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Barnes v. Glen Theatre: Censorship--So What

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BARNES V. GLEN THEATRE[1]: CENSORSHIP? SO WHAT?

Barnes, which addressed the First Amendment protection of live nude dancing performances, is not a case about nudity; it is about the freedom of expression. The net effect of the decision is to endow legislatures with greater authority to circumscribe individual expression. Yet, the First Amendment was adopted to prevent any government, even a democratically elected one, from silencing individual citizens.[2] The rationale underlying the First Amendment is that individuals as private citizens and in their relationships to other individuals through the mechanism of representative government will personally benefit from having as much information as possible.[3] The maximization of personal benefit, i.e., the pursuit of happiness,[4] is the logical consequence of such informational freedom.

Whether a communication triggers the linguistic, musical, logical-mathematical, spatial or bodily-kinesthetic sectors of the mind,[5] it furthers the purpose of the Free Speech Clause to promote and protect the psychologically whole individual. In *Barnes*, the communicative freedom of individuals is subjected to the States' power to dictate a legislative majority's version of morality *Barnes*, although dismissible as merely affecting nude dancing, may have more far reaching implications because the morality justification for speech suppression advanced therein has potentially impacts a much wider variety of speech contexts.

After reviewing the procedural path of *Barnes* in section I,

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

2. *See* West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and to establish them as legal principles to be applied by the courts."); *see also* Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (Bork, J.) (rejecting the notion that laws regulating essentially moral choices are necessarily unconstitutional, "[w]e stress, because the possibility of being misunderstood is so great, that deference to democratic choice does not apply when the Constitution *removes the choice from majorities.*") (emphasis added); *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring) (citing *Dronenburg*).

3. *See* J. E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.6 at 835-36 (3rd ed. 1986 & Supp. 1988) (describing different theories of the value of free speech and the function of the First Amendment); *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PENN. L. REV. 591, 593 (1982) (individual self-realization is a function of free speech).

4. *See* DECLARATION OF INDEPENDENCE.

5. *See* HOWARD GARDNER, FRAMES OF MIND (1983) (theory of multiple intelligences).

this comment addresses the constitutional context of the decision in section II, and in section III presents an overview of the plurality opinion.[6] Section IV aims at harmonizing the decision's most salient points with the First Amendment jurisprudence detailed in Section II. Section V outlines *Barnes* potential implications in light of the Supreme Court's perceived deference toward governments at the expense of individual rights.

I. BACKGROUND

Indiana statute 35-45-4-1 prohibits nudity in public places.[7] Respondent, Glen Theatre, is an Indiana corporation which operated a bookstore in South Bend offering live nude performances patrons viewed from behind a glass partition while sitting in a booth.[8] The

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6. The decision generated a variety of opinions. Chief Justice Rehnquist delivered the plurality opinion, in which Justices O'Connor and Kennedy joined. Justices Scalia and Souter each filed opinions concurring in the judgment. Justice White filed a dissenting opinion, in which Justices Marshall, Blackmun and Stephens joined. *Id.* at 2458. In the interest of brevity, this essay will analyze the plurality's and Justice Souter's opinions as compared and contrasted with the salient features of Justice White's cogent dissent. Because Justice Scalia concurred in the judgment but not the essential reasoning of the plurality, his opinion will not be analyzed for its effect on First Amendment jurisprudence. *See generally* International Eateries of America, Inc. v. Broward County, Fla., 941 F.2d 1157, 1159-61 (11th Cir. 1991) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting in part Marks v. United States, 430 U.S. 188, 193 (1977)).

7. Ind. Code § 35-45-4-1 (1988) provides:

> Public Indecency
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> Sec. 1. (a) A person who knowingly or intentionally, in a public place:
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> (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 discernibly turgid state.

8. Barnes v. Glen Theatre, 111 S. Ct. 2456, 2459 (1991). The other respondent, J.R.'s Kitty Kat Lounge, also provided live nude dancing performances, but unlike Glen Theatre, served liquor and thus was subject to a greater degree of regulation stemming from Indiana's exercise of its Twenty-First Amendment power. *See infra* note 23 and accompanying text. Accordingly, the discussion will be confined to issues relating to respondent Glen Theatre, Inc.

owner of Glen Theatre and the dancers employed at the bookstore challenged the public indecency statute on First Amendment grounds, arguing that the statute was facially overbroad and that dancing was protected expression.[9] Because previous litigation had given the statute a limiting construction,[10] the Seventh Circuit Court of Appeals remanded to the District Court for the Northern District of Indiana so the statute could be challenged as applied.[11]

Three decisions later,[12] the Seventh Circuit Court of Appeals held that the public indecency statute was unconstitutional as applied because prohibition of non-obscene nude dancing performed as entertainment in order to promote "public morality generally" violated the First Amendment.[13] The United States Supreme Court granted certiorari[14] and reversed. In *Barnes v. Glen Theatre*, a plurality,[15] despite acknowledging that the First Amendment protects nude dancing performances, ruled that the "Indiana statutory requirement that the dancers in the establishment must wear pasties and a G-string does not violate the First Amendment."[16]

II. THE CONSTITUTIONAL CONTEXT

Because the case involved nude dancing performed as entertainment, and because protected speech has been held to include non-obscene[17] expressive conduct,[18] entertainment,[19] and indecent sexual expression,[20] as well as nude dancing performed as

9. Glen Theatre, Inc. v. City of South Bend, 726 F. Supp. 728 (N.D. Ind. 1985).

10. *See* State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), *appeals dism'd sub nom.* Clark v. Indiana, 446 U.S. 931 *and* Dove v. Indiana, 449 U.S. 806 (1980).

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

12. Glen Theatre, Inc. v. Civil City of South Bend, 695 F Supp. 414, 419 (N.D. Ind. 1988) (nude dancing not protected expression), *rev'd,* Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), *vacated by* Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990).

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

14. 111 S. Ct. 38 (1990).

15. *See supra* note 6.

16. 111 S. Ct. at 2460 (Rehnquist, C.J., plurality opinion).

17. Obscenity is not protected by the First Amendment. *See* Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).

18. Expressive conduct is protected. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931) (expressive conduct in form of displaying a red flag as a symbol of opposition to organized government is free speech).

19. The First Amendment protects entertainment. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) (entertainment in the form of film of human cannonball deserving of First Amendment protection); Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (First Amendment prohibits censorship based on a nuisance theory of drive-in theater film portraying nudity).

20. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989)

entertainment,[21] the State of Indiana's statutory ban on nudity became the object of First Amendment analysis.[22] Had Glen Theatre, Inc. also served liquor, Indiana, in its narrow role as a regulator of the sale and consumption of alcohol, and not as a censor, may have incidentally prohibited nude dancing under the authority of the Twenty-First Amendment.[23] Glen Theatre, Inc. did not, however, sell liquor.[24]

The specific type of speech involved in a case determines what test a court will apply to a challenged statute or regulation. In *Barnes*, the plurality classified nude dancing performed as entertainment as "symbolic speech."[25] Non-inherently expressive activity, such as altering or burning a flag, or sleeping in a park, will be construed as symbolic speech, and thus will be afforded a limited degree of First Amendment protection, if it is intended to convey a particularized message that is likely to be understood by the receiver.[26] Under the test formulated in *United States v. O'Brien*[27] and applied in *Barnes*,[28] a statute suppressing symbolic speech will be upheld if: (1) it is within the government's constitutional power to legislate in the area; (2) the restriction furthers an important gov-

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("sexual expression which is indecent but not obscene is protected by the First Amendment").

21. *E.g.*, 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.").

22. Barnes v. Glen Theatre, 111 S. Ct. 2456, 2460 (1991).

23. The Twenty-First Amendment to the United States Constitution provides in relevant part: "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. *See* New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715 (1981) (upholding ban on topless dancing); California v. LaRue, 409 U.S. 109, 114-16 (1972) (concluding that the state's broad power to regulate liquor under the Twenty-first Amendment outweighed First Amendment interest in nude dancing).

24. *Id.* at 2459.

25. *See id.* at 2460. Chief Justice Rehnquist also referred to the dancing as "expressive conduct." *Id.*

26. *See* United States v. Eichmann, 496 U.S. 310, 316 (1990) (overturning act designed to punish flag burning only when it communicates a message); Texas v. Johnson, 491 U.S. 397, 404 (1989) (acknowledging conduct as "speech" when engaged in to express an idea); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (sleeping in park to demonstrate plight of homeless); Spence v. Washington, 418 U.S. 405, 410-11 (1974) ("[A]n intent to convey a particular message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.").

27. 391 U.S. 367 (1968).

28. *Barnes*, 111 S. Ct. at 2460-61.

ernmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and, (4) if the incidental restriction on First Amendment freedoms is "no greater than essential" to the furtherance of the interest.[29] Until *Barnes*, the symbolic speech doctrine was not applied to inherently expressive activity.[30]

The *O'Brien* test does not permit governments to suppress ideas by suppressing the content of communication. It is a "bedrock principle underlying the First Amendment that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[31] If a government interest "blossom[s] only when a person's [conduct] communicates some message ,"[32] that interest is *related* to the suppression of free expression. The regulation embodying the government's interest thus fails the third prong of *O'Brien*, and, because the action involves the suppression of an idea, the *O'Brien* test will not apply.[33] Rather, the asserted state interest will be subject to "the most exacting scrutiny,"[34] under which the state will have a heavy burden, content-based speech laws are *presumptively* violative of the First Amendment.[35] The *Barnes* dissent alone concluded that Indiana's ban on nudity was related to the suppression of ideas, and thus invited the application of strict scrutiny, i.e., traditional First Amendment analysis.[36]

In addition to the *O'Brien* and traditional First Amendment tests, *Barnes* included a discussion of a third mode of analysis, the "time, place, or manner" ("TPM") test.[37] This test is applied to determine the constitutionality of time, place, or manner restrictions

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

30. *See Barnes*, 111 S. Ct. at 2468, 2470. Miller v. Civil City of South Bend, 904 F.2d 1081, 1090-98 (7th Cir. 1990).

31. *Johnson*, 491 U.S. at 414 (Brennan, J.).

32. *Id.* at 410.

33. *See id.*

34. Boos v. Barry, 485 U.S. 312, 321 (1988).

35. *See* Carey v. Brown, 447 U.S. 455, 462-63 & n.7 (1980) (overturning statute making all but labor-related picketing illegal); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99 (1972). Under strict scrutiny, judicial or state assessment of the merits of a specific form of expression, such as non-obscene expressive performances of the kind at issue in *Barnes*, is absolutely prohibited. *See* Cohen v. California, 403 U.S. 15, 25 (1971) (denying state the power to "cleanse public debate"); *see also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-59 (1988) (striking down standardless licensing scheme fostering arbitrary law enforcement); Kolender v. Lawson, 461 U.S. 352, 358-62 (1983) (validating vague criminal laws creating risk of discriminatory enforcement).

36. *See Barnes*, 111 S. Ct. at 2473-74 (White, J., dissenting).

37. *Id.* at 2460.

imposed by the government on expression, "whether oral, written or symbolized by conduct,"[38] taking place in public forums such as streets, sidewalks, and parks.[39] As under *O'Brien*, content suppression is not allowed. Restrictions may not be based upon either the content or subject matter of speech,[40] and must be "narrowly tailored to serve a significant governmental interest."[41]

The TPM test is stricter than the *O'Brien* test. A time, place, or manner restriction which does not "leave *ample* alternative channels for communication" will be struck down.[42] Nuisance,[43] trespass,[44] and zoning[45] restrictions have been upheld as valid time, place, or manner regulations. Total prohibitions, however, such as zoning ordinances banning all forms of live entertainment, including nude dancing performances, have been struck down as invalid time, place, or manner regulations for failing to "leave open adequate alternative channels of communication."[46]

III. OVERVIEW OF THE DECISION

In *Barnes*, the main question presented to the Court was whether non-obscene nude dancing performed as entertainment is

38. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

39. *See* Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (distinguishing (1) places devoted to assembly and debate by tradition or fiat, (2) public property opened by the government for expressive activity, and (3) public property neither expressly nor traditionally opened for expression); Hague v. CIO, 307 U.S. 496 (1939) (Roberts, J., concurring, joined by Black, J.) (original definition of "public forum"); NOWAK et al., *supra* note 3, § 16.47 at 970.

40. Madison School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 (1976).

41. *Clark*, 468 U.S. at 293.

42. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535, 536 (1980) (emphasis added). The *Barnes* plurality, however, stated that the *O'Brien* and time, place or manner tests "embody the same standards." *Barnes*, 111 S. Ct. at 2460.

43. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding ordinance regulating the quality and volume of amplified sound in public parks on nuisance theory).

44. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984) (validating prohibition on sleeping overnight in national parks).

45. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986) (upholding zoning ordinance dictating the concentration of "adult" theaters showing non-obscene films); Young v. American Mini Theatres, 427 U.S. 50, 63 & n.18, 78-79 (1976) (approving zoning ordinance dictating the dispersion of "adult" theaters showing non-obscene films) (Powell, J., concurring).

46. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981). Notice the use of "adequate" instead of "ample" to describe the alternative that must be made available. *Cf. Consolidated Edison Co.*, 447 U.S. at 535, 536 ("ample alternative channels").

expressive conduct protected by the First Amendment.[47] Chief Justice Rehnquist, writing for a plurality, answered yes. Having classified the type of speech at issue, the plurality chose a test to determine the constitutionality of Indiana's prohibition. Declining to apply "time, place, or manner" analysis to the statute, as Indiana requested, the plurality applied the *O'Brien* symbolic speech test, which was viewed as "embodying the same standards."[48] The plurality[49] concluded that the statute was sufficiently justified under the four prongs of *O'Brien*.[50]

First, Indiana possessed the power to enforce the statute derived from the traditional police power to provide for public morals.[51] Second, the statute furthered the substantial governmental interest in protecting morals and public order.[52] Third, the governmental interest was unrelated to the suppression of free expression because the statute, as applied, only reached the non-communicative element of the nude dancing, i.e., the nudity.[53] Finally, the plurality concluded, the incidental restrictions on First Amendment freedoms were no greater than essential to the furtherance of the interest because the statute was not a means to some "greater end," but "an end in itself."[54] Accordingly, the First Amendment did not prevent Indiana from enforcing its public indecency law to ban nude dancing performances.[55]

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47. Barnes v. Glen Theatre, 111 S. Ct. 2456, 2471 (1991).

48. *Id.* at 2458; *see supra* notes 37-42 and accompanying text. Indiana's request is puzzling, since the "ample alternative channels of communication" element of time, place or manner analysis could have presented a potential stumbling block in light of the fact that the statute did not allow for any alternative channels of communication for the message of eroticism via nudity. *See infra* section IV.B. Indiana's request for time, place or manner analysis makes sense as an appeal for the extension of speech regulations to private property in the non-zoning context. *Cf.* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (application of time, place or manner analysis to zoning ordinance dictating location of "adult" movie theaters). At least one decision has interpreted *Barnes* as addressing the application of TPM regulations. *See* Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 62 n.9 (3rd Cir. 1991).

49. In this regard, Justices Souter and Scalia, who wrote separate concurring opinions, joined the plurality.

50. *Barnes*, 111 S. Ct. at 2461-63.

51. *Id.* at 2462.

52. *Id.* at 2461-62 (Justice Souter opining that Indiana's interest in preventing the secondary effects of the nude dancing, such as crime, was a legitimate state interest under *O'Brien*'s second prong).

53. *Id.* at 2462-63.

54. *Id.* at 2463.

55. *Id.* at 2458, 2463.

IV ANALYSIS

A. Conduct, The Achilles Heel of Free Expression

The plurality's solicitude towards legislatures first appeared with its branding of the nude dancing performances as expressive conduct protected by the First Amendment, but unworthy of full protection. Classifying the dancing as being of the "customary 'barroom' type within the outer perimeters of the First Amendment though only marginally so,"[56] the plurality neither offered a standard for determining these "outer perimeters" nor made inquiry[57] into the *inherently* expressive nature of the performances. Declining to categorize "an apparently limitless" variety of conduct as speech, the plurality observed that "[i]t is possible to find some kernel of expression in almost every activity but such a kernel is not sufficient [to implicate] the First Amendment."[58]

The plurality's classification of the dancing as symbolic speech was a crucial part of its opinion because it resulted in the application of the weak[59] *O'Brien* test under which Indiana was permitted to totally suppress the performances. By summarily rejecting a determination of inherently expressive conduct,[60] the plurality avoided confronting the communicative nature of the dancing and made it clear that non-traditional speech, i.e., expressive conduct, even if historically protected by precedent as the performances at issue were, do not to trigger full First Amendment protection.

By qualifying the dancing as being on the "outer perimeters of

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56. *Id.* at 2460.

57. *See also* Miller v. Civil City of South Bend, 904 F.2d 1081, 1090-98 (7th Cir. 1990) (Posner, J., concurring).

58. *Barnes*, 111 S. Ct. at 2462 (quoting Dallas v. Stanglin, 490 U.S. 19, 25 (1989) and citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

59. *See id.* at 2460-61; *supra* text accompanying notes 27-35.

60. The plurality could have applied the *Spence* communicative intent/likelihood of understanding test for non-inherently expressive conduct but did not even mention it, preferring to assume that the dancing implicated "some" First Amendment protection, which could be easily surmounted by Indiana's police power under the *O'Brien* test. *See Barnes*, 111 S. Ct. at 2460, 2462; Spence v. Washington, 418 U.S. 405, 410-11 (1974) Had the plurality tested the performances under the *Spence* test, it would have had to recognize the dancer's intent to communicate and the likelihood that her audience would understand her "erotic message," as Justice Rehnquist refers to it. *Barnes*, 111 S. Ct. at 2463; *supra* note 25 and text accompanying note 26.

the First Amendment but only marginally so,"[61] the plurality applied a lesser quality of protection to dancing than prior cases seemed to require.[62] The plurality further avoided contact with the communicative nature of nude dancing by ignoring cases which support the proposition that entertainment is protected speech because it involves the communication of ideas.[63] By giving no reason for its departure from settled precedent in the classification of dancing, the *Barnes* plurality legitimized an exclusive focus on conduct, and not communication, in the crucial first step of First Amendment analysis speech classification.[64] This approach substitutes assertion for proof and avoids the core question concerning any alleged First Amendment activity· does the activity involve *communication*? The *Barnes* plurality, by focusing exclusively on the element of conduct, which is present in *every* form of speech, encourages courts to "categorize an apparently limitless variety" of *speech* as conduct, thereby leading to "reduced" or non-existent First Amendment protection.

Justice White, writing for the dissent, adopted a contrary view of the performances, which he saw as possessing the power to generate thoughts, ideas, and emotions.[65] This power, he stated, is the essence of communication.[66] Nudity, explained Justice White, is not merely conduct, but a "distinctive expressive component" of a nude dancing performance.[67] Because the State applied its statute to prohibit all activity containing this expressive component, Justice White reasoned, the State was regulating content, thus inviting strict First Amendment scrutiny of the statute as applied.[68]

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

62. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972). *See supra* text accompanying note 21.

63. *See* Zacchini v. Scripps-Howard Broadcasting, 433 U.S. 562, 578 (1977) (entertainment in form of film of human cannonball deserving First Amendment protection); Erznoznik v. City of Jacksonville, 422 U.S. 205, 207-12 (1975) (drive-in theater film portraying nudity). *See also supra* text accompanying note 19.

64. *See Barnes* 111 S. Ct. at 2461; *O'Brien*, 391 U.S. at 376-77.

65. *Barnes*, 111 S. Ct. at 2474 (White, J., dissenting).

66. *Id.*

67. *Id.* (citing "the thoughtful concurring opinion" of Judge Posner in Miller v. Civil City of South Bend, 904 F.2d 1081, 1090-98 (7th Cir. 1990)). Justice White cited Aristotle as casting light on the expressive nature of the dancing performances. *Id.* at 2471-72 n.1. "Rhythm alone, without harmony, is the means of the dancer's imitations; for even he, by the rhythms of his attitudes, may represent men's characters, as well as what they do and suffer." ARISTOTLE, POETICS 223 (Modern Library ed., I. Bywater tr. 1954).

68. *Barnes*, 111 S. Ct. at 2474 (citing Texas v. Johnson, 491 U.S. 397, 411-12 (1989)

The plurality's approach to speech classification could allow a contraction of First Amendment protection. Because conduct, by definition, is inherent in everything we do, the conduct/expression dichotomy could be instrumental in restricting First Amendment freedoms in non-nude dancing contexts.[69] *Barnes*'s conduct-intensive focus allows legislatures to select conduct as the significant element in regulating other 'expressions.' For example, flag burning and flag defacement scenarios involve conduct-intensive fact scenarios and ample opportunity for the Court to invoke a lesser level of First Amendment protection for the activities on the basis of conduct.[70]

In the past, the Court did not invoke a lesser level of protection for these conduct-intensive scenarios. Perhaps the fact that these cases involved political, not sexual, speech, can explain *Barnes*'s lack of inquiry into the communicative aspects of First Amendment activity Such a distinction, however, is based on content, and content suppression is supposed to be strictly prohibited.[71] *Barnes*, however, allows a circumvention of this most basic First Amendment command, resulting in the avoidance of strict scrutiny[72] and use of the legislature-friendly *O'Brien* test.[73]

B. "Time, Place, or Manner" As "Never, Nowhere, No Way"

After establishing a conduct-intensive method of speech classification, the plurality set out to apply the *O'Brien* test, but first modified the time, place, or manner test, laying the groundwork for

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and Boos v. Barry, 485 U.S. 312, 321 (1988)). Under strict scrutiny, a judicial assessment of the artistic merits of the nude dancing performances is not to be a determining factor. *Id.* at 2474-75 (quoting Cohen v. California, 403 U.S. 15, 25 (1971) ("[I]t is largely because government officials cannot make principled decisions in this area that the Constitution leaves matters of taste and style so largely to the individual.") (Harlan, J.)).

69. It is difficult to imagine any type of expression that does not contain *some* element of conduct since the mind, which formulates an idea, and the body, which expresses it, are part of the same unit, an individual. Since the plurality offered no standard to determine the extent of protection to be accorded to differing types of conduct, the rational citizen would probably conclude that the safest forms of expressive conduct are either manual — writing or text — or vocal — speech.

70. *See, e.g.*, United States v. Eichmann, 496 U.S. 310 (1990) (flag burning).

71. *See Johnson*, 491 U.S. at 404; *Boos*, 485 U.S. at 321; Spence v. Washington, 418 U.S. 405, 410-11 (1974). *See also supra* text accompanying notes 31-35.

72. *See Boos*, 485 U.S. at 321; Carey v. Brown, 447 U.S. 455, 462-63 & n.7 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99 (1972).

73. *See generally* Donald Ayer, *Right Makes Might: Laying Down the Law at the Supreme Court, The Rehnquist Court Unbound*, CONN. L. TRIB., July 29, 1991, at A1 (discussing the conservative Justices' deference to state governmental processes).

a broader application of government speech prohibitions with a corresponding relaxation of the burden governments must carry to justify speech prohibitions.[74] Although the plurality overtly declined to apply a TPM test to the statute, it observed that this test had been applied to conduct on private property, that the test "embod[ied] much the same standards" as the *O'Brien* symbolic speech test, and thus the *O'Brien* test should be used.[75]

The *O'Brien* test is quite different from the TPM test in that it can sanction total prohibitions of expressive conduct. No "adequate alternative channels of communication"[76] need be made available under *O'Brien.* Rather, the prohibition need only be "no greater than essential" to the furtherance of a substantial government interest.[77] Therefore, a *total* prohibition on First Amendment expression may be deemed "no greater than essential." Need, which can be easily created, becomes an operative factor.

The plurality's comparison of the time, place, or manner test with the symbolic speech test is curious. Applying both tests to the same scenario could mandate distinctly different outcomes. These tests, however, can be harmonized if the *O'Brien* test is seen as modifying the TPM test. If a total prohibition[78] under *O'Brien* is deemed to be no greater than essential to further a government interest, then the alternative channels of communication which must be left open according to the TPM test can only be adequate if "alternative channels" refers to qualitatively alternative messages. Yet, a qualitatively alternative message is still an alternative message.[79] Nonetheless, the plurality and Justice Souter categorize the total prohibition on the communication of eroticism via nudity as only quantitatively moderating the performances' "erotic message."[80]

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

75. *Id.* The Court did not, however, go so far as to expressly equate the two tests.

76. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981); *supra* note 46 and accompanying text.

77. *O'Brien,* 391 U.S. at 377; *see supra* text accompanying note 29.

78. In this case, a total prohibition means no erotic thoughts communicated via nudity.

79. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989); Carey v. Brown, 447 U.S. 455, 462-63 & n.7 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99 (1972). *See also supra* text accompanying notes 37-46.

80. *Barnes,* 111 S. Ct. at 2463 ("[T]he [prohibition] does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.") (Rehnquist, C.J.); *id.* at 2471 ("[T]he limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message) (Souter, J.).

This characterization allows the government to mandate the suppression of any specific message under the guise of "merely" diluting that message. For example, the phrase at issue in *Cohen v. California*, "Fuck The Draft," is qualitatively distinct from the ideologically similar phrase, "The Draft is Bad."[81] The impact with which an idea is communicated can clearly change the meaning of the communication. Similarly, the communication of eroticism via nudity and the communication of eroticism via "pasties and a G-string" relay distinct messages. *Barnes*'s comparison of the TPM and *O'Brien* tests results in a synthesized symbolic speech ("SSS") test. This synthesized test suggests that total qualitative prohibitions provide an adequate alternative channel of communication. Logically, this result is absurd.[82] Legally, it means that states may legislate prohibitions of symbolic communication on increasingly diverse bases.[83]

The second consequence of the plurality's synthesis of the time, place, and manner test with the *O'Brien* test is an increase in the number of places where states can suppress symbolic communication. By noting that the TPM test had been applied to conduct occurring on private property in *City of Renton v. Playtime Theatres*,[84] the plurality may have been, if not opening a door, at least opening a window, to a much larger role for that test.[85] Although it did observe that the TPM test has been traditionally applied to conduct taking place in a public forum like a street or a public park, the plurality proceeded to modify by implication the "adequate alternative channels of communication" element of the test by positive comparison to the *O'Brien* symbolic speech test.[86]

Given the reasoning that both tests "embody the same standards," that the TPM test has been applied to private property, along with the application of the symbolic speech test to private property in *Barnes*, it would not be irrational for future courts to view *Barnes* as an invitation to further extend hybrid TPM analy-

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81. *See* 403 U.S. 15, 25-26 (1971).

82. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 650-54 (1991) (questioning the wisdom of a trend towards collapsing the time, place and manner and symbolic conduct tests).

83. *See generally* Robert Giuffra, Jr., *Romancing The Rehnquist Court*, MANHATTAN LAW., Nov. 1991, 39, 40 (discussing Chief Justice Rehnquist's elevation of federalism as a constitutional value).

84. 475 U.S. 41, 46 (1986).

85. *See Barnes*, 111 S. Ct. at 2460.

86. *See supra* text accompanying notes 74-77.

sis[87] to private property In *Renton*, the TPM regulations upheld provided for adequate *locationally* alternative channels of communication and did not effect total qualitative prohibitions.[88] However, after *Barnes*'s synthesis of the TPM and *O'Brien* analyses, if the TPM test is applied to private property, the *O'Brien* symbolic speech test would be available to influence the outcome. Under the plurality's synthesized symbolic speech test, the complete absence of alternative channels of communication can be considered adequate. After *Barnes*, states possess the power to legislate total prohibitions of an individual's symbolic communications wherever the SSS test applies, be it public or private property [89]

C. Private Moral Preference, Public Legal Effect

Because the *O'Brien* test may sanction total prohibitions on forms of expression, the governmental interest advanced to justify the prohibition must be sufficiently important, i.e., "compelling [or] substantial."[90] On its own initiative, the *Barnes* plurality advanced a theoretically possible interest that will serve as a powerful justification for future prohibitions.[91] Unlike Justice Souter and the dissent, who saw the State's goal in applying the statute as the deterrence of crime and other anti-social activities,[92] the plurality simply ignored Indiana's proffered interest for suppressing nude dancing performances.

Citing the lack of legislative history associated with the Indiana statute, the plurality undertook an historical examination of "public indecency" laws and concluded that Indiana's prohibition "reflect[s] moral disapproval of people appearing in the nude among strangers in public places" and was "designed to protect morals and public order."[93] The dissent was alone in placing emphasis on the fact that the statute was not applied to plays, ballets, or operas containing public nudity despite the asserted constancy of

87. This hybrid test would take the form of the synthesized symbolic speech test.

88. *Renton*, 475 U.S. at 46.

89. *See generally* Charles Rothfeld, *Federalism's Smoking Guns*, LEGAL TIMES, Sept. 30, 1991, at 34 (criticizing the Supreme Court's deference preference).

90. *See Barnes*, 111 S. Ct. at 2461 (citing *O'Brien*, 391 U.S. at 376). Although the words "compelling" and "substantial" interest seem like the language of strict scrutiny, *O'Brien* analysis is in fact much weaker. *See supra* notes 27-46 and accompanying text.

91. *Barnes*, 111 S. Ct. at 2461-62.

92. *Id.* at 2473.

93. *Id.* at 2461-62.

the state interest in "promoting societal order and morality."[94]

By striking out on its own to locate an important government interest to satisfy the government interest prong of *O'Brien*, the plurality may have been expressing the same willingness to accord deference to legislative bodies with respect to control over individual sexual morality as it did in *Bowers v. Hardwick*.[95] Indiana had not sought deference on such a metaphysical basis. Further, unlike the government interest in *O'Brien*, which stemmed from no less than Congress's *express* power to raise armies under the Constitution,[96] the state interest in "promoting morality" as located by the *Barnes* plurality, is *derived* from the police power, a power nowhere mentioned in the Constitution.[97] The plurality's investigation of the history of public indecency statutes may constitute additional evidence of a *Bowers*-type willingness to defer to a legislature's determination of a universally correct moral choice by drawing on a very large pool of potential justifications.

By tracing the offense of public nudity through seventeenth century English common law, back to the "story of Adam and Eve," the plurality may have been suggesting that potential sources for these moral justifications are neither exclusively American nor solely legal in nature.[98] The promotion of a religious system of morality, however, could lead to arbitrary schemes of enforcement of the type previously struck down for vagueness.[99]

Further, reliance on a notion of public morality, especially a notion so intrinsically related to religious definitions, treads threat-

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

95. 478 U.S. 186, 196 (1986) (upholding a prohibition on private homosexual sodomy enacted solely "on the presumed belief of a majority of the electorate that homosexual sodomy is immoral and unacceptable"); *Barnes*, 111 S. Ct. at 2462, 2465.

96. U.S. CONST. art. I, § 8, cll. 12, 14.

97. *See* 111 S. Ct. at 2461-62; *see also* NOWAK et al., *supra* note 3, § 8.2 at 263-64.

98. *See Barnes*, 111 S. Ct. at 2461. By means of its Biblical allusion, the plurality may have been suggesting an ultimate influence for Judaeo-Christian beliefs, if only through the back door of a majority of voter-believers influencing their elected representatives to adopt a Judaeo-Christian approach to sexual morality. The garden myth is a central feature of what one judge in the case below had referred to as "our Judaeo-Christian heritage." Miller v. Civil City of South Bend, 904 F.2d 1081, 1105, 1106 (7th Cir. 1990) (Coffey, J., dissenting) ("I am not one who believes that the federal courts [should] establish a secular moral view that contributes to the piece-by-piece dismantling of our historic Judaeo-Christian principles and heritage.")

99. *See* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-59 (1988) ("[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."). *See also supra* note 35.

eningly near the concept of religious freedom. As Judge Learned Hand has observed, "[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."[100] The effect of the plurality's elevation of a legislative majority's views on sexual morality to the status of "important government interest" under *O'Brien* is to enhance the power of states to determine the range of an individual's essentially private moral choices.[101]

D. The First Amendment: Symbol of Sacrifice?

By permitting Indiana's prohibition based on a morality interest derived from the "traditional police power of the States" to "provide for the public morals,"[102] the plurality altered the strength of the traditional adversary of individual rights, creating a greater potential for future dilutions of those rights. As the plurality correctly observed, the police power to promote public morality has been upheld as a basis for legislation in prior cases.[103] However, these cases, unlike *Barnes*, did not involve *any* fundamental right. *Roth v. United States*, the leading obscenity case, stands for the proposition that the First Amendment does not protect obscenity;[104] *Paris Adult Theatre I v. Slaton* stands for the proposition that the public display of obscenity may be prohibited despite the consenting nature of adult viewers;[105] *Bowers v. Hardwick* upheld a prohibition on homosexual sodomy, which was not regarded as a fundamental right.[106]

Under *Gitlow v. New York*, freedom of expression, which includes nude dancing performed as entertainment, *is* a fundamental right made applicable to the States through the Fourteenth Amendment.[107] Justifications forged in the context of obscenity jurisprudence do not carry the same weight in the fundamental right context. As the Court noted: "Freedom of press, freedom of speech,

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100. Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953).

101. *See generally* Anita L. Allen, *Court Disables Disputed Legacy Of Privacy Right*, NAT'L L.J., Aug. 13 1990, at S8 (categorizing the Rehnquist Court's philosophy of legislative deference as a means to disable a "controversial jurisprudence of fundamental constitutional privacy").

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

103. *Id.*

104. *See* 354 U.S. 476, 485 (1957); *supra* note 17 and accompanying text.

105. *See* 413 U.S. 49, 57 (1973).

106. *See* 478 U.S. 186, 196 (1986).

107. 268 U.S. 652, 665 (1925).

freedom of religion are in a preferred position."[108] The *Barnes* plurality's balancing of the States' essentially plenary police power against an express constitutional command informing the fundamental right of free expression subjects the First Amendment, a limit on *government* power, to the relatively unrestrained whims of state legislative majorities.[109]

E. Secondary Effects: Race to the Bottom?

Justice Souter's view of the important government interest satisfying *O'Brien*'s second prong, which differed substantially from the plurality's,[110] would provide states with another powerful justification for enforcing speech prohibitions. Echoing Indiana's position, he concluded that the interest advanced by the state's application of the statute to nude dancing performances was the deterrence of the "pernicious secondary effects" associated with the dancing such as "prostitution, criminal activity, and other activities which break down family structure "[111] The government need not await "localized proof of those effects" before acting to prevent them;[112] instead, it may rely on the legislative and administrative findings of other municipalities to reasonably conclude that the dancing is "likely to produce" the negative secondary effects.[113]

Justice Souter then concluded that the government interest in deterring these secondary effects was unrelated to the suppression of free expression, thus satisfying *O'Brien*'s third prong. Justice Souter argued that the "association" between the nude dancing establishments and the evil sought to be eradicated did not necessarily mean that the evil was caused by the persuasiveness of the "expression inherent in the dancing."[114] Rather, he explained, a

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108. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *See also* NOWAK et al., *supra* note 3, § 16.7(a) at 837-38.

109. *See generally* Donald Ayer, *The Path of Restraint; Conservative Court Exerts Its Will By Not Interfering With the Political Decisions of the Legislative and Executive Branches*, THE RECORDER, Aug. 8, 1991, at 4 (discussing the Rehnquist Court's deference to legislative bodies).

110. *See supra* section IV.C.

111. *Barnes*, 111 S. Ct. at 2473 (Souter, J., concurring).

112. *Id.* at 2469-70 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 44 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 & n.34 (1976); California v. LaRue, 409 U.S. 109, 111 (1972)).

113. *See id.* at 2469, 2470 (citations omitted).

114. *Id.* at 2470.

conclusion that a locus of expressive activity is associated with certain secondary effects simply indicates the existence of a correlation between the locus and the effects without deciding "what the precise causes of the correlation actually are."[115]

The secondary effects rationale employed by Justice Souter, like the plurality's morality rationale,[116] affords states a broad new range of potential justifications with which to satisfy the government interest prong of *O'Brien*. Where the plurality would examine chronologically, geographically, and metaphysically distant, to find support for a State's morality interest,[117] Justice Souter would regard the experiences and findings of any American municipality as presumptively valid in a determination of the non-causal link between a particular expressive activity and negative secondary effects. However, as Justice White, writing for the dissent observed, "[i]f Justice Souter is correct that there is no causal connection between the message conveyed by the nude dancing at issue here and the negative secondary effects that the State desires to regulate, the State does not have even a rational basis for its absolute prohibition on nude dancing that is admittedly expressive."[118]

In addition, the *Renton* presumptive effect analysis relied on by Justice Souter was forged in the context of speech forum relocations, i.e., classic time, place, or manner regulations, not total qualitative prohibitions as in *Barnes*.[119] In *Renton*, the Court upheld a zoning ordinance which merely concentrated theaters showing non-obscene films.[120] The lowered level of "localized proof" was justified by a correspondingly lower First Amendment stake, due to the adequate alternative channels of communication.[121] Justice Souter's substitution of legislative edict for "localized proof" could encourage future government litigants to engage in a

115. *Id.*

116. *See supra* section IV.C.

117. *See Barnes*, 111 S. Ct. at 2459-60; *supra* section IV.C.

118. *Id.* at 2474 n.2.

119. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986).

120. *Id.* at 51.

121. *See id.* at 51-52; *American Mini-Theatres* at 427 U.S. 50, 70-72 (1976) (finding that city's interest in preserving quality of its neighborhoods supports ordinance dictating the dispersion of adult, but non-obscene, theaters in light of lowered First Amendment stake attending simple relocation of theaters without regard to content); NOWAK et al., *supra* note 3, § 16.61(d) at 1024. Zoning, unlike the absolute prohibition on the communication of eroticism via nudity in *Barnes*, specifically creates alternative channels of communication for an expressive activity.

nationwide search for a finding of causality made by other governmental entities who possess the power and the will to "discover" such causality by fiat. Such an incentive could lead to a reduction of the empirical validity of the causal relationship between alleged negative secondary effects and the totally prohibited expressive conduct.

Correlation analysis, the second important component of Justice Souter's opinion, constitutes an important new barrier to challengers of statutory prohibitions on speech. By positing that negative secondary effects *cor*related with the presence of the establishments where the expression occurs are *un*related to the inherently expressive[122] performances taking place inside those establishments, Justice Souter introduced locus of expression as an operative factor in the chain of causation calculus under *O'Brien*'s third prong. The word "correlated" is defined as "closely, systematically, or reciprocally related."[123] It is no leap to say that the presence of nude dancing establishments is directly related to the inherently expressive performances taking place inside. Because the presence of the establishments is correlated, i.e. "closely [or] systematically related" to the negative secondary effects, and the expressive performances are closely related to the establishments themselves, then the performances are also closely related to those secondary effects. Thus, a government interest in deterring those secondary effects is closely related to the expressive performances.

To advance its interest, the government must suppress the expressive performances that correlate with negative secondary effects. Logically, the interest is related to the suppression of free expression, thus failing the third prong of *O'Brien*.[124] Legally, the locus of expression is substituted for the expression itself as the object of the prohibition.[125] However, it is an "entire category of

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122. Justice Souter is of the opinion that the performances were inherently expressive. *See Barnes*, 111 S. Ct. at 2468.

123. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

124. Since Justice Souter admits that the nude dancing performances are "inherently expressive," the chain of causation runs from the performances, to the presence of the establishments to the negative secondary effects alleged by the State. *See Barnes*, 111 S. Ct. at 2468. Accordingly, under Justice Souter's own terms, the prohibition of an inherently expressive activity to combat pernicious secondary effects fails the third *O'Brien* prong because the asserted state interest in combatting crime is *directly* related to the suppression of an inherently expressive activity.

125. A focus on the locus of expression makes sense in cases like *Renton* and *American Mini-Theatres* which involved ordinances

expression,"[126] the nude dancing performances, which are totally prohibited, not the locus of expression as in *Renton* or *American Mini Theatres*.[127] Under Justice Souter's correlation analysis, states are essentially immune from an attack under the third prong of *O'Brien* because of the extreme difficulty of determining whether a speech prohibition is related or merely "correlated" to the suppression of free expression.[128]

F Conclusion

In *Barnes*, the plurality and Justice Souter weakened the individual right to free expression in seven concrete ways. First, by focusing exclusively on conduct and ignoring the communicative nature of expressive activity, the plurality legitimized the arbitrary classification of even speech protected by precedent as "mere expressive conduct" and thus subject to a lesser degree of First Amendment protection.[129] Second, by equating symbolic speech and "time, place, or manner" analysis, the plurality synthesized a new symbolic speech test which gutted time, place, or manner analysis' stricter "adequate alternative channels of communication" requirement, allowing total qualitative prohibitions on expression to be deemed to be "no greater than essential."[130]

Third, by equating symbolic speech and time, place, or manner analysis to synthesize a new symbolic speech test, observing that time, place, or manner analysis has been applied to conduct occurring on private property, and applying the new test to private

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regulating permissible speech forums, but is inapposite in *Barnes* where a prohibition, rather than a relocation of speech was at issue. Although Justice Souter focused on the location of the expression, his *animus* towards the nude dancing performances was obvious, surfacing in such comments as "society's interest in [this expression] is of a lesser magnitude " and that "sexually explicit expression may be of lesser societal importance " *Barnes*, 111 S. Ct. at 2470-71.

126. *Id.* at 2475.

127. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48, 52 (1986); Young v. American Mini Theatres, 427 U.S. 50, 82 n.4 (1976).

128. *See generally* Charles Rothfeld, *Right Makes Might; Laying Down the Law at the Supreme Court, Federalism Redux: Spotlight on the States*, CONN. L. TRIB., July 29, 1991, at A12 (noting the "extraordinary range of cases" in which the Court's conservative majority invoked the doctrine of federalism to defer to state courts and legislatures).

129. *See supra* text accompanying notes 58-73.

130. *See supra* text accompanying notes 74-83.

property, the plurality opened a window to further expansion of the symbolic speech test to private property.[131] Fourth, by allowing the *implied* and open-ended police power to promote public morality to outweigh the *fundamental* individual right of free speech, the plurality restricted the range of essentially private communications available to individuals.[132] Fifth, by elevating the promotion of public morality by legislative majorities to the status of governmental interest capable of informing a prohibition on speech, the plurality injected a heavy dose of arbitrariness into the body of First Amendment jurisprudence.[133]

Sixth, by employing a "secondary effects" analysis premised on the presumptive validity of legislatively-issued findings in the First Amendment context, Justice Souter opened the door to a diminution of the empirical validity of the interests advanced to justify empirically absolute suppressions of expressive activity.[134] Seventh, by positing locus of expression, rather than prohibited expression itself, as determinative of the cause of the secondary effects sought to be eradicated by a statutory prohibition, Justice Souter creates a scheme of analysis under which the government would almost always prevail over the individual.[135]

V APPLICATION OF *BARNES*

Barnes has already had an effect upon a wide variety of speech cases. In the thirteen cases citing the decision, only four have involved nude dancing performed as entertainment. In those four, the decision has been construed as according a lesser degree of First Amendment protection to the "expressive aspect of nude dancing;"[136] as an example of the continuing viability of the

131. *See supra* text accompanying notes 74-77, 84-89.

132. *See supra* text accompanying notes 90-101.

133. *See supra* text accompanying notes 102-09.

134. *See supra* text accompanying notes 110-21.

135. *See supra* text accompanying notes 110-28.

136. *See, e.g.*, D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 143 (4th Cir. 1991) (citing *Barnes* as a general example of the application of a lesser degree of First Amendment protection to physical conduct as compared to "purer modes of communicative speech" and as a specific example of the Supreme Court according less than full First Amendment protection to "the expressive aspect of nude dancing"); International Eateries of America, Inc. v. Broward County, Fla., 941 F.2d 1157, 1159-61 (11th Cir. 1991) (noting Justice Rehnquist's reduced protection of dancing despite precedential treatment, and deciding to apply the *Renton* secondary effects test to the ordinance at issue in light of Justice Souter's conclusion that control of secondary effects was a substantial government interest under the second prong of O'Brien); Lee v. City of Newport, 947 F.2d 945,

Renton secondary effects test in the zoning context; and as supporting the proposition that nude dancing is a protected form of speech. In the commercial speech context, the Justice White's dissent has been cited as supporting the requirement that content-based restrictions be narrowly drawn to accomplish a compelling governmental interest.[137]

In the reproductive rights arena, an abortion protest case has cited *Barnes* as involving time, place, or manner analysis;[138] another abortion case referred to the decision as an example of the application of the *O'Brien* symbolic speech test.[139] *Barnes* has been cited in an attorney "gag rule" case as involving speech that is a direct target of a statutory prohibition;[140] in a flag display case as forbidding the application of an ordinance to suppress expressive conduct precisely because of its communicative attributes;[141] and in a "hate speech" case as a decision involving the application of a statute to regulate conduct, not content.[142]

In the military justice context, *Barnes* has been interpreted as supporting the prohibition of "immoral" activities without regard to their offensive character;[143] as an example of the proper applica-

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945 n.4 (6th Cir. 1991) (noting that in *Barnes*, "the Supreme Court held that nude dancing is not unprotected expression").

137. *See* Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464, 473 (6th Cir. 1991) (citing *Barnes* dissent for proposition that content based restrictions will be upheld only if narrowly drawn to accomplish a compelling governmental interest constitutional challenge to city ordinance banning the distribution of commercial handbills on city streets due to aesthetic and safety reasons).

138. *See* Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 62 (3d Cir. 1991) (challenge to constitutionality of injunctive restrictions placed on speech of abortion protesters upheld with one narrow exception).

139. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, 691 (3d Cir. 1991) (challenging to the constitutionality of Pennsylvania abortion statute).

140. *See* Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2724 (1991) (distinguishing *Barnes* as a case involving speech as a direct target of the statute in question).

141. *See* Dimmitt v. City of Clearwater, 1991 WL 288827 at *2 (M.D. Fla. 1991) (citing Justice Scalia s concurring opinion in *Barnes* for the proposition that if the City sought to prohibit the expressive conduct, flag display, precisely because of its communicative attributes, the ordinance would be found unconstitutional).

142. *See* Iota XI Chapter of Sigma Chi Fraternity v. George Mason University, 773 F.Supp. 792, 793-94 (E.D.Va. 1991) (reviewing discipline imposed on fraternity members who had sponsored what George Mason University administrators considered to be a socially offensive contest involving the performance of "ugly woman" and blackface skits and finding sanctions unconstitutional because they punished expression).

143. *See* United States v. Hall, 1991 WL 244298 *9 n.13 (A.C.M.R. 1991) (citing *Barnes* to as example of continuing judicial maintenance of the prohibition on consensual sodomy, specifically quoting Justice Scalia's concurring opinion to the effect that society prohibits a range of activities not because they harm others, but because the are consid-

tion of the symbolic speech test;[144] and as supporting the proposition that nudity alone, even in the presence of others, does not "in and of itself" constitute a crime.[145]

So?

While *Barnes* has been cited in a number of cases, it is important to note that states have not taken advantage of the wider latitude seemingly offered them. Yet, in the few months since its publication, *Barnes*, true to its nature as a First Amendment case, has served to inform a range of opinions united by a "golden thread" of communication. Few of the cases citing *Barnes* seem to demand an immediate manning of the barricades, perhaps because none have involved total prohibitions on communication like *Barnes* did. This situation is fortunate, but, like fortune, a product of accident, not design.

In light of the seven ways *Barnes* strengthens legislative power to suppress fundamental rights of expression,[146] it is easy to imagine *Barnes* being used to justify scenarios fundamentally at odds with the letter and the spirit of the First Amendment. The secondary-effect driven area of sexually explicit speech and the morality-charged area of "hate speech" appear most likely to attract an application of *Barnes*.[147]

Justice Souter's secondary effects/correlation analysis could easily find resonance in the book- and film-banning context. Under his analysis, any legislature could make a legislative finding that the locus of the sale or showing of sexually explicit materials was correlated to a rise in crime, thus allowing the legislature to "incidentally" yet totally prohibit the sale of certain works. The prohibition would not be related to the suppression of free expression because the analysis would focus on the locus of sale or display, not the communicative aspects of the works.

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ered *contra bono mores*, or immoral).

144. *See* United States v. Wilson, 33 M.J. 797, 799-800 (A.C.M.R. 1991) (citing *Barnes* as example of the application of *O'Brien* test in challenge to soldier's conviction for disobedience and dereliction of duty for blowing his nose on flag while member of a flag-raising detail based on allegation that the punished act was a form of expressive conduct and thus protected by the First Amendment).

145. *See* United States v. Choate, 32 M.J. 423, 427 (C.M.A. 1991) (soldier's conviction for exposing of buttocks to fellow soldier's wife).

146. *See supra* text accompanying notes 129-35; *see also supra* section IV

147. Other areas of potential application might include abortion protest, abortion information, education, choice of lifestyle, environmentalism and commercial speech.

By relying on the presumed validity of various and sundry legislative findings, the government could avoid the issue of cause and effect altogether and would not even have to show a rational basis for its prohibition. The only brake on this scenario would be prudential, based on the political value of a prohibition to its supporters. In many areas of the country, that political value would be high.[148] If sexually explicit communication is of lesser societal value, as Justice Souter assures us,[149] its packaging in book or film formats will not save it from the censor. Further, a sexually explicit material exception to the First Amendment could be extended to the realm of political thought. Crime, again, could be advanced as the secondary effect of bookstores selling books advocating an activist strategy to secure political change.[150]

The main problem with a legislative assessment of the relative worth of ideas is that it is informed by a single dangerous principle, arbitrariness. The *Barnes* secondary effects analysis which neither provides for alternative channels of communication nor requires a cause and effect relationship between the prohibited conduct and the interest advanced to justify the prohibition serves to inflict the arbitrary edicts of legislative majorities on a range of communications "limited" only by the plenary power of the legislature. Content suppression will be the primary effect of Justice Souter's secondary effects/correlation analysis.

The *Barnes* plurality's establishment of morality as a factor justifying speech prohibition will continuously beg the thorny question, whose morality? Our system of representative government, absent a Constitution limiting the power of the majority, would result in those groups with the loudest and most persistent voices getting things done their way at the expense of that smallest of minorities, the individual. Absent judicial enforcement of federal constitutional rights, the same result ensues. If morality limits the Limiter, i.e., the Constitution, what limits morality? *Barnes* implies that legislative majorities can *morally* decide on a morality for all individuals. The wisdom of this policy may be tested in the "hate speech" context,[151] where majorities must choose values inform-

148. *See* Ken Terry, *Industry Prepares to Fight Proposed 'Sex Offender' Bill*, BILLBOARD, at 4, June 8, 1991 (noting free speech groups' efforts to combat U.S. Senate bill that would allow victims of sex crimes to sue producers, distributors, and sellers of sexually explicit, though not obscene, materials).

149. *See Barnes*, 111 S. Ct. at 2470.

150. *E.g.*, KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (1848).

151. *See* Deborah Ellis, *Hate Speech Is Still Protected Speech*, N.J.L.J., Dec. 9, 1991, at

ing the morality they wish to promote via campus hate speech codes.[152]

Under *Barnes*, hate speech could easily be recast as involving a "fighting words" element analogous to conduct, thus triggering the weak symbolic speech test. The main question under the plurality's analysis would be the question of what morality interest informs a prohibition on "hateful expressive conduct." By shielding the leaders of tomorrow from the psychological and emotional harm presumed to flow from conduct "found" to be socially detrimental to "captive" audiences, the majority chooses paternalism over personal responsibility.[153] By purporting to eliminate unpopular thought by force, the majority chooses power over reason as a universal justification.[154] By compelling adherence to an orthodoxy, the majority chooses obedience over autonomy as a badge of human decency.[155] Most importantly, by arbitrarily imposing punishment for disagreement, the majority chooses group rights over individual rights.

Will the "beneficiaries" of hate speech codes become psychologically whole individuals or will they seek a Hitler? Assuming that morality consists of discerning the difference between good and evil and choosing the good, the inherent contradiction of a morality interest informing a prohibition on expression is that the morality interest is immoral because it destroys individual choice. Under the guise of deference, the *Barnes* decision gives legislatures

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16 ((1) noting the irony that the command of the First Amendment only becomes necessary when the majority views speech as disagreeable; (2) quoting Justice Holmes, "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death," and noting that attempts to censor unpopular opinions arose in 1920s, to muzzle labor organizers and anti-war protesters, in the 1960s, to suppress the message of civil rights workers; and, (3) observing that absent Justice Brennan's decision in *New York Times v. Sullivan*, 376 U.S. 274 (1967), which subjected libel law to the Constitution, that the civil rights revolution in the South may not have been as zealously reported).

152. *See Daniel Harris, Whose Culture Is It Anyway?*, L.A. TIMES, Mar. 1, 1992, Book Review Section, at 3 (review of DEBATING P.C. - THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES (Paul Berman ed. 1992)) (discussing the rise of "well-intentioned yet ill-advised" efforts by universities to promote a political orthodoxy on campus and criticizing article by Professor Stanley Fish, *"There's No Such Thing As Free Speech and It's a Good Thing, Too"* as constructing a "fraudulent intellectual rationale for censorship").

153. *See* Ronald J. Riccio, *Free Speech v. Freedom from Bigotry*, N.Y.L.J., Sept. 30, 1991, Outside Counsel Section at 1 (citing reasons to support campus speech codes).

154. *See id.*

155. *See id.*

a blank check to control content in communication for all. What a blatant violation of the Constitution! The First Amendment was specifically enacted to guarantee each individual's right to make speech-content decisions without such political interference.

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