rebut the inference of content censorship in a different and less solid way, which is to acknowledge that listeners' reactions to the speech content is one cause of the negative effects, but show that its aim is exclusively to reduce the other cause, which is the time, place, or manner variable adjusted by the regulation.

Initially, this inquiry is a gatekeeping prerequisite to entering deferential Secondary Effects Analysis. Regulators must plausibly assert that the secondary effects they aim to reduce are caused by the combination of listeners' reactions to the content of the speech and the means of delivery adjusted by the regulation, and that their aim is exclusively to eliminate the effectiveness of the latter. Placed as part of the "proposition" that regulators must assert, this is a crucial part of the "pretext" inquiry, which is referenced in a number of opinions addressing secondary effects, but not spelled out.

Once within Secondary Effects Analysis, this proposition also defines the claim an erotic entertainment business must make and the evidence it must produce to dispute the assumptions of the regulator and shift the burden of proof. Once again, the business's focus must be on the nature of the secondary effects relied upon by the regulator and the role of the aspect of business operation regulated in producing them.

One example that helps illustrate this requirement is *Annex Books*,³²⁵ mentioned above. To reduce the negative effect of armed robberies at adult bookstores, the city required them to close from midnight to 10 a.m. every day and all day on Sunday.³²⁶ The court

323. *Id.* at 445 (A regulation aimed at reducing secondary effects may be consistent with the Constitution "if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech").

324. John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 332 (2009) (observing that secondary effects may arise from "multiple causal factors").

325. *Annex Books, Inc. v. City of Indianapolis, Ind.*, 740 F.3d 1136 (7th Cir.), *cert. denied*, 135 S. Ct. 99 (2014).

326. *Id.* at 1137.

noted the requirement from Justice Kennedy's concurrence, and reasoned that the problem with the ordinance before it was with the form of the means.³²⁷ According to the court, "The benefits come from closure: shuttered shops can't be robbed at gunpoint, and they lack customers who could be mugged. If that sort of benefit were enough to justify closure, then a city could forbid adult bookstores altogether."³²⁸ This is true to a certain extent, but not entirely. Courts have upheld all sorts of hours-of-operation requirements imposed on erotic entertainment businesses. The problem with the ordinance before this court, and the one it identified more specifically in an oral argument hypothetical, was that the hours of required closure did not represent times that disproportionately aggravated the effect of armed robbery.³²⁹ For this reason, the "proposition" offered by the regulator as an initial matter would have been faulty, since it could not plausibly assert that the armed robberies it sought to reduce were disproportionately caused by being open, in particular, on Sunday. Alternatively, the regulated businesses could offer evidence disputing the city's proposition and shift the burden of proof.

Another example involves litigation challenging a Texas statute that imposed a \$5 per patron tax on businesses that both offer live nude entertainment and serve alcohol.³³⁰ Both the trial court and the court of appeals majority had characterized the assessment as an invalid "content-based tax" because it depended for its application on a governmental evaluation of the content of the expression, and it 'singl[ed] out a specific class of First Amendment speakers' who are 'conveying a message that the taxing body might consider undesirable.'³³¹ The Texas Supreme Court, however, accepted the state's argument that the tax law was aimed at reducing negative secondary effects, and not suppressing speech.³³² According to the court, "The fee is not a tax on unpopular speech but a restriction on combining nude dancing, which unquestionably has secondary effects, with the aggravating influence of alcohol consumption."³³³ That is, the state could reasonably believe that the means of delivering erotic

327. *Id.* at 1138.

328. *Id.*

329. *Id.* at 1137.

330. *Tex. Entm't Ass'n, Inc. v. Combs*, No. D-1-GN-07-004179, 2008 WL 2307196 (Tex. Dist. Ct., Travis Cnty., Mar. 28, 2008); *Combs v. Tex. Entm't Ass'n, Inc.*, *aff'd* 287 S.W.3d 852, 859 (Tex. App. 2009), *rev'd*, 347 S.W.3d 277 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012).

331. *Combs*, 347 S.W.3d at 279-80.

332. *Combs*, 347 S.W.3d at 286.

333. *Id.* at 287.

entertainment – in combination with serving alcohol by the drink – facilitates patrons’ movement from sexual stimulation to regulable behaviors. The court reasoned that the operation of the statute was to encourage businesses to eliminate this manner of delivery, which it could reasonably believe would reduce negative secondary effects and not speech.³³⁴

E. Summary of the Attributes of Secondary Effects That Lead to Deferential Secondary Effects Analysis

The first step toward the move into Secondary Effects Analysis is for a court to verify that, on its face, a regulation presents as a time, place or manner restriction on the operations of sexually-oriented businesses. The speech content-sensitivity of this type of regulation on its face is what requires Secondary Effects Analysis, rather than the analysis that applies to content-neutral time, place or manner restrictions. The speech content-sensitivity of time, place or manner regulations imposed on sexually-oriented businesses may not lead to strict scrutiny review because these businesses intentionally sell speech for the purpose of inciting sexual stimulation and tend to offer it in an environment that facilitates the occurrence of negative secondary effects, which are foreseeable, likely and imminent. The government’s obvious and plausible aim to modify the aggravating effect of these types of business operations, rather than the content of the speech product, is what a court must find evident on the face of a regulation to justify entry into deferential Secondary Effects Analysis.

The next step is for a court to confirm that the restrictions imposed are aimed at reducing negative secondary effects, which are of the type that can justify the move away from strict scrutiny. Although the Court has seemed to assume that the negative secondary effects of sexually-oriented businesses that justify targeting them for regulation can be “unrelated to the impact of the speech on the listener,”³³⁵ what it must mean is that negative secondary effects that rebut an inference of censorship are unrelated to the *negative* impact of the speech on the

334. *Id.* at 288 (“[T]he fee provides some disincentive to present live nude entertainment where alcohol is consumed”). *See also* *Ben’s Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702, 726 (7th Cir. 2003) (“This is not a restriction on erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol) during the presentation of expressive conduct.”); *Sammy’s of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 999 (11th Cir. 1998) (“[W]e are unaware of any constitutional right to drink while watching nude dancing”).

335. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434, 444 (2002) (Kennedy, J., concurring); *Boos v. Barry*, 485 U.S. 312, 320 (1988) (secondary effects “happen to be associated” with the content of sex speech).

listener.³³⁶ To confirm that the move into Secondary Effects Analysis is appropriate, courts must verify that the secondary effects relied upon, and likely recited on the face of the regulation, plausibly trace to attributes or behaviors of willing listeners. Secondary effects must be caused in part by the responses of willing listeners to the speech content, but must be facilitated by the means of operation modified by the regulation. Once again, the crucial condition to applying Secondary Effects Analysis is that the terms of the regulation make plausible the regulator's assertion that its purpose is to adjust the contributing variable, not the content of the speech.³³⁷

CONCLUSION

Like it or not, Secondary Effects Analysis almost certainly will survive the Court's strong statements in *Reed v. Town of Gilbert*.³³⁸ If it is here to stay, then it is all the more urgent that its place in Free Speech Clause doctrine and link to constitutional principles be explained. The determination that a regulation is aimed at reducing the negative secondary effects of erotic entertainment is crucial to moving a facially content-based regulation out of strict scrutiny. But the Justices' abstract comments about secondary effects being "unrelated to the impact of speech on the audience" do not help regulators to write rules or lower courts to decide real cases.³³⁹ Avoiding the core question of why negative effects that obviously must be caused in part by listeners' responses to the content of the expression nevertheless are "secondary" is not an acceptable strategy of constitutional interpretation. Both proponents and critics of Secondary Effects Analysis have something to gain from acknowledging the inevitable connection between listeners' reactions to speech content and "secondary" effects. Proponents gain the legitimacy that Secondary Effects Analysis lacks currently. Critics gain the clarity and limits that come with a principled grounding. The primary concern of critics—that a doctrine that allows for deferential review of regulations that

336. See discussion, *supra* Part II.A.

337. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 46, 47 (1986) ("The ordinance by its terms is designed to prevent [negative secondary effects], not to suppress the expression of unpopular views. . . . As Justice Powell observed in *American Mini Theatres*, "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.") (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 82 n.4 (1976) (emphasis added)).

338. *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

339. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J. concurring).

classify speech according to its content leaves room for pretextual justifications³⁴⁰—cannot be entirely satisfied. Nevertheless, a transparent understanding of the connection between speech content and secondary effects locates, hones, and potentially strengthens the pretext inquiry. Additionally, acknowledging and explaining the circumstances in which Secondary Effects Analysis applies also identifies the opposite—when it does not—and thereby prevents its seepage into areas where it does not belong.

340. David Hudson, *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L. J. 55, 93 (1997) ("The net effect of the secondary effects doctrine is to allow an easy path to censorship.").