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ABSTRACT

In First Amendment law, one rarely disputed notion is that sexually explicit speech is less valuable than so-called "core" forms of expression, such as political discourse. This study revives that dispute with a focus on the Supreme Court's justifications for categorizing sexually explicit speech as "low-value" in the first place. The analysis reveals three conundrums plaguing the Court's jurisprudence: categorizing restrictions on sexually explicit speech; interpreting the value and harms of sexually explicit speech; and assessing the evidence (or lack thereof) for restrictions on sexually explicit speech. This article explains how these conundrums should be resolved in sexually explicit speech cases with an emphasis on adopting an analytical framework that requires substantiation similar to intermediate constitutional scrutiny as in commercial speech cases.

INTRODUCTION

State and local governments are often described as "laboratories of democracy."[1] America's federal system encourages lawmakers to conduct democratic experimentation on economic, political, and social issues,

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[1] *See* Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119 (2018). Justice Louis Brandeis coined the laboratory metaphor in *New State Ice Co. v. Liebmann*, a Fourteenth Amendment due process case involving an Oklahoma statute that required companies to obtain a state-issued license to produce and sell ice. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It 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.").

including the regulation of sex and sexually explicit expression. Since the early colonial era,[2] government officials have taken a keen interest in crafting solutions to perceived problems purportedly caused by sexually explicit speech. During the last twenty years especially, state and local governments have focused legislative experimentation on perceived public health problems caused by adult entertainment businesses, producing a mix of results in terms of success and sustainability along with some ingenious and oddly specific regulatory distillates.[3] For example, Los Angeles requires adult movie theaters and bookstores to be at least 1,000 feet from one another within business districts.[4] To prevent nude and semi-nude erotic performances, Erie, Pennsylvania, requires female erotic dancers to wear G-strings over their pubic area and pasties over their nipples.[5] The State of California proposed mandatory condom use by pornographic film actors during the production of sex scenes.[6]

These restrictions are grounded in a powerful, if not taken-for-granted, presumption in First Amendment doctrine that sexually explicit speech is less valuable than political, scientific, literary, and ideological expression ranging from the ordinary to the extreme. Thus, speakers and purveyors of sexually explicit content have limited latitude to "speak" as they wish, and the government retains substantial power to experiment with regulations that impact these speakers' discourses about sex. And despite the speakers' efforts to overturn each of the regulations described above on the grounds that they violate the First Amendment's guarantees of freedom of speech, courts have repeatedly and resoundingly emphasized that sexually

[2] *See* GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY (2017).

[3] *Id*. The range of government regulations on sexually explicit speech include search and seizure procedures for sexually oriented businesses, censorship and licensure schemes, and advertising regulations.

[4] City of L.A. v. Alameda Books, Inc., 535 U.S. 425 (2002).

[5] City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

[6] Vivid Ent., LLC v. Fielding, 774 F.3d 566 (9th Cir. 2014) (dismissing Vivid Entertainment's argument that the law was an unconstitutional infringement on pornography actors' and producers' First Amendment rights). In 2016, a California state initiative known as Proposition 60: the California Safer Sex in the Adult Film Industry Act, was put on the state ballot for public referendum. The proposition, which was an expansion of a Los Angeles County ordinance that passed in 2012, called for mandatory condom use and other barrier-based safe sex practices by adult film actors during the production of hardcore sex scenes. L.A. CTY., CAL. HEALTH & SAFETY CODE § 11.39). The statewide proposition ultimately failed by a margin of nearly one million votes but remains in effect in Los Angeles. *California Proposition 60 - Condoms in Pornographic Films Initiative - Results: Rejected*, NEW YORK TIMES, (Aug. 1, 2017, 11:23 AM ET), https://www.nytimes.com/elections/2016/results/california-ballot-measure-60-adult-film-health-reqs.

explicit speech is unequivocally low-value.[7] But what rationale or evidence, if any, justifies these legal conclusions and practical results? In this article, we probe that question by analyzing the empirical and logical substance of the Supreme Court's applications of low-value theory to regulations of sexually explicit speech.

American governments have regulated sexually explicit speech for centuries,[8] but the regulatory schemes like the kind in California and Pennsylvania described above first emerged in the 1970s,[9] during a period when American society's relationship with sexually explicit speech was significantly different than in the 21st century. Popular television programs of those days showed married couples sleeping in separate beds,[10] and films were outlawed for depicting promiscuity and infidelity.[11] However, only a few generations later, one of the most popular shows on television depicted unmarried couples fighting over the last condom,[12] and another included a plotline in which a pornographic film star ran a legitimate campaign for public office.[13] Rather than being confined permanently to a seedy blacklist, sexual content became considerably more mainstream. Likewise, decades of public opinion research repeatedly demonstrates that United States citizens show broad support for freedoms of sexually explicit speech, including

[7] The Supreme Court has recognized that nearly all regulation on adult entertainment is content-based, but that pornography's low-value justifies the use of intermediate scrutiny for the purposes of First Amendment analysis. *See Alameda Books, Inc*., 535 U.S. at 448 (Kennedy, J., concurring).

[8] *See* Stone, *supra* note 2.

[9] In 1972, the Supreme Court decided *Young v. American Mini Theatres, Inc*., which tested the constitutionality of a Detroit zoning ordinance restricting the location of adult entertainment businesses. 427 U.S. at 70. The Court recognized that the First Amendment affords limited protection to sexually explicit speech and adult businesses, but ultimately upheld the regulation. *Id*.

[10] Michael Asimow, *Divorce in the Movies: From the Hays Code to Kramer vs. Kramer*, 24 LEGAL STUD. F. 221, 235 n.65 (2000); JACK VIZZARD, SEE NO EVIL: LIFE INSIDE A HOLLYWOOD CENSOR 114 (1st ed. 1970).

[11] *See*, *e.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

[12] In the 1994, NBC aired the popular TV series, *Friends*, which told the story of six friends living and working in New York City. Part of the storyline included the romantic relationships of the friends, which included explicit conversations between the characters about birth control and condom use. *Friends: The One Where Dr. Ramoray Dies* (NBC television broadcast Mar. 21, 1996).

[13] In 2009, NBC aired the popular TV series, *Parks & Recreation*, which told the story of a local Indiana Parks Department and its employees. A reoccurring character of the series was a fictional pornographic film actress, who at one point in the series ran for a seat on the local city council. *Parks & Recreation: The Debate* (NBC television broadcast Apr. 26, 2012). Art occasionally imitates life. In June 2020, former pornographic film actor Juan Melecio filed to run for a seat on the Wilton Manor commission. Kyle Spinner, *Florida porn actor running for local office*, CBS12.COM (June 10, 2020), https://cbs12.com/news/local/florida-porn-actor-running-for-local-office.

pornography access and use.[14] Coupled together, changes in mainstream media and strong public support for sexually explicit speech freedom call into question a sexually explicit speech jurisprudence based predominantly on the notion that sexually explicit speech is low-value.[15]

Courts often look to legal history and precedent for answers to perceived social problems, but the longstanding First Amendment jurisprudence for sexually explicit speech may not reflect current or developing social attitudes toward the relative value of sexually explicit speech. Alternatively, as regulatory experimentation on sexually explicit speech continues, courts may better meet the moment by consulting empirical social science. By identifying and unpacking the Court's low-value approach to sexually explicit speech, this research sheds light on why sexually explicit speech was classified as low-value and proposes a framework for how sexually explicit speech (and government regulation of sexually explicit speech) should be treated in the future.

To do this, this article explores *Young v. American Mini Theatres, Inc.*,[16] the pivotal case in which the Court first adopted the low-value approach to sexually explicit speech. Examination of the Supreme Court's doctrinal move in *Young* and its "low-value theory" progeny[17] revealed three pressing conundrums—the categorical, the interpretive, and the evidentiary—that have led to doctrinal fractures among the Justices that should be resolved. These three conundrums arise from the Court's struggles to categorize restrictions on sexually explicit speech, interpret its value (and related harms), and assess relevant empirical evidence in sexually explicit

[14] Polls from the 1990s found that sexually explicit speech, specifically speech dealing with nudity and sexually suggestive behaviors like nude dancing, is the second most-supported type of expression, falling just behind political speech and tying with religious speech. Julie L. Andsager, *A Constant Tension: Public Support for Free Expression*, 38 STAN. J. INT'L L. 3, 7 (2002). Additionally, recent studies on attitudes towards specific types of sexually explicit speech, such as pornography, found citizens' attitudes toward sexually explicit speech are generally positive and that the use of sexually explicit speech is socially acceptable. Joseph Price et al., *How Much More XXX Is Generation X Consuming? Evidence of Changing Attitudes and Behaviors Related to Pornography Since 1973*, 53 J. SEX RSCH. 12 (2016); *see also, e.g.*, Jason S. Carroll et al., *Generation XXX: Pornography Acceptance and Use Among Emerging Adults*, 23 J. ADOLESCENT RSCH. 6 (2008).

[15] Although the First Amendment does not permit total suppression of sexually explicit speech, the Supreme Court has stated that sexually explicit speech is considered to have little or no social importance and therefore receives little to no First Amendment protection. *See Young*, 427 U.S. at 70 ("Moreover, even 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.").

[16] 427 U.S. at 50.

[17] FCC v. Pacifica Found., 438 U.S. 726 (1978); *City of Erie,* 529 U.S. 277; United States v. Playboy Ent. Grp.*,* 529 U.S. 803 (2000).

speech cases. Failure to resolve these three conundrums risks further muddling a doctrine in desperate need of reformation. Based on these findings, we recommend several incremental doctrinal fixes to bring the law and protections of sexually explicit speech into harmony with a society that values sexually explicit speech considerably more than the law recognizes.

CASE SELECTION & THE RESEARCH

To be clear, this study focuses on the regulation of protected forms of sexual speech and expression,[18] referred to herein as "sexually explicit speech," and not unprotected obscenity. From 1957 to 1973, the Supreme Court decided a series of cases, mostly related to criminal obscenity prosecutions, that laid out the modern framework for distinguishing protected sexually explicit speech from unprotected obscenity. Although the obscenity cases are relevant because they lay out much of the conceptual groundwork for the cases studied here, they are not the focus of the analysis. Starting with *Roth v. United States*[19] and blossoming in *Miller v. California*,[20] the Supreme Court fashioned a modern obscenity framework that manifested in the *Miller* test.[21] Soon after, in 1976, the Court decided *Young v. American Mini Theatres, Inc*.,[22] which proved to be a pivotal case regarding questions of the value and protection of sexually explicit speech.

Young called into question the constitutionality of zoning laws in Detroit, Michigan, that restricted the locations of adult movie theaters. Finding the laws constitutional, the Court reasoned that sexually explicit speech, such as adult film, is not entirely without First Amendment protection, but such speech fails to carry material value worthy of heightened

[18] This study does not include cases referring to illegal forms of sexually explicit speech. Thus, cases like *New York v. Ferber*, 458 U.S. 747 (1982) – the case denying protection for sexually explicit speech involving children – that reference to *Young v. American Mini Theatres*, *Inc*., but concern illegal forms of speech were removed to avoid muddying the case analysis.

[19] 354 U.S. 476, 484 (1957). The Court established in *Roth* that obscenity is beyond the protection of the First Amendment because this type of speech is without social importance: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

[20] 413 U.S. 15 (1973).

[21] *Id*. at 24. The three-prong obscenity test referred to as the *Miller* test consists of the following: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

[22] 427 U.S. 50 (1976).

protection, like that of political speech. Specifically, Justice John Paul Stevens, writing for the majority, argued, "[I]t is manifest that society's interest in protecting this [sexually explicit] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate…."[23] Decades later, the Court's perception of sexually explicit speech has held steadfast through cases involving a variety of sexually explicit content, from profane words to nude dancing.

Young's significance to sexually explicit speech law guided the case selection for this analysis. Following *Young*, the Supreme Court heard three freedom-defining cases for sexually explicit speech—*Federal Communications Commission (F.C.C.) v. Pacifica Foundation*,[24] *City of Erie v. Pap's A.M.*,[25] and *United States v. Playboy*—each of which engaged with the *Young* precedent.[26] Each case establishes a significant part of the law on sexually explicit speech: *Pacifica* is the pivotal case in which the Court affirmed the F.C.C.'s power to regulate indecent content in broadcast media during daytime hours when children may be in the audience; *Pap's A.M.* affirmed that although nude dancing is a protected form of free expression, it is subject to regulation even when the regulation interferes with the speech; and *Playboy* reinforced the exceptions and protections of adults to access sexually explicit content on cable channels.

The *Young* progeny helped cement the protections and restrictions on sexually explicit speech. In each case, the Court reaffirmed that sexually explicit speech is low-value. It is this low-value status that this research aims to better understand. This study is not the first to explore and question whether sexually explicit speech is low-value, but it does sharpen the focus to the line of cases stemming from *Young*. Broadly, legal scholars have analyzed many of these same cases to argue that the value of sexually explicit speech often depends heavily on its surrounding context, such as the medium of expression and the genre (e.g. political commentary, humor, or non-educational content).[27] For example, Christopher Schultz elegantly observed that the value of sexually explicit speech is fluid and can "float" between levels of protection depending on its context.[28] But amid these studies on sexually explicit speech, a discussion of the Court's underlying justifications (if any) for the low-value approach to sexually explicit speech is glaringly absent. Thus, this research aims to fill this gap by interrogating the legal,

[23] *Id.* at 70-71.

[24] *Pacifica Found.,* 438 U.S. 726.

[25] *City of Erie*, 529 U.S. 277.

[26] *Playboy Ent. Grp.,* 529 U.S. 803.

[27] Christopher M. Schultz, *Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction*, 41 ARIZ. L. REV. 573, 597-99 (1999).

[28] *Id*.

theoretical, practical, and empirical justifications that have built the doctrine of sexually explicit speech.

THE THREE CONUNDRUMS

Three analytical conundrums characterize the cases reviewed in this study. The first, the categorical conundrum, entails the Court's struggle to categorize restrictions on sexually explicit expression for First Amendment analysis purposes. The second, the interpretive conundrum, involves the Court's struggle to clearly articulate the communicative values and social harms related to sexually explicit expression. The third, the evidentiary conundrum, focuses on the Court's inconsistent approach to the nature and amount of evidence required to sustain such restrictions. Together, these conundrums cause fracture among the justices and create muddled doctrine in need of reformation in light of existing and nascent social science related to the public's attitudes toward sexually explicit speech.

THE CATEGORICAL CONUNDRUM

The most obvious point of fracture is how the justices choose to categorize incursions on the protected, though purportedly low-value, First Amendment activities involved in sexually explicit speech cases. Each of the focal cases, including *Young v. American Mini Theatres* and its three progeny cases analyzed here, involved some dispute over whether the regulations of sexually explicit speech were content-based regulations requiring heightened constitutional scrutiny or content-neutral regulations deserving of less exacting, intermediate scrutiny. The case law on sexually explicit expression is dominated by this doctrinally critical categorical conundrum.

The following section explores the Court's efforts to resolve this categorical conundrum and the implications of its failure to render a coherent doctrinal position on laws that explicitly target protected sexually explicit expression and adult businesses. How the Court resolves this conundrum, if it chooses to revisit any of its landmark cases,[29] could portend upheaval in the First Amendment landscape underlying sexually explicit speech. Additionally, if the Court were to extend its reasoning from paradigm-shifting cases such as *Reed v. Town of Gilbert*,[30] which raised critical First

[29] *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring) ("In my view, the Court's decision in *FCC v. Pacifica Foundation* was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration.") (internal citations omitted).

[30] 576 U.S. 155 (2015).

Amendment categorization issues, then the doctrine of sexually explicit speech could be primed for renaissance and reimagination.

Every restriction of sexually explicit speech is content-based

The First Amendment is not content-agnostic. As other scholars have discussed capably, a system of First Amendment protection constructed hierarchically necessarily invites the Court to separate protected content from unprotected content.[31] As the Court stated clearly in *Young v. American Mini Theatres*, "[t]he question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech."[32] In that sense, every restriction on expression must take into account the content restricted. However, the government may not restrict protected expression when the primary motivation for the restriction is that the government disfavors the communicative content. Unpopular speech must be given breathing space. In *Young*, however, the Court sanctioned a local government's efforts to channel a broad category of disfavored expression (adult films) into particular geographical areas. As the theater operators in *Young* argued, the restrictions foisted financial burdens on them solely because of the content of the films they showed. The majority in *Young* categorized the zoning regulations as time, place, or manner regulations because they did not clearly disfavor a particular political or social viewpoint within the adult film genre. If the regulation had applied only to adult theaters showing pornography that ridiculed then-President Gerald Ford, then the Court likely would have analyzed the restriction as content-based. Instead, the Court permitted the regulation of an entire sector of business on the basis of content using the doctrinal maneuver of content-neutrality.

This pattern emerged in all of the cases analyzed in this study. For example, in *FCC v. Pacifica Foundation*, the Court searched the record unsuccessfully for evidence that federal regulators had penalized the Pacifica Foundation because of the political or social message underlying George Carlin's use of vulgar language.[33] Without such evidence, the regulation of non-obscene, indecent expression was allowed to stand. The Court has permitted more sweeping regulations of large swaths of content purportedly done for content-neutral purposes such as protecting property values and minimizing crime.[34] In doing so, the Court has fashioned a gargantuan exemption to protection for sexually explicit speech that would be inconceivable in the realms of political or commercial speech.

[31] *See, e.g.,* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 1 (2015).

[32] *Young,* 427 U.S. at 66.

[33] *Pacifica Found.,* 438 U.S. at 746.

[34] *City of Erie*, 529 U.S. 277.

City of Erie v. Pap's A.M. represents the most striking instance of the Court's application of the content-neutral *O'Brien* standard to a regulation aimed to restrict sexual content. The decision also hangs on a precarious evidentiary record, which will be discussed later in this article. Whereas *Young v. American Mini Theatres* involved a regulation that prohibited two adult film establishments within 1,000 feet of one another, *City of Erie v. Pap's A.M.* categorically prohibited public nudity in public places, including businesses of public accommodation.[35] Although "being in a state of nudity is not an inherently expressive condition," the Court nevertheless affirmed that "nude dancing of the type at issue [in *City of Erie*] is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."[36] Although the Court did not define the contours of that outer ambit, it clearly brought nude dancing within the First Amendment's protective reach insofar as the dancing took place inside a private or quasi-private place and not openly in public space.

But lawmakers in Erie, Pennsylvania, harbored no tolerance for nude dancing, banning it outright and in a manner that punished only adult nude dancing and left untouched supposedly highbrow theater. Indeed, legal counsel for the City of Erie admitted in an earlier proceeding that the ban on public nudity would not apply to stage productions of "Equus" or "Hair," both of which are stage plays involving full nudity.[37] The city had clearly identified a disfavored form of nude expressive conduct, erotic dancing, and targeted it under a more sweeping, though facially neutral, public nudity ordinance.

The categorical conundrum manifested in the *Pap's A.M.*'s plurality's use of the *O'Brien* test for expressive conduct as the dominant analytical framework. In dissent, Justice Stevens argued that the regulation ultimately worked a total ban, not an incidental burden on speech, rendering *O'Brien* inappropriate:

> If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned; if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.[38]

Justice Stevens went on to suggest that the Court's use of secondary effects justifications for limiting speech were only constitutionally tenable in

[35] *Id*. at 282-83.
[36] *Id*. at 289.
[37] *Id*. at 328 (Stevens, J., dissenting).
[38] *Id*. at 319 (Stevens, J., dissenting).

circumstances where the market for such speech could survive.[39] This was plainly not the case under Erie's total ban on nude dancing. It was on this basis that the dissenting justices in *City of Erie v. Pap's A.M.* urged their brethren to strike down the ordinance, arguing that the government bore the burden of proving a higher-order government interest and narrow tailoring given Erie's "near obsessive preoccupation with a single target of the law," nude dancing.[40]

Young v. American Mini Theatres looms large in *City of Erie v. Pap's A.M.* The plurality maintained that whatever illicit motive lawmakers used to craft the public nudity ban, *O'Brien* required the Court to look only at the constitutionality of the statute as written.[41] All that Erie lawmakers had to show was a reasonable belief that the same secondary effects that threatened Detroit, the city whose ordinance was at issue in *Young*, would threaten Erie. Despite many indications that the City of Erie had singled out the adult establishment, Kandyland, because of its erotic messaging, the Court concluded that the matter was properly resolved as a content-neutral, secondary effects case. The Court did not require the City of Erie to make a stronger showing that the ordinance was necessary to directly or materially advance a more compelling government interest than what is required under intermediate scrutiny.

The existing case law on sexually explicit speech presents a seemingly intractable categorization problem. Many of the regulations of sexually oriented businesses are glaringly and often admittedly, based on content or the identity of the speaker. In other contexts and for other speech types, the Supreme Court habitually condemns such regulations by analyzing them against a rigorous, "fatal in fact" standard of strict constitutional scrutiny.[42] However, in the context of sexually oriented businesses, the Court has sanctioned the use of the content-neutral *O'Brien* test, a much less exacting standard, even when the record contains evidence that lawmakers specifically targeted disfavored speakers on the basis of the content they purvey, which Justice Stevens' dissent clearly opposes in *City of Erie v. Pap's A.M.* [43]

The Supreme Court's decision in *Reed v. Town of Gilbert*[44] calls into question the viability of the regulatory scheme upheld in *City of Erie v. Pap's A.M*. Although *Reed v. Town of Gilbert* did not involve sexually explicit speech, it represents a paradigm shift in the Court's approach to identifying

[39] *Id*. at 319-20.
[40] *Id*. at 330.
[41] *Id*. at 292.
[42] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
[43] *City of Erie*, 529 U.S. at 328 (Stevens, J., dissenting).
[44] *Reed,* 576 U.S. 155.

content-based restrictions and contributes an additional layer of uncertainty to the existing categorical conundrum. *Reed* is an important departure from the cases discussed here insofar as it makes clear that content-based restrictions presumptively target expression on the basis of its communicative content.[45] Implicit here is that if a court classifies a regulation as content-based, then that means the regulation necessarily targets communication. This is a significant shift from the central lessons of *Young* and its progeny. As we discussed above, the dominant paradigm arising out of *Young* holds that some content-based restrictions regulate communication whereas others regulate the effects of communication, placing secondary effects regulations on different (and more government-friendly) constitutional footing. *Reed* is far less equivocal. Writing for the majority in *Reed*, Justice Clarence Thomas stated that a content-based restriction, subject to strict scrutiny, applies to protected communication because of the "topic discussed or the idea or the message expressed."[46]

Considering the Court's reasoning in *City of Erie v. Pap's A.M.* and taking the Court in *Pap's A.M.* at its word, an erotic message likely qualifies as a topic and its non-obscene depiction qualifies as expression. Therefore, the holding in *Reed* presents one possible avenue for extending fuller First Amendment protection to sexually explicit speech that is targeted on the basis of its sexual subject matter. At a minimum, *Reed* suggests that the Court has not resolved the categorical conundrum the runs through the case law on sexually explicit speech. If anything, it has further complicated the doctrine.

THE INTERPRETIVE CONUNDRUM – FINDING THE MESSAGE IN SEXUALLY EXPLICIT SPEECH

Although the Justices roundly agree that sexually explicit speech deserves some modicum of First Amendment protection[47]—it is impossible to quantify how much or qualify what kind—the majority opinions vacillate between theoretical justifications for protection. From time to time, the Justices have invoked the marketplace of ideas, an external, consequentialist theoretical framework concerned with speech's contributions to public discourse. At others, autonomy (or self-fulfillment) theory has characterized the majority position. These opinions call on us to examine how the Court applies a value structure to the unfamiliar.

[45] *Id.* at 161 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[46] *Id*.

[47] *See, e.g.*, *Pacifica Found.,* 438 U.S. at 743; *City of Erie,* 529 U.S. at 285.

The interpretative conundrum surrounding speech's value is especially dynamic. The Supreme Court's collective difficulty with confronting social and technological change has been taunted occasionally.[48] Memoirs tell of Supreme Court justices, popcorn in hand, awkwardly watching the pornographic films to prepare for oral argument on docketed obscenity cases.[49] Although sometimes comical, one oft-repeated concern is that the members of the Court struggle to understand unfamiliar technologies and texts. In the case law on sexually explicit speech, this struggle manifests as an interpretive conundrum that feeds directly back into the Court's discussion of the value of sexually explicit speech. In the cases examined for this study, the Court routinely struggles to articulate in explicit terms the communicative value of erotic texts or sexually expressive conduct, yet in many cases, the justices have no trouble concluding that such texts lie at the periphery of First Amendment protection. The resulting case law exhibits a dearth of critical engagement on the meaning of sexually explicit texts.

A very brief history of the regulation of sexually explicit speech

The most significant starting point for U.S. law on sexual expression is *Roth v. United States*,[50] a 1957 case in which the Supreme Court laid out its first modern test for unprotected obscene speech. In *Roth*, a bookseller was prosecuted for using the postal service to sell and distribute allegedly obscene, sexually explicit materials in violation of federal law.[51] The bookseller, Samuel Roth, argued that the law violated his First Amendment right to free expression, but the Court unsurprisingly upheld his conviction because obscenity is "not within the area of constitutionally protected speech or press," meaning the government could regulate it freely.[52] Further, the *Roth* majority announced a rough standard of obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[53]

[48] *See, e.g.*, Trevor Timm, *Technology Law Will Soon be Reshaped by People Who Don't Use Email*, THE GUARDIAN (May 3, 2014), https://www.theguardian.com/commentisfree/2014/may/03/technology-law-us-supreme-court-internet-nsa.

[49] *See, e.g.*, BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979); TED CRUZ, A TIME FOR TRUTH: REIGNITING THE PROMISE OF AMERICA (2015).

[50] *Roth,* 354 U.S. 476.

[51] *Id*.

[52] *Id*. at 485.

[53] *Id*. at 489.

The *Roth* standard held for only a decade until the Supreme Court decided *Memoirs v. Massachusetts*.[54] In *Memoirs*, the Massachusetts government argued that *John Cleland's Memoirs of a Woman of Pleasure*, a novel published in 1748 that detailed the life of an English sex worker, was legally obscene.[55] The Court determined the book, despite any offensiveness, was not obscene because it was not "utterly without redeeming social value."[56] In *Memoirs*, the Court clarified the *Roth* standard with a three-prong test that must "coalesce" for speech to be obscene: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[57] Most importantly, the Court explained that for speech to be obscene it must be *entirely* without value; even speech with only a "modicum of social value" was worthy of protection.[58] The *Memoirs* standard was a win for free speech advocates because it required the utter absence of value to strip a work of First Amendment protection. In the decade following *Memoirs*, the Court decided nearly 45 obscenity cases without sustaining an obscenity conviction.

But changes to the composition of the Court near the end of the 1960s brought monumental changes in the law of sexual expression. In June 1973, the Court handed down three doctrine-shifting opinions: *Miller v. California*,[59] *Paris Adult Theater I v. Slaton*,[60] and *Kaplan v. California*.[61] *Miller* involved the prosecution of mailing obscene advertisements;[62] *Paris Adult Theater I* reviewed the powers of a local government to enjoin an adult movie theater from showing allegedly obscene films to consenting adults;[63] and *Kaplan* concerned the conviction of an adult bookstore proprietor for selling a "plain-covered" but sexually explicit book.[64] In these opinions, the Court ruled on an array of issues related to states' ability to enjoin the distribution of obscene sexual expression, including the now-prevailing *Miller* obscenity test, which asks: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a

[54] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Com. of Mass., 383 U.S. 413 (1966).
[55] *Id*.
[56] *Id*. at 420.
[57] *Id*. at 418.
[58] *Id*. at 420-21.
[59] *Miller*, 413 U.S. 15.
[60] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
[61] Kaplan v. California, 413 U.S. 115 (1973).
[62] *Miller*, 413 U.S. 15.
[63] *Paris Adult Theatre I,* 413 U.S. 49.
[64] *Kaplan,* 413 U.S. 115.

whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[65]

But when the *Miller* test was established, individual parts of the test remained undefined, which required the Court to clarify the test in subsequent cases. For example, in *Jenkins v. Georgia*, which involved an obscenity conviction of a Georgia theater manager for showing the film "Carnal Knowledge," the Court clarified that "patently offensive" must "depict or describe patently offensive 'hard core' sexual conduct,"[66] such as "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," or "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[67] However, the value question under *Miller* remained governed by somewhat amorphous national standards rather than a discrete community standard.[68] Collectively, these cases defined the speech-restrictive aspects of *Miller* but failed to provide clarity about its redemptive value prong, which made for an especially restrictive First Amendment doctrine.

Context and media: some problems in the post-Miller landscape

Since *Miller*, the Supreme Court has heard many cases involving sexually explicit speech, addressing challenges to search and seizure procedures,[69] censorship schemes,[70] licensing schemes,[71] advertising regulations,[72] jury instructions,[73] and protections for specific types of

[65] *Miller,* 413 U.S. at 24.

[66] Jenkins v. Georgia, 418 U.S. 153, 160 (1974).

[67] *Id*.

[68] Smith v. United States, 431 U.S. 291 (1977); Pope v. Illinois, 481 U.S. 497 (1987).

[69] *See, e.g.*, Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63 (1989). The Court established that materials challenged as obscene cannot be seized and removed from circulation until officially found obscene, "While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing." *Id*.

[70] *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965). From the 1950s to the 1980s, it was common for local governments to use censorship systems, like prior review of movies, to screen for obscene content, but the Court ruled that such systems had to include safeguards, such as prompt judicial review, to prevent unfair censorship.

[71] *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).

[72] *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966). The Court established that the ways in which sexual but non-obscene content is advertised, such as exploiting the material for its sexual content, can lead the material to qualify as obscene.

[73] *See, e.g.*, *Pope*, 481 U.S. 497. There was confusion in the lower courts about the instructions to juries on how to apply the three prongs of the *Miller* test for obscenity. In *Pope*, the Court held that, while the first two prongs of the *Miller* test may be determined based on

sexually explicit speech such as nude dancing.[74] In each of these cases, the Court recognized that perceptions of sexually explicit speech vary by context and community.[75] As a result, the Court never committed to a single definition of "pornographic" or "indecent."

The protection for sexually explicit speech depends on a variety of factors, such as the audience viewing the speech,[76] the medium through which the speech is accessed,[77] the physical space in which the speech is accessed,[78] the state interests for regulating the speech,[79] and, of course, the speech itself.[80] Legal researchers have written extensively on how protection for sexually explicit speech depends heavily on contextual factors. For example, Milagros Rivera-Sanchez examined the FCC's dismissed

contemporary community standards, the third prong must be determined based on whether a reasonable person would find value in the material. *Id*. at 500.

[74] Sexually explicit speech takes many different forms, and the Court has addressed a variety of forms of such speech. *City of Erie*, 529 U.S. 277 (analyzing restrictions on nude dancing); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (analyzing restrictions on live adult entertainment); *Playboy Ent. Grp.,* 529 U.S. 803 (analyzing restrictions on adult-oriented cable channels); Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115 (1989) (analyzing regulations on dial-a-porn/phone sex services).

[75] The Court determined that obscenity (*Miller*, 413 U.S. 15), child pornography (Osborne v. Ohio, 495 U.S. 103 (1990)), and indecent content on broadcast during daytime programming (FCC v. Pacifica Found., 438 U.S. 726 (1978)) are unprotected by the First Amendment.

[76] The Court was most concerned about protecting minors from exposure to sexually explicit speech. *See*, *e.g.*, United States v. Am. Library Assoc., Inc., 539 U.S. 194 (2003); *Playboy Ent. Grp.,* 529 U.S. 803; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *Pacifica Found.,* 438 U.S. 726; Ginsberg v. New York, 390 U.S. 629 (1968).

[77] The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems," *Se. Promotions, Ltd.,* 420 U.S. at 557 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) and Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)).

[78] Sexually explicit speech, both obscene and non-obscene, is legal in the privacy of one's home: "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565 (1969). But sexually explicit speech may be regulated or outlawed when accessed in public. *See Paris Adult Theatre I,* 413 U.S. 49.

[79] State interests in regulating sexually explicit speech include protecting vulnerable audiences, like minors (*Pacifica Found.*, 438 U.S. 726, protecting social order and morale (Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Erznoznik v. City of Jacksonville, 422 U.S. 204 (1975); *Paris Adult Theatre I*, 413 U.S. 49), and preventing the secondary effects of sexually explicit speech, such as increased crime and decreased property values (*Alameda Books, Inc.,* 535 U.S. at 425; *City of Erie*, 529 U.S. 277; Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); *Young*, 427 U.S. 50).

[80] The Court determined that obscenity (*Roth*, 354 U.S. 476), child pornography (Ferber, 458 U.S. 747), and indecent content on broadcast during daytime programming (*Pacifica Found*., 438 U.S. 726 were unprotected by the First Amendment).

indecency complaints and determined that the communicative context of sexually explicit speech is especially crucial to its protection on broadcast media.[81] According to Rivera-Sanchez, sexually explicit speech in a humorous or non-educational programming context is more likely to be penalized by the FCC than sexually explicit speech used in purely educational, non-entertainment contexts.[82] Similarly, Stephen Sher determined the purpose of sexually explicit speech drives its level of protection. Analyzing the decency provisions put in place by the National Endowment for the Arts (NEA), Sher revealed that the Court gives variable protection to speech that lies on the border between artistic indecent speech and non-artistic indecent speech (i.e., pornography), with more protection given to speech that is believed to have artistic merit, like nude dancing.[83] Finally, researcher David Cole determined that the protection for sexually explicit speech depends greatly on its social acceptability over time rather than specific material aspects of the expression in a given moment. The Court is often concerned that sexually explicit speech brings private behavior into the public sphere. [84] Cole argues that society represses speakers "who challenge the public/private line by making public sexual matters that the majority would prefer remained private."[85] This creates a system in which protection for sexually explicit speech depends on how much the speech violates deeply engrained social standards of decency and how much the speech breaks the spheres of public and private behavior.[86]

Across a wide array of contexts and content, the Court consistently classifies sexually explicit speech according to its lesser quantum of social value.[87] It expresses this concept linearly: the more speech is perceived as aiding in social progress or promoting the exchange of ideas, the more

[81] Milagros Rivera-Sanchez, *How Far Is Too Far? The Line Between "Offensive" and "Indecent" Speech*, 49 FED. COMM. L.J. 327, 328 (1997).

[82] *Id*. at 328.

[83] Stephen N. Sher, *The Identical Treatment of Obscene and Indecent Speech: The 1991 NEA Appropriations Act*, 67 CHI.-KENT L. REV. 1107, 1131-32 (1991).

[84] David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 115 (1994).

[85] *Id*.

[86] *Id*. at 131.

[87] *See, e.g*., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). In *Chaplinsky*, the Court upheld the conviction of a Jehovah's Witness who was charged with breaching the peace, stating, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (internal citations omitted). *Chaplinsky* remains good law that guides the hierarchical or low-value approach.

valuable speech is perceived to be. But is this distinction based on anything real? As a social fact, is sexually explicit speech really low-value? And if so, what justifications and decisions do the Supreme Court make to reach such a significant conclusion? In the near half-century since the United States Supreme Court decided *Miller v. California*, the U.S. experienced a digital revolution that changed the availability of information and media and a political revolution that challenged social norms around love, marriage, and sex.[88] With those revolutions came changes to the landscape of sexually explicit speech. The number of web pages containing sexually explicit media reaches into the millions,[89] entire radio and podcast channels are dedicated to answering questions about sex and relationships,[90] and mainstream entertainment depicts actors discussing sexual issues, such as sexually transmitted diseases and pornography use.[91] Despite this progress, the doctrine related to sexually explicit speech has remained relatively stable; sexually explicit speech receives minimal First Amendment protection and it is still perceived as low-value.[92] But seldom have courts, including the Supreme Court, explicitly discussed the relative value of sexually explicit speech compared to core protected speech under the First Amendment. The snapshot of cases from *Young v. American Mini Theatres* to *City of Erie v. Pap's A.M.* provides a window into this harm-value conundrum related to sexually explicit speech.

Sexually explicit speech and theories of value

Broadly, the case analysis reveals a clear split in how the justices articulate whether and to what extent sexually explicit speech, which falls at the borderlines of constitutional protection, retains value for First Amendment purposes. Starting in *Young v. American Mini Theatres*, the justices diverged dramatically in the theoretical frameworks applied to the conundrum of sexually explicit speech. Justices amenable to robust

[88] *See, e.g.*, Barry Leiner et al., *A brief history of the Internet*, 39 ACM SIGCOMM COMPUT. COMM. REV. 22 (2009).

[89] *See* OGI OGAS & SAI GADDAM, A BILLION WICKED THOUGHTS: WHAT THE WORLD'S LARGEST EXPERIMENT REVEALS ABOUT HUMAN DESIRE (2011); *see also* Pornhub, 10 Years of Pleasure and Data, Pornhub (last visited April 15, 2018), https://www.pornhub.com/event/10years.

[90] Ellen Huerta, *The 10 Most Intimate Podcasts About Love and Sex*, HUFFINGTON POST (Feb. 26, 2016), https://www.huffingtonpost.com/ellen-huerta/the-10-most-intimate-podcasts-about-love-and-sex_b_9310214.html.

[91] Television shows like *Friends* and *Girls* are known for their explicit discussions on sexual issues like condom use and effectiveness (*Friends*: *The One Where Dr. Ramoray Dies*, (NBC television broadcast March 21, 1996)); pornography use, sexual diseases, and abortion *(Girls: Close-Up*, (HBO cable television Feb. 22, 2015)).

[92] *See Vivid Ent., LLC*, 774 F.3d 566.

regulation of sexually explicit speech employed the rhetoric and theory of the marketplace of ideas framework. They posited that sexually explicit speech is unrelated to the communication of ideas or beliefs. Yet, as discussed earlier, the justices neither fully explain the logic behind that conclusion, nor do they entertain the possibility that the market has rendered a value judgment in favor of sexual content. On the other hand, justices predisposed to protecting sexually explicit speech gravitate toward autonomy-based justifications for limiting the government's attempts to stifle it.

Young v. American Mini Theatres perfectly captures the dialogue of the Court's interpretive conundrum. Justice John Paul Stevens, writing for the majority in *Young* argued, "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."[93] Perhaps unintentionally, the Court sanctioned the belief that adult film is not operating the marketplace of social and political ideas. It relegated so-called "borderline" speech, unabashedly on the basis of its content and the identity of the speakers, into specific government-regulated physical spaces.[94] As discussed above, the majority did not shy away from the fact that this is a content-based regulation. It claimed instead that this sort of content-based regulation for borderline speech poses less of a free speech problem than a regulation aimed at a more obvious exposition of ideas.

According to the Court, one of the chief justifications for upholding the zoning laws at issue in *Young v. American Mini Theatres* is the assumption that protected sexually explicit speech categorically lacks societal importance:

> Moreover, even 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. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that

[93] *Young*, 427 U.S. at 61.
[94] *Id*. at 63.

> the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.[95]

However, the Court made this determination without inspecting the works in question or the role that adult film theaters might play in how adults engage with ideas on the subjects of sex and sexuality. In Justice Stevens's view, the Court can make this constitutional maneuver because the "market for [pornography] is essentially unrestrained."[96] According to the majority, if the ordinance in *Young* had been more expressly focused on specific viewpoints expressed in certain adult films and not on channeling an entire category of speech into particular physical spaces, this may have posed an insurmountable constitutional problem. [97]

The interpretive conundrum seemed to blossom in *FCC v. Pacifica Foundation*, a landmark case in which Justice Stevens, the author of the majority opinion in *Young*, argued that George Carlin's famous "Filthy Words" monologue fell outside the scope of full First Amendment protection when communicated via broadcast technology. Justice Stevens asserted, "While some of these references may be protected, they surely lie at the periphery of First Amendment concern."[98] However, he never explained why.

At this point, the Court's conclusory reasoning is not especially notable. But what is notable is how Justice Stevens framed the First Amendment question. He wrote, "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case."[99] This asks whether the speaker-claimant in a First Amendment challenge can prove that the government has targeted an ideological, and thus presumptively valuable, message or merely targeted the message's offensiveness. Justice Stevens's opinion in *Pacifica*, built upon the foundation cemented in *Young*, leaves courts today with an intractable circularity problem. If a court must discern whether the government is targeting offensiveness, it must first interpret both the speaker's message and the government's response. This necessarily injects the jurist's subjective interpretation into what is intended to be an objective exercise in First Amendment categorization. This, the majority in *Cohen v. California* ruled, the government may not do, recognizing the risks

[95] *Id*. at 70-71.
[96] *Id*. at 62.
[97] *Id*. at 70.
[98] *Pacifica Found.,* 438 U.S. at 743.
[99] *Id*. at 746.

of leaving interpretive power in the hands of government actors.[100] Justice Lewis F. Powell echoed that sentiment in his concurrence in *Pacifica*, which highlighted his disagreement with Justice Stevens's approach dating back to *Young*:

> I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.[101]

Indeed, as fans and scholars of Carlin's work have noted, the social value of Carlin's commentary on linguistic taboos was inextricably tied to its offensiveness and the listener's subsequent grappling with it.[102]
Powell's concurrence in *Pacifica* provided powerful, though ultimately unsuccessful, support for a First Amendment theory of value rooted in listener autonomy. As the Court continued to grapple with cases involving sexually explicit speech, this theoretical framework appeared to secure some semblance of a foothold as the pure marketplace of ideas metaphor faded in these few cases. In *United States v. Playboy*, the penultimate case in the *Young* lineage, the Court embraced autonomy theory more forcefully. *United States v. Playboy* involved a First Amendment challenge to FCC regulations requiring cable companies delivering adult material to scramble their signal to prevent non-subscribing households from receiving any sound or images of adult content through "signal bleed" into other cable channels.[103]

The Court struck down the regulatory scheme on First Amendment grounds, holding that it could not survive strict constitutional scrutiny required for content-based regulations of speech carried over privately built and operated technological infrastructure.[104] Justice Anthony Kennedy's majority opinion embraced the individual autonomy justification for limiting government control over cable content:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the

[100] Cohen v. California., 403 U.S. 15 (1971).

[101] *Pacifica Found.,* 438 U.S. at 761 (Powell, J., concurring) (citing *Young*, 427 U.S. at 63–73).

[102] Richard G. Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited – What Does the Future Hold for the Seven Dirty Words?*, 65 TUL. L. REV. 131, (1990).

[103] *Playboy Ent. Grp.,* 529 U.S. at 808.

[104] *Id*. at 818.

> Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.[105]

The only mention of markets involved the Court's discussion of the efficacy of various market-based solutions for cable companies to prevent delivery of potentially offensive content to users who might be so offended. "The citizen," Justice Kennedy argued, "is entitled to seek out or reject certain ideas or influences without Government interference or control."[106] For Justice Kennedy, the citizen and not the market took primacy.

Although *United States v. Playboy* seemed to indicate full-throated support for the proposition that the government may not single out private businesses trafficking in adult material, the Court reversed course in the same term in *City of Erie v. Pap's A.M*. The *Pap's A.M.* case involved a First Amendment challenge to a ban on public nudity brought by an adult nightclub that featured fully nude dancing for entertainment on its premises.[107] The Court ultimately ruled that the regulation passed First Amendment scrutiny because it amounted to a constitutional limitation on expressive conduct that was unrelated to the suppression of free expression.[108] The Court in *City of Erie v. Pap's A.M.* relied heavily on Justice Stevens's conclusory dicta in *Young v. American Mini Theatres*:

> [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.[109]

Interestingly, Justice Stevens dissented in *City of Erie v. Pap's A.M.*, not because of any epiphany that adult entertainment possessed more constitutional value than he acknowledged in *Young*, but because he considered the total ban on a form of erotic message to be an unconstitutional government overstep in the way that using zoning law to cluster or channel expressive businesses was not. [110]

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[105] *Id*.
[106] *Id*. at 817.
[107] *City of Erie*, 529 U.S. at 282-83.
[108] *Id*. at 285.
[109] *Young,* 427 U.S. at 70.
[110] *See City of Erie,* 529 U.S. at 319 (Stevens, J., dissenting).

The legacy of Justice Stevens's opinion in *Young* is that the government is given broad authority to foist regulatory burdens on adult content that jurists consider less valuable so long as it does not ban the speech entirely. The prevailing theory, despite some backlash, is that the market will respond to protect adult content if it is indeed valuable. The case law, however, has built in several powerful predeterminations of value and marketability despite pushback from jurists like Justice Powell and Justice Kennedy who raised concerns about encroachments on citizen autonomy in the mutual exchange of ideas. Thus continues a classic First Amendment conundrum: How, if at all, can the Supreme Court adopt an appropriate theoretical framework for value without tainting its own rulings with the interpretive gloss of the individual justices who rotate through the chambers? The most likely answer is that the Court cannot promise that. Fortunately, the Court has an available path toward resolving both the categorical conundrum and the interpretive conundrum if it can resolve a key evidentiary conundrum.

THE EVIDENTIARY CONUNDRUM

In *Roth v. United* States, the Court stated, "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[111] If we take the Court at its word, then the doctrine of sexually explicit speech must give substantial weight to citizens' preferences for borderline speech. The challenge in this area has been adequately capturing both the core purpose of the First Amendment and the diversity of ways that sexually explicit speech promotes potentially unpopular social ideas[112] with differing levels of abstraction and sometimes through various forms of expressive conduct.

Unsurprisingly, the Court has not given much explicit guidance on whether or how it will use empirical evidence to answer First Amendment questions. The Supreme Court is not, at least explicitly, a factfinding body. It seldom reconsiders factual circumstances or it does not explicitly weigh the probative value of evidence in the cases it hears. In rare cases involving

[111] *Roth,* 354 U.S. at 484.

[112] Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (stating, "[w]e would reiterate, however, our recognition in *Roth* that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that '[t]he portrayal of sex, *e.g.,* in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.'[ ] It follows that material dealing with sex in a manner that advocates ideas, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection.").

serious implications for social institutions such as marriage,[113] employment,[114] and voting,[115] the Court has been willing to engage with empirical evidence. However, the cases examined here reflect a profound reluctance among the majority of the justices during the period studied to second-guess lower courts' factual determinations arising out of empirical studies. What is especially troubling about the Court's deference to lawmakers is that in several of these key cases, the record reveals glaring instances of unfounded assumptions of third-party harm that clearly burden certain content and certain speakers without empirical justification.

Judicial deference and empirical evidence

The Court's application of the secondary effects doctrine in *Young v. American Mini Theatres* rested on evidence from sociologists, urban planners, and unidentified laypersons who predicted that concentrations of adult establishments would lead to the erosion of Detroit's economic vitality.[116] The Detroit Common Council found that adult establishments, "because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas."[117] But rather than regulating the operational characteristics of such establishments directly, the Detroit Common Council passed, and the Supreme Court upheld, the zoning regulations that limited the permitted locations for the establishments themselves on the basis of the types of films they exhibited. One important piece of the precedent from *Young* is the Court's firm refusal to second-guess the Common Council's motives or the strength of the evidence justifying the sweeping regulation:

> It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.[118]

The Court generally passed on the opportunity to discuss the weight of the evidentiary or technology policy arguments at issue in the landmark *FCC v. Pacifica Foundation* case, opting instead to defer to the FCC's own

[113] *See*, *e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015).
[114] *See*, *e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731 (2020).
[115] *See*, *e.g.*, Merrill v. People First of Alabama 141 S. Ct. 190 (2020).
[116] *Young,* 427 U.S. at 82 (Powell, J., concurring).
[117] *Id*. at 54 (citing Ord. No. 11-05, § 1(66.000)).
[118] *Id*. at 71.

findings regarding the threats posed by sexually explicit media on broadcast and its determination that the Carlin monologue was legally indecent.[119] Conceptually at least, the Court took for granted the FCC's position that broadcast technologies presented unique threats by exposing unwitting listeners, especially minors, to objectionable material.[120] We do not quibble with the Court's sensible determination that broadcast technology is a unique medium and that its technological characteristics should have some bearing on how courts analyze the context and circumstances surrounding potentially offensive broadcasts, but the Court's commitment to evidentiary deference is noteworthy. The issue of evidentiary deference that characterized *Young* and *Pacifica* truly came to a head in *United States v. Playboy*, which involved considerable dispute over the level of evidence required to justify a sweeping federal regulation on sexually explicit speech.

The evidentiary conundrum discussed here presents a core question: what is the nature and extent of evidence required to sustain a restriction on protected sexually explicit speech? *Young* suggests that in secondary effects cases, restrictions on an entire class of speakers or content could be justifiable on the basis of some reasonable modicum of evidence, a minimal standard[121]. But in *United States v. Playboy*, the Court appeared open to a heightened evidentiary requirement that calls for probative evidence that the harms the government cites are real and likely to be experienced by a substantial proportion of the population the government seeks to protect.[122]

As discussed above, Congress passed Section 505 of the Telecommunications Act to address "signal bleed," the problem of sexually explicit images creeping over from adult cable channels into channels intended for general audiences.[123] Although the categorization and interpretative conundrums puzzled the Court, one of the most significant disputes among the Supreme Court justices, in dialogue with Congress and the lower courts, involved the evidence presented by the government that signal bleed was a serious problem capable of being addressed by legislative restrictions on cable operators. As summarized by the three-judge panel sitting in the United States District Court for the District of Delaware, the government relied primarily on purportedly compelling anecdotal evidence of bleeding signals affecting unsuspecting and sensitive customers who did not want to receive Playboy's cable content.[124]

Unlike its approach in *Young* or *Pacifica*, the Supreme Court explicitly questioned the paucity of empirical evidence justifying the signal

[119] *Pacifica Found.,* 438 U.S. at 760 (Powell, J., concurring).
[120] *Id*. at 748-50.
[121] *See Young,* 427 U.S. at 71.
[122] *See Playboy Ent. Grp.,* 529 U.S. at 821-22.
[123] *Id.* at 806.
[124] *Id*. at 819.

bleed provision in Section 505. Although Congress possessed evidence that nearly 39 million homes with approximately 29.5 million children might be exposed to signal bleed, the evidence did not show the significance of the harmful effects as they would be experienced in real-life households. The Court questioned whether the regulation met the strict scrutiny standard, which requires showing that the regulation is necessary to achieve a compelling government interest. [125]There was some evidence that the potential for harm was broad, but no indication in the majority's eyes that the harm was qualitatively significant. Specifically, the Court pointed out that there was "no probative evidence in the record which differentiates among the extent of bleed at individual households and no evidence which otherwise quantifies the signal bleed problem."[126] "Without some sort of field survey," Justice Anthony Kennedy wrote, on behalf of the majority, "it is impossible to know how widespread the problem in fact is, and the only indicator in the record is a handful of complaints."[127] Despite the dissent's plea to grant regulators more empirical leeway,[128] *Playboy* demonstrates that over time, the judicial deference at the core of *Young* and *Pacifica* had perhaps given way to healthy scientific skepticism as new methods of private content delivery, such as cable and internet, became available in homes.

However, the Court's apparent willingness in *Playboy* to engage in scientific dialogue does not resolve the evidentiary conundrum. In *City of Erie v. Pap's A.M.*, the justices struggled with core scientific issues of external validity and generalizability.[129] In passing its public nudity ban that ultimately targeted adult clubs, the City of Erie relied on evidence of adult establishments' harmful secondary effects.[130] The problem with the evidentiary record in *City of Erie* is that it consisted entirely of evidence introduced in the Supreme Court's earlier cases in *Young v. American Mini Theatres* and *City of Renton v. Playtime Theatres*. Over Pap's A.M.'s counsel's objections, the Court endorsed this approach:

> And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.[131]

[125] *Id*. at 815.
[126] *Id*. at 820-21.
[127] *Id*.
[128] *Id*. at 841.
[129] *See City of Erie,* 529 U.S. 277.
[130] *Id.* at 291.
[131] *Id.* at 313 (internal citations omitted).

The City of Erie apparently relied on its own "findings" to support its regulation of adult business, although the Court only cited the preamble of the ordinance at issue in *City of Erie v. Pap's A.M.*, and not the evidence itself:

> [T]he Council of the City of Erie *has, at various times over more than a century, expressed its findings* that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.[132]

Reasonable belief should not carry the day in matters that can be investigated by rigorous social science, especially in legal terrain that requires intermediate, if not heightened strict, scrutiny. Likewise, government regulations that rely merely on vague conceptualizations of harm (i.e. "debasement of both women and men") must fail if they do no more than assert a social harm without substantial empirical support.

The Court's preference for deference in cases involving small adult businesses but interest in field surveys investigating harms caused by massive private cable operators lacks logical soundness necessary to form coherent doctrine. However, of the three conundrums highlighted here, the evidentiary conundrum is the one most amenable to resolution, provided that the Court is willing to follow its own recent rulings and applications of heightened scrutiny where certain speakers or content are singled out for disparate treatment by lawmakers.[133] The sexually explicit speech cases have attracted a cadre of amici curiae, demonstrating heightened interest in appealing to the Court's considerations of social science and empirical evidence through appellate advocacy. It is in this robust amicus strategy that the Court might find help in resolving an otherwise hopelessly contradictory set of doctrines that limit discourses on sex.

The emergence of amicus strategy in sexually explicit speech cases

For each of the cases analyzed here, a wide variety of organizations (from legal scholars to nudist groups) submitted amicus briefs for the Court to consider the groups' insights on the law of sexually explicit speech and the implications of the docketed cases. As previously discussed, in the earlier cases of *Young* and *Pacifica*, the Court deferred to the regulatory bodies and

[132] *Id*. at 297.
[133] *Reed,* 576 U.S. 155.

their claims without contending with the evidence of purportedly harmful effects of sexually explicit speech. But in *Playboy* and *City of Erie*, the Court drew significant attention to the scientific evidence for its decisions, which may be the result, in part, of the submitted amicus briefs.

The subject of harm resulting from signal bleed (an empirical question), was at the core of *United States v. Playboy* and the government's proposed regulatory scheme for sexually explicit adult cable channels.[134] Submitted to the Court were a series of amicus briefs, but two—of opposing positions—focus on the evidence of these harms. The first, submitted by a collection of "sexuality scholars, researchers, educators, and therapists," argues that there is no scientific evidence of psychological harms experienced by signal bleed.[135] Citing to a collection of health experts, the group called on the Court to disregard the government's claims of harms and to find no compelling governmental interest in shielding minors from "sexually explicit" or "indecent" signal bleed.[136] Conversely, a collection of family and morality groups submitted to the Court a brief with research arguing that such signal bleed was, indeed, dangerous because even the slightest exposure encourages children to access sexually explicit speech, a "detriment" to children's sexual development,[137] thus regulation to stem signal bleed is necessary and justified. The Court did not acknowledge or cite to either of these briefs in its opinion, but the debate and role of empirical evidence weighed heavily in the Court's decision in *Playboy*, which ultimately concluded that the scientific record was insufficient to justify the sweeping regulation on signal bleed.

Debate over empirical evidence again manifested in *City of Erie v. Pap's A.M.* when the Court considered the constitutionality of a total ban on public nudity aimed at stemming harmful secondary effects of nude dancing on community property values and crime rates.[138] Particularly compelling in the opinion was an amicus brief submitted by the First Amendment Lawyers Association which provided extensive research on the impact—or lack thereof—of nude dancing entertainment. The Association's brief argued that three of the four secondary effects studies cited by the City of Erie were scientifically invalid.[139] Specifically, the three challenged studies were not reliable because they failed at least one of the following checks for scientific validity: a well-matched control city, sufficient time for study measurement,

[134] 529 U.S. 803 (2000).

[135] Brief for Sexuality Scholars et. al. as Amici Curiae Supporting Appellee, United States v. Playboy Ent. Grp., 529 U.S. 803 (2000).

[136] *Id*.

[137] Brief for Family Research Council et. al. as Amici Curiae Supporting Petitioners at 9, United States v. Playboy Ent. Grp., 529 U.S. 803 (2000) (No. 98-1682).

[138] *City of Erie,* 529 U.S. 277.

[139] Brief for The First Amendment Lawyers Association as Amicus Curiae Supporting Respondent, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (No. 98-1161).

a valid measure for "crime," and the correct survey method/research tool.[140] The secondary effects study conducted in Indianapolis, Indiana, for example, failed three of the four points of scientific validity.[141] Furthermore, the one study that did pass scientific muster, conducted in St. Paul, Minnesota, in 1978, found no negative secondary effects associated with adult entertainment establishments.[142] Despite this extensive evidence provided by the Association that disproves the government's claims of negative secondary effects and nude entertainment, the Court states in its opinion that "the study relied on by *amicus curiae* does not cast any legitimate doubt on the Erie city council's judgment about Erie."[143] The Court gave no additional explanation for why it found the Association's research insufficient. This decision by the plurality, however, is a source of fracture in the opinion.

In his dissent, Justice David Souter criticized the plurality's opinion on the government's evidence of secondary effects and demanded a greater evidentiary basis for the nude ban (something he acknowledges he failed to do in his concurrence in *Barnes v. Glen Theatre*[144]). The plurality states that the preamble of Erie's nudity ordinance—which states vaguely of "findings" of detrimental secondary effects from adult entertainment businesses—is sufficient evidence to support Erie's regulation.[145] But in Justice Souter's view, the plurality "seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge."[146] Further, Justice Souter contends that this "evidence" as cited by the plurality is insufficient in the presence of real fact. Citing to the research provided by the Association, Justice Souter states, "it is one thing to accord administrative leeway as to predictive judgments in applying " 'elusive concepts' " to circumstances where the record is inconclusive and "evidence ... is difficult to compile," and quite another to dispense with evidence of current fact as a predicate for banning a subcategory of expression."[147] According to Justice Souter, not only did the City of Erie fail to demonstrate the nudity ban will mitigate the secondary effects but there lacks sufficient evidence that such harms even exist, particularly in light of research that empirically reports the opposite.

[140] *Id*.

[141] Brief for The First Amendment Lawyers Association as Amicus Curiae Supporting Respondent at Table 2, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (No. 98-1161).

[142] *Id*.

[143] *City of Erie,* 529 U.S. at 298.

[144] *Id*. at 315 (Souter, J., concurring in part and dissenting in part); *See Barnes,* 501 U.S. 560.

[145] *Id*. at 298 (majority opinion).

[146] *Id*. at 314 (Souter, J., concurring in part and dissenting in part).

[147] *Id*. at 314-15.

The fracture of opinion over the science and evidence in *City of Erie v. Pap's A.M.* best demonstrates the evidentiary conundrum affecting the Supreme Court's ability to determine the nature and extent of evidence required to sustain a restriction on protected sexually explicit speech. *Playboy* and *Pap's A.M.* indicate the Court's willingness to engage in scientific dialogue, but the Court has not settled on a legal standard for sufficient and substantive evidence in sexually explicit speech cases. This lack of cohesion, however, may be remedied using expert knowledge, like the kind found in the submitted amicus briefs.

Earlier, we acknowledged that the Supreme Court is not, at least explicitly, a factfinding body. Especially in the post-digital era, a time when data is constantly gathered and peer-reviewed research is readily accessible, ample expertise is available to assist the Court in evaluating evidentiary claims. As made evident by the amicus briefs submitted for *Playboy* and *Pap's A.M.*, there are interested and qualified parties from which the Court can glean knowledge and better inform its decisions. The challenge, however, is establishing a clear substantiation standard. Without clear and uniform agreement from the Court on the level of evidence required, a strategy for relying on knowledge submitted by friends of the courts will be fruitless.

RECOMMENDATIONS & CONCLUSION

THREE CONUNDRUMS – TWO DISASTERS AND SOME HOPE

In unpacking the Supreme Court's decisions and justifications for assigning sexually explicit speech a low-value categorization, this study revealed three conundrums within the sexually explicit speech case law: the categorical, the interpretative, and the evidentiary. The Court has created fractured doctrine, often around their resolutions to these conundrums. Undoubtedly, the law on sexually explicit speech needs reformation.

Based on the findings from this analysis, we recommend that, in future cases, the Supreme Court abandon its approaches related to the categorization or interpretations of sexually explicit speech and its regulations. It was arguably a noble endeavor by the Court to try to link these cases using categorization or interpretation, but when faced with the variability and subjectivity of these cases (ranging from dirty words to dirty dancing), disaster was likely inevitable. As demonstrated in the analysis, these practices lead to glaring inconsistencies and fail to unify protections and regulations of sexually explicit speech. Thus, the Court should dispense with using these practices in future cases of sexually explicit speech and its regulations.

But, to paraphrase the Court, let us not burn down the house to roast the pig,[148] as the evidentiary conundrum is not without remedy. Although this study revealed the Court has been unclear and inconsistent on the nature and extent of evidence required to sustain a restriction on protected sexually explicit speech, leaving it with no clear direction, a workable substantiation standard could resolve the evidentiary conundrum. This section describes the proposed standard and applies its key components to the evidentiary problems presented by secondary effects cases.

First Amendment scrutiny and substantiation in sexually explicit speech cases

The Supreme Court has long engaged with the conceptual and practical challenges of analyzing legislative attempts to regulate speech in the realm of vice. Like speech related to lawful commercial products such as alcohol[149] or tobacco,[150] or services such as gambling,[151] sexually explicit speech has frequently drawn interest from legislatures aiming to curb speech for the purposes of promoting public health and morality.[152] We assume as the Court has, that sexually explicit speech involves a cognizable erotic message,[153] with some modicum of value that brings it within the First Amendment's protective reach. Like regulations aimed at valuable commercial speech associated with potentially harmful vice products, a workable doctrine of sexually explicit speech must include doctrinal elements that balance the value of erotic messages against their purported harms in a manner that satisfies at least intermediate scrutiny. The commercial speech doctrine and the progeny of the landmark case *Central Hudson Gas & Elec. v. New York Pub. Serv. Comm'n* provide the appropriate framework for balancing the legislative preferences of local governments with the First Amendment rights of adult content purveyors. It does so by injecting into the First Amendment analysis a substantiation requirement by which regulators must demonstrate a minimum level of efficacy for a regulation to survive First Amendment scrutiny.

Following a conservative realignment of the Supreme Court in the 1980s, commercial speech jurisprudence has undergone seemingly rapid reformation favoring a fairly exacting, protective standard for commercial

[148] Butler v. State of Mich., 352 U.S. 380, 383 (1957) (stating "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.").

[149] *See* Rubin v. Coors, 514 U.S. 476 (1995).

[150] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

[151] Greater New Orleans Broad. Assoc., Inc. v. United States, 527 U.S. 173 (1999).

[152] *See City of Erie*, 529 U.S. 277.

[153] *Id*. at 278-79; *see also Barnes,* 501 U.S. at 571.

speech, beginning in *Central Hudson* and ripening in *Sorrell v. IMS Health*. In *Central Hudson*, the Court fashioned a conjunctive, four-pronged test that a regulation of commercial speech must meet in order to survive intermediate constitutional scrutiny:

> [First], we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern a lawful activity and not be misleading. [Second], we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must [third] determine whether the regulation directly advances the governmental interest asserted, and [fourth] whether it is not more extensive than is necessary to serve that interest.[154]

Insofar as governments seek to regulate lawful commercial speech with an eye toward ameliorating public health concerns, such as binge drinking[155] or underage smoking,[156] the first two prongs represent a minimal hurdle for legislatures. *Central Hudson* and its progeny find their teeth in an increasingly strict third prong, which requires lawmakers to prove that a regulation on protected commercial speech directly and materially advances the government's stated regulatory interest.[157]

At its heart, the third prong calls for empirical measures of regulatory efficacy. In 1993, the Supreme Court applied *Central Hudson* in *Edenfield v. Fane* to a Florida regulation that prohibited certified public accounts from "direct, in-person, uninvited solicitation" of clients.[158] The Florida Board of Accountancy argued that the non-solicitation rule was necessary to preserve the independent judgment of CPAs who often attest to the accuracy of audited financial statements.[159] After easily finding that the regulation satisfied the first two prongs of *Central Hudson*, the Court struck down the non-solicitation regulation on the grounds that the State of Florida

[154] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[155] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 490 (1996).

[156] *See Lorillard Tobacco Co.*, 533 U.S. at 533-34.

[157] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661-62 (1994) (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). For the test of regulations of commercial speech, *see Central Hudson Gas & Elec. Corp.* 447 U.S. at 566 ("At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

[158] Edenfield v. Fane, 501 U.S. 761, 763 (1993).

[159] *Id*. at 764.

had failed to introduce sufficient studies or even anecdotal evidence that the non-solicitation rule directly and materially advanced its interest in preventing conflicts of interest in the accounting profession.[160] Building on the existing commercial speech standard, the Court emphasized that the direct-and-material-advancement burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[161]

Edenfield strengthened the *Central Hudson* standard considerably and also set forth a doctrinal framework for ascertaining the type, quantity, and character of evidence necessary to support a restriction on protected commercial speech.[162] Only two years later, in *Florida Bar v. Went For It, Inc*., the Court upheld a restriction that prohibited attorneys from sending direct-mail advertising to accident victims (read: potential clients) within thirty days of a motor vehicle accident.[163] Assessing the evidentiary support for the restriction, the Court found that the State of Florida met the *Edenfield* substantiation standard by producing two methodologically sound empirical studies independently commissioned by the State of Florida that showed that a substantial percentage of respondents thought that direct-mail attorney advertising violated victim privacy or undermined public perception of the judicial system or the attorney profession.[164]

Failing to meet the evidentiary requirements, the Court struck down a host of commercial speech restrictions in the years that followed *Went For It*, many of which were assertedly rooted in legislative interests in public health issues. The *Edenfield* substantiation standard proved pivotal as the Court explored the contours of the commercial speech doctrine and the third prong of *Central Hudson*. For example, the Court dashed a federal ban on broadcast advertisements for casino gambling finding scant causal links between advertising and compulsive gambling.[165] Similarly, the Court struck

[160] *Id*. at 771.

[161] *Id*. at 770-71.

[162] R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953, 983 (2007).

[163] *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

[164] *Id*. at 625-27.

[165] *Greater New Orleans Broad. Assoc., Inc.*, 527 U.S. at 189 ("Assuming the accuracy of this causal chain, it does not necessarily follow that the Government's speech ban has directly and materially furthered the asserted interest. While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another. More important, any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate

down a federal ban on advertising the strength (measured by alcohol-by-volume) of certain alcoholic beverages citing both conjectural purported harm and a lack of regulatory efficacy.[166] And in 2001, the Court handed a major victory to Lorillard Tobacco Company after the cigarette manufacturer challenged a series of regulations aimed at curbing underage smoking, one of which required point-of-sale advertising for tobacco products to be placed more than five feet off the ground, supposedly to limit youth exposure to tobacco ads.[167] The so-called five-foot rule failed *Central Hudson* analysis in part because it provided "only ineffective or remote support for the government's purpose."[168]

The Supreme Court put a final punctuation mark in the evolution of the *Central Hudson* standard in the 2011 case *Sorrell v. IMS Health, Inc.*, which involved a Vermont ban on a marketing practice known as pharmaceutical detailing in which drug manufacturers use prescribing information to target market pharmaceutical drugs to physicians.[169] In striking down the ban, the Court seemingly strengthened the commercial speech doctrine further when held that the ban aimed at pharmaceutical marketers amounted to a speaker-based ban subject to "heightened judicial scrutiny."[170]

The *Central Hudson* standard's evolution has been fueled by governmental attempts to regulate either speech about purportedly harmful products or purportedly harmful modes of commercial speech and marketing activity. These concerns closely parallel the public health concerns raised in many of the cases discussed above involving sexually explicit speech. Yet in the commercial context, the Court has cautioned, "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[171] The Court has also reminded us that market participants ought to have some say in the value of commercial speech:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the

exceeding any increase in gambling or compulsive gambling that private casino advertising could produce.").

[166] *Rubin*, 514 U.S. at 486-87.

[167] *Lorillard Tobacco Co.*, 533 U.S. at 566.

[168] *Id*.

[169] Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011).

[170] *Id*. at 556.

[171] *44 Liquormart,* 517 U.S. at 503.

> audience, not the government, assess the value of the information presented.[172]

Many of the landmark attempts to regulate sexually explicit speech have called for the Court to consider the constitutionality of such regulations against the backdrop of society's interest in sexual expression and its corresponding social value. But this is the wrong question entirely. For one, it treats society as a monolith. Additionally, it downplays the role that empirical social science can play in describing causal relationships between speech, harm, and social value. On the evidentiary question, there is no principled reason to treat the consumption of sexually explicit speech in quasi-private spaces by consenting adults any different than allegedly harmful speech practices borne out of a purely commercial context, particularly when governments have the ability to amass an evidentiary record of the purported harms and the effectiveness of their regulatory proposals.

The proper inquiry for the Court to undertake is a two-fold analysis of the government's rationale for restricting sexually explicit speech on the basis of a purported harm and the supporting evidence proffered by the government: First, the Court must determine whether the government has articulated a sufficiently important interest in regulating protected sexually explicit speech; Second, the Court must determine the efficacy of the challenged regulation such that the law reasonably fits the interest in a manner that is neither overbroad nor unduly burdensome. To sustain a regulation aimed at protected sexually explicit expression, the government should have to prove that the harms it recites are real and that the regulation to alleviate those harms to a material degree without relying merely on speculation or conjecture.[173] By adopting this approach, the Court would incentivize the introduction of competent and reliable scientific evidence to support what are ultimately empirical claims about the effects of sexually explicit speech.

The proposals articulated above give courts ample alternative choices for meaningful doctrinal reformation. At maximum, they invite the Court to interpret direct burdens on purveyors of sexually explicit speech for the content-based restrictions that they are. Given the judiciary's collective approval of the low-value approach, however, such a sea change is unlikely. At minimum, then, the Court ought to consider the more modest proposal of engrafting a substantiation requirement onto the test of intermediate scrutiny it frequently uses to resolve constitutional challenges to regulations that target sexually explicit speech in private domains or quasi-private places of public accommodation.

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[172] *Edenfield*, 501 U.S. at 767.

[173] *See*, *e.g.*, *Greater New Orleans Broad. Assoc., Inc.*, 527 U.S. 173.

Fortunately, this standard is readily adaptable either wholesale from the commercial speech doctrine or piecemeal from the sexually explicit speech cases analyzed and discussed in this article. The shift toward a doctrine grounded in empirical reality is already present in the case law, albeit among either a soft majority or a cadre of dissenting justices through the decades. The majority opinion in *United States v. Playboy* and Justice Souter's dissent in *City of Erie v. Pap's A.M.* demonstrate that over time, the judicial deference at the core of *Young v. American Mini Theaters* and *F.C.C. v. Pacifica Foundation* has perhaps given way to healthy scientific skepticism. Furthermore, reference by the Court to scientific research provided by the represented parties and in amicus briefs in *Playboy* and *Pap's A.M.*, respectively, suggest a willingness by the Court to not only require substantive evidence but also to consider knowledge and expertise outside of the law. To that end, a substantiation standard requiring empirical, evidentiary support is achievable now, more than ever, because of the modern availability of scientific evidence and useful data.

At the time *Young* and *Pacifica* were decided, an empirical efficacy standard would have represented an almost insurmountable, albeit constitutionally consistent, burden. Requiring lawmakers to empirically link pornography to real social harms and then convincingly argue that a regulation could alleviate those harms to a material degree might have proven a bridge too far. But today, particularly for regulations targeting the purportedly harmful effects of sexually explicit speech, there is no reason for the Court to not require heightened substantiation given an abundance of scientifically valid, empirical research available from a variety of fields, including media effects,[174] psychology,[175] public health,[176] and public opinion.[177] To that point, if and when the Court is asked to consider new or additional regulation of sexually explicit speech, the Court will find ample research that suggests U.S. citizens strongly support the freedoms of sexually explicit speech[178] and heightened social acceptance of sexually explicit

[174] *E.g.*, Brian J. Willoughby et al., *Associations between Relational Sexual Behaviour, Pornography Use, and Pornography Acceptance among U.S. College Students*, 16 CULTURE, HEALTH & SEXUALITY 1052 (2014).

[175] *E.g.*, John B. Franks, *The Evaluation of Community Standards*, 139 J. SOC. PSYCHOL. 253 (1999).

[176] *E.g.*, Cameron C. Brown et al., *A Common-Fate Analysis of Pornography Acceptance, Age, and Sexual Satisfaction among Heterosexual Married Couples*, 46 ARCHIVES SEXUAL BEHAV. 575 (2017).

[177] *E.g.*, Richard Wike & Katie Simmons, *Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech*, PEW RESEARCH CENTER (Nov. 18, 2015), http://www.pewglobal.org/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech.

[178] *See* HADLEY CANTRIL & MILDRED STRUNK, PUBLIC OPINION 1935-1946 244 (1951) (discussing public opinion research on U.S. citizens' attitudes toward free speech dating back to the 1930s). *See also* Julie L. Andsager, *A Constant Tension: Public Support for Free*

speech,[179] all while supporting regulations like limiting access for adolescents and minors.[180] In this regulatory environment, state and local governments are suitable laboratories for experimenting with regulations that balance public health concerns with First Amendment protections. But regulatory schemes, like all good experiments, should be scrutinized for reliability, validity, and the overall presence or absence of empirical support. Courts are equipped to make these empirical judgments, but they currently lack the doctrinal mechanisms for assessing the efficacy of strong regulations on protected sexual expression.

Currently, the conundrums created by the Court's convoluted sexually explicit speech cases leave the entire doctrine weak, insufficient, and outdated. Therefore, we recommend that the Court abrogate its previous decisions that categorized sexually explicit speech as categorically low-value. We urge the Court to categorize restrictions on sexually explicit speech as content-based and therefore worthy of strict constitutional scrutiny. But absent that significant doctrinal turn, we recommend adopting and implementing a substantiation standard for restrictions on sexually explicit speech that mirrors the commercial speech doctrine's efficacy requirements. These recommendations will realign the fractured doctrine of sexually explicit speech and will create a clearer decision-making framework that balances the valuable interests in sexually explicit speech against its potential downstream harms.

Expression, 38 STAN. J. INT'L L. 3, 7 (2002) (identifying additional research on specific types of speech, like sexual speech and expression).

[179] *See supra* notes 161-165 and accompanying text.

[180] *E.g.*, Albert C. Gunther, *Overrating the X-rating: The Third-Person Perception and Support for Censorship of Pornography*, 45 J. COMM. 27 (1995). Jennifer L. Lambe, *Who Wants to Censor Pornography and Hate Speech?*, 7 MASS COMM. & SOC. 279 (2004).