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SECONDARY EFFECTS AND PUBLIC MORALITY

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INTRODUCTION

When may the state regulate constitutionally protected activity in the interests of public morality? In *Barnes v. Glen Theatre, Inc.*,[1] *City of Erie v. Pap's A.M.*,[2] and *City of Los Angeles v. Alameda Books, Inc.*,[3] the Supreme Court considered First Amendment challenges to three state regulations of adult businesses. The controversial subject matter of the cases, against the backdrop of expanding First Amendment protections and changing societal mores, exposed a philosophical knot within the Court's jurisprudence. And a difficult one at that: the three cases resulted in twelve opinions authored by seven different Justices and brought into focus an unresolved tension surrounding the legitimacy of morality as a basis for lawmaking.

This Article examines the Justices' struggle to reconcile the intuitive sense that adult businesses can be detrimental to society at large with two countervailing forces: first, the common opinion that the state has no business legislating morality, and second, that the First Amendment now affords wide protection to activities once considered obscene and meriting little constitutional protection. To do this, in Section I we briefly summarize the First Amendment doctrinal framework; then, in Section II, we review in detail the cases and the opinions they generat-

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1. 501 U.S. 560 (1991).

2. 529 U.S. 277 (2000).

3. 535 U.S. 425 (2002).

ed. In Section III, we characterize the "secondary effects" doctrine that emerges from these cases as the courts attempt to resolve this tension. We then critique that attempt in Section IV, placing it in a broader philosophical context. We find that while the Court by the time of *Alameda* may have set too high an evidentiary barrier within the secondary effects analysis, the Court is equally justified in focusing on secondary social harms as it would be in relying on public morality. But choosing which secondary effects are harmful involves moral reasoning of the same kind as that which underpins public morality, the very doctrine secondary effects appeared designed to avoid.

We insist that although *Alameda*, the most recent Supreme Court case involving secondary effects, was decided in 2002, the philosophical and jurisprudential problem at the root of these cases remains, perhaps now more than ever, exceedingly relevant. A legal community that often bristles when confronted with questions of morality is more likely to accept empirical evidence in lieu of philosophical argumentation. Secondary effects thus can provide an alternative basis on which to uphold legislation enacted in the exercise of the public morality component of the police power. As we will argue, secondary effects and public morality often come to the same thing.

I. BACKGROUND AND CONTEXT

To fully understand the secondary effects cases, some attention must be paid to the context in which they arose—in particular, to the law of obscenity as it has developed over the course of the twentieth century.[4] Obscenity has never been protected by the First Amendment in American constitutional law.[5] States were free to regulate obscene subject matter, and the federal government did so too via the Comstock Act of 1873,[6] which prohibited the distribution of obscene materials by mail.[7] The Comstock Act,

4. *See generally* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 295–99 (2009). We rely extensively on Professor Fee's synopsis of the developments leading up to the Secondary Effects Doctrine.

5. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

6. *See* Comstock Act of 1873, ch. 258, § 2, 17 Stat. 598.

7. *Id.* at 599.

however, did not define obscenity, and it was left to the courts to determine the contours of the obscenity exception. In 1896, the Supreme Court, in upholding a conviction for distributing a pamphlet containing obscene images, endorsed a jury instruction that defined obscenity as follows:

> [T]he test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall . . . Would it . . . suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?[8]

Prior to the introduction of tiers of scrutiny in First Amendment law, subject matter was either protected or unprotected under the First Amendment.[9] Thus, if a jury found a work to be obscene by the *Rosen* test, the work was not constitutionally protected and that was the end of the matter. For example, "[t]here was no doubt that explicit material of the type one might find today in *Penthouse* or *Hustler* magazines was clearly obscene and did not have any constitutional protection."[10] But "[f]or a period, the law was so broad that disputed obscenity cases tended to involve mildly racy passages in novels, such as James Joyce's *Ulysses*."[11]

This remained so until *Roth v. United States*,[12] which, in upholding a conviction based upon a successor statute to the Comstock Act, declared that "obscene material" is material that "deals with sex in a manner appealing to the prurient interest."[13] The Court framed the question as whether the average person, applying "contemporary community standards," would judge this to be the "dominant theme of the material . . . taken as a whole."[14] *Roth* inaugurated a sea change in the regulation of obscenity, both doctrinally and practically. Then, in 1973, *Miller v.*

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8. Rosen v. United States, 161 U.S. 29, 43 (1896).

9. *See* Fee, *supra* note 4, at 297 (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

10. Fee, *supra* note 4, at 295–96 (citing United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933)).

11. *Id.*

12. 354 U.S. 476 (1957).

13. *Id.* at 487.

14. *Id*. at 489.

California[15] added to the *Roth* test the requirement that in order to be considered obscene, subject matter had to "depict or describe patently offensive 'hard core' sexual conduct"[16] lacking "serious literary, artistic, political, or scientific value."[17] Although *Miller* listed some specific depictions of sexual acts that juries were permitted to find per se obscene, the subsequent introduction of tiers of scrutiny had the effect of placing even prohibitions against "hard-core" depictions in jeopardy.[18]

After *Miller*, the Court began to apply varying degrees of scrutiny to regulations burdening speech depending on whether the regulation specifically targeted the content of the speech or merely incidentally burdened it.[19] In general, content-based restrictions on speech are subject to strict scrutiny, which usually proves fatal to the regulation.[20] Under strict scrutiny, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end."[21] However, content-neutral regulations that nevertheless burden speech may be analyzed under a more lenient intermediate scrutiny standard if they are merely restrictions on the time, place, and manner of the speech.[22] Under intermediate

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

16. *Id.* at 27.

17. *Id*. at 24.

18. *See id*. at 25–26. *See generally* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007) (chronicling the consolidation by the 1980s of distinct treatment of various speech regulations, including time, place, and manner regulations, regulations of commercial speech, symbolic conduct, and other areas of the law into a single intermediate scrutiny tier of review).

19. *See* Bhagwat, *supra* note 18, at 800–05. There remained, of course, types of speech meriting no First Amendment protection at all, such as incitement and fighting words. *See Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011).

20. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991).

21. *Simon & Schuster*, 502 U.S. at 118 (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

22. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 312–14 (1984). There are of course other categories of speech regulations warranting merely intermediate scrutiny; for example, commercial speech, which until 1976 had been considered unprotected by the First Amendment. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 748 (1976); Bhagwat, *supra* note 18, at 793–94. For simplicity, and because the Court in the cases discussed herein used intermediate time, place, and manner scrutiny as an analogy for the treat-

scrutiny, content-neutral restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[23] Relevant to our discussion of *Barnes* and *City of Erie*, expressive conduct is also treated as speech if there is an intent to convey a particularized message and a great likelihood that the message will be understood,[24] and regulations of it are subject to either type of scrutiny depending on whether the law is facially content-based or content-neutral.

The upshot of these two developments is that sexually explicit speech became significantly more difficult to regulate.[25] Prior to *Roth*, the states and the federal government could directly regulate adult expression on the basis of its content and seek refuge in a wide obscenity exception.[26] After *Miller*, the obscenity exception was significantly narrowed. At the same time, a law that burdened one type of speech specifically was likely to be labeled a content-based restriction and stricken on that basis. Obscenity prosecutions dropped off precipitously and the pornography industry grew exponentially.[27]

Secondary effects can be seen as a slight retrenchment intended to deal with the resulting constitutional arrangement.[28] Against the backdrop of severely curtailed regulatory power over obscenity, the Court, prior to *Barnes*, began to invoke the

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ment of regulations of secondary effects, we refer only to time, place, and manner review in discussing intermediate scrutiny.

23. *Cmty. for Creative Non-Violence*, 468 U.S. at 293.

24. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989).

25. *See* Fee, *supra* note 4, at 296 ("[After *Miller*,] government could no longer take it for granted that all pornography, or even hard-core pornography, qualified as obscene. Nor could it assume that nude dancing was obscene.").

26. *See id.* at 295–96.

27. *See id.*

28. *See id.* at 295 (describing secondary effects as a "response" to these developments); *see also* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN. ST. L. REV. 139, 149 (2012) ("The judicial allowance of morality-influenced zoning decisions, albeit under the guise of content-neutrality, represents a tacit endorsement of the enactment of local moral standards into law.").

concept of negative "secondary effects"[29] of erotic speech—crime, disease, prostitution, decreases in neighborhood property values—to justify treating as time, place, and manner restrictions regulations that would not otherwise qualify for intermediate scrutiny. In *Young v. American Mini Theatres*,[30] the Supreme Court was confronted with Detroit's "Anti-Skid Row" ordinance, which prohibited adult movie theaters from operating within a certain radius of another specified adult business.[31] In upholding the ordinance as a time, place, and manner restriction, Justice Stevens, writing for a plurality of the Court, contrasted *Amerian Mini Theatres* with *Erznoznik v. City of Jacksonville*.[32] Whereas in *Erznoznik* the Jacksonville city government had attempted to prohibit the screening of nudity in a drive-in theater because of the actual content of the speech itself, Detroit merely wanted to protect its citizens from the harmful effects caused by concentrations of adult businesses:

> The Common Council's determination was that a concentration of "adult" movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.[33]

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29. Secondary effects are general, indirect societal harms resulting from a pattern of activity. They are not to be confused with the apparently similar notion of "side effects." These are certain, specific consequences of an individual action. *See generally Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, https://plato.stanford.edu/entries/double-effect/ [https://perma.cc/2ZY5-YMRN] (last accessed May 13, 2017). Though sometimes called "secondary effects," "side effects" (unlike the secondary effects discussed in this Article) are unintended negative results of a good action. Side effects are essential to any discussion of ethics generally, and as such the Court has also addressed them, for example, in its discussion of assisted suicide. *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 800 n.6 (1997) (quoting with approval the New York State Task Force on Life and the Law, which had opined, "[Professional organizations] consistently distinguish assisted suicide and euthanasia from the withdrawing or withholding of treatment, and from the provision of palliative treatments or other medical care that risk fatal side effects").

30. 427 U.S. 50 (1976).

31. *See id.* at 52 (plurality opinion).

32. *See id*. at 71 n.34 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)).

33. *Id*. The idea that certain conduct could have harmful secondary effects surfaced briefly as a vague supposition in *Stanley v. Georgia*, 394 U.S. 557 (1969).

This would be the first time the Supreme Court invoked the secondary, or follow-on, effects of speech to justify treating a law as content-neutral. A majority of the Court adopted this analysis in *Renton v. Playtime Theatres*.[34] In upholding an ordinance that paralleled Detroit's ordinance at issue in *American Mini Theatres* and required that adult movie theatres not be located in close proximity to one another, the Court opined that:

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres,* does not appear to fit neatly into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's "*predominate* concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves.[35]

The Court upheld the zoning regulations in *Renton*, instituting the doctrine of secondary effects in First Amendment cases dealing with zoning of adult businesses.

Secondary effects, according to Professor John Fee, were a direct result of the curtailment of the states' ability to regulate the very tangible consequences of the proliferation of adult businesses.[36] Whatever the consequences of deregulating sexually explicit television and film, they are not as concrete as the visible construction of brick-and-mortar establishments in American cities. Recognizing this result, the Justices permitted a narrow exception, in the form of secondary effects, to the general First Amendment rules they had created. This exception re-

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There, Justice Marshall, though he rejected Georgia's argument that private possession of obscene material leads to "deviant sexual behavior or crimes of sexual violence," qualified his rebuke as "given the present state of knowledge." 394 U.S. at 566–67. Similarly, Chief Justice Burger entertained the possibility that there is an "arguable correlation" between obscene material and sex crimes in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58–59 (1973).

34. 475 U.S. 41 (1986).

35. *Id.* at 47.

36. *See* Fee, *supra* note 4, at 294–99.

sembled the old obscenity regime, despite its uncomfortable doctrinal fit. Secondary effects began to take on a life of their own in subsequent cases, however, and it is there that they began to embody the philosophical tension in the Court's jurisprudence that is the concern of this Article.

Barnes and *City of Erie* deal—the latter to a greater extent than the former, as we shall see—with the extension of the secondary effects doctrine to erotic dancing. In *Barnes*, secondary effects went unmentioned by the plurality opinion, which relied on a preexisting framework to deal with the regulation of expressive conduct. The plurality grounded the state's interest in the regulation of erotic dancing in the state's police powers[37]—specifically, the right of the state to regulate for the health, safety, *and morals* of the public.[38] Secondary effects were introduced by Justice Souter's concurring opinion.[39] Once introduced here, however, secondary effects became the basis of the plurality opinion in *City of Erie*, which bore no mention of the public morality component of the police power, referring only to the power of the state to regulate in the interest of public health, safety, and welfare.[40] By this time, Justice Souter had come to reconsider his earlier position on the secondary effects doctrine, refusing to join the plurality opinion and attempting to limit its reach by an appeal to heightened evidentiary standards.[41] By the time the Court considered *Alameda*, Justice Souter had recanted his earlier view and proposed a reformulation of the secondary effects doctrine.

These remarkable developments result, in our view, from the tension between the Court's attitude regarding the legitimacy of

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37. Barnes v. Glen Theater, Inc., 501 U.S. 560, 567–68 (1991) (plurality opinion). So did Justice Scalia in his opinion concurring in the judgment. *See id.* at 560 (Scalia, J., concurring in the judgment). Hence in *Barnes* four Justices explicitly upheld the police power for the protection of public morality. It is likely the last occurrence of this in the Supreme Court. *See infra* Section IV.

38. The state's police powers traditionally extended to public morals also called public morality. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 787–88 (2007) (reviewing the relevant case law of the Supreme Court).

39. *Barnes*, 501 U.S. at 586 (Souter, J., concurring in the judgment).

40. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (plurality opinion).

41. *See id.* at 310–17 (Souter, J., concurring in the judgment).

morals legislation and First Amendment jurisprudence.[42] The secondary effects test has come under much criticism for its lack of doctrinal clarity,[43] and more than one member of the Court appeared to regard it as a legal fiction, if perhaps a necessary one.[44] However, the doctrinal morass of secondary effects ultimately results from the Court's reluctance to address the legitimacy of morals legislation head-on. It is true that the public morality rationale too has been subject to staunch criticism. But not in the same way or for the same reasons, as we discuss below.

Once it was accepted that though the obscenity exception had been curtailed, certain adult expression could still be regulated to a greater extent than other speech, the motivation for entertaining the secondary effects doctrine at all seems to be

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42. It is not easy to circumscribe "morals laws" and distinguish them from other criminal laws. Hill goes as far as claiming that "there is no sui generis difference between the function of morals laws and other laws." John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 10 (2010). In his magisterial treatise on the police power Ernst Freund considered that most morals laws fell under three major headings: gambling, intoxication, and sexual immorality. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 172 (1904) ("The practices with which [police power] legislation is chiefly concerned are: gambling, drink, and sexual immorality.").

43. Many scholars are quite hostile to the secondary effects doctrine as a legal concept. *See, e.g.*, Bhagwat, *supra* note 18, at 797 ("The secondary effects doctrine is an extremely odd one, as it seems clearly inconsistent with the Court's approach to content neutrality elsewhere in its First Amendment jurisprudence . . ."); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59-61 (2000) (criticizing *Renton* for calling a content-based law "content-neutral," but limiting critique to "secondary effects" cases associated with restrictions on adult theatres and entertainment establishments); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 490 (1996) ("But if the doctrine of secondary effects has any sound foundation, it relates to refining the search for improperly motivated governmental actions. More specifically, the doctrine emerges from the view that it is relatively easy in cases involving secondary effects to isolate the role played by hostility, sympathy, or self-interest. No other account of the doctrine of secondary effects makes better (or indeed, any) sense."); 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, 553 (2000) ("[T]he doctrine of secondary effects obliterates the content-based doctrine . . ."); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115–17 (1987) (arguing that secondary effects doctrine weakens the distinction between content-based and content-neutral regulations).

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

that the majority of the Justices appeared to find in the secondary effects test an alternative to public morality—a test the purpose of which would be to permit regulation of adult enterprises (and, potentially, other forms of conduct) without recourse to moral judgments.[45] But, we shall argue, the only way to make sense of the secondary effects rationale is in the light of states' police power to promote public morality. If this explanation holds true, the secondary effects test ought not to be understood as an exclusionary alternative to the public morality rationale but rather as a complement to it. The appeal to "objective" secondary effects, we shall conclude, cannot substitute for an appeal directly to morality. A review of the opinions in each of the three cases—*Barnes, City of Erie,* and *Alameda*—will provide the necessary context from which it will be possible to better understand the secondary effects test, the consternation it has caused on the Court, and the way we suggest it should interact with the public morality rationale.

II. THE APPARENT SUBSTITUTION OF SECONDARY EFFECTS FOR PUBLIC MORALITY

A. The Barnes *Case*

In *Barnes*, a South Bend, Indiana ordinance prohibited public nudity generally, which as applied to adult dancers required a minimal amount of clothing.[46] Two nude dancing establishments and certain other parties sued to enjoin enforcement of the ordinance, claiming that it was invalid under the First Amendment.[47] Sitting en banc, the Court of Appeals for the Seventh Circuit held, in a sharply divided decision, that nonobscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the public indecency statute was improper because its purpose was to pre-

45. The secondary effects test also allowed the Justices to avoid addressing the lack of content neutrality in these laws regulating adult expression, and thereby avoid implicating additional First Amendment protection that had been given to adult-oriented materials. *See supra* notes 4–18 and accompanying text.

46. *See* Barnes v. Glen Theater, Inc., 501 U.S. 560, 563 (1991) (plurality opinion).

47. *See id*. at 563–64.

vent the erotic message.[48] Upon review, Chief Justice Rehnquist, writing for a plurality of the Court and joined by Justice O'Connor and Justice Kennedy, held that while nude dancing is expressive conduct within the "outer perimeters" of the First Amendment, it is "only marginally so."[49] The plurality applied the test for regulations of expressive conduct formulated in *United States v. O'Brien*.[50]

O'Brien had upheld under intermediate scrutiny a regulation banning the mutilation of draft cards as content-neutral, holding that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."[51] *O'Brien* set forth a four-part test for the analysis of facially neutral regulation of expressive conduct: the law will be upheld if (i) it is "within the constitutional power of the Government;" (ii) it furthers an "important or substantial governmental interest;" (iii) the governmental interest is "unrelated to the suppression of free expression;" and (iv) the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[52] The *Barnes* plurality held, in satisfaction of the first element of the *O'Brien* test, that the "traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation."[53] The plurality cited *Bowers v. Hardwick*[54] for the proposition that in general the law "is constantly based on notions of morality" and implied that the courts would be forced to strike down most laws if morality were not a legitimate basis for legislation.[55] Similarly, such state authority furthers a substantial government

48. *See* Miller v. City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (en banc).

49. *Barnes*, 501 U.S. at 566 (plurality opinion).

50. 391 U.S. 367 (1968).

51. *Barnes*, 501 U.S. at 567 (plurality opinion) (citing *O'Brien*, 391 U.S. at 376–77).

52. *Id*.

53. *Id*. at 569. Professor Louis Henkin correctly notes that the different cases refer to "morals," "morality," and "public morals," interchangeably. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 403 (1963).

54. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

55. *Barnes*, 501 U.S. at 569 (plurality opinion) (citing *Bowers*, 478 U.S. at 196).

interest in public morals,[56] which is unrelated to the suppression of free expression.[57] Proceeding through the remainder of the *O'Brien* test, the plurality found the statute constitutional.[58]

Justice Scalia concurred in the judgment. In his view, however, the case could be resolved simply by noting that "[t]he intent to convey a 'message of eroticism' (or any other message) is not a necessary element of the statutory offense"[59] and thus on its face the law was not directed at expression.[60] Noting that public indecency had long been an offense at common law,[61] Justice Scalia contended the First Amendment affords protection to expressive conduct only when the law prohibits it precisely because of its communicative attributes.[62] Thus *O'Brien*-level intermediate scrutiny was inappropriate and the state did not need to show that its restriction was no broader than essential to achieve its aims.[63] Immoral conduct can be prohibited as long as the state does not intend to suppress a message; erotic dancing is, on this view, merely immoral conduct regulable by the states.[64]

Justice Souter's concurring opinion in *Barnes* is especially notable in that it drew secondary effects from the zoning context in *Renton v. Playtime Theatres*[65] into the field of expressive conduct regulation,[66] and did so while avoiding any reliance on public morality. Justice Souter, though accepting the plurality's general framework (rather than Justice Scalia's), explicitly substituted the morality justification invoked by the plurality with

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56. *See id*.

57. *See id*. at 570.

58. *See id*. at 571–72.

59. *Id*. at 573 (Scalia, J., concurring in the judgment).

60. *See id*. at 572.

61. *See id*. at 573.

62. *See id*. at 577.

63. *See id*. at 576–77.

64. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 831 (2000) (Scalia, J., dissenting) (contending that commercial entities engaging in "the sordid business of pandering . . . engage in constitutionally unprotected behavior." (citing Ginzburg v. United States, 383 U.S. 463, 467 (1966))).

65. 475 U.S. 41 (1986).

66. *See Barnes*, 501 U.S. at 582–85 (Souter, J., concurring in the judgment). Note that *Renton* involves a slightly differently formulated intermediate scrutiny test than *O'Brien*. *See infra* notes 77–82 and accompanying text.

a secondary effects rationale.[67] In Justice Souter's view, the "substantial government interest"[68] required by *O'Brien* was not the maintenance of public morals, but rather the suppression of the secondary effects of crime, prostitution and the like associated with adult establishments.[69] He also cited *Renton* as standing for the proposition that "legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects,"[70] a characterization he would later retract.[71] The principal thrust of his opinion, however, was to refocus the governmental interest at issue from public morality to secondary effects.

Three of the four dissenting Justices in *Barnes* would no longer sit on the Court by the time *City of Erie* was decided.[72] Nevertheless, Justice White's opinion is notable insofar as it contested the idea that the moral judgment embodied by the prohibition could be constitutional under the First Amendment.[73] In Justice White's view, "the perceived harm is the communicative aspect of the

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67. *See id.* at 582.

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

69. *Id.* ("I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by the respondents' establishments.").

70. *Id.* at 584.

71. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 316–17 (2000) (Souter, J., concurring in part and dissenting in part).

72. Justices White, Marshall, and Blackmun were no longer sitting on the Court in 2000 when *City of Erie* was decided. Justice Stevens, however, was, and would write the dissenting opinions in *City of Erie* and *Alameda*. Incidentally, Justice Stevens had written the opinion that introduced secondary effects into Supreme Court jurisprudence in the first place. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976); *see also supra* notes 32–35 and accompanying text.

73. *See Barnes*, 501 U.S. at 591 (White, J., dissenting). This is notable insofar as Justice White had been the author of *Bowers*, which the plurality in *Barnes* cited in defending its position that moral judgments can form a legitimate basis of state regulation. *See id.* at 569 (plurality opinion). The difference between *Bowers* and Justice White's dissent in *Barnes* is that Justice White is committed to the idea that erotic dancing is expressive conduct protected by the First Amendment; thus, moral judgments applied against it will be subject to strict scrutiny. Not so in *Bowers* where, in his view (the view of the Court), there was no expressive conduct at stake. *See* Bowers v. Hardwick, 478 U.S. 186, 195 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

erotic dance;"[74] thus it could not be constitutionally prohibited. Justice White also directly disagreed with Justice Souter that the secondary effects could be reduced without preventing, rather than merely curtailing, the speech: "The attainment of these goals . . . depends on preventing an expressive activity."[75] This statement would come to embody the tension at the heart of the secondary effects cases to follow.

B. The City of Erie *Case*

In *City of Erie*, a plurality consisting of Justice O'Connor, Chief Justice Rehnquist, Justice Kennedy and Justice Breyer, in an opinion written by Justice O'Connor, endorsed a secondary effects justification in upholding a ban on public nudity nearly identical to the ban upheld in *Barnes* nine years earlier. The City of Erie's ordinance forbade the intentional appearance in public in a "state of nudity."[76] Erotic dancers would have to wear some, albeit extremely minimal, clothing to comply with the statute. Respondent Pap's A. M. operated a nude dancing establishment in Erie and challenged the regulation in state court, prevailing on appeal to the Pennsylvania Supreme Court.[77] The U.S. Supreme Court reversed, with the plurality upholding the ordinance as a content-neutral regulation satisfying *O'Brien*'s four-part test.[78] The plurality first noted that "[a]s we explained in *Barnes* . . . nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."[79] Erie's ordinance was not facially content-based, the plurality held, so it was not subject to strict scrutiny, but was ra-

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74. *Barnes*, 501 U.S. at 591 (White, J., dissenting).

75. *Id*.

76. *City of Erie*, 529 U.S. at 283 (plurality opinion).

77. *See id*. at 283, 285. The Pennsylvania Supreme Court contended that "aside from agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *Pap's A.M. v. City of Erie*, 719 A.2d 273, 278 (Penn. 1998). Of course, this neglects the single and most important point on which a majority of the *Barnes* Court did agree: the holding that the nearly identical South Bend ordinance was constitutional.

78. *City of Erie*, 529 U.S. at 283 (plurality opinion).

79. *Id*. at 289.

ther subject to evaluation under *O'Brien*.[80] Unlike *Barnes*, however, here the substantial government interest acknowledged by the plurality was the reduction of secondary effects, not the protection of public morality. Just as the draft card regulation in *O'Brien* was aimed at preserving the integrity of the selective service system, and not at the expressive conduct of burning draft cards, Erie's ordinance was directed not at the expressive content of nude dancing but rather at the secondary effects on the "public health, safety, and welfare" of the community,[81] such as violence, sexual harassment, public intoxication, prostitution, and the spread of sexually transmitted diseases, as the preamble to the ordinance noted.[82] Requiring that dancers wear only "pasties" and "G-strings," the ordinance's "effect on the overall expression is *de minimis*,"[83] and since the regulation was content-neutral, the plurality proceeded through the *O'Brien* test in summary fashion, finding the ordinance constitutional.[84]

It is worth noting that the Court's invocation of the traditional elements of the police power here—"health, safety, and welfare"—substituted "welfare" for a different item normally rounding out the list: public morality. Public morality had been explicitly referenced by Chief Justice Rehnquist's *Barnes* plurality, though "welfare" and secondary effects were not.[85] It was just the opposite in *City of Erie*: public morality was nowhere to be found, and "welfare" and secondary effects appeared in its place.

Justice Scalia, joined by Justice Thomas, concurred only in the judgment. Justice Scalia would have held that the case was moot because the affected adult establishment had closed by the time the case reached the Court, but nevertheless went on to reiterate

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80. *See id*. The plurality noted that the ordinance had been on the books in various forms since 1866, so it could not have been targeted at businesses such as Pap's, not in existence at that time. *See id.* at 290.

81. *Id*. at 291.

82. *Id*. at 290.

83. *Id.* at 294, 296.

84. *See id*. at 296–97, 300–02.

85. *See* Barnes v. Glen Theater, Inc., 501 U.S. 560, 569 (1991) (plurality opinion) ("The traditional police power of the states is defined as the authority to provide for the public health, safety, and morals, and we have upheld such as a basis for legislation . . . Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.").

his view on the merits, expressed in *Barnes*, that there was no need to delve into any discussion of secondary effects. His opinion, similar to that expressed in another First Amendment context,[86] was that the ordinance at issue constituted "a general law regulating conduct and not specifically directed at expression,"[87] and as such was "not subject to First Amendment scrutiny at all."[88] Justice Scalia's view was that it is within a city's power to regulate conduct in the interest of "*bonos mores*"[89] and that this power and "the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment."[90]

Despite the case involving facts nearly identical to *Barnes*, Justice Souter, whose separate concurrence in *Barnes* had been the only opinion to articulate the secondary effects concept in that case, dissented on the merits question in *City of Erie*.[91] He once again endorsed the view that a city's interest in reducing secondary effects associated with adult entertainment, provided it is unrelated to the suppression of free expression, is legitimate.[92] His concern centered on the fact that Erie had relied on mere conjecture as to the actual effect of its restriction on the secondary effects, which "[w]e have never accepted . . . as adequate to carry a First Amendment burden."[93] His partial dissent "rest[ed] on a demand for an evidentiary basis that [he] failed to make when [he] concurred in *Barnes* . . . ."[94] Recognizing that this was in direct conflict with his earlier statements in *Barnes*,[95]

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86. *See* Emp't Div. v. Smith, 494 U.S. 872, 878–79 (1990) (holding that regulation of peyote use, being generally applicable, did not unconstitutionally burden Native American tribe's free exercise of religion).

87. *City of Erie*, 529 U.S. at 307–08 (Scalia, J., concurring in the judgment).

88. *Id*. at 308.

89. *Id*. at 310.

90. *Id*.

91. Justice Souter concurred with the plurality on the mootness question, but dissented based on his view that the evidentiary record was insufficient to sustain the regulation. *Id.* at 310–11 (Souter, J., concurring in part and dissenting in part).

92. *See id*.

93. *Id.* at 312 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000)).

94. *Id*. at 316.

95. Barnes v. Glen Theater, Inc., 501 U.S. 560, 584 (1991) (Souter, J. concurring in the judgment) ("[L]egislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects . . . ").

Justice Souter expressly stated that he made a mistake in that case; although he refused to retract his support for the secondary effects test, he noted that he "should have demanded the evidence then [in *Barnes*], too . . . ."[96] A stronger evidentiary showing would help to comfort the Court that no pernicious motivation to suppress governmentally disfavored speech stood behind the ostensibly neutral regulation.[97] This concern would take center stage later in *Alameda*.

Two Justices dissented outright. Justice Stevens, joined by Justice Ginsburg, expressed alarm that the secondary effects jurisprudence was making its way into hitherto untouched territory—they appeared to take as given that secondary effects were legitimate in zoning cases, such as *Renton*, but disagreed that the idea should be extended to expressive conduct regulations.[98] He noted that "[for] the first time, the Court has now held that such [secondary] effects may justify the total suppression of protected speech."[99] In order to sustain this contention, Justice Stevens had to gloss over any difference between expressive conduct and pure speech, a maneuver that is present throughout the opinion though never addressed directly. Similarly, the opinion contains the implicit premise that the additional "message" conveyed when "the last stitch is dropped" is wholly distinct from the rest of the erotic expression.[100] Referring to *Barnes* as a "fractured decision,"[101] Justice Stevens together with Justice Ginsburg would later join Justice Souter's dissent in *Alameda* advocating a reformulation of the secondary effects concept, though not calling for its total abolition.

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96. *City of Erie*, 529 U.S. at 316 (Souter, J., concurring).

97. *See id*. at 314.

98. *Id*. at 317 (Stevens, J., dissenting).

99. *Id*. at 317–18.

100. Note that this claim turns on the premise that the clothing requirement actually suppresses the message: "Indeed, if Erie's concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message." *Id*. at 325. The *City of Erie* plurality expressly disclaimed this idea. *Id*. at 292–93 (plurality opinion).

101. *Id*. at 318 (Stevens, J., dissenting).

C. The Alameda *Case*

In *City of Los Angeles v. Alameda Books, Inc.*,[102] the Court was confronted with a municipal ordinance prohibiting adult establishments from operating within a thousand feet of one another or within five hundred feet of a school or church. A loophole in the original ordinance which had permitted multiple such businesses to operate under the same roof was corrected in 1983.[103] Two adult bookstores that also operated adult arcades, considered a separate adult business under the statute, sued the city seeking declaratory and injunctive relief, contending that the ordinance violated the First Amendment.[104] In defense, the city cited a study conducted in 1977 showing that concentrations of adult businesses were associated with higher crime.[105] On summary judgment, the district court applied strict scrutiny and struck down the ordinance.[106] The Ninth Circuit affirmed, holding that even if intermediate scrutiny were applied, the city would not have met its burden.[107] It held, in spite of the 1977 study, that "the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects."[108]

The Court granted certiorari "to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*."[109] Again, a plurality of the Court upheld the statute, this time consisting of Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, in another opinion written by Justice O'Connor. While *City of Erie* dealt with expressive conduct, and thus utilized the *O'Brien* test, *Alameda* involved the slightly different *Renton* intermediate scrutiny framework established for cases dealing with zoning regulations.[110] The *Renton* analysis proceeded in three steps:

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102. 535 U.S. 425 (2002).
103. *Id.* at 431.
104. *Id*. at 432.
105. *See id.* at 430.
106. *See id.* at 429.
107. Alameda Books, Inc. v. City of L.A., 222 F.3d 719 (9th Cir. 2000).
108. *Alameda*, 535 U.S. at 430.
109. *Id.* at 433.
110. *See id*. at 434.

first, if the regulation was not a total ban, then it could be analyzed as a time, place, and manner restriction;[111] next, if the regulation was aimed at secondary effects rather than at the content of the regulated material, it could properly be considered under intermediate scrutiny as a content-neutral restriction;[112] and finally, if the ordinance was "designed to serve a substantial government interest and . . . reasonable alternative avenues of communication remained available," the regulation could be upheld.[113] The key question in this case was whether the city could reasonably rely on the 1977 study to support its substantial interest in preventing secondary effects in defending a motion for summary judgment.[114]

The Court of Appeals held that the first prong of *Renton* had been satisfied and that the statute was a time, place, and manner restriction.[115] However, the court then proceeded to skip the second question, declining to determine whether the ordinance was content-neutral or content-based, reasoning that in either case the city failed the third prong of *Renton*.[116] The Court of Appeals held that the 1977 study did not show that the multiple-use ban served the city's substantial interest in reducing crime because it did not "'suppor[t] a reasonable belief that [the] combination [of] businesses . . . produced harmful secondary effects of the type asserted,"[117] pointing out that the study had found that a high concentration of adult *establishments* was correlated with high crime rates, but that the study said nothing about the concentration of adult *businesses*.[118] On a motion for summary judgment, this amounted to a very strict evidentiary requirement for the city.

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111. *See id*. (citing Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46 (1986)).

112. *See id*. (citing *Renton*, 475 U.S. at 47–49).

113. *See id*. (citing *Renton*, 475 U.S. at 50).

114. *See* FED. R. CIV. P. 56; Anderson v. Liberty Lobby, 477 U.S. 242, 248–252 (1986).

115. Alameda Books, Inc. v. City of L.A., 222 F.3d 719, 723 (9th Cir. 2000).

116. *Id*. at 723–724.

117. *Id*. at 724.

118. *Id*.

The plurality found that the Court of Appeals "misunderstood the implications of the 1977 study."[119] The plurality was willing to permit the city to make the inference that high concentrations of adult businesses had the same effects as adult establishments on crime because "areas with high concentrations of adult establishments are also areas with high concentrations of adult operations, albeit each in separate establishments."[120] The plurality expressed concern that any more stringent standard of proof, especially at the summary judgment stage, would result in an unreasonable burden on the city.[121] This is not to say the city can "get away with shoddy data or reasoning;" on the contrary, "[t]he municipality's evidence must fairly support the municipality's rationale for its ordinance."[122] Nevertheless, the plurality opinion left the Court's secondary effects jurisprudence untouched.

In dissent, Justice Souter expressed his concern that the evidentiary thresholds set out by the plurality would permit cities to engage in "covert content-based regulation."[123] He echoed the Ninth Circuit's view that the 1977 study was inapposite because it showed only the effects of concentrations of adult establishments, not the effects of concentrations of adult business operations.[124] Justice Souter emphasized that the 1983 amendment to the zoning scheme at issue moved "[f]rom a policy of dispersing adult establishments" to "a policy of dividing them in two,"[125] which would be substantially more burdensome and

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119. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 436 (2002) (plurality opinion).

120. *Id*.

121. *Id*. at 437 ("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.").

122. *Id*. at 438.

123. *Id*. at 466 (Souter, J., dissenting).

124. *Id*. at 462 ("The Los Angeles study treats such combined stores as one . . . and draws no general conclusion that individual stores spread apart from other adult establishments (as under the basic Los Angeles ordinance) are associated with any degree of criminal activity above the general norm . . . .").

125. *Id*. at 454.

in all likelihood result in the closure, rather than the removal to another part of the city, of either the arcades or the bookstores.

In the first section of his opinion, joined only by Justices Stevens and Ginsburg, but not Justice Breyer,[126] Justice Souter questioned whether the analytical framework governing these cases ought to be revised. He noted that First Amendment cases garnering intermediate scrutiny were "spoken of as content neutral" but that cases such as this "rais[e] a risk of content-based restriction."[127] He cautioned against equating cases involving this risk of content-based restriction with pure time, place, and manner restrictions, also analyzed under intermediate scrutiny, because in those comparatively harmless cases "[n]o one has to disagree with any message to find something wrong with a loudspeaker at three in the morning."[128] Such a conflation would elide an important distinction: "A restriction on loudspeakers has no obvious relationship to the substance of what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does."[129] It may be true that the regulating jurisdiction is concerned only with the secondary effects and not the underlying message, but the restriction applies only if the expressive products have adult content.[130] These cases thus occupy a "limbo" between content-based restrictions and content-neutral restrictions.[131] Justice Souter stated he would prefer to abandon the fiction that these restrictions are actually neutral with regard to content, and instead call them "content correlated."[132] They should be allowed to stand only if "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 government to combat them . . . *without suppressing the expressive activity it-*

126. Justice Breyer also dissented, but joined only in the second part of the dissenting opinion dealing with the question of evidentiary sufficiency. See id. at 460–66.

127. *Id*. at 455.

128. *Id*. (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

129. *Id*. at 456–57.

130. *Id*. at 457.

131. *Id*.

132. *Id*.

self."[133] The capacity of zoning regulations to accomplish this diminishment of secondary effects without eliminating the speech is the only justification for treating them analogously to time, place and manner restrictions.[134] Empirical justification is essential, because "the weaker the demonstration of facts distinct from disapproval of the 'adult' viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation."[135] Justice Souter acknowledged that his approach would raise the evidentiary threshold, but thought it warranted.[136]

Justice Souter proceeded to attack the city's reliance on the 1977 study with the support of Justice Breyer and the other two dissenters. He argued, along the same lines as the Ninth Circuit, that the assumption that separating adult video arcades from adult bookstores would reduce secondary effects was "clearly unsupported."[137] The city assumed that more crime results from the combined adult enterprises than would be the case if the bookstore were located in one part of town and the video arcade in another.[138] Essentially, Justice Souter was unsatisfied that the 1977 study did not deal with the exact factual situation addressed by the regulation. He permitted no inferences to be drawn from the study. The plurality addressed this contention, replying that it would "raise the evidentiary bar that a municipality must pass,"[139] and noting that previous Supreme Court "cases require[d] only that municipalities rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address."[140] Justice Souter's test would also effectively have prohibited municipalities from trying new regulatory approaches, since any new approach would by definition not have been tried, and thus not studied.[141]

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133. *Id*. (emphasis added).
134. *Id*.
135. *Id*. at 458.
136. *See id*. at 459.
137. *Id*. at 461.
138. *See id*. at 462.
139. *Id*. at 441 (plurality opinion).
140. *Id*. at 442 (citing City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (plurality opinion)).
141. *See id*. at 439–40.

The plurality argued that Justice Souter's approach would constitute a subtle diminishment of the Court's secondary effects case law: "[Souter's] logic is that verifying that the ordinance actually reduces the secondary effects asserted would ensure that zoning regulations are not merely content-based regulations in disguise [but] . . . [w]e think this proposal unwise."[142] The plurality reasoned that municipalities are held to too high a standard if at summary judgment the city was required not only to show that it could reasonably rely on its findings that the regulation tends to reduce secondary effects, but also that its findings cannot conceivably be interpreted in any other way.[143] *Renton*, which Justice Souter had cited in *Barnes*, did not require such a burden.[144] Rather, the plurality thought the better approach would be to require the plaintiffs to cast doubt on the study, in which case the municipality may supplement its evidence to prove otherwise.[145] Justice Souter did not contradict these assertions; he insisted, as he did in *City of Erie*, that he had come to believe that a higher burden of proof was required in these cases to ensure that a municipality is truly targeting the secondary effects and not using them as a rationalization for targeting the content of the speech.[146]

Justice Kennedy's concurrence is perhaps the most notable opinion in the case. began with the proposition that secondary effects can be regulated if the city "uses its zoning power in a reasonable way to ameliorate them without suppressing speech."[147] Justice Kennedy concurred separately because he "agree[d] with the dissent that the [content-neutral] designation is imprecise" and secondly because he feared the plurality's view of *Renton*

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142. *Id*. at 441.

143. *See id.* at 438.

144. *See* Barnes v. Glen Theater, Inc., 501 U.S. 569, 571–72 (1991) (plurality opinion).

145. *See Alameda*, 535 U.S. at 439 (plurality opinion).

146. *See id*. at 459 (Souter, J., dissenting) ("The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us." (citing City of Erie v. Pap's A.M., 529 U.S. 277, 300–01 (2000) (plurality opinion); *id.* at 313 & n.2 (Souter, J., concurring in part and dissenting in part))).

147. *Id*. at 444 (Kennedy, J., concurring in the judgment).

"might constitute a subtle expansion."[148] The challenge in regulating secondary effects is to "leave the quantity and accessibility of the speech substantially undiminished,"[149] at least no more than trivially.[150] Justice Kennedy was comfortable with the idea that intermediate scrutiny would apply to zoning ordinances targeted at the secondary effects of adult speech, even though it might appear content-based, as long as neither the purpose nor the effect is to suppress the speech.[151]

How might a city reduce secondary effects of speech without reducing the amount of speech at all? Following the logic of his premises, Justice Kennedy posited the existence of a factual situation in which simply separating the businesses geographically, without causing any to close, reduces the secondary effects associated with them. He hypothesized a circumstance in which there is an amplifying effect of adult businesses being near one another that causes the associated crime to increase more than proportionally. All of this required a theoretical "economics of vice,"[152] in which there exists the verifiable possibility that each adult business produces more secondary effects when located near other such establishments than any would alone.[153] This resolved the evidentiary question: since the appeal arose from a motion for summary judgment, Justice Kennedy considered that it is possible for the city to show that the "economics of vice" are such that its measure will in fact reduce secondary effects in this way, without burdening speech, since "[a]t least in theory," all the businesses would still exist and would not experience diminished patronage.[154] He went so far as to use a numerical example to prove the point.[155] If the city could factually demonstrate that such circumstances exist, it would prevail; thus, summary judgment against it was not warranted.

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148. *Id*. at 444–45.

149. *Id*. at 445.

150. *Id*.

151. *See id*. at 447, 449.

152. *Id*. at 452.

153. *Id*. at 449 ("A city may not assert that it will reduce secondary effects by reducing speech in the same proportion.").

154. *Id*. at 445–46.

155. *See id*. at 452.

Finally, Justice Scalia wrote a brief concurrence reiterating his view that regulations of this type are permissible, and noting that he joined the plurality opinion because he considered the plurality opinion "a correct application of [the Court's] jurisprudence concerning regulation of the 'secondary effects' of pornographic speech."[156]

III. ON HOW PUBLIC MORALITY AND SECONDARY EFFECTS GO HAND IN HAND

A. Justice Souter's Evolving Perspective

As discussed above, Justice Souter's about-turn—from extending the secondary effects doctrine to expressive conduct cases, to retrenching by advocating for its alteration and effective sterilization via evidentiary bars—is a remarkable development in this area of the law. Though his intentions are of course unknown to us, on the basis of his opinions it appears that Justice Souter was uncomfortable with public morality as a basis for restriction of First Amendment freedoms. His replacement of public morality with secondary effects in *Barnes* can be seen as an effort to avoid delving into moral judgments, the assumption being that such judgments are personal and subjective, and thus not amenable to either legislative or judicial involvement.[157] However, Justice Souter appeared not to object to the idea that adult establishments can be regulated to a degree, perhaps because conventional wisdom holds that, at least on some level, they are not good for society. Yet he appeared to cringe at the thought of the Court allowing legisla-

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156. *Id*. at 443 (Scalia, J., concurring).

157. Of course, Justice Souter does not explicitly reject moral justifications in his concurring opinion, though he does conspicuously avoid them. *See* Barnes v. Glen Theaters, Inc., 501 U.S. 569, 582 (1991) (Souter, J., concurring in the judgment) ("I nonetheless write separately to rest my concurrence in the judgment, not on the *possible sufficiency* of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects."(emphasis added)). *But see* Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611 (1992). Blasi is unequivocal in his assessment of Justice Souter's motives, contending that Justice Souter "could not accept Chief Justice Rehnquist's proposition that the state's interest in the enforcement of morality can serve as a justification for restricting activities that enjoy First Amendment protection." *Id.* at 652.

tures to make such determinations arbitrarily—after all, especially in the First Amendment context, this might smack of censorship. Secondary effects, empirically measurable by such seemingly objective criteria as crime statistics and property values, would seem the perfect compromise in the search for the required substantial governmental interest. Such data would appear to modern sensibilities as more objective and independently verifiable than any conception of morality, which might differ from person to person. Justice Souter thus attempted to split the baby and let each side have its way by applying *Renton* to the regulation of expressive conduct.

When the *City of Erie* plurality tried take him up on this endeavor, however, Justice Souter reneged—even though *City of Erie*'s public nudity ordinance was nearly identical to the one Justice Souter himself had voted to uphold in *Barnes*. If the purpose of the secondary effects doctrine was to permit regulation of adult enterprises without recourse to moral judgments, then empirical data must be presented to verify the regulators' claims. Otherwise, a government could pass legislation aimed at censoring disfavored conduct or speech and simply invoke secondary effects as a cover.[158] Nothing would have been achieved; states would still be permitted to legislate morality. This possibility has been pointed out by both defenders[159] and critics[160] of the secondary effects test. Justice Souter recognized

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158. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 311 (2000) (Souter, J., concurring in part and dissenting in part) ("[A]pplication of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue."); *see also* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 465–66 (2002) (Souter, J., dissenting) (noting that the evidentiary support for the city's regulation was "a very far cry from any assurance against covert content-based regulation" and that the law "sound[ed] . . . like a policy of content-based regulation").

159. *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1307–08 (2004) (claiming that "the empirical support requirement may not provide a meaningful constraint" since defenders of such laws can always make "highly speculative arguments about factual harms and thereby render the empirical grounding requirement useless").

160. *See* Hill, *supra* note 42, at 62 ("[T]he quasi-Millian interpretation [of objective harm] does not go far enough because it opens the door to constitutional legitimacy whenever the state can adduce some putative empirical interest in limiting a behavior.").

in retrospect, however, that *Renton* did not provide for a higher evidentiary burden that would ensure objectivity, and that the progress he had hoped to make in *Barnes* towards pure objectivity would thus be thwarted. He dismissed his suggestions to the contrary in his concurrence in *Barnes* as oversight, attributing his "lapse" to "'[i]gnorance, sir, ignorance.'"[161] Now, he said, evidence of secondary effects "must be a matter of demonstrated fact, not speculative supposition;"[162] else, he seemed to suppose, we will have made no progress out of the realm of subjectivity and morality. Justice Souter did not, however, make any attempt to revise the secondary effects doctrine in *City of Erie*. He still had not confronted the question of whether in fact secondary effects actually can be reduced without simultaneously reducing protected activity, but cracks in the edifice had begun to form.

Finally, in *Alameda*, Justice Souter at last acknowledged the elephant in the room: that "[w]hile spoken of as content neutral, these [adult business zoning] regulations are not uniformly distinct from the content-based regulations calling for scrutiny that is strict."[163] Noting that time, place, and manner restrictions garner softer scrutiny precisely because they are unrelated to the affected content and do not diminish it, Justice Souter drew a distinction between an uncontroversial time, place, and manner restriction regulating noise[164] and a zoning ordinance applicable only to adult businesses.[165] His new category for this type of regulation, "content correlated," would address this problem;[166] indeed, it would elide the "fiction"[167]

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161. *City of Erie*, 529 U.S. at 316 (quoting McGrath v. Kristensen, 340 U.S. 162, 178 (1950) (Jackson, J., concurring)).

162. *Id*. at 314.

163. *Alameda*, 535 U.S. at 455 (Souter, J., dissenting).

164. *See id*. (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

165. *See id*. at 456–57 ("A restriction on loudspeakers has no obvious relationship to the substance of what is broadcast, while a zoning regulation of businesses in adult expression just as obviously does.").

166. *Id*. at 457.

167. *Id*. at 448 (Kennedy, J., concurring in the judgment) ("[T]he Court designated the restriction 'content neutral' . . . . The Court appeared to recognize, however, that the designation was something of a fiction, which, perhaps, is why it kept the phrase in quotes. After all, whether a statute is content neutral or content

that these types of restrictions do not seek to regulate secondary effects by actually targeting the primary conduct. However, the new test he created bears a striking similarity to strict scrutiny: requiring a regulating jurisdiction to factually prove that its restriction addresses the secondary problems without at all restricting speech looks a lot more like the "least restrictive means" requirement of strict scrutiny review than the "narrowly tailored" bar of intermediate scrutiny. In essence, this is an acknowledgement that the restrictions at issue in these cases burden the speech based on content.

B. Can a Reduction in Secondary Effects Be Achieved Without Reducing Protected Activity?

Justice Souter was not the only one to perceive that the reduction in the underlying speech was necessary to produce any diminishment of secondary effects. Justice White had originally voiced this concern in *Barnes*: "The attainment of these goals . . . depends on preventing an expressive activity."[168] Similarly (but from a different perspective and while relying on the public morality rationale), Justice Scalia expressed a great deal of skepticism in *City of Erie* that any meaningful secondary effects would be ameliorated by requiring erotic dancers to wear clothing as minimal as the statute provided.[169] A *de minimis* regulation of the conduct (though permissible) would only be expected to have a *de minimis* effect on crime, intoxication, prostitution, and the like—with the logical implication being that a greater restriction (presumably also permissible in his view) would have a more significant effect. Even the plurality in *City of Erie* admitted that "[t]o be sure, requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects"[170]—another tacit acknowledgement that greater reductions in secondary effects would presumably require greater intrusions on the primary conduct. The dissenters in

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based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.").

168. Barnes v. Glen Theaters, Inc., 501 U.S. 569, 591 (1991) (White, J., dissenting).

169. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., concurring in the judgment).

170. *Id*. at 301 (plurality opinion).

City of Erie, referring to the plurality's misgivings as "an enormous understatement," responded in no uncertain terms that "[t]o believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."[171] From their perspective, however, this was only of tertiary importance; the problem at the outset was that erotic messages were suppressed to any degree.

In *Alameda*, Justice Kennedy recognized these contradictions and tried to resolve them by positing that if secondary effects could be reduced at no cost to the underlying speech, then regulations targeting them could be countenanced. He too acknowledged that the content-neutral designation as applied to zoning regulations focused on adult establishments is "something of a fiction."[172] After all, in the case of a specialized zoning regime applicable only to adult businesses, content neutrality is quite a stretch. He illustrated the only possible reconciliation of Justice Souter's concerns by resort to his "economics of vice" thought experiment. If there exists some sort of (empirically verifiable) feedback effect whereby the secondary effects caused by two adult businesses in close proximity exceed the aggregate effects produced by each when geographically separated, then a regulation could simultaneously reduce the effects without reducing the activities of the establishments. In this circumstance, the "fiction" could be tolerated because overall level of speech would not be affected.

Though Justice Kennedy's opinion in *Alameda* deals only with the zoning regulations, the underlying tension he describes exists in *City of Erie* as well. In *City of Erie*, each opinion acknowledged that any reduction of secondary effects achieved by requiring dancers to wear pasties and G-strings would be minimal. The plurality considered this immaterial; the suppression of secondary effects was a valid purpose, and the extent to which the city chose to (or was able to) reduce them is none of the Court's business.[173] In any event, the infringement

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

172. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment).

173. *See City of Erie*, 529 U.S. at 301 (plurality opinion).

on speech was also *de minimis*.[174] The dissent was unconvinced that any substantial reduction of secondary effects could be achieved without a much greater intrusion into protected speech, and used this fact as evidence that secondary effects can only be ameliorated at the expense of speech.[175] Thus, in both *City of Erie* and *Alameda*, all of the Justices implicitly acknowledged that secondary effects can only be reduced in proportion to the suppression of speech producing the effects. Justice Kennedy's hypothesis about the "economics of vice" is the only circumstance in which this would not be the case.[176] In *Alameda*, Justice Souter stated he would require direct and unambiguous proof of such a factual circumstance at the outset of the case;[177] in contrast, Justice Kennedy was willing to send the case back to the district court to allow the parties to produce additional evidence at trial.[178] But the fact remains that, under this proposed framework, the regulation will only be sustained in the improbable event that Justice Kennedy's "economics of vice" is proven to be a factual reality.

The Justices recognized, then, that it is implausible that secondary effects can be reduced without concomitant restrictions on the activity ultimately responsible for the secondary effects. The First Amendment context illuminates this point, insofar as the doctrinal muddle resulting from attempting to treat content-based regulations as content-neutral forced the Justices to consider the relationship between purportedly immoral conduct and its secondary effects. We begin to see an equivalence between secondary effects and public morality. If allegedly immoral conduct is actually wrong, that is, not conducive to human flourishing, then it is no surprise that secondary evils surround it. It follows that the attendant ills would be reduced in proportion to the reduction in the immoral activity causing them. A slight restriction on public nudity as in *Barnes* and *City of Erie* might result in a slight reduction in secondary effects;

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174. *Id.*
175. *See id.* at 323–24 (Stevens, J., dissenting).
176. *Alameda*, 535 U.S. at 452 (Kennedy, J., concurring in the judgment).
177. *Id.* at 457 (Souter, J., dissenting).
178. *Id.* at 453 (Kennedy, J., concurring in the judgment).

presumably, banning the conduct would eliminate associated secondary effects entirely.[179] If the conduct in question is to be left completely intact, as Justices Kennedy, Souter, Stevens, Breyer and Ginsburg insisted, then there must be some more-than-proportional relationship between the vice and the effects sought to be thwarted. It requires an "economics of vice"—a super-proportional relationship between the activity when conducted in a certain fashion, as Justice Kennedy theorized, that dictates that secondary effects can almost miraculously disappear without any reduction in the underlying conduct. If this is plausible to a limited extent, it is the exception that proves the rule that secondary effects and public morality are intimately intertwined.

IV. IS THERE A DIFFERENCE BETWEEN PUBLIC MORALITY AND SECONDARY EFFECTS?

It appears that *Barnes v. Glen Theatre, Inc.*, decided in 1991, was the last case in which the Supreme Court—or rather a plurality of three Justices plus Justice Scalia—explicitly relied on the public morality element of the police power to uphold a law.[180] But it does not really matter if the legislative interest is described by the Court in terms of public morality, as the plurality and Justice Scalia described it in *Barnes*, or without terminological reference to public morality but rather using instead the term public welfare, as a virtually identical plurality described the interest in *City of Erie* when it accepted to apply

179. There of course may be policy reasons against banning a given conduct altogether. Thomas Aquinas's dictum may happen to be on point regarding some conducts: it is not the purpose of the law to suppress all immoralities but only the most grievous ones. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE part II-I, quest. 96, art. 2, at 2321–23 (Benzinger Bros. 1947) (1265–74). But this is a different question from the one we address in the text, namely the relationship between the extent of the suppression of the conduct and the extent of the amelioration of its negative secondary effects.

180. In 1996 Justice Stevens, writing for a plurality, made a passing reference to the public morality rationale while stating that "[a]lmost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514 (1996). Five years later Justice Thomas reiterated this idea in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 589–90 (2001) (Thomas, J., concurring in part and concurring in the judgment).

the secondary effects framework that had been advanced by Justice Souter concurring in *Barnes*. It is not the names that matter but the actual reality of the regulations and the reasoning at issue.[181] The *Barnes* and *City of Erie* pluralities' reasoning clearly refer to the same thing even though only the former uses the term public morality. Professor Cicchino, on the contrary, notes the different wording in the two cases and attempts to make much of it, concluding that secondary effects, while relevant for public welfare, are unrelated to public morality.[182] By so doing he "completely reads 'public morals' out of the states' police power."[183] But whenever secondary effects are at stake, the public morality argument is unavoidable regardless of the terminology chosen by the several Justices.

Even when Justice Souter introduced secondary effects in *Barnes*—perhaps, as we said, in order to avoid the concept of public morality[184]—he referred to the "State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments."[185] He was not referring to just any effects out there but some that deserved to be legitimately "combated" by the State.[186] Likewise,

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181. What matters is whether public morality has been upheld under whatever name. *Cf.* Santiago Legarre, *Towards a New Justificatory Theory of Comparative Constitutional Law*, 1 STRATHMORE L.J. 90, 109 (2015) (making a similar argument concerning the defense of natural law under whatever name).

182. Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify As Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 170 (1998) (holding that Justice Souter's secondary effects are the kinds of empirical effects on the public welfare to which public morality arguments are unrelated). Wolfe too notes the difference between Justice Souter's terminology and that of the plurality in *Barnes* but he correctly does not draw Cicchino's inferences. Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 74 (2000).

183. Christopher J. Gawley, *A Requiem for Morality: A Response to Peter M. Cicchino*, 30 CAP. U. L. REV. 711, 718 (2002).

184. We reiterate that we are tentative ("perhaps") because it is not clear that this was Justice Souter's intention. See *supra* note 146.

185. Barnes v. Glen Theaters, Inc., 501 U.S. 569, 582 (1991) (Souter, J., concurring in the judgment).

186. Justice Souter's argument in *Alameda* that empirical justification is essential, because "[t]he weaker the demonstration of facts distinct from disapproval of the 'adult' viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation" does not detract from the argument in the text. City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 458 (2002) (Souter, J., dis-

when in *City of Erie* the plurality embraced Justice Souter's test, it clearly referred to "deleterious effects caused by the presence of such an establishment in the neighborhood"[187] and to "harmful secondary effects."[188] "Deleterious" and "harmful" are synonymous, and they mean "damaging." Of course, "damaging," applied in the secondary effects contexts associated with adult establishments, does not mean, for the most part, *physically* damaging. As recalled by the plurality in *City of Erie*, the city council had stated in the preamble to Erie's ordinance that it had adopted the regulation to try to limit an atmosphere conducive to public intoxication and prostitution, among other deleterious effects.[189] These secondary effects were selected, among others, by the city (and accepted by the Justices) as relevant for the purposes of justifying a restriction of the conduct at stake. They were not just any effects; they were, clearly, morally relevant: intoxication and prostitution—*ex hypothesi* conduct by consenting adults—are morally problematic regardless of what the law might say about them at a given time and place. None of which, we insist, is by chance: if what is at stake (nude dancing) is purportedly immoral conduct, then it comes as no surprise that evils will surround it.

There is, therefore, a complementarity between the secondary effects test and the public morality rationale.[190] Indeed, they

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senting). For purposes of defining deleterious effects deserving to be combated, empirical analysis is necessary but insufficient.

187. City of Erie v. Pap's A.M., 529 U.S. 277, 293 (2000) (plurality opinion).

188. *Id*.

189. *Id.* at 290.

190. Professor Goldberg accepts that when "a morals rationale for government action is relied on together with a government interest in reducing harms or increasing benefits that are material or otherwise observable," there is a "composite" morals-based justification for lawmaking. Goldberg, *supra* note 159, at 1245. In such cases "the concern with morality does not stand alone but instead appears coupled with other grounds for the exercise of government power." *Id.* If, however, the inseparability thesis defended in this article is true there shall always be a "composite" justification for such lawmaking, *pace* Goldberg who separates excessively public morality and secondary effects while positing that there are pure morals-based justifications for lawmaking. *Id.* at 1244–45. She indeed detaches herself from the (correct, in our opinion) view of others that "may find [her] proposal impractical because they see moral judgments as so fundamentally intertwined with the most concrete—and practical—seeming harms so as to render empirical and morals rationales analytically indistinguishable." *Id.* at 1310–11.

are inseparable.[191] If the test was initially extended beyond the zoning context by Justice Souter in order to replace public morality, that effort was destined to fail. Public morality serves to identify which secondary effects are relevant for purposes of restricting rights. The attempts by scholars such as Professor Cicchino[192] to draw a stark contrast between "bare assertions of morality" and "public welfare" arguments—or, in the case of Professor Goldberg, between "pure" and "composite" morals-based justifications[193]—are similarly destined to fail. Cicchino says that public morality arguments are "unrelated" to any empirical effects on the public welfare[194] and that they "defend a law by asserting a legitimate government interest in prohibiting or encouraging certain human behavior without any empirical connection to goods *other than* the alleged good of eliminating or increasing, as the case may be, the behavior at issue."[195] But neither proposition is true except by Cicchino's arbitrary stipulation. Laws based on morality do in fact seek to protect against societal harm, but such harms may not always be particularized or perceptible to the degree required by Cicchino and others whose views ultimately emulate in one way or another John Stuart Mill's harm principle.[196] Public morality arguments are, in sum, not only compatible with secondary ef-

191. Gawley, *supra* note 183, at 714 n.13.

192. Cicchino, *supra* note 182, at 140–41.

193. Goldberg, *supra* note 159, at 1244–45.

194. Cicchino, *supra* note 182, at 170.

195. *Id.* at 140.

196. *See generally* JOHN STUART MILL, ON LIBERTY (1860). While implicitly resisting the notion that Mill's philosophy is ingrained in the United States constitution, Justice Scalia notably argued in Barnes that "there is no basis for thinking that our society has ever shared that Thoreauvian 'you may do what you like so long as it does not injure someone else' beau ideal—much less for thinking that it was written into the Constitution." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574–75 (1991) (Scalia, J., concurring in the judgment). The historic presence of public morality as one of the goods to be promoted by the police power testifies to this reality. As Professor William J. Novak writes regarding public morality, "[o]f all the contests over public power in that period, [the nineteenth century] morals regulation was the easy case." WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 149 (1996). The police power endures today in legislation that resorts to secondary effects considerations for similar purposes, like for instance the ordinance upheld in the *City of Erie* case. Likewise, other branches of the law typically go well beyond the harm principle, such as the regulation of the environment, the law of nuisance, and the police power for the promotion of public health.

fects arguments; the latter complement the former insofar as they intend to provide the alluded "empirical connection."

Why, then, the apparent demise of public morality as a rationale in this context? Why the attempt by Cicchino, and others,[197] to read public morals out of the states' police power?[198] In our view the rejection of public morality is in part due to a poor conceptualization of it in Supreme Court case law, especially in *Bowers v. Hardwick*.[199] In *Bowers* public morals were reduced to

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197. *See, e.g.*, Goldberg, *supra* note 159, at 1236 (claiming that "mere reference[s] to morality should not suffice as . . . justification[s] for lawmaking" and that instead, the proponent of a law must point to "demonstrable facts" showing some harm); Steven G. Gey, *Is Moral Relativism A Constitutional Command?*, 70 IND. L.J. 331, 331 (1995) (stating that "[i]n order to pass muster under the Constitution, government policy must be premised primarily on some rationale other than morality, such as preventing a specifically identified harm to one individual by another").

198. It must be said that public morality is an elusive concept, difficult to define. What Freund said of the police power (a much related concept, as we know) is also true of the idea of public morality: "The term police power, while in constant use and indispensable in the vocabulary of American constitutional law, has remained without authoritative or generally accepted definition." FREUND, *supra* note 42, at iii.

We haste to make clear that in spite of the inherent elusiveness of the concept at stake the American legal system is, we think, better off with the category "public morality." We find persuasive Professor John Finnis's answer to the question "why not say that the exercise of rights is to be limited only by respect for the rights of others?" Even if he is commenting on a different legal system (the one governed by the European Convention on Human Rights and Fundamental Freedoms, where "public morality" also features) his response is on point. *See* Santiago Legarre, *The use of the term "(Public) Morality" in the European Convention on Human Rights: a Brief History*, *in* INTERNATIONAL LAW IN THE POST-COLD WAR WORLD 268 (Sienho Yee & Wang Tieya eds., 2001). Rather than accepting the Millian challenge implied in the question Finnis suggests that "although it would be possible, given the logical reach of rights-talk, to express *any* desired restriction on rights in terms of other rights" the public morality rationale is "neither conceptually redundant nor substantively unreasonable." He goes on to explain that there is reason for referring to it specifically because public morality is a "diffuse common benefit[] in which all participate in indistinguishable and unassaignable shares." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 216 (2d ed. 2011). It is true of public morality what is true more generally of the common good: rights terminology is bound to impoverish its richness. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

199. 478 U.S. 186, 196 (1986). Justice Scalia embraced a concept of public morality similar to the one in *Bowers* in his dissent in *Lawrence*. *See* Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (affirming the "impossibility of distinguishing homosexuality from other traditional "morals' offenses").

their subjective, majoritarian dimension: whatever a majority of the people or of a legislature considers immoral is immoral for purposes of public morality. So the presumed belief of a majority of the electorate in Georgia that sodomy is immoral and unacceptable was held in that case enough of a rational basis for the relevant law.[200] This equation of public morals to merely traditional or conventional morality is dangerous (and the object of valid criticism)[201] insofar as it potentially enables disastrous moral choices to deserve the label of "public morality."[202] Professor Robert P. George is correct when he affirms that the "genuine immorality of the act it prohibits is . . . a necessary (though not a sufficient) condition for the legitimacy of a morals law. Sometimes prejudice really does masquerade as moral judgment; and majorities have no right to enact their mere prejudices into law."[203] History confirms of course that traditions and majorities can and have at times been capricious, and this is a danger that ought not be overlooked. Traditional or majoritarian judgments ought to be properly under the scrutiny of reason.

When *Bowers* was overruled in *Lawrence v. Texas*,[204] Justice Scalia, dissenting, famously prophesized the demise of public morality:

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200. *See Bowers*, 478 U.S. at 196.

201. For example, Goldberg rightly claims that "if the Court accepts a morals-based justification out of respect for majoritarian views, it cannot ensure against the majority's misuse of morality as a benign cover for arbitrary or invidious aims." Goldberg, *supra* note 159, at 1237.

202. This is not to say tradition does not have a valid and useful place in constitutional law and American jurisprudence generally. Appeals to tradition can help to identify rules and customs that are the product of the collected, time-tested wisdom of the ages, often the incompletely articulated and imperfectly understood result of centuries of experience and trial and error, and often a useful practical counterpoint to rationalistic deductive moral reasoning that is prone to error. *See generally* FREDRICK A. HAYEK, LAW, LEGISLATION, AND LIBERTY: RULES AND ORDER (1973). In addition, tradition can have legal significance when it is relevant in determining the semantic content of ancient legal texts such as constitutions. In that case, tradition can serve to delineate the permissible constructions of a constitutional provision by helping to clarify contemporaneous understandings of the text. An example particularly relevant to the present discussion is the longstanding obscenity exception to the First Amendment. *See supra* notes 4–18 and accompanying text.

203. ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY, at x (1993).

204. 593 U.S. 558 (2003).

> We ourselves relied extensively on *Bowers* when we concluded, in *Barnes v. Glen Theatre, Inc.* that Indiana's public indecency statute furthered "a substantial government interest in protecting order and morality." State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision.[205]

But one can abandon *Bowers*'s holding that a certain sodomy law is constitutional (as *Lawrence* did) without simultaneously abandoning *Bowers*'s dictum that "the law is constantly based on notions of morality," which is unobjectionable and is indeed the crux of the public morality rationale.[206] We agree with Professor Hill that *Lawrence* does not preclude future morals legislation based on assertions of societal harm.[207] At the same time one can reconfigure *Bowers*'s description of morality so that it is not reduced to its subjective, majoritarian, traditional dimension. For the notion of public morality to be enriched it ought to be complemented by an objective dimension, an appeal to reason and truth. For something to be within the domain of public morality—and, conversely, for something to be considered publicly immoral—it ought to be susceptible of reasoning in public. We must be able to argue: "For reasons X and Y, such conduct immorally impacts the public domain, the life of the community." Of course, such reasoning may at times be faulty or indeed fail. But failure presupposes a standard according to

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205. *Id.* at 590 (Scalia, J., dissenting) (quoting Barnes v. Glen Theater, Inc., 501 U.S. 560, 569 (1991) (plurality opinion); *id.* at 575 (Scalia, J., concurring in the judgment)) (citations omitted).

206. That "the law is constantly based on notions of morality" is, more generally, the crux of natural law theory. As such that proposition states a general idea and is totally independent from the context in which it was proclaimed in *Bowers*. For an explication of the theory, see FINNIS, *supra* note 188, at 281–90; Santiago Legarre, *Derivation of Positive from Natural Law Revisited*, 57 AM. J. JURIS. 103 (2012). Within a position apparently at odds with "natural law," Goldberg accepts the "unavoidable presence of moral judgments in lawmaking." Goldberg, *supra* note 159, at 1304.

207. *See* Hill, *supra* note 42, at 6 (finding that *Lawrence v. Texas* is a "sober, coherent, but limited, restriction on the power of the state to foster, express, and reinforce public morality").

which certain reasoning has failed; it presupposes truth and falsehood in practical, moral discourse.

That certain conduct was traditionally considered immoral or that it was disapproved by a majority are relevant considerations only when those judgments (traditional or majoritarian) come afterwards, so to speak: because such conduct *is* immoral we have considered it immoral.[208] Which, by the way, does not entail the conclusion that we ought to consider it illegal too: it is not the purpose of the law to suppress all immoralities but only the most grievous ones.[209] We are not advocating here for (or against) the prohibition of nude dancing (or of any other particular conduct for that matter).

Insofar as the rise of the secondary effects test is perceived to evidence a general trend away from reliance on appeals to public morality, we ought to bring back to the conversation our previous conclusion: that substitution was bound to fail. The test cannot work without a concept of public morality. Thus, Justice Scalia's claim in his dissent in *Lawrence* that the decision would be the end of morals legislation is not literally true so long as the secondary effects test remains viable.

V. CONCLUSION

We have attempted in this Article to analyze and explain a remarkable development in a small subset of the Court's First Amendment jurisprudence: the substitution of public morality as a legitimate basis for legislation with appeals to purportedly empirically observable harms. However, as we have seen, this experiment is doomed to failure. The criteria by which we judge secondary effects to be deleterious are in the end the

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208. Our view is therefore compatible with the idea that tradition can serve as a valid basis for upholding laws under the police power; the status of a tradition as a longstanding practice in our community can legitimately give weight, even if not conclusive weight, to the argument that it is and should be protected by our law. It operates like a sort of presumption. For example, in the case of interracial marriage (which was traditionally prohibited in our society) the moral arguments against it were clearly strong enough to overcome the presumption of legitimacy bestowed by tradition in that case.

209. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

same moral arguments once used to uphold legislation on their own. The appeal to secondary effects has done little more than impose a statistical data requirement on authorities seeking to regulate in the interest of public morality. Yet this appeal to empiricism wrongly assumes that reliance on public morality alone has been devoid of recourse to experience, which is not a fair characterization. This realization, too, is apparent in the Supreme Court's secondary effects cases, and has led members of the Court to insist on more and more stringent evidentiary burdens on regulators. We hope we have shown these worries to be unfounded, because the very same moral criteria underlie public morality and secondary effects. We hope too that this Article may help open a path by which to explore other potential applications of the secondary effects test. If our argument is correct, one could indeed try to analyze other situations in which public morality is at stake, such as the regulation of gambling and of marijuana, for example, in terms of secondary effects—knowing now that secondary effects will only make sense if one resorts to public morality, under whatever name.