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### Why the Patently Offensive Just Became More Offensive: The “Pole Tax” and the Texas Supreme Court’s Expansion of the Secondary Effects Doctrine in *Combs v. Texas Entertainment Ass’n*

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## Why the Patently Offensive Just Became More Offensive: The “Pole Tax” and the Texas Supreme Court’s Expansion of the Secondary Effects Doctrine in *Combs v. Texas Entertainment Ass’n*

### Cover Page Footnote

J.D. Candidate, May 2013, The Catholic University of America, Columbus School of Law; B.A., 2008, James Madison University. The author wishes to thank Professor Mark Rienzi for his insight and investment in her success, Professor Antonio F. Perez for an invaluable foundation in constitutional law, and her colleagues on the Catholic University Law Review for their dedication to this Note. The author is also grateful to her family, whose love and support made her the person she is today. Lastly, the author dedicates this Note in loving memory of Aidan Charles, whose laugh made the world a better place.

WHY THE PATENTLY OFFENSIVE JUST BECAME  
MORE EXPENSIVE: THE “POLE TAX” AND THE  
TEXAS SUPREME COURT’S EXPANSION OF THE  
SECONDARY-EFFECTS DOCTRINE IN *COMBS V.*  
*TEXAS ENTERTAINMENT ASS’N*

Frances Taylor Bishop<sup>+</sup>

In the words of Justice John Marshall Harlan, “surely it will not be said to be a part of any one’s liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce . . . an element that will be confessedly injurious to the public morals.”<sup>1</sup> But what if that element is speech, or, what if it is *expressive* speech—what would Justice Harlan say then? In *Combs v. Texas Entertainment Ass’n*, the Texas Supreme Court sided with the government (and potentially Justice Harlan) in holding that the Sexually Oriented Business Fee Act (SOBFA) is constitutional.<sup>2</sup> The SOBFA taxes businesses that offer the combination of nude dancing and alcohol and intends to curb the negative secondary effects of such businesses.<sup>3</sup> By extending the application of the secondary-effects doctrine beyond zoning ordinances and public-indecency regulations to the realm of taxation, the Texas Court opened a Pandora’s Box of potential secondary-effects legislation aimed at eliminating activities deemed to create a “widespread pestilence.”<sup>4</sup>

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1. *Champion v. Ames* (Lottery Case), 188 U.S. 321, 357 (1903).

2. 347 S.W.3d 277, 278 (Tex. 2011), *cert denied*, 132 S. Ct. 1146 (2012).

3. TEX. BUS. & COM. CODE ANN. § 102.052 (West Supp. 2011); see Rachel E. Morse, Note, *Resisting the Path of Least Resistance: Why the Texas “Pole Tax” and the New Class of Modern Sin Taxes Are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189, 191–92 (2009) (referring to the “Texas ‘Pole’ Tax” as a “sin tax,” or a tax which seeks to assess costs based on the disfavored nature of the good or service). Morse argues that sin taxes highlight class distinctions in America by placing an undue burden on lower-income individuals and small businesses. *Id.* at 192. Morse notes, however, that despite this disparate impact, sin taxes are generally supported by the public because sin taxes are associated with “programs purported to cure the ills caused by the activity being taxed.” *Id.* (noting that individuals are more likely to turn a blind eye if they are not one of the select few negatively impacted by the tax).

4. *Lottery Case*, 188 U.S. at 357; see *infra* text accompanying notes 138–39 (describing the harms of expanding the secondary-effects doctrine); see also note 14 (providing examples of traditional zoning and public-indecency regulations).

At first glance, the constitutional admonition, “Congress shall make no law abridging the freedom of speech,”<sup>5</sup> appears in terms too absolute to admit ambiguity. However, the United States Supreme Court’s colorful First Amendment jurisprudence proves the opposite.<sup>6</sup> During the early development of free-speech jurisprudence, the Court addressed the meaning of “speech” and established vague criteria to determine what speech is afforded First Amendment protection.<sup>7</sup> Attempts at constitutional line-drawing became more complex as the Court began to distinguish between ordinary conduct that falls squarely within the realm of government regulation, and expressive conduct that falls within the safety of the First Amendment.<sup>8</sup> However, one bright-line rule did emerge—the Court declared that obscenity was clearly outside the scope of the First Amendment.<sup>9</sup> Speech qualifying as obscene generally lacks social importance or a tangible contribution and portrays sexual or pornographic material in an offensive manner.<sup>10</sup>

Today, the judicially created secondary-effects doctrine permits many content-based regulations<sup>11</sup> that would otherwise be held

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5. U.S. CONST. amend. I.

6. See generally THOMAS L. TEDFORD & DALE A. HERBECK, FREEDOM OF SPEECH IN THE UNITED STATES (4th ed. 2001) (providing an evolution of First Amendment case law); JOHN F. WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH (rev. ed. 2004) (focusing in-depth on the development of the First Amendment).

7. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (articulating the “clear and present danger” standard and noting that such words are not protected by the First Amendment); *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (invalidating a prohibition that reached the purely symbolic speech of flag burning); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573–74 (1942) (holding that “fighting words” are outside the scope of First Amendment protection and, accordingly, are capable of being regulated).

8. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (enunciating the infamous “O’Brien Test” that applies to the regulation of conduct that incidentally restricts speech). Expressive conduct differs from “conduct” per se, in that it combines nonverbal conduct with an element of symbolism. See James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 2–4, nn.8–10 (2008) (noting the practice of distinguishing between “pure speech,” expressive conduct or “speech plus,” and mere conduct alone).

9. See *Roth v. United States*, 354 U.S. 476, 485 (1957). Some scholars have realized a dichotomy between obscenity’s prominent place in American culture and the Court’s rigid view of obscene speech as unworthy of First Amendment protection. See FRED R. BERGER, FREEDOM, RIGHTS AND PORNOGRAPHY 132 (Bruce Russell ed., 1991) (“An observer of American attitudes toward pornography faces a bewildering duality: on the one hand, we buy and read and view more of it than just about anyone else, while, on the other hand we seek to suppress it as hard as anybody else.”).

10. See Francis Marsico III, Note, *The Fate of Indecency? The Constitutional Issue Presented by Fox Television Stations, Inc. v. Federal Communications Commission*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1033, 1050 (2011) (describing the general characterization of obscenity as lacking any “redeeming social importance”).

11. Content-based regulations are restrictions on communications “because of the message it conveys.” Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987). Content-based regulations are virtually always held invalid by reviewing courts because such regulations are subject to a strict scrutiny analysis. *Id.* at 47–48. On the other hand, a

unconstitutional.<sup>12</sup> Essentially, the secondary-effects doctrine enables courts to categorize certain regulations that would otherwise be viewed as targeting the suppression of content as content-neutral, and accordingly apply an intermediate level of scrutiny.<sup>13</sup> Historically, the secondary-effects doctrine had been limited to zoning ordinances and public-indecency statutes.<sup>14</sup> However, in *Texas Entertainment Ass'n*, the Texas Supreme Court applied the secondary-effects doctrine to taxes on sexually oriented businesses offering nude dancing with alcohol.<sup>15</sup> The court reasoned that because the statute targets the negative secondary effects of nude dancing, such as sexual abuse, rather than regulates the expressive conduct of nude dancing, SOBFA is a constitutional restriction on free speech.<sup>16</sup>

This Note analyzes the Texas Supreme Court's application of the secondary-effects doctrine in determining the constitutionality of SOBFA, which imposes a five dollar per-customer tax on sexually oriented businesses.<sup>17</sup> Part I discusses the Court's foundational First Amendment jurisprudence and its attempt to define the scope of free speech protection. This Note then addresses the Court's struggle to articulate a concrete definition for obscenity and the proper regulation of so-called symbolic speech. In doing so, this Note emphasizes the critical distinction between content-neutral and content-based legislation. Next, this Note discusses the emergence and evolution of the secondary-effects doctrine in the context of the Court's modern content jurisprudence. This Note next explores the Texas lower courts' decisions on

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content-neutral restriction "limit[s] expression without regard to the content or communicative impact of the message conveyed." *Id.* at 48. These types of regulations are subjected to a lower standard of review. *Id.* at 48–50. At least one circuit has held that time-place-manner restrictions that are content-neutral and, thus, subject to intermediate scrutiny, include those aimed at the "undesirable secondary effects of sexually explicit expression." *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir. 1997) (en banc).

12. See, e.g., *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) (finding the regulations in question to be a "valid governmental response to the 'admittedly serious problems' created by adult theaters").

13. See Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1175–76 (2002) (noting that "[w]hat was once considered an obscure and limited doctrine confined to adult entertainment regulations is now an integral part of First Amendment jurisprudence"); see also Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 797 (2007) (noting that the secondary-effects doctrine is at odds with First Amendment jurisprudence because regulations of sexual speech clearly regulate speech because of its content).

14. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277, 283 (2000) (public indecency); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 563 (1991) (public indecency); *Renton*, 475 U.S. at 43 (zoning); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 52 (1976) (zoning).

15. *Combs v. Tex. Entm't Ass'n*, 347 S.W.3d 277, 278 (Tex. 2011) (quoting TEX. BUS. & COM. CODE ANN. §§ 102.051(2), 102.052(a) (West Supp. 2011)), *cert. denied*, 132 S. Ct. 1146 (2012).

16. *Id.* at 287–88.

17. TEX. BUS. & COM. CODE ANN. § 102.052(a).

the constitutionality of SOBFA before analyzing the final disposition on the issue by the Texas Supreme Court. Finally, this Note argues that the Texas Supreme Court was incorrect to extend the secondary-effects doctrine beyond zoning ordinances.

## I. EVOLUTION OF FIRST AMENDMENT FREE SPEECH

### A. *Defining the Scope and Outer Limits of Constitutionally Protected Free Speech and Expression Under the First Amendment*

#### 1. *Establishment of the “Clear and Present Danger” Test*

In *Schenck v. United States*, Charles Schenck challenged his conviction for conspiracy to violate the Espionage Act, which arose from his distribution of pamphlets designed to foster draft resistance.<sup>18</sup> Schenck argued that the Espionage Act abridged his First Amendment right to speech and press.<sup>19</sup> The Court recognized that Schenck’s speech would have enjoyed constitutional protections “in ordinary times;”<sup>20</sup> however, the Court reasoned that an individual’s rights must be considered within the particular context of the activity.<sup>21</sup> In doing so, Justice Holmes articulated the foundational “clear and present danger” test:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.<sup>22</sup>

One week after *Schenck*, the Court added a higher evidentiary burden to the “clear and present danger” test in *Debs v. United States*, a similar case in which the defendant was convicted of violating the Espionage Act.<sup>23</sup> Justice Holmes affirmed the defendant’s conviction and noted that a guilty verdict needed to be predicated on both a finding of specific intent to cause obstruction

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18. 249 U.S. 47, 48–49, 51 (1919) (quoting the pamphlets’ language encouraging those subjected to the draft to “do [their] share to maintain, support, and uphold the rights of the people of this country”).

19. *Id.* at 49. The Espionage Act of 1917 makes it a crime to “willfully cause or attempt to cause insubordination, disloyalty, mutiny, or *refusal of duty*, . . . [or] willfully obstruct the recruiting or enlistment service.” PUB. L. NO. 65-24, § 3, 40 Stat. 217, 219 (emphasis added).

20. *Schenck*, 249 U.S. at 52.

21. *Id.* (citing *Aikens v. Wisconsin*, 195 U.S. 194, 205–06 (1904)).

22. *Id.* (emphasis added) (noting that a statement that would go unnoticed in times of peace may not be tolerated in times of war because of the threat the statement poses to the nation).

23. 249 U.S. 211, 211–12 (1919). Debs was indicted for a public speech espousing socialism and decrying the oppression of the working class, particularly in times of war. *Id.* at 212–13. The Court found that Debs urged the crowd to realize that “the master class has always declared the war and the subject class has always fought the battles.” *Id.* at 213.

to the Armed recruiting services, and on a reasonable probability that such obstruction would be the natural result of the speech at issue.<sup>24</sup>

## 2. "Every Idea is an Incitement"?

Before 1925, the Court's free-speech jurisprudence required a showing of an imminent threat of incitement before limiting an individual's free speech.<sup>25</sup> In *Gitlow v. New York*, the court re-interpreted the meaning of "imminent" to include the unforeseeable future consequences of certain speech.<sup>26</sup> The *Gitlow* Court considered the constitutionality of a state criminal anarchy statute prohibiting advocacy for the overthrow of the government.<sup>27</sup> In the case, Benjamin Gitlow was charged with criminal anarchy as a result of his distribution of a pamphlet entitled "The Left Wing Manifesto."<sup>28</sup> The Court held that the regulation of speech that advocates, even indirectly, for the overthrow of government is a legitimate exercise of the government's police power.<sup>29</sup> The Court was troubled by small, unforeseeable predictions of incitement and rebellion as a reason to prohibit speech, noting that "[a] single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."<sup>30</sup> Justice Holmes, joined by Justice Louis Brandeis, authored a dissenting opinion stressing the necessity for a "present danger" to justify a constitutional abridgment of such speech.<sup>31</sup>

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24. *Id.* at 216. Less than a year later, in yet another Espionage Act case, Justice Holmes dissented, disagreeing with the majority's conclusion on what constitutes an intentional act. *See Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (disagreeing with the majority's conclusion that the leaflets in question represented an intentional act to warrant conviction under the Espionage Act). Justice Holmes argued that although an actor may be aware of the likely consequences of his speech, mere awareness does not rise to the level of specific intent. *Id.* at 627. In his opinion, Justice Holmes referred to the defendant's publication as a "silly leaflet by an unknown man" with the sole purpose of preventing American interference with the Russian Revolution. *Id.* at 628–29. Stressing that the First Amendment protects efforts to "change the minds of the country," Justice Holmes warned: "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so *imminently threaten* immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.* at 630 (emphasis added). *But see* Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 MISS. L.J. 1263, 1265 (2011) (arguing that the threat of terrorism combined with the expansive reach of the Internet requires a more lenient standard for evaluating the effects of "subversive advocacy"). For a more comprehensive account of *Abrams*, see generally RICHARD POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH* (Cornell Univ. Press 1999).

25. *See supra* notes 18–24.

26. 268 U.S. 652, 669 (1925).

27. *Id.* at 654.

28. *Id.* at 655; *see also* *The Left Wing Manifesto*, REVOLUTIONARY AGE, July 5, 1919, at 6, available at <http://www.marxist.org/history/usa/pubs/revolutionaryage/v2n01-jul-05-1919.pdf>.

29. *Gitlow*, 268 U.S. at 670.

30. *Id.* at 669.

31. *Id.* at 672–73 (Holmes, J., dissenting).

Justice Holmes observed that all opinions have the inherent potential to spread and gain support,<sup>32</sup> implicitly warning that a departure from the limited “clear and present danger” standard would improperly narrow the scope of constitutionally protected speech.<sup>33</sup>

In *Stromberg v. California*, the Court heeded Justice Holmes’s warning by finding a California statute that banned the display of red flags to be an unconstitutional violation of the freedom of expression guaranteed by the Fourteenth Amendment.<sup>34</sup> The Court reasoned that criminalizing the display of red flags as a symbol of government opposition punished wholly legal conduct that is vital to the functioning of democracy.<sup>35</sup> The *Stromberg* Court’s holding curbed the prevailing trend of limiting First Amendment rights and laid the foundation for the Court’s recognition of symbolic speech.<sup>36</sup>

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32. See *id.* at 673 (noting that “[t]he only difference between the expression of an opinion and an incitement . . . is the speaker’s enthusiasm for the result”).

33. *Id.* (noting that if speech may be suppressed merely for its tendency to “incite,” little would remain within the ambit of the First Amendment because “[e]very idea is an incitement”).

34. 283 U.S. 359, 361, 369 (1931) (noting that a statute, which criminalizes the display of a flag as a sign or symbol of opposition to the government, is contrary to the Fourteenth Amendment’s protection of free expression).

35. *Id.* at 369 (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”); see Matthew Alan Cherep, Comment, *Barbie Can Get a Tattoo, Why Can’t I?: First Amendment Protection of Tattooing in a Barbie World*, 46 WAKE FOREST L. REV. 331, 335 (2011) (stressing that symbolic speech dramatically contributes to social dialogue and arguing that the failure to protect such expression “could stifle societal discourse and cultural advancement”).

36. See *Stromberg*, 283 U.S. at 369–70 (acknowledging the display of red flags as a form of symbolic speech protected by the Constitution). However, *Stromberg* did not extinguish the “incitement” doctrine completely, as evidenced by *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In *Chaplinsky*, a New Hampshire statute prohibited the use of “offensive, divisive, [and,] annoying” words or names directed at another individual in public. 315 U.S. at 569. In the case, Walter Chaplinsky called a city marshal a “damned Fascist,” among other things, and was subsequently convicted for his actions under the New Hampshire statute. *Id.* In responding to Chaplinsky’s First Amendment claim of protection, the Court remarked:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.* at 571–72 (footnote omitted). In this case, the Court held that the statute fit into this limited class and was not an unconstitutional abridgment of speech because it only prohibited words a man of “common intelligence” would understand to “cause an average [person] to fight.” *Id.* at 573; but cf. *Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949) (invalidating a “breach of the peace” ordinance that punished any speech that “stirred people to anger, invited public dispute, or brought about a condition of unrest” and noting that an opposite result would “lead to the standardization of ideas either by legislatures, courts, or dominant political or community groups”).



### 3. Obscenity: "I Know It when I See It"

Whereas the Court's general treatment of constitutionally protected free speech began to take shape, legal rights concerning obscenity lagged behind as the Court struggled to articulate a functional definition. The Court's early First Amendment obscenity cases focused primarily on identifying whether or not material was "obscene."<sup>37</sup> This demarcation was of particular importance because, as noted in *Roth v. United States*, once material was deemed obscene it was no longer "within the area of constitutionally protected speech or press."<sup>38</sup> In *Roth*, the Court addressed the constitutionality of a federal obscenity statute that prohibited the mailing of obscene materials.<sup>39</sup> The Court's reading of the history of the First Amendment led it to conclude that obscenity is not afforded First Amendment protection because it is "utterly without redeeming social importance."<sup>40</sup> The Court described obscenity as "material which deals with sex in a manner appealing to the prurient interest."<sup>41</sup>

Subsequently, in *Jacobellis v. Ohio*, the Court further refined its definition of obscenity when it held that a French film, entitled "Les Amants," was improperly categorized as obscene.<sup>42</sup> The *Jacobellis* Court, holding that the film was entitled to First Amendment protection, emphasized that a state may not proscribe the public display of a motion picture unless the film is "utterly

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37. See BERGER, *supra* note 9, at 132 (stating that prior to the *Roth* era, there was no clear legal definition of obscenity due the absence of obscenity litigation in our "common-law background").

38. 354 U.S. 476, 485 (1957), *overruled on other grounds*, Marks v. United States, 430 U.S. 188, 193–94 (1977); see TERRENCE J. MURPHY, CENSORSHIP: GOVERNMENT AND OBSCENITY 24 (1963) (stating that courts could not interpret the validity of obscenity statutes without first identifying obscenity's meaning).

39. *Roth*, 354 U.S. at 479 & n.1. Roth's business involved the mailing of advertising materials to generate interest in the publications offered in his store. *Id.* at 480.

40. *Id.* at 483–84 (noting that despite the lack of depth in obscenity law at the time of the First Amendment's adoption, there existed adequate evidence that the First Amendment was not intended to extend to obscenity) (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952)).

41. *Id.* at 487 (quoting with approval the trial court's jury instruction that applied a general community-based standard for determining prurency). The *Roth* court almost entirely adopted the American Law Institute's model definition of obscenity, the purpose of which was explained in an official comment:

Obscenity is defined in terms of material which appeals predominantly to prurient interest. . . . "Appeal to prurient interest" refers to qualities of the material itself; the capacity to attract individuals eager for a forbidden look behind the curtain of privacy which our customs draw about sexual matters. Psychiatrists and anthropologists see the ordinary person in our society as caught between normal sex drives and curiosity, on the one hand, and powerful social and legal prohibitions against overt sexual behavior. The principal objective of [the model obscenity statute] is to prevent commercial exploitation of this psychosexual tension.

MURPHY, *supra* note 38, at 27 (quoting MODEL PENAL CODE, § 207.10 cmt. 2.A (Tentative Draft No. 6 1957)).

42. 378 U.S. 184, 196 (1964) (plurality opinion).

without redeeming social importance.”<sup>43</sup> In adhering to the admittedly imperfect obscenity test from *Roth*, the Court emphasized that the mere portrayal of sex, alone, is not enough to bring the film outside the scope of the First Amendment.<sup>44</sup> But, perhaps the most accurate representation of the Court’s threshold for obscenity was articulated by Justice Potter Stewart’s poignant comment: “I know it when I see it, and the motion picture involved in this case is not that.”<sup>45</sup>

*B. Characterization and Fine-Tuning the Substantive Protections Afforded by Freedoms of Speech and Expression*

*1. Obscene, but with Redeeming Social Value*

With the outer limits of free speech coming into focus with a foundational, albeit imperfect, test for determining obscenity in place, the Court shifted its focus to the social value of otherwise obscene speech.<sup>46</sup> In *Memoirs v. Massachusetts*, the Court reversed the Massachusetts Supreme Judicial Court, holding that a book chronicling the life of a prostitute was not obscene—even though it appealed to the “prurient interest” and was “patently offensive.”<sup>47</sup> Using the test articulated in *Roth*, the Court found that the book was not “utterly without redeeming social value,” noting that although the commercial success of material pertaining to sexual subject matter is more likely attributable to its sexual character, the social worth of the book must be evaluated in a holistic manner so as to consider even a “modicum of literary and historical value.”<sup>48</sup> In reaching its decision, the Court rejected a balancing test, opining that a work’s legitimate social value, however slight, cannot

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43. *Id.* at 191 (quoting *Roth*, 354 U.S. at 484).

44. *Id.*

45. *Id.* at 197 (Stewart, J., concurring).

46. *See, e.g.*, *Ginzburg v. United States*, 383 U.S. 463, 470–71 (1966) (finding a publisher’s intent for “titillation,” instead of “intellectual content,” a critical factor in determining obscenity under *Roth*); *see also Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam) (noting that although a “quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication,” the photographs and poem at issue were constitutionally protected because they related to the broader theme of the publication, and at least represented “the earmarks of an attempt at serious art”).

47. *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts (Memoirs v. Massachusetts)*, 383 U.S. 413, 419 (1966) (plurality opinion) (determining that it was erroneous to hold that “a book need not be ‘unqualifiedly worthless before it can be deemed obscene’”), *overruled on other grounds by Miller v. California*, 413 U.S. 15 (1973), *as stated in Marks v. United States*, 430 U.S. 188, 194 (1977).

48. *Id.* at 419–21. Similarly, the private possession of otherwise obscene material without a commercial motivation also falls within the domain of legally protected speech and expression. *See Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (recognizing an individual’s constitutional right of access to and possession of obscene materials in the privacy of his or her own home); *see also Memoirs*, 383 U.S. at 426 (Douglas, J., concurring) (“[T]he First Amendment does not permit the censorship of expression not brigaded with illegal action.”).

depend upon a governmental interest in regulating its prurient or offensive aspects.<sup>49</sup>

## 2. Replacing the Social Value Test with a More Flexible Obscenity Standard

The Court soon recognized that the social value test, wherein the slightest contribution to society precluded material from being labeled as obscene, created a rarely attainable obscenity standard.<sup>50</sup> In *Miller v. California*, the Court acknowledged that limiting restrictions of obscene speech to only that which was "utterly without social value" erected a bar that would seldom be met under the Court's evidentiary standards.<sup>51</sup> Because nearly all allegedly obscene material contains expressive elements with, arguably, *some* social value, the previous standard proved impractical and was abandoned.<sup>52</sup> In its place, the Court adopted a new three-part test, directing the trier of fact to consider:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>53</sup>

Notably, the Court expressly rejected a "national standard" for evaluating obscenity, focusing instead on community standards.<sup>54</sup> Effectively, this language helped to support future local ordinances that restrict sexually oriented businesses by introducing an element of deference to community-legislative decisions.<sup>55</sup>

In *Paris Adult Theatre I. v. Slaton*, a companion case to *Miller*, the Court held that state governments had a "legitimate interest in regulating commerce in obscene material and . . . [the] exhibition of obscene material in places of public accommodation."<sup>56</sup> The case was remanded for determination in accordance with the new obscenity standard articulated in *Miller* and in

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49. *Memoirs*, 383 U.S. at 419.

50. *Miller v. California*, 413 U.S. 15, 21–22 (1973).

51. *Id.* at 22; see *Marks v. United States*, 430 U.S. 188, 194 (1977) ("Clearly it was thought that some conduct which would have gone unpunished under *Memoirs* would result in conviction under *Miller*.").

52. *Miller*, 413 U.S. at 24 (citations omitted).

53. *Id.* (citations omitted) (quoting *Kois v. Wisconsin*, 231 U.S. 229, 230 (1972) (per curiam)).

54. *Id.* at 37.

55. See BERGER, *supra* note 9, at 133 (noting that one often-asserted justification for local regulation of pornographic material is that "irrespective of its morality, a practice which most people in a community find abhorrent and disgusting may be rightfully suppressed").

56. 413 U.S. 49, 69 (1973) (referring to the display of obscene films in adult movie theaters).

accordance with the local-community standards.<sup>57</sup> Combined, these two cases laid the foundation for future battles over increasing local regulations aimed at sexually oriented business—including movie theaters and nude-dancing establishments.<sup>58</sup>

3. *Symbolic Speech and the Regulation of Conduct: “One Man’s Vulgarity is Another Man’s Lyric”*

In addition to the arduous process of formulating a workable obscenity standard, the Court grappled with the issue of expressive speech in the form of non-verbal conduct. In *United States v. O’Brien*, the Court upheld a federal conviction for the destruction of draft cards against a First Amendment challenge.<sup>59</sup> Defendant David Paul O’Brien argued that the federal statute unconstitutionally violated his freedom of expression by criminalizing the symbolic burning of his registration papers.<sup>60</sup> The Court held that when an individual’s conduct contains both speech and non-speech elements, a statute aimed solely at the non-speech elements may excuse secondary limitations of otherwise protected expression.<sup>61</sup> Thus, because the statute was solely intended to prevent the physical destruction of registration papers (the non-speech component of O’Brien’s speech), it was incidentally justified in restricting the symbolic message O’Brien wished to convey by burning the papers.<sup>62</sup> This decision established the “*O’Brien* test” for evaluating the constitutionality of restrictions within the speech/non-speech dichotomy.<sup>63</sup> The test provides that:

[A] government regulation is sufficiently justified [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.<sup>64</sup>

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57. *Id.* at 70.

58. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (plurality) (nude dancing), *abrogated in part* by *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000); *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 62–63 (1976) (adult movie theaters); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211–12 (1975) (nudity shown at drive-in theater).

59. 391 U.S. 367, 376 (1968).

60. *Id.* O’Brien claimed that the burning of his draft papers deserved protection because his actions symbolized his disagreement with the war and the draft. *Id.*

61. *Id.*

62. *Id.* at 376–77.

63. *See id.* at 382 (finding that O’Brien’s conduct threatened the Selective Service System’s daily operation, and therefore warranted incidental limitations on the expressive elements of his non-verbal speech).

64. *Id.* at 377. The four-prong O’Brien test is considered to be “the definitive doctrinal statement” in the realm of symbolic speech. *See Bhagwat, supra* note 13, at 791–92.

The Court in *O'Brien* found that the statute at issue furthered the government's interest in maintaining the integrity and future availability of draft registrations, and had minimal effects on O'Brien's expressive rights.<sup>65</sup> Thus, the Court determined the statute satisfied all four prongs of the test.<sup>66</sup> The O'Brien test has special relevance in the context of obscenity regulations, as those ordinances deemed content-neutral through the application of the secondary-effects doctrine receive the benefit of intermediate scrutiny.<sup>67</sup>

### C. The Content-Neutrality Theme and the Court's Special Niche for All Things Obscene

#### 1. Content-Neutral "Time—Place—Manner" Restrictions

In the years following *O'Brien*, the Court began to carve out exceptions for regulations of constitutionally protected speech.<sup>68</sup> For example, in *Ward v. Rock Against Racism*, the Court upheld a New York City ordinance that regulated sound control at a popular venue in Central Park.<sup>69</sup> In the case, *Rock Against Racism*, a frequent sponsor of concerts, filed suit alleging the sound guidelines violated the First Amendment.<sup>70</sup> The Court reasoned that, as long as the regulations are "justified without reference to the content of regulated speech . . . the government may impose reasonable restrictions on time, place, or manner of protected speech."<sup>71</sup> In assessing content-neutrality, the Court

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65. *O'Brien*, 391 U.S. at 382. Defining what constitutes regulation of "conduct" as opposed to communicative aspects of speech can be challenging, as illustrated in *Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the Court reversed a conviction for breach of the peace based on a jacket depicting the words "Fuck the Draft." *Id.* at 16–17. Justice John Marshall Harlan, writing for the majority, noted that because Cohen's conviction resulted solely from the offensiveness of the words "Fuck the Draft," the government sought to regulate the communicative aspects of the speech. *Id.* at 18. As a result, the government could not receive the benefit of the *O'Brien* test, which is limited to regulation aimed at the non-communicative aspects of speech. Justice Harlan observed that allowing the government to prohibit the use of certain inflammatory words would create a tool designed to censor, which could lead to a slippery slope toward the extinguishment of unpopular ideas. *Id.* at 26. See ARCHIBALD COX, FREEDOM OF EXPRESSION 50–57 (1981) for a scholarly discussion analyzing Justice Harlan's opinion in *Cohen*.

66. *O'Brien*, 391 U.S. at 382.

67. See discussion *infra* Part II.C.

68. See *infra* notes 69–73 and accompanying text.

69. *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). The guidelines required sponsors to agree to use equipment and sound technicians provided by the city. *Id.* New York City implemented the sound guidelines in response to complaints regarding the excessive volume level in the vicinity of the Central Park area, which included an area reserved for peaceful and recreational use. *Id.* at 785.

70. *Id.* at 784.

71. *Id.* at 791 (providing that the regulations must also be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))); see *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (noting the Court's approval of time, place, or manner restrictions); see

noted that the critical distinction is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>72</sup> In this case, because the government’s purpose for enacting the guidelines was confined to sound control, and not the suppression of any particular idea, the Court upheld the regulation as constitutionally valid.<sup>73</sup>

## 2. *The Emergence of the Secondary-Effects Doctrine*

In *City of Renton v. Playtime Theaters, Inc.*, the Court upheld the constitutionality of a content-based ordinance, under the auspices of the secondary-effects doctrine, by classifying it as content-neutral.<sup>74</sup> The case involved an ordinance that prohibited the operation of adult movie theaters located within 1,000 feet of residential areas, schools, parks, or churches.<sup>75</sup> The Ninth Circuit struck down the ordinance, finding that the ordinance was related to the suppression of speech, and that the government failed to establish

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also Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 116 (1982) (explaining that time, place, or manner restrictions are less controversial than content-based regulations because they “presume the existence of alternative avenues of expression”).

72. *Rock Against Racism*, 491 U.S. at 791 (citing *Cnty. for Creative Non-Violence*, 468 U.S. at 295) (holding that a National Park Service regulation prohibiting demonstrators from sleeping did not violate the First Amendment); cf. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 94–95 (1972) (holding that a city ordinance prohibiting peaceful picketing near school grounds, with the exception of peaceful labor picketing, was unconstitutional because it used the subject matter of the picketing as the criterion to determine lawful and unlawful picketing).

73. *Rock Against Racism*, 491 U.S. at 792–93. A few years later, the Court addressed the same issue in a markedly different statute from St. Paul, Minnesota, that criminalized the display of “symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (quoting ST. PAUL LEGIS. CODE § 292.02 (1990)). The Minnesota Supreme Court rejected a challenge that the ordinance was overbroad because of its limitation to conduct that “arouses anger, alarm, or resentment in others.” *Id.* at 380–81 (citing *In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991)). The United States Supreme Court disagreed with the Minnesota Court’s characterization of fighting words by stressing that it is the non-speech elements of fighting words that remove them from First Amendment protection. *Id.* at 386. Even accepting the Minnesota Supreme Court’s limiting construction, the United States Supreme Court held that the law was facially unconstitutional because its prohibition on the use of fighting words applied only if the speaker was motivated by one or more of the enumerated biases. *Id.* at 391. In other words, the Court found that the St. Paul ordinance discriminated on the basis of content and viewpoint by intending to prohibit the underlying message—or motive—that was being conveyed, instead of being concerned with the danger associated with fighting words. *Id.* at 391–93. See generally *Turner Broad. Sys. v. Fed. Comm’n Comm’n*, 512 U.S. 622, 641–43 (1994) (providing a comprehensive analysis of the principles and policies underlying the content-neutrality inquiry of First Amendment jurisprudence).

74. 475 U.S. 41, 43 (1986).

75. *Id.*

a substantial interest for enacting the restriction.<sup>76</sup> The Supreme Court reversed the Ninth Circuit, classifying the *Renton* ordinance as "content-neutral" because it targeted only the negative "secondary effects" of adult businesses in the community.<sup>77</sup> Although the Court classified the ordinance as "content-neutral," it, in effect, saved a content-based ordinance<sup>78</sup> through the cloak of the secondary-effects doctrine.<sup>79</sup>

### 3. The Content-Neutral/Content-Based Dichotomy as Applied to Nudity and Nude Dancing

In *City of Erie v. Pap's A.M.*, the Court was presented with an opportunity to clarify earlier cases addressing the standard applicable to regulations of public nudity.<sup>80</sup> As a result of a city ordinance in Erie, Pennsylvania, prohibiting nudity in public locations, operators of Kandyland could no longer offer nude dancing unless the dancers donned some type of covering.<sup>81</sup> The operators of Kandyland challenged the ordinance under the First Amendment, and the Pennsylvania Supreme Court struck down the ordinance as an unconstitutional content-based restriction.<sup>82</sup> When appealed to the United States Supreme Court, the Court observed that although nudity alone contains no expressive elements, nude dancing is a form of expression that falls just within the

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76. *Id.* at 46 (noting that significant to the Ninth Circuit's decision was the fact that the government used evidence gathered by *other cities* in reaching its conclusion that adult movie theaters lead to negative neighborhood impacts).

77. *Id.* at 54–55 (upholding the ordinance as a "valid governmental response to the 'admittedly serious problems' created by adult theaters"). Furthermore, the Court remarked that even if the ordinance was "content-based," it was still a valid regulation because it was limited to "time, place, and manner" restrictions. *Id.* at 46–47. *But cf.* *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (holding that a law requiring the "scrambling" of sexually explicit channels did not pass strict scrutiny because the government did not meet the burden of proving that it was the least restrictive means of curbing secondary effects).

78. The ordinance was arguably content-based because it applied only to *adult* movie theaters and not to movie theaters in general.

79. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (Souter, J., concurring) (basing his concurrence on the "State's substantial interest in combating the secondary effects of adult entertainment establishments"). *See generally* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291 (2009) (discussing the origins, applications, and problems of the secondary-effects doctrine).

80. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (citing *Barnes*, 501 U.S. at 565–66).

81. *Id.* at 282, 284. Dancers wearing "pasties" and "G-string[s]" were considered compliant with the ordinance. *Id.* at 284.

82. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279–80 (Pa. 1998) (acknowledging the purpose of alleviating the negative secondary effects associated with nude dancing, but finding it inextricably linked with an "unmentioned purpose" of suppressing the "erotic message of the dance"), *rev'd*, 529 U.S. 277 (2000).

boundaries of First Amendment protection.<sup>83</sup> Nevertheless, the Court, in a plurality decision, upheld the statute, reasoning that public-indecency laws banning nudity are content-neutral restrictions that bear no relationship to the expression of nude dancing, and should therefore be evaluated pursuant to *O'Brien's* intermediate-scrutiny test.<sup>84</sup> The Court concluded that the city ordinance satisfied intermediate scrutiny because the government's goal of decreasing the negative secondary effects of nudity was unrelated to the expression of nude dancing, and because the effect on Kandyland dancers was minimal.<sup>85</sup>

Shortly thereafter, the Court reviewed another zoning ordinance restricting the location of an adult business in *City of Los Angeles v. Alameda Books, Inc.*<sup>86</sup> In *Alameda Books*, the Court considered the evidentiary standard necessary to invoke the secondary-effects doctrine.<sup>87</sup> In both stages of lower court review, the trial court and the Ninth Circuit both held that the government failed to offer competent evidence to show the required connection between locations of adult businesses and increased negative secondary effects.<sup>88</sup> The Supreme Court, in yet another plurality opinion, declined to set the evidentiary bar at such a high level, concluding that the evidence of related secondary effects need only "fairly support the municipality's rationale for its ordinance."<sup>89</sup>

Notably, Justice Anthony Kennedy's concurring opinion in *Alameda Books* was related to the issue of using a tax to combat negative secondary effects.<sup>90</sup> Although he concurred in the judgment, Justice Kennedy cautioned against an over-application of *Renton's* secondary-effects doctrine to the direct suppression of speech.<sup>91</sup> According to Justice Kennedy, the government cannot combat negative secondary effects by implementing a tax on the basis of the speech's substance even if the tax can be rationalized by reference to negative secondary effects.<sup>92</sup> Justice Kennedy's language suggests that the

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83. *Pap's A.M.*, 529 U.S. at 289 (plurality opinion); see also *Barnes*, 501 U.S. at 565–66 (“[N]ude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.”).

84. *Pap's A.M.*, 529 U.S. at 289–90.

85. *Id.* at 293–94, 301–02.

86. 535 U.S. 425, 429 (2002).

87. *Id.* at 429–30.

88. *Id.* at 433. The lower courts rejected the 1977 crime-pattern study on which the government relied to support its secondary-effects assertion. *Id.*

89. *Id.* at 438.

90. See *id.* at 445 (Kennedy, J., concurring) (emphasizing that the content of speech cannot be used as a basis for a fee or tax).

91. *Id.* (distinguishing between zoning ordinances that target speech's secondary effects while “leav[ing] the quantity and accessibility of the speech substantially undiminished,” and those restrictions that seek to suppress the speech itself).

92. *Id.* (citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992)). Justice Kennedy further explained that even “[t]hrough the inference may be inexorable that a city



judicially made secondary-effects doctrine does not authorize municipalities to prohibit unwanted speech under the pretext of combating negative secondary effects; rather, it provides a carefully delineated tool for decreasing negative effects when the cause is determined to be the actual content of the speech.<sup>93</sup>

## II. THE "POLE TAX": LAUDABLE GOALS, QUESTIONABLE METHODS

### A. *The Road to Court is Paved with Good Intentions*

In 2007, the Texas legislature enacted the Sexually Oriented Business Fee Act (SOBFA), which imposed a five dollar per-customer fee on businesses offering the combination of nude dancing and alcohol.<sup>94</sup> Revenue from the so-called "Pole Tax" was allocated to sexual abuse prevention programs and to health insurance for those families unable to afford coverage,<sup>95</sup> under complimentary provisions of Texas's Sexual Assault Program Fund.<sup>96</sup> Although preliminary estimates projected approximately \$44 million of revenue from the Act, less than half of that amount had been generated by August 2011.<sup>97</sup> Nonetheless, the tax still has the potential to raise significant revenue, as there are reportedly 175 sexually oriented businesses licensed in Texas.<sup>98</sup>

### B. *Calling a Spade a Spade: SOBFA is a Differential Tax on a Socially Unfavorable Activity*

One sexually oriented business, Karpod, along with the Texas Entertainment Association (TEA), filed suit in the District Court of Texas in Travis County seeking declaratory and injunctive relief, challenging the constitutionality of SOBFA.<sup>99</sup> The district court granted Karpod and TEA's request and declared

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could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech." *Id.*

93. *See id.* at 446 (explaining that ordinances of this type might be permissibly content-based, as long as the purpose is to decrease the negative secondary effects associated with the speech, and not the speech itself).

94. TEX. BUS. & COM. CODE ANN. § 102.051–.056 (West Supp. 2011).

95. Manny Fernandez, *Strip Club 'Pole Tax' is Upheld in Texas*, N.Y. TIMES, Aug. 27, 2011, at A10.

96. TEX. GOV'T CODE ANN. § 420.008 (West Supp. 2011).

97. Fernandez, *supra* note 95. To date, only \$15 million has been raised because many businesses refused to pay during ongoing litigation. *Id.*

98. Bureau of Business Research, *An Assessment of the Adult Entertainment Industry in Texas*, at 11 (2009), <http://www.ic2.utexas.edu/sob2>.

99. *Tex. Entm't Ass'n v. Combs*, No. D-1-GN-07-004179, slip op. at \*1–3, 2008 WL 2307196 (Tex. Dist. Ct. Mar. 28, 2008), *aff'd*, 287 S.W.3d 852 (Tex. Ct. App. 2009), *rev'd*, 347 S.W.3d 277 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012).

the Act unconstitutional. The court held that despite its “laudable goals,” SOBFA was invalid under strict and intermediate scrutiny.<sup>100</sup>

When the State appealed to the Court of Appeals of Texas, it conceded the statute’s inability to satisfy strict scrutiny, arguing instead that SOBFA was a content-neutral law that should be analyzed under intermediate scrutiny.<sup>101</sup> In affirming the district court’s ruling, the Court of Appeals held that SOBFA may not receive the benefit of intermediate scrutiny as enjoyed by many zoning ordinances.<sup>102</sup> Further, the Texas Appellate Court noted that “this type of differential taxation based on content is precisely the type of restriction warranting strict scrutiny.”<sup>103</sup> The court’s concern over differential taxation schemes was rooted in the fear of suppression of undesirable speech solely based on content.<sup>104</sup> The court’s specific apprehension of SOBFA was confirmed by the record that revealed that representatives from the state taxation department determined which businesses were subject to the tax based on content.<sup>105</sup> Having determined that strict scrutiny was the appropriate

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100. *Id.* at \*1–2. The court found that SOBFA failed the strict scrutiny test because it lacked the requisite narrow tailoring to serve a compelling state interest. *Id.* at \*2. Furthermore, in reaching the conclusion that SOBFA failed intermediate scrutiny, the court pointed not only to a lack of pre-enactment evidence linking negative secondary effects to nude dancing and alcohol, but also to the lack of any evidence supporting the proposition that a tax would compensate for a business’s individual contribution to alleged secondary effects. *Id.* at \*3.

101. *Combs v. Tex. Entm’t Ass’n*, 287 S.W.3d 852, 858 (Tex. Ct. App. 2009), *rev’d*, 347 S.W.3d 277 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012).

102. *Id.* at 859 (noting that prior case law analyzing zoning ordinances in the context of the First Amendment have limited applicability because of the unique nature of a zoning ordinance in comparison to other types of speech restrictions). The court emphasized that although zoning ordinances typically receive the benefit of a lower standard of review based on their content-neutrality, a taxation scheme is a wholly separate, content-based restriction on speech. *Id.* at 858–59.

103. *Id.* at 860 (citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227–29 (1987); and *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581–83 (1983)).

104. *Id.* at 859–60 (referring to SOBFA as a “selective taxation scheme in which an entity’s tax status depends entirely on the content of its speech”).

105. *Id.* at 860. The court noted that testimony revealed that the tax is not imposed uniformly to all entities offering nude dancing and alcohol, rather it is selectively imposed based on the Comptroller’s determination that the content as a whole “represents the ‘essence’ of live nude entertainment.” *Id.* A program specialist in the tax policy division testified to various ways in which the department determined whether a tax would be implemented. For example, if an establishment that serves alcohol shows a play or a comedy show with nudity, the place would not be subject to the tax because “the main ingredient of the performance is not necessarily that of live nude entertainment.” *Id.* However, “a bar hosting a ‘wet t-shirt contest’ or a bar at which bartenders periodically perform dance routines and become nude” would be subject to a tax. *Id.* One auditor commented that she uses her own judgment when auditing, noting: “If it’s like a theater that puts on plays and concerts I would think that maybe this fee was not appropriate for them . . . [b]ecause the whole essence of the transaction to me would be for somebody to go see a play and not so much a sexually-oriented business.” *Id.*

standard, no further analysis was necessary to hold SOBFA unconstitutional, in light of the state's concession.<sup>106</sup>

*C. The Texas Supreme Court Employs the Secondary-Effects Doctrine to Justify a Tax on Sexual Expression*

After yet another unfavorable ruling, the State of Texas appealed to the Supreme Court of Texas, arguing that the ordinance comported with the First Amendment because it merely targeted the speech's negative secondary effects.<sup>107</sup> The Texas Supreme Court, considering the secondary-effects argument, conducted a careful and thorough analysis of recent jurisprudence relating to adult businesses and zoning ordinances, including *Pap's A.M.* and *Alameda Books*.<sup>108</sup> The court found that SOBFA was not aimed at controlling the expressive message conveyed by nude dancing, but rather was limited to the *secondary effects* of nude dancing combined with the consumption of alcohol. Therefore, the state supreme court concluded that SOBFA was *not* content-based.<sup>109</sup> Once the Act was labeled a content-neutral restriction via the secondary-effects doctrine, the court held that SOBFA satisfied the intermediate scrutiny test articulated in *O'Brien*.<sup>110</sup>

III. REIGNING IN "SECONDARY EFFECTS": THE TEXAS COURT'S MISAPPLICATION AND EXTENSION OF THE SECONDARY-EFFECTS DOCTRINE

*A. The Texas Court Erred in Expanding the Secondary-Effects Doctrine Beyond Time-Place-Manner Restrictions*

In the abstract, the United States Supreme Court's analysis in *O'Brien* of conduct that included both "speech" and "non-speech" elements<sup>111</sup> similarly applies to the activity at issue in *Texas Entertainment Ass'n* in that it consists

106. *See id.* at 864 (reiterating that the Comptroller conceded that the tax fails constitutional muster under a strict scrutiny analysis).

107. *Combs v. Tex. Entm't Ass'n*, 347 S.W.3d 277, 280 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012).

108. *See id.* at 281–86.

109. *Id.* at 287–88 ("The fee is not a tax on unpopular speech but a restriction on combining nude dancing, which *unquestionably* has secondary effects, with the aggravating influence of alcohol consumption.") (emphasis added). Scholar Fred Berger referred to this type of negative, secondary-effects justification as the "incitement to rape" theory, which contends that "pornography arouses sexual desire, which seeks an outlet, often in antisocial forms such as rape." BERGER, *supra* note 9, at 134. Berger's response suggests that the causality premise of the incitement to rape theory provides an unfounded excuse for rapists, arguing that "[p]ornographic materials, *by their nature*, . . . are an unlikely source or means of altering and influencing our basic attitudes toward one another." *Id.* at 137.

110. *Tex. Entm't Ass'n*, 347 S.W.3d at 288. Addressing *O'Brien*'s second and fourth prongs, the court found that by providing at least "some disincentive" to strip clubs, the Act furthered the government's interest in curbing negative secondary effects, and that the "minimal restriction" imposed by the \$5 fee is "no greater than is essential to the furtherance of that interest." *Id.*

111. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968); discussion *supra* Part I.B.3.

of both the “non-speech” element of being nude and the “speech” element of dancing.<sup>112</sup> According to Justice Souter, nudity “is a condition, not an activity, . . . [that] expresses nothing beyond the view that the condition is somehow appropriate to the circumstances.”<sup>113</sup> On the other hand, the Court has recognized *nude dancing* as having at least some, albeit minimal, constitutional protection in the First Amendment’s outer limits.<sup>114</sup>

However, SOBFA differs from the prohibition against burning draft registrations seen in *O’Brien* because it is not limited to “regulating the nonspeech element . . . [with only] incidental limitations on First Amendment freedoms.”<sup>115</sup> SOBFA is not a mere indecency statute limiting public nudity and thus incidentally limiting nude dancing, rather it is a tax on conduct because the content is sexual.<sup>116</sup> As Justice Kennedy stated in *Alameda Books*, a legislative body may not hide behind the secondary-effects doctrine to do indirectly what it is forbidden from doing directly—that is, suppress speech.<sup>117</sup> Perhaps foreseeing the inappropriate expansion of the secondary-effects doctrine, Justice Kennedy stated:

A city may not, for example, impose a content-based fee or tax. This is true even if the government purports to justify the fee by reference to secondary effects. Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy.<sup>118</sup>

Similarly, in *Forsyth County v. The Nationalist Movement*, the Court declared unconstitutional a county ordinance that set parade fees in accordance with the party’s predicted effect on the crowd.<sup>119</sup> The Court rejected the argument that the statute was valid due to its concerns regarding the conduct’s secondary effects of hostile parade spectators, noting that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.”<sup>120</sup>

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112. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991) (plurality) (Souter, J., concurring) (defining expressive conduct and noting that “[a]lthough such performance dancing is inherently expressive, nudity *per se* is not.”).

113. *Id.*

114. See *id.* at 566 (plurality opinion); see also *id.* at 581 (Souter, J., concurring) (“[D]ancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly [nude] so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience.”).

115. *O’Brien*, 391 U.S. at 376.

116. See TEX. BUS. & COM. CODE ANN. § 102.052(a) (West Supp. 2011) (taxing only sexually oriented business).

117. *City of L.A. v. Alameda Books*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring).

118. *Id.* (citation omitted).

119. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 124, 137 (1992). The revenue was intended for the procurement of police and security to maintain public order. *Id.* at 124, 134.

120. *Id.* at 134. The Court further rejected distinctions between mere fees and outright prohibitions in this context: “Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Id.* at 134–35.

As applied to SOBFA, the alleged negative secondary effects associated with alcohol consumption and nude entertainment are also considered a type of listener reaction, purportedly caused by the speech. Because "[l]isteners' reactions to speech are *not* the type of 'secondary effects' . . . referred to in *Renton*,"<sup>121</sup> SOBFA cannot be saved from strict scrutiny analysis by relying on its goal of minimizing sexual abuse.

The secondary-effects doctrine should be limited to the realm of time, place, or manner restrictions;<sup>122</sup> otherwise the judiciary risks sanctioning regulations that target the content of speech under the guise of illusory and innumerable negative secondary effects.<sup>123</sup> SOBFA regulates neither the time nor location at which nude dancing may take place, nor the manner in which nude dancing may be expressed.<sup>124</sup> It merely requires businesses that choose to participate in this type of sexually expressive speech pay five dollars per "listener" to the government.<sup>125</sup>

In reality, because the secondary-effects doctrine does nothing to transform a regulation from content-based to content-neutral,<sup>126</sup> it follows that its application should be limited to only those regulations affecting when, where, or how speech is conducted.<sup>127</sup> Any other approach erodes the sole purpose of

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121. See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion) (emphasis added). According to the *Boos* Court, had the ordinance in *Renton* been aimed at psychological damage caused by adult films, instead of neighborhood blight, then the Court would have categorized it as a content-based regulation targeting the direct effects of the speech on the listener. *Id.*; see also *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 591–92 (1991) (White, J., dissenting) (arguing that the Indiana statute banning public nudity on the basis of deterring sexual assault and prostitution was rooted in the spectator message received by the nude expression); *Johnson v. Cnty. of L.A. Fire Dep't*, 865 F. Supp. 1430, 1437 (C.D. Cal. 1994) (holding that the fire department may not rely on the secondary-effects doctrine to validate a ban on *Playboy* magazine as part of its sexual harassment policy, noting that the ban is directly related to the "emotive impact of the 'sexually oriented magazines'"); *Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 76, 225 P.3d 153, 174 (Utah 2009) (Durham, C. J., dissenting in part) (arguing that a similar tax in Utah was "a reaction to a primary effect" and the secondary-effects doctrine was inapplicable by definition); Andrew, *supra* note 13, at 1198–1200 (addressing the impact of *Boos* and *Barnes* on the application of the secondary-effects doctrine).

122. See George P. Smith II & Gregory P. Bailey, *Regulating Morality Through the Common Law and Exclusionary Zoning*, 60 CATH. U. L. REV. 403, 436 (2011).

123. See David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55, 60 (1997) (arguing that the secondary-effects doctrine has been abused by legislators, in that it allows for the transformation of a content-based regulation into a content-neutral one as long as some secondary effect, however indirect, is cited).

124. See TEX. BUS. & COM. CODE ANN. § 102.051–.056 (West Supp. 2011).

125. *Id.* § 102.052.

126. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 573 (2001) (Thomas, J., concurring in part and concurring in judgment) ("[T]he abiding characteristic of valid time, place, and manner regulations is their content neutrality.").

127. See Michael S. Fenster, *The Harmful Sin Tax: Why We Shouldn't Charge Extra for Drinking*, The ATLANTIC (Nov. 15, 2011, 9:02 AM), <http://www.theatlantic.com/health/archive/2011/11/the-harmful-sin-tax-why-we-shouldnt-charge-extra-for-drinking/248133/> ("The purposes of sin taxes are generally twofold: to raise revenues

the secondary-effects doctrine: to permit regulations that keep core speech elements intact while substantially reducing the associated negative secondary effects at the same time.<sup>128</sup> Therefore, the issue is not whether SOBFA is content-based, but rather whether it actually reduces the sexual abuse purportedly associated with adult entertainment facilities and alcohol, and protects and maintains the existence of the primary speech—the nude dancing.

It is difficult to argue that SOBFA actually furthers the State's interest in reducing sexual abuse by merely levying a tax on sexually oriented businesses.<sup>129</sup> The Texas Supreme Court noted that SOBFA produced “some discouragement [from] combining nude dancing with alcohol consumption.”<sup>130</sup> However, “some discouragement” is minimal compared to the higher standard of *furthering* a government's interest.<sup>131</sup> A tax, by itself, does not eliminate the alleged secondary effects caused by the combination of nude dancing and

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and to decrease the utilization of a particular product or activity.”); *see also* Smith & Bailey, *supra* note 122, at 437–38 (observing that ordinances previously saved by the secondary-effects doctrine “specifically and overtly regulated one type of speech and expression, that which is sexually oriented, and therefore . . . cannot be called content-neutral”).

128. *City of L.A. v. Alameda Books*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring). According to Justice Kennedy:

The challenge is to correct the latter while leaving the former, as far as possible, untouched. If a city can decrease the crime and blight associated with certain speech by the traditional exercise of its zoning power, and at the same time leave the quantity and accessibility of the speech substantially undiminished, there is no First Amendment objection. This is so even if the measure identifies the problem outside by reference to the speech inside – that is, even if the measure is in that sense content based.

*Id.*

129. First, assuming a causal link between sexual abuse and strip clubs that serve (or the consumption of) alcohol, the five dollar per-customer fee is unlikely to cause patrons to cut back on their visits *even if* the strip clubs pass the cost of the fees onto their customers. *See* Jordon E. Otero, *Banking on ‘Sin’: Rising Taxes on Vice Make Vital Revenue Sources for States*, WASH. TIMES, Oct. 27, 2011, at A1. Second, even if the fee's effect reduced strip-club patronage, the fee still leaves unaddressed the other material that, by SOBFA's logic, has negative secondary effects just as likely to increase instances of sexual abuse, among other antisocial behavior, and that has far greater reach and appeal. *See* BERGER, *supra* note 9, at 148–49 (“Indeed, much of what is found in the media *is* immoral in that it is expressive of, caters to, and fosters attitudes which *are* morally objectionable.”). And yet, according to Berger, obscene material has less impact on society than the substance of primetime television because “[p]ornography, when it does attract us, affect us, appeal to us, has a limited narrowly focused appeal,” which “tends toward short-lived enjoyments, rather than any far-reaching effects on the personality.” *Id.* at 149.

130. *Combs v. Tex. Entm't. Ass'n*, 347 S.W.3d 277, 287 (Tex. 2011), *cert. denied*, 132 S. Ct. 1146 (2012).

131. Even if it is conceded that SOBFA is a content-neutral restriction, it fails to pass even an intermediate level of review. Courts often do not allow the government to justify restrictions based on purely hypothetical or weak evidence of the alleged harm, and also subject the restriction to close analysis to determine if its application actually alleviates the alleged harm. *See* Stone, *supra* note 11, at 11 (footnote omitted).

alcohol.<sup>132</sup> Rather, a tax is a tool to raise revenue, not a mechanism to reduce sexual abuse, and thus should be employed in a cautious manner.<sup>133</sup>

Moreover, SOBFA does not operate in a manner that leaves the speech unscathed. The Texas Court's characterization of the impact of the tax on strip clubs and nude dancing as "de minimis"<sup>134</sup> was not an accurate assessment. A "de minimis" effect is one that is "so slight or mild that it does not rise to the level of constitutional significance."<sup>135</sup> However, attorneys for TEA estimated that more than half of the affected business owners could be put out of business by the tax—a consequence that is neither slight nor mild.<sup>136</sup> If these businesses are forced to close as a result of SOBFA, the vehicles for sexual speech are eliminated and accordingly the speech itself is substantially diminished. Although an effective means of reducing alleged secondary effects, this type of approach exceeds the secondary-effect's doctrine's permissible limits.<sup>137</sup>

### B. The Secondary-Effects Doctrine's Negative Secondary Effects

A glaring consequence of the expansion of the secondary-effects doctrine is that it would enable the government to assert false motives in order to indirectly target undesirable speech.<sup>138</sup> The threat is potentially all-encompassing because "[a]ny regulatory objective, no matter whether it is

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132. See Otero, *supra* note 129 (discussing one economic analyst's view that sin taxes "don't reduce the sin, they raise the revenue"). The tax is not only allocated for sexual abuse prevention, but also for assisting low-income families in meeting health insurance premiums. *Tex. Entm't Ass'n*, 347 S.W.3d at 279 ("The first \$25 million collected is to be credited to the sexual assault program fund, and the balance is to be used to provide health benefits coverage premium payment assistance to low-income persons.").

133. See *McCulloch v. Maryland*, 17 U.S. 316, 347 (1819) ("A right to tax, is a right to destroy . . .").

134. *Tex. Entm't Ass'n*, 347 S.W.3d at 288.

135. Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 13 (1988); see BLACK'S LAW DICTIONARY 496 (9th ed. 2011) (defining "de minimis" as "trifling" or "minimal; and "so insignificant that a court may overlook it in deciding an issue or case"). But see *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 136 (1992) ("[T]he level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax.").

136. Mark Kernes, *Texas Supremes Uphold Adult Club Entrance Fee*, AVN (Aug. 26, 2011, 5:24 PM), <http://business.avn.com/articles/legal/Texas-Supremes-Uphold-Adult-Club-Entrance-Fee-445636.html>. See Koppel, *infra* note 148 (reporting that Houston strip clubs now face a ten dollar per-customer fee, as they are subject not only to SOBFA, but also a local Houston ordinance).

137. See *supra* text accompanying note 90.

138. See Hudson, *supra* note 123, at 60 ("The secondary effects doctrine has become a favorite tool for government officials who seek to disguise content-based regulations. Government officials often claim that laws are not aimed at the content of the disfavored expression, but at certain indirect or side effects of speech . . ."); see also Otero, *supra* note 129 (noting that sin taxes are frequently aimed at ridding society of "socially undesirable" conduct).

inadvertent or deliberate, can constitute a secondary effect.”<sup>139</sup> To date, the secondary-effects doctrine has been limited to sexually oriented speech in strip clubs,<sup>140</sup> adult theaters,<sup>141</sup> and adult bookstores.<sup>142</sup> However, the acceptable list of traditional effects a government may target is expanding beyond the traditional conception of the state’s police powers.<sup>143</sup> Furthermore, the Court has hinted in dicta at the validity of the secondary-effects doctrine beyond its application to sexually oriented businesses.<sup>144</sup> As a result, the door remains open for legislators to use the secondary-effects doctrine as a “possible avenue of governmental censorship whenever censors can concoct ‘secondary’ rationalizations for regulating the content of . . . speech.”<sup>145</sup>

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139. Hudson, *supra* note 123, at 60. Hudson notes the problems with the “expansive” secondary-effects doctrine, specifically that “all speech causes effects. . . . The secondary effects doctrine, a fertile ground for abuse, insidiously eviscerates free expression by allowing 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 (footnote omitted); *see also* Thomas R. McCoy, *Understanding McConnell v. FEC and its Implications for the Constitutional Protection of Corporate Speech*, 54 DEPAUL L. REV. 1043, 1048 n.31 (2005) (“It is difficult to perceive any limit on the applicability of this secondary effects doctrine since the government’s ultimate regulatory objective in every case of suppressing core political speech is the prevention of some undesirable *effect* of the message. Direct suppression of the speech in and of itself is never the ultimate regulatory objective. The ultimate regulatory objective is always the prevention of some effect that is expected to result from the message if left unrestricted. Thus, it appears that the secondary effects doctrine, if taken seriously and applied broadly, would effectively negate all First Amendment protection for all disfavored advocacy.”).

140. *See supra* note 82 and accompanying text.

141. *See supra* Part I.C.2.

142. *See supra* Part I.C.2; *see also* Bhagwat, *supra* note 13, at 796–97; William M. Howard, Annotation, *Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated*, 21 A.L.R. 425 (2007) (providing a detailed overview of case law in the context of sexually oriented businesses).

143. *See* Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287, 300, 325–26 (2004) (citing examples of asserted secondary effects held to be valid, ranging from the traditional harms such as declining property value and increased crime, to the more recent evils of public urination, tax evasion, and fraud) (citations omitted).

144. *See* *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion) (“Respondents and the United States do not point to the ‘secondary effects’ of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies. Rather, they rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments.”).

145. *Id.* at 335 (Brennan, J., concurring in part and concurring in judgment); *see* COX, *supra* note 65, at 49 (“Even without empirical studies it is safe to surmise that the chief danger to freedom of expression by the poor, the unorthodox, and the unpopular lies in licensing ordinances and other general laws that vest wide discretion in local authorities to maintain the peace and public order.”); *see also* Morse, *supra* note 3, at 194 (warning that “[p]roposed taxes on strip clubs, junk food, video games, sugary sodas, bottled water, and ammunition would bring with them all the traditional ills of sin taxes and would also confuse the appropriate role of the tax system with the improper role of government as social engineer”).



Consider the instance of Terry Jones, the pastor who, in March 2011, publicly burned the Koran as a symbol of anti-Islamic sentiment.<sup>146</sup> Angry protestors subsequently attacked a U.N. compound in Afghanistan, killing seven, while similar protests the next day resulted in nine dead and at least ninety injured.<sup>147</sup> Viewed through the secondary-effects lens, could a regulation have prohibited Jones from burning the Koran by citing to the imminent risk of death to U.S. citizens abroad? Such a regulation would no doubt be content-based, because the negative effects are consequences of the symbolic nature of burning the Koran. However, one could argue that the secondary-effects doctrine would excuse this otherwise content-based restriction because it targets not the speech itself, nor even its primary effects on the listener, but its *negative secondary effects* of loss of life. The use of the secondary-effects doctrine in this context exemplifies the risks associated with such an expansion.

#### IV. CONCLUSION

The secondary-effects doctrine is undeniably gaining traction in free speech jurisprudence, as evidenced by an ever-increasing number of sexually oriented business regulations,<sup>148</sup> most of which, if challenged, survived lower court review.<sup>149</sup> Using the secondary-effects doctrine to justify a discriminatory tax,

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146. Kevin Sieff, *Florida Pastor Terry Jones' Koran Burning Has Far-Reaching Effect*, WASH. POST (Apr. 2, 2011), [http://www.washingtonpost.com/local/education/florida-pastor-terry-joness-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC\\_story.html](http://www.washingtonpost.com/local/education/florida-pastor-terry-joness-koran-burning-has-far-reaching-effect/2011/04/02/AFpiFoQC_story.html).

147. *Id.*

148. See, e.g., MO. ANN. STAT. § 311.710.1(3) (West 2011) (prohibiting "immoral or improper entertainment" on the licensed premises of intoxicating liquor); S.C. CODE ANN. § 61-4-580(4) (2009) (prohibiting immoral entertainment when an individual is in a "state of undress" on a liquor license holder's premises); W. VA. CODE § 60-7-12(a)(2),(c) (LexisNexis 2011) (making money from "obscene, lewd, or immoral, or improper entertainment" is a criminal misdemeanor); see also Nathan Koppel, *Houston's Strip Clubs Hit by New 'Pole Tax'*, WALL ST. J., June 28, 2012, at A7 (reporting that those clubs unfortunate enough to be located in Houston are now subject to a local five dollar per-customer fee, approved by the Houston City Council as a measure to fund rape forensics, in addition to SOBFA); Catherine Rampell, *Sin Is Sure Lucrative*, N.Y. TIMES, Apr. 18, 2010, at WK5 (reporting that three "cash-strapped" states—Texas, Georgia, and Pennsylvania—have considered "pole taxes"); Laura Hibbard, *Phoenix Considers 'Sin Tax' on Strip Clubs, Tattoo Parlors*, HUFF. POST (Sept. 16, 2011), [http://www.huffingtonpost.com/2011/09/15/sin-tax-could-be-imposed-in-arizona\\_n\\_965004.html](http://www.huffingtonpost.com/2011/09/15/sin-tax-could-be-imposed-in-arizona_n_965004.html) (reporting that Phoenix, Arizona, has considered taxing strip clubs and tattoo parlors to increase state revenue).

149. See, e.g., 181 South Inc. v. Fischer, 454 F.3d 228, 230, 234–35 (3d Cir. 2006) (upholding N.J. ADMIN. CODE § 13:2-23.6(a)(1) (2005), which prohibits "lewdness" and "immoral activity" on premises serving alcohol); G.M. Enterprises, Inc. v. Town of St. Joseph, Wis., 350 F.3d 631 (7th Cir. 2003) (upholding Ordinance 2001-02, § 153-4 (2001), which prohibited the sale of alcohol on premises and any physical contact between performers and customers); Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cnty., Tenn., 274 F.3d 377 (6th Cir. 2001) (upholding M.C.L. §§ 6.54.090, 6.54.140 (1997), which conditioned licensing of sexually oriented business on compliance with no-touch/buffer zones and a fee of

such as SOBFA, is at odds with the Court's view of differential taxation under the First Amendment, as the Court has previously stated that "a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech."<sup>150</sup> Until the Supreme Court addresses the specific parameters of the secondary-effects doctrine,<sup>151</sup> its outer limits will remain uncertain. However, the reasoning is not indefinitely linked to sexual speech alone, as the overall concept lends itself to application in a variety of contexts. Although the doctrine's application has thus far been contained to sexual speech, the judicial abdication exemplified by *Texas Entertainment Ass'n* may "set the Court on a road that will lead to the evisceration of First Amendment freedoms."<sup>152</sup>

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\$500 for each license); *Bushco v. Utah State Tax Comm'n*, 2009 UT 73, ¶ 59, 225 P.3d 153, 157, 171–72 (Utah 2009) (holding constitutional UTAH CODE ANN. § 59-27-101 (West 2011), which levies a ten percent tax on sexually oriented businesses), *cert. denied*, 131 S. Ct. 455 (2010). *But see* *Conchatta Inc. v. Miller*, 458 F.3d 258, 261 (3d Cir. 2006) (striking down 47 PA. CON. STAT. ANN. § 4-493(10) (West 2005), which sought to ban lewd entertainment on premises licensed to sell alcohol).

150. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints . . . . A tax is also suspect if it targets a small group of speakers. Again, the fear is censorship of particular ideas or viewpoints.") (citations omitted).

151. *See Denali, L.L.C. v. Utah State Tax Comm'n*, 131 S. Ct. 455 (2010) (denying certiorari on the issue of Utah's ten percent tax on sexual businesses).

152. *See Boos v. Barry*, 485 U.S. 312, 338 (1988) (Brennan, J., concurring in part and concurring in judgment).