COMMENTS

THE FIRST AMENDMENT GONE AWRY: *CITY OF ERIE V. PAP'S A.M.*, AILING ANALYTICAL STRUCTURES, AND THE SUPPRESSION OF PROTECTED EXPRESSION

CHRISTOPHER THOMAS LEAHY[†]

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[†] B.A., Hamilton College, 1999; J.D. Candidate 2002, University of Pennsylvania. I wish to thank Noreen, Thomas, and Matthew Leahy, Florence Senff, and Mariana Pastore for their friendship, love, and support. I wish to thank the editors of the *University of Pennsylvania Law Review* for their dedication and strong work. All remaining errors are mine.

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INTRODUCTION

"[T]here is an implicit narrative which the viewer is left to complete in his imagination. That is why it is important that the striptease not end in a bathing suit, because a bathing suit is for swimming, not for sex."¹

There are likely few groups who, while enjoying a vivid academic exchange in the much-celebrated marketplace of ideas, will be interrupted by one member's call to move the debate to a nearby all-nude dance club for additional intellectual perspective. Similarly, while some might be disappointed, it is unlikely that any citizen would be irreparably harmed by the closing of their local "Kandyland" go-go. So now, after years of exhaustive debate and the perpetually prominent role of explicit adult entertainment in the pantheon of First Amendment scholarship, why all the fuss about another nude dancing case? The answer is complex, yet it is instructive as to the degree First Amendment jurisprudence has gone awry. In this Comment, I contend the state of the First Amendment, viewed through the instructive lens of adult entertainment, is far from strong. I argue that, despite the basic First Amendment value that even the most unpopular and perhaps unnecessary expression need be preserved in the face of the suppressive force of a majority,² the Supreme Court has taken profoundly disturbing steps in *City of Erie v. Pap's A.M.* toward moving itself from the position of First Amendment rights guarantor and into the position of disinterested spectator of government-imposed majoritarian preferences. Plainly spoken, the plurality's manipulation of

¹ RICHARD A. POSNER, *SEX AND REASON* 364 (1992).

² See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("It is the function of speech to free men from the bondage of irrational fears."); OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 12 (1996) (describing the First Amendment as "a means of protecting the individual speaker from being silenced by the state").

doctrine, precedent, and justifications in *Pap's* has grave implications for the freedom of any expression that challenges societal orthodoxy.

A thorough foray into modern First Amendment doctrine unquestionably must consider the pernicious effect of *Pap's*³ on underlying free speech values. Indeed, adult expression doctrine is an excellent avenue for examination of the larger state of the First Amendment; explicit adult entertainment occupies a unique place among forms of expression because such a large portion of the populace allegedly disfavors it under many different social, political, and religious rubrics.⁴ Constitutional protection of adult entertainment is also an issue of critical import as increasing numbers of municipalities attempt urban renewal initiatives that include regulations designed to relocate or

³ *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

⁴ Some might suggest that adult expression doctrine has been played out over the years in scholarly discussion. Not only has adult expression doctrine taken on a disturbing new life in *Pap's*, but it will continue to shape First Amendment jurisprudence in the near future through further consideration of secondary effects, Internet, and child pornography issues. See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719 (9th Cir. 2000) (concluding as a matter of law that ordinances of the City of Los Angeles prohibiting the operation of adult businesses that both sell adult products and contain facilities for the viewing of adult movies or videos were inadequately supported by evidence of adverse impact so as to violate the First Amendment), *cert. granted*, 69 U.S.L.W. 3591 (U.S. Mar. 5, 2001) (No. 00-799) (argued Dec. 4, 2001); *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000) (barring enforcement of the Child Online Protection Act, which makes it unlawful to make any communication for commercial purposes by means of the World Wide Web that is available to minors and that includes material that is "harmful to minors" on First Amendment grounds because it relies on community standards to identify material that is harmful to minors), *cert. granted sub nom.* *Ashcroft v. ACLU*, 69 U.S.L.W. 3739 (U.S. Sept. 7, 2001) (No. 00-1293) (argued Nov. 28, 2001); *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom.* *Holder v. Free Speech Coalition*, 69 U.S.L.W. 3495 (U.S. Sept. 7, 2001) (No. 00-795) (argued as *Ashcroft v. Free Speech Coalition*, Oct. 30, 2001) (holding that the Child Pornography Prevention Act of 1996, which prohibits the shipment, distribution, receipt, reproduction, sale, or possession of any visual depiction that "appears to be[]" of a minor engaging in sexually explicit conduct," and also contains a similar prohibition concerning any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct" is unconstitutional under the First Amendment); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 921 (2001) (asserting child pornography law is the next major First Amendment battleground).

Changes in adult expression doctrine in recent and forthcoming decisions will have great import above and beyond the mere perpetuation of the salacious striptease or publication of the enticing erotic image. To borrow from a more talented source, I would say about explicit adult expression: "You've begun to matter more than the things you say." Andrew Lloyd Webber, *Heaven on Their Minds, on JESUS CHRIST SUPERSTAR* (MCA Records 1993).

suppress a growing number⁵ of adult-oriented businesses.⁶ “As of February 1997, Americans spend more money at strip clubs than at Broadway, off-Broadway, regional, and non-profit theaters; than at the opera, the ballet, and jazz and classical music performances—*combined*.”⁷ As such, the use of zoning⁸ and general laws⁹ to limit or eliminate adult entertainment establishments is a particularly thorny issue because it inextricably involves conflicts between passionate defenders and equally fervent detractors, as well as difficult questions of morality, government censorship, and legislative motive.¹⁰ Even the most

⁵ In New York City, for example, the total number of adult bookstores, peepshows, and video stores increased from twenty-nine to eighty-nine between 1984 and 1993; topless and nude bars increased from fifty-four to sixty-eight; and adult video establishments increased from none to sixty-four—overall an increase of more than forty-seven percent. See NEW YORK CITY DEP'T OF CITY PLANNING, ADULT ENTERTAINMENT STUDY 1, 21 (1994). The New York study also predicted large-scale growth through 2002. *Id.* I grant that no study has yet reliably determined whether the implied relationship between increased business and increased patronage is one of correlation or causation. More than ever, however, it seems impossible to ignore Foucault's observation that modern society speaks about sex “*ad infinitum*, while exploiting it as *the secret*.” 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 35 (Robert Hurley trans., 1978).

⁶ Although the focus of this Comment is on nude dancing establishments, I will at times use “adult-oriented businesses” or “adult establishments,” which unless specified as “adult theatres” or “nude dancing establishments” may include video and book stores; motels; massage parlors; sex clubs; topless, bottomless, and nude bars; and peepshows. If you desire a frame of reference for nude dancing establishments, view a modern one by using the Internet to visit <www.fantasysshowbar.com>.

⁷ Margot Rutman, *Exotic Dancers' Employment Law Regulations*, 8 TEMP. POL. & CIV. RTS. L. REV. 515, 516 (1999).

⁸ New York City's “Quality of Life Initiative” is an excellent example of such a governmental zoning scheme. Launched in 1995, it was accompanied by the city's Adult Zoning Resolution, which, generally, restricted adult establishments to manufacturing districts and banned adult businesses from most commercial districts. It also prohibited adult establishments from operating within five hundred feet of a church, school, residence, or another adult establishment. For a thorough explanation of the resolution, see Rachel Simon, Note, *New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis*, 23 FORDHAM URB. L.J. 187, 190-92 (1995), which cites Resolution No. 1322. See also Howard Goldman & Rachel D. Tanur, *Zoning for Adult Use: A Delicate Balance: New York City Proposes Tough New Restrictions*, N.Y. L.J., Nov. 14, 1994, at S1 (describing New York City zoning initiatives from the mid-1970s forward); Vivian S. Toy, *Council Approves Package of Curbs on Sex Businesses*, N.Y. TIMES, Oct. 26, 1995, at A1 (relating the New York City Council's approval of the Adult Zoning Resolution).

⁹ For examples of these types of laws, see *infra* notes 22 & 100 on the laws considered in *Barnes* and *Pap's*.

¹⁰ See generally Timothy M. Tesluk, *Barnes v. Glen Theatre: Censorship? So What?*, 42 CASE W. RES. L. REV. 1103 (1992) (describing *Barnes* as a case fundamentally about free expression); Daniel J. McDonald, Note, *Regulating Sexually Oriented Businesses: The Regulatory Uncertainties of a “Regime of Prohibition by Indirection” and the Obscenity Doctrine's Communal Solution*, 1997 BYU L. REV. 339 (defining sexually-oriented businesses as

principled legal debates on the topic are usually "fraught with some emotionalism."¹¹

Until the early 1970s, the U.S. Supreme Court did not acknowledge protection for nude dancing; states were free to enact any limitations they desired.¹² Since then, a fierce debate has raged over the level of protection owed to nonobscene adult expression under the First Amendment of the U.S. Constitution.¹³ Although the Court has consistently held that nude dancing is entitled to some degree of First Amendment protection, over the last thirty years it has developed, adapted, and continually expanded a line of doctrine that has granted broad discretion to local governments to suppress that expression as a means to combat deleterious "secondary effects."¹⁴ Prominent commentators have derided this doctrine as a "gravely erod[ing] the First Amendment's protections"¹⁵ and have decried its "corrosive impact"¹⁶

purveyors of obscenity and premising a need for regulation thereon).

¹¹ *Pap's*, 529 U.S. at 314 (Souter, J., concurring in part and dissenting in part).

¹² Lisa Malmer, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1276 (1991); see also *id.* at 1276 n.9 (collecting cases supporting this proposition). Obscenity convictions in general did not occur prior to the late 1800s. See Fred K. Berger, *Pornography, Sex, and Censorship*, in FREEDOM, RIGHTS, AND PORNOGRAPHY: A COLLECTION OF WORKS BY FRED K. BERGER 132 (Bruce Russell ed., 1991) (discussing the history of obscenity convictions). For details on the historical evolution of obscenity doctrine, see the articles collected in PORN 101: EROTICISM, PORNOGRAPHY, AND THE FIRST AMENDMENT 535-74 (James Elias ed., 1999) [hereinafter PORN 101]. For a comprehensive documentary history of obscenity cases and statutes from 1960-1998, see FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY 150-208 (Sheila Suess Kennedy ed., 1999).

¹³ See generally Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992) (discussing the First Amendment issue presented by topless dancing); Gianni P. Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 TUL. L. REV. 1231 (1993) (noting the debate over the proper meaning and proper regulation of pornographic expression); Tesluk, *supra* note 10 (arguing for a First Amendment right to expression); Simon, *supra* note 8 (describing a government scheme to restrict the locations of adult establishments).

¹⁴ For a detailed explication of the evolution of nude dancing doctrine through *Barnes*, see David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55, 57-77 (1997); Malmer, *supra* note 12, at 1275-1305; Michael McBride, *Pap's A.M. v. City of Erie: The Wrong Route to the Right Decision*, 33 AKRON L. REV. 289, 290-98 (2000); Servididio, *supra* note 13, at 1232-54; McDonald, *supra* note 10, at 341-48; Simon, *supra* note 8, at 192-201; and *infra* text accompanying notes 38-122.

¹⁵ See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 952 (2d ed. 1988); see also *id.* § 12-18, at 943-44 (noting that if "one parses first amendment doctrine too finely, one may discover that little protection for expression remains").

¹⁶ Hudson, *supra* note 14, at 60; see also David L. Hudson, Jr., "Secondary Effects Doctrine" is Fertile Ground for Abuse, N.J. L.J., Mar. 24, 1997, at 23 (describing how courts

on First Amendment jurisprudence. Nevertheless, this doctrine has cut an ever-widening swath across First Amendment freedoms.

This doctrinal debate reached an ideological breaking point in the Court's important but hopelessly splintered 1991 decision in *Barnes v. Glen Theatre, Inc.*, where a battle-worn plurality answered the threshold question of whether nude dancing constituted expressive conduct in the affirmative.¹⁷ A decade of confusion followed as courts tried to cull from *Barnes* a cohesive framework for examining the constitutionality of laws that had the effect of restricting adult expression.¹⁸ In 2000, the Court seized an opportunity to revisit and clarify this clouded doctrine when the Pennsylvania Supreme Court overturned a City of Erie general nudity ordinance on the grounds that it unconstitutionally restricted free expression rights of nude dancing entertainers.¹⁹

Instead of taking the opportunity to pull back from its heavily criticized prior decisions, in *City of Erie v. Pap's* the Court actually extended the secondary effects doctrine beyond the pale of precedent, with dangerous implications for increased prohibition of protected expression. In doing so, the Court misread existing precedent and misapplied First Amendment analysis both by entrenching a view of nonobscene expression as low-value speech and by adhering to the nonobvious conclusion that general laws that target specific adult expression merit only lower-level scrutiny reserved for content-neutral laws. Furthermore, the Court's decision in *City of Erie v. Pap's* has unleashed a dangerously deferential secondary effects justification that may threaten a wider array of protected speech. In effect, the *Pap's* Court has built, stoked, and released a runaway steam engine in the guise of the secondary effects doctrine and has virtually lashed adult-oriented expression to the tracks a few miles down the line. This Comment argues that the doctrine expounded in *City of Erie v. Pap's* must be both restrained and reevaluated before municipalities use *Pap's* to exert increasing power to further suppress controversial expression.

Part I of this Comment provides background on the 2000 Pennsyl-

pass zoning laws against adult businesses without ever citing harmful secondary effects).

¹⁷ See 501 U.S. 560 (1991) (showing no five Justice agreement on rationale); see also *Young v. Am. Mini Theatres*, 427 U.S. 50 (1986) (same).

¹⁸ See, e.g., *Pap's A.M. v. City of Erie*, 719 A.2d 273, 277-79 (Pa. 1998) (attempting to divine a controlling rationale from *Barnes*).

¹⁹ *Id.* at 281.

vania Supreme Court *Pap's v. City of Erie* case. Part II provides a detailed explication of the evolution of adult entertainment doctrine. First, I briefly examine the obscene/nonobscene distinction in the aftermath of the landmark 1973 obscenity case of *Miller v. California*.²⁰ I describe the prevailing content discrimination analysis used to examine laws under the First Amendment. I then provide a thorough description of the application of the content discrimination analytical framework in adult entertainment cases and the development of the secondary effects doctrine through *Barnes v. Glen Theatre, Inc.*²¹ Part III discusses the application of those precedents and principles by the U.S. Supreme Court in *Pap's* and offers an analysis of the decision's most important points. In Part IV, I offer my analysis of the dangers of the *Pap's* decision. Finally, in Part V, I recommend changes the Court should consider in the application of First Amendment adult expression doctrine. A brief Conclusion follows.

I. SETTING THE SCENE: *PAP'S A.M. v. CITY OF ERIE*

In September of 1994, the Erie, Pennsylvania, City Council enacted City of Erie Ordinance 75-1994, making it a summary offense to knowingly or intentionally appear in public in a state of nudity.²² To

²⁰ 413 U.S. 24 (1973)

²¹ 501 U.S. 560 (1991).

²² Ordinance 75-1994, codified as Article 711 of the Codified Ordinances of the City of Erie, provides in relevant part:

1. A person who knowingly or intentionally, in a public place:
 - a. engages in sexual intercourse
 - b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
 - c. appears in a state of nudity, or
 - d. fondles the genitals of himself, herself, or another person commits a Public Indecency, a Summary Offense.
2. "Nudity" means the showing of the human male or female genital [sic], pubic hair or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admissions charge is levied

comply with this ordinance, a female over the age of ten would have to wear at least what are colloquially known as "pasties" and a "G-string."

Pap's A.M. ("Pap's") operated a totally nude dancing establishment in Erie known as "Kandyland." Shortly after the ordinance became effective, Pap's filed a complaint in equity against the City of Erie, the Mayor, and the City Council seeking a declaratory judgment that the ordinance was unconstitutional and requesting permanent injunctive relief.²³ In January of 1995, the Court of Common Pleas of Erie County struck down the ordinance as unconstitutionally overbroad.²⁴ On cross-appeals, the Commonwealth Court—citing Justice Souter's concurrence in *Barnes* as binding precedent²⁵—reversed the trial court's order on two grounds: that the holding of unconstitutional overbreadth was in error and that the ordinance did not infringe impermissibly on Pap's right to freedom of expression.²⁶

The Pennsylvania Supreme Court granted review on both grounds and held the ordinance violated the free expression rights of Pap's under the First and Fourteenth Amendments to the U.S. Constitution.²⁷ At the outset, the court held that nude dancing is expressive conduct and is entitled to "some quantum of protection under the First Amendment."²⁸ The court next examined whether the governmental interest in enacting the ordinance was content-based or content-

4. The prohibition set forth in subsection 1(c) shall not apply to:

- a. Any child under ten (10) years of age; or
- b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

See also *Pap's*, 529 U.S. at 283-84 (reprinting ordinance); 719 A.2d 273, 275 n.2 (same).

²³ *Pap's*, 529 U.S. at 284; 719 A.2d at 276.

²⁴ *Pap's A.M. v. City of Erie*, 23 Pa. D. & C. 4th 337 (Ct. Com. Pl. Erie County 1995).

²⁵ *Pap's A.M. v. City of Erie*, 674 A.2d 338, 343 (Pa. Commw. Ct. 1996); *Barnes*, 501 U.S. at 581-87 (Souter, J., concurring).

²⁶ *Pap's*, 674 A.2d 338, 343, 346 (Pa. Commw. Ct. 1996); 719 A.2d at 281.

²⁷ *Pap's*, 719 A.2d at 281; see also U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . ."); *id.* amend. XIV ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."). The First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) ("It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment."). For a detailed examination of the Pennsylvania Supreme Court's *Pap's* decision, see McBride, *supra* note 14, at 299-309.

²⁸ *Pap's*, 719 A.2d at 276 (citing *Barnes*, 501 U.S. at 565-66); see 529 U.S. at 285 (quoting the Pennsylvania Supreme Court noting that "nude dancing is expressive conduct that is entitled to some quantum of protection under the First Amendment"). See also *Barnes*, in which eight of the Justices held that nude dancing was expression entitled to Constitutional protection.

neutral. After asserting that no clear precedent arises out of *Barnes*' "splintered and . . . non-harmonious opinions,"²⁹ the court conducted an independent examination of the ordinance and concluded that it was content-based and deserving of strict scrutiny.³⁰ Although the court conceded that one of the purposes behind the ordinance was to combat negative secondary effects, it found an "unmentioned purpose" that was "inextricably bound up with [the] stated purpose"—that of impacting negatively on the erotic message of nude dancing.³¹ Specifically, the court agreed with Justice White's dissent in *Barnes*, noting that "[i]t is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity."³²

After applying strict scrutiny, the court found that the ordinance failed the narrow tailoring requirement³³ and severed the public nudity provisions after finding them violative of the First Amendment to the U.S. Constitution.³⁴ This holding obviated the need to decide the question of overbreadth. Two justices concurred in the decision but noted that—although they would have sustained the ordinance under the U.S. Constitution because of its similarity to the ordinance upheld in *Barnes*—they would have invalidated it under the Pennsylvania Constitution.³⁵

²⁹ *Pap's*, 529 U.S. at 285 (quoting *Pap's*, 719 A.2d at 277).

³⁰ *Pap's*, 719 A.2d at 278-80.

³¹ *Id.* at 276. The Court drew much of this language from Justice White's dissent in *Barnes*. See *Barnes*, 501 U.S. at 592-93 ("[T]he emotional or erotic impact of the dance is intensified by the nudity of the performers . . . [and t]he nudity element of nude dancing performances cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance.").

³² *Pap's*, 719 A.2d at 283-84 (citing *Barnes*, 501 U.S. at 592 (White, J., dissenting)); see also *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based.").

³³ The Court suggested that less restrictive methods such as time, place, or manner restrictions would achieve the government's interest in preventing harmful secondary effects. *Pap's*, 719 A.2d at 280 (citing *Barnes*, 501 U.S. at 594 (White, J., dissenting)); see also McBride, *supra* note 14, at 308 n.116 (citing Ron Kalyan, Note, *Regulation of Nude Dancing in Bring Your Own Bottle Establishments in the Commonwealth of Pennsylvania: Are the Commonwealth's Municipalities Left to Fend for Themselves?*, 99 DICK. L. REV. 169, 181 (1994)) (observing that municipalities can utilize regulations such as control of location of clubs and restrictions on hours of operation to reduce conflicts with residents and reduce crime).

³⁴ *Pap's*, 529 U.S. at 286; 719 A.2d at 281.

³⁵ *Pap's*, 529 U.S. at 286; 719 A.2d at 281-84 (Castille, J., concurring); McBride, *supra* note 14, at 302. See PA. CONST. art. I, § 7, which states that "[t]he free communi-

The City of Erie petitioned for a writ of certiorari,³⁶ and the U.S. Supreme Court decided the case, now captioned *City of Erie v. Pap's A.M.*, on March 29, 2000. The plurality upheld a restrictive general law, applying a secondary effects rationale.³⁷ I shall return to this decision after setting the doctrinal scene.

II. DEVELOPMENT OF NUDE DANCING DOCTRINE

A. *The Limitations of Miller and Nude Dancing as Protected Expressive Conduct*

The Supreme Court set forth the modern obscenity test in *Miller v. California*.³⁸ Miller conducted a mass mailing campaign to advertise the sale of illustrated books. His brochures contained pictures of sexually explicit activities and were mailed to individuals who had not requested them. Miller was convicted of violating California law by knowingly distributing obscene matter.³⁹ In vacating Miller's convic-

cation of thoughts and opinions is one of the invaluable rights of man." Michael McBride argues that the Pennsylvania Supreme Court "invited a needless reversal of [its] decision" by deciding the case under the U.S. Constitution and could have instead "clearly defined the ability of local governments to regulate nude dancing in [its] Commonwealth" by following the suggestion of the concurrence to decide the case under the Pennsylvania Constitution. McBride, *supra* note 14, at 302-03. He suggests the court should have acknowledged *Barnes* as binding precedent and decided the case on independent state grounds. *Id.* at 305. Other courts have chosen this path, see, for example, 7250 Corp. v. Bd. of County Comm'rs, 799 P.2d 917 (Colo. 1990); O'Day v. King County, 749 P.2d 142 (Wash. 1988). Indeed, in his subsequent concurring opinion in *Pap's*, Justice Souter specifically suggested the Pennsylvania Supreme Court was not barred "from choosing simpler routes to disposition of the case" under either a federal overbreadth challenge or a Pennsylvania constitutional challenge. *Pap's*, 529 U.S. at 317 n.6 (Souter, J., concurring in part and dissenting in part); see also *Pennsylvania v. Campana*, 314 A.2d 854, 855-56 (1974) (holding that after reversal by the U.S. Supreme Court on a federal issue, the Pennsylvania Supreme Court can reaffirm its decision on state constitutional grounds). McBride discusses the precedents for an independent state constitutional ruling at length in his article. McBride, *supra* note 14, at 305 n.105.

³⁶ *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, 526 U.S. 1111 (May 17, 1999) (No. 98-1161).

³⁷ See *Pap's*, 529 U.S. at 296, 302 (upholding city ban against public nudity on the basis that the goal of the regulation is the prevention of harmful secondary effects that are unrelated to the suppression of free expression).

³⁸ 413 U.S. 15, 24 (1973). For a survey of the development of obscenity doctrine prior to *Miller*, see THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 467-515 (1970). The *Miller* test supplanted the "utterly without redeeming social importance" obscenity standard set forth in *Roth v. United States*, 354 U.S. 476, 484-85 (1957).

³⁹ *Miller*, 413 U.S. at 16-18. The brochures Miller sent advertised four graphic books entitled *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, and *An Illustrated History of*

tion, the Court developed the three-prong *Miller* test—whether a work is obscene is determined by:

- (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴⁰

However, the Court intended for this test to label only graphic, “hard-core” pornography as obscene,⁴¹ as reflected in the Court’s reversal of an obscenity conviction for a showing of the film *Carnal Knowledge* in *Jenkins v. Georgia*.⁴² At the same time, the Court expanded its recognition of First Amendment protections for a variety of forms of entertainment.⁴³ As a result, only a small portion of pornographic materials could be restricted under *Miller*’s strict reading of obscenity law.

Eventually (if somewhat reluctantly), the Court recognized explicitly that nude dancing was entitled to some level of First Amendment protection. In *California v. LaRue*, the Court first acknowledged that nude dancing might be entitled to First and Fourteenth Amendment protection under some circumstances.⁴⁴ Nine years later the Court suggested in *Schad v. Mt. Ephraim* that “nude dancing is not without its

Pornography. They contained explicit drawings and pictures of groups of two or more people engaging in explicit sexual activities, with genitals often showing. *Id.* at 18.

⁴⁰ *Id.* at 24-25.

⁴¹ See *Miller*, 413 U.S. at 27 (“Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law”); Simon, *supra* note 8, at 193 (“The Court has used the *Miller* test to deny First Amendment protection only to the most sexually explicit and hard-core pornography.”).

⁴² See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (“We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene.”).

⁴³ McBride, *supra* note 14, at 291 n.19; Servodidio, *supra* note 13, at 1234-35; see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (establishing protection for broadcasting); *Jenkins*, 418 U.S. at 161 (protection for film); *Sable Communications of Cal. v. FCC*, 492 U.S. 115 (1989) (protection for dial-a-porn messages). See generally Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255 (1987-88) (providing a history of the Supreme Court’s obscenity jurisprudence and detailing its shortcomings).

⁴⁴ 409 U.S. 109, 118 (1972).

First Amendment protections from official regulation."⁴⁵ Finally, in *Barnes*, eight Justices agreed that nude dancing is expressive conduct whose regulation requires First Amendment analysis.⁴⁶

B. Content Discrimination Analysis

To best understand the evolution of this doctrine and its distortion in *City of Erie v. Pap's A.M.*, it is helpful to be familiar with the content-based/content-neutral distinction, the "primary doctrinal tool employed by the Supreme Court" in First Amendment analysis.⁴⁷ The Court most often applies a "motivational" or "government purpose" inquiry to determine whether a law was passed because the government disagreed with a particular message, as well as to gauge what level of scrutiny should be applied to the regulation.⁴⁸

Briefly, content-based laws restrict expression based on the specific message conveyed;⁴⁹ these can include laws that restrict a specific

⁴⁵ 452 U.S. 61, 66 (1981).

⁴⁶ See *Barnes v. Glen Theatre*, 501 U.S. 560, 565-66 (1991) (describing nude dancing as "within the outer perimeters of the First Amendment, though . . . only marginally so"); *id.* at 581 (Souter, J., concurring) ("[W]hen nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression. . . . [A]n interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection."); *id.* at 587-88 n.1 (White, J., dissenting) (noting that dancing "[i]nherently . . . is the communication of emotion or ideas"). Only Justice Scalia argued that nude dancing did not deserve First Amendment protection: "It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a general law regulating conduct pass normal First Amendment scrutiny . . ." *Id.* at 576.

⁴⁷ Hudson, *supra* note 14, at 57; see also Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413, 449-50 (1993) (concluding that the decade of the 1980s, where the Supreme Court consistently distinguished between content-based and content-neutral regulations, "produced the crystallization of First Amendment law"). For a thorough general discussion of content discrimination analysis, see Hudson, *supra* note 14, at 57-59; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) [hereinafter Stone, *Content-Neutral*]; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) [hereinafter Stone, *Content Regulation*]; Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991).

⁴⁸ Hudson, *supra* note 14, at 58-59; see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration." (citation omitted)).

⁴⁹ Hudson, *supra* note 14, at 58 n.13 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994))).

subject matter on their face (e.g., banning the publishing of a magazine on the subject of guns) and laws that narrowly proscribe a particular viewpoint (e.g., banning pro-gun control magazines).⁵⁰ Prior to *Renton v. Playtime Theatres*, content-based statutes always received strict scrutiny, even if they only restricted the time, place, or manner of expression.⁵¹

In contrast, content-neutral laws are not intended on their face to suppress a message, although they may have inadvertent restrictive effects on expression.⁵² The two most common forms of content-neutral laws are time, place, or manner restrictions and incidental regulations of symbolic speech.⁵³ Importantly, the Supreme Court originally established different tests for these two types of content-neutral regulations.

1. Time, Place, or Manner Regulation Test

A time, place, or manner restriction ("TPM")—which by definition is *not* a total ban—is content-neutral if it meets three criteria. First, the government must have a substantial interest in the regulation that is unrelated to the suppression of ideas; second, the means must be narrowly tailored to the goal of the regulation; and finally, reasonable alternative avenues of expression must be left open.⁵⁴ The tailoring requirement means that the regulation must merely "promote[] a substantial government interest that would be achieved less effectively absent regulation"—not that it be the "least restrictive means" available.⁵⁵ Furthermore, the TPM test requires that reasonable alternative avenues be made available for expression that is due

⁵⁰ Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904, 1906-07 (1989) [hereinafter *Free Speech Analysis*].

⁵¹ See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (applying strict scrutiny and striking down an ordinance banning movies containing nudity from outdoor drive-in movie theaters); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 101-02 (1972) (applying strict scrutiny and striking down an ordinance banning picketing near schools).

⁵² Hudson, *supra* note 14, at 60.

⁵³ See generally Stone, *Content-Neutral*, *supra* note 47; Stone, *Content Regulation*, *supra* note 47.

⁵⁴ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976); see also *Erznoznik*, 422 U.S. at 217 (holding that the means employed by a city ordinance banning films containing nudity from drive-in theaters are overbroad with respect to the legitimate interests asserted as the goals of the regulation); Williams, *supra* note 47, at 642 n.118 (collecting cases).

⁵⁵ Williams, *supra* note 47, at 643-44 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

some sort of First Amendment protection.

2. Incidental Burden/Symbolic Speech Test

Symbolic speech occurs when the expressive element of communication is conveyed through non-verbal speech (action), and the "speech" and "non-speech" elements are combined in the same expressive action.⁵⁶ In order to qualify as speech, the conduct must be intended to be communicative and the message conveyed must be reasonably understood by the viewer.⁵⁷ In *United States v. O'Brien*, the Supreme Court created a four-part test for content-neutral laws that create an incidental burden on symbolic speech. In *O'Brien*, the Court reviewed the conviction of a man for burning his draft card in violation of federal law. An "incidental" restriction is allowed under *O'Brien* if (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restrictions on First Amendment freedoms are no greater than is essential to the furtherance of that interest.⁵⁸ Furthermore, the Court clarified in *Grayned v. City of Rockford* that, in determining reasonableness under the fourth prong, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."⁵⁹

3. Collapse of the Two Standards

While the tests may appear similar at first glance, they are distinct in several ways. First, the Court created the *O'Brien* test in the face of the preexisting TPM test—signaling an intention to create a distinct standard.⁶⁰ Second, the TPM test's tailoring requirement is substantially weaker than the parallel requirement in the *O'Brien* test—it does not require that the restriction be "no greater than is essential to the furtherance of [the governmental] interest."⁶¹ Third, the TPM test requires consideration of "alternative avenues of speech," a prong

⁵⁶ *Id.* at 644; Simon, *supra* note 8, at 196.

⁵⁷ *Texas v. Johnson*, 491 U.S. 397, 404, 406 (1989).

⁵⁸ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁵⁹ 408 U.S. 104, 116 (1972).

⁶⁰ See Williams, *supra* note 47, at 648-50 (explaining the different origins of the two doctrinal tests).

⁶¹ *Id.* at 648 (citing *O'Brien*, 391 U.S. at 377).

framework.⁶⁷ The Court first faced the question of whether a city may use zoning regulations to single out adult-oriented businesses in *Young v. American Mini Theatres*.⁶⁸

The regulation at issue in *American Mini Theatres* required that an adult-oriented business⁶⁹ could not be located within one thousand feet of any two other "regulated uses" (ten types of establishments, including adult theaters) or within five hundred feet of any area zoned for residential use.⁷⁰ The ordinance itself did not distinguish between establishments presenting "obscene" material and those presenting "non-obscene" pornographic material under *Miller*. The Supreme Court, in upholding the regulation, admitted that the law—both facially and in its operation—deliberately placed a burden on a type of expression specifically because of its content.⁷¹

Despite this reality, the Court declined to apply the strict scrutiny normally required for content-based regulations and instead applied the lower standard of scrutiny pegged to content-neutral regulations.⁷² The Court accepted the City of Detroit's argument that the goal of the ordinance was not to target any particular subject matter because of the subject matter itself, but rather was to prevent the deterioration of

⁶⁷ For a detailed account of such efforts and reaction by the lower federal courts, see *id.*, discussing local governments' uses of TPM restrictions; Simon, *supra* note 8, at 197-99, discussing the Supreme Court's application of TPM restrictions, particularly the requirement that content neutrality be aimed at negative secondary effects.

⁶⁸ 427 U.S. 50 (1976). For general discussion of this case, see also Malmer, *supra* note 12, at 1296-97, which generally discusses *Young* and notes that the court's holding relied on the fact that the statute was content-neutral and that erotic material, although protected under the First Amendment, receives a lesser degree of protection; Francesca Ortiz, *Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Websites Through Land Use Laws*, 34 U.C. DAVIS L. REV. 929, 958-60 (2001), which discusses *Young* and its holding that the statute in question was permissible as being viewpoint neutral and that the rights at stake regarding sexual speech were deserving of a lower degree of First Amendment protection; Williams, *supra* note 47, at 629-32, which generally discusses *Young* and uses it as an example of the fact that the Supreme Court does not apply the content discrimination principle broadly; McDonald, *supra* note 10, at 343-46, which discusses the application of TPM restrictions in *Young* and determines that local governments relying on such restrictions will ultimately have to demonstrate the negative secondary effects adult entertainment has on the community in order to prevail; Simon, *supra* note 8, at 197-98, which discusses *Young* and its holding that zoning restrictions are permissible when viewpoint neutral.

⁶⁹ Here this term encompassed adult bookstores and motion picture theaters. *American Mini Theatres*, 427 U.S. at 53 n.5.

⁷⁰ *Id.* at 52.

⁷¹ *Id.* at 63.

⁷² Williams, *supra* note 47, at 629; see Servodidio, *supra* note 13, at 1238 (noting that Justice Stevens declined to apply strict scrutiny and holding that a lesser scrutiny is appropriate "on the basis of its content as long as it does not violate . . . 'neutrality.'").

completely absent from the *O'Brien* analysis.⁶²

Despite this segregated development, the Supreme Court has confusingly but effectively collapsed these two tests into a single, lenient test.⁶³ In *Clark v. Community for Creative Non-Violence*, the Court explicitly stated that there was "little, if any" difference between the TPM test and the *O'Brien* test and sustained an incidental burden regulation under a loose, combined standard.⁶⁴ The Court saw fit to justify this metamorphosis:

[I]f the time, place, or manner restriction on expressive sleeping . . . sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served.⁶⁵

Until *Pap's*, no dissenters drew attention to this doctrinal collapse.

C. *Application of the Content Discrimination Framework and Development of Secondary Effects Doctrine*

1. Doctrinal Shift in *Young v. American Mini Theatres*

Soon after it became clear that the *Miller* test would not support bans of nonobscene adult entertainment, local governments began to use time, place, or manner zoning restrictions⁶⁶ to restrict adult entertainment establishments, and they sought to justify such laws as content-neutral within the Court's content discrimination analytical

⁶² *Id.*

⁶³ *Id.* at 650-55 (detailing "the collapse of the two lines of doctrine"); see, e.g., *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804-17 (1984) (applying the *O'Brien* standard to a classic TPM regulation); see also David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 211-27 (1987) (discussing the hybridization of the two tests and whether or not such a step was warranted).

⁶⁴ 468 U.S. 288, 298 (1984).

⁶⁵ *Id.* at 298 n.8; see also *Ward v. Rock Against Racism*, 491 U.S. 781, 796-800 (1989) (noting that the Court in *Clark* held *O'Brien* to apply standards no different from those applied to TPM restrictions and reaffirming that holding).

⁶⁶ For a description of other means that local governments have used to restrict adult-oriented businesses, including alcohol restrictions and licensing, see Malmer, *supra* note 12, at 1281-304 (discussing cases in which local governments have attempted to limit adult entertainment through alcohol restrictions pursuant to regulatory powers conferred by the Twenty-First Amendment, TPM restrictions, and licensing restrictions).

urban neighborhoods caused by the aggregation of adult-oriented businesses.⁷³ These “secondary effects,”⁷⁴ the Court held, were not related to the suppression of expression.

Scholar David Hudson suggests that the Court neatly “substituted ‘viewpoint-neutrality’ for ‘content-neutrality’”⁷⁵ by concluding that the regulation met constitutional muster “because it [did] not restrict a certain “social, political, or philosophical message’ or ‘point of view.’”⁷⁶ Furthermore, the plurality supported the application of content-neutral analysis by asserting that nonobscene pornographic speech was of low value: “[S]ociety’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate”⁷⁷ In a sharp dissent, Justice Stewart characterized this shift as an “aberration” that was “a drastic departure from established principles of First Amendment law.”⁷⁸

2. Development of Secondary Effects Doctrine Through *City of Renton v. Playtime Theatres*

After holding prevention of harmful secondary effects—“non-communicative effects arising from the speech as a physical event in the world, not from the communicative aspect of the speech”⁷⁹—to be a valid government intention, the Court reaffirmed its permissive purposive analysis in *City of Renton v. Playtime Theatres*.⁸⁰ As Susan Wil-

⁷³ *American Mini Theatres*, 427 U.S. at 54-55.

⁷⁴ See *id.* at 71 n.34 (Stevens, J.) (noting that the ordinance is intended to avoid secondary effects, such as deterioration and crime, that accompany the establishment of adult theaters).

⁷⁵ Hudson, *supra* note 14, at 62 (quoting *American Mini Theatres*, 427 U.S. at 70).

⁷⁶ *Id.* at 62 (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); see also Malmer, *supra* note 12, at 1296-97 (“The majority also stressed that although the ordinance was not content neutral, it was viewpoint neutral.”).

⁷⁷ *American Mini Theatres*, 427 U.S. at 70 (emphasis added); see also Larry Alexander, *Low Value Speech*, 83 NW. U.L. REV. 547 (1989) (advancing the theory that the Court has deliberately created a brand of “low-value” speech entitled to less constitutional protection).

⁷⁸ *American Mini Theatres*, 427 U.S. at 84, 87 (Stewart, J., dissenting).

⁷⁹ Williams, *supra* note 47, at 630.

⁸⁰ See *City of Renton v. Playtime Theatres*, 475 U.S. 41, 46 (1986) (stating the result was “largely dictated by our decision in *Young v. American Mini Theatres*”). For a detailed analysis of *Renton*, see Servodidio, *supra* note 13, at 1238-41, which discusses *Renton* generally and notes its reliance on *Young* in permitting TPM restrictions that are content-neutral, but then changes the analysis of content neutrality to focus on secondary effects; *Free Speech Analysis*, *supra* note 50, at 1907-12; Ortiz, *supra* note 68, at 960-61, which discusses *Renton* and notes its holding that a statute can be permissible as content-neutral if its purpose is to prevent undesirable secondary effects.

liams concludes, "[a]fter *Renton*, it was clear that the Court had adopted the secondary effects analysis and its underlying purposive theory of content discrimination."⁸¹

The ordinance at issue prohibited any "adult motion picture theaters from locating within [one thousand] feet of any residential zone, single- or multiple-family dwelling, church, park, or school," but did not regulate any other types of adult-oriented businesses.⁸² The *American Mini Theatres* plurality had concluded that the Detroit ordinance in question was content-based, but nevertheless was entitled to less scrutiny based on the low value of the speech and secondary effects. The *Renton* Court advanced that proposition two dramatic steps further in holding the *Renton* ordinance to be constitutional.⁸³

First, the Court—while admitting the law facially discriminated against adult theaters⁸⁴—held for the first time that such an ordinance was content-neutral: "[T]he *Renton* ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'"⁸⁵ As such, the plurality invoked the TPM test and held that the ordinance both satisfied a substantial government interest and did not unreasonably limit alternative avenues of communication.⁸⁶ The vehicle the Court rode to this destination was the now fully-enunciated secondary effects doctrine. The City of *Renton* had claimed that its purpose in passing the ordinance was to combat secondary effects and to protect and preserve "the quality of its neigh-

⁸¹ Williams, *supra* note 47, at 632.

⁸² *Renton*, 475 U.S. at 43.

⁸³ David Hudson notes that *Renton* has been sharply criticized by legal commentators. See Hudson, *supra* note 14, at 65-66 (noting that *Renton* has been criticized as substantially revising First Amendment doctrine and as taking a wholly unprecedented approach to the understanding of content neutrality); see, e.g., TRIBE, *supra* note 15, at § 12-19, at 952 ("The *Renton* view should be quickly renounced. Carried to its logical conclusion, such a doctrine could gravely erode the first amendment's protections."); ROHR, *supra* note 47, at 452 ("[*Renton* is] a wholly unprecedented approach to the understanding of content-neutrality."); *Free Speech Analysis*, *supra* note 50, at 1908 ("Construed expansively to encompass viewpoint-specific resolutions, *Renton* substantially revises first amendment doctrine."); *The Supreme Court—Leading Cases*, 100 HARV. L. REV. 100, 196 (1986) [hereinafter *Leading Cases*] ("This reasoning marks a startling break with traditional First Amendment jurisprudence.").

⁸⁴ See *Renton*, 475 U.S. at 47 ("To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters.").

⁸⁵ *Id.* at 48 (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

⁸⁶ *Young v. Am. Mini Theatres*, 427 U.S. 50, 71-73 (1976) (plurality opinion).

borhoods, commercial districts, and the quality of urban life.”⁸⁷ For the *Renton* majority, the ordinance was not aimed at adult theaters, but rather at the secondary effects of such theaters on the surrounding community.⁸⁸

Second, as Gianni Servodidio cogently observes, *Renton* extended the secondary effects doctrine beyond the scope of *American Mini Theatres* in several ways.⁸⁹ First, the Court ruled that the City of Renton did not have to develop any specific, independent evidentiary basis to support its secondary effects purpose claim. The Court held Renton could simply use evidence already generated by other cities “so long as [it] is reasonably believed to be relevant to the problem that the city addresses.”⁹⁰ This profoundly lax standard allowed Renton—a city of 32,000 people that did not even have an adult theater when the ordinance was passed⁹¹—to use evidence gathered in Seattle and Detroit as evidence of Renton’s need to combat secondary effects that did not yet exist. Second, in a departure from *American Mini Theatres*, the Court demonstrated a willingness to allow the secondary effects rationale to profoundly restrict the availability of alternative avenues of expression.⁹² The *American Mini Theatres* Court had relied in part on the fact that the ordinance left “myriad locations”⁹³ where theaters could operate without violating the ordinance. The Renton ordinance, in sharp contrast, left only a small area of virtually unusable land open to use for adult theaters⁹⁴—a difference the Court was willing to ignore as mere conditions of the real estate market.⁹⁵ The Court was unwilling to consider the imposition of what could be

⁸⁷ *Renton*, 475 U.S. at 58 (Brennan, J., dissenting) (citation omitted).

⁸⁸ See *id.* at 47 (approving the district court’s characterization of the ordinance as aimed not at the content of the films but at the secondary effects); see also Hudson, *supra* note 14, at 64-66 (noting that the court, while relying on *Young*, expanded the doctrine to encompass the secondary effects on which it based its decision); Servodidio, *supra* note 13, at 1240-42 (“[T]he City Council’s actions were not justified on the basis of the content of sexually explicit films but rather on the secondary effects adult theatres would have on the surrounding community.”).

⁸⁹ Servodidio, *supra* note 13, at 1240-41.

⁹⁰ *Renton*, 475 U.S. at 51-52.

⁹¹ *Id.* at 44.

⁹² See Servodidio, *supra* note 13, at 1241-42 (noting that *Renton*, by allowing an ordinance that substantially limited the amount of real estate available, thereby restricted alternate avenues of expression).

⁹³ *Young v. Am. Mini Theatres*, 427 U.S. 50, 71-72 n.35 (1976).

⁹⁴ *Renton*, 475 U.S. at 53-54.

⁹⁵ See *id.* at 54 (stating that “respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees”).

termed a "major competitive disadvantage" on adult theater owners as a compelling argument for strict scrutiny.⁹⁶ These remarkable secondary effects extensions directly precipitated *Barnes*.⁹⁷

3. Splintered Entrenchment of Lower Level Scrutiny in *Barnes v. Glen Theatre, Inc.*

The U.S. Supreme Court heard *Barnes v. Glen Theatre, Inc.* after an en banc Court of Appeals for the Seventh Circuit held an Indiana public indecency statute to be an unconstitutional restriction on expressive nude dancing.⁹⁸ While the ordinances at issue in *American Mini Theatres* and *Renton* were zoning laws (location restrictions imposed on businesses), the Indiana statute at issue in *Barnes* banned all nudity in public and thus involved a direct restriction on nude dancing itself.⁹⁹ The law could only be satisfied if dancers wore pasties and a G-string.¹⁰⁰

⁹⁶ Servodidio, *supra* note 13, at 1241; see Simon, *supra* note 8, at 201 ("Despite the Court's refusal to disturb the trial court's finding that other land was available to establish an adult business, it may have in fact created 'a major competitive disadvantage'" (citations omitted)).

⁹⁷ Laurence Tribe feared this result when, after *Renton*, he suggested that the secondary effects doctrine could "gravely erode the first amendment's protections" and subject "most, if not all" speech to regulation. TRIBE, *supra* note 15, at § 12-19, at 952; see also *Leading Cases*, *supra* note 83, at 200 ("[*Renton*] has opened the door to restrictions of all speech on the basis of contrived secondary effects.").

⁹⁸ See *Miller v. South Bend*, 904 F.2d 1081, 1088 (7th Cir. 1990) ("Indiana's attempt to ban nude dancing in pursuit of its aforementioned interest is a forbidden interference and restraint because it seeks to withdraw this non-obscene and protected communication from the realm of public discourse."), *rev'd*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). For a careful analysis of the vivid dialogue between Judges Posner and Easterbrook in this case, see Blasi, *supra* note 13, at 625-39.

⁹⁹ See Hudson, *supra* note 14, at 67-68 ("While *American Mini Theatres* and *Renton* involved the concentration or dispersal of adult businesses, 'the essence of zoning,' *Barnes* involved a direct restriction on the nature of exotic dancing" (citation omitted)).

¹⁰⁰ The Indiana Code provided in relevant part:

- (a) A person who knowingly or intentionally, in a public place:
 - 1. engages in sexual intercourse;
 - 2. engages in deviate sexual conduct;
 - 3. appears in a state of nudity; or
 - 4. fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.
- (b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernably turgid state.

IND. CODE ANN. § 35-45-4-1 (1988) (current version codified with some differences in

Although the Court's decision was fractured and no more than three Justices agreed on any one rationale,¹⁰¹ eight of the nine Justices answered the threshold question of whether nude dancing constituted expressive conduct in the affirmative. The plurality opinion came to this conclusion reluctantly, admitting it was protected, but "only marginally so."¹⁰² The plurality then proceeded to characterize nude dancing as *symbolic* speech deserving of analysis under the *O'Brien* test.¹⁰³ This was a marked departure from precedent.¹⁰⁴

To accomplish this shift, the plurality had to ignore cases such as *Schad*, *American Mini Theatres*, and *Renton*, which recognized the inherent expressive quality of adult entertainment. The plurality declined to apply the TPM analysis requested by Indiana,¹⁰⁵ concluding that it was developed for "evaluating restrictions on expression taking place on public property which had been dedicated as a 'public forum.'"¹⁰⁶ The Court then disposed of the *Renton* precedent by noting that "although we have on at least one occasion applied it to conduct occurring on private property," the two tests "embody much the same standards" anyway.¹⁰⁷ As commentator Timothy Tesluk shrewdly suggests, "[b]y giving no reason for its departure from settled precedent in the classification of dancing, the *Barnes* plurality legitimized an exclusive

language at IND. CODE ANN. § 35-45-4-1 (1998)), *quoted in Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 n.2 (1991).

¹⁰¹ In fact, two concurring Justices "went out of their way to avoid having to endorse Chief Justice Rehnquist's [plurality opinion]." Blasi, *supra* note 13, at 639; *see also Barnes*, 501 U.S. at 572-81 (Scalia, J., concurring) (upholding the regulation not because it survives a lower level of First Amendment scrutiny, but because regulating conduct not specifically directed at expression is not generally subject to First Amendment scrutiny); *id.* at 581-87 (Souter, J., concurring) (agreeing with the plurality's application of the *O'Brien* test and noting that the activity in question is subject to some degree of First Amendment protection, but writing separately to express his view that the case should be decided principally on the state's interest in "combating the secondary effects of adult entertainment").

¹⁰² *Barnes*, 501 U.S. at 565-66. For a detailed examination of Chief Justice Rehnquist's opinion, see Blasi, *supra* note 13, at 639-44, which examines Rehnquist's enthusiastic approval of the enforcement of morality as a justification for regulating speech.

¹⁰³ *Barnes*, 501 U.S. at 566-68. *But see id.* at 596 (White, J., dissenting) ("[The plurality and Justice Scalia] would eviscerate the *O'Brien* test."). For a detailed discussion of Justice White's dissent, see Blasi, *supra* note 13, at 655-61, which examines Justice White's skepticism toward legal claims of a symbolic and unspecific character.

¹⁰⁴ *See, e.g., Renton*, 475 U.S. at 41 (applying a TPM analysis to an ordinance regulating the zoning of adult theaters).

¹⁰⁵ *Barnes*, 501 U.S. at 566.

¹⁰⁶ *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁰⁷ *Id.*

focus on conduct, and not communication, in the crucial first step of First Amendment analysis speech classification."¹⁰⁸ The Court then applied the "legislature-friendly"¹⁰⁹ *O'Brien* test, which, importantly, does not require the adequate alternative channels of communication requirement of the TPM test—in effect leaving open the possibility of a total ban on some expressive conduct.

The majority's splintered rationales are reflected keenly in their *O'Brien* analyses. The plurality concluded that the substantial government interest required by *O'Brien* was the interest in "protecting societal order and morality,"¹¹⁰ buoyed by a lengthy Indiana common law history of prohibiting indecency. In doing so, the plurality relied on several cases unrelated to First Amendment-protected conduct,¹¹¹ and admitted that it was impossible to actually know what the legislature intended because Indiana does not record legislative history.¹¹² The plurality then concluded that the law was "unrelated to the suppression of expression" because it was a *general law* aimed at all nudity.¹¹³

Justice Souter's concurrence opened another permissive door to

¹⁰⁸ Tesluk, *supra* note 10, at 1111. Tesluk argues that this approach "substitutes assertion for proof and avoids the core question concerning any alleged First Amendment activity: does the activity involve communication?" and suggests that by focusing their argument in this way, the plurality encouraged "courts to 'categorize an apparently limitless variety' of speech as conduct, thereby leading to 'reduced' or non-existent First Amendment protection." *Id.*; see also *Barnes*, 501 U.S. at 567 ("[A] sufficiently important governmental interest in regulating non-speech element[s] can justify incidental limitations on First Amendment freedoms." (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1967))).

¹⁰⁹ Tesluk, *supra* note 10, at 1112.

¹¹⁰ *Barnes*, 501 U.S. at 568.

¹¹¹ *Id.* at 569 (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), and *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

¹¹² *Id.* at 567-68.

¹¹³ See *id.* at 570-71 ("[The law] does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity."). Gianni Servodidio argues that "the breaking down of conduct into its component parts" used effectively in *O'Brien* proves problematic in application to the expression in *Barnes*. Servodidio, *supra* note 13, at 1250-51. In *O'Brien*, the case clearly involved speech and nonspeech elements, and *O'Brien*'s conviction was based on the non-communicative aspect of his conduct. In *Barnes*, however, the conduct in question had been previously held by the Supreme Court to have inherently expressive attributes. See *id.* at 1250 (discussing the plurality's demonstrated "discomfort with its earlier holding regarding the Constitutionality of nude dance"). But see *Barnes*, 501 U.S. at 589-90 (White, J., dissenting) (taking issue with the characterization of the Indiana statute as a "general law" since it does not apply to nudity in performances of theatrical productions, plays, ballets, or operas).

local governments.¹¹⁴ Differing from the plurality's rationale, Justice Souter's justification for the "substantial government interest" was the deterrence of "pernicious secondary effects" (such as "prostitution, sexual assault, and associated crimes") as advanced in *Renton*.¹¹⁵ Since the law was aimed directly at these secondary effects, and not the suppression of expression, it survived Justice Souter's *O'Brien* analysis because he doubted whether there was a causal connection between "the expression inherent in nude dancing" and the evils the State was seeking to prevent.¹¹⁶ Most importantly, Souter determined that a local government need not "await localized proof of those effects" and that Indiana could "reasonably conclude" there was a direct correlation without knowing "what the precise causes of the correlation really are."¹¹⁷ Therefore, Souter implicitly sanctioned the application of *Renton*'s secondary effects justification for zoning TPM restrictions to satisfy the potential total suppression of expression as an incidental effect of a general law under *O'Brien*.¹¹⁸ Finally, Justice Scalia argued against application of *O'Brien* at all: "It cannot reasonably be demanded, therefore, that every restriction of expression incidentally produced by a

¹¹⁴ For a detailed examination of Justice Souter's opinion, see Blasi, *supra* note 13, at 649-55, which examines Souter's desire to search for limiting principles in the secondary effects doctrine.

¹¹⁵ *Barnes*, 501 U.S. at 584 (Souter, J., concurring) (relying on *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)).

¹¹⁶ *Id.* at 585-86 (Souter, J., concurring). But see *id.* at 593 n.2 (White, J., dissenting) ("If Justice Souter is correct . . . the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive."); *id.* at 594 (White, J., dissenting) (asserting that if the State's interest was really in preventing evils like prostitution, the State should adopt restrictions that do not interfere with the expressive nature of nonobscene nude dance instead of "[b]anning an entire category of expressive activity").

¹¹⁷ *Id.* at 584-86 (Souter, J., concurring).

¹¹⁸ See Tesluk, *supra* note 10, at 1119 ("Justice Souter would regard the experiences and findings of any American municipality as presumptively valid in a determination of the non-causal link between a particular expressive activity and negative secondary effects."). Timothy Tesluk asserts that, under Souter's analysis, the government must suppress the expressive performances that correlate with negative secondary effects as opposed to being related to the expression (which would fail *O'Brien*'s third prong)—a rationally questionable distinction. *Id.* at 1120-21. Given the difficulty in differentiating between the two, Tesluk concludes that Justice Souter effectively gives a free pass on the third prong. *Id.* at 1121 ("Under Justice Souter's correlation analysis, states are essentially immune from an attack under the third prong of *O'Brien* because of the extreme difficulty of determining whether a speech prohibition is related or merely 'correlated' to the suppression of free expression."). Vincent Blasi notes that Justice Souter made no attempt to explain how the pasties and G-string requirement "could be thought, even speculatively, to have any incremental impact on the secondary effects he had posited." Blasi, *supra* note 13, at 654.

general law regulating conduct pass normal First Amendment scrutiny, or even . . . that it be justified by an 'important or substantial' government interest."¹¹⁹

The outcome of the *Barnes* decision was swift and dramatic—it “engendered an assault on the adult entertainment industry.”¹²⁰ Unquestionably, it entrenched a lower level of scrutiny for restrictions on adult entertainment. But it also left courts with no clear guidance as to how best to justify restrictive general laws.¹²¹ Aside from advancing three sharply different rationales, *Barnes*' result is confusing and internally contradictory: while the Court feels constrained by precedent to admit that nude dancing is protected expression, it then “label[s] nudity a noncommunicative component of some undefined whole.”¹²² Nine years later, the Court was asked to articulate a more cohesive decisional framework in *City of Erie v. Pap's A.M.*¹²³

III. APPLICATION OF NUDE DANCING DOCTRINE IN *CITY OF ERIE V. PAP'S A.M.*

In upholding the constitutionality of the City of Erie ordinance

¹¹⁹ *Barnes*, 501 U.S. at 576-77 (Scalia, J., concurring). Justice Scalia based his argument on the fact that the law at issue was a general law not specifically targeted at expressive conduct, and that the “First Amendment explicitly protects ‘the freedom of speech [and] of the press’—oral and written speech—not ‘expressive conduct.’” *Id.* at 576. For a detailed examination of Justice Scalia's opinion, see Blasi, *supra* note 13, at 644-49, which examines Scalia's rejection of the notion that nude dancing enjoys constitutional protection.

¹²⁰ Hudson, *supra* note 14, at 73. See, e.g., *id.* at 77-79 (highlighting twenty-seven widely varied types of secondary effects used to justify restrictions on expression). *Barnes* also spurred laws not related to adult entertainment. See Tesluk, *supra* note 10, at 1122 (observing that, in the year following *Barnes*, only four of the thirteen decisions citing *Barnes* have involved nude dancing performed as entertainment).

¹²¹ See Tesluk, *supra* note 10, at 1121-22 (suggesting seven ways *Barnes* weakened and confused the right to free expression).

¹²² Servodidio, *supra* note 13, at 1254; see also *id.* at 1254 n.162 (“Attempts to determine which element ‘predominates’ will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected.” (quoting John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975))). This conclusion is especially confusing given the Court's prior conclusion in *Schad* that “‘nudity alone’ does not place otherwise protected material outside the mantle of the First Amendment.” *Barnes*, 501 U.S. at 592 (White, J., dissenting) (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981)).

¹²³ The Sixth Circuit demonstrated this need when it complained that following Supreme Court precedent in this area was limited to “reading the tea leaves of *Barnes*.” *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994).

outlawing public nudity,¹²⁴ the *Pap*'s Court took another dramatic step toward applying low-level scrutiny and allowing municipalities to effectively suppress nude dancing.¹²⁵ Critically, however, the Court once again failed to achieve more than an embattled plurality to endorse its revised rationale.¹²⁶ Justice Scalia's fifth-vote concurrence displayed overt skepticism toward the plurality's reasoning,¹²⁷ while Justice Souter—member of the *Barnes* majority and original architect of the secondary effects doctrine now adopted by the plurality¹²⁸—questioned a significant portion of his *Barnes* concurrence in dissent.¹²⁹ Despite the Court's continued problems with mustering a convincing majority, the plurality made several substantial strides in its opinion. It emphatically strengthened the content-neutral analysis enunciated in *Barnes*, while at the same time it adopted the secondary effects justification of Justice Souter's *Barnes* concurrence as its overriding rationale. Both of these movements significantly altered the landscape of nude dancing First Amendment doctrine.

After disposing of the issue of justiciability,¹³⁰ the plurality began by acknowledging precedents that hold nude dancing to be expressive

¹²⁴ For the text of the ordinance, see *supra* note 22.

¹²⁵ *City of Erie v. Pap's, A.M.*, 529 U.S. 277 (2000) (holding that an ordinance banning public nudity was content-neutral and thus did not unconstitutionally burden the expressive conduct of a nude dancing establishment). For a concise summary of the Justices' positions, see Erin Buford Vinett, *Annual Survey of Caselaw: Constitutional Law*, 23 U. ARK. LITTLE ROCK L. REV. 1059, 1073-77 (2001).

¹²⁶ Justices O'Connor, Rehnquist, Kennedy, and Breyer joined the plurality opinion with respect to nude dancing doctrine. *Pap's*, 529 U.S. at 282.

¹²⁷ *Id.* at 302-10 (Scalia, J., concurring) (arguing that the case should have been dismissed as moot and disagreeing with the Court's mode of analysis on the merits).

¹²⁸ *Barnes*, 501 U.S. at 581-87 (Souter, J., concurring).

¹²⁹ *Pap's*, 529 U.S. at 316 (Souter, J., concurring in part and dissenting in part) (acknowledging that his "partial dissent rested on a demand for an evidentiary basis" that he failed to make in *Barnes*). Justice Stevens, writing for himself and Justice Ginsburg, authored a stinging partial dissent in part that attacked every aspect of the plurality opinion:

Under today's opinion, a State may totally ban speech based on its secondary effects—which are defined as those effects that "happen to be associated" with speech Because the category of effects that "happen to be associated" with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence.

Id. at 323 (Stevens, J., dissenting) (citing *Boos v. Barry*, 485 U.S. 312, 320-21 (1988)).

¹³⁰ *Id.* at 289 ("Although the issue is close, we conclude that the case is not moot."). Note that support for the mootness holding came from Justice Souter's partial concurrence in part; Justice Scalia, concurring only in the judgment, sharply disagreed with this aspect of the plurality opinion. *Id.* at 302 (Scalia, J., concurring) ("The case before us here is moot.").

conduct but ignored the scope of those holdings by concluding that nude dancing "falls only within the outer ambit of the First Amendment's protection."¹³¹ Writing for the majority, Justice O'Connor then "clarified" *Barnes* and held definitively that government restrictions on public nudity should be evaluated under the "less stringent" *O'Brien* test for content-neutral restrictions on symbolic speech if the city's purpose was unrelated to the protected expression.¹³² The ordinance at issue, the plurality concluded, was fundamentally similar to that in *Barnes*—a general prohibition that does not target nudity containing an erotic message.

Importantly—and unlike *Barnes*¹³³—the plurality made this determination in the face of evidence directly to the contrary.¹³⁴ In the preamble of the ordinance, the Erie City Council explicitly stated its purpose as "*limiting a recent increase in nude live entertainment within the City.*"¹³⁵ Justice Stevens' reading of the record revealed that a "near obsessive preoccupation" with nude dancing clubs was evident in City Council records.¹³⁶ Furthermore, counsel for the City stipulated to the trial court that nudity in theater productions would *not* be prevented.¹³⁷ The ordinance was specifically targeted at nude dancing establishments with regard to both its "applicable scope and the city's enforcement."¹³⁸

The plurality ignored this evidence of content discrimination in favor of another governmental purpose—combating negative secon-

¹³¹ *Id.* at 289 (relying on *Barnes*, 501 U.S. at 565-66, which viewed nude dancing as only marginally "expressive conduct within the outer perimeters of the First Amendment").

¹³² *Id.*

¹³³ For a detailed explanation of why the Erie ordinance differs from the Indiana law in *Barnes*, see *id.* at 325-32 (Stevens, J., dissenting), in which Justice Stevens stated: "Several differences between the Erie ordinance and the statute at issue in *Barnes* belie the Court's assertion that the two laws are 'almost identical.'"

¹³⁴ See *id.* at 326 (Stevens, J., dissenting) ("[B]oth the text of the ordinance and the reasoning in the Court's opinion make it pellucidly clear that the city of Erie has prohibited nude dancing '*precisely because of its communicative attributes.*'" (quoting *Barnes*, 501 U.S. at 577 (Scalia, J., concurring in judgment))).

¹³⁵ *Id.* at 327 (Stevens, J., dissenting) (emphasis added by Justice Stevens) (quoting the preamble to the ordinance).

¹³⁶ See *id.* at 331 (Stevens, J., dissenting) ("We should not stretch to embrace fanciful explanations when the most natural reading of the ordinance unmistakably identifies its intended target.").

¹³⁷ See *id.* at 328 (Stevens, J., dissenting) ("[A]s stipulated in the record, the city permitted a production of *Equus* to proceed without prosecution, even after the ordinance was in effect, and despite its awareness of the nudity involved.").

¹³⁸ *Id.*

dary effects. Justice O'Connor classified such evidence—no matter how obvious—to be that of only an “alleged illicit motive” into which the Court chose not to inquire.¹³⁹ Rather, the plurality independently designated the suppression of secondary effects as the predominate purpose of the ordinance. Furthermore, while the Court went to great lengths to distinguish between regulations targeting the primary effects of nude dancing—the effect on the audience—and those targeting secondary effects, such as impacts on public health, safety, and welfare,¹⁴⁰ it offered virtually no explanation of why the two purposes are not inherently related. Perhaps recognizing this quandary, Justice O'Connor analogized the Erie ordinance to the factual situations in *O'Brien*, *Clark v. Community for Creative Non-Violence*,¹⁴¹ and *Ward v. Rock Against Racism*¹⁴²—symbolic speech cases where general laws had incidental effects on expression. Justice O'Connor concluded that, although it *does* have an effect on protected speech, the instant case is similar because it produces only a *de minimis* effect on the overall expression by requiring the wearing of pasties and G-strings, and that such “*de minimis* intrusions on expression . . . cannot be sufficient to render an ordinance content based.”¹⁴³ Justice O'Connor noted further that a city is justified in enacting an ordinance that bans public nudity to combat the secondary effects that may result while simultaneously singling out one specific example of public nudity (e.g., nude dancing) as particularly problematic.¹⁴⁴ As such, the plurality left itself in a confusing position. After concluding that the intent of the ordinance was unrelated to the suppression of expression under the secondary effects rationale, the plurality also attempted to justify the ordinance by claiming its suppression of expression was minimal.

¹³⁹ *Id.* at 292 (citing *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (noting that the “Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive”)).

¹⁴⁰ *Id.* at 290-92 (“[T]he ordinance prohibiting public nudity is aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic messages conveyed by this type of nude dancing.”).

¹⁴¹ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a law prohibiting protesters from occupying space overnight on the National Mall).

¹⁴² *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding a guideline regulating sound systems in New York’s Central Park).

¹⁴³ *Pap’s*, 529 U.S. at 294.

¹⁴⁴ *Id.* at 295 (“[T]here is nothing objectionable about a city passing a general ordinance to ban public nudity . . . and at the same time recognizing that one specific occurrence of public nudity—nude erotic dancing—is particularly problematic because it produces harmful secondary effects.”).

In addition, the plurality, for the first time, used the secondary effects doctrine to justify restrictions other than the time, place, or manner of operation of a commercial enterprise—in this case, by upholding a general law that has the effect of a *total ban* on protected expression.¹⁴⁵ Moreover, Justice O'Connor for the first time coupled a secondary effects justification with the more permissive *O'Brien* symbolic speech test instead of the TPM test used in *American Mini Theatres* and *Renton*.¹⁴⁶ While the plurality advanced a weak argument that the ordinance was not actually a total ban (i.e., there is little difference between fully nude and pasties/G-string),¹⁴⁷ there is no question that it did not object to such a ban where it enthusiastically utilized the *O'Brien* test, which does not require that *any* ample alternatives exist.¹⁴⁸ In doing so—in the words of Professor Arnold Loewy—the court “subtly but completely, transmogrifies low value speech into no value speech or nonspeech.”¹⁴⁹

¹⁴⁵ Note that the plurality disagreed with this observation, and cited *Ward* as an instance where the Court relied on *Renton* to justify another type of restriction. *Id.* at 294-95. Justice Stevens correctly indicates, however, that the *Ward* regulation was actually a time, place, or manner restriction, and that *Ward* was not a secondary effects case, but a symbolic speech case. *Id.* at 321 (Stevens, J., dissenting). For a detailed argument that this use of the secondary effects doctrine “finds no support whatsoever in our precedents,” see *id.* at 319-23 (Stevens, J., dissenting). But see the opinion of James S. Malloy, who miraculously concludes “the Court’s decision was based on sound constitutional principles that are firmly established in precedent.” James S. Malloy, *A Content Neutral Public Nudity Ordinance That Satisfies the O’Brien Test May Require Erotic Dancers to Wear G-Strings and Pasties Without Violating Their First Amendment Right of Freedom of Expression*: City of Erie v. Pap’s A.M., 39 DUQ. L. REV. 705, 728 (2001).

¹⁴⁶ See also *id.* at 324-25 (Stevens, J., dissenting) (criticizing the Court for mistaking its secondary effects cases with the incidental burdens doctrine applied in cases such as *O’Brien*).

¹⁴⁷ *Id.* at 296-97. But see *id.* at 318 (Stevens, J., dissenting) (“Despite the similarity between the messages conveyed by the two forms of dance, they are not identical.”); *Miller v. South Bend*, 904 F.2d 1081, 1089-104 (7th Cir. 1990) (Posner, J., concurring) (describing a significant difference between the two messages and holding that nonobscene nude dancing of the barroom variety performed as entertainment was expression and thus entitled to a protection under the First Amendment, and that an Indiana statute, which on its face provided for a total ban on nudity in public places, was unconstitutional as applied to prohibit such dancing).

¹⁴⁸ See *Pap’s*, 529 U.S. at 319 (Stevens, J., dissenting) (“If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing the message is banned; if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.” (footnote omitted)).

¹⁴⁹ Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 220 (2001). Only speech of some value is entitled to protection, and the Court had already enshrined adult expression within the ambit of at least low-value speech in *American Mini Theatres*. Loewy makes the logical observation: “Obviously,

Applying the *O'Brien* test led the plurality to the rapid conclusion that the Erie ordinance passed constitutional muster in the same manner as the Indiana statute in *Barnes* did.¹⁵⁰ Justice O'Connor found the first prong—whether the government exercised authority pursuant to the Constitution—was satisfied by Erie's police power to protect public health and safety.¹⁵¹ To fulfill the important or substantial governmental interest prong (the second prong), the plurality found that Erie could have "reasonably rel[ied] on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood."¹⁵² Justice O'Connor credited the city council members' "expert judgment," contained in findings made over the course of a century about the negative effects of "lewd, immoral" activities as sufficient justification of the governmental interest required by *O'Brien*.¹⁵³ Next, the plurality's analysis of *O'Brien*'s third prong—whether government interest is unrelated to the suppression of free expression—grew even more def-

something is wrong here. If speech is protected, even low value speech, it cannot be precluded because it is immoral." *Id.* at 219. He concludes by suggesting that "[l]ow value speech, properly conceived, provides an important detente for utterances that are worthy of some constitutional protection, but are not the functional equivalent of full value political speech. . . . Stripped of its misuses, low value speech should be celebrated as a means to protect both free speech and society." *Id.* at 225.

John F. Wirenius exposes the fruitlessness of this type of speech value paradox: "[The] center needs to be fleshed out, both in terms of its justifications, and in application across the board. This means weeding out the false conflicts—discarding the nonsense about 'high-' and 'low-' value speech in favor of a functional approach to the First Amendment." JOHN F. WIRENIUS, *FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH* 123 (2000); see also R. GEORGE WRIGHT, *THE FUTURE OF FREE SPEECH LAW* 219-20 (1990) (arguing a basic thesis that free speech caselaw has become "pathologically complex," and that the scope of coverage of the Free Speech Clause should be determined by the broadest range of purposes or values that can coherently be thought to underlie the Free Speech Clause).

¹⁵⁰ *Pap's*, 529 U.S. at 296-97.

¹⁵¹ *Id.* at 296.

¹⁵² *Id.* at 297.

¹⁵³ Justice O'Connor noted:

The preamble to the ordinance states that 'the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about their resulting secondary effects.

Id. at 297-98.

erential by giving municipalities "sufficient leeway" to combat secondary effects however they see fit, and by deeming empirical data unnecessary since Erie had already shown a substantial government interest and documented its own experience on the issue.¹⁵⁴ Justice O'Connor candidly admitted that "requiring dancers to wear pasties and G-strings may not greatly reduce secondary effects," but asserted that "*O'Brien* requires only that the regulation further the interest in combating such effects."¹⁵⁵ Finally, Justice Souter's concurrence held that the ordinance satisfied *O'Brien*'s fourth prong—"that the restriction is no greater than essential to the furtherance of the government interest"¹⁵⁶—by returning to the tenuous argument that the effect of pasties and a G-string is *de minimis*; the opinion even made the surprising suggestion that other means, such as zoning, would quite possibly be no less of a burden than Erie's total ban.¹⁵⁷

Other opinions in the case are notable when contrasted with the plurality's rationale. Justice Scalia echoed the sentiments of his *Barnes* concurrence by asserting that it was not the communicative character of nude dancing that provoked the ban and then made the difficult argument that suppressing nude dancing is not the same thing as suppressing what nude dancing communicates.¹⁵⁸ Interestingly, Justice Scalia—who saw no need to apply the secondary effects doctrine at all—saw fit to comment that he is "highly skeptical" that the means chosen by Erie would do anything to further the governmental goal of reducing secondary effects.¹⁵⁹

Justice Souter also took issue with the plurality's use of the secondary effects doctrine. In recanting part of his *Barnes* concurrence,¹⁶⁰

¹⁵⁴ *Id.* at 298-300.

¹⁵⁵ *Id.* at 301. *But see id.* at 314 n.2 (Souter, J., concurring in part and dissenting in part) ("It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude."); *id.* at 324 (Stevens, J., dissenting) ("It is one thing to say, however, that *O'Brien* is more lenient It is quite another to say that the test can be satisfied by nothing more than the mere possibility of *de minimis* effects on the neighborhood.").

¹⁵⁶ *Id.* at 301.

¹⁵⁷ *Id.* *But see id.* at 316 (Souter, J., concurring in part and dissenting in part) (explaining that there were zoning ordinances already in effect to regulate nude dancing establishments, but they were not enforced by the City of Erie).

¹⁵⁸ *Id.* at 310 (Scalia, J., concurring).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 316 (Souter, J., concurring in part and dissenting in part) ("[M]y mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, 'Ignorance, sir, ignorance.'" (quoting *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950))).

Justice Souter demanded "some factual justification to connect [secondary effects] with the regulation in issue."¹⁶¹ Souter argued for an evidentiary basis for both the harm the municipality claims to flow from the expressive activity *and* the amelioration expected from the restriction imposed.¹⁶² He found no evidence yet established in the record to support either connection. The plurality responded to Justice Souter's arguments by asserting that *Renton* was still the controlling precedent on the secondary effects evidentiary standard regardless of the Justice's change of mind.¹⁶³ This sudden fallback on precedent is both ironic and unconvincing given the plurality's unbiased willingness to ignore far greater precedent belying a total ban on protected adult expression.

IV. DANCING AROUND THE FIRST AMENDMENT: THE DANGERS OF PAP'S

A. *Content Discrimination Analysis and a Potential Total Ban of Protected Expression*

Phrased succinctly by Professor Geoffrey Stone, the central concern of traditional content discrimination analysis is whether restrictions, "by limiting the availability of particular means of communication, can significantly impair the ability of individuals to communicate . . . to others."¹⁶⁴ To the extent that laws impede this end, they "frustrate individual 'self-fulfillment.'"¹⁶⁵ Professor Cass Sunstein echoed this First Amendment master value when he concluded that "viewpoint restrictions are . . . inconsistent with a central premise of any system of free expression—that the usual remedy for harmful speech is more speech rather than enforced silence."¹⁶⁶

Professor Stone argued convincingly in 1983 that the Court's approach to content-neutral review seemed "a sensible response" to the concern that content-neutral restrictions can diminish the opportuni-

¹⁶¹ *Id.* at 311 (Souter, J., concurring in part and dissenting in part).

¹⁶² *Id.* at 313; *see also id.* at 323 (Stevens, J., dissenting) ("To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible.").

¹⁶³ *Id.* at 295. But note that *Renton* employed a TPM analysis, not the more permissive *O'Brien* test.

¹⁶⁴ Stone, *Content Regulation*, *supra* note 47, at 193.

¹⁶⁵ *Id.* at 193; *see also id.* at 193 n.8 (collecting literature on values underlying the First Amendment).

¹⁶⁶ Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 611 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

ties for free expression.¹⁶⁷ That approach allowed the Court to examine carefully restrictions that “seriously threaten” First Amendment rights and to balance them against legitimate governmental interests.¹⁶⁸ However, even at that early date in the realm of this area of First Amendment jurisprudence, Stone posited that the Court “should be more skeptical of claimed government interests.”¹⁶⁹

In *Renton*, the Court was willing to characterize a restrictive zoning law as content-neutral because it was justified without reference to the adult content (i.e., based on secondary effects).¹⁷⁰ However, as a time, place, or manner restriction, the Court applied the more restrictive TPM test—which required ample alternative means of communication—and hinged its decision on the fact that five percent of available zoned land in *Renton* was still available to adult business owners.¹⁷¹ This reasoning dovetails with the primary focus of content discrimination analysis.

The Court’s application of content discrimination analysis in *Pap’s* has taken the opposite tack. In *Pap’s*, the plurality evinced a continued strong desire to view laws that, in effect, restrict adult businesses, as content-neutral. But *Pap’s*, like *Barnes*, involved a general law that had the potential to be a total ban on nude adult entertainment. The plurality chose to examine that law under *O’Brien’s* permissive symbolic speech analysis. Viewed in terms of the possibility of a total prohibition, the continued use of the traditional content discrimination analytical framework in such situations is extremely problematic, because it ignores the fundamental concern that *opportunities* for expression be preserved. Even if one were to grant that secondary effects were a legitimate justification for a content-neutral determination under the traditional framework, the *effect* of the law in question undermines the goal of that analysis to the point that it becomes an unten-

¹⁶⁷ Stone, *Content-Neutral*, *supra* note 47, at 77.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 79.

¹⁷⁰ See *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (holding that an ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school was a valid governmental response to the problems created by adult theaters and satisfied the dictates of the First Amendment, because the ordinance does not bar adult theaters altogether, and therefore was properly analyzed as a form of time, place, or manner regulation).

¹⁷¹ *Id.* at 53. The *Renton* Court went so far as to cite a critical passage from *American Mini Theatres* where the Court cautioned against the enactment of regulations that have “the effect of suppressing, or greatly restricting access to, lawful speech.” *Id.* at 54 (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 n.35 (1976)).

able constitutional tool, leading one to doubt whether upholding such a law is the type of "sensible response" of which scholars have previously approved.

One commentator, arguing for a restrictive interpretation of *Renton*, acknowledged this underlying problem and argued that construing *Renton*'s approval of the secondary effects/content-neutral analysis as limited to only subject-matter restrictions would preserve the central values of the First Amendment.¹⁷² In effect, the *Pap*'s endorsement of the potential total ban of nude dancing by a general nudity law is a type of viewpoint discrimination,¹⁷³ not subject-matter discrimination, as in the case of zoning laws that specifically regulate adult businesses. The result of the *Pap*'s general law is that one particular viewpoint (expressive message)—which is communicated by fully nude dancing itself—can be completely suppressed.¹⁷⁴ The *Pap*'s

¹⁷² See *Free Speech Analysis*, *supra* note 50, at 1912-17 (arguing that *Renton* should be construed as limited to only subject-matter-based restrictions on speech, such as time, place, or manner restrictions).

¹⁷³ Susan Williams offers a concise explanation of the continuum of discrimination in terms of the content category at which a regulation is aimed. She explains how viewpoint discrimination is at the most biased end of the spectrum, while subject-matter restrictions lie in the middle. Williams, *supra* note 47, at 655-57.

The Court of Appeals for the Seventh Circuit used this rationale when it invalidated an anti-pornography law in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The court of appeals held the law unconstitutional on grounds of viewpoint discrimination because it "established an 'approved' view of women." *Id.* at 328. The Supreme Court summarily affirmed. See Sunstein, *supra* note 166, at 609 (discussing the court of appeals' rejection of a law that acted as a form of "thought control").

¹⁷⁴ See *Pap*'s, 529 U.S. at 318-19 (Stevens, J., dissenting) (asserting that even if the difference in message between fully nude dancing and dancing with pasties and a G-string is very small, there is still a difference and thus the law restricts a particular viewpoint). The most elegant explanations of the expressive viewpoint of nude dancing over less revealing forms of erotic dance are offered by Judge Richard Posner as part of a concurring opinion in *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1089-104 (7th Cir. 1990). Posner aptly observes that

[t]he goal of the striptease—a goal to which the dancing is indispensable—is to enforce the association: to make plain that the performer is not removing her clothes [for other reasons]; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex. . . . The sequel is left to the viewer's imagination. This is the "tease" in "striptease."

Id. at 1091. Posner expounds on this characterization in *Sex and Reason*: "[T]here is an implicit narrative which the viewer is left to complete in his imagination. That is why it is important that the striptease not end in a bathing suit, because a bathing suit is for swimming, not for sex. . . . The erotic signal . . . imparts to striptease an unmistakably, and ordinarily a dominant, aphrodisiacal effect." POSNER, *supra* note 1, at 364 (1992). As Steven Gey appropriately concludes, opponents have "fundamentally misconstrued the nature of pornography and that only by accepting their cropped view of

holding ignores this distinction, and in doing so forgets that "viewpoint discrimination poses a more serious threat to [F]irst [A]mendment values: by doing less than it might government sometimes does more than it may."¹⁷⁵

B. *Purposive Theory and Ignorance of Audience Viewpoint*

Stemming directly from this first problem is a second danger: that the governmental "purposive" analysis, approved by the Court in *Barnes* and validated in *Pap's*, does not devote enough attention to the motive requirement of *Renton*—that the law be "justified without reference to the content of the regulated speech."¹⁷⁶ By not applying a more reasonable and careful motive analysis, the plurality has aggravated the difficulty in identifying laws that are portrayed as subject-matter restrictions but really are viewpoint restrictions.¹⁷⁷ Professor

communication and ideas can their repressive goals be justified." Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1566 (1988); see also *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part sub nom. Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) ("[W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye."); JUDITH LYNNE HANNA, *DANCE, SEX AND GENDER: SIGNS OF IDENTITY, DOMINANCE, DEFIANCE AND DESIRE* 22-23 (1988) (discussing the sexuality of dance and its ability to cause vicarious, empathic experiences in its spectators).

¹⁷⁵ *Free Speech Analysis*, *supra* note 50, at 1915. This commentator argues in detail for the vitality of the subject-matter/viewpoint distinction and appropriate, differing levels of scrutiny. See *id.* at 1913-17; see also Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 83-88 (1978) (examining the Courts' varying approaches to dealing with challenges to content-based restrictions and the distinction between subject matter and viewpoint regulations). But see Sunstein, *supra* note 166, at 612-13 (arguing that anti-pornography legislation is aimed at harms, not viewpoint, and that *Renton* should be read to focus the analysis on content, not viewpoint).

¹⁷⁶ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (emphasis omitted) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Elena Kagan argues that First Amendment law actually has as its primary, but unstated, object the discovery of improper governmental motives, and that application of First Amendment law is really "a kind of motive-hunting." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996). Kagan asks the obvious question—why would an analytical framework unconcerned with illicit motives have generated the content-based/content-neutral distinction in the first place? *Id.*

¹⁷⁷ See *Free Speech Analysis*, *supra* note 50, at 1922 ("[C]ourts should be hesitant to accord deferential treatment to seemingly viewpoint-neutral subject matter restrictions."); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 203-06 (1982) (arguing in favor of the distinction). But see Note, *Content*

Sunstein (although admittedly arguing against viewing anti-pornography regulations as viewpoint restrictions) suggests that "[w]hether a classification is viewpoint-based thus ultimately turns on the viewpoint of the decisionmaker."¹⁷⁸ If so, the *Pap*'s Court, by refusing to engage in a thorough motive investigation, foreclosed the possibility of an accurate viewpoint restriction determination.

In response, Elena Kagan argues that the content-based/content-neutral distinction implicitly flushes out improper purposes.¹⁷⁹ While that may be true elsewhere, it appears to have failed dramatically in the case of nude dancing, where the *Pap*'s Court made its content-neutral determination in the face of direct evidence of improper motive. In *Pap*'s, there was clear evidence that the Erie City Council not only passed the ordinance for the express purpose of targeting and reducing the number of nude dancing establishments, but that it also intended to enforce the general nudity law solely against such establishments. The Preamble to the Erie ordinance specifically stated that the "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana . . . for the purpose of limiting a recent increase in the nude live entertainment within the City."¹⁸⁰ Furthermore, City of Erie Counsel stipulated that mainstream theater productions involving nudity would be allowed to continue undeterred.¹⁸¹

While no such positive evidence existed in *Barnes*, the *Pap*'s plurality—when directly confronted with it—declined to consider the extrinsic evidence of improper motive.¹⁸² But the plurality glaringly

Regulation and the Dimensions of Free Expression, 96 HARV. L. REV. 1854, 1867-72 (1983) (arguing for an alternative approach).

¹⁷⁸ Sunstein, *supra* note 166, at 615; see also STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 18-19 (1990) (noting that an "analysis of the first amendment can not be reduced to a concern about government motives").

¹⁷⁹ See Kagan, *supra* note 176, at 451 (contending, in fact, that flushing out improper purpose is a goal of the doctrine).

¹⁸⁰ *Pap*'s, 529 U.S. at 327 (quoting App. to Pet. for Cert. at 42a, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (1999) (No. 98-1161)).

¹⁸¹ *Id.* at 327-29; see also *id.* at 328 (Stephens, J., dissenting) ("As presented to us, the ordinance is deliberately targeted at Kandyland's type of nude dancing (to the exclusion of plays like *Equus*), in terms of both its applicable scope and the city's enforcement.").

¹⁸² See *id.* at 292 ("[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."). Justice Stevens took issue with what he characterized as an overbroad interpretation of *O'Brien*. He suggested that what *O'Brien* actually stated was that a law would not be struck down on the assumption of a wrongful purpose or motive. He also indicated that there was no need to do so in the instant case because the unambiguous statements of the city council members were

failed to acknowledge that in light of such evidence, the law might not have been "otherwise constitutional," since the truth about it would have been revealed: it was really a viewpoint restriction that required strict scrutiny. This blissful ignorance (or deliberate unwillingness to address the issue) is frustrating; it disguises the real question of constitutionality by skipping the spirit of *Renton*'s crucial motive analysis altogether. Narrowly defined, *Renton* does not permit the circumvention of strict scrutiny adopted by the plurality in *Pap's*.¹⁸³

Part and parcel of this problem is the Court's continued refusal to include an analysis of discrimination from the *audience* viewpoint in nude dancing cases.¹⁸⁴ Content-neutral regulations "can have a discriminatory effect on the speech market available to would-be listeners."¹⁸⁵ As Susan Williams suggests, "the relevant question concerning discrimination is whether the impact of the regulation falls evenly across the speech marketplace or disproportionately on one part of it."¹⁸⁶ From the perspective of the audience, even a regulation that could be justified as "content-neutral" might prohibit some kinds of speech more than others. This question of audience discrimination—a question which should be asked and answered independent of the government's purpose—is especially relevant in nude dancing cases. From the audience perspective, the *Pap's* law completely eliminates a

already in the record. *Id.* at 330 n.16; see also *TRIBE*, *supra* note 15, at § 12-5, at 819-20 (suggesting that the Court's interpretation of *O'Brien* is overbroad).

¹⁸³ See *Free Speech Analysis*, *supra* note 50, at 1923 ("Broadly construed, *Renton* permits circumvention of strict scrutiny. . . . To avoid this result, courts must conduct more than a cursory motive inquiry.").

¹⁸⁴ The special involvement of the audience in this type of entertainment militates strongly in favor of considering audience viewpoint. See *supra* note 174 (listing and discussing sources dealing with nude dancing and its viewers); see also *PORN 101*, *supra* note 12, at 289 ("Plainly the porn viewing experience is more involved than first meets the eye; where the actual imagery is sometimes less significant than the feelings, thoughts, and associations going on inside the viewer's head."). The audience, in words borrowed from Milton, is able to "consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better." *ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES* 543 (1941).

¹⁸⁵ Williams, *supra* note 47, at 658; see also *id.* at 658-60 (describing views on audience discrimination by content-neutral regulation); Kagan, *supra* note 176, at 423-27 (examining perspectives on the First Amendment including the "speaker-based" and "audience-based" models); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 *GEO. WASH. L. REV.* 757, 764-71 (1986) (arguing that content-neutral regulations have problematic discriminatory effects); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 *STAN. L. REV.* 113, 130-31 (1981) (arguing that content-neutral regulations should not receive less scrutiny than other types of restrictions).

¹⁸⁶ Williams, *supra* note 47, at 658.

particular content category; furthermore, enforcement actions fall disproportionately on that category as a result of the government's social policy choices. The plurality in *Pap*'s, however, declined to even examine this question, focusing its analysis solely on the government's purpose rather than on the law's impact on particular audiences. When justified by secondary effects, that analysis completely forestalled any consideration of audience discrimination.¹⁸⁷

To illustrate this concern, Williams offers a hypothetical that highlights the importance of pamphleteering to an audience of poor people, who cannot afford other ways of publicizing their message.¹⁸⁸ A general law restricting pamphleteering would impact that audience disproportionately, raising a substantial question of content discrimination. Similarly, audience discrimination is particularly problematic in the case of *live*, nude dancing establishments. Such venues are frequently limited sharply by number and separated by geography; they are often few and far between. Laws such as the Erie Ordinance may foreclose all access to this particular form of entertainment for those without access to transportation and financial means to travel great distances to operating clubs in other localities. Hard-core adult movie theaters and adult video rental stores within the same geographic area are not adequate substitutes, as their messages are decidedly different from live, expressive dance.¹⁸⁹ Similar to pamphleteering regulations, a general law prohibiting nudity thus impacts the geographically restricted live nude dancing audience disproportionately, raising a real question of content discrimination that will be difficult for the Court to continue to ignore.

¹⁸⁷ Note that, despite substantial advocacy by commentators, the Supreme Court has yet to exhibit any real approval of audience-discrimination analysis. See *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 n.30 (1984) (noting that solicitude to the concept of audience discrimination has "practical boundaries").

¹⁸⁸ See Williams, *supra* note 47, at 658-59 (positing that, from the perspective of the audience deprived of particular points of view, restrictions with a non-communicative purpose can raise serious questions of content discrimination).

¹⁸⁹ See *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1099 (7th Cir. 1990) (Posner, J., concurring) ("There are exceptions to the parity of the live and the canned performance. . . . [I]t might be possible to distinguish between live and canned nude dancing on the ground that in the former the dancers are accessible to the audience . . .").

C. Runaway Secondary Effects Doctrine

1. Troubling Expansion

The *Pap's* plurality dangerously extended the secondary effects doctrine beyond existing precedent. For the first time, the doctrine was used to justify a total prohibition of a form of protected expression.¹⁹⁰ Never before had the Court used the secondary effects justification in an adult entertainment case to sustain anything other than a time, place, or manner zoning restriction.¹⁹¹ In both *American Mini Theatres* and *Renton*, essential elements of the holdings were that the ordinances be directed only at the places where expression might be presented, and that the regulations did not interfere with content. A critical argument in each of the opinions was that the regulations under consideration did not significantly curtail adult entertainment presentations or the opportunity for a message to reach an audience. However, the *Pap's* plurality refused to recognize this explicit limitation, maintaining that there was no total ban because only "one particular means" was "limit[ed]."¹⁹² Because the plurality could not rely on *Renton*, it had to fall back upon an analogy to *O'Brien*, which was not even a secondary effects case.¹⁹³

This extension of the secondary effects doctrine is dangerous because it undermines what the *Renton* Court described as "the fundamental principle that underlies our concern about 'content-based'

¹⁹⁰ Cf. Rondi Thorp, *City of Erie v. Pap's A.M., The First Amendment: Wounded in the War for Freedom of Expression*, 36 GONZ. L. REV. 183, 187-201 (2000-2001) (arguing that the Court should have passed on this dangerous holding and instead opted to either strike down the Erie statute based on a theory of statutory overbreadth, or upheld it by classifying nude dancing as obscenity under *Miller*). Although I seriously question whether either of these actions has real potential for success, I credit Ms. Thorp for keeping a focus on the benefits of avoiding the dangerous corner into which the Court has painted itself.

¹⁹¹ While Justice Souter advanced this theory in his *Barnes* concurrence, the plurality declined to adopt it and justified its opinion with arguments about the traditional power of the state to regulate for the health, welfare, and morality of the people. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-70 (1991) (providing an understanding of the plurality's reasoning on this point); see also *Pap's*, 529 U.S. at 317-18 (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.").

¹⁹² 529 U.S. at 293.

¹⁹³ *O'Brien* was decided as a symbolic speech/incidental burdens case. See *United States v. O'Brien*, 391 U.S. 367, 376-86 (1968) (outlining the Court's analysis of the First Amendment issues in this case).

speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'¹⁹⁴ Indeed it was only "with this understanding in mind" that the *American Mini Theatres* majority decided that secondary effects-justified regulations be examined under the standards applicable to TPM restrictions, requiring ample alternative avenues of communication to exist.¹⁹⁵ Likewise, the Renton ordinance only "'circumscribe[d] adult establishments' choice as to location."¹⁹⁶ In effect, the *Pap's* plurality directly contradicted the Court's prior statement that "the First Amendment requires . . . that [the city] refrain from *effectively denying* respondents a reasonable opportunity to open and operate . . . within the city."¹⁹⁷ Likewise, the *Pap's* decision is irreconcilable with the Court's holding in *Schad*: "[t]he Court did not imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide."¹⁹⁸ The only difference between *Pap's*, on the one hand, and *American Mini Theatres*, *Renton*, and *Schad*, on the other hand, is that Erie disguised its attempt in a general law. Erie's nudity law in effect does exactly what those cases admonished could not be allowed, but the *Pap's* plurality was simply willing to ignore this wolf in sheep's clothing.¹⁹⁹

As Justice Stevens observed in his dissent, "[u]nder today's opinion, a State may totally ban speech based on its secondary effects—which are defined as those effects that 'happen to be associated' with speech."²⁰⁰ The grave implications of this extension may be felt in all areas of protected speech. *Pap's* reinforces Justice Brennan's original

¹⁹⁴ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (citing *Police Dep't of Chicago v. Mosley*, 404 U.S. 92, 95-96 (1972)).

¹⁹⁵ *Id.* at 49.

¹⁹⁶ *Id.* at 48 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 82 n.4 (1976)).

¹⁹⁷ *Id.* at 54 (emphasis added).

¹⁹⁸ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71 (1981).

¹⁹⁹ See also *Pap's*, 529 U.S. at 322 (Stevens, J., dissenting) ("The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship."). Many jurisdictions have applied the secondary effects doctrine to justify nude dancing regulations. See Hudson, *supra* note 14, at 73-74 n.127 (listing post-*Barnes* cases that apply the secondary effects doctrine to regulate nude dancing establishments); see also Clinton P. Hansen, Note, *To Strip or Not to Strip: The Demise of Nude Dancing and Erotic Expression Through Cumulative Regulations*, 35 VAL. U. L. REV. 561, 584-601 (2001) (describing nine different types of regulations that have some potentially successful secondary effects justification and which, when used together, constitute a cumulative adult use ordinance).

²⁰⁰ *Pap's*, 529 U.S. at 323 (citing *Boos v. Barry*, 485 U.S. 312, 320-21 (1988)).

fear that the secondary effects doctrine “creates a possible avenue for governmental censorship whenever censors can concoct ‘secondary’ rationalizations for regulating the content of political speech.”²⁰¹ Already, the Supreme Court has indicated a willingness to extend the application of the secondary effects doctrine to time, place, or manner restrictions on “high-value” political speech. In *Boos v. Barry*, a plurality suggested that a District of Columbia law restricting picket signs within five hundred feet of an embassy could be constitutional if it focused on the secondary effects of picket signs such as “congestion,” “interference with ingress or egress,” or “visual clutter.”²⁰² Indeed, in the past ten years, the secondary effects doctrine has been used to justify regulation of all kinds of speech, including commercial, noncommercial, and political speech.²⁰³ Instead of reining in this runaway censorship vehicle, the *Pap*’s Court gave its overt approval for total suppression of nude dancing under a general law, thereby leaving open the possibility to develop more complete bans on other types of protected speech beyond mere time, place, or manner restrictions.

2. Evidentiary Basis and the Relationship Between Secondary Effects and Regulations

Pap’s raises two major evidentiary concerns regarding the secondary effects doctrine. As Justice Souter reads First Amendment precedent, a regulating government should have to show both real harms it claims flow from an expressive activity and evidence that the regulation in question will alleviate them in a direct and material manner.²⁰⁴ With regard to the first prong, real harms, the *Pap*’s plurality dangerously reinforced the holding that municipalities need not develop an independent evidentiary basis for the secondary effects they use to justify a regulation of protected speech. Instead, the plurality was willing to trust the city’s “expert judgments” and accept its “reasonable belief that the experience of other jurisdictions is relevant

²⁰¹ *Boos v. Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and concurring in the judgment).

²⁰² *Id.* at 321; *see also* Hudson, *supra* note 14, at 74-77 (detailing the expansion of secondary effects doctrine outside the adult entertainment industry); Servodidio, *supra* note 13, at 1241-44 (discussing the expanding notion of secondary effects after *Boos*).

²⁰³ *See* Hudson, *supra* note 14, at 77-93 (discussing regulations on commercial, noncommercial, and political speech justified by lower federal courts on the basis of secondary effects).

²⁰⁴ *Pap*’s, 529 U.S. at 313-14 (Souter, J., concurring in part and dissenting in part).

to the problem it is addressing."²⁰⁵

The plurality continued to allow municipalities to analogize evidence gathered by other cities regardless of whether or not it was obtained by studying a city of the same size, location, demographics, concentration of adult business, or even types of adult businesses. Three commentators recently evaluated the scientific validity of the secondary effects studies most often relied upon by cities by abstracting and analyzing their methods and empirical findings.²⁰⁶ Their scientific investigation revealed that, with few exceptions:

[T]he methods most frequently used in these studies are seriously and often fatally flawed. Specifically, these studies do not adhere to professional standards of scientific inquiry and nearly all universally fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses or a reversal of the presumed negative effect.²⁰⁷

In a footnote in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court observed that, in a case involving scientific evidence, evidentiary reliability will be based on scientific validity.²⁰⁸ The commentators suggest that the vast majority of secondary effects studies do not meet this requirement because they fail to meet four criteria for insuring a scientifically valid study,²⁰⁹ making them little more than “junk science.”²¹⁰ Furthermore, the ten most often cited²¹¹ of these fatally

²⁰⁵ *Id.* at 297-98 (citation omitted).

²⁰⁶ Bryant Paul et al., *Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL’Y 355 (2001).

²⁰⁷ *Id.* at 367.

²⁰⁸ 509 U.S. 579, 590 n.9 (1993).

²⁰⁹ Those criteria consist of the following:

1. A control area equivalent to the area containing the adult entertainment business;
2. A sufficient period of elapsed time prior to and following opening of the adult establishment;
3. A crime rate measured according to the same valid source for all areas considered, with crime information factual and reliable; and
4. Properly conducted survey research.

Paul et al., *supra* note 206, at 372-75.

²¹⁰ *Id.* at 370.

²¹¹ The ten most cited studies are (with number of citations in parentheses):

1. Indianapolis, IN - 1984 (22)
2. Phoenix, AZ - 1979 (18)
3. Los Angeles, CA - 1977 (13)

flawed studies continue to be shared, referenced, and cited by more and more cities—continuing the web of reliance upon fundamentally unreliable evidence.²¹² The social scientific study aptly concluded:

[T]here is sufficient room for a serious challenge to the assumption made by communities across the United States that past studies of secondary effects show an empirical relationship between adult businesses and negative effects. . . . [T]here is presently no legitimate basis for extending the secondary effects doctrine . . . based on these studies.²¹³

In *Pap's*, the plurality condoned the fact that Erie relied on the same study used by the City of Renton—a Seattle study of the relationship between zoning and secondary effects of adult theaters.²¹⁴ While it might have been logical for Renton to use the Seattle study (both zoning, both adult theaters),²¹⁵ allowing Erie to use that same study falls far short of the evidentiary basis the Court should have required. The twenty-year old study involved the secondary effects of a different type of entertainment in a much larger, urbanized city and its relationship to a completely different type of regulation. Thus, a Seattle

4. St. Paul, MN - 1987 (13)

5. Austin, TX - 1986 (10)

6. St. Paul, MN - 1987, 1988 (9)

7. Amarillo, TX - 1977 (7)

8. Detroit, MI - 1972 (5)

9. Beaumont, TX - 1982 (5)

10. Kent, WA - 1982 (4)

Id. at 369. Cities use combinations of these studies today, often cross-referencing twenty-year-old studies and duplicating reliance on major studies. For example, the City of Erie relied on a Seattle study, which had relied on the 1982 Kent, WA study, which had previously relied on several 1970s studies. *Id.* The trial of questionable science is unmistakable and continues today.

²¹² *Id.* at 387. For example, the Indianapolis study, which has been relied upon by no fewer than twenty-two communities as evidence of a relationship between adult establishments and negative secondary effects, is terribly flawed and contains serious methodological flaws—"[t]hus, the potential exists that as many as twenty-two zoning ordinances have been founded on a false premise about the substantial government interest in regulating the location of these businesses." *Id.* at 387-88.

²¹³ *Id.* at 391.

²¹⁴ See *Pap's*, 529 U.S. at 296-97 ("And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* . . . to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood."). The plurality further suggested that "findings" of the city council over a century of secondary effects flowing from lewd and immoral activities constituted evidence of real harms. *Id.* at 297-98. Justice Souter aptly countered this point by responding that the city council assumes its own conclusion, and that however much the city councilors believe their conclusions to be true does not decide the evidentiary question. *Id.* at 314 (Souter, J., concurring in part and dissenting in part).

²¹⁵ City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

adult theater zoning study is not rationally transferable as an evidentiary basis for Erie's general nudity law.²¹⁶ Justice Souter noted this inconsistency when he found in the record a "failure to reveal any evidence on which Erie may have relied."²¹⁷ Indeed, Souter was so troubled by the lack of evidentiary basis that he lamented the portion of his *Barnes* concurrence in which he failed to "demand reliance on germane evidentiary demonstrations."²¹⁸

The acceptance of this most flimsy of proof of real harms is nothing short of a signal to municipalities that even the most transparent, strained suggestion of a "real harm" will satisfy the plurality's scrutiny.²¹⁹ Tellingly, the original proponent of the secondary effects justification in nude dancing cases, Justice Souter, admitted his error in not demanding better evidence. The plurality, however, marched on and suggested that the proof required for a total ban under a general law is no greater than that required for a time, place, or manner restriction that leaves open ample alternatives. After entrenching secondary effects as a means to a total ban, the *Pap's* plurality lowers the evidentiary bar for this greater suppression.²²⁰

Second, the plurality accepts Erie's secondary effects justification even though it bears no reasonable or rational relationship to the particular means chosen to alleviate those harms. This equally troubling development signals to municipalities that their regulatory means do not even have to pass a minimum rationality (i.e., "laugh") test to be

²¹⁶ See Ortiz, *supra* note 68, at 963 ("[The *Pap's*] plurality . . . seemed to stretch what could be considered reasonable.").

²¹⁷ *Pap's*, 529 U.S. at 314 (Souter, J., concurring in part and dissenting in part).

²¹⁸ *Id.* at 315 (Souter, J., concurring in part and dissenting in part).

²¹⁹ An eyebrow-raising example of this flimsy proof requirement in action can be found in *Restaurant Row Associates v. Horry County*, 516 S.E.2d 442, 448 (S.C.), *cert. denied*, 528 U.S. 1020 (1999), in which the South Carolina Supreme Court held that a city did not have to make an individualized showing of secondary effects even when the plaintiff adult entertainment establishment produced expert testimony that no negative secondary effects would result.

²²⁰ This treatment of secondary effects reasoning does not rectify confusion in the lower courts. Compare *Secret Desires Lingerie, Inc. v. City of Atlanta*, 470 S.E.2d 879, 880 (Ga. 1996), in which the Georgia Supreme Court struck down an ordinance regulating lingerie modeling studios because the city had failed to consider secondary effects caused by those *specific* types of businesses, with *ILQ Inv., Inc. v. City of Rochester*, 25 F.3d 1413, 1417-18 (8th Cir. 1994), in which the Eighth Circuit upheld use of a general secondary effects rationale for a regulation zoning bookstores that sold both adult and mainstream material, despite the fact that the ordinance was tailored based on links to adult businesses generally. See also Donald B. Verrilli, Jr., & Deanne E. Maynard, *Playboy and City of Erie: Shift Toward Balancing*, COMM. LAW., Fall 2000, at 12, 16 (describing how secondary effects arguments are "inherently destabilizing").

accepted as a legitimate response to specified secondary effects.²²¹ Such permissive analysis belies the Court's own prior conclusion. In *Reno v. ACLU*, seven Justices agreed that "the mere fact that a statutory regulation of speech was enacted for [an] important purpose . . . does not foreclose inquiry into its validity."²²² That decision, striking down the Communications Decency Act (CDA), further specified that the "inquiry embodies an 'overarching commitment' to make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'"²²³ The Court even noted with disapproval the fact that the record contained no evidence as to how effective or ineffective the regulations might prove to be.²²⁴

The *Pap*'s plurality cavalierly suggests that "it is evident" that the Erie nudity law will have the required efficacy.²²⁵ This is perhaps the plurality's most tenuous conclusion, for evidence was neither required nor offered that the wearing of pasties and G-strings by erotic dancers would have *any* remedial effect on the secondary effects associated with nude dancing establishments.²²⁶ Erie did not point to any study suggesting that the adverse secondary effects of adult-oriented businesses offering erotic dancing depends in any way on the precise costume worn by the performers. Rather, the city "merely assumes it to be so"²²⁷ and the plurality apparently agrees. Furthermore, the pasties and G-string solution chosen by Erie is *not* the one suggested by the

²²¹ See Williams, *supra* note 47, at 654 ("[T]he requirement . . . amounts to little more than the most minimal rational relation review . . .").

²²² 521 U.S. 844, 875 (1997) (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)).

²²³ *Id.* at 876 (quoting *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996)).

²²⁴ See *id.* at 875 n.41 (analogizing the lack of considered judgment as to the effectiveness of CDA regulations to the similarly vacant legislative history of preceding adoption of the unacceptable statute struck down in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989)).

²²⁵ *Pap*'s, 529 U.S. at 300-01.

²²⁶ See *id.* at 313 n.2 (Souter, J., concurring in part and dissenting in part) ("It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude."); *id.* at 310 (Scalia, J., concurring) ("I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.").

²²⁷ *Id.* at 321 n.4 (Stevens, J., dissenting); see also *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listener's reaction to speech is not a content-neutral basis for regulation.").

Seattle study that the city used to arrive at its secondary effects justification in the first place.²²⁸ In holding such, the plurality in essence shifts the burden of proof to adult establishments to disprove proactively the effectiveness of a proposed secondary effects-targeted measure.

The *Pap*'s plurality thus encourages a two-fold evidentiary failure. First, it does not require any particularized evidence of real harms associated with nude dancing establishments. Second, it does not require a city to tailor its regulation to alleviate those harms (real or otherwise) in an actual manner. In a case involving a total ban under a general law (as opposed to a zoning regulation that is more self-evidently efficacious), a more perceptive reading of precedent suggests that a city should have to make a showing of a causal connection between the regulated speech and the secondary effects as well as a rational explanation of how the regulation will alleviate those harms.²²⁹ By not requiring either, the *Pap*'s plurality gives municipalities carte blanche to invent secondary effects and then pass expression-suppressive regulations that do not actually remedy them—the ultimate form of approved “improper motive” censorship in disguise.

D. *Conflation of Secondary Effects and Symbolic Speech Analytical Frameworks*

In Part II.B.3, I described how the Court has systematically collapsed two doctrines—TPM and symbolic speech/incidental burden—into one by using the *O'Brien* test where the TPM test had been previously employed.²³⁰ The *Pap*'s plurality embraces this collapse, indicating that general nudity laws should be evaluated as restrictions on symbolic speech under the “less stringent” *O'Brien* test.²³¹ Under the *O'Brien* analysis, the plurality asserts that the Constitution “requires only that the regulation further the interest in combating such effects.”²³² The plurality acknowledges that the Erie regulation—requiring pasties and G-strings—might not have any real remedial effect on secondary effects,²³³ but asserts that, by allowing the government to

²²⁸ That study recommended dispersal through zoning. *Pap*'s, 529 U.S. at 321 n.4 (Stevens, J., dissenting).

²²⁹ See *Free Speech Analysis*, *supra* note 50, at 1923 (indicating that the absence or presence of an objective nexus can be illustrative of true legislative motive).

²³⁰ *Supra* text accompanying notes 47-65.

²³¹ *Pap*'s, 529 U.S. at 289.

²³² *Id.* at 301.

²³³ *Id.*

experiment with that regulation, its interest would somehow be furthered.²³⁴ This assumption requires what Justice Stevens sagely referred to as a "titanic surrender to the implausible."²³⁵

By making this assumption, the plurality dangerously "[ignores] the critical difference between secondary effects caused by speech and the incidental effects on speech that may be caused by a regulation of conduct."²³⁶ Reiterated succinctly:²³⁷

The incidental burdens doctrine applies when "'speech' and 'non-speech' elements are combined in the same course of conduct," and the government's interest in regulating the latter justifies incidental burdens on the former. Secondary effects, on the other hand, are indirect consequences of protected speech and may justify regulation of the places where that speech may occur.²³⁸

A municipality may have either of these doctrines as its aim when implementing a regulation, but they are not the same.²³⁹ The plurality, however, ignored the difference and, by devolving the analysis to the *O'Brien* test, insisted that "both aims are equally unrelated to speech,"²⁴⁰ when they clearly are not.

There were two possible choices as to how *Erie* could pass a law that could withstand constitutional muster.²⁴¹ *Erie* could have aimed its regulation at something other than speech and then attempted to justify the law under the incidental burdens doctrine, previously discussed.²⁴² Alternatively, *Erie* could have justified its law as directly aimed at the secondary effects caused by (and thus directly related to) protected speech. It did the latter. Yet the plurality, by conflating the two doctrines, miraculously arrives at the conclusion that the law is unrelated to speech. As Justice Stevens suggests, they tried to "have their cake and eat it too."²⁴³ The result is a doctrinal

²³⁴ *Id.* ("Even though the dissent questions the wisdom of *Erie*'s chosen remedy . . . the 'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" (quoting *Renton*, 475 U.S. at 52)).

²³⁵ *Id.* at 323 (Stevens, J., dissenting).

²³⁶ *Id.*

²³⁷ For a more thorough explanation, see *supra* text accompanying notes 41-47.

²³⁸ *Pap's*, 529 U.S. at 324-25 (Stevens, J., dissenting).

²³⁹ See *id.* at 325 (Stevens, J., dissenting) ("One can think of an apple and an orange at the same time; that does not turn them into the same fruit.").

²⁴⁰ *Id.*

²⁴¹ See *id.* at 326 (Stevens, J., dissenting) ("[I]t cannot conflate the two with the expectation that *Erie*'s interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.").

²⁴² For a detailed discussion of this issue, see *id.* at 324-26 (Stevens, J., dissenting).

²⁴³ *Id.* at 326 (Stevens, J., dissenting).

maelstrom:²⁴⁴ The City admitted its law was aimed at secondary effects caused by protected speech and did not defend the law as only having created incidental burdens afterward. The plurality, by way of doctrine conflation, does the City's work for it. It incorrectly analogizes Erie's secondary effects claim to the incidental burdens claims in *Clark* and *Ward*,²⁴⁵ and then eliminates the critical "ample alternative avenues" of the TPM test. In addition, the "further the governmental interest" prong of the *O'Brien* test, as employed by the plurality, is satisfied by what it admits to be only a *de minimis* effect on the neighborhood.

Professor Erwin Chemerinsky recently criticized such a path by describing the treatment of "content-based laws as content-neutral because of a permissible purpose" as one of three major problems with the Court's application of the principle of content-neutrality.²⁴⁶ Chemerinsky emphasizes that—despite any attendant secondary effects rationale—if the application of a law depends on the content of the message, then, by definition, the law is content-based. As he suggests, "[t]he court can uphold it by finding that it serves a sufficiently important purpose, but it is still content based. In fact, the Court might even say that it is a category of speech that warrants less than full First Amendment protection"²⁴⁷ But, he wisely concludes, "it is simply wrong to say that a facial, content-based distinction is otherwise because it is based on a permissible purpose."²⁴⁸

The *Pap*'s plurality's choice to make that mistake is the final link in a chain of extreme deference to the social policy choices of municipalities. First, the Supreme Court made it simple for municipali-

²⁴⁴ This confusion is revealed when the plurality doubly argues that [T]here is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity—nude erotic dancing—is particularly problematic because it produces harmful secondary effects.

Id. at 295. They make this case despite the fact the Erie did not advance an incidental burdens theory.

²⁴⁵ See *id.* at 294 ("This case is, in fact, similar to *O'Brien*, *Community for Creative Non-Violence*, and *Ward*."). But see *id.* at 324 (Stevens, J., dissenting) ("The plurality is also mistaken in equating our secondary effects cases with the 'incidental burdens' doctrine applied in cases such as *O'Brien*; and it aggravates the error by invoking the latter line of cases to support its assertion that Erie's ordinance is unrelated to speech.").

²⁴⁶ See Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59-61 (2000) (discussing the Court's willingness to find clearly content-based laws content-neutral).

²⁴⁷ *Id.* at 61.

²⁴⁸ *Id.*

ties to use a nebulous secondary effects justification without any evidentiary basis or relationship between those effects and the regulation. Then the Court made it clear that it would characterize such regulations as content-neutral despite the fact that they were aimed at the effects of speech long held to be protected. Finally, by conflating doctrines, the *Pap*'s plurality communicates to municipalities that even though they need to use secondary effects to justify their law, the Court will put that justification aside and employ a less stringent analytical framework originally designed for the completely different situation of after-the-fact incidental burdens on symbolic speech.²⁴⁹

The route to a total prohibition ends with a *Pap*'s/*O'Brien* test that allows a virtually hypothetical furtherance of an assumed governmental interest to satisfy the demands of the First Amendment.²⁵⁰ Although the Court credits the "*O'Brien* test," the single standard that has developed "is really just a weak version of the TPM test" that allows restrictions where it did not before.²⁵¹ By locking secondary effects and the symbolic speech/incidental burdens test in this dangerous dance, the *Pap*'s plurality moves perilously further away from anything but the most deferential analysis of restrictions on protected nude dancing. As Susan Williams aptly concludes, "[t]hese two lines of parallel doctrinal development, then, have miraculously ended in a single point As a result, the range of doctrinal tools available to deal with complex first amendment problems has been reduced, and real first amendment protections have been lost."²⁵²

E. *Tension with United States v. Playboy Entertainment Group*

Pap's is also at great tension with the Supreme Court's recent decision in *United States v. Playboy Entertainment Group*.²⁵³ *Playboy* involved a challenge to section 505 of the Telecommunications Act of 1996,²⁵⁴ which required cable television operators, who provide channels pri-

²⁴⁹ This conflation poses a danger for all types of protected speech. For example, Timothy Tesluk suggests that "hate speech could easily be recast as involving a 'fighting words' element analogous to conduct, thus triggering the weak symbolic speech test." Tesluk, *supra* note 10, at 1126.

²⁵⁰ See *Pap*'s, 529 U.S. at 318 (Stevens, J., dissenting) ("Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship.").

²⁵¹ Williams, *supra* note 47, at 654.

²⁵² *Id.* at 653-54.

²⁵³ 529 U.S. 803 (2000).

²⁵⁴ Telecommunications Act of 1996, § 505, Pub. L. 104-104, 110 Stat. 136 (codified at 47 U.S.C. § 561 (Supp. III 1997)).

marily dedicated to sexually oriented programming, to either scramble fully or otherwise block fully those channels or to limit their transmission to hours when children are unlikely to be viewing.²⁵⁵ The section was specifically directed at sexually oriented programming and was enacted to address the phenomena of “signal bleed.”²⁵⁶ Playboy Entertainment Group challenged the law as a content-based regulation violative of the First Amendment.²⁵⁷ Similar to the nude dancing in *Pap’s*, the content of the sexually oriented channels was admittedly protected by the First Amendment as nonobscene adult entertainment.²⁵⁸

Because of the law’s specific aim, the majority agreed with the lower court that the law was content-based and found it an unconstitutional restriction on protected speech.²⁵⁹ One might argue then that a comparison of *Pap’s* to this case is of little value—apples and oranges.²⁶⁰ I argue, however, that it is the spirit of the two cases that produces conflicting visions of underlying First Amendment values. The effect of the laws in the two cases is markedly similar. In *Playboy*, the Court highlighted that the effect of section 505 “limited Playboy’s market as a penalty for its programming choice, though other channels capable of transmitting like material are altogether exempt.”²⁶¹ In *Pap’s*, the general nudity law had the very same effect on owners of fully nude dancing establishments—it limited their market simply because those owners chose to offer fully nude dancing as a programming choice, while other clubs were free to present dancers with pasties and G-strings. In fact, the effect of the law upheld in *Pap’s* is much stronger, as it in fact *eliminated* an entire market across the board. The *Pap’s* plurality used the convenient vehicle of the secondary effects doctrine to remove the Erie law to the realm of content-neutral restrictions, but the essence of the effect of the laws is strik-

²⁵⁵ *Playboy*, 529 U.S. at 806.

²⁵⁶ *Id.* Signal bleed occurs when, from time to time, discernable pictures appear on the screen and/or audio may be heard through the scrambling. *Id.*

²⁵⁷ *Id.* at 807.

²⁵⁸ *Id.* at 811 (“All parties bring the case to us on the premise that Playboy’s programming has First Amendment protection.”). But see *id.* at 829-30 (Thomas, J., concurring) (arguing that at least some of the programming could be prohibited entirely under *Miller v. California*); *id.* at 831 (Scalia, J., dissenting) (maintaining that section 505 could be justified as regulating the “business of obscenity”).

²⁵⁹ *Id.* at 811-12.

²⁶⁰ Indeed the majority declares its zoning cases (e.g., *American Mini Theatres and Renton*) to be irrelevant because the secondary effects doctrine requires lower scrutiny than the content-based issue at hand. *Id.* at 815.

²⁶¹ *Id.* at 812 (emphasis added).

ingly similar.

Yet, the result is strikingly different. The *Playboy* Court extols that the general "right of expression prevails," and that we should simply avert our eyes.²⁶² Moreover, in applying strict scrutiny, the *Playboy* Court demanded that *any* less restrictive alternative must be employed.²⁶³ But the *Pap*'s plurality, again through the vehicle of secondary effects, did not even demand a consideration of less restrictive means—it in fact endorsed what is essentially a total ban.

The *Playboy* Court is careful to stress that its case involves speech alone.²⁶⁴ This determination highlights the mistake of the untenable *Pap*'s conclusion that erotic dance contains both speech and non-speech elements that can be independently targeted. The Court, in essence, dictates that televising nude dancers on Playboy is speech alone, but having them dance live on a stage is both speech and conduct. Phrased differently, a cablecast of Erie's live dancers would be legal, but the dancing itself would not. This distinction is more than difficult to explain—it is bizarrely without merit.²⁶⁵

A comparison of *Playboy* and *Pap*'s illustrates how the secondary effects doctrine, coupled with an exclusive governmental purposive analysis, has warped the Court's perception of First Amendment protection. By ignoring the effect of the general nudity law on the audience, and allowing a content-neutral distinction based on an assumption of secondary effects, the *Pap*'s decision has the same constitutionally offensive effect as section 505 in *Playboy*; yet, the plurality is willing to settle for glaring inconsistency. The decisions make remarkably different content discrimination determinations despite highly analogous expression-suppressive effects. These disparate determinations undercut a primary First Amendment value: "[f]reedom of speech calls for wide and stringent protection for those who speak, or write, or otherwise communicate to the public—protection not just for the words they choose, but *also* for the means of producing and

²⁶² *Id.* at 813 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

²⁶³ *Id.*

²⁶⁴ *Id.* at 814.

²⁶⁵ This point was recently explored by commentators who observed that "[t]he same genre of expression was subjected to drastically different judicial treatment." Verrilli & Maynard, *supra* note 220, at 12. Indeed, the authors astutely indicate the irony of the two decisions: "The Court afforded erotic expression the least protection in the setting in which the expression was least likely to be available to minors or to large audiences, live entertainment in adults-only establishments, whereas the Court aggressively protected such expression when transmitted over mass media." *Id.* at 17.

distributing their speech."²⁶⁶

It is unsatisfying to chalk up this result to differences in wording. Justice Kennedy's discussion of the First Amendment's grand protections in *Playboy* is markedly absent from Justice O'Connor's plurality opinion in *Pap's*.²⁶⁷ Several commentators have appropriately decried these discrepancies, questioning how laws that have such a similar effect can receive completely different treatment under the First Amendment.²⁶⁸ By taking the secondary effects doctrine on such a runaway ride, the Court makes its own pronouncements in *Playboy* sound hollow—conveniently ignored when a good enough excuse (or policy preference) wanders along.²⁶⁹

F. *Wrong Turn or True Orthodoxy?*

It is worth mentioning a final perspective before concluding this discussion—that of the increasingly popular “new critics,” as termed by Nicholas Wolfson.²⁷⁰ New critics—drawing on Plato and John Stuart Mill—attack an absolutist view of the First Amendment by citing the need to order a “good and just society.”²⁷¹ Wolfson uses Willmore Kendall as an example of this counter to the idea that the First Amendment makes society a “debating club.” Kendall and others disagreed, arguing that “[s]ocieties . . . cherish a whole series of goods—among others . . . the *living* of the truth they believe themselves to embody already.”²⁷² New critics believe that a First Amendment driven society will “descend . . . into progressive breakdown of those common

²⁶⁶ FISS, *supra* note 2, at 71-72 (emphasis added). In this collection of essays, Fiss elaborates a theory of the First Amendment as, primarily, an instrument of democratic self-governance.

²⁶⁷ Justice Kennedy joined Justice O'Connor's opinion in *Pap's*, making the result even more perplexing. *Pap's*, 529 U.S. at 282.

²⁶⁸ Verrilli & Maynard, *supra* note 220, at 12.

²⁶⁹ “[T]he American legal community is like an alcoholic staunchly promising to stay sober, but allowing for one glass—or two, at most—of scotch. After all, all things in moderation—including freedom of speech or thought.” WIRENIUS, *supra* note 149 at 121.

²⁷⁰ In this Section, I rely heavily on Nicholas Wolfson's description of the modern attacks on the traditional, civil rights position on free speech. See NICHOLAS WOLFSON, *HATE SPEECH, SEX SPEECH, FREE SPEECH* 11-45 (1997).

²⁷¹ *Id.* at 27. See PLATO, *THE REPUBLIC* reprinted in *THE PORTABLE PLATO* 353 (Scott Buchanan ed., 1977) (proclaiming the value of censorship to ensure the achievement of objective goods).

²⁷² WOLFSON, *supra* note 270, at 26 (citing Willmore Kendall, *The “Open Society” and its Fallacies*, in *ON LIBERTY: ANNOTATED TEST SOURCES AND BACKGROUND CRITICISMS* 162 (David Spitz ed., 1975)).

premises upon which alone a society can conduct its affairs by discussion."²⁷³ More specifically, new critics argue that once a consensus truth is reached by society, it is the responsibility of that society's democratic government to "sustain true belief and wipe out false opinion."²⁷⁴ Stated differently, there are "true orthodoxies on which courts can reach closure"²⁷⁵

It is tempting (and in fact is regularly suggested by some prominent scholars) to assert that society has simply reached a valid consensus that certain forms of adult expression are of the lowest possible value. This conclusion carries with it the implication that holdings such as *Pap*'s neither misapply existing doctrine nor realize particular policy preferences; rather, they are realizations that a free speech "truth-seeking" has occurred, and further, that an ordered government should be allowed to implement the resultant true orthodoxy. Once society determines a particular form of expression is "false," and will lead to harm,²⁷⁶ suppressive *Pap*'s-like results become much more acceptable, if not lauded.²⁷⁷

Wolfson posits the best response to the new critics:

[Theirs] is a principle impossible to contain. In the first place, it is impossible to achieve infallibility in the judgment that a consensus has been reached. Since dissent itself is at issue, there will always be those dissenters who insist that truth has not been ascertained. Second, even if only one individual in all mankind disagrees on an issue, to use the famous Mill example, the truth cannot be said to have been infallibly ascertained. Third and most important, once we grant that society can infallibly pick certain opinions as "noxious," censorship will quickly extend to all areas that majorities, or powerful minority interest groups, consider dangerous.²⁷⁸

²⁷³ *Id.* at 26-27.

²⁷⁴ *Id.* at 30.

²⁷⁵ *Id.* at 29 (emphasis added).

²⁷⁶ For an objective investigation of the quantifiable harms of adult expression, see SUSAN M. EASTON, *THE PROBLEM OF PORNOGRAPHY: REGULATION AND THE RIGHT TO FREE SPEECH* 10-41 (1994).

²⁷⁷ The works of Catherine MacKinnon and Andrea Dworkin are good examples of the argument that a particular type of expression, whether it be sexist speech or pornography itself, is inherently "false" and the bearer of harm. See, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 201 (3d ed. 1981) ("The fact that pornography is widely believed to be 'depictions of the erotic' means only that the debasing of women is held to be the real pleasure of sex."); CATHERINE A. MACKINNON, *ONLY WORDS* 9 (1993) ("Protecting pornography means protecting sexual abuse as speech, at the same time that both pornography and its protection deprives women of speech, especially speech against sexual abuse.").

²⁷⁸ WOLFSON, *supra* note 270, at 30-31.

The First Amendment, Wolfson argues convincingly, “must permit grotesque and nasty speech, because society in the domain of speech cannot be half skeptical and half infallible.”²⁷⁹ In other words, we as a society cannot infallibly choose the subjects that are “legitimately debatable and those that are not.”²⁸⁰

If, as Wolfson suggests, “[o]nce we accept that debate and inquiry must end in certain areas, we cannot limit that principle,”²⁸¹ then it is impossible to consider movement toward true orthodoxies as an acceptable First Amendment value. Governments acceptably regulate harmful conduct. When the government regulates speech on the same grounds—concluding it to be false and thus harmful—it confuses speech with action. The inevitable conclusion, Wolfson posits, is pervasive censorship.²⁸² This argument illustrates a steep slope of a sort somewhat different from the normatively weak, time-worn fear that courts cannot distinguish between laws that censor completely different types of expression. The new critics’ slope is the acceptance of “a fundamental proposition that there are certain orthodoxies that a society and a government must accept and enforce in order to maintain worth and dignity.”²⁸³ The subtle difference is that those orthodoxies mandate censorship, rather than suggest its possibility. The conceptual acceptance in *Pap*’s of the orthodoxy that adult expression is, in essence, both speech that is unnecessary in our society and speech that causes direct harms through cognizable secondary effects, takes a dangerous step toward acceptance of the new critics’ search for enforceable orthodoxy. This, in turn, moves us back toward “the order of mind that free speech advocacy was designed to overthrow.”²⁸⁴

V. REEVALUATING FIRST AMENDMENT ADULT EXPRESSION DOCTRINE

Adult expression doctrine has become an unstoppable suppressive force in spite of the free speech guaranties of the First Amendment. Six major problems arise in the wake of the unfortunate plurality

²⁷⁹ *Id.* at 31.

²⁸⁰ *Id.*; see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 466 (1990) (suggesting we should be “particularly wary of people who claim to have found the truth and who argue that further inquiry would be futile . . . [A] fallibilist theory of knowledge emphasizes, as preconditions to the growth of . . . knowledge, the continual testing and retesting of accepted ‘truths’”).

²⁸¹ WOLFSON, *supra* note 270, at 31.

²⁸² *Id.* at 132.

²⁸³ *Id.* at 24.

²⁸⁴ *Id.*

opinion in *Pap*'s. First, the *Pap*'s plurality enshrines the secondary effects doctrine as justification for a general prohibition of protected speech contrary to the intentions of the doctrine as a limited approach to time, place, or manner restrictions.²⁸⁵ Second, an implausible application of content discrimination analysis by the plurality results in a content-neutral determination that ignores the practical effect of general laws on protected speech. In bending doctrine to get a desired result, the plurality has undermined the basic underlying theoretical framework that justified First Amendment content discrimination analysis in the first instance. Third, the *Pap*'s decision entrenches an analysis that focuses solely on governmental purpose, at the expense of the audience viewpoint so critical and particular to the protected expression of nude dancing. Since this form of entertainment is not popular among the American majority, is not considered to be "high-value" speech, and arguably provides limited stand-alone contributions to American society as a whole, it is only in the very minds of its particular audience that this uniquely erotic expression has its desired effect. As such, the plurality allows a plainly majoritarian attack on unpopular speech to be disguised by jurisprudential smoke and mirrors.

Fourth, the Court has strayed far from the path of a rationally reasonable secondary effects doctrine in two ways. It continues to absolve municipalities of any responsibility to provide an evidentiary basis for their justifications. At the same time, it allows the most irrational remedial means to be coupled with those secondary effects—even if they are both far-fetched and unlikely to have any real impact. In combination, the Court has given municipalities carte blanche to create a secondary effects fiction on both ends of the spectrum—justification and means. Fifth, by conflating what originated as two distinct lines of First Amendment doctrine into one weak standard, the Court effectively sanctions the elimination of alternative avenues of communication, threatening all forms of expression with total prohibition at the hands of the secondary effects fiction. Finally, the Court's reasoning, rationale, and underlying First Amendment commentary in *Pap*'s is, in effect, strangely and jarringly at odds with other statements by the Court on the underlying priorities of First Amendment doctrine and common understandings of vital First Amendment values.

²⁸⁵ It is also a departure from the entire original purpose of obscenity law in general, which, as a *sui generis* deviation from First Amendment freedoms, was "undoubtedly far less concerned with the impact of erotic materials on overt behavior than with their impact on internal moral standards." EMERSON, *supra* note 38, at 499.

Several adjustments need be considered by the Court to both contain this runaway line of doctrine and to better adapt it to the particularized needs of adult entertainment analysis. Since the avenue to a total ban is now clear, the Court must at the very least consider both the governmental purpose behind a law and the direct discriminatory impact such a law would have on the availability of a particular form of expression to its viewing audience. It should not be enough for the Court to dismiss a law's effects as merely *de minimis* in the larger scheme of adult entertainment, for such a conclusion defies the very need for a particular remedial action. In addition, if the Court continues to sanction the possibility of totally prohibiting a particular form of expression, it has a positive obligation to consider actively any and all evidence of improper motive as a safeguard against abuse. Proactively probing a law for illicit intentions (especially when plain evidence exists in the record) is necessary in this particular context to preserve the Court's overall stated commitment to honoring core First Amendment values.

If the Court remains determined to sustain the secondary effects justification, it should take active steps to bring it back from the land of make-believe. The Court should seriously consider splitting the secondary effects test and incidental burdens/symbolic speech tests back into their different selves. Doing so would realize the clear desires of the *American Mini Theatres* and *Renton* Courts to preserve alternative avenues for protected expression while making some concession to majoritarian morality by allowing moderate restrictions on adult entertainment. After parsing the two analytical frameworks in keeping with their original justifications, the Court should then implement a two-prong secondary effects nexus requirement. First, the Court should require a demonstrable factual nexus between the secondary effects claimed and the means proposed to ameliorate them. Second, the Court should also require a rational relationship between the regulation (means) and the actual furtherance of the governmental interests in question. The first prong addresses the need for an underlying factual basis for concluding that a restrictive law is necessary, while the second assures that a law bears directly upon only those demonstrated problems.

Finally, the Court should evaluate whether the path chosen in *Pap's*—the potential for total prohibition of heretofore protected expression—gels with its larger body First Amendment jurisprudence, or whether the Court's longstanding sympathy for objection to "immoral" expression finally got the better of it in *Pap's*. The Court,

frankly, needs to revisit and rediscover its First Amendment first principles and attempt to place *Pap's* within that framework or discard it as an aberration.

CONCLUSION

The plurality has tried to do with its nude dancing doctrine in *Pap's* what it could not do under *Miller v. California*: give municipalities the ability to eliminate what they perceive to be nonobscene but offensive adult entertainment. Unfortunately, the Court has long conceded that such entertainment is entitled to constitutional protection. As a result, the Court has had to contrive an elaborate set of decisional rules to circumvent the First Amendment in order to arrive at the desired suppressive result.

The *Pap's* decision illustrates how implausible, untenable, and dangerous that path has become. It is dangerously close to failing the "laugh test" measuring rationality, and already requires a healthy imagination to even sound plausible. In 1991, commentator Kimberly Smith made a most cogent conclusion about the danger of lowering the hurdles for regulating adult expression:

The perceived danger of sexual speech is not the view it espouses, but the words or symbols themselves. Our emotional reaction to sexual speech, like our reaction to the word "fuck," stems not from the idea it expresses, but from the violation of social taboos; it is a matter of cultural effrontery. There is a risk that this emotional reaction will motivate excessive government censorship of all discussion on the topic, regardless of the viewpoint expressed.²⁸⁶

Such fears are closer to reaching fruition now in many ways; the plurality in *Pap's* allowed an entire medium of expression to fall under the executioner's blade. Surely the Court does not want this limited line of doctrine eventually to swallow whole the master values of First Amendment protection.²⁸⁷

²⁸⁶ Kimberly K. Smith, Comment, *Zoning Adult Entertainment: A Reassessment of Renton*, 79 CAL. L. REV. 119, 143 (1991).

²⁸⁷ This fear was enunciated shortly prior to *Pap's* by James Weinstein, who described the "potentially significant indirect cost of modifying current doctrine to permit such bans—a general weakening of the constitutional protection afforded debate on matters of public issues." See JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 159-88 (1999) (urging the need to delineate a "confinable principle" to prevent the gutting of core free speech protection); see also Gey, *supra* note 174, at 1565 ("The more significant problem with the pro-suppression position is that it cannot be limited to pornographic expression; it provides a broader rationale for suppressing deviant expression of many sorts.").

The forthcoming consideration of *City of Los Angeles v. Alameda Books, Inc.*²⁸⁸ indicates a pressing need for heightened recognition of the problems implicit in the *Pap*'s plurality's permissive analytical structure that I have discussed herein. In *Alameda Books*,²⁸⁹ the Court examines whether a city may ban multiple-use adult businesses based on a secondary effects rationale when it relies on a study that only examined the harmful effects caused by a clustering of many different adult businesses. Below, the Court of Appeals for the Ninth Circuit almost altogether avoided discussing *Pap*'s and, returning to the guiding principles of *Renton* and *American Mini Theatres*, determined that Los Angeles did not have a sufficient evidentiary nexus tying multiple-use adult businesses to actual adverse secondary effects on their surrounding areas.²⁹⁰ This case provides a ripe opportunity for the Supreme Court to regain control of a runaway doctrine, and serves as a further call for a return to the fundamental First Amendment values which preceded the under-performing content discrimination framework embraced by the *Pap*'s plurality.

In *Sable Communications*, the Court refused to allow the government to "burn the house to roast the pig" through a complete ban of indecent commercial telephone communications.²⁹¹ In *Reno v. ACLU*, the Court refused to allow the CDA to "torch a large segment" of the Internet to shield a portion of the population from adult expression.²⁹² In *Playboy*, the Court reminded us that "[w]hat the Constitution says is that these judgments are for the individual to make."²⁹³ In *Pap*'s, however, the plurality allowed a general law to eliminate an entire form of expression without much regret, forgetting what Justice Frankfurter termed the need to bar legislation "not reasonably restricted to the evil with which it is said to deal."²⁹⁴ The Court should heed its own warnings and bring adult expression jurisprudence back

²⁸⁸ *City of Los Angeles v. Alameda Books, Inc.*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3591 (U.S. Mar. 5, 2001) (No. 00-799) (argued Dec. 4, 2001).

²⁸⁹ *Id.*

²⁹⁰ See *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719, 724-27 (9th Cir. 2000) (holding that a city ordinance prohibiting the operation of adult businesses violated the First Amendment). The Ninth Circuit panel limited its mention of *Pap*'s to one footnote, noting it is of "little aid." *Id.* at 727 n.7.

²⁹¹ *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

²⁹² *Reno v. ACLU*, 521 U.S. 844, 882 (1997).

²⁹³ *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000).

²⁹⁴ *Butler*, 352 U.S. at 383.

from the perils of *Pap's* by reembracing the First Amendment in a more doctrinally compelling and objectively convincing manner.