February 11, 2013

The First Amendment Right to Bare All: How Should Courts Apply the Secondary Effects Doctrine to Strip Bars and Other Sexually Oriented Businesses?

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THE FIRST AMENDMENT RIGHT TO BARE ALL: HOW SHOULD COURTS APPLY THE SECONDARY EFFECTS DOCTRINE TO STRIP BARS AND OTHER SEXUALLY ORIENTED BUSINESSES?

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ABSTRACT

The U.S. Supreme Court has developed a deferential First Amendment Doctrine that can be used to uphold laws that target speakers on the basis of the content of their speech. This so-called “secondary effects” doctrine relies on a fictional premise: state and local laws that target certain forms of speech are actually aimed at the adverse secondary effects of the speech. The doctrine supposedly applies to any form of speech that produces secondary effects. It also theoretically permits targeted speakers to challenge the constitutionality of such laws by disproving the existence of secondary effects.

Nevertheless, lower courts have impliedly limited the scope of the doctrine to sexually oriented businesses and have effectively eliminated the possibility of successful evidentiary challenges to legislative findings of such effects. Consequently, lower courts have not only failed to properly follow the doctrine, but they have also threatened the security of free expression. This Note discusses possible alternatives to the current approach that can, inter alia, safeguard free speech rights and reduce doctrinal inconsistency.

I. INTRODUCTION

First Amendment jurisprudence separates governmental regulations of speech into two categories: content-based and content-neutral. The basic distinction between these groups is that a content-based regulation discriminates on the basis of the message while a content-neutral regulation does not.

Although content-based regulation is generally subjected to strict scrutiny while content-neutral laws are examined

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2 See, e.g., Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 643 (1994) (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.”).
under intermediate scrutiny, the U.S. Supreme Court has subjected state and local content-based regulations of sexually oriented businesses to intermediate scrutiny via the secondary effects doctrine. The doctrine purports to permit state and local governments to regulate speech not because of its “content,” but because of its “secondary effects,” (e.g., public indecency, blight, and prostitution). While the doctrinal inconsistency of the secondary effects doctrine alone has been the source of considerable controversy, this Note’s focus is instead on the manner in which the secondary effects doctrine has been applied in American courts.

Although the secondary effects doctrine is a “general First Amendment doctrine[,]” American courts, as demonstrated by decisions like 84 Video/Newsstand, Inc. v. Sartini, have effectively restricted its application to sexually oriented businesses. Furthermore, cases like 84 Video are so deferential to legislative judgment regarding the existence of the adverse effects of sexually oriented businesses that they effectively prohibit any challenges to those findings, even though the doctrine permits sexually oriented businesses to invalidate legislation by “demonstrating that the [government’s] evidence does not support its rationale or by furnishing evidence that disputes the [government’s] factual findings . . . .” This Note

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3 Fee, supra note 1.

4 When referring to the secondary effects doctrine, this Note treats the doctrine as if it is limited to the “sexually oriented business,” which one statute defined as: “an adult bookstore, adult video store, adult cabaret, adult motion picture theater, sexual device shop, or sexual encounter center, but . . . not . . . a business that merely show[s], sell[s] or rent[s] materials that may depict sex.” 84 Video/Newsstand, Inc. v. Sartini, 455 Fed. Appx. 541, 545 (6th Cir. 2011) (quoting Ohio Rev. Code Ann. § 2907.40(a)(15) (West 2010)). The Note uses this term because the secondary effects doctrine is usually constrained to such businesses. See infra note 20 and accompanying text. However, courts have sometimes used the doctrine to uphold laws that are facially broader in scope. See, e.g., Town of Islip v. Caviglia, N.E.2d 215, 217–21, 225–26 (N.Y. 1989) (using the secondary effects doctrine to uphold a law that restricted several types of businesses, including “drive-in theater[s] that customarily present[] motion pictures that are not open to the public generally but exclude[] any minor by reason of age.”).

5 See Erwin Chemerinsky, Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application, 74 S. Cal. L. Rev. 49, 59–61 (2000) (explaining that, although the secondary effects doctrine upholds legislation that is content-based, the Court has used the doctrine as if it is content-neutral).

6 See, e.g., City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986) (upholding a zoning ordinance that restricted the locations of adult motion picture theatres in part because it was “aimed not at the content of the films shown at ‘adult motion picture theatres,’ but rather at the secondary effects of such theaters on the surrounding community.”).

7 See, e.g., 84 Video, 455 Fed. Appx. at 545.

8 See, e.g., Chemerinsky, supra note 5.

9 Fee, supra note 1.

10 455 Fed. Appx. 541 (6th Cir. 2011).

11 See id. at 545; infra note 20 and accompanying text.

explores the implications of the dichotomy between the doctrine and its application and offers proposed changes to the courts’ approach.

Because, as this Note demonstrates, the secondary effects doctrine is applied by most courts in a disingenuous way that endangers the security of freedom of expression,¹³ courts should modify the secondary effects doctrine or the manner in which it is applied. Many of the shortcomings of the current application of the secondary effects doctrine could be solved by either of the alternatives discussed in this Note.¹⁴ Although each alternative has its disadvantages, even apart from the fact that these proposals constitute departures from existing practice, both are superior to the current approach.¹⁵

Part II of this Note will describe the approach taken by most American courts for evaluating challenges to the factual findings of a legislature concerning a law that regulates speakers on the basis of their adverse secondary effects. Part III discusses one alternative approach that courts can use to modify the secondary effects doctrine: holding that the doctrine is limited to sexually oriented businesses and that plaintiffs cannot challenge legislative findings by furnishing their own evidence negating the existence of adverse secondary effects. Part IV discusses a second alternative: actually allowing plaintiffs to produce evidence to challenge the legislatures’ findings regarding the purported adverse effects of sexually explicit speech.

Clay Calvert & Robert D. Richards, Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 287, 326–27 (2004) (explaining that American courts are usually very deferential to legislative judgment and often strain to not shift the burden to the legislature even when plaintiffs have met their burden); infra notes 21–23, 51, 59–64 and accompanying text; see, e.g., SOB, Inc. v. Cnty. of Benton, 317 F.3d 856, 858–59, 862–64 (8th Cir. 2003) (holding that legislative judgments regarding secondary effects are to be given “substantial deference” and refusing to shift the burden of proof to the county because plaintiffs did not refute the evidence of all the secondary effects identified by the county); Sammy’s of Mobile, Ltd. v. City of Mobile, 140 F.3d 993, 994–97 (11th Cir. 1998) (emphasis added) (holding that a municipality may rely upon “the experience of other cities, studies done in other cities, caselaw reciting findings on the issue, as well as [municipal officials’] own wisdom and common sense” to justify the conclusion that an ordinance will serve the “substantial governmental interest” of curbing secondary effects); Metro Pony, LLC v. City of Metropolis, No. 11–cv–144–JPG, 2012 WL 1389656, at *1–3, *8–12 (S.D. Ill. April 20, 2012) (finding that plaintiffs failed to create a genuine of material fact regarding the existence of secondary effects in part because plaintiffs did not dispute each type of evidence relied upon by the legislature, including judicial opinions). In SOB, the court “ignored . . . completely” plaintiffs’ research that cast doubt on past studies that had concluded that sexually oriented businesses have an empirical relationship with secondary effects. Calvert & Richards, supra, at 327.

¹³ See infra Parts III–IV.
¹⁴ See id.
¹⁵ See id.
II. THE APPROACH TAKEN BY MOST AMERICAN COURTS

Ordinarily, content-based regulation is subjected to strict scrutiny.\(^\text{16}\) However, the secondary effects doctrine subjects content-based regulation to intermediate scrutiny—treating such laws as if they are content-neutral.\(^\text{17}\) The doctrine seems to be applicable to any kind of speech that is connected with adverse secondary effects.\(^\text{18}\) However, even when a state or local government has identified secondary effects of a form of speech, plaintiffs may challenge such laws by “cast[ing] direct doubt on [the government’s] rationale, either by demonstrating that the [government’s] evidence does not support its rationale or by furnishing evidence that disputes the [government’s] factual findings . . . .”\(^\text{19}\)

In practice, American courts are treating sexually oriented businesses differently than other plaintiffs in the context of First Amendment challenges. Specifically, courts have impliedly constrained the application of the secondary effects doctrine to sexually oriented businesses.\(^\text{20}\) Furthermore, when applying the doctrine, courts are very deferential to the factual findings of the legislatures that enacted the contested legislation.\(^\text{21}\) In fact, published appellate decisions indicate that courts strike down laws that facially target sexually oriented businesses only when lawmakers failed to make any specific factual findings regarding the adverse secondary effects of sexually oriented businesses.\(^\text{22}\) The approach seems to be in conflict with the

\(^{16}\) See supra note 1.
\(^{17}\) See supra note 5.
\(^{18}\) See supra note 9 and accompanying text.
\(^{20}\) See Fee, supra note 1, at 324 & n. 141 (surveying federal and state cases and finding that the secondary effects doctrine has been applied outside of the sexually oriented business context on very few occasions).
\(^{21}\) See supra note 12; infra notes 51, 59–64 and accompanying text.
\(^{22}\) See, e.g., Illusions—Dallas Private Club, Inc. v. Steen, 482 F.3d 299, 313 (5th Cir. 2007) (invalidating an ordinance because “the record is completely devoid of any evidence that a secondary effects problem exists or that [the ordinance] furthers that interest.”); 754 Orange Ave., Inc. v. City of West Haven, Conn., 761 F.2d 105, 112 & n.6 (2d Cir. 1985) (invalidating an ordinance because the record contained “no evidence whatsoever” of adverse secondary effects); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 98–99 (6th Cir. 1981) (striking down an ordinance because the record revealed “no objective information” justifying the restrictions); see also Carol A. Crocca, Annotation, Validity of Ordinances Restricting Location of “Adult Entertainment” or Sex-oriented Businesses, 10 A.L.R. 5th 538, §3[c] (2011) (in all of the published cases listed in that section of the Annotation, legislatures failed to demonstrate they had a substantial governmental interest because they provided no evidence that sexually oriented businesses were causing adverse secondary effects). But see Calvert & Richards, supra note 12, at 327 (describing a “rare[]” case in which
doctrinal requirement that courts permit plaintiffs to challenge such laws by “cast[ing] direct doubt on [the government’s] rationale . . . .” 23 Therefore, as discussed further in Part IV, the doctrine has permitted legislatures, without much fear of their actions being invalidated, to restrict the operations of sexually oriented businesses.

III. THE “ACKNOWLEDGING REALITY” APPROACH

Disparate treatment of sexually oriented businesses is arguably proper. One could argue that because the harmful effects of their speech (e.g., degradation of women and “sexual coercion”) 24 outweigh its communicative value (i.e., often the content of the message is nothing more than sexual stimulation), 25 the speech communicated by sexually oriented businesses is entitled to less First Amendment protection than other forms of speech. 26 Nevertheless, because disparate treatment of a particular form of speech defies the general rule of First Amendment content-neutrality 27 and employing such a balancing test is arguably arbitrary, 28 the “Acknowledging Reality” approach is controversial. This section assumes that courts will continue to treat sexually explicit speech differently, even if doing so is doctrinally unwarranted, and proceeds to determine whether the doctrine should be modified to acknowledge that reality. Part IV proceeds on the assumption that a categorical exception for adult speech should not be created and that the application of the doctrine, rather than of the doctrine itself, should be changed. 29

the plaintiffs prevailed using a “volume of evidence” while the municipality failed to “respond with evidence of [its] own.”).
24 See, e.g., Elizabeth Spahn, On Sex and Violence, 20 NEW ENG. L. REV. 629, 630, 632–33 (1985) (explaining that supporters of “anti-pornography statutes” believe that pornography is degrading to women and causes so-called “sexual coercion”—a form of sex discrimination that “fosters the continued creation and maintenance of the subordination of women.”).
25 Fee, supra note 1, at 326.
26 See, e.g., Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) (“[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire’s immortal comment.”).
27 Chemerinsky, supra note 5.
28 See Fee, supra note 1, at 316 (“Perhaps the term secondary effect is convenient only because it is capable of more than one meaning while appearing to be objective, and can therefore easily mask a subjective balancing process.”).
29 Whether treating this form of speech differently is appropriate is beyond the scope of this Note. Rather, the Note focuses on the practical shortcomings and free speech ramifications of the disingenuous nature of the courts’ current application of the secondary effects doctrine.
Acknowledging the reality of the approach taken by most courts (i.e., by holding that plaintiffs cannot challenge legislative findings using their own evidence\(^{30}\) and that the secondary effects doctrine applies only to sexually oriented businesses because they are entitled to less First Amendment protection than other forms of speech) has its advantages. Recognizing that courts accord less First Amendment protection to sexually oriented businesses may allow state and local governments and sexually oriented businesses to avert expensive litigation. If the doctrine is modified as such, sexually oriented businesses will be on notice that the secondary effects doctrine applies solely to them and that legislative findings will be evaluated in a vacuum (i.e., findings cannot be challenged by independent evidence). The adjustment may therefore provide sexually oriented businesses with less incentive to challenge the legislation using their own experts because they would know that such efforts would be fruitless.

Moreover, conceding the truth about how the “secondary effects” principles work will eliminate needless doctrinal inconsistency. Currently, American courts implicitly allow municipalities and states to explicitly target the speech of sexually oriented businesses using the supposedly “content-neutral” secondary effects doctrine.\(^{31}\) The secondary effects doctrine not only upholds laws that are actually content-based instead of content-neutral,\(^{32}\) but it also permits legislatures to restrict the operation of sexually oriented businesses specifically because of effects caused by their speech.\(^{33}\) Therefore, the doctrine itself is inherently inconsistent. Acknowledging that the sexually oriented businesses are being treated differently specifically because of their speech ensures that the doctrine is seen for what it truly is: a method of upholding content-based legislation.\(^{34}\)

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\(^{30}\) Part IV further discusses the fact that courts seem to defer to legislative findings so long as there is some evidence in the record that sexually oriented businesses have adverse secondary effects.

\(^{31}\) See, e.g., City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47–48 (1986) (upholding an ordinance under the secondary effects doctrine because the law was “content-neutral”).

\(^{32}\) Chemerinsky, supra note 5, at 59–62 (explaining that because the secondary effects doctrine upholds laws that are facially discriminatory, it protects content-based legislation).

\(^{33}\) Fee, supra note 1, at 306–13 (reasoning that the only plausible definition of “secondary effects” must include communicative effects of speech, otherwise the doctrine could not uphold laws that facially target sexually oriented businesses).

\(^{34}\) The Court has held that some categories of content-based regulation are not prohibited by the First Amendment. Chemerinsky, supra note 5, at 62 (noting that certain categories of speech are completely unprotected, including “incitement of illegal activity” and “obscenity.”).
Furthermore, limiting the secondary effects doctrine may prevent other forms of speech from being subjected to this highly deferential analysis. Although the doctrine has rarely been used outside of the sexually oriented businesses context, *City of Renton v. Playtime Theaters, Inc.* appears to hold that the doctrine applies to any “content-neutral” laws (which, as discussed earlier, are not necessarily facially neutral) that function as “time, place, and manner regulations” because they are aimed at curbing the adverse secondary effects of speech. While there is not much risk that courts will apply the doctrine to other types of speech, explicitly limiting it to the sexually oriented businesses context has the virtue of helping to prevent speech of arguably higher communicative value from being regulated with great ease.

Nevertheless, “[t]here are no unmixed blessings in life.” Explicitly holding that sexually oriented businesses are entitled to less First Amendment protection may encourage municipalities and states to more stringently regulate these businesses, thus diminishing the volume of sexually explicit speech. Although “any fear that secondary effects regulations would effectively drive sexually explicit speech out of the marketplace of ideas certainly has not come to pass[,]” and probably will not happen since Americans create such a high demand for adult entertainment, state and local governments may be more inclined to impose harsher regulations if they are aware that the likelihood of a successful legal challenge has been diminished by the imposition of an expressly deferential doctrine. The result may be a substantial reduction of speech, albeit sexually explicit in nature.

Furthermore, it is possible that sexually oriented businesses are already aware that courts effectively deny evidentiary challenges to legislative findings, yet these businesses still challenge such laws on the belief that the slim chance of prevailing in a First Amendment challenge is worth the costs. If that is true, then modifying the doctrine so as to acknowledge reality might not reduce litigation costs. More empirical research on this issue is required to determine whether litigation costs will in fact be saved by this measure.

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35 475 U.S. 41 (1986)
36 See id. at 47–48; see also Fee, supra note 1, at 292 (“[T]he Supreme Court has implied that [the secondary effects doctrine] is a general First Amendment doctrine.”).
37 See Fee, supra note 1, at 294.
39 Fee, *supra* note 1, at 324.
40 Calvert & Richards, *supra* note 12, at 289–90.
Moreover, although explicitly restricting the secondary effects doctrine to sexually oriented businesses may contain the doctrine to that context, one could argue that such an explicit restriction sets a dangerous precedent. Arguably, if judges know that they can explicitly limit the doctrine to certain categories, judges may choose to expand the scope of this deferential doctrine to encompass other categories of speech that have little value in light of their harmful effects.

However, further analysis indicates that there is little cause for concern that the doctrine will be expanded. As noted earlier, the speech communicated by sexually oriented businesses is unique in the sense that it has so little value—it often communicates nothing more than sexual stimulation. Although other forms of speech may otherwise be on the “chopping block” because their content arguably causes adverse effects (e.g., political speech can threaten to “disturb the peace”), they rarely offer as little communicative value as do the “messages” from sexually oriented businesses. Therefore, this principled distinction would likely keep other speech categories from being accorded less First Amendment protection.

41 Because the “acknowledging reality” approach accords the speech of sexually oriented businesses (e.g., adult bookstores), rather than all sexually explicit speech, with less First Amendment protection, the modified doctrine would not be broad enough encompass other forms of sexually explicit speech that would arguably have artistic or literary value (e.g., classical nude artwork). The Note makes this distinction not only because that is how the secondary effects test functions, see supra note 20 and accompanying text, but also because sexually oriented businesses tend to attract the type of clientele that produce adverse secondary effects, while other businesses that merely communicate sexually explicit speech do not, see, e.g., Young v. American Mini Theaters, Inc., 472 U.S. 50, 54–55, 71–73 (1976) (plurality opinion) (upholding a statute that restricted the location of “adult movie theaters” and “adult bookstores,” businesses that the municipality believed “tend[] to attract an undesirable quantity and quality of transients, adversely affect[] property values, cause[] an increase in crime, especially prostitution, and encourage[] residents and businesses to move elsewhere.”).

42 Fee, supra note 1, at 326 (“Pornography often does not even claim artistic or literary value (although sometimes these claims are made), but rather typically panders to its target audience for the sole purpose of sexual arousal. As some commentators have noted, pornography has more in common with a sexual device—which is not speech—then [sic] it has with cognitive speech.”).


44 See, e.g., Fee, supra note 1, at 326 (noting that even commercial speech has more communicative value than the speech of sexually oriented businesses because commercial speech’s “purpose [is to] inform[] consumers about available products and services in all facets of commercial life.”).

45 Admittedly, following the logic of this approach, other speech categories that have very little communicative value relative to their harmful effects could be accorded less First Amendment protection. For instance, violent video games could theoretically be accorded less protection on this basis. See, e.g., Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729, 2750 (2011) (Alito, J., concurring) (“If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid
Accordingly, because acknowledging reality of the secondary effects doctrine will have the virtues of being honest,\(^{46}\) reducing litigation expenses (potentially), eliminating doctrinal inconsistency, and diminishing the potential for the doctrine to be applied in other contexts, the benefits of this revision outweigh the speculative concerns regarding the reduction of the volume of speech and the expansion of the doctrine. Therefore, assuming that the current application of the secondary effects doctrine is likely to continue, modifying the doctrine to reflect reality is better than the current approach.

IV. THE “MODIFY APPLICATION” APPROACH

Assuming that sexually oriented businesses should not be accorded less First Amendment protection than other forms of speech (e.g., because doing so would validate an arbitrary balancing test),\(^{47}\) then courts should, for the sake of free speech rights and a measure of doctrinal consistency, apply the doctrine so as to allow evidentiary attacks to legislative findings.

The secondary effects doctrine supposedly provides plaintiffs with the opportunity to rebut the factual findings of legislatures. In particular, most federal circuits have expressly adopted the burden shifting analysis from the *City of Los Angeles v. Alameda Books, Inc.*\(^{48}\) plurality opinion,\(^{49}\) a part of the secondary effects doctrine that purports to allow plaintiffs to launch evidentiary challenges to legislative findings.\(^{50}\) Nevertheless, as discussed earlier in Parts I and II
and later in this section, courts are extremely deferential to the legislatures’ factual findings.

This phenomenon is illustrated by the fact that “[c]ourts . . . often disregard th[e] burden-shifting approach [from Alameda Books].”\textsuperscript{51} \textit{84 Video} exemplifies this trend by demonstrating that most courts have diminished the prospect of any successful attack on legislative findings. \textit{84 Video} analyzed whether the plaintiffs in that case had created a genuine issue of material fact regarding whether an Ohio law, which regulated “sexually-oriented businesses” (e.g., strip clubs and adult bookstores) by limiting their operating hours and prohibiting strippers from touching each other and their customers,\textsuperscript{52} furthered a substantial governmental interest.\textsuperscript{53} The court evaluated the testimony of Dr. Daniel Linz, an expert on secondary-effects studies who had conducted studies in Toledo, Cleveland, Columbus, and Dayton and had concluded that “sexually oriented businesses” do not cause adverse secondary effects, specifically crime, in those cities.\textsuperscript{54} Dr. Linz also testified that “the methods [used by researchers who found adverse secondary effects] are either so flawed or the studies so poorly conducted, that they do not, in fact, demonstrate an adverse secondary effect.”\textsuperscript{55}

Although the Sixth Circuit panel conceded that “Linz’s study of four Ohio cities was directly relevant to the central issue in the case and, if accurate, does tend to cast doubt on the Ohio General Assembly’s evidence[,]”\textsuperscript{56} the court concluded that Linz’s evidence failed to create a genuine issue of material fact as to whether the plaintiffs casted doubt on Ohio’s findings of adverse secondary effects.\textsuperscript{57} The court reasoned that Linz’s studies failed to rebut other types of evidence relied upon by the legislature, “including prior court

\footnotesize{municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality’s rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.”.}\textsuperscript{51} Calvert & Richards, \textit{supra} note 12.
\textsuperscript{52} \textit{84 Video/Newsstand, Inc. v. Sartini}, 455 Fed. Appx. 541, 544–45 (6th Cir. 2011) (quoting \textit{OHIO REV. CODE ANN. § 2907.40} (West 2010)). Other state and local governments impose similar restrictions on these types of businesses. \textit{E.g.}, \textit{SAN DIEGO, CAL., MUNICIPAL CODE § 33.3609(c)} (2011) (prohibiting strippers from “intentionally touch[ing] any patron . . . .”).\textsuperscript{53} \textit{84 Video}, 455 Fed. Appx. at 550–52.
\textsuperscript{54} \textit{Id.} at 550.
\textsuperscript{55} \textit{Id.} (internal quotation marks omitted).
\textsuperscript{56} \textit{Id.} at 552.
\textsuperscript{57} \textit{Id.}
decisions, news reports, and anecdotal testimony by law enforcement officials and others.”

If plaintiffs are unable to even survive summary judgment when they have produced evidence “directly relevant to the central issue in the case”—empirical evidence disproving the existence of secondary effects of sexually oriented businesses in major Ohioan cities—then they face an “all-but-impossible burden . . . , as there is little chance they can challenge all prior court decisions, news reports and police testimony.”

Because the decision imposes an “all-but-impossible burden” on sexually oriented businesses, it essentially prevents sexually oriented businesses from successfully challenging the legislative findings of adverse secondary effects, at least so long as the legislature relied on some form of evidence other than the type procured by the plaintiffs. As a consequence, decisions like 84 Video effectively prevent rebuttals to legislative findings.

This approach contradicts the Alameda Books burden-shifting test that allows sexually oriented businesses to challenge such laws by “furnishing evidence that disputes the [government’s] factual findings . . . .” Furthermore, such deference to the legislatures’ findings appears to not be in accordance with the intermediate scrutiny with which laws regulating sexually oriented businesses are to be subjected, but instead more closely resembles the “rational basis” test the U.S. Supreme Court used to employ in Commerce Clause cases. Therefore, only by lowering the burden so as to effectively allow evidentiary challenges (e.g., by allowing plaintiffs like those in 84 Video to survive summary judgment), can the courts’ application in this area of First

58 Id. Many other courts employ a similarly deferential approach. See supra note 12; supra notes 21–23 and accompanying text.
59 84 Video, 455 Fed. Appx. at 552.
61 Id.
63 Fee, supra note 1.
64 See, e.g., Hodel v. Virginia Surface Mining and Reclamation Ass’n, Inc., 452 U.S. 264, 276 (1981) (“The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.”). The courts’ deference when applying the secondary effects test is analogous to Court’s former approach to Commerce Clause cases in the sense that in both instances, the judiciary defers to the factual findings of the legislature so long as these findings have some rational basis.
Amendment jurisprudence comport with the secondary effects doctrine.

Even though the “Modify Application” Approach would be a more honest application of the secondary effects doctrine that would enable sexually oriented businesses to, with greater ease, protect their speech from legislative attack, this alteration does have at least one major drawback. Allowing plaintiffs to amass their own evidence to rebut legislative findings of adverse secondary effects invites courts to second-guess legislatures. This may potentially shift judgment regarding the facts underlying legislation away from lawmakers and to the courts, implicating separation of powers and federalism issues.65

However, the appropriate balance of decision-making was already struck by Alameda Books, which has been adopted by most of the federal circuits.66 Moreover, if plaintiffs have successfully demonstrated that there are no secondary effects, then there is no justification for legislation that explicitly restricts the speech of sexually oriented businesses. Therefore, modifying the application of the doctrine so as to allow evidentiary challenges is better than the current approach.

V. CONCLUSION

As this Note demonstrates, most courts effectively accord sexually oriented businesses less First Amendment protection than they provide to other speakers. 84 Video illustrates the courts’ trend of permitting local and state legislatures to, virtually without reproach, single out sexually oriented businesses and regulate them because of the purportedly adverse secondary effects they cause. However, because the doctrine is not restricted to sexually oriented businesses and is not supposed to render evidentiary challenges to legislative findings impossible, either the doctrine or its application must change. Otherwise, the doctrine is not only disingenuous, but it also poses a danger to free speech.

65 Ewing v. California, 538 U.S. 11, 28 (2003) (“We [(the members of the Court)] do not sit as a “superlegislature” to second-guess these policy choices [made by the legislature].”).
66 See infra note 49 and accompanying text.