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Daniel J. McDonald

Regulating Sexually Oriented Businesses: The Regulatory Uncertainties of a "Regime of Prohibition by Indirection"† and the Obscenity Doctrine's Communal Solution

I. INTRODUCTION

Though government and community efforts to stop the proliferation of sexually oriented businesses are frequently in the headlines, promoters of adult businesses are making headlines—and headway—of their own. And the story following the headlines: money. For example, Rick's Cabaret, a Houston topless bar, is publicly traded on the NASDAQ Small Cap Market.[1] Colleen "Ginger" Hussey, owner of Ginger's Escorts in Salt Lake City, Utah, makes more than $150,000 a year.[2] A "private dancer" can make nearly $200 an hour, charging $66 for a twenty-minute session.[3] Adult films alone were a $2.5 billion industry nationwide in 1994.[4] Businesses that sell pornography and sexually explicit material are just part of a growing $8 billion annual nationwide industry[5] that is rapidly expanding into world markets.[6] And where there is money there is power.

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† FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 253 (1990) (Scalia, J., concurring in part and dissenting in part).

1. *See Topless Bar Entrepreneur Not Ashamed He Went Public*, SALT LAKE TRIB., Nov. 22, 1995, at B6 ("There was a time when the only way to invest in a topless club was one dollar bill at a time. But times have changed.").

2. *See* Joshua B. Good, *Will S.L. Shut Down Escorts? Attorney: Ban Won't Hold Up in Court; Mayor, Council Head Looking for Ban*, SALT LAKE TRIB., Aug. 5, 1996, at D1.

3. *See* Carey Hamilton, *The Business of Sex Is Turning a Healthy Profit*, SALT LAKE TRIB., Feb. 26, 1996, at D1.

4. *See id.*

5. *See* Jamie Dettmer, *Fight Against Pornography Lags Amid Justice Scandal*, INSIGHT, July 22, 1996, at 7. Other reports suggest that, according to the Federal Bureau of Investigation, the pornography industry is a $10 billion-a-year enterprise. *See* Robert L. Maginnis, Opinion, *Military Shouldn't Push Anti-Woman Material*, SAN DIEGO UNION-TRIB., May 15, 1996, at B7.

6. *See* Haider Rizvi, *Asia: Internet Ads Promote Teenage Sex*, INTER PRESS SERV., Oct. 10, 1996, *available in* 1996 WL 11625810. As this report indicates:

> Those running the multi-billion dollar sex industry in the United States are now exploring new ways to expand their markets abroad.
>
> "Welcome to the exotic world of Asia," says an Internet Web site

Consequently, sexually oriented businesses may be here to stay. That is, unless the law can stop them. And just how can the law do that? This Comment does not purport to answer that question once and for all. Rather, it seeks to demonstrate why zoning, the most common regulatory approach, has failed and will continue to fail. This Comment also attempts to analytically nudge the law in the right direction by suggesting that regulators ought to recognize sexually oriented businesses for what they are—purveyors of obscenity—and regulate them accordingly.

Part II sets out the basic legal framework for regulating sexually oriented businesses through zoning and demonstrates why the rationale undergirding that framework is unstable and susceptible to subversion. Specifically, Part II argues that the rationale supporting adult-business zoning regulations is a legal fiction and is therefore an inherently tenuous foundation for any lasting regulatory scheme. Part II then briefly demonstrates how the disingenuousness of the zoning rationale has allowed adult businesses to circumvent entire zoning schemes either by distinguishing their own factual settings from the factual premises used to justify regulation or by using their own factual settings to show how the purported purposes of regulation are satisfied through other means. Part II concludes by arguing that the profitability of sexually oriented businesses will allow them to evade zoning regulation and, consequently, lead to their preponderance.

Part III discusses the need to regulate sexually oriented businesses for what they are—purveyors of obscenity. Part III does this by addressing how current regulatory schemes presume that such businesses deserve constitutional protection and thus reinforce and promote the very evils such schemes are intended to proscribe. Part III then briefly discusses how the problem of defining obscenity by the Supreme Court's national-local obscenity standard has discouraged regulators from utilizing the obscenity doctrine. Since there is no way to really define obscenity

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> provided by the U.S.-based Ultra Infoseek Company. Click on the advisory page, and you will see dozens of pictures of nude teenage Asian girls.
>
> . . . .
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> The trend to place advertisements like these on the Internet that specifically target sex markets in poor Asian countries is growing fast.

Id.

in such a way that all people from all cultures and moral traditions in pluralistic America could read a statute and know precisely what is proscribed and what is permitted, local determinations of what is obscene ought to be given deference. This view is supported by demonstrating that local determinations of what is obscene are inherently more legitimate than judicial determinations and are necessary to preserve the morality of society and to avoid the needless dilution of constitutional doctrine; and that local determinations of what is obscene are consistent with the federalist structure of American government.

II. PROHIBITION BY INDIRECTION: REGULATION THROUGH ZONING

A. The Zoning Framework

Just as "there is more than one way to skin a cat,"[7] there is more than one way to regulate sexually oriented businesses.[8] In addition to obscenity prosecutions, such businesses have been regulated via zoning ordinances, licensing requirements, nuisance laws, and the federal Racketeer Influenced and Corrupt Organization (RICO) statute.[9] The regulatory tool of choice, however, remains zoning ordinances.[10] These ordinances generally take one of two approaches to regulating sexually oriented businesses. First, local governments may use zoning ordinances to concentrate adult business into a single area.[11] This could be called the red-light-district approach. The second approach is to disperse adult businesses somewhat evenly throughout the

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7. 130 CONG. REC. 5919 (1984). The reference is to Senator Jesse Helms' comments about Congress's ability to override or avoid Supreme Court decisions. He said, "[T]here is more than one way to skin a cat, and there is more than one way for Congress to provide a check on arrogant Supreme Court Justices who routinely distort the Constitution to suit their own [n]otions of public policy." *Id.*

8. *See generally* JULES B. GERARD, LOCAL REGULATION OF ADULT BUSINESSES (1996) (outlining the various regulatory approaches).

9. *See id.*

10. This is, in part, because traditionally "local zoning regulation has enjoyed a strong presumption of validity" when constitutionally challenged. Steven I. Brody, *When First Amendment Principles and Local Zoning Regulations Collide*, 12 N. ILL. U. L. REV. 671, 672 (1992); *see* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

11. *See* Ronald M. Stern, Note, *Sex, Lies, and Prior Restraints: "Sexually Oriented Business"—The New Obscenity*, 68 U. DET. L. REV. 253, 253-54 (1991).

community so as to avoid the creation of red-light districts.[12] For purposes of this Comment, however, the zoning strategy used remains largely irrelevant since both present similar constitutional difficulties. Whether adult businesses are told they must locate in warehouse districts on the outskirts of town—where there is no pedestrian or vehicular traffic and, consequently, no clientele—or whether they are told to locate in a red-light district—where there is perhaps too much competition for clientele—adult businesses are likely to challenge any zoning restrictions placed upon them.

These challenges are most often based on the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech"[13] and has been made applicable to the States through the Due Process Clause of the Fourteenth Amendment.[14] Because of these amendments, state and local governments cannot make laws abridging the freedom of speech. Adult businesses predictably contend that their services and products are a form of speech deserving constitutional protection against state and local regulation. So far, the Supreme Court has agreed.[15] However, the amount of constitutional protection afforded depends largely on the purpose of the regulation as demonstrated by its effect on speech.

If the ordinance is predominately aimed at restricting the content of the speech itself,[16] the ordinance will be placed under strict scrutiny by courts[17] and will, almost presumptively, be

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12. *See id.*

13. U.S. CONST. amend. I.

14. *See* Edwards v. South Carolina, 372 U.S. 229 (1963).

15. *See, e.g.*, Barnes v. Glen Theater, 501 U.S. 560 (1991) (plurality) (recognizing that nude dancing is protected speech under First Amendment); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (finding adult movie theater entitled to First Amendment protection but nevertheless upholding ordinance as a valid time, place, and manner restriction on speech); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (holding ordinance prohibiting live nude dancing unconstitutional); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality) (finding movie theater that displayed sexually explicit films on a regular basis entitled to constitutional protection but upholding city ordinance as a reasonable time, place, and manner restriction on that protected speech).

16. The Court has said that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

17. *See Playtime Theatres*, 475 U.S. at 46-47; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 791-92 (2d ed. 1988).

declared invalid.[18] Strict scrutiny requires the government to show that the content-based "regulation is a precisely drawn means of serving a compelling state interest."[19] This type of judicial review has been described as "strict in theory, but fatal in fact" as nearly all such ordinances will be invalidated as violative of the Constitution.[20] If, by contrast, the regulation seeks not to regulate the content of the speech itself but some other problem (e.g., rape or drug abuse) commonly associated with it, or in other words, if the regulation can be *justified* without regard to the content of the speech,[21] the regulation can theoretically be deemed to make no reference to the content of the speech and is labeled "content neutral."[22] Valid content-neutral regulation seeks only to restrict the "time, place or manner" in which the speech takes place and not the protected speech itself, thus making it constitutionally permissible.[23] The critical distinction between an ordinance that is a content-based restriction and one that is not content-based seems to be whether the ordinance altogether bans the allegedly protected activity.[24] If it does, then the ordinance will not be analyzed to determine whether it is a valid content-neutral time, place, and manner restriction but will be subjected to strict scrutiny.[25]

The case of *Young v. American Mini Theatres, Inc.*[26] is illustrative. There, the city of Detroit passed zoning ordinances that prohibited adult bookstores and adult theaters from being located within 1000 feet of any other similar business or 500 feet

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18. *See Playtime Theatres*, 475 U.S. at 46-47; *see also* Carey v. Brown, 447 U.S. 455, 462-63 & n.7 (1980); *Mosley*, 408 U.S. at 92, 95, 98-99.

19. *Playtime Theatres*, 475 U.S. at 62 (Brennan, J., dissenting) (quoting Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980)).

20. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment); *see also Playtime Theatres*, 475 U.S. at 46-47.

21. *See Playtime Theatres*, 475 U.S. at 48.

22. *See* TRIBE, *supra* note 17, § 12-2, at 790.

23. *See Playtime Theatres*, 475 U.S. at 47; *see also* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Heffron v. International Soc'y for Krishna Conscionsness, Inc., 452 U.S. 640, 647-48 (1981).

24. For example, before analyzing whether a Renton, Washington ordinance was a *valid* time, place, and manner regulation the Supreme Court in *Playtime Theatres* first decided that "[t]he ordinance is . . . properly analyzed as a form of time, place, and manner regulation" because the ordinance "[did] not ban adult theaters altogether." *Playtime Theatres*, 475 U.S. at 46.

25. *See supra* notes 16-20 and accompanying text.

26. 427 U.S. 50 (1976) (plurality).

of a residential dwelling without the city's approval.[27] The ordinances were based on findings that these types of businesses, when concentrated, had a blighting effect on surrounding neighborhoods.[28] Various urban planning and real estate experts claimed that "the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere."[29] A plurality of the Supreme Court upheld the ordinance as constituting a valid content-neutral time, place, and manner restriction because the ordinance was meant to "preserve the quality of urban life" by avoiding or mitigating the "secondary effects" of these businesses.[30] The Court distinguished this situation, where the city was regulating only the effects of the businesses, from one in which the regulatory purpose was to suppress the businesses themselves.[31]

Local governments frequently attempt to regulate sexually oriented businesses by the *Young* method of placing content-neutral restrictions upon them, since these restrictions are subjected to a lower level of constitutional scrutiny. To show that its regulation is content neutral and thus survive constitutional review through application of this lower level of scrutiny a governmental entity must show: (1) that the regulation was "designed to serve a substantial governmental interest" unrelated to the content of the speech;[32] (2) that the regulation is narrowly tailored to serve that purpose;[33] and (3) that the regulation does "not unreasonably limit alternative avenues of communication" for the speech that is incidentally burdened.[34] If

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27. *See id.*
28. *See id.* at 55.
29. *Id.*
30. *Id.* at 71.
31. *See id.* at 71-72 n.35.
32. City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986).
33. *See id.* at 52.
34. The test for determining the validity of time, place, or manner regulations on sexual expression has been stated a number of ways. Most recently a plurality of the Supreme Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), quoted *United States v. O'Brien*, 391 U.S. 367 (1968):

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an

the government cannot show a substantial interest, the zoning scheme is prima facie invalid. Accordingly, the ultimate success of any such zoning scheme almost always turns upon whether the government has demonstrated the negative secondary effects these types of businesses have on a community.[35] For all practical purposes, then, the premise underlying nearly all zoning of sexually oriented businesses is that these businesses generate negative secondary effects and that the government

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> 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.

Barnes, 501 U.S. at 567 (quoting *O'Brien*, 391 U.S. at 376-77).

The doctrine underlying the test has undergone a massive evolution since it was first introduced in the 1940 case *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260-62 (1995). Originally, the doctrine was used to coordinate "competing legitimate public interests . . . in the face of multiple valid claims" upon fixed state resources. *Id.* at 1260. Thus a city could legitimately require a parade license that would satisfy "various inconsistent demands" for a limited number of city streets but could not ban leafleting "in order to serve the legitimate interest of preventing trash and litter." *Id.* at 1260-61. The former merely coordinated competing claims of speech while the latter "subordinated" a form of speech. *Id.* This distinction between coordination and subordination was abandoned in subsequent cases. *See id.* at 1261 (citing Buckley v. Valeo, 424 U.S. 1 (1976) and Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

35. Cases invariably turn on the "substantial interest" prong because "the means chosen" and "alternative channels" prongs are "extraordinarily lenient." Post, *supra* note 34, at 1263. "Because [these] criteria . . . have been interpreted so leniently, the Court has placed increasing pressure on [the first factor]." *Id.* at 1265; *see, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989) (Court should essentially presume that the interests sought to be protected are "best served by" the regulatory *means* chosen by the government); *Playtime Theatres*, 475 U.S. at 53-53 (zoning scheme that forced adult theater sites into 520 acres of commercially unviable land did not violate the "alternative channels" prong); North Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 444-45 (7th Cir. 1996) (zoning scheme that left only one percent of Chicago open for adult businesses provided reasonable alternative channels), *cert. denied*, 117 S. Ct. 684 (1997); Spokane Arcade, Inc. v. City of Spokane, 75 F.3d 663, 667 (9th Cir. 1996) (city ordinance that required interior of adult video arcade booths be visible to employees in adjacent room and that at least one employee be situated in arcade room whenever a customer entered was not an invalid time, place, and manner restriction even if the costs of compliance were so great that the business "would be forced out of business, [because] the ordinances do not pose any intrinsic limitation on the operation of the arcades, but merely increase World Video's vulnerability to such market forces as the increased costs of labor and the decreased or stagnant demand for pornography"); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986) (ordinance requiring exotic dancers to perform at least 10 feet away from patrons and on a stage raised at least 2 feet from the floor did not deny dancers "reasonable access to their market").

therefore has a substantial interest in imposing time, place, and manner restrictions upon them.

To show such a substantial interest, a city need not commission its own studies to demonstrate the blighting effects that adult businesses have had on their community.[36] A city may "borrow" research from other jurisdictions that demonstrates the blighting effect adult businesses have on cities in general.[37] Similarly, such businesses do not need to exist in a city before a city can enact an ordinance that regulates them.[38] Such a content-neutral scheme was upheld in *City of Renton v. Playtime Theatres, Inc.*[39] The Renton, Washington zoning ordinance prohibited "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[40] The ordinance was enacted at a time when no adult businesses were located within the city.[41] Therefore, whether Renton could justify such an ordinance on the *Young* rationale that such businesses generated negative secondary effects was at issue in the case.[42] The Court held that "Renton was entitled to rely on the experiences of . . . other cities" to show the negative secondary effects adult businesses generate[43] because

> [t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.[44]

The *Young-Playtime Theatres* method of regulating sexually oriented businesses has caught on. For example, a recent article by Barry K. Arrington, an attorney for the Coalition for Children and Families, announced that "[f]ourteen studies from around the United States have documented a strong connection between sexually oriented businesses and increased levels of

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36. *See Playtime Theatres*, 475 U.S. at 51-52.
37. *See id.*
38. *See id.*
39. 475 U.S. 41 (1986).
40. *Id.* at 43.
41. *See id.* at 44.
42. *See id.* at 46.
43. *Id.* at 51.
44. *Id.* at 51-52.

crime in an area."[45] The article then provides an address and phone number for cities wishing to obtain the studies.[46] Arrington notes, "In response to the findings of the surveys mentioned above, many communities have enacted ordinances imposing strict regulations on sex businesses," which have caused many "sexually oriented businesses [to close] or change[] operations."[47] And in Utah, for example, several cities, including Salt Lake City, have recently sought to tighten their zoning restrictions on sexually oriented businesses.[48]

Despite its apparent successes, this method of regulating sexually oriented businesses on the basis of the secondary effects they allegedly produce rests on an analytical foundation that will eventually crumble. This erosion of secondary effects analysis is inevitable for several reasons. First, the doctrinal premise of this mode of regulation, which is nothing more than a legal fiction, is paradoxically flawed and disingenuous. Second, even assuming the doctrinal soundness of secondary effects analysis, adult businesses may use their own factual settings to, figuratively-speaking, "call a city's bluff." They can do this by distinguishing their situation from the situations upon which a city's borrowed research is predicated or by demonstrating that the purported purposes of the regulation are not offended by the circumstances of their case. Third, emerging social research supported by large sums of money may rebut on a nationwide and case-by-case basis the presumption—"demonstrated" in most cases by the aforementioned "canned research" borrowed from other jurisdictions—that adult businesses generate negative secondary effects.

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45. Barry K. Arrington, *Local Regulation of Sexually Oriented Businesses*, 22 COLO. LAW. 537, 537 (1993).

46. *See id.* at 539 n.2.

47. *Id.* at 537.

48. *See No Ban, But North Salt Lake Limits Adult Businesses*, SALT LAKE TRIB., Mar. 7, 1996, at C1 (North Salt Lake ordinance passed allowing only one nude or seminude bar per 14,000 residents when the city's population is only 7,000); *S. Salt Lake Limits Sex Businesses*, SALT LAKE TRIB., Jan. 12, 1996, at D1 (reporting that South Salt Lake has limited the number of sexually oriented businesses to one for every 6,000 residents); *Sex-Business Measure Passes in W. Jordan*, SALT LAKE TRIB., Apr. 4, 1996, at B3 (ordinance passed, limiting sexually oriented businesses to one for every 10,000 residents and requiring they be 600 feet away from schools, parks, churches, and each other).

B. How Firm a Legal Foundation?

1. A dangerous legal fiction

Secondary effects analysis is, at best, a legal fiction. Once fully recognized as such—assuming that it has not been already[49]—the likelihood of its downfall is great.[50] If candid, most would agree that the *real* purpose of "content-neutral" zoning schemes, at least in the case of regulating sexually oriented businesses, is to suppress the content of the businesses themselves. For example, the ordinance upheld in *Playtime Theatres* pinpointed "adult motion picture theater[s]" by reference to the content of the movies they showed, defining such theaters as "'[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, *distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."*'"[51] And in *Young* the plurality concluded that

> the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," noting that "[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech."[52]

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49. This mode of regulating has seemed suspicious to many from the onset. For example, in *Playtime Theatres* Justice Brennan began his dissent by stating, "Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there." *Playtime Theatres*, 475 U.S. at 55 (Brennan, J., dissenting); *see also* Stern, *supra* note 11, at 284 ("The Court has allowed regulation of speech based on content, under the guise of allowing municipalities to keep secondary effects out of the community.").

50. Some "think of a legal fiction as a logically untenable concept that the Court fully intends to cling to." Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1137 (1989). On the other hand, others observe that "courts create legal fictions to express needed legal developments that they are unable to weave into law's seamless web. Later, as the law develops, courts become able to revise their fictions and express them in standard, rational, logical form," thus leaving the fiction behind. *Id.* (citing Lon Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 513, 877 (1930)).

51. *Playtime Theatres*, 475 U.S. at 44 (emphasis added) (quoting RENTON, WASH., ORDINANCE NO. 3526 (April 1981)).

52. *Id.* at 49 (alterations in original) (quoting Young v. American Mini Theatres, 427 U.S. 50, 70, 71 n.34 (1976)).

Indeed, most "content-neutral" zoning schemes make explicit and detailed reference to the content of the "speech" they are indirectly regulating because failure to do so may subject the regulation to strict scrutiny--and thus failure—for vagueness or overbreadth.[53] For example, Provo, Utah defines a "Sexually-Oriented Business," in part, as a place where a "Licensed Entertainer"[54] might show "the human male or female genitals, public [sic] area, or buttocks, with less than an opaque covering" or the "female breast with less than an opaque covering, or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state."[55] And Park City, Utah's zoning scheme regulates businesses that show or depict live or in person acts of "[f]lagellation or torture by or upon a person clad in undergarments [or] a mask or bizarre costume."[56] As one writer said of the adult films shown in *Playtime Theatres*, "It is clear that the harms these restrictions sought to avert would not have occurred if the movie theaters in question had simply displayed white screens that conveyed no communicative content whatever."[57]

The foregoing illustrates a paradox that will eventually cripple this mode of regulation. On the one hand, all regulations based upon the secondary effects of adult businesses are necessarily detailed in their description of the subject matter (content) to be regulated so as to avoid vagueness and overbreadth challenges.[58] On the other hand, such regulations necessarily postulate—if not elaborate—a causal link between content and its associated harms.[59] As the descriptiveness to avoid vagueness increases, the likelihood that a regulatory scheme is facially content-neutral decreases.

Beyond this debilitating paradox, the line between what is a content-neutral regulation and what is a content-based regu-

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53. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981) (finding an ordinance prohibiting live entertainment, including nude dancing, to be constitutionally overbroad as it would have the effect of banning dancing in musical and dramatic works).

54. PROVO, UT., CITY CODE § 9.60.010 (1996).

55. *Id.*

56. PARK CITY, UT., MUNICIPAL ORDINANCES § 4-9-4 (L)(3) (1996).

57. Post, *supra* note 34, at 1267.

58. *See Schad*, 452 U.S. at 65.

59. *See* Post, *supra* note 34, at 1267.

lation is, perhaps, indefinable. As Professor Post tells us, "the Court has so far failed to articulate any substantive First Amendment theory to guide its distinction" but has instead "produced only particular judgments, more or less convincing on their own facts."[60] For example, in *Boos v.Barry*,[61] the Court held that a Washington, D.C. ordinance prohibiting the display of any signs in front of a foreign embassy designed to "'intimidate, coerce, or bring into public odium any foreign government'"[62] was unconstitutional.[63] The Court rejected the argument that the ordinance was not aimed at restricting the content of speech but was intended to shield foreign officials from the demeaning and humiliating secondary effects of protected speech.[64] Justice O'Connor noted that the city did "not point to the 'secondary effects' of picket signs in front of embassies. They [did] not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies,"[65] suggesting that such facts might have justified content-neutral regulations.

Such rhetoric demonstrates the dangerous malleability of the rationale. The Court might justifiably uphold an ordinance regulating adult businesses because they routinely cause people to protest them, which, in turn, creates congestion, interference with ingress or egress, and visual clutter. Conversely, the same ordinance, enacted for the same reasons, might be stricken by the Court as an unconstitutional attempt to regulate the protected speech of the protestors. In addition, the Court might justifiably enjoin or limit adult business protestors engaging in political speech outside such establishments because such protest creates congestion, interference with ingress or egress, and visual clutter. In any case, the Court's decision could turn solely upon whether the negative secondary effects are negative enough. As Professor Post queries:

> Should a law that prohibits pornographic movies because [such movies]allegedly increase the rate of crimes against women be

60. *Id.*
61. 485 U.S. 312 (1988).
62. *Id.* at 316.
63. *See id.* at 334.
64. *See id.* at 320-21.
65. *Id.* at 321.

> deemed content-based or content-neutral? What of a law that suppresses violence in the media because of an asserted connection to violent crimes? Or a law regulating corporate speech during elections in order to avert voter alienation? Or, to revive an old chestnut, a law banning Communists from key positions in the leadership of national labor unions in order to protect national security?[66]

Perhaps Justice Brennan was correct when he said that the secondary effects analysis "creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of . . . speech."[67] As the previous discussion shows, Brennan may well have added that governmental censorship could also exist whenever the Court disapproves of the regulated speech in question.

For this reason, although conservatives may temporarily enjoy secondary effects successes on the adult business battlefield they are losing ground elsewhere. For example, in *Madsen v. Women's Health Center Inc.*,[68] the Court reviewed a lower court injunction that strictly regulated protestors of an abortion clinic, restricting only the speech of those who opposed abortion. The Court held that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based"[69] and partially upheld the injunction, which was justified by the state's significant interest in protecting women's freedom to seek lawful medical treatment, promoting the free flow of traffic on public streets and sidewalks, protecting private property rights of abortion clinic owners and residential privacy.[70] The logical extension of decisions like these, themselves based on a secondary effects rationale, may be to sorely limit the free speech rights of citizens to publicly voice their concerns by picketing adult bookstores, adult movie houses, and other businesses due to the negative secondary effects such speech might generate. Thus, ironically, the secondary effects rationale conceivably could help undermine the very purposes for which it was created. This

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66. Post, *supra* note 34, at 1267.

67. *Boos*, 485 U.S. at 335 (Brennan, J., concurring in part and concurring in the judgment).

68. 114 S. Ct. 2516 (1994).

69. *Id.* at 2524.

70. *See id.*

would be a costly price to pay, sacrificing not only the freedom to speak out on an important political issue but also sacrificing what may be the most effective way to eliminate undesirable businesses.[71]

For the foregoing reasons and those that follow, as Justice Antonin Scalia has said, "It does not seem to me desirable to perpetuate such a regime of prohibition by indirection."[72] In summary, because secondary effects analysis on the one hand allegedly makes no reference to the content of "speech," but on the other hand must make such a reference to avoid overbreadth or vagueness challenges, it is a disingenuous legal fiction that contains the seeds of its own destruction. Even if the doctrine does not ultimately self-destruct, its utility for regulators is sure to be undermined by its inability to distinguish between content-based and content-neutral regulations. This lack of clarity alone renders the doctrine as unstable as the predilections of the members currently constituting the Court. And even assuming that the content-neutral, secondary effects mode of regulating is truly content neutral, its supporting rationale may nevertheless be used to "objectively" stifle constitutionally protected and valuable modes of speech essential to the fight against adult businesses, thus defeating its own purposes.

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71. In fact, assuming that the secondary effects rationale maintains its vitality, the *only* way to completely eliminate sexually oriented businesses from a community is through direct political action by the citizenry, which may often generate negative secondary effects. A Salt Lake City newspaper describes the possibilities:

> Ending what is believed to be the longest-running picket line by nonpaid volunteers, about 150 people in this town of 3,500 [Mesquite, Nev.] celebrated the court-ordered closure of an adult book and video store, which was publicly protested from the day it opened in September 1993.
>
> For more than 30 months, an estimated 8,000 people from Utah, Nevada and Arizona alternately participated in a 24-hour, seven-day-a-week vigil on the sidewalk in front of Pure Pleasure Book and Video store, logging down customers' license plates while verbally scolding anyone who went inside.
>
> . . . .
>
> "This is a landmark case," said Dena Hoff, founder of the area anti-pornography organization known as HOME, for Help Our Moral Environment. "Had we not done anything, had we just sat idly by, there would be three or four porn stores today. But now there are none."

Christopher Smith, *Porn Store's Demise Brings Pure Pleasure to Its Feisty Foes*, SALT LAKE TRIB., May 15, 1996, at A1.

72. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 253 (1990) (Scalia, J., concurring in part and dissenting in part).

2. Defying the regulatory "poker face"

Similar problems can be seen with the methodology used to show the harmful secondary effects of sexually oriented businesses. While "[c]ourts have repeatedly held that local municipalities need not conduct their own studies on areas of important local concern, but . . . may rely on studies performed in other locales,"[73] adult businesses may use their own factual settings to distinguish their situation from the situations upon which a city's borrowed research is predicated. For example, in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*,[74] a federal district court in Colorado held that a city zoning ordinance violated an adult business's right to freedom of expression because the city failed to show that the studies relied upon to demonstrate its substantial interest in regulating the secondary effects of adult businesses involved adult businesses substantially similar to the one before the court.[75] In addition to distinguishing its business—which sold sexually explicit video tapes, magazines, and "novelties"[76]—from the businesses in the borrowed studies, the adult business in *Z.J. Gifts* produced evidence that crime had not increased in the nearly two and a half years it had operated.[77]

Similarly, an adult business may rely on the facts of its own case to avoid a zoning scheme by showing that the purported purposes of distance requirements are satisfied through other means. For example, a recent California federal court decision, *Vicary v. City of Corona*,[78] held that a facially valid zoning scheme was unconstitutional as applied because there existed "both artificial and natural conditions which would mitigate or

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73. Tee & Bee, Inc. v. City of West Allis, 936 F. Supp. 1479, 1486 (E.D. Wis. 1996) (citing City of Renton v. Playtime Theatres, 475 U.S. 41, 51-52 (1986) and Suburban Video, Inc. v. City of Delafield, 694 F. Supp. 585, 590 (E.D. Wis. 1988)).

74. 932 F. Supp. 1256 (D. Colo. 1996).

75. *See id.* at 1260.

76. *Id.* at 1258.

77. *See id.* The businesses in the borrowed studies provided "sexual entertainment on business premises" as opposed to off-premises entertainment. *Id.* at 1260. The court said that "[t]he problems well-documented in studies of adult businesses providing sexual entertainment on business premises can no more be generalized to a business like [the plaintiff's] than they can be to the cable television industry." *Id.*

78. 935 F. Supp. 1083 (C.D. Cal. 1996).

block any secondary effects which could potentially impact on the nearby residential communities."[79] Specifically, the court granted a permanent injunction against the enforcement of a city zoning regulation that prohibited "any 'live adult entertainment establishment' from operating within 750 feet of a residentially zoned lot, or school, church, park or library attended by minors"[80] because the city's substantial interest in protecting against the secondary effects of the business was satisfied through means other than an arbitrary 750-foot buffer zone.[81] In short, although the adult business was within 750 feet of residential areas the court determined the business would not have an adverse secondary impact on those areas since it was surrounded by an industrial warehouse, a storage yard, a vacant parcel of land, and a four-lane thoroughfare with an eighty-foot median.[82]

In summary, assuming that the real purpose of zoning regulations is to virtually eliminate sexually oriented businesses, these adult businesses can avoid that purpose whenever they can show that the purported-though-not-genuine purpose of the regulation is carried out by other means. And even assuming the less realistic notion that these zoning regulations are used as a balancing mechanism to altruistically protect the First Amendment rights of adult businesses while protecting the community from the evils associated with the exercise of those rights, the balance tips in favor of an adult business any time it can show that there are no real evils associated with the exercise of those rights.

3. *Money's power to tell the "truth"*

Another problem with secondary effects analysis is that it necessarily assumes that sexually oriented businesses are harmful to individuals and society. However obvious this assumption may seem to people,[83] it has not gone, and will not in the future

79. *Id.* at 1089.
80. *Id.* at 1084.
81. *See id.* at 1090.
82. *See id.* at 1089.
83. As Rebecca Hart, leader of a group of sexually oriented business protestors in Mesquite, Nevada, said after two employees of a local adult video store were arrested on charges of murdering and robbing an elderly man at his trailer home in Mesquite: "This just underlines what we've been saying all along about the effects of

go, unchallenged. Currently, there is no consensus in either the legal or scientific communities regarding the effects on society of these businesses and the materials they sell.[84] Some argue that there is absolutely no causal link between consumption of pornography and violence.[85] Others argue that there is a direct causal link between *violent* pornography and violence and that research will continue to support this position.[86] And yet others,

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pornography. . . . It's well-known that crime in general with drugs and prostitution are all part of the scene when a sexually oriented business comes to town." Christopher Smith, *Adult Bookstore Workers Charged in Murder*, SALT LAKE TRIB., Feb. 22, 1996, at B3.

84. *See, e.g.*, RICHARD ABEL, SPEECH AND RESPECT 93-94 (1994) (no causal link between consumption of pornography and rape or violence to women); EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 105 (1987) (examining conflicting research); DON C. GIBBONS, SOCIETY, CRIME, AND CRIMINAL BEHAVIOR 274-75 (6th ed. 1992) (citing national study that found reading of magazines like Playboy and Hustler was highly correlated with rape rates); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 624 n.216 (1997) (citing studies showing "that extremely graphic, nonviolent pornography decreases aggression against women," and that "studies done in the United States, Denmark, Sweden, and West Germany show no increase in the rape rate in the years following legalization and increased circulation of pornographic materials"); Craig B. Bleifer, *Looking at Pornography Through Habermasian Lenses: Affirmative Action for Speech*, 22 N.Y.U. REV. L. & SOC. CHANGE 153, 163 & nn.51-55 (1996) (noting academic disagreement and collecting and contrasting research); Sarah H. Garb, *Sex for Money is Sex for Money: The Illegality of Pornographic Film As Prostitution*, 13 LAW & INEQ. 281, 301 n.13 (1995) (studies show link between violent pornography and violent behavior); Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143, 163 (1995) ("Social studies, laboratory data, and testimony from real perpetrators and real victims all support the conclusion that men's exposure to pornography makes women's lives more violent, dangerous, and unequal.") (citing PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES (Catherine Itzin ed., 1993)); Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 865 (1993) (arguing that research "seems to affirm that exposure of men to violent sexual material leads to harm to women"); Kimberly A. Yuracko, *Toward Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism*, 6 UCLA WOMEN'S L.J. 1, 48 n.112 (1995) (noting studies that show increased levels of violence to women caused by exposure to pornography).

85. *See* ABEL, *supra* note 84, at 93-94.

86. *See* Wesson, *supra* note 84, at 864-66. In discussing the possibility of a tort cause of action against the purveyors of violent pornography Wesson notes:

> I do not think that many . . . attorneys will fail to produce evidence of a general causal link between exposure to violent pornography and harm to women. Although some researchers have been reluctant to affirm the existence of a link between exposure to nonviolent sexual material and harmful changes in the subject's attitudes or thoughts, those who have done the most work in this area acknowledge that exposure to materials that depict the infliction of pain or rape does have such a damaging effect.

Id. at 866.

like Catharine MacKinnon, take a more nuanced approach, arguing that pornography does not just cause harm to women in a tort-like, cause-and-effect sense but that it *is* harm to women.[87] And some go so far as to suggest that pornography may actually decrease the likelihood of societal injury. For example, Judge Richard A. Posner has said that "by facilitating masturbation, pornography may actually reduce the demand for rape."[88]

From the divergent and confusing dialogue regarding the secondary effects of sexually explicit materials, and thus the businesses that provide them, one senses that the balance of academia is highly suspicious of the notion that harmful secondary effects are caused by the types of goods and services these businesses provide. This includes both the scientific[89] and legal[90] academies. But regardless of how the academic debate is resolved[91] it is likely that the economic clout of a multi-billion dollar industry may ultimately resolve the issue in the industry's favor.

Sexually oriented businesses certainly have the money to fund favorable research of their own.[92] This research could be used by businesses in litigation, which often turns on who has hired the best expert witnesses,[93] to "prove" that their business has no harmful secondary effects on the community. Of course, expert witnesses are not cheap[94] and a multi-billion dollar industry certainly has more ability to hire "good" experts than a

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87. *See* MacKinnon, *supra* note 84.

88. RICHARD A. POSNER, SEX AND REASON 366 (1992).

89. *See* Augustine Brannigan, *Obscenity and Social Harm: A Contested Terrain*, 14 INT'L J.L. & PSYCH. 1 (1991) (research on the effects of obscenity and violent pornography is subject to scientific controversy); Daniel Linz et al., *The Findings and Recommendations of the Attorney General's Commission on Pornography: Do the Psychological "Facts" Fit the Political Fury?*, 42 AM. PSYCHOL. 946 (1987) (arguing that the 1986 Meese Commission on Pornography misrepresented available research on its harmful effects).

90. *See supra* note 86.

91. Indeed, given the desire for tenure, coupled with healthy egos unyielding to persuasion, it is highly likely that the debate will continue to rage and grow even more confusing.

92. *See supra* notes 1-6 and accompanying text.

93. *See* George L. Blum, Annotation, *Propriety of Questioning Expert Witness Regarding Specific Incidents or Allegations of Expert's Unprofessional Conduct or Professional Negligence*, 11 A.L.R. 5TH 1, § 2(a), at 12 (1993).

94. This is not intended to be a pun.

typical municipality.[95] Therefore, on a broad scale, adult businesses may be able to purchase political and, thus, societal legitimacy. Few have doubted the ability of money to influence the political process.[96] And there is every reason to believe that money influences the politics of pandering pornography. As Andrea Dworkin notes, "Pornography is a multi-billion-dollar industry, and [promoters of pornography] spend a lot of money lobbying for laws that protect them."[97] If adult businesses are not able to secure affirmative protections through money, they may at least be able to launch effective public relations campaigns when their existing interests are challenged. For example, money from sexually oriented businesses was allegedly linked to the recent defeat of Measure 31 in Oregon, which was designed to make changes in the state's constitution that limited free-speech protections for obscenity.[98]

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95. One could even foresee the creation of national associations of sexually oriented businesses that may pool economic resources together to fight the necessary legal battles. Thus the argument that most sexually oriented businesses are "Ma and Pa" operations that have little economic clout loses some credibility.

96. *See* Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1281 & n.1 (1994) (recognizing that it is "scarcely a controversial proposition" that candidates for office "spend too much of their time raising money"); Allison Rittenhouse Hayward, *Stalking the Elusive Express Advocacy Standard*, 10 J.L. & POL. 51, 52 (1993) (noting several different ways "individuals and groups can spend money to influence politics"); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1371 n.424 (1993) (stating the notion that wealth influences politics "is so apparent and widely accepted as to be beyond reasonable dispute"); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 276 (1993) ("In our contemporary money politics, well-heeled interests use large campaign contributions to buy political influence with state and federal legislators, governors, and presidents who work legislative and policy results favorable to these interests."); Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1067-68 (1996) (recognizing that "[l]arge numbers of Americans have come to view legislative politics as a money game, in which campaign contributions are the dominant influence on policymaking" and that "[e]xperience and human nature tell us that legislators, like most people, are influenced by money, even when it goes into their campaign funds rather than directly into their pockets"). *See generally* HUGH NIBLEY, APPROACHING ZION (1989) (discussing how money influences politics and society in general).

97. *Quoted in* Liesl Schillinger, *The Interview: Andrea Dworkin Talks to Liesl Schillinger*, INDEPENDENT (London), Apr. 21, 1996, at 2.

98. *See Oregon Ballot Measures*, OREGONIAN (Portland), Nov. 6, 1996, at C5. Louise Shaw, campaign manager for the proposed Measure, said, "Using money from the pornography industry, the opposition hid behind libraries and bookstores and twisted this into something it was not." *Id.*

All of this is not to say that there are no negative secondary effects associated with sexually oriented businesses. There are.[99] However, the ability to demonstrate these harmful effects may vary somewhat according to the financial resources available to the parties involved. And as sexually oriented businesses gain economic power, we can be sure that this will translate into more and more legal clout. This ability to purchase legitimacy is a reality, not only in the context of actual litigation but also in the larger societal and political debate. As sexually oriented businesses become more profitable, the negative secondary effects associated with them will inevitably be downplayed, if not mysteriously vanish.

III. THE OBSCENITY DOCTRINE

A. The Sanctification of Smut

Having concluded in Part II that (1) the doctrinal premise of current zoning regulations dealing with sexually oriented businesses is a paradoxically flawed and disingenuous legal fiction, (2) adult businesses may use their own factual settings to effectively undermine zoning purposes, and (3) the ability to effectively demonstrate negative secondary effects of these businesses may be largely determined by money, one may ask if there are *any* legal means by which sexually oriented businesses may be regulated. There are. As mentioned in Part II, these businesses may be regulated via licensing, RICO statutes, and other means, which are not the subject of this Comment. However it is this author's opinion that most of these measures severely miss the point by their collective failure to squarely address the real problem: whether sexually oriented businesses deserve any constitutional protection at all. Since *Playtime Theatres* and *Young*, most courts and regulators have assumed that they do, thus conveniently avoiding the more difficult question of whether the goods and services these businesses convey and purvey are obscene. In so doing, regulators may

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99. Although I would tend to argue that the secondary effects exist I am more convinced that the primary effects of these businesses are much *more* harmful in a *less* demonstrable way. There is no way to adequately explain the spiritual and emotional devastation that occurs in an individual through sexual addiction. *See also* PORNOGRAPHY'S VICTIMS (Phyllis Schlafly ed., 1987) (containing various narrative and descriptive accounts of pornography's dangers).

have unnecessarily conceded huge amounts of moral territory to sexually oriented businesses.

By assuming that sexually oriented businesses deserve constitutional protection—e.g., by devising regulatory schemes designed to survive mid-tier scrutiny—regulators in effect clothe these businesses in sacred and protective constitutional garments.[100] Ultimately, rather than *regulating* ribaldry, regulators *reify* and *sanctify* it. As Professor David Cole explains, "prohibitions simultaneously reinforce the taboo character of sexual speech and assure readers and viewers that the bulk of pornography is socially acceptable."[101] Beyond this, the secondary effects mode of regulating is wholly ineffective for communities that object to such businesses and seek to *wholly* eliminate them.[102] Laws aimed at suppressing sexually oriented businesses need to move from peripheral regulation to more direct approaches that recognize these businesses for what they are—purveyors *of* obscenity. But how is this to be done?

B. A Noncommunity Community Standard

It is well settled that nonobscene, sexually explicit material or conduct is entitled to constitutional protection. But here lies the rub: what is the difference between what is obscene and what is not obscene, and who gets to decide the difference? As Justice Scalia has explained:

> Since this Court first had occasion to apply the First Amendment to materials treating of sex, some three decades ago, we have been guided by the principle that "sex and obscenity are not synonymous." The former, we have said, the Constitution permits to be described and discussed. The latter is entirely unprotected, and may be allowed or disallowed by

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100. "'As a practical matter, the speech suppressed by restrictions such as those involved [here] will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores.'" City of Renton v. Playtime Theatres, 475 U.S. 41, 56 n.1 (1986) (Brennan, J., dissenting) (alteration in original) (quoting Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111-12 (1978)).

101. David Cole, *Playing By Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 169 (1994).

102. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 252 (1990) (Scalia, J., concurring in part and dissenting in part) (making the same observation with respect to the Court's current obscenity doctrine).

> States or communities, as the democratic majority desires. Distinguishing the one from the other has been the problem.[103]

The Supreme Court developed a three-part test in *Miller v. California*[104] in an effort to facilitate such distinctions. According to that standard, something is obscene if:

> (a) . . . "the average person, applying contemporary community standards[,]" would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[105]

The *Miller* standard actually comprises two separate standards: one national and the other local. The "literary, artistic, political or social value" prong of *Miller* could be thought of as a national standard because in *Pope v. Illinois*[106] the Supreme Court held that this "value" prong of the obscenity standard is not determined by community standards.[107] It held that "[t]he proper inquiry is not whether an ordinary member of any given community would find serious . . . value . . . , but whether a reasonable person would find such value in the material, taken as a whole."[108] In essence the Court reasoned that "the value of a work does not vary from one community to the next depending on the acceptance it has won"[109] and that a work "need not obtain societal approval to merit protection."[110] The other two prongs of *Miller*, whether the speech reflects a prurient interest in sex and is patently offensive, are defined by local standards.[111] As one commentator has summarized the analysis, "once sexual speech is found to have no 'serious literary, artistic, political, or scientific value,' it may be criminally prohibited

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103. *Id.* at 250 (Scalia, J., concurring in part and dissenting in part).
104. 413 U.S. 15 (1973).
105. *Id.* at 24 (citations omitted).
106. 481 U.S. 497 (1987).
107. *See id.* at 500-01.
108. *Id.*
109. GERARD, *supra* note 8, at 78.
110. *Id.*
111. *See id.*

if the community finds it shamefully or morbidly prurient and patently offensive."[112]

The Supreme Court's national-local obscenity standard has discouraged regulators from using the obscenity doctrine.[113] Designed to safeguard against majoritarian and local excesses, such as the banning of Dreiser's *An American Tragedy*,[114] Lawrence's *Lady Chatterley's Lover*,[115] or Miller's *Tropic of Cancer* and *Tropic of Capricorn*,[116] because they were allegedly obscene,[117] the *Miller* test has been applied stringently "to avoid any risk of suppressing socially valuable expression."[118] The Court has thus overturned local determinations of obscenity on two fronts: jury determinations of obscenity and legislative definitions of obscenity. For example, in *Jenkins v. Georgia*[119] the Court reversed a jury verdict finding the movie *Carnal Knowledge* to be obscene, holding that juries do not have unlimited discretion in determining what is obscene.[120] The Court reasoned that while

> there are scenes in which sexual conduct including 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nu-

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112. Cole, *supra* note 101, at 122 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

113. For example a Salt Lake City, Utah newspaper reports, "Months ago, Salt Lake City Mayor Deedee Corradini asked City Attorney Roger Cutler to write a new ordinance that would ban escorts and at the same time survive any constitutional challenge. So far, Cutler and his staff have not gotten past the drafting stage." Good, *supra* note 2, at D1.

114. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 251 (Scalia, J., concurring in part and dissenting in part) (citing Commonwealth v. Friede, 171 N.E. 472 (1930) (holding it to be obscene)).

115. *See id.* (citing People v. Dial Press, Inc., 48 N.Y.S.2d 480 (N.Y. Magis. Ct. 1944)).

116. *See id.* (citing United States v. Two Obscene Books, 99 F. Supp 760 (N.D. Cal. 1951), *aff'd sub nom.* Besig v. United States, 208 F.2d 142 (9th Cir. 1953)).

117. *See also id.* (citing United States v. One Book Entitled Ulysses by James Joyce, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (holding, despite a challenge, that the book was not obscene)).

118. *Id.*

119. 418 U.S. 153 (1974).

120. *See id.*

> dity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.[121]

Cases like *Pope* and *Jenkins* demonstrate that while the Court is willing, as it was in *Miller*, to pay lip service to local values,[122] it ultimately holds—and wants to hold—the trump card. Thus, regulatory attempts to build upon the *Miller* standard have been invalidated. Indeed, what at first appeared to be a national-local standard has turned out to be only a national standard.

In *Brockett v. Spokane Arcades, Inc.*[123] the Court struck down as overly broad a Washington statute that mirrored *Miller* but sought to further define "prurient."[124] Similarly, attempts by States to clarify the definition of "patently offensive" have been declared unconstitutional. In *Smith v. United States*[125] the Court said:

> It would be . . . inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated.[126]

"The lesson of these cases," says one commentator, "appears to be that legislatures would do well simply to quote the language of *Miller*, which has been held to be constitutional, and avoid trying to improve on it, no matter how well intentioned their

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121. *Id.* at 161.

122. The *Miller* Court explained:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.

Miller v. California, 413 U.S. 15, 30 (1973).

123. 472 U.S. 491 (1985).

124. *See id.* at 498.

125. 431 U.S. 291 (1977).

126. *Id.* at 302.

efforts."[127] For the most part, States have taken this approach.[128]

Having usurped the definitional *terra firma* from local governments, the Court has articulated and monopolized a standard that has done little to clarify the metes and bounds of obscenity. Indeed, *Miller*, and the Court's reluctance to follow its own charge therein to defer to localism, may have only obscured the meaning of obscenity by spawning other vague standards that allegedly flesh out the broad *Miller* standard. For example, elaborating on the concept of a "prurient interest" in sex, the Court in *Brockett* "offered a mysterious, not to say mystical, exegesis on the meaning of the term."[129] As mentioned above, the *Brockett* Court struck down a Washington statute that equated "prurient" with things that incite "lust" because it was overbroad.[130] Justice White, writing for the Court, explained that prurient interests in sex were those interests that went "over and beyond those that would be characterized as normal"[131] but that did not include "good, old fashioned, healthy" interests in sex.[132] Perhaps the Court should have announced Justice Potter Stewart's approach on obscenity—"[I

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127. GERARD, *supra* note 8, at 71.

128. *See, e.g.*, ALA. CODE § 13A-12-190(13) (1994); ARIZ. REV. STAT. ANN. § 13-3501-2.(a)-(c) (1996); ARK. CODE ANN. § 5-68-203(B)(2) (1993); CAL. PENAL CODE § 311(a) (West 1996); CONN. GEN. STAT. ANN. § 53A-193(1) (West 1994); DEL. CODE ANN. tit. 10, § 7201(4) (Supp. 1996); GA. CODE ANN. § 16-12-80(b)(1)-(3) (1996); HAW. REV. STAT. § 712-1210(6) (1993); IDAHO CODE § 18-4101(A) (1987); ILL. ANN. STAT. ch. 720, para. 5/11-20(b) (Smith-Hurd 1993); IND. CODE ANN. § 35-49-2-1 (Burns 1994); IOWA CODE ANN. § 728.1(5) (West 1993); KAN. STAT. ANN. § 21-4301(c)(1) (1994); KY. REV. STAT. ANN. § 531.010(3) (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:106 A.(3) (West 1986); ME. REV. STAT. ANN. tit. 17, § 2912.2.B (West 1996); MD. ANN. CODE art. 27, § 419(b)(4) (1996); MASS. GEN. LAWS ANN. ch. 272, § 31 (West 1990); MISS. CODE ANN. § 97-29-103(1) (1994); MONT. CODE ANN. § 45-8-201(2) (1995); NEB. REV. STAT. § 28-807(10) (1995); NEV. REV. STAT. § 201.235-4 (1996); N.H. REV. STAT. ANN. § 650:1(IV) (1996); N.M. STAT. ANN. § 30-38-1(B) (Michie 1989); N.C. GEN. STAT. § 14-190.1(b) (1993); N.D. CENT. CODE § 12.1-27.1-01-5 (Supp. 1995); OR. REV. STAT. § 167.087(2) (1995); 18 PA. CONS. STAT. ANN. § 5903(b) (1996); R.I. GEN. LAWS § 11-31-1(b)(1) (1994); S.C. CODE ANN. § 16-15-305(B) (Law. Co-op. Supp. 1996); S.D. CODIFIED LAWS ANN. § 22-24-27(10) (Supp. 1996); TENN. CODE ANN. § 39-17-901(10) (1991); UTAH CODE ANN. § 76-10-1203 (1995); W. VA. CODE § 7-1-4(b)(4) (1993); WIS. STAT. ANN. § 944.21(2)(c) (West 1996); WYO. STAT. § 6-4-301(a)(iii) (1988).

129. GERARD, *supra* note 8, at 70.

130. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498-99 (1985).

131. *Id.* at 498.

132. *Id.* at 499.

can't define it], but I know it when I see it"[133]—and adopted the practice of announcing decisions unsupported by reasoning. More accurately, perhaps the Court *has* adopted Justice Potter Stewart's approach. As Professor Cole has remarked:

> The Court has now put forward a set of doctrinal "rules" that in the end do little more than obscure what is basically Stewart's intuitive approach. In defining obscenity, the Court has advanced an incoherent formula that requires the application of "community standards" without any specification of what constitutes a "community"; the identification of national "reasonable" judgments about artistic and literary taste, a subject on which reason may be of little guidance and on which the nation is likely to have no consensus; the differentiation of healthy from "shameful or morbid" sexual interests; and the determination that speech is "patently offensive," a judgment which in nonsexual circumstances is a reason for protecting, not criminalizing speech.[134]

And Professor Post writes:

> In recent years something seems to have gone seriously amiss with the Supreme Court's ability doctrinally to elucidate its First Amendment decisions. In fact its First Amendment doctrine has begun to display an insouciance so pronounced as to mark a virtual divide between the language of doctrine and the resolution of cases. Although the pattern of the Court's recent First Amendment decisions may well be (roughly) defensible, contemporary First Amendment doctrine is nevertheless striking chiefly for its superficiality, [and] its internal incoherence . . . .[135]

Though entertaining, and perhaps true, the standard academic criticisms of *Miller* and the Court's obscenity decisions are far from helpful. Professor Cole, after dismantling the Court's jurisprudence and others' efforts to suppress sexually explicit "speech," offers the helpful suggestion that "[t]hey would do better *not* to seek to control sexual expression, but instead to participate in affirmative private and public explora-

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133. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
134. Cole, *supra* note 101, at 111-12 (footnotes omitted).
135. Post, *supra* note 34, at 1249-50.

tion of alternative visions."[136] And Professor Post, realizing that he can only give "rather abstract advice,"[137] suggests:

> First Amendment doctrine can recover its rightful role as an instrument for the clarification and guidance of judicial decisionmaking only if the Court refashions its jurisprudence so as to foster a lucid comprehension of the constitutional values implicit in discrete forms of social order. The Court must reshape its doctrine so as to generate a perspicuous understanding of the necessary material and normative dimensions of these forms of social order and of the relationship of speech to these values and dimensions. The Court must also develop doctrinal means for allocating speech to these distinct forms of social orders.[138]

Addressing the *Miller* abstraction with academic abstraction simply will not generate the Holy Grail of surefire guidance for judicial decision making that so many seek. Such methodological certainty may simply be impossible in an area of the law that calls more for moral or sociological than analytical judgment. As Professor Paul Gewirtz tells us, "[T]he Court . . . in [obscenity] cases was faced with the task of trying to define what may be indefinable."[139] The Court itself has recognized its own "inability to define regulated materials with ultimate, godlike precision."[140] Thus the true irony and the real object of criticism is not that the Court has stumbled in its attempts to set forth a clear line of demarcation between what is obscene and what is not, but that the Court, in spite of recognizing its own incapacities to do so, has essentially usurped from local governments the opportunity to define obscenity.

The nearly quarter of a century since *Miller* ought to allow us safely to assume that Justice Stewart was right—that there is no methodological way to derive from the First Amendment guiding principles that adequately and a priori define obscenity.[141] As the Court recognized in *Miller* there simply is no way

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136. Cole, *supra* note 101, at 177.

137. Post, *supra* note 34, at 1281.

138. *Id.* at 1280-81.

139. Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1024 (1996).

140. Miller v. California, 413 U.S. 15, 28 (1973).

141. *See* Frederick Mark Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 VAND. L. REV.

to formulate a single definition of obscenity such that all people from all cultures and moral traditions could read a statute and know precisely what is proscribed and what is permitted. "[O]ur nation is simply too big and too diverse . . . [for] such standards [to be] articulated for all 50 States in a single formulation,"[142] said the *Miller* Court. Therefore:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.
>
> . . . .
>
> [We therefore] hold that obscenity is to be determined by applying "contemporary community standards," not "national standards."[143]

It is time for the Court to transform its *Miller* rhetoric into reality. Transcending the foregoing fundamental suppositions of *Miller*—that obscenity eludes definition on a national scale—the following subsections will argue that local determinations of what is obscene ought to be given nearly complete deference by the Court. This view will be supported by arguing that local determinations[144] of what is obscene are inherently

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(forthcoming 1997) (arguing, from a postmodern perspective, that "epistemological certainty in interpretation . . . cannot be achieved" by methodology that purports to separate the cognitive or "objective" meaning of a text from its normative or "subjective" application). *See generally* HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1995).

142. *Miller*, 413 U.S. at 30.

143. *Id.* at 32-33, 37.

144. Under current doctrine what is obscene is largely a question of fact. *See id.* at 30. However, the Court has "rejected the contention that a jury finding of obscenity *vel non* is insulated from review." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 507 (1984). Accordingly, the Court has and will override jury determinations of obscenity. *See* Jenkins v. Georgia, 418 U.S. 153, 159-61 (1974) (overriding jury determination of *Miller*'s "patently offensive" prong); *see also supra* notes 119-122 and accompanying text (discussing *Jenkins*). Likewise, as mentioned previously, the Court is also likely to override local efforts to define obscenity *a priori* through textual elaborations of the *Miller* standard. *See supra* notes 123-32 and accompanying text (discussing *Brockett* and *Smith*). Thus when I argue that the Court ought to grant near complete deference to local determinations of obscenity I am arguing that it should almost always affirm jury determinations of obscenity and almost never strike down municipal codes or pieces of legislation aimed at defining the contours of obscenity.

more legitimate because they are in tune with a discernible community conscience. "Local determinations" used in this context refers to determinations made by both juries and local legislative bodies. This Comment will also argue that deference to local determinations of obscenity is consistent with the federalist structure of American government.

C. Sensus Communis and Common Consciousness

1. Local determinations of what is obscene are inherently more legitimate

As outlined above, First Amendment obscenity doctrine illustrates that much of constitutional adjudication is not about algorithmic-like legal decision making or "finding" clearly defined, fully functional principles that churn out decisions like a machine.[145] Instead, constitutional decision making is largely about making moral choices. As Professor Michael J. Perry, commenting on the work of James Bradley Thayer, has said, "Some 'principles of the actual Constitution' are quite indeterminate . . . ; in that sense, some constitutional principles do not merely leave room for, but necessitate significant moral choices."[146] When pressed, most would agree that the First Amendment's obscenity doctrine is perhaps the clearest example of such an indeterminate constitutional principle.[147] And the very concern many have with such principles is that they allegedly allow an unelected judiciary to impose *its* morals on the rest of society.[148] The troubling question then is not necessarily

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145. *See supra* notes 142-44 and accompanying text.

146. MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS 89 (1994).

147. Speaking of First Amendment doctrine in general, one commentator has quite accurately stated, "It has become almost a cliche of American constitutional law that the First Amendment is not absolute." Allen Lichtenstein, *Adult Entertainment and the Cutting Edge of First Amendment Jurisprudence*, NEV. LAW., June 1994, at 12, 12.

148. This is the view of Robert H. Bork who tells us that

> the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has a valid theory derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny of the majority or of the minority.

"*What* moral decision will be made?" but "*Who* will make the coercive moral decision?" The answer to this question presupposes that whoever (or whatever) makes this decision must have legitimacy. As Ronald Dworkin points out, "A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power."[149] This instinctive urge to legitimate coercion is apparent in the dialogue concerning the Court's allegedly illegitimate obscenity doctrine. Professor Gewirtz writes:

> The reactions to "I know it when I see it" emerge against a backdrop of a set of traditional beliefs about the appropriate basis for judicial *decisions* and the appropriate content of judicial *opinions*. These beliefs arise from a wholly justified concern about the legitimacy of judicial power in a democracy, particularly in constitutional cases where unelected judges say "no" to the decisions of elected legislatures. Judicial power involves coercion over other people, and that coercion must be justified and have a legitimate basis.[150]

The problem in obscenity cases is that the primary source of perceived judicial legitimacy is nonexistent:

> *The central justification for [judicial] coercion is that it is compelled, or at least constrained, by preexisting legal texts and legal rules, and by legal reasoning set forth in a written opinion.* From this perspective, the exercise of judicial power is not legitimate if it is based on a judge's personal preferences rather than law that precedes the case, on subjective will rather than objective analysis, on emotion rather than reasoned reflection.[151]

As mentioned above, obscenity doctrine is characterized precisely by its inability to formulate such guiding texts. But if the problem is with texts, it would follow that local legislative texts would be subject to the same problems. However, there is a subtle but crucial difference between texts formulated at the local level and texts formulated nationally by the judiciary. The former are enacted by politically accountable officials while the

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Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

149. RONALD DWORKIN, LAW'S EMPIRE 190 (1986).

150. Gewirtz, *supra* note 139, at 1025.

151. *Id.* at 1025 (emphasis added).

latter are not. Accordingly, as the following discussion illustrates, local decisions are inherently more legitimate because they are more closely linked to a discernible community conscience, the sense on which a community is founded, or "We the people,"[152] if you will—the ultimate source of all constitutional legitimacy.[153]

a. Gadamer's sensus communis. This sense upon which a community is founded is referred to as *sensus communis* by Hans-Georg Gadamer,[154] a continental philosopher who authored *Truth and Method*, which "has long been viewed by continental philosophers as the most important work on interpretation to have been published in this century."[155] The *sensus communis* is "a sense that is acquired through living in the community and is determined by its structures and aims."[156] Gadamer also refers to the *sensus communis* as a communal sense for "what is right and of the common good"[157] that "'serve[s] to direct us in the common affairs of life, where our reasoning faculty would leave us in the dark.'"[158] The *sensus communis* is a common or shared sense of the "'things that hold an entire society together.'"[159] *Sensus communis* is not to be confused with social consensus, although there is an element of consensus to *sensus communis*, as it is "'concerned . . . with things that all men see daily before them.'"[160] Thus the things we see on national television might be part of the national *sensus communis*; or, more properly, the things we allow to appear on national public television may only be seen because they are in accord with or appeal to the *sensus communis*. *Sensus communis* also should not be confused with simple "common sense" although there is also an element of common sense in the *sensus communis*. According to Gadamer, proper socialization into a given community or *sensus communis* allows

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152. U.S. CONST. preamble.

153. After all, it is "We the people . . . [who] do ordain and establish this Constitution." *Id.*

154. GADAMER, *supra* note 141, at 21.

155. Gedicks, *supra* note 141.

156. GADAMER, *supra* note 141, at 22.

157. *Id.*

158. *Id.* at 25 (citation omitted).

159. *Id.* at 27 (citation omitted).

160. *Id.* (citation omitted).

one to know, with certainty, what the law is and how it will be applied.[161]

b. Durkheim's "common consciousness." Emile Durkheim, a nineteenth-century French sociologist, referred to this sense on which a community or nation is founded as the "common" or "collective" consciousness.[162] The common consciousness could be thought of as the sociological analogue of Gadamer's *sensus communis* and was greatly influenced by the political philosophy of Jean-Jacques Rousseau[163] and Auguste Comte.[164] As Durkheim explains:

> What constitutes the strength of the collective states of consciousness is not only that they are common to the present generation, but particularly that they are for the most part a legacy of generations that have gone before. The common consciousness is in fact formed only very slowly and modified in the same way. Time is needed for a form of behavior or a belief to attain that degree of generality and crystallisation, and time also for it to lose it. Thus it is almost entirely a product of the past. But what springs from the past is generally an object of very special respect. A practice to which everyone unanimously conforms has without doubt great prestige. But if it is also strong because it bears the mark of ancestral approval, one dares even less to depart from it. The authority of the collective consciousness is therefore made up in large part of the authority of tradition.[165]

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161. Gadamer maintains that although the law cannot be understood outside of its particular applications . . . it is possible, at least in principal, for one to be sufficiently familiar with the practice of law within a particular legal tradition so as to be able accurately to predict how a law will be applied in a particular situation . . . .

Gedicks, *supra* note 141.

162. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 121 (W.D. Halls trans., 1984).

163. Specifically, Durkheim was influenced by Rousseau's "general will." According to Rousseau's general will,

> the positive law will align with natural law only when the general will of a society governs through the voice of the people. While the freedom in the state of nature is different from the freedom in civil society, the latter is also natural when the general will, the will of the collectivity, rules.

BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 54 (1994).

164. *See* DURKHEIM, *supra* note 162, at xix.

165. *Id.* at 233.

Thus to Durkheim the common consciousness is a collective consciousness of what is true and right and is not a matter of a conscious social contract or explicit agreement but is a reality implicit in the social order that predates any collective action designed to express a common will. People do not get together to enact a common consciousness. It already exists. People may collectively attempt to codify aspects of the common consciousness, but it does not necessarily exist as an object apart from us.[166] Like Gadamer's *sensus communis*, the common consciousness serves to shape us and we serve to form and shape it. For Durkheim, the common consciousness was inevitably linked with the morals of society and the law was an outward manifestation of the common consciousness.[167] Thus there is a critical nexus between the common consciousness, law, and morality.[168]

c. Local vs. national "common consciousness." According to a Gadamerian account, and consistent with a Durkheimian account, legal texts do not speak for themselves. Rather, texts are part of a local community that speaks for the texts. Accordingly, people usually do not need to obtain notice of what is legal or illegal by looking up a statute. Instead, in a Durkheimian sense, the statute or ordinance merely reflects what everybody already knows to be illegal simply by being in the community; it reflects the common consciousness. And, in a Gadamerian sense, the simple review of a statute or ordinance would not give adequate notice of what the law is simply because the text has no meaning apart from its particular context. By both accounts, then, one does not have to look up the Provo, Utah city code to safely assume that a lap dancing parlor would offend the common consciousness—and thus the law—of that community. Notice of such illegality can be presumed by one's being in a community. As Ronald Dworkin tells us:

> [T]he best defense of political legitimacy—the right of a political community to treat its members as having obligations in

166. In fact Durkheim viewed the law as the truest reflection of the common consciousness. *See, e.g.*, Steven Lukes & Andrew Scull, *Introduction* to DURKHEIM AND THE LAW 1, 1-11 (Steven Lukes & Andrew Scull eds., 1983).

167. *See* ROGER COTTERRELL, LAW'S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE 178-80, 194-96 (1995).

168. *See id.* at 197 (noting Frank Pearce's argument "that the relevance of the Durkheimian tradition today must be found in the substance of what Durkheim has to say about links among law, morality, and society").

> virtue of collective community decisions—is to be found not in the hard terrain of contracts or duties of justice or obligations of fair play that might hold among strangers, where philosophers have hoped to find it, but in the more fertile ground of fraternity, community, and their attendant obligations. Political association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation. It is no objection to that claim that most people do not choose their political communities but are born into them or brought there in childhood.[169]

Therefore, when confronted with identical texts, one written by a national judiciary and the other by a local city council, one cannot assume that they mean precisely the same thing. In other words, since the word "obscenity" has no meaning apart from its context, courts ought to give deference to the contextual—or local—meanings of obscenity. Local elaborations of what is obscene ought to be accorded deference because such textual elaborations are theoretically a reflection of the local common consciousness and are thus inherently more legitimate.[170]

The same intimate connection that exists between an individual and his community's common consciousness does not exist between an individual and a national common consciousness—if one exists. In fact, appealing to some distant national common consciousness—national legal-moral standards—in a pluralistic society will inevitably lead to a decline in morality

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169. DWORKIN, *supra* note 149, at 206-07.

170. As mentioned above, one knows what is obscene and what is not obscene in a given community not by rifling through municipal codes but through being in a community and feeling accountable for one's actions. One cannot get such a sense on a national level. Also, as Dworkin says, it is no objection to say that a community standard is illegitimate simply because one is born into it without choice. Likewise, it is no objection to say that a community standard, which imposes collective obligations upon all, is invalid simply because one newly moves into a given community. Those who move into a community are quickly socialized into a general conception of what is and what is not acceptable within that community. Perhaps this socialization could begin even prior to entering a community. It would be disingenuous for an Atlantic City, New Jersey entrepreneur to argue that he really thought a lap dancing parlor would be acceptable in predominantly Mormon Provo, Utah. Nonetheless, my argument is not that texts are meaningless. Indeed, it would be extremely helpful for an outsider to be able to look up and read a local code that elaborates upon that particular community's conception of what is obscene. However, under current obscenity doctrine, this is not a realistic possibility. *See supra* Part III.B.

and a dilution of constitutional doctrine. According to Durkheim, as society grows and becomes more diverse and complex the national common consciousness is "forced to rise above all local diversities"[171] of consciousness. Accordingly, it becomes more abstract.[172] This abstraction in turn serves only to foster more abstraction, ironically, by allowing for greater individualism.

> The more general the common consciousness becomes, the more scope it leaves for individual variations. When God is remote from things and men, His action does not extend to every moment of time and to every thing. Only abstract rules

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171. DURKHEIM, *supra* note 162, at 230.

172. Durkheim describes this evolution of the common consciousness by a description of the evolution from tribal to complex industrial society:

> In a small society, since everybody is roughly placed in the same conditions of existence, the collective environment is essentially concrete. It is made up of human beings of every kind who people the social horizon. The states of consciousness that represent it are therefore of the same character. At first they relate to precise objects, such as a particular animal, tree, plant, or natural force, etc. Then, since everyone is similarly placed in relation to these things, they affect every individual consciousness in the same way. The whole tribe . . . enjoys or suffers equally the advantages and inconveniences of sun and rain, heat and cold, or of a particular river or spring, etc. The collective impressions resulting from the fusion of all these individual impressions are thus determinate in their form as in their objects. Consequently the common consciousness has a definite character. But this consciousness alters in nature as societies grow more immense. Because they are spread over a much vaster area, the common consciousness is itself forced to rise above all local diversities, to dominate more the space available, and consequently to become more abstract. For few save general things can be common to all these various environments. There is no longer [a] question of such and such an animal, but of such and such a species; not this spring, but these springs; not this forest, but forest *in abstracto*.
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> Moreover, because living conditions are not the same everywhere, these common objects, whatever they may be, can no longer determine everywhere feelings so completely identical. The results for the collectivity thus lack the same distinctness, and this is even more the case because the component elements are more dissimilar. The more differences between the individual portraits that have served to make a composite portrait, the more imprecise the latter is. It is true that local collective consciousnesses can retain their individuality within the general collective consciousness and that, since they encompass narrower horizons, they can more easily remain concrete. But we know that gradually they vanish into the general consciousness as the different social segments to which they correspond fade away.

Id. at 229-30.

> are fixed, and these can be freely applied in very different ways.[173]

Ultimately, "legal rules become universalised, [sic] as do those of morality."[174] Legal and moral rules now allow such variation in conduct that a lack of social control and a decline in morality result.[175] Inasmuch as the common consciousness now "can restrain less efficiently[,] . . . diverging tendencies . . . appear,"[176] thus causing an even more abstract (national) common consciousness allowing for even greater individualism to emerge (and so on) until the "common consciousness loses its authority."[177]

To summarize, then, because any sort of national common consciousness is necessarily abstract in a pluralistic society, any particular individual's familiarity with it is remote. What is acceptable or unacceptable becomes more uncertain. This not only allows for a general decline in the morality of society as a whole but alienates the individual from his own sense of constitutional and political accountability. As Thayer recognized, our core democratic conviction—that "'We the people' . . . are, after all, the ultimate sovereign"[178]—necessarily assumes that "We the people" "must learn to take final responsibility for resolving constitutional questions ourselves, rather than to have an external sovereign, or even an unrepresentative legislature, do it for us."[179] Thus, Thayer argued:

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173. *Id.* at 232.
174. *Id.* at 231.
175. Durkheim tells us:

> As a result . . . , acts are committed daily that infringe [the common consciousness], without however its reacting. If therefore some acts are repeated sufficiently frequently and consistently, they end up by enfeebling the collective sentiment that they offend. A rule no longer appears as respectable when it ceases to be respected . . . . Moreover, once we have enjoyed a liberty, we acquire a need for it. It becomes as necessary and as sacred to us as all the others. We deem intolerable a control we are no longer accustomed to. An acquired right to a greater autonomy is set up. Thus encroachments committed by the individual personality, when the personality is less forcibly constrained externally, end up by receiving the consecration of custom.

Id. at 240.
176. *Id.* at 238.
177. *Id.* at 241.
178. PERRY, *supra* note 146, at 91.
179. *Id.*

> [T]he exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. . . .
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> The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to *deaden its sense of moral responsibility*.
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> . . . .
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> . . . And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. . . . [B]y adhering rigidly to its own duty, the court will help, as nothing else can, *to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation*. . . . For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of *their own responsibility*.[180]

Imposing a national common consciousness may, then, inevitably lead to a society with no moral or political consciousness—or conscience—at all. Unfortunately, we may be witnessing the fulfillment of the Court's prescient observation in *Miller*: "It is neither *realistic* nor *constitutionally sound* to read the First Amendment as requiring that the people of Maine or Mississippi accept" the common consciousness of "Las Vegas, or New York City."[181]

In sum, according to Durkheim, a uniform national obscenity standard is unrealistic and unsound because either there is no national common consciousness—and thus the Court acts illegitimately—or it exists at such a high level of abstraction so as to be useful only in facilitating political and social uncertainty and (thus) immorality and further doctrinal dilution. Therefore, in a modern pluralistic society, the only way to retain any sense of common consciousness, and thus attain long-lasting coercive legitimacy, is to recognize or somehow accom-

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180. JAMES BRADLEY THAYER, JOHN MARSHALL 106-07, 109-10 (1901) (emphasis added).

181. Miller v. California, 413 U.S. 15, 32-33 (1973) (emphasis added).

modate a plurality of common consciousnesses. Translated into the legal context, Durkheim's analysis suggests that the only way to preserve the law's ability to safeguard constitutional doctrine from illegitimacy, preserve community morals from the aforementioned abstraction-to-oblivion, and to coerce legitimately is to allow for local control and regulation. A "society must be split up into moderately small compartments that enclose completely the individual . . . [because] both social control and the common consciousness grow weaker as such divisions fade."[182]

2. Let the experimentation begin

We are thus brought to a tension that notions of community and federalism may help resolve. On the one hand, the Court's complete abstention theoretically allows communities to ban *Ulysses*. The rhetoric of *Miller*, pushed to an extreme, assumes there can be no majoritarian excesses in the field of obscenity because those very majorities are allowed, in principal, to determine whether a thing is obscene or not. On the other hand, the Court's current involvement in defining obscenity would force *Carnal Knowledge* to be shown at the Vatican were it within our nation's borders. Some will inevitably object that local control of obscenity unjustifiably sacrifices on the altar of political accountability sacred constitutional rights intended to receive judicial protection.[183] Others recognize the force of Thayer's arguments but attack them on pragmatic grounds. For example, Professor Jesse H. Choper points out:

> [O]n the one hand, it is impossible convincingly to refute the propositions that lawmaking would be more sensitive to individual liberties if it were conducted with the knowledge that its resolutions were final, and that the ever present potential of judicial disapproval actually encourages popular irresponsibility and stultifies the poeple's [sic] sense of moral and constitutional obligation. On the other hand, it is equally *impracti-*

182. DURKHEIM, *supra* note 162, at 241.

183. This is essentially the argument that Professor Perry makes. *See* PERRY, *supra* note 146, at 83-114 (arguing that courts can often more legitimately answer the moral-political question). In other contexts, such as race relations, I might agree with Professor Perry. Therefore, my discussion in this Comment is limited to a constitutional principle that is nearly unanimously viewed as indeterminate—obscenity.

> *cable* to reject the contention that, *without the threat of judicial invalidation* in the background, majoritarian excesses in respect to minority rights would be all the less restrained.[184]

However, that majoritarian excesses may occur is, in fact, an underlying predicate of the Thayerian notion of political accountability. Thus to say that majoritarian excesses may occur is not to make an objection but to reaffirm and restate Thayer's accountability premise.[185] Majoritarian excesses are less illegitimate when we are less certain about the constitutional moral or value they allegedly infringe. And thus the weakness of both criticisms is apparent, when applied to the context of obscenity regulation, in that they both assume that the course of conduct interfered with is constitutionally protected. This severely begs the question. How can we worry about the majoritarian infringement of rights to consume nonobscene, sexually explicit material when we are not so sure what such protected material is?

And while there is something immoral about banning Joyce and Miller as obscene, there is something more fundamentally wrong with censoring an entire community's ability to make such a determination. This is particularly true when the Court has recognized that the States have a reserved power under the Constitution to determine such moral issues.[186] Indeed, the Court has recognized that the States' power to do so is "a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day."[187]

Just as a failure to allow individuals the freedom to make a wide range of choices is detrimental to their ability to distinguish right from wrong, so is a community's ability to make such distinctions wounded by national judicial usurpation of a doctrine that now equates *Ulysses* with *Carnal Knowledge*.

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184. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 66 (1980) (emphasis added).

185. The best objection to Thayerian minimalism is that, taken to its logical extreme, it proves too much: that there is no such thing as a constitutional right; that there is no sacred sphere of protection or societal mercy seat in which shelter from majoritarian oppression can be sought; and that political rights only exist as defined by the current winds of majoritarianism.

186. *See Miller*, 413 U.S. at 29.

187. *Id.*

Developing a sense of civic virtue is essential to obtaining the moral virtue necessary to cultivate respect, tolerance, and trust, which principles, in turn, will facilitate a community's ability to make the critical distinction between *Ulysses* and *Carnal Knowledge*. And, as Roger Cotterrell informs us, this resultant civic and moral virtue can only be developed by allowing regulation to take place at a community level:

> [C]ollective participation serves the value of order by stabilizing the conditions for continuance of mutual trust. But also it facilitates discussion and debate, the sharing of experience and the development of collective understandings. In this way it contributes to the evolution of principles of justice and their elaboration in the *ratio* of community regulation. Equally, public altruism serves the value of justice by infusing a calculated moral content of mutual concern into social relations. But also it guarantees the inclusion of all members in the collective welfare. Hence it helps to foster the motivation and, up to a point, the obligation of each member to participate in developing and promoting the interests and values of the community as a whole. . . .
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> . . . [This] reconciliation of elements of principle in the *ratio* of regulation . . . is . . . hard to achieve except on relatively 'local' levels or in relatively specific social fields. It follows, therefore, that the focus of regulation must become, increasingly, these levels or fields, rather than the purportedly all-embracing unitary jurisdiction of the contemporary centralized state.[188]

It seems, then, that the only way to legitimately hash out the difference between the obscene and nonobscene is to allow the work of experimentation to be conducted in the laboratories of states and communities. Indeed, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[189] Such experimentation will generate competition between jurisdictions that may allow a clear and discernible national consensus to emerge. Some localities will choose to give great protection while others will not. Adult businesses in

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188. COTTERRELL, *supra* note 167, at 333.

189. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

the former will thrive while businesses in the latter may not. If our theorists are correct, such experimentation will work for the good of both nation and individual[190] and a true national consensus will emerge. Consequently, the Court will more readily be able to ascertain what is or is not acceptable; what is or is not part of the national common consciousness. If this occurs, the Court is more able to legitimately intervene to protect that which would then be more discernible as a constitutional right. Perhaps no trend will emerge and a plurality of obscenity definitions and standards will exist *ad infinitum*.[191] Perhaps localities will choose to give greater and greater protection to adult businesses until they are as common, on a national scale, as 7-Elevens.[192] So be it. The Constitution cannot save us from ourselves.[193]

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190. *See* New York v. United States, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 BYU L. REV. 329, 336-37.

191. Such a state of affairs would allow migration from one jurisdiction to another. *See* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1877-79 (1995) (noting that state authority over family law "erects a structural defense against the potentially tyrannous consequences of moral lawmaking on a uniform national scale" because families that feel oppressed by a particular state regime can relocate to another state).

192. The ability of states and localities to provide greater constitutional protections through state constitutions than the federal constitution can provide is well documented. *See, e.g.*, People v. Cloud Books, Inc., 503 N.E.2d 492 (N.Y. 1986) (giving adult business greater protection under the New York constitution); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490-91, 502-03 (1977) (arguing that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution" and that "[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation"); Judith S. Kaye, *Foreward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 728-34, 750-51 (1992).

193. According to one account:

> [It] is not common that the voice of the people desireth anything contrary to that which is right; but it is common for the lesser part of the people to desire that which is not right; therefore this shall ye observe and make it your law—to do your business by the voice of the people.
>
> And if the time comes that the voice of the people doth choose iniquity, then is the time that the judgments of God will come upon you; yea, then is the time he will visit you with great destruction . . . .

THE BOOK OF MORMON, *Mosiah* 29:26-27.

D. What Can Communities Do Now?

So what can communities do *now* to regulate sexually oriented businesses under the obscenity doctrine? The foregoing analysis is addressed to the desirability of the judiciary granting deference to local determinations of what is obscene. But until the judiciary begins to do so, local governments' ability to forge new territory remains largely within the realm of wishful thinking. However, paradoxically, the judiciary will not have the inclination to accord more deference to local determinations of obscenity unless local governments are willing to give them an opportunity to do so by making such determinations. Accordingly, a first suggestion is that some courageous municipality attempt to do so.

Two other suggestions seem appropriate. First, local governments should recognize and assert that the Court cannot and should not "arbitrarily depriv[e] the States of a power reserved to them under the Constitution," to determine what is and what is not obscene, "a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day."[194] As subdivisions of the State, local governments should insist upon these same protections.[195] That the Court is likely to give deference to local regulations designed to protect public morality is evinced by its most recent decision dealing with adult businesses, *Barnes v. Glen Theatre, Inc.*[196] In that case the Court upheld an Indiana statute proscribing "public nudity across the board" but that was applied to prohibit nude dancing in nightclubs.[197] There was no opinion for the five-to-four Court but at least four Justices justified upholding the statute on the grounds that if furthered "a substantial government interest in protecting order and morality."[198] Though not an obscenity case, *Barnes* gives some indication that the Court may be more willing to defer to local deter-

194. Miller v. California, 413 U.S. 15, 29 (1973).

195. Indeed, the current Court seems particularly willing to be persuaded by federalist arguments. *See* United States v. Lopez, 115 S. Ct. 1624 (1995); New York v. United States, 505 U.S. 144 (1992).

196. 501 U.S. 560 (1991).

197. *Id.* at 566 (Rehnquist, C.J., plurality opinion).

198. *Id.* at 569 (Rehnquist, C.J., plurality opinion); *id.* at 575 (Scalia, J., concurring).

minations of obscenity. This is particularly true since three of the four dissenters, Justices White, Marshall, and Blackmun have since left the Court.

Second, local governments should treat adult businesses as being within a class of proscribed conduct, such as prostitution, that is unquestioningly unprotected. Justice Scalia outlined this approach in his concurrence in *FW/PBS, Inc. v. City of Dallas*.[199] Justice Scalia suggested that adult businesses that "pander"—e.g., engage in businesses "devoted to the sale of highly explicit sexual material" to such an extent that they "can be found to be engaged in the marketing of obscenity"[200]—can be completely prohibited "even though each book or film it sells might, in isolation, be considered merely pornographic and not obscene."[201] This approach relies on *Ginzburg v. United States*,[202] where the Court upheld the conviction of a defendant who violated a federal obscenity statute by mailing publications. The Court upheld the conviction not because the three publications mailed were in and of themselves obscene but because "each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'"[203]

According to Justice Scalia, *Ginzburg* and *Miller*, when read together, hold that "[t]he Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity."[204] Under Justice Scalia's approach, particular books, films, or performances would not necessarily be stripped of constitutional protection but ordinances that prohibit the concentration of such material in one business would be justified under the obscenity doctrine.[205] This ap-

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199. 493 U.S. 215, 250 (1990) (Scalia, J., concurring in part and dissenting in part).

200. *Id.* at 253.

201. *Id.*

202. 383 U.S. 463 (1966).

203. *Id.* at 467 (quoting Roth v. United States, 354 U.S. 476, 495-96 (1957) (Warren, C.J., concurring)).

204. *FW/PBS*, 493 U.S. at 258 (Scalia, J., concurring in part and dissenting in part).

205. *See id.* at 263-64.

proach, according to Justice Scalia, "'reconcile[s] the right of the Nation and of the States to maintain a decent society and . . . the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments.'"[206]

From a regulatory standpoint, the main drawback of Justice Scalia's approach is that so far he is the only member of the Court to publicly espouse it. However, a courageous jurisdiction may nonetheless venture off in this new direction with the assurance that the theory will eventually make its way to the Supreme Court.

IV. CONCLUSION

If this Comment demonstrates nothing else, it demonstrates that the secondary effects mode of regulation is undesirable. Not only is it based upon a legal fiction with an inherently tenuous foundation for any lasting regulatory success but it has established a regime of prohibition by indirection. This prohibition by indirection has allowed adult businesses to circumvent entire zoning schemes either by distinguishing their own factual settings from the factual premises used to justify regulation or by using their own factual settings to show how the purported purposes of regulation are satisfied through other means. The ability of adult businesses to so undermine the secondary effects mode of regulating will only increase as this multi-billion dollar industry expands and gains even more economic clout. Moreover, this regime of prohibition by indirection is undesirable because it reifies and sanctifies adult businesses by presuming that they deserve constitutional protection. Such ingenious disingenuousness ultimately serves to reinforce and promote the very evils this "regime of prohibition by indirection" is intended to proscribe.

Though the Supreme Court's national-local obscenity standard has discouraged regulators from using the obscenity doctrine, local governments should not concede the moral battle just yet. Local governments should not run from the obscenity doctrine but should hide behind its ambiguities as adult busi-

206. *Id.* at 264 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

nesses have for the past quarter century. Local governments should actively use the obscenity doctrine to prohibit such businesses by treating them as businesses undeserving of constitutional protection. In so doing, local governments should confidently assert that local determinations of what is obscene are inherently more legitimate than federal judicial determinations and are necessary to preserve the morality of society and to avoid the needless dilution of constitutional doctrine; and that local determinations of what is obscene are consistent with the federalist structure of American government. Only by addressing adult businesses for what they are will local governments have any lasting success in the effort to regulate them.

Daniel J. McDonald