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NOTES AND COMMENTS

DANCING AROUND THE FIRST AMENDMENT: SYMBOLIC SPEECH AFTER *BARNES* V. *GLEN THEATRE, INC.*

I. INTRODUCTION

After years of controversy over the constitutionality of nude dancing, the Supreme Court, in *Barnes v. Glen Theatre, Inc.*,¹ explicitly stated that nude dancing is symbolic speech protected by the First Amendment. Despite this holding, and with suggestive irony, the Court nevertheless upheld an Indiana statute prohibiting nude dancing. The Court's reasoning, stripped to its essence, indicated that less protection will be given to symbolic speech and more protection to statutes imposing popular morality.

In analyzing whether the Indiana statute prohibiting nudity, and thereby prohibiting nude dancing, violated the First Amendment by infringing on protected symbolic speech, all of the Justices but one used the four-prong "incidental restriction test" articulated in *United States v. O'Brien*.² In doing so, the Court tacitly announced that this test would replace the "time, place, and manner test" previously utilized in symbolic speech cases. The three-member plurality also expanded the second prong of the incidental restriction test, which requires a substantial governmental interest, to encompass "protecting order and morality."³ With this seemingly innocuous phrase the Supreme Court relegated expression related to sex to a second-class status; granted states the power to restrict symbolic speech at the whim of public morality; and effectively watered down the level of judicial scrutiny for statutes regulating symbolic speech to a rational basis test, submerging a protected constitutional right in the vast pool of conduct unprotected by the constitution. In sum, the Court allowed constitutional analysis to swallow constitutional principles.

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

2. 391 U.S. 367 (1968).

3. See *Barnes*, 111 S. Ct. at 2461-62.

II. HISTORY

A. *Nude Dancing*

The First Amendment of the United States Constitution says that the government "shall make no law . . . abridging the freedom of speech."⁴ The Supreme Court has interpreted the First Amendment as giving citizens a right to engage in a host of expressive activities, including entertainment,⁵ which are not speech per se yet which fall under the umbrella of protected symbolic speech.⁶ However, from the late 1950's to the early 1970's the Supreme Court did not grant First Amendment protection to nude dancing, thereby allowing states or local communities to prohibit nude dancing.⁷

In *Schad v. Borough of Mt. Ephraim*,⁸ the Court reversed this trend and stated in dicta that "nude dancing is not without its First Amendment protections from official regulation."⁹ In *Schad*, an adult bookstore owner was found guilty in a municipal court of violating a zoning ordinance by installing a coin-operated mechanism which allowed customers to watch a live dancer, usually nude, perform behind a glass panel.¹⁰ The Court struck down the ordinance because it was overbroad in prohibiting live entertainment.¹¹

Almost all of the lower federal courts have read *Schad* as affording nude dancing some First Amendment protection.¹² In contrast, the United States Court of Appeals for the Eighth Circuit, in *Walker v. City*

4. U.S. CONST. amend. I.

5. The Court has extended protection to a variety of entertainment forms. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (protecting dance under the First Amendment); *Jenkins v. Georgia*, 418 U.S. 153 (1974) (protecting film under the First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (protecting motion pictures).

6. "Entertainment, as well as political and ideological speech, is protected [by the First and Fourteenth Amendments]; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

7. *Lisa Malmer, Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1276 (1991).

8. 452 U.S. 61 (1980).

9. *Id.* at 66.

10. *Id.* at 62-64.

11. *Id.* at 76. The Court distinguished this case from *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1972). In *Young*, the court upheld a zoning ordinance that regulated where an adult movie theater could be located. *Id.* at 59-61. The ordinance did not affect the number of adult theaters that could operate in the city; it merely dispersed them. *Id.* at 71. This did not imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts citywide. *Schad*, 452 U.S. at 71.

12. *Malmer, supra* note 7, at 1278. See, e.g., *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1084 (7th Cir. 1990); *BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986).

of *Kansas City*,¹³ held that nude dancing is obscene under the *Miller* test.¹⁴ The Eighth Circuit rejected the *Schad* dicta because it was “unadulterated dicta—and dicta quite wide of the holding.”¹⁵ The court also referenced *Paris Adult Theater I v. Slaton*,¹⁶ a companion case to *Miller*, in which the Supreme Court stated that lewd conduct which states could prohibit on the street was not automatically protected because it occurred indoors and on a stage.¹⁷

Despite the confusion over *Schad*, in *California v. LaRue*¹⁸ the Supreme Court held that a state has the authority under the Twenty-First Amendment to prohibit nude dancing in establishments licensed to sell liquor.¹⁹ In *LaRue*, the California Department of Alcoholic Beverage Control prohibited any display of the genitals and actual or simulated touching of the breast, buttocks, anus or genitals, in establishments licensed to sell liquor.²⁰ The Department was reacting to incidents of prostitution, rape, and attempted rape occurring in and around these establishments.²¹ The Supreme Court concluded that the Twenty-First

13. *Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990). Walker wanted to have the dancers at his club perform in bikini bottoms and pasties. *Id.* at 84.

14. *Miller v. California*, 413 U.S. 15 (1973). Under this test, a party charging that material is obscene must show that the material: (1) would be found as a whole, by the average person applying contemporary community standards, to appeal to the prurient interest; (2) depicts or describes, in a patently offensive way, sexual conduct specifically defined by the relevant state law; and (3) as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

15. *Walker*, 911 F.2d at 85.

16. 413 U.S. 49 (1973).

17. Malmer, *supra* note 7, at 1278-79.

18. 409 U.S. 109 (1972).

19. Justice Rehnquist, writing for the six member majority, stated:

The substance of the regulation struck down prohibits licensed bars or nightclubs from displaying, either in the form of movies or live entertainment, “performances” that partake of more gross sexuality than of communication. . . . This is not to say that all such conduct and performance are without the protection of the First and Fourteenth Amendments. But we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater.

Id. at 118-119. See generally, Daniel E. Ramczyk, Note, *Constitutional Law—Regulating Nude Dancing in Liquor Establishments—The Preferred Position of the Twenty-First Amendment*—Nall v. Baca, 12 N.M. L. REV. 611 (1982).

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

21. *Id.* at 111.

Amendment,²² which repealed prohibition, allowed the states to go beyond the normal police power in regulating the sale and use of liquor²³ and, as in this case, respond reasonably to illegal activities associated with strip bars.²⁴ In *New York State Liquor Authority v. Bellanca*²⁵ and *Doran v. Salem Inn, Inc.*,²⁶ the Court reaffirmed *LaRue*, making it clear that states have the power to prohibit nude or semi-nude entertainment in any establishment selling alcohol.²⁷

B. Symbolic Speech Analysis

In analyzing whether symbolic speech is constitutionally protected, the Court takes a categorical approach and attempts to delimit First Amendment protection by relying on broad, abstract classifications of protected and unprotected speech.²⁸ The Court categorizes the governmental regulation as either content-based or content-neutral. This categorization is often referred to as the two-track system.²⁹ Content-based regulations limit communication because of the message conveyed;³⁰ content-neutral regulations ostensibly limit communication without regard to the message conveyed³¹ (such as prohibiting at a State Fair the

22. The Twenty-First Amendment to the United States Constitution reads:

Section 1: The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2: The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. CONST. amend. XXI.

23. *Larue*, 409 U.S. at 114 (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964) and *Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 64 (1936)).

24. *Id.* at 116.

25. 452 U.S. 714 (1981).

26. 422 U.S. 922 (1975).

27. Zachary T. Fardon, Note, *Barnes v. Glen Theatre, Inc.: Nude Dancing and the First Amendment Question*, 45 VAND. L. REV. 237, 242 n.39 (1992). *New York State Liquor Authority*, 452 U.S. at 717-18 ("Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment."). In *Doran*, Justice Rehnquist, speaking for the majority, stated:

In *LaRue* . . . we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program.

Doran, 422 U.S. at 932-33.

28. See Pierre Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 672 (1983).

29. David Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 195-96 (1987).

30. Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983).

31. *Id.* at 189.

distribution of merchandise except from a licensed booth³²). Besides determining whether the law is content based or content neutral, the Court also categorizes the type of speech at issue, e.g., political, commercial, etc.³³ This second categorization by its very nature influences the level of judicial scrutiny.³⁴ A few types of speech, such as obscenity and fighting words, are categorized as “non-speech” and subject the governmental regulation to only a rational basis test.³⁵ If the regulation does not involve a categorically-ostracized type of speech and is content-based, the government must justify the content regulation by showing that it serves a compelling governmental interest and that the regulatory means chosen are the least restrictive means available to further that interest.³⁶

The Court, however, has been both unclear and controversial in its treatment of nominally content-neutral regulations involving categories of protected speech.³⁷ Historically, the Court has taken two approaches to content-neutral regulations, both employing a level of judicial scrutiny less rigorous than strict scrutiny: the time, place, and manner test (TPMT) and the incidental regulation test (IRT).³⁸ The TPMT has four prongs: (1) the governmental regulation must not be based on the content or subject matter of the expression; (2) it must serve a significant governmental interest; (3) it must not covertly discriminate against certain types of speech; and (4) it must leave open alternative forums for the regulated speech.³⁹ The IRT is very similar and has four prongs: a government regulation is sufficiently justified (1) if it 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.⁴⁰

While the tests are very much alike, the key difference between them is the Court’s attitude toward the apparent content-neutrality of the governmental regulation. When using the TPMT, the Court strongly considers the possibility that purportedly “neutral” regulations are merely

32. *Heffron v. International Soc’y for Krishna Consciousness, Inc.* 452 U.S. 640, 648-49 (1981).

33. *See Day, supra* note 29, at 198; *Stone, supra* note 30.

34. *Day, supra* note 29, at 198.

35. *Id.*

36. *Id.* at 199.

37. *Id.* at 196-97.

38. *Id.*

39. *See id.* at 202, 206-07.

40. *O’Brien v. United States*, 391 U.S. 367, 376-77 (1968).

pretexts for content-based regulations.⁴¹ For example, in *Schad* the Court used the TPMT and found that an even-handed total ban on live entertainment was not content-neutral.⁴² By contrast, when the Court uses the IRT, the government enjoys a presumption that its action was not adopted to restrain speech purposefully and is therefore content-neutral, or unrelated to the suppression of free expression under the third prong.⁴³ Under the TPMT the government shoulders the evidentiary burden of showing that its content-neutral regulation is not a pretext for content-based regulation, whereas the IRT places the evidentiary burden on the party seeking symbolic speech protection.⁴⁴

Despite the significant doctrinal difference between the two tests, over the last eight years the Court has moved towards using them interchangeably.⁴⁵ In *Members of the City Council v. Taxpayers for Vincent*,⁴⁶ for example, the Court upheld under both tests a Los Angeles ordinance banning the posting of any signs on public utility poles.⁴⁷ In *Renton v. Playtime Theatres, Inc.*⁴⁸ the Court went further and, while stating that it was using the TPMT,⁴⁹ applied it as if it were the IRT.⁵⁰ Because of the secondary effects of the theaters, such as their tendency to reduce property values and foster prostitution, the Court found permissible a zoning ordinance prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.⁵¹ The Court used this secondary effects rationale to deem the ordinance content-neutral.⁵² Because the *Renton* Court used the TPMT as if it were the IRT, the Court effectively eliminated the TPMT as a judicial tool for exposing pretextual justifications for content-based regulations and apparently replaced it with the IRT.⁵³ The Court's token lip service to the TPMT further compounded the confusion as to whether the TPMT had been truly superseded by the IRT. Fittingly, later that same year the Eleventh Circuit applied *Renton* to an

41. Day, *supra* note 29, at 211.

42. *Id.* at 204.

43. *Id.* at 210.

44. *Id.* at 200-01, 219.

45. *Id.* at 211-18.

46. 446 U.S. 789 (1984).

47. *Id.*

48. 475 U.S. 41 (1986).

49. *Id.* at 46.

50. Day, *supra* note 29, at 217-19.

51. *Renton*, 475 U.S. at 43, 49-55.

52. *Id.* at 48-55.

53. Day, *supra* note 29, at 217-19.

ordinance aimed at limiting nude dancing and upheld the ordinance.⁵⁴

III. *BARNES*: THE REASONING LAID BARE

In South Bend, Indiana both the Kitty Kat Lounge and Glen Theatre, Inc.⁵⁵ wished to provide “totally nude dancing.” However, an Indiana statute prohibited public nudity, requiring in effect that dancers at least wear “pasties” and a “G-string.”⁵⁶ Asserting that this statutory prohibition against complete nudity in public places violated the First Amendment, the two establishments and several dancers sued in federal district court to enjoin the enforcement of Indiana’s public indecency statute.⁵⁷ The district court granted injunctive relief, holding the statute to be facially overbroad.⁵⁸ The Court of Appeals for the Seventh Circuit reversed that holding and remanded the case so the plaintiffs could pursue their claim that the statute violated the First Amendment as applied to their dancing.⁵⁹ On remand, the district court held that nude dancing is “not expressive activity protected by the Constitution of the United

54. *International Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986).

55. The Kitty Kat Lounge sells alcohol and provides dancers. Glen Theatre, Inc. operates an adult bookstore and has dancers that can be observed through a glass panel.

56. IND. CODE ANN. § 35-45-4-1 (West 1990) reads: Public Indecency
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 discernably turgid state.

57. *Barnes*, 111 S. Ct. at 2459. *Barnes v. Glen Theatre, Inc.* began as three separate actions filed in 1985 in the Indiana district courts: *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), *Miller v. Civil City of South Bend*, No. S85-598 (N.D. Ind. filed May 5, 1986), and *Diamond v. Civil City of South Bend*, N. S85-722 (N.D. Ind. filed May 5, 1986). Fardon, *supra* note 21, at 246. The plaintiffs in these three cases claimed that enforcement of the statute, which prevented them from performing their dances without pasties or G-strings, violated their freedom of expression under the First Amendment; the Seventh Circuit remanded and transferred the *Miller* and *Diamond* cases in order to consolidate all the nude dancing cases. *Id.* at 247-48. *Pearson* involved live nude dancing from behind a glass panel at the Chippewa Bookstore, an adult bookstore owned by Glen Theatre (no alcohol was served); *Diamond* involved Ramona’s Car Wash and the Ace-Hi Lounge which sold alcoholic beverages and offered nude dancing; *Miller* involved the Kitty Kat Lounge which sold alcoholic beverages and offered nude dancing. *Id.* at 246-247.

58. *Pearson*, 802 F.2d at 287.

59. *Barnes*, 111 S.Ct at 2459; *Pearson*, 802 F.2d at 288-90.

States.”⁶⁰ Again the court of appeals reversed, holding that nude dancing is expressive conduct protected by the First Amendment.⁶¹

In a five to four decision, the Supreme Court reversed the decision of the appeals court and held that the Indiana statute prohibiting nude dancing—and in effect requiring that dancers wear pasties and a G-string—did not violate the First Amendment.⁶² Chief Justice Rehnquist wrote the plurality opinion and was joined by Justices Kennedy and O’Connor. The plurality, like the appeals court, held that nude dancing is “expressive conduct protected by the First Amendment.”⁶³ However, the plurality limited the appeals court by relegating nude dancing to the “outer perimeters of the First Amendment.”⁶⁴

The next issue for the plurality was the extent to which nude dancing is to be constitutionally protected. After observing that the TPMT, as expressed in *Clark v. Community for Creative Non-Violence*,⁶⁵ embodies much of the same standards as the IRT set forth in *O’Brien*,⁶⁶ the Court proceeded to analyze the Indiana statute under the IRT.⁶⁷ By using the IRT rather than the TPMT the plurality presumed that Indiana’s statute was content-neutral.

Although the plurality found it “impossible to discern”⁶⁸ the governmental interest from the statute’s legislative history, the plurality turned to the history of public indecency statutes generally and an 1877 Indiana court decision that traced the offense to Adam and Eve and summarily concluded that “the statute’s purpose of protecting societal order and morality is clear from its text and history.”⁶⁹ Reasoning that the

60. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988) (holding that “the dances are mere conduct”).

61. *Barnes*, 111 S. Ct. at 2459-60. As Judge Posner stated in a separate concurring opinion, What is indefensible is to set up “entertainment” as a category of activities, distinct from “art,” that government can regulate without regard to the First Amendment. Or to suppose—unless one is prepared to deprive most art of constitutional protection—that there is a rational conception of “expression” that places striptease dancing on the nonexpressive side of the divide.

Miller, 904 F.2d at 1098-99.

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

63. *Id.*

64. *Id.*

65. 468 U.S. 288, 293-99 (1984).

66. 391 U.S. 367, 377 (1968).

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

68. *Id.* at 2461.

69. *Barnes*, 111 S. Ct. at 2461. Justice Rehnquist referenced several nineteenth century statutes and quoted the following passage from an 1881 statute: “Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, . . . is guilty of public indecency.” *Id.* at 2462 (quoting IND. ACTS, ch. 37, sec. 90).

traditional police power of the state authorizes it “to provide for the public health, safety, and morals,”⁷⁰ the plurality found the Indiana statute to be within the constitutional power of the state. The Chief Justice then announced that the government’s interest in protecting societal order and morality is important or substantial enough to pass the second prong of the IRT.⁷¹ In support of this announcement that protecting order and morality involves a substantial governmental interest, the plurality quoted passages from *Paris Adult Theatre I* and *Bowers v. Hardwick*⁷² asserting that “a legislature could legitimately act”⁷³ to champion morality.

The plurality then analyzed the statute under the third prong of the IRT and deemed the state’s interest in protecting morality to be unrelated to “the suppression of free expression.”⁷⁴ First the Court rejected an expansive notion of speech.⁷⁵ Using somewhat tortured legal reasoning, the plurality found that prohibiting nudity was not tantamount to the suppression of free expression because it is the evil of public nudity that the state seeks to prevent, whether or not it is combined with expressive activity.⁷⁶ The plurality concluded that the Indiana statute passed the third prong because the statute did not proscribe nudity due to the erotic message conveyed by the dancers.⁷⁷

Finally, the plurality deemed that under the Fourth prong of the IRT the Indiana statute was an incidental restriction on free expression that was no greater than necessary to further the governmental interest.⁷⁸ The plurality interpreted the requirement that the dancers don pasties and a g-string as a modest requirement.⁷⁹ They concluded that Indiana’s public indecency statute satisfied all four prongs of the IRT and thus permissibly infringed on the symbolic expression of nude dancing.⁸⁰

70. *Id.* at 2461.

71. *Id.* at 2461-62.

72. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 61 (1973) (upholding state restrictions on the exhibition of obscene films); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding state prohibitions on sodomy).

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

74. *Id.* at 2462-63.

75. *Id.* at 2462. Here the Court quoted *O’Brien*: “We cannot accept the view that an apparently limitless variety of conduct can be labelled “speech” whenever the person engaging in the conduct intends thereby to express an idea.” *Id.* (quoting from *O’Brien*, 391 U.S. at 376).

76. *Id.* at 2463.

77. *Id.* According to the Court, “we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers.” *Id.*

78. *Id.*

79. *Id.* According to the Court, “it makes the message slightly less graphic.” *Id.*

80. Fardon, *supra* note 27, at 254.

Justice Souter, concurring in judgment, also used the IRT in determining that the statute was constitutional. He agreed that nude dancing is symbolic speech and that forcing dancers to wear pasties and G-strings is a minor burden.⁸¹ He sharply disagreed, however, about what constitutes a substantial governmental interest: he did not accept the plurality's position that the government has a substantial interest in "protecting order and morality."⁸² Rather, Souter argued that the State has a substantial interest in combating the secondary effects of adult entertainment establishments.⁸³ For this reason, Souter found that the statute was content-neutral and not related to the suppression of free expression, even though the legislative history was unclear as to what motivated Indiana to enact this statute.⁸⁴

Despite Justice Scalia's concurrence in judgment with the plurality and Justice Souter, Scalia rejected the IRT. He saw the Indiana statute as a general content-neutral law regulating conduct and not specifically directed at expression and, therefore, not subject to First Amendment

81. *Barnes*, 111 S. Ct. at 2468, 2471. As Justice Souter stated:

But when nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a strip-tease, are integrated into the dance and its expressive function. . . . Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

Id.

82. *Id.* at 22468-69. Justice Souter wrote,

I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment of the sort typified by respondents' establishments.

Id.

83. *Id.*

84. *Id.* at 2470. Justice Souter acknowledged the strength of Justice White's argument that Indiana sought to regulate nude dancing because of the erotic thoughts and ideas expressed. *Id.* Souter asserted in response:

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

Id. Justice White's response to this was:

If 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. Furthermore, if the real problem is the "concentration of crowds of men predisposed to the" designated evils, . . . then the First Amendment requires that the State address that problem in a fashion that does not include banning an entire category of expressive activity.

Id. at 2474 n.2 (White, J., dissenting).

protection.⁸⁵ According to Scalia, the government cannot prohibit conduct precisely because of its communicative attributes,⁸⁶ but it can prohibit conduct that has an incidental effect on expression.⁸⁷ He therefore applied the same test the Court used in *Employment Division v. Smith*,⁸⁸ which entails subjecting heightened First Amendment scrutiny to *only* those restrictions on conduct that are aimed directly at protected expression.⁸⁹ Since the statute regulated public nudity and not dancing, and since nudity is not per se expressive conduct, Scalia held the statute to be constitutional.⁹⁰

Justice Scalia went on to criticize the IRT. He argued that the IRT creates an intermediate level of First Amendment scrutiny which he believes does not exist.⁹¹ Moreover, he warned that judicial assessment of the importance of governmental interests—the second prong of the IRT—should be avoided whenever possible, especially if the government’s interest involves morality.⁹²

Justice White’s dissent was joined by Justices Marshall, Blackmun, and Stevens. While all four agreed with the plurality and Justice Souter that nude dancing is expression protected by the First Amendment,⁹³ the dissent disagreed with the contention that the statute was not aimed at protected expression. Justice White distinguished *O’Brien*, *Smith*, and many of the other cases referenced in the concurrence, stating that these cases involved “truly general proscriptions on individual conduct.”⁹⁴ That is, in these cases, the State promulgated an across-the-board regulation which even extended into people’s homes, prohibiting acts such as destroying a draft card at any time, in any place.⁹⁵ Because the Indiana statute did not apply to nudity wherever it occurs, including the home,

85. *Id.* at 2463.

86. *Id.* at 2466.

87. *Id.*

88. 110 S. Ct. 1595 (1990) (holding that a state’s prohibition of peyote use was constitutional even though it prevented some Native Americans from freely exercising their religion).

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

90. *Id.* at 2464-69.

91. *Id.* at 2467.

92. *Id.*

93. *Id.* at 2471 (White, J., dissenting). Justice White added, “[t]his is no more than recognizing, as the Seventh Circuit observed, that dancing is an ancient art form and ‘inherently embodies the expression and communication of ideas and emotions.’” *Id.* (quoting *Miller v Civil City of South Bend* 904 F.2d 1081, 1087 (1990)). “At the root of all [t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalize states which we cannot externalize by rational means.” *Id.* at n.1 (quoting J. MARTIN, INTRODUCTION TO THE DANCE (1939)).

94. *Id.* at 2472.

95. *Id.*

and because the statute had been selectively applied,⁹⁶ Justice White reasoned that the statute was intended to target expressive activity.⁹⁷ He agreed with Justice Souter that the state's purpose was to curtail the possible secondary effects associated with nude dancing.⁹⁸ According to Justice White, Indiana therefore regulated nude dancing because of its messages of eroticism and sensuality and their potential secondary effects.⁹⁹ Interpreting the statute as a content-based restriction, Justice White said that the statute should be upheld only if it was "narrowly drawn to accomplish a compelling State interest."¹⁰⁰ Concluding that the statute was not narrowly drawn and not able to withstand strict scrutiny, he deemed it to be unconstitutional.¹⁰¹

IV. THE RAMIFICATIONS OF *BARNES* EXPOSED

"Power is so apt to be insolent and Liberty to be saucy, that they are very seldom upon good terms." George Savile

On the one hand *Barnes* made it clear that nude dancing is protected expression, if only "marginally so."¹⁰² But the Court's ruling puts the emphasis on the word "marginally": for what the Court gave with one hand, it took away with the other by making it easier for local governments to drive nude dancing establishments out of their communities. According to the Court, a governmental entity can remove nude dancing from its community without invoking the Twenty-First Amendment by merely prohibiting nudity in public places.

In deciding *Barnes*, the Court appears to have resolved the question of whether the IRT has superseded the TPMT. Instead of clouding the question as the Court did in *Renton* (using the IRT while giving lip service to the TPMT), eight of the Justices explicitly said the IRT is the appropriate test to be used in symbolic speech analysis. The plurality and Justice Souter applied it in a manner consistent with its historical

96. *Id.* at 2473. Indiana did not prohibit nudity as part of a play or ballet. Fardon, *supra* note 27, at 258-61.

97. *Barnes*, 111 S. Ct. at 2474.

98. *Id.* at 2473.

99. *Id.* at 2474.

100. *Id.*

101. *Barnes*, 111 S. Ct. at 2475-76. Justice White stated: "[T]he State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny." *Id.* at 2475.

102. *Barnes*, 111 S. Ct. at 2459-61.

deference to the legislature, granting the government the evidentiary presumption that all ostensibly content-neutral regulations do not involve purposeful abridgement of speech. The dissent also deferentially applied the IRT, but, by contrast, endowed the content-neutral prong with some bite by taking notice of Indiana's selective enforcement.

However, the real significance of *Barnes*¹⁰³ is that the Court's reasoning pushes toward the margin all constitutionally protected symbolic speech. The plurality extended the area of important or substantial governmental interest to include "protecting order and morality" and did so at the expense of a constitutional right. This is the first time that protecting morality has been considered a sufficient justification for restricting protected speech.¹⁰⁴ What previous Supreme Court Justices held out to be the 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"¹⁰⁵—may now only be topsoil. As Justice Douglas said, "[I]f the First Amendment means anything . . . it must allow protests even against the moral code that the standard of the day sets for the community."¹⁰⁶

By expanding the second prong of the IRT to include protecting order and morality, the plurality gutted the third and fourth prongs and, in effect, reduced the test for symbolic speech to a rational basis test. Despite the Indiana legislature's silence as to its purpose, the plurality deemed it self-evident that in the context of our culture the purpose of the law was a moral one.¹⁰⁷ The implicit message that the plurality has sent to the lower courts is that the judiciary can invent a moral purpose ad hoc, as long as the statute in question corresponds with the court's interpretation of popular morality.

This inclination to allow a state to contrive a moral purpose is critical because, as demonstrated by the plurality's analysis, when the moral purpose is discovered the third and fourth prongs of the IRT are rendered meaningless. The plurality presumed that "[p]ublic nudity is the

103. Leading Cases, *State Restrictions on Nude Dancing*, 105 HARV. L. REV. 287, 292 (1991).

104. *Id.* at 293. See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 499 (1970). "There is no basis in the First Amendment, or in the concepts underlying our system of freedom of expression, for applying a different rule in the case of sexual thoughts." *Id.* Although the Court could draw support from the fact that laws against miscegenation were justified on moral grounds. *Bowers v. Hardwick*, 478 U.S. 186, 211 n.5 (1986) (Blackmun, J., dissenting).

105. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Cohen v. California*, 403 U.S. 15 (1971).

106. *Roth v. United States*, 354 U.S. 476, 513 (1957) (Douglas, J., dissenting).

107. *Barnes*, 111 S. Ct. at 2461. That reasonable minds, i.e. Souter, disagreed as to the law's purpose shows the precariousness of this ad hoc interpreting.

evil the state seeks to prevent, whether or not it is combined with expressive activity,"¹⁰⁸ and therefore concluded that taking the nudity out of nude dancing is unrelated to the suppression of free expression, or content-neutral.¹⁰⁹ In other words, a moral purpose is, by definition, unrelated to the suppression of free expression, or content-neutral, thereby nullifying the third prong of the IRT. Because a moral purpose is "an end in itself,"¹¹⁰ a moral purpose is necessarily essential to the furtherance of a governmental interest, thus voiding the fourth prong of the IRT with a textbook example of circular reasoning. Regardless of the specifics of future symbolic speech cases, because symbolic speech entails acts that can be distilled from the whole and abstracted to the point where the act in and of itself does not involve speech per se, and because these acts could conceivably have moral overtones, almost any law regulating conduct could be deemed unrelated to the suppression of free expression and essential to the furtherance of a governmental interest. In short, the plurality created a tautological fiat for moral purposes and eviscerated the third and fourth prongs of the IRT.

In determining that a moral purpose is substantial enough to outweigh a First Amendment right, the plurality turned to *Roth v. United States*¹¹¹ and *Bowers v. Hardwick*.¹¹² These two cases upheld statutes having a moral purpose and held that a moral purpose is a legitimate governmental interest.¹¹³ However, since neither *Roth* nor *Bowers* pitted a governmental interest against a constitutional right,¹¹⁴ the Court only required that the government's regulation rationally serve a moral purpose.¹¹⁵ By implication, then, when the governmental interest entails protecting order and morality, the plurality has diluted the question of whether the governmental interest is substantial in the face of a constitutional right to whether the governmental interest is rational. Since Indiana's public nudity statute was selectively enforced against erotic dancers¹¹⁶ and still deemed content-neutral, legislatures no longer have to burden themselves with carefully fashioning pretextual content-based

108. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 925, 929 (equating content-neutrality with unrelatedness to the suppression of free expression).

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

110. *Id.*

111. 354 U.S. 476 (1957).

112. 478 U.S. 186 (1986).

113. *Barnes*, 111 S. Ct. at 2462 (discussing *Roth* and *Bowers*).

114. *Id.* *Roth* involved obscenity, which was held not to be speech; *Bowers* involved sodomy, which was held to not be a constitutional right.

115. See *Roth*, 354 U.S. at 476; *Bowers*, 478 U.S. at 186.

116. Fardon, *supra* note 27, at 258-62.

regulations.¹¹⁷ They can ban entirely any conduct and selectively enforce the ban, as long as they can create in the minds of the judiciary a rationally based moral purpose. In essence, by emasculating the third and fourth prongs of the IRT by tautological fiat, and by merely asking if the government's interest is rational and affording the legislature the minimal evidentiary burden, the plurality has taken a giant step back in constitutional analysis and put symbolic speech on the same footing as activities *not* protected by the Constitution.

Because the State can now justify so much under the umbrella of "protecting order and morality," the State is free to express its disapproval statutorily of almost any symbolic expression. And if the State's interest in protecting morals and public order can extend to nude dancing, it also could extend to nude expression in private—in the home, for example.¹¹⁸ Thus, should the plurality attract two more votes, other forms of nude expression, such as pornography, may no longer be protected.¹¹⁹ In fact, cinematic nudity and sexual activity could be banned.

Souter's reasoning suggests that he would not protect cinematic nudity and sexual activity.¹²⁰ Souter held that symbolic speech is unprotected if the government's legislation can be interpreted as an attempt to address its secondary effects, even if the speech and the secondary effects are not causally linked but are associated with one another.¹²¹ Because a number of scholars contend that the portrayal of women in cinema—in pornography particularly but also in the film industry generally—promotes the degradation of, and violence towards, women (rape, for example),¹²² legislation banning nudity or sexual activity in film could be interpreted as not only having a moral purpose, but as an attempt to arrest its secondary effects.

Armed with the moral purpose and secondary effects rationales, the Court could lead us back to the "good old days" when James Joyce's *Ulysses* and D.H. Lawrence's *Lady Chatterley's Lover* were banned. Indeed, with Justice Thomas already being touted as the most conservative

117. See, Day, *supra* note 29.

118. Fardon, *supra* note 27, at 264.

119. Leading Cases, *supra* note 103, at 293-94.

120. This is suggested by his reasoning despite his statement to the contrary. *Barnes*, 111 S. Ct. at 2470 n.2.

121. *Id.* at 2469-71.

122. See, e.g., M. HIRSCH & E. KELLER, *CONFLICTS IN FEMINISM* 308-09 (1990); Anrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985).

member of the Court,¹²³ the plurality could well have the final vote needed to uphold the banning of nudity and sexual activity in the cinema.

The plurality's focus on morality continued the Court's recent trend of creating a moral low-ground for certain forms of speech.¹²⁴ As Justice Scalia observed, traditional First Amendment doctrine employed only one level of heightened scrutiny—"strict scrutiny."¹²⁵ But as discussed earlier, the Supreme Court over the last two decades has adopted a categorical approach to First Amendment analysis which entails applying different levels of protection to different categories of speech.¹²⁶

The irony of creating second-class or morally suspect speech is that it undermines the basic First Amendment principle that government should treat all ideas and speakers equally.¹²⁷ By creating categories of second-class speech—and especially by giving inferior protection, if any, to unpopular speech entailing morality—the Court is limiting the marketplace of ideas to only those ideas accepted by the majority or the powerful few—an ideological hegemony. Clearly, in adopting the Bill of Rights, our founders realized that freedom of speech is meaningless if it rests on a theory that allows for the authoritarian imposition of truth.¹²⁸ Minimally protecting symbolic speech with the rational basis test, as the plurality's newfangled IRT does, contradicts the constitutional principle that a constitutional right invalidates legislation *in spite of its rationality*, for only in this way can a right be truly protected.¹²⁹ Because the First Amendment's opening words are "Congress shall make no law respecting the establishment of religion,"¹³⁰ and because religion is necessarily wedded to morality, permitting the government to abridge the freedom of speech for a moral purpose seems highly suspect.

The question is: are we to be a nation of taboos or a nation of laws? To place a premium value on a specific right in order to "secure the Blessings of Liberty"¹³¹ means maximizing that right and, hence, handcuffing the right of the majority to impose its will. To secure the blessings of liberty, we demand that the majority have a very good reason for

123. Boston Globe, July 12, 1992, at 1, col. 4.

124. Leading Cases, *supra* note 103, at 295.

125. *Id.* at 294; *Barnes*, 111 S. Ct. at 2465-66.

126. Leading Cases, *supra* note 103, at 294.

127. See Leading Cases, *supra* note 103, at 295; Emerson, *supra* note 104, at 326.

128. Schlag, *supra* note 27, at 729.

129. See Frederick Schaver, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 3 (1989).

130. U.S. CONST. amend. I.

131. U.S. CONST. pmb.

shackling the rights of others. Our system of checks and balances embodies this principle when the judiciary demands that the legislature have a compelling interest when regulating constitutional rights. To be a nation of liberty is a moral purpose.

Another problem with creating categories of second-class speech, as Justice Scalia indicated, is that when the judiciary first determines what level of speech is at issue, the Court is inserting another subjective step of judicial interpretation into ostensibly objective legal analysis.¹³² What happens when speech fits into several categories at the same time? Could nude dancers extricate themselves from low-level scrutiny by making token political expressions during their routines? Should the Court automatically use a higher level of scrutiny if a more valued category of speech is involved, or should the Court employ some sort of test for interpreting whether the higher valued speech is genuinely at issue? How much erotic conduct renders a dance one which no longer contains high-value expression? Determining when the conduct involved in low level expression is inseparable from high level expression is often a twisted, tangled art.

The hidden issue is this: who is to say what is art? Should judges hold degrees in literature? Should justice hinge on the liberty of interpretation? Is Keats' nightingale the archetypal example of "negative capability," the foster parent of Thoreau's aesthetics of the imagination, or a drug-induced erotic fantasy? As the riddle of interpretation shows, the very inelegance of a calculus of categories based on a multiplicity of normative values suggests that the wrong edifice has been built.¹³³ Moreover, the vague but expansive method of hierarchial free speech analysis gives judges considerable power to make political choices under the cover of categorical analysis.¹³⁴

Simply requiring the government to demonstrate a compelling governmental interest in symbolic speech cases (as the government must in cases involving child pornography films or other films which involve a felony in their making) is not free of interpretative traps, but is cleaner. Although determining what is expressive activity starts on the interpretative path, one step does not mandate two or three. Asking for a compelling governmental interest is more consistent with what appears to be the

132. See *Barnes*, 111 S. Ct. at 2463-67.

133. Schlag, *supra* note 27, at 696.

134. Leading Cases, *supra* note 103, at 296.

current Court's philosophy of "hands off, that's the job of the legislative branch."

Although Scalia chastised the plurality in *Barnes* for using hierarchical, categorical analysis, his approach is also problematic. It runs away from the First Amendment by giving protection to the regulation of symbolic speech only when the regulation is aimed at the expressive aspect of the conduct.¹³⁵ This approach would have judges divine whether a law is "aimed at" protected expression by asking if it facially targets speech.¹³⁶ Because few laws on their face target protected conduct even when they are "aimed at" protected conduct,¹³⁷ Scalia's approach would narrow to the point of obscurity the range of protected conduct. Ironically, Justice Scalia demonstrated the danger of his own analytical method by making the incredulous claim that Indiana's ban on nudity was unrelated to the expressive content of nude dancing.¹³⁸

V. CONCLUSION

In *Barnes*, the Court expressed a reluctance to protect expressive conduct and continued its propensity to genuflect to the legislative branch of government by effectively diminishing the test for protecting symbolic speech to a rational basis test. In upholding the statute, the Court danced around the First Amendment with a naked disregard for its principles. The Court signalled to state legislatures that, so long as they can justify restricting speech in the name of "order" and "morality," they can wantonly trample over the First Amendment, as if the Bill of Rights were like so much wax to melt when the flames of popular morality blaze toward the Constitution.

Eric Morrow

135. See *Barnes*, 111 S. Ct. at 2466.

136. Leading Cases, *supra* note 103, at 296.

137. *Id.*

138. *Id.*