The secondary effects doctrine occupies an important place in the historical development of the speech protections of the First Amendment. Its implementation can have a major impact on whether a governmental speech regulation is upheld or invalidated. The secondary effects doctrine allows a court to characterize a speech regulation as content-neutral instead of content-based and apply intermediate scrutiny if the regulation is aimed at suppressing the "secondary effects" of the speech and not the speech itself. n1 The scope and substance of the secondary effects doctrine has changed dramatically since the doctrine was first introduced in a footnote to the plurality opinion in Young v. American Mini Theatres, Inc. n2 The breadth of the doctrine was recently expanded in City of Erie v. Pap's A. M.,” n3 and the evidentiary burdens and mechanics of the doctrine were further defined in City of Los Angeles v. Alameda Books, Inc. n4 What was once considered an obscure and limited doctrine confined [*1176] to adult entertainment regulations is now an integral part of First Amendment jurisprudence. The secondary effects doctrine and its increasingly relevant role warrant further investigation and discussion.

This Note will trace the judicial history of the secondary effects doctrine and examine the most significant secondary effects cases decided in the last three decades. Part II of the Note will provide a brief overview of the First Amendment, the judicial standard of review applied to governmental speech regulations, and the role of secondary effects analysis in this review. Part III will focus on the origins of the secondary effects doctrine, from its introduction in Young through its true articulation in City of Renton v. Playtime Theaters, Inc. n5 Part IV will examine the expanding role of the doctrine and discuss the important decisions since Renton which have re-defined the substance and scope of the doctrine.
including Erie and Alameda Books. Part V will analyze the strengths and shortcomings of the secondary effects doctrine and argue that the doctrine needs to be redefined to succeed in its recently expanded role. Part VI will then conclude that the doctrine, in its current form, is an appropriate means of regulating adult entertainment regulations, but it will also encourage the Court to take certain remedial measures to ensure that the secondary effects doctrine does not provide a means for governmental authorities to target and suppress unfavorable expression under the guise of alleviating deleterious secondary effects in other contexts. These measures include instituting a standard for judicial scrutiny of the legislative intent behind the regulations and placing a stringent evidentiary burden on municipalities that attempt to justify new speech regulations with a secondary effects rationale.

II. Background

A. Free Expression and the First Amendment

The First Amendment to the United States Constitution guarantees the freedom of speech to all citizens. n6 By the terms of this amendment, the judiciary has a duty to invalidate governmental regulations that have the effect of unconstitutionally abridging protected speech. n7 This protection also extends to regulations enacted at the state and local levels through the Due Process Clause of the [*1177] Fourteenth Amendment. n8 By protecting speech, the First Amendment also safeguards a number of important and indispensable American values. n9 The First Amendment attempts to ensure an open and honest discourse between citizens and allows an open forum for the exchange of ideas. n10 It also protects the political and social ideas of all citizens, which is essential to the intellectual discourses typified in a free society. n11 In addition, it prevents the majority from censoring the views of the minority and allows citizens to express their personal views and display their individuality free from excessive governmental restraint. n12 The protections of the First Amendment are vital.

The United States Supreme Court regularly reviews speech regulations to determine if they violate the First Amendment. The Court first determines whether the regulated material is protected by the First Amendment. The language of the First Amendment refers to a general "freedom of speech." n13 Speech is usually assumed to be written or verbal in nature, but certain types of expressive conduct are also entitled to First Amendment protection. n14 Expressive conduct is protected if "[a]n intent to convey a particularized message [is] present, and ... the likelihood [is] great that the message would be understood by those who viewed it." n15 Under this standard, First Amendment protections have been extended to music, n16 motion pictures, n17 theatrical performances, n18 and other creative forms of [*1178] expression. The Supreme Court has also extended First Amendment protections to various forms of adult entertainment, including sexually explicit motion pictures, n19 adult bookstores, n20 and live nude dancing, n21 albeit to an ever-decreasing degree. This Note deals with a number of these "low value" speech and conduct categories, n22 since the secondary effects doctrine originated in the area of adult entertainment zoning regulations.

B. The Standard of Judicial Review

The language of the First Amendment states that "Congress shall make no law" that "abridges the freedom of speech," n23 but this is not entirely accurate. A governmental regulation can "abridge" protected speech in certain circumstances pursuant to judicially prescribed and supervised limitations. A contested regulation of speech or conduct protected by the First Amendment is subjected to varying degrees of judicial scrutiny. n24 The level of scrutiny is determined through an examination of whether the "regulation is related to the suppression of free expression." n25 A regulation that is "related to the suppression of expression" is a "content-based" restriction, and the Court will subject it to strict judicial scrutiny. n26 If the regulation is unrelated to the "suppression of expression," it is considered "content-neutral" and is subjected to intermediate scrutiny, often the less stringent test articulated in United States v. O'Brien. n27 An understanding of the differences between content-based and content-neutral regulations is essential to any discussion of the secondary effects doctrine.

1. Content-Based Regulations

The Court articulated the basic principal behind the content- [*1179] based regulations in Police Department of Chicago v. Mosley. n28 The principle is that "above 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." n29 The Court will consider a regulation to be content-based if it is targeted at the message the speech is intended to convey. n30 Regulations "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." n31 Content-based speech regulations are subjected to strict judicial scrutiny because they are based on the speech itself and the ideas that the speech is intended to communicate. The Court is generally
skeptical about the validity of content-based regulations and begins its scrutiny with the presumption that these regulations are invalid. n32 A content-based speech regulation will only be upheld if this presumption is overcome by a government showing that the regulation is necessary to "promote a compelling [governmental] interest" and that the regulation represents the "least restrictive means to further the articulated interest." n33 This is a difficult standard to meet, and the Court has invalidated numerous regulations under this standard.

2. Content-Neutral Regulations

Regulations that do not meet the content-based criteria are considered to be content-neutral by default. Content-neutral regulations "are not based on the speech's subject matter, but rather on accidental attributes with which one can tamper without altering the meaning being conveyed." n34 Content-neutral speech restrictions are restrictions that "are justified without reference to the content of the regulated speech." n35 The Court does not presume that content-neutral speech regulations are invalid and subjects them to intermediate scrutiny. n36 Under this standard, a regulation will only be upheld if it advances important governmental interests unrelated to the suppression of speech and does not burden substantially more speech than is necessary. n37 Protected speech can be subjected to content-neutral time, place, and manner restrictions as long as the regulations are "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." n38 Similarly, expressive conduct can be subject to certain restrictions so long as the regulations meet the criteria set forth in O'Brien. n39 Under the four-part O'Brien test, the Court will uphold a content-neutral conduct regulation (1) "if it is within the constitutional power of the Government," (2) "if it furthers an important or substantial governmental interest," (3) "if the governmental interest is unrelated to the suppression of free expression," and (4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." n40 The Court has commented that the tests regarding time, place, and manner restrictions and expressive conduct restrictions are nearly identical, and appears to use them interchangeably with only minor amounts of difficulty. n41

3. Overbroad, Vague, or Unfettered Regulations

The Court will also invalidate speech regulations when it finds the language or terms of the regulation to be unreasonable. If a regulation reaches aspects of speech or conduct that it does not have the discretion to regulate, or adversely impacts other protected aspects of speech, the Court may consider it to be "overbroad" and invalid. n42 Similarly, if the regulation does not articulate the type of speech or conduct it is meant to regulate with adequate specificity, the Court may consider it to be "vague" and invalid. n43 In addition, if a regulation gives a governmental authority too much discretion in deciding what kind of speech or expressive conduct may be prohibited, the Court may decide that it gives the government "uncontrolled discretion" and declare it invalid. n44

C. The Role of Secondary Effects in Categorizing Regulations as Content-Based or Content-Neutral

While defining a regulation as content-based or content-neutral appears to be a relatively simple distinction, it can be difficult in cases where a regulation burdens a communicative aspect and a non-communicative aspect of protected conduct at the same time. n45 The introduction of secondary effects analysis to this already troublesome process complicates matters even further. n46 The secondary effects doctrine allows courts to apply intermediate scrutiny to an ordinance that is content-based if the ordinance is targeted at suppressing the "secondary effects" of the speech and not the speech itself. n47 The Court does not overlook the fact that the regulation may suppress the speech along with the secondary effects, but it is considered to be justified under a modified version of the O'Brien analysis. n48 Many legal scholars consider this to be damaging to the generally applicable First Amendment framework because speech restrictions, which deserve strict scrutiny, are analyzed under an inappropriate standard and are overwhelmingly found to be appropriate despite the fact that they effectively target and regulate protected speech. n49 In addition, secondary effects analysis in First Amendment cases has become increasingly common and is currently used in a wide variety of cases in which it would not traditionally have been considered appropriate. n50 Tracing the history of the secondary effects doctrine provides an explanation of the necessity of the doctrine and also provides numerous examples of the complicated, challenging, and often confusing nature of the doctrine as well.

III. The Origins of the Secondary Effects Doctrine

A. Regulating Speech Through Zoning: Young v. American Mini Theatres
The legal foundations of the secondary effects doctrine can be traced back to the Supreme Court's 1976 decision in Young v. American Mini Theatres. The Court upheld a zoning ordinance enacted specifically to regulate an adult entertainment establishment. Though the Court only mentioned "secondary effects" in a cursory manner, this was the first time an analysis of this type was implemented by the Court in determining the validity of a regulation that potentially infringed on the First Amendment. The Young decision would provide the model for judging these types of zoning regulations until the Court decided City of Renton v. Playtime Theaters, Inc. nine years later.

In Young, the owners of two adult movie theaters challenged amendments to a Detroit, Michigan anti-skid row zoning ordinance that had been passed by the city ten years earlier. The amendments prevented "adult" theaters from operating within 1,000 feet of any other "regulated uses," or within 500 feet of any residential area. The ordinance had been enacted to prevent the clustering of certain establishments thought to have deleterious effects on the community. The theater owners argued that the amended ordinances violated the First Amendment as a restriction of protected speech (the adult films being shown in the theaters) and that the ordinances violated the Equal Protection Clause of the Fourteenth Amendment by placing restrictions on adult movie theaters solely based on the content of the material shown while allowing other movie theaters to operate without restrictions. The district court had rejected both of these arguments, but the Sixth Circuit reversed this lower court's decision. The Sixth Circuit found that the ordinance violated the Equal Protection Clause because it targeted certain establishments based primarily on the content of the material shown in the theaters. The Supreme Court reversed the Sixth Circuit, and held that the ordinance did not violate the First or Fourteenth Amendments.

1. Content-Based/Content-Neutral Determination

In doing so, a plurality of the Court categorized the ordinance as a content-neutral time, place, and manner restriction instead of the content-based speech regulation that the theater owners had urged. Justice Stevens, writing for the plurality and joined by Justice White, Justice Rehnquist, Justice Powell (except for Part III), and Chief Justice Burger, concluded that an ordinance that did not directly regulate the content of the protected speech did not violate the First Amendment. In formulating this conclusion, Stevens noted that zoning regulations, or licensing requirements, could be imposed upon speech without necessarily violating the First Amendment. Stevens relied on the character of the regulations in making this assessment, narrowly holding that a "zoning" regulation did not "in itself ... create an impermissible restraint on protected communication" by regulating where that communication could take place.

2. Finding a Significant Government Interest

The plurality determined that the amended ordinance represented a "reasonable regulation[ ] of the time, place, and manner of protected speech," which was permitted when "necessary to further significant governmental interests." The plurality noted that it considered the prevention of "skid row" caused by the concentration of adult uses to be a significant governmental interest. Stevens conceded that the "First Amendment [would] not tolerate the total suppression of erotic materials that have some arguably artistic value," but found that the city could "legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." Specifically, Stevens found a factual basis in the district court record for the city's determination of the necessity of placing the ordinance in a footnote to the opinion:

The [city'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.

3. Alternate Methods of Analysis

Justice Powell concurred in the result of the plurality's analysis but subjected the ordinance to scrutiny as a content-neutral ordinance under the O'Brien standard instead of the general time, place, and manner analysis of the plurality.
the speech implicated but instead relied on the nature of the establishment. He characterized the case as "a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings," which only incidentally implicated the First Amendment. n76 In applying the O'Brien test to the ordinance, Powell noted that this ordinance still left available a substantial number of avenues for the viewing of adult movies since it did not ban the movies; it only regulated the location of the theaters and left much of the city available for this entertainment. n77 The plurality had similarly stressed the alternate avenues the city available for this entertainment.

In a strongly worded dissent, Justice Stewart, joined by Justice Brennan, Justice Marshall, and Justice Blackmun, contended that this case was not about zoning, or the regulation of obscenity, but about "a system of prior restraints and criminal sanctions [enacted] to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit non-obscene but sexually oriented films." n79 Stewart would have subjected the ordinance to strict scrutiny as a content-based restriction of constitutionally protected speech. n80 Stewart noted that the First Amendment was to protect unpopular speech which might "produce distasteful effects" and that by interfering with the protected speech of adult movie theaters the city compromised the tenets of the First Amendment. n81 Justice Blackmun wrote a separate dissent to add that the ordinance was also unconstitutionally vague and should be struck down on those grounds as well. n82

B. Revising the Standard for Zoning Regulations and Secondary Effects Analysis

The secondary effects analysis and justification utilized by the plurality in Young would be solidified ten years later with the majority opinion in City of Renton v. Playtime Theaters, Inc. In the intervening decade, however, the Court decided a number of cases in which it utilized a secondary effects analysis. n83 Nonetheless, throughout this period, lower courts appeared reluctant to apply Young and sustain local zoning ordinances based upon a secondary effects analysis. n84 The lower courts also had trouble articulating a clear standard of review from the fractured Young decision. n85 It is interesting to review how the lower courts read Young during this period and note how many of the innovations initiated at the appellate level were superceded by the Court's subsequent codification of the secondary effects doctrine in Renton.

In Schad v. Borough of Mount Ephraim, n86 decided five years after Young, the Court attempted to refine the adult entertainment [*1187] analysis it had implemented in the previous case. Schad dealt with an ordinance banning all "live entertainment" in a small borough. n87 Live entertainment included nude dancing, and a bookstore owner who ran a peep show was convicted for violating the ordinance. n88 In upholding the conviction, the county court relied upon language from Young which stated: ""the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."" n89

The Supreme Court rejected the lower court's interpretation of Young, noting that zoning laws still had to be within the confines of the First Amendment. n90 The Court determined that a zoning ordinance of this type in a small borough was more damaging than the ordinance implemented in Detroit in Young, in particular because it would not leave open other avenues for the restricted expression. n91 The Court explained that the Young decision "did not imply that a municipality could ban all adult theaters ? much less all live entertainment or all nude dancing ? from its commercial districts citywide." n92 An overbroad ordinance of this type was not a "reasonable, time, place, and manner restriction" which "[left] open adequate alternative channels of communication" such as the ordinance held constitutional in Young. n93 The Court also placed an affirmative burden on the governmental body to "adequately justify its substantial restriction of protected activity" n94 with an evidentiary showing of the secondary effects the ordinance sought to alleviate before the ordinance would survive intermediate scrutiny. n95 This obligation made it more difficult for governmental entities to directly regulate unwanted speech under the guise of eliminating the secondary effects of that speech. n96

[*1188]

2. Adherence to a Strict Evidentiary Standard

Following the evidentiary standard advocated in Schad, in Avalon Cinema Corp. v. Thompson, n97 the Eighth Circuit invalidated an ordinance similar to the one upheld in Young n98 due to the lack of a sufficient justification for the ordinance and the absence of an evidentiary showing as to the effects the ordinance sought to avoid. n99 The Avalon court also noted that
the regulations in Young were amendments to existing ordinances, while this ordinance was passed specifically to prevent a new theater from commencing operation. n100 As such, the court found this to be a content-based restriction and invalidated the ordinance. 
n101 Similarly, in Keego Harbor Co. v. City of Keego Harbor, n102 the Sixth Circuit held that a city was required to prove its justification for burdening First Amendment rights of adult theater operators with the passage of a similar zoning ordinance. n103

In Ebel v. City of Corona, n104 the Ninth Circuit formulated the opinion that in secondary effects zoning cases district courts "should make factual findings on the validity of the city's assertions of harm and then closely scrutinize the ... ordinance's relationship to prevention of the alleged harms." n105 The Ebel court placed great emphasis on the timing of the ordinance and the evidence of the city council's motivation in adopting and enforcing the ordinance. n106 Lower courts seemed to apply a stringent evidentiary standard to regulations of this type to ensure that municipalities were only adopting ordinances truly targeted at alleviating only secondary [*1189] effects of speech and not the speech itself.

3. An Examination of Motivation

Lower courts also began to factor the motivations of the governmental entities in enacting the ordinances into the evidentiary analysis articulated in Schad. For instance, in Basiardanes v. City of Galveston, n107 the Fifth Circuit found that the legislative history of an ordinance that textually mirrored the ordinance upheld in Young revealed that the "city's motive was to remove [the] adult theater from the vicinity of the opera house because of apprehension that an adult theater would drive patrons away," which did "not support [the city's] claim that it was motivated by the crime and blight problem." n108 The evidentiary burden remained on the city to affirmatively justify the ordinance. The Basiardanes court also noted that the ordinance they reviewed relegated adult theaters to "the most unattractive, inaccessible, and inconvenient areas of a city." n109 unlike the ordinance in Young, which left significant room available for adult theater operations throughout the city. n110 This ordinance "drastically impaired the availability in Galveston of films protected for adult viewing by the First Amendment," which rendered the ordinance invalid "as a reasonable time, place, and manner regulation" under Young. n111

In Grand Faloon Tavern, Inc. v. Wicker, n112 the Eleventh Circuit similarly scrutinized the record of the district court proceedings and determined that an ordinance banning nude dancing at establishments serving alcohol was valid due to the nature of the evidence presented by the city to the district court. n113 This evidence included a report by the police chief as to numerous complaints and incidents at the establishment including prostitution (in some cases by the female dancers), numerous assaults, acts of indecent exposure, and rape. n114 The court found that the police chief's deposition "provided the necessary linkage between the stipulated purpose of [*1190] the ordinance and the problems allegedly justifying it." n115 It appears that the lower courts were uncomfortable with the test defined in Young, and were attempting to redefine the elements of that decision to protect the First Amendment rights of certain businesses while giving the governmental authorities sufficient leeway to enact limited zoning regulations.

4. Increasing the Scope of the Doctrine

During this period, lower courts also began to implement secondary effects analysis in cases other than zoning cases similar to Young and Schad. In Hart Book Stores, Inc. v. Edmisten, n116 the Fourth Circuit applied the Young secondary effects analysis to a non-zoning based adult entertainment ordinance which prevented the operation of more than one adult use in the same building. n117 The court upheld the ordinance as a mildly restrictive means to further the governmental interest in avoiding deleterious secondary effects after an evidentiary showing. n118 Similarly, in American Future Systems, Inc. v. Pennsylvania State University, n119 the Fourth Circuit court applied a secondary effects analysis to a non-adult entertainment zoning ordinance that banned commercial solicitation in dormitories. n120 The court upheld the ordinance since the ban was not directed at the literature itself but at the secondary effects the solicitors produced, since students could get information elsewhere and the constant barrage of solicitors was negatively impacting the quality of college life for the dormitory residents. n121 This outgrowth of the secondary effects doctrine from adult entertainment regulation zoning to other aspects of First Amendment jurisprudence was limited and would remain mostly in the realm of zoning until the Renton and Boos decisions advocated the application of the doctrine to other areas.

C. The True Articulation of the Secondary Effects Doctrine: City of Renton v. Playtime Theaters, Inc.

City of Renton v. Playtime Theaters, Inc. n122 was the pivotal case in which the secondary effects doctrine was truly articulated by the [*1191] Supreme Court. Renton concerned two adult theater owners in Renton, Washington who sought to overturn a city ordinance
that prohibited adult theaters n123 from being located "within 1,000 feet of any residential zone, single-or multiple-family dwelling, church, or park, and within one mile of any school." n124 Following a familiar pattern, the district court found the ordinance was appropriate, n125 while the Ninth Circuit reversed and held that the ordinance violated the First Amendment. n126 The Supreme Court then reversed the Ninth Circuit, relying on Young and adopting many of the findings of the district court. n127

1. Content-Based/Content-Neutral Determination

Justice Rehnquist, writing for a majority of the Court, indicated, as a preliminary matter, that the majority opinion in Renton was "largely dictated" by the plurality opinion in Young. n128 The Court reiterated the rationale that had been applied by various courts since Young: an ordinance that did "not ban adult theaters altogether ... [was] properly analyzed as a time, place, and manner regulation." n129 In this particular case, the Court relied on the district court's findings that the ordinance was "aimed not at the content of the films shown at "adult motion picture theatres,' but rather the secondary effects of such theaters on the surrounding community." n130 The Court [*1192] determined that even if the suppression of speech was a ""motivating factor" in the decision to pass the ordinance, the ordinance would not fail the O'Brien test as long as the municipality's ""predominant concerns' were with the secondary effects ... and not with the content of the adult films themselves." n131 The fact that the regulation purported to target the secondary effects of the speech, not the speech itself, enabled the Court to declare the ordinance ""completely consistent with [the Court's] definition of "content-neutral' speech regulations as those that "are justified without reference to the content of the regulated speech." n132 The Court then determined that the appropriate test for an ordinance of this type was "whether the [ ] ordinance [was] designed to serve a substantial governmental interest and allowed for reasonable alternative avenues of communication." n133

2. Substantial Government Interest

The Court disagreed with the Ninth Circuit assessment that the city had not met the evidentiary burden required by Young, Schad, and O'Brien. n134 The Ninth Circuit determined that the city passed the ordinance without looking at "the particular problems or needs of Renton," and that the terms of the ordinance provided only "conclusory and speculative" evidence. n135 In a move that would have a lasting effect on secondary effects cases, the Court allowed the city to rely on studies conducted in nearby Seattle when justifying its ordinance. n136 The Court then held that that the "First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or procure evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." n137

[*1193]

3. Reasonable Available Alternatives

The Court also accepted the district court's finding that 520 acres of land in the city remained open to the adult theaters under the ordinance, which defeated the argument that the ordinance was a "substantial restriction" of expression. n138 As Rehnquist noted, "that respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." n139 Individuals still had a "reasonable opportunity to open and operate an adult theater," which was all that intermediate scrutiny required under these circumstances. n140

4. Narrow Tailoring?

The method of correcting the perceived problem was left in the hands of the city, n141 but Rehnquist suggested that the ordinance was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in [Schad] and [Erznoznik]." n142 It is not immediately apparent if this was dicta, or if narrow tailoring would be a requirement in secondary effects cases. This would later cause some confusion to lower courts, as well as certain members of the Court. n143

5. Alternate Analysis

Justice Brennan dissented from the majority opinion, joined by Justice Marshall. n144 Brennan primarily disagreed with the majority's assessment of the ordinance as content-neutral and found that the "language of the ordinance" and the "dubious legislative history" showed that the city was very much interested in regulating free speech when instituting the ordinance. n145 The dissent refused to categorize the ordinance as content-neutral because the ordinance "selectively imposed limitations on the location of a movie theater [*1194] based exclusively on the content of the films shown there." n146 Brennan noted that while "the fact that adult movie theaters may cause
harmful "secondary' land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral." n147 Brennan implied that the terms of the ordinance revealed its true discriminatory intention and meaning. n148 In addition, Brennan called into question the lack of an evidentiary record with respect to the secondary effects that the ordinance was enacted to combat. Brennan argued that "the City Council conducted no studies, and heard no expert testimony, on how the protected uses would be affected by the presence of an adult movie theater" and as a result any "findings" were "purely speculative conclusions." n149 While the majority allowed the city to rely on the studies of other cities to justify its action, the city council "never actually reviewed any of these studies" before enacting the ordinance. n150

The dissent also insinuated that the Seattle findings might have been irrelevant to the situation in Renton. n151 The dissent found that the city did not prove "that locating adult movie theaters in proximity to its churches, schools, parks, and residences [would] necessarily result in undesirable "secondary effects,' or that these problems could not be effectively addressed by less intrusive restrictions." n152 Brennan would have held the ordinance unconstitutional because it allowed the city to "effectively ban a form of protected speech from its borders." n153

IV. The Expansion of the Secondary Effects Doctrine

A. Re-Defining the Substance of the Secondary Effects Doctrine [*1195] after Renton

In the aftermath of the Renton decision, a number of legal commentators voiced the opinion that the Court's decision was an unwarranted expansion of Young. n154 The prevalent position in the legal community was that the secondary effects doctrine implemented in Renton would remain useful in the area of adult entertainment regulation but would not be applied to other types of speech regulations. n155 Along these lines, Professor Clarke commented that the "practical impact of Renton upon adult uses is much greater than might have been anticipated from [Young]" and surmised that this decision might allow cities and towns to greatly reduce access to material protected by the First Amendment. n156 There was also unease among some legal scholars that the rationale of the Renton decision would affect First Amendment jurisprudence outside of the adult entertainment area. n157

After Renton, the Supreme Court began to recognize the secondary effects doctrine as an exception to the content-based category alongside solidified restrictions such as the "speaker based" exceptions to the First Amendment. n158 The Court also began to re-


For instance, the Court indicated that secondary effects analysis would not be available in every case in which the First Amendment was implicated. The Court declined to apply a secondary effects analysis in Arcara v. Cloud Books, Inc., n160 when a city applied a nuisance ordinance to close down an adult bookstore where prostitution was actively being solicited. n161 The Court found the burden on the free speech was incidental since the ordinance was targeted at prostitution, not the adult entertainment. n162 The Court determined that the ordinance and actions were "directed at imposing sanctions on nonexpressive activity" which was the prostitution, not the operation of the bookstore. n163

2. City of Cincinnati v. Discovery Network, Inc. and City of Ladue v. Gilleo

The Court also determined that secondary effects analysis would be appropriate only if the secondary effects of the speech being regulated were markedly different than secondary effects created by other non-regulated speech. The Court declined to apply a secondary effects analysis in City of Cincinnati v. Discovery Network, Inc., n164 in which a city prohibited certain news racks from operating throughout the city. n165 The Court found the city's reliance on Renton in enacting the ordinance was misplaced, since the secondary effects of one news rack were indistinguishable from the other news racks allowed to remain. n166 This prevented the Court from utilizing a secondary effects analysis and led to the invalidation of the ordinance under strict scrutiny. n167 Along similar lines, in City of Ladue v. Gilleo n168 a city banned all signs except those falling within certain enumerated [*1197] exceptions. n169 The Court declined to initiate a secondary effects analysis and dealt only with the initial banning of all signs, thus defeating the need for a content-based/content-neutral determination. n170

3. Reno v. ACLU

This re-definition of the substance of the secondary effects doctrine proceeded throughout the 1990s as the Court continued to delineate the difference between primary effects and secondary effects of expression when it came to the content-based/content-neutral
distinction. The general idea became solidified: a regulation based on primary effects would receive the regular content-based strict scrutiny, while one based on secondary effects would receive intermediate scrutiny. n171 Using this basic concept, in Reno v. American Civil Liberties Union, n172 the Court refused to apply secondary effects analysis to Internet legislation prohibiting the broadcast of indecent material to individuals below the age of eighteen under the Communications Decency Act (the "CDA"). n173 The government argued for the application of secondary effects analysis, contending that "the CDA [was] constitutional because it constituted a sort of "cyberzoning' on the Internet." n174 The Court refused to accept this characterization and instead found that "the CDA is a content-based blanket restriction on speech, and, as such, cannot be "properly analyzed as a form of time, place, and manner regulation" since the regulation "applied broadly to the entire universe of cyberspace and the purpose ... [was] to protect children from the primary effects of "indecent' and "patently offensive' speech, rather than any "secondary' effect of such speech." n175 The Court found that secondary effects precedents "did not require [the Court] to uphold the CDA and [were] fully consistent with the application of the most stringent review of its provisions." n176

B. Re-Defining the Scope of the Secondary Effects Doctrine after Reno

The fact that the Supreme Court declined to initiate a secondary effects analysis in Cloud Books, Discovery Network, Gilleo, and Reno [*1198] v. ACLU was unrelated to the fact that they were not adult entertainment zoning cases. n177 The Court had fashioned a powerful and useful tool that allowed it to redefine the scrutiny of ordinances based upon something other than speech itself. It would soon become evident that the Court was willing to extend the application of secondary effects analysis to a number of different First Amendment contexts.

1. Boos v. Barry

Boos v. Barry n178 represented an important re-definition of the secondary effects doctrine. Although the Court refused to implement a secondary effects analysis in Boos, it revealed that certain members of the Court would be willing to apply the doctrine outside of the traditional adult entertainment zoning regulations. n179 In Boos, the Court dealt with an ordinance that prohibited picketing by displaying derogatory signs that targeted foreign governments outside foreign embassies. n180 The Court noted:

Listeners' reactions to speech are not the type of "secondary effects' we referred to in Renton... . If the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. n181

The ordinance in this case targeted the "direct impact of ... [the] speech, not a secondary feature that happened to be associated with that type of speech," as the Court had found in Renton. n182 The Court decided that the ordinance was content-based and invalidated it under strict scrutiny because it was not the least restrictive means available. n183 The Court noted that this ordinance did "not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies" but rather "relied on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that [was] critical of their governments." n184 The Court thus appeared to be willing to apply the secondary effects doctrine to political speech in a public forum, a supposedly sacred area which Stewart had characterized in Young as [*1199] the most precious of First Amendment areas, n185 so long as the ordinance was worded properly. This would have represented a novel application of the doctrine, as secondary effects analysis would be utilized to change the character of the ordinance from content-based to content-neutral and then depart, leaving the court to apply the O'Brien standard to an otherwise content-based ordinance without any further mention of secondary effects or Renton. n186

2. Barnes v. Glen Theatre, Inc.

The Court again refined the secondary effects standard and used secondary effects analysis in a case removed from any zoning regulation in Barnes v. Glen Theatre, Inc. n187 In Barnes, the Court applied the secondary effects doctrine to a case involving an ordinance which had not been enacted to alleviate secondary effects. n188 Barnes dealt with a public indecency statute requiring dancers in strip clubs to wear pasties and G-strings rather than appearing nude in their acts. n189 Eight members of the Court found nude dancing to be on the outer scope of First Amendment protection, n190 but the Court still held that the ordinance could be upheld. n191 Justice Rehnquist, joined by Justice O'Connor and Justice Kennedy, determined that the ordinance regulated conduct rather than expression by separating the nudity and the dance aspects of the routines at issue. n192 Justice Scalia concurred in the judgment but found that, as a conduct regulation, there
should be no First Amendment analysis required at all. n193 Justice Souter also concurred in the judgment, but applied a secondary effects analysis and found that the ordinance was appropriate under the O'Brien standard. n194 Souter applied this secondary effects analysis despite the fact that the ordinance had not been enacted to alleviate secondary effects at all, but simply to prevent nude dancing. n195

Justice White, joined by Justice Marshall, Justice Blackmun, and Justice Stevens, dissented from the plurality opinion and found that "the purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates." n196 The dissenting Justices believed that the ordinance "as applied to nude dancing, targeted the expressive activity itself; in Indiana nudity in a dancing performance is a crime because of the message such dancing communicates." n197 This was a fractured opinion with confusing precedent value and did little to help lower courts deal with ordinances of this kind. This issue would effectively have to be re-decided ten years later in City of Erie v. Pap's A. M., n198 with only a slightly less confusing result. n199

3. R. A. V. v. City of St. Paul

The Court also declined to apply a secondary effects analysis to an ordinance aimed at preventing bias-motivated disorderly conduct in R.A.V. v. City of St. Paul. n200 The Court characteristically did not decline the opportunity to further redefine the purpose and extent of the doctrine, however. In R.A.V., the Court found that an ordinance prohibiting cross-burning and other racially or religiously symbolic activity was "facially unconstitutional." n201 The Court refused to accept the government's characterization of the ordinance as prohibiting "fighting words," n202 and similarly refused to apply a secondary effects analysis as the government had urged. n203 The Court stated that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of ["...speech."]' n204

The Court also found that "since words can in some circumstances violate laws directed not against speech but against conduct ... a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." n205 This is similar to what was accomplished in Barnes under the framework of the O'Brien test for expressive conduct: allowing expression to be restricted along with the violative conduct when the two are inextricably combined. n206 This case appears to have substituted the secondary effects test of Renton for the expressive conduct test of O'Brien. n207 This solidified the transformation to which the Boos Court had alluded n208 and interjected secondary effects analysis into many of the cases in which the O'Brien standard previously would have been inapplicable.

C. Using Secondary Effects as a Means to Directly Regulate Content: City of Erie v. Pap's A. M. TDBA "Kandyland"

In City of Erie v. Pap's A. M., n209 decided in 2000, the Supreme Court once again invoked the secondary effects doctrine in deciding the constitutionality of an ordinance regulating adult entertainment at the local level. n210 The Court applied the secondary effects doctrine to a non-zoning ordinance patterned after the one in Barnes, which directly prohibited nude dancing in order to prevent harmful secondary effects. n211

In Erie, the owner of a "nude dancing establishment" brought suit against the city challenging the validity of an ordinance that banned public nudity. n212 On appeal from the Pennsylvania Supreme Court, the Supreme Court held that the ordinance was "a content-neutral restriction that regulated conduct, not First Amendment expression," which allowed the city to "have sufficient leeway to justify such a law based on secondary effects." n213

1. Content-Based/Content-Neutral Determination

As with other secondary effects cases, the question of the ordinance's validity depended on whether the Court classified the ordinance as content-based or content-neutral. n214 Justice O'Connor, writing for a plurality of the Court and joined by Justice Rehnquist, Justice Kennedy, and Justice Breyer, determined that "government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in O'Brien for content-neutral restrictions on symbolic speech." n215 This clarified, to a degree, the fragmented holding in Barnes where a similar ordinance was upheld by the Court under a number of rationales. n216 The city argued that the ordinance banned conduct and not speech and was thus content-neutral. n217 The club owner argued that the ordinance was targeted at nude dancing, not nudity, and should be considered content-based, n218 and provided evidence that this was the case. n219
such as the impact on public health, safety, and welfare, which we have previously recognized are "caused by the presence of even one such establishment." n220

2. Justification

O'Connor "concluded that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing." n221 O'Connor then applied the O'Brien test without any further analysis of the secondary effects aspects of the ordinance and decided that the ordinance was justified. n222

3. Other Available Avenues? Narrow Tailoring?

O'Connor noted that requiring "pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." n223 As in Barnes, O'Connor separated the nudity aspect from the dancing aspect of what she referred to as "erotic dancing." n224 This was as close as the plurality would come to mentioning the narrow tailoring or other available avenues that had been important to the Young, Renton, and Schad decisions. n225

4. Alternate Methods of Analysis

Justice Scalia and Justice Thomas concurred in the plurality's judgment but would have declared the issue moot. n226 In dicta, Scalia noted that following the logic of his concurring opinion in Barnes he would have categorized the ordinance as a general regulation that did not implicate the First Amendment at all. n227 Scalia also referred to a "traditional judgment ... that nude public dancing itself is [*1204] immoral," an opinion which at least he and Justice Thomas shared. n228

Justice Souter concurred in the Court's opinion that the O'Brien test was the appropriate test in secondary effects cases of this type but dissented from the plurality's disposition of the case. n229 Souter found that the evidentiary burden of O'Brien was not met. n230 Souter found that the government did not make a "sufficient evidentiary showing" as is required under O'Brien n231 and bemoaned the "need for factual justifications to satisfy intermediate scrutiny under the First Amendment." n232 Souter found a failure on the part of the government "to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy." n233 In addition, Souter would have found that the ordinance failed the "no greater than" requirement of O'Brien since "the record shows that for [twenty three] years there has been a zoning ordinance on the books to regulate the location of establishments like Kandyland, but the city has not enforced it." n234 In Souter's view, the evidence Erie had forwarded would not "permit the conclusion that Erie's ordinance is reasonably designed to mitigate real harms." n235

Justice Stevens, who authored the plurality opinion in Young, which first mentioned secondary effects, dissented from the plurality opinion and acknowledged the "dramatic changes in legal doctrine that the Court endorsed" with this decision. n236 Stevens identified that prior to this decision the secondary effects of adult entertainment "had justified only the regulation of their location," but "the Court has now held that such effects may justify the total suppression of protected speech." n237 Justice Stevens distinguished Young and Renton from Erie because those cases implicated zoning ordinances directed at where the expression took place, not the [*1205] expression itself. n238 Stevens noted that "the reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: [a] dispersal that simply limits the places where speech may occur is a minimal imposition whereas a total ban is the most exacting of restrictions." n239 The Erie ordinance "totally silenced a message the dancers at Kandyland want to convey." n240 The dissent also took issue with the Court's handling of the O'Brien test. The plurality had conceded that ""requiring dancers to wear pasties and G-Strings may not greatly reduce these secondary effects," which Stevens characterized as "an enormous understatement." n241 Steven took issue with the Court's contention that the O'Brien test required only that the ordinance ""further the interest in combating such effects," stating that this should not satisfy the test. n242


In City of Los Angeles v. Alameda Books, Inc., n243 decided on May 13, 2002, the Court again addressed the topic of secondary effects and elaborated on the evidentiary standard a municipality must meet to ensure a secondary effects analysis by the Court. n244
This case also reinvigorated a debate about to exactly what standard regulations enacted to counter secondary effects would be subject; after twenty-six years, the standard of scrutiny and the test to apply in secondary effects cases still appears to be in doubt.

In Alameda Books, the owners of two adult entertainment businesses (a bookstore and a video arcade) that operated simultaneously in the same building challenged an ordinance that prohibited "more than one adult entertainment business in the same building," n245 claiming that this violated the First Amendment. n246 The district court granted summary judgment to the owners, finding that the ordinance was a content-based regulation that failed when subjected to strict scrutiny. n247 The Ninth Circuit affirmed the [*1206] judgment on different grounds, deciding that regardless of whether the ordinance was content-based or content-neutral, it was invalid due to a lack of evidence that the ordinance served a "substantial government interest." n248 The Supreme Court rejected this idea and instead found that the evidentiary burden could have been met by the city in this case. n249

1. Evidentiary Burdens

Justice O'Connor delivered the judgment of the Court, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. A plurality of the Court relied on the rationale of Renton and determined that the city had met the burden imposed by this standard. n250 The plurality found that the Ninth Circuit had "misunderstood the implications" of the survey in making its determination. n251 The plurality found that the city had depended on an "assumption" based on the evidence contained in the survey and that "it [was] rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, will reduce [*1207] crime rates." n252 O'Connor added that "while the city certainly bears the burden of providing evidence that supports a link between concentrations of adult operations and asserted secondary effects, it does not bear the burden of providing evidence that rules out every theory for the link between concentrations of adult establishments that is inconsistent with its own." n253 The city was not required "to prove that its theory [was] the only one that [could] plausibly explain the data." n254 O'Connor pointed out that this was a motion for summary judgment, and concluded that the city "at [that] stage of the litigation" had met the requirements of Renton. n255 The plurality also disregarded the owners' contentions regarding the other piece of evidence relied on by the city: a study used by a court in a previous secondary effects case. n256 The owners claimed that the city could not rely on this evidence because the city could not prove that it had ever examined the evidence before enacting the ordinance. n257 The plurality did not address this issue, finding that the evidence in the 1977 Los Angeles survey was sufficient. n258

2. Alternate Methods of Analysis

Justice Scalia, while concurring in the judgment of the court, once again wrote separately to indicate that secondary effects analysis was inappropriate in this and all cases of this type, because "the Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." n259

Justice Kennedy also concurred in the judgment of the Court, but cautioned that the plurality's statements about Renton "might constitute a subtle expansion" of the secondary effects doctrine. n260 Kennedy noted that "the First Amendment protects speech and not slaughterhouses," but recognized that "[a] zoning law need not be blind to the secondary effects of adult speech, so long as the purpose [*1208] of the law is not to suppress it." n261 Kennedy found that "the ordinance [was] not so suspect that we must employ the usual rigorous analysis that content-based laws demand in other instances" and would have been willing to apply intermediate scrutiny to the ordinance. n262 This was due to the zoning aspects of the ordinance that "provided a built-in legitimate rationale" that rebutted the presumption of invalidity generally associated with content-based ordinances. n263 Kennedy examined the appropriate form for ordinances of this kind and stated that "the ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside ... [not that] it will reduce secondary effects by reducing speech in the same proportion." n264 Kennedy found that the "plurality's analysis [did] not address how speech will fare under the city's ordinance" which ignored that "the necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects without substantially reducing speech." n265 Thus, Kennedy alluded to the fact that while not invalid on its face, the ordinance might be shown to be in violation of the First Amendment.

Justice Souter wrote a dissenting opinion, joined by Justice Stevens and Justice Ginsburg, and Justice Breyer in part. n266 The dissent focused not only on the evidentiary issue identified by the majority, but on a much simpler (or more difficult) issue: what was the correct procedure and form of applying intermediate
V. The Strengths, Shortcomings, and Future Applications of the Secondary Effects Doctrine

The secondary effects doctrine has undergone fundamental changes throughout the past twenty-five years, having evolved from a rudimentary idea in Young, to the important and wide-reaching doctrine recognized in Erie and Alameda Books. The scope and substance of the doctrine have been expanded in the area of adult entertainment regulations in a way that accurately reflects and deals with the secondary effects related to adult entertainment establishments. The Court has also evidenced an intention to utilize secondary effects analysis in a number of cases far removed from adult entertainment. In these cases, the evidentiary burdens and legislative motivations need to be explored and solidified, as has been done in the area of adult entertainment regulations. Applying the doctrine to new areas in the same way it is currently applied to adult entertainment regulations would threaten the protections guaranteed by the First Amendment.

A. Secondary Effects Analysis in its Traditional Role

In the area of adult entertainment regulations, the secondary effects doctrine in its current form bears little resemblance to the one articulated in Young. The ordinance passed in Young was quite limited in nature. While the ordinance may have affected the theater owners and forced them to find new locations for their theaters, the ordinances still left citizens with available alternatives to view the adult movies. Access to adult entertainment in Detroit was still very much available with the contested ordinance in place. The ordinance only attempted to prevent a concentration of certain "adult uses," which included a number of businesses unrelated to adult entertainment. The plurality acknowledged that any sort of ban on the adult theaters would not have survived constitutional muster. In actuality, a majority of the court would have extended full First Amendment protections to the adult theaters had Powell not decided that the First Amendment was not implicated at all. The fact that this was a zoning ordinance and not a ban on adult motion pictures allowed the plurality to initiate this secondary effects analysis with which Powell agreed.

Renton built upon the decision in Young, but the secondary effects doctrine remained rooted in its zoning nature. While the Court referenced the O'Brien test in Renton, they did not really apply the full expressive conduct test but instead formulated a
new test relating to the ordinances as "time, place, and manner" restrictions. n290 Only later, in Erie, would a plurality of the Court substitute the full O'Brien test in its secondary effects analysis. n291 This would downplay the narrow tailoring aspects of the review that had been stressed in the Young and Schad opinions. A plurality of the Court would then return to the Renton time, place, and manner restrictions to analyze the ordinance in Alameda Books. n292 Renton and Alameda Books both represent departures from Young where the majority called the regulation at issue content-neutral, while the concurring opinion did not really discuss the matter, or would have called it content-based but reviewable under a content-neutral standard. n293 Renton also lowered the evidentiary burden that a municipality needed to overcome to justify regulations based on secondary effects, making it easier to rely on other cities with problems that may not have reflected the secondary effects at issue. n294 This reversed the trend, in effect since Young and Schad, of requiring the government to truly articulate a compelling basis for the implementation of the ordinance. n295 The "predominant concerns" test adopted by Renton, in place of the "motivating factor" test used by many lower courts, also opened the door for legislators to adopt ordinances based on a dual purpose of limiting unfavorable speech and eradicating unwanted secondary effects. n296

Erie and Alameda Books provide further examples of the extent to which the substance and scope of secondary effects analysis have been refined and extended and the extent to which the analysis itself is still subject to debate. n297 Erie represented a significant departure from the secondary effects doctrine as a zoning ordinance. Erie built upon the ideas that had been circulating since Boos, Barnes, and R.A.V. and extended the doctrine into an area into which it had not previously been applied. n298 In Young, Stevens noted that secondary effects analysis would be appropriate in cases where "the burden on the first amendment ... was slight," n299 such as adult entertainment zoning ordinances. n300 This was not really the case in Erie, as Stevens noted in his dissent. n301 Erie represents a significant but perhaps necessary departure from the originally intended use of the secondary effects doctrine. Erie highlights the encompassing nature of the secondary effects doctrine, and thus illustrates the need for a comprehensive review of ordinances aimed at alleviating secondary effects. Alameda Books, on the other hand, represents a missed opportunity for the Court to come to a decision on the intricacies of secondary effects analysis, which would be useful once the Court begins applying the analysis consistently outside the area of adult entertainment regulations. It seems clear that the evidentiary burdens and legislative motivations are not entirely clear from the fractured nature of many of the recent secondary effects opinions and the different discussions and rationales that are provided throughout these opinions. n302

B. Secondary Effects Analysis outside of its Traditional Role

Commentators have argued for an end to secondary effects analysis, n303 but at this point it appears that the Supreme Court has adopted this standard and will continue to apply it on a regular basis. In addition, district and appellate courts have recently begun to use the language of Boos and R. A. V to apply secondary effects analysis to a number of new adult entertainment regulations aimed at directly regulating activities, not zoning them, including an open book ordinance, n304 a restriction on operating hours of bookstores, n305 an ordinance regulating actors in pornographic movies, n306 a no touch provision, n307 and most recently, bans of nude dancing in strip clubs. n308 Lower courts have also initiated secondary effects analysis at the request of the government in numerous areas unrelated to adult entertainment or zoning regulations, including regulations that restrict door-to-door solicitation, n309 billboard use, n310 commercial hours of operation, n311 and discrimination. n312 The Supreme Court has similarly discussed secondary effects in connection with other types of regulations, including outdoor advertising prohibitions n313 and vote solicitation restrictions. n314

While the Court appears to be willing to extend secondary effects analysis to cases removed from the adult entertainment zoning ordinances, the evidentiary burden that will be applied in these new cases remains unclear. The Court had an opportunity to define the evidentiary burden in Alameda Books, but the plurality declined to do so. n315 This is probably due to the fact that the ordinance in Alameda Books was similar to the adult entertainment zoning ordinances to which the secondary effects doctrine has traditionally been applied. The Court and numerous federal courts have already decided that the secondary effects of adult businesses are harmful and that these businesses can be regulated to minimize these effects. n316 Courts have reviewed studies from a multitude of municipalities that all point towards the same conclusions. The Justices discussed the evidentiary burdens and the application of secondary effects analysis itself more thoroughly in the concurring and dissenting opinions in Alameda Books. They appeared to be willing to discuss the future of secondary effects analysis, and refine the test and evidentiary burden for future cases.
unrelated to adult entertainment zoning, but were apparently unable to convince the plurality of this need. n317 The Court has determined that secondary effects analysis is useful outside of its traditional areas, but has not yet provided guidance on the details of this application.

Outside of the area of adult entertainment, the Court needs to revisit the actual working of secondary effects analysis and the evidentiary burdens associated with secondary effects analysis. The Court needs to ensure that municipalities are not able to pass ordinances that would be struck down under strict scrutiny by alluding to secondary effects that are not really the focus of the ordinances or a concern of the community. A less stringent [\*1215] application of secondary effects analysis might allow municipalities to anticipate and shift the amount of scrutiny their ordinances will receive not by re-wording or relaxing the terms of the ordinances, but by simply adding an additional secondary effects rationale. This would have a significant and deleterious effect on First Amendment jurisprudence by allowing municipalities to back around the First Amendment. n318

Dicta in some of the Court's recent opinions could be read to encourage this type of behavior. n319 Also problematic is the fact that secondary effects analysis used to be implemented in a separate test for speech related regulations, then gradually became intertwined with the O'Brien analysis. n320 The Court needs to ensure that intermediate scrutiny does not become available merely by mentioning a potential secondary effect. There needs to be an independent evidentiary showing each time the secondary effects doctrine is implicated, and especially the first time it is applied to a new type of speech restriction. The lack of a strong showing in adult entertainment cases such as Alameda Books may be justified by the multitude of other sources available for proof, but this may not be true when the doctrine is applied to new areas.

The Court has mentioned in the past that it will not invalidate an ordinance based on certain motives of the municipalities, but this would be a way to make sure that secondary effects analysis is only implemented in appropriate cases. Allowing a degree of scrutiny into the motive, legislative history, and intent behind speech regulations enacted to deal with secondary effects would provide an additional safeguard in new areas into which this doctrine is applied. n321 At this point, the Court only relies on the face of the ordinance and not on the true intentions of the legislature in passing the ordinance. This is true in the adult entertainment area in cases where the government admits the true purpose of the ordinance, but also includes in its argument some secondary effects to guarantee intermediate scrutiny. In Erie, for instance, the plurality cited O'Brien for the proposition [\*1216] that a "court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." n322 Stevens rejected this notion in his dissent, commenting that the actual text of O'Brien stated the Court would not invalidate a law "on the assumption that a wrongful purpose or motive has caused the power to be exerted." n323 There would be no reason to rely on an assumption to invalidate the ordinance in Erie, because the city had been very clear that the ordinance was enacted to ban nude dancing in order to shut down establishments in which promoted activity took place. n324 Courts have upheld numerous ordinances in this way when the illicit motives of the government were not "assumed," but were very clear and undisputed. When the difference between upholding or invalidating an ordinance depends upon whether the ordinance is content-based or content-neutral, an admission by the municipality that it is content-based should be considered by the Court.

Before Renton (and even after to a lesser degree), lower courts routinely invalidated regulations based on the perceived motives of the government. In Walnut Properties, Inc. v. City of Whittier, n325 the Ninth Circuit relied on Renton to return a case to the district court to determine whether the city had an "improper motivating factor" or an "unconstitutional predominant purpose in enacting" the ordinance. n326 The Ninth Circuit used a "motivating factor" analysis before the Court decided Renton, and instructed courts to use a "predominant purpose" test based on the language of Renton. n327 Using that test, in Colacurcio v. City of Kent, n328 the Ninth Circuit recently upheld an adult entertainment restriction despite a transcript of a discussion of the ordinance that included the board chairman's comments that "with all the regulations we have adopted and stuff, I'm not too concerned that someone's going to come and try to open something up. Because we've made it a little bit difficult for them to make money in the traditional way they make money." n329 Similarly, in Ambassador Books & Video, Inc. v. City of Little Rock, n330 the Eighth Circuit upheld an ordinance despite the existence of a memo between the city manager and city attorney which ordered the staff to "please get together and draft a legal opinion on this - I want to [\*1217] shut these places down! Somehow." n331

It seems absurd to overlook these clear statements of intent and apply intermediate scrutiny when the municipality admits that it intended to target speech and not secondary effects. Similarly, Erie presents a striking example of an ordinance that was clearly enacted to suppress expression, not to deal with secondary effects. n332 It is important to remember, however, that these cases were all adult entertainment
cases in which secondary effects analysis has become commonplace. Outside of the area of adult entertainment, a stricter standard should be applied, closer to a "motivating factor" test, to ensure that the "predominant purpose" of ordinances enacted to combat secondary effects in other areas is to alleviate secondary effects, not regulate speech under false pretenses.

Along similar lines, when applying secondary effects analysis to new areas, it is imperative that the Court require the municipality to meet the evidentiary burden and justify the ordinance based on secondary effects. The stringent evidentiary standards of Young and Schad appear to have eroded over time, but hopefully this is because most cases have involved adult entertainment, which repeatedly has been proven to yield harmful secondary effects. Originally, courts would invalidate an ordinance that did not significantly justify the secondary effects it purported to alleviate. n333 This has continued to be true in the area of adult entertainment when the government has failed to make any evidentiary showing as to secondary effects. n334 Some governmental bodies do seek to justify their ordinances based on studies pertaining to the city in question and the specific secondary effects present at the time of passage. n335 But too often the government relies only on studies done in other cities which may be irrelevant to the secondary effects at hand, and may be based on types of expression not present. n336 The Court must require a municipality to meet an evidentiary burden and conduct current research prior to the passage of an ordinance when the secondary effects doctrine is applied in new areas. This has not always been the case with adult entertainment. n337 If a photocopy of a judicial decision never actually reviewed by a municipality at the time of enactment is the only evidence the municipality needs to put forward to justify an abridgement of the First Amendment, the evidentiary standard is hardly an obstacle that needs to be taken seriously. n338 While a municipality may not have to "affirmatively ... undertake to litigate [an] issue repeatedly in every case," n339 the evidentiary burden should be met until the Court feels comfortable that an assumption may properly be drawn from the totality of evidence available.

VI. Conclusion

In deciding Young, Justice Stevens concluded, "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." n340 The Supreme Court initiated the idea of secondary effects because, in cases of adult entertainment zoning regulation, "'[the] burden on First Amendment rights is slight.'" n341 By applying the secondary [*1219] effects doctrine outside this area, or to directly regulate speech, the Court needs to take some additional precautionary steps. The Court needs to ensure that each time secondary effects analysis is used in a new area, the municipality bears the burden of proving that the secondary effects really exist and that the ordinance is related to preventing them. This is not as important once there is a body of law stating evidentiary requirements for municipalities to rely on, as is the case with adult entertainment. The weak nature of the plurality's imposition of the evidentiary burden in Alameda Books should only be attributed to the fact that Alameda Books concerned an adult entertainment zoning ordinance. The concurring and dissenting opinions in Alameda Books show that a number of members of the Court are treating the evidentiary burden seriously and are aware that the application of the doctrine to new areas will be more difficult and require more thought than the plurality gave to the matter in its opinion.

To accomplish this, the Court should clarify and redefine the O'Brien standard as it relates to its secondary effects analysis to ensure that the secondary effects doctrine does not lead to a suppression of First Amendment expression. One way to do this is to begin look at the motivation, legislative history, and intent behind the ordinance. This appears to be the most rational way to determine whether a regulation is content-based or content-neutral, but the Court has refused to utilize this method since O'Brien. The Court should also revive the strict evidentiary burdens imposed under Young and Schad each time secondary effects analysis is extended into a new area. These opinions are often referred to in reference to other issues and they should be used for this proposition as well.

Renton imposed a less stringent standard than the standard utilized in previous secondary effects cases, but this was because the secondary effects of adult entertainment in the zoning context had been proven in numerous instances. At the time Renton was decided, secondary effects analysis was confined to adult entertainment zoning ordinances, and was not available in cases to which it will surely be extended in the future. If a municipality chooses to enact an ordinance that limits the First Amendment freedoms of certain individuals, the municipality should have to define the secondary effects to be eliminated, prove they are in effect or will be in effect, and show how the regulations to be implemented will eliminate or minimize them. These requirements are not unreasonable, since the outcome of this evidentiary burden showing will be the imposition of intermediate scrutiny. This approach would not require the
formulation of a new test, just a stricter application of O'Brien as [*1220] modified throughout the secondary effects cases discussed in this Note.

FOOTNOTE-1:

n1. See discussion infra Part II.C.

n2. 427 U.S. 50, 71 n.34 (1976); see also discussion infra Part III.A.

n3. 529 U.S. 277 (2000); see also discussion infra Part IV.C.

n4. 122 S. Ct. 1728 (2002); see also discussion infra Part IV.D.


n6. U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech ...").

n7. See id.

n8. U.S. Const. amend. XIV, 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ... ").; see also Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963) (applying the protections of the First Amendment to the states through the Due Process Clause of the Fourteenth Amendment).


n12. See Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 966 (1978) ("Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual.").

n13. U.S. Const. amend. I.

n14. Texas v. Johnson, 491 U.S. 397, 404 (1989) (acknowledging that First Amendment protection "does not end at the spoken or written word").


n16. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (holding that "music, as a form of expression and communication, is protected under the First Amendment").

n17. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (finding that "the importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform").


n21. Id. at 66 (finding that "nude dancing is not without its First Amendment protections from official regulation"); see also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (agreeing that First Amendment protection extended to nude dancing, but disagreeing on the amount of such protection); City of Erie v. Pap's A. M., 529 U.S. 277, 285 (2000) (holding that nude dancing is "expressive conduct that is entitled to some quantum of protection under the First Amendment").

n22. See discussion infra note 63 and accompanying text.

n23. U.S. Const. amend. I.

n24. See Johnson, 491 U.S. at 403.


n27. Id.


n29. Id. at 95.

n30. See id.


n34. Ofer Raban, Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?, 30 Seton Hall L. Rev. 551, 555 (2000).


n37. See id. at 643.


n39. 391 U.S. at 377.

n40. Id.

n41. Clark, 468 U.S. at 298 (noting that "validating a regulation of expressive conduct ... in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions").


n46. See Raban, supra note 34, at 556 (noting that the "content-based/content-neutral distinction ... was intuitively clear until the Court launched the doctrine of "secondary effects" (emphasis omitted)).

n47. See discussion infra Part III.A.

n48. See discussion supra Part II.B.2.

n49. See, e.g., Raban, supra note 34, at 566-68. Raban argues that the "doctrine [of secondary effects] obliterates and is hostile toward the very purpose of the content-based/content neutral distinction." Id. at 566-67.

n50. See discussion infra Part V.B.


n52. See id. at 76 (Powell, J., concurring).

n53. The phrase "secondary effects" and the basic theory that would evolve into the secondary effects doctrine are casually mentioned in a footnote to the plurality opinion. See id. at 71 n.34 ("It is [a] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech.")


n55. Young, 427 U.S. at 54. The original ordinance was passed in 1962 after a successful urban renewal program eradicated several "skid row" areas in downtown Detroit and was implemented to prevent the reappearance of such areas. Charles H. Clarke, Freedom of Speech and the Problem of the Lawful Harmful Public Reaction: Adult Use Cases of Renton and Mini Theatres, 20 Akron L. Rev. 187, 188 (1986).

n56. Young, 427 U.S. at 54. Theaters showing material depicting ""specified sexual activities"" or ""specified anatomical areas"" were considered to be "adult" theaters. Id. at 53 n.4. "Adult" book stores faced similar restrictions under the ordinance. See id.

n57. Id. at 52. "Regulated uses" included adult bookstores, liquor stores, cabarets, hotels, motels, pawnshops, pool halls, secondhand stores, public lodging houses, shoeshine parlors, and establishments...
referred to as "taxi dance halls." \(\text{Id. at 52 n.3.}\)

n58. \(\text{Id. at 52.}\)

n59. See \(\text{id. at 54-55.}\) In its decision, the Court notes a prevailing public opinion that "the location of several such businesses in the same neighborhood tended to attract an undesirable quantity and quality of transients, adversely affected property values, caused an increase in crime, especially prostitution, and encouraged residents and businesses to move elsewhere." \(\text{Id.}\)

n60. \(\text{Id. at 58.}\)

n61. See \(\text{Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363, 366-71 (E.D. Mich. 1974), rev'd sub nom. Am. Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975).}\) The district court granted summary judgment for the city, concluding that the city's proffered basis for the ordinance, to "protect neighborhoods from deleterious business," was legitimate. \(\text{Id. at 366-67.}\) Furthermore, the district court rejected any vagueness or Equal Protection argument. \(\text{Id. at 366-68.}\) The court also found that because the ordinance only regulated the places the movies were shown, not the content of the movies, there was no First Amendment violation. \(\text{Id.}\)

n62. \(\text{Am. Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), rev'd, 427 U.S. 50 (1976).}\)

n63. \(\text{Id. at 1019-20.}\) The appellate court found that the ordinances imposed a prior restraint on constitutionally protected communication, and therefore "merely establishing that they were designed to serve a compelling public interest" provided an insufficient justification for a classification of motion picture theaters on the basis of the content of the materials they "pursue to the public." \(\text{Id.}\)

n64. \(\text{Young, 427 U.S. at 70-73.}\)

n65. \(\text{Id. at 63.}\) This is interesting because in framing the issue for the court, Justice Stevens acknowledged that the question was whether the "statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment." \(\text{Id. at 52}\) (emphasis added). Regulations based on content are (not surprisingly) regularly categorized as content-based.

n66. \(\text{Id. at 62-63.}\)

n67. \(\text{Id. at 62.}\)

n68. Id.

n69. \(\text{Id. at 63.}\)

n70. \(\text{Id. at 63 n.18.}\) The Plurality did not really follow the four steps of the O'Brien test in making this assessment, but formulated a new test comprised of a number of similar factors. \(\text{Id. at 73-84 (Powell, J., concurring).}\)

n71. \(\text{Id. at 71.}\) The Court found that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." \(\text{Id.}\)

n72. \(\text{Id. at 70-71.}\) In his article, David L. Hudson, Jr. alleges that Justice Stevens seems to have substituted the "content-neutrality" he speaks about with "viewpoint-neutrality" throughout the decision. Hudson, supra note 54, at 62. Hudson also notes that Justice Stevens considered adult entertainment type speech to be of a "low value," as evidenced by Steven's determination that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." \(\text{Id. at 63 (quoting Young, 427 U.S. at 61).}\) This attitude permeates the opinion and leads the Court to this analysis that it would not dare present in cases of other protected speech. See generally Philip J. Prygoski, Low-Value Speech: From Young to Frasier, 32 St. Louis U. L.J. 317 (1987) (providing further discussion on the idea of the different values of speech coloring the Court's interpretation of the First Amendment protection that should be afforded).

n73. \(\text{Young, 427 U.S. at 71.}\)

n74. \(\text{Id. at 71 n.34.}\)

n75. \(\text{Id. at 73-84 (Powell, J., concurring).}\)
Powell did not agree that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression" as opposed to the plurality. \textit{Id.} at 73 n.1. In effect, four justices agreed on this concept. \textit{Id.}

Stewart contended that by finding the ordinance to be content-neutral, the Plurality compromised "cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience." \textit{Id.} at 85-86. Stewart believed that by regulating only theaters featuring adult films, "the ordinances thus "slip from the neutrality of time, place, and circumstance into a concern about content' ... which was "never permitted." \textit{Id.} at 85 n.2 (Stewart, J., dissenting) (quoting \textit{Police Dep't of Chicago v. Mosley}, 408 U.S. 92, 99 (1972)) (alteration in original).

Stewart would later revisit the issue of the evidentiary burdens placed on the municipality in\textit{Erie} and \textit{Alameda Books}. See discussion infra Parts IV.C-D.

\textit{Id.} at 662. The Eighth Circuit found that the decision to enact the ordinance banning adult films "apparently were not based on any studies by social scientists, or on a demonstrated past history of "adult' theatres' causing neighborhood deterioration. Such demonstrated findings were a critical factor in the decision upholding the Detroit ordinances [in \textit{Young}]." \textit{Id.} at 661. The ordinance was enacted in anticipation of the "opening of the city's first "adult' movie theater." \textit{Id.}

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\textit{Id.} at 662.

\textit{Id.} at 663.

\textit{Id.} at 666-65 (alteration in the original) (quoting \textit{Young}, 427 U.S. at 62). Apparently, the Borough thought of the ban on all live entertainment as an extremely effective form of licensing.

\textit{Id.}

\textit{Id.} at 71-72.

\textit{Id.} at 71.

\textit{Id.} at 75-76.

\textit{Id.} at 72.

\textit{Id.} at 67 ("The First Amendment requires that there be sufficient justification for the exclusion of a broad category of protected expression as one of the permitted commercial uses in the Borough.").

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\textit{Id.} at 667 F.2d 659 (8th Cir. 1981).

\textit{Id.} at 99.
The Ninth Circuit upheld the issuance of an injunction to stop the city from closing an adult book store under a hastily passed city ordinance prohibiting the distribution of "sex-oriented material" within certain geographical areas. See id. at 391, 393. This emphasis would not survive the Court's Renton decision, which watered down the requisite evidentiary burden. See discussion infra Part III.C.

The Basiardanes court noted that the permitted locations under the ordinance were "among warehouses, shipyards, undeveloped areas, and swamps." Id. Only making these locations available "greatly restricted access to ... lawful speech," Young, 427 U.S. at 71 n.35, an approach which was not permitted under Young. Basiardanes, 682 F.2d at 1214.

The appellate court in Renton would later apply a similar motivational analysis in invalidating an ordinance, only to be reversed by the Supreme Court. See discussion infra Part III.C.

The ordinance defined "adult motion picture theaters" as those buildings used to present "'visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" ... for observation by patrons therein.'" Id. (citation omitted).

The district court granted summary judgment for Renton and concluded that Renton was allowed to "rely on the experiences of other cities" when justifying the secondary effects sought to be prevented. Id. The district court also determined that the purpose of the ordinance was not to suppress speech, and that the speech restrictions passed intermediate scrutiny of Young and O'Brien and did not violate the First Amendment. Id.

The Ninth Circuit overturned the district court's decision and concluded that the ordinance constituted a substantial restriction on First Amendment interests. Id. at 534-38. The court applied the O'Brien standards to the facts and held that the city had not met its evidentiary burden since it relied on outside studies from other cities (Seattle and Detroit) instead of conducting studies specific to Renton. Id. at 536-37. The court also found that the record was sufficient to infer that "a motivating factor behind the ordinance was suppression of the content of the speech as opposed merely to regulating the effects of the mode of that speech," which the court held invalidated the ordinance. Id. at 537.
n135. *Renton*, 748 F.2d at 537. The Ninth Circuit noted that Renton had looked to a Detroit ordinance (from Young) which was enacted to prevent a clustering of adult uses and a Seattle ordinance (from Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153 (Wash. 1978)) which was enacted to concentrate adult theaters in one area to confine the secondary effects. Id. at 536. The Renton ordinance, by contrast, was "aimed at protecting" schools, parks, churches and residential areas from unwanted secondary effects. Id. The court felt that "the Supreme Court [in Young and Schad] required Renton to justify its ordinance in the context of Renton's problems - not Seattle's or Detroit's problems." Id.

n136. *Renton*, 475 U.S. at 50-51. The Court held that the Renton City Council could rely on the Seattle studies. Id.

n137. Id. at 51-52.
n138. Id. at 53-54.
n139. Id. at 54.

n140. Id. The Ninth Circuit had disagreed with this assessment and found the regulation ""for all practical purposes excluded adult theaters from the City,' ... only 200 acres were not restricted by the ordinance, and ... all of these areas were "entirely unsuited to movie theater use." *Renton*, 748 F.2d at 532.

n142. Id.

n143. See discussion infra Part IV.C-D.

n145. Id. at 56-57 (Brennan, J., dissenting).
n146. Id. at 55 (Brennan, J., dissenting).

n147. Id. at 56 (Brennan, J., dissenting).

n148. Id. at 57 (Brennan, J., dissenting). Brennan suggested the fact that the ordinance situated adult theaters away from institutions such as churches and schools showed "selective treatment," and that "Renton was interested not in controlling the "secondary effects' associated with adult business, but in discriminating against adult theaters based on the content of the films they exhibit." Id. The dissent also relied on the fact that the ordinance had been amended after litigation commenced to include a statement of reasons for passing the ordinance. Id. at 58. The Ninth Circuit had found that many of these reasons "did not relate to legitimate land use concerns" and were nothing more than ""expressions of dislike for the subject matter". Id. at 59 (quoting *Renton*, 748 F.2d. at 537).

n149. *Renton*, 475 U.S. at 60 (Brennan, J., dissenting).

n150. Id. at 61 (Brennan, J., dissenting).

n151. Id. at 62 (Brennan, J., dissenting).

n152. Id. at 63 (Brennan, J., dissenting).

n153. Id. at 65 (Brennan, J., dissenting).

n154. See, e.g., Joseph R. Schaper, Constitutional Law - First Amendment - Municipal Zoning - Pornography - The Supreme Court Has Held That A Municipal Zoning Ordinance Prohibiting Adult Motion Picture Theaters From Locating Within 1,000 Feet Of Any Residential Zone Single-Or Multiple-Family Dwelling, Church, Park, Or School, Does Not Violate the First Amendment, 26 Duq. L. Rev. 163, 180 (1987) (noting that the Renton decision would "reopen the door for zoning of sexually oriented businesses that had been partially closed by post-Young litigation"); Lisa Yoshida, Note, The Role Of "Secondary Effects" in First Amendment Analysis: Renton v. Playtime Theatres, Inc., 22 U.S.F. L. Rev. 163, 162 (1987) (commenting that the Renton decision undermined the protections afforded expression by applying a minimal standard of review based upon secondary effects in a further departure from the Young decision");

n155. See Laurence H. Tribe, American Constitutional Law 12-3, at 799 n.17 (2d ed. 1988) (stating that "the Renton view will likely prove to be an aberration limited to the context of sexually explicit materials"); Schaper, supra note 154, at 180 (expressing concern that other municipalities would now be able to "rely on the Renton decision to expand location restrictions to other adult uses, such as adult bookstores").
n156. Clarke, supra note 55, at 188.
n157. William M. Sunkel, Note, City Of Renton v. Playtime Theatres, Inc.: Court-Approved Censorship Through Zoning, 7 Pace L. Rev. 251, 253 (1986) (suggesting that the Renton "approach constitutes little more than tacit Court approval of governmental censorship through manipulation of a municipality's zoning power"); Note, The Content Distinction In Free Speech Analysis After Renton, 102 Harv. L. Rev. 1904, 1904-05 (1989) (arguing for a restrictive interpretation of Renton and Boos and stating that the Renton decision had "paved the way for greater content-specific regulation of speech"). Professor Clarke remarked that these decisions, meant to clarify the test for adult entertainment regulations, created "a considerable amount of confusion in the law of freedom of speech." Clarke, supra note 55, at 191.


n159. See, e.g., FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (declining to apply secondary effects analysis to an adult entertainment licensing ordinance that on its face was "an unconstitutional prior restraint that failed to provide adequate procedural safeguards").


n161. Id. at 707.

n162. Id.

n163. Id.


n165. Id. at 412-13, 430.

n166. Id. at 430.

n167. Id. at 431.


n169. Id. at 45.

n170. Id. at 53 n.11.

n171. See discussion supra Part II.B.1-2.


n174. Reno v. ACLU, 521 U.S. at 867-68.

n175. Id. at 868 (quoting Renton, 475 U.S. at 46).

n176. Reno v. ACLU, 521 U.S. at 868.

n177. See discussion supra Part IV.A.


n179. Id. at 321.

n180. Id. at 316.

n181. Id. at 321.

n182. Id.

n183. Id. at 321, 329.

n184. Id. at 321.

n185. See Young, 427 U.S. at 61 (stating "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance").

n186. Justice Brennan recognized the potential for abuse this decision represented and included a separate dissent in Boos specifically "to object to Justice O'Connor's assumption that the Renton analysis applies not only outside the context of businesses purveying sexually explicit materials but even to political speech." Boos, 485 U.S. at 335 (Brennan, J., dissenting).


n188. Id. at 567-68 (noting that "it is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind" but that "the statute's purpose of protecting societal order and morality is clear from its text and history").

n189. Id. at 563.

n190. Justice Scalia expressed uncertainty as to whether dancing was "conduct that is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else." Id. at 577 n.4 (Scalia, J., concurring in judgment). He was more certain about nudity: "Nudity is not normally engaged in for the purpose of communicating an idea or an emotion." Id.

n191. Barnes, 501 U.S. at 572, 582.
The ordinance held a person who "knowingly or intentionally" appeared "in a state of nudity" in "a public place" guilty of public indecency. Ord. 75-1994 (codified as Article 711 of the Codified Ordinances of the City of Erie). Theaters were included in the list of "public places" covered by the ordinance. Id. at 283. The Erie County Court of Common Pleas struck down the ordinance as unconstitutional. Paps A.M. v. City of Erie, Civ. No. 60059-1994 (Jan 18, 1995), Pet. for Cert. 40a. Id. at 284. On appeal the Commonwealth Court of Appeals reversed, finding that the ordinance "satisfied the requirements of O'Brien and did not violate Paps' First Amendment rights, despite the incidental limitations on some expressive activity." Paps A.M. v. City of Erie, 674 A.2d 338, 344 (1996). The court relied on Barnes, Renton and O'Brien. Id. The Pennsylvania Supreme Court reviewed this decision and reversed, finding that it was impossible to draw a clear precedent from Barnes, and holding "the stated purpose for promulgating the ordinance [was] inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." Paps A.M. v. City of Erie, 719 A.2d 273, 279 (1998). The court relied on Forsyth for precedential value. Id. The court went on to subject the ordinance to strict scrutiny as a content-based regulation, and found that this ordinance violated the First Amendment since it was not narrowly tailored to address the secondary effects it was enacted to prevent. Id. at 280.

There appears to be support for this proposition. Four of the six council members who adopted the ordinance admitted "the ordinance was aimed specifically at nude adult entertainment." Id. at 329 (Stevens, J., dissenting). One lawmaker noted, "We're not talking about nudity ... ...we're talking about what is indecent and immoral... . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." Id. (Stevens, J., dissenting) (citing App. 39).
In the ordinance's preamble, the reason for adopting the ordinance was "for the purpose of limiting a recent increase in nude live entertainment within the City." Id. (quoting Erie, 719 A.2d at 279).

Id. at 290.

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n219. Id. at 290. In the ordinance's preamble, the reason for adopting the ordinance was "for the purpose of limiting a recent increase in nude live entertainment within the City." Id. (quoting Erie, 719 A.2d at 279).

n220. Id. at 291 (quoting Renton, 475 U.S. at 47-48).

n221. Id. at 296.

n222. Id.

n223. Id. at 301.

n224. Id.

n225. See discussion supra Parts III.A, III.B.1, and III.C.

n226. Erie, 529 U.S. at 302 (Scalia, J., concurring) (noting that the clubs at issue had already closed down by the time this appeal was heard).

n227. Id. at 307-08 (Scalia, J., concurring).

n228. Id. at 310 (Scalia, J., concurring).

n229. Id. at 310-11 (Souter, J., concurring in part and dissenting in part).

n230. Id. at 316 (Souter, J., concurring in part and dissenting in part).

n231. Id. at 310-11 (Souter, J., concurring in part and dissenting in part).


n233. See discussion supra Parts III.A, III.B.1, and III.C.

n234. Id. at 307-08 (Scalia, J., concurring).

n235. Id. at 307-08 (Scalia, J., concurring).

n236. Id. at 307-08 (Scalia, J., concurring).

n237. Id. at 310-11 (Souter, J., concurring in part and dissenting in part).

n238. See id. at 319-20 (Stevens, J., dissenting).

n239. Id. at 322 (Stevens, J., dissenting).

n240. Id. (Stevens, J., dissenting).

n241. Id. (Stevens, J., dissenting).

n242. Id. (Stevens, J., dissenting).


n244. Id. at 1731.

n245. Id. at 1731 (quoting L.A., Cal. Municipal Code 12.70(C)(1983)).

n246. Id. at 1731.

n247. Id. at 1733. The district court found that the evidence that the city provided to justify the amendments to the ordinance (a 1977 study conducted in Los Angeles and a report cited in another secondary effects case, Hart Book Stores v. Edmisten, 612 F.2d 821 (4th Cir. 1979)), did not show that a multiple use building such as the one at issue led to deleterious secondary effects. Id. Finding no justification for a content-neutral determination, the court subjected the ordinance to strict scrutiny, found a lack of a compelling government interest, and invalidated the ordinance. Id.

n248. Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719, 723 (9th Cir. 2000). The appellate court used the framework set forth in Renton, mentioning that there were two variations to the Renton test. Id. at 722. The first was set forth in Tollis v. San Bernardino County, 827 F.2d 1329, 1332 (9th Cir. 1987) (inquiring "(1) whether the ordinance is a time, place, and manner regulation; (2) if so, whether it is content-neutral or content-based; and (3) if content-neutral, whether it is "designed to serve a substantial government interest and does not unreasonably limit alternate avenues of communication""). Id. The other variation was formulated in Colacurcio v. City of Kent, 163 F.3d 545, 551 (9th Cir. 1998) (finding that "municipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant First Amendment expression." Id. at 319 (Stevens, J., dissenting).
government interest; and (3) leave open ample alternative channels for communication of the information"). Id. The appellate court in Alameda Books applied the Colacurcio test, and found that the city failed to establish that the ordinance was "aimed to control the secondary effects resulting from the protected expression rather than at inhibiting the protected expression itself," due to the failure to present sufficient evidence in the studies. Id. at 723 (citing Tollis, 827 F.2d at 1332). The court noted that the "deference to legislative decision making [was] not unbounded" and found that the studies did not justify the ordinance. Id.

n249. Alameda Books, 122 S. Ct. at 1732 (finding that "[the city] may reasonably rely on a study it conducted some years before ... to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime").

n250. Id. at 1734.

n251. Id. at 1735.

n252. Id.

n253. Id.

n254. Id. The Court added:

in Renton, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest.

Id. at 1736. (quoting Renton, 475 U.S. at 51-52).


n256. Id. at 1738.

n257. Id.

n258. Id.

n259. Id. at 1739 (Scalia, J., concurring).

n260. Id. (Kennedy, J., concurring).

n261. Id. at 1740 (Kennedy, J., concurring).

n262. Id. at 1741 (Kennedy, J., concurring).

n263. Id. (Kennedy, J., concurring).

n264. Id. at 1742 (Kennedy, J., concurring).

n265. Id. (Kennedy, J., concurring).

n266. Id. at 1744 (Souter, J., dissenting).

n267. Id. (Souter, J., dissenting).

n268. Id. at 1745 n.2 (Souter, J., dissenting). Souter also remarked that "O'Brien is a closer relative of secondary-effects zoning than mere time, place, or manner regulations, as the Court has implicitly recognized." Id. (citing Erie, 529 U.S. at 289).

n269. Id. at 1745 (Souter, J., dissenting) (recognizing that "this kind of regulation, though called content neutral, occupies a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said").

n270. Id. at 1746 (Souter, J., dissenting).

n271. Id. (Souter, J., dissenting). The dissent stated the following:

If combating secondary effects of property devaluation and crime is truly the reason for the regulation, it is possible to show by empirical evidence that the effects exist, that they are caused by the expressive activity subject to the zoning, and that the zoning can be expected either to ameliorate them or to enhance the capacity of the government to combat them (say, by concentrating them in one area), without suppressing the expressive activity itself. This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations.

Id. (Souter, J., dissenting).

n272. Id. (Souter, J., dissenting) (quoting Young, 427 U.S. at 84).

n273. Id. at 1747 (Souter, J., dissenting).

n274. Id. at 1746 (Souter, J., dissenting).
The dissent found that the plurality had allowed assumptions to be substituted for actual empirical evidence, which the dissent would have disallowed. Id. (Souter, J., dissenting).

n276. Id. at 1750 (Souter, J., dissenting).

n277. Id. (Souter, J., dissenting).

n279. See discussion supra Parts IV.C, IV.D.

n281. See discussion supra Part III.A.

n282. See discussion supra notes 56-60 and accompanying text.

n283. See Young, 427 U.S. at 62-63, 71-72, 72 n.35.

n284. Id. at 52, 71.

n285. See id. at 61.

n286. See discussion supra Part III.A.

n287. See Young, 427 U.S. at 73.

n288. See id. at 72-73.

n289. See discussion supra Part III.C.

n290. See discussion supra Part III.C.1.

n291. See discussion supra Part IV.C.1.

n292. See discussion supra Part IV.D.1.

n293. See discussion supra Part III.A.1.

n294. See discussion supra Part III.C.

n295. See discussion supra Part III.A.1.

n296. See discussion supra Part IV.C.

n297. See discussion supra Parts IV.C and IV.D.

n298. See discussion supra Parts IV.B.1-3.

n299. Young, 427 U.S. at 72 n.35.

n300. See discussion supra Parts III.A.1-3.

n301. See discussion supra Part IV.C.4 and accompanying footnotes.

n302. See generally Young, 427 U.S. 50 (containing one plurality opinion, part by four Justices, part by five Justices, one concurring opinion by one Justice, and two different dissenting opinions by four Justices); Barnes, 501 U.S. 560 (containing one plurality opinion by three Justices, two concurring opinions by two different Justices, one dissenting opinion by four Justices); Erie, 529 U.S. 277 (containing one plurality opinion, part by five Justices, part by four Justices, one concurring opinion by two Justices, one concurring and dissenting opinion by one Justice, and one dissenting opinion by two Justices); Alameda Books, 122 S. Ct. 1728 (containing one plurality opinion by four Justices, one concurring opinion by one Justice, one opinion concurring in the judgment by one Justice, one dissenting opinion, part by three Justices, part by four Justices).

n303. See discussion supra notes 154-157 and accompanying text.

n304. Berg v. Health and Hosp. Corp. of Marion County, 865 F.2d 797, 801-05 (7th Cir. 1989) (upholding an "open booth" ordinance aimed at adult theaters due to the secondary effects concerns about the possible spread of AIDS through the anonymous sexual activity which may occur there).

n305. See Mitchell v. Comm'n on Adult Entm't Establishments, 10 F.3d 123, 138-39 (3rd Cir. 1993) (leaving city a "reasonable opportunity to experiment with solutions to admittedly serious problems" by closing stores early).

n306. See Am. Library Ass'n v. Reno, 33 F.3d 78, 84-86 (D.C. 1994) (applying secondary effects analysis to an ordinance requiring that producers of pornographic movies keep a list of all actors and ages to deter child pornography).

n307. See Hang On, Inc. v. City of Arlington, 65 F.3d 1248, 1253-54 (5th Cir. 1995) (utilizing secondary effects analysis, but holding ordinance's "no touch" provision, which prohibited touching between nude performers and customers in adult cabarets, did not violate the First Amendment).

n308. See Erie, 529 U.S. at 298; see also Tunick v. Safir, 209 F.3d 67, 82-83, 83 n.14 (2nd Cir. 2000) (discussing Barnes and Erie in determining whether to uphold a nudity ban that prevented an artist from taking nude outdoor photos); Farkas v.
Miller, 151 F.3d 900, 904-05 (8th Cir. 1998) (finding under Souter's rationale in Barnes that a public nudity ban did not violate the First Amendment); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 135 (6th Cir. 1994) (finding that a public indecency ordinance used to ban nude dancing was overbroad and invalid on its face).


n310. See Wheeler v. Comm'r of Highways, 822 F.2d 586, 594-95 (6th Cir. 1987) (applying secondary effects analysis to an anti-billboard ordinance that banned only certain types of billboards due to secondary detrimental effects on highway scenic beauty).

n311. See Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 741-42, 749 (1st Cir. 1995) (upholding an ordinance that prohibited all commercial entertainment in the city between the hours of one and six in the morning on secondary effects grounds).

n312. See Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 518, 521-22 (D.N.J. 1995) (utilizing secondary effects analysis in connection with an ordinance that added sexual orientation to a list of subgroups that could not be discriminated against).

n313. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-14 (1981) (analyzing secondary effects to find an anti-billboard ordinance lawful as to its restriction on commercial speech, but unconstitutional as to its effect on non-commercial speech).

n314. See Burson v. Freeman, 504 U.S. 191, 206-08 (1992) (discussing secondary effects in the context of voter solicitation restrictions); see also discussion supra Part IV.B (detailing Boos, Barnes and R.A.V.).

n315. See discussion supra Part IV.D.1.

n316. See discussion supra notes 267-72, 298-302 and accompanying text.

n317. See discussion supra Part IV.D.2.

n318. See Hudson, supra note 54, at 60. Hudson argues that "despite its facially laudatory purpose ... the secondary effects doctrine has had a corrosive impact on First Amendment jurisprudence." Id. Hudson finds that the "secondary effects rationale also waters down the level of constitutional protection for speech affected by a genuinely content-neutral law." Id. Hudson adds that the doctrine "allows government officials to characterize content-based regulations as content-neutral. In practice, government officials use the doctrine to silence expression they dislike." Id. at 61.

n319. See discussion supra notes 298-302 and accompanying text.

n320. See Raban, supra note 34, at 573-76. Raban argues that the secondary effects doctrine has replaced the content-neutral category and has overshadowed and intruded upon the bounds of the content-based category as well. Id. at 553.


n322. Erie, 529 U.S. at 292.

n323. Id. at 330 n.16 (Stevens, J., dissenting) (quoting O'Brien, 391 U.S. at 383).

n324. See discussion supra notes 218-19 and accompanying text.

n325. 808 F.2d 1331 (9th Cir 1986).

n326. Id. at 1335.

n327. See id.

n328. 163 F.3d 545 (9th Cir. 1998).

n329. Id. at 552.

n330. 20 F.3d 858 (8th Cir. 1994).

n331. Id. at 859.

n332. See discussion supra Part IV.C.

n333. See discussion supra Part III.B.

n334. See Christy v. City of Ann Arbor, 824 F.2d 489, 493 (6th Cir. 1987) (invalidating a Renton-like zoning ordinance for lack of a governmental showing of "any evidence of a legitimate governmental objective for the passage of this zoning ordinance"); U.S. Sound &
Serv., Inc. v. Township of Brick, 126 F.3d 555, 559 (3rd Cir. 1997) (applying strict scrutiny to a Renton-like ordinance "because the Township and the Board seek to justify the Board's resolution on the sole basis of a desire to protect minors from exposure to adult entertainment").

n335. See, e.g., East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 222 (6th Cir. 1995) (finding a Renton-like ordinance appropriate since the city had met its evidentiary burden by "reviewing reports of the unusually large number of criminal arrests around sexually oriented businesses, reports prepared by the Memphis Vice Squad, and studies of the impact of sexually oriented businesses on other cities").

n336. See, e.g., Thames Enters., Inc. v. City of St. Louis, 851 F.2d 199, 202 (8th Cir. 1988) (finding that the burden of Renton was met with evidence consisting of "personal observations and judgments of a legislator" who was the town judge, and because the ordinance was based on the one in Young); 23 West Washington St., Inc. v. City of Hagerstown, 972 F.2d 342, 1992 WL 183688, at 2 (4th Cir. Aug. 4, 1992) (per curiam) (upholding a Renton-type ordinance due to evidence that included "studies by other cities of the secondary effects of adult businesses and with statements by various citizens about increased crime and decreased property values near the existing adult businesses"); Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1258-59 (5th Cir. 1992) (upholding a Renton-style ordinance regardless of the lack of actual evidence reviewed before passage).

n337. See, e.g., Barnes, 501 U.S. at 584 (Souter, J., concurring) (finding that, under Renton, a municipality "need not await localized proof of those effects" and "could reasonably conclude that forbidding nude entertainment of the type offered at the Kitty Kat Lounge and the Glen Theatre's "bookstore" furthers its interest in preventing prostitution, sexual assault, and associated crimes"); Holmberg v. City of Ramsey, 12 F.3d 140, 142 (8th Cir. 1993) (noting that secondary effects analysis can be applied to adult entertainment zoning regulations in the absence of any true secondary effects based on the studies of other towns); Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 687 (10th Cir. 1998) (approving the use of a study of secondary effects of peep shows to justify the regulation of an adult book store).

n338. See DiMa Corp. v. Town of Hallie, 185 F.3d 823, 830-31 (7th Cir. 1999) (upholding an ordinance on evidence that the ordinance was based on an ordinance deemed appropriate by another court, while noting that the town "could have reasonably relied" on that decision as a justification for the ordinance, although they never actually did).

n339. Barnes, 501 U.S. at 584-85 (Souter, J., concurring).

n340. Young, 427 U.S. at 71 n.35.
