



3-22-2010

Freeway Porn & The Signs of Sign: Sex, Cigarettes and Censorship of Billboards

Clay Calvert

University of Florida, profclaycalvert@gmail.com

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

Recommended Citation

Clay Calvert, *Freeway Porn & The Signs of Sign: Sex, Cigarettes and Censorship of Billboards*, 30 Loy. L.A. Ent. L. Rev. 215 (2010).

Available at: <https://digitalcommons.lmu.edu/elr/vol30/iss2/1>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

FREEWAY PORN & THE SIGNS OF SIN: SEX, CIGARETTES AND CENSORSHIP OF BILLBOARDS

*By Clay Calvert**

I. INTRODUCTION

Bowman is a tiny, poverty-plagued town in Orangeburg County, South Carolina, that has seen more than its fair share of trouble recently.¹ Although home to fewer than 1,200 residents,² one dozen were registered sex offenders in February 2010.³ Its former police chief even pleaded guilty in August 2009 to one count of misconduct in office after authorities alleged he “showed pornographic materials to at least three teens while serving as Bowman’s top law enforcement officer”⁴ and used his position of authority to unlawfully touch the children in a sexual manner.⁵

* Professor & Brechner Eminent Scholar in Mass Communication at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks graduate students Wendy Brunner, Kayla Gutierrez, Karla Kennedy, Christina Locke and Kara Carnley Murrhee of the University of Florida for reviewing a draft of this article during a seminar on media law research. The author also thanks Marion B. Brechner for her support of both his research and the Marion B. Brechner First Amendment Project that he directs.

1. See Citi-Data.com, Bowman, S.C., <http://www.city-data.com/city/Bowman-South-Carolina.html> (last visited Feb. 10, 2010) (providing a complete profile of the demographics of the town and, among other things, noting that in 2008 more than 30 percent of its residents fell below the poverty level, more than twice the rate for the state of South Carolina, that its estimated median household income was \$23,219—compared to \$44,625 for the median household income in all of South Carolina—and that its unemployment rate is above the state average).

2. *Id.*

3. See South Carolina Sex Offender Registry, <http://services.sled.sc.gov/sor/search.aspx?Type=City> (last visited Feb. 10, 2010) (entering “Bowman” at the “City Name” prompt on this site revealed that twelve residents were listed as registered sex offenders on October 5, 2009).

4. *Ex-Police Chief Gets 3 Years Probation*, POST & COURIER (Charleston, S.C.), Aug. 14, 2009, at 2B.

5. As one local newspaper reported:

The charge is in connection with several allegations of misconduct over the two-year period [Jason] Marchant was employed as Bowman’s top law enforcement

But perhaps Bowman's most notorious resident in 2009 was not a sex offender, a corrupt government official, or even a person, for that matter. It was, instead, a seemingly successful business⁶—the Lion's Den Adult SuperStore #23—which proudly proclaims itself as “your one stop shop for sexy adult fun. Shop for birthdays, anniversaries, bachelor or bachelorette parties with our huge inventory. We carry all adult products from lingerie to dvds, to toys and novelties.”⁷ The store, located just off of exit 159 on Interstate 26 near a truck stop,⁸ is part of a chain of more than forty adult emporia “dedicated in providing the very best in adult videos, periodicals, novelties, and intimate apparel.”⁹

It was not, however, the merchandise inside the store—it is legal to sell vibrators in South Carolina, unlike in nearby Alabama¹⁰—or even a

officer. At the time of his arrest in February 2006, Marchant was charged with misconduct in office and four counts of providing obscene material to minors. Those latter four charges were dismissed since they were included in the misconduct allegations, which accused the former police officer of showing pornographic material to at least three teenagers.

Richard Walker, *Ex-Bowman Police Chief Pleads Guilty*, TIMES & DEMOCRAT (Orangeburg, S.C.), Aug. 13, 2009, <http://thetandd.com/articles/2009/08/13/news/doc4a8381f1da3ee170155858.prt>.

6. See Michael Gartland, *Porn in the Bible Belt*, POST & COURIER (Charleston, S.C.), Feb. 6, 2005, at F1 (noting that the store employs about eight to ten people and offers health and dental plans, as well as a 401(k) plan; quoting one employee for the proposition that the benefits are “better than most places around here”; and quoting a woman who lives a few miles away from the store for the proposition that it “gets a huge amount of business”).

7. See Lion's Den Adult SuperStore #23—Bowman, South Carolina, <http://www.lionsdenadult.com/pages/storelocation/store23.html> (last visited Feb. 10, 2010) (providing the quoted text that corresponds to this footnote, setting forth the address and phone number of the store as, respectively, 2269 Homestead Road, Bowman, South Carolina, 29018, and (803) 829-1781, and adding that it is located off of exit 159 on Interstate 26).

8. See Gartland, *supra* note 6, at F1 (reporting that the store is located near a “truck stop on the other side of I-26,” and describing the building that houses the store as “squat and gray. Its windows are blacked out. Across the street stands an ancient-looking grain silo surrounded by dirt fields and rows of leafless trees. Cars and trailers whiz by on Interstate 26 about an eighth of a mile away.”).

9. See The Lion's Den, About Our Company, <http://www.lionsdenadult.com/pages/aboutus.html> (last visited Feb. 10, 2010) (setting forth not only a description of the company, but also its vision and mission statements).

10. See ALA. CODE § 13A-12-200.2 (2009) (providing, in relevant part, that “it shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value” and making it a crime for wholesalers “to knowingly distribute, possess with intent to distribute, or offer or agree to distribute, for the purpose of resale or commercial distribution at retail, any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for anything of pecuniary value”) (emphasis added). The statute was upheld as constitutional in 2007 by a federal appellate court. *Williams v. Morgan*, 478 F.3d 1316, 1324 (11th Cir. 2007).

visit to it by adult-film star Flower Tucci¹¹ in April 2009 that caught the attention of law enforcement officials.¹² It was, instead, the store's six off-site billboards located near Interstates 26 and 95¹³ that drew their wrath in *Carolina Pride, Inc. v. McMaster*.¹⁴ The signs, of course, also "drew many of its customers and constituted one of its principal means of advertising."¹⁵

The billboards, however, didn't feature photographs of any naked or scantily clad women.¹⁶ Likewise, they didn't have images of sex toys or various and sundry adult novelties.¹⁷ In fact, as described by U.S. District Judge Cameron McGowan Currie, the billboards were relatively stark, text-only ads, except for "an outline of the profile of a lion."¹⁸ They merely conveyed "the existence and location of The Lion's Den"¹⁹ and simply let drivers know that it was "an adult book store."²⁰ In other words, they were a far cry from the so-called "boob billboard"²¹ for a Platinum strip club in Rosedale, New York, that in 2009 caused a commotion with its fifty-foot image of a buxom woman wearing little more than "a miniscule, black leather S&M strap pulled across nipples."²²

So what was wrong with the tame Lion's Den billboards? They violated a South Carolina statute providing that "an off-premises, outdoor advertising sign²³ for an adult or sexually-oriented business²⁴ may not be

11. Tucci is "the star of *Flower's Squirt Shower*, the recipient of the AVN awards for Best Specialty Series—Squirting and Best Specialty Release—Squirting in 2007 and 2008. She was also repeatedly featured on the hit Showtime series 'Family Business' with Seymore Butts." *Flower Tucci Signing for Elegant Angel, Premiere Sales Group in Ga.*, AVN.COM, Mar. 23, 2009, <http://business.avn.com/company-news/31374.html>.

12. See *The Lion's Den, Past Lion's Den Events*, <http://www.lionsdenadult.com/pages/storepromos.html> (last visited Feb. 10, 2010) (describing Tucci's appearances in 2009).

13. See *Carolina Pride, Inc. v. McMaster (Carolina Pride I)*, No. 3:08-04016-CMC, 2009 U.S. Dist. LEXIS 16300, *4 (D. S.C. Feb. 17, 2009) (observing that the store "advertises the existence and location of The Lion's Den on six off-site outdoor advertising signs. Each of these signs is located within one mile of a public highway (Interstate highways I-26 and I-95)").

14. *Id.* at *4 n.5.

15. Fred Horlbeck, *U.S. District Court Strikes Down Ban on Adult-Oriented Billboards*, S.C. LAW. WKLY., Aug. 24, 2009.

16. *Carolina Pride I*, 2009 U.S. Dist. LEXIS 16300, at *4 n.5 (describing the images featured on the billboard at issue).

17. *Id.*

18. *Id.*

19. *Id.* at *4.

20. *Id.*

21. Linda Stasi, *Tempest in a D-Cup—A Strip-Club Sign Riles Queens—And Busts Up My Family*, N.Y. POST, Feb. 15, 2009, at 25.

22. *Id.*

23. See S.C. CODE ANN. § 57-25-120(3) (2008) (providing that an "outdoor advertising

located within one mile of a public highway.”²⁵ The regulation stemmed from a bill²⁶ that actually was vetoed by South Carolina Governor Mark Sanford²⁷—he would later face his own sexually oriented problems²⁸—but took effect in 2006 when he was overridden by both the South Carolina House and Senate.²⁹

Citing First Amendment³⁰ free-speech concerns, Judge Currie first issued a preliminary injunction against the law in early 2009³¹ and then granted a permanent injunction stopping its enforcement in August 2009.³² His twin decisions mirror those in other recent opinions striking down similar billboard laws targeting adult businesses; these include a June 2009 decision by U.S. District Judge Julie A. Robinson in *Abilene Retail # 30, Inc. v. Six*,³³ stopping Kansas from enforcing a statute that provides:

No sign or other outdoor advertising, for an adult cabaret³⁴ or

sign’ means an outdoor sign, display, device, figure, painting, drawing, message, plaque, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, or any part of the advertising or its informative contents”).

24. *See id.* § 57-25-120(9) (defining a sexually oriented business as one “offering its patrons goods of which a substantial portion are sexually-oriented materials. A business in which more than ten percent of the display space is used for sexually-oriented materials is presumed to be a sexually-oriented business”).

25. *Id.* § 57-25-145.

26. H.B. 3381, 116th Sess. (S.C. 2006). The original version of the bill did not include the provision targeting billboards for sexually oriented businesses. *See* John Frank, *Billboard Legislation Opponents Look for Signs of Veto*, POST & COURIER (Charleston, S.C.), Feb. 1, 2006, at 3B.

27. Editorial, *Shameful Vote on Billboards*, POST & COURIER (Charleston, S.C.), Feb. 24, 2009, at A10.

28. *See generally* Philip Rucker, *In S.C., Governor’s Wife is ‘the Hero in This Story’*, WASH. POST, June 29, 2009, at A3 (describing Sanford’s “affair with an Argentine woman” that caused “a sex scandal that gripped the nation and embarrassed his state”).

29. *See* Editorial, *supra* note 27, at A10. Sanford complained that the bill “trumps local government, which should be the regulatory authority on local matters within its jurisdiction. And he pointed out that the requirements upon local government are more stringent than those related to billboard management by state agencies.” *See* Kirsten Singleton, *Lawmakers, Sanford Bicker Over Budget*, AUGUSTA CHRON. (Ga.), Feb. 25, 2006, at 6B (describing the override of the veto of the bill).

30. *See* U.S. CONST. amend. I. The First Amendment to the United States Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” *Id.* The Free Speech and Free Press Clauses were incorporated eighty-five years ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

31. *See Carolina Pride I*, 2009 U.S. Dist. LEXIS 16300.

32. *See id.* at *11 (concluding that “the Sign Statute violates the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment” and declaring it “unconstitutional on its face and as applied to” the owner of the Lion’s Den store).

33. *Abilene Retail # 30, Inc. v. Six*, 641 F. Supp. 2d 1185, 1199 (D. Kan. 2009).

34. *See* KAN. STAT. ANN. § 68-2255(a)(1) (2008) (defining an adult cabaret as “a nightclub,

sexually-oriented business³⁵ shall be located within one mile of any state highway except if such business is located within one mile of a state highway then the business may display a maximum of two exterior signs on the premises of the business, consisting of one identification sign and one sign solely giving notice that the premises are off limits to minors.³⁶

And just as in *Carolina Pride*, the Kansas dispute was brought by the owner of a rural Lion's Den store³⁷ that had billboards near a major interstate with "no pictures or drawings and advertise[d] only the store's name, location and logo."³⁸

The decisions in *Carolina Pride* and *Abilene Retail* followed on the heels of a 2006 opinion by the United States Court of Appeals for the Eighth Circuit declaring unconstitutional a Missouri statute³⁹ that also targeted billboards located within one mile of state highways.⁴⁰ The high court of Georgia had reached the same conclusion about a similar law in 1998.⁴¹

Just as legislative bodies continue to pass unconstitutional laws limiting minors' access to violent video games despite a tall wall of precedent against them,⁴² lawmakers out to halt billboards targeting adult businesses seem to ignore precedent and persist in crafting patently

bar, restaurant or similar commercial establishment" that regularly features nudity or semi-nudity or live performances "characterized by the exposure of specified anatomical areas or by specified sexual activities").

35. *See id.* § 68-2255(a)(4) (defining a sexually oriented business as "any business which offers its patrons goods of which a substantial portion are sexually-oriented materials. Any business where more than 10% of display space is used for sexually-oriented materials shall be presumed to be a sexually-oriented business").

36. *Id.* § 68-2255(b).

37. In this case, the Lion's Den store is located near Interstate 70 in Abilene, Kansas, in what used to be "a Stuckey's truck stop." The store, which sells "[l]otions, lingerie, oils, toys, movies, DVDs, [and] magazines," drew protests when it opened, with a group of people standing "across the street from the store, holding signs aimed at truck drivers. The signs said, 'Think again, or we report.'" *Weekend All Things Considered: Abilene, Kansas, Fights Adult Business in the Town* (National Public Radio broadcast Apr. 3, 2004).

38. Assoc. Press, *Judge Blocks Adult Store Sign Law*, TOPEKA CAPITAL-J. (Kan.), June 30, 2009, at A1.

39. MO. REV. STAT. § 226.531 (2006).

40. *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 839 (8th Cir. 2006).

41. *State v. Café Erotica, Inc.*, 507 S.E.2d 732, 735 (Ga. 1998).

42. *See, e.g., Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009) (holding that California's violent video game statute "violates rights protected by the First Amendment because the State has not demonstrated a compelling interest, has not tailored the restriction to its alleged compelling interest, and there exist less-restrictive means that would further the State's expressed interests"); *see generally* Clay Calvert & Robert D. Richards, *Violence and Video Games 2006: Legislation and Litigation*, 8 TEX. REV. ENT. & SPORTS L. 49 (2007) (providing an overview of laws that have been struck down in this area).

unconstitutional laws. Indeed, in October 2009, a bill⁴³ was moving its way through the legislature in Michigan that would limit billboards for sexually oriented businesses, although it is more narrowly tailored⁴⁴ than those struck down to date.⁴⁵

As Lion's Den superstores proliferate in small towns, bringing their own brand of "freeway porn"⁴⁶ to crossroads truckers and motorists in rural America, the fight over adult-store billboards is not likely to disappear soon. In fact, as *USA Today* reported, "[i]n every town where the Lion's Den has opened, the new stores have faced opposition, including court challenges."⁴⁷ The *Omaha World Herald* noted that adult stores "are increasingly common on the nation's rural Interstate highways, where they find relatively cheap land, few zoning restrictions and a steady stream of potential customers."⁴⁸

It is not just billboards for adult stores, however, that are the object of legislative ire today. In June 2009, Congress passed a bill giving the U.S. Food and Drug Administration the authority to ban outdoor advertising for tobacco products near schools and playgrounds.⁴⁹ That same month,

43. S. 266, 95th Leg., Reg. Sess. (Mich. 2009).

44. The bill, as passed by the state Senate on Aug. 19, 2009, allows billboards for sexually oriented businesses, provided they are in a text-only format (words and numbers and a registered corporate trademark are the only items allowed on the billboard). S. 266, 95th Leg., Reg. Sess. (Mich. 2009). This bill is addressed in more detail later in this article, *infra* notes 296–303 and accompanying text.

45. See Ron Barnett, *Bill Aims at Bawdy Billboards*, USA TODAY, Sept. 25, 2009, at 3A (describing a bill introduced by Michigan state Senator Tupac Hunter and passed in the state Senate in August 2009).

46. See Debbie Howlett, *Sex Shops Infiltrate Small Towns*, USA TODAY, Dec. 4, 2003, at 3A (using the term "freeway porn" and describing Lion's Den as "a national chain based in Columbus, Ohio. Nine of its 29 stores have opened in the past two years. Eight are in or near towns of 16,000 or fewer residents. All of them are just off an interstate.").

47. *Id.*

48. John Ferak, *Adult Stores Making More Interstate Exits X-Rated*, OMAHA WORLD HERALD, Feb. 1, 2004, at 1A.

49. In particular, the newly adopted Family Smoking Prevention and Tobacco Control Act of 2009 provides that within 180 days of its enactment, the Secretary of Health and Human Services shall publish in the Federal Register a final rule regarding cigarettes and smokeless tobacco that will "include such modifications to section 897.30(b), if any, that the Secretary determines are appropriate in light of governing First Amendment case law, including the decision of the Supreme Court of the United States in *Lorillard Tobacco Co. v. Reilly* (533 U.S. 525 (2001))." Pub. L. No. 111-31, § 102, 123 Stat. 1776, 1830-31 (2009); 21 U.S.C. § 387a-1 (2009).

Section 897.30(b), in turn, is a 1996 rule adopted by the Food & Drug Administration—but never enforced due to the Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)—providing that "[n]o outdoor advertising for cigarettes or smokeless tobacco, including billboards, posters, or placards, may be placed within 1,000 feet of the perimeter of any public playground or playground area in a public park (e.g., a public park with

President Barack Obama, himself a smoker,⁵⁰ signed the Family Smoking Prevention and Tobacco Control Act⁵¹ into law. He claimed it would “save American lives” and protect children from the “constant and insidious barrage of advertising where they live, where they learn, and where they play.”⁵²

In line with the recent decisions involving highway-contiguous billboards for adult stores,⁵³ however, the U.S. Supreme Court in 2001 in *Lorillard Tobacco Co. v. Reilly*⁵⁴ declared unconstitutional a Massachusetts law that prohibited outdoor advertising for smokeless tobacco or cigar products within a 1,000-foot radius of a school or playground.⁵⁵ The nation’s high court observed:

The State’s interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.⁵⁶

Not surprisingly, several leading tobacco companies already are challenging provisions of the new law, including those affecting billboard

equipment such as swings and seesaws, baseball diamonds, or basketball courts), elementary school, or secondary school.” 61 Fed. Reg. 44396, 44617 (Aug. 28, 1996) (to have been codified at 21 C.F.R. pt. 897.30(b)). When linked together, these two provisions mean that the Family Smoking Prevention and Tobacco Control Act of 2009 requires the Secretary of Health and Human Services to try to rework the original 1,000-foot proposal in such a way as to make it constitutional.

See Jim Abrams, *FDA Gets Hands on Tobacco*, VIRGINIAN-PILOT (Norfolk, Va.), June 12, 2009, at A1 (reporting the bill “bans billboards close to schools”); Janet Hook, *FDA Set to Get Tobacco Powers*, L.A. TIMES, June 12, 2009, at A1 (reporting the bill “bans billboards close to schools”); and Duff Wilson, *Tobacco Regulation Is Expected To Face a Free-Speech Challenge*, N.Y. TIMES, June 16, 2009, at B1 (discussing the measure).

50. See Jeff Zeleny, *For Obama, Tough Grip By Tobacco*, N.Y. TIMES, June 24, 2009, at A12 (describing how Obama admits to smoking); and *House Approves Federal Regulation of Tobacco*, RICHMOND TIMES-DISPATCH (Va.), Apr. 3, 2009, at A1 (reporting that “President Barack Obama has spoken publicly about his own struggles to kick a smoking habit”).

51. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 15 U.S.C. § 1333, 15 U.S.C. § 4402 and 21 U.S.C. § 387a-1 (2009)).

52. Philip Elliott, *Obama Signs Strong Anti-Smoking Bill*, BOSTON GLOBE, June 23, 2009, at A6.

53. *Supra* notes 31–41 and accompanying text.

54. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

55. *Id.* at 565 (concluding that Massachusetts “has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State’s substantial interest in preventing underage tobacco use”).

56. *Id.* at 564 (emphasis added).

advertising, in *Commonwealth Brands, Inc. v. United States*.⁵⁷ As the plaintiffs stated in their August 2009 complaint, the new law “resurrects a ban on outdoor advertising similar to the one invalidated by the U.S. Supreme Court in *Lorillard*.”⁵⁸

This article examines the regulation of billboard advertising for what might be considered the vice products of sexual entertainment content and tobacco-related goods. Part I of the article: (a) establishes important foundational steps to a First Amendment inquiry into the censorship of billboards for adult stores and tobacco products; (b) analyzes why legislators target such content for censorship; and (c) exposes the flaws with such rationales including what the author dubs the *secondary secondary-effects* doctrine. Next, Part II provides a brief overview of the commercial speech doctrine that sets forth the analytical framework for considering whether regulations affecting billboard advertising for sexually oriented businesses, which sometimes are referred to by the perhaps appropriate acronym of SOBs,⁵⁹ and tobacco products pass constitutional muster. Part III then explains how courts have applied the rules of the commercial speech doctrine to specific instances of billboard censorship. Much greater emphasis is paid in this article to the regulation of billboards advertising SOBs, given the relative paucity of professorial scholarship in this area. Finally, Part IV concludes the article by analyzing a pending piece of billboard legislation from Michigan and suggesting specific ways it might be re-drafted in order to stand a better chance of surviving constitutional scrutiny. In addition, Part IV exposes other issues tied to billboard legislation, from the fiscal realities of challenging billboard laws to the cultural realities of life in a sex-saturated society. Significantly, this article does not include a separate literature review but rather incorporates legal scholarship and judicial precedent directly into each of the aforementioned parts.

57. Complaint at 23, *Commonwealth Brands, Inc. v. United States*, No. 1:09-CV-00117-JHM-ERG (W.D. Ky. Aug. 31, 2009), available at <http://static.mgnetwork.com/rtd/pdfs/complaint.pdf> [hereinafter *Commonwealth Brands Complaint*].

58. *Id.*

59. See Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 *CARDOZO ARTS & ENT. L.J.* 247, 251 (2004) (providing that “municipalities across the United States today are stepping up efforts both to zone the locations of sexually oriented businesses—entities sometimes known by the double entendre-laden acronym SOBs—and to regulate the activities inside them) (emphasis added).

II. FIRST AMENDMENT FUNDAMENTALS VS. THE REASONS FOR CENSORING SIN ADVERTISING

This part of the article is divided into two sections. The first sets forth some basic principles of First Amendment jurisprudence that are necessary to contextualize and understand the controversies surrounding the censorship of billboards that advertise sexually oriented businesses and tobacco-related products. The second section provides an overview of the justifications and rationales for the censorship in these two areas; it also critiques these rationales.

A. *The First Amendment Fundamentals*

Initially, it is important to establish a foundation for a First Amendment inquiry into the censorship of the billboards at issue in this article. This occurs below through a progression of several steps.

First, it is clear today that non-obscene,⁶⁰ non-child pornographic⁶¹ sexual content is protected by the First Amendment.⁶² Thus, unless an adult store like the Lion's Den is peddling obscene content or child pornography, it is engaged in selling lawful products that adults are free to purchase if they so choose.⁶³ As Chief Judge of the U.S. Court of the Appeals for the Seventh Circuit Frank Easterbrook wryly wrote in September 2009 when considering a zoning ordinance affecting adult

60. Obscenity is one of the few categories of expression that is not protected by the First Amendment's guarantee of free speech. *See* *Roth v. United States*, 354 U.S. 476, 485 (1957) (stating that "obscenity is not within the area of constitutionally protected speech or press").

61. The U.S. Supreme Court has held that the distribution and possession of child pornography is not protected by the First Amendment. *See* *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1836 (2008) (writing that "we have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and that "we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (providing that "[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and *pornography produced with real children*") (emphasis added).

62. *See* *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (writing that "sexual expression which is indecent but not obscene is protected by the First Amendment").

63. It should be noted that if such a sexually oriented business also features nude or nearly nude dancing, that genre of dancing too has been held to be a form of "expressive conduct within the outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991). It is not, however, a violation of free speech to require minimal clothing on dancers. *See id.* at 565 (concluding that an Indiana law requiring dancers the dancers to "wear pasties and G-strings does not violate the First Amendment").

bookstores, “the sellers of books and movies enjoy constitutional protections that sellers of snow shovels, shoes, and parakeets do not.”⁶⁴ States may, however, prohibit minors from purchasing such non-obscene sexual content⁶⁵ under the concept of “variable obscenity.”⁶⁶

Second, cigarettes are lawful for adults to purchase. The U.S. Supreme Court, for instance, observed in *Lorillard Tobacco Co. v. Reilly* that the government’s “interest in preventing underage tobacco use is substantial, and even compelling, but *it is no less true that the sale and use of tobacco products by adults is a legal activity.*”⁶⁷ But just as with non-obscene sexual content, it is permissible for states to ban minors’ access to purchase tobacco products.⁶⁸ As *USA Today* recently reported, “all 50 states and the District of Columbia are in compliance with the Synar Amendment, a federal regulation that aims to reduce young people’s access to tobacco by requiring states to implement laws and other programs that limit the sale of tobacco to minors.”⁶⁹

Third, when one jointly considers the first two points above, it becomes clear that the regulation of billboards advertising sexually oriented businesses and tobacco-related products constitutes an effort to limit access

64. *New Albany DVD, LLC v. City of New Albany*, 581 F.3d 556, 559 (7th Cir. 2009).

65. *See Ginsberg v. New York*, 390 U.S. 629, 631 (1968) (upholding a New York law that “prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults”).

66. As one federal district court succinctly explained it:

The Supreme Court has approved prohibiting a minor’s access to sexually oriented magazines, even though those magazines were not obscene as to adults but were as to minors. This has become known as the concept of *variable obscenity*. Minors have a more restricted right than adults to sexually oriented material. It is permissible to determine what minors may view with reference to prevailing standards in the adult community with respect to what is suitable for minors.

Am. Booksellers Ass’n v. Schiff, 649 F. Supp. 1009, 1018, n.10 (D. N.M. 1986) (emphasis added) (internal citations omitted). Variable obscenity is also sometimes referred to as “obscenity as to minors.” *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009).

67. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (emphasis added).

68. Joni Hersch, *Risks: Teen Smoking Behavior and the Regulatory Environment*, 47 DUKE L.J. 1143, 1150 (1998) (noting that “by 1995, the minimum age for legal sale of tobacco products was eighteen in all states, with higher minimum ages in four states”).

69. Jillian Berman, ‘Substantial Reduction’ in Tobacco Sales to Minors, USA TODAY, Aug. 11, 2009, at 10B. The Synar Amendment:

enacted in 1992, requires that every state, as a condition for receiving federal substance abuse block grants, must have in place a law forbidding sales of tobacco products to anyone under the age of eighteen and must commit to a program for active enforcement of the prohibition, including random, unannounced compliance checks on retailers.

Peter D. Enrich & Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement*, 35 HARV. J. ON LEGIS. 87, 108 (1998).

to information—in particular, truthful information, such as the existence and location of an adult business—about lawful goods that adults have the right to purchase but that minors do not. It is recognition of this situation that creates the legal quandary. In his 1992 book *Free Speech in an Open Society*, current Washington and Lee University School of Law Dean Rodney A. Smolla identified what he called “the perplexing problem” of “whether the First Amendment should permit controls on the speech of adults to adults in the general marketplace merely because children may be exposed to the message.”⁷⁰ Indeed, that appears to be the situation with the types of billboards discussed in this article—they are created by adults (or by business entities run by adults) to convey messages to adults, but, as illustrated later, there is concern that children should not be exposed to them.

Fourth, there are two sets of First Amendment stakeholders involved in the billboard cases:

- those of the businesses that want to convey information about themselves; and
- those of the people who might be interested in their products.⁷¹

In other words, there are both *speakers' rights* and *audiences' rights* at stake, as the U.S. Supreme Court has recognized that there is an unenumerated First Amendment right to receive speech.⁷² As the Court wrote in *Griswold v. Connecticut*, “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, [and] the right to read.”⁷³ The “spectrum of . . . knowledge”⁷⁴ about the location of lawful businesses and lawful products is diminished for adults by the billboard laws at the heart of this article.

Fifth, in resolving the problem identified above by Dean Smolla,⁷⁵ it is clear that shielding minors from material that simply may offend their sensibilities (or at least their sensibilities, as imagined by legislators and/or

70. RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 329 (Alfred A. Knopf 1992).

71. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 243 (2002) (deciding First Amendment claims brought by the publisher of a book advocating the nudist lifestyle, a painter of nudes, and a photographer, among others); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (considering as part of the First Amendment claim the ability of adults at a drive-in movie theatre to view nudity on screen).

72. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

73. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (emphasis added).

74. *Id.*

75. Smolla, *supra* note 70 and accompanying text.

parents) will not, standing alone, be a sufficient justification to overcome First Amendment concerns. In other words, the fact that some people may find sexually oriented businesses offensive and, therefore, try to shield minors from their very existence, will not justify censorship.⁷⁶

More than three decades ago, the U.S. Supreme Court in *Erznoznik v. City of Jacksonville* considered, against a First Amendment challenge, the “validity of a Jacksonville, Fla., ordinance that prohibits showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place.”⁷⁷ The city argued that “it may protect its citizens against unwilling exposure to materials that may be offensive.”⁷⁸

The high court, however, rejected this argument.⁷⁹ It reasoned that “much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”⁸⁰ Significantly, the Court added that any person who might be offended by nudity on a drive-in movie screen already had as sufficient remedy—he “can avert his eyes.”⁸¹ This, of course, echoes the sentiment of the high court in *Cohen v. California* that when people are in a public place, they possess a lesser privacy expectation of being shielded from unwanted messages⁸² and they can “effectively avoid further bombardment of their sensibilities simply by averting their eyes.”⁸³ In articulating a principle that surely is relevant to efforts to ban ads about lawful products, the Court in *Cohen* wrote:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal

76. See *infra* notes 79–94 and accompanying text (explaining this proposition).

77. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206 (1975).

78. *Id.* at 208.

79. *Id.* at 210.

80. *Id.*

81. *Id.* at 212.

82. See *Cohen v. California*, 403 U.S. 15, 21–22 (1971) (reasoning that “while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one’s own home”).

83. *Id.* at 21.

predilections.⁸⁴

In other words, the government should not be able to shut off the billboard-conveyed speech of tobacco companies or SOBs along public highways without first proving that the billboards are so intolerable that they interfere with substantial privacy interests. When one is in a public place or on a public highway, however, one has *no* reasonable expectation of privacy.⁸⁵ The statement in *Cohen* that “[a]ny broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections”⁸⁶ taps directly into the notion that the personal views of lawmakers or the majority of citizens about SOBs should not be allowed to silence the speech of such SOBs and, in turn, stifle the right of the minority of people who frequent them to receive that speech.

Of particular importance to the possible argument that minors should be shielded from billboards for sexually oriented businesses, the Supreme Court in *Erznoznick* noted that while “a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults,” it is equally true that “minors are entitled to a significant measure of First Amendment protection.”⁸⁷ Here the ordinance banning all nudity was simply too broad,⁸⁸ and the Court stressed that:

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when

84. *Id.*

85. See *Good v. Borough of Steelton*, 2008 U.S. Dist. LEXIS 76820, at *36 (M.D. Pa. Sept. 30, 2008) (observing that “there is no reasonable expectation of privacy in a public place”); *Rodriguez v. United States*, 878 F. Supp. 20, 24 (S.D.N.Y. 1995) (reasoning that a person has “no reasonable expectation of privacy on the public street”).

86. See *Cohen*, 403 U.S. at 21.

87. *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

88. See *J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379, 383 (6th Cir. 2008) (stating that “[t]he overbreadth doctrine prohibits the government from proscribing a ‘substantial’ amount of constitutionally protected speech judged in relation to the statute’s plainly legitimate sweep,” and adding that the “[o]verbreadth doctrine exists to allay the concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech—especially when the law provides criminal sanctions”). See generally John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004) (providing an excellent overview of the overbreadth doctrine, including its use in both First Amendment situations and other contexts); Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1990–91) (providing a critical examination of the overbreadth doctrine and suggesting ways to improve it).

government seeks to control the flow of information to minors.⁸⁹

In a nutshell, “speech may not be prohibited because it concerns subjects offending our sensibilities,” as the Supreme Court opined in *Ashcroft v. Free Speech Coalition*⁹⁰ in 2002. In addition, the U.S. Supreme Court observed more than a half-century ago in *Butler v. Michigan*⁹¹ that the government cannot “reduce the adult population . . . to reading only what is fit for children.”⁹² In 2002, the high court reiterated this maxim, calling it an “important First Amendment principle.”⁹³

When enacting the SOB billboard law struck down in *Carolina Pride*, however, the South Carolina legislature specifically inserted language on January 26, 2006 into its official findings that the measure was intended to “mitigate the adverse secondary effects of sexually-oriented businesses and limit harm to minors.”⁹⁴ Likewise, the Kansas legislature cited the desire “to limit harm to minors”⁹⁵ when it enacted the law struck down in *Abilene Retail*.⁹⁶ Clearly, there would be no physical or psychological harm to minors by seeing a text-only billboard advertising an adult bookstore; the only possible harm to minors would be one of moral offense at the notion that such sexually-oriented businesses exist and, in turn, that minors would learn at too early an age about this supposedly sordid reality. While typically today one might think of a country like China invoking the defense of its “public morals”⁹⁷ in order to quash speech it finds offensive, the Alabama Supreme Court in September 2009 upheld a state law banning the sale of sexual devices, reasoning that, despite the decision in *Lawrence v. Texas*,⁹⁸ “public morality can still serve as a legitimate rational basis for

89. See *Erznoznick*, 422 U.S. at 213–14 (footnote omitted).

90. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

91. *Butler v. Michigan*, 352 U.S. 380 (1957).

92. *Id.* at 383.

93. *Free Speech Coal.*, 535 U.S. at 252.

94. H. 3381, 2005–2006 Gen. Assem., 116th Sess. (S.C. 2006) (amended, as passed by Senate), available at http://www.scstatehouse.gov/sess116_2005-2006/prever/3381_20060126.htm (emphasis added).

95. See KAN. STAT. ANN. § 68-2255 (e) (1) (2008), available at <http://www.kslegislature.org/legsrv-statutes/getStatute.do?number=28682> (providing that the billboard law was designed to: (1) “mitigate the adverse secondary effects of sexually-oriented businesses; (2) to improve traffic safety; (3) to limit harm to minors; and (4) to reduce prostitution, crime, juvenile delinquency, deterioration in property values and lethargy in neighborhood improvement efforts”) (emphasis added).

96. See *supra* notes 33–38 and accompanying text (discussing the *Abilene Retail* decision).

97. See Richard Verrier & David Pierson, *Setback for U.S. Films in China*, L.A. TIMES, Sept. 23, 2009, at B1 (reporting on China’s desire “to protect public morals [by] restricting imports of movies, music and books”).

98. *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the nation’s high court struck down a Texas anti-sodomy statute that prohibited, among other things, consensual sexual

regulating commercial activity.”⁹⁹

Even in today’s high-tech digital world, billboards are an important mechanism for speech transmission.¹⁰⁰ As attorney Darrel Menthe argues, “billboards are increasingly the most reliable means of communicating with a public that spends more time on the road, but no longer watches television commercials or listens to radio advertisements.”¹⁰¹ Predictably, such regulations raise traditional First Amendment issues.

The next section further explores the reasons for censoring billboards that advertise adult businesses and tobacco-related products.

B. Reasons for Squelching Billboards for SOBs and Tobacco Products

The first part of this section addresses the reasons for suppressing billboards advertising SOBs, while the second part addresses the justifications for thwarting tobacco-related billboards.

1. Billboards for Sexually Oriented Businesses

When it comes to laws that forbid highway-proximate billboards that advertise the location and existence of sexually-oriented businesses, the primary legislative justifications are to:

- *protect minors*¹⁰²; and
- *force adult stores out of business.*¹⁰³

Section A, *supra*, already identified problems with the first of these two justifications.¹⁰⁴ At this point, then, it is simply worth noting that a minor does not suffer physical harm by reading a text-only billboard for an SOB; billboards don’t punch minors. Likewise, the states have offered no evidence—at least none is set forth in the legislative records—of any social

intercourse by gay men, reasoning that the “State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.* at 578.

99. 1568 Montgomery Highway, Inc. v. City of Hoover, 2009 Ala. LEXIS 209, at *68–69 (Ala. Sept. 11, 2009).

100. See Darrel Menthe, *Writing on the Wall: The Impending Demise of Modern Sign Regulation Under the First Amendment and State Constitutions*, 18 GEO. MASON U. CIV. RTS. L.J. 1, 2 (2007) (recognizing that billboards are making a comeback even “[a]midst the communications revolution of inexpensive broadband Internet and five-hundred channels of television programming”).

101. *Id.*

102. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251–52 (2002); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

103. See, *J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379, 384 (6th Cir. 2008).

104. See *supra* notes 92–99 and accompanying text (discussing the regulation of speech in order to protect minors from it).

science studies demonstrating that a child who views a text-only billboard for an SOB suffers psychological harm.¹⁰⁵ A billboard announcing the presence of a strip club simply is not like the “girlie”¹⁰⁶ magazines at issue in *Ginsberg v. New York*¹⁰⁷ that contained images of female nudity (which, unlike a billboard posted on a highway viewed by speeding cars, could be viewed repeatedly and up close) and that led to the variable obscenity doctrine noted earlier.¹⁰⁸

The first justification, then, boils down to moral offense or shielding minors from the existence of a business that adults, holding positions of government authority, believe is wrong. But legislators cannot, as one federal appellate court put it, “undermine the First Amendment rights of minors willy-nilly under the guise of promoting parental authority.”¹⁰⁹ And as the Supreme Court observed, “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”¹¹⁰ In sum, if it is constitutional for children to be exposed briefly to a jacket carrying the explicit message “Fuck the Draft” in a public location,¹¹¹ then it should be constitutionally permissible for them to be exposed briefly to a non-explicit message that provides a business’s name and location.

The logic chain for the second justification—driving adult stores out of business—is fairly easy to understand. As stated in *Passions Video, Inc. v. Nixon*¹¹² when considering Missouri’s statute targeting adult-store billboards:

The state argues that its ultimate goal is to reduce the adverse secondary effects of sexually oriented businesses by limiting the presence of sexually oriented businesses. Under that theory, restricting the amount of advertising by the affected businesses would reduce the number of customers that patronize the affected business, thus reducing profits, and ultimately forcing the affected business to close.¹¹³

105. The author of this article could locate no studies showing direct causation of injury from such billboards.

106. *Ginsberg v. New York*, 390 U.S. 629, 631 (1968).

107. *Id.*

108. *See supra* note 66 and accompanying text (discussing the concept of variable obscenity).

109. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003).

110. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975).

111. *Cohen v. California*, 403 U.S. 15 (1971).

112. 458 F.3d 837 (8th Cir. 2006).

113. *Id.* at 842.

Simply put, *fewer ads* → *fewer customers* → *less revenue* → *closure*. Phrased differently, if no one knows that a business exists, then no one can shop there and the business's failure to make revenue inevitably causes the business to shut down. The government wins, garnering its desired result and, apparently, tolerating the by-product of unemployment as the SOB's employees lose their jobs.

The notion of "secondary effects"¹¹⁴ allegedly caused by adult establishments is a common, yet highly controversial,¹¹⁵ justification for zoning these types of businesses.¹¹⁶ As Professor Daniel Farber describes it, "a secondary effect is a kind of side-effect of speech that happens to be associated with particular types of content."¹¹⁷ Professor Daniel Linz and his colleagues write that "secondary effects have most often included alleged increases in crime, decreases in property values, and other indicators of neighborhood deterioration in the area surrounding the adult business."¹¹⁸ Secondary effects blamed on adult bookstores have even included "pornographic litter."¹¹⁹

Citing secondary effects is a popular tactic when zoning SOBs because, as one federal appellate court recently observed, "when the purpose of an adult entertainment ordinance is to ameliorate the secondary effects of adult businesses, intermediate scrutiny applies"¹²⁰ rather than the more rigorous strict scrutiny standard¹²¹ that typically applies when

114. *Id.*

115. See RUSSELL L. WEAVER & DONALD E. LIVELY, UNDERSTANDING THE FIRST AMENDMENT 115 (2d ed. 2006); Daniel R. Aaronson et al., *The First Amendment in Chaos: How the Law of Secondary Effects is Applied and Misapplied by the Circuit Courts*, 63 U. MIAMI L. REV. 741 (2009).

116. See, e.g., *Independence News, Inc. v. City of Charlotte*, 568 F.3d 148 (4th Cir. 2009) (upholding a Charlotte, North Carolina zoning ordinance that was designed to prevent the secondary effects supposedly caused by adult establishments); *729, Inc. v. Kenton County Fiscal Ct.*, 515 F.3d 485 (6th Cir. 2008) (upholding, on the grounds of reducing the alleged secondary effect of prostitution, part of a municipal ordinance barring entertainers at sexually oriented businesses "from entering areas of an establishment occupied by customers within one hour of the entertainers' performing semi-nude on stage"); *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50 (1st Cir. 1999) (upholding a zoning ordinance in the town of Tyngsborough, Massachusetts, that was justified on the interest of reducing negative secondary effects allegedly caused by adult entertainment establishments).

117. DANIEL A. FARBER, *THE FIRST AMENDMENT* 140 (1998).

118. Bryant Paul, David Linz & Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355, 356 (2001).

119. *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1195 (9th Cir. 2004).

120. *Zibtluda, LLC v. Gwinnett County*, 411 F.3d 1278, 1284 (11th Cir. 2005).

121. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (writing that a "content-based speech restriction [is permissible] only if it satisfies strict scrutiny," which

reviewing the constitutionality of content-based laws.¹²² As Justice Anthony Kennedy reasoned in his critical concurrence in the adult-business zoning case of *City of Los Angeles v. Alameda Books, Inc.*,¹²³ “[a] zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny.”¹²⁴ Thus, as Shima Baradaran-Robison explained in a law journal article:

[C]ities are able to zone adult businesses in order to deal with the *effects* of these businesses rather than to regulate the content of the speech expressed by the businesses. So, cities can zone adult businesses because, for example, they cause a decline in the quality of urban neighborhoods and increase prostitution, but *not* because a city disapproves of nude dancing as entertainment.¹²⁵

Although a complete analysis of the secondary effects doctrine is beyond the scope of this article, it is important to note that it is controversial.¹²⁶ This is true partly because, as Professors Russell Weaver and Donald Lively assert, it creates “the possibility that content will be a primary rather than subordinate consideration in support of regulatory initiative”¹²⁷ and there can be a “problem in discerning the real regulatory concern.”¹²⁸ Furthermore, as Florida-based adult entertainment attorney Daniel Aaronson and his colleagues pointed out in a 2009 law journal article, “[t]he law of secondary effects is a mess¹²⁹ [and it] is both confused and intellectually dishonest; the federal circuits are split on issues both large and small, and the guidance offered to lower courts resembles

requires that the law in question “be narrowly tailored to promote a compelling Government interest”); *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (explaining that the government may “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”). See generally ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 903 (2d ed. 2002) (writing that “content-based discrimination must meet strict scrutiny”).

122. See generally Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004) (providing an excellent overview of the sometimes slippery distinctions between content-neutral and content-based laws).

123. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

124. *Id.* at 448 (Kennedy, J., concurring).

125. Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 449 (2004).

126. See generally WEAVER & LIVELY, *supra* note 115, at 115; Aaronson et al., *supra* note 115, at 741.

127. WEAVER & LIVELY, *supra* note 115, at 115.

128. *Id.*

129. Aaronson et al., *supra* note 115, at 741.

instructions for operating a Ouija board.”¹³⁰

The text of the Missouri billboard statute held to be unconstitutional¹³¹ specifically proclaimed that it was designed, in part, “to mitigate the adverse secondary effects of sexually oriented businesses.”¹³² Identical language, except for an added hyphen, appears in the failed Kansas law.¹³³ Finally, when South Carolina adopted its now-enjoined statutory prohibition on billboards for adult stores within one mile of highways in 2006, it also amended the corresponding statutory declaration of purpose to reflect the legislature’s desire to “mitigate the adverse secondary effects of sexually-oriented businesses and limit harm to minors.”¹³⁴

Viewed in this light, the author of this article contends that what these states really are asserting is what might be thought of as, to coin a phrase, a “*secondary secondary-effects* argument.”¹³⁵ In particular, the billboards do not actually cause any of the secondary effects about which the states are concerned. Rather, the states are interested in secondary effects of the SOB, *not* the billboards.¹³⁶ A billboard does not bring with it pornographic litter, crime, or decreased property values. It is the specific *content* of the message on a billboard—a message identifying the existence and location of an SOB—that might (but need not) motivate a person to find an SOB. The billboard, thus, is one step removed from the actual source of the secondary effects—the SOB:

Message on Billboard → *Causes Behavior* (driving to SOB) → *SOB*
Causes Secondary Effects (crime, litter, lower property values)

Accordingly, the “secondary secondary-effects” argument used in states like Missouri, Kansas and South Carolina to justify their SOB-billboard laws is ultimately flawed. It is not a content-neutral justification but, rather, a content-based one that should be reviewed under strict scrutiny.¹³⁷ Why? Because the governments that attempt to ban billboards on this ground are concerned about the *primary effect* of the message on the audience—namely, that the messages regarding the presence and location

130. *Id.*

131. *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 844 (8th Cir. 2006).

132. MO. REV. STAT. § 226.531 (2006).

133. See KAN. STAT. ANN. § 68-2255 (e)(1)(2008) (providing that the law was enacted, in part, “[t]o mitigate the adverse secondary effects of sexually-oriented businesses”).

134. S.C. CODE ANN. § 57-25-130 (2009).

135. The author could not locate either a judicial opinion or law journal article using this phrase, as of February 10, 2010, when this article was last reviewed by the author before going to press.

136. See Bryant Paul et al., *supra* note 118, at 356.

137. *Supra* note 122.

of an SOB will impact the billboard readers' conduct by influencing them to turn off an exit from a freeway and to visit an SOB.¹³⁸ Primary effects are the effects on the audience (in this case, a highway driver) when viewing a message.¹³⁹ As Professor John Fee recently observed: "[T]he direct communicative effects of speech on audience members are always primary effects. These include *persuasion*, offense, changed social attitudes, changed desires and emotions, and even sexual arousal."¹⁴⁰ The billboards for SOB's, for instance, may persuade a driver to visit them.

Conversely, a secondary effect of a billboard, as Justice Kennedy observed in 2002 in *City of Los Angeles v. Alameda Books, Inc.*,¹⁴¹ occurs when it "may obstruct a view."¹⁴² Here, the content of the billboard makes no difference at all. It is both the sheer size and opaque nature of billboards that impede views, regardless of the words that may be painted or pasted on it.

All billboards, of course, block views, but the laws in South Carolina,¹⁴³ Kansas¹⁴⁴ and Missouri¹⁴⁵ targeted only certain billboards conveying certain messages—namely, those of sexually oriented businesses—because of their persuasive impact, not their view-obstructing effect.¹⁴⁶ This distinguishes them from content-neutral billboard laws that "apply evenhandedly to commercial and non-commercial speech"¹⁴⁷ and that "discriminate against no viewpoint or subject matter."¹⁴⁸ The bottom line, then, is that the *secondary secondary-effects* argument mounted in the SOB billboard case is both flawed and disingenuous. Recognition of this problem, in turn, might help to stem the tide of what one legal scholar has

138. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (observing, in the context of a law banning public nudity (including nude dancing), that "the ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare, which we have previously recognized are 'caused by the presence of even one such' establishment") (internal citations omitted).

139. *Id.*

140. John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 306 (2009) (emphasis added).

141. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002).

142. *Id.* at 444 (Kennedy, J., concurring).

143. S.C. CODE ANN. § 57-25-130 (2009).

144. KAN. STAT. ANN. § 68-2255 (e)(1)(2008).

145. MO. REV. STAT. § 226.531 (2006).

146. To put it differently, the recent laws targeting billboards for SOB's are not, unlike some billboard laws, "vestige[s] of the 1960s era effort to 'beautify' the expanding interstate highway system by limiting the proliferation of billboards." *Vono v. Lewis*, 594 F. Supp. 2d 189, 191 (D. R.I. 2009).

147. *Wheeler v. Comm'r of Highways*, 822 F.2d 586, 590 (6th Cir. 1987).

148. *Id.*

termed the continued “encroachment on commercial speech”¹⁴⁹ of the secondary effects doctrine.

2. Billboards for Tobacco Products

Turning to billboards advertising tobacco products, the primary justifications for restricting them rest in the protection of minors from exposure to a product that is illegal for them to purchase and, in turn, protecting them from a product that will harm their health.¹⁵⁰ As Representative Henry Waxman, the primary sponsor of the Family Smoking Prevention and Tobacco Control Act of 2009¹⁵¹ put it, the law will “ensure that tobacco is not advertised for children or sold to them.”¹⁵² The Congressional findings, as set forth in the legislation behind the new measure, provide in relevant part that “[t]obacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents”¹⁵³ and that “[b]ecause past efforts to restrict advertising and marketing of tobacco products have failed adequately to curb tobacco use by adolescents, comprehensive restrictions on the sale, promotion, and distribution of such products are needed.”¹⁵⁴

Similarly, when Massachusetts enacted a law prohibiting smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground, it did so “in an effort to combat the use of tobacco products by minors”¹⁵⁵ Likewise, Baltimore, Maryland was “successful in characterizing restrictions as based on the goal of preventing the promotion of illegal products to minors.”¹⁵⁶ Legislators may fear the impact of such billboards on minors because, as civil rights attorney Katherine Culliton

149. David L. Hudson, Jr., *The Secondary Effects Doctrine: “The Evisceration of First Amendment Freedoms,”* 37 WASHBURN L.J. 55, 86 (1997). Hudson goes so far to describe the secondary effects “doctrine’s pervasive use in First Amendment commercial speech cases.” *Id.* at 88 (emphasis added).

150. See generally Patricia A. Davidson, *Tales From the Tobacco Wars: Industry Advertising Targets Teenage Girls*, 13 WIS. WOMEN’S L.J. 1, 25–26 (1998) (noting how both the FDA and the city of Baltimore, Maryland, were concerned about the exposure of minors to billboards advertising tobacco products).

151. See *supra* note 49 (discussing this legislation as it relates to billboard advertisements).

152. Duff Wilson, *A Vote Nears for a Tobacco Bill That Philip Morris Can Live With*, N.Y. TIMES, Apr. 1, 2009, at B3.

153. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 15 U.S.C. § 1333 (2009), 15 U.S.C. § 4402 (2009) and 21 U.S.C. § 387f-1 (2009)).

154. *Id.*

155. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001).

156. Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGIS. 1, 4 (1997).

wrote, “[d]ue to the susceptibility of youth, advertising or marketing to young people is considered to be a highly effective business tool.”¹⁵⁷ Attorney Robert Kline, director of the Tobacco Control Legal Clinic at Northeastern University School of Law, adds that “research has shown that young children regard and recognize tobacco advertising images in a positive manner. Researchers have demonstrated a strong link between tobacco promotion and the decision by adolescents to begin smoking.”¹⁵⁸

In summary, restrictions targeting billboards for both sexually oriented business and tobacco products are aimed, in large part, at shielding the eyes of minors from content that is illegal for them to purchase—minors cannot lawfully purchase cigarettes or sexually explicit magazines¹⁵⁹—and that may, at least in the case of billboards for SOBs, contain offensive imagery or language that supposedly is damaging to minors.

With these interests in mind, the article now provides a brief overview of the commercial speech doctrine, as it embodies the legal standard typically applied to billboards promoting commercial products and services.

III. THE COMMERCIAL SPEECH DOCTRINE AND SIN ADVERTISING: A BRIEF OVERVIEW

To analyze the constitutional validity of laws targeting advertising on billboards for SOBs and tobacco products, courts rely on the four-part test

157. Katherine Culliton, *The Impact of Alcohol and Tobacco Advertising on the Latino Community as a Civil Rights Issue*, 16 BERKELEY LA RAZA L.J. 71, 73 (2005).

158. Robert L. Kline, *Tobacco Advertising After the Settlement: Where We Are and What Remains to be Done*, 9 KAN. J.L. & PUB. POL’Y 621, 621 (2000).

159. Various obscenity statutes prevent the sale to minors of non-obscene, yet sexually explicit, magazines and other materials that adults can freely purchase. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (upholding a New York statute, which used the phrase “harmful to minors,” that restricted minors’ access to sexually explicit speech that was otherwise non-obscene for adults). See, e.g., ALA. CODE § 13A-12-200.5 (2005) (providing, in relevant part, that “[i]t shall be unlawful for any person to knowingly or recklessly distribute to a minor, possess with intent to distribute to a minor, or offer or agree to distribute to a minor any material which is harmful to minors”); ARK. CODE ANN. § 5-68-502 (2005) (making it unlawful to knowingly “[d]isplay material that is harmful to minors in such a way that the material is exposed to the view of a minor as part of the invited general public” and to “[s]ell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor with or without consideration any material that is harmful to minors”); OKLA. STAT. ANN. tit. 21, § 1040.76 (Supp. 2010) (making it illegal to knowingly “[d]isplay material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material” and to knowingly “[s]ell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor, with or without consideration, any material which is harmful to minors”).

created by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁶⁰ As a threshold matter, the high court has grappled mightily with finding a suitable definition for commercial speech.¹⁶¹ It has openly acknowledged “the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.”¹⁶² And, although the commercial speech doctrine already has been the subject of much scholarly criticism¹⁶³ and judicial condemnation,¹⁶⁴ despite it being of relatively “recent vintage,”¹⁶⁵ the *Central Hudson* test still stands today, three decades after its adoption.

As a starting point under this test, only advertising for lawful activities/products that are neither false nor misleading receive First Amendment protection.¹⁶⁶ If the advertising is for a lawful activity/product and is truthful, then it receives protection, but it still can be regulated if the government demonstrates that it has a substantial interest that is directly advanced by a regulation that is “not more extensive than is

160. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

161. See Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *LOY. L.A. L. REV.* 67, 74 (2007) (“[T]he Supreme Court has cryptically offered a number of different—and not always consistent—definitions of commercial speech . . .”).

162. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993).

163. See, e.g., Bruce E. H. Johnson, *First Amendment Commercial Speech Protections: A Practitioner’s Guide*, 41 *LOY. L.A. L. REV.* 297, 303 (2007) (describing commercial speech jurisprudence as varying “from case to case in ways that make utterly no sense”); Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 *HARV. J.L. & PUB. POL’Y* 663, 664, 714 (2008) (noting that the “commercial speech doctrine is the constant subject of reinterpretation and revision” and proposing that “with minimal doctrinal change, commercial speech law can be simplified and made coherent”); Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 *COMM. L. & POL’Y* 383, 432 (2005) (describing commercial speech as “an unnecessary and ill-defined doctrine that turns the First Amendment on its head”).

164. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 *U. ILL. L. REV.* 783, 794 (2007) (noting that the commercial speech doctrine has been the subject of “occasional criticism by various justices”); Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 *COMM. L. & POL’Y* 237, 245–46 (2004) (“Several justices have advocated discarding it, arguing that the test is an artificial and ultimately unworkable method for distinguishing protected commercial speech. Arguments for and against the *Central Hudson* test have centered, ultimately, around the justices’ differing conceptions of the definitions and purposes of commercial speech.”).

165. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 622 (1995).

166. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563–64 (1980) (finding that “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity,” and adding that the government can ban “commercial speech related to illegal activity” and commercial speech that is “more likely to deceive the public than to inform it”).

necessary to serve that interest.”¹⁶⁷

This amounts to an intermediate scrutiny standard of review that accords commercial speech “second class” status relative to the regulation of political speech, which can only pass constitutional muster if it clears the strict scrutiny standard of review.¹⁶⁸ As media attorney Daniel E. Troy wrote, the commercial speech doctrine “gives the government considerably more power to control the content of advertising than it has to control the content of other communications, such as those that concern scientific, artistic, and especially political issues.”¹⁶⁹

Although the U.S. Supreme Court has not addressed a case directly dealing with the regulation of billboards for a SOB, it has addressed advertising for other sin or vice products that are legal for adults but not minors, including tobacco¹⁷⁰ and alcohol.¹⁷¹ Significantly, these cases established that the government would not be accorded greater deference under the *Central Hudson* test just because it was attempting to regulate the advertising of these products. The Supreme Court, for instance, in *44 Liquormart, Inc. v. Rhode Island*¹⁷² wrote that “we find unpersuasive the State’s contention that . . . the price advertising ban [for alcohol] should be upheld because it targets commercial speech that pertains to a ‘vice’ activity.”¹⁷³ It thus squarely rejected the existence of “any ‘vice’ exception to the protection afforded by the First Amendment.”¹⁷⁴ The high court, in

167. *Id.* at 566.

168. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring) (describing “the intermediate scrutiny of *Central Hudson*”); FARBER, *supra* note 117, at 151 (explaining the importance of the “free flow of commercial information”); Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007) (observing that “the commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment”). As the United States Supreme Court has observed, “[w]hen a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995). See *Burson v. Freeman*, 504 U.S. 191, 198, n.3 (1992) (observing that “a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny”).

169. Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 88 (1999).

170. See generally *Lorillard Tobacco*, 533 U.S. at 590 (striking down a Massachusetts law that regulated the outdoor advertising of smokeless tobacco products and cigars).

171. See generally *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down a state statute restricting the retail price advertising of alcoholic beverages); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (declaring unconstitutional a law prohibiting beer labels from displaying alcohol content).

172. *44 Liquormart*, 517 U.S. 484.

173. *Id.* at 513.

174. *Id.* at 514.

another alcohol-related case, *Rubin v. Coors Brewing Co.*,¹⁷⁵ similarly rejected crafting an exception to *Central Hudson* for advertising alcohol.¹⁷⁶

The two alcohol cases, in fact, arguably beefed up protection for commercial speech. As Professors Michael Hoefges and Milagros Rivera-Sanchez observed in a 2000 law journal article:

The decisions in *Rubin* and *44 Liquormart* taken together significantly tightened the third and fourth *Central Hudson* factors. *Rubin*, in particular, stands for the proposition that irrational and inconsistent regulations of protected commercial speech will not likely pass constitutional muster. In addition, the *Rubin* Court refused to relax the *Central Hudson* analysis for regulations of “vice” advertising. Instead, the Court demanded evidence under the third (direct advancement) factor and crafted a direct-means analysis under the fourth (narrowly tailored) factor, the latter of which became a strong point of agreement for the justices in *44 Liquormart*.¹⁷⁷

Likewise, in a different law journal article analyzing the high court’s ruling in the tobacco-related case of *Lorillard Tobacco Co. v. Reilly*,¹⁷⁸ Professor Hoefges observes that:

the *Lorillard Tobacco* Court clearly continued a trend of providing strong First Amendment protection for non-misleading advertising including tobacco advertising. In addition, the Court made it clear that the First Amendment will not allow the government to substantially disrupt the flow of lawful commercial information to adult consumers even when a compelling regulatory goal of protecting children from the harms of tobacco usage exists.¹⁷⁹

Former Stanford Law School Dean Kathleen Sullivan aptly summed up the Supreme Court’s rulings in the alcohol cases of *Rubin* and *44*

175. 514 U.S. 476 (1995).

176. *Id.* at 482 n.2.

177. Michael Hoefges & Milagros Rivera-Sanchez, “Vice” Advertising Under the Supreme Court’s Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 HASTINGS COMM. & ENT. L.J. 345, 372 (2000). See Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes and the Commercial Speech Doctrine*, 11 COMM. L. & POL’Y 589, 627 (2006) (stating that “[i]n terms of vice advertising, the Court has already returned to its *Virginia Pharmacy* prohibition of paternalistic regulations and the classic precedent has been sufficiently re-adopted as the prevailing paradigm”).

178. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

179. Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL’Y 267, 311 (2003).

Liquormart by writing that “vice advertising is arguably doing much better now.”¹⁸⁰ With this brief overview of the commercial speech doctrine in mind, the article now turns to how it has been applied in the cases addressing the constitutionality of billboards advertising SOBs and tobacco products.

IV. JUDICIAL ANALYSES OF SOB AND TOBACCO BILLBOARD REGULATIONS: THE SIGNS OF SIN ARE STILL STANDING

This part is divided into two sections: the first addresses legal rulings relating to laws that target billboards for sexually oriented businesses, while the second section addresses laws that restrict billboards advertising tobacco products.

A. Billboards for Sexually Oriented Businesses

The 2006 opinion by the U.S. Court of Appeals for the Eighth Circuit in *Passions Video, Inc. v. Nixon*¹⁸¹ set the standard and precedent in 2009 for two federal district courts striking down similar laws targeting billboards for SOBs in *Abilene Retail # 30, Inc. v. Six*¹⁸² and *Carolina Pride, Inc. v. McMaster*.¹⁸³

1. Passions Video, Inc. v. Nixon: Missouri’s Flawed Law

In *Passions Video*, the Eighth Circuit applied the *Central Hudson* test to evaluate the constitutionality of a Missouri law that, among other things, prohibited SOBs from off-premises advertising within one mile of state highways.¹⁸⁴ Missouri’s law made “no reference to the content of the off-premises advertising signs.”¹⁸⁵ In other words, SOBs in Missouri could not even advertise near highways via text-only billboards that simply provided the name of a business and an exit ramp, such as hypothetical word-only signs like “Lion’s Den Adult Superstore, Exit 37” or “Adult

180. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 578, n.59 (1998).

181. *Passions Video, Inc. v. Nixon*, 458 F.3d 837 (8th Cir. 2006).

182. *Abilene Retail # 30, Inc. v. Six*, 641 F. Supp. 2d 1185 (D. Kan. 2009).

183. *Carolina Pride, Inc. v. McMaster (Carolina Pride II)*, No. 3:08-04016-CMC, 2009 U.S. Dist. LEXIS 72436 (D. S.C. Aug. 13, 2009).

184. *Passions Video*, 458 F.3d at 839–40. The appellate court wrote that “we apply the four-step commercial speech analysis outlined by the Supreme Court in *Central Hudson*.” *Id.* at 841. The law also restricted on-premises advertising, a discussion of which is beyond the scope of this article. *Id.* at 839.

185. *Id.* at 841.

World Store Next Exit.”

The law was challenged by Passions Video, Inc., which operates one adult store in rural Boonville, Missouri, near Interstate 70,¹⁸⁶ another in Marshall Junction,¹⁸⁷ and Gala Entertainment of KC, Inc.,¹⁸⁸ which owns the Satin Dolls strip club near Interstate 70 in Kansas City, Missouri.¹⁸⁹ Passions Video, as one newspaper article reported, “maintains a variety of billboards along the state’s highways, some proclaiming ‘Passions—Where lovers shop,’ others advertising the business as an ‘Adult Superstore’ that sells adult toys, videos and the like.”¹⁹⁰ However, they were not the only companies with billboards for SOBs near Interstate 70 in the Show Me State. The *Kansas City Star* reported in 2004 that the law targeted “the dozens of adult-oriented billboards that have sprouted in recent years along the state’s highways, particularly along Interstate 70 between Kansas City and Columbia. One lawmaker counted 45 sex-themed billboards lining that stretch of highway.”¹⁹¹

The initial prongs of *Central Hudson* were dispatched with quite easily in *Passions Video*. The appellate court, for instance, observed that “[t]here is no dispute here that the speech in question is commercial speech that contains no misleading statements or concerns unlawful activity, and is therefore constitutionally protected.”¹⁹² Again, the court quickly concluded that Missouri had a substantial interest in preventing the supposed secondary effects of SOBs and limiting harm to minors.¹⁹³

186. See *Passions Video, Inc. on CitySquares*, <http://mo.citysquares.com/boonville/retail-shopping/toy-game-stores/passions-video-inc> (last visited Feb. 10, 2010) (providing the address and phone number for Passions Video, Inc.), and *Profile of Passions Video Incorporated on Kudzu*, <http://missouri.kudzu.com/merchant/9594859.html> (last visited Feb. 10, 2010) (providing the address and phone number for Passions Video, Inc.).

187. See *Adult Businesses Challenge Missouri Ban on Sexy Billboards*, FIRST AMEND. CENTER, Aug. 30, 2004, <http://www.firstamendmentcenter.org/news.aspx?id=13950> (reporting that “Passions Video, based in Boonville, owns one store there and another in Marshall Junction”); AP Wire Service, *Suit Challenges Ban on Sex-Oriented Billboards*, TULSA WORLD, Aug. 29, 2004, at A12 (reporting that “Passions Video, based in the central Missouri town of Boonville, owns one adult book store there and another in Marshall Junction, about 40 miles east of Kansas City”).

188. *Passions Video*, 458 F.3d at 839.

189. *Kansas City Strip Club Fighting Ban on Sexually Oriented Billboards*, BELLEVILLE NEWS-DEMOCRAT, Aug. 30, 2004, at B4. See Dan Margolies, *Sex-Ad Billboards Will Stay*, KAN. CITY STAR, Aug. 22, 2006, at A1 (stating that the law took “aim at the dozens of adult-oriented billboards that have sprouted along Missouri’s highways, particularly Interstate 70 in recent years”).

190. Margolies, *supra* note 189.

191. Dan Margolies, *Billboard Law Challenged*, KAN. CITY STAR, Aug. 28, 2004, at C1.

192. *Passions Video*, 458 F.3d at 842.

193. *Id.*

Turning to the final two prongs of *Central Hudson*, the Eighth Circuit wrote that “[a]lthough there may be *some* evidence that the statute directly and materially advances the state’s asserted interest, the statute fails under the final *Central Hudson* step because it is not narrowly tailored to meet its asserted goals.”¹⁹⁴ In analyzing the final prong, the appellate court emphasized that “[t]he availability of obvious and numerous less-burdensome alternatives to the restriction factors into the consideration of whether the ‘fit’ is reasonable.”¹⁹⁵ It blasted Missouri’s blanket ban on all SOB billboards, writing that the law “threatens criminal prosecution for the mere inclusion of the name or address of an affected business on billboards within one mile of a state highway.”¹⁹⁶ Given the wide sweep of the statute, the appellate court concluded that the statute “is directed at speech beyond that which would lead to the stated secondary effects, and is not narrowly tailored to achieve Missouri’s stated goal.”¹⁹⁷ In support of its conclusion, the Eighth Circuit cited¹⁹⁸ the 1998 opinion by the Supreme Court of Georgia in *Georgia v. Café Erotica, Inc.*¹⁹⁹

In *Café Erotica*, the high court of Georgia considered a state statute that prohibited “*any* off-premises outdoor advertising of commercial establishments where nudity is exhibited.”²⁰⁰ It observed that the Georgia law “is not directed solely at provocative images, but it prohibits even a worded sign advertising the location of a business.”²⁰¹ The court thus held that “[b]ecause the absolute proscription against any form of off-site advertising impedes the free flow of information and far exceeds the State’s legitimate interest, [the statute] is an unconstitutional infringement on free speech as guaranteed by the First Amendment and the Georgia Bill of Rights.”²⁰²

2. Abilene Retail # 30, Inc. v. Six: Deep-Sixing Kansas’ Law

The 2009 battle fought over billboards was not the first legal skirmish that the Lion’s Den store in Abilene, Kansas has fought in its brief existence. Shortly after it opened its doors in September 2004, a self-righteously titled group called Citizens for Strengthening Community

194. *Id.* (emphasis added).

195. *Id.* at 843.

196. *Id.*

197. *Id.*

198. *Passions Video*, 458 F.3d at 843.

199. *Georgia v. Café Erotica, Inc.*, 507 S.E.2d 732 (Ga. 1998).

200. *Id.* at 733 (emphasis added).

201. *Id.* at 735.

202. *Id.*

Virtues conducted what the Associated Press described as a 100-day vigil in front of it, with protestors holding “signs warning truckers they would notify their bosses if they went inside.”²⁰³ The protestors even engaged in their own measure of billboard counterspeech²⁰⁴ when they took out a billboard of their own conveying the message, “Jesus Heals and Restores. Pornography Destroys.”²⁰⁵ In 2005, the Abilene Lion’s Den successfully defended against ten misdemeanor charges that accused the store of “illegally promoting obscenity by selling sexual devices.”²⁰⁶ Then came the billboard battle.

In June 2009, U.S. District Judge Julie A. Robinson issued a preliminary injunction in *Abilene Retail # 30, Inc. v. Six*,²⁰⁷ on First Amendment grounds, that stopped Kansas from enforcing a statute prohibiting off-premises outdoor advertising located within one mile of highways, for sexually-oriented businesses.²⁰⁸ The law was challenged by the owner of a Kansas Lion’s Den store located in Abilene, Kansas, that:

displays three (3) billboards along I-70 in Dickinson, Geary, and Russell counties. None of the billboards contain images; however, the company logo appears on two of the billboards. They all display yellow block letters on a black background stating that an adult “superstore” named Lion’s Den is located at Exit 272.²⁰⁹

Judge Robinson applied the rule from *Central Hudson* to analyze the constitutionality of the Kansas signage statute.²¹⁰ On the first prong, the

203. *Group Finishes Crusade Against Adult Business*, LAWRENCE JOURNAL-WORLD (Lawrence, Kan.), Feb. 4, 2004, at 8B.

204. See generally Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553 (2000) (providing an overview of the counterspeech doctrine and relatively recent examples of its use).

205. John Hanna, *Idea of Sin Tax on Pornography Intrigues Some State Legislators*, LJWORLD.COM, July 18, 2005, http://www2.ljworld.com/news/2005/jul/18/idea_sin_tax_pornography_intrigues_some_state_legi/?kansas_legislature.

206. David Clouston, *Judge Dismisses Obscenity Charges Against Abilene, Kan., Adult Bookstore*, SALINA J. (Salina KS.), Sept. 8, 2005, at 1A.

207. *Abilene Retail # 30, Inc. v. Six*, 641 F. Supp. 2d 1185 (D. Kan. 2009).

208. *Id.* at 1187. The law allowed only for on-premises advertising, and even that was confined to:

one identification sign and one sign solely giving notice that the premises are off limits to minors. The identification sign shall be no more than 40 square feet in size and shall include no more than the following information: Name, street address, telephone number and operating hours of the business.

KAN. STAT. ANN. § 68-2255(b) (2008).

209. *Abilene Retail*, 641 F. Supp. 2d at 1188.

210. *Id.* at 1190 (writing that “[t]he Supreme Court in *Central Hudson Gas & Electric Corp.*

court concluded that the Lion's Den billboards fell within the scope of First Amendment protection as they did not advertise illegal goods or services.²¹¹ Judge Robinson observed that "Lion's Den has submitted evidence that it markets the products they sell to those interested in 'a healthy sex life' and not to those with a 'prurient interest in sex.' Furthermore, there are no currently pending criminal charges against plaintiff based on these allegations."²¹² The court thus rejected the argument by Kansas Attorney General Stephen Six "that the advertising necessarily proposes an illegal transaction."²¹³

Regarding the second prong of *Central Hudson*, Judge Robinson engaged in what can only be characterized, in the opinion of the author, as a cursory analysis.²¹⁴ After noting that Kansas had asserted goals of mitigating the secondary effects of SOBs and limiting harm to minors, as well as improving traffic safety, Judge Robinson simply stated "[t]he Court assumes for purposes of its analysis that the State can establish that these are substantial interests."²¹⁵

Turning to the third prong of *Central Hudson*, the court reasoned that "because the statute constitutes an outright ban on off-premises advertising, the State must show that the signage statute will significantly further its stated interests. The regulation cannot be sustained by speculation or conjecture."²¹⁶ Here the court engaged in a much more detailed examination of the evidence, initially noting that Kansas "proffered some evidence in the form of legislative history that the signage statute will advance the State's interests."²¹⁷ Judge Robinson, to her credit, was extremely skeptical of the secondary effects introduced by Kansas, writing that:

the Attorney General has provided this Court with absolutely no anecdotal evidence of negative secondary effects associated with sexually-oriented businesses aside from the conclusory statements by the sponsor of the bill, a lobbyist, and a resident of Dickinson County, with no supporting documentation. At this

v. Public Service Commission set forth a four-part test that applies to commercial speech regulations. The Court applies this test to the Kansas signage statute, as it prohibits off-premises and on-premises advertising for sexually-oriented businesses").

211. *Id.* at 1192–93.

212. *Id.* at 1192.

213. *Id.* at 1193.

214. The analysis of the second prong consisted of one paragraph that was comprised of four sentences. *Id.*

215. *Abilene Retail*, 641 F. Supp. 2d at 1193 (emphasis added).

216. *Id.* at 1194.

217. *Id.*

stage of the proceedings, the Court is unable to conclude, based on the limited record, that the State could establish that its outright ban on off-premises advertising and limitation of on-premises signage will significantly further its interests in reducing the negative secondary effects caused by sexually-oriented businesses.²¹⁸

Addressing the state's assertion that the law would limit harm to minors, Judge Robinson seemed equally skeptical. She reasoned that "[a]ssuming signs and outdoor advertising for sexually-oriented businesses increase the chances that minors will attempt to patronize those businesses, there is *no evidence* of a 'direct and material link' to an all-out ban on signs, including those that merely include the name and location of the business."²¹⁹ Thus, unlike Missouri's statute discussed above,²²⁰ the Kansas law could not even pass constitutional muster on the third prong of *Central Hudson*.

To add insult to injury, Judge Robinson also found that the Kansas law failed the fourth prong of *Central Hudson* for not being narrowly tailored, as "there is no evidence that advertising away from a state highway would serve any function."²²¹ She wrote that, "[a]ssuming without deciding that the State could show that the ban on advertising significantly advances its various interests, the Court finds it unlikely that an outright ban on off-premises advertising will be found to be narrowly drawn to achieve the State's objectives set forth in the statute."²²² Commenting on the remarkable breadth of the statute, the judge added that "[t]he statute broadly sweeps any speech that is 'for' a sexually-oriented businesses, whether or not that speech is obscene or relates to the sale of constitutionally protected products such as books and magazines."²²³

The court in *Abilene Retail* thus granted a preliminary injunction stopping enforcement of the law.²²⁴ In August 2009, less than two full months after Judge Robinson's opinion, Kansas Attorney General Stephen Six announced that he would not appeal the decision, stating that "[g]iven the state's budget challenges, it would be fiscally irresponsible to continue litigation that has very little chance of success."²²⁵ Six admitted in his

218. *Id.* at 1195.

219. *Id.* at 1196 (emphasis added).

220. *Supra* notes 185–197 and accompanying text.

221. *Abilene Retail*, 641 F. Supp. 2d at 1196.

222. *Id.*

223. *Id.* at 1197.

224. *Id.* at 1199.

225. Press Release, Kansas Attorney General Steve Six, *Lion's Den Litigation Concluded*

press release that “[t]he Kansas statute was substantively identical to the Missouri statute. Kansas copied its statute from Missouri after the Missouri federal district court held the statute to be constitutional.”²²⁶ One is left to wonder, then, why Kansas chose to fight the initial battle at the district court level on the taxpayers’ dime if it knew the law was very likely unconstitutional. The day after the parties announced their settlement, Judge Robinson approved it.²²⁷

3. *Carolina Pride, Inc. v. McMaster*: South Carolina’s Law Tossed

In August 2009 in *Carolina Pride, Inc. v. McMaster*, United States District Court Judge Cameron McGowan Currie held that South Carolina’s statute targeting billboards located within one mile of public highways that advertise SOBs “violate[d] the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment.”²²⁸ He then issued a permanent injunction prohibiting the statute’s enforcement.²²⁹ The decision affirmed Currie’s earlier ruling from February 2009 and converted a preliminary injunction against the law that he had granted at that time.²³⁰

In issuing that February ruling, Judge Currie cited as precedent both the *Passions Video, Inc. v. Nixon* and *Georgia v. Café Erotica, Inc.*, opinions discussed earlier in this article that involved similar laws.²³¹ Noting that “both cases found the statutes unconstitutional,”²³² Judge Currie not surprisingly applied the *Central Hudson* test to evaluate South Carolina’s law,²³³ and determined there were several problems with it.²³⁴

On the third prong of *Central Hudson*, Judge Currie gave a detailed analysis criticizing South Carolina’s stated goal of limiting harms to minors from viewing and reading billboards that advertise SOBs.²³⁵ Among other

(Aug. 11, 2009), <http://www.ksag.org/page/lions-den-litigation-concluded>.

226. *Id.*

227. *See So Much For Federalism! Federal Judge Says No to Kansas Pron Sign Limitations*, THE KANSAS FEDERALIST, Aug. 17, 2009, <http://www.kansasfederalist.com/081709issue.html> (reporting that Judge Robinson “approved an agreement ending a lawsuit over Kansas’ attempt to restrict some adult stores’ signs”).

228. *Carolina Pride II*, 2009 U.S. Dist. LEXIS 72436 at *11.

229. *Id.* at *12.

230. *Carolina Pride I*, 2009 U.S. Dist. LEXIS 16300 at *42–43.

231. *Id.* at *18; *See supra* notes 181–202 and accompanying text (discussing the *Passions Video* and *Café Erotica* cases).

232. *Carolina Pride I*, 2009 U.S. Dist. LEXIS 16300 at *18.

233. *Id.* at *18, 23–41.

234. *Id.* at *22.

235. *Id.* at *32–34.

things, the judge wrote that South Carolina's:

concern that parents might need to explain to a child what is meant by some euphemism for "sexually-oriented business" (e.g., "adult bookstore" or "gentlemen's club"), presents only an attenuated link to the claimed protective purpose underlying the advertising ban. In the modern age, parents are often required to limit their children's access to inappropriate materials including *radio and television programs, books, videos and even certain articles (or advertisements) in newspapers* in which a child might see announcements.²³⁶

The last sentence of this statement above demonstrates the vast under-inclusiveness problem with the justification of shielding minors from access to a particular type of content in one medium but not in others.²³⁷ As Judge Richard Posner wrote for the U.S. Court of Appeals for the Seventh Circuit in *American Amusement Machine Association v. Kendrick*²³⁸ in striking down an Indianapolis ordinance targeting violent imagery in video games located at arcades, "[v]iolent video games played in public places are a *tiny fraction of the media violence* to which modern American children are exposed."²³⁹ Likewise, a federal judge in the state of Washington pointed out, in holding unconstitutional a state law targeting violent video games, that the statute was "too narrow in that it will have no effect on the *many other channels* through which violent representations are presented to children."²⁴⁰

Focusing on the fourth and final prong of *Central Hudson*, Judge Currie found:

a high probability that Plaintiff will succeed in establishing that the challenged statute fails the fourth prong of the *Central Hudson* test, at least as applied to Plaintiff's current signs. The restrictions at issue amount to a virtual ban on use of an entire

236. *Id.* at *33 (emphasis added).

237. See generally Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship*, 60 FED. COMM. L.J. 157, 170 (2008) (addressing the "underinclusiveness problem that plagues laws that single out one medium (television, for example) for conveying content such as violent imagery but that leave unregulated and unlegislated other varieties of media (movies, video games, and the Internet) to transmit the same content").

238. *Am. Amusement Mach. Assoc. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

239. *Id.* at 579 (emphasis added).

240. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004) (emphasis added).

medium, outdoor signage. It is difficult to envision that such a near-total statewide ban would be found to be sufficiently narrowly drawn.²⁴¹

Attorney J. Michael Murray, a member of the Lion's Dens legal team that challenged the law, trumpeted the outcome as "an important victory for freedom of expression"²⁴² and added that "[w]e prevailed upon demonstrating to the court's satisfaction that the statute was a clear abridgement of the First Amendment right of freedom of speech in this case commercial speech. So we were very, very pleased."²⁴³

In summary, the three judicial strikes against laws targeting billboards advertising SOBs in the *Passions Video*, *Abilene Retail # 30* and *Carolina Pride* decisions built a solid foundation of precedent against their future. But rather than adopt a three-strikes-and-you're-out mentality, some lawmakers seem willing to push ahead with more regulation in this area.²⁴⁴ That issue is addressed later in Part V of this article.²⁴⁵

B. Billboards for Tobacco Products

In *Lorillard Tobacco Co. v. Reilly*,²⁴⁶ the United States Supreme Court in 2001 declared unconstitutional a provision of a Massachusetts law that prohibited outdoor advertising for cigars and smokeless tobacco products in any location "within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school."²⁴⁷ In making its ruling, the high court focused only on the third and fourth prongs of the *Central Hudson* test.²⁴⁸

On the third prong, the Court began by noting that this part "concerns the relationship between the harm that underlies the State's interest and the

241. *Carolina Pride I*, 2009 U.S. Dist. LEXIS 16300 at *40.

242. Horlbeck, *supra* note 15.

243. *Id.*

244. *See, e.g.*, S. 266, 95th Leg., Reg. Sess. (Mich. 2009) (providing, in relevant part, that "any billboard within this state that advertises a sexually oriented business shall display only words or numbers and may display the business's trademark if the trademark has been registered under the Lanham Act"); *see infra* notes 297–323 and accompanying text (addressing legislation in Michigan that would regulate billboards for sexually oriented business in that state).

245. *See infra* notes 297–323 and accompanying text (addressing legislation in Michigan that would regulate billboards for sexually oriented businesses in that state).

246. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

247. *Id.* at 535.

248. *See id.* at 555 (writing that "only the last two steps of *Central Hudson's* four-part analysis are at issue here," as there was no challenge by the tobacco-industry plaintiffs to "the importance of the State's interest in preventing the use of tobacco products by minors").

means identified by the State to advance that interest.”²⁴⁹ It emphasized that while mere speculation and conjecture that a law will directly and materially advance a government interest will not suffice, references to both empirical and anecdotal data from other locales may suffice.²⁵⁰ This distinction was important because Massachusetts, by and large, did not rely on its own evidence regarding the link between advertising and tobacco-product usage, but instead “on evidence gathered by the Food and Drug Administration (FDA) in its attempt to regulate the advertising of cigarettes and smokeless tobacco.”²⁵¹ The FDA had “considered several studies of tobacco advertising and trends in the use of various tobacco products”²⁵² when it drafted rules in the 1990s, which were very similar to those adopted by Massachusetts. But these never took effect because of the 2000 ruling by the U.S. Supreme Court that the FDA “lack[ed] statutory authority to regulate tobacco products.”²⁵³

Applying this rule and the FDA-generated evidence to the facts of the case, the Supreme Court found that:

the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, we disagree with petitioners’ claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars.²⁵⁴

With the outdoor-advertising measuring surviving scrutiny on the third prong of *Central Hudson*, the high court turned its attention to the final question of narrow tailoring: whether there was a reasonable fit between Massachusetts’ goal of preventing the use of tobacco products by minors and the means chosen to accomplish that goal.²⁵⁵ In brief, this step “requires a reasonable fit between the means and ends of the regulatory scheme.”²⁵⁶

The court held that Massachusetts failed to meet its burden here.²⁵⁷ A

249. *Id.*

250. *Id.*

251. *Id.* at 557.

252. *Lorillard Tobacco*, 533 U.S. at 558.

253. *Id.* at 558 (citing *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120 (2000)).

254. *Id.* at 561.

255. *Id.* at 556.

256. *Id.* at 561.

257. *Id.* (holding that “[w]hatever the strength of the Attorney General’s evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis”).

major problem is the 1,000-foot buffer zone around schools and playgrounds applied to all of Massachusetts, from rural areas to major metropolitan ones.²⁵⁸ The high court noted that the Massachusetts “Attorney General did not seem to consider the impact of the 1,000-foot restriction on commercial speech in major metropolitan areas.”²⁵⁹ The Attorney General “apparently selected the 1,000-foot distance based on the FDA’s decision to impose an identical 1,000-foot restriction when it attempted to regulate cigarette and smokeless tobacco advertising.”²⁶⁰ Noting that this would have a much greater impact on metropolitan areas where schools and playgrounds are more tightly clustered such that there could be very, very few tobacco-product billboards,²⁶¹ the high court held that “[t]he uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.”²⁶²

In contrast to Massachusetts’ unconstitutional billboard law,²⁶³ a law adopted by Baltimore, Maryland, that targeted outdoor ads for both alcohol and tobacco products passed constitutional muster in a pair of decisions by the U.S. Court of Appeals for the Fourth Circuit.²⁶⁴ The Fourth Circuit found the fit was reasonable, noting that:

Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore’s ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.²⁶⁵

Also critical here was the fact that Baltimore’s law actually exempted “commercial and industrial zones from its effort.”²⁶⁶ These areas are ones where minors are less likely to be present and thus less likely to be exposed

258. *Lorillard Tobacco*, 533 U.S. at 562.

259. *Id.* at 562–63.

260. *Id.*

261. The Court wrote that “[e]ven in Massachusetts, the effect of the Attorney General’s speech regulations will vary based on whether a locale is rural, suburban, or urban.” *Id.* at 563.

262. *Id.*

263. *Id.* at 562–63.

264. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 330 (4th Cir. 1996) (upholding, against a constitutional challenge, a Baltimore “ordinance prohibiting the placement of stationary, outdoor advertising that advertises alcoholic beverages in certain areas” of the city); *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996) (upholding restrictions on outdoor advertising for cigarettes in Baltimore).

265. *Anheuser-Busch*, 101 F.3d at 329 (4th Cir. 1996).

266. *Id.* at 328.

to tobacco and alcohol-related billboards.²⁶⁷

One might take away from this at least two things: (1) statewide measures that simply slap uniform standards on all geographic areas (rural, suburban and urban), as was the case with the Massachusetts law and its 1,000-foot buffer,²⁶⁸ are not likely to survive *Central Hudson* because they indicate little effort to narrowly tailor the measure;²⁶⁹ and (2) local measures that carve out exemptions for particular areas of town where minors are less likely to congregate are indicative of efforts to narrowly tailor laws.

Professor Michael Hoefges, in an article closely analyzing the Supreme Court's decision in *Lorillard*, writes that:

the *Lorillard Tobacco* Court continued its trend of requiring the government to seek out more direct means of accomplishing regulatory goals than restricting protected commercial speech. In other words, a regulation of protected commercial speech is unlikely to be considered narrowly tailored if there are direct regulatory means available that government has not tried or has tried and found ineffective.²⁷⁰

Such direct means might take the form of imposing increased taxes on cigarettes or simply stricter age verification at the point of sale.²⁷¹ Although a complete discussion of a more direct means is beyond the scope of this article and is fodder for an article of its own, it should be noted that several states recently have considered imposing a so-called porn tax on adult entertainment content,²⁷² such as Washington state's failed effort in

267. *Id.*

268. See *Lorillard Tobacco*, 533 U.S. at 535.

269. Cf. Hoefges, *supra* note 179, at 307 (contending that after the Supreme Court's decision in *Lorillard*, "the Court seems unwilling to tolerate such broad suppression of protected commercial speech when narrower, more precise regulations have not been considered. But it remains to be seen how the Court might handle more exacting regulations under the fourth *Central Hudson* factor.").

270. *Id.* at 308.

271. As Justice Samuel Alito, Jr. noted when he was on the bench of the U.S. Court of Appeals for the Third Circuit and wrote an opinion declaring unconstitutional a Pennsylvania law that prohibited bars and restaurants from advertising the prices of liquor specials in college newspapers, "the Commonwealth can seek to combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment. The most direct way to combat underage and abusive drinking by college students is the enforcement of the alcoholic beverage control laws on college campuses." *Pitt News v. Pappert*, 379 F.3d 96, 108 (3d Cir. 2004). The same logic would apply to point-of-purchase venues for cigarettes.

272. See Tom Barnes, *Sen. Oriole Looking Into Tax on Sex Industry*, PITT. POST-GAZETTE, Jan. 5, 2008, at A-1 (describing plans by a Pennsylvania state senator to "ask senators to call for a study by a legislative research group on whether a tax should be imposed on sexually explicit, adult-oriented businesses," and noting that "[t]he sex tax, or porn tax as others are calling it, could

early 2009 “to add an 18.5 percent sales tax to adult entertainment materials.”²⁷³

A federal district court in Kentucky will soon have the opportunity to consider the federal government’s efforts to regulate billboard advertising for tobacco products in *Commonwealth Brands, Inc. v. United States*.²⁷⁴ At issue is a part of the Family Smoking Prevention and Tobacco Control Act of 2009 that gives Kathleen Sebelius, the Secretary of Health and Human Services, the power to regulate billboards near schools and playgrounds.²⁷⁵ The FDA is still seeking public comment on such regulation,²⁷⁶ so the final terms of the billboard regulations are not yet known.

V. ANALYSIS & CONCLUSION

In analyzing the recent laws and judicial opinions related to billboards advertising so-called vice products like adult DVDs and cigarettes, this article has coined the term *secondary secondary-effects*,²⁷⁷ and has illustrated how the efforts of municipalities to use this rationale to regulate billboards that advertise SOBs is fundamentally flawed.²⁷⁸

Significantly, not everyone in rural or heartland America wants to outlaw freeway-adjacent billboards for SOBs. For instance, the editors of the *Garden City Telegram* in rural Kansas²⁷⁹ got it right in a September

be a 10 percent levy on the admission price to an adult-oriented business, or a tax on the sale of food and drink at such businesses”); Editorial, *Forget the Porn Tax*, ANNISTON STAR (Ala.), Apr. 9, 2008, at 8A (describing the idea of a “porn tax” as being “touted by Paul Hubbert, executive secretary of the Alabama Education Association,” and questioning how, if implemented, Alabama would “go about deciding what is pornographic, meaning material without redeeming value, and what is merely offensive content?”); Richard Roesler, *Porn Tax Proposed to Buttress Budget*, SPOKESMAN REV. (Spokane, Wash.), Feb. 11, 2009, at A6 (reporting that the state of Washington “has long had sin taxes” on items such as tobacco, liquor and beer, but is now considering a “porn tax” that “would add an extra 18.5 percent sales tax to ‘adult entertainment materials and services’”).

273. Madelyn Fairbanks, *Porn Tax Bill Rejected Without a Hearing*, SEATTLE POST-INTELLIGENCER, Feb. 19, 2009, at A13.

274. See *Commonwealth Brands Complaint*, *supra* note 57.

275. Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended at 15 U.S.C. § 4402 and 21 U.S.C. § 387A-1 (2009)).

276. FDA Seeking Public Comment on Tobacco Regulation, <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm173455.htm> (last visited Oct. 12, 2009).

277. *Supra* notes 136–58 and accompanying text.

278. See *supra* notes 135–59 and accompanying text (discussing what this article calls the “secondary secondary-effects” doctrine).

279. Garden City is located in Finney County, Kansas, which:

measures 48 miles east to west across the top, 24 miles across the bottom, is 36

2009 editorial when they opined:

Forget the argument of whether pornography is harmful. People have a constitutional right to produce and view it. You don't approve? That's none of your business. Like the Salina police of decades ago, most of us have figured out that we have better things to do than to try to stop others who want to look at dirty pictures.²⁸⁰

Likewise, the editors of the *Hays Daily News* in Hays, Kansas,²⁸¹ took an equally forceful First Amendment position, reasoning that:

It really doesn't matter if one condones or condemns tobacco products, liquor, trans-fat-laden food products, low-mileage vehicles, coal-fired power plants, abortion providers or even adult night clubs and sex shops. What matters in these United States is whether the businesses are legal or not—at least as far as any advertising or marketing the companies choose to pursue.²⁸²

The *Hays Daily News* further opined against Kansas Attorney General Steve Six's efforts to thwart the Lion's Dens' billboards at issue in *Abilene Retail # 30, Inc. v. Six*²⁸³:

Perhaps the attorney general and his team of lawyers don't appreciate the extremely large, attention-grabbing billboards every traveler on Interstate 70 can't help but notice. Who cares? From a legal perspective, they should be treated no differently than the multitude of billboards promoting McDonald's, the saving powers of Jesus, Rolling Hills Wildlife Adventure, the Eisenhower Presidential Museum, shopping in Wichita or any

miles north to south at the widest point, and 18 miles in the panhandle. Finney County is located in southwest Kansas approximately 200 miles west of Wichita and 300 miles southeast of Denver, Colorado. US Highways 83 and 50/400 and Kansas Highways 156 and 23 serve the County.

About Finney County, Kansas, <http://www.finneycounty.org/index.aspx?NID=62> (last visited Feb. 10, 2010).

280. Dena Sattler, Editorial, *Adult Content*, GARDEN CITY TELEGRAM (Kan.), Sept. 1, 2009, available at <http://www.gctelegram.com/> (search Archives click Editorial/Opinion "Adult Content").

281. Hays "is the largest city in Northwest Kansas at the crossroads of Interstate 70 and US Highway 183. This city, which has approximately 20,000 residents, was incorporated in 1885. Hays is a growing city with excellent opportunities." City of Hays, KS, <http://www.haysusa.com> (last visited Feb. 10, 2010).

282. Editorial, *Sex Shop Billboards*, HAYS DAILY NEWS, May 21, 2009, available at 2009 WLNR 9700256.

283. *Abilene Retail # 30, Inc. v. Six*, 641 F. Supp. 2d. 1185 (D. Kan. 2009).

other establishment.²⁸⁴

While a recent law journal article contends that “[t]he legal history of billboards is notable for the judicial system’s remarkable willingness and ability to accommodate the public’s dislike of these signs,”²⁸⁵ courts are remarkably unwilling to do so when the justifications for their censorship are not concerns about aesthetics, traffic, or safety, but pivot on the vice-like nature of the products advertised.²⁸⁶

Perhaps the courts are reluctant because they recognize, deep down and when all of the legalese is parsed out, that the only real harm stemming from billboards for SOBs is the red-faced embarrassment of parents that is triggered by their querying kids.²⁸⁷ Even Missouri lawmaker Matt Bartle, the sponsor of the disputed billboard legislation in *Passions Video*,²⁸⁸ admitted as much when he stated, “[w]e shouldn’t have a situation where we have to explain to our children what XXX means or what an adult toy is.”²⁸⁹

Bartle apparently wants children to live inside a bubble, shielded from the real world.²⁹⁰ But as Judge Richard Posner wisely wrote in striking down a law restricting minors’ access to violent video games, “*the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary* either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”²⁹¹ Likewise, the U.S. Court of Appeals for the Eighth Circuit reasoned that “the government cannot silence protected speech by wrapping itself in the cloak of parental authority.”²⁹² Moreover, it observed that the U.S. Supreme Court has *not* held that “the government’s role in helping parents to be the guardians of their children’s well-being is an unbridled license to governments to regulate what minors read and view.”²⁹³

However, this line of logic has not prevented lawmakers from

284. Editorial, *supra* note 282.

285. David Burnett, Note, *Judging the Aesthetics of Billboards*, 23 J. L. & POLITICS 171, 228 (2007).

286. See, e.g., *Abilene Retail*, 641 F. Supp. 2d 1185.

287. See generally Margolies, *supra* note 191.

288. See *supra* notes 184–197 and accompanying text (discussing the *Passions Video* case).

289. Margolies, *supra* note 191.

290. *Id.*

291. *Am. Amusement Mach. Assoc. v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (emphasis added).

292. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003).

293. *Id.* at 959–60.

continuing to craft bills in which the government takes on such a role. In late 2009, a bill was pending in the Michigan legislature²⁹⁴ that represents a Springsteenian “one step up and two steps back”²⁹⁵ approach to regulating billboards that advertise SOBs. In particular, Senate Bill 229 represents one step forward (in contrast to laws like those struck down in South Carolina) because it does not ban *all* billboards for SOBs in Michigan; rather, it allows them to have words, numbers, and the display of a corporate trademark,²⁹⁶ unless “the words on a billboard shall not describe or relate to a specified sexual activity or specified anatomical area.”²⁹⁷ If enacted, this bill would permit the type of text-only billboards used by the Lion’s Den adult stores in Bowman, South Carolina and Abilene, Kansas.²⁹⁸ Furthermore, it would withstand a vagueness challenge,²⁹⁹ as it provides precise definitions for the phrases “specified sexual activity”³⁰⁰ and “specified anatomical area.”³⁰¹

So, what are the two steps back? First, this bill clearly suffers from an overbreadth³⁰² problem with respect to permissible content. In

294. See S. 266, 95th Leg., Reg. Sess. (Mich. 2009).

295. See BRUCE SPRINGSTEEN, *One Step Up, on TUNNEL OF LOVE* (Columbia 1987) (singing “I’m the same old story same old act, one step up and two steps back” and “I’m caught movin’ one step up and two steps back”).

296. See S. 266, 95th Leg., Reg. Sess. (Mich. 2009) (providing, in relevant part, that “any billboard within this state that advertises a sexually oriented business shall display only words or numbers and may display the business’s trademark if the trademark has been registered under the Lanham Act”).

297. *Id.*

298. See *Carolina Pride I*, 2009 U.S. Dist. LEXIS 16300, *4 (describing the images featured on the billboard at issue).

299. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (observing that “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined” such that they fail to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”).

300. The bill defines this as “the fondling or other erotic touching of covered or uncovered human genitals, pubic region, buttocks, or female breast.” S. 266, 95th Leg., Reg. Sess. (Mich. 2009).

301. The bill defines this as “less than completely and opaquely covered human genitals, pubic region, buttocks, or female breasts below a point immediately above the top of the areola.” *Id.*

302. See *J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379, 383 (6th Cir. 2008) (stating that “[t]he overbreadth doctrine prohibits the government from proscribing a ‘substantial’ amount of constitutionally protected speech judged in relation to the statute’s plainly legitimate sweep,” and adding that the “[o]verbreadth doctrine exists to allay the concern that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech—especially when the law provides criminal sanctions”). See generally John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004) (providing an excellent overview of the overbreadth doctrine, including its use in both First Amendment situations and other contexts); Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (providing a critical

particular, it does not allow *any* images—not a basic head-shot photo of a dancer’s face, not a photo of the outside of a store, and not a photo of an empty dancer’s stage or a simple brass pole—other than a registered trademark.³⁰³ There simply is no good reason why images such as the three above should not be allowed: not one depicts any of the specified sexual activities or anatomical areas that cannot be described by words on the billboard.³⁰⁴ In a nutshell, there are many benign images that could appear on a billboard that are representative or indicative of an SOB but that do not show sexual activity or imagery.³⁰⁵ To put it bluntly, if a billboard for a tanning salon can portray a woman in a bikini, or if a billboard for Hooters can portray a woman wearing a white tank top and orange shorts, then surely an SOB should be able to have *some* images other than registered trademarks.³⁰⁶

The bottom line is that the Michigan bill, were it to become law and be challenged in court, would likely fail the *Central Hudson* commercial speech doctrine³⁰⁷ because there is no reasonable fit between the provision that bans all non-trademark images and the bill’s apparent goal of shielding minors from sexual imagery. In an August 2009 press release promoting the Michigan bill, state Senator Tupac A. Hunter stated:

Virtually no one likes to see billboards promoting topless bars and other sexually-oriented businesses, especially when you have family members and young children in the car These are not the kind of *images* we want to see on our way to work, school, or to the store, and they are certainly *images* that I do not want my young son, or any Michigan children, to see.³⁰⁸

Clearly, the bill is primarily intended to address billboard images to which a minor might be exposed.³⁰⁹ Yet, Hunter’s bill won’t even allow an image of an American flag or the Bill of Rights on a billboard

examination of the overbreadth doctrine and suggesting ways to improve it).

303. See S. 266, 95th Leg., Reg. Sess. (Mich. 2009).

304. See *id.* (defining the specified sexual activities and anatomical areas that cannot be described by words on the billboards, under the Michigan bill).

305. See *supra* notes 300–01 and accompanying text (defining the specified sexual activities and anatomical areas that cannot be described by words on the billboards, under the Michigan bill).

306. See *supra* notes 300–01 and accompanying text (defining the specified sexual activities and anatomical areas that cannot be described by words on the billboards, under the Michigan bill).

307. See *supra* Part II (describing the commercial speech doctrine).

308. Press Release, State Senator Tupac A. Hunter, Senate Approves Bill to Regulate Obscene Billboards (Aug. 19, 2009), <http://www.senate.michigan.gov/hunter/pr.php?id=1404> (emphasis added).

309. See *id.*

advertising an SOB.³¹⁰ Under Hunter's legislation, the owner of an SOB would be denied the opportunity to make the political statement of placing the text of the free-speech portion of the First Amendment to the U.S. Constitution³¹¹ on a billboard to subtly suggest that his or her movies and magazines are safeguarded by the Bill of Rights.³¹²

Michigan State Senator Jud Gilbert, the Chair of the Senate Committee on Transportation, made it clear in the same press release that he was concerned about what he called "the display of inappropriate or offensive content on billboards in our state."³¹³ This telling statement reveals that the true intent of the legislation has nothing to do with any secondary effects caused by SOBs advertised on billboards; rather, it seemingly has everything to do with shielding minors from specific content—namely, content which is "inappropriate or offensive."³¹⁴ But, perhaps because terms like "inappropriate" and "offensive" are inherently vague,³¹⁵ the Michigan legislature opted not to use them and instead chose to draft an overly broad law forbidding all images—even benign and innocuous ones, as well as political ones—from billboards for SOBs.³¹⁶

The second "step back" with the Michigan billboard legislation is that it applies to "billboards within this state,"³¹⁷ regardless of where they are located and, more specifically, regardless of whether they are likely to be seen by children. It would sweep up billboards located near industrial parks, as well as ones situated far away from schools, playgrounds, and parks where children are more likely to be present. In brief, the legislation casts its massive *purse seine* net³¹⁸ far too wide, encircling all of Michigan

310. See S. 266, 95th Leg., Reg. Sess. (Mich. 2009).

311. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

312. See S. 266, 95th Leg., Reg. Sess. (Mich. 2009).

313. Press Release, *supra* note 308.

314. *Id.*

315. In *Cohen v. California*, the U.S. Supreme Court observed that the conviction of Paul Robert Cohen for wearing a jacket bearing the words "Fuck the Draft" in a public courthouse "quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public." 403 U.S. 15, 18 (1971). The high court noted the definitional difficulties with trying to define what words are offensive, famously reasoning that it is "often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

316. See S. 266, 95th Leg., Reg. Sess. (Mich. 2009).

317. *Id.*

318. See Bruce Lieberman & David Hasemyer, *Scientists Say Studies of Dolphin Stress*

and, in turn, ensnaring any and all billboards for SOBs regardless of their locations. As with the problem of banning all images (other than trademarks) on billboards for SOBs,³¹⁹ there simply is not a reasonable fit, as is required under *Central Hudson*,³²⁰ between the terms of the statute and its goal of shielding minors from sexual imagery.

It is instructive to note here that when Baltimore, Maryland, adopted an ordinance limiting billboards advertising alcoholic beverages and tobacco products, it only banned “such advertisements *in particular areas where children are expected to walk to school or play in their neighborhood.*”³²¹ In upholding this ordinance, the U.S. Court of Appeals for the Fourth Circuit observed that Baltimore was essentially attempting “to zone outdoor alcoholic beverage advertising into appropriate areas,”³²² rather than to regulate them in every corner of the city. Thus, the Michigan legislature should revise its legislation in accordance with the approach taken by Baltimore if it wishes to enhance the odds of the bill surviving constitutional scrutiny on First Amendment grounds.

Of course, the wise solution here would be for Michigan either to drop its legislation altogether—thereby saving taxpayer dollars that would be spent in the likely litigation brought by adult businesses to challenge it in court—or to repackage the legislation in such a way that:

(1) forbids content on billboards that *already* is prohibited from display to minors under Michigan’s harmful-to-minors statute;³²³ and (2)

Blocked, SAN DIEGO UNION-TRIB., Jan. 10, 2003, at A6 (explaining that “[a] purse seine is a large net that can be closed like a draw-string purse once it has been set. It is commonly used by tuna fishermen,” and describing the controversy such nets create because they sweep up dolphins as by-catch along with the intended catch of tuna).

319. *Supra* notes 303–05 and accompanying text.

320. *Abilene Retail # 30, Inc. v. Six*, 641 F. Supp. 2d 1185, 1191 (D. Kan. 2009); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566–71 (1980).

321. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996) (emphasis added).

322. *Id.* at 329.

323. MICH. COMP. LAWS § 722.674 (LexisNexis 2005). Michigan defines content that is harmful to minors as:

sexually explicit matter which meets all of the following criteria:

(i) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.

(ii) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.

(iii) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.

Id. § 722.674(a). The same statute, in turn, defines “prurient interest” as:

a lustful interest in sexual stimulation or gratification. In determining whether sexually explicit matter appeals to the prurient interest, the matter shall be judged with reference to average 17-year-old minors. If it appears from the character of the

only applies to billboards that are within a specified distance—perhaps 1,000 feet away—from locations where children are likely to be present, such as schools, parks and playgrounds.

These two steps, when taken together, would be far more permissive of speech than the Michigan legislation that passed the state Senate in August 2009. Why? Because the first step would permit much more imagery than simply a company's trademark, while the second step would only restrict harmful-to-minors imagery on billboards located where minors are likely to be present. In brief, when these two steps are viewed collectively, the fit of the law is more reasonable under *Central Hudson*.³²⁴

Ultimately, the problems plaguing laws targeting billboards for SOBs will continue to be resolved by courts in the coming years. Oklahoma, for instance, adopted an SOB-billboard law in 2006 that is ripe for judicial challenge.³²⁵ Yet, from a cultural perspective, perhaps legislators should take a step back and realize that sexual imagery is all around us. In 2003, for instance, a three-story billboard with an image of adult film star Jenna Jameson appeared in New York City.³²⁶ That, in and of itself—in the opinion of the author—should give legislators pause when they target text-only billboards like those of the Lion's Dens stores that were impacted by the laws in both South Carolina and Kansas.

While lawmakers like Missouri's Matt Bartle and Michigan's Tupac Hunter might want to shield children from the realities of adult stores and sex toys, they seem to forget that we live in a world where very young girls

matter that it is designed to appeal to the prurient interest of a particular group of persons, including, but not limited to, homosexuals or sadomasochists, then the matter shall be judged with reference to average 17-year-old minors within the particular group for which it appears to be designed.

Id. § 722.674(c).

324. *Abilene Retail*, 641 F. Supp. 2d at 1191; *Cent. Hudson Gas & Elec.*, 447 U.S. at 566–71 (1980).

325. OKLA. STAT. tit. 21, § 1040.55 (2009). The Oklahoma law provides, in relevant part, that:

no billboard or other exterior advertising sign for an adult cabaret or sexually oriented business shall be located within one (1) mile of any state highway. If such a business is located within one (1) mile of a state highway, the business may display a maximum of two exterior signs on the premises of the business, consisting of one identification sign and one sign solely giving notice that minors are not permitted on the premises. The identification sign shall be no more than forty (40) square feet in size and shall include no more than the following information: name, street address, telephone number, and operating hours of the business.

Id.

326. See Bob Baker, *Pushing Porn to the Fore*, L.A. TIMES, Nov. 23, 2003, at E1 (describing “a three-story billboard of porn queen Jenna Jameson [that] looks down upon family-friendlier Times Square”).

take sexually provocative photographs of themselves and then send them to boys and/or post them online.³²⁷ University of Iowa Professor M. Gigi Durham observes in her 2008 book, *The Lolita Effect*, that today “sexuality marks preadolescence and childhood”³²⁸ and “children as young as eight report [being] worr[ie]d about being popular with the opposite sex; first-graders describe being sexually harassed by classmates; and by middle school, kids are steeped in sexual jargon, images and exploration.”³²⁹ Durham contends that “[i]ncreasingly, very young girls are becoming involved in a sphere of fashion, images, and activities that encourage them to flirt with a decidedly grown-up eroticism and sexuality—and the girls playing with these ideas are getting younger and younger every year.”³³⁰ Indeed, there has been a “cultural drift toward revealing clothing even on very young girls, a trend sometimes referred to as ‘prosti-tots.’”³³¹ All of this is simply to suggest that perhaps there are more real and more pressing problems than billboards for lawmakers and parents to worry about when it comes to minors, sex, and sexuality.

Finally, there is the issue of money. It takes a significant amount of legal funds to challenge the billboard ordinances, and independent SOB owners may not be able to take up the battle due to a lack of fiscal resources. It is fortunate, then, from a pro-First Amendment perspective, that the Lion’s Den chain, which has been described as “the Wal-Mart of porn stores,”³³² apparently has the monetary resources to fight the battles.³³³ In brief, the small businesspeople—the owners of the proverbial mom-and-pop stores—are not likely to be able to afford the cost of taking on state and local governments that limit billboard advertising; rather, it will be left largely to major operations like the Lion’s Den and perhaps

327. See generally Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1 (2009) (analyzing the legal issues raised by the phenomenon of “sexting,” and featuring an interview with an individual who is now classified as a sex offender for engaging in sexting when he was 18 years old).

328. M. GIGI DURHAM, *THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT* 65 (2008).

329. *Id.*

330. *Id.* at 21.

331. David N. Dunkle, *Competence & Cleavage: Businesswomen Wonder What TV Reveals About Them*, PATRIOT NEWS (Harrisburg, Pa.), Jan. 20, 2008, at G3.

332. *Fox Special Report With Brit Hume: Senator McCain to Propose Legislation Banning 527 Groups Contrary to Democrats and Republican Who Oppose the Ban; Hard-Core Porn Shops Move into Small Towns as More Americans Become Aware of Sex Materials* (Fox News Network broadcast Dec. 10, 2004) (transcript on file with author).

333. See About Our Company, The Lion’s Den, *supra* note 9.

Larry Flynt's growing chain of Hustler Hollywood stores.³³⁴ The same fiscal issues, however, are not quite as problematic when it comes to cigarette companies fighting billboard restrictions on tobacco advertising. The plaintiffs, for instance, in *Commonwealth Brands, Inc. v. United States*, filed in August 2009, include the nation's second, third and fourth largest tobacco companies.³³⁵

The bottom line is that the adult entertainment and cigarette industries are not the kind of business enterprises that generate a lot of public sympathy when it comes to protecting the First Amendment. It is doubtful one will ever see the bumper stickers "I'm a Pro-Porn Voter" or "Hope, Change, and Porn." For now, then, the battles waged over free speech on billboards along the nation's highways are relatively lonely ones carried on by businesses marginalized by social norms and mores. The tobacco case of *Commonwealth Brands* is likely to generate far more mainstream news media attention, given it is a federal law at stake that targets a high-profile industry, but Big Tobacco likely won't find many friends of the court taking its side as it uses the First Amendment to peddle a product that causes cancer.

334. There are Hustler Hollywood retail stores located in California, Florida, Kentucky, Louisiana, Missouri, Ohio, Tennessee and Washington. See Locations: Hustler Hollywood, http://www.hustlerhollywood.com/index.php?main_page=page&id=2 (last visited Feb. 10, 2010). The stores, the first of which opened in 1998 on Sunset Boulevard in California, are designed to be a "bright, refreshing alternative to the seedy adult bookstore." About: Hustler Hollywood, http://www.hustlerhollywood.com/index.php?main_page=page&id=6 (last visited Feb. 10, 2010).

335. *Commonwealth Brands* Complaint, *supra* note 57, at 5-7 (identifying the plaintiffs in the case, including R.J. Reynolds Tobacco Company, the second-largest tobacco manufacturer in the United States; Lorillard Tobacco Company, the third-largest tobacco manufacturer in the United States; and *Commonwealth Brands, Inc.*, the fourth-largest tobacco manufacturer in the United States).

