# THE PORNOGRAPHIC SECONDARY EFFECTS DOCTRINE

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ABSTRACT

*The secondary effects doctrine has made a muddle of First Amendment law. The doctrine formally holds that a speech regulation will be treated as content-neutral if its purpose is to control the secondary effects of speech, even if it facially discriminates according to speech content. It pretends to be a general First Amendment doctrine, but in practice it is all about regulating pornographic expression. This Article aims to re-evaluate the secondary effects doctrine in a way that is more transparent. Appreciating the functional basis of the secondary effects doctrine is useful for understanding the doctrine's limitations, as well as for analyzing new types of regulation that may arguably fall within its scope. It also provides important lessons for general First Amendment theory, including how cost–benefit analysis affects the constitutional rules regarding content discrimination and how the purpose of a regulation affects the level of scrutiny that courts apply.*



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## INTRODUCTION

In First Amendment law, a critical distinction exists between speech regulations that are content-based and those that are content-neutral. Normally, if a regulation is content-based, it is subject to strict scrutiny and presumed to be unconstitutional.[1] If it is content-neutral, a more lenient intermediate scrutiny applies.[2] Generally, whether a regulation is content-based or content-neutral is resolved by looking at the face of it: a regulation is content-based if it legally discriminates between different kinds of speech on the basis of message, subject matter, words, ideas or images—treating one class of speech unfavorably in relation to other classes of speech.[3]

The secondary effects doctrine is one exception to this usual methodology. It provides that a regulation will be treated as content-neutral and subject to intermediate scrutiny, despite its content-discriminatory form, if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech.[4] The doctrine applies most commonly—and indeed, almost exclusively—to justify the selective regulation of pornography and sexual entertainment,[5] even though the Supreme Court has implied that it is a general First Amendment doctrine.

This Article explores the descriptive meaning and lessons of the secondary effects doctrine. What exactly is a secondary effect? Why is it pre-

1. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

2. *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

3. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) ("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."); *see also* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1123–24 (2005) (describing the various forms of content discrimination).

4. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 438 (2002); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976). These three cases are the primary subject of Part I, *infra*.

5. *See infra* note 141 and accompanying text.

ferable for government to regulate speech based on its secondary effects rather than its primary effects? And why do courts seem to believe that only sexually explicit speech has secondary consequences? Related to these questions is the larger issue of why content-based regulations are disfavored at all.[6]

I propose here that the formal secondary effects doctrine is misleading and even dangerous on its own terms. As applied to most forms of protected speech, the secondary effects doctrine is both descriptively incoherent and normatively empty. For example, when political speech is concerned, the secondary effects doctrine has no rational place in First Amendment law. The good news, however, is that courts generally do not apply the secondary effects doctrine to most forms of protected speech. The doctrine was created for the regulation of pornography and sexually oriented entertainment, a type of expression that differs from other speech in significant ways.

One might conclude from this that the secondary effects doctrine should be abandoned,[7] but that is not the approach of this Article. Much of society accepts the appropriateness of zoning sexually oriented businesses for locations where they will cause the least harm to property values, residential neighborhoods, and nearby commerce, even if this means selectively regulating some constitutionally protected speech based on its content.[8] One need not be morally opposed to pornography or erotic entertainment in order to agree with zoning laws that specifically apply to these businesses. Thus, the Supreme Court has repeatedly held that it does not offend First Amendment values for government regulators to treat sexually oriented businesses as a distinct category of land use[9]—just as regulators treat smoky factories as a distinct category of land use[10]—provided that they do not overregulate those constitutionally protected businesses. The secondary effects doctrine is the law's way of reaching this result.

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6. For significant works addressing the role of content discrimination in First Amendment law see Fee, *supra* note 3; Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

7. *See, e.g.*, David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55 (1997) (arguing the doctrine should be abolished).

8. Municipal regulations that control the location and operation of sexually oriented business are common. Typically, a "sexually oriented business" or "adult business" is a formal category of land use activity defined in a city's zoning ordinance, and subject to unique restrictions. *See* David A. Thomas, *Tips for Successfully Regulating Sexually Oriented Businesses*, PROB. & PROP., Jan.–Feb. 2008, at 43, 45 (2008).

9. *See infra* notes 136–40 and accompanying text.

10. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 446 (2002) (Kennedy, J., concurring) (comparing regulations of sexually oriented businesses to factory pollution regulations for purposes of constitutional analysis).

Rather than call for the unlikely abandonment of this doctrine, this Article takes the secondary effects doctrine as a given, instead re-evaluating it as a pornographic speech doctrine. If the results of the secondary effects doctrine are firmly entrenched, even if the methodology is exceptional or tortured, then it suggests some important lessons for constitutional law that this Article explores. First, the secondary effects doctrine shows that pornography and sexually oriented entertainment receive a different level of constitutional protection than core First Amendment speech. Similar to the law's treatment of commercial speech, the First Amendment treats pornography as constitutionally protected but subject to its own rules. Indeed, recognizing the distinctive constitutional status of pornographic speech has the advantage of preventing the secondary effects doctrine from spilling into other areas of law, which could erode First Amendment protections for all forms of speech.

Second, the secondary effects doctrine reveals something deeper about the constitutional distinction between content-based and content-neutral laws: the distinction is a means to an end, and that end is to maximize the potential value of speech for audiences while controlling preventable harms. The First Amendment does not require either courts or legislatures to be wholly indifferent to the costs and benefits of various types of speech, despite occasional statements in judicial opinions to the contrary. Rather, the secondary effects doctrine indicates that First Amendment rights are a function of the predicted costs and benefits of different types of speech in various situations. While the First Amendment does tip the balancing scale significantly in favor of tolerating speech, requiring even the toleration of harmful, low-minded speech to a significant extent, it does not prohibit the balancing process altogether. The First Amendment does not require society to suffer predictable harms that can be avoided through reasonable content-based restrictions.

Finally, the secondary effects doctrine shows that a government's purpose for regulating speech is relevant in determining the level of scrutiny imposed. It also provides a possible explanation as to why. Certain kinds of regulatory motives, especially those that depend upon deterring or reducing speech, are more likely to produce regulations that are not worth their risks in terms of their chilling effects on speech. The secondary effects doctrine thus imposes an "anti-proportionality" principle, which helps to sort the most dangerous kinds of speech regulations from less suspicious regulations.

It is time to recognize the secondary effects doctrine in non-formalist terms for what it does and why it exists. It is time to recognize that the doctrine is not just coincidentally associated with pornographic speech, but is all about pornographic speech and its predicted effects in society. The doctrine is also about the inevitable balancing process that undergirds First Amendment law. Recognizing this is not a threat to First Amendment in-

terests, as some may suppose. Rather, it provides a surer basis for understanding and developing the rights that we have, and for controlling the circumstances under which government may regulate speech.

Part I describes the development of the secondary effects doctrine in its historical context as a response to changes in First Amendment law in the 1970s. Part II addresses the descriptive question "what is a secondary effect?" and concludes that courts do not apply the same standard to all kinds of speech. Part III addresses the normative basis—or lack thereof—for the distinction. Parts IV and V explore the general lessons of a revised secondary effects doctrine for pornography regulation and broader First Amendment application.

## I. A PRODUCT OF EXPANDING SPEECH PROTECTION

To appreciate the context in which the Supreme Court invented the secondary effects doctrine, it is important to understand two developments in First Amendment law that immediately preceded it. Both developments strengthened the freedom of speech in opposition to government censorship and significantly changed First Amendment law by imposing seemingly clear rules. Yet both created the need for some kind of exceptional doctrine.

### *A. The Narrowing of Obscenity Law*

The first development was the dramatic revision of the law's definition of obscenity between 1957 and 1974, which created new constitutional protection for pornography.[11] Prior to the 1960s, a business that specialized in selling explicit pornography could have been regulated or even shut down for dealing in obscenity. Such businesses were no more protected by the First Amendment than brothels or gambling houses. Obscenity has never been protected by the First Amendment,[12] and in earlier times obscenity included anything that was aimed to appeal to the prurient interest of the average adult.[13] For a period, the law was so broad that disputed obscenity cases tended to involve mildly racy passages in novels, such as James Joyce's *Ulysses*.[14] There was no doubt that explicit material of the

11. I mark this evolution as beginning with *Roth v. United States*, 354 U.S. 476 (1957), and ending with *Jenkins v. Georgia*, 418 U.S. 153 (1974).

12. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

13. *See Roth*, 354 U.S. at 489. The obscenity standard used in the late nineteenth and early twentieth centuries was even broader, covering essentially any work likely to corrupt the weakest members of society. *See* FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 8–29 (1976) (describing the history of obscenity law in the United States prior to *Roth*).

14. *See* United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933).

type that one might find today in *Penthouse* or *Hustler* magazines was clearly obscene and did not have any constitutional protection.

By the 1970s, however, after a long line of Supreme Court obscenity cases, the law had evolved in such a way that government could no longer take it for granted that all pornography, or even all hard-core pornography, qualified as obscene. Nor could it assume that nude dancing was obscene. The new test for obscenity announced in *Miller v. California*[15] required showing not only that a work "appeals to the prurient interest" of adults according to "contemporary community standards," but also that it depicts specified sexual conduct "in a patently offensive way," and that it "lacks serious literary, artistic, political, or scientific value"—elements which typically would be proven in jury trials.[16] Moreover, in *Jenkins v. Georgia*,[17] the Supreme Court made clear that there is an objective limit to what a jury may find to be obscene: only depictions of "hard core" sexual conduct may qualify. Mere nudity, implied sex, or immoral themes cannot alone qualify a work as obscene.[18]

Consequently, this legal change, combined with changed social attitudes towards pornography, made it increasingly difficult for governments to prosecute obscenity through jury trials. Obscenity prosecutions dropped off dramatically in the 1970s,[19] and a new category of protected First Amendment expression arose. This expression included sexually explicit movies, books, and entertainment that had many of the familiar attributes of pornography—including an emphasis on explicit sexual acts, a pandering to the sexual interest of the audience, and use of shocking elements.[20] However, these works either were not sufficiently offensive to qualify as

15. 413 U.S. 15 (1973).

16. *Id.* at 24. Although the *Miller* definition of obscenity was significantly narrower than the *Roth* definition, the case was actually a partial victory for anti-obscenity forces and the product of a new conservative majority on the Supreme Court. The real narrowing of obscenity law had occurred during the 1960s through a series of per curiam decisions that generally held anything but hard-core pornography to be constitutionally protected. *E.g.*, Redrup v. New York, 386 U.S. 767 (1967). Even so, the *Miller* standard proved in practice to be advantageous to the pornography industry, especially by comparison to what the law had been in 1957 and earlier. *See* Bruce A. Taylor, *Hard-Core Pornography: A Proposal For a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 256–71 (1987–88) (describing the difficulties of prosecuting obscenity under the *Miller* test in the late 1970s and 1980s as contrasted to earlier times); *see also* U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 13–14, 341–46 (Rutledge Hill Press 1986) [hereinafter COMM'N ON PORNOGRAPHY] (describing the evolution of obscenity law from a period of broad application to the modern era, in which even hard-core pornography and sexually oriented businesses are rarely subject to obscenity prosecution).

17. 418 U.S. 153 (1974).

18. *Id.* at 160–61.

19. *See* Taylor, *supra* note 16, at 257; COMM'N ON PORNOGRAPHY, *supra* note 16, at 53–55.

20. *See* Park Elliott Dietz & Alan E. Sears, *Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines, and Films in Four American Cities*, 21 U. MICH. J.L. REFORM 7 (1987–88) (detailing the frequency of various explicit and violent elements of pornography available in stores; although the study took place in the 1980s, it is an indication of where the trend was headed in the 1970s).

obscenity under the new test, or at least prosecutors were unwilling to charge them as obscene. Businesses specializing in pornography and live sexual entertainment came out of hiding in increasingly large numbers, creating new concerns for land use planners.[21]

An implication of this development, though not necessarily intended, was that this new, legal form of sexually oriented business enjoyed the full protection of the First Amendment. Because First Amendment law prior to 1976 formally recognized only two categories of expression—protected and unprotected[22]—one could infer that by recognizing some First Amendment protection for non-obscene pornography, and by narrowing the definition of obscenity so as to exclude most pornography for practical purposes, the Supreme Court had raised mainstream pornography to the same status as political speech, subject to all the same First Amendment rules. Sexually oriented businesses went from being illegal public nuisances to claiming favored constitutional protection, seemingly equivalent in their constitutional status to libraries, schools, newspapers, and political campaigns.

### *B. A New Emphasis on Content Neutrality*

A second development of the early 1970s was the introduction of the idea that the First Amendment disfavors content discrimination of any type in laws that regulate speech.[23] Prior to the 1970s, the Supreme Court did not focus on content discrimination in its First Amendment cases. Some older cases indicate that disagreement with a speaker's viewpoint is not a valid basis for restricting it,[24] but even these cases do not establish a clear antidiscrimination methodology and do not suggest that other kinds of content classifications (such as subject matter, word choice, or image classifications) are unconstitutional or even troubling.[25]

In an earlier era, rather than focus on content discrimination, the Supreme Court generally resolved free speech disputes through a flexible balancing process. The methodology considered such factors as the extent

21. *Id.* at 38–41; *see also* COMM'N ON PORNOGRAPHY, *supra* note 16, at 345–46.

22. The Supreme Court did not recognize commercial speech as having even limited First Amendment protection until it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

23. For an overview of this development, and the trend towards treating the freedom of speech primarily as an anti-discrimination rule, see Fee, *supra* note 3, at 1116–22.

24. *E.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 510–11 (1969); Niemotko v. Maryland, 340 U.S. 268, 272–73 (1951).

25. At least this suggestion is not made in any majority opinion of the Supreme Court prior to 1970. Justice Black, however, did apply the modern content approach in his concurring opinion in *Cox v. Louisiana*, 379 U.S. 536, 580–81 (1965) (Black, J., concurring in part and dissenting in part), to which the Supreme Court later cited authoritatively. For a historical account of the Court's treatment of content and viewpoint discrimination in the early years, see Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 214–27 (1982).

of the regulation or punishment, the potential value or harm of the speech, the government's interest in regulating it, and the general value of free and open debate on public issues.[26] If the balance favored the government in a given case, the Court upheld the regulation or punishment, even if it was content-discriminatory.[27] For example, in *Rowan v. United States Post Office Department*, the Court upheld a restriction against mailing sexually explicit material to home recipients who had objected to receiving "'erotically arousing or sexually provocative'" material.[28] The Court found the law constitutional because of the overriding interests of homeowners to be free from offensive speech,[29] while failing even to discuss the regulation's content-discriminatory form.

Beginning around 1971, however, it became a threshold First Amendment question to ask whether a regulation of speech is content-based. Three cases marked the shift. In *Cohen v. California*, the Supreme Court reversed a man's conviction for wearing a profanity-inscribed jacket in public, holding that "governmental bodies may not prescribe the form or content of individual expression" nor excise offensive words from the public vocabulary.[30] In *Police Department v. Mosley*, the Court held unconstitutional a law restricting picketing near schools because it contained an exception for labor-related picketing, thus violating the "'equality of status in the field of ideas.'"[31] And, in *Erznoznik v. City of Jacksonville*, the Court struck down a city ordinance which banned the showing of movies with nudity at outdoor theaters visible from public streets, stating that "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."[32]

The content-based methodology of *Cohen*, *Mosley*, and *Erznoznik* was new in several respects. First, it expanded the principle disfavoring viewpoint discrimination to cover other kinds of content classifications, including words, subject matter, and images. Second, these cases seemed to

26. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (relying on "the principle that debate on public issues should be uninhibited, robust, and wide-open" to strike a new balance in the area of defamation law).

27. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a statute prohibiting distribution of pornography to minors because of the interest in protecting minors); Konigsberg v. State Bar of Cal., 366 U.S. 36, 51 (1961) (upholding a rule disqualifying from state bar membership any person who had advocated forcible overthrow of the government based on a "weighing of the respective interests involved"); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding the selective punishment of fighting words upon finding that such utterances are valueless).

28. Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 730 (1970) (quoting 39 U.S.C. § 4009(a) (1964 & Supp. IV 1965–1968)).

29. *Id.* at 736–38.

30. Cohen v. California, 403 U.S. 15, 24 (1971).

31. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) (quoting ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948)).

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

imply that the constitutional rule against content discrimination operated independently of the degree of burden imposed on speech. Thus, even small regulatory burdens were presumed unconstitutional if imposed in a content-discriminatory manner, as in *Mosley*. Third, the opinions in these cases suggested that the rule against content discrimination was absolute or subject only to rare exceptions. A stirring passage from *Mosley* captures all three of these ideals:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of . . . forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[33]

The new rhetoric concerning content discrimination was powerful and modern. But if taken literally, this methodology would pose problems for many areas of law and regulation that had never previously been challenged.[34] Sexually oriented businesses were among the first to notice this.

### *C. The Secondary Effects Doctrine of* Young v. American Mini Theatres

The secondary effects doctrine originated with the Supreme Court's fractured decision in *Young v. American Mini Theatres, Inc*.[35] Despite the lack of a majority opinion on the central issue, *Young* is worth greater study and emphasis than commentators commonly give it, in part because it presents two competing versions of the secondary effects doctrine that continue to cast their shadow over current law.

The *Young* episode began in 1972, when the City of Detroit amended its Anti-Skid Row Ordinance to add "adult motion picture theaters," "adult mini theaters," and "adult bookstores" to a list of regulated uses that tended, in the city's judgment, to cause neighborhood decline.[36] According to experts who advised the city, allowing several of these businesses to concentrate in the same neighborhood "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages

33. *Mosley*, 408 U.S. at 95–96 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

34. For an overview of the many exceptions in the law to this content-neutrality ideal, see Fee, *supra* note 3, at 1136–48.

35. 427 U.S. 50 (1976).

36. *Id.* at 54. The Ordinance also applied to cabarets, bars, hotels, motels, pawnshops, pool halls, secondhand stores, shoeshine parlors, and taxi dance halls. *Id.* at 52 n.3.

residents and businesses to move elsewhere."[37] The Ordinance therefore provided that no more than two such businesses could operate within 1,000 feet of one another, nor could any such business operate within 500 feet of a residential area.[38]

The problem with the amended Ordinance was that it defined regulated businesses according to the content of the movies or books that they offered. An "adult" business was one that presented "material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas,'" terms that the Ordinance further defined in detail.[39] The Ordinance plainly discriminated according to speech content and therefore seemed to conflict with the Court's holding in *Mosley*. For this reason, the Sixth Circuit Court of Appeals found the Ordinance unconstitutional, suggesting that Detroit tackle the problem of neighborhood decline "'by means of more carefully drawn and even-handed legislation.'"[40]

The Supreme Court reversed and held the Detroit Ordinance constitutional despite its content-discriminatory form. Justice Stevens wrote a plurality opinion joined by three other Justices, while Justice Powell wrote a concurring opinion. The plurality and concurring opinions agreed on several points that make up the essentials of the modern secondary effects doctrine.[41] For all Justices in the majority, the Detroit Ordinance was permissible, despite its content discriminatory form, for three reasons:

*The Ordinance was designed to serve interests not directly related to the suppression of pornography's message*. Justice Stevens and Justice Powell agreed that the Detroit Ordinance's goals of reducing crime and preventing neighborhood blight distinguished it from cases involving message-based censorship. Although the Ordinance singled out sexually explicit speech, Justice Stevens found this permissible because the Ordinance was designed to control secondary effects associated with this speech, not its offensive message.[42] For similar reasons, Justice Powell found that the

37. *Id.* at 55 (quotes refer to the Supreme Court's summary of the expert's findings). Detroit had previously maintained such an ordinance without mention of adult businesses, but the rapid increase in the number of adult businesses operating in Detroit in just a few years prompted it to add them to the list. *Id.* at 54, 55 n.8.

38. *Id.* at 52.

39. *Id.* at 53 (internal quotation marks omitted).

40. Am. Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1021 (6th Cir. 1975) (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 20 (1974) (Marshall, J., dissenting)).

41. While commentators have sometimes attributed the secondary effects doctrine to Justice Powell's opinion in *Young*, as contrasted with that of Justice Stevens, both opinions use similar logic and are consistent with the basic doctrine. Moreover, Justice Stevens's opinion actually contains the phrase "secondary effect," *see* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976), whereas Justice Powell's does not.

42. *Id.* ("The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.").

city was justified in regulating adult theaters differently than other theaters "because they have markedly different effects upon their surroundings."[43] He warned that if the purpose of the Ordinance had been to curtail the message of adult theaters, he would have decided differently.[44]

*The Ordinance was reasonably designed to serve a substantial governmental interest*. Justices in the majority agreed that the government's interest in neighborhood preservation was substantial, and found the city's choice of how to serve that interest through land use regulations acceptable. Justice Stevens stated that the city's interest in preventing neighborhood decline "must be accorded high respect" and that "the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[45] In similar language, Justice Powell, applying intermediate scrutiny,[46] found that there is no "doubt that the interests furthered by this ordinance are both important and substantial."[47]

*The Ordinance did not significantly impair access to the speech in question*. Justices Stevens and Powell also found it significant that the restriction imposed only a modest burden on the speech of adult businesses. Since the Ordinance regulated only the location of adult businesses, Justice Powell predicted that there would be no "significant overall curtailment of adult movie presentations."[48] Similarly, Justice Stevens characterized the burden on protected expression as "'slight.'"[49] He further stated, "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."[50]

In spite of their agreement on these points, the analyses of Justices Stevens and Powell differed in two significant ways. First, Justice Stevens recognized the Detroit Ordinance as content-based,[51] whereas Justice Powell did not. Rather, Justice Powell found the Ordinance to be content-neutral because its purpose was not to suppress speech.[52] This difference of methodology is less important than it may seem because both the plurality and concurring opinions concluded that the Ordinance was subject to relaxed scrutiny for similar reasons, including the Ordinance's lack of

43. *Id.* at 82 n.6 (Powell, J., concurring).
44. *See id.* at 81–82 n.4.
45. *Id.* at 71 (plurality opinion).
46. Justice Powell applied the *O'Brien* test, *see id.* at 79 (Powell, J., concurring), whereas the plurality did not make clear what standard it was applying. The plurality's analysis, however, is consistent with intermediate scrutiny and the *O'Brien* test.
47. *Id.* at 80.
48. *Id.* at 79. Indeed, Justice Powell noted that, according to the district court's findings, "if a sufficient market exists to support them the number of adult movie theaters in Detroit will remain approximately the same." *Id.*
49. *Id.* at 72 n.35 (plurality opinion) (quoting Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363, 370 (E.D. Mich. 1974)).
50. *Id.* at 71 n.35.
51. *See id.* at 70–71.
52. *See id.* at 78–79 (Powell, J., concurring).

ultimate focus on the speech's message. Although Justice Stevens framed the secondary effects doctrine as an exception to the general rule against content discrimination, while Justice Powell applied it as part of the definition of "content-based," it is in effect the same principle stated two different ways.

Second, and more substantively, Justice Stevens recognized and gave constitutional weight to the idea that pornography is a distinctive type of speech subject to less protection than political speech. He stated:

> [I]t is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . . [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[53]

Justice Stevens thus treated non-obscene pornography as having a distinctive constitutional status somewhere between fully protected speech and unprotected speech. He concluded that the State may not ban such material because of its potential for some artistic value, but "the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."[54]

By contrast, Justice Powell's concurrence conspicuously made no judgment about pornography's relative value. Indeed, this was apparently the issue that prompted Justice Powell to write separately.[55] Classifying some kinds of speech as "low value" for constitutional purposes is a dangerous exercise, for it risks the suppression of speech that the majority of society does not appreciate.[56] Out of cautiousness, Justice Powell seemed to prefer resting solely on the neighborhood effects rationale.

The irony of this cautiousness, however, is that in some respects it causes Justice Powell's opinion to be more threatening to the freedom of speech than Justice Stevens's opinion. Justice Powell's methodology, if taken to be indifferent to the type of speech that is regulated, poses a broader conflict with the rule disfavoring content discrimination stated in *Cohen*, *Mosley*, and *Erznoznik*—a rule that has since become a central

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

54. *Id.* at 70–71.

55. *See id.* at 73 n.1 (Powell, J., concurring). Moreover, Justice Stewart, in a dissenting opinion, objected most strongly to this part of the plurality's analysis, calling it "wholly alien to the First Amendment." *Id.* at 86 (Stewart, J., dissenting).

56. *See* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 337–48 (1995) (discussing critiques of low value speech theory). *But see* Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 199–210 (2001) (discussing how treating some speech as low value is constitutionally legitimate and can serve First Amendment interests).

feature of modern First Amendment analysis.[57] Whereas Justice Stevens's secondary effects doctrine creates at most a pornography exception to the constitutional rule disfavoring content discrimination, Justice Powell's version of the doctrine appears to apply to any category of speech regulation. In theory, this could allow even facially discriminatory regulations of political, religious, or scientific speech as long as the speech causes some negative societal effects that can be reduced by partially restricting it, such as by limiting it to certain zones of a city according to its content.

### *D. The Split Remains:* Renton *and* Alameda Books

More than thirty years after the Supreme Court decided *Young*, while cities and counties routinely rely on the secondary effects doctrine to regulate sexually oriented businesses, the Supreme Court has not firmly settled the tension between Justice Stevens's plurality and Justice Powell's concurring opinions on either issue that divided them. These issues are: (1) whether, as a matter of classification, to recognize secondary effects ordinances as acceptably content-based or instead to deem them content-neutral; and (2) whether the secondary effects doctrine is limited to sexually explicit speech.

The Supreme Court appeared to settle the classification issue in *City of Renton v. Playtime Theatres, Inc.*, wherein a majority of the Court reaffirmed the secondary effects doctrine of *Young*, and applied it as part of what defines a content-neutral regulation.[58] In *Renton*, the Supreme Court held that an ordinance controlling the location of adult movie theaters for the purpose of reducing secondary effects "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.'"[59] The Court then proceeded to apply intermediate scrutiny applicable to content-neutral regulations.[60]

More recently, however, this part of the *Renton* analysis has divided the Court. In *City of Los Angeles v. Alameda Books, Inc.*,[61] while all nine Justices agreed that intermediate-level scrutiny is appropriate for ordinances aimed at controlling the secondary effects of adult businesses,[62] only

57. *See* Fee, *supra* note 3, at 1116–20.

58. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986).

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

60. *Id.* at 50.

61. 535 U.S. 425 (2002).

62. *See id.* at 434–42 (plurality opinion) (applying the *Renton* framework, including its application of content-neutral scrutiny); *id.* at 447 (Kennedy, J., concurring) (The ordinance "calls for intermediate and not strict scrutiny, as we held in *Renton*."); *id.* at 454 (Souter, J., dissenting) ("This ordinance stands or falls on the results of what our cases speak of as intermediate scrutiny . . . ."); *see also id.* at 456 (describing the scrutiny level as "middle-tier").

Justice O'Connor's plurality applied the full *Renton* methodology.[63] Other Justices applied something closer to the Stevens methodology from his opinion in *Young*. Justice Kennedy, in a concurring opinion, described the *Renton* classification as a "fiction" that is inconsistent with the Court's usual method of treating facially discriminatory regulations as content-based.[64] He concluded, "These ordinances are content based, and we should call them so."[65] Justice Souter added to this, in dissent, and agreed that to call such a law content-neutral is misleading, suggesting that another term such as "content correlated" would be more appropriate.[66] He was joined in this part by Justices Stevens and Ginsburg.[67] Thus, at least four members of the Court seem disinclined to call these ordinances content-neutral, even if they are ultimately constitutional under a lower standard of scrutiny.

The significance of this category choice is subtle. An advantage of recognizing these ordinances as content-based—albeit exempt from strict scrutiny—as Justice Kennedy would do, may be to achieve doctrinal clarity and consistency, thereby preventing a muddying of the content-based/content-neutral distinction in other areas.[68] Moreover, as Justice Souter suggested, recognizing these ordinances as content-discriminatory might serve to protect speech, even within a system of intermediate scrutiny, by reminding judges that the secondary effects doctrine is not a rubber stamp.[69] However, there is also a potential pro-regulatory effect of admitting that the secondary effects doctrine is yet another exception to constitutional rules that disfavor content-based regulation. It permits courts and commentators to more easily observe, as Justice Stevens did in *Young*, that there are many forms of content-based regulation that are acceptable, and that regulating speech on the basis of content, therefore, does not create such a strong presumption of invalidity as cases sometimes suggest.[70] The more exceptions there are to the presumption disfavoring content-based regulations, the more this tends to erode the normative force of the presumption.

The Supreme Court has also left murky the second and larger issue, which is whether the secondary effects doctrine only applies to sexually explicit speech. The Court has never upheld a content-discriminatory regu-

63. *See id.* at 434, 441 (plurality opinion).
64. *See id.* at 448 (Kennedy, J., concurring).
65. *Id.*
66. *See id.* at 457 (Souter, J., dissenting).
67. *See id.* at 453. Justice Breyer did not join this section of Justice Souter's dissent and did not express a view on this issue.
68. *See id.* at 448 (Kennedy, J., concurring).
69. *See id.* at 457 (Souter, J., dissenting).
70. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 65–71 (1976) (plurality opinion); *see also* Fee, *supra* note 3, at 1136–49 (arguing that the many exceptions to the constitutional rule disfavoring content discrimination should cause us to reevaluate both the strength and meaning of the rule).

lation on the basis of the secondary effects doctrine that did not concern sexually explicit speech.[71] In *Renton*, the Court found it sufficient to hold that the secondary effects doctrine applies "at least with respect to businesses that purvey sexually explicit materials" and cited Justice Stevens's statement in *Young* that pornography has diminished constitutional value.[72] At the same time, *Renton* cited cases involving other kinds of speech for the general proposition that an ordinance is content-neutral if it is "'*justified* without reference to the content of the regulated speech'" and purported to rely on that general principle.[73] In *Alameda Books*, neither the plurality nor concurrence relied upon pornography's distinctive constitutional status as justification for the secondary effects doctrine.[74]

Adding to the confusion, the Supreme Court has sometimes entertained secondary effects arguments with respect to non-sexual speech—even political speech—and it has never rejected those arguments on the simple grounds that the doctrine doesn't apply.[75] Nevertheless, it has always found in non-sexual speech cases that the effects in question were not secondary, thus avoiding the doctrine's effects. What can explain this? Perhaps only sexually explicit speech produces negative secondary effects, although this seems doubtful. Or perhaps the Court will someday apply the doctrine to justify a discriminatory regulation of non-sexual speech once an appropriate case arises. But there is also good reason to doubt this, as shown in the next part. To examine these propositions requires closer examination of the phrase "secondary effect." It appears that the Supreme Court does not apply this concept consistently to all kinds of speech.

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71. Both *Renton* and *Alameda Books* involved facially discriminatory regulations of sexually oriented businesses similar to that in *Young*. Other Supreme Court cases that are sometimes cited with *Renton* and *Alameda Books* have involved content-neutral speech regulations or expression-neutral laws of conduct, and therefore, do not depend upon the secondary effects doctrine to avoid strict scrutiny. For example, in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), the Court cited *Renton* to uphold a noise-control regulation as applied to an outdoor musical performance and sometimes this is called a secondary effects case. But importantly, *Ward* involved a facially content-neutral noise regulation; the Court's opinion does not even mention the term "secondary effects" and does not require a special doctrine to avoid strict scrutiny. For similar reasons, neither of the Court's nude dancing cases, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), necessarily depend upon application of the secondary effects doctrine. In both cases, the Supreme Court upheld application of general laws prohibiting public nudity against establishments that wished to violate the law for expressive reasons, and so involved a straightforward application of the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367 (1968). *See Erie*, 529 U.S. at 289–90; *Barnes*, 501 U.S. at 566 (plurality opinion); *id.* at 582 (Souter, J., concurring). While the Supreme Court's use of the term "secondary effects" in *Barnes* and *Erie* reinforces its association with adult businesses, it was not essential to determine the level of scrutiny.

72. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 & n.2 (1986).

73. *Id.* at 48–49 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

74. Justice Scalia wrote in a separate concurrence that he would treat "the business of pandering sex" as entirely unprotected, but he offered this as an alternative rationale to the plurality's secondary effects analysis, which he joined. 535 U.S. 425, 443–44 (2002) (Scalia, J., concurring).

75. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 394–95 n.7 (1992); Boos v. Barry, 485 U.S. 312, 320–21 (1988).

## II. THE DESCRIPTIVE PROBLEM

Let us assume for purposes of this section that the secondary effects doctrine applies equally to all kinds of speech, as the Supreme Court has sometimes implied. It holds, as an exception to the usual rules disfavoring content discrimination, that a facially content-discriminatory regulation of speech is permissible if its purpose is to control the secondary effects of the speech and if it passes intermediate scrutiny. To apply this doctrine, one must know what counts as a secondary effect.

Even taking Supreme Court case law alone, this presents a serious descriptive problem. The Supreme Court has not explained the distinction between secondary and primary effects clearly or consistently, and there appears to be no single concept of secondary effects that can reconcile current law. While there are several possible definitions of secondary effects that are theoretically available, none of them can explain the various cases in which the Supreme Court has applied intermediate scrutiny or strict scrutiny. It appears that the Court employs different conceptions of secondary effects depending on the kind of speech at issue.

This part will test several possible definitions of secondary effects against established First Amendment law. The definitions of secondary effects considered here are: (1) remote in the chain of causation (including variations based on the speaker's intent or foreseeability); (2) mere correlation; (3) non-communicative causation; and (4) causation independent of viewpoint.

### *A. Remote Causation*

One straightforward meaning of secondary effect refers to remote or downstream causation, as the term is sometimes used in labor law.[76] Where an action causes a chain of consequences, the first consequence in the chain is a primary effect while the second and more remote consequences are deemed to be secondary.

Under this framework, the direct communicative effects of speech on audience members are always primary effects. These include persuasion, offense, changed social attitudes, changed desires and emotions, and even sexual arousal. Consistent with this, the Court held in *Boos v. Barry* that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" but rather is a "direct impact."[77]

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76. *See, e.g.*, Enter. Ass'n v. NLRB, 521 F.2d 885, 906–10 (D.C. Cir. 1975) (Bazelon, C.J., concurring), *rev'd*, 429 U.S. 507 (1977) (discussing the problems of distinguishing illegitimate secondary effects from legitimate ones in labor law).

77. *Boos*, 485 U.S. at 321 (plurality opinion); *see also id.* at 334 (Brennan, J., concurring) ("Whatever 'secondary effects' means, I agree that it cannot include listeners' reactions to speech.").

By contrast, under this definition, the societal consequences that flow from those communicative effects are secondary. If a man views pornography so often that he begins to neglect his family, and if he later becomes divorced because of the neglect, the divorce is a secondary effect. Likewise, if a man attends a nude dance club every day after work, eventually changing his attitudes towards women and causing him to speak offensively to the women in his workplace, this is a secondary effect. In both of these examples, the impact of speech on its audience is a necessary part of the chain of causation, but the secondary consequences also depend upon independent causal factors, such as the audience member's own subsequent choices or the decisions of other people.

While this method of dividing primary and secondary effects is clear enough, and is perhaps most faithful to the term "secondary," it is not a method that the Supreme Court usually employs, and for good reason. This definition of secondary effect would make avoiding strict scrutiny for content-based regulations far too easy. Almost all speech with harmful direct effects also has negative downstream consequences that are predictable. Indeed, it is typically because of the downstream social consequences that government officials often wish to regulate dangerous speech. Persuasion often leads to action. Offense often leads to a response. Psychological harm often leads to personal problems, loss of productivity, and loss of opportunities in other aspects of life. These consequences in turn produce other injuries to society, including economic and educational problems. If all downstream consequences of dangerous or negative speech counted as secondary effects, then many of the classic First Amendment cases, including those involving subversive speech,[78] offensive speech,[79] false statements,[80] and speech harmful to the political process,[81] for example, should have been decided under the standard of intermediate scrutiny. Because government could always look further down the chain of causation to find a secondary effect for its justification, strict scrutiny would cease to exist as a meaningful restraint on content-based speech regulations.

So let us try revising this method by introducing speaker-intent or foreseeability as limiting factors. Identifying a consequence as indirect or secondary could also refer to a lack of intent or foreseeability on the part of the speaker. Unintended or unforeseeable consequences seem to be less direct—and more logically classified as secondary—compared to those that the speaker specifically intends to bring about through communication.

78. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech advocating unlawful action, but not in a way that constitutes imminent incitement).

79. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (offensive racist message).

80. *E.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation).

81. *E.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (use of corporate wealth to influence the state referendum process).

Neither of these revisions to the remoteness test can explain current law. If the concept of secondary effects includes all downstream consequences that are unintended by the speaker, the definition is still far too broad. Often speakers do not intend the negative downstream consequences of their speech. For example, pornography producers do not generally intend to affect the rates of divorce or sexual harassment, even if their speech happens to have such an influence.[82] There are many First Amendment cases that would have been decided differently if the fact that a speaker does not intend the downstream negative consequences of his speech means that the government can impose discriminatory regulations against such speech under intermediate scrutiny as a means of curtailing such effects.[83] Clearly, the secondary effects doctrine must be narrower than this.

The opposite problem arises if we add an unforeseeability element to the test. This would wipe out the secondary effects doctrine. If secondary effects include only those effects that are not reasonably foreseeable at the time of the speech, this calls into question the classic secondary effects cases, including *Young*, *Renton*, and *Alameda Books*. In each of these cases, the harm to neighborhoods from adult businesses was foreseeable and supported by studies,[84] and yet the Supreme Court treated these effects as secondary effects. If the secondary harms had not been predictable, these laws should have failed under intermediate scrutiny as being irrational.

### *B. Mere Correlation*

If remote causation is not the test, then suppose that a secondary effect is one that is merely correlated with the speech content in question. According to another potential framework, if speech's effect on its audience is a necessary part of the chain of causation leading to the effect in question, the latter is not a secondary effect. All of the downstream consequences of primary effects remain primary effects. Secondary effects, therefore, are not caused, even indirectly, by the speech content in question; they are merely correlated with it.

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82. *See generally* Jill C. Manning, *The Impact of Internet Pornography on Marriage and the Family: A Review of the Research*, 13 SEXUAL ADDICTION & COMPULSIVITY 131 (2006) (presenting broad-sweeping findings on pornography's effect on society, including rates of divorce and sexual harassment).

83. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (holding unconstitutional as content-discriminatory a rule imposed on adult cable television channels for the purpose of avoiding bleed-between stations, even though there was no indication that the adult stations intentionally caused bleed); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (holding unconstitutional a parade fee based on the anticipated security costs, even though there was no indication that the parade organizers intended to impose security costs on the government).

84. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 430 (2002); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50–51 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 55 (1976).

The Supreme Court implied this framework in *R.A.V. v. City of St. Paul*, where it found unconstitutional a city ordinance imposing extra penalties for violent crimes that convey a racist message.[85] The Court held that even if racist hate crimes are more likely to cause violent responses than comparable non-racist crimes, the resulting violence would not count as a secondary effect:

> The only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message; because the "chain of causation" thus *necessarily* "run[s] through the persuasive effect of the expressive component" of the conduct, it is clear that the St. Paul ordinance regulates on the basis of the "primary" effect of the speech—*i.e.*, its persuasive (or repellant) force.[86]

Further supporting the correlation/causation distinction, a plurality of the Court wrote in *Boos v. Barry* that secondary effects regulations "apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech" but "the justifications for regulation have nothing to do with content."[87] The phrases "happen to be associated with" and "nothing to do with content" imply that secondary effects exist where there is a mere correlation, but no causal relationship, between the content of speech and ultimate harm.[88]

Of course, it is entirely plausible that some neighborhood effects associated with particular kinds of speech are merely correlated. For example, it is possible that sexually oriented businesses tend to locate disproportionately in high-crime neighborhoods for business reasons of their own without making the crime any worse, leading to a correlation between such businesses and neighborhood crime. If this is what explains the relationship between adult businesses and neighborhood conditions, then the phrases "happen to be associated" and "nothing to do with content" are accurate.

The problem with the "mere correlation" standard, however, is that it fails to justify the Court's use of the secondary effects doctrine in *Young*, *Renton*, and *Alameda Books*. The theory of regulation in all three of these cases was, and must have been, that the sale of sexually explicit speech at least sometimes *causes* negative secondary effects, or there would have

85. R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

86. *Id.* at 394–95 n.7 (1992) (alteration in original) (citation omitted) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 586 (1991) (Souter, J., concurring)).

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

88. *Cf.* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 457 (2002) (Souter, J., dissenting) (calling permissible adult business ordinances "content correlated," implying that content-based causation is absent).

been no rational basis for targeting only businesses that sell such speech as the means of combating negative conditions.[89] If the presence of businesses that offer pornography or nude dancers is merely correlated with high neighborhood crime rates, then removing or relocating them would do nothing to reduce such crime. Any regulation of speech as a means of combating its secondary effects would by definition be irrational. Mere correlation, therefore, also fails to explain the secondary effects doctrine.

### *C. Non-Communicative Causation*

An alternative way to interpret the doctrine is to distinguish between two types of causation: communicative and non-communicative. Let us suppose that all communicative effects and their downstream consequences are classified as primary, whereas all non-communicative effects and their consequences—such as would exist even if we changed the content of the speech in question—would count as secondary. For example, a bookstore specializing in violent white supremacist literature might have an effect of increasing the risk of violence in a city, which could hurt the commerce of the city; it might have another effect of causing flood problems for the city, because it occupies a space that would otherwise serve as a flood drainage area. The first would count as a primary effect, while the second would count as secondary because it is causally unrelated to the speech's message or content.

This distinction finds support in Justice Kennedy's concurring opinion in *Alameda Books*, where he described secondary effects as non-communicative effects:

> Speech can also cause secondary effects . . . unrelated to the impact of the speech on its audience. A newspaper factory may cause pollution, and a billboard may obstruct a view. These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.[90]

It is true that the mere presence of speech-related materials can cause negative effects wholly apart from whether the materials happen to communicate something. A leaflet can become litter even if it is blank. This

89. *See Alameda Books*, 535 U.S. at 436–41 (plurality opinion) (concluding that the city's evidence was adequate to support a finding that concentrated adult businesses cause negative secondary effects); City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (ordinance targeted negative secondary effects due to presence of nude dancing establishment); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 584 (1991) (Souter, J., concurring) ("It . . . is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films . . . at issue in *Renton*."); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (ordinance aimed at "secondary effects caused by the presence of even one such theater in a given neighborhood").

90. *Alameda Brooks*, 535 U.S. at 444 (Kennedy, J., concurring).

distinction also correlates nicely with the First Amendment's intuitive concern with content discrimination: a business should not be exempt from laws of general applicability merely because it deals in expressive material, but it also generally should not be subject to special burdens on account of what its material expresses.

Nevertheless, this framework can only partly explain the secondary effects cases. It more easily explains secondary effects cases involving facially content-neutral or expression-neutral laws. This includes the nude dancing cases.[91] In *Barnes v. Glen Theatre, Inc.*[92] and *City of Erie v. Pap's A.M.*,[93] the Court upheld the application of laws prohibiting "public nudity" to erotic dancers. In both cases, the government refused to grant an exemption for dancers, citing concerns that such an exemption would cause neighborhood crime. If the government rationally believed that the presence of public nudity in these settings would cause neighborhood crime apart from whether the nudity is expressive (and regardless of the message expressed),[94] then the effects could qualify as secondary under this framework. In fact, as the Court's opinions note, the cities in both cases confirmed that their concerns were unrelated to communicative causation by prohibiting all public nudity regardless of expressiveness.[95]

Even if some cases fit the doctrine, however, this framework cannot explain cases that use the secondary effects doctrine to justify facially content-discriminatory laws affecting sexually oriented theaters and bookstores—namely *Young*, *Renton*, and *Alameda Books*. In all three cases, the government singled out sexually explicit movies and literature for regulation as a means of combating negative neighborhood effects, which the Supreme Court found to be rational because other types of speech do not cause those kinds of negative neighborhood effects.[96] This is inconsistent with a communication-neutral theory of causation. There could have been no rational reason to regulate differently theaters that show sexually explicit works unless the content and communication of sexually explicit films was thought to be part of the chain of causation leading to negative neigh-

91. As explained in note 71, *supra*, the nude dancing cases do not require application of the secondary effects doctrine to avoid strict scrutiny in the same way as *Young*, *Renton*, or *Alameda Books*, because they involved generally applicable laws of conduct, although both cases include a discussion of secondary effects.

92. 501 U.S. 560 (1991).

93. 529 U.S. 277 (2000).

94. If this theory of non-communicative causation is implausible, as readers may well conclude, then the nude dancing cases are also inconsistent with this version of the secondary effects doctrine. I consider it here because some of the Justices rely on it, *see, e.g.*, *Barnes*, 501 U.S. at 585–86 (Souter, J., concurring), and it is the only way to potentially reconcile these cases with the non-communicative definition of secondary effects.

95. *Erie*, 529 U.S. at 290; *Barnes*, 501 U.S. at 566, 570 (plurality opinion); *id.* at 576 (Scalia, J., concurring).

96. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976) (plurality opinion); *id.* at 82 (Powell, J., concurring).

borhood effects. Either the government's regulations were irrational for singling out one kind of speech according to what it communicates, or they were designed to curtail negative effects that were somehow causally related to communication.

Justice Kennedy's examples of other kinds of secondary effects—a newspaper factory that emits pollution and a billboard that blocks a view—demonstrate the point. If these effects are secondary because they are "unrelated to the impact of the speech on its audience,"[97] a proper regulatory response would be content-neutral in form as well as in purpose. A valid regulation of printing press pollution need not regulate business-related newspapers according to one set of emissions rules and politics-related newspapers to a different set of emissions rules. Likewise, a restriction on the placement of billboards for the purpose of protecting scenery should not vary according to the message of the billboard. But *Young*, *Renton*, and *Alameda Books* hold that it is rational to single out businesses that specialize in sexually explicit speech as a means of controlling secondary effects. How so?

There is no escaping the conclusion that the holdings of *Young*, *Renton*, and *Alameda Books* depend upon there being some kind of causal connection between the communicative effects of sexually explicit speech and negative neighborhood effects. This does not mean that the theory of causation must be direct or simple, as in the theory that pornography immediately incites its audience to go out and commit crimes in the same neighborhood where it is purchased. That is only one of several theories whereby the communicative content of sexually explicit speech could cause negative neighborhood effects in areas that surround adult businesses.

Another causal theory is based on the idea of community distaste. It is plausible that many members of the public are disgusted by pornography or nude dancing, causing them as consumers and homebuyers to avoid locations that purvey such speech. If this effect is pronounced enough, it could cause property values for residential and commercial property to be lower in the vicinity of adult businesses, which in turn could contribute to neighborhood crime and blight. If this is the cause, however, these should all count as primary effects of the speech in question because the offensiveness of the speech's content is part of the chain of causation.[98]

Another theory is based on customer demographics. Perhaps the customers of adult businesses are more likely than average members of the

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

98. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 394–95 n.7 (1992) (an effect is not secondary if the "repellant force" of the speech forms part of the chain of causation); Boos v. Barry, 485 U.S. 312, 321 (1988) (rejecting a rule against offensive messages directed against embassies, stating, "The emotive impact of speech on its audience is not a 'secondary effect.'").

public to have an interest in illegal drugs or prostitution,[99] and drug dealers and prostitutes know this. This demographic of potential customers is attracted to the location of an adult business because they find the content of pornography appealing. Then drug dealers and prostitutes respond by visiting the location more often themselves, and soon the location becomes a known gathering place for crime. By this chain of causation, the sexually explicit content of materials offered by an adult business could contribute to neighborhood deterioration because of its communicative effect on a target audience.[100] Change the content of the material to something else, and the audience would change, causing the effects to diminish.

Or perhaps it is some combination of all of the above—pornography's inciting effect for some, its repulsive effect for others, and its luring effect to still others that may cause neighborhoods to change in a negative way when an adult business appears. This only confirms that these are communicative effects. Take the communicative elements of pornography away, and the secondary effects would not exist, at least not in a way that is uniquely caused by adult businesses. This can explain why the government might rationally single out such businesses for special regulatory treatment, even if it has no moral objection to pornography. But it also disproves the "no communicative causation" definition of secondary effects. In *Young*, *Renton*, and *Alameda Books*, there is no plausible theory of causation that can (a) justify special regulatory treatment of adult businesses based on the content of their works, and (b) that does not depend on the communicative effect of sexually explicit works on some audience.

### *D. Causation Independent of Viewpoint*

A final possible definition distinguishes between two kinds of communicative causation: viewpoint-related causation and viewpoint-neutral causation. Under this definition, a secondary effect is one that is causally unrelated to the viewpoint of the speaker. So if audience persuasion or offense at the speaker's viewpoint is part of the chain of causation, then the ensuing effects are all primary effects. But if the only communicative effects in the chain of causation involve abstract or imaginative communication (as in the communication of a sexual fantasy), then the resulting effects are secondary.

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99. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 583–87 (1991) (Souter, J., concurring) (speculating a similar theory of causation, based on the predispositions of adult business consumers).

100. Some might argue that the fantasy-inducing and sexually stimulating effect of pornography for its audience is not a communicative effect of a type that the First Amendment should recognize. But this argument also cannot reconcile current law because it would make most pornography unprotected by the First Amendment. While the precise communicative impact of pornography can vary depending on the material and audience, something about it must be communicative for it to count as speech, and whatever that communicative element is will relate to the audience it attracts.

This definition of secondary effect finds support in Supreme Court cases holding that viewpoint discrimination is the worst form of content discrimination under the First Amendment.[101] It is also consistent with one part of the Court's description in *Renton* for why the city's adult business ordinance was subject to intermediate scrutiny:

> The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" 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."[102]

According to this framework, the neighborhood effects of adult businesses are secondary because they are not caused by the expression of any particular viewpoint, even though they flow from pornography's broader communicative effects. Indeed, pornography does not typically express any concrete viewpoint (although it may be used to do so), but rather, is characterized by its sexual explicitness.[103] This framework also explains why the Supreme Court did not apply the secondary effects doctrine in *R.A.V.* or *Boos*, both of which involved the consequences of viewpoint-based offenses. To regulate racist hate speech for the purpose of preventing violence, as in *R.A.V.*, or to regulate speech critical of foreign governments for the purpose of protecting diplomatic relations, as in *Boos*, would be to target effects that would not exist but for the speaker's expression of a viewpoint and the audience's appreciation of that viewpoint.[104] These were, therefore, properly treated as primary effects.

The problem with this methodology, however, is that it effectively reduces the definition of "content-based regulation" to cover little more than viewpoint discrimination.[105] In so doing, it contradicts *Cohen*, *Mosley,*

101. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); *R.A.V.*, 505 U.S. at 391.

102. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986) (quoting Police Dep't v. Mosley, 408 U.S. 92, 95–96 (1972)).

103. In saying this, I acknowledge, as many others have shown, that pornography tends to portray women as objects of abuse, and that it affects readers' attitudes towards women. But it is another matter to say that this is what defines pornography, or that the purpose of the speech is to influence readers' attitudes about gender roles. At least the ordinances in *Renton* and *Young* do not define "adult" speech according to its gender message, and do not aim at the gender effects of pornography.

104. *See also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) (holding that parade fees based on the government's anticipated costs of security are not content-neutral because of the causal relationship between security expenses and the speaker's viewpoint).

105. The definition does not make viewpoint-neutrality and content-neutrality entirely synonymous, because it is possible for some laws to restrict all viewpoints of a given topic equally and yet still aim at the viewpoint-related effects of speech. *E.g.*, Republican Party v. White, 536 U.S. 765, 774–75 (2002) (applying strict scrutiny to a law prohibiting judicial candidates from expressing their views on certain topics); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 533–34 (1980) (applying strict scrutiny to a law prohibiting utilities from expressing views on controversial topics in bill in-

*Erznoznik*,[106] and other more recent cases holding that a content-discriminatory regulation requires strict scrutiny even if it does not single out a particular viewpoint, and even if the government's motives are unrelated to viewpoint. For example, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Court held unconstitutional under strict scrutiny a law requiring authors of works describing their own crimes to share their book royalties with crime victims.[107] Under the definition of secondary effects suggested here, however, the law should have been reviewed under intermediate scrutiny because the government was concerned with the effects of allowing criminals to profit from their wrongful acts—a concern that does not depend upon the expression of a viewpoint. For similar reasons, the Supreme Court's cases involving the regulation of internet pornography,[108] cable television pornography,[109] and telephone pornography[110] all should have been decided under intermediate scrutiny. The government's primary interest in all of these cases was to prevent harm to minors from viewing sexually explicit material, which does not depend upon any viewpoint, and therefore should have been treated as a secondary effect. This framework, therefore, also fails to reconcile current law.

To summarize, the Supreme Court's First Amendment cases do not fit any plausible meaning of secondary effects if that phrase refers to a type of causal relationship. While various conceptions of secondary effects are implied in Supreme Court cases, no one of them can predict when the Court will apply the secondary effects doctrine or, alternatively, when it will apply strict scrutiny.

Perhaps this conclusion should be expected, given that the Court has not even consistently applied the distinction between content-based and content-neutral regulations outside the scope of the secondary effects doctrine. For example, at times it has applied the narrow definition of content-based regulation suggested in *Ward v. Rock Against Racism*, which looks primarily at whether the government disagrees with the speaker's

serts).

106. *See supra* notes 30–32 and accompanying text. None of these cases involved government interests related to unfavorable viewpoints, but rather concerned offense at profane words, offense at nude images, and disruptive effects of picketing.

107. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115–23 (1991). These laws aim at the primary effects of speech under this framework, even though they are technically viewpoint neutral.

108. *See* Ashcroft v. ACLU, 542 U.S. 656 (2004) (applying strict scrutiny to the Child Online Protection Act); Reno v. ACLU, 521 U.S. 844 (1997) (holding unconstitutional the Communications Decency Act).

109. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (holding unconstitutional an anti-bleed rule applied to adult cable television channels).

110. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (holding unconstitutional a restriction on dial-a-porn services).

message.[111] At other times, it has applied the more formal and broader definition from *Mosley* and *Simon & Schuster*, which encompasses formal discrimination on the basis of viewpoint, subject, words, or imagery. Sometimes the Court even asks the more nebulous question of whether "official suppression of ideas is afoot."[112] Given this lack of clarity, it might be unreasonable to expect that the Supreme Court would apply the secondary effects doctrine consistently when it operates as an exception to (or sometimes as an application of) such a flexible principle as the First Amendment's aversion to content discrimination.

Nevertheless, if the term secondary effects gives the illusion that the Supreme Court has been assigning speech regulations to strict or intermediate scrutiny according to some neutral principle, that illusion should be dispelled. The Supreme Court appears to be choosing what is meant by secondary effect not according to principles of causation as the term implies, but rather according to broader contextual factors, including the nature of the speech at issue. Perhaps the term secondary effect is convenient only because it is capable of more than one meaning while appearing to be objective, and can therefore easily mask a subjective balancing process.

## III. THE NORMATIVE PROBLEM

Besides its descriptive failure, the secondary effects doctrine suffers from an even more fundamental problem. There appears to be no good constitutional reason why it should matter whether the effects that government seeks to prevent are secondary or primary in relation to the regulated speech.

In this part, let us assume that the distinction between primary and secondary effects is clear enough to apply, and that the distinction has to do with the type of causation involved. Without committing to a precise definition of primary and secondary effects, assume that primary effects are more direct or immediate in the chain of causation, are more often intended by the speaker, and are more often causally related to the viewpoint of the speaker. By contrast, secondary effects are more likely indirect or remote in the chain of causation, are more often unintended by the speaker, and are more often unconnected to any particular viewpoint that

111. *See* 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."); Hill v. Colorado, 530 U.S. 703, 719 (2000) (applying the *Ward* standard).

112. *See, e.g.*, Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2381–82 (2007) (holding that content discrimination affecting non-entitlements is permissible where "'there is no realistic possibility that official suppression of ideas is afoot'" (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992))).

the speaker expresses. With these assumptions in mind, it is useful to ask why it should matter for constitutional purposes whether a regulation is aimed at the primary or secondary effects of speech.

To illustrate the problem, suppose that there are two kinds of speech, Speech A and Speech B, that are so closely related that they have cross-over secondary effects. Both types of speech cause increased crime rates for two types of crime, Crime A and Crime B, that are harmful to society. The government knows that Speech A has the primary effect of causing more people to commit Crime A, but it also has the secondary effect of causing more people to commit Crime B. Likewise, the government knows that Speech B has the primary effect of causing more people to commit Crime B, but it also has the secondary effect of causing more people to commit Crime A.

The secondary effects doctrine rests upon a premise that it is far more preferable for the government to regulate Speech A for the purpose of preventing Crime B (its secondary effect), rather than to prevent Crime A (its primary effect). Conversely, it is preferable for the government to regulate Speech B for the purpose of preventing Crime Type A (its secondary effect) rather than to prevent Crime Type B (its primary effect). Why should this be so? To explore this, it is useful to consider those theories that scholars have commonly offered for why the freedom of speech exists and why content-based regulations are dangerous.

### *A. Audience- and Speaker-Based Theories*

One group of normative theories supporting the freedom of speech includes all those that aim to preserve the value of speech for audiences, and by extension for society.[113] These theories include the role of free speech in facilitating the search for truth and knowledge,[114] in facilitating self-government,[115] in checking abusive government,[116] and in developing art and culture. This group of theories encompasses the presumption that the marketplace of ideas is generally a better judge of speech's truth and value for society than is the government.[117]

113. *See* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966) (exploring various normative theories for protecting free speech); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 29–41 (2d ed. 2005) (organizing various policy arguments for free speech protection with supporting quotations).

114. *See* William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

115. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–35 (1971) (arguing that the First Amendment protects only speech that is explicitly aimed at furthering self-government).

116. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

117. *See* Abrams v. United States, 250 U.S. 616, 630 (Holmes, J., dissenting).

Because all audience-based theories are concerned with the effects of suppressing too much speech rather than the government's reasons for suppressing the speech, they appear on the surface to provide no support for the secondary effects/primary effects distinction. If Speech A has potential value for society, that value is threatened by regulation whether the government's purpose is to prevent Crime A (its primary effect) or to prevent Crime B (its secondary effect).

One might try to explain the secondary effects doctrine by supposing that regulations of secondary effects are, on average, less likely to cause significant suppression of valuable speech than regulations of primary effects. It is not clear why this would be so, or that this would warrant differing standards even if it were true to some degree. Certainly it is possible for secondary-effects-type reasoning to support even the total suppression of some kinds of speech that produce harmful secondary effects.[118] Under current law, government cannot entirely ban protected speech for the purpose of controlling secondary effects because intermediate scrutiny requires government to leave protected speech "reasonable alternative avenues of communication."[119] If this standard adequately protects speech's value when government aims at preventing harmful secondary effects, it should also be adequate protection when government aims at preventing harmful primary effects. Or, if it is not adequate protection against regulations aimed at primary effects, we should not consider it adequate protection against regulations aimed at secondary effects.

One might alternatively argue that the circumstances in which government has reason to regulate speech based on secondary effects are fewer than the circumstances in which it has reason to regulate speech based on primary effects. Thus, the aggregate effect of secondary-effects-based regulations may be less likely to do serious damage to the marketplace of ideas than the aggregate effect of primary-effects-based regulations. This might be true, but it is not a principled reason to distinguish between primary and secondary effects for constitutional purposes. One might just as well observe that the suppression of Sunday newspapers is less harmful on the whole than the equivalent suppression of weekday newspapers, because the former will only be suppressed once a week. What should matter for constitutional purposes is not the aggregate effect of the whole category, but whether regulations of one type are more likely than regulations of another type to produce outcomes contrary to the public interest. If government tends generally to overregulate speech when it aims at negative

118. For example, if exploitation or prostitution of models by those who produce pornography is a secondary effect of pornography, almost any suppression of pornography up to the point of total suppression would likely advance the government's interest in preventing that effect. It is through similar reasoning that the Supreme Court has held that government may ban child pornography. *See* New York v. Ferber, 458 U.S. 747 (1982).

119. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986).

primary effects—because it does not appreciate the speech's value or overestimates its harm—it is probably just as likely to overregulate speech when it aims at negative secondary effects. Government might even be more likely to overregulate based on secondary effects because the causal connection between speech and harm is more remote, and therefore more prone to overestimation.

This analysis does not mean that audience-based theories are indifferent to whether regulations are content-neutral or content-based. There are several possible theories within an audience-based framework for the First Amendment's general aversion to content-based regulations. One theory is that content-based regulations—especially viewpoint-based regulations—tend to distort the marketplace of ideas, allowing one side of a public debate to dominate the other.[120] This could lower the chances that truth will emerge from the competitive and deliberative process that the First Amendment is designed to protect. Another theory suggests that content-based regulations are more often supported by insubstantial governmental interests, as evidenced by the fact that the government was not willing to impose the same regulation on speech that it favors.[121] The constitutional requirement of content-neutrality, therefore, serves as an aid to judicial review and discourages governments from regulating speech—even in small ways—except in circumstances where it has sufficient reason to regulate all speech according to the same rules.[122] Another theory notices that it is politically easier for government to get away with significantly suppressing some types of speech if it can impose content-discriminatory regulations; so the rule against discriminatory regulations is designed to make this kind of suppression less likely for the benefit of audiences.[123]

Even if one accepts all of these reasons for disfavoring content-based regulations, they do not support the secondary effects doctrine. All three of these theories focus on dangers to the marketplace of ideas that are inherent in the *form* of content-based regulations. These dangers do not diminish if one changes the government's underlying purpose from one of primary-effects prevention to one of secondary-effects prevention. For all we know, government is just as likely to distort public debate, to regulate for insubstantial reasons, and to oversuppress speech when it singles out Speech A for discriminatory regulation to prevent Crime B as it is when it regulates the same speech to prevent Crime A.

120. *See* Stone, *supra* note 6, at 217–27.
121. *See* Fee, *supra* note 3, at 1157–66.
122. *See id.*
123. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1305–06 (2005).

The same conclusion holds if we apply a speaker-based framework, or in other words, the self-realization value of the First Amendment.[124] This theory emphasizes that people should be free to find self-fulfillment in expression wholly apart from whether the expression has value to others. Like the audience-focused framework, however, this also fails to support the secondary effects doctrine for a simple reason: if speakers find significant fulfillment in a particular type of speech (Speech A), and if government substantially limits that expression through regulation, the loss of self-fulfillment is precisely the same whether the government regulates for the purpose of controlling secondary effects (Crime B) or primary effects (Crime A). The government's motivation for regulating speech is irrelevant to the self-realization value of the First Amendment.[125]

### *B. Motive-Based Theories*

In contrast to audience-based and speaker-based theories, another framework focuses on avoiding impermissible governmental motives. Scholars who support this framework argue that it is inherently wrong for government to regulate speech with certain purposes in mind, no matter what the effect on the marketplace of ideas, and even if it would be permissible for the government to regulate the same speech for different reasons.[126] Although these theories appear on the surface to come closer to explaining the secondary effects/primary effects distinction, they also cannot do so.

Let us begin with the impermissible motive theory, described most thoroughly by Elena Kagan.[127] The theory posits that it is inherently wrong for the government to regulate speech for certain wrongful purposes, including to prevent audiences from being persuaded by speech, or to prevent audiences from taking offense at speech, or to serve the self-interest of government officials.[128] But since it is impractical for courts to inquire

124. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (arguing that freedom of speech ultimately only serves one value: self-fulfillment of authors and speakers).

125. It is notable that Martin Redish, a leading proponent of the self-realization theory of the First Amendment, does not accept the content-neutral/content-based distinction as legitimate. *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981) ("The most puzzling aspect of the distinction between content-based and content-neutral restrictions is that either restriction reduces the sum total of information or opinion disseminated.").

126. *See, e.g.*, Kagan, *supra* note 6; Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); *see also* Stone, *supra* note 6, at 227–33.

127. *See* Kagan, *supra* note 6; *see also* Stone, *supra* note 6, at 227–33.

128. *See* Stone, *supra* note 6, at 228. For a discussion of the limitations of these premises as guiding constitutional values, see Fee, *supra* note 3, at 1152–56. The basic problem is that these principles do not apply to all areas of government activity or even to all areas of speech regulation, and therefore are at best only second-order constitutional values. They do not avoid the need for an outside normative framework (most plausibly an effects-based framework) to explain why certain governmental motives are impermissible only when coupled with certain means of governmental action.

directly into the motives of government officials when examining the constitutionality of a regulation, the First Amendment requires strict scrutiny for those kinds of regulations that are most likely to have been influenced by hidden improper motives, even where there is no evidence of improper motive in the individual case.[129]

As Dean Kagan herself explains, however, this theory seems to undermine rather than support the secondary effects doctrine, because unlike other areas of First Amendment law that apply strict scrutiny because a government's claim of legitimate purpose cannot be trusted, the secondary effects doctrine takes a government's claim of permissible motive at face value.[130] Even though one *can* justify adult business ordinances by reference to permissible motives, it is likely that society's offense at pornography also influences the degree to which government officials are willing to regulate such businesses, even if officials do not say so openly. So under the hidden impermissible motive theory, for example, regulations that zone adult bookstores less favorably than other types of bookstores are precisely the kind of regulation that First Amendment law should subject to strict scrutiny.[131]

More fundamentally, however, the secondary effects doctrine does not work as if it is designed to prohibit any particular governmental purpose from influencing regulation. As shown by the primary example of this part,[132] the results of the secondary effects doctrine do not differ simply according to the government's ultimate purpose. Rather, the doctrine only discourages the government from using certain means to accomplish certain ends. If the government's ultimate purpose is to reduce Crime A, the secondary effects doctrine suggests that it is allowed for the government to aim for that result by regulating Speech B—where the causal relationship is secondary—but that it is wrong for the government to aim for that result by regulating Speech A—where the causal relationship is primary. Remarkably, there is no difference in the government's ultimate motive in these two actions, but only a difference of means. This suggests that the secondary effects doctrine does not rest on a theory of impermissible motive at all—at least not one based on ultimate motive. If the government's desire to prevent Crime A is legitimate, then only a theory concerned with the effects of regulation for audiences or speakers can explain why certain means of accomplishing that goal are constitutional while other means are not.

129. *See* Kagan, *supra* note 6, at 438–42.

130. *See id.* at 484–85 ("The secondary effects doctrine . . . seems to run counter to—and thereby negate the effect of—all the indirect techniques for flushing out illicit purpose that the Court has developed.").

131. *See id.* at 484–85.

132. *See supra* pp. 316–317.

So, if the secondary effects doctrine rests on a theory that certain governmental motives are impermissible, it must be that the motives it aims to avoid are defined in terms of process or causation, not in terms of the ultimate policies that a government seeks to further. For example, if we posit that it is inherently wrong as a matter of constitutional law for governments to regulate speech with a "motive" of combating the direct, viewpoint-related consequences of speech, but that it is not wrong for the government to regulate with a "motive" of combating the indirect consequences of speech, this proposition supports the secondary effects doctrine perfectly. The problem with this is that it entirely begs the question that it seeks to answer. It is not a normative theory so much as it is a restatement of the secondary effects doctrine. Its usefulness as a guiding normative theory collapses when we ask: Why should we regard the first motive as impermissible?

Indeed, the proposition that it is inherently wrong for governments to regulate with a motive of reducing the direct, viewpoint-related consequences of speech is highly questionable as a first principle of government. To prefer government regulations of speech based on remote, indirect consequences rather than immediate, direct consequences seems backwards when compared to established First Amendment law in the area of incitement. Under *Brandenburg v. Ohio*, it is permissible for the government to punish a person's words as incitement only if those words are "directed to inciting . . . imminent lawless action and [are] likely to . . . produce such action."[133] Thus, the government may punish a person for saying, "Kill him now" while standing next to a gunman, but it may not punish a person for preaching dangerous ideas that are likely in the long run to cause some people to commit murder. Under incitement law, the more direct and immediate the causal connection, the more likely it is allowed for the government to prohibit words because of their effects.

Incitement law's preference for direct, immediate causal connections makes sense for several reasons. The risk of government error and overregulation is lower when the speech's harm is quite certain, and harm is generally easier to predict when it is imminent. Moreover, where there is likely to be a significant time delay—like months or years—between the moment someone utters dangerous words and the unlawful conduct that those words inspire, it is more likely that government can reduce the problem through education and persuasion. Finally, the punishment of abstract advocacy that is only remotely connected to potential unlawful conduct is far more likely to chill valuable political speech than the mere punishment of direct and imminent incitement. For all these reasons, the requirement

133. Bradenburg v. Ohio, 395 U.S. 444, 447 (1969).

that there be a close and direct causal connection between speech and harm in incitement cases is reasonable.

By contrast, the secondary effects doctrine's apparent preference for regulating speech only to avoid remote, indirect consequences seems to have nothing but say-so to support it.

## IV. LESSONS OF A SEXUALLY ORIENTED SECONDARY EFFECTS DOCTRINE

The previous two parts have shown that the formal version of the secondary effects doctrine is incoherent as a description of current law and is not justified by leading policy theories of the First Amendment. The doctrine purports to be a neutral constitutional principle that favors regulation of remote and indirect consequences of speech as opposed to immediate and direct consequences. But the secondary effects doctrine that courts apply has almost nothing to do with the term secondary in this sense, and there is no reason grounded in constitutional text or values why it should.

One might draw the conclusion that courts should simply abandon the doctrine and apply strict scrutiny to those kinds of regulations that are currently covered by it. This would mean, in essence, holding most adult business zoning regulations to be unconstitutional. This proposal, however, would be disruptive and harmful, with little benefit to the free speech marketplace. It would not only call into question over thirty years of settled expectations in the area of land use planning, but it would actually give a level of protection to pornography that has never existed at any time under the Constitution. Recall that the Supreme Court decided *Young* only a few years after the Court first began to apply heightened scrutiny to content-based regulations.[134] *Young* also came uncoincidentally after a line of decisions significantly narrowing the constitutional definition of obscenity.[135] Understood in its historical context, *Young* was not a break from the past; it was simply a decision marking the outer boundaries of two new developments in constitutional law that otherwise would have required extreme results. If the Supreme Court should consider overruling the secondary effects doctrine of *Young*, it might as well reconsider the presumption against content discrimination stated in *Mosley* or the narrow definition of obscenity stated in *Miller v. California*, all of which came about together.

Moreover, time has only strengthened the Supreme Court's acceptance of the secondary effects doctrine as applied to adult business regulations. While the Supreme Court decided *Young* by a 5–4 vote,[136] in *Renton* the

134. *See supra* Part I.B.
135. *See supra* Part I.A.
136. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (describing votes).

vote was 7–2,[137] and more recently in *Alameda Books* the Supreme Court unanimously approved the central holding of *Young* and *Renton* that adult business regulations aimed at secondary effects receive intermediate scrutiny.[138] In fact, Justices Brennan and Marshall were the last Justices on the Court to disagree with the general methodology of *Young* and *Renton*.[139] By contrast, Justices Stevens, Kennedy, and Souter, who today are among those Justices most inclined to protect pornography, have all three authored opinions explaining why this methodology does not offend First Amendment values.[140] Fears that secondary effects reasoning would justify regulations beyond those affecting sexually explicit speech have not materialized. And any fear that secondary effects regulations would effectively drive sexually explicit speech out of the marketplace of ideas certainly has not come to pass. Thus, while the idea that adult business regulations aimed at secondary effects should receive strict scrutiny may be popular in some academic circles, it is an idea that is losing traction. This has never been the law and seems increasingly unlikely ever to become the law.

Suppose that we take the modern secondary effects doctrine as a given, and that we recognize it as designed for pornography and sexually explicit entertainment. As shown earlier, the Supreme Court has only ever used the doctrine to justify regulations of sexually explicit speech, despite many opportunities to apply it in other areas according to the same principles of causation. In other courts, the pattern is the same: seldom does the doctrine make any difference other than in cases involving pornography or sexual entertainment.[141] Courts seem intuitively to understand that

137. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 42 (1986) (describing votes). Although Justice Blackmun dissented in *Young*, he concurred in the result in *Renton*. *See id.* at 55.

138. Although members of the Court disagreed in *Alameda Books* over the application of intermediate scrutiny to the ordinance in question, all nine Justices nonetheless wrote or joined opinions citing *Renton* with approval and agreeing that intermediate scrutiny was the appropriate standard because the ordinance focused on secondary effects. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 432–43 (2002) (plurality opinion); *id.* at 443–44 (Scalia, J., concurring); *id.* at 444–49 (Kennedy, J., concurring); *id.* at 453–57 (Souter, J., dissenting).

139. *See* Boos v. Barry, 485 U.S. 312, 334–38 (1988) (Brennan, J., concurring) (criticizing the *Renton* analysis); *Renton*, 475 U.S. at 55–56 (Brennan, J., dissenting). Both opinions were joined only by Justice Marshall.

140. *See Alameda Books*, 535 U.S. at 444–53 (Kennedy, J., concurring); *id.* at 453–57 (Souter, J., dissenting); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 583–87 (1991) (Souter, J., concurring); *Young*, 427 U.S. at 63–73 (Stevens, J., plurality).

141. According to a survey of federal and state cases reported in Westlaw ("ALLCASES" database), in the years 2004–2006, the terms "secondary effect" or "secondary effects" appeared in 168 cases in the context of disputed First Amendment questions. Of these, 138 cases involved disputes over sexually explicit speech, many of which upheld regulations similar to those in *Young* and *Renton* on the basis of the secondary effects doctrine. By contrast, only 30 First Amendment cases referring to "secondary effects" did not involve sexually explicit speech, and only 10 of these ultimately upheld the regulations in question. (The others either rejected application of the secondary effects doctrine or mentioned "secondary effects" in passing.) Moreover, in most of these ten cases, the reference to secondary effects appears to be unnecessary to the analysis either because the law was content-neutral on its face, *e.g.*, Lee v. Katz, No. CV 00-310-PA, 2004 WL 1211921 (D. Or. June 2, 2004) (upholding a content-neutral restriction establishing free speech zones in a public plaza), involved speech

the secondary effects doctrine is limited to this kind of speech. How does this critique influence how we should interpret the secondary effects doctrine? I propose several lessons for First Amendment analysis that appear from a strictly pornographic secondary effects doctrine.

### *A. Pornography Is Subject to Intermediate Protection*

The first lesson of a revised secondary effects doctrine is that it is justified by the distinctive qualities of pornography and sexual entertainment. Sometimes courts apply lower scrutiny in a case because the class of speech raises a built-in legitimate justification for government to impose content-based regulation. We already recognize this about commercial speech regulations,[142] and it would be helpful for courts to recognize it about sexually oriented business regulations. If the secondary effects cases are correctly decided, then Justice Stevens was right in *Young*: pornographic speech is subject to a distinctive form of constitutional protection—while government may not ban it altogether, content-based regulations of pornography do not always require strict scrutiny.[143]

Indeed, there are close parallels between commercial speech and pornography. Like commercial speech, pornography was historically understood to be outside the scope of First Amendment protection altogether.[144] Like commercial speech, there are strong market forces that support the continued presence of pornography, making it "a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'"[145] And like unregulated commercial speech, unregulated pornography causes distinctive harms. In the case of commercial speech, its potential for misleading or defrauding consumers gives government a content-based reason for regulating it.[146] In the case of pornography, its ability to cause neighborhood blight and crime, and its tendency to intrude upon the privacy of the home in a particularly invasive way, are among those reasons that can justify content-based regulations. While these effects all flow from the communicative elements of speech, it also matters that these

subject to diminished protection, *e.g.*, Salib v. City of Mesa, 133 P.3d 756 (Ariz. Ct. App. 2006) (upholding a restriction on the size of signs as applied to commercial speech), or for other reasons.

142. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–66 (1980).

143. Granted, there are some Supreme Court cases that do apply strict scrutiny to pornography regulations. *See supra* notes 108–110. Thus, the analogy to commercial speech is not perfect, at least not as a description of current law.

144. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding commercial speech unprotected), *abrogated by* Va. State Pharm. Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *see also supra* Part I.A (explaining the historical breadth of obscenity law).

145. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 n.6 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977)).

146. *See id.* at 562–63.

harms affect innocent people and are capable of reduction through modest content-based regulations.

The case for giving pornography reduced constitutional protection seems even stronger than for commercial speech when comparing the informational value of each. Commercial speech serves the obvious purpose of informing consumers about available products and services in all facets of commercial life. It serves the knowledge-seeking function of the First Amendment directly, and it is absolutely essential to the functioning of a free market. By contrast, pornography is not typically designed for either informational or persuasive value; to the extent it provides either, this effect is incidental. Pornography often does not even claim artistic or literary value (although sometimes these claims are made), but rather typically panders to its target audience for the sole purpose of sexual arousal. As some commentators have noted, pornography has more in common with a sexual device—which is not speech—then it has with cognitive speech.[147]

This is not to say that pornography has no potential communicative value whatsoever. Undoubtedly, some would find artistic, informational, or political value in even the most explicit and raw forms of pornography.[148] It can also be difficult to distinguish gratuitous pornography which merely panders to prurient interests from works of more serious artistic, literary, or scientific value. Thus, current law makes the reasonable choice to protect a good deal of low-minded sexual expression to give breathing room to higher-value expression on sexual subjects. The Supreme Court's decisions defining obscenity narrowly reflect this caution and the tendency to give the benefit of the doubt to free expression.

But it does not follow that all sexual expression deserves the same level of constitutional protection as any other speech, or that it has the same predicted value.[149] Judicial caution does not require courts to abandon all

147. *See, e.g.*, Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979) (noting the same proposition); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 612–17 (noting that pornography differs from high-value speech in that it functions primarily as an aid to masturbation, and not as a cognitive expression).

148. David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. Rev. 111, 122–27 (1994) (arguing that the distinction between sexual expression and high-value expression is improper and underestimates the value of sexual expression).

149. In a Seventh Circuit en banc case, Judge Easterbook, in a dissenting opinion, responded to a similar logical leap in the argument of a nude dance club:

> If the First Amendment protects [nudity in painting and opera], the argument goes, Joe Six-pack is entitled to see naked women gyrate in the pub. Why does this follow? That a dance in *Salome* expresses something does not imply that a dance in JR's Kitty Kat Lounge expresses something, any more than the fact that Tolstoy's *Anna Karenina* was a stinging attack on the Russian social order implies that the scratching of an illiterate is likely to undermine the Tsar.

Miller v. Civil City of South Bend, 904 F.2d 1081, 1125 (7th Cir. 1990) (Easterbrook, J., dissenting) (citation omitted). While Judge Easterbrook wrote this in dissent, his position prevailed when the Supreme Court reversed the Seventh Circuit in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991),

sense of speech's constitutional value. Just as the law treats some utterances as constitutionally unprotected because of their apparent lack of any constitutional value,[150] it is rational to treat some forms of sexual expression as subject to qualified constitutional protection. For pornographic speech that has remote First Amendment value at best, causes distinct harm, and has strong commercial interests supporting it, there is little reason to disfavor all regulation of it. In the adult business setting, intermediate-level scrutiny is likely to provide sufficient protection to society's interest in advancing knowledge and culture through speech.[151]

Thus, while First Amendment law operates cautiously in giving some constitutional protection to pornography and sexual entertainment, it treats this as a distinct class of expression having less protection than political, scientific, or religious speech. It is, as some Justices have said of nude dancing, at the "outer ambit" of First Amendment protection.[152] This is the only reasonable way to explain why the secondary effects doctrine applies essentially only to adult business regulations. It is also the only way to explain several other legal principles affecting the time, place, and manner of sexually explicit speech, including the FCC's indecency doctrine,[153] postal service rules against mailing pornography to unwilling homeowners,[154] rules allowing cable television operators to regulate pornography,[155] the requirement of pornography filters at public library internet stations,[156] certain anti-spam rules focused on pornography,[157] and the role of sexual harassment law in regulating pornography in the workplace.[158]

Recognizing pornography as a distinctive category of speech serves not only to explain these content-based doctrines, but it also prevents their being used to support broader regulations of higher value speech. Confus-

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upholding the city's regulation.

150. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 n.22 (1984).

151. *See supra* Part III.A for a discussion of audience-based theories of the First Amendment.

152. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (nude dancing "falls only within the outer ambit of the First Amendment's protection"); *Barnes*, 501 U.S. at 566 (plurality opinion) (nude dancing is "within the outer perimeters of the First Amendment, though we view it as only marginally so"); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) (describing pornography as having low First Amendment value and diminished protection); *see also Miller*, 904 F.2d at 1130 (Easterbrook, J., dissenting) (writing of nude dancing, "someone standing at the center of the First Amendment (political speech) would need binoculars to see this far into the periphery").

153. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

154. *See* Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970).

155. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

156. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194 (2003).

157. *See* Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. §§ 7701–7713 (2006).

158. *See, e.g.*, Coniglio v. City of Berwyn, No. 99 C 4475, 1999 WL 1212190 (N.D. Ill. Dec. 16, 1999) (finding that plaintiff stated a valid claim under Title VII for hostile work environment based on an employee's pervasive pornography use).

ing pornography as fully protected speech is actually a threat to First Amendment values because it could cause the accepted constitutional rules of pornography to spill into other areas.

### *B. Content-Based Regulations Are Sometimes Preferable*

A second lesson of the secondary effects doctrine has broader significance. It is that content-based regulations are not always harmful to First Amendment values, and sometimes they are even preferable to content-neutral alternatives. This is an important observation for First Amendment theory given how frequently courts and commentators describe content discrimination as "[t]he essence of this forbidden censorship."[159] Justice Stevens was correct in *Young*, at least as a descriptive matter, when he explained that the rhetoric of disfavoring content discrimination is exaggerated.[160]

We should recognize that adult business regulations such as those upheld in *Young* and *Renton* are content-based both in form and in purpose. They are content-based in form because they classify media businesses according to what is printed or depicted. They are content-based in purpose because they target consequences that arise—according to the only rational basis for such regulations—from the communicative effects of sexually explicit speech,[161] even if the effects are remote in the chain of causation. The government's motives and means may be legitimate, but this does not make them content-neutral.

If cases upholding these regulations are correctly decided, it is an indication that content-neutrality is not the primary goal of First Amendment law. Rather, it is a means of achieving public welfare through speech, and as such can be overruled by cost–benefit considerations.[162] Cities claim that adult businesses tend to cause lower property values and crime in the areas where they locate.[163] If regulation can reduce this harm by prohibiting adult businesses in some zones, while still allowing them ample places to exist elsewhere, it is possible to achieve a net clear benefit for society. Tangible harm is avoided, while the speech is largely preserved for speak-

159. Police Dep't v. Mosley, 408 U.S. 92, 96 (1971).

160. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 65–70 (1976) (describing examples of permissible content discrimination and how the Court's statements against content discrimination in *Mosley* should be confined to context).

161. *See supra* Part II.C.

162. *See* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002) (defending the role of cost–benefit analysis in resolving First Amendment problems).

163. *See, e.g.*, City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 430 (2002); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50–51 (1986); *Young*, 427 U.S. at 55. For a collection of studies supporting this claim, see Community Defense Counsel: Secondary Effects, http://www.communitydefense.org/lawlibrary/secondaryeffect.html (last visited Jan. 4, 2009).

ers and audiences who value it.[164] This may not leave all speech equal under the law, but it does have the potential to improve social welfare.

What is more, the secondary effects cases indicate that content-based regulations are sometimes preferable to content-neutral alternatives for a system that highly values speech. Had *Young* been decided differently, cities would still have the option of responding to the problems of adult businesses through content-neutral regulations. For example, they might choose to prohibit all media outlets, movie theaters, and entertainment businesses in protected zones, regardless of the content of their works. This approach, however, would burden large quantities of speech that have no causal connection to the harm in question. It would make little sense on the authority of the First Amendment to require government to restrict speech that does not cause harm.[165] Rigid adherence to the ideal of content-neutrality is not constitutionally required and can even contradict another constitutional norm: the principle that regulations of speech should be narrowly tailored to their legitimate objectives. Sometimes, only a content-based regulation serves the government interest in question without regulating more speech than necessary.

For those who claim that the freedom of speech is, at its most fundamental level, a right to have one's speech treated no worse than anyone else's speech under the law,[166] the secondary effects cases present difficulty. If that were the essence of the freedom of speech, adult business regulations should be per se unconstitutional. Instead, the secondary effects doctrine fits comfortably within the pattern of other First Amendment doctrines that allow content discrimination in some settings,[167] some of which reflect content-based choices in the very structure of First Amendment law,[168] and that appear to be the product of offsetting costs and benefits associated with specific categories of speech.[169]

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164. This assumes the primary purpose of the First Amendment is to provide value to audiences and speakers, which is satisfied by a requirement that government not overregulate. If the dominant interest of the Speech and Press Clauses were ensuring that government treats all speech equally, or that it should be indifferent to consequences of communication, then the secondary effects doctrine should not exist.

165. *See Young*, 427 U.S. at 71 n.34 (plurality opinion) (noting the city's finding that the negative effects of sexually oriented theaters are not attributable to theaters showing other types of films).

166. *E.g.*, Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993); Kagan, *supra* note 6; Rubenfeld, *supra* note 126. Of course, commentators supporting this idea could argue that the secondary effects cases were wrongly decided, and some of them do. At the least, however, it becomes difficult for commentators to rely solely on Supreme Court authority, as established in cases such as *Police Department v. Mosley*, 408 U.S. 92 (1971), for the proposition that content-discrimination is inherently wrong or unconstitutional when there exists other Supreme Court authority in contradiction to this idea.

167. *See* Fee, *supra* note 3, at 1136–38 (exploring the various exceptions to the First Amendment's rule against content discrimination).

168. *Id.* at 1146–47 (discussing categories of low-value/high-harm speech in First Amendment law).

169. The famous quote from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), captures this

Of course, the suggestion that cost–benefit analysis explains some areas of First Amendment law does not mean that courts do, or even should, approach every free speech case as a fresh balancing question. In interpreting the First Amendment, the Supreme Court has established a variety of doctrinal rules and standards to ensure consistency and to tip the scales in favor of allowing free speech. This includes the general presumption against content discrimination that applies to many areas of governmental regulation.[170] As to be expected, established First Amendment doctrines sometimes direct courts to find seemingly harmless and potentially beneficial regulations to be unconstitutional as a precaution against shortsightedness. But the doctrines themselves, including those regarding content discrimination, still appear to be products of judicial cost–benefit analysis.[171] Granted, the First Amendment requires caution before ever concluding that the value of regulation outweighs the value of unregulated free speech, but the level of appropriate caution may vary depending on the type of speech and the context of the regulation. The secondary effects doctrine marks one area where the potential benefits of content-based regulation are likely to be so strong, and the corresponding threat to speaker and audience interests so minor, that intermediate scrutiny provides the appropriate level of protection.

### *C. Legislative Purpose and the Anti-Proportionality Principle*

The secondary effects doctrine also raises a potential lesson regarding the role of legislative purpose in constitutional law. It is that legislative motive can serve as an indicator of whether a speech regulation is rationally consistent with the speech's status as constitutionally protected. It does this by focusing not simply on the objective of a regulation, but also on its intended means of achieving that objective.

According to the secondary effects doctrine, legislative purpose affects the level of constitutional scrutiny. A government regulation of sexually oriented businesses is subject to intermediate scrutiny only if designed for the predominate purpose of controlling secondary effects, and not for the purpose of inhibiting speech that the government disagrees with.[172] While

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notion: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

170. *See* Fee, *supra* note 3, at 1157–66 (exploring how the presumption against allowing content-based regulation serves to deter overregulation of speech without usurping the role of elected branches of government).

171. *See, e.g.*, Davenport v. Wash. Educ. Ass'n, 127 S. Ct. 2372, 2381 (2007) (explaining that content discrimination is a problem when it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" and that there are "numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted").

172. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986). This stands in tension

it might not be fully clear what the phrase "secondary effects" means,[173] we can suppose that a regulation based on traditional moral objections or feminist objections to pornography, for example, would not qualify under this doctrine. These purposes seem to reflect direct disagreement with pornography's message, which the Court's secondary effects cases explicitly distinguish.[174] Even though a regulation based on these goals might have the same practical effect on sexually explicit speech as a standard adult business ordinance, it would be subject to strict scrutiny.[175] Why should this be so?

One answer might be that courts simply find some policy reasons for regulating speech to be more compelling than others. For example, some judges might consider moral or feminist objections to pornography to be irrational, while believing that protecting a neighborhood from the deteriorating effects of adult businesses carries more weight. This explanation seems inadequate, however, because the Supreme Court has conspicuously avoided disagreeing on the merits with those who find speech objectionable because of its direct communicative impact.[176] Rather than treat these kinds of objections as irrational or flimsy, courts treat them as improper in the context of government regulation of protected speech.[177] Something more must explain why certain kinds of governmental purposes are preferable to others.

A more persuasive answer lies in what we might call the anti-proportionality principle. Justice Kennedy refers to this in his concurring opinion in *Alameda Books*.[178] The principle correlates in some cases with

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with the Supreme Court's famous statement in *United States v. O'Brien*, 391 U.S. 367 (1968), that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 383.

173. *See supra* Part II.

174. *See, e.g.*, *Renton*, 475 U.S. at 48–49 ("The ordinance does not contravene the fundamental principle . . . 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." (internal quotations omitted)).

175. *See, e.g.*, Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (holding unconstitutional under strict scrutiny a law aimed at controlling pornography's gender message).

176. For example, in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the Court wrote the following, while striking down a pornography regulation:

> When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

*Id.* at 818.

177. *See id.*

178. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 450–51 (2002) (Kennedy, J., con-

the distinction between remote and immediate effects, and may roughly explain the phrasing of the secondary effects doctrine, but the correlation does not fit every case. The anti-proportionality principle aligns more closely to First Amendment normative interests than the distinction between remote and immediate effects, and so provides a stronger basis for explaining why courts sometimes look at motive in determining the level of scrutiny.

According to the anti-proportionality principle, intermediate scrutiny should apply to a regulation only if the regulatory benefit can be achieved without reducing the quantity of speech proportionally to the benefit in question. In other words, if a regulatory benefit depends upon suppressing speech, such that the desired benefit is directly proportional to the chilling effect of the regulation, then strict scrutiny should apply, even if the regulation is only a partial restriction. On the other hand, if the intended benefit does not depend upon reducing the quantity of speech, but merely depends on changing the circumstances of its delivery, so that it is possible to achieve a significant benefit without burdening speech to the same extent, then intermediate scrutiny is generally appropriate.

How is it possible for a regulation to reduce harms that arise from the communicative effects of speech and yet satisfy the anti-proportionality principle? It is possible if the targeted harm arises from multiple causal factors. For example, adult businesses might cause harm through the combination of (1) the communicative effects of sexually explicit speech, and (2) the location or context of the speech. By regulating the location or context of the speech, it is sometimes possible to reduce certain negative communicative effects of speech without changing its content or volume, in the same way that it is possible to reduce harms that arise from the smell of a pig farm by changing its location (and without changing its smelliness) to a place where the smell does not interact negatively with its surroundings.

The anti-proportionality principle makes sense within a cost–benefit framework that is suspicious of bans on speech. If the speech in question is protected by the First Amendment, we might presume that the benefits of banning the speech do not outweigh the potential costs in terms of speech-chilling effects. If this is true, then it must also be true that any regulatory burden (even a slight one) does not outweigh the regulatory benefit if the benefit is directly proportional to the speech-suppression effect. Any fraction of a negative number is still a negative number. On the other hand, if the net benefit of partially burdening the speech is positive, and arises directly from the regulation's effectiveness in suppressing speech, then logically the government should ban the speech entirely. It is

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therefore only rational to regulate speech on the basis of content—without fully banning the speech—where the regulatory benefit is disproportionate to the speech-suppression effect, and that can only happen where the harm bears a certain kind of relationship to the speech in question. Focusing on legislative purpose in secondary effects cases may serve to identify if that relationship exists.

A regulation of adult businesses that is based on moral or feminist objections to pornography would not satisfy the anti-proportionality principle, even assuming that those objections have substantial merit.[179] A regulation can serve those interests only by deterring pornography's message generally—either by deterring suppliers or by deterring consumers and viewers—so its effectiveness will be directly proportional to its message-burdening effect. This means that the cost–benefit analysis of such a regulation will yield the same answer as to whether a total ban of such material should be allowed. If the Supreme Court has already held that banning this kind of speech is unconstitutional, then any law with a regulatory purpose that logically supports a total ban should be treated in the same manner. Moral or feminist objections to pornography may be relevant to whether the material should be protected at all (which raises the question of how to define obscenity),[180] but they cannot rationally support a partial regulation of speech that is correctly held to be protected.

Ultimately, the anti-proportionality principle is not a pure purpose test but is an effects test. It helps courts make sure that government does not overregulate protected speech. It makes sense, however, for courts to consider legislative purpose in predicting the effects of a law, especially if deference to legislative judgment is part of the equation.[181] A regulation designed for a purpose that is consistent with the anti-proportionality principle is more likely to have such an effect, and so it is reasonable for courts to treat these laws less suspiciously. Intermediate scrutiny may be sufficient to ensure that the regulation will have the intended effect and is not overbroad.

The anti-proportionality principle may not be the only explanation for the secondary effects doctrine and its focus on legislative purpose. But it is at least one explanation that correlates with the goal of preserving valuable speech while controlling its harm. It also provides a way for courts to interpret—or preferably avoid—the ambiguous phrase "secondary effects."

179. For an overview of feminist arguments against pornography and obscenity, see generally Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why* Miller *Should Survive* Lawrence, 15 GEO. MASON L. REV. 611 (2008).

180. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57–62 (1973) (discussing the moral and aesthetic basis for obscenity law); Dionne, *supra* note 179 (discussing feminist arguments for preserving obscenity law).

181. *See* Kagan, *supra* note 6, at 507–10 (explaining how a motive-based First Amendment can make sense for consequentialist reasons).

If courts would apply the anti-proportionality principle explicitly, rather than ask whether the effects are secondary, the law would be clearer and more visibly designed to achieve a rational balance of the goals of regulation and freedom of speech.

## V. EXAMPLE APPLICATION: INTERNET PORNOGRAPHY ZONING

This part will briefly explore an example of how a functional understanding of the secondary effects doctrine can inform First Amendment problems beyond its usual area of application. While the secondary effects doctrine provides lessons for speech regulation generally, let us consider an example involving sexually explicit speech in a different context than the neighborhood adult business.

Suppose that Congress passes a law that creates something like zoning on the internet for sexually explicit content.[182] The general purpose of the law would be to facilitate private choices of internet subscribers who do not want pornography to be available on their networks. More specifically, the regulatory goals would include: helping parents to protect minors from pornography, helping employers to create work environments that are professional and free of offense, and helping employers preserve workplace productivity.[183]

Of course, private filtering software can accomplish some of this without a system of regulation.[184] But there are limitations to filters, and one of them is that it is difficult to identify sites with objectionable content. For this reason, some have proposed laws that would require internet publishers of sexually explicit content to publish their content in a manner that would enable private filtering methods to work more effectively. These proposals include the requirement to use a ".xxx" top level domain, or a special channel for pornographic content.[185] Such laws would allow explicit content to exist on the internet for those who choose to access it, but would require affirmative action by those who publish such material to do so in the required manner. Internet publishers of sexually explicit material would likely object to such a law, not only because it could require some extra effort on their part, but it could reduce the size of their audiences if the system works.

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182. For an overview of options, see Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417.

183. *See id.* at 1437 (citing these interests in support of internet zoning).

184. *See* Ashcroft v. ACLU, 542 U.S. 656, 667–70 (2004) (discussing filters as an alternative to regulation for the protection of minors).

185. *See* Preston, *supra* note 182, at 1490; *see also* Cheryl B. Preston, *The Internet Community Ports Act of 2007*, www.cp80.org/resources/0000/0013/Internet_Community_Ports_Act.pdf (last visited Jan. 4, 2009).

Should a court apply strict scrutiny to such a law?[186] Formal application of the secondary effects doctrine provides no principled answer to the problem. The law would serve a variety of purposes, some of which seem to qualify as secondary in the sense of being remote in the chain of causation. For example, one might identify lost workplace productivity as a secondary effect of pornography because it is removed in the chain of causation and does not depend on disagreement with the speaker's message. But as explained earlier, remote causation is not always a sufficient reason to apply relaxed scrutiny,[187] and this might not be the law's only purpose. It would seem silly to allow government to regulate pornography for the reason of protecting workplace productivity, but not for purposes of protecting children, especially if one could show that pornography has adverse effects on children, which could later produce other negative effects for society.[188]

Equally unsatisfying is the argument that strict scrutiny should apply because the legislation aims at the communicative effects of speech. This may be true, but it does not convincingly distinguish *Young*, *Renton*, and *Alameda Books*, all of which upheld laws designed to control the downstream effects of pornography's communicative effects in a particular environment.[189] Formal application of the secondary effects doctrine does not yield a clear or principled answer to this problem, precisely because courts have not used the phrase secondary effects consistently.

Applying the lessons suggested in this Article, one might instead analyze the problem less formalistically and focus on whether the law would affect publishers and audiences in a way that should require a high level of caution. In other words, Does the law have features indicating that it would likely impose an unreasonable danger to the marketplace of ideas in

186. For purposes of this analysis, assume that the law defines regulated material in terms clear enough to avoid vagueness problems. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 58–61 (1976) (upholding Detroit's adult business ordinance against vagueness challenge).

187. *See supra* Part II.A.

188. Some might argue that this analysis contradicts what the Supreme Court has already held in the area of internet pornography—namely that content-based regulations designed for the protection of minors are subject to strict scrutiny. *See* Ashcroft v. ACLU, 542 U.S. 656 (2004) (upholding a preliminary injunction against the Child Online Protection Act); Reno v. ACLU, 521 U.S. 844 (1997) (holding the Communications Decency Act unconstitutional). But while the analysis of some pornography cases differs from the functional approach suggested here, neither the outcome of those cases nor the choice to apply strict scrutiny conflicts with this interpretation of the secondary effects doctrine, which recommends strict scrutiny in appropriate cases. For example, the statutes in both *Reno* and *Ashcroft* imposed relatively significant burdens on protected communication, and for this reason alone may have justified heightened scrutiny. *See Reno*, 521 U.S. at 874–77; *see also* ACLU v. Gonzales, 478 F. Supp. 2d 775, 813–20 (E.D. Pa. 2007) (describing the significant chilling effects of the Child Online Protection Act). Moreover, other Supreme Court cases affecting pornography contradict the notion that any regulation of sexual expression designed to control communicative effects requires strict scrutiny. *See supra* notes 153–158 and accompanying text. A central thesis of this Article is that something other than simple reference to "primary impact" or "secondary impact" must explain the distinction between these lines of cases.

189. *See supra* Part II.C.

relation to the interests that support it? If the secondary effects doctrine is a function of asking this broader question, then it is helpful to refer to that question in determining the scope of the doctrine. With this inquiry in mind, there are several sub-issues that one should examine.

*The Category of Speech Regulated*. First, one should look closely at the regulatory definition of the speech subject to restriction. If the regulation is written to encompass essentially only low-value pornographic speech—even though it may cover more than that which is legally obscene—then intermediate scrutiny may be appropriate (subject to other issues discussed below) because such speech has diminished First Amendment protection.[190] As Justice Stevens pointed out in *Young*, pornography does not have the same constitutional status as political speech, even though it has some First Amendment protection.[191] If, however, the regulation is written in a manner that is overbroad, or fails to exempt works of more significant constitutional value, strict scrutiny should apply.

*The Interests Served by the Ordinance*. Second, one should consider whether the interests served by the law are significant enough to warrant regulating speech on the basis of content, as well as whether the law would likely serve those interests effectively. In this case, facilitating private choice and protecting minors appear to be relatively strong interests,[192] but there may be questions about the effectiveness of the law. This may involve exploring the technology and its potential loopholes, as well as the problem of international web publishing.[193] Granted, a full exploration of the government's interest and the law's effectiveness might await the application of strict or intermediate scrutiny, whichever is appropriate, but it is worth taking a preliminary look at these issues in deciding which level of scrutiny to apply.

*The Burden on Protected Speech*. Third, one should ask whether the ordinance would likely impose a significant burden on publishers of pornography and internet users. In this case, the burden on pornography publishers might be significant or slight, depending on the nature of the regulatory requirement. The fact that many publishers would prefer not to identify their work as pornographic, for example by attaching ".xxx" to the domain name, could create chilling effects. On the other hand, if the identification is essentially invisible to internet users who do not filter, a regulatory requirement of marking sexually explicit material in a manner that allows filters to work might be more acceptable.

190. *See supra* Part IV.A.

191. *Young*, 427 U.S. at 70.

192. *Cf.* Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970) (upholding postal regulation of indecent materials triggered by homeowner choice).

193. *See Ashcroft*, 542 U.S. at 667 (noting the Child Online Protection Act's inability to control overseas publishing as a factor against its effectiveness).

*The Anti-Proportionality Principle*. Finally, one should ask whether the law is designed for a purpose that is consistent with the speech's constitutionally protected status. This means that the regulatory benefit should be one that does not depend on reducing the quantity or accessibility of protected speech for those who have a right to access it, and any such effect should be slight and incidental in comparison to the law's legitimate effect. In the case of an internet zoning regulation, this analysis may depend on whether courts consider there to be any constitutional significance to an employee's or child's desire to access protected internet speech in violation of the computer owner's wishes. If this is a protected form of communication, then an internet zoning regulation as described would violate the anti-proportionality principle because its primary effect would be to prevent this. But if the computer owner/internet subscriber's property interest trumps the First Amendment interests of end-users (and publishers who communicate with those end-users), and if the law does not curtail the choices of internet subscribers, then the internet zoning law would likely satisfy this criterion. Its intended effect is likely to be highly disproportionate to any burden on lawful, legitimate communication.

If the internet zoning law fails any of the steps of this analysis, then it is proper to treat it under strict scrutiny for the usual reasons that the law disfavors content-based regulations. But if it meets all of these criteria, there appears to be no principled reason for treating it differently than the adult business regulations upheld in *Young* and *Renton*. The kind of deference applicable to adult business zoning regulations should apply.

At least this is one way to apply the lessons of the secondary effects doctrine. To be sure, the framework does not provide a bright-line rule. Reasonable minds could disagree over what criteria to apply, and how to apply them in particular cases, just as judges commonly disagree over the application of strict or intermediate scrutiny. But we should recognize that the formal version of the secondary effects doctrine also fails to provide a bright-line rule, despite its having the appearance of a rule. At least a functional secondary effects doctrine focuses on criteria rooted in constitutional policy rather than word games.

## CONCLUSION

The secondary effects doctrine is among the least understood of First Amendment principles, both as to its theory and practical implications. The Supreme Court is largely to blame for this, having failed to explain what is meant by a secondary effect or why this should matter for constitutional purposes. The Court has not even clearly settled whether the doctrine is an application of the general rule against content discrimination or an exception to that rule, or whether the doctrine is limited to pornography and sexual entertainment. This befuddlement has caused scholars to see

the doctrine as illegitimate, as it appears on the surface to conflict with basic First Amendment principles disfavoring content discrimination. Yet at the same time, the doctrine seems to enjoy greater judicial acceptance than ever before, it is the basis of local land use laws throughout the nation, and it is applied in dozens of reported cases every year.[194] It is not going to disappear any time soon.

This Article aims to re-evaluate the secondary effects doctrine in a way that is more transparent. The real secondary effects doctrine has little to do with the term secondary and has everything to do with the content of sexually explicit speech. This does not mean that those who would regulate sexually explicit speech are morally opposed to its existence, but they do object to some of its negative effects. Appreciating the functional basis of the secondary effects doctrine is necessary for understanding the doctrine's limitations and reach. It also provides insights for general First Amendment application, including how cost–benefit analysis affects the constitutional rules regarding content discrimination and how the purpose of a regulation affects the level of scrutiny that courts apply.

194. *See supra* note 141.