UIC Law Review

Volume 35 | Issue 2 Article 3

Winter 2002

Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine, 35 J. Marshall L. Rev. 189 (2002)

Brandon K. Lemley

EFFECTUATING CENSORSHIP: CIVIC REPUBLICANISM AND THE SECONDARY EFFECTS DOCTRINE

BRANDON K. LEMLEY*

INTRODUCTION

In 1919, Justice Holmes wrote of free speech that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]"[1]

The First Amendment[2] stands as both a hallmark and fountainhead of American independence.[3] It encourages the open flow of ideas by limiting government intrusion on both speech and expressive conduct.[4] Underlying the First Amendment is the

---

* Law clerk to United States Magistrate Judge Roger B. Cosbey for the Northern District of Indiana.

1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

3. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.) (characterizing the First Amendment as "the matrix, the indispensable condition, of nearly every other form of freedom"); Roth v. United States, 354 U.S. 476, 484 (1957) (characterizing First Amendment protections as existing to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Douglas, J., dissenting) stating:

> When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world);

Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (stating that the "freedom of speech . . . secured by the First Amendment . . . [is] among the fundamental personal rights and liberties which are secured to all persons").

4. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (striking a regulation prohibiting the display of a symbol one knows arouses anger, alarm, or resentment as facially invalid proscription of free expression); Cantwell v. Connecticut, 310 U.S. 296, 308-11 (1940) (maintaining that even

philosophy that the individual is the "keeper of his tastes, beliefs, and ideas."[5] However, time, technology, and culture have greatly expanded the scope of free speech, leaving many wondering whether free speech has gone too far. In a marketplace of ideas, are there some ideological products which are simply unfit for mental "consumption"?

Many critical First Amendment scholars maintain that free speech jurisprudence must, and is, shifting to meet a "realistic view of what free speech can do."[6] Civic republican theorists,[7] in

---

where the state has the ability to regulate speech, it must not "unduly" infringe the protected freedom); Texas v. Johnson, 491 U.S. 397, 406 (1989) (striking a Texas statute criminalizing desecration of the flag as a content-based prohibition on free expression).

5. *Paris Adult Theatre I*, 413 U.S. at 73 (Douglas, J. dissenting).

6. Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 170 (1994). Delgado argues that a "formalistic" theory of free speech, which "view[s] . . . speech as a near-perfect instrument for testing ideas and promoting social progress[,]" has undergone a transformation towards a new sense of First Amendment legal realism, which "looks to self and class interest, linguistic science, politics, and other tools of the realist approach to understand how expression functions in our political system." *Id.*

7. For the purposes of this Article, I use the terms "civic republican" and "republican" interchangeably. However, "republican" in no way connotes modern partisan government. Rather, civic republicanism is a strain of political theory in which "republican approaches [to governance] posit the existence of a common good, to be found at the conclusion of a well-functioning deliberative process." Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) [hereinafter Sunstein, *Beyond the Revival*]. Modern republican theory, in many ways, relies on classical republicanism as envisioned by the likes of Locke and Madison, where "[b]ehind this republican discourse is a tradition of political philosophy with roots in Aristotle's *Politics*, Cicero's *Res Publica*, Machiavelli, Harrington, Bolingbroke . . . . The pursuit of public good is privileged over private interests, and freedom means participation in civic life rather than protection of individual rights from interference." Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3, 4-5 (1988). This conception of government maintains that sovereignty belongs to "We the People" rather than the government itself. *See* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xvi (1993) [hereinafter SUNSTEIN, THE PROBLEM OF FREE SPEECH]. As such, the republican system of government creates a "'government by discussion,' in which outcomes would be reached through broad public deliberation." *Id.* Moreover, the republican political system "is characterized by a belief in universalism . . . in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue. The process of mediation is designed to produce substantively correct outcomes . . .." Sunstein, *Beyond the Revival*, *supra*, at 1554. In this way, modern notions of civic republicanism urge that "republican constitutional thought is not indissolubly tied to any . . . static, parochial, or coercive communitarianism; that, indeed, reconsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities, by inclusion of those who have been excluded, enhances everyone's political freedom." Frank Michelman, *Law's*

particular, maintain that the freedom of speech has expanded too far and currently safeguards much speech unworthy of constitutional protection.[8] In their progressive attempt to achieve the common good, civic republicans, like Cass Sunstein,[9] contend that a sort of "New Deal" is needed for free speech.[10] That is, just as Roosevelt's New Deal "self-consciously rejected the system of laissez-faire [economics and] . . . gave rise to an extensive national government, with a wide array of regulatory agencies displacing market arrangements,"[11] so too, Sunstein and civic republicans argue that government and private entities should displace the free market of speech with regulations designed to promote the common good. Under this theoretical framework, private and governmental restrictions on free speech are necessary to achieve

---

Republic, 97 YALE L.J. 1493, 1495 (1988).

8. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at xviii (stating that "[c]urrently American law protects much speech that ought not be protected").

9. Republican conceptions of politics and law vary greatly from one theorist to another. Sunstein, *Beyond the Revival*, *supra* note 7, at 1547; Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 210 n.51 (1996). However, this paper focuses ostensibly on Cass Sunstein, who is perhaps the most prominent civic republican theorist to have written extensively on the First Amendment. For discussions of the modern civic republican movement, see generally Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989); Michelman, *supra* note 7; Sunstein, *Beyond the Revival*, *supra* note 7. *But see generally* Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988); Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988); Richard A. Epstein, *Modern Republicanism—Or The Flight From Substance*, 97 YALE L.J. 1633 (criticizing Michelman and Sunstein's conception of republicanism); Richard H. Fallon, Jr., *What is Republicanism and Is It Worth Reviving*, 102 HARV. L. REV. 1695 (1989); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651 (1988); Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663 (1988); Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673 (1988); Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988); H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703 (1988); Suzanna Sherry, *Civic Virtue and The Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

10. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 28-29.

11. *Id.* at 29. Sunstein discusses the transformation in constitutional thinking that occurred during this period. He maintains that similar to the First Amendment's protection of speech, pre-New Deal constitutional theory viewed the Constitution as a shield to protect against governmental regulation of existing rights and entitlements. *Id.* It was for this reason that, prior to the New Deal, the Court invalidated minimum wage and maximum hour laws as unconstitutional takings from the employers for the benefit of the public at large. *Id.* (citing Adkins v. Children's Hospital, 261 U.S. 525 (1923) and Lochner v. New York, 198 U.S. 45 (1905)).

progressive cultural reform.

Similar to Sunstein's theoretical approach to censorship, the Supreme Court has created avenues for censorship that resonate with republican overtones. Although exceptions to the First Amendment's free speech guarantee have existed since its inception,[12] one current stand of free speech analysis, the secondary effects doctrine, has the potential to substantially censor expression. The secondary effects doctrine allows the government to enact legislation that ostensibly targets disfavored—but protected—speech where the purpose is to reduce the harmful non-speech antecedent effects that derive from certain types of speech.[13] While the secondary effects doctrine, in its inception, applied to zoning regulations for adult-use establishments like strip clubs and adult bookstores and theaters,[14] the application of the doctrine has progressively

12. Society, as well as the Supreme Court, has permitted limitations on the freedom of expression since the First Amendment's inclusion in the Bill of Rights. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (finding that the "right of free speech is not absolute at all times and under all circumstances"); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996) (Breyer, J.) (stating that the "government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech"); *Paris Adult Theatre I*, 413 U.S. at 61-66 (discussing the ability of government to restrict commercial, business, and associational speech); *R.A.V.*, 505 U.S. at 382-83 (noting that "[f]rom 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that expressive conduct may be narrowly regulated in pursuit of an important or substantial governmental interest that is unrelated to the content of expression). Notwithstanding, this Article ostensibly focuses on the continued validity of a broad—and expanding—application of the secondary effects doctrine.

13. The secondary effects doctrine, which will be discussed in depth below, is a method of First Amendment analysis that essentially reduces the severity of scrutiny with which the courts analyze a restriction where a purpose behind the regulation is to reduce negative secondary effects that can be associated with the speech. *See, e.g.*, David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 60 (1997). Thus, if the government justifies the speech restriction "without reference to the content of the regulated speech," then the courts will analyze a content-based restriction under the less stringent intermediate test for content neutrality. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986). The secondary effects rationale is most frequently used to regulate adult-use establishments like strip clubs, adult bookstores, and adult movie theaters. *See* Hudson, *supra* at 61 (noting that the secondary effects doctrine deeply impacts the free speech issues concerning adult material).

14. *See, e.g.,* Young v. American Mini Theatres, 427 U.S. 50, 72-73 (1976) (upholding a zoning ordinance prohibiting an adult movie theatre within 1000 feet of any other regulated use); *City of Renton v. Playtime Theatres*, 475 U.S. at 54 (upholding a statute that prohibited the operation of adult movie theatres within 1000 feet of residences, churches, parks, and schools based on

expanded. Indeed, decisions by the Supreme Court indicate a willingness to continue the doctrine's expansion and many lower courts have allowed for substantial displacement of a citizen's ability to engage in certain types of expression, be it symbolic or actual speech.

I posit that there is a fundamental nexus between Sunstein's civic republican thought and the secondary effects doctrine: what the former theorizes the latter effectuates. This Article takes the position that an expansion of republican thought in and through free speech theories, like the secondary effects doctrine, amounts to little more than governmental imposition of popular morality. Both threaten to censor vernacular and fringe forms of expression that garner the First Amendment's full protection from governmental impropriety. Civic republicanism and the secondary effects doctrine share a basic common denominator rooted in censorship. The government acts as the paternal censor, selectively shielding "the public from some kinds of speech on the ground that they are more offensive than others."[15]

Part I examines Cass Sunstein's civic republican approach to freedom of speech.[16] Part II offers an introduction into general free speech analysis and content discrimination specifically. Part III discusses the history of the secondary effects doctrine and its application to different areas of free speech analysis. Part IV asks whether either approach can successfully bring about a better society of governance.

I. CIVIC REPUBLICANISM AND FREE SPEECH

A. Conceptualizing Civic Republican Politics

Civic republican thought, as championed by Cass Sunstein, contends that the function of politics "is to select values . . . or to provide opportunities for preference formation rather than simply to implement existing desires."[17] That is, in the republican form of governance created by the United States Constitution, the government should do more than to simply appease parsimonious interest groups.[18] Instead, the republican political system should

---

the negative secondary effects—increased crime, prostitution—associated with such adult use establishments).

15. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (maintaining that when the government acts as censor, protecting the people from offensive expression, then the "First Amendment strictly limits its power").

16. I have devoted a substantial amount of space to the thought of Sunstein, which as a cognitive whole maintains a rational footing with a conception of the freedom of expression as conceived by the founding fathers, and particularly by James Madison.

17. Sunstein, *Beyond the Revival*, *supra* note 7, at 1545.

18. Sunstein asserts that under a pluralistic system of politics, "politics

strive to achieve a coherent common good through mediation and deliberation based on a "commitment to political empathy."[19] Political empathy, in turn, requires elected representatives to assume positions as both proponents and opponents, make concerted efforts to set value preferences, and then enact regulations based on those values.[20]

For Sunstein, this republican theory is firmly located in the ideals of James Madison.[21] The Madisonian conception of representation posits that civic virtue defines the very essence of citizenship. Thus, in the Virginia Ratifying Convention, Madison stated:

---

consists of a struggle among interest groups for scarce social resources. Laws are a kind of commodity, subject to forces of supply and demand." *Id.* at 1542. Instead of a system marked by self-serving infighting for market allocation, republican thought champions the "conception of individual autonomy as involving selection rather than implementation of ends, and the republican conception of political freedom, which prizes collective self-determination." *Id.* at 1548.

19. *Id.* at 1555. Sunstein maintains that in a pluralistic system marked by infighting among interest groups, the notion of the common good is both mystical and tyrannical. *Id.* at 1554. In contrast, the republican system arises out of practical reason in which compromise is necessary and the government must "attempt to select and pronounce values" that reflect a coherent commitment to all citizens. *Id.* at 1555.

20. *See id.* at 1555. However, Sunstein is careful to note that not every issue should be subject to the unitary public good. For example, he maintains that issues of religion should be entirely off limits to politics and political preference setting. *Id.* "The republican position is not that every issue is subject to political resolution; it is instead that some questions can yield general agreement[s] through deliberation." *Id.*

21. *See* Sunstein, *Beyond the Revival*, *supra* note 7, at 1558 (noting how Madison's thought differed from classical republican thought). The fundamental foundational tenet of Madison thought resides in Madison's definition of a republic. Madison defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961). Indeed, Sunstein proclaims his heavy reliance on Madison's thought in formulating his notion of civic republicanism. *But see* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1955-56 (1995) (reviewing CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993)). However, Balkin maintains that Sunstein's reliance on the ideas of James Madison could be better understood as a reliance on the thought of the American philosopher John Dewey. *Id.* at 1956. Balkin argues that Sunstein's emphasis on society's need to shape its preferences to serve public and democratic ends is more closely tied with the thought of Dewey than to James Madison. *Id.* In Dewey's thought, society's interest supercedes self-serving individual interests, resulting in individual conformity with societal interest because individualism and individual rights are social constructs designed to serve the larger societal interests. *Id.* Balkin suggests that while Dewey was one of America's greatest philosophers, he was neither a founding father nor did he pen the words of the First Amendment, as did Madison. *Id.*

> I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.[22]

Maintenance of the Madisonian, or originalist, conception of politics depends on representation of virtuous leaders elected by a virtuous populace.[23] Indeed, John Jay emphasized that the state legislatures should select "those men only who have become the most distinguished by their abilities and [their] virtue."[24] Today, these are the very men whose high degree of civic-mindedness allows them to supposedly operate above the pressures amassed by self-serving interest groups.[25] Consequently, the well-functioning, virtuous republican democracy determines that "some values are superior to others"[26] and then governs in the manner designed to effectuate those superior values.

B. Sunstein's Republican Approach to the First Amendment: The Case Against Free Speech

As applied to free speech, Sunstein argues that the current constitutional analysis threatens to undermine legitimate efforts to effectuate popular sovereignty.[27] For Sunstein, the problem with the First Amendment is that it protects too much speech that has "little or no connection with democratic aspirations and...produces serious social harm."[28] Critics of free speech

---

22. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 535-37 (1888).

23. *See* Sunstein, *Beyond the Revival*, *supra* note 7, at 1561 (noting that Madison maintained that the republican form of government called "for more virtue from the citizenry than any other form").

24. THE FEDERALIST NO. 64, at 391 (John Jay) (Clinton Rossiter ed. 1961).

25. *See* Sunstein, *Beyond the Revival*, *supra* note 7, at 1559 (discussing Madison's conception of representative government).

26. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985).

27. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at xviii. Sunstein maintains that society is now in the process of rethinking the existent structures of traditional democratic government; specifically he mentions "campaign finance regulation, broadcasting law, and the electoral process in general." *Id.* at xviii-xix. He further maintains that "[t]he First Amendment should not be an obstacle to this process of rethinking." *Id.* at xix.

28. *Id.* at xviii.

frequently note that, certainly, when the founding fathers first negotiated the Bill of Rights and the First Amendment, they did not envision the breadth or depth of its future application.[29] The founders did not foresee that freedom of speech would be heralded as a defense to sadistic pederasty,[30] obscenity,[31] hatred,[32] unabashed eroticism,[33] and other various embodiments of the immoral and illegal. However, Sunstein, unlike other critics, is willing to argue that the invocation of free speech, in seemingly innocuous areas—like television and radio broadcasting, campaign finance laws, rights and duties of newspapers, and governmental secrecy—threatens to undermine the very nature of democracy and the deliberative value of the First Amendment.[34]

1. *Deliberative Value of the First Amendment*

Sunstein conceptualizes the First Amendment's speech guarantee through a Madisonian lens focused on the "right of

29. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at xiv (noting that the founding fathers had a far narrower conception of free speech); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971) (arguing that the founding fathers only intended to protect political speech); Pnina Lahav, *The Chicago Conspiracy Trial: Character and Judicial Discretion*, 71 U. COLO. L. REV. 1327, 1344 (2000) (stating that "[c]ertainly, no one could claim that the founders, fathers of the Alien and Sedition Act of 1798, were models of an open mind"); Robert Peters, *"Marketplace of Ideas" or Anarchy: What Will Cyberspace Become?*, 51 MERCER L. REV. 910, 911 (2000) (asking whether the founding fathers would have granted First Amendment protection to the transmission of images of a woman masturbating over the Internet); Theresa J. Pulley Radwan, *How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 49 (1997) (noting that the framers of the Constitution likely envisioned limits on the right of free expression); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1165 n.25 (1982) (stating that "[t]here can be little doubt that whatever the framers intended, it was not absolutism").

30. For a discussion of the civil wrongful death action against the North American Man Boy Love Association ("NAMBLA") and NAMBLA's free speech defense, see generally Cheryl Wetzstein, *ACLU to Defend Boy-Sex Group; Lawsuit Stems from Homosexual Murder of 10-Year-Old*, WASH. TIMES, Sept. 1, 2000, at A3.

31. *See generally* Miller v. California, 413 U.S. 15 (1973) (discussing the standards used to identify "obscene" material and the antecedent scope of state regulation).

32. *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377, 379 (1992) (discussing free speech in the context of state hate crime statutes).

33. *See generally* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); Barnes v. Glenn Theatre, Inc., 501 U.S. 560 (1991); California v. LaRue, 409 U.S. 109 (1972); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1972); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (all discussing free speech with respect to adult entertainment establishments).

34. *See, e.g.*, SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 93-121.

freely examining public characters and measures, and of free communication among people[.]"[35] He explains that Madison "place[d] a high premium on political (not economic) equality and on the deliberative functions of politics."[36] That is, free expression highlights the struggle to understand a connection between the notions of popular sovereignty and free speech.[37] Sunstein argues that the First Amendment functions as the means through which society might achieve "a certain conception of democratic government, one that promotes political discussion."[38] Free speech ensures the exchange of meaningful discussion, and "its overriding goal is to allow judgments to emerge through general discussions and debates."[39]

Armed with his particularized view of the First Amendment as a political tool for attaining a deliberative democracy, Sunstein attacks popular conceptions of free speech. Indeed, Sunstein lays siege on Justice Holmes' open market conception of free speech contained in his dissenting opinion in *Abrams*.[40] Sunstein maintains that the central problem in Holmes' dissent is that the opinion evinces skepticism about understandings of truth, because truth is "defined by reference to what emerges through 'free trade in ideas.'" For Holmes, it seems to have no deeper status. The competition of the market is the governing conception of free speech."[41] Moreover, Sunstein argues that Holmes' writings

---

35. *Id.* at xvii. *See also* James Madison, *Report of 1800*, (Jan. 7, 1800), *in* PAPERS OF JAMES MADISON 341 (David Matern, et al., eds. 1991).

36. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at xvii.

37. *See* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 257 (1992) (discussing how rooting a conception of free speech in the principle of popular sovereignty demonstrates that current First Amendment analysis is off the mark).

38. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 27-28 (discussing Justice Brandeis' civic conception of speech).

39. Sunstein, *supra* note 37, at 314.

40. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 23-26 (discussing Justice Holmes' dissent in *Abrams*). In *Abrams*, Justice Holmes wrote in his dissent:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law[.]

Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

41. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 25 (quoting *Abrams*, 250 U.S. at 624).

concerning the notion of free speech fail to account for the proper market conditions in which a free interplay of concepts may expound the principle of one definable truth.[42] Holmes' dissent leaves Sunstein dissatisfied because it offers no indication of whether "market competition really *define*[s] truth, or . . . lead[s] to truth, which is independently defined[.]"[43] In a society where the definition of truth is left up to idiosyncratic realities, Sunstein maintains that "[t]here can be no assurance of freedom in a system committed to the 'Daily Me.'"[44]

Indeed, Sunstein's preference—and the foundation to his theoretical construct—is a romantic notion of an independently defined truth.[45] Instead of a Holmesian view of the First Amendment, Sunstein argues that the better interpretation of First Amendment rhetoric is Justice Brandeis' "civic conception of free speech" espoused in his concurring opinion in *Whitney v. California*.[46] Sunstein argues that the Brandeis model of free speech, which identifies public discussion and political activism as civic duties necessary to bring about the deliberative forces of government,[47] can be thought of as distinctly Madisonian.[48] Moreover, Sunstein argues that when carried to its logical end, the Brandeis' conception of free speech arrives at a markedly different conclusion than would Holmes' open market conception.[49] Thus,

---

42. *Id.* at 26. Sunstein maintains that this failure to delineate favorable speech market conditions is indicative of Holmes' skepticism concerning truth, itself. *Id.*

43. *Id.* at 25.

44. CASS SUNSTEIN, REPUBLIC.COM 50 (2001).

45. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 26-28 (contrasting Holmes' "pluralism" against Brandeis' conception of civic virtue).

46. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 26-27 (quoting Justice Brandeis' concurring opinion in *Whitney*). In his opinion, Justice Brandeis maintained that:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

Whitney, 274 U.S. at 375.

47. *See, e.g.*, *Whitney*, 274 U.S. at 375; SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 27-28.

48. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 28.

49. *Id.* Sunstein argues that although Holmes and Brandeis are often

under the banners of Madisonian politics and Brandeisian speech, Sunstein blithely professes his theory of how to square free speech with republican ideals.

2. Squaring the Circle: The New Deal for Speech

In order to align free speech analysis with the First Amendment's core Madisonian goals and achieve progressive social reformation, Sunstein envisions that various measures and regulations which might compromise the popular free speech principle—or even amount to flat out censorship—actually promote the public deliberation and the social good.[50] In order to 9achieve a Madisonian conception of free speech, Sunstein proposes that what is needed is a sort of "New Deal for speech."[51]

Sunstein analogizes the current state of free speech conception with the type of constitutional analysis in place prior to the New Deal. Sunstein states that:

> Before the New Deal, the Constitution was often understood as a constraint on government "regulation"... In practice, this understanding meant that the Constitution frequently prohibited [the] government from interfering with existing distributions of rights and entitlements. Hence minimum wage and maximum hour laws... were invalidated... as unjustifiable [constitutional] exactions...."[52]

Indeed, constitutional analysis was defined to prevent governmental interference with these systems of distribution. "Government action was understood as interference with [these distributions]. The rallying cry 'laissez-faire' captured such ideas."[53] However, Sunstein maintains that the Great Depression revealed the problems with this thinking and Roosevelt's New Deal attempt to reform from the ground up. Thus, in the New Deal period of the 1930s, the unregulated market conflicted with constitutional goals, and the result was that from the zenith of this conflict, New Dealers substantively reformed the constitutional framework to allow for increased regulatory agency power and a stronger national government.[54]

---

ranked together as "free speech heroes," their "alliance" could only exist "when [the] government tries to suppress political dissent;" however, if the government were to suppress the speech marketplace in order to promote public issues, then "[t]he two would be antagonists, not allies." *Id.*

50. *Id.* at xix.

51. *See id.* at 28-34 (analogizing the need to make substantive progressive cultural reformation to the reform instituted under Roosevelt's highly centralized New Deal).

52. *Id.* at 29 (citing Adkins v. Children's Hosp., 261 U.S. 525 (1923) and Lochner v. New York, 198 U.S. 45 (1905)).

53. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 29.

54. *Id.* at 29.

Sunstein maintains that the New Deal period transformed constitutional thought altogether. Instead of harboring the fundamental premise that the Constitution existed as a shield to protect against governmental regulation, "New Deal reformers argued that this entire framework [the shield construct] was built on fictions."[55] Thus, Sunstein looks to President Roosevelt's argument favoring social security legislation (i.e., that economic laws are not built by nature but by man) and posits that the government is always involved in the regulation of free speech:

> Laws underlay markets and made them possible. If they had good reason for doing so, people might change those markets and existing distributions .... The notion of "laissez-faire" thus stood revealed as a conspicuous fiction. In a system of free markets, government did not leave everything alone. It allocated rights of property; it decided on the law of contract and tort.[56]

American free speech jurisprudence has failed to seriously consider a New Deal-style reformation.[57] Specifically, he asserts that modern free speech analysis fails to pay enough attention to "the real purposes of the protection of free speech—its roots in the Madisonian conception of sovereignty, its concern to bring about broad deliberation, including attention to public issues and to diverse views."[58] Indeed, in his recent writings, Sunstein has observed that the self-interest of groups and, more critically, of individuals at large has led to a schizoid vision of the collective American conscious.[59] Instead of a collective conscious based on shared experiences, modern society, as evidenced through technology and the digital generation, faces extreme fragmentation where people make their affirmations to "the Daily Me."[60]

---

55. *Id.* at 30.

56. *Id.* at 30-31.

57. *See id.* at 34.

58. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 35.

59. *See* SUNSTEIN, REPUBLIC.COM, *supra* note 44, at 9 (2001) (discussing how patronage to self-interest threatens the "social glue" of a well-functioning democracy by undermining the collective, shared experiences of society).

60. *Id.* at 3-22 (discussing Sunstein's conception of the "Daily Me"). Sunstein maintains that the concept of the "Daily Me" is rooted in the modern individual's ability to "filter" out general interest in favor of being able to see exactly what he or she wants to see, and nothing more. *Id.* at 3. Thus, one can restrict what they want to see to a particular point of view. *Id.* at 4. Of course, the result of such informational isolation is cultural extremism and fragmentation. *Id.* at 65-72. Moreover, Sunstein contends that modern technology provides the basis to expand this fragmentation. *Id.* at 58. Specifically, Sunstein looks to politically based Internet web sites to demonstrate the isolationism and fragmentation advanced by technology. *Id.* at 59-60. Indeed, Sunstein observes that very few sites provided links to the political opposition. *Id.* at 59. The result of this polarization is that moderate-leaning individuals will only strengthen their already held beliefs and

Consequently, Sunstein maintains that we tend to conceive of governmental interaction of speech through a "pre-New Deal" lens; governmental interaction is an "intrinsic evil to be eradicated through constitutional law."[61] Sunstein argues that instead of viewing interaction as inherently counterproductive, we must explore it to see whether it serves or disserves Madisonian goals because "at a minimum, what seems to be government regulation of speech might, in some circumstances, promote free speech as understood through the democratic conception associated with both Madison and Brandeis."[62]

3. *Two-Tiered Approach: Political and Nonpolitical Speech*

To effectuate this theory, Sunstein argues that restrictions on some kinds of speech are appropriate and perhaps even necessary to promote Madisonian free speech.[63] Thus, what is needed to achieve this conception of free speech is restraint: both private restraint of industries (i.e., unrelated to governmental action/interaction[64]) and governmental restraint supported by legitimate "purposes and effects."[65] Where the government

---

"[w]henever group discussion tends to lead people to more strongly held versions of the same view with which they began, there is legitimate reason for concern." *Id.* at 77. Sunstein contends that the modern conception of American sovereignty is caught in political tension between two strands of thought he terms "consumer sovereignty" and "political sovereignty":

> Consumer sovereignty means that individual consumers are permitted to choose as they wish, subject to the constraints provided by the price system, and also by their current holdings and requirements. This idea plays a significant role in thinking not only about economic markets, but also about both politics and communications.

Id. at 45.

In contrast, political sovereignty "does not take individual tastes as fixed or given. It prizes democratic self-government, understood as a requirement of 'government by discussion,' accompanied by reason-giving in the public domain." *Id.*

61. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 35.

62. *Id.*

63. *Id.* at 43. Sunstein notes that some regulatory efforts, like allowing political candidates to have free airtime on network television, might actually promote free speech. *Id.* However, as Sunstein correctly identifies, the only way that we will know whether a specific speech regulation impermissibly restrains speech will be to examine and understand the purposes and consequences of the regulation. *Id.*

64. *Id.* at 36-37 (discussing self-imposed regulation of speech by private industry, a concept not implicating the First Amendment's charge against governmental restrictions on free speech). Although my concern is with governmental regulation of speech, it is noteworthy that Sunstein goes to great length to repeatedly mention that privatized curtailment of speech would not give rise to First Amendment concern. *Id.*

65. *Id.* at 37 (suggesting that the governmental restrictions on free speech "should not be invalidated if their purposes and effects are constitutionally valid, even if they conspicuously intrude on the rights of some property owners

attempts to regulate specific forms of speech, Sunstein argues that what is needed is a two-tier approach to the First Amendment.[66] These two tiers are defined according to their "constitutional value" or their ability to promote the underlying core goals of the First Amendment.[67] Thus, Sunstein conceives of the two-tier system as having relatively simple structure: "[d]oes the speech at issue fall inside the constitutional core? If so, it can be regulated only on the gravest showing of harm. . . . If not, it can be regulated by an invocation of legitimate, sufficiently weighty reasons."[68] Thus, speech that has a Madisonian content amounts to political speech, and everything else belongs to the lower tier.

Sunstein defines the top tier, political speech, as speech that "*is both intended and received as a contribution to public deliberation about some issue.*"[69] According to Balkin, Sunstein defines public deliberation to include "'social norms' as well as changes in the law or government."[70] The broad scope of the upper tier of speech, then, is that speech which touches on issues of genuine public interest and political concern.[71] However, Sunstein argues that this definition has limits: "[b]oth intent and receipt must be shown."[72] According to Sunstein, once the speech falls into

---

and even some speakers").

66. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 122.

67. *Id.* Sunstein's conception of constitutional value is to ask whether the speech in question is concerned with democratic deliberation and the Madisonian goals of popular sovereignty. *Id.* This political conception of the First Amendment self-consciously owes homage to the thought of Alexander Meiklejohn. *See id.* (noting that a conception that "nonpolitical speech . . . receives less stringent protection" was vigorously asserted by Meiklejohn).

68. *Id.* at 123-24.

69. *Id.* at 130 (italics in original).

70. *See* Balkin, *supra* note 21, at 1959; SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 130-31. This definition of political speech, according to Balkin, is an attempt to solve Meiklejohn's problem of trying to explain "why nonpolitical expression like art, music, and literature receive a high level of protection." *See* Balkin, *supra* note 21, at 1958. Balkin distinguishes Meiklejohn from Sunstein by observing that for Meiklejohn, these nonpolitical forms of expression were intricately tied "to the actual processes of self-governance," whereas for Sunstein, they "help individuals deliberate on the social norms generally." *Id.* at 1960.

71. *See* SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 152 (noting that his definition of political speech is broad enough to encompass "not simply political tracts, but all art and literature that have the characteristics of social commentary"). In this way, art and literature are political because they harbor political content. *Id.* at 153. However, Sunstein maintains that speech that only carries political consequences, such as obscenity, hate speech directed at an individual, and commercial speech, does not amount to political speech. *Id.* at 153-54.

72. *Id.* at 131. Sunstein clarifies the proposition that the speech must be intended and received as political by noting that not all people must see the political content; it is sufficient if only a few readers or listeners see the political content of the speech in question. *Id.* Nonetheless, Sunstein seems to

the political speech category, then the speech may only be regulated under the "strongest showing of harm."[73] These stringent requirements are needed because when the government regulates top-tier speech, it is "biased or . . . acting on the basis of illegitimate, venal, or partial considerations. Government is rightly distrusted when it is regulating speech that might harm its own interests; and when the speech at issue is political, its own interests are almost always at stake."[74]

The harder case, in contrast, is Sunstein's second tier of speech, where even he admits that "[t]here is a hard problem of definition here."[75] Thus, he maintains that a line must be drawn between political and nonpolitical speech.[76] This being said, a significant spectrum of speech must necessarily be excluded from top-tier protections[77] and may be curtailed on a showing of a legitimate and important purpose.[78] Although Sunstein maintains that the fact that the speech may offend does not amount to a permissible governmental justification, he nonetheless notes that it was a sufficient justification for the zoning of adult theatres.[79] Sunstein goes on to equivocally state that:

> Perhaps we can conclude from this that offense at the content of ideas is always unacceptable and that offense at the means of expressing ideas will be unacceptable (a) when the speech is political or (b) when there is some basis to believe that [the] government is trying to suppress a viewpoint.[80]

Despite this distinction, Sunstein suggests that when the government finds that the speech produces substantial "real-world" harm, it has the power to regulate or exclude certain forms

---

limit even this expansive proviso by stating that "if some people understand the speech in question to be political, it cannot follow that the speech qualifies as such for constitutional purposes, without treating almost all speech as political and therefore destroying the whole point of the two-tier system." *Id.* at 132.

73. *Id.* at 123.

74. *Id.* at 134.

75. *Id.* at 148.

76. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 149. Sunstein notes that there is some aversion to the process of line drawing because we are never entirely certain as to who is drawing the lines. *Id.* However, he maintains that there are really two issues to consider: (1) "whether the relevant distinction is plausible in principle and administrable in practice . . . [and (2)] whether alternative systems are better." *Id.* at 150. Sunstein maintains that if his Madisonian conception of speech fares well with these considerations—and, by implication, they must because he is raising the theory in the first place—then the risks attendant with line drawing are acceptable. *Id.*

77. *See id.* at 154.

78. *Id.* at 124.

79. *See id.* at 157.

80. *Id.*

of speech that are associated with these harms.[81]

At bottom, Sunstein's civic republican approach to free speech largely values the speech of "We the People," but allows the economic, common, and otherwise vernacular speech to be subject to governmental imposition where the government can show that the speech results in harm. Under his conception of free speech, such a showing of harm need not even be related to the speech in order to suppress the form of expression.

Still, Sunstein's approach should not seem foreign. His theoretical framework is intimately rooted in and related to current First Amendment analysis, especially regarding the secondary effects doctrine.

II. THE FIRST AMENDMENT AND CONTENT DISCRIMINATION

A. Introduction to First Amendment Analysis

Today, First Amendment doctrine represents a cavernous embodiment of conflicting rules and judicial viewpoints.[82] Understanding a general theory of free speech is a protean battle,[83] and, indeed, some commentators suggest that, in practice, it boils down to little more than simple *ad hoc* balancing.[84] Although

81. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 164. Sunstein specifically speaks of nude dancing, which may be associated with such "real-world harm" as prostitution, criminal activity, and sexual assault. *Id.*

82. *See* Metromedia, Inc. v. San Diego, 453 U.S. 490, 501 (1981) (stating that "[e]ach method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method").

83. *See* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 9, 13 (1990) (noting that First Amendment jurisprudence represents "an endless maze" with "no general framework"). For a critique of efforts to construct a general theory of the First Amendment, see ROBERT NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 29-35 (1989) (critiquing the efforts of First Amendment scholars in formulating general free speech theories); Lawrence A. Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319, 1320 (1983) (arguing that a general theory of free speech doctrine is inconceivable because of the inherent complexity of the law); Steven H. Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1215-16 (1983) (maintaining that where regulation is aimed at effecting commercial speech, a general theory of free expression fails to provide adequate consideration); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207 (stating that "[o]ne would err to speak of [F]irst [A]mendment doctrine as if a well-defined consensus existed about the principles underlying [F]irst [A]mendment analysis"); Laurence H. Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U. L. REV. 237, 237 (1978) (recognizing the difficulties in articulating a general theory of free expression).

84. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 39 (1992)

there are various principles of free speech analysis like categorization,[85] public forum doctrine,[86] and content discrimination,[87] perhaps the most pervasive principle is content discrimination.[88]

1. Content Discrimination

Under the content discrimination methodology, laws that regulate speech are distinguished based on the degree they regulate the content of speech. Under this test, the courts examine the governmental motivation or purpose in order to determine the regulation's impact on expression.[89] Laws that

---

(arguing that in resolving a First Amendment conflict, one of the most seductive theories of interpretation is the ad hoc balancing test in which "the weight of the speech interest is balanced against the weight of the competing interest, and the conflict is resolved under a straightforward cost/benefit analysis"). Because both expression and the societal interests are afforded varying weights of importance and protection, Smolla recognizes that this "ad hoc balancing" test "fluctuates with the circumstances, requiring a case-by-case evaluation of the value of the speech threatened by the governmental regulation." *Id.*

85. Categorization is a principle of analysis that is based on the type of speech involved. In *Chaplinsky v. New Hampshire*, the Supreme Court wrote that:

> certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those that by their very utterance inflict injury or tend to incite an immediate breach of peace.

315 U.S. 568, 571-72 (1942).

Moreover, some speech, such as political speech, receives the highest level of protection, whereas other speech, like commercial speech, is entitled to less. *Compare* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that only political speech should receive constitutional protection), *with* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18 (2d ed. 1988) (characterizing the commercial speech doctrine as "intermediate categories").

86. The public forum doctrine is a method of free speech analysis that examines speech based on where the speech takes place. The Supreme Court held that certain places like public streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

87. Content discrimination is a method of free speech analysis that examines the degree to which the governmental regulation impacts the speech.

88. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55-56 (discussing the content-based/content-neutral distinction and the long standing principle that the "government may not restrict speech because it disapproves of a particular message").

89. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding New York City's sound amplification guidelines where the same

directly regulate the content of speech are termed content-based restrictions; laws that regulate without regard to content are called content-neutral restrictions.[90] While some scholars have criticized content distinction,[91] it is the predominant test favored by the Supreme Court, and, in the words of Justice O'Connor, perhaps "no better alternative has yet come to light."[92]

a. Content-Based Regulations

Content-based regulations target expression precisely because of the ideas conveyed by the speech.[93] Even when the communication in question is not speech *per se* but is a symbolic form of expression, governmental regulations that restrict the *expressive elements* of the speech face a heavy challenge as a content-based restriction.[94] Content-based restrictions frequently

---

were used to require concert promoters to use the city's sound equipment).

90. Hudson, *supra* note 13, at 57.

91. After all, the determination as to whether a law "is content based or content neutral is not always a simple task." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

92. City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

93. *Turner Broad. Sys.*, 512 U.S. at 643 ("[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based."). *See also* Boos v. Barry, 485 U.S. 312, 321 (1988) (holding that a statute banning signs critical of foreign governments within 500 feet of respective embassies was a content-based restriction on speech); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (finding that "[l]istener's reaction to speech is not a content-neutral basis for regulation"); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (stating that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"); Reno v. ACLU, 521 U.S. 844, 867-68 (1997) (holding that a prohibition of the transmission of indecent communications over the Internet to persons under eighteen was a restriction on speech because of the expressive elements of the communication); Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 115-117 (1991) (finding that a statute imposing a financial burden on speakers is presumptively content-based). Additionally, a legislature cannot proscribe a part of the expression that it finds disagreeable. *See* Cohen v. California, 403 U.S. 15, 24-26 (1971) (holding that the defendant's jacket stating "Fuck the Draft" was not obscene and was protected under the First amendment). The Court stated:

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen, 403 U.S. at 24.

94. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (finding that a Texas regulation prohibiting the desecration of a flag discriminated against the expressive elements involved in such conduct). In *Johnson*, the authorities

violate the First Amendment,[95] not because they impact speech but because the government *intends* to restrict the actual content of the idea contained in the speech.[96] As such, a content-based restriction will only be upheld if it advances a compelling governmental interest in the least restrictive means.[97]

b. Content-Neutral Restrictions

Content-neutral restrictions, on the other hand, curtail speech through the conduct or context of the expression, not the ideas expressed.[98] As Rodney Smolla notes, a purely content-neutral restriction has "nothing to do with the message, only the mode. It is not what is said that is at issue, but where and how

---

arrested Johnson, who, in a political demonstration protesting the policies of Ronald Reagan, by burning an American flag in front of the Dallas City Hall and chanting "'America, the red, white, and blue, we spit on you.'" *Id.* at 399. The trial court convicted Johnson of violating a "Desecration of Venerated Object" statute that specifically prohibited damaging the national flag. *Id.* at 400. The Supreme Court found that the statute violated the First Amendment as a content-based regulation that was not narrowly drawn to serve a compelling governmental interest. *Id.* at 409-10. The Court justified its holding, stating: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

95. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating, "[c]ontent-based regulations are presumptively invalid").

96. *See* Roth v. United States, 354 U.S. 476, 484 (1957) (discussing obscenity, the Court stated that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach on the limited area of more important interests").

97. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (maintaining that content-based restrictions are permissible "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

98. *See generally* United States v. O'Brien, 391 U.S. 367, 386 (1968) (upholding a regulation prohibiting the knowing destruction of a draft card); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (upholding a regulation by the National Parks Service banning sleeping in public parks). Additionally, other content-neutral regulations concern the context of the expression, such as the time, place, and manner of the speech. *See generally* Madsen v. Women's Health Center, Inc., 512 U.S. 753, 776 (1994) (upholding an injunction that created a "36 foot buffer-zone" around a health clinic from anti-abortion protestors); Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding a regulation on the volume of music performed in a public park based on permissive time, place, and manner restrictions); Young v. American Mini Theatres, Inc., 427 U.S. 50, 72-73 (1976) (upholding a zoning ordinance prohibiting an adult movie theater or bookstore located within 1000 feet of any other like establishment and at lest 500 feet from any residential areas);

loud."[99] The two basic methods for analyzing content-neutral regulations[100] are the "time, place and manner test"[101] and the *O'Brien* test, which applies to restrictions on "symbolic speech" or incidental regulations.[102] However, despite the distinction between these tests, the Supreme Court has held that, for all intents purposes, the tests are identical.[103] A content-neutral regulation

99. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY, *supra* note 84, at 54.

100. It should be noted that Professor Stone has identified at least seven different tests for a content-neutral analysis. *See* Stone, *supra* note 88, at 48-50. Two of the seven tests he identifies are the "'time, place, and manner'" test and the "'*O'Brien* test.'" *Id.* at 51.

101. City of Renton v. Playtime Theatres, Inc. 475 U.S. 41, 47 (1986). Under the time, place, and manner test, content-neutral restrictions will be upheld if "they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47.

102. The *O'Brien* test arose out of United States v. O'Brien, 391 U.S. 367 (1967). In *O'Brien*, David Paul O'Brien burned his draft card on the steps of the South Boston Courthouse to encourage others to adopt his anti-war beliefs. *O'Brien*, 391 U.S. at 369. The authorities arrested O'Brien and convicted him of violation a criminal statute prohibiting the knowing destruction or mutilation of a Selective Services Certificate (draft card). *Id.* at 369-70. The Supreme Court found that although this conduct amounted to speech within the parameters of the First Amendment, the statute was constitutional because it satisfied the four-part test for content-neutrality. *Id.* at 378-83. The Supreme Court rejected O'Brien's First Amendment argument and set out a four-prong test to be used when speech and nonspeech elements are combined in the same activity. *Id.* at 376. The Court found that:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

The pivotal loci for the *O'Brien* test rest with the determination of two issues: (1) whether the governmental interest is important or substantial, and (2) whether the governmental interest relates to the suppression of the free expression in question. *See* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 9:4 (1998) (maintaining that the most important prong of *O'Brien* rests with the determination of whether the governmental interest involved is unrelated to the content of the expression). Moreover, Smolla also argues that the Court in *O'Brien* misapplied its own test. *See* 1 SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, *supra*, at § 9:5 (arguing that the Court's assertion of the governmental interests asserted were simply too trivial to find them to be both important and unrelated to the suppression of free expression). Smolla contends that the *O'Brien* Court was "less than fully candid in its reading of the legislative history" because Congress "openly declared that its *real* reason for passing the law [was] to stifle dissenters from burning their draft cards as a means of persuading others to resist the draft and the war effort." *Id.* In this way, the *O'Brien* test challenges the very quality of the governmental interest involved in the regulation. *See O'Brien*, 391 U.S. at 376.

103. *See Clark* 468 U.S. at 298 (maintaining that there is "little, if any,"

has a better chance of withstanding constitutional scrutiny than does a content-based restriction.[104] However, sometimes (and perhaps often) "a seemingly content-neutral regulation of speech is promulgated to disguise the true purpose of insidious censorship."[105] This is the very problem encountered with the secondary effects doctrine since it reduces the level of scrutiny of a content-based regulation to that of a content-neutral regulation.

III THE SECONDARY EFFECTS DOCTRINE

Under the secondary effects doctrine, a seemingly content-based law—one that targets only one type of speech[106]—is analyzed as a content-neutral law if the regulation of speech is "*justified* without reference to the content of the regulated speech."[107] Thus, where the governmental purpose is to prevent or reduce the negative secondary effects associated with certain types of speech, the level of constitutional protection for speech is reduced from strict scrutiny to intermediate scrutiny.[108] In effect, this test blurs the distinctions between content discrimination and speech categorization. For this reason, the doctrine, as discussed *infra*, is frequently used as a powerful tool in regulating adult entertainment and presents the potential for further expansion. Although the secondary effects doctrine originated out of cases concerning the zoning of "adult entertainment" establishments like adult bookstores, adult movie theatres, and exotic dance clubs,[109] it has expanded to include non-zoning regulations and has even been applied to situations not dealing with adult entertainment at all. This section discusses both the history and the continued scope of the doctrine's application.

---

difference between the standard applied for expressive conduct and the time, place, and manner standard); *Ward*, 491 U.S. at 798 (same).

104. *See* Hudson, *supra* note 13, at 60.

105. *Id.*

106. *See* Stone, *supra* note 88, at 115-17 (maintaining that regulations which single out one type of speech have the semblance of content-based laws).

107. *City of Renton v. Playtime Theater, Inc.*, 475 U.S. 41, 48 (1986). (italics in original).

108. Hudson, *supra* note 13, at 60. Hudson also notes that the secondary effects doctrine also "waters down the level of constitutional for speech affected by a genuinely content-neutral law." *Id.*

109. *See* 1 SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, *supra* note 102, at § 9:18 (noting that municipalities frequently attempt to control sexually oriented forms of expression through zoning ordinances). Smolla notes that because municipalities frequently target only one type of expression, "'adult entertainment,'" that this type of regulation appears to be content-based on its face. *Id.*

A. The History of the Secondary Effects Doctrine

1. Zoning Adult Entertainment

The genesis of the doctrine lay in a footnote in *Young v. American Mini Theatres, Inc.*[110] In *Young*, Detroit amended an "anti-skid row ordinance" to place zoning limitations on adult businesses.[111] Under this ordinance, the Detroit City Council sought to disperse red light areas by preventing adult businesses from being located within 1,000 feet from any existing adult business and 500 feet from any residential area.[112]

The Supreme Court, addressing a First Amendment challenge by two adult businesses, determined that the zoning ordinance was not passed to silence speech but was passed to prevent neighborhoods from deteriorating.[113] Justice Stevens, writing for the plurality, wrote:

> The Common Council's determination was that a concentration of "adult" movie theatres causes the area to become a focus of crime, effects which are not attributable to theatres showing other types of films. It is this secondary effect that these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.[114]

Although the Court recognized that the ordinance classified the films based on their content,[115] it nonetheless found that such a classification did not violate the government's duty of neutrality because the regulation did not restrict a particular "social, political, or philosophical message . . . [or] point of view."[116]

The Supreme Court reaffirmed the validity of the secondary effects doctrine and expanded its scope in *City of Renton v. Playtime Theatres, Inc.*[117] *City of Renton* concerned another constitutional challenge to a zoning ordinance which affected adult entertainment establishments in the City of Renton, Washington, a suburb of Seattle.[118] The ordinance in question, like *Young*, prohibited locating adult movie theatres within 1,000 feet of any residential zone, single- and multiple-family dwelling, church,

---

110. 427 U.S. 50, 71 n.34 (1976). *See also* Hudson, *supra* note 13, at 61; Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1265 n.77 (1995).

111. *Young*, 427 U.S. at 54.

112. *Id.*

113. *Id.* at 70-72.

114. *Id.* at 71 n.34.

115. *Id.* at 70-71 (holding "that the [s]tate may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures").

116. *Young*, 427 U.S. at 70. Commentators like David Hudson suggest that the Court effectively substituted "'viewpoint-neutrality'" for "'content-neutrality.'" Hudson, *supra* note 13, at 62.

117. 475 U.S. 41 (1986).

118. *Id.* at 43. Specifically, the ordinance targeted adult movie theatres. *Id.*

park, or school.[119] The ordinance excluded 94% of the land in the city from use by adult entertainment establishments.[120] In effect, the ordinance zoned adult entertainment establishments into complete extinction.[121]

The Supreme Court, relying on *Young*,[122] found that although the ordinance singled out adult movie theatres over other types of theatres, it was a content-neutral regulation because its predominate concerns were with the secondary effects of adult theatres rather than the content of films.[123] The Court stated:

> At first glance, the Renton ordinance, like the ordinance in *American Mini Theatres,* does not appear to neatly fit into either the "content-based" or the "content-neutral" category. To be sure, the ordinance treats theatres that specialize in adult films differently from other types of theatres. Nevertheless, . . . [the] City Council's "*predominate* concerns" were with the secondary effects of adult theatres, and not with the content of the adult films themselves.[124]

The city maintained—and the Court agreed—that these theaters facilitated secondary effects such as increased crime, injury to retail trade, damage to property values, and the general deterioration in neighborhood quality.[125] The Court found that the ordinance was "completely consistent with our definition of 'content-neutral' speech regulations,"[126] because it was "*justified* without reference to the content of the regulated speech."[127] Furthermore, the Court maintained that the City of Renton need

---

119. *Id.* at 44-45. The ordinance in question, as originally enacted, prohibited adult establishments from being located within a mile of any school; however, after the plaintiffs brought suit, the City Council reduced this distance to 1,000 feet. *Id.*

120. *See* 1 SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, *supra* note 102, § 9:19, at 9-29. Smolla notes that, of the remaining 520 acres of space available, "a substantial part was occupied by a sewage disposal and treatment plant, a horse racing track, a warehouse and manufacturing facilities [sic], a Mobil Oil tank farm, and a fully developed shopping center." *Id.* (citing *City of Renton*, 475 U.S. at 53-54).

121. *See id.* (stating that "[t]he city had thus, as a practical matter, largely zoned adult theatres out of existence").

122. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46 (1986) (stating that "the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc.*").

123. *Id.* at 47-48.

124. *Id.* at 47. (emphasis in original). *But see id.* at 58-59 (Brennan, J., dissenting) (noting that the City Council's entire secondary effects justification was added in an amendment to the ordinance made after the lawsuit was filed).

125. *Id.* at 48. The Court also maintained that even if one of the motivating factors had been invalid, the existence of an improper motive will not lead to striking down an otherwise constitutional statute. *Id.* at 47-48 (citing *O'Brien*, 391 U.S. at 382-86).

126. *Id.* at 48.

127. *City of Renton*, 475 U.S. at 48. (emphasis in original).

not investigate the effects of these establishments, but could instead rely on the findings of nearby Seattle.[128] Thus, the Court found that the Renton ordinance survived content-neutral intermediate scrutiny because it was "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication."[129]

2. Non-Zoning Regulations on Adult Entertainment: Barnes v. Glenn Theatre, Inc. & City of Erie v. Pap's A.M.

Although *Young* and *City of Renton* involved the zoning of adult entertainment establishments, the Supreme Court has applied the secondary effects doctrine to regulations more centrally tied to the nature of the expression.

Indeed *Barnes v. Glenn Theatre, Inc.*[130] did not involve a zoning regulation, rather, at issue was an Indiana public indecency statute which proscribed public nudity across the board and prescribed that, at a minimum, a woman must wear a G-string and pasties.[131] A plurality of the Court analyzed the statute under the *O'Brien* test for content-neutral regulations on expressive conduct. The plurality found that the regulation was not aimed at restricting expression—the erotic message conveyed by nude dancers—but was intended to "protect morals and public order."[132]

---

128. *Id.* at 50-51.

129. *Id.* at 47. Courts have applied the secondary effects doctrine to the zoning of adult establishments where the statute does not identify a particular adult industry but instead targets "sexually oriented businesses." *See* Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683, 685 (10th Cir. 1998). In *Z.J. Gifts*, a suburb of Denver enacted an ordinance which required all sexually oriented businesses to be located in industrial zones and prohibited them from being located within 1,500 feet of any church, school, residential areas, public parks, or other sexually oriented businesses. *Id.* Z.J. Gifts did not provide any on site nude entertainment but nearly sold sexually oriented material to be viewed at home. *Id.* The Court of Appeals for the Tenth Circuit sustained the regulation relying on *City of Renton's* secondary effects rationale. *Id.* at 687.

130. 501 U.S. 560 (1991).

131. *Id.* at 563 (Rehnquist, J.). It should be noted that the law was seemingly discriminatorily enforced. The dissenting Justices noted that not all nude dancing was prohibited, only the barroom style nude dancing as performed in adult entertainment establishments, not theatrical presentations of plays. *Id.* at 590 (White, Marshall, Blackmun, & Stevens, JJ., dissenting).

132. *Id.* at 569. As such, requiring the dancers to wear G-strings and pasties did not deprive the dance of the message, but "simply ma[de] the message slightly less graphic." *Id.* at 571. *But see* 1 SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, *supra* note 102, § 9:14, at 9-16 (maintaining that "[i]t was telling that the principal cases cited by the Chief Justice for this proposition involved obscenity, which the Court had long before ruled was *not* constitutionally protected speech—and homosexual sodomy—which the Court had previously held could be outlawed by government").

Justice Souter's concurring opinion provided the fifth vote needed to uphold the statute. Relying on the secondary effects doctrine, Justice Souter maintained that the law was a content-neutral proscription of the expressive or symbolic speech.[133] Souter wrote:

> 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 respondents' establishment.[134]

Although the Indiana legislature never referenced the secondary effects doctrine when enacting the law, Justice Souter indicated that the secondary effects doctrine may be used to regulate speech even when "it is unclear to what extent this purpose [secondary effects] motivated the Indiana Legislature in enacting the statute."[135] Indeed, Justice Souter assumed that the Indiana Legislature considered the secondary effects doctrine when it enacted the legislation, regardless of whether the legislature relied on independent research.[136]

Despite the fact that only Justice Souter supported the secondary effects rationale, the *Barnes* opinion was "helplessly

---

133. *Barnes*, 501 U.S. at 582.

134. *Id.*

135. *Id.*

136. *Id.* at 583-84. Souter states: "I do not believe that a [s]tate is required affirmatively to undertake to litigate this issue repeatedly in every case." *Id.* at 584. Notwithstanding this flexible evidentiary standard, at least one court has sought to limit the exceedingly broad evidentiary showing required. In Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000), *cert. granted,* 121 S.Ct. 1223 (2001), the Ninth Circuit invalidated a 1983 amendment to a Los Angeles ordinance because the City failed to carry its evidentiary burden. The original ordinance, enacted in 1978, zoned "adult business[es]" at least 1000 feet from another such establishment and 500 feet from religious institutions, schools, or public parks. *Id.* at 720. This ordinance was based on a comprehensive study that found a correlation between concentrations of adult businesses and heightened crime rates. *Id.* However, in 1983, the city redefined "adult entertainment businesses" to include "adult bookstore" and "adult arcade" as "separate adult businesses" under the ordinance, without conducting another survey. *Id.* at 720-21. In 1995, the Alameda bookstore was found to be operating both an adult bookstore and arcade in the same location, in violation of the 1983 amendment. *Id.* at 721. The district court granted summary judgment in favor of Alameda Books, finding that the city failed to carry its evidentiary burden because the study it relied on treated multiple use adult businesses as one adult business. *Id.* at 724. The Ninth Circuit agreed with the district court and rejected the city's contention that it could also rely on studies conducted by other cities because there was no evidence that the type of behavior that would occur in a multiple-use adult business would not be identical to what occurred in a single-use adult business. *Id.* at 728. The Supreme Court heard oral arguments on December 4, 2001.

fragmented"[137] and understanding it is like "reading . . . tea leaves,"[138] resulting in many lower courts applying Justice Souter's secondary effects concurrence.[139] The result was that the Supreme Court revisited its *Barnes* opinion nine years later in *City of Erie v. Pap's A.M.*[140]

In *Pap's A.M.*, a plurality of the Court validated a nearly identical public indecency regulation[141] based on the secondary effects doctrine. Unlike the statute in *Barnes*, the preamble to the public indecency ordinance enacted by the City of Erie, Pennsylvania specifically targeted nude dance and invoked the secondary effects doctrine as a justification. The preamble stated that that City Council adopted the regulation:

> [F]or the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety, and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.[142]

The Supreme Court rejected the argument that the city council had an illicit motive in enacting the ordinance.[143]

---

137. *See* Pap's A.M. v. City of Erie, 719 A.2d 273, 278 (Pa. 1998) (characterizing *Barnes* as a "fragmented decision"), *rev'd* 529 U.S. 277 (2000).

138. Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 134 (6th Cir. 1994).

139. *See, e.g., Triplett Grille*, 40 F.3d at 135; Pap's A.M. v. City of Erie, 674 A.2d 338 (Pa. Commw. Ct. 1996), *rev'd* 719 A.2d 273, 278 (Pa. 1998), *rev'd* City of Erie v. Pap's A.M., 529 U.S. 277 (2000); J & B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 373-75 n.7 (5th Cir. 1998) (upholding statute banning public nudity, except for those persons expressing a matter of "serious artistic, literary, political, or scientific expression," on the basis of the negative secondary effects doctrine); Farkas v. Miller, 151 F.3d 900, 903-05 (8th Cir. 1998) (upholding a statute banning the exposure of genitals or the female breast by entertainers); International Eateries of America, Inc. v. Broward County, 941 F.2d 1157, 1161 (11th Cir. 1997); D'Angio v. Borough of Nescopeck, 56 F. Supp. 2d 502, 505 (M.D. Pa. 1999).

140. 529 U.S. 277 (2000).

141. *Pap's A.M.*, 529 U.S. at 302. Although both the public indecency statute in *Barnes* and *Pap's A.M.* banned nudity in public, it should be noted that the City of Erie defined nudity in a specialized way. Justice Stevens, in his dissent, highlights the distinctions:

> In *Barnes*, the statute defined "nudity" as "the showing of the human male or female genitals . . . with less than fully opaque covering." . . . The Erie ordinance duplicates that definition in all material respects, but adds the following to its definition of "nudity": "[T]he exposure of any device, costume, or covering *which gives the appearance of or simulates* the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, *which device simulates and gives the realistic appearance* of nipples and/or areola."

Pap's A.M., 529 U.S. at 330-31 (Stevens, J., dissenting). (emphasis in original).

142. *Id.* at 290.

143. *Id.* at 291-92. The respondent adult entertainment establishment,

Moreover, the Court maintained that although the preamble specifically identified nude live entertainment as the targeted expression, the ordinance was content-neutral because it "[did] not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects. . . ."[144] Having found the regulation to be content-neutral, the Court summarily analyzed the ordinance under the *O'Brien* test and found it to be constitutional,[145]

Kandyland, argued that the ordinance targeted nude dance only based on statements by the city attorney that "the public nudity ban was not intended to apply to 'legitimate' theater productions." *Id.* at 292. The Court rejected this argument, as it did in *City of Renton*, by invoking the statement from *O'Brien* that the Court will not "strike down an otherwise constitutional statute on the basis of an illicit motive." *Id.*; *O'Brien*, 391 U.S. at 382-83; *City of Renton*, 475 U.S. at 47-48. However, commentators have argued that this doctrine in *O'Brien* is, itself, overbroad. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 85, § 12-5, at 819-20.

144. *Pap's A.M.*, 529 U.S. at 291. The Court analogizes, indeed even directly links, the secondary effects doctrine to the *O'Brien* test for content-neutral incidental effects.

> This case is, in fact, similar to *O'Brien*, *Community for the Creative Non-Violence*, and *Ward*. The justification for the government regulation in each case presents harmful "secondary" effects that are unrelated to the suppression of expression. . . . While the doctrinal theories behind "incidental burdens" and "secondary effects" are, of course, not identical, there is nothing objectionable about a city passing a general ordinance to ban public nudity (even though such a ban may place incidental burdens on some protected speech) and at the same time recognizing that one specific occurrence of public nudity—nude erotic dancing—is particularly problematic because it produces harmful secondary effects.

Id. at 294-95.

Also, at least one scholar has claimed that the origin of the secondary effects doctrine lay with *O'Brien* itself. *See* Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 COOLEY L. REV. 1, 3-6 (1989) (stating that *O'Brien* is "the source of the secondary effects analysis"). It is, of course, open to debate as to whether the Court paid reverence to this argument, but it seems that the Court certainly endorses the idea that the secondary effects doctrine and the incidental burden doctrine in *O'Brien* amount to a close parallel. The Court noted this parallel in stating "[i]n that sense, this case [Pap's A.M.] is similar to *O'Brien*." *Pap's A.M.*, 529 U.S. at 291.

145. *Pap's A.M.*, 529 U.S. at 302. In his dissent, Justice Stevens argued that the secondary effects doctrine "has grave implications for basic free speech principles." *Id.* at 322 (Stevens, J., concurring and dissenting in part). Justice Stevens noted that "[b]ecause the category of effects that 'happen to be associated' with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence." *Id.* at 323. Justice Stevens further states that the plurality's characterization of the effectiveness of the law in achieving the stated goal is "an enormous understatement" and "[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." *Id.* (emphasis in original). However, Justice Stevens would expressly limit the secondary effects doctrine to limiting

regardless of the fact that the Erie City Council did not investigate the effects of public nudity, but simply relied on the Court's opinion in *Barnes*.[146]

3. *Expansion Outside of Adult Entertainment*

The secondary effects doctrine may have some use outside the particular arena of adult entertainment. Although some commentators question the doctrine's ability to survive outside of the adult-use environment,[147] lower courts and, indeed, legislative bodies have readily invoked the secondary effects doctrine to contend with a variety of legislation outside of the adult entertainment context. Thus, the secondary effects doctrine may have a place in other arenas like political speech, discriminatory or hate speech, and commercial speech.

The Supreme Court first indicated a willingness to extend the

---

the *place* where such speech could be made—not a specific proscription of the speech itself. *Id.* at 324-25. For this reason, he maintains that "[u]ntil now, the 'secondary effects' of commercial enterprises featuring indecent entertainment have justified only the regulation of their location [zoning]." *Id.* at 317.

Supporting his contention that the City of Erie enacted the regulation specifically to silence the speech—or effectively eradicate the "immoral" message conveyed—Justice Stevens examines the legislative history further. *See id.* at 318-27. He notes that in addition to the portion of the preamble quoted by the plurality, it also states that "'the Council of the City of Erie has [found] . . . that certain lewd, immoral activities carried on in public places for profit . . . lead to the debasement of both women and men . . .'" *Id.* at 327 n.10. Additionally, "[o]ne lawmaker observed: 'We're not talking about nudity. We're not talking about the theater or art . . . We're talking about what is indecent and immoral . . . We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion.'" *Id.* at 329.

146. *Id.* at 301. *But see id.* at 310-315 (Souter, J., concurring and dissenting in part) (maintaining that the evidentiary showing of secondary effects was not sufficiently based on the facts of the case).

147. *See* 1 SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, *supra* note 102, §§ 9:20 and 9:21 (maintaining that the *City of Renton* secondary effects doctrine may be limited to the special case of sexually oriented expression). Smolla argues that Justice Souter's invocation of the doctrine in his concurring opinion in *Barnes* may justify this view of a special adult entertainment jurisprudence because Justice Souter maintained that *Barnes* was similar to other cases that limited adult content. *Id.* at § 9:21. *See also* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 632-33 (1991) (noting that "[t]he question remaining is whether the Court will extend the secondary effects approach to facially content-based regulations affecting 'higher' value speech . . ."). However, Smolla's argument fails to consider the *Pap's A.M.* plurality's conflagration of secondary effects with traditional incidental burdens cases like *O'Brien*, *Clark v. Community for Creative Non-Violence,* and *Ward v. Rock Against Racism*—none of which dealt with "adult entertainment." To the extent that the Supreme Court is willing to equate the secondary effects doctrine with the *O'Brien* test for content-neutral regulations on symbolic expression, Smolla's delimitation may not prove accurate.

doctrine beyond adult entertainment in *Boos v. Barry*[148] by legitimately considering its application to a prohibition on political speech.[149] There, the Court invalidated a District of Columbia law that prohibited the display of signs critical of foreign governments within 500 feet of their respective embassy.[150] When challenged by persons wanting to protest the Soviet Union and Nicaragua by picketing outside their respective embassies, the government argued that the law was content-neutral and based on the secondary effects doctrine.[151] The alleged purpose of the law was to prevent secondary effects by protecting "our international law obligation to shield diplomats from speech that offends their dignity."[152] Although the United States Court of Appeals for the D.C. Circuit upheld the law, relying on *City of Renton*,[153] the Supreme Court reversed, maintaining that the argument set forth by the Government "misreads *Renton*."[154] The problem with the law was that the "justification focuses *only* on the content of the speech and the direct impact that the speech has on its listeners. . . . Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. . . . [t]he emotive impact of speech on the audience is not a 'secondary effect'" but is rather a primary effect.[155] Thus, although the Supreme Court struck the regulation for not focusing on the secondary effects, by considering the doctrine's application to an area outside of adult entertainment, the Court opened the door to the continued expansion of the secondary effects doctrine.[156] While many Supreme Court cases have focused on this *Boos* distinction,[157] the

148. 485 U.S. 312, 320 (1988).

149. *See id.*

150. *Boos*, 485 U.S. at 315 (the law provided that: "'[i]t shall be unlawful to display any flag, banner, placard, or device designed . . . [to] bring into public odium any foreign government . . . or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government . . .'").

151. *See id.* at 319.

152. *Id.* at 320.

153. *See* Finzer v. Barry, 798 F.2d 1450, 1453, 1469 (D.C. Cir. 1986) (Bork, J.).

154. *Boos*, 485 U.S. at 320.

155. *Id.* at 321.

156. *See, e.g., id.* at 334-35 (Brennan, J., concurring in part and concurring in the judgment). Justice Brennan wrote, "[t]he *Renton* analysis, however, creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech." *Id.* at 335. "Until today, the *Renton* analysis, however unwise, had at least never been applied to political speech. *Renton* itself seemed to confine its application to 'businesses that purvey sexually explicit materials.'" *Id.* at 337-38.

157. *See generally* Reno v. ACLU, 521 U.S. 844, 867-68 (1997) (holding that the Government's secondary effects argument failed because the purpose of the regulation, which criminalized the transmission of indecent materials to children under eighteen over the Internet, was aimed at preventing the

Court has not expressly limited the application of the doctrine, and many lower courts have utilized the secondary effects doctrine to uphold content-based restrictions.[158]

The secondary effects doctrine is also invoked in the context of discriminatory speech and hate speech. The use of the secondary effects doctrine in these areas arose out of the Supreme Court decision, *R.A.V. v. City of St. Paul.*[159] In that case, the Court

---

primary effects rather than the secondary effects); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1995) (finding that "[l]isteners' reaction to speech is not a content-neutral basis for regulation"). *See also* Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 854 n.4 (Cal. 1999) (stating that "'[t]he emotive impact of speech on its audience is not a 'secondary effect'").

158. *See generally* Able v. United States, 88 F.3d 1280, 1294-96 (2nd Cir. 1996) (finding that governmental restriction on the right of homosexuals in the military to speak out were incidental to the secondary effect of prohibiting homosexual conduct); Auburn Police Union v. Carpenter, 8 F.3d 886, 893 n.9 (1st Cir. 1993) (upholding a ban on police solicitation because it focused on secondary effects like "the implied coercion inherent in solicitation on behalf of law enforcement personnel, with the resulting loss of integrity"); Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 185 (1st Cir. 1996) (upholding a ban on newspaper distribution in order to prevent the secondary effect of "'visual clutter'"); Potts v. City of Lafayette, 121 F.3d 1106, 1112 (7th Cir. 1997) (upholding an ordinance prohibiting attendants of a KKK rally from carrying personal items—including a reporter's tape recorder—because of the secondary effect that individuals might injure *themselves*); Sanjour v. EPA, 786 F. Supp. 1033, 1037 (D. D.C. 1992), *rev'd,* 984 U.S. 443 (D.C. Cir. 1993) (upholding law prohibiting government employees from being compensated for unofficial speech because the law was passed to prevent the negative secondary effect of "the appearance of impropriety"); Nat'l Amusements, Inc. v. Town of Dedham, 846 F. Supp. 1023, 1032 (D. Mass. 1994) (upholding prohibition on any licensed entertainment establishment from operating between 1 a.m. and 6 a.m. to prevent the secondary effects of late night traffic, noise, and security problems); New York State Ass'n of Realtors, Inc. v. Shaffer, 833 F. Supp. 165, 189 (E.D.N.Y. 1993) (upholding anti-solicitation law on real estate brokers to prevent the secondary effect of blockbusting); Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492 (D. N.J. 1995), *aff'd on other grounds,* 99 F.3d 101 (3d Cir 1996) (upholding a New Jersey law that prohibited discrimination based on sexual orientation to protect individuals from the secondary effect of discrimination in employment, public accommodations, and business transactions); Aguilar v. Avis Rent-A-Car Sys., Inc., 53 Cal. Rptr. 2d 599 (Cal. Ct. App. 1996), *aff'd on other grounds,* 980 P.2d 846 (Cal. 1999) (upholding speech specific injunctions to prevent the secondary effect of a discriminatorily abusive work environment).

159. 505 U.S. 377 (1992). The Court in *R.A.V.* struck an anti-hate crime ordinance that punished action that "one knows . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. The Court found that although the law punishes unprotected speech under the First Amendment [*see Chaplinsky*, 315 U.S. at 571 (maintaining that fighting words have never received the protection of the First Amendment)], the government could not pass a law that punishes certain types of fighting words. *R.A.V.*, 505 U.S. at 380. Identification of such specific content amounted to an impermissible content distinction. *Id.*

held that although some speech, such as fighting words (or hate speech), may be proscribed because it does not invoke First Amendment protections, prohibiting specific words amounted to impermissible content discrimination.[160] Nonetheless, the majority noted three exceptions to this general rule, which included the secondary effects doctrine.[161] In this way, a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects.'"[162]

Lower courts have taken up the secondary effects gauntlet from *R.A.V.*. For example, in California, the secondary effects doctrine was invoked in a case concerning speech specific injunctions prohibiting racially harassing speech in the workplace.[163] However, the Supreme Court of California rejected this argument, noting that enjoining certain racial epithets to protect an individual from upset does not amount to a secondary effect of speech, but rather a primary effect of the speech.[164]

IV. THE RELATIONSHIP BETWEEN CIVIC REPUBLICANISM AND THE SECONDARY EFFECTS DOCTRINE

The correlation between civic republican thought and the secondary effects rationale appears, on the surface at least, minimal. However, underlying both theories is a deep connection based on value preference setting by the government. Indeed, both theories operate in a similar fashion and take their roots in republican conceptions of free speech. In their distinct way, each blurs and bends the differentiation between various categories of speech analysis and provides alternative and incredibly elastic standards that are easily satisfied.

Sunstein's theory, on its face, asks whether the regulation targets political speech. If the speech is not political speech, then all that is needed for any content discriminatory restriction is a legitimate purpose.[165] The legitimacy of the purpose is perhaps at its zenith, for the purposes of non-political speech, where it seeks to protect "real world harms."[166] Sunstein's free speech theory effectively blends categorization with content discrimination to

160. *Id.* at 381.
161. *Id.* at 389.
162. *Id.*
163. *See* Aguilar v. Avis Rent-A-Car Sys., Inc., 53 Cal. Rptr. 2d 599 (Cal. Ct. App. 1996).
164. Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 854 n.4 (Cal. 1999) (stating that "'[t]he emotive impact of speech on its audience is not a 'secondary effect'"). The Supreme Court of California nonetheless upheld the regulation based on other grounds. *Id.*
165. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 124.
166. *Id.* at 164.

effectuate a method to protect political speech, subject to a showing of grave harm caused by the speech. It leaves less important speech—indeed the mundane—by the roadside, subject only to a showing that the government has "legitimate, sufficiently weighty reasons."[167]

Indeed, Sunstein's approach can be said to require a *really damn good reason* for restricting political speech but merely a *legitimate reason* for suppressing normal, non-political speech.[168] The difference between the two standards is, of course, great. There is an ocean of difference between justifications based on the gravest showing of harms and those providing only legitimate reasons. The practical application of this theory would place most speech in the lower tier, allowing for easy censorship. Although Sunstein intends to provide for legitimate standards to protect non-political speech, even a nominally intelligent, yet overly zealous, legislative body may thwart his standard. Thinking of a legitimate reason or a "weighty" justification today means little more than invoking the government's oft-famed calling card of the interest of "police powers." Moreover, it may be possible to think of real world harms that are associated with types of speech, even though they are not caused by that speech.

The secondary effects doctrine feeds off of the crumbs of Sunstein's theory. Just as Sunstein is willing to blur the lines between categorization and content discrimination, so too the secondary effects doctrine, which properly belongs within the content discrimination approach, enables the government to sidestep the strict scrutiny required for content-based laws where the government claims to be attempting to prevent the harms associated with some speech. It effectively bends the rules of free speech analysis to serve its own needs. In practice, it has meant that the secondary effects doctrine has primarily targeted unpopular forms of speech like adult-entertainment. Social interest in stomping out such unpopular speech from the marketplace of ideas provides the springboard from which the government acts as parental censor, shielding society from the immoral and the unpleasant, in an effort to preempt the social ills that are associated with the speech. In this way, both theories effectively abridge First Amendment protections when the government is presenting a "weighty" justification to prevent negative effects. The protections of the free speech doctrine simply acquiesce to the invocation of a laudable purpose.

Perhaps most unsettling about both theories is that they effectively remove sources of independent judgment making and

167. *Id.* at 124.

168. Of course, by "really damn good reason" I import Sunstein's notion that political speech may only be restricted if there is a grave showing of harm. *See id.* at 123-24.

value setting from the true sovereigns, the individuals of the nation, and give it to a centralized group of decision makers. Indeed, Sunstein maintains that individuals relinquish this control as part of the social contract and of a government by "We the People." Likewise, the secondary effects doctrine superimposes value preference onto the speech, without saying so directly.

The primary cases touching on the secondary effects doctrine resonate in civic republican overtones. Just as Sunstein clearly establishes a particularized form of value setting by favoring political speech above all else, so too, the secondary effects doctrine distinctly invokes the civic republican emphasis on democratic debate and value preference. In *Pap's A.M.*, Justice O'Connor wrote for the plurality:

> "[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate," [and] "few of us would march our sons or daughters off to war to preserve the citizen's right to see" specified anatomical areas exhibited at establishments like Kandyland.[169]

Clearly, the Supreme Court weaves Madisonian thought into its discussion of the secondary effects.[170] It is telling, however, that the Supreme Court generally employs this line of patriotic, republican, *marching off to war* rhetoric when it is addressing speech that is largely disfavored by the popular element of society. As Stephen Shiffrin observes, if the Court kept strictly to this *marching off to war* standard, then "apparently no speech would ever be protected."[171] Moreover, Shiffrin contends by invoking such "Meiklejohn rhetoric"[172] the Court utilizes civic republican metaphor—protecting the core political speech and leaving sexually explicit speech at the fringes or, as the Supreme Court states, at the outer ambit.[173]

Because the success of the secondary effects rationale has really only been established in nude dancing cases, it is difficult to determine whether the Court is willing to invoke such civic republican flourishes in secondary effects cases concerning other

---

169. *Pap's A.M.*, 529 U.S. at 294 (quoting *Young*, 427 U.S. at 70).

170. *See* SHIFFRIN, *supra* note 83, at 47, 54 (discussing how this republican notion of the First Amendment is currently the principle understanding of the First Amendment and discussing the republican salutations contained in the preceding quote from *Young* and *Pap's A.M.*).

171. *Id.* at 54. Shiffin contends that the *marching off to war* metaphor amounted to little more than a "passing stylistic flourish—a cheap shot." *Id.*

172. *Id.* at 54.

173. *Barnes v. Glenn Theatre, Inc.*, 501 U.S. 560, 565-66 (1991).

types of speech. What is unique about the secondary effects doctrine, and what aligns it so closely with Sunstein, is that where the government enacts value-setting legislation that, significantly impedes non-political speech, is a laudable purpose for all intensive purposes, the ends the inquiry into its legitimacy.

Although I raise no objection to the application of the secondary effects doctrine to zoning ordinances of the type in *Renton* and *Young*, my concern is whether such value preference setting is either sufficient or appropriate to overcome serious First Amendment protections when dealing with blatantly content-based laws which directly impinge on the speech in question. In this regard, it is notable that Justice Stevens, who first raised the Madisonian *marching off to war* analogy in *Young*, wrote in his dissent in *Pap's A.M.*, that "[t]he fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship. . . . Under today's opinion, a State may totally ban speech based on its secondary effects . . . yet the regulation is not presumptively invalid."[174]

Additionally, while Sunstein does not expressly herald the secondary effects doctrine as the harbinger of his republican notion of the First Amendment, he nonetheless express approval of the doctrine, saying:

> [A] state could plausibly decide that some kinds of nude dancing are associated with a range of serious real-world harms, including prostitution, criminal activity of various sorts, and sexual assault. At least this is so if the government can muster evidence that the regulated form of nude dancing does produce these harms, which would be sufficient to justify regulation under the standards applied to lower-tier speech.[175]

Although Sunstein's reference to the secondary effects doctrine is limited to the specific arena of nude dancing (the most common invocation of the doctrine, after all), it is doubtless that logical extensions of the secondary effects doctrine would meet his approval, so long as the restriction in question limits speech based on allegedly legitimate justifications like reducing the secondary harm that is associated with the speech.

Under the secondary effects doctrine, the government sets the value of the speech and effectively reduces the level of protection by focusing on the social ills that are often associated with the speech. However, the speech most likely to be associated with social ills is, by nature, unpopular. Nevertheless, it is clear that the speech prohibited by the secondary effects doctrine is not the cause of the social ills. Indeed, there is no distinct line of

---

174. *Pap's A.M.*, 529 U.S. at 322-23 (Stevens, J., dissenting).

175. SUNSTEIN, THE PROBLEM OF FREE SPEECH, *supra* note 7, at 164 (citing Justice Souter's concurring opinion in *Barnes*).

causation connecting the social ill to what is said, expressly or symbolically. Although the government may seek to cure social ills by targeting secondarily related sources, rather than the directly responsible source, it only succeeds in limiting the most visible associate of the ill and not the source of the harm. This rationale misplaces the social "blame" for a culture in disrepute onto the safety valve of the same culture.[176] It blames the fruit of such a culture and not the culture itself.

The trouble with both civic republicanism and the secondary effects doctrine is that both remove the individual sources of judgment making and value-setting from the consuming public and place them with the parochial government. My fundamental objection to these doctrines is firmly grounded with their explicit and implicit rejection of the Holmesian free speech marketplace. That is, just as quickly as a market conception of free speech is rejected, so too, the government is replete with the possibility for censorship. Indeed, by eliminating the speech as a commodity, the "consumer" loses his ability to make an independent judgment formation. Although this is the fundamental underpinning of Sunstein's republican conception of the First Amendment, it is one that I believe is fundamentally misplaced. In a free market of speech, the individual should act as consumer, setting his own judgment preferences and deciding how best to allocate speech resources. Moreover, criminal laws subject preferences that are so blatantly immoral—like child pornography—to criminal liability, such that this type of speech should not be considered an invasion into the individual's preference setting. However, when the government acts as the parental censor telling the individual what she may or may not say or hear, then the best allocations of speech resources will be hampered. More importantly, governmental decision makers remove individual autonomy from the consuming listener. However, because civic republicanism and the republican flourishes of the secondary effects doctrine place the sovereignty of the nation above that of the individual (as part and parcel of the social contract), the individual's preferences are subordinate to the government. With this in mind, Judge Posner, facing the public nudity statute upheld by the Supreme Court in *Barnes*, wrote:

> Once the relevant marketplace is understood to include expressive activity concerned with emotions as well as expressive activities concerned with ideas . . . it becomes evident that erotic performances are a major component of the First Amendment marketplace. . . . Censorship of erotica is pretty ridiculous . . . What

176. Smolla and Nimmer identify the safety valve concept, enabling the market to effectuate democratic principles, as one of the three functions of the First Amendment. *See* SMOLLA, 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH, *supra* note 102, §§ 2:1-2:7. The two other functions of free speech include enlightenment and self-fulfillment. *Id.*

> kind of people make a career of checking to see whether the covering of a woman's nipples is fully opaque, as the statute requires? . . . Many of us do not admire busybodies who want to bring the force of the law down on the heads of adults whose harmless private pleasures the busybodies find revolting. The history of censorship is a history of folly and cruelty.[177]

CONCLUSION

Much like the end of the nineteenth century,[178] the end of the twentieth century saw a significant rise in rhetoric on popular morality and civic virtue in both social and political debate.[179] The cry for cultural reformation must necessarily focus on the content of speech,[180] because speech is the most easily accessible indicator of the pulse of society. Indeed, in a culture deluged by information and modes of communication, First Amendment analysis necessarily plays a central role in any attempt to effectuate a governmental response to the demands for change.

Nonetheless, we must question whether removing preference formation from the individual and giving it to the government is a proper form of governance. While the forms of speech attacked by

---

177. *See* Miller v. Civil City of South Bend, 904 F.2d 1081, 1097-1100 (7th Cir. 1989) (Posner, J., concurring) (finding an Indiana statute, which required nude dancers to wear a G-string and pasties, to be unconstitutional under the First Amendment), *rev'd sub nom*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

178. The late nineteenth and early twentieth centuries gave rise to two successive political movements—populism and progressivism. ROBERT W. CHERNY, POPULISM, PROGRESSIVISM, AND THE TRANSFORMATION OF NEBRASKA POLITICS, 1885-1915 151-66 (1981) (discussing the geographical origins of the two movements, populism as an agrarian movement and progressivism as primarily urban); RICHARD HOFSTADTER, THE AGE OF REFORM; FROM BRYAN TO F.D.R. 131-35 (1st ed. 1955) (same). Although these movements differed, they nonetheless maintained a similar desire for reform and the elimination of corrupting influences in government and mass culture. *See* J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1946-48 (1995).

179. *See* Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 267-68 (1991) (discussing the flourish of discussion of civic republicanism and its focus on civic virtue and communitarian deliberation).

180. The Federal Trade Commission issued a report calling for self-regulation of the music, movie, and video game industries and their marketing strategies. *See generally* FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES (Sept. 2000) *available at* http://www.ftc.gov/os/2000/09/index.htm. For a discussion of the rap music industry's emphasis on sex, violence, and greed and the internal split over the value of such content, see generally Allison Samuels et al., *Battle for the Soul of Hip-Hop*, NEWSWEEK, Oct. 9, 2000, at 58-65.

the secondary effects doctrine may conform to popular morality, we must consciously challenge governmental efforts to silence speech and expression. Certainly, the lessons taught by the histories of highly centralized governments show that chilling and freezing speech is a quick and incredibly effective method of consolidating support.[181] Additionally, it should be noted that even our own country's experience with centralizing popular morality (i.e. prohibition) met a disastrous result. While Sunstein's civic republican thought takes up the gauntlet of cultural reform, I cannot help but question the implied assumption that our culture is engrossed in a moral depression and the only escape is through moral regulations that limit speech.

Finally, I find it difficult to fathom living in Sunstein's world, one where the citizen must constantly think about the political process and live every moment participating in deliberative democracy. Moreover, the secondary effects doctrine picks up on civic republican thought by permitting regulations based on the notion that chilling certain speech will reduce the social ills that are associated with, not caused by, the speech. Indeed, efforts to combat the ailing ideologies of our culture necessarily begin by chilling the channel of the dissemination of ideas, and culminate in the abrogation of our sacred right to speech itself.

Postscript:

I finish thinking about Cass Sunstein, about secondary effects, about strip clubs and about "free" speech. I find myself driving in my car. I drive through industrial corridors. I drive past projects. I drive past people everywhere engaged in conversation. I go to 7-11 for a bean burrito. I place the tender frozen folds of tortilla in the green wrapper in the microwave and set the timer for three minutes. I do not think about what it means to be a citizen or to be engaged in deliberative democracy.

181. *See, e.g.*, DINA R. SPECHLER, PERMITTED DISSENT IN THE USSR: *NOVY MIR* AND THE SOVIET REGIME 52-60 (1982) (discussing Khrushchev's policies towards the arts); PRISCILLA JOHNSON, KHRUSHCHEV AND THE ARTS: THE POLITICS OF SOVIET CULTURE, 1962-1964 1-93 (1965) (discussing Soviet policies towards the visual arts both before and after the Cuban missile crisis). In the Soviet Union, for example, chilling and freezing speech and the dissident arts served as a critical tool for consolidating political support by crushing ideas emanating from the margins of Soviet society. *See generally* SPECHLER, *supra*.