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Ban on Nude Dancing Strips Away First Amendment Rights to Protect "Order and Morality" in Barnes v. Glen Theatre, Inc.

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"I disapprove of what you say, but I will defend to the death your right to say it."

—François Marie Arouet Voltaire (1694-1778)

"Freedom of expression is the indispensable condition of all our liberties."

—Justice Benjamin Cardozo (1870-1938)

INTRODUCTION

The First Amendment to the United States Constitution establishes the fundamental protection of an individual's freedom of speech and expression.[1] However, controversy regarding the amount of state control over individual expression has spurred furious debate among judges, legal scholars and the American public.[2] Some feel a strong emotional commitment to preserving the states' interests in controlling an individual's actions for the good of society.[3] Adhering to this view, the Supreme Court has given limited protection to speech which threatens society or possesses limited value.[4] Just as

1. The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

2. One could cite an exhaustive list of books, articles and court opinions. *See, e.g.*, Marianne Benevenia, Note, *First Amendment Does Not Preclude Closure of Adult Bookstore Where Illegal Activity Occurs on Premises—Arcara v. Cloud Books, Inc., 106 S. Ct. 3172 (1986)*, 17 SETON HALL L. REV. 382 (1987) (noting that there have been "recurrent attempts to elucidate the true values served by the First Amendment"); W. G. Roeseler, *Regulating Adult Entertainment Establishments Under Conventional Zoning*, 19 URB. LAW 125, 140 (1987) (stating that "[c]onflicting interests with equal rights for constitutional protection must be reconciled."). *See also* Chuck Philips, *Virgin Records to Strike Back with Free Speech Stickers: The Chief of the Album Label Urges and Industrywide Campaign Against a National 'Witch Hunt'*, L.A. TIMES, July 19, 1990, at F11. Virgin Records displays a red, white and blue label which reads: "The First Amendment gives you the right to choose what you hear, what you say and what you think. CENSORSHIP IS UNAMERICAN. Don't let anyone take away that right. Raise your political voice. Register to vote." *Id.*; R. GEORGE WRIGHT, THE FUTURE OF FREE SPEECH LAW 1-31 (1990).

3. Justice Rehnquist's view that protecting order and morality is essential to our nation's survival follows this reasoning. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

4. *See infra* notes 41-48 and accompanying text.

some fight vehemently to exercise their belief that the government should protect society from offensive expression, others recognize the right to this expression as the core of American freedom and democracy.[5] This fundamental disagreement over the appropriate amount of censorship the government should exercise upon its people is at the heart of the controversy in the United States Supreme Court's decision *Barnes v. Glen Theatre, Inc.*,[6] where the Court ruled on the constitutionality of the right to non-obscene barroom nude dancing.[7]

This Note is divided into six parts. Part II examines the historical background of the First Amendment, including the ways in which the government has regulated nude dancing in the past.[8] Part III discusses both the historical and procedural facts of *Barnes*.[9] Part IV analyzes the plurality opinion by Chief Justice Rehnquist, the concurring opinions by Justices Scalia and Souter, and the dissenting opinion by Justice White.[10] Part V explores the impact of the decision, focusing on the public reaction as well as the decision's legal significance.[11] Finally, Part VI will suggest that *Barnes* may signal the current Court's reluctance to find constitutional protection for similar forms of expressive speech. Also, state courts must take strong action in order to compensate for this threat to First Amendment freedoms.[12]

II. HISTORICAL BACKGROUND

A. The First Amendment Generally

1. Freedom of Speech

The First Amendment to the United States Constitution mandates protection of an individual's freedom of speech.[13] The Supreme

5. The Court expounded this fundamental principle in Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (stating that "[t]he safeguarding of these rights to the ends that men speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government"). For an insightful commentary advocating an "absolutist" view of First Amendment protection, *see* Emily Campbell, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 NOVA L. REV. 159 (1991).

6. 111 S. Ct. 2456 (1991).

7. *Id.* at 2463. One must note that the *Barnes* decision did not involve the issue of obscenity because the State conceded that the dancing involved was "non-obscene." *See also* Miller v. Civil City of South Bend, 904 F.2d 1081, 1082 (7th Cir. 1990), *rev'd*, 111 S. Ct. 2465 (1991) (emphasizing that the court's limited scope of inquiry focused solely upon the same issues addressed by the Seventh Circuit in *Barnes*, not on obscenity or public fora).

8. *See infra* notes 13-247 and accompanying text.

9. *See infra* notes 248-70 and accompanying text.

10. *See infra* notes 271-378 and accompanying text.

11. *See infra* notes 379-431 and accompanying text.

12. *See infra* notes 432-37 and accompanying text.

13. *See supra* note 1 and accompanying text. Additionally, under the doctrine of prior restraint, "the First Amendment forbids the Federal Government to impose any

Court has established that "free speech" not only protects the written or spoken word, but protects "expressive" activity as well.[14] This fundamental right has been one of the most widely construed and extensively safeguarded guarantees in the United States Constitution.[15] Specifically, the freedom of expression has enjoyed a "preferred" and more fervently protected position than other rights within the First Amendment.[16] The First Continental Congress recognized the importance of freedom of expression in "the advancement of truth, science, morality, and arts in general . . . ."[17] In addition, the United States Supreme Court has held that "[t]he door barring federal and state intrusion into [free expression] cannot be left ajar; it must be

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system of prior restraint, with certain limited exceptions, in any area of expression that is within the boundaries of that amendment. By incorporating the First Amendment into the Fourteenth Amendment, the same limitations are applicable to the states." Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955). Therefore, the First Amendment also guarantees certain procedural due process safeguards.

The Supreme Court initially applied the First Amendment guarantee of freedom of expression to the states through the Fourteenth Amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925). For a further discussion of the doctrine of prior restraint, *see* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

14. Therefore, this Note will use the terms "freedom of speech" and "freedom of expression" interchangeably. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (holding that "expression" such as a performance of a musical is protected). *See also infra* notes 22-48 and accompanying text.

15. *See* Thornhill v. State, 310 U.S. 88 (1940), where the Court stated, "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the process of education and discussion is essential to free government." *Id.* at 95.

16. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 88-96 (1949) (both Justice Reed's majority opinion and Justice Frankfurter's concurring opinion discuss the First Amendment's "preferred position"). For a discussion of the nature and strength of the constitutional protection of free speech, *see* R. George Wright, *Does Free Speech Jurisprudence Rest on a Mistake?: Implications of the Commensurability Debate*, 23 LOY. L.A. L. REV. 763 (1990).

The following cases chronologically illustrate the evolution of the "favored position" of the freedom expression: Herndon v. Lowry, 301 U.S. 242, 258 (1937) (holding that the state's power to abridge freedom of speech is the exception, not the rule); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) (stating that mere legislative preferences regarding matters of public convenience may be insufficient to support an alleged free speech infringement); Bridges v. California, 314 U.S. 252, 262 (1941) (ruling that an abridgement of free expression cannot be justified by the mere likelihood of a substantial evil); Thomas v. Collins, 323 U.S. 516, 530 (1945) (holding that only the gravest abuses which threaten paramount interests justify limiting the freedom of expression); Marsh v. Alabama, 326 U.S. 501, 510 (1946) (Frankfurter, J., concurring) (noting that several Jehovah's Witnesses cases refer to the "preferred position" of the First Amendment).

17. 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774) (quoted in Roth v. United States, 354 U.S. 476, 484 (1957)).

kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."[18] Hence, freedom of expression has enabled our society to develop ideas without governmental encroachment.[19] The government must preserve this freedom for society's future growth and progression.[20]

2. Symbolic Speech

The Court deems activities that do not contain traditional speech characteristics, but which assert communicative conduct, "symbolic speech," and generally gives those activities the same degree of protection as traditional speech.[21] Forms of symbolic speech which the Court has protected include: wearing a black armband to protest the Vietnam War;[22] burning the American flag as a means of displaying political disagreement;[23] participating in sit-ins to protest segregation;[24] refusing to recite the Pledge of Allegiance because of religious philosophy;[25] displaying a red flag to show support for communism;[26]

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18. Roth v. United States, 354 U.S. 476, 488 (1957). In his concurrence in *Roth*, Chief Justice Warren cautioned against developing broad standards which "may eventually be applied to the arts and sciences and freedom of communication generally . . . ." *Id.* at 494 (Warren, C.J., concurring).

19. As Justice Brandeis stated in Whitney v. California, 274 U.S. 357, 375 (1927), "[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Id.* (Brandeis, J., concurring).

20. *Id. See also* Schad v. Borough of Mount Ephraims, 452 U.S. 61, 79 (1961) (Blackmun, J., concurring) (stating "The Court must remain attentive to the guarantees of the First Amendment, and in particular to the protection they afford to minorities against the 'standardization of ideas' . . . by . . . dominant political or community groups.' " *Id.*) (quoting Terminiello v. Chicago, 337 U.S. 1, 4-5, *reh'g denied*, 337 U.S. 934 (1949)).

21. *Schad*, 452 U.S. 61 (stating that live entertainment such as dramatic works or musicals is within First Amendment protection); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505 (1969) (stating that where the purpose of particular clothing is to express certain ideas or views, the act is "symbolic speech" inside First Amendment protection).

22. *Tinker*, 393 U.S. at 505-06.

23. Texas v. Johnson, 491 U.S. 397, 420 (1989); Street v. New York, 394 U.S. 576 (1969) (holding that the government could not prohibit words spoken after defendant set fire to an American flag, "We don't need no damn flag," under the First Amendment).

24. Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring) (stating that blacks sitting at lunch counter reserved only for whites was protected symbolic speech); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (holding that actions of five African-Americans who refused to leave reading room of public library were protected forms of speech under the First Amendment).

25. Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1943) (ruling that employer violated teacher's First Amendment rights when it fired her for standing quietly at attention during the pledge of allegiance).

26. Stromberg v. California, 283 U.S. 359 (1931) (holding that defendant's display of red flag as symbol of opposition to organized government is constitutionally permissible).

wearing a jacket bearing an obscene message[27] inside a courtroom to make a political statement;[28] picketing for causes;[29] and failing to rise in a courtroom upon a United States Marshall's command.[30] When a type of expression is challenged, the court begins its analysis with the presumption that the controversial speech in question is protected.[31] Thus, the state carries the burden of persuasion.[32]

The Court has traditionally afforded protection to the communication of beliefs with only the slightest redeeming societal significance, such as controversial, unorthodox, and even hateful ideas.[33] In fact, the First Amendment has been used to protect expression advocating a variety of philosophies, including adultery,[34] communism,[35] bigotry,[36] Naziism,[37] sodomy,[38] totalitarianism,[39] and transvestism.[40]

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27. Cohen v. California, 403 U.S. 15 (1971) (holding that a jacket bearing the words "Fuck the Draft" was protected symbolic speech).

28. The *Cohen* Court emphasized:

> That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'

Id. at 25 (quoting Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)).

29. United States v. Grace, 461 U.S. 171, 176 (1983) (holding a statute prohibiting the display of any flag, banner, or device communicating support of any party, cause, or organization in front of a courthouse violative of the First Amendment).

30. United States v. Snider, 502 F.2d 645, 660 (4th Cir. 1974) (failure of defendant to rise upon command of marshall in U.S. courtroom was not "behavior," but rather symbolic speech).

31. *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583 n.6 (1983). *See also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48 (1987) [hereinafter Stone, *Content-Neutral Restrictions*].

32. Boos v. Barry, 485 U.S. 312, 317 (1988) (ruling that state must establish that compelling state interest justified regulation).

33. Roth v. United States, 354 U.S. 476, 484 (1957).

34. *See, e.g.*, Doe v. Duling, 603 F. Supp. 960 (E.D. Va. 1985), *vacated*, 782 F.2d 1202 (4th Cir. 1986) (holding Virginia's fornication statute unconstitutional).

35. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931) (displaying red flag to endorse communist party).

36. National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1016 (4th Cir. 1972) (holding that state could not forbid use of a public school auditorium for a white supremacists' meeting because the action would infringe upon right to free speech).

37. *See* ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISK OF FREEDOM (1979) (Neier was executive director of the ACLU when the organization attempted to obtain a march permit for the Nazi party).

38. *See, e.g.*, Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986). Although the court upheld statute restricting sodomy, the parties were still able to freely express their opinion in favor of sodomy. *See generally*, Arthur E.

However, differing levels of protection exist for various types of speech.[41] The First Amendment affords some types of speech little or no protection because the content of the speech is of low value.[42] Obscenity, for example, is not within the realm of constitutional protection because the Court considers it to lack any social importance.[43] Other types of speech which receive lower levels of protection include commercial speech,[44] child pornography,[45] harassing phone calls,[46] "fighting words,"[47] and defamation.[48]

Brooks, Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645 (1985).

39. *See generally* Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 237-42 (1972) (arguing that the Court should give advocacy of totalitarianism First Amendment protection).

40. *See, e.g.*, City of Chicago v. Wilson, 389 N.E.2d 522, 524 (Ill. 1978) (holding unconstitutional a city ordinance forbidding a person from wearing clothing of the opposite sex).

41. Stone, *Content Regulation*, 25 WM. & MARY L. REV. 189, 194 (1983) [hereinafter Stone, *Content Regulation*]. "[T]he Court begins with the presumption that the First Amendment protects all communication and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the [F]irst [A]mendment." *Id.*

42. *Id.* (noting that some speech possesses such limited value that it is only entitled to marginal protection).

43. Roth v. United States, 354 U.S. 476, 484-85 (1957); Miller v. California, 413 U.S. 15, 24 (1973) (holding that obscenity is unprotected speech). The *Miller* Court provided the following three-part test to determine what constitutes obscene material:

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

Id. at 24 (citations omitted).

The *Miller* test continues to be the standard for determining whether material is obscene and therefore undeserving of First Amendment protection. *See* Ronald Stern, Note, *Sex, Lies, and Prior Restraints: "Sexually Oriented Business"—The New Obscenity*, 68 U. DET. L. REV. 253 (1991) (citing Virginia M. Giokaris, Comment, *Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments*, 55 UMKC L. REV. 263, 266 n.30 (1987)).

44. *See* Virginia State Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-65 (1976) (holding that the Court gives commercial speech only limited First Amendment protection).

45. *See* New York v. Ferber, 458 U.S. 747, 774 (1982) (holding that child pornography distributors are not afforded First Amendment protection); *see also* Osborne v. Ohio, 495 U.S. 103, 108 (finding that state may constitutionally proscribe the viewing of child pornography).

46. *See* Walker v. Dillard, 523 F.2d 3, 4 (4th Cir. 1975), *cert. denied*, 423 U.S. 906 (1975) ("state has a legitimate interest in prohibiting obscene, threatening, and harassing phone calls, none of which are . . . protected by the First Amendment.").

47. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (holding that the state may limit insulting words apt to prompt retaliation); Cohen v. California, 403 U.S. 15 (1971) (defining offensive speech is that which would provoke others to violent acts).

48. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public officials).

3. First Amendment Standards

The government has generally attempted to restrict speech in one of two manners.[49] First, the government has challenged information or ideas directly based on the viewpoint or message which the ideas relay. Here, the state may be concerned about the listener's response to the speaker's message.[50] Second, the government has restricted information indirectly by pursuing other state interests. The government has attempted this restriction by either (1) limiting an activity through which one can convey information or ideas,[51] or (2) by enforcing rules which disrupt the flow of information.[52]

As a result of numerous First Amendment challenges, the Supreme Court has developed a "content distinction" which determines the appropriate level of scrutiny for laws regulating speech.[53] If the government action is aimed directly at the speech or the expression's communicative impact, the Court deems it "content-based."[54] If the government regulation focuses only on the noncommunicative aspect of the activity, the Court classifies it as "content-neutral."[55]

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49. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d ed. 1988).

50. *Id.*

51. *Id.*

52. *Id.* These governmental challenges have resulted in a plethora of First Amendment lawsuits. *Id.*

53. *See generally* MELVIN B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.04 (1984); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978) [hereinafter Stone, *Subject-Matter Restrictions*]; Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); TRIBE, *supra* note 49, at § 12-2; Stone, *Content-Neutral Restrictions*, *supra* note 31; Stone, *Content Regulations*, *supra* note 41.

However, the Court has not always drawn a distinction between content-based and content-neutral speech regulation. *See* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 121-31 (1981).

54. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 457, 459 (1980) (invalidating an ordinance which disallowed " 'picket[ing] before or about the residence or dwelling of any person' " but made an exception for " 'peaceful picketing of a place of employment involved in labor dispute' "). In fact, very few content-based restrictions have survived the Court's scrutiny. Professor Stone has pointed out that "outside the realm of low-value speech, the Court has invalidated almost every content-based restriction that it has considered in the past thirty years." Stone, *Content-Neutral Restrictions*, *supra* note 30, at 48.

55. TRIBE, *supra* note 49, at § 12-2. *See also* Boos v. Barry, 485 U.S. 312, 315 (1988) (finding that content-neutral speech restrictions are those which are valid without reference to the content of the speech at issue); Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986) (restating that content-neutral regulations are justified without examining the content of regulated speech); Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (stating that "restrictions [are proper if] . . . they are justified without reference to the content of the regulated speech").

a. "Content-based" restrictions

As their name implies, content-based restrictions focus upon the subject matter of speech.[56] Because the government is restricting speech based on what the speaker is communicating, the Court applies a strict scrutiny analysis.[57] The Court refers to this analysis as the "compelling state interest test."[58] Thus, the government must possess a "compelling" reason when it restricts speech based on its content, or the Court will deem the restriction unconstitutional.

For example, in *Police Department of Chicago v. Mosley*,[59] the Court considered the constitutionality of a city ordinance which prohibited picketing on a public walkway.[60] The law sought to eliminate picketing occurring within one hundred fifty feet of a public school during certain hours.[61] However, the city ordinance specifically exempted peaceful labor picketing from the prohibition.[62] Although supporters of the ordinance argued that it was a valid time, place, and manner restriction,[63] the Court recognized that because it permitted labor-related speech and prohibited other types of speech, the regulation was content-based.[64] Thus, because the government could not show a compelling state interest to support a distinction between labor picketing and other types of speech, the ordinance could not stand.[65]

Similarly, in *Carey v. Brown*,[66] the Court invalidated an Illinois statute that prohibited picketing of residences, but exempted peaceful picketing of a residence that was a place of employment involved in a labor dispute.[67] The majority relied on *Mosley* and concluded that because the residential picketing statute gave preferential treatment to the expression of views regarding labor, it was also content-

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56. *See* Stone, *Content-Neutral Restrictions*, *supra* note 31, at 48.

57. LAURENCE TRIBE, *supra* note 49, § 12-8 at 833-34.

58. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

59. 408 U.S. 92 (1972).

60. *Id.* at 93-94.

61. *Id.*

62. *Id.* at 93.

63. For a discussion of time, place, and manner restrictions, *see infra* notes 73-94, 135-42 and accompanying text.

64. *Mosley*, 408 U.S. at 97-98.

65. *Id.* at 100. The *Mosley* Court stated:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor/management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

Id. at 95-96.

66. 447 U.S. 455 (1980).

67. *Id.* at 460.

based.[68] Therefore, the Court struck down the statute as impermissibly infringing upon free speech.

The Court often refers to the compelling state interest test as the strict scrutiny test.[69] Under this inquiry, the Court suspends a presumption of constitutionality.[70] Accordingly, the state bears the burden of proving that the regulation serves a compelling state interest, and that it is the least restrictive means available to promote the state's interest.[71] This test reflects the Court's fear of governmental regulation that suppresses some forms of speech without restricting others, which could ultimately distort the content of public debate and destroy society's thought processes.[72] Hence, content-based restrictions presumptively violate the First Amendment.[73]

b. "Content-neutral" time, place, and manner restrictions

While content-based restrictions generally invoke strict scrutiny analysis, the Court routinely applies lower levels of judicial protection to content-neutral activities.[74] The Court's rationale for permitting a lower standard of protection is based upon the notion that the government intends to restrict the *ways* in which ideas may be ex-

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68. *Id.* at 459-60. *See also* Neimotko v. Maryland, 340 U.S. 268, 272-73 (1951) (holding that the government could not deny Jehovah's Witnesses a permit to use a city park for Bible talks when the government had allowed other religious and political groups to use the park for similar purposes).

69. *See* Stone, *Subject Matter Restrictions*, *supra* note 53. Professor Stone notes that Courts treat content-based restrictions with greater deference. *See id.* (citing Young v. American Mini Theatres, 427 U.S. 50 (1976)). *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U. S. 37, 45 (1983) (finding that the state bears the burden of establishing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); *accord* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1985).

70. *See, e.g.*, *Perry*, 460 U.S. at 45 (noting that state must first establish its interest in the regulation before a finding of constitutionality).

71. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978), *reh'g denied*, 438 U.S. 907 (1978).

72. Geoffrey R. Stone, Statement before the United States Senate Committee on the Judicial Hearings on the United States Supreme Court Decision in *Texas v. Johnson*, at 4 (Aug. 1, 1989).

73. *See, e.g.*, *Carey*, 447 U.S. at 463 n.7 ("the First and Fourteenth Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression").

74. *See* United States v. Albertini, 472 U.S. 675, 688-89 (1985) (holding that incidental regulations on speech are permissible); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 517 n.23 (1981) (opinion of White, J.) ("the less strict standard of review may be applied to time, place, and manner restrictions . . .").

pressed, rather than the speaker's ideas themselves.[75] Therefore, the government restrictions are less likely to damage the thought processes within the community or affect public discussion.[76]

When analyzing content-neutral speech, the Court has generally used two judicially created standards: the time, place, and manner test and the incidental regulation test.[77] However, at times the Court has implied that it may be difficult to distinguish between the two standards.[78] Furthermore, lower courts have gone so far as to interchange the two standards.[79] Although these judicial guidelines allow the state greater latitude regarding regulation of content-neutral expression, the restriction must usually overcome three hurdles.[80] First, the regulation must be content-neutral.[81] Second, the regulation must be narrowly tailored to " 'serve a significant governmental interest.' "[82] Third, the regulation must " 'leave open ample alternative channels for communication of the information.' "[83]

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75. *See Albertini*, 472 U.S. at 688-89 (emphasis added); TRIBE, *supra* note 49, § 12-2 at 790.

76. *But see* David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 495-500 (1988). Professor Day noted that "the modern TPM [time, place, manner] doctrine contemplates . . . that judicial review of such governmental conduct must guard against the prospect that the purportedly neutral regulations are merely pretexts for content restrictions." *Id.* at 498. *See generally* Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1185 (1983) (censorial versus noncensorial regulations); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions of Communication*, 26 WM. & MARY L. REV. 779, 785 (1985) (intended versus unintended regulations); Stone, *Content-Neutral Restrictions*, *supra* note 31, at 99 (communicative versus noncommunicative regulations).

77. *See, e.g.*, City of Renton v. Playtime Theatres, 475 U.S. 41, 50 (1986) (applying the time, place, and manner restriction test to zoning ordinances); Posadas De Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 344 n.9 (1986) (using the incidental regulation test).

78. *See Albertini*, 472 U.S. at 687-90; Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

79. *See, e.g.*, Playtime Theatres, Inc. v. City of Renton, 748 F.2d 527, 536-38 (9th Cir. 1984), *rev'd* 475 U.S. 41 (1986); Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94, 97 (6th Cir. 1981).

80. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 516 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 452 U.S. 748, 771 (1976)).

81. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (quoting Virginia Pharmacy Bd., 452 U.S. at 771) (concluding that time, place, and manner restrictions cannot be based upon the content of speech).

82. *Id.*

83. *Id.* However, the Court has not limited itself to applying only these two tests. *See* Stone, *Content-Neutral Restrictions*, *supra* note 31, at 48-49. Professor Stone set forth the following list of seven distinct standards of review:

> 1. Some content-neutral restrictions do not even "implicate" first amendment concerns [quoting Acara v. Cloud Books, 478 U.S. 697, 707 (1986)].
>
> 2. Some content-neutral restrictions are constitutional if they are "reasonable" [quoting U.S. Postal Serv. v. Greensburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)].
>
> 3. Some content-neutral restrictions are constitutional if "they are designed to serve a substantial governmental interest and do not unreasonably limit al-

For instance, the Court applied the time, place, and manner analysis in *Members of City Council of Los Angeles v. Taxpayers for Vincent*,[84] where it upheld an ordinance prohibiting the posting of signs on public property.[85] The Court found that the law was not aimed at suppressing a particular message.[86] Rather, the ordinance regulated the *manner* in which a message could be communicated.[87] Therefore, the Court concluded that the ordinance was a valid time, place, and manner restriction.[88]

When analyzing supposedly "content-neutral" regulations, the Court must determine whether otherwise valid time, place, and manner restrictions are actually an effort to suppress speech on the basis of its content.[89] For example, in *Tinker v. Des Moines Independent Community School District*,[90] a lower court upheld the validity of a school regulation which prohibited the wearing of armbands, finding that the policy was a valid "place" restriction.[91] However, the Supreme Court overturned the lower court's decision on the basis that the regulation was merely a pretext for content-bases restric-

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ternative avenues of communication" [quoting City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986) (the time, place, and manner test)].

4. Some content-neutral restrictions are constitutional if they are "within the constitutional power of the government"; they further "an important or substantial governmental interest"; the government interest is "unrelated to the suppression of free expression," and the restriction is "no greater than is essential to the furtherance of that interest" [quoting United States v. O'Brien, 391 U.S. 367, 377 (1968) (the balancing test)].

5. Some content-neutral restrictions are constitutional depending upon the Court's resolution of "the delicate and difficult task of" weighing "the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation" [quoting Schneider v. State, 308 U.S. 147, 161 (1939)].

6. Some content-neutral restrictions are constitutional if they serve "sufficiently strong, subordinating" interests by means of "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms" [quoting Schaumburg v. Citizens for a Better Env't., 444 U.S. 620, 636-37 (1980)].

7. Some content-neutral restrictions are constitutional if they are "necessitated by a compelling governmental interest" and are "narrowly tailored to serve that interest" [quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)].

Stone, *Content Neutral Restrictions*, *supra* note 31, at 48-50 and nn.7-13.

84. 466 U.S. 789 (1984).

85. *Id.* at 815.

86. *Id.* at 804.

87. *Id.* at 803.

88. *Id.* at 817.

89. *See Township of Willingboro*, 431 U.S. at 94.

90. 393 U.S. 503 (1969).

91. *Id.*

tions on student speech.[92] Of utmost importance to the Court in *Tinker* was the fact that the students who wore armbands in violation of the school district's policy did so to protest American involvement in the Vietnam War. Furthermore, the district had previously permitted students to wear political insignia.[93] Therefore, the Court found that regulation was not consistent with an interest in avoiding aggressive or disruptive actions, but rather school officials "sought to punish petitioners for a silent, passive, expressive opinion" related to the conflict in Vietnam.[94] Hence, the Court held the regulation invalid because it acted as an unconstitutional restraint upon the students' right to engage in personal intercommunication regarding matters of political importance.[95]

B. Nude Dancing as Protected Expression

The United States Supreme Court has recognized that the First Amendment protects certain forms of entertainment.[96] However, until the early 1970s, the Court refused to acknowledge even the slightest First Amendment protection for nude dancing.[97] As a result, the Court permitted the states to prohibit this type of entertainment entirely.[98] Thus, it was not until 1981, in *Schad v. Borough of*

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92. *Id.* The *Tinker* Court refused to apply the *O'Brien* analysis and instead based its decision on the time, place, manner distinction. *Id.* at 513-14. Consequently, the *Tinker* decision contradicts the general theory that all symbolic speech cases should be resolved under the incidental regulation test. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 72 (1981).

93. *Tinker*, 393 U.S. at 504.

94. *Id.*

95. *Id.* at 510-11. *See also* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986) (characterizing *Tinker* as a narrower decision based upon viewpoint discrimination).

96. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection").

97. *See* Doran v. Salem Inn, 422 U.S. 922, 932 (1975) (stating that nude barroom dancing may "involve only the barest minimum of protected expression"); California v. LaRue, 409 U.S. 109, 118 (1972) (stating that nude barroom dancing may be entitled to First and Fourteenth Amendment protection); Jones v. City of Birmingham, 224 So. 2d 922 (Ala. 1969), *cert. denied*, 396 U.S. 1011 (1970); Hoffman v. Carson, 250 So. 2d 891 (Fla. 1971), *appeal dismissed*, 404 U.S. 981 (1971); Adams Newark Theatre Co. v. City of Newark, 126 A.2d 340 (N.J. 1956), *aff'd*, 354 U.S. 931 (1957); City of Portland v. Derrington, 451 P.2d 111 (Or. 1969), *cert. denied*, 396 U.S. 901 (1969); *see generally* Lisa Malmar, Comment, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1276 (1991).

98. *See* Jones v. City of Birmingham, 224 So. 2d 922 (Ala. 1969), *cert. denied*, 396 U.S. 1011 (1970); Hoffman v. Carson, 250 So. 2d 891 (Ala. 1971), *appeal dismissed*, 404 U.S. 981 (Fla. 1971) (while holding that barroom nude dancing lacks First Amendment protection, the court stated that its decision was not intended to "suggest that nudity or exposure in all circumstances would be violative of this statute"); Adams Newark Theatre Co. v. City of Newark, 126 A.2d 340 (N.J. 1956), *aff'd*, 354 U.S. 931 (1957); City of Portland v. Derrington, 451 P.2d 111 (Or. 1969), *cert. denied*, 396 U.S. 901 (1969)

Mount Ephraim,[99] that the Court first appeared willing to reconsider its rigid stance on the nude dancing issue.[100]

In *Schad*, the appellants were operators of an adult bookstore, which also featured a coin-operated machine through which customers could watch live nude performers dance behind a glass panel.[101] The trial court found the bookstore owners guilty of violating a zoning ordinance which did not permit this type of activity in the area.[102] The appeals court affirmed.[103] However, the Supreme Court reversed the lower courts' decisions on the ground that the ordinance was not a justifiable time, place, and manner restriction.[104] Moreover, it is important to note that the *Schad* Court stated in dictum that nude dancing does not wholeheartedly lack First Amendment guarantees:[105]

(holding that ordinance forbidding females from exposing their breasts did not offend free speech).

99. 452 U.S. 61 (1981).

100. *Id.* Note that in 1976 the Court indirectly faced the nude dancing issue in California v. LaRue. *See also infra* notes 107-121 and accompanying text.

101. *Schad*, 452 U.S. at 62.

102. *Id.* at 64.

The section of the code at issue provided that "[a]ll uses not expressly permitted in this chapter are prohibited." *Id.* (quoting MOUNT EPHRAIM CODE § 99-4 (1979)). The following were permitted uses under the zoning ordinance:

> (1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores, and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of stores. (2) Motels.

MOUNT EPHRAIM CODE § 99-15B(1)(2) (1979).

103. *Schad*, 452 U.S. at 64-65.

104. *Id.* at 76-77.

105. *Id.* at 66. However, the quoted language is somewhat ambiguous because it fails to clearly state that sexually explicit but non-obscene expressive behavior deserves *total* First Amendment protection. *See id.* at 80 (Stevens, J., concurring) (footnotes omitted) ("[A]nd even though the foliage of the First Amendment may cast provocative shadows over some forms of nude dancing, its roots were germinated by more serious concerns . . .").

Nonetheless, numerous federal appellate courts have interpreted *Schad* as placing nude dancing within the protections of the First Amendment. *See* International Food & Beverage System v. Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986) (citing *Schad* to support the premise that "[w]e may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park before casual viewers"); Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1058 (9th Cir. 1986) (citing *Schad* and *Doran* as support for its decision

> Entertainment, as well as political and ideological speech is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee . . . . Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment . . . . [N]ude dancing is not without its First Amendment protections from governmental regulation.[106]

C. *Regulating Nude Dancing*

Because the level of protection afforded to sensual expression is lower than that of political or philosophical expression,[107] courts are permitted broader discretion to regulate activities such as nude dancing.[108] This section discusses ways in which the government has ex-

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that topless dancing is "expression, subject to constitutional protection within the free speech and press guarantees of the [F]irst and [F]ourteenth Amendments"); BSA, Inc. v. King County, 804 F.2d 1104, 1107 (9th Cir. 1986) (stating that *Schad* controverts any notion that barroom dancing lacks first amendment protection even though it may be considered "non-expressive" or lacking "any communicative content"); Kreuger v. City of Pensacola, 759 F.2d 851, 854 (11th Cir. 1985) ("We are bound to treat topless dancing as a form of expression which is protected at least to some extent by the [F]irst [A]mendment."); Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) (noting that court could relate purpose of zoning ordinance affecting adult bookstores and theaters to suppression of free speech).

Additionally, many federal district courts, relying on *Schad*, have given First Amendment protection to nude dancing. *See, e.g.*, Doe v. City of Minneapolis, 693 F. Supp. 774, 779 n.12 (D. Minn. 1988) (stating that "[l]ive nude dance entertainment is also protected expression under the [F]irst [A]mendment"); Walker v. City of Kansas City, Mo., 691 F. Supp. 1243, 1249 (W.D. Mo. 1988) (citing *Schad* as support for the proposition that "[s]ince an entertainment program may not be 'prohibited solely because it displays the human nude figure,' nude dancing is protected expression under the [F]irst [A]mendment").

Further, numerous legal scholars agree with this reading of *Schad*. *See, e.g.*, Susan J. Rice, *A Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 NOTRE DAME L. REV. 561 (1988); Virginia M. Giokaris, Comment, *Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments*, 55 UMKC L. REV. 263 (1987); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985); Alfred C. Yen, *Judicial Review of the Zoning of Adult Entertainment: A Search for the Purposeful Suppression of Protected Speech*, 12 PEPP. L. REV. 651 (1985); *Freedom of Speech—Regulation of Live Entertainment*, 95 HARV. L. REV. 211, 231 (1981); Robert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079 (1986).

106. *Schad*, 452 U.S. at 65-66 (quoting Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 211-13 (1975)).

107. *See* Young v. American Mini Theatres, 427 U.S. 50, 70-71 (1976) (where Justice Stevens stated, "Even though the First Amendment protects communication in . . . [adult films] . . . from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures").

108. *See id.* at 70 (commenting that societal interests in the free discussion of philosophy and politics are greater than societal interests in the protection of sensual expression from governmental invasion).

ercised its regulatory powers regarding nude dancing.

1. The Twenty-First Amendment[109]

Courts have generally used the Twenty-first Amendment to regulate nude dancing in establishments that serve alcohol.[110] Originally, the Twenty-first Amendment permitted the states to extend their general police power to regulate alcohol sale and consumption.[111] Also, the Court has recognized the Twenty-first Amendment as granting additional power to states to protect the general health and welfare of citizens when situations involve the sale and use of alcohol.[112]

For example, in *California v. LaRue*,[113] liquor license holders and the dancers who performed on their premises challenged the constitutionality of a statewide law regulating conduct at establishments serving alcohol.[114] The Court relied on the Twenty-first Amendment

109. The Twenty-first Amendment states in pertinent part:
Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
Section 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 laws thereof is hereby prohibited.
U.S. CONST. amend. XXI.

110. California v. LaRue, 409 U.S. 109, 114 (1972) (asserting that states may use Twenty-first Amendment power to regulate nude entertainment).

111. *Id.* at 114 (citing Hostetter v. Idlewild Bon Voyage Liquor Corp., 337 U.S. 324, 330 (1964) (proposing that the Twenty-first Amendment permits the states to exceed its police power when regulating alcohol sale and use; and relying upon Board of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936) for the rule that the Fourteenth Amendment cannot prohibit a classification acknowledged by the Twenty-first Amendment).

112. *Id. See* New York State Liquor Authority v. Bellanca, 452 U.S. 714, 718 (1981) (per curiam) (favoring state's power under the Twenty-first Amendment over any artistic merit found in topless dancing). *See also* Seagrams & Sons v. Hostetter, 384 U.S. 35, 41 (1966) (stating that "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment . . . .").

113. 409 U.S. 109 (1972).

114. The regulations prohibited the following:
(a) The performance of acts, or simulated acts, of 'sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law';
(b) The actual or simulated 'touching, caressing or fondling on the breast, buttocks, anus or genitals';
(c) The actual or simulated 'displaying of the pubic hair, anus, vulva or genitals';
(d) The permitting by a licensee of 'any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus'; and, by a companion section,
(e) The displaying of films or pictures depicting acts of live performance of which was prohibited by the regulations quoted above.

in determining the regulation's constitutionality.[115] It is important to recognize, however, that the Court reiterated that the regulation applies only to establishments holding liquor licenses.[116]

The *LaRue* decision created several ambiguities regarding the states' power under the Twenty-first Amendment.[117] First, the Court did not address the issue of whether a state must justify prohibiting nude dancing in bars.[118] Second, the law at issue in *LaRue* prohibited only totally nude or bottomless dancing. Thus, states received no guidance regarding the treatment of topless dancing.[119] However, the decision in *New York State Liquor Authority v. Bellanca*[120] later resolved the uncertainties left in the wake of *LaRue*. In this case, the Court held that states have complete authority under the Twenty-first Amendment to ban nude or semi-nude dancing in any establishment that sells liquor.[121]

In *Bellanca*, owners of establishments which featured topless dancing challenged a New York law which prohibited such activity where the establishments served liquor.[122] Finding that the law did not act as an unconstitutional restraint on protected expression, the Court reasoned that the states' authority to completely ban liquor sales encompassed the lesser power to prohibit topless dancing where patrons consumed liquor.[123] Significantly, the Court ruled that a state which imposed such a regulation need not justify its decision.[124]

Id. at 111-12.

115. *Id.* at 118-19.

116. *Id.* at 118. The Court stated: "While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board." *Id.*

117. For a more detailed discussion of *LaRue*, *see* Note, *California v. LaRue: The Supreme Court's View of Wine, Women, and the First Amendment*, 68 NW. U.L. REV. 130 (1973).

118. *See* Richter v. Dept. of Alcoholic Beverage Control, 559 F.2d 1168, 1172 (9th Cir. 1977) *cert. denied*, 434 U.S. 1046 (1978) (although there was no showing of social unrest at a particular establishment, general notion of disturbances at nude bars within the state was sufficient); Felix v. Young, 536 F.2d 1126, 1132 (6th Cir. 1976) (declaring that a rational basis test is appropriate in the wake of *LaRue*); .

119. *LaRue*, 409 U.S. at 111-12.

120. 452 U.S. 714 (1981) (per curiam).

121. *Id.* at 717-18.

122. *Id.* at 715. The New York statute stated:

> No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed premises in such a manner or attire as to expose to view any portion of the pubic area, anus, vulva or genitals, or any simulation thereof, no shall suffer or permit any female to appear on licensed premises in such a manner or attire as to expose to view any portion of the breast below the top of the areola, or any simulation thereof.

N.Y. ALCO. BEV. CONT. LAW § 6-a (MCKINNEY 1980-81).

123. *Bellanca*, 452 U.S. at 718.

124. *Id.* The Court declared that: "[W]hatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment." *Id.*

2. General Police Power

The power to regulate nude dancing does not belong exclusively to the states. Rather, municipalities may also regulate live nude entertainment using their general police powers,[125] regardless of whether the states have expressly delegated their powers under the Twenty-first Amendment.[126] Under the doctrine of police power, a city need only demonstrate a "rational government interest" in order to justify a regulation on nude entertainment.[127] For example, the Eleventh Circuit has held that increased criminal activity resulting from the combination of nude dancing and alcohol consumption is a "rational government interest."[128]

In *Grand Falcon Tavern, Inc. v. Wicker*,[129] the municipality of Cocoa Beach, Florida passed an ordinance which banned nude dancing in establishments holding liquor licenses.[130] Finding that the state had not expressly delegated its powers under the Twenty-first Amendment, the Eleventh Circuit demanded that the municipality justify the ordinance.[131] Using the broad concept of police power, the city argued that there was a correlation between topless dancing, liquor consumption, and criminal activity.[132] In fact, the parties representing Cocoa Beach referred to actual disturbances near local nude bars, which were similar to those the Court used to support its decision in *LaRue*.[133] Thus, the Eleventh Circuit held that the ordinance

125. *See* Grand Falcon Tavern, Inc. v. Wicker, 670 F.2d 943, 949-50 (11th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982) (asserting that state may use its police power to regulate nude entertainment).

126. When state and local governments regulate land use, they are said to be exercising their "police powers." Some courts have defined police powers as "the power of government to regulate human conduct to protect or promote 'public health, safety or the general welfare.'" ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 9.2 at 517 (1984) (quoting Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926) *See also* Grand Falcon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982) (finding that state may use police power to regulate nude entertainment). For further discussion of police power, *see* ERNST FREUND, THE POLICE POWER (1904).

127. *See* Ronald M. Stern, *Sex, Lies and Prior Restraints: "Sexually Oriented Business"—The New Obscenity*, 68 U. DET. L. REV. 253, 253 (1991) (stating that "[a] municipality must show a rational government interest in order to exercise its police power").

128. *See, e.g.*, Grand Falcon Tavern, Inc. v. Wicker, 670 F.2d 943, 944, 950 (11th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 950.

133. *Id.* These commotions included prostitution, indecent exposure and many assaults. *Id.*

was constitutional regardless of the minimal burden imposed upon free expression.[134]

3. Time, Place, and Manner Restrictions as Applied to Nude Dancing

While some municipalities justify the regulation of nude dancing by means of the police power or the power of the Twenty-first Amendment, other local governments have attempted to regulate nude dancing through time, place, and manner restrictions.[135] As mentioned above,[136] the United States Supreme Court has determined that for a time, place, and manner restriction to be valid, it must satisfy a three-prong test.[137] First, the regulation must be content-neutral.[138] Second, the regulation must be narrowly tailored and justified by a significant governmental interest.[139] Third, the regulation must preserve ample alternative channels for a party to express the interest.[140]

States have implemented time, place, and manner restrictions on nude dancing in two ways. First, a state may enforce a minimum distance requirement between the dancer and the customers.[141] Second, a state may establish zoning laws which regulate the areas in which

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134. *Id. But see* Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985), where a different Eleventh Circuit panel refused to uphold a city ordinance banning topless dancing on grounds that the city failed to establish the ordinance was enacted to attempt to reduce criminal activity within the area. *Id.* at 855.

135. *See, e.g.*, Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986); International Food & Beverage Sys. v. City of Fort Lauderdale, 794 F.2d 1520, 1522-23 (11th Cir. 1986).

136. *See supra* notes 74-95 and accompanying text.

137. The Court announced the first three prongs in Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 647-48 (1981) (citing and quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748, 771 (1976)). In subsequent decisions, the Court has promulgated a fourth prong—an explicit means test. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (stating that "there are ample alternative modes of communication" when the "same advantages [may] be obtained through other means"). However, one could interpret this as the "alternative channels of communication" prong. *See generally* Glen R. Anstine II, Note, *Time, Place, and Manner Regulations of Expressive Activities in the Public Forum*, 61 NEB. L. REV. 167, 181-85 (1982) (discussing *Heffron* prongs).

138. *Heffron*, 452 U.S. at 648 (finding that time, place, and manner restrictions cannot be based upon the expression's subject matter) (citing and quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980)).

139. *Id.* at 649; *see also* Graynerd v. City of Rockford, 408 U.S. 104, 115 (1972) (holding that reasonable time, place, and manner restrictions are allowable to satisfy a significant government interest); *accord*, United States v. Grace, 461 U.S. 171, 181-83 (1983) (ruling statute unconstitutional because it failed to satisfy a significant government interest).

140. *Heffron*, 452 U.S. at 654; *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that regulation must "leave open ample alternative channels for communication of the information").

141. *See, e.g.*, Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1061 (9th Cir. 1986).

nude dancing establishments may be located.[142]

a. Minimum distance requirements

Primarily, distance requirements shield dancers from being within the reach of audience members by restricting performers to elevated platforms.[143] The Ninth Circuit dealt with two such distance requirements in *Kev, Inc. v. Kitsap County*[144] and *BSA, Inc. v. King County*.[145] In *Kev*, a Kitsap County ordinance prohibited physical contact between dancers and customers.[146] While each dancer was performing, the ordinance required her to remain on a platform elevated at least two feet above floor level and located at least ten feet from the patrons.[147] Furthermore, the ordinance prohibited the customers from tipping the dancers.[148] The rationale behind the Kitsap County ordinance was to prevent dancers and patrons from negotiating for sexual encounters and narcotics.[149]

In *BSA*, a King County ordinance mandated that dancers perform all nude dancing on a platform eighteen inches high and six feet away from the customers.[150] The court stated that King County had a substantial interest in deterring public sexual touching and sexual criminal infractions.[151] In addition, the court found no evidence that the legislature enacted the ordinance specifically to suppress protected speech.[152] Therefore, because the state had a significant government interest in preventing sexual contact in public and because there was no evidence of an unconstitutional purpose behind the ordinance, the Ninth Circuit upheld both ordinances as valid time,

142. *See, e.g., International Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1522-23 (11th Cir. 1986).

143. *See, e.g., Kev, Inc.*, 793 F.2d at 1061.

144. 793 F.2d 1053 (9th Cir. 1986).

145. 804 F.2d 1104 (9th Cir. 1986).

146. *Kev, Inc.*, 793 F.2d at 1061. The ordinance stated in pertinent part that "[n]o dancer shall fondle or caress any patron and no patron shall fondle or caress any dancer." *Id.* (citing KITSAP COUNTY ORD. NO. 92, § 9k).

147. *Id.* The pertinent portion of the ordinance stated: "All dancing shall occur on a platform intended for that purpose which is raised at least two feet (2') from the level of the floor" and "[n]o dancing shall occur closer than ten feet (10') to any patron." *Id.* (citing KITSAP COUNTY ORD. NO. 92, §§ 9i, 9j).

148. *Id.* The relevant portions of the ordinance stated: "No patron shall directly pay or give any gratuity to any dancer [and no] dancer shall solicit any pay or gratuity from any patron." *Id.* (citing KITSAP COUNTY ORD. NO. 92, §§ 9l, 9m).

149. *Id.*

150. BSA Inc. v. King County, 804 F.2d 1104, 1110-11 (9th Cir. 1986) (citing KING COUNTY ORD. NO. 7216, § 8(A)(6)).

151. *Id.* at 1111.

152. *Id.* at 1112.

place, and manner restrictions.[153]

In both *Kev* and *BSA*, the Ninth Circuit failed to discuss the requirement that time, place, and manner restrictions be content-neutral. Yet, the United States Supreme Court has continuously upheld regulations focused on adult entertainment, even though they were not technically content-neutral.[154] For instance, in *Young v. American Mini Theatres Inc.*,[155] in a plurality opinion written by Justice Stevens, the Court held that although ordinances restricting adult theaters affected protected communication, they were nonetheless constitutionally valid.[156] Justice Stevens reasoned, "It is [the] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech."[157]

Additionally, in *City of Renton v. Playtime Theatres Inc.*,[158] the Court recognized that "the Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the 'content-based' or 'content-neutral' category."[159] Although the ordinance treated theaters featuring adult films *differently* than those that did not, the Court concluded that the state aimed the ordinance not at the speech's content, but rather at tackling the secondary effects of urban blight.[160] For these reasons, the Court found that the ordinance was consistent with First Amendment standards.[161] Thus, it appears that both state and local governments may constitutionally regulate nude dancing by imposing restrictions such as distance requirements.

b. Zoning and prior restraint

The state may establish zoning laws which regulate the areas in which nude dancing establishments may be located. The influence of zoning laws is a relatively new development.[162] Zoning laws made their debut in 1916 when New York City passed the first comprehen-

153. *Kev, Inc.*, 793 F.2d at 1062; *BSA Inc.*, 804 F.2d at 1111.

154. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986); Young v. American Mini Theatres, 427 U.S. 50, 66 (1976).

155. 427 U.S. 50 (1976).

156. *Id.* at 73.

157. *Id.* at 71 n.34 (secondary effects include deterioration of neighborhood and increased crime).

158. 475 U.S. 41 (1986).

159. *Id.* at 47.

160. *Id.*

161. *Id.* at 50. It should be noted that Renton, in enacting its zoning ordinance, relied solely on studies conducted in other cities which concluded that adult theaters contributed to neighborhood blight. *Id.* at 51-52.

162. Before the tremendous growth of American cities, a property owner had complete control over the use of his land. As urban centers grew, governments enacted nuisance laws to control land uses which were either offensive to commonly accepted community standards, or were environmentally harmful. However, as cities became more complex and conflicting property interests developed between neighbors, govern-

sive zoning plan.[163] New York's law spurred an outbreak of similar ordinances throughout the nation, and by 1926, more than four hundred cities had enacted similar ordinances.[164] These local governments quickly learned that zoning laws were powerful legislative devices for restricting land uses.[165]

The Supreme Court first acknowledged zoning as a legitimate police power in *Village of Euclid v. Ambler Realty Co.*[166] In *Euclid*, a village enacted a zoning ordinance that restricted the location of an industrial development.[167] The ordinance divided the village into six "use" districts, three "height" districts, and four "area" districts.[168] The classifications restricted various parts of the plaintiffs' land from the following uses: apartments, hotels, churches, schools, industries, theaters, banks, and shops.[169] The Court held that the state's police power extended to industrial use zoning restrictions.[170] Further, the Court ruled that it would determine the legitimacy of a specific restriction by the totality of the surrounding circumstances.[171] Specifically, the Court decided that an ordinance was unconstitutional if it was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[172]

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ments began to enact zoning ordinances aimed at preventing those problems. *See generally* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS 8-9 (1977).

163. STANISLAW J. MAKIELSKI, JR., THE POLITICS OF ZONING 1 (1966). Generally, New York's zoning plan and other similar programs were responses to the overcrowding and oppression that tormented their urban centers. *See* 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 1.14 (2d ed. 1976). While New York City's ordinance is generally regarded as the first comprehensive plan, the Supreme Court previously upheld at least three municipal land use ordinances. *See* Hadacheck v. Los Angeles, 239 U.S. 394 (1915) (upholding law barring brickyards within certain locations of the municipality); Reinman v. Little Rock, 237 U.S. 171 (1915) (upholding ordinance forbidding livery stables from designated areas of town); Welch v. Swasey, 214 U.S. 91 (1909) (upholding law dividing Boston into two sections with varying building height restrictions).

164. NELSON, *supra* note 162, at 9. The number of cities that passed ordinances represented over half of the United States' urban population. *Id.*

165. For an in-depth discussion of zoning ordinances and their uses, *see* Kenneth Pearlman, *Zoning and the First Amendment*, 16 URB. LAW. 217 (1984) (discussing traditional zoning challenges as they relate to "reasonableness" and "taking" issues).

166. 272 U.S. 365 (1926).

167. *Id.* at 379-80.

168. *Id.* at 380.

169. *Id.*

170. *Id.* at 387-88.

171. *Id.* at 388. The Court stated that "the question of whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined . . . by considering it in connection with the circumstances and the locality." *Id.*

172. *Id.* at 395.

Thus, under this analysis, "quality of life" is a material interest that a community can attempt to control through the use of zoning ordinances.[173]

While only limited case law directly addresses the nude dancing issue, courts have decided many cases involving "adult-use establishments" such as adult bookstores, adult theaters, and other forms of adult entertainment.[174] As a general rule, the constitutional standards set forth in these cases are applicable to zoning laws regulating nude dancing.[175] The following section discusses five prominent cases in which the Court analyzed the restrictions imposed upon adult-use establishments through zoning.[176]

1. *Paris Adult Theatre I v. Slaton*

In 1973, in *Paris Adult Theatre I v. Slaton*,[177] the Supreme Court first recognized that a government interest may justify prohibiting an individual from using his property to display obscene materials.[178] In *Paris Adult Theatre*, the local Georgia district attorney attempted to prevent two Atlanta movie theaters from showing obscene films.[179] The theater posted a sign on its door limiting entrance to those persons over twenty-one years of age.[180] The Court began its analysis noting that states have legitimate interests in regulating "commercial obscenity."[181] Such interests include "the quality of life and the total

173. However, this type of power is by no means absolute. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (articulating that the interference must be substantially related to the community's health, safety, morals or general welfare). *But see* Comment, *Developments in the Law of Zoning*, 91 HARV. L. REV. 1427, 1451 n.65 (1978) (citing further examples of cases supporting the use of zoning to obtain an overall "use" goal of a locality).

174. *See generally* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (ruling that ordinance restricting adult entertainment establishment locations did not violate constitution).

175. *Id.* (analyzing constitutionality of zoning ordinance which regulated topless cabarets and other adult entertainment establishments).

176. For a thorough discussion of the First Amendment issues raised when governmental bodies use zoning to regulate adult establishments, *see generally* Edmund J. Postawko, Recent Developments, *The Conflict Between the First Amendment and Ordinances Regulating Adult Establishments*, 30 WASH. U.J. URB. & CONTEMP. L. 315, 328-29 (1986).

177. 413 U.S. 49 (1973).

178. *Id.* at 57-59.

179. *Id.* at 51. The Supreme Court characterized two films, *Magic Mirror* and *It All Comes Out in the End*, as "hard core pornography." *Id.* at 51-52. *See generally* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that private possession of obscene materials is not a criminal act).

180. *Paris Adult Theatre*, 413 U.S. at 52.

181. *Id.* at 57. *But see id.* at 73 (Brennan, J., dissenting). In his dissent, Justice Brennan stated that because the process of defining obscenity is considerably vague, the result may be the chilling of protected speech. *Id.* at 113 (Brennan, J., dissenting). Justice Brennan felt that although states have the authority to consider the community's best interest, the interest in suppressing obscenity is weak. *Id.* (Brennan, J., dissenting). He concluded that "at least in the absence of distribution to juveniles or

community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[182] The Court based its ruling in part on the assumption that there is a connection between obscenity and criminal activity.[183] The Court held that the states have a legitimate interest in regulating obscene materials, and that restricting admission to consenting adults did not ensure constitutional protection.[184] Further, the Court held that states can regulate the exhibition of an allegedly obscene film as long as the regulation meets the standards set forth in *Miller v. California*.[185]

In *Miller*, the Supreme Court set forth a three-part obscenity test. Under the *Miller* standard, a work is subject to regulation if 1) it appeals to the prurient interest when an average person of the community considers the work as a whole; 2) it depicts or describes in a patently offensive manner certain sexual conduct as defined by state law; and 3) it "lacks serious literary, artistic, political, or scientific value."[186]

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obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Id.* (Brennan, J., dissenting).

182. *Id.* at 58.

183. *Id.* To support its theory, the Court cited the *Hill-Link Minority Report of the Commission on Obscenity and Pornography*, which indicates that there is an "arguable correlation" between obscene materials and crime. *Id.* *See also* Memoirs v. Massachusetts, 383 U.S. 413 (1966), in which Justice Clark, in his dissenting opinion, stated:

> While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct . . . . [o]bscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person.

Id. at 452 (Clark, J., dissenting).

184. *Paris Adult Theatre*, 413 U.S. at 68-69. The Court explicitly rejected the argument that obscene materials were protected by the fundamental right of privacy. *Id.* at 66.

185. 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973). The *Paris* Court vacated the judgment and remanded the case to the Georgia Supreme Court for proceedings consistent with *Miller v. California*, which was decided on the same day as *Paris Adult Theatre*. *Paris Adult Theatre*, 413 U.S. at 69.

186. *Miller*, 413 U.S at 24. *But see* State v. Henry, 717 P.2d 189, 196-97 (1986) (ruling that an obscenity statute patterned after the *Miller* standard was unconstitutionally vague). For a further discussion of the vagueness doctrine *see infra* notes 220-31 and accompanying text. *See also* Robert E. Riggs, *Miller v. California Revisited: An Empirical Note*, 1981 B.Y.U. L. REV. 247, 247-73 (1981) (discussing *Miller*'s effects on obscenity law since 1973).

2. *Young v. American Mini Theatres*

The *Paris* decision set the stage for *Young v. American Mini Theatres*.[187] The dispute in *Young* focused upon two Detroit "anti-Skid Row" ordinances.[188] The ordinances required the dispersion of adult establishments[189] by prohibiting them from being located within one thousand feet of any other such establishment, or within five hundred feet of a residential area.[190] Two theater owners challenged the constitutionality of the ordinances.[191] The Court held that Detroit could use its zoning laws to regulate the locations of commercial establishments.[192] Additionally, the Court stated that "[t]he city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support that kind of restriction applicable to all theaters within the city limits."[193] Further, although the Court did not classify the ordinances strictly as "content-neutral," it determined that the ordinances were "viewpoint-neutral" because they did not prefer one viewpoint over another.[194]

The *Young* Court also noted that the objective of avoiding the secondary effects affiliated with sexually oriented establishments was significant enough to justify the lower degree of First Amendment protection.[195] However, the Court acknowledged that if the ordinance had suppressed or greatly inhibited access to this type of expression, the outcome of the case might have been different.[196] Nonetheless, the *Young* decision established that a city government

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187. 427 U.S. 50 (1976). For further discussion of *Young*, *see* Cynthia D. Stevenin, Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321, 351 (1977); and David Gold, Note, *Equal Protection and the First Amendment: Zoning Away Skid Row*, 31 U. MIAMI L. REV. 713 (1977).

188. DETROIT, MICH. ORDINANCE §§ 742.G-743.G (1972).

189. The Court defined adult establishments as uses characterized or distinguished by emphasizing matters depicting, describing, or relating to "Specified Sexual Activities" or "Specified Anatomical Areas." *Young*, 427 U.S. at 53.

190. *Id.* at 52.

191. *Id.* at 55.

192. *Id.* at 62-63.

193. *Id.*

194. *Id.* at 70.

195. *Young*, 427 U.S. at 70. Justice Stevens stated:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . .

Id.

196. *Id.* at 71 n.35. The Court recognized the district court's findings that the ordinance did not affect existing establishments, but rather applied only to new businesses. *Id.* The district court stated, "There are myriad locations in the City of Detroit which must be over one thousand feet from existing regulated establishments. This burden on First Amendment rights is slight." Nortown Theatre v. Gribbs, 373 F. Supp. 363, 370 (E.D. Mich. 1974).

may use its zoning power to restrict adult use establishments.[197]

3. *Schad v. Borough of Mount Ephraim*

Five years later, in *Schad v. Borough of Mount Ephraim*,[198] the Court struck down a zoning ordinance which prohibited all live entertainment, including nude dancing, in specific commercial locations.[199] The Court held that zoning ordinances must be narrowly drawn and must further a significant government interest in order to justify an infringement upon First Amendment rights.[200] The ordinance at issue in *Schad* instituted a total ban on adult entertainment. Thus, the Court determined that such a sweeping regulation precluded alternative channels of communication, and therefore acted as an unconstitutional restriction on free expression.[201]

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197. Nevertheless, the *Young* decision has been the subject of much criticism since its birth. In his dissent, Justice Stewart disagreed with the plurality's opinion that erotic types of speech deserve a lower degree of protection. According to Justice Stewart, although the offensive speech does not address important political or social concerns, that "does not mean that it is less worthy of constitutional protection." *Young*, 427 U.S. at 87 (Stewart, J., dissenting). *See also* TRIBE, *supra* note 49, at 954 (proclaiming that *Young* was decided incorrectly because the plurality opinion should have analyzed the case as a content-based issue, instead of a content-neutral (viewpoint-neutral) matter); Kevin D. McDonald, Note, *Constitutional Law—First Amendment—Content-Neutrality*, 28 CASE W. RES. L. REV. 456, 490 (1978) ("It must be concluded that under these standards *Young v. American Mini Theatres* is a jurisprudential mess.").

198. 452 U.S. 61 (1981).

199. *Id.* at 65. The government filed complaints which accused the bookstore of violating section 99-15b of Mount Ephraim's zoning ordinance. The ordinance described the permitted uses in a commercial zone as follows:

> Principal permitted uses on the land and in buildings. (1) Offices and Banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and launderies; pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores. (2) Motels.

MOUNT EPHRAIM CODE § 99-15b 1, 2 (1979).

200. *Schad*, 452 U.S. at 68; *see, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (holding that ordinance which restricted occupancy of dwelling to members of a single family was unconstitutional). Because an ordinance defined "family" in terms that prevented extended family members from living together, it acted as an unconstitutional infringement upon protected liberty interests; *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974) (upholding zoning ordinance regulating land use for single-family units because it only affected unrelated persons).

201. *Schad*, 452 U.S. at 75-76. Because the ordinance completely banned all live en-

4. *City of Renton v. Playtime Theatres*

In 1986, the Court again addressed the constitutionality of an adult entertainment zoning ordinance in *City of Renton v. Playtime Theatres*.[202] The Court in *Renton* rejected a First Amendment challenge to a zoning ordinance which prohibited adult motion picture theaters from locating within one thousand feet of any residential zone, family dwelling, church, or park, or within one mile of any school.[203] The Court noted that because "[t]he Renton ordinance . . . does not ban adult move theaters altogether, . . . [it] is therefore properly analyzed as a form of time, place, and manner regulation."[204] Although the plain language of the ordinance demonstrated that it only applied to speech of a particular content, the Court treated the ordinance as content-neutral, asserting that the city aimed the ordinance "not at the *content* of the films shown 'at adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community."[205]

The Court also approved of the city's reliance upon empirical data from other municipalities concerning the adverse effects of adult entertainment establishments to justify the ordinance.[206] Thus, the Court did not require the City of Renton to demonstrate a specific need for the ordinance within its own boundaries.[207] Finally, the Court held that Renton had left open sufficient "alternative avenues

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tertainment from the area, the holding was not applicable in *Young*. Rather, the ordinance in *Schad* resembled laws described by Justice Blackmun in *Young* which have "the effect of suppressing or greatly restricting access to lawful speech." Young v. American Mini Theatres Inc., 427 U.S. 50, 71 n.35. (1976). *See also Schad*, 452 U.S. at 78 (Blackmun, J., concurring), where Justice Blackmun stated:

> It would be a substantial step beyond [*Young*] *Mini Theatres* to conclude that a town or county may legislatively prevent its citizens from engaging in or having access to forms of protected expression that are incompatible with its majority's conception of the 'decent life' solely because these activities are sufficiently available in other locales.

202. 475 U.S. 41 (1986). For a further discussion of *Renton* and its importance in the area of zoning law, *see* Alan C. Weinstein, *The Renton Decision: A New Standard for Adult Business Regulation*, 32 WASH. U.J. URB. & CONTEMP. L. 91 (1987); Jim Bobo, Recent Decisions, *Cities May Restrict Location of Adult Theatres Through Narrowly Tailored, Content-Neutral, Time, Place and Manner Restriction*, 56 MISS. L. J. 401 (1986).

203. *Renton*, 475 U.S. at 44. The City of Renton ordinance defined an adult movie theater as " '[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on [sexually oriented material].' " *Id.* (citing RENTON, WASHINGTON RESOLUTION NO. 2368 (1980)).

204. *Id.* at 46.

205. *Id.* at 47. For an in-depth discussion of the *Renton* Court's content distinction, *see* Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904 (1989).

206. *Renton*, 475 U.S. at 51-52.

207. *Id.*

of communication."[208] Although the respondents contended that almost all available land for operating adult establishments was either inappropriate for such a use or was not for sale, the Court asserted that the First Amendment did not demand that the government provide *ideal* locales for speech-oriented businesses.[209]

5. *FW/PBS, Inc. v. City of Dallas*

In 1990, in *FW/PBS, Inc. v. City of Dallas*,[210] the Supreme Court once again addressed the issue of the regulation of sexually oriented businesses.[211] In *FW/PBS*, three groups brought suit challenging the constitutionality of an ordinance passed by the Dallas city council.[212] The ordinance, which regulated sexually oriented businesses[213] through a zoning and licensing scheme, was focused at reducing the secondary effects of urban blight and criminal activity.[214] In a plurality opinion, the Court held that the licensing requirements were an unconstitutional prior restraint on freedom of speech because they failed to establish procedural safeguards first annunciated by the

208. *Id.* The district court found 520 acres of land suitable for the respondents to purchase. *Id.* at 53-54.

209. *Id.* at 54 (emphasis added). "That respondents must fend for themselves in the real estate market, on equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Id.* For a discussion of the interrelationship between *Young*, *Schad*, and *Renton*, *see* Leon Harvey Lee, Jr., Note, *Constitutional Law—Policing the Parlor and the First Amendment—City of Renton v. Playtime Theatres, Inc.*, 22 WAKE FOREST L. REV. 673 (1987).

210. 493 U.S. 215 (1990).

211. *Id.*

212. DALLAS CITY CODE ch. 41A (1986).

213. The ordinance defined sexually oriented business as: "[A]n adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theatre, escort agency, nude model studio, or sexual encounter center." *Id.* at ch. 41A, § 41A-2(19).

214. *FW/PBS*, 493 U.S. at 220. Section 41A-1(a) states:

> It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

DALLAS CITY CODE ch. 41A, § 41A-1(a) (1986). Regardless of this "intent disclaimer," and comparable remarks by both city councilmembers and city commissioners who enacted the ordinance, public supporters endorsed the restriction because of its suppressive effects on speech. *See* Dumas v. City of Dallas, 648 F. Supp. 1061, 1064-65 n.11 (N.D. Tex. 1986).

Court in *Freedman v. Maryland*.[215]

The *Freedman* case involved a local censorship board which was authorized to revoke a book or motion picture distributor's license for the sale or display of obscene materials. The Court held that in order for such an entity to pass constitutional muster, its method of review must meet three requirements.[216] First, the censorship board must place the burden of proof on the restraining party.[217] Second, the board must make prompt judicial review available to the censored party.[218] Third, the board must aim any restraint imposed before a final judicial determination at preserving the status quo until the matter can be resolved in court.[219]

In its endorsement of the *Freedman* factors, the Court in *FW/PBS* emphasized that while "prior restraints are not unconstitutional per se . . . [a]ny system of prior restraint comes to this Court bearing a heavy presumption against its constitutional validity."[220] This ominous statement signaled that in the 1990s, issues of prior restraint would likely face exacting scrutiny by the Court.

D. Procedural Challenges to Nude Dancing Regulations

When the government attempts to restrict a constitutional freedom, a party can challenge the restriction through the court system. This section discusses the various methods for challenging ordinances that impose unconstitutional restrictions upon freedom of expression.

1. Void for Vagueness Doctrine

One procedural challenge to a municipal ordinance is the claim that the law is inherently vague.[221] "Void for vagueness" simply means that a court cannot impose criminal punishment where a reasonable person could not have realized his or her conduct was forbid-

215. *FW/PBS*, 493 U.S. at 229. *See* Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).
216. *Freedman*, 380 U.S. at 58-59.
217. *Id.*
218. *Id.*
219. *Id.*
220. *FW/PBS*, 493 U.S. at 225 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975)). For a further discussion of FW/PBS, Inc. v. City of Dallas, *see* Grace F. Woods, Case Comment, *Constitutional Law: Procedural Safeguards Required in First Amendment Prior Restraint Context*, 42 FLA. L. REV. 399 (1990).
221. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (ruling that municipality's anti-noise ordinance was not unconstitutionally vague); *cf.* Cox v. Louisiana, 379 U.S. 536, 550-52 (1965) (holding that breach of peace ordinance was unconstitutionally vague because the ordinance allowed individuals to be reprimanded for merely expressing unpopular opinions). For further discussion of the void for vagueness doctrine, *see* Anthony G. Amsterdam, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-85 (1960); Jeffrey I. Tilden, Note, *Big Mama Rag: An Inquiry into Vagueness*, 67 VA. L. REV. 1543, 1548-59 (1981) (discussing traditional purposes of vagueness challenges).

den.[222] The Court generally evaluates vagueness challenges using three standards.[223] First, the law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[224] Second, the ordinance must present clear, straightforward guidelines for its application.[225] Third, the law must not threaten the exercise of valid First Amendment rights.[226]

There are several policy reasons underlying the concern about vague statutes. First, vague statutes may be ambiguous, whereas clearly defined statutes enable state officials to use objective standards while evaluating the speech in question.[227] Second, the enforcement of vague statutes may have a "chilling effect" on protected speech—the thought being that persons will shy away from any related activity in order to avoid potential litigation.[228] Third, there must be clear guidelines for law enforcement officials to regulate speech-related activity. This policy is particularly applicable when analyzing the guidelines for speech-related arrests. It is important that an ordinance not allow officers to arrest someone solely on the grounds that they disagree with the message the arrestee is attempting to convey.

For example, in *Kolender v. Lawson*,[229] the Court invalidated a

222. Parker v. Levy, 417 U.S. 733, 753-58 (1974) (holding that Uniform Code of Military Justice, which permitted court martial for "behavior unbecoming of an officer and a gentleman," was not unconstitutionally vague).

It is important to note that the void for vagueness doctrine differs from the overbreadth doctrine in that a plaintiff must show that an ordinance is vague as applied to *him*. Whereas, a plaintiff who asserts a challenge on the ground of overbreadth need not demonstrate whether or not the statute actually hinders *his* personal activity. *See infra* notes 231-45 and accompanying text.

223. *Grayned*, 408 U.S. at 108. The strictness of the three standards depends upon the degree of vagueness ascribed to the questioned legislation. For instance, the Court usually subjects economic regulation to a less stringent analysis, while it subjects legislation which embraces constitutional rights to stricter analysis.

224. *Id.*

225. *Id.* at 108-09; *see also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (finding that statutes, which fail to provide explicit means for those who enforce the law, violate due process rights).

226. *Village of Hoffman Estates*, 455 U.S. at 499 (stating that void for vagueness doctrine requires a stricter degree of specificity when the ordinance touches First Amendment expression); *see also* Smith v. Goguen, 415 U.S. 566, 576 (1974) (finding that a more strict vagueness doctrine should apply when the law interferes with freedom of expression claims).

227. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (stating that "vague laws may trap the innocent by not providing fair warning").

228. *Id.* at 109 ("[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' ") (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). For further discussion of the "chilling effect," *see infra* notes 385-412 and accompanying text.

229. 461 U.S. 352 (1973).

state statute which required persons who loitered on streets to provide "credible and reliable" identification and to account for their presence when a police officer asked them.[230] Writing for the majority, Justice O'Connor emphasized that the most significant aspect of the vagueness doctrine is the implementation of guidelines that prohibited arbitrary, selective enforcement on a constitutionally suspect basis by police officers.[231] However, even under a strict interpretation of ordinance regulating free expression, "void for vagueness" challenges to laws restricting nudity are difficult to sustain.[232]

2. Overbreadth Doctrine

Individuals often challenge city ordinances as being overly broad.[233] Parties attacking laws which restrict nude dancing frequently plead the overbreadth doctrine as the basis for their complaints.[234] According to this doctrine, courts should not permit the government to encroach upon First Amendment guarantees any further than is necessary to protect a compelling state interest.[235] Generally, an individual may not assert the overbreadth doctrine as a challenge to an otherwise valid statute. However, the doctrine creates an exception for situations involving protected expression.[236]

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230. *Id.*

231. *Id.* at 358.

232. *See, e.g.*, South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608 (11th Cir. 1984) (finding that statute prohibiting nudity in a public place was not unconstitutionally vague); Chapin v. Town of Southampton, 457 F. Supp. 1170 (E.D.N.Y. 1978) (overruling challenge for vagueness of terms "adjacent waters," "nude," and "suitable bathing dress"). *But see* Erzoznik v. City of Jacksonville, 422 U.S. 205 (1975). In *Erzoznik*, a city ordinance prohibited all nudity from being displayed on outdoor movie theatre screens visible from a public place. The Court held that the law was vague because it banned nudity in general and did not make exceptions for non-indecent nudity. *Id.* at 213.

233. For an in-depth analysis of the overbreadth doctrine, *see* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L. J. 853 (1991).

234. *See, e.g.*, Doran v. Salem Inn, Inc., 422 U.S. 922, 933 (1975) (defendant may challenge a statute as overly broad "if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court"); Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986) (plaintiffs challenge public nudity statute for overbreadth); BSA, Inc., v. King County, 804 F.2d 1104 (9th Cir. 1986) (plaintiffs challenged public nudity statute for overbreadth); Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981) (statute held overbroad); Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2d Cir. 1975) (finding that ordinance banning topless dancing within municipality was invalid for First Amendment overbreadth).

235. *See generally* Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 10-14 (1981). *See also* TRIBE, *supra* note 49 at § 12-24, 710-12. The Supreme Court has stated that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964).

236. New York v. Ferber, 458 U.S. 747, 767 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). The *Broadrick* Court stated:

The Court has justified this deviation as a "judicial prediction or assumption that the statutes' very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[237] The rationale behind the overbreadth doctrine is not to protect an out-of-court individual's expression, but rather to reduce the consequences that overly expansive legislation have on First Amendment freedom of expression.[238]

For instance, in *Doran v. Salem Inn, Inc.*,[239] the City of North Hempstead, New York passed an ordinance which prohibited any female from revealing her breasts in public.[240] Establishments which featured topless dancing challenged the ordinance's constitutionality.[241] Although the Court upheld the ordinance as far as it applied to the establishments which served alcohol,[242] it nevertheless permitted them to challenge the ordinance on the basis of overbreadth.[243] However, the Court ultimately upheld the injunction without reaching the merits of the case.[244]

Even in the wake of the dubious *Doran* decision, courts have distinguished between ordinances which regulate conduct and those which regulate "pure speech."[245] However, because the overbreadth

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> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgement that a particular mode of expression has to give way to other compelling needs of society.

Broadrick, 413 U.S. at 611-12.

However, one must also note that even plaintiffs accused of unprotected expression can challenge state laws which are overly broad.

237. *Broadrick*, 413 U.S. at 612.

238. *See* Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) (quoting *Broadrick*, 413 U.S. at 612); *see also* Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (overly broad statutes may deter expression because third parties fearing criminal sanctions may not come forward to exercise their right of expression); Gooding v. Wilson, 405 U.S. 518, 520 (1972) (finding that possibility that the government may mute protected speech outweighs the harm in permitting protected speech to go unpunished).

239. 422 U.S. 922 (1975).

240. *Id.* at 933.

241. *Id.* at 924.

242. *Id.* at 932-33. The Court emphasized that because the establishments served alcohol, the Twenty-first Amendment authority outweighed any First Amendment interest in nude dancing. *Id.* at 932 (citing California v. LaRue, 409 U.S. 109, 118 (1972)).

243. *Id.* at 933.

244. *Id.* at 934.

245. *Broadrick*, 413 U.S. at 615.

However, Justice Brennan has expressed disagreement with this distinction. In his dissenting opinion in *Broadrick*, he stated:

> [T]he Court offers no rationale to explain its conclusion that, for purposes of

doctrine has powerful ramifications, the United States Supreme Court has been careful to use the doctrine conservatively.[246] Consequently, when a statute is challenged, the asserted overbreadth must be significant in order for the Court to strike down the legislation.[247]

III. STATEMENT OF THE CASE

A. *Factual History*

In *Barnes v. Glen Theatre*, two South Bend, Indiana adult establishments, the Kitty Kat Lounge and the Glen Theatre, desired to offer totally nude dancing as entertainment for their patrons.[248] The Kitty Kat Lounge sold alcoholic beverages and offered nude "go-go" dancing.[249] The Chippewa Bookstore, run by Glen Theatre, offered booths with glass panels through which paying customers could view live women dancing nude on a platform.[250] The performances at the Chippewa Bookstore and the Kitty Kat Lounge, generally called "striptease acts," were similar.[251] Each began with a fully clothed female who danced to one or more songs while taking off her clothing.[252] At the conclusion of the dance, the performer was either totally nude or nearly nude.[253] However, an Indiana statute regulating "public nudity" prohibited such activity.[254] The statute required the dancers to wear "pasties" and "G-strings" when they per-

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> overbreadth analysis, deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment. Indeed, in the case before us it is hard to know whether the protected activity falling within the Act should be considered speech or conduct.

Broadrick, 413 U.S. at 630-31 (Brennan, J., dissenting). *See also Ferber*, 458 U.S. at 770. *See generally* David S. Bogan, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 712-14 (1978).

246. *Ferber*, 458 U.S. at 769.

247. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985) (finding that party may challenge statute on basis of overbreadth only if the overbreadth is substantial); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) (citations omitted) (stating that for a party to challenge a statute as overly broad, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . .").

248. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2458-59 (1991).

249. *Id.* at 2458.

250. *Id.*

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

252. *Id.*

253. *Id.* One performer, Darlene Miller, danced to the Bon Jovi song, "You Give Love a Bad Name." She began her routine with hip-shaking struts up and down the stage. After removing her dress and bikini underwear, Miller was left wearing only her spike-heels and a tattoo above her right bosom. Linda P. Campbell & William Grady, *Indiana Striptease Case Pits Public Morals, 1st Amendment*, CHI. TRIB., Dec. 26, 1991, at C8.

254. IND. CODE § 35-45-4-1 (1988) provides:

> Public Indecency

formed.[255] Furthermore, the establishments did not pay the dancers on an hourly basis; the dancers performed solely on commission.[256] The respondents challenged the constitutionality of the Indiana statute, asserting that the law's prohibition against complete nudity while dancing violated the First Amendment's right to free expression.[257]

Section 1. (a) A person who knowingly or intentionally, in a public place:
(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) appears in a state of nudity; or
(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.
(b) 'Nudity' means 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 or the covered male genitals in a discernibly turgid state.

Id. The State acknowledged that the dancing at issue was not obscene. Thus, obscenity was not an issue which the Court addressed. Miller v. Civil City of South Bend, 904 F.2d at 1082. Also, the plaintiffs recognized that the establishments in question were "public places" under the statute. *Id.*

255. *See* IND. CODE § 35-45-4-1 (1988). Approximately 24 other states have similar laws in effect. Linda Greenhouse, *States May Ban Nude Dancing to Protect "Order," Justices Rule*, N.Y. TIMES, June 22, 1991, § 1, at 1.

256. The performers were entitled to 100 percent of the bar's earnings obtained from the first $60.00 in beverage sales. During oral argument, the state's attorney, Wayne Uhl, asserted that since the dancers desired to perform nude to make more money, their dancing was similar to "commercial speech." Accordingly, it deserved less protection. One justice replied, "That's why Dickens wrote his books, too." After Uhl suggested Dickens had aspirations in mind other than earning profits, the Justice replied, "Are you sure of that?" *Supreme Court Hears Free Speech Arguments on Nude Dancing—First Amendment: Barnes v. Glen Theatre*, ENT. LITIG. REP., Mar. 11, 1991. However, it must be noted that the fact that the dancers earned a profit by exposing their nude bodies is immaterial for constitutional protection. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

257. *Barnes*, 111 S. Ct. at 2459. In 1985, Glen Theatre scheduled Gayle Ann Marie Sutro, an accomplished actress, stunt performer, and ecdysiast, to dance at the Chippewa Bookstore. During Sutro's engagement at the bookstore, the Chippewa drive-in featured a movie in which the dancer had a starring role.

Sutro had extensive training and experience in the field of entertainment. She studied acting, dancing, speech and language for more than 15 years, and her job history indicated that she had danced, acted and modeled professionally. Sutro was also a member in good standing of the Screen Actors Guild, the Screen Extras Guild, and AFTRA. In her statement, Sutro said when she danced she tried to "communicate as well as entertain." Further, she choreographed her nude dancing with the intent to properly express this emotion. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 420 (N.D. Ind. 1988).

Sandy Diamond, another dancer who performed at Ramona's Car Wash, spent four years at the Academy of Ballet and had seven years' experience as an "exotic dancer." *Id.* at 421. In addition, Diamond was also an accomplished movie and television actress, and designed her own costumes for her dance performances. *Id.*

B. *Procedural Facts*

Litigation began in 1985 with three separate actions filed in federal court.[258] The district court granted a preliminary injunction, finding the ordinance unconstitutional for overbreadth.[259] The Seventh Circuit Court of Appeals reversed the decision because the Supreme Court's dismissal of appeals from *State v. Baysinger*[260] invalidated the trial court's decision.[261] The Seventh Circuit then remanded the case to the district court for arguments regarding the plaintiffs' assertion that the statute violated their right to free expression.[262]

On remand, the district court found that "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States."[263] On a second appeal, the Sev-

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258. The three cases were Miller v. Indiana Alcoholic Beverage Comm'n, Glen Theatre Inc. v. Civil City of South Bend, and Diamond v. Indiana Alcoholic Beverage Comm'n. The disputes were filed under 28 U.S.C. § 1343(a)(3) (original action to redress deprivation of civil rights), 28 U.S.C. § 2202 (declaratory judgment) and 42 U.S.C. § 1983 (civil rights). Brief for Petitioner at 26, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (No. 90-26).

For further discussion of the comparison of content-based and content-neutral regulation emphasizing the distinctions between various incidental regulation standards, *see* David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491 (1988).

259. *Barnes*, 111 S. Ct. at 2459. *See also supra* notes 233-47 and accompanying text.

260. 397 N.E.2d 580, 597 (Ind. 1979), *appeals dismissed sub nom.*, Clark v. Indiana, 446 U.S. 931, and Dove v. Indiana, 449 U.S. 806 (1980).

261. *Barnes*, 111 S. Ct. at 2459. Justice Rehnquist explained the Indiana Supreme Court's treatment of the overbreadth issue as follows:

> The Indiana Supreme Court appeared to give the public indecency statute a limiting construction to save it from a facial overbreadth attack: 'There is no right to appear nude in public. Rather, it *may* be constitutionally required to tolerate or allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved.'
>
> Five years after *Baysinger*, however, the Indiana Supreme Court reversed a decision of the Indiana Court of Appeals holding that the statute did 'not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity,' in a case involving a partially nude dance in the 'Miss Erotica of Fort Wayne' contest. The Indiana Supreme Court did not discuss the constitutional issues beyond a cursory comment that the statute had been upheld against constitutional attack in *Baysinger*, and Erhardt's conduct fell within the statutory prohibition . . . . Therefore, the Indiana Supreme Court did not affirmatively limit the reach of the statute in *Baysinger*, but merely said that to the extent the First Amendment would require it, the statute might be unconstitutional as applied to some activities.

Barnes, 111 S. Ct. at 2459 n.1 (citations omitted).

262. *Id.* (citing Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 288-90 (1986)). The district court was specifically directed to "examine the plaintiffs' proferred evidence of the dancing they wish to perform [and decide if] the activity should be afforded First Amendment protection." *Pearson*, 802 F.2d at 291.

263. *Barnes*, 111 S. Ct. at 2459. The district court concluded that the dances were "mere conduct" and described them as "striptease dances . . . not performed in any theatrical or dramatic context . . . ." Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 419 (N.D. Ind. 1988).

The district court initially declared the *Glen Theatre, Inc.* plaintiffs' claims moot because a fire had destroyed their building. *Glen Theatre, Inc.*, 695 F. Supp. at 416. How-

enth Circuit reversed, holding that all nonobscene nude dancing performed for entertainment is "expressive activity" protected by the First Amendment.[264]

The state defendants[265] then requested a rehearing *en banc*.[266] The Seventh Circuit granted the rehearing.[267] On May 24, 1990, the court of appeals vacated and reversed the trial court's judgment, prohibiting the defendants from enforcing the Indiana public indecency statute.[268] The Seventh Circuit further concluded that the statute was invalid because "its purpose was to prevent the message of eroticism and sexuality conveyed by the dancers."[269] The Supreme

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ever, pursuant to a post-judgment motion, the district court found the case was not moot, thereby making the judgment binding on all parties. *Id.*

264. *Barnes*, 111 S. Ct. at 2459-60 (citing Miller v. Civil City of South Bend, 887 F.2d 826, 827 (7th Cir. 1989), *rev'd*, 111 S. Ct. 2465 (1991)). For a discussion criticizing Judge Posner's concurring opinion in the *Miller* decision, *see* R. George Wright, *Judge Richard Posner on the Scope of the Free Speech Clause*, 21 CUMB. L. REV. 225 (1991).

265. The defendants in the Seventh Circuit were: the Civil City of South Bend; Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana and the Indiana Alcoholic Beverage Commission; Charles Hurley, Chief of Police of South Bend Police Department. Brief for Petitioners at 19, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

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

267. Brief for Petitioner at 20, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

268. *Barnes*, 111 S. Ct. at 2460; Brief for Petitioners at 20, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26). The Seventh Circuit ruled that "as a matter of law, non-obscene nude dancing performed as entertainment is expression and such is entitled to limited protection under the First Amendment." Miller v. Civil City of South Bend, 904 F.2d 1081, 1085 (7th Cir. 1990), *rev'd*, 111 S. Ct. 2465 (1991). In a lengthy and eloquent concurrence, Judge Posner voiced his opinion that the nudity in the dance was not conduct but true expression:

> [T]he dancing and the music are not distractions from the main theme, patched on to fool the censor; they are what make a given female body expressive of a specifically sexual emotion. The striptease is the ensemble of the music, the dance, the disrobing, and the nude end state; it is more erotic than any of the components; and what makes it more erotic than the body itself or the disrobing itself, is, precisely, that it is *expressive* of erotic emotion.

Miller, 904 F.2d at 1092 (Posner, J., concurring).

269. *Barnes*, 111 S. Ct. at 2460. The majority stated that the statute was an invalid restriction on nude dancing, regardless of the state's "laudable concerns" of protecting public morality in general and specifically, the family structure. *Miller*, 904 F.2d at 1088. The court reasoned that "[t]he messages conveyed by the performances in question, no matter how unappealing to one's personal value system, are protected nonetheless." *Id.* The court of appeals also referred to the Second Circuit, which stated:

> While the entertainment afforded by the nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by the judges) or in quality (as viewed by the critics), it may not differ in substance from the dance viewed by the person [at the local pub].

Miller v. Civil City of South Bend, 904 F.2d at 1081, 1086 (7th Cir. 1990), *rev'd*, 111 S. Ct. 2465 (1991) (quoting Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir. 1974),

Court of the United States granted *certiorari*.[270]

IV. ANALYSIS OF THE *BARNES* OPINION

A. Justice Rehnquist's Plurality Opinion

In a closely divided decision,[271] a majority of the Court held that requiring the performers to wear pasties and G-strings while dancing does not violate an individual's First Amendment right to free expression.[272] Chief Justice Rehnquist, writing for a plurality, first addressed the issue of whether nude dancing was conduct or protected expression.[273] Holding that nude dancing was a form of expression, although "only marginally so,"[274] the Chief Justice noted that the Indiana public indecency statute was valid regardless of its "incidental limitations on some expressive activity."[275] In reaching its decision, the majority relied upon the standard set forth in *United States v. O'Brien*,[276] where the Court squarely addressed the issue of whether

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aff'd in part, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)). Judge Flaum, writing for the majority, stated:

> Though this dance is clearly of inferior artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' *Salome*, the erotic message communicated to the viewers is present in both performances. That Strauss' *Salome* tells a compelling story and the nude dancing at the Kitty Kat Lounge may not [sic] is not determinative; expression does not lose its protection for lack of a scripted plot.

Miller, 904 F.2d at 1087.

270. *Barnes*, 111 S. Ct. at 2460. In support of Barnes, the following organizations submitted *amicus curiae* briefs: National Governors Association, National Association of Counties, United States Counsel of Mayors, International City Management Association, National League of Cities, American Family Association, National Family Legal Foundation, Children's Legal Foundation, and the States of Arizona, Connecticut, Missouri, North Carolina, and Pennsylvania. Bernard James, *Nude Dancing: Conduct or Expression?*, 1990-91 S. CT. PREVIEW 149, Jan. 25, 1991.

Several of the briefs stressed the need to preserve "society's moral structure and decency" and the "paramount interest in preventing the sexual exploitation and degradation of women." Ruth Marcus, *Justices Accept Cases on Nude Dancing, Discrimination, Libel as Term Opens*, WASH. POST, Oct. 22, 1990 § 1, at A4.

In support of Glen Theatre, the Georgia On-Premise & Lounge Association argued that nude dancing should be protected because it was expressive entertainment. Also, they asserted that because the state wished to ban nude dancing in all situations, the restriction was not reasonable or incidental. Bernard James, *Nude Dancing: Conduct or Expression?*, 1990-91 S. CT. PREVIEW 149, Jan. 25, 1991.

271. Chief Justice Rehnquist wrote the plurality opinion in which only Justices O'Connor and Kennedy joined. Justices Scalia and Souter filed concurring opinions, and Justice White wrote a dissenting opinion in which Justices Blackmun, Marshall, and Stevens joined. Barnes v. Glen Theatre, 111 S. Ct. 2456, 2458 (1991).

272. *Id.* at 2460.

273. *Id.*

274. *Id.* Justice Rehnquist also referred to the nude dancing as "expressive conduct." *Id.*

275. *Id.* at 2461.

276. 391 U.S. 367 (1968). For further discussion of the *O'Brien* test, see Lawrence R. Velvel, *Freedom of Speech and the Draft Card Burning Case*, 16 KAN. L. REV. 149 (1967); Andrew E. Forshey, Note, *The First Amendment Becomes a Nuisance: Arcara*

the government possesses a valid justification for regulating speech.[277]

In *O'Brien*, the defendant and several of his colleagues ceremonially burned their draft cards on the steps of a Boston municipal building to protest the Vietnam War.[278] The government convicted O'Brien of disobeying the 1965 amendment to the Selective Service Act, which forbids one from "willfully and knowingly" destroying a draft card.[279] The First Circuit held that the statute violated O'Brien's freedom of speech.[280] However, the Supreme Court reversed, stating that when an activity involves both speech and nonspeech elements, the government can justify a First Amendment limitation by a "sufficiently important government interest."[281] According to *O'Brien*, in order to justify government regulation of speech, the state must meet each part of the following four-part test: (1) enacting the ordinance or statute must be "within the constitutional power of the government"; (2) the ordinance must "further an important or substantial government interest"; (3) the governmental interest must be "unrelated to the suppression of free expression"; and (4) the incidental restriction on alleged First Amendment freedoms must be "no greater than is essential to the furtherance of that interest."[282]

Chief Justice Rehnquist found the Indiana statute explicitly within the state's constitutional power, thereby satisfying *O'Brien*'s first prong.[283] However, the Chief Justice found it difficult to determine whether the statute passed the second prong of the *O'Brien* test, furthering a substantial government interest, for several reasons. First, because Indiana's legislative history was not recorded when the statute was enacted, the legislature's purpose in enacting the statute was

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v. Cloud Books, Inc., 37 CATH. U. L. REV. 191 (1987). Commentators have criticized the *O'Brien* decision for its failure to judge O'Brien's actions using a more traditional First Amendment weighing of speech and nonspeech concerns. *See* Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1 SUP. CT. REV. 10-11 (1968).

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

278. *O'Brien*, 391 U.S. at 369-70.

279. *Id.* at 370. Under the act an offense was committed by one "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate." 50 App. U.S.C.A. § 462(b)(3) (West 1990).

280. *O'Brien*, 391 U.S. at 371. *See also* O'Brien v. United States, 376 F.2d at 538, 541-42 (1st Cir. 1967).

281. *O'Brien*, 391 U.S. at 376-77.

282. *Id.* at 377. This analysis is the time, place, and manner test discussed *supra* at notes 74-95, 135-42 and accompanying text.

283. *Barnes*, 111 S. Ct. at 2461.

unclear.[284] Second, in discussing the statute, the Indiana Supreme Court neither recognized this problem nor clarified the statute's purpose.[285] Thus, the Chief Justice questioned the type of governmental interest the state legislature intended to further when it enacted the statute.[286] Nevertheless, Chief Justice Rehnquist looked to the common law for guidance.[287] He pointed out that at common law, courts considered public nudity *malum in se*[288] and "gross."[289] These characterizations, therefore, demonstrated a significant government interest in curbing public nudity.[290] He also reiterated that the statute was a "general prohibition" of *all* nudity which took place before barroom dancing began.[291] Chief Justice Rehnquist concluded that Indi-

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284. *Id.*

285. *Id.*

286. *Id.* In fact, when the court questioned the state's lawyer as to the statute's purpose, he first responded that the law intended to protect marriage. Upon remembering the skyrocketing divorce rate in the United States "he quickly added that *that* battle had already been lost and he switched his ground to the prevention of adultery." Miller v. Civil City of South Bend, 904 F.2d 1081, 1100 (7th Cir. 1990), *rev'd*, 111 S. Ct. 2465 (1991) (Posner, J., concurring).

287. *Barnes*, 111 S. Ct. at 2461.

288. Black's Law Dictionary defines *malum in se* as follows:

> A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. An act is said to be *malum in se* when it is inherently and essentially evil, that is immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.

BLACK'S LAW DICTIONARY 959 (6th ed. 1990) (citations omitted).

289. *Barnes*, 111 S. Ct. at 2461 (citing Winters v. New York, 333 U.S. 507, 515 (1948)) (stating that "[a]cts of gross . . . indecency or obscenity, injurious to public morals [violate] the public policy that requires . . . retribution for acts that flaunt accepted standards of conduct"). However, in 1948, the year *Winters* was decided, "accepted standards of conduct" were considerably more conservative than in 1991, when the Court decided *Barnes*.

290. *Barnes*, 111 S. Ct. at 2461.

291. *Id.* In 1831, an Indiana statute punished "open notorious lewdness, or . . . any grossly scandalous and public indecency." *Id.* (quoting REV. LAWS OF IND., ch. 26, § 60 (1831)). However, today one could challenge this statute on the grounds that it is void for vagueness and is overbroad. For further discussion of these doctrines, *see supra* notes 221-47 and accompanying text.

Additionally, the dissent proposed that Justice Rehnquist's classification of the statute as a "general prohibition" proved that it was not narrowly tailored and therefore failed *O'Brien*'s fourth prong. *See Barnes*, 111 S. Ct. at 2473, 2475 (White, J., dissenting).

Justice Rehnquist also cited two cases in which the Court previously upheld legislation on moral grounds: Roth v. United States, 354 U.S. 476 (1957), and Bowers v. Hardwick, 478 U.S. 186 (1986). *Id.* at 2462. Neither of the two cases cited by Justice Rehnquist involved the use of legislation to restrict speech. Thus, Rehnquist's extension of "morality" as a basis for upholding legislation which affects free speech is arguably a creation of new law.

In *Bowers*, the Court did not accept the respondent's argument that the government should legalize homosexual sodomy in the home. *Id.* at 195. In that case, the respondent relied upon Stanley v. Georgia, 394 U.S. 557 (1969), where the Court stated, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.* at 595. However, the *Bowers* Court relied upon the "morality" argument referred

ana's "interest in protecting order and morality" was a substantial governmental interest. Thus, the statute satisfied the second prong of the *O'Brien* test.[292]

Next, the Chief Justice analyzed whether the Indiana statute satisfied *O'Brien*'s third prong:[293] the state's interest is unrelated to the suppression of free speech.[294] The plurality contended that disallowing a performer to be completely nude while dancing does not indicate that the restriction relates to what the nudity is meant to express.[295] The plurality denied that Indiana's prohibition of total nudity was intended to suppress the dancer's erotic message.[296] In fact, Rehnquist asserted that the nudity alone was the "evil the state seeks to prevent," regardless of whether it was combined with expressive conduct such as dancing.[297]

The Chief Justice analogized the instant case to the facts in *O'Brien*, where the Court addressed the destruction of draft cards. In that case, the Court upheld the petitioner's conviction for burning his card because of the compelling state interest in the preservation of

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to by Justice Rehnquist and distinguished *Stanley* because, just as in *Barnes*, "the decision was firmly grounded in the First Amendment." *Bowers*, 478 U.S. at 195. For further discussion of legislative interaction with individual freedom, *see* Paul L. Alpern, Comment, *Bowers v. Hardwick: The Uneasy Interaction Between Legislative Interaction and Judicial Restraint*, 10 HARV. J.L. & PUB. POL'Y 213 (1987).

292. *Barnes*, 111 S. Ct. at 2462. However, as one commentator remarked: "The question is not whether the enforcement of morals is legitimate, but whether it is permissible for the state to enforce moral beliefs in a manner that is inconsistent with the Constitution." Simon Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 CARDOZO L. REV. 677, 701 (1989).

293. *Barnes*, 111 S. Ct. at 2462.

294. *See* United States v. O'Brien, 391 U.S. 367, 377 (1967).

295. *Barnes*, 111 S. Ct. at 2462-63. The Court pointed out that one could consider numerous actions "expressive." *Id.* at 2462. However, the Court cited *O'Brien*, which rejected this extended concept of "expressive conduct." *Id.* The *O'Brien* 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." *O'Brien*, 391 U.S. at 376.

296. *Barnes*, 111 S. Ct. at 2463. The Court stated, "The requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." *Id.* However, Justice Rehnquist should have given credence to Justice Holmes' opinion in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). Justice Holmes wrote:

> It would be a dangerous undertaking for persons trained only [in] law to constitute themselves final judges of worth of [art] . . . . At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their [artist] spoke.

Id. at 251.

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

valid draft card information.[298] Hence, the government punished O'Brien not for the communicative aspect of his conduct—the political statement he was making—but for the non-communicative aspect of his action: the destruction of the draft card.[299] Similarly, the majority reasoned that even though the dancing in *Barnes* possessed communicative elements, the dancing *itself* was not why the state disallowed the activity. Rather, the ordinance sought to eliminate the dancing merely because it involved nudity.[300] Thus, *O'Brien*'s third prong was satisfied.[301]

Finally, the Court turned to the fourth prong of *O'Brien* to determine whether the First Amendment restriction was the least restrictive means available while still furthering the state interest.[302] The Court determined that, because the Indiana statute was "narrowly tailored," the restriction was the least possible intrusion on free speech.[303] The majority concluded that demanding that the dancers "wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve that purpose."[304] In reaching its decision, the Court found that the government interest served by the statute was consistent with "societal disapproval of nudity in public places and among strangers."[305] Accordingly, the public indecency statute satisfied *O'Brien*'s fourth prong.[306]

B. Justice Scalia's Concurring Opinion

In his concurrence, Justice Scalia determined that the Courts should uphold the Indiana Public Indecency Statute, but not because it satisfied the standard set forth in *O'Brien*. Rather, he believed that the statute did not implicate the First Amendment whatsoever.[307] First, Justice Scalia argued that the state did not attempt to

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298. *Id.*

299. *Id.* Because O'Brien frustrated the state's purpose when he destroyed his card, he was punished and "for this non-communicative aspect of his conduct, and for nothing else, he was convicted." *Id.* (citing *O'Brien*, 391 U.S. at 382).

300. *Id.*

301. *Id.* Although the majority reached this conclusion, the dissent strongly disagreed. *See id.* at 2474-75 (White, J., dissenting).

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

303. *Id.*

304. *Id.*

305. *Id.* However, the majority failed to address the distinction that the public place in *Barnes* was an indoor adults-only club frequented by consenting patrons, while the statute's purpose could actually have been to prevent nonconsenting persons in open areas, such as beaches, from being forced to view another's nude body. Nonetheless, Justice Scalia's concurring opinion addresses this argument. *See id.* at 2465. (Scalia, J., concurring).

306. *Id.*

307. *Id.* (Scalia, J., concurring). Justice Scalia felt that the statute was not aimed at expression, but governed the mere conduct of appearing nude in public, and thus was not even subject to First Amendment protection. *Id.* at 2463-64 (Scalia, J., concur-

control expressive behavior through the public indecency statute, but merely sought to regulate a form of conduct.[308] Justice Scalia reasoned that because Indiana's first public nudity statute,[309] enacted in 1831, was in place long before the establishment of barroom nude dancing, the state could not have directed the statute at such expressive behavior.[310] In support of this theory, he referred to a number of instances in which the government used the statute to prosecute nonexpressive activities.[311]

Justice Scalia also rebutted the dissent's argument that the statute's aim was to protect the nonconsenting public from being forced to view another's nude body.[312] He argued that the purpose of the statute was to protect not only the nonconsenting public from nudity,

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ring). Justice Scalia's conclusion worried numerous commentators and legal scholars alike. *See, e.g.*, Bernard James, *Justices Still Seeking a Consistent Voice on First Amendment*, NAT'L L. J., Aug. 19, 1991, at S4. Professor Bernard James, Pepperdine University School of Law, declared, "[T]o ignore the burden placed on protected speech when there is no proof that a law was aimed at suppressing expression—is the most disturbing element of the Court's new activism." *Id.* *See also* Linda Greenhouse, *States May Ban Nude Dancing to Protect "Order," Justices Rule*, N. Y. TIMES, Jun. 22, 1991, § 1, at 1 (stating that American Civil Liberties Union members were pleased that the Court did not take Scalia's approach but drew a more narrow analysis).

308. *Id.* at 2464 (Scalia, J., concurring).

309. REV. LAWS OF IND. ch. 26, § 60 (1831).

310. *Barnes*, 111 S. Ct. at 2464 (Scalia, J., concurring). Scalia pointed out that public nudity was unlawful at common law. *See* 50 AM. JUR. 2D 449, § 17, 472-74 (1970); 93 A.L.R. 996, 997-98 (1934).

311. *Id.* (Scalia, J., concurring). *See* Bond v. State, 515 N.E.2d 856, 857 (Ind. 1987) (child molesting); *In re* Levinson, 444 N.E.2d 1175, 1176 (Ind. 1983) (public masturbation); Preston v. State, 287 N.E.2d 347, 348 (1972) (same); Thomas v. State, 154 N.E.2d 503, 504-05 (Ind. 1958) (indecent exposure in public park); Blanton v. State, 533 N.E.2d 190, 191 (Ind. App. 1989) (prostitution). However, Sweeney v. State, 486 N.E.2d 651, 652 (Ind. App. 1985), cited by Justice Scalia, may actually undermine his argument. The defendant in *Sweeney*, who performed sexual acts for a customer's viewing pleasure in an enclosed booth in an adult bookstore, was found not to have violated the public indecency statute because the area was not considered a "public place" for purposes of the statute. *Sweeney*, 486 N.E. 2d at 653.

Furthermore, using Justice Scalia's own argument that the statute has never been used to regulate expression, should the Court ever find nude dancing to be expression, the statute could not be used to regulate such expression. Therefore, given Chief Justice Rehnquist's conclusion that nude dancing was expressive activity at least "marginally" deserving First Amendment protection, under Justice Scalia's analysis, nude dancing should not be prohibited.

312. *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring). According to Justice Scalia:

> Perhaps the dissenters believe that "offense to others" *ought* to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian "you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else" beau ideal—much less for thinking that it was written into the Constitution.

Id. (Scalia, J., concurring).

but the consenting public as well.[313] Justice Scalia noted that American and other cultures have long forbidden some practices because they are deemed " '*contra bonos mores*,' i.e., immoral."[314] Thus, he supposed the statute's purpose was to impose the "traditional moral view" that people should not publicly expose their sexual organs indiscriminately, regardless of whether those present have consented to view them.[315]

Second, Justice Scalia reasoned that this case did not even involve the First Amendment because Indiana did not specifically aim its law at suppressing expressive communication.[316] He pointed out that in the past the Court has consistently held that any law which suppresses speech, even if the suppression is not related to the conduct, must pass the First Amendment scrutiny.[317] Justice Scalia criticized this practice based upon his belief that "virtually any prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition."[318] In addition, Justice Scalia distinguished the nude dancing in *Barnes* from activities which are performed specifically for their expressive characteristics.[319] Further, he questioned whether dancing, in general, even fell into the category of inherently expressive behavior.[320]

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313. *Id.* (Scalia, J., concurring).

314. *Id.* (Scalia, J., concurring). Examples of such activities include: cockfighting, drug use, sadomasochism, prostitution, suicide, sodomy and bestiality. *Id.* (Scalia, J., concurring).

315. *Id.* (Scalia, J., concurring). Justice Scalia added, "The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another, even if there were not an offended innocent in the crowd." *Id.* (Scalia, J., concurring).

316. *Id.* (Scalia, J., concurring).

317. *Id.* at 2465-66 (Scalia, J., concurring). Scalia provided examples such as Saia v. New York, 334 U.S. 558, 561 (1948) (noise reduction); Buckley v. Valeo, 424 U.S. 1, 16 (1976) (election campaign regulation) and Schneider v. State, 308 U.S. 147, 163 (1939) (litter prevention). *Id.* at 2465 (Scalia, J., concurring).

318. *Id.* at 2466 (Scalia J., concurring). *See, e.g.*, Florida Free Beaches, Inc. v. Miami, 734 F.2d 608, 609 (1984) (nude sunbathers' "message" that nudity was not indecent).

319. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (flag burning); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); Spence v. Washington, 418 U.S. 405 (1974) (defacing flag); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing black arm band); Brown v. Louisiana, 383 U.S. 131 (1966) (joining sit-in) and Stromberg v. California, 283 U.S. 359 (1931) (flying red flag).

320. *See Barnes*, 111 S. Ct. at 2466 n.4. However, the dissent pointed out that the dancing to which Scalia referred was "social dancing" present in a case which did not even involve expressive behavior, but asserted that the plaintiff's "*associational* rights were infringed upon by being forbidden admission to dance clubs because of age." *Barnes*, 111 S. Ct. at 2472 n.1 (White, J., dissenting).

Further, the dissent did not agree with Justice Scalia's contention that dancing was not inherently expressive behavior. Instead, they preferred the court of appeal's opinion: "Dance has been defined as 'the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself.' " *Id.* at 2471 n.1 (White, J., dissenting) (citing Miller v.

Hence, Justice Scalia argued that the Court's inquiry should be whether the purpose of the law is to inhibit expression.[321] He asserted that laws affecting expressive conduct should receive the same treatment as the Court adopted in *Employment Division v. Smith*,[322] where the Court analyzed restrictions on the free exercise of religion.[323] In *Smith*, the Court ruled that "general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminish some people's ability to practice their religion."[324] Similarly, argued Justice Scalia, the Court should examine under First Amendment analysis only those restrictions on conduct which the government directly targets at protected expression.[325] Otherwise, no First Amendment analysis is needed.[326]

Third, Justice Scalia refused to endorse the plurality's application of the *O'Brien* test.[327] He reasoned that the Court should avoid making judicial assessments of the "importance" of government interests, particularly those which judge the correctness of societal moral standards.[328] Justice Scalia used the same case law as the plurality to support his proposition; however, he reached a different conclusion as to *why* the challenged activities were prohibited.[329] Where the majority concluded the state's interest in forbidding the activities was "substantial" or "important," Justice Scalia found a rational basis standard was all that was necessary.[330] In summary, Justice Scalia

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Civil City of South Bend, 904 F.2d 1081, 1087 (1990) (en banc) (quoting 16 THE NEW ENCYCLOPEDIA BRITANNICA 935 (1989)).

321. *Barnes*, 111 S. Ct. at 2466 (Scalia, J., concurring).

322. 494 U.S. 872 (1990) (finding that a state's prohibition of peyote use was constitutional although it prevented some Native Americans from freely practicing their religion).

323. *Barnes*, 111 S. Ct. at 2467 (Scalia, J., concurring).

324. *See id.* (Scalia, J., concurring).

325. *Id.* at 2466 (Scalia, J., concurring).

326. *Id.* (Scalia, J., concurring). Scalia pointed out that this is the Court's standard practice in free exercise cases. For example, in *Employment Division, Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), the Court ruled that if a general law is not specifically aimed at religion, a higher degree of First Amendment scrutiny is not required. *Id.* Hence, Justice Scalia asserted there is greater reason to apply the Court's analysis to free expression cases because "[r]elatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons; but almost anyone can violate almost any law as a means of expression." *Barnes*, 111 S. Ct. at 2467 (Scalia, J., concurring).

327. *Id.* (Scalia, J., concurring).

328. *Id.* (Scalia, J., concurring).

329. *Id.* (Scalia, J., concurring). The two cases were *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973) and *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

330. *Barnes*, 111 S. Ct. at 2467 (Scalia, J., concurring).

declared that he would uphold the Indiana statute simply because "moral opposition to nudity supplies a rational basis for its prohibition."[331] Therefore, he concluded that the court of appeals' judgment should be reversed.[332]

C. *Justice Souter's Concurring Opinion*

Although Justice Souter agreed with the outcome of the plurality's decision, he took a more liberal approach than both the plurality and Justice Scalia. Justice Souter determined that expressive dancing is entitled to limited First Amendment protection.[333] Although Justice Souter conceded that dancing is expressive behavior, he concluded that "nudity per se" is not. Rather, it is merely a condition.[334] Next, Justice Souter determined that the four-prong *O'Brien* test is the proper analysis by which to judge whether nude dancing deserves First Amendment protection.[335] However, Justice Souter wrote separately because he did not agree with the plurality's conclusion that the statute satisfied *O'Brien*'s second prong.[336] In a highly structured opinion, Justice Souter confronted each prong of the *O'Brien* test as applied to the facts in *Barnes*.[337] Justice Souter agreed that the statute satisfied *O'Brien*'s first prong, because one may find the authority to enact such public indecency laws within the legislature's constitutional power.[338] However, when analyzing the second prong, his reasoning differed from that of the plurality. Justice Souter determined that the statute satisfied the *O'Brien* test because the state had a substantial interest in deterring secondary effects of nude dancing such as prostitution, crime and other illegal sexual activities.[339] Justice Souter asserted that application of the *O'Brien* test was appropriate even if the Indiana legislature did not enact the statute for these rea-

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331. *Id.* at 2468 (Scalia, J., concurring).

332. *Id.* (Scalia, J., concurring).

333. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring). Justice Souter declared that "when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a strip-tease, are integrated into the dance and its expressive function." *Id.* (Souter, J., concurring).

334. *Id.* (Souter, J., concurring). The majority determined that the statute met the second prong because the government had a substantial interest in controlling "order and morality." *See id.* at 2462.

335. *Id.* (Souter, J., concurring).

336. *Id.* (Souter, J., concurring).

337. *Id.* at 2468-71 (Souter, J., concurring).

338. *Id.* at 2469 (Souter, J., concurring).

339. *Id.* (Souter, J., concurring). Justice Souter did not agree that the Court should limit itself by recognizing the legislation's justification. Instead, he decided to give deference to the petitioner's declaration that the law should be applied to nude dancing because such activity "encourag[es] prostitution, increas[es] assaults, and attract[s] other criminal activity." *Id.* at 2469 (Souter, J., concurring) (quoting Brief for Petitioner at 37, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26)).

sons.[340] Accordingly, Justice Souter reasoned that because the Court had already established that a state may restrict adult entertainment because of its secondary effects,[341] the statute satisfied *O'Brien*'s second prong.[342]

Addressing the third prong of *O'Brien*, Justice Souter concluded that the state interest, that is, the decrease in prostitution and criminal activity, was not related to the suppression of free expression.[343] Justice Souter distinguished expression which may result in increased criminal activity and in the concentration of crowds gathered to see the nude dancing.[344] He recognized that when a statute regulates nude dancing because of its secondary effects, the restriction is somewhat related to free expression.[345] However, Justice Souter argued that the expressive aspect of the nudity was so far attenuated

340. *Id.* at 2469 (Souter, J., concurring). Justice Souter stated:

> Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional . . . . At least as to the regulation of expressive conduct, "[w]e 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. (Souter, J., concurring) (quoting O'Brien v. United States, 391 U.S. 367, 384 (1968)) (citations and footnote omitted).

341. Justice Souter cited Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding a zoning ordinance which was established to deter the adverse secondary effects associated with adult entertainment). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (legislature concluded that "a concentration of 'adult' movie theatres causes the areas to deteriorate and become the focus of crime"); California v. LaRue, 409 U.S. 109 (1972) (criminal activity associated with adult entertainment).

342. *Barnes*, 111 S. Ct. at 2470 (Souter, J., concurring).

However, Justice Souter conceded that the "secondary effects" rationale he used to meet *O'Brien*'s second prong would be unlikely to withstand a challenge by a theatrical production or ballet company. Souter stated:

> It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects.

Id. at 2470 n.2 (Souter, J., concurring).

343. *Id.* at 2470 (Souter, J., concurring).

344. *Id.* at 2470 (Souter, J., concurring). Justice Souter stated:

> To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in the nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are.

345. *Id.* at 2470 (Souter, J., concurring).

from the increase in criminal activity that the causation chain was broken.[346] Thus, the government restriction passed *O'Brien*'s third prong.[347]

Finally, Justice Souter turned to *O'Brien*'s fourth prong, which requires the restriction to be no broader than necessary to further the state interest.[348] Justice Souter characterized the limitation on expression as minimal compared to the dancer's opportunity to use other modes of expression to convey her sensual message.[349] Therefore, the ordinance satisfied the fourth prong of *O'Brien*.[350]

Based upon his application of the *O'Brien* test, Justice Souter concluded that restriction on nude barroom dancing was indeed constitutional.[351] Accordingly, because a plurality of the Justices agreed that the ordinance satisfied the four-prong *O'Brien* test, the Court concluded that the restriction on nude dancing did not violate First Amendment freedom of expression, and thereby reversed the court of appeal's holding.[352]

D. Justice White's Dissenting Opinion

In his dissent, Justice White followed the reasoning of both the court of appeal's and prior Supreme Court decisions which have held that "nude dancing is not without its First Amendment protections from official regulation."[353] The dissent acknowledged dancing as "an ancient art form [which] 'inherently embodies the expression and

346. *Id.* (Souter, J., concurring).

347. *Id.* at 2470-71 (Souter, J., concurring). Justice Souter's argument appears to be patterned after a proximate cause theory. For a further discussion of the proximate cause theory, *see* HERBERT LIONEL ADOLPHUS HART, CAUSATION IN THE LAW, (2d. ed. 1985); Thomas A. Moore, *Proximate Cause*, 203 N.Y.L.J. 1, 3 (1990); David E. Seidelson, *Some Reflections on Proximate Cause*, 19 DUQ. L. REV. 1, 1-42 (1980). *But see* Kenneth Vinson, *Proximate Cause Should Be Barred From Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215, 215-55 (1985).

348. *Barnes*, 111 S. Ct. at 2470-71 (Souter, J., concurring).

349. *Id.* (Souter, J., concurring). However, Justice Souter did admit that the portion of the statute which required dancers to wear pasties and a G-string moderated the expression. *See id.* at 2471 (Souter, J., concurring). Hence, it could be argued that this limitation of expression is *proof* that a state of total nudity is in fact, part of the dancer's erotic message and therefore, is deserving of First Amendment protection.

350. *Id.* at 2471 (Souter, J., concurring).

351. *Id.* (Souter, J., concurring). Justice Souter's perspective on the scope of the First Amendment is considerably more confined than that of his predecessor, Justice William J. Brennan, Jr., who retired in 1990. Thus, the Court most likely would have decided *Barnes* differently had Justice Brennan remained on the Court. Linda Greenhouse, *States May Ban Nude Dancing to Protect "Order," Justices Rule*, N.Y. TIMES, Jun. 22, 1991, § 1, at 1.

352. *Barnes*, 111 S. Ct. at 2471 (Souter, J., concurring).

353. *Id.* (White, J., dissenting) (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981)). *See* Doran v. Salem Inn, 422 U.S. 922, 932 (1975) (nude barroom dancing may deserve "the barest minimum of protected expression"); California v. LaRue, 409 U.S. 109, 118 (1972) (nude barroom dancing may be entitled to First and Fourteenth Amendment protection); Miller v. Civil City of South Bend, 904 F.2d 1081 (7th

communication of ideas and emotions.' "[354]

Next, Justice White pointed to several flaws in the plurality's approach.[355] First, Justice White contended that the Court had contradicted itself. On the one hand, the Court argued that it was impossible to determine precisely what Indiana had intended when it enacted the statute. Yet, on the other hand, the Court *still* concluded the statute's purpose clearly was to protect "societal order and morality."[356] Second, Justice White criticized the majority's willingness to uphold the statute as a *"general prohibition"* against individuals being seen nude in public locations.[357] Third, the dissent disagreed with the majority's conclusion that the ban on nude dancing was "unrelated to free expression."[358] And finally, Justice White took issue with the majority's assertion that the legislature drafted the statute narrowly.[359]

Although the Court labeled the statute's prohibition as general, it was clear to the dissent that this terminology was incorrect.[360] Jus-

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Cir. 1990) *rev'd* 111 S. Ct. 2465 (1991) (non-obscene nude barroom dancing is expressive behavior worthy of First Amendment protection).

According to Justice White, "That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine." *Barnes*, 111 S. Ct. at 2474 (White, J., dissenting).

354. *Barnes*, 111 S. Ct. at 2471 (White, J., dissenting) (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (1990), *rev'd*, 111 S. Ct. 2465 (1991)). Justice White referred to quotations in the court of appeals' decision which described the art form of dance: "Inherently, it is the communication of emotion or ideas. At the root of all 'the varied manifestations of dancing . . . lies the common impulse to resort to movement to externalize states which we cannot externalize by rational means. This is basic dance.' " *Miller*, 904 F.2d at 1085 (quoting JOHN S. MARTIN, INTRODUCTION TO THE DANCE (1939)). Further, the Court of Appeals contended that "[t]he raw communicative power of dance was noted by the French poet Stéphan Mallarmé who declared that the dancer 'writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose.' " *Barnes*, 111 S. Ct. at 2471-72 n.1 (White, J., dissenting) (quoting *Miller*, 904 F.2d at 1085-86).

355. *Barnes*, 111 S. Ct. at 2472 (White, J., dissenting).

356. *Id.* (White, J., dissenting). *See id.* at 2461.

357. *Id.* (White, J., dissenting) (emphasis added). The majority stated, "The history of Indiana's public indecency statute shows that it predates barroom dancing and was enacted as a general prohibition." *Id.* at 2461.

358. *Id.* (quoting *Barnes*, 111 S. Ct. at 2462).

359. *Id.* at 2472 (White, J., dissenting).

360. *Id.* at 2472 (White, J., dissenting). The dissent noted the majority relied upon cases which prohibited the challenged activity regardless of whether the activity was done in public or in the privacy of one's own home. *Id.* (White, J., dissenting). For example, in *O'Brien v. United States*, 391 U.S. 367 (1968), the government prohibited a war protestor from destroying his draft card regardless of whether he destroyed it in his home or on the courthouse steps. Additionally, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the government prohibited sodomy no matter *where* the sodomy occurred.

tice White argued that if this restriction against public nudity were *truly* a general one, it would apply to all situations.[361] Yet, as the petitioners themselves pointed out, theater productions such as "Hair" are protected under the statute.[362] Further, an Indiana policeman's affidavit plainly acknowledged that "[n]o arrests have ever been made for nudity as part of a play or ballet."[363] Hence, the dissent concluded the statute was not at all a general prohibition, but one which the state specifically aimed at nude barroom dancing.[364] Justice White also believed that because the prohibition was not a general one, the holding in *O'Brien* forced the Court to examine the statute's purpose more closely.[365]

Further, the dissent took issue with the plurality's conclusion that the prohibition was not related to the suppressed expression.[366] As Justice White pointed out, the plurality admitted that nude dancing holds an "erotic message."[367] Also, they acknowledged that the message would be "muted" if the dancers wore pasties and G-strings.[368] Therefore, because the regulation would affect the dance's message, Justice White concluded that the restriction *must* be related to the expressive behavior.[369]

Additionally, the dissent was dissatisfied with Justice Souter's logic.[370] Justice White reasoned that if the State's aim was to decrease the secondary effects of nude dancing, and the means of

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Hence, these prohibitions were what may be termed "general," whereas in *Barnes*, the statute did not prohibit the nude dancing generally (i.e., it did not illegalize dancing nude in one's own private bedroom). *Id.* at 2472 (White, J., dissenting).

361. *Id.* at 2472-73 (White, J., dissenting).

362. *See* Petitioners' Brief at 25, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

363. *Barnes*, 111 S. Ct. at 2472 (White, J., dissenting) (quoting Petitioners' Brief at 25, 30-31, *Barnes*, (No. 90-26)).

364. *Barnes*, 111 S. Ct. at 2473 (White, J., dissenting). The dissent further criticized Justice Scalia because he characterized the Indiana prohibition as a general one. *Id.* at 2473 (White, J., dissenting).

365. *Id.* (White, J., dissenting). The dissent asserted that "the state's general interest in promoting societal order and morality is not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity." *Id.* (White, J., dissenting).

366. *Id.* (White, J., dissenting).

367. *See id.* at 2463. The plurality stated, "[T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic *message* it conveys." *Id.* (emphasis added).

368. *Id.* at 2474 (White, J., dissenting) (citing *Barnes*, 111 S. Ct. at 2463). Despite the Court's conclusion that requiring performers to cover their body parts with pasties and G-strings did not eradicate the dance's erotic message, it admitted that the requirement made the message less graphic. *Id.* Therefore, the state's interference changed the erotic message the dance communicated.

369. *Id.* at 2474 (White, J., dissenting). "The sight of a fully clothed, or even partially clothed, dancer . . . will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself . . . expressive." *Id.* (White, J., dissenting).

370. *Id.* (White, J., dissenting).

achieving this end demanded "covering up" the nudity, then it follows that nudity's expressive value must have some relation to the government's interest.[371] If the nudity was not a form of expression, then it would not have an effect on criminal activity. Accordingly, the dissent determined that the prohibition would fail *O'Brien*'s third prong.

Next, Justice White criticized both the plurality and Justice Souter's conclusions that the statute was narrowly drawn.[372] The dissent suggested other alternative measures which the state could have implemented to regulate the dancing without broadly censoring an entire category of expressive behavior.[373]

Finally, the dissent focused upon specific defects in Justice Scalia's reasoning.[374] Justice White reiterated his disagreement with Justice Scalia's claim that the statute's prohibition was general in nature.[375] Further, the dissent asserted that Indiana's reason for the prohibition was to prevent the customers of adult establishments from being exposed to the expressive elements of dance.[376] The dissent therefore believed that Justice Scalia's observation was exactly on point: "Where government prohibits conduct *precisely because of its com-*

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371. *Id.* at 2473-74 (White, J., dissenting). "Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition." *Id.* at 2474 (White, J., dissenting).

372. *Id.* at 2475 (White, J., dissenting). Justice White declared, "Banning an entire category of expressive activity . . . does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny." *Id.* (White, J., dissenting). *See also* Frisby v. Shultz, 487 U.S. 474, 485 (1988) ("[a] complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil").

373. *Barnes*, 111 S. Ct. at 2475 (White, J., dissenting). First, Justice White suggested the state could place minimum distance requirements on the dancers' performances, or it could use other time, place, and manner restrictions. *Id.* (White, J., dissenting). *See supra* notes 135-142 and accompanying text.

Moreover, Justice White suggested that the State may use its twenty-first amendment power to regulate establishments which serve alcohol. *Barnes*, 111 S. Ct. at 2475 (White, J., dissenting). *See supra* notes 109-124 and accompanying text.

374. *Barnes*, 111 S. Ct. at 2475 (White, J., dissenting).

375. *Id.* (White, J., dissenting). Justice White employed Justice Scalia's amusing hypothetical to clarify this point:

> We agree with Justice Scalia that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosierdome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends.

Id. at 2475-76 (White J., dissenting). *See supra* note 315 and accompanying text.

376. *Id.* at 2476 (White, J., dissenting).

municative attributes, we hold the regulation unconstitutional."[377] Therefore, Justice White and three other Justices concluded that the State's prohibition against complete nudity while dancing violates a dancer's First Amendment right to free expression.[378]

V. IMPACT OF THE *BARNES* DECISION

A. Social Impact

1. Public Response

First Amendment issues profoundly impact Americans regardless of one's personal stand on a particular issue. Thus, immediate public response to the *Barnes* decision was strong, yet diverse.[379] Some Americans have interpreted the Court's words as powerful and frightening limitations on fundamental freedoms.[380] Some even believe that Justice Rehnquist's opinion will lead to an infringement upon such freedoms as the exercise of religion.[381] Others, however, have taken a more lighthearted approach to the decision, emphasiz-

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377. *Id.* (White, J., dissenting). *See Barnes*, 111 S. Ct. at 2466 (Scalia, J., concurring). *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (flag burning); Spence v. Washington, 418 U.S. 405 (1974) (defacing flag); and Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing black arm bands).

378. *Barnes*, 111 S. Ct. at 2476 (White, J., dissenting). Justices Marshall, Blackmun, and Stevens joined in the dissenting opinion. *Id.* at 2471.

379. Thomas L. Jipping, director of the Free Congress Foundation, said, "The First Amendment is not an altar on which American families must sacrifice the traditional values that made this country great . . . . [The decision] gives a green light for communities to aggressively enforce basic standards of decency." However, Stephen Shapiro of the American Civil Liberties Union believes that *Barnes* is "a dangerous and disturbing decision because it says free speech can be censored in the interest of public morality . . . . They took on the issue of nude dancing but ended up writing an essay, and a bad essay, on the First Amendment." David Savage, *Ban on Nude Dancing Backed by High Court*, L.A. TIMES, Jun. 22, 1991, at A1.

380. The following appeared in the L.A. TIMES editorial column:

> Two side-by-side reports on the front page (June 22) were frightening.
>
> In *'Ban on Nude Dancing Backed by High Court,'* David G. Savage reports that 'Government has the authority to protect 'societal order and morality,' including the power to forbid 'expressive activity' within the confines of a private establishment, Chief Justice William Rehnquist said for the court.'
>
> In *'Gorbachev Puts Down Threat by Hard-Liners,'* Michael Parks reports that in response to his efforts for radical political and economic reforms in the Soviet Union, Gorbachev said, 'The people understand that now is the time for concrete action, a time when delays will kill. Yet we have people who do not like this . . . . At any forum, in the mass media, at the plenums of the (Communist Party) Central Committee, beyond the scenes, they are working to impose their opinions on us, to impose their visions, their policies.'
>
> I'm confused. Which is the dictatorship and which is the democracy?
>
> Norman N. Alperin, Rancho Palos Verdes

Norman N. Alperin, *Supreme Court on Nude Dancing*, L.A. TIMES, July 2, 1991, at B6. One commentator referred to the decision as "heinous" and quipped, "Yet again, the Supreme Court has decided to tell women what to do with their bodies." Alex Beam, *Goodbye Zone; T.G.I.W.*, BOSTON GLOBE, June 26, 1991, at 69.

381. The following letter appeared in the NEW YORK TIMES editorial section:

> When High Court Voices Moral Disapproval

ing that the subject matter should not be taken so seriously.[382] Nonetheless, the immediate impact felt by hundreds of adult establishments throughout Indiana will be strong. They now must force their dancers to modify their dress to cover bare breasts and genitalia. Further, since virtually all states across the nation have public indecency laws,[383] the decision grants broad leeway to the state legislatures to restrain live nude dancing.[384]

To the Editor:

Chief Justice William H. Rehnquist in his opinion in Barnes v. Glen Theatre, which allows states to ban nude dancing, appeals to moral disapproval of public nudity. But he fails to explain why public nudity might be deemed immoral or if there might be a morality that would permit nudity under certain conditions.

Early Christian baptisms were performed in the nude. 'The Apostolic Tradition' of St. Hippolytus, bishop of Rome (circa 215), called for all to be baptized—from little children to grown men and women—to "put off their clothes." Moreover, this rule ordered, "Let no one go down to the water having any alien object with them"—which, I suppose, would preclude pasties and G-strings, as well as earrings and the like.

We all know that early Christians used the Roman public baths, where both men and women bathed communally in the nude (according to Irenaeus, Tertullian and Eusebius).

Christian morality did not preclude nudity until some church fathers developed an anti-body philosophy (borrowed ultimately from Plato), which led St. Jerome in the fifth century, for example, to consider it immoral for a Christian virgin to bathe in the nude—even if all alone.

Chief Justice Rehnquist writes that "Public nudity is the evil the state seeks to prevent." There is no evidence that the early Christians considered nudity in church rites or in the public baths to be either an evil or immoral. Anyone who chooses to be guided by early Christian morality should be concerned not merely about the infringement of free expression, but also the infringement of freedom of religion.

Roy Bowen Ward
Professor of Religion, Miami University
Oxford, Ohio, June 24, 1991.

Roy Bowen Ward, *When High Court Voices Moral Disapproval*, N.Y. TIMES, Jul. 12, 1991, at A28.

382. Judge Posner thought the real reason for wishing to take nude dancing outside the realm of First Amendment protection was the "feeling that the proposition, 'the First Amendment forbids the State of Indiana to require striptease dancers to cover their nipples,' is ridiculous." Miller v. Civil City of South Bend, 904 F.2d 1081, 1100 (7th Cir. 1990), *rev'd*, 111 S. Ct. 2465 (1991) (Posner, J., concurring). *See also Bare Any Burden*, THE ECONOMIST, Jun. 29, 1991 at 22, where one commentator asks, "Does this [restriction] erode liberty or resist its trivialization?" *Id.*; Bruce Fein, *Naked Truths . . . Welcome Message*, WASH. TIMES, Jun. 27, 1991, at G1. "[T]he gales of lugubrious responses to *Glen Theatre* are much ado about nothing." *Id.*

383. Forty-seven states proscribe public nudity laws. Bruce Fein, *supra* note 382, at G1.

384. James Vicini, *Nude Dancers Must Wear Pasties, G-Strings, Supreme Court Says*, REUTERS, Jun. 21, 1991.

2. Artistic Stagnation and the Chilling Effect

A chilling effect occurs when a protected activity is inhibited due to a fear of its legal or nonlegal ramifications. Such an effect may occur when a law restricts perfectly legal activity as well as the targeted illegal activity.[385] Hence, an indirect form of censorship takes place. The artistic community has already begun to witness such a stagnation since the Court decided *Barnes*.[386]

Sexually oriented expression is generally negatively stereotyped. Therefore, the *Barnes* decision will likely have several important ramifications. First, painters who fear the negative stigma associated with nudity might be reluctant to produce sexually suggestive paintings.[387] Second, sculptors whose work glorifies the human anatomy may become reticent or feel the need to tone down their expression for fear of public criticism.[388] Third, medical doctors and psychologists who perform photographic studies of child development may fear that their work will be classified as "child exploitation."[389] Fourth, and most importantly, the political "pro-censorship message" could affect artists' pocketbooks. In the wake of the *Barnes* decision, organizations such as the National Endowment of the Arts (NEA) may be reluctant to allocate funds to museums or other federally funded groups.[390] These examples are evidence of the hysteria and repression which now loom over expressive activity in the United States.

The *Barnes* decision is not the only recent threat to artistic free expression. In 1989, NEA President John D. Frohnmayer shocked the artistic community by withdrawing NEA sponsorship from "Artists Space," a gallery where artists were to promote a show spotlighting the AIDS crisis.[391] In a decision which many considered a response to Congress' recent efforts to restrict sexually explicit art,

385. *See generally* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (referring to "the possibility that protected speech of others may be muted . . .").

386. Patti Hartigan, *Mapplethorpe's 'Chilling Effect' A Year Later, Battle Goes On*, THE BOSTON GLOBE, Oct. 6, 1991, at 1 (National/Foreign). Several artists interviewed attested that supporters withdrew their funding after authorities learned of the artwork's sexually explicit themes. *Id.*

387. Performance artist Karen Finley asserted, "There are artists right now who are changing their art because they are scared." Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1373 n.105 (1990) (quoting Telephone Interview with Karen Finley, performance artist (Aug. 1989)).

388. Interview with Bernard James, Professor of Constitutional Law, Pepperdine University School of Law (Feb. 6, 1992).

389. *Id.*

390. *Id.*

391. Letter from John D. Frohnmayer to Susan Wyatt, Director of Artists Space (Nov. 3, 1989). "Artists Space" is a well-known New York artist-run gallery. The show, "Witnesses: Against Our Vanishing," involved 23 different artists and was organized by Nan Goldin, a prominent Boston photographer and artist. William H. Honan, *Arts Endowment Withdraws Grant for AIDS Show*, N.Y. TIMES, Nov. 9, 1989, at A1.

Frohnmayer referred to "the recent criticism the Endowment has come under and the seriousness of Congress' directive." Further, he wrote, "[W]e must all work together to ensure that projects funded by the Endowment do not violate either the spirit or the letter of the law."[392] The reaction to Frohnmayer's decision was extremely negative among members of the art community, civil libertarians, and ardent First Amendment supporters.[393] Susan Wyatt, Director of Artists Space, characterized Frohnmayer's decision as "a very dangerous precedent. We did a show of Eastern European art here last June, and I know what official art is all about, and I just hope we are not moving into that."[394] First Amendment lawyer Floyd Abrams argued that "[the withdrawal of funding] of artistic works because the catalogue for those works criticizes public officials and other prominent figures is an appalling surrender of First Amendment principle."[395]

In the summer of 1988, North Carolina Republican Senator Jesse Helms introduced a bill to Congress that would forbid the NEA from funding projects depicting "sexual or excretory activities or organs" in a "patently offensive way."[396] The new law, which bars funding of obscene or pornographic artworks, represents the first congressionally imposed content restriction in the NEA's twenty-five year history.[397] Unfortunately, efforts to censor artists by means of the NEA funding process are only part of the movement among conservative politicians and religious fundamentalists to control the content of popular music, television and radio broadcasts, public school text-

392. Honan, *supra* note 391, at A1.

393. William H. Honan, *The Endowment v. the Arts: Anger and Concern*, N.Y. TIMES, Nov. 10, 1989, at C33.

394. Honan, *supra* note 391, at A1.

The conservatives' attempt to publicly stigmatize art which is outside of the politically correct mainstream can be analogized to the "Exhibition of Degenerate Art," which propagandist Josef Goebbels organized in Nazi Germany in 1937. In that instance, the Nazis seized 5,000 sculptures and paintings, of which 700 were exhibited and labeled "degenerate" because they failed to endorse National Socialist Ideas. The artwork included paintings by Chagall, Dada, Gauguin, Kandinsky, Klee, Mondrian, and Picasso. IAN DUNLOP, THE SHOCK OF THE NEW 224-59 (American Heritage Press. 1972).

395. William H. Honan, *The Endowment v. the Arts: Anger and Concern*, N.Y. TIMES, Nov. 10, 1989, at B13.

396. *Id.* The bill passed the Senate 68 to 28. *Id.*

397. Particularly, the law restricts the funding of works which are "considered obscene, including but not limited to portrayals of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value." H.R. CON. RES. 264, 101st Cong., 1st Sess. (1989).

books, and other forms of expression.[398] Controversy also continues over the use of the human body as a visual symbol in paintings, photography, videos, and film.[399] For example, in the fall of 1989, many removed copies of *Vogue* and other women's magazines from newsstands in response to objections to a female nude body shown in an advertisement.[400] Producers of the *Today* show refused to air a segment which included a shot of Bronzino's *An Allegory with Venus and Cupid*, upon determining that the showing of a female's bare breast "was not in good taste."[401] And in December 1991, Music Television (MTV) banned Madonna's video, "Justify My Love," because it revealed too much of her body.[402]

Hence, the chilling effect of legislation, coupled with the movement among some conservative politicians and members of the public, could further suppress artistic creation across the country. Just as the Supreme Court decided in *Rust v. Sullivan*[403] that clinics which accepted federal funding may compel their employees to withhold information from their patients regarding abortion as an alternative,[404] it is not far-fetched to imagine art-funding groups telling artists that they will not receive monetary support if the artist produces sexually explicit work.[405]

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398. *See* Jon Pareles, *Legislating the Imagination*, N.Y. TIMES, Feb. 11, 1990, at H30; Chuck Phillips, *Are Church Groups Allying for Anti-Rock Crusade?*, L.A. TIMES, Feb. 11, 1990, (Calendar) at 75.

399. *Don't Look Now*, VOGUE, Feb. 1991, at 318-21.

400. *Id.* at 320.

401. *Id.*

402. *Id.*

403. 111 S. Ct. 1759 (1991).

404. *Id.* at 1772.

405. One commentator characterizes the *Rust* and *Barnes* decisions as signs of an "increasing willingness by the Court to find excuses to stop free speech." Alexander Cockburn, *Black Robes and Judicial Brass Knuckles: The Supreme Court is Steadily Infringing on the First and Fourth Amendments*, L.A. TIMES, Jun. 27, 1991, at B7. Another commentator contemplated:

> While an art museum has no right to receive a federal grant, what if Congress prohibited the NEA from giving grants to art exhibits by Republicans? Or to plays that portray religions other than Christianity in a positive light: Should the government be able to ban federal grants for productions of *"Jesus Christ Superstar"* or Shakespeare's *"Merchant of Venice,"* which offends various religious groups? Or, as one NEA official asked in response to Senator Helms' proposal, should funding be cut for Mozart's great opera *"Don Giovanni"* because it contains a speech extolling the virtues of war which would not doubt offend devout Quakers?

Eric B. Schnurer, *The Troublesome First Amendment*, CHRONICLE, Winter 1990 (published by the National Constitution Center).

In *Rust*, Chief Justice Rehnquist declared that the government's power to advance a specific social interest outweighs First Amendment protection when federal funds are involved. The only significant distinction between Justice Rehnquist's opinions in *Rust* and *Barnes* is the manner in which he treats the issue of governmental funding. Joe Patrick Bean, *Trouble Ahead for the First Amendment*, CHRISTIAN SCIENCE MONITOR, Jul. 8, 1991, at 18.

Nonetheless, artists have been fighting back against congressional attempts to "purify" their artwork. Since October 1989, the NEA has required artists to sign an "artistic loyalty oath" pledging that if they receive monetary funding, their art will not violate anti-obscenity restrictions.[406] Joseph Papp, director of the New York Shakespeare Festival, refused to sign the oath, and thereby sacrificed a $50,000 grant.[407] Papp wrote to NEA President Frohnmayer, "I cannot in all good conscience accept any money from the NEA as long as the Helms-inspired amendment on obscenity is part of an agreement."[408] Further revealing his disappointment in the trend toward artistic censorship in this country, Papp commented, "If you look at foreign countries where dictatorships prevail, you find that the writers, the musicians, the artists are either under surveillance or under attack. The arts are always the first to be hit. The only difference is now it's happening here."[409]

B. Legal Significance

1. Impact on Future Cases

Although the plurality in *Barnes* stated that nude dancing is expressive conduct within the realm of First Amendment protection, it specified that it is "only marginally so."[410] The plurality further eroded the Constitution's protections for expressive behavior by emphasizing that any First Amendment interest may be outweighed by "substantial government interest in protecting order and morality."[411] The decision elicits the fundamental question: Who deter-

406. William H. Honan, *Papp Rejects Grant from Endowment Over Restrictions*, N.Y. TIMES, Apr. 27, 1990, at B1.

407. *Id.*

408. *Id.* Television producer Mark Goodson offered to make up Papp's $50,000 grant because he believed that "[t]his thing went right to the heart of something I feel very strongly about, which is censorship of plays. Half the things that have been done on Broadway—David Mamet's work, for instance—could be blocked out in an attempt to skirt someone's definition of what is or is not obscene." Allan Parachini, *Venice Choreographer Refuses $50,000 NEA Fellowship Over Obscenity Limits*, L.A. TIMES, Apr. 28, 1990, at F10.

409. *Some Voices on the Arts*, SEATTLE TIMES, July 22, 1990, at L1.

410. *See Barnes v. Glen Theatre, Inc.*, 111 S. Ct. at 2456, 2460 (1991).

411. *Id.* at 2462. Ironically, as one entertainment executive has declared, "[T]here is no evidence that any type of censorship or repression of free speech increases moral behavior. All of the evidence shows the opposite." *Look Who's Talking: The First Amendment in Crisis: Arts and Entertainment, a Colloquium Presented by the Playboy Foundation*, PLAYBOY, April 1991, at 49 (quoting interview with Danny Goldberg, President, Gold Mountain Entertainment) [hereinafter *Look Who's Talking*].

In discussing post-World War II censorship of anti-Semitic speech in the Soviet

mines which forms of expression are permissible under the "public morality" test? If Justice Rehnquist's logic is extended, *Barnes* could enable the Court to revisit other cases in which the Court protected symbolic speech.[412]

For example, if the Court balanced the value of flag burning against the state interest in order and morality, the Court could overturn *United States v. Eichman*[413] and *Texas v. Johnson*[414] on the grounds that such conduct is highly offensive to society's moral views.[415] Ironically, just two short terms ago in *Johnson*, the Court reaffirmed its belief that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[416]

Cohen v. California[417] is yet another decision which *Barnes* may threaten. There, the Court held that the state could not penalize a Vietnam War protester who entered a courthouse wearing a jacket bearing the words "Fuck the Draft," because his action was protected symbolic expression.[418] The Court could overturn this decision, if considered under the logic of *Barnes*, in order to protect state order or morality interests.[419]

Further, *Barnes* leaves open the question of whether sexually explicit artwork may be displayed in museums and galleries.[420] Hence,

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Union, Goldberg notes that the United States took a very different approach to the issue. The U.S. not only allowed this type of speech, but permitted Nazis to march in public. He concluded that "forty or fifty years later, it's a lot safer to be a Jew in the United States with free speech than in the Soviet Union that censored anti-Semitism for forty years." *Id.* at 49-50.

412. Stuart Taylor, Jr., *The Bare Minimum of Free Speech; The Nude Dancing Case Might Lead to a Narrowing of Protected Expression*, THE RECORDER, Jul. 19, 1991, at 5. As one commentator has noted, "Four of the five justices in the majority employed language that could form the basis for further restrictions on expressive conduct deemed offensive to society's moral views." *Id.* Thus, fervent First Amendment supporters are strongly depending on the fact that Rehnquist's "morality" language did not receive a majority of the justices' vote.

413. 110 S. Ct. 2404 (1990) (5-4 decision).

414. 491 U.S. 397 (1989) (5-4 decision).

415. Taylor, *supra* note 412, at 5.

416. *Johnson*, 491 U.S. at 414.

417. 403 U.S. 15 (1971).

418. *Id.* at 26. The *Cohen* Court reiterated:

> To many, the immediate consequences of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are . . . necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is . . . not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of privilege, these fundamental societal values are truly implicated.

Id. at 24-25.

419. Taylor, *supra* note 412, at 5.

420. Martin Garbus, *The Big Chill on Free Speech*, NEWSDAY, Jul. 4, 1991, at 63;

Cincinnati city officials might have been able to shut down Robert Mapplethorpe's artistic photo exhibit because its homoerotic images could be construed as morally offensive.[421] Moreover, the artistic community should be alarmed because Justice Rehnquist's decision mentions no exceptions for ballet or theatrical productions which include nude scenes.[422] As one acclaimed constitutional law professor has noted, "[I]n effect, *Barnes* indirectly expands obscenity law by preferring an outcome—the downgrading of offensive but non-obscene expression to unprotected status—but without the precision ordinarily required to avoid a chilling effect on protected expression."[423]

2. Court's Conservative Trend

The *Barnes* decision provided yet another example of how the replacement of Justice William Brennan with Justice David Souter has made a significant impact on the law.[424] Moreover, *Barnes'* language is even more frightening in light of Justice Thurgood Marshall's retirement in 1991.[425] In Marshall's final opinion on the Court, he railed against his colleagues' "far-reaching assault" on the Bill of

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David G. Savage, *Ban on Nude Dancing Backed by High Court; Judiciary: The 5-4 Decision Says Public's 'Moral Disapproval' Outweighs the Right of Free Expression*, L.A. TIMES, Jun. 22, 1991, at A1.

421. Rita Ciollo, *Case Clothed: Ban Upheld on Nude Dancing; Supreme Court OK's Indiana Law; Critics See First Amendment Peril*, NEWSDAY, Jun. 22, 1991, at 7. Artists are unsure if their work will fall within First Amendment protection because the *Barnes* decision voices no true basis for determining whether a piece of art may be banned because it contravenes society's morals. Bernard James, *Justices Still Seeking a Consistent Voice on First Amendment*, NAT'L L.J., Aug. 19, 1991, at S4; *see also* Stephen F. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 HASTINGS COMM. & ENT. L.J. 353, 358-73, 393-93 (1990).

422. David G. Savage, *Ban on Nude Dancing Backed by High Court; Judiciary: The 5-4 Decision Says Public's 'Moral Disapproval' Outweighs the Right of Free Expression*, L.A. TIMES, Jun. 22, 1991, at A1. Thus, a future Court could deny First Amendment protection to such artistic theatrical productions as "Hair," or "Salome," the Richard Strauss opera featuring the "Dance of the Seven Veils."

423. Bernard James, *Reading Between the Lines: The First Amendment, Government Regulation and the Rehnquist Court*, LOS ANGELES LAWYER, Vol. 14, No. 9, Dec. 1991, at 26, 30.

424. Because Justice Brennan was considered a "friend of free speech," he most likely would have struck down the Indiana statute. Thus, with Justice Brennan's vote, the *Barnes* Court would have reached the opposite conclusion. Martin Garbus, *The Big Chill on Free Speech*, NEWSDAY, July 4, 1991, at 63.

425. Linda Greenhouse, *The Conservative Majority Solidifies*, N.Y. TIMES, Jun. 30, 1991, § 4, at 1. In one of Justice Thurgood Marshall's last dissenting opinions he cautioned that the Rehnquist majority fired a "far-reaching assault upon this Court's precedents." *Id.*

Rights, characterizing it as the squandering of "the authority and the legitimacy of this Court as a protector of the powerless."[426] In response to a 6-3 ruling which overturned two cases decided merely two and four years earlier, Marshall wrote, "Power, not reason, is the currency of this Court's decision-making."[427] Hence, the Rehnquist Court seems willing to chip away at precious constitutional freedoms which were established to protect *all* Americans, not merely the ones speaking in sync with the political majority.[428]

Legal scholars share Justice Marshall's frustration. Catherine Stimpson, Dean of Rutgers University Graduate School, has warned that "the sex police are on the beat."[429] Other legal scholars have commented on Justice Rehnquist's judicial activism demonstrated by outcome of *Barnes*. Professor Burt Newborne of the New York University School of Law said, "Five years ago, Rehnquist would have foamed at the mouth if the liberal wing was doing this."[430] The new conservative Court should give credence to one commentator's declaration that "you cannot claim the higher moral ground by suppressing arguments, rewriting history, and legislating away behavior."[431]

VI. CONCLUSION

For more than four decades, the American people have relied upon the High Court to protect and preserve the First Amendment's freedom of speech clause against political encroachment. Unlike elected officials, who are pressured by high-powered interest groups with their own political agendas, the public traditionally relies upon the Supreme Court as the shield that protects our nation's fundamental

426. Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting).

427. *Id.* (Marshall, J., dissenting). In *Payne*, the majority ignored its 1987 decision in *Booth v. Maryland*, 482 U.S. 496 (1987), and its 1989 decision in *South Carolina v. Gathers*, 490 U.S. 805 (1989), which held that prosecutors at sentencing hearings could not introduce evidence of the character of a murder victim or the effect of the crime on the survivors. *Payne*, 111 S. Ct. at 2619. Chief Justice Rehnquist wrote that adherence to precedent "is the preferred course, [but] not an inexorable command." *Id.* at 2609. He justified his reasons for ignoring the doctrine of *stare decisis* by pointing out that the *Payne* case did not involve "property or contract rights" where adherence to High Court precedence is imperative. *Id.*

428. Jeffrey Davis, *The War on Nudity Part Two: The Supreme Court Considers the Art of Striptease*, PLAYBOY, July 1991, at 42. The author was convinced that the Warren and Burger Courts would have denied *certiorari* to *Barnes*. *Id.* at 45.

429. *Look Who's Talking*, *supra* note 411, at 48 (quoting Interview with Dean Catherine Stimpson). Dean Stimpson referred to a "cultural war" targeted against those who challenge sexually oriented statutes. She observes that "[o]bscenity has replaced communism as the demon of choice for rigid and fearful Americans." *Id.*

430. Marcia Coyle, *Complete Control*, NAT'L L.J., Aug. 19, 1991, at § 1. Professor Newborne was perturbed by "the hypocrisy with which the Chief Justice has waged a lifelong war against judicial activism and then does it once he gets five votes." *Id.*

431. John Allemang, *A New Puritanism for the Nagging 90's: Taking the Fun Out of Practically Everything*, WORLD PRESS REVIEW, May 1991, at 30, 32.

freedoms. Unfortunately, the retirements of Justices William Brennan and Thurgood Marshall have allowed the Court to lower its protective shield.[432] Moreover, the addition of Justices David Souter and Clarence Thomas could even further erode First Amendment protections.[433]

The next decade poses an ominous question: Will freedom of expression and artistic creativity flourish abroad and dwindle in our own country? As totalitarian governments lose control over the minds of their people, will our own government further tighten its grasp on what our citizens are able to see or read?

The answer may be found not in the United States Constitution, but in the fifty state constitutions throughout the country. As Justice William Brennan stated, "Rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times."[434] It has long been settled that the United States Supreme Court will not review any case decided on independent and adequate state grounds as long as states do not offer fewer rights than are in the federal Constitution.[435] Thus, as a practical matter, the United States Constitution establishes "a floor for civil liberties protections, but not a ceiling."[436] Therefore, liberal state courts have the ability to issue decisions that go considerably beyond current Supreme Court interpretations.[437]

The Supreme Court's decision in *Barnes v. Glen Theatre, Inc.* may seem somewhat trivial at first glance. However, its potential chilling

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432. The Court is left with no outspoken liberals and only two moderates, Justices Blackmun and Stevens. David G. Savage, *The Rehnquist Court*, L.A. TIMES MAGAZINE, Sept. 29, 1991, at 38.

433. "[Clarence Thomas'] arrival is likely only to accelerate the urge to purge past decisions . . . . Thomas [gives the conservatives] yet another potential ally on a Court with no diehard liberals and but two moderates." Bos Cohn & David Kaplan, *Supreme Conservatism*, NEWSWEEK, Oct. 14, 1991, at 56.

Another commentator observes, "The confirmation of Clarence Thomas has created one of the most ideologically homogeneous high courts in this century and the possibility that there will be fewer of the ringing dissents on which law is often built." Kevin Cullen, *In Court's Turn Right—Few Detour Signs*, BOSTON GLOBE, Oct. 21, 1991, at 1.

434. Ronald K.L. Collins & Peter J. Galie, *The Methodology*, NAT'L L.J., Sept. 29, 1986, at S8. *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

435. David Margolick, *State Judges are Shaping Law that Goes Beyond Supreme Court*, N.Y. TIMES, May 19, 1982, at A1.

436. *Id.*

437. For example, Connecticut, New Jersey and Pennsylvania have held that their constitutions protect speech occurring on private property such as shopping centers and universities. *Id.*

effect could have detrimental repercussions not only on the art community, but on free speech generally.

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