Nude Dancing, Expressive Conduct, and the First Amendment: Reviewing *Barnes v. Glen Theatre*

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Introduction

The United States Supreme Court has considered several First Amendment[1] challenges to state and local prohibitions on nude dancing,[2] and recently revisited the issue in *Barnes v. Glen Theatre*.[3]

In *Barnes*, the Court evaluated the constitutionality of an Indiana public indecency statute that prohibited all public nudity.[4] The Court upheld the statute as constitutional in a five to four plurality decision.[5]

The Court's focus in *Barnes* was limited in three respects. The nude dancing at issue in the case was not obscene.[6] The theaters and barrooms

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1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend I. The First Amendment applies to state governments through the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972).

3. 111 S. Ct. 2456 (1991).

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

> Public Indecency; indecent exposure
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> Sec. 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 of the covered male genitals in a discernible turgid state.

5. *Barnes*, 111 S. Ct. 2456.

6. The Seventh Circuit below referred to the nude dancing in this case as "non-obscene nude dancing of the bar-room variety performed as entertainment." Miller v. Civil City of

involved were "public places" for purposes of the statute.[7] Perhaps most importantly, Indiana courts had already rejected overbreadth challenges to the statute.[8]

Because the Indiana public indecency statute did not specifically prohibit nude dancing, but instead prohibited all public nudity,[9] *Barnes* presented the Court with the limited question of the constitutionality of the statute as applied to non-obscene nude dancing performed as entertainment. The Court upheld the statute as constitutional.

This Comment will consider the reasoning of the three-Justice plurality,[10] the separate concurring opinions of Justices Souter and Scalia, and the four-Justice dissent,[11] and will evaluate the relative strengths and weaknesses of each. Specifically, this Comment will address how a general public indecency statute which infringes on non-obscene nude danc-

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South Bend, 904 F.2d 1081, 1082 n.2 (7th Cir. 1990) (en banc); no claim was ever made that the nude dancing was obscene. *See* Glen Theatre v. Civil City of South Bend, Memorandum and Order n.3, Cause No. S85-353 (N.D. Ind. July 26, 1985), *reprinted in* Appendix to Petition for Writ of Certiorari at 154, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (No. 90-26), *microformed on* U.S. Supreme Court Records and Briefs (Congressional Info. Serv.) [hereinafter Appendix to Petition for Writ of Certiorari].

Obscene speech is not protected by the First Amendment. Roth v. United States, 354 U.S. 476 (1957). In Miller v. California, 413 U.S. 15 (1973), the Court defined "obscene":

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

For purposes of this Comment, the term "nude dancing" will refer only to non-obscene nude dancing.

7. *See* State v. Baysinger, 397 N.E.2d 580, 583 (Ind. 1979) (interpreting the statute to apply to nude entertainment in theaters, nightclubs, and other places open to the public), *appeals dismissed sub nom.* Clark v. Indiana, 446 U.S. 931 (1980), and Dove v. Indiana, 449 U.S. 806 (1980).

8. If the statute had been overbroad, then it would have been unconstitutional. A statute regulating expressive conduct is overbroad if, by reason of its broad scope, it extends to constitutionally protected forms of expression (notwithstanding the constitutionality of the statute as applied in the case). *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

According to the plurality in *Barnes*, however, the Indiana Supreme Court had given the Indiana statute a limiting construction (thus saving it from overbreadth challenges) by holding that it did not apply to nudity in protected forms of expression (such as theatrical productions). *Barnes*, 111 S. Ct. at 2460 n.1 (plurality opinion) (citing *Baysinger*, 397 N.E.2d 580).

9. Justice Scalia described the statute as a "general law," because in his view it did not specifically target expression. *Barnes*, 111 S. Ct. at 2463 (Scalia, J., concurring). A general law aimed at public nudity proscribes nudity whether or not expression is involved. *Id.*

10. Chief Justice Rehnquist delivered the opinion of the Court, which was joined by Justices O'Connor and Kennedy. *See generally Barnes*, 111 S. Ct. 2456.

11. Justice White wrote a dissenting opinion, which was joined by Justices Marshall, Blackmun, and Stevens. *See generally Barnes*, 111 S. Ct. at 2471.

ing should be treated under the First Amendment, and will propose a framework under which such a law will be held constitutional.

I. Background

The Supreme Court has frequently asserted that the First Amendment's guarantee of free speech protects expressive conduct as well as verbal speech. In *Stromberg v. California*,[12] the Court struck down a California statute that prohibited public displays of "any flag, badge, banner, or device . . . as a sign, symbol or emblem of opposition to organized government."[13] The Court has adhered to this approach for expressive conduct, providing First Amendment protection to flag burning,[14] peace symbols affixed to flags,[15] the wearing of black arm bands as a protest to war,[16] public sit-ins protesting racial segregation,[17] and picketing by striking union members.[18]

The Court has also extended at least some First Amendment protection to nude dancing as expressive conduct. In *California v. LaRue*,[19] the Court held that live sexual performances "are within the limits of the constitutional protection of freedom of expression."[20] In *Doran v. Salem Inn*,[21] the Court recognized that a "barroom" type of nude dancing involves "the barest minimum of protected expression."[22] Finally, in *Schad v. Borough of Mount Ephraim*,[23] the Court noted that "nude dancing is not without its First Amendment protections."[24] Thus, the Court has held consistently that expressive conduct is protected by the First Amendment.

The Court, however, has not granted absolute First Amendment protection to expressive conduct. In *United States v. O'Brien*,[25] the leading case on expressive conduct, the Court sustained defendant's convic-

12. 283 U.S. 359 (1931).

13. *Id.* at 361.

14. United States v. Eichman, 496 U.S. 310 (1990).

15. Spence v. Washington, 418 U.S. 405 (1974).

16. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 731 (1969).

17. Brown v. Louisiana, 383 U.S. 131, 142 (1966).

18. Thornhill v. Alabama, 310 U.S. 88 (1940).

19. 409 U.S. 109 (1972).

20. *Id.* at 118.

21. 422 U.S. 922 (1975).

22. *Id.* at 932.

23. 452 U.S. 61 (1981).

24. *Id.* at 66. Reasoning that dancing is protected expression, the Court held that " '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Id.* (citations omitted).

25. 391 U.S. 367 (1968).

tion for burning his draft card.[26] The Court rejected his First Amendment challenge, holding that Congress's purpose in prohibiting draft card destruction was merely to promote an efficient administration of the draft.[27] The Court reasoned that the incidental restriction on expression was justified by the government's important interest in draft administration.[28]

Some commentators describe the federal statute involved in *O'Brien* as "content-neutral"[29] because Congress's purpose was not to suppress the expressive message in draft card burning.[30] Other examples of content-neutral restrictions include laws that restrict noise near hospitals, prohibit billboard advertising in residential communities, and limit campaign contributions.[31] While the Court has applied varying standards of review to different content-neutral regulations,[32] once it determines that a regulation is content-neutral its review is often "highly deferential."[33]

Content-based laws, on the other hand, are those that limit expression precisely because of the message conveyed.[34] For example, if the Court in *O'Brien* had determined that Congress's purpose was to deter

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26. The defendant in *O'Brien* burned his Selective Service certificate as a symbolic means of influencing others to resist the draft and of protesting America's involvement in the Vietnam War. *Id.* at 369-70.

27. *Id.* at 378-82.

28. *See id.* at 378-80. The Court in *O'Brien* employed a four-part test to determine whether governmental regulation of expressive conduct is justified. It is justified:

(1) "if [the governmental regulation] is within the constitutional power of the Government;
(2) "if it furthers an important or substantial governmental interest;
(3) "if the governmental interest is unrelated to the suppression of free expression; and
(4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 377.

29. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

30. *Id.* At least one commentator disagrees and believes that the statute was aimed at expression. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 819 (2d ed. 1988).

31. Stone, *supra* note 29, at 48.

32. One type of content-neutral restriction which is distinct from the one in *O'Brien* is the "time, place, or manner" restriction. Clark v. Community of Creative Non-Violence, 468 U.S. 288 (1984) (upholding prohibition on overnight camping in national park applied against campers protesting for the plight of the homeless). Here, the expression itself may be regulated so long as the restriction does not discriminate on the basis of the content of the message presented, is narrowly tailored to serve a substantial governmental interest, and leaves open ample alternative channels for the expression. *Id.* at 293.

33. Stone, *supra* note 29, at 55; *O'Brien*, 391 U.S. 367; *Clark*, 468 U.S. 288. Professor Stone noted that under these deferential standards, the Court will uphold a law so long as it rationally furthers the stated governmental interest. Stone, *supra* note 29, at 50. Where a content-neutral restriction has a significant or severe effect on protected expression, the Court may apply a stricter level of review. *Id.* at 71.

34. Stone, *supra* note 29, at 47.

protests of the Vietnam War, the statute prohibiting draft card destruction would have been deemed content-based.[35] Once the Court determines that a law is content-based, its review is usually strict.[36]

The Court's review is less strict, however, when it deems the speech to be of "low value."[37] Examples of low value speech include obscenity,[38] and perhaps non-obscene but sexually explicit speech.[39] When the Court determines that speech is low value, it then adopts a more deferential review of the statute's constitutionality.[40]

Two recent cases illustrate that the Court is inclined to classify non-obscene sexually explicit speech as low value. In *Young v. American Mini Theatres*,[41] a four-Justice plurality held that a zoning ordinance that targeted adult theaters was constitutional.[42] In language similar to *Chaplinsky v. New Hampshire*,[43] the plurality noted that "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."[44]

In *City of Renton v. Playtime Theatres*,[45] the Court upheld as constitutional a city zoning ordinance aimed at adult motion picture theaters. Although the Court nominally determined that the ordinance was content-neutral, the result seemed to be governed by *Young*.[46] The *Renton*

35. *See* TRIBE, *supra* note 30.

36. Stone, *supra* note 29; *see also* United States v. Eichman, 496 U.S. 310 (1990) (burning flag as a form of political protest). Professor Stone noted 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, *supra* note 29, at 48.

37. The Court has described low value speech as follows:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnotes omitted).

38. *See supra* note 6. While obscenity is considered low value speech, the First Amendment does not protect it at all. Thus, the Court will only invalidate a prohibition on obscenity if the prohibition has no rational basis. *See Barnes*, 111 S. Ct. at 2467 (Scalia, J., concurring) (discussing obscenity); *see also infra* notes 114-15 and accompanying text.

39. *See supra* notes 19-24 and accompanying text, suggesting that non-obscene sexually explicit speech may be entitled to less than full First Amendment protection.

40. Stone, *supra* note 29, at 47 n.3 (citing MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.03 (1984)). Professor Stone noted that the Court applies different standards for different types of low value speech. *Id.* at 47 n.4.

41. 427 U.S. 50 (1976) (plurality opinion).

42. Adult theaters were defined as those "depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas.' " *Id.* at 53.

43. 315 U.S. 568 (1942); *see also supra* notes 37-40 and accompanying text.

44. *Young*, 427 U.S. at 61 (plurality opinion).

45. 475 U.S. 41 (1986).

46. *Id.* at 46 ("the resolution of this case is largely dictated by our decision in *Young*").

Court characterized the speech as low value, stating " '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.' "[47]

In summary, the Court's analysis of expressive conduct focuses on whether a statute is content-neutral or content-based, and, where content-based, whether the speech is high value or low value. In the context of non-obscene sexually explicit expression such as nude dancing, the Court prior to *Barnes* had failed to develop a predictable approach. As this Comment will illustrate, the *Barnes* Court continued this failure, struggling with the content-neutral and low value concepts in holding the Indiana public indecency statute constitutional.

II. The *Barnes v. Glen Theatre*[48] Decision

A. The Facts of *Barnes v. Glen Theatre*

The Petitioners in *Barnes* were Michael Barnes, Prosecuting Attorney of St. Joseph County, Indiana, Linley E. Pearson, Attorney General of Indiana, and the Indiana Alcoholic Beverage Commission.[49] Petitioners sought review of the constitutionality of Indiana's public indecency statute that prohibited public nudity.[50]

Respondent Kitty Kat Lounge, an Indiana drinking establishment, wanted to present totally nude "go-go" dancing despite the enactment of the Indiana public indecency statute.[51] Respondent Glen Theatre also provided nude dancing as entertainment, but did not serve alcoholic beverages.[52] Glen Theatre's patrons sat in private booths and watched the live nude and seminude dancers through a panel by inserting coins into a "timing mechanism."[53] Respondents Darlene Miller, Gayle Ann Marie Sutro, and Carla Johnson were dancers at these establishments.[54]

47. *Id.* at 49 n.2 (quoting *Young*, 427 U.S. at 70).

48. 111 S. Ct. 2456 (1991).

49. Petition for Writ of Certiorari at ii, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (No. 90-26), *microformed on* U.S. Supreme Court Records and Briefs (Congressional Info. Serv.) [hereinafter Petition for Writ of Certiorari].

50. *See* IND. CODE § 35-45-4-1, *supra* note 4.

51. Glen Theatre v. Civil City of South Bend, 695 F. Supp. 414, 420 (N.D. Ind. 1988).

52. *Id.* The Indiana public indecency statute made no reference to alcoholic beverages; therefore, the constitutional validity of the statute did not involve the Twenty-first Amendment to the United States Constitution. *See, e.g.*, California v. LaRue, 409 U.S. 109, 115-16 (1972) (holding that states have a wide latitude under the Twenty-first Amendment to regulate live entertainment occurring simultaneously with liquor sales).

53. *Glen Theatre*, 695 F. Supp. at 419.

54. Miller v. Civil City of South Bend, 904 F.2d 1081, 1082 (7th Cir. 1990) (en banc).

B. Procedural History

Respondents separately brought suit in the United States District Court to enjoin the enforcement of the Indiana public indecency statute on the grounds that it violated their First Amendment rights.[55] The district court denied the injunction in *Miller*, but granted the injunction in *Glen Theatre*, reasoning that the statute was facially overbroad.[56]

The Court of Appeals for the Seventh Circuit reversed,[57] holding that precedent precluded this challenge,[58] and remanded on the question whether the statute violated the First Amendment.[59]

On remand, *Glen Theatre* and *Miller* were consolidated, and the district court upheld the statute. It found that "the type of dancing [respondents] wish to perform is not expressive activity protected by the Constitution of the United States."[60]

The respondents appealed and the Seventh Circuit reversed, holding that the nude dancing was expression entitled to First Amendment protection.[61] The Seventh Circuit vacated the decision and granted a rehearing en banc.[62]

The Seventh Circuit majority held that nude dancing was entitled to "limited" First Amendment protection and struck down the Indiana statute as applied.[63]

The United States Supreme Court granted *certiorari*[64] and reversed.

C. Plurality Decision

Chief Justice Rehnquist, writing for the three-Justice plurality,[65]

55. Petition for Writ of Certiorari, *supra* note 49, at 5. Respondents' separate suits were called *Miller* and *Glen Theatre*. *See Glen Theatre*, 695 F. Supp. at 415.

56. Glen Theatre v. Civil City of South Bend, Memorandum and Order, Cause No. S85-353 (N.D. Ind. July 26, 1985), *reprinted in* Appendix to Petition for Writ of Certiorari, *supra* note 6, at 149-58. A statute regulating expressive conduct is overbroad if, by reason of its broad scope, it extends to constitutionally protected forms of expression (notwithstanding the constitutionality of the statute as applied in the case). *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

57. Glen Theatre v. Pearson, 802 F.2d 287 (7th Cir. 1986).

58. *See* State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), *appeals dismissed sub nom.* Clark v. Indiana, 446 U.S. 931 (1980), and Dove v. Indiana, 449 U.S. 806 (1980). According to the plurality in *Barnes*, the Indiana Supreme Court had given the Indiana statute a limiting construction (thus saving it from overbreadth challenges) by holding that it did not apply to nudity in protected forms of expression (such as theatrical productions). *Barnes*, 111 S. Ct. at 2460 n.1 (plurality opinion).

59. *Pearson*, 802 F.2d at 291.

60. *Glen Theatre*, 695 F. Supp. at 419, *quoted in Barnes*, 111 S. Ct. at 2459.

61. Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989).

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

63. *Id.* at 1082.

64. Barnes v. Glen Theatre, 111 S. Ct. 38 (1990).

65. The plurality consisted of Chief Justice Rehnquist and Justices O'Connor and Kennedy.

held "that the Indiana statutory requirement that the dancers in the establishments involved in this case must wear pasties and a G-string does not violate the First Amendment."[66] The plurality initially conceded that prior Supreme Court cases suggested that nude dancing is expressive conduct protected by the First Amendment.[67] The plurality stated, however, that the "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, *though we view it as only marginally so*."[68] The plurality then turned to the question of "the level of protection to be afforded to the expressive conduct at issue."[69]

The plurality recognized that the Indiana statute did not ban nude dancing alone, but prohibited all public nudity.[70] Citing the arguments of both parties,[71] the plurality implicitly accepted the state's argument that the Indiana statute was a valid "time, place or manner" restriction.[72] The plurality then reasoned that because the "time, place or manner" test "has been interpreted to embody much the same standards"[73] as those embodied in *United States v. O'Brien*[74] for permissible government

66. Barnes v. Glen Theatre, 111 S. Ct. 2456, 2460 (1991) (plurality opinion). Note that the statute did not *require* pasties and a G-string (making no reference at all to nude dancing); rather, it *proscribed* all public nudity. *See* IND. CODE § 35-45-4-1, *supra* note 4. This distinction is important in considering whether the statute is a "time, place, or manner" regulation or merely a general law regulating conduct. *See infra* note 139 and accompanying text.

67. *Barnes*, 111 S. Ct. at 2460 (plurality opinion) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, 422 U.S. 922 (1975); and California v. LaRue, 409 U.S. 109 (1972)). *See supra* notes 19-24 and accompanying text. In adhering to this precedent, the plurality implicitly rejected Petitioners' argument that the nude dancing involved here did not qualify as "speech" under Texas v. Johnson, 491 U.S. 397, 404 (1989), and Spence v. Washington, 418 U.S. 405, 410 (1974). *See* Brief for Petitioners at 9-10, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (No. 90-26), *microformed on* U.S. Supreme Court Records and Briefs (Congressional Info. Serv.) [hereinafter Brief for Petitioners].

68. *Barnes*, 111 S. Ct. at 2460 (plurality opinion) (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (*citing* Clark v. Community of Creative Non-Violence, 468 U.S. 288 (1984)); *see also supra* note 32. *Clark* involved a content-neutral statute prohibiting camping applied to overnight protesters. The Court recognized that such demonstrations were protected by the First Amendment, but held that reasonable alternative means were available. Thus, the statute was held valid as a "time, place, or manner" restriction. *Clark*, 468 U.S. at 294-95.

73. *Barnes*, 111 S. Ct. at 2460 (plurality opinion).

74. 391 U.S. 367 (1968). The *O'Brien* test states that a government regulation of expressive conduct is permissible under the following conditions:

(1) "if [the governmental regulation] is within the constitutional power of the Government;
(2) "if it furthers an important or substantial governmental interest;
(3) "if the governmental interest is unrelated to the suppression of free expression; and
(4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

regulation, the *O'Brien* test should be applied to determine the First Amendment issue in this case.[75]

The plurality applied the *O'Brien* test to the facts of *Barnes*. First, the plurality held that the statute was within the constitutional power of the state.[76]

Second, although it noted that Indiana's actual purpose in enacting the statute was impossible to discern,[77] the plurality found a clear purpose from the statute's text and history "of protecting societal order and morality."[78] This satisfied the requirement for a substantial governmental interest.

Third, the plurality held that the state's purpose of protecting societal order and morality was "unrelated to the suppression of free expression."[79] The plurality noted that merely appearing nude in public is "expressive" in an "expansive" sense, but cited *O'Brien* for rejecting this "expansive" definition in First Amendment analysis.[80] The plurality rejected the respondents' contention that prohibiting the performance of nude dancing was inspired by the state's desire to abridge the erotic message. Instead, the plurality held that Indiana's goal was to prevent nudity, not erotic dancing. Merely by wearing pasties and a G-string, the plurality reasoned, the respondents could express their message without violating the statute.[81]

Fourth, the plurality found that this "incidental restriction" on expression was no more than essential to achieve the state's interest in preserving morality by discouraging public nudity. In other words, the plurality concluded that the Indiana requirement that dancers wear pasties and a G-string was "narrowly tailored."[82]

D. Justice Souter's Concurrence

Justice Souter arrived at the same result and used similar reasoning as the plurality.[83] Justice Souter agreed that nude dancing enjoys some First Amendment protection, stating that "when nudity is combined

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Id. at 377.

75. *Barnes*, 111 S. Ct. at 2460 (plurality opinion).

76. *Id.* at 2461-62 (citing the traditional police power of the state).

77. *Id.* at 2461. The plurality conceded that Indiana does not record its legislative history and noted that Indiana's high court did not "shed any light" on the purpose. *Id.*

78. *Id.*

79. *Id.* at 2462.

80. *Id.* (citing *O'Brien*, 391 U.S. at 376). On this point, the plurality noted that the expression in recreational dancing also does not implicate the First Amendment. *Id.* (citing Dallas v. Stanglin, 490 U.S. 19 (1989)).

81. *Id.* at 2463. The plurality, however, conceded that some clothing "makes the message slightly less graphic." *Id.*

82. *Id.* (the plurality's pun). See *supra* note 66 for discussion of the pasties and G-string "requirement."

83. *Barnes*, 111 S. Ct. at 2468-71 (Souter, J., concurring).

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."[84] Justice Souter also agreed that *United States v. O'Brien*[85] was properly used to "judg[e] the limits of appropriate state action burdening expressive acts as distinct from pure speech."[86]

Justice Souter, unlike the plurality, declined to use societal order and morality as a basis for the substantial governmental interest in the *O'Brien* test.[87] Instead, he relied on *City of Renton v. Playtime Theatres*[88] to find a "substantial interest in combating the secondary effects of adult entertainment."[89] The secondary effects Justice Souter referred to included prostitution, sexual assaults, and other criminal activity.[90] Justice Souter argued that the "appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest," thus avoiding having to rely on societal order and morality to justify the statute.[91]

In applying the *O'Brien* test, Justice Souter first found that Indiana had the constitutional power to combat the secondary effects of nude dancing.[92] Second, he found that this "state interest is plainly a substantial one," and relied on *Renton* for concluding that the prohibition on nude dancing furthered that state interest.[93]

Third, Justice Souter found that the state interest in combating the secondary effects of nude dancing was "unrelated to the suppression of free expression."[94] Justice Souter disagreed with the dissent's position that the expression was the cause of these secondary effects,[95] and cited

84. *Id.* at 2468.

85. 391 U.S. 367 (1968).

86. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring).

87. *Id.* Justice Souter, though, agreed with the plurality that it was sound to infer this purpose from the statute. *Id.* at 2469.

88. 475 U.S. 41 (1986); *see also* notes 45-47 and accompanying text.

89. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring).

90. *Id.* at 2469; *see also* Brief for Petitioners, *supra* note 67, at 37.

91. *Barnes*, 111 S. Ct. at 2469 (Souter, J., concurring) (comparing McGowan v. Maryland, 366 U.S. 420 (1961)).

92. *Id.* Justice Souter did not give a reason for this conclusion. Although he cited *O'Brien*, 391 U.S. at 377, this passage from *O'Brien* refers to the power of Congress to raise and support armies. Justice Souter's use of *O'Brien* here does not support his contention. Presumably, however, he agreed with the plurality that the Indiana statute fell within the traditional police powers of the State.

93. *Barnes*, 111 S. Ct. at 2469-70 (Souter, J., concurring). Justice Souter argued that it was "no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films . . . in *Renton*." *Id.* at 2470.

94. *Id.* at 2471.

95. *Id.* at 2470 (citing *id.* at 2474 (White, J., dissenting) ("It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption

Renton again to distinguish causation and mere correlation.[96]

Finally, Justice Souter found that the restriction on expression was no greater than necessary to further the state interest.[97] He conceded that minimal clothing might "moderate the expression to some degree," but concluded that there were ample alternative means "to express the erotic message."[98]

E. Justice Scalia's Concurrence

Although Justice Scalia concurred with the plurality's result, he did not agree that the statute "survive[d] some lower level of First Amendment scrutiny."[99] Instead, Justice Scalia asserted that the First Amendment did not apply in the first place because the Indiana statute was merely a general law regulating conduct rather than expression.[100]

Justice Scalia considered the language of the Indiana statute and rejected the respondents' argument that the statute was directed at expression.[101] Justice Scalia made a distinction between expression and nudity, asserting that the statute "does not regulate dancing . . . [but rather] regulates public nudity,"[102] and cited several cases of public indecency where no expression was involved.[103] Moreover, Justice Scalia stated, the statute would not affect even the most explicit erotic expression, unless one "of the four specified acts" was committed in the process.[104]

Justice Scalia drew a distinction between the general applicability of the statute and the lower-level scrutiny of *United States v. O'Brien*[105] and rejected the plurality's application of the latter.[106] Justice Scalia stated that because "the Indiana regulation is a general law not specifically targeted at expressive conduct, its application to such conduct does not

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that creating or emphasizing such thoughts and ideas may lead to increased prostitution and the degradation of women.")).

96. *Id.* at 2470-71 (citing *Renton*, 475 U.S. at 48). "To say that pernicious secondary effects are *associated* with nude dancing establishments is not necessarily to say that such effects *result from* the [expression in nude dancing]." *Id.* at 2470 (emphasis added).

97. *Id.* at 2471.

98. *Id.*

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

100. *Id.*; *see also supra* note 9.

101. *Barnes*, 111 S. Ct. at 2464 (Scalia, J., concurring).

102. *Id.* (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1120 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting)).

103. *See id.* (citing Bond v. State, 515 N.E.2d 856, 857 (Ind. 1987); *In re* Levinson, 444 N.E.2d 1175, 1176 (Ind. 1983); Preston v. State, 287 N.E.2d 347, 348 (Ind. 1972)).

104. *Id.* (referring to the Indiana statute, *supra* note 4). The four acts were engaging in sexual intercourse, engaging in deviate sexual conduct, appearing in a state of nudity, or fondling one's own genitals or those of another person.

105. 391 U.S. 367 (1968).

106. *Barnes*, 111 S. Ct. at 2463 (Scalia, J., concurring).

. . . implicate the First Amendment."[107] The First Amendment, Justice Scalia stated, protects the " 'freedom of speech [and] of the press'—oral and written speech—not 'expressive conduct.' "[108] Justice Scalia conceded, however, that expressive conduct must be protected where the government prohibits it "precisely because of its communicative attributes."[109]

In cases of expressive conduct, Justice Scalia suggested the following test:

> [T]he only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of [the First Amendment question]; if so, the court then proceeds to determine whether there is substantial justification for the proscription.[110]

Justice Scalia noted that this was the same test the Court recently applied in the Free Exercise context[111] and claimed that it would work even better in the free speech context.[112]

Justice Scalia criticized the plurality for applying an intermediate level of First Amendment scrutiny—where the governmental interest must be "important or substantial"—both because he did not think the intermediate standard should apply to general laws regulating conduct, and because he thought that the Court should avoid a standard that requires a "judicial assessment of the 'importance' of government interests," particularly interests in morality.[113]

In conclusion, Justice Scalia reasoned that the First Amendment was not implicated because the statute was not directed at expression and, therefore, all the Court needed to do was find some rational basis for

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107. *Id.* at 2465. Justice Scalia rejected the dissent's characterization of the statute as protecting others from offense (thus suppressing communication), and stated he would uphold the statute on the basis of morality alone even if 60,000 fully consenting adults in the Hoosierdome showed their genitals to one another. *Id.* Justice Scalia cited prohibitions on sadomasochism, cockfighting, bestiality, suicide, drug use, and prostitution as similar examples where the governmental interest is morality rather than the suppression of expression. *Id.*

108. *Id.* (quoting the First Amendment to the United States Constitution, *supra* note 1).

109. *Id.* at 2466 (emphasis omitted) (citing United States v. Eichman, 496 U.S. 310 (1990) (burning flag); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing black arm bands); Brown v. Louisiana, 383 U.S. 131 (1966) (participating in silent sit-in)).

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

111. *See* Employment Div., Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that Oregon could, consistent with the Free Exercise Clause of the First Amendment, deny claimants unemployment compensation benefits even though dismissal resulted from religious use of the drug peyote).

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

113. *Id.*

the prohibition of nudity.[114] The state's moral opposition to public nudity, Justice Scalia asserted, provided that rational basis.[115]

F. Justice White's Dissent

Justice White started with the premise that the nude dancing involved in *Barnes* was expressive conduct protected by the First Amendment.[116] In support of this conclusion, Justice White cited the Seventh Circuit's observation "that dancing is an ancient art form and 'inherently embodies the expression and communication of ideas and emotions.' "[117] Moreover, Justice White argued that the *nudity itself* was an expressive component of the dance, not merely incidental conduct.[118]

Justice White disagreed with the plurality and Justice Scalia that the statute was a general proscription on conduct.[119] Justice White argued that the statute would only be a general proscription on conduct if it proscribed "nudity wherever it occurs."[120] Because the statute only proscribed *public* nudity, the statute was not the same type of general prohibition found in the cases relied on by the plurality and Justice Scalia.[121] Moreover, Justice White noted that there had never been any arrests for " 'nudity as part of a play or ballet,' "[122] and argued that the state's inter-

114. Under a rationality review, the Court will invalidate a statute only where there is no rational basis for the regulation. *See e.g.* Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981) (finding that the state's purpose of protecting the environment was a rational basis for banning sale of nonreturnable plastic milk containers).

115. *Barnes*, 111 S. Ct. at 2468 (Scalia, J., concurring) (citing Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding moral opposition to private homosexual sodomy was a rational basis for legislation)).

116. *Id.* at 2471 (White, J., dissenting). Justice White was joined by Justices Marshall, Blackmun, and Stevens.

117. *Id.* (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990) (en banc)).

118. *Id.* at 2474 (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (" '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment.")).

119. *Id.* at 2472-74. Justice White's use of the term "general proscription" referred both to the plurality's characterization of the statute as a "time, place, or manner" restriction and Justice Scalia's "general law" framework.

120. *Id.* at 2472. Further, Justice White did not believe that such a statute would be constitutional under Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the mere possession of obscenity in one's own home was not a punishable offense).

121. *Barnes*, 111 S. Ct. at 2472 (White, J., dissenting) (citing Employment Div., Oregon Dept. of Human Resources v. Smith, 494 U.S. 872 (1990) (upholding prohibition as applied to peyote use), Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding prohibition on sodomy), and United States v. O'Brien, 391 U.S. 367 (1968) (upholding prohibition against the destruction of draft cards).

122. *Id.* at 2473 (citing Glen Theatre v. Civil City of South Bend, Memorandum and Order, Cause No. S85-353 (N.D. Ind. July 26, 1985) (affidavit of Sgt. Timothy Corbett), *reprinted in* Joint Appendix at 19, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (No. 90-26), *microformed on* U.S. Supreme Court Records and Briefs (Congressional Info. Serv.)).

est would not be implicated by the nudity in theatrical productions.[123] Having concluded that the Indiana public indecency statute was not a general proscription on conduct, Justice White argued that mere references to the "[s]tate's general interest in promoting societal order and morality is not sufficient [because the statute] reaches a significant amount of protected expressive activity."[124]

Justice White then turned to the purpose of the Indiana public indecency statute, which he considered to be two-fold: Where persons appeared nude in parks, beaches, and similar public places, the purpose "is to protect others from offense";[125] in theaters and barrooms, where persons are consenting adults, the purpose "is to protect the viewers from what the State believes is the harmful message that nude dancing communicates."[126] Because the purpose was to suppress the expression in nude dancing, Justice White concluded that the statute proscribed nude dancing "precisely because of the distinctive, expressive content."[127] In other words, Justice White characterized the statute as "content-based."[128]

Under Justice White's analysis of the statute as content-based, he would have upheld the statute only " 'if narrowly drawn to accomplish a compelling governmental interest.' "[129] Justice White did not concede that nude dancing is low value speech; rather, he stated that the "Court's assessment of the artistic merits of nude dancing performances *should not* be the determining factor in deciding this case."[130] Justice White argued that even if the state interests advanced by the plurality and Justice Souter were compelling, the statute should fail the compelling interest test because it was not narrowly drawn.[131]

123. *Id.* (citing Reply Brief for Petitioners at 11-12, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (No. 90-26), *microformed on* U.S. Supreme Court Records and Briefs (Congressional Info. Serv.) [hereinafter Reply Brief for Petitioners]).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2474. On this point, Justice White argued that the third step of the *O'Brien* test, that the state interest be unrelated to expression, was not met. *See id.* at 2473-74.

128. *Id.* at 2474; *see also supra* notes 34-36 and accompanying text.

129. *Barnes*, 111 S. Ct. at 2474 (White, J., dissenting) (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).

130. *Id.* at 2474-75 (emphasis added).

131. *Id.* at 2475. Justice White suggested several alternative methods to achieving the same result. These included requiring a buffer zone between the dancers and audience, limiting times of operation, zoning restrictions, criminalizing prostitution and obscenity, and (where alcohol is served) invoking the Twenty-first Amendment.

III. Critique of the *Barnes v. Glen Theatre* Decision

A. Plurality Opinion

First, although the plurality applied the *O'Brien* test, it did not clearly state its reasons for doing so. It started by noting that "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board."[132] Because the Indiana statute was not specifically directed at expression, it would be reasonable to believe that the plurality considered the law a content-neutral restriction.[133] Under the Court's traditional content-neutral analysis, *O'Brien* would be the proper test.[134]

The plurality, however, apparently accepted the petitioners' argument that the statute was a valid "time, place, or manner" restriction.[135] The plurality noted that in *Clark*, the time, place, or manner test had been interpreted "to embody much the same standards as those set forth in *United States v. O'Brien*."[136] On this theory, the plurality reasoned that the respondents could express any erotic message, so long as they did so wearing some clothing.[137] Whether the *O'Brien* test is suitable to "time, place, or manner" restrictions is questionable.[138] Further, the notion that the Indiana public indecency statute was a "time, place, or manner" restriction seems directly at odds with the language and breadth of the statute.[139] In short, the plurality's stated rationale for applying the *O'Brien* test to nude dancing was murky at best.

An even deeper problem was the plurality's failure to recognize a major distinction between the subject matter of *O'Brien* and *Barnes*.

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132. *Id.* at 2460 (plurality opinion).

133. *See supra* notes 29-33 and accompanying text.

134. *See supra* notes 25-28 and accompanying text.

135. *Barnes*, 111 S. Ct. at 2460 (plurality opinion) (citing Clark v. Community of Creative Non-Violence, 468 U.S. 288 (1984) (upholding prohibition on overnight camping in National Park applied against campers protesting the plight of the homeless)). Under a "time, place, or manner" restriction, the expression itself may be regulated so long as the restriction does not discriminate on the basis of the message presented, is narrowly tailored to serve a substantial governmental interest, and leaves open ample alternative channels for the expression. *Clark*, 468 U.S. at 293.

136. *Barnes*, 111 S. Ct. at 2460 (plurality opinion) (citing *Clark*, 468 U.S. at 298 & n.8); *see also supra* notes 28 & 32.

137. Compare the Court's decision in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), where the Court characterized a zoning statute as content-neutral. While the statute in *Renton* addressed the "time, place, or manner" of adult theaters, it also addressed the content of the expression. *See supra* notes 45-47 and accompanying text.

138. Compare the *O'Brien* test, *supra* note 28, with the *Clark* "time, place, or manner" test, *supra* note 32.

139. The Indiana public indecency statute proscribed *all* public nudity; it made no mention of nude dancing, nor did it dictate the pasties and G-string that the plurality characterized as reasonable "time, place, or manner" restrictions. *See* IND. CODE § 35-45-4-1, *supra* note 4; *see also supra* note 66.

O'Brien dealt with a case of expressive conduct of a political variety: burning draft cards in opposition to the Vietnam War.[140] *Barnes*, on the other hand, dealt with expressive conduct that had no political overtones.[141] This was significant when the Court evaluated the "substantial" governmental interest in the second prong of the *O'Brien* test, because this prong implicitly balances the state interest in regulation against the interest in free speech. Because the plurality considered nude dancing to be only "marginally" protected by the First Amendment,[142] the plurality likely considered it to be "low value." Only in comparison to the interest in low value speech could it reasonably characterize the government interest in protecting societal order and morality as "substantial," "compelling," or "paramount."[143] Such use of judicial discretion and balancing of interests in issues of morality is problematic, however, both because it provides little guidance for lower courts and because judges are not politically accountable for the value judgments they make.

In summary, the plurality blurred the traditional distinctions of First Amendment analysis. Although the plurality applied the *O'Brien* test, it seemed to have considered the Indiana statute to be a "time, place, or manner" regulation, rather than a traditional content-neutral regulation. While the plurality conceded that nude dancing was protected expression, it treated it as only low value expression. It implicitly balanced the value of that expression against the state's interest in societal order and morality, concluding that the state's interest was substantial. In effect, the plurality followed *Young v. American Mini Theatres*[144] and *City of Renton v. Playtime Theatres*[145] by diluting the constitutional protections given to non-obscene sexually explicit expression and failing at the same time to provide adequate guidance to lower courts to decide similar issues.

B. Justice Souter's Concurrence

Justice Souter advocated applying the *O'Brien* test to "judg[e] the limits of appropriate state action burdening expressive acts as distinct

140. *See* United States v. O'Brien, 391 U.S. 367 (1968).

141. It is generally said that political speech lies at the heart of the First Amendment. *See* Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.").

142. *Barnes*, 111 S. Ct. at 2460 (plurality opinion); *cf. infra* notes 184-91 and accompanying text (discussing political versus nonpolitical speech).

143. *See Barnes*, 111 S. Ct. at 2461 (plurality opinion); *cf. id.* at 2467 (Scalia, J., concurring) (arguing that moral opposition to public nudity is sufficient to provide a rational basis for legislation).

144. 427 U.S. 50 (1976); *see also supra* notes 41-44 and accompanying text.

145. 475 U.S. 41 (1986); *see also supra* notes 45-47 and accompanying text.

from pure speech or representation."[146] Justice Souter recommended adopting *O'Brien* in all cases where expressive conduct is affected, at least in the content-neutral framework.[147] Thus, unlike the plurality, Justice Souter clearly set forth his reasons for applying the *O'Brien* test.

The primary difference between Justice Souter's opinion and the plurality's was Justice Souter's application of the *O'Brien* test. Instead of relying on the state's interest in societal order and morality, Justice Souter emphasized the secondary effects of nude dancing.[148] According to Justice Souter, a substantial state interest existed in combating prostitution, sexual assaults, and other crimes.[149] While this state interest is undoubtedly worthwhile and avoids the plurality's vague reliance on societal order and morality, Justice Souter conceded that combating the secondary effects of nude dancing may not have been the actual intent of the Indiana legislature.[150] Moreover, nothing in the record proved the existence of these secondary effects.[151] By relying upon these unproved secondary effects of nude dancing to establish the state interest, Justice Souter essentially created a "substantial" state interest out of whole cloth.[152]

Finally, Justice Souter was probably incorrect in arguing that the state interest in combating the secondary effects of nude dancing was "unrelated" to the expressive component in the dancing.[153] Justice Souter himself stated it "is no leap to say that live nude dancing . . . is likely to produce the same pernicious secondary effects as [in *Renton*]."[154] By admitting that live nude dancing produces those effects, Justice Souter diminished his claim that the secondary effects did not "result from" the expression in nude dancing. Justice Souter asserted that the *mere exist-*

146. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring).

147. *See supra* notes 29-33 and accompanying text.

148. *See supra* notes 45-47, 88-96. Justice Souter argued that the Court was not limited to considering the actual intent of the state legislature, but instead could consider the existence of a current governmental interest. *Barnes*, 111 S. Ct. at 2469 (Souter, J., concurring).

149. Brief for Petitioners, *supra* note 67, at 37.

150. *Barnes*, 111 S. Ct. at 2469 (Souter, J., concurring). Justice Souter pointed out that " 'Indiana does not record legislative history.' " *Id.* (quoting *Barnes*, 111 S. Ct. at 2461 (plurality opinion)). Moreover, Justice Souter noted that the state's interest in combating the secondary effects of nude dancing would not be a "justification for all applications of the statute." *Id.*

151. *Cf.* City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986) (noting that the District Court had concluded, based on the record, that the *Renton* ordinance was aimed at the secondary effects of adult theaters); *see also supra* notes 90-95 and accompanying text.

152. One commentator characterized Justice Souter's use of unproved secondary effects as, in effect, merely adding a pleading requirement to the State's case. David Faigman, Address at Hastings College of the Law (Oct. 9, 1991) (on file with the *Hastings Constitutional Law Quarterly*).

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

154. *Id.* (referring to prostitution, sexual assaults, and other crimes associated with sexually-explicit adult entertainment).

ence of the adult establishments, not the expressive impact of the nude dancing, caused the secondary effects of nude dancing,[155] but on this point the dissent seems to have the better argument, because the *O'Brien* test speaks to relation, not causation.[156]

C. Justice Scalia's Concurrence

Although Justice Scalia's approach had its shortcomings, it was more intelligible than the plurality's or Justice Souter's. It also provided a better guide for lower courts by relying less on *ad hoc* judicial balancing of state interests against expressive conduct held to be only "marginally" protected by the First Amendment.

In analyzing whether Indiana's statute is constitutional as applied to nude dancing, Justice Scalia adopted the general law framework from the Free Exercise context.[157] According to Justice Scalia, under this test all oral and written speech is protected by the First Amendment. Also, all laws directed at expressive conduct would be subject to traditional First Amendment analysis.[158] Generally applicable laws, not directed at expression, would not implicate the First Amendment at all.[159]

Justice Scalia's general law approach would rely less upon judicial balancing of interests and provide lower courts better guidance in expressive conduct cases.[160] Where the plurality would subject all governmental restrictions that incidentally affect expression to a judicial balancing of state interests versus free speech, Justice Scalia's general law approach would require an initial inquiry as to the focus of the legislation. Only laws directly aimed at expression would be subject to First Amendment scrutiny, thus avoiding the balancing required in many cases.[161] While

155. *Id.*

156. *See supra* note 28 ("if the governmental interest is *unrelated* to the suppression of free expression") (emphasis added); *see also Barnes*, 111 S. Ct. at 2474 (White, J., dissenting). Once it is conceded that the government interest is related to the expression, however, the statute will be held unconstitutional under the *O'Brien* test.

157. *Barnes*, 111 S. Ct. at 2467 (Scalia, J., concurring); *see also supra* notes 110-12 and accompanying text; *see also* Employment Div., Oregon Dept. of Human Resources v. Smith, 494 U.S. 872, 878 (1990) (applying the general law framework in the Free Exercise context).

158. *See supra* notes 12-40 and accompanying text.

159. One commentator stated that Justice Scalia's approach was attractive given the fact pattern, but warned that "it ought not be a free pass to legislatures to dress up their particularized infringements, and deliberate infringements, on speech as if they were [general laws]." Martin Shapiro, Address at Hastings College of the Law (Oct. 9, 1991) (on file with the *Hastings Constitutional Law Quarterly*).

160. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 110 n.14 (1980) (arguing that "[i]n any First Amendment situation, for that matter in any situation involving our liberties, it is desirable for courts to try to develop predictable and discretion-reining rules.").

161. Justice Scalia stated that "we should avoid wherever possible . . . a method of analysis that requires judicial assessment of the 'importance' of government interests—and especially of government interests in various aspects of morality." *Barnes*, 111 S. Ct. at 2467 (Scalia, J., concurring).

Justice Scalia's approach could lead to some harsh results, his framework can be modified to minimize these difficulties.[162]

D. Justice White's Dissent

Justice White's dissent contrasted sharply with the opinions of the plurality, Justice Souter, and Justice Scalia.

The most crucial difference was Justice White's characterization of the "expression" in nude dancing. Not only did he clearly state that the nude dancing in *Barnes* was protected by the First Amendment,[163] but he also argued that the *nudity itself* was an expressive component of the dancing.[164] Despite Justice White's reference to *Schad v. Borough of Mount Ephraim*, where the Court stated that " '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment,"[165] the suggestion that nudity itself is protected expression goes beyond established precedent.[166] In essence, Justice White's argument is a slippery slope: He reasoned that dancing is speech because it is expressive, and nudity is speech because it is an "integral part" of the dance.[167]

Justice White's characterization of nudity as speech would not only overturn most public indecency statutes, but would extend constitutional law beyond that contemplated by the ratifiers of the Bill of Rights.[168] Such judicial expansion of the First Amendment's coverage should be

162. *See infra* notes 184-92 and accompanying text (discussing the effect of Justice Scalia's general law test on political and nonpolitical expressive conduct and the problem of illicit legislative motives).

163. *Barnes*, 111 S. Ct. at 2471-72 (White, J., dissenting); *cf. id.* at 2460 (plurality opinion) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, *though we view it as only marginally so.*") (emphasis added).

164. *Id.* at 2474 (White, J., dissenting).

165. 452 U.S. 61, 66 (1981) (quoting Jenkins v. Georgia, 418 U.S. 153, 161 (1974)).

166. *See, e.g.*, Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places . . . .").

167. *See Barnes*, 111 S. Ct. at 2474 (White, J., dissenting) ("[T]he nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes.") (citing Miller v. Civil City of South Bend, 904 F.2d 1081, 1090-98 (7th Cir. 1990) (en banc) (Posner, J., concurring)). To illustrate the sweep of Justice White's argument, an analogy could be made to bullfighting: If bullfighting is speech because it is expressive, then the killing of the bull is speech because it is "an integral part" of the bullfighting.

168. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 6 (1990) (arguing that judicial supremacy is legitimate only when the courts interpret the Constitution " 'according to the sense of the terms, and the intention of the parties.' ") (quoting Justice Story, *Commentaries on the Constitution of the United States* 135 (Carolina Academic Press 1987) (1833)); *see also Miller*, 904 F.2d at 1124 (Easterbrook, J., dissenting) ("James Madison would have guffawed had anyone suggested public nudity as an example of 'freedom of speech'—or of anything that could be derived from the Framers' conception by a series of plausible interpretations.").

rejected, and instead left to the democratic process.[169]

Justice White also argued that the Indiana public indecency statute was not a "general" proscription on conduct.[170] He advanced two arguments to support this view. First, the statute was not general because the statute only applied to public nudity, not to "nudity wherever it occurs."[171] While this distinguished somewhat the cases on which the plurality and Justice Scalia relied, this was a distinction without a difference. The statute was still general because its terms applied to nudity without regard to expression; that it only applied to *public* nudity and not nudity everywhere is irrelevant to whether the law discriminated against expression or not.[172]

Justice White's second argument against the general nature of the Indiana public indecency statute was stronger. Justice White noted that there had been no arrests for nudity occurring in plays or ballet, and argued that the state's interest would not even be implicated by nudity in these contexts.[173] While this argument would probably be sufficient if the statute was directed at expressive activities alone, it fails because the statute proscribed all public nudity and likely was enforced in a great proportion of cases.[174] It also might fail because the Indiana Supreme Court had given the statute a limiting construction.[175]

Justice White next examined the purpose of the statute when applied to nudity in theaters and barrooms. Justice White reasoned that because only consenting adults are present in these establishments, the purpose of

169. The passage of a constitutional amendment guaranteeing the right to public nudity is, however, unlikely.

170. *Barnes*, 111 S. Ct. at 2472-74 (White, J., dissenting). Justice White's use of the term "general proscription" referred both to the plurality's characterization of the statute as a "time, place, or manner" restriction and Justice Scalia's "general law" framework.

171. *Id.* at 2472.

172. *Cf. id.* at 2465 n.3 (Scalia, J., concurring). Justice White's argument also contradicted his decision in Clark v. Community for Creative Non-Violence, where he considered the Park Service's ban on overnight camping to be a general one. The ban, however, only applied to camping in National Parks and not to "camping wherever it occurs." *See Clark*, 468 U.S. 288, 289-99 (1984).

173. *Barnes*, 111 S. Ct. at 2473 (White, J., dissenting) (citing Reply Brief for Petitioners at 11-12, *supra* note 123).

174. *See id.* at 2464 (Scalia, J., concurring) (citing Bond v. State, 515 N.E.2d 856, 857 (Ind. 1987); *In re* Levinson, 444 N.E.2d 1175, 1176 (Ind. 1983); Preston v. State, 287 N.E.2d 347, 348 (Ind. 1972)).

175. *See* State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), *appeals dismissed sub nom.* Clark v. Indiana, 446 U.S. 931 (1980), and Dove v. Indiana, 449 U.S. 806 (1980). According to the plurality in *Barnes*, the Indiana Supreme Court had given the Indiana statute a limiting construction by holding that it did not apply to nudity in protected forms of expression (such as theatrical productions). *Barnes*, 111 S. Ct. at 2460 n.1 (plurality opinion). From Justice White's perspective, however, this begs the question since he considered nude dancing a protected form of expression. If nude dancing is a protected form of expression, the Indiana limiting construction would result in the Indiana statute not applying to the nude dancing in *Barnes*.

the statute must be "to protect the viewers from what the State believes is the harmful message that nude dancing communicates."[176] This is necessarily so, because consenting adults will not take offense to the dancers' nudity. This argument might be convincing if the statute only proscribed nudity in dancing; but because the statute applied to all nudity, there is no reason why the purpose of protecting societal order and morality should not apply in theaters.[177]

Having determined that the purpose of the Indiana public indecency statute (as applied to barrooms or theaters) was to suppress communication, Justice White invoked strict content-based scrutiny.[178] He concluded that the statute must fail because it was not narrowly drawn.[179] Assuming that content-based scrutiny was appropriate, Justice White was correct in concluding that the statute was not narrowly drawn. This result was inevitable, however, because the statute was in fact a general one proscribing all public nudity and, therefore, could not be narrowly drawn.

IV. Proposal

Only Justice Scalia proposed using the general law framework in *Barnes*,[180] and it may be some time before the Court takes another appropriate case to evaluate the merits of this approach.

The Court should adopt Justice Scalia's basic framework in the free speech context. Justice Scalia's categorical approach draws a brighter line than the *O'Brien* test,[181] depends less on the personal preferences of the Justices, and provides better guidance for lower courts in First Amendment cases. All written or spoken expression would undergo traditional First Amendment analysis.[182] Expressive conduct would be protected only where the law is directed at expression.

Adoption of such an approach would effectively sever the contemporary content-neutral framework for expressive conduct cases.[183] Laws not directed at expression would be treated under Justice Scalia's general law framework. Laws directed at expression but not against any particular viewpoint would continue to be analyzed under the content-neutral framework. While this modified content-neutral framework would effectively focus on "viewpoint" rather than "content," it would eliminate the

176. *Barnes*, 111 S. Ct. at 2473 (White, J., dissenting).

177. Justice White seemed to concede this point when he admitted that the statute would apply to 60,000 consenting Hoosiers exposing themselves in the Hoosierdome. *Id.* at 2475.

178. *Id.* at 2474; *see also supra* notes 34-36 and accompanying text.

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

180. *See id.* at 2467 (Scalia, J., concurring).

181. *See supra* note 28.

182. The First Amendment undoubtedly addresses the written and spoken word. *See supra* note 1. For "traditional" analysis, see generally *supra* notes 12-40 and accompanying text.

183. *See supra* notes 29-33 and accompanying text.

duality existing in today's content-neutral theory. This duality is seen by comparing the statute in *O'Brien* prohibiting draft card burning (aimed at efficient draft administration, not at expression) with laws prohibiting billboard advertising (aimed at expression, but not at viewpoint). The two are not logically equivalent (they would be if the *O'Brien* statute prohibited burning for expressive purposes). It is not clear why the *O'Brien* test should apply equally to both.

Nonetheless, Justice Scalia's general law framework could lead to harsh results, especially where political expression is involved. The Court has often maintained that political expression lies at the heart of the First Amendment[184] and many commentators agree.[185] Because political expression is so central to the First Amendment, the Court should distinguish *political* expressive conduct and *nonpolitical* expressive conduct[186] and carve out an exception for political expressive conduct. Here the general law framework would not apply.[187] The Court would then afford political expressive conduct traditional First Amendment protection by subjecting restrictions on political expressive conduct to the *O'Brien* test.[188]

184. Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.") (citations omitted).

185. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (*only* explicitly political speech should be protected); *cf. Hearings Before the Committee on the Judiciary on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess., at 268-71 (Judge Bork admitting that there are First Amendment rights outside the core of political speech); *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (limiting First Amendment protection to public discussion of issues of civic importance); *cf.* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 (expanding notion of protected expression); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523 (arguing that free speech also serves as a check on government power).

186. Although it is difficult to draw a line between political and nonpolitical expression, difficulty is no reason to refuse to draw a line. *See* Bork, *supra* note 185, at 27-28. Judge Bork argued that First Amendment protection should be limited to "speech that is explicitly political," defining speech as "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country." *Id.* at 29. This definition seems too narrow and should be substituted with a broader definition that would include all expression that is reasonably related to government or public affairs.

187. *See supra* notes 107-12, 157-61 and accompanying text; *see also Barnes*, 111 S. Ct. at 2467 (Scalia, J., concurring) (arguing that the general law test is better suited to free speech). The political/nonpolitical distinction in expressive conduct indeed makes the general law test better suited to free speech than free exercise, as no such distinction exists between various forms of religious worship.

188. *See supra* text accompanying notes 140-43 (arguing that the *O'Brien* test is best suited to political expressive conduct).

Nonpolitical expressive conduct, on the other hand, would receive narrower protection. It would be protected only in those cases where a law is directed at expression. While it can be argued that this is protection that the First Amendment does not dictate,[189] the Court should err on the side of caution when constitutional rights are implicated.[190] Nonpolitical expressive conduct would not enjoy First Amendment protection where a law is not directed at that expression.[191] Further, to guard against a legislature drafting restrictions cloaked as general laws (but intended to abridge either political or nonpolitical expression), courts should inquire beyond the mere text of statutes and strike down facially general laws which have illicit motives.[192]

The Court should adopt the general law framework for expressive conduct cases because it provides lower courts with better guidance, is less influenced by judicial discretion, and leads to greater predictability. Under the *O'Brien* test, courts face a nearly impossible task: They must determine what the state's interest is, whether that interest is important or substantial, whether the state's interest is unrelated to the suppression of expression, and whether the incidental restriction on expression is no greater than essential to further that interest.

The general law framework, in contrast, would often provide the same protection with greater predictability. Courts need only make two determinations: Whether the law is one of general applicability, and whether the expressive conduct is political or nonpolitical. Courts will

189. There are at least two plausible arguments why nonpolitical expressive conduct should not be protected by the First Amendment. First, because expressive conduct is neither written nor oral speech, it is illegitimate for the Court to extend First Amendment protection to it. Second, even if it is legitimate, the Court should only do so where political interests are implicated because these lie at the core of the First Amendment. This second argument is the better one: Certainly "speech" cannot reasonably be restricted to pure speech, but each extension to new forms of expressive conduct need not adopt an all-or-nothing approach.

190. This distinction between political and nonpolitical speech should be limited to cases where a generally applicable law is applied to expressive conduct. Here it is justified because protection of nonpolitical expressive conduct involves at least three stretches of logic. First, expressive conduct is neither spoken nor written. Second, nonpolitical expressive conduct is further from the core of First Amendment interests than political speech. Third, the law is not specifically directed at the expressive conduct. The importance of pure speech and of precedent, however, weighs heavily against making the distinction elsewhere.

191. A similar way of stating this principle is that there is no protection for low value speech against the applicability of a content-neutral statute, but the problem here is that the Court must determine what speech is low value. *See, e.g.*, Miller v. Civil City of South Bend, 904 F.2d 1081, 1125 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting) (maintaining that ballet is expression, nude dancing is not). Because these determinations depend entirely on judicial discretion and give lower courts little guidance, the general law approach should be favored.

192. *Cf.* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

find the test simpler to apply, and, more importantly, the results will depend less on judicial values and discretion.

For example, compare the treatment of laws banning draft card burning to laws banning nude dancing. Draft card burning would be categorized as political expressive conduct if the purpose of the draft card burning was political protest. If the law was directed at that expression, a content-based analysis would be warranted.[193] Even if the law did not target that expression, the law would have to survive the *O'Brien* test.[194] Nude dancing, on the other hand, would be categorized as nonpolitical expressive conduct. It would enjoy no First Amendment protection if the legislature enacted a general law like the one in *Barnes*, but would be protected by the scrutiny applied to content-based regulations if the law was directed at the "erotic message" in nude dancing.[195]

A final example of the application of the general law test might satisfy Justice White's view. Suppose a state university enacted a public indecency statute much like the one in *Barnes*. Instead of nude dancing, however, the statute is applied against war protesters who streaked across campus to gain recognition for their cause. Assuming this is expression, under the general law test it would be categorized as political expressive conduct and the case would be judged under the *O'Brien* test. Such additional protection, as compared with that given nude dancing, is justified because political expression is so central to the First Amendment.

V. Conclusion

Barnes v. Glen Theatre provides a good example of why the Court should reconsider its treatment of expressive conduct under the First Amendment.

In *Barnes*, the Court held that the Indiana public nudity statute was constitutional as applied to nude dancing. The Justices, however, did not agree on a reason for their conclusion.

A plurality of three Justices[196] characterized the statute as a "time, place, or manner" restriction, applied the *O'Brien* test, and weighed the state's interest in societal order and morality against the expression in nude dancing. In so doing, they blurred the traditional content-neutral

193. *See supra* notes 34-36, 129-31 and accompanying text (discussing content-based scrutiny).

194. The result would be in accord with United States v. Eichman, 496 U.S. 310 (1990); Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); and Stromberg v. California, 283 U.S. 359 (1931). For a discussion of these cases, see *supra* text accompanying notes 12-17.

195. *See supra* notes 34-36, 129-31 and accompanying text (discussing content-based scrutiny).

196. The plurality consisted of Chief Justice Rehnquist and Justices O'Connor and Kennedy.

and low-value concepts of traditional First Amendment analysis, in effect diluting the First Amendment protections given to nude dancing and leaving lower courts little guidance in future expressive conduct cases.

Justice Souter concurred. While Justice Souter agreed with the plurality's use of the *O'Brien* test, he declined to rely on societal order and morality as a substantial state interest. Instead, he focused on the state's interest in regulating the "secondary effects" of nude dancing, such as prostitution and drug use. Justice Souter's approach failed because he accepted the existence of these secondary effects without proof, and because the secondary effects were probably related to the nude dancing in the third prong of the *O'Brien* test, which under a literal application of the test should have resulted in the statute being held unconstitutional.

Justice Scalia's concurrence employed a completely different analysis. Justice Scalia viewed the Indiana public indecency law as a general law proscribing nudity. Justice Scalia reasoned that because the law was not directed at expressive conduct, only nudity, the First Amendment did not apply. In the case of laws affecting expressive conduct, Justice Scalia would invoke the First Amendment only where those laws are directed at expression.

Justice White in his dissenting opinion argued not only that nude dancing is protected expression, but that nudity itself is protected as an expressive component of the dance. Justice White also characterized the purpose of the statute in barrooms and theaters as protecting the viewers from the harmful message that nude dancing communicates and rejected the plurality's and Justice Scalia's use of morality as the state interest. Instead, Justice White applied strict content-based scrutiny and would have affirmed the Seventh Circuit's decision holding the statute unconstitutional.

Justice Scalia's general law approach avoids the reliance on balancing tests, judicial discretion, and inferred "substantial" state interests, and provides lower courts with better guidance. Justice Scalia's approach, however, should be tempered to provide better protection for political expression. Because political expression lies at the core of First Amendment values, a law that affects political expressive conduct should implicate the First Amendment whether or not the law is directed at expression. On the other hand, a law that affects nonpolitical expressive conduct should implicate the First Amendment only where the law is directed at expression.