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Stripping Away First Amendment Protection

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Barnes v. Glen Theatre, Inc.[1]

I. INTRODUCTION

> We should ask ourselves in the first instance whether, looking at [the deviant social behavior] calmly and dispassionately, we regard it a vice so abominable that its mere presence is an offense. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.[2]

> Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principle ingredients of human happiness, and quite the chief ingredient of individual and social progress.[3]

These two passages provide the philosophical parameters for the conflict between individual liberty and state police power that underlies much of the legal discussion of First Amendment rights.[4] In *Barnes v. Glen Theatre, Inc.*, the Supreme Court ruled that nude dancing was expressive activity and thus protected by the First Amendment.[5] The Court also held, however, that it was constitutionally permissible for a state to prohibit the activity in that there

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1. 111 S. Ct. 2456 (1991).

2. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 17 (1965).

3. JOHN STUART MILL, ON LIBERTY 185 (S. Collini ed., rev. ed. 1989) (1st ed. 1859).

4. Legitimate state police power is based on the state's interest in promoting health, safety, morality, and the general welfare. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973); California v. LaRue, 409 U.S. 109, 111 (1972); Lochner v. New York, 198 U.S. 45, 49 (1905). It is, however, true that only rarely do courts expressly base their holding on morality, and thus this tension between the legislation of morality and the marketplace of ideas is largely left to the fields of political philosophy. *See* JOEL FEINBERG, MORAL LIMITS OF THE CRIMINAL LAW (1984). Nonetheless, recently the Supreme Court has shown a willingness to uphold state and local regulations explicitly on the basis of community morality and tradition. *See* Webster v. Reproductive Health Services, 492 U.S 490 (1989); Michael H. & Victoria D. v. Gerald D., 492 U.S 110 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986). *Contra* Texas v. Johnson, 491 U.S. 397 (1989).

5. *Barnes*, 111 S. Ct. at 2460.

was a sufficiently important governmental interest in the regulation of nude dancing.[6]

This Note will first briefly outline the legal background pertaining to First Amendment protection of nude dancing. Second, it will analyze the three opinions put forth in this case. Third, it will contend that the Court erroneously failed to apply a "strict scrutiny" standard when reviewing Indiana's public indecency statute. Fourth, it will criticize elements of the test employed by the plurality and Justice Souter as overly flexible. Finally, it will conclude by arguing that Justice Scalia's concurring opinion presents dangerous implications for First Amendment protection of symbolic speech.

II. FACTS AND HOLDING

In 1976, the Indiana legislature passed a public indecency statute making public nudity a Class A misdemeanor.[7] The statute defined "nudity" as:

> the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernably turgid state.[8]

The Kitty Kat Lounge and Glen Theatre, Inc. are located in South Bend, Indiana, and are in the business of providing adult erotic entertainment.[9] The former provides alcoholic beverages and "go-go dancing" while the latter furnishes written materials, movies, and live shows in which nude and semi-nude women perform behind glass panels.[10] These two establishments and individual dancers employed at each sought to provide completely nude dancing as entertainment.[11] They claimed that Indiana's public indecency statute, which requires dancers to wear "pasties" and a "g-string," violated their First Amendment right of freedom of expression in that it prohibited completely nude dancing.[12]

They brought suit in federal district court seeking an order enjoining enforcement of the statute.[13] Ruling that the statute was facially overbroad, the district court issued a permanent injunction preventing the state from

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6. *Id.* at 2461.
7. IND. CODE § 35-45-4-1 (1988).
8. *Id.* § 35-45-4-1(b) (1988).
9. *Barnes,* 111 S. Ct. at 2457.
10. *Id.* at 2458-59.
11. *Id.* at 2458.
12. *Id.* at 2458-59.
13. *See id.* at 2459.

enforcing the statute.[14] On appeal, the Seventh Circuit reversed, holding that the Indiana Supreme Court had sufficiently narrowed the statute through judicial construction.[15] In addition, the circuit court of appeals remanded the case so that the lounge and the theater could assert their claim that the statute violated the First Amendment as applied to nude dancing.[16]

On remand, the district court ruled that this type of dancing is not expressive activity and is therefore not protected by the First Amendment.[17] The case was again appealed to the Seventh Circuit. A panel of that court again reversed, ruling that such activity was protected by the First Amendment.[18] The Seventh Circuit, hearing the case en banc, voted 7-4 to affirm the panel's ruling.[19]

The United States Supreme Court granted the state's writ of certiorari.[20] Chief Justice Rehnquist, writing for the plurality, ruled that public nude dancing was expressive conduct at the periphery of the First Amendment.[21] The Supreme Court, however, upheld the statute ruling that there was "a sufficiently important government interest in regulating the non-speech element," which could "justify incidental limitations on First Amendment freedoms."[22]

The plurality viewed the state interest as maintaining morality and societal order. Justice Souter, however, concurring in the judgment, argued the statute should be upheld as preventing the secondary effects of adult entertainment establishments, namely prostitution and sexual assaults.[23] Justice Scalia, also concurring in the judgment, contended that an intermediate level of scrutiny was not required because the statute was a general law regulating conduct and was not specifically directed at expression.[24] Justice

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14. *Id.*

15. Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 288-90 (7th Cir. 1986).

16. *Id.* at 290.

17. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 416 (N.D. Ind. 1988).

18. Miller v. Civil City of South Bend, 887 F.2d 826, 830 (7th Cir. 1988).

19. Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990). The Court ruled: (1) non-obscene nude dancing performed as entertainment is expression and thus entitled to First Amendment protection; (2) the state's public indecency statute is unconstitutional as applied to nude dancing. *Id.* at 1089.

20. 111 S. Ct. 38 (1990).

21. *Barnes*, 111 S. Ct. at 2460.

22. *Id.* at 2461 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1967)).

23. *Id.* at 2468-69.

24. *Id.* at 2463.

Scalia noted that the state need only show a rational basis for the statute, which is supplied by the state's interest in maintaining morality.[25]

Dissenting, Justice White, joined by Justices Marshall, Blackmun and Stevens, argued that the statute was a content-based restriction and thus should only be upheld if "narrowly drawn to accomplish a compelling government interest."[26] The dissent contended that the State had not met this requirement.[27]

III. LEGAL BACKGROUND

A. First Amendment Overview

In relevant part, the First Amendment reads, "Congress shall make no law . . . abridging the freedom of speech. . . ."[28] In *Gitlow v. New York*,[29] the Supreme Court held that the Free Speech Clause applies to state action through the Due Process Clause of the 14th Amendment.[30] The Supreme Court has ruled, however, that First Amendment protection of speech is not absolute. Some forms of expression are not afforded protection under the First Amendment despite the fact that they could reasonably be viewed as protected under its literal language.[31] Seven types of unprotected speech have been identified by the Supreme Court: (1) advocacy of illegality;[32] (2) "fighting words;"[33] (3) "obscenity;"[34] (4) child pornography;[35] (5) torts of

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25. *Id.* at 2468.

26. *Id.* at 2473.

27. *Id.* at 2475.

28. U.S. CONST. amend. I.

29. 268 U.S. 652 (1925).

30. *Id.* at 666. *Accord* Stromberg v. California, 283 U.S. 359, 368 (1931).

31. "[T]he freedom of speech which is secured by the constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled licence giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom . . . ." Whitney v. California, 274 U.S. 357, 371 (1927). *Accord* Stromberg v. California, 283 U.S. 359, 368-69 (1931).

32. Brandenberg v. Ohio, 395 U.S. 444 (1969).

33. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("face to face words plainly likely to cause a breach of the peace by the addressee are not protected under the First Amendment"). *See generally* JOHN E. NOWAK AND RONALD A. ROTUNDA, CONSTITUTIONAL LAW §§ 16.38-16.40 (4th ed. 1991).

34. Roth v. United States, 354 U.S. 476, 484-85 (1957) ("Obscenity is not within the area of constitutionally protected speech or press, because it possesses so little social value and the state's interest in order and morality exceeds the individual's interest in such conduct.").

defamation[36] and invasion of privacy;[37] (6) commercial speech that is false or deceptive or proposes an illegal transaction;[38] and (7) copyright violations.[39] The First Amendment, "though precious, remains subject to reasonable accommodation to other valued interests."[40]

After determining that the speech in question does not fall within any of the categories of unprotected speech, the next step is to determine the degree of constitutional protection afforded.[41] This degree is determined largely by whether the government is attempting to stifle expression.[42] As the Supreme

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35. New York v. Ferber, 458 U.S. 747 (1982) (on the basis of the state's compelling interest in preventing the sexual exploitation of children, a state may prohibit the distribution of visual materials depicting children engaged in sexual conduct).

36. Until New York Times v. Sullivan, 376 U.S. 254 (1964), there was no First Amendment protection of statements treated as defamatory under state law. However, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and New York Times, Curtis Pub. Co v. Butts, 388 U.S. 130 (1967), set up an elaborate system of limited protection for publishers of defamatory statements concerning public figures and public matters.

37. *See* Cox Broadcasting Corp v. Cohn, 420 U.S. 469 (1975) (a state may not punish publication of accurate information derived from official court records open to public inspection). *See generally* NOWAK AND ROTUNDA, *supra* note 33, § 16.36 ("May the state, to protect an individual's privacy, prohibit the publication of information that is true but that admittedly relates to and infringes on private matters?"). The Supreme Court has yet to give a definitive answer to this question.

38. Friedman v. Rogers, 440 U.S. 1 (1979) (Court upheld a ban on the use of trade names by optometrists fearing the "significant" possibility that they would mislead the public); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) (Court upheld an order prohibiting newspaper sex-designated help-wanted columns in that they facilitated illegal sex discrimination in employment).

In contrast, state regulation of commercial speech generally receives intermediate review from the courts. *See generally* NOWAK AND ROTUNDA, *supra* note 33, §§ 16.27-16.31. *See infra* notes 48-56 and accompanying text.

39. Harper & Row, Publishers, Inc. v. Nation Magazine, 471 U.S. 539, 543-44 (1985) (so long as the material in question is copyrighted, First Amendment principles are irrelevant, even if it involves matters of public interest).

40. Spence v. Washington, 418 U.S. 405, 417 (1973) (Rehnquist, J., dissenting).

41. When the court determines that the state regulation impacts protected speech, "the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives." Heffron v. International Soc. for Krishna Consciousness, 452 U.S. 640, 658 (1981).

42. Martin Redish argues that all government restrictions on speech should be subject to a unified "compelling interest" analysis because the "content distinction is conceptually and pragmatically untenable." Martin Redish, Note, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 142 (1981). This is based on his belief that the interests and values of free expression are equally

Court has stated on numerous occasions, a "bedrock principle underlying the First Amendment" is that expression of an idea cannot be prohibited simply because society finds the idea offensive or disagreeable.[43] If the government is restricting speech because of its content, that is, because its message is deemed harmful, the regulation will be invalidated unless the government is able to prove that it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[44] For example, in *Metromedia, Inc. v. San Diego*,[45] the Supreme Court viewed a city ordinance that prohibited all billboards containing non-commercial messages, except for those messages falling within certain defined categories, as content-based, and thus, subject to strict scrutiny.[46]

In contrast, if the Court finds that the government restriction of speech is directed toward avoiding some evil unconnected with the speech's content, but nonetheless incidentally interfering with a particular message, the regulation will receive intermediate review.[47] In the vast majority of such cases, the speech either involves commercial speech and will be invalidated unless it meets the requirements of *Central Hudson Gas v. Public Service Commission*,[48] or takes place on government property and is therefore subject to review as a time, place or manner restriction.[49]

In *Central Hudson Gas*, New York prohibited all advertising that "promotes the use of electricity" directed toward stimulating the use of utility services.[50] The Court outlined the following three-part test that allows such a restriction only if it: (1) "directly advances" (2) a "substantial" government

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threatened by both content-based regulations and content-neutral regulations. *Id.* at 114.

43. Texas v. Johnson, 485 U.S. 397, 414 (1989); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (the primary inquiry "is whether government had adopted a regulation of speech because of disagreement with the message").

44. Boos v. Barry, 485 U.S. 312 (1988); Widmar v. Vincent, 454 U.S. 263, 270 (1981). This standard is applied whether the speech takes place on a public forum, limited public forum, or a non-public forum. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

45. 453 U.S. 490 (1981).

46. *Id.* at 512-17. *Accord* Widmar v. Vincent, 454 U.S. 263 (1981) (Court ruled that state university that made its facilities available to registered student groups could not close its facilities to religious groups).

47. *See infra* notes 48-62 and accompanying text.

48. 447 U.S. 557 (1980).

49. *See infra* notes 57-62 and accompanying text. *See generally* NOWAK AND ROTUNDA, *supra* note 33, § 16.47; Susan Jill Rice, Note, *The Search for Valid Governmental Regulations: A review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 NOTRE DAME L. REV. 561, 566-69 (1988).

50. *Central Hudson Gas*, 447 U.S. at 558.

interest and (3) is "not more restrictive than is necessary" to further the government interest.[51] Ruling that the regulation was more restrictive than necessary, in that it prevented a utility from promoting the efficient use of electricity, the Court ruled that it violated the First Amendment.[52] In this case, the regulation was clearly content-based;[53] however, the Court generally uses the same test even when the regulation is content-neutral.[54] For example, in *Don's Porta Signs, Inc. v. City of Clearwater*,[55] the Eleventh Circuit used the *Central Hudson Gas* test to conclude that a content-neutral prohibition of the use of portable signs within the city did not violate the First Amendment.[56]

As indicated above, the Court will also apply an intermediate level of review of regulation of speech that takes place on some government properties.[57] If the speech takes place in a "public forum," defined as an area "historically associated with the free exercise of expressive activities such as streets, sidewalks, and parks,"[58] the Court will uphold a "time, place or manner" restriction if the prohibition is "content neutral . . . narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication."[59] For example, in *Frisby v. Shultz*,[60] the Supreme Court upheld a city ordinance that banned picketing in front of a single residence.[61] The Court noted that the speech was to take place in the street, a traditional public forum, and thus the Court used time, place or manner analysis.[62]

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51. *Id.* at 564. The court must also determine that the speech is within the scope of the First Amendment. *See supra* notes 31-40 and accompanying text.

52. *Central Hudson Gas*, 447 U.S. at 572.

53. *Id.* at 573 (Blackmun, J., concurring).

54. Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir.), *cert denied*, 485 U.S. 981 (1987); Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987); Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986).

55. 829 F.2d 1051 (11th Cir.), *cert denied*, 485 U.S. 981 (1987).

56. *Id.* at 1054.

57. *See supra* note 49 and *infra* notes 58-74 and accompanying text.

58. United State v. Grace, 461 U.S. 171, 177 (1983).

59. *Id.* Convictions of two individuals who wanted to engage in political activity on the sidewalk outside the United States Supreme Court building, in violation of a federal statute, were reversed in that the statute did not further the legitimate government interest in maintaining order on Supreme Court grounds. *Id.*

Apparently, the same standard applies for limited public forums. *See generally* NOWAK AND ROTUNDA, *supra* note 33, § 16.47.

60. 487 U.S. 474 (1988).

61. *Id.* at 488.

62. The Court found that the statute was content neutral in that it did not discriminate on the basis of subject matter or speakers. *Id.* at 477. There were ample

If the speech occurs in a limited public forum, meaning an area "the state has opened for use by the public as a place for expressive activity,"[63] the Court will apply the same standard as discussed above except the government purpose need only be "reasonable."[64] In *Heffron v. International Soc. For Krishna Consciousness*,[65] the Supreme Court found a state fair regulation that allowed groups to distribute literature only from an assigned booth to be a reasonable time, place or manner restriction.[66] The Court viewed the fair as a limited public forum and ruled that the state's interest in protecting the "safety and convenience" of fair patrons was a "valid" objective.[67]

On the other hand, if the regulation of speech occurs in the context of a non-public forum, a government-owned area that is dedicated for a specific governmental purpose, such as a jailhouse,[68] a legislative chamber,[69] or a military base,[70] the government must merely show that there is a rational justification for the regulation, that it is content-neutral, and that it does not present substantial interference with communication.[71] In *Perry Educational Ass'n v. Perry Local Educators' Ass'n*,[72] the Supreme Court viewed the public school district's internal mail system as a non-public forum.[73] Thus, the district could constitutionally close its mail system to some private groups, including a union competing with the established union, to preserve the property for the use to which it was lawfully dedicated, namely, official business.[74]

Even if a government regulation of speech withstands the above-mentioned First Amendment judicial review, there are two alternative doctrines that may be used to invalidate the statute: substantial overbreadth

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alternatives by which the demonstrators could express their views. *Id.* at 483-84. Protection of residential privacy constituted a significant government interest. *Id.* at 484. Finally, the Court determined that the ordinance was narrowly tailored to protect only unwilling recipients of the communications. *Id.* at 487-88.

63. Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

64. *Id.* at 46.

65. 452 U.S. 640 (1981).

66. *Id.* at 649-51.

67. *Id.* at 650.

68. Adderley v. Florida, 385 U.S. 39, 41 (1966) (jails are "built for security reasons" and are not open to the public).

69. *See id.* at 49 (Douglas, J., dissenting).

70. M.N.C. of Hinesville v. United States Dep't of Defense, 791 F.2d 1466 (11th Cir. 1986).

71. *Perry*, 460 U.S. at 45-46.

72. 460 U.S. 37 (1983).

73. *Id.* at 46.

74. *Id.* at 46-49.

and void for vagueness. The doctrines are closely related; in fact, courts often address them together.[75] It is important to understand, however, their different applications. The doctrine of substantial overbreadth serves to invalidate a statute that is designed to punish activities unprotected by the Constitution, but in fact includes within its sweep protected activities.[76] This doctrine provides an individual, whose own speech was unprotected, standing to litigate the interests of third parties whose speech is chilled by the statute.[77] In *Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*,[78] the Court made use of this doctrine to invalidate an airport regulation that prohibited groups from engaging in First Amendment activities within a certain area of the airport.[79]

The void for vagueness doctrine is a procedural due process doctrine that nullifies a statute that is so vague that it fails to give notice to the populace as to what activities are prohibited.[80] In *Colautti v. Franklin*,[81] the Supreme Court held a regulation void for vagueness that required a doctor to determine if there was "sufficient reason to believe that a fetus may be viable" before determining whether the doctor was permitted to perform the abortion procedure.[82]

B. First Amendment Protection of "Symbolic Speech"

The Supreme Court has also interpreted the First Amendment's protection of free speech as covering many types of expressive conduct that are not technically speech.[83] For example, in *Stromberg v. California*,[84] the

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75. *E.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

76. *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

Another way to phrase this doctrine involves least restrictive means analysis. A regulation of speech that fails to capitalize on the availability of means less intrusive of First Amendment rights, while still accomplishing the government's purpose violates the substantial overbreadth doctrine. *See* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 216-20 (1984).

77. National Ass'n of Colored People v. Button, 371 U.S. 415, 432-34 (1963) (the statute will be invalidated if it bans activities protected by the First Amendment whether or not the accused was engaging in a protected activity).

78. 482 U.S. 569 (1987).

79. *Id.* at 577.

80. Broadrick v. Oklahoma, 413 U.S. 601, 609 (1973) (a statute is unconstitutionally vague if "men of common intelligence must necessarily guess at it meaning.") (quoting Connally v. General Const. Co., 269 U.S. 385, 391 (1926)). *See generally* NOWAK AND ROTUNDA, *supra* note 33, § 16.9.

81. 439 U.S. 379 (1979), *modified*, 492 U.S. 490 (1989).

82. *Id.* at 391-94.

83. *See infra* notes 84-89 and accompanying text.

Supreme Court recognized that conduct can embody an idea and invalidated a state statute that prohibited the displaying of a red flag "as a sign, symbol or emblem of opposition to organized government," as a violation of First Amendment protection of expressive conduct.[85] In *Brown v. Louisiana*,[86] the Supreme Court ruled that the First Amendment protected individuals engaged in an orderly demonstration at a segregated public library and stated that First Amendment rights "are not confined to verbal expression."[87] In *West Virginia State Board of Education v. Barnette*,[88] the Supreme Court ruled that a student could not be forced to salute the flag and stated that "symbolism is a primitive but effective way of communicating ideas."[89]

To determine whether the conduct receives constitutional protection, the court must determine whether it constitutes expressive conduct.[90] In *Spence v. Washington*,[91] the Supreme Court outlined a two-step test to make this determination. Conduct is expressive if: (1) the actor had an "intent to convey a particularized message," and (2) there was a great likelihood that the audience understood that message.[92] If the conduct is non-expressive, it does not receive any First Amendment protection. In *Florida Free Beaches, Inc. v. Miami*,[93] the Eleventh Circuit refused to give First Amendment protection to nude sunbathers who challenged a public indecency law on the basis that it infringed on their right to communicate their belief that nudity was not indecent.[94]

If the court views the conduct as containing an expressive component, the next issue is to determine whether the government's interest in the regulation is related to the suppression of that expression.[95] If the regulation in

84. 283 U.S. 359 (1931).

85. *Id.* at 368-69.

86. 383 U.S. 131 (1966).

87. *Id.* at 142.

88. 319 U.S. 624 (1943).

89. *Id.* at 632.

90. In United States v. O'Brien, 391 U.S. 367, 376 (1968), the Court wrote, "[w]e cannot accept the view than an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

91. 418 U.S. 405 (1973).

92. *Id.* at 410-11 (displaying an American flag upside down with an attached peace symbol is expressive conduct).

93. 734 F.2d 608 (11th Cir. 1984).

94. *Id.* at 609.

95. This analysis is very similar to that which takes place when the speech is "pure," i.e., not involving any conduct at all. In both cases, the court will determine the amount of protection afforded on the basis of whether the regulation is content-based or content-neutral. *See* LAURANCE TRIBE, CONSTITUTIONAL LAW § 12-7 (1988)

question is found to be directed at expression, it receives traditional First Amendment analysis.[96] For example, in *Texas v. Johnson*,[97] the Supreme Court invalidated a flag desecration law because the Court viewed the state's asserted interest in preserving the flag as a national symbol as related to expression.[98] In contrast, if the regulation is unrelated to the suppression of expression, courts will invoke the "*O'Brien* Test" to determine whether it violates the First Amendment.[99]

In *United States v. O'Brien*,[100] the Supreme Court formulated a four factor test for determining whether a government regulation aimed at non-expressive conduct violated the First Amendment.[101] In *O'Brien*, the defendant was convicted under federal law[102] for burning his draft card to protest American involvement in the Vietnam war.[103] The Court characterized O'Brien's conduct as consisting of both expressive and non-expressive conduct; however, the Court stated, "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[104] The Court ruled that government regulation of such conduct was constitutional if: (1) the regulation is a constitutional exercise of the government's power; (2) it furthers an important or substantial government interest; (3) it is unrelated to the suppression of free expression; and (4) any incidental burden upon First

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("[t]he trouble with the distinction between speech and conduct is that it has less determinate content than is sometimes supposed .... Expression and conduct, message and medium, are ... inextricably tied together in all communicative behavior."); *accord* MELVILE W. NIMMER, NIMMER ON FREEDOM OF SPEECH § 3.06[B] (1984) ("The speech element in symbolic speech is entitled to no lesser (and also no greater) degree of protection than that accorded to so-called pure speech.").

This similarity is not often recognized in that courts frequently state that conduct receives less First Amendment protection than speech. *See, e.g.*, California v. LaRue, 409 U.S. 109, 117 (1972) ("[A]s the mode of expression moves from the printed page to the commission of public acts ... the scope of permissible state regulations significantly increases."). *Accord* Miller v. California, 413 U.S. 15, 25-26 (1973).

96. *See supra* notes 44-46 and accompanying text. *See generally* NOWAK AND ROTUNDA, *supra* note 33, § 16.49 ("Having failed the O'Brien test, the regulation must be analyzed with general First Amendment principles.").

97. 491 U.S. 397 (1988).

98. *Id.* at 410. *Accord* Boos v. Barry, 485 U.S. 312, 327-329 (1987).

99. *See infra* notes 100-16 and accompanying text.

100. 391 U.S. 376 (1967).

101. *Id.* at 377.

102. 50 U.S.C. § 462(b)(3) (1988).

103. *O'Brien*, 391 U.S. at 370.

104. *Id.* at 376.

Amendment rights is no greater than necessary to promote the compelling state interest.[105]

The Court ruled that the four factor test had been met.[106] First, the statute was within the constitutional power of Congress to enact laws concerning military preparedness.[107] Second, the regulation furthered the government's interest in efficient administration of the Selective Service Program.[108] Third, although the regulation prohibited destruction of the draft card for expressive purposes, it did not differentiate between public and private conduct.[109] Finally, the regulation met the fourth factor because it was sufficiently limited to the noncommunicative aspect of O'Brien's conduct.[110]

In *Clark v. Community For Creative Non-Violence*,[111] the Supreme Court was faced with a situation where demonstrators wished to erect a tent-city in a public park to dramatize the plight of the homeless.[112] They sought to enjoin enforcement of a national park service ban on sleeping in public parks, claiming that the ban violated their First Amendment rights.[113] The Court invoked the *O'Brien* test and found the regulation in conformity with constitutional guidelines.[114] The Court viewed the regulation as content-neutral because it prohibited the activity without reference to the particular message.[115] There was a substantial government interest in "maintaining the parks . . . in an attractive and intact condition," which was furthered by preventing the activity prohibited by the regulation.[116]

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105. *Id.* at 377.

106. *See infra* notes 107-10 and accompanying text.

107. *O'Brien*, 391 U.S. at 377.

108. *Id.*

109. *Id.* at 381-82.

110. *Id.*

111. 468 U.S. 288 (1984).

112. *Id.* at 291-92.

113. *Id.*

114. *Id.* at 298.

115. *Id.* at 295.

116. *Id.* at 296. The Court paid little attention to the requirement that the regulation involve the least restrictive means by deferring to the superior knowledge of the Park Service. For a criticism of this reasoning, see *id.* at 301-16 (Marshall, J., dissenting).

C. First Amendment Protection of Nude Dancing[117]

It has been argued that nude dancing constitutes "obscenity," and is thus without First Amendment protection.[118] In *Walker v. City of Kansas City*,[119] the Eighth Circuit in dicta wrote, "To the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment 'speech,' it may contain a message that nonetheless is categorically unprotected by the First Amendment—that is, an appeal to the prurient interest."[120] The Supreme Court's willingness to engage in First Amendment analysis in nude dancing cases, however, indicates that the Court does not view nude dancing as "obscene."[121]

A number of Supreme Court decisions indicate that nude dancing passes the "*Spence* test"[122] and thus constitutes expressive conduct within the scope of First Amendment analysis.[123] In *Schad v. Borough of Mount*

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117. For a good general discussion of this topic, see Lisa Malmer, Note, *Nude Dancing and the First Amendment*, 59 U. CINN. L. REV 1275 (1991).

118. *See supra* note 34 and *infra* notes 119-120 and accompanying text.

It is sometimes argued that because the activity only takes place before consenting adults that it should be accorded "constitutional immunity." *See Barnes*, 111 S. Ct. at 2465. The Supreme Court has clearly stated that this potential argument is invalid. Paris Adult Theatre I v. Slaton 413 U.S. 49, 57 (1972). *See also* Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986) (activities between consenting adults may nevertheless constitute crimes).

119. 911 F.2d 80 (8th Cir. 1990), *cert denied*, 111 S. Ct. 2234 (1991).

120. *Id.* at 87. The case was actually decided on the basis of Twenty-First Amendment analysis. *Id.* at 91-93. *See infra* notes 167-74 and accompanying text.

121. *See* Schad v. Mount Ephraim, 452 U.S. 61, 65-66 (1980); Doran v. Salem, Inc., 422 U.S. 922, 932 (1975); California v. LaRue, 409 U.S. 109, 116-17 (1972).

122. *See supra* notes 90-94 and accompanying text.

123. *See supra* notes 95-116 and accompanying text.

Some Justices have suggested that sexually explicit material should be afforded less protection under the First Amendment than other protected speech. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 258 (1990) (Scalia, J., dissenting) (the Constitution does not prevent government from prohibiting business that "intentionally specializ[es] in . . . live human nudity"); FCC v. Pacifica Foundation, 438 U.S. 726, 743 (1978) (Stevens, J., writing for the plurality) (although FCC regulation prescribing the broadcast of "indecent" material is overbroad because the provision will affect only references to excretory and sexual activities that lie at the periphery of the First Amendment, the regulation should be sustained; the overbreadth doctrine should not be used to "preserve the vigor of patently offensive sexual and excretory speech"); Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976) (Stevens, J., writing for the plurality) ("it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammeled political debate").

Ephraim,[124] the Supreme Court reversed the appellants' convictions under a zoning restriction that prohibited all live entertainment in the city.[125] The appellants in the proceeding operated an adult bookstore that also offered nude dancing as entertainment.[126] The Court based its holding on overbreadth.[127] While not directly ruling on the extent of protection given to nude dancing, the Court stated that the ordinance "excludes all live entertainment, including non-obscene nude dancing that is otherwise protected by the First Amendment,"[128] and that "'nudity' alone does not place otherwise protected material outside the mantle of the First Amendment."[129] It is important to note that the majority's position on nude dancing was accepted by the entire Court, except for Chief Justice Burger who in dissent disagreed expressly only with the Court's overbreadth analysis.[130] Chief Justice Burger, joined by Justice Rehnquist stated, "[T]he fact that [a form of expression] enjoys some protection does not mean that there are not times and places inappropriate for its exercise."[131]

In *Doran v. Salem Inn, Inc.*,[132] the Supreme Court upheld a preliminary injunction that enjoined enforcement of a city regulation that prohibited "topless" dancing.[133] The Court stated:

> Although the customary "barroom" type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*,[134] that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances.[135]

Two of the three circuit courts of appeal have viewed the language in *Schad*, *Doran*, and *LaRue* as indicating nude dancing is within the scope of First Amendment protection.[136]

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124. 452 U.S. 61 (1981).
125. *Id.* at 77.
126. *Id.* at 62.
127. *See supra* notes 75-79 and accompanying text.
128. *Schad*, 452 U.S. at 76.
129. *Id.* at 66 (citing Jenkins v. Georgia, 418 U.S. 153, 161 (1974)).
130. *Id.* at 86 (Burger, J., dissenting).
131. *Id.* at 87.
132. 422 U.S. 922 (1974).
133. *Id.* at 933. *See infra* notes 154-60 and accompanying text.
134. 409 U.S. 109, 118 (1972).
135. *Doran*, 422 U.S. at 932. *Accord* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) ("[s]exual expression which is indecent but not obscene is protected by the First Amendment"). (citations omitted)
136. *See* International Food & Beverage System v. Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058 (9th

The Supreme Court has approached government regulation of nude dancing in a variety of ways. It has invoked the time, place or manner test, the substantial overbreadth or void for vagueness doctrines, and the Twenty First Amendment. Each will be discussed in turn.

The time, place or manner test was technically formulated only to apply to speech or expressive conduct that takes place in "public forums;"[137] however, some courts and scholars have viewed the doctrine and the *O'Brien* test as essentially the same.[138] As a result of this confusion, the Supreme Court has mistakenly used the time, place or manner test to evaluate state regulation of nude dancing.[139]

These cases often arise in the context of a zoning regulation that owners of establishments offering adult entertainment view as violative of the First Amendment. In *City of Renton v. Playtime Theaters, Inc.*,[140] the Supreme Court ruled that a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, church, park, or school was a reasonable time, place or manner restriction.[141] It was "content-neutral" because it was aimed not at the content of the film, but at the "secondary effects" of such theaters.[142] The regulation was "narrowly tailored" to affect only those establishments that produced such secondary effect.[143] And finally, the regulation allowed for reasonable alternative

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Cir. 1986). *Contra* Walker v. City of Kansas City, 911 F.2d 80, 87 (8th Cir. 1990). For a synopsis of the legal status of nude dancing in the lower courts, see Erwin S. Barbre, Annotation, *Topless or Bottomless Dancing or Similar Conduct as Offense*, 49 A.L.R. 3d. 1084 (1973).

137. *See supra* notes 57-62 and accompanying text.

138. *See* NOWAK AND ROTUNDA, *supra* note 33, § 16.47 ("The Court has stated its analytical method of review of time, place or manner restrictions in two slightly different forms." Nowak and Rotunda then outlined both the *O'Brien* approach and the approach used in *Grace*). *See also* Texas v. Johnson, 491 U.S. 397, 407 (1988) (*O'Brien* test is "little different from the standard applied to time, place or manner restrictions); City of Renton v. Playtime Theaters, Inc. 475 U.S. 41, 46 (1985) (the Court used the time, place, and manner test to examine the constitutionality of a zoning regulation); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (the Court observed that the time, place or manner test embodies much the same standards as the O'Brien approach).

139. *See infra* notes 140-53 and accompanying text.

140. 475 U.S. 41 (1986).

141. *Id.* at 43, 54.

142. *Id.* at 47. For a discussion of this concept, see *infra* notes 183-86, 235-241 and accompanying text.

143. *Id.* at 52.

avenues of communication because it left five percent of the city open for use as adult theater sites.[144]

In *Young, v. American Mini Theaters, Inc.*,[145] the Supreme Court upheld a Detroit city zoning ordinance that forbade adult motion picture theaters, topless cabarets, and other such establishments from operating within 1000 feet of each other or within 500 feet of a residential area.[146] Even though the ordinance was not technically content neutral[147] because it applied only to adult entertainment, the Court viewed the ordinance as a reasonable time, place, and manner restriction of protected speech[148] because "the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political or philosophical message a film may be intended to communicate."[149] In a somewhat convoluted manner, the plurality[150] suggested a new test for the constitutionality of state regulation of non-obscene sexual matters: statutes are constitutional if they (1) make subject matter classifications,[151] (2) directed not at speech but at their secondary effects,[152] and (3) do not greatly restrict access to the lawful speech.[153]

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144. *Id.* at 53. The Court of Appeals for the Ninth Circuit relied on *O'Brien* to rule that the regulation was unconstitutional because the state had failed to establish evidence of the existence of secondary effects of such establishments and that the city had not shown the regulation to be unrelated to the suppression of expression. Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 537 (9th Cir. 1984).

145. 427 U.S. 50 (1976).

146. *Id.* at 55. The respondent apparently conceded that the original ordinance was valid but apparently objected to amendments that brought adult theaters as well as cabarets under regulation. *Id.* at 75 (Powell, J., concurring).

147. *Id.* at 53 n.4, 54 n.5. Perhaps the Court viewed the regulation as content-neutral because it viewed non-obscene "adult" books and films as afforded less First Amendment protection than other types of speech, especially political debate. *See id.* at 66-67 (Stevens, J., plurality opinion). *See supra* note 123 and accompanying text.

148. *Id.* at 63 n.18.

149. *Id.* at 70. In Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1980), the Supreme Court also made use of this doctrine. It viewed a zoning ordinance that completely banned all live entertainment, including nude dancing, as an unreasonable time, place and manner restriction because it did not leave open adequate alternative channels of communication. *Id.* at 75-76. The city had not adequately justified its restriction of the protected activity. *Id.* at 72.

150. Part III of the opinion, from where this test comes, was not joined by Justice Powell, and thus did not have the support of a majority of the court.

151. *Id.* at 60-61.

152. *Id.* at 71 n.34.

153. *Id.* at 71-72 n.35.

As noted above, courts also make use of substantial overbreadth to invalidate statutes concerning nude dancing.[154] In *Doran v. Salem Inn, Inc.*,[155] the Supreme Court invoked this doctrine to uphold an injunction against an ordinance enacted by the city of North Hempstead, New York.[156] The city had enacted Local Law No. 1-1973, which prohibited waitresses, barmaids and entertainers from appearing in public with uncovered breasts. Two bar owners who had provided topless dancing as entertainment contested the validity of the ordinance.[157] Because the bar owners served alcohol, the Court ruled that the ordinance was valid as applied.[158] However, because the ordinance also applied to establishments that did not serve liquor, the Court permitted the bar owners to assert third-party standing to challenge the ordinance.[159] While the Court did not technically reach the merits of the case, to uphold the temporary injunction, the bar owners were required to provide a "sufficient showing of the likelihood of ultimate success on the merits."[160]

The Supreme Court in *Schad* invalidated a city zoning ordinance under the First Amendment as overbroad.[161] The Court noted that the ordinance prohibited activities, such as musical and dramatic performances, that definitely receive First Amendment free speech protection.[162] Thus, regardless of the extent of protection given to nude dancing,[163] "[b]ecause Appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their

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154. *See infra* notes 155-65 and accompanying text.

155. *Id.* at 924.

156. 422 U.S. 922, 933-34 (1975).

157. *Id.*

158. *Id.* at 933. For a discussion of the increased latitude given to states and cities in regulating nude dancing in establishments that serve liquor, see *infra* notes 167-74 and accompanying text.

159. *Id.* at 932-33. The Court also stated another basis for the ordinance's possible overbreadth, namely that it would prohibit a number of "works of unquestionable artistic and socially redeeming significance." *Id.* at 933 (quoting the lower court's opinion in Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 483 (E.D.N.Y. 1973)).

160. *Doran*, 422 U.S. at 932-33. In an attempt to meet constitutional requirements, the city amended the ordinance by only applying the prohibition to cabarets, bars, lounges, dance halls, discotheques, restaurants, and coffee shops; however, the Second Circuit ruled that the ordinance was still overbroad in that it was not limited to establishments that sold liquor and applied to some non-obscene expressive activity. Salem Inn, Inc. v. Frank, 522 F.2d 1045, 1046-47 (2d Cir. 1975).

161. *Schad*, 452 U.S. at 74-75.

162. *Id.* at 65.

163. The Court states, "Whatever First Amendment protection should be extended to nude dancing . . . ." *Id.* at 66.

own."[164] The Court invalidated the ordinance because it "prohibit[ed] a wide range of expression that had long been held to be within the protections of the First and Fourteenth Amendments,"[165] and the city had not "adequately justified its substantial restriction" of live entertainment.[166]

The final approach taken by the Supreme Court to review a governmental regulation of nude dancing involves the Twenty-First Amendment.[167] The Court has recognized that pursuant to the Twenty-First Amendment,[168] states have wide latitude to enact laws that prevent establishments that offer nude dancing from acquiring liquor licenses.[169] In *California v. LaRue*,[170] the Supreme Court upheld a state law that prohibited establishments that serve liquor from permitting individuals to expose, "any portion of his or her genitals or anus."[171] The state enacted this regulation to combat the secondary effects of observed activity such as customers masturbating in public, customers and performers engaging in oral copulation, and prostitution, rape, and attempted rape in the area.[172]

While ruling that nude dancing was marginally protected by the First Amendment, the Court stated that the Twenty-First Amendment allowed the states more discretion in regulating liquor sales when combined with nude dancing.[173] In essence, the Court viewed the statute as constitutional because it had a rational basis, i.e., the state's interest in combating the secondary effects of liquor sales in conjunction with bottomless-dancing.[174]

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164. *Id.* at 66.

165. *Id.* at 65.

166. *Id.* at 72. The city tried to justify the ordinance on the basis of the "immediate (commercial) needs," of the residents and the problems associated with live entertainment such as "parking, trash, police protection and medical facilities." The Court, however, found both justifications lacking. *Id.* at 73.

167. *See infra* notes 168-174 and accompanying text.

168. U.S. CONST. amend. XXI, § 2. ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited.").

169. *See infra* notes 170-74 and accompanying text.

170. 409 U.S. 109 (1972).

171. *Id.* at 111-12.

172. *Id.* at 111.

173. *Id.* at 114 ("the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals").

174. *Id.* at 115-18.

IV. INSTANT DECISION

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, ruled that nude dancing is expressive activity within the scope of the First Amendment.[175] The Court cited four reasons for invoking the *O'Brien* test: (1) the Indiana indecency statute was viewed by the court as content neutral; (2) it could not be contested on the grounds of overbreadth;[176] (3) the statute was not related to the sale of alcohol; and (4) the statute regulated expressive conduct on private property.[177] The plurality stated the statute met the four requirements of *O'Brien*.[178] First, the statute was "clearly" within the

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175. *Barnes*, 111 S. Ct. at 2460. As discussed above, for the conduct to be deemed expressive, it is necessary that the actor intend to convey a message. *See supra* notes 90-94 and accompanying text. Testimony by the dancers at the district court indicated that their intent was not to convey a message, but rather to make money. *Miller*, 904 F.2d at 1116. The circuit court ruled that the conduct was expressive because dance is "inherently expressive." *Id.* at 1085. This is a problematic conclusion because it fails to follow the *Spence* test. *See supra* notes 90-94 and accompanying text. The Supreme Court did not explain why it viewed the conduct as expressive. Perhaps, the Court drew a parallel between nude dancing and book publishing, reasoning that since the latter does not lose its First Amendment protection when engaged in for profit, neither should the former. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

176. The statute was originally contested as being unconstitutionally overbroad because it applied to a wide scope of expressive activity protected by the First Amendment. *See Barnes*, 111 S. Ct. at 2459. The Seventh Circuit, however, upheld the statute ruling that the Indiana Supreme Court in State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), had sufficiently narrowed the statute through judicial construction. Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986). In *Baysinger*, the Indiana Supreme Court read the statute as not applying to, "dramatic performances in the theaters or in movies, which may be protected expression." *Baysinger*, 397 N.E.2d at 585.

The *Baysinger* decision also indicated that the term "public place" as used in the Indiana public indecency statute applied to any area "open to common and general use, participation, or enjoyment" of the public. *Id.* at 582-83 (quoting Peachey v. Boswell, 167 N.E.2d 48, 56 (Ind. 1960)).

177. Justice Rehnquist, writing for the plurality, noted that the time, place, or manner test was essentially the same as the *O'Brien* test. *Barnes*, 111 S. Ct. at 2460. In fact, the briefs submitted to the Supreme Court by both parties appeared to assume that the correct framework for this case was the time, place or manner test. However, because the Court invoked the *O'Brien* test in Texas v. Johnson, 491 U.S. 397, 407 (1988), and this case, it is apparent that this doctrine should now be viewed as the appropriate standard of review for symbolic speech.

178. *Barnes*, 111 S. Ct. at 2463.

constitutional power of the state.[179] Second, the statute furthered a substantial state interest in "protecting societal order and morality."[180] Third, the statute was unrelated to the suppression of free speech because "the evil Indiana seeks to address is not erotic dancing, but public nudity."[181] Finally, the restriction on protected activity is not greater than that required to further the state's interest because "the statutory prohibition is not a means to some greater end, but an end in itself."[182]

Justice Souter, concurring in the judgment, also applied the *O'Brien* test and found that Indiana's public indecency statute conformed with constitutional requirements.[183] Instead of viewing the statute as based on the state's interest in promoting morality, however, Justice Souter contended that the state's interest was in "combating the secondary effects of adult entertainment establishments" such as prostitution, sexual assaults, and other related criminal activity.[184] Justice Souter believed that Indiana was not required to give

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179. *Id.* at 2461. Apparently, the plurality felt that this statement was so obvious that it didn't require support. It is clear, however, that the statute was within Indiana's constitutional police power to legislate to promote health, safety, morality and the general welfare. *See supra* note 4.

180. *Barnes*, 111 S. Ct. at 2461. The Court was somewhat handicapped by the fact that Indiana did not record legislative history. Furthermore, the Indiana Supreme Court had never explained the purpose of the statute. *Id.* However, the plurality defined the "purpose" by noting that 47 states have similar statutes, public indecency was considered *malum en se* at common law, and Indiana has had such a law since 1831. *Id.* Thus, the plurality viewed this statute as "reflect[ing] moral disapproval of people appearing in the nude among strangers in public places." *Id.*

181. *Id.* at 2463. The plurality stated that the statute applied to individuals engaging in public nudity whether or not they were simultaneously engaging in expressive conduct. Furthermore, the statute did not prevent erotic dancing so long as the dancers "wear a scant amount of clothing." *Id.*

182. *Id.* at 2463.

183. *Id.* at 2468.

184. *Id.* at 2468-69. Justice Souter agreed with the plurality concerning the first and fourth elements of the *O'Brien* test. *Id.* at 2469, 2471.

Like the Plurality, Justice Souter also noted that Indiana does not record legislative history, but argued that the State's assertion of this interest could not be ignored solely on the lack of evidence of the Legislature's motive. "We decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id.* at 2469 (quoting *O'Brien*, 391 U.S. at 384).

Interestingly, Justice Souter does not mention the feminist argument against pornography, namely that it involves depictions of subordination that tend to perpetuate subordination in society. See *Miller*, 904 F.2d at 1111 (Coffey, J., dissenting). *See generally* TRIBE, *supra* note 95, § 12-17.

specific and localized proof of how its public indecency statute furthered this interest.[185] Instead, the state legislature could rely on studies performed in other cities and states to conclude that there is a correlation between establishments that offer nude dancing and the "pernicious secondary effects," discussed above.[186]

Justice Scalia, unlike the plurality, Justice Souter, and the dissent, argued that nude dancing is not within the scope of First Amendment protection.[187] He contended that the law was not directed at expressive conduct, but rather at public nudity.[188] Because the law is a "general law," one that applies to conduct whether there is an expressive element or not, the statute does not regulate expression.[189] Thus, Justice Scalia would uphold the statute on a rational basis standard,[190] which is supported by the state's interest in furthering morality.[191] Justice Scalia distinguished this case from *Texas v. Johnson*, where the state prohibition of flag desecration was directed at conduct, "precisely because of its communicative attributes."[192] Finally, Justice Scalia noted that the Court had adopted such an approach in *Employment Division v. Smith*,[193] holding that a general prohibition on the use of peyote applied to Native Americans who wanted to use the drug as part of a religious ceremony.[194]

Writing for the dissent, Justice White, joined by Justices Marshall, Blackmun, and Stevens, contended that the statute was an unconstitutional

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185. *Barnes*, 111 S. Ct. at 2469-70.

186. *Id.* at 2470. Justice Souter based this view on the Court's holding in *Renton* where a city of Renton zoning ordinance was upheld on the basis of the city's interest in preventing the secondary effects of nude dancing. The Court allowed the city to base this connection on studies done in Seattle and other cities. *Id.*

Justice Souter was very careful not to draw a causal relationship between the expressive component in nude dancing and the "secondary effects" referred to in his opinion. It was enough for him that there was some correlation, "without deciding what the precise causes of the correlation actually are." *Id.*

187. *Id.* at 2463 (Scalia, J., concurring).

188. *Id.* at 2464.

189. *Id.* at 2465.

190. He presumably finds this rational basis requirement in the Fourteenth Amendment Due Process clause.

191. *Barnes*, 111 S. Ct. at 2465 (Scalia, J., dissenting). Justice Scalia cited Bowers v. Hardwick, 478 U.S. 186, 196 (1986) and compared the prohibition of nude dancing to similar state laws outlawing sadomasochism, cockfighting, beastiality, suicide, drug use, prostitution, and sodomy. *Barnes*, 111 S. Ct. at 2465.

192. *Id.* at 2466. For a brief discussion of Texas v. Johnson, see *supra* notes 97-98 and accompanying text.

193. 494 U.S. 872 (1990).

194. *Barnes*, 110 S. Ct. at 2467 (Scalia, J., concurring).

violation of the First Amendment.[195] The dissent argued that the statute was not a general law, but rather was content-based because it did not apply to all nudity in all circumstances.[196] On this basis, Justice White distinguished *Bowers v. Hardwick* (homosexual sodomy)[197] and *Smith* (peyote use)[198] in which the Court upheld state prohibitions of a specific activity without exception.[199]

Because the statute was related to the suppression of protected speech, Justice White asserted that the Court's employment of the *O'Brien* test was erroneous.[200] Rather, the dissent argued that it is appropriate to engage in a "closer inquiry as to the purpose of the statute."[201] If that purpose is not "compelling," the statute must be nullified.[202] Neither the state nor the Court has suggested that the statute could withstand the scrutiny of this standard.[203]

V. COMMENT

A. Strict Scrutiny: Proper Standard of Review for Nude Dancing

As discussed above, when a state regulation of expressive conduct is content-based, the *O'Brien* test is inappropriate.[204] Instead, the proper standard is one of "strict scrutiny," which requires the Court to invalidate the state regulation unless it is "narrowly drawn to accomplish a compelling government interest."[205]

In *State v. Baysinger*,[206] the Indiana Supreme Court ruled that the Indiana public indecency statute did not apply to public nudity that was intertwined with "the larger form of expression of ideas."[207] The Court "read *LaRue*[208] to caution against attempting to censor dramatic performanc-

195. *See infra* notes 196-203 and accompanying text.
196. *Barnes*, 110 S. Ct. at 2472 (White, J., dissenting).
197. 478 U.S. 186 (1986).
198. *Smith*, 494 U.S. at 872.
199. *Barnes*, 110 S. Ct. at 2472 (White, J., dissenting).
200. *Id.* at 2473.
201. *Id.* at 2473.
202. *Id.* at 2475. Presumably the dissent would also require the statute to meet the least restrictive means test. *See supra* note 44 and accompanying text.
203. *Id.* at 2475.
204. *See supra* notes 95-99 and accompanying text.
205. *Barnes*, 110 S. Ct. at 2474-75 (White, J., dissenting).
206. 397 N.E.2d 580 (Ind. 1979).
207. *Id.* at 587.
208. *See supra* notes 134, 136, 170-74 and accompanying text.

es in the theaters or in movies, which might be protected activity," to save the statute from an overbreadth attack.[209] It is appropriate for the Supreme Court to show deference to the state's highest court in judicial construction of its own state laws.[210] If this construction of the statute is accepted, the statute is clearly related to the suppression of speech. At the same time, if this construction of the statute is not accepted, then all live entertainment that includes a scintilla of topless female nudity, or bottomless male or female nudity, no longer constitutes protected expressive conduct. Each option will be explored in turn.

If the *Baysinger* construction is accepted by the Indiana Courts, public nudity is legal in some entertainment contexts, such as ballet, musicals, and drama, while prohibited in others, such as barroom nude dancing. In other words, the statute gives the state wide discretion to determine under what circumstances public nudity is legal and when it is not. As the state conceded in oral argument before the circuit court or appeals,[211] if the dancers had performed the same nude dance routine, but it had been choreographed in connection with a Ph.D thesis, the expressive conduct would have been protected under *Baysinger*.[212]

In essence, the state is allowed to define what is art and what is not, which directly contradicts the Court's holding in *Cohen v. California*,[213] namely that "it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[214] As the court of appeals correctly stated, "Any attempt to distinguish 'high' art from 'low' entertainment based solely on the advancement of intellectual ideas must necessarily fail."[215] Such a standard clearly ignores the fact that much art appeals as much to our emotions as to our intellect, and is thus subject to the same constitutional protection.[216] Tchaikovsky's "1812 Overture" charges us with patriotic passion, Monet's "Water Lilies" affects our sense of beauty and serenity, and Beethoven's "Moonlight Sonata" fills us with romantic yearning.

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209. *Baysinger*, 397 N.E.2d at 585.

210. Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91 (1965).

211. Miller v. Civil City of South Bend, 904 F.2d 1081, 1086 (7th Cir. 1990).

212. *Id.*

213. 403 U.S. 15 (1971).

214. *Id.* at 25. *Accord* Winters v. New York, 333 U.S. 507, 510 (1948) (entertainment is protected because the "line between the informing and the entertaining is too elusive" for determining First Amendment protection).

215. *Miller*, 904 F.2d at 1086.

216. *Cohen*, 403 U.S. at 26 (reversing a conviction for wearing a jacket bearing the words "Fuck the Draft," illustrates the notion that the "emotive function" of words, regardless of their impact on the intellect, warrant First Amendment protection).

In addition, it is difficult to discern the intellectual messages conveyed by nude "plotless" dance productions performed across this country by dance companies.[217] They are surely protected under the *Baysinger* construction, however, in that they are viewed as "art" by the artistic, intellectual and social elite of our society. Such a standard reeks of class bias. It only protects art that is sophisticated and refined, while exposing to prosecution art that appeals to the less cultured members of our society.

Therefore, the only way in which the statute could be interpreted as being unrelated to the suppression of free speech would require a rejection of the *Baysinger* construction. Such an approach does avoid giving the statute a "strict scrutiny" standard of review. If all public nudity is to be outlawed, however, a profound invasion of artistic expression would result. For example, the last act in Saint-Sans' opera "Samson and Delilah," the "Bachannal," is a wild orgy of drugs, alcohol, dance, nudity, and simulated sex in which the Philistines celebrate the capture of Samson. Igor Stravinsky's "Rite of Spring" is a ballet filled with orgiastic music and female nudity in which the performers revel in sexual freedom and passion. The striptease ("The Dance of the Seven Veils") by King Herod's step-daughter in Strauss' "Salomé," is designed to express debauchery, sin, and corruption.[218] It would be a sad day indeed if such performances were to be outlawed in the state of Indiana.[219] As (now Chief) Justice Rehnquist ruled in *Doran*:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance.[220]

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217. Respondents Brief at *20, Barnes v. Glen Theatre, Inc., No. 90-1049, 1991 Genfed LEXIS (U.S. 1991).

218. For a general discussion of nudity and the theater, see GILLIAN HANSON, ORIGINAL SKIN: NUDITY AND SEX IN CINEMA AND THEATER (1970).

219. For opinions that have cited *Barnes* for the proposition that government may constitutionally prohibit nude dancing, see D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 143 (4th Cir. 1991); Brass Bull v. City of Newport, 947 F.2d 945 (6th Cir. 1991); International Eateries of America v. Broward County, 941 F.2d 1157 (11th Cir. 1991); Webb v. Indiana, 575 N.E.2d 1066 (Ind. 1991).

220. *Doran*, 422 U.S. at 933 (citing Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 483 (E.D.N.Y. 1973)).

Furthermore, would a nude model in an art class at a university be prosecuted under the Indiana statute? Would a male dancer in a ballet wearing tights be

In short, the Supreme Court's plurality opinion in this case results in either of two regrettable consequences: Indiana judges will be transformed into art critics, determining whether a specific production conveys "ideas" and thus constitutes protected expression, or all artistic expressive conduct involving nudity will no longer be protected under the First Amendment. The first is a clear violation of the *O'Brien* formula, the second, an even clearer violation of the First Amendment.

B. "Government Interest": Overly Flexible Concept

The second element of the *O'Brien* test requires that the state regulation, "further an important or substantial government interest."[221] It is rare, however, for a piece of legislation to have only one clear and specific purpose; the result is that a court wishing to uphold the regulation is given free reign to design a purpose that it deems unrelated to the suppression of free expression, the third requirement of the *O'Brien* formula.[222]

In *O'Brien*, the legislative history shows that the statute was motivated by an intent to prevent expressive conduct. Those legislators who spoke on behalf of the regulation detailed the negative expressive effects of draft-card burning.[223] Nonetheless, the statute was upheld as serving the government's legitimate interest in orderly administration of the Selective Service system.[224] The Court ruled that it would not invalidate a statute on the basis of "illicit" legislative motive,[225] "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."[226] Thus,

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prosecuted if his penis was in a "discernably turgid state?"

221. *O'Brien*, 391 U.S. at 376. *See supra* notes 105, 108 and accompanying text.

222. *See generally* TRIBE, *supra* note 95, § 12-6.

223. The only discussion of the merits of the statute in the Committee Reports or from the floor of either House referred to the "contumacious" and "unpatriotic" conduct of individuals who burned their draft cards demonstrating their opposition to the war in Southeast Asia. *Id.* § 12-7.

224. *O'Brien*, 391 U.S. at 381-82.

225. Legislative "motive," "intent," "purpose," and "interest" are terms that are extremely difficult to differentiate in a coherent manner. *See* Morell E. Mullins, *Creation Science and McLean v. Arkansas Board of Education: The Hazards of Judicial Inquiry into Legislative Purpose and Motive*, 5 U. ARK. LITTLE ROCK L.J. 345 (1982). In fact, the Supreme Court has failed to adequately explain how it defines these terms and when courts should make use of them. *See* John Hart Ely, *Legislative and Administrative Motive in Constitutional Law*, 79 YALE L.J. 1205, 1211-12 (1970) ("The Court should stop pretending it does not remember principles for deciding on what occasions and in what ways the motivation of legislators or other government officials is relevant to constitutional issues.").

226. *O'Brien*, 391 U.S. at 384. According to Tribe, the other two objections to

as long as the Court can design one important government interest, the regulation will be upheld, regardless of the legislator's motivating purpose.[227]

This Note is not advocating that such determinations of government purpose and interest be based wholly on legislative history, for such a practice is unworkable because a legislature rarely if ever enacts a statute with one purpose, motive, or intent in mind.[228] Rather, it seems preferable to amend the *O'Brien* test to invalidate a statute when the Court can decipher from the surrounding societal circumstances any substantial government interest in the suppression of free speech.[229] Only by such an approach will citizens be assured of the inalienable right to convey and receive expressive messages when combined with non-expressive conduct. If there is to be judicial error in making the decision whether to protect the speech, as there is bound to be, let it result in providing excessive protection, rather than risking the stifling of liberty.[230]

In *Barnes*, the plurality determined that the purpose of Indiana's public indecency statute was to "protect societal order and morality."[231] While there is substantial precedent to support the assertion that government is constitutionally justified in basing its police power on morality,[232] such an

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inquiring into legislative motive are: (1) "the statute may be entirely proper although it was the expression of an improper motive;" (2) "motivation is extremely difficult to ascertain, particularly in a collective body such as a legislature." TRIBE, *supra* note 95, § 12-6. Tribe also provides a concise criticism of each objection. *Id.*

227. *See generally* NOWAK AND ROTUNDA, *supra* note 33, § 16.49.

228. *See* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971); *O'Brien*, 391 U.S. at 383-84. *Accord* Arthur S. Miller, *Reductionism in the Law Schools, or Why the Blather About the Motivation of Legislators*, 16 SAN DIEGO L. REV 891, 893 (1979).

229. *See* Renton v. Playtime Theaters, Inc., 748 F.2d 527, 537 (9th Cir. 1984). *Contra* Renton v. Playtime Theater, Inc., 475 U.S. 41, 47 (1985). Tribe advocates a system by which the complainant is required to show that "the legislature was motivated in substantial part by an illicit purpose; once this is shown, the burden should shift to the law's defenders to establish that the same law probably would have been enacted even if the impermissible purpose had not been present." TRIBE, *supra* note 95, § 12-6.

230. While beyond the scope of this Note, it is odd that in a day and age of serious problems relating to violence, drugs, education, poverty and homelessness, certain communities, with finite police resources, devote such an interest in whether or not nude dancers are wearing their legally mandated pasties. *See e.g.*, *Miller*, 904 F.2d at 1100 (Posner, J., concurring).

231. *Barnes*, 110 S. Ct. at 2461. *See supra* note 180 and accompanying text.

232. Bowers v. Hardwick, 478 U.S. 186, 196 (1986) ("The law is constantly based on notions of morality . . . ."); Roth v. United States, 354 U.S. 476 (1957) ("a legislature [can] act . . . to protect the social interest in order and morality").

approach is far too all-encompassing and will virtually assure every statute safe passage through the second and third elements of the *O'Brien* test. As the Court ruled in *Bowers v. Hardwick*,[233] "[t]he law . . . is constantly based on notions of morality."[234] As long as the court views the non-expressive component as immoral and the focus of the state's interest, the expressive component has minimal First Amendment protection.

Justice Souter, on the other hand, finds the regulation in accord with the Constitution because the government has a legitimate interest in preventing the secondary effects of nude dancing.[235] While this approach is also supported by some degree of precedent,[236] this contention again illustrates the vague and malleable nature of the second element of the *O'Brien* test. In *Barnes*, the state had not conducted a single study to illustrate the connection between nude dancing and any of the "pernicious secondary effects" mentioned by Justice Souter.[237] Justice Souter rested his conclusion on the Court's holding in *Renton* where the city was allowed to rely on studies done in Seattle and other cities to support such a connection.[238] It appears certain that Justice Souter was implicitly relying on the Meece Commission's report

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233. 478 U.S. 186 (1986).

234. *Id.* at 196.

235. *Barnes*, 110 S. Ct. at 2468-69. *See supra* notes 184-86 and accompanying text. It is likely that he viewed the government's interest as such to avoid contradicting the Indiana Supreme Court's interpretation of the statute. *See supra* notes 206-220 and accompanying text. This approach, however, is equally problematic because it ignores the fourth element of the *O'Brien* test: "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. If the government is really attempting to prevent prostitution, rape and other sexually-related crimes, it can devote more money and manpower to directly combatting those crimes that would further the government's interest while not infringing on First Amendment rights. See TRIBE, *supra* note 95, § 12-17 ("Government may surely outlaw the direct incitement of sexual violence against women . . . . It is, however, altogether different, and far more constitutionally tenuous, for government to outlaw . . . the incitement of violence against women only when such incitement is caused by words or pictures that express a particular point of view: that women are meant for domination"). *Accord* Marilyn J. Magg, Note, *The Indianapolis Pornography Ordinance: Does the Right to Free Speech Outweigh Pornography's Harm to Women?*, 54 U. CIN. L. Rev. 249 (1985).

236. *Renton*, 475 U.S. at 49-50; *Young*, 427 U.S. at 55; *Paris Adult Theater*, 413 U.S. at 57-63; *LaRue*, 409 U.S. at 111.

237. As the Seventh Circuit points out, "[p]rostitution is a local problem, so the case for banning nude dancing in bars in order to reduce the incidence of prostitution will be stronger or weaker depending on local conditions." *Miller*, 904 F.2d at 1102 (Cudahy, J., concurring).

238. *Barnes*, 110 S. Ct. at 2469 (Souter, J., concurring).

that found a causal connection between pornography and crime.[239] It is important to note, however, that there is a great deal of criticism of these conclusions as empirically questionable and a product of the political process.[240] It is therefore problematic for him to view this connection as fact.[241]

It appears certain that when a court views the purpose of a statute as an attempt to combat the secondary effects of an activity, and those effects are not simply individuals' reaction to the activity,[242] the interest will be viewed as unrelated to the suppression of free speech, and thus not violative of the third factor of the *O'Brien* test.[243] If the court is allowed to find this

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239. ATT'Y GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 322-49 (1986). However, Justice Souter carefully avoids claiming a causal link. *See supra* note 186 and accompanying text. He focuses on "correlation" rather than "causation." As D'Amato correctly points out, this could simply mean that "people who are predisposed to committing acts of sexual violence also enjoy seeing sexually violent materials." Anthony D' Amato, Note, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence* 31 WM & MARY L. REV. 575, 575 (1990).

240. *Id.*; REPORT OF THE COMMISSION OF OBSCENITY AND PORNOGRAPHY 27 (1970); M. Maag, *supra* note 33; Robert B. Cairns, Note, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962) (*cited in* California v. LaRue, 409 U.S. at 131 (Marshall, dissenting)); Steven G. Gey, Note, *The Apologetics of Suppression: The Regulation of Pornography As Act And Idea*, 86 MICH. L. REV. 1564 (1988). *Contra* Deana Pollard, Note, *Regulating Violent Pornography*, 43 VAND. L. REV. 125 (1990); Cass R. Sunstein, Note, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986). For an extremely moving personalized account of the connection between violent pornography and crime against women, see Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN L. REV. 607 (1987).

241. Furthermore, Justice Souter's argument is even more untenable if viewed in light of the actual application of the statute in question. According to the Court's decision, a dancer can avoid prosecution merely by wearing a "g-string" on her pubic area and "pasties" on her nipples. *See* Erhardt v. State, 463 N.E.2d 1121 (Ind. Ct. App. 1984) (where the Indiana Court of Appeals reversed a conviction under the public indecency statute of a dancer who, as a part of a "Miss Erotica of Fort Wayne" contest danced in two songs, the second of which was completed wearing only a g-string and scotch tape criss-crossed over her nipples). To argue that such precautions will prevent the secondary effects listed by Justice Souter borders on the ludicrous.

242. Boos v. Barry, 485 U.S. 312, 321 (1987) ("Regulations that focus on the direct impact of speech on its audience . . . are not the type of 'secondary effects' we referred to in *Renton*").

243. *See supra* note 105 and accompanying text.

purpose on the basis of generalized normative notions of causation[244] without the benefit of any specific sociological empirical evidence, the *O'Brien* test ceases to function as a protection of expressive conduct. As Professor Tribe writes, "All viewpoint-based regulations are targeted at some supposed harm, whether it be linked to an unsettling ideology like Communism or Nazism or socially shunned practices like adultery."[245]

If the approach to finding government interest advocated by this Note were to be applied to this case, Indiana's public indecency statute would clearly violate the third element of *O'Brien*.[246] Regardless of the existence of a state interest in either morality and societal order, as the plurality contends,[247] or combating the secondary effects of nude dancing, as Justice Souter advances[248] (which are both *arguendo* content-neutral), the state clearly had a substantial interest in completely preventing nude dancing. Because this activity was viewed by the Court as expressive conduct,[249] the statute cannot be construed as unrelated to the suppression of speech.

C. *"General" Laws, Symbolic Speech and Intermediate Scrutiny*

Justice Scalia was the only member of the Court to view nude dancing as completely outside the scope of First Amendment protection.[250] He argued that the state regulation should be upheld upon a finding of a "rational basis" for the statute, a requirement stemming from the Fourteenth Amendment Due Process Clause.[251] The Justice makes this claim on the basis of

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244. Because Justice Souter is focusing on "correlation" as opposed to "causation," there is even greater discretion. There are an infinite number of legal activities that take place in connection with any one type of crime. For example, a city could pass a law prohibiting women from standing on street corners in short skirts as an attempt to prevent the "secondary effect" of the activity, namely prostitution. While this hypothetical perhaps somewhat exaggerates the problematic effect of Justice Souter's argument, it surely highlights the danger of his approach.

245. Tribe, *supra* note 95, § 12-17.

246. *See supra* note 105 and accompanying text.

247. *See supra* notes 180, 231-34 and accompanying text.

248. *See supra* note 184 and accompanying text.

249. *See supra* note 175 and accompanying text.

250. *Barnes*, 110 S. Ct. at 2463. *See* Arcara v. Cloud Books, Inc., 478 U.S. 687 (1986) (The Court determined that *O'Brien* was irrelevant to a statute that punished premises involved in prostitution, lewdness, or assignation even though the statute was invoked by the state to close down a book store which offered "adult" literature. *Id.* at 707. The majority stated that the New York Court of Appeals had inappropriately applied the *O'Brien* test. *Id.*).

251. *Barnes*, 110 S. Ct. at 2468 ("In *Bowers*, we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual

his determination that Indiana's public indecency law is "general" in nature.[252] This assertion ignores the fact that if Indiana courts apply the *Baysinger* construction, the statute is clearly not a general law applicable to all persons in all situations.[253] Rather, it outlaws certain types of nude dancing while allowing others.[254]

Justice Scalia explained his motivation for this opinion in terms of his distaste for intermediate review in cases concerning symbolic speech.[255] For him, after determining that the purpose of the law is unrelated to the suppression of speech, it is properly viewed as outside the scope of First Amendment protection.[256] This approach is in direct contradiction to the *O'Brien* formula,[257] which has been viewed by the Court as the appropriate framework for reviewing government regulations that incidentally restrict expressive conduct. Under Justice Scalia's "regime," the state would no longer be forced to show a "substantial or legitimate" interest when the regulation constitutes a "general law,"[258] nor would it be required to show that the restriction is "no greater than essential to the furtherance" of the non-speech interest."[259]

In terms of their impact on the analysis of this case, the primary difference between Justice Scalia's opinion and that of the plurality is that the former will uphold the statute upon evidence of a "rational basis,"[260] while

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intercourse needed only a rational basis in order to comply with the Due Process Clause. . . . I would uphold the Indiana statute on precisely the same ground."). *See generally* Andrew E. Forshay, Note, *The First Amendment Becomes a Nuisance: Arcara v. Cloud Books, Inc.*, 37 CATH. U. L. REV. 191 (1987).

252. Justice Scalia defines a general law as a law, "which regulates conduct without regard to whether that conduct is expressive." *Barnes*, 110 S. Ct. at 2465 n.3 (Scalia, J., concurring).

253. *See supra* notes 206-220 and accompanying text.

254. *Id.*

255. "I think we should avoid wherever possible . . . a method of analysis that requires judicial assessment of the 'importance' of government interests—and especially of government interests in various aspects of morality." *Barnes*, 110 S. Ct. at 2467 (Scalia, J., concurring).

256. *See supra* notes 187-94 and accompanying text.

257. *See supra* notes 99-105 and accompanying text.

258. *See supra* notes 105, 189-94 and accompanying text.

259. *See supra* notes 105, 190 and accompanying text. Dean Ely argues that this element of the *O'Brien* test is meaningless because the overbreadth doctrine serves the same purpose, namely to invalidate a statute if its sweep is unnecessarily broad. John Hart Ely, Note, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1486 (1975).

260. For Justice Scalia:

the latter requires the state to show an "important or substantial" government interest. In practice, however, when the government interest rests in morality or in combating the secondary effects of the prohibited activity, it is difficult to find a statute that meets the second test, while failing the first.[261]

There is, however, an important implication of Justice Scalia's approach. Because the Court viewed the statute as regulating conduct within the scope of the First Amendment and only ruled on the facial validity of the statute, the right for nude dancing establishments to contest the statute as applied was preserved. Under Justice Scalia's framework, such an attack is impossible. Because it is likely that the *Baysinger* construction will be applied by Indiana police and prosecutors, such an attack seems imminent.

Justice Scalia's opinion is even more noteworthy because he blatantly disregards precedent[262] in an attempt to convince the Court to adopt the "regime" employed in *Employment Division v. Smith.*[263] In *Smith,* the Supreme Court ruled that a state regulation that outlawed the use of peyote was not within the scope of the Free Exercise Clause even when applied to Indians who sought to use the drug as part of a religious ceremony.[264] Justice Scalia, who authored the majority opinion, ruled that the Oregon regulation was a neutral law of general applicability.[265] It is clear, however, that Indiana's prohibition of public nudity is quite different from Oregon's prohibition of peyote use because the latter applies in all circumstances to all people.[266] As discussed above, under the *Baysinger* construction, Indiana's public indecency statute is not of general applicability.[267]

> the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription.

Barnes, 110 S. Ct. at 2467 (quoting Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting)).

261. Perhaps Justice Scalia should be commended for doing expressly what the Plurality did covertly.

262. *See supra* notes 90-153 and accompanying text.

263. 110 S. Ct. 1595 (1990).

264. *Id.* at 1599-1600.

265. *Id.* at 1600.

266. *Id.* at 1597.

267. *See supra* notes 206-220 and accompanying text.

VI. CONCLUSION

This Note has argued that the Court's decision in this case was erroneous because it failed to recognize the content-based nature of Indiana's public indecency law.[268] Furthermore, it contends that the *O'Brien* test should be made more stringent by searching for the existence of any substantial governmental interest in the suppression of speech rather than focusing on one vague governmental interest that is content-neutral. Finally, it criticizes Justice Scalia's opinion as directly contrary to precedent and potentially dangerous to First Amendment freedoms.

In *Young v. American Mini Theaters*,[269] Justice Stevens wrote the following:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see [sexual activities] exhibited in the theaters of our choice.[270]

While this may seem an obvious truism to some, the judiciary was designed by our founding fathers to protect individual rights, acting as a balancing force to the tyranny of the majority.[271] Only by rigorously scrutinizing legislative enactments that regulate expression can the courts fulfill this crucial role. Any other approach is an abdication of monumental proportion by the judiciary.

DANIEL YVES HALL

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268. It should be pointed out, however, that even if the statute had been invalidated, Indiana could still protect its interests by designing a statute pursuant to the Twenty-First Amendment or by encouraging cities to enact zoning regulations concerning establishments which offer nude dancing. *See supra* notes 140-53, 167-74 and accompanying text.

269. *See supra* notes 145-53 and accompanying text.

270. *Young*, 427 U.S. at 70.

271. *See* Kingsley International Pictures Corp v. Regents of N.Y.U., 360 U.S. 684, 689 (1959) (the First Amendment's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax").