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A Content Neutral Public Nudity Ordinance That Satisfies the *O'Brien* Test May Require Erotic Dancers to Wear G-Strings and Pasties without Violating Their First Amendment Right of Freedom of Expression: *City of Erie v. Pap's A.M.*

James S. Malloy

A Content Neutral Public Nudity Ordinance That Satisfies the *O'Brien* Test May Require Erotic Dancers to Wear G-Strings and Pasties Without Violating Their First Amendment Right of Freedom of Expression: *City of Erie v. Pap's A.M.*

CONSTITUTIONAL LAW — FIRST AMENDMENT — FREEDOM OF SPEECH AND EXPRESSION — THE O'BRIEN TEST — The Supreme Court of the United States held that a content-neutral ordinance, aimed at combating the negative secondary effects of public nudity, satisfied the *O'Brien* standard for restrictions on symbolic speech and was, therefore, a constitutionally permissible restriction on freedom of expression.

City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

Pap's A.M. ("Pap's") owns and operates "Kandyland," an Erie, Pennsylvania, club featuring totally nude erotic dancing by women.[1] In September of 1994, the City of Erie enacted a public indecency ordinance that makes knowingly or intentionally appearing in public in a state of nudity a summary offense.[2] The dancers at

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1. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

2. *Id.* at 283. Ordinance 75-1994, codified as Article 711 of the Codified Ordinances of the City of Erie, provides in relevant part:

1. *A person who knowingly or intentionally, in a public place*:
   a. engages in sexual intercourse
   b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
   c. *appears in a state of nudity*, or
   d. fondles the genitals of himself, herself or another person commits Public Indecency, a *Summary Offense*.
2. "Nudity" means the showing of the human male or female genital, pubic hair 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; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of female breast, which device stimulates and gives the realistic appearance of nipples and/or areola.
3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance

"Kandyland" must wear pasties and G-strings to comply with the statute.[3]

Two days after the ordinance went into effect, Pap's filed a complaint seeking declaratory relief and a permanent injunction against the ordinance's enforcement.[4] The Erie County Court of Common Pleas granted the permanent injunction and struck down the ordinance on the grounds that it was unconstitutional as facially overbroad.[5] On appeal, the commonwealth court held that the ordinance did not violate Pap's First Amendment rights or the Pennsylvania Constitution and reversed the trial court.[6] The Pennsylvania Supreme Court granted review and held that the ordinance violated Pap's First and Fourteenth Amendment rights to freedom of expression, thus reversing the commonwealth court's decision.[7]

The Pennsylvania Supreme Court first made a determination that nude dancing is expressive conduct and is entitled to some protection under the First Amendment.[8] The Court's next inquiry was whether the ordinance was content neutral in terms of government interest.[9] The majority concluded that the ordinance impacted negatively on the erotic message of the dancing and, therefore, that such an effect was an unmentioned purpose of the ordinance in addition to the stated purpose of combating secondary effects.[10] As a result, the ordinance was found to be content-based

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halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection 1(c) shall not apply to:

a. Any child under ten (10) years of age; or b. Any individual exposing the breast in the process of breastfeeding an infant under two (2) years of age.

Id. at 284 (emphasis added).

3. *Id.* at 284

4. *Id.* The complaint filed by Pap's named the City of Erie, the mayor of the city, and the members of the city council as defendants. *Id.*

5. *City of Erie v. Pap's A.M*, 674 A.2d 338 (Pa. Commw. 1996).

6. *Id.* at 344-45. The appeal to the commonwealth court was a cross appeal because Pap's sought attorney's fees along with the permanent injunction that was denied by the trial court. *Id.* at 341.

7. *City of Erie v. Pap's A.M.*, 719 A.2d 273, 280-81 (Pa. 1998).

8. *Id.* at 276. The court noted that this view was adopted by eight members of the Supreme Court of the United States in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). *City of Erie*, 719 A.2d at 276.

9. *City of Erie*, 719 A.2d at 277. If an ordinance is unrelated to the suppression of expression it is not subject to strict scrutiny, but, rather, to the standard adopted in *United States v. O'Brien*, 391 U.S. 367 (1968), a less stringent standard. *City of Erie*, 719 A.2d at 277.

10. *City of Erie*, 719 A.2d at 279. The Pennsylvania Supreme Court looked to *Barnes* to

and subject to strict scrutiny.[11]

The ordinance failed to withstand strict scrutiny because imposing civil and criminal penalties on offenders, rather than requiring dancers to wear G-strings and pasties, is a narrower means of tailoring the ordinance.[12] Consequently, the ordinance was declared an unconstitutional burden on Pap's expressive conduct.[13] Two justices wrote a concurring opinion stating that they would have upheld the ordinance under the United States Constitution because it was similar to the one in *Barnes v. Glen Theatre, Inc.*, but that they would have held that the ordinance violated the freedom of expression provisions of the Pennsylvania Constitution.[14]

The City of Erie successfully petitioned for a writ of certiorari from the United States Supreme Court.[15] Pap's filed a motion seeking to dismiss the case as moot because Kandyland had ceased operating as a nude dance club; the motion, however, was denied.[16]

The issue on appeal to the Supreme Court was whether Erie's public nudity ordinance violated Pap's constitutional rights to freedom of speech and expression under the First Amendment.[17]

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decide whether the ordinance was content-neutral. *Id.* at 277. The court noted the statute at issue in *Barnes* was "strikingly similar" to the Erie ordinance, but went further to note that the decision was composed of four separate and non-harmonious opinions that agreed on nothing except that nude dancing was entitled to some First Amendment protection. *Id.* Therefore, the court concluded there was no clear United States Supreme Court precedent on the matter and conducted its own independent determination. *Id.* at 277-79.

11. *Id.*

12. *Id.* at 280.

13. *Id.* Instead of striking down the entire ordinance, the Pennsylvania Supreme Court severed only the public nudity provisions. *Id.* at 281. This was done pursuant to 1 PA. CONS. STAT. § 1925 (1995) and the Construction and Severability clause of the Erie ordinance that states:

> It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purpose of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

Id. at 275 n.6.

14. *Id.* at 281. The Court never reached the validity of the ordinance under the Pennsylvania Constitution, finding it violative of the United States Constitution. *Id.* at 281.

15. *City of Erie*, 529 U.S. at 287.

16. *Id.* at 287.

17. *Id.* at 283. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

The plurality held that the Erie ordinance was a content-neutral regulation that satisfies the four-part test of *United States v. O'Brien* and was, therefore, constitutional.[18]

Before reaching the constitutionality question, the Court resolved the issue of mootness.[19] Pap's motioned to dismiss on the grounds it had ceased operations as a nude dance club and, therefore, that any outcome would have no effect.[20] The plurality stated that simply closing the dance club did not make the issue moot because Pap's could decide to operate another club in the future.[21] In addition, Erie had an ongoing injury because it was prohibited from enforcing its public nudity ordinance.[22] Finally, Justice O'Connor noted that Pap's attempt to preserve a favorable ruling from the Pennsylvania Supreme Court, and to prevent an appeal therefrom, weighed against a finding of mootness.[23]

Turning to the merits of the case, Justice O'Connor recognized that the state of nudity is not inherently expressive, but that nude dancing of the type at issue here is expressive conduct within the outer ambit of the First Amendment.[24] The Court stated, "whether the ordinance is related to the suppression of expression" determines what level of scrutiny is to be applied.[25] A strict scrutiny test would be applied if Erie's purpose in enacting the ordinance was related to the suppression of expression, but if the city's purpose was unrelated to the content of the expression, the less exacting *O'Brien* standard would be applied.[26] The plurality's conclusion clarified the holding in *Barnes* by stating that restrictions on public nudity, such as in the instant case, should be

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18. *Id.*

19. *Id.* at 287-89. "Mootness Doctrine is the principle that American courts will not decide moot cases - that is cases in which there is no longer any actual controversy." BLACK'S LAW DICTIONARY 1025 (7th ed. 1999).

20. *City of Erie*, 529 U.S. at 287.

21. *Id.* at 287. Justice O'Connor also noted that Pap's never mentioned a word about mootness until after certiorari was granted and the age of Pap's owner, 72, does not make it certain that he will never again decide to operate a club in the City of Erie. *Id.* at 287-88.

22. *Id.*

23. *Id.* at 288. Pap's prevailed in the state court. *Id.* The City of Erie brought the appeal to the United States Supreme Court. *Id.* Justice O'Connor stated that it would be a manipulation of the Court's jurisdiction to allow Pap's to preserve the lower court decision by rendering the issue now moot. *Id.*

24. *Id.* at 289. The majority cited *Barnes* as authority for this proposition. *Id.*

25. *City of Erie*, 529 U.S. at 289 (citing Texas v. Johnson, 491 U.S. 397 (1989)).

26. *Id.* Erie argued that the ordinance is content-neutral because it regulates conduct, not speech, and therefore the *O'Brien* test applied. *Id.* Pap's argued that the ordinance is aimed at suppressing expression and, therefore, should be subject to strict scrutiny. *Id.* at 290.

evaluated under the *O'Brien* test for content-neutral restrictions on symbolic speech.[27]

Justice O'Connor began the content-neutrality determination by recognizing that the ordinance is a general prohibition against public nudity on its face that targets conduct alone, and is not directed solely at nudity with an erotic message but public nudity as a whole.[28] The plurality refuted the contention that the ordinance is related to the suppression of expression because the preamble to the ordinance suggests that the ordinance is actually directed at erotic dancing of the type at issue.[29] The Pennsylvania Supreme Court interpreted this language to mean that the purpose of the ordinance was to combat negative secondary effects.[30] The plurality agreed with this interpretation, stating that the ordinance was aimed at regulating secondary effects such as crime, not at the erotic message emanating from nude dancing.[31]

Justice O'Connor, however, rejected the view held by the Pennsylvania Supreme Court that, although the ordinance had the one goal of combating secondary effects, it also had an "unmentioned" goal relating to the suppression of expression.[32] This view was adopted by Justice White in his dissent in *Barnes* and was rejected there as well.[33] The Court equated this argument to

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27. *Id.* The Court recognized that the statute in *Barnes* was almost identical, and because five members of the Court could not agree on a single rationale in *Barnes*, they used this opportunity to clarify the holding in *Barnes*. *Id.*

28. *Id.* at 290. Justice O'Connor also noted that the ordinance updates indecency ordinances that have been on the books before nude dancing establishments were founded. *Id.*

29. *Id.* The preamble states that city council adopted the regulation:

> [F]or the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

Id. at 290.

30. *City of Erie*, 719 A.2d at 279.

31. *City of Erie*, 529 U.S. at 291. The Court analogized the situation with that in *O'Brien*. *Id.* O'Brien was convicted under a statute banning the destruction of draft cards. *Id.* The Supreme Court rejected his First Amendment violation claim, holding that the law was aimed at maintaining the integrity of the draft system by preventing the destruction of draft cards and was not aimed at suppressing O'Brien's antiwar views. *Id.*

32. *Id.* at 291-92.

33. *Id.* Justice White's view, that was consistent with the Pennsylvania Supreme Court's decision, was that because the ordinance allows the dancers to perform wearing pasties and G-strings, but not without them, it is specifically the expressive content of nude dancing that is being regulated. *City of Erie*, 719 A.2d at 279.

one that the city had an "illicit motive" for enacting the ordinance.[34] Citing *Renton* v. *Playtime Theaters*,[35] the Court stated that an alleged illicit motive is not sufficient to strike down a statute that is otherwise constitutional and has a predominant purpose of combating secondary effects.[36] Thus, the Pennsylvania court's finding that one purpose of the ordinance is to combat secondary effects made it no different than the restriction in *O'Brien* where the means of expression, and not the expression itself, was being regulated.[37]

Justice O'Connor respectfully disagreed with Justice Stevens's contention that the ordinance is a complete ban on expression because the ordinance has the effect of limiting the only means of expressing the erotic message that Kandyland wants to convey.[38] *O'Brien* was again used as support for the position that a regulation is content-neutral if its justification is unrelated to the suppression of expression even though it may have some incidental effect on the expressive element of conduct.[39] The Court further noted that Erie's interest in combating secondary effects caused by the presence of nude dancing in the area is not related to the suppression of expression.[40] Justice O'Connor stated, "even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings . . . any effect on the overall expression is de minimis."[41] The Court stated that such de minimis intrusions cannot be sufficient to

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34. *City of Erie*, 529 U.S. at 292. Pap's argument rested on statements made by the city's attorney that nudity bans were not intended to apply to "legitimate" theater productions. *Id.*

35. 475 U.S. 41 (1986).

36. *Renton*, 475 U.S. at 47-48.

37. *City of Erie*, 529 U.S. at 292.

38. *Id.*

39. *Id.* at 293. Justice O'Connor recognized that there may be situations where the regulation of the means of expression essentially bans the message, but found that such is not the case here. *Id.*

40. *Id.* The majority cited *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). In *Clark*, the Court held that a park regulation preventing homeless people from sleeping in the park at night was not a violation of First Amendment rights. *Id.* at 294-97. The homeless people were sleeping in the park as part of a demonstration to protest the plight of the homeless. *Id.* at 291-92. The Court held that the government's interest in preserving the parks was unrelated to the homeless people's message, and, even though the regulation may have directly limited the expressive element of their message, it was content-neutral. *Id.* at 299.

41. *Id.* at 294.

render a regulation content-based if secondary effects are to be regulated.[42] Justice O'Connor noted that a city, such as Erie, is justified in enacting an ordinance that bans public nudity to combat the secondary effects that may result while simultaneously singling out one specific example of public nudity (e.g., erotic dancing) as particularly problematic.[43]

Justice O'Connor went on to illustrate that, contrary to Justice Stevens's contention, the extension of the secondary effects doctrine of *Renton* is not new.[44] The Court noted the extension of the doctrine in *Ward v. Rock Against Racism*.[45] Further, in *Renton*, adult theatres were singled out from other movie theatres by their content, but the Court still held the regulation content-neutral because the ordinance was aimed at the secondary effects of the theatre and not the content of the movies themselves.[46] Justice O'Connor noted that the Erie ordinance, on the other hand, is a content-neutral regulation of conduct on its face.[47] The Court stated that even if the ordinance mentions clubs like Kandyland as a specific problem, it is still a content-neutral regulation because it is designed to combat secondary effects and does not target the erotic message of nude dancing.[48]

Ultimately, the plurality concluded that Erie's interest in combating harmful secondary effects resulting from establishments such as Kandyland is not related to the suppression of the erotic message conveyed by nude dancing.[49] Thus, the ordinance would be valid if it met the requirements of the four-factor *O'Brien* test.[50]

The Court concluded that, under the *O'Brien* standard, the Erie

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42. *City of Erie*, 529 U.S. at 294. The Court cited Justice Stevens's opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976):

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

Id. at 70.

43. *Id.* at 295. Justice O'Connor viewed this case and the cases of *O'Brien*, *Clark*, and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), as similar because they involved government regulations combating harmful secondary effects as opposed to the suppression of expression. *Id.* at 294.

44. *Id.* Justice Stevens claimed that the majority's position is a novel extension of the secondary effects doctrine. *Id.* at 317.

45. *Id.*

46. *City of Erie*, 529 U.S. at 295.

47. *Id.* at 296.

48. *Id.*

49. *Id.*

50. *Id.* The *O'Brien* test is used to evaluate restrictions on symbolic speech. *Id.*

ordinance is constitutional.[51] The first factor, whether the regulation is within a government's legitimate powers, is satisfied because Erie's attempt to protect public health and safety are clearly within the police power of the city.[52] The second factor, whether the regulation furthers an important or substantial governmental interest, drew more extensive discussion from the majority.[53]

Justice O'Connor stated that the interest in combating the harmful secondary effects associated with nude dancing is unquestionably important.[54] Justice O'Connor noted that the City of Erie did not have to conduct independent studies to prove that the secondary effects are harmful to the city.[55] She further noted that the city can rely on past court decisions that are relevant to the problem at hand to show the existence of the harmful effects.[56] The Court found that it was reasonable for Erie to conclude that harmful secondary effects would result because the same type of entertainment was at issue in *Renton* and *Young*.[57] The Court found *Renton* and *Young* as sufficient foundations for Erie's belief that the existence of adult entertainment clubs will cause negative secondary effects.[58] Therefore, the Court determined that Erie reasonably relied on *Barnes* and its discussion of secondary effects and met the evidentiary standard of *Renton*.[59]

Justice O'Connor noted that, regardless of precedent, Erie relied on its own evidentiary findings.[60] These findings included a determination that the city council had firsthand knowledge and experience of the downtown area and knew what sort of activities occur around the areas of such entertainment establishments as

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51. *City of Erie*, 529 U.S. at 296.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id. See also Renton*, 475 U.S. at 41.

56. *City of Erie*, 529 U.S. at 296 (citing *Renton*, 475 U.S. at 51-52).

57. *Id.* at 296-97 (citing *Young*, 427 U.S. 50 (1976)).

58. *Id.* at 297. Reliance on a judicial opinion describing the evidentiary basis is sufficient. *Id.* (citing *Renton*, 475 U.S. at 51-52).

59. *City of Erie*, 529 U.S. at 297.

60. *Id.* The preamble to the ordinance in question states:

> [T]he Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.

Id.

Kandyland.[61] Kandyland failed to attack the city council's findings or to shed any doubt on their validity.[62] In the absence of such doubt, the Court followed Erie's expert judgment.[63]

The Court further noted that the city should have adequate leeway to support the ordinance based on secondary effects because Erie's ordinance is a facially content-neutral regulation of conduct and not a regulation of First Amendment expression.[64] Justice O'Connor again noted that *O'Brien* is especially helpful because the *O'Brien* Court permitted Congress to take official notice of the harmful effects the destruction or mutilation of draft cards would have on the selection system without an independent inquiry or specific evidentiary record.[65] To the contrary, Justice Souter would have required such a record from Erie to support its ordinance.[66] Justice O'Connor and the plurality disagreed with Justice Souter.[67] The Court stated that no empirical data was needed because Erie had shown a substantial governmental interest through establishing, by past decisions of the Court and the city council's own experience, that the harmful secondary effects relied upon are real.[68] Justice O'Connor noted that it is also evident that, because nude dance clubs create negative secondary effects like crime, drug use, and violence, an ordinance banning nude dancing

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61. *Id.* at 297-98.

62. *Id.* at 298.

63. *Id.* The Court related the city council's findings to an administrative agency. *Id.* As long as an opposing party has an opportunity to challenge a finding, an agency is not confined to the evidence in the record in reaching its expert judgment. *Id.* Kandyland had ample opportunity to challenge the council's findings before the council itself, during the state proceedings, and in front of the Supreme Court. *Id.* It only asserted that evidentiary proof was lacking from the Erie city council's determination. *Id.*

64. *City of Erie*, 529 U.S. at 298.

65. *Id.* at 298-99. In *O'Brien*, the Court simply reviewed the administrative interests and concluded that Congress had a legitimate and substantial interest in preventing the destruction and mutilation of draft cards. *Id.*

66. *Id.* at 316-17 (Souter, J., concurring in part and dissenting in part). Justice Souter agreed with the plurality's notion that combating the negative secondary effects of nude dancing is a legitimate government interest and that the Erie ordinance should be evaluated under *O'Brien*, but believed that *O'Brien* was distinguishable because in that case there was no doubt that the regulation would eliminate the harmful secondary effects. *Id.*

67. *Id.* at 300. Justice Souter argued that Erie's findings could not be accepted because "the subject of nude dancing is fraught with emotionalism" and because secondary effects must be established by empirical data. *Id.* at 314 (Souter, J., concurring in part and dissenting in part).

68. *Id.* Justice Souter's argument regarding empirical data was flatly rejected in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), where the Court stated that "the invocation of academic studies said to indicate the threatened harms are not real is insufficient to cast doubt on the experience of local government." *Id.*

would further the government's interest in combating such problems.[69]

Justice O'Connor further illustrated that the ordinance satisfies the third requirement of the *O'Brien* test, that the government interest is unrelated to the suppression of free expression.[70] The Court stated that the fourth and final factor of the *O'Brien* test is satisfied as well because the restriction is no greater than is essential to the furtherance of the government interest.[71] As stated previously, the Court found that the ordinance regulates conduct and has a de minimis impact on the expressive element of dancing.[72] The plurality concluded that the G-string and pasties requirements are minimal restrictions in furtherance of the city's interest and leave ample room to convey the dancer's erotic message.[73] Therefore, the Court held that the Erie ordinance is a valid content-neutral regulation of conduct and reversed the judgment of the Supreme Court of Pennsylvania.[74]

Justice Scalia, concurring, thought that the case was moot.[75] Justice Scalia divided the plurality's decision regarding mootness into two categories: 1) Pap's may at sometime in the future resume business, and 2) the City of Erie is suffering an ongoing harm since the state court invalidated the ordinance.[76] Justice Scalia stated that it is not disputed that Kandyland no longer exists and that the sole shareholder has sworn in an affidavit that he operates no active business and does not plan to do so in the future.[77] He stated that

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69. *City of Erie*, 529 U.S. at 300-01. G-strings and pasties may not reduce the secondary effects greatly, but the *O'Brien* test only requires that the regulation further the government's interest. *Id.* at 301. A city must balance its attempts to combat a problem with the requirement that a restriction be no greater than necessary. *Id.*

70. *Id.* at 301.

71. *Id.*

72. *Id.*

73. *Id.* Justice Souter argued that zoning may be an alternative to the ordinance. *Id.* However, Justice O'Connor countered that it was uncertain whether zoning would have less of an impact on expression than the G-string and pasties requirement, and, because the ordinance is a content-neutral regulation, a least restrictive means analysis was not required. *Id.* at 301-02.

74. *City of Erie*, 529 U.S. at 302.

75. *Id.* (Scalia, Thomas, JJ., concurring).

76. *Id.* (Scalia, Thomas, JJ., concurring).

77. *Id.* (Scalia, Thomas, JJ., concurring). The building in which Kandyland was located has been sold and is currently being used as a comedy club. *Id.* Nick Panos, the sole shareholder, gave a sworn affidavit that states he does not "employ any individuals involved in the nude dance business," "maintain any contacts in the adult entertainment business," "has any current interest in any establishment providing nude dancing," or "has any intention to own or operate a nude dancing establishment in the future." *Id.*

the plurality's conclusion that, because Pap's was still incorporated in Pennsylvania it could decide to start a nude dance club again, does not suffice under the case law to overcome mootness.[78]

The test for mootness in voluntary-termination cases, according to Justice Scalia, is whether it is absolutely clear the behavior could not reasonably be expected to recur.[79] Justice Scalia determined that the mootness test was met because of Pap's sworn affidavit, the age of the sole shareholder, and the timing of the events concerning the sale of the business and the filing for certiorari.[80] According to Justice Scalia, even if there is a possibility of Pap's reopening a dance club, there is no reasonable expectation of such.[81]

Justice Scalia pointed out that the usual practice when mootness is attributable to the unilateral action of a party who prevailed in the lower court is to vacate that judgment.[82] Justice Scalia's concurrence further noted that a problem with the case is that it came from a state court and entailed a lack of jurisdiction over *vacatur*.[83] The concurring opinion stated that this results in an unfortunate consequence but not one that authorized the Court to hear a matter outside of its power.[84] Justice Scalia rested this conclusion on the fact that the Court has no power to suspend the Article III fundamental requirement of a "case or controversy."[85]

Concerning the ongoing injury of the City of Erie, Justice Scalia stated that although the plurality cited no authority for their

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78. *Id.* at 303 (Scalia, Thomas, JJ., concurring). Erie did not contest Pap's affidavit but responded by stating that he could very easily get back into the business. *Id.*

79. *City of Erie*, 529 U.S. at 303 (Scalia, Thomas, JJ., concurring).

80. *Id.* (Scalia, Thomas, JJ., concurring). Pap's ceased operations and the establishment was sold a year before the petition for certiorari was filed. *Id.* Justice Scalia asserted that it was absurd to assume that Pap's would do this to preserve the Pennsylvania Supreme Court decision before an appeal was ever filed. *Id.*

81. *Id.* at 303-04 (Scalia, Thomas, JJ., concurring). Justice Scalia argued the age of Pap's sole shareholder was not the only basis for his conclusion. *Id.* at 304 n.2. He did this to refute the majority's contention that an advanced age of seventy-two does not make it absolutely clear that a life of quiet retirement is the only reasonable expectation for such a septuagenarian. *Id.*

82. *Id.* at 304 (Scalia, Thomas, JJ., concurring) (citing Arizonans for Official English *v.* Arizona, 520 U.S. 43 (1997)).

83. *Id.* at 305 (Scalia, Thomas, JJ., concurring) (citing ASARCO, Inc. *v.* Kadish, 490 U.S. 605 (1989)).

84. *City of Erie*, 529 U.S. at 305. The significance of this problem is that a dismissal for mootness caused by a unilateral action would leave Erie subject to a legal disability, the ordinance inoperative, and the city unable to enforce the public nudity regulations against anyone, not just nude dancers. *Id.*

85. *Id.* at 305-06 (Scalia, Thomas, JJ., concurring).

proposition, they seemed to rely on *ASARCO, Inc. v. Kadish*.[86] Justice Scalia noted, however, that *ASARCO* did retain the "case or controversy" requirement and the requirement that the parties be adverse.[87] According to Justice Scalia, the Court appeared to eliminate these last requirements, and, in concluding that the case avoided mootness solely on Erie's ongoing injury, the Court created a "case or controversy" where only one party was involved.[88]

Justice Scalia would have dismissed the case as moot for the reasons already discussed, but because the plurality reached the merits of the case, he did so briefly as well, agreeing with the result but not with the mode of analysis.[89] He noted that the Erie ordinance is modeled after the one in *Barnes*, a case in which he voted to uphold a statute because it was a general law regulating conduct and not specifically directed at expression, and was therefore not subject to First Amendment scrutiny.[90] Justice Scalia noted that Erie's ordinance prohibits the act of public nudity regardless of whether it is for the purpose of dancing or not.[91] Further, according to Justice Scalia, the preamble of the ordinance that the plurality discussed does nothing to change this conclusion.[92] Justice Scalia commented that there is no basis for the idea that the ordinance does not apply to other theatrical productions because the text contains no such limitations.[93] Even if nude dancing was specifically targeted, Justice Scalia would not have found it violative of the First Amendment unless it targeted the communicative part of nude dancing.[94] Ultimately, Justice Scalia thought that the reliance placed upon secondary effects was unnecessary because of his belief that the traditional power of government to foster morals and the judgment that nude dancing is

86. *Id.* at 306 (Scalia, Thomas, JJ., concurring).

87. *Id.* (Scalia, Thomas, JJ., concurring). Justice Scalia dissented in *ASARCO*.

88. *Id.* (Scalia, Thomas, JJ., concurring).

89. *City of Erie*, 529 U.S. at 307 (Scalia, Thomas, JJ., concurring).

90. *Id.* 307-08 (Scalia, Thomas, JJ., concurring). Justice Scalia stated that one would suppose, and that Erie calculated, that the Pennsylvania courts would have felt bound by the decision in *Barnes*. *Id.* at 307.

91. *Id.* at 308 (Scalia, Thomas, JJ., concurring).

92. *Id.* (Scalia, Thomas, JJ., concurring). The preamble merely shows that Erie was having a public nudity problem with lap dancers and not streakers, sunbathers or hot-dog vendors. *Id.*

93. *Id.* at 308 (Scalia, Thomas, JJ., concurring). The fact that no enforcement attempt was made on the production of Equus at the same time was due to the fact that no one had complained about it and not because the ordinance did not apply. *Id.*

94. *City of Erie*, 529 U.S. at 310. (Scalia, Thomas, JJ., concurring). Justice Scalia believed the First Amendment is only violated if, "the government prohibits conduct precisely because of its communicative attributes." *Id.*

immoral were sufficient for Erie to enact the ordinance.[95]

Justice Souter joined in parts I and II of the plurality's opinion but did not believe Erie had established a sufficient evidentiary basis for sustaining its ordinance and, therefore, dissented in part.[96] He stated that, under the First Amendment, the need for factual justifications to satisfy intermediate scrutiny had arisen in recent cases.[97] A specific quantum of evidentiary findings has not been identified, but the need for some factual justifications was clear according to Justice Souter.[98]

Justice Souter stated that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims flows from expressive activity, and for the expected benefit from the restriction imposed.[99] The opinion noted that the evidentiary basis can come from other governments or from legislative invocation of a judicial opinion, as long as the basis is one of demonstrated fact, not speculation.[100] Justice Souter believed that by these standards, the Erie ordinance fails to establish any such evidence.[101] He further stated that the record is devoid of any findings of fact by the city council on the problem of secondary effects.[102] Justice Souter determined that the plurality rested its conclusions on the preamble, which is "slim pickings" on an issue that is "fraught with emotion."[103]

Justice Stevens, with whom Justice Ginsburg joined, dissented in the matter because he believed the plurality opinion incorrectly extended the secondary effects doctrine to justify the total suppression of speech.[104] The dissenters stated that the secondary effects doctrine had only been used in the past to justify the location of establishments like Kandyland, not to censor speech.[105]

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95. *Id.* (Scalia, Thomas, JJ., concurring). According to Justice Scalia, the First Amendment did not abolish these powers. *Id.*

96. *Id.* at 310-11 (Souter, J., concurring in part and dissenting in part). Justice Souter would have vacated the Pennsylvania Supreme Court decision. *Id.* at 311.

97. *Id.* at 311 (Souter, J., concurring in part and dissenting in part) (citing Turner Broad. System, Inc. v. FCC, 520 U.S. 180 (1997) ("Turner II") and Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) ("Turner I")).

98. *Id.* (Souter, J., concurring in part and dissenting in part).

99. *City of Erie*, 529 U.S. at 313 (Souter, J., concurring in part and dissenting in part).

100. *Id.* at 313-14 (Souter, J., concurring in part and dissenting in part).

101. *Id.* at 314 (Souter, J., concurring in part and dissenting in part).

102. *Id.* (Souter, J., concurring in part and dissenting in part).

103. *Id.* (Souter, J., concurring in part and dissenting in part).

104. *City of Erie*, 529 U.S. at 317-18 (Stevens, Ginsburg, JJ., dissenting).

105. *Id.* at 317 (Stevens, Ginsburg, JJ., dissenting). Justice Stevens attributed this shift

Justice Stevens pointed out that the preamble of the Erie ordinance specifically states that the ordinance was enacted due to the recent increase in live nude entertainment.[106] Further, the Stevens dissent remarked that dancing nude or in G-strings and pasties are both forms of expressing erotic messages, but the messages being conveyed are quite different.[107] Justice Stevens' position was that even if nude dancing is within only the outer ambit of the First Amendment, the Erie ordinance still suppresses a message protected by that Amendment.[108]

Justice Stevens believed that precedent did not support the use of the secondary effects test to support an ordinance that bans First Amendment speech.[109] He noted that in *Young* the Court upheld a zoning ordinance on the basis of the secondary effects doctrine because the ordinance was only a limitation on the locations that adult theatres could use.[110] In addition, he noted that in *Renton* the Court upheld a similar zoning ordinance because it regulated the location of theaters and did not deny theaters a reasonable opportunity to open and operate.[111] In a footnote to his opinion, Justice Stevens stated that the plurality's reliance on *Ward* as a basis for the extension of the secondary effects doctrine was misplaced.[112] Justice Stevens pointed out that in *Schad* v. *Borough of Mount Ephraim*[113] the Court struck down an ordinance that banned all nude dance clubs because, at least according to Justice Stevens, the secondary effects doctrine does not apply to an

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to the plurality's failed attempt to structure a united opinion out of *Barnes* and believed that neither precedent nor persuasive reasoning supported the shift. *Id.* at 318.

106. *Id.* at 318 (Stevens, Ginsburg, JJ., dissenting).

107. *Id.* (Stevens, Ginsburg, JJ., dissenting).

108. *Id.* at 319 (Stevens, Ginsburg, JJ., dissenting). Justice Stevens referred to Judge Posner's position in *Miller* v. *South Bend*, 904 F.2d 1081 (1990), which stated that the difference between the message of a nude dancer and that of one wearing a G-string and pasties is significant. *Id.* at 318-319. The Supreme Court plurality called the difference in message de minimis. *Id.* Justice Stevens assumed for argument purposes that the difference is small. *Id.* at 319.

109. *City of Erie*, 529 U.S. at 319 (Stevens, Ginsburg, JJ., dissenting).

110. *Id.* (Stevens, Ginsburg, J.J., dissenting). *Young* involved a Detroit zoning ordinance affecting the secondary effects of lower property values and crime. *Id.* The zoning ordinance limited where adult films could be exhibited. *Id.*

111. *Id.* at 320 (Stevens, Ginsburg, JJ., dissenting).

112. *Id.* at 320 n.3 (Stevens, Ginsburg, JJ., dissenting). Justice Stevens stated that both *Young* and *Renton* concerned time, place, and manner regulations that left open ample alternative channels for communication. *Id.* He placed *Ward* in this category and distinguished it from the instant case. *Id.* at 321.

113. *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981).

ordinance that totally bans nude dancing.[114]

In addition, Justice Stevens dissented because, in his eyes, the plurality also erred by lowering the degree of state interest that is needed to regulate speech and by ignoring the difference between secondary effects caused by speech and effects on speech caused by regulation of conduct.[115] Further, according to Justice Stevens, the addition of G-strings and pasties to nude dancers has no impact on the secondary effects that Erie is trying to combat.[116] Finally, Justice Stevens concluded that the *O'Brien* test could not be satisfied even if one assumed that secondary effects would be prevented by such an ordinance because a mere assumption is not sufficient to meet the *O'Brien* test.[117]

According to Justice Stevens, the plurality also confused the incidental burdens doctrine with the secondary effects doctrine even though they are distinct and designed to serve different interests.[118] The dissent emphatically stated that the plurality could not base the decision on both simultaneously.[119] Justice Stevens stated that either the Erie ordinance is aimed at speech and is justified under the incidental burdens doctrine, or it is aimed at secondary effects and is justified under the secondary effects doctrine.[120] Thus, Justice Stevens explained that the ordinance cannot be aimed at secondary effects and rendered unrelated to speech by the incidental burdens test.[121]

Justice Stevens believed the ordinance could only be correctly analyzed by recognizing that nude dancing is expressive conduct protected under the First Amendment.[122] According to the dissent the nudity of the dancer is a component of that protected

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114. *City of Erie*, 529 U.S. at 321-22 (Stevens, Ginsburg, JJ., dissenting).

115. *Id.* at 323. (Stevens, Ginsburg, JJ., dissenting).

116. *Id.* (Stevens, Ginsburg, JJ., dissenting). Justice Stevens agreed with Justice Scalia that there is no reason to believe the measures will reduce the secondary effects. *Id.* at 314.

117. *City of Erie*, 529 U.S. at 324 (Stevens, Ginsburg, JJ., dissenting). The plurality concluded that, under *O'Brien*, the regulation need only further the government interest. *Id.* at 300-01.

118. *Id.* (Stevens, Ginsburg, JJ., dissenting). The incidental burdens doctrine applies when speech and non-speech elements are involved and the government's regulation of the non-speech component justifies an incidental intrusion upon the speech element. *Id.* Secondary effects are indirect consequences of speech and may justify regulation of the location of speech. *Id.* The incidental burdens and secondary effects doctrines are not identical. *Id.* at 324-25.

119. *Id.* at 326 (Stevens, Ginsburg, JJ., dissenting).

120. *Id.* (Stevens, Ginsburg, JJ., dissenting).

121. *Id.* (Stevens, Ginsburg, JJ., dissenting).

122. *City of Erie*, 529 U.S. at 326 (Stevens, Ginsburg, JJ., dissenting).

expression and the target of the Erie ordinance.[123] By pointing out that the preamble of the Erie ordinance reveals a purpose of limiting speech, Justice Stevens asserted that only a compelling government interest could support such a regulation.[124] Thus, Justice Stevens dissented because no such compelling government interest was established.[125]

The right to free expression is a bedrock principle of our nation rooted in the First Amendment.[126] One of the first cases within which the Supreme Court addressed the issue of symbolic speech, the First Amendment paradigm through which nude dancing has been analyzed, was *Stromberg* v. *California*.[127] Stromberg was convicted of violating a statute prohibiting the display of flags as an emblem in opposition to the government.[128] Stromberg raised the flag of the Soviet Union every morning at his children's summer camp.[129] The Court held that the statute unconstitutionally suppressed communication and could not be sustained as a regulation of non-communicative conduct.[130] The Court explained its decision by stating that the statute was vague as to what conduct was prohibited and allowed punishment for acts that are within the protection provided by the First Amendment.[131]

The Supreme Court revisited the combination of conduct and speech twelve years later in *West Virginia State Board of Education.* v. *Barnette*.[132] In this case, the issue was whether public schools could force students to salute the American flag.[133] The

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123. *Id.* (Stevens, Ginsburg, JJ., dissenting). According to Justice Stevens, the text of the ordinance and the plurality's opinion made it obvious that Erie was regulating the communicative nature of nude dancing. *Id.*

124. *Id.* at 327 (Stevens, Ginsburg, JJ., dissenting). Justice Stevens also looked to the comments of the city's attorney who said the ordinance would not include the performance of Equus, a playhouse production at the time. *Id.* at 328. This narrow view was also confirmed by the comments of several city council members during the debate on the ordinance stating that indecent, immoral nudity and not theater nudity was their target. *Id.* at 329.

125. *Id.* at 332 (Stevens, Ginsburg, JJ., dissenting).

126. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925); Whitney v. California, 274 U.S. 357, 362 (1927); Fiske v. Kansas, 274 U.S. 380, 382 (1927).

127. 283 U.S. 359 (1931).

128. *Id.* at 360-61.

129. *Id.* at 362. Along with raising the Soviet flag, there was a ritual during which the children stood and saluted the flag reciting a pledge of allegiance to the "workers' red flag." *Id.*

130. *Id.* at 369.

131. *Id.*

132. 319 U.S. 624 (1943).

133. *Id.* at 626. The Board of Education passed a resolution on January 9, 1942, which stated *inter alia*,

Court held that such a requirement violated the students' constitutional rights to freedom of speech and expression.[134] The Court found that saluting the flag is a form of utterance that conveys an idea of acceptance or rejection of that which is being saluted.[135] Justice Jackson stated that the First Amendment no more permitted a state to compel allegiance to a symbol of the organized government than it permitted the state to punish someone who used a symbol to express peaceful opposition to organized government.[136]

Nearly twenty-five years later, the Supreme Court decided *United States* v. *O'Brien*, the landmark case in the area of conduct as expression.[137] O'Brien and three of his companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse in protest of the Vietnam war and thereby violated a statute prohibiting such acts.[138] O'Brien was convicted under the statute.[139] In his appeal to the Supreme Court, O'Brien argued that the statute was unconstitutional as applied to him because the act of burning the registration card was protected symbolic speech under the First Amendment.[140]

The Court began its analysis by stating that "[it] cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[141] The Court further noted that

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> Therefore, be it resolved, that the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

Id. at 626 n.2.

134. *Id.* at 642.

135. *Id.* at 632.

136. *Id.* at 641-42.

137. 391 U.S. 367 (1968).

138. *Id.* at 369-70. When FBI officials who had been at the protest arrested O'Brien, he told them that he was burning his card because of his beliefs, knowing that he was violating federal law. *Id.* at 369.

139. *Id.* at 371.

140. *O'Brien*, 391 U.S. at 376.

141. *Id.* The Court asserted that the destruction of registration cards is conduct, alone, and has nothing to do with speech and is not necessarily expressive. *Id.* at 375.

even assuming arguendo that the burning of a registration card is within the First Amendment, it is not necessarily afforded absolute constitutional protection.[142] Justice Warren, delivering the majority opinion, explained that when speech and non-speech elements are intertwined in the same type of conduct, "a sufficiently important government interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."[143]

Eventually the Court delineated what has come to be known as the "*O'Brien* test" for analyzing government restrictions on symbolic speech.[144] Under the *O'Brien* test, a government regulation is constitutional 1) if the regulation is within the constitutional power of the government; 2) if it furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[145] Ultimately, the Court concluded that the test was met and upheld the statute.[146]

One of the first cases dealing with nude dancing and expression was *California* v. *LaRue*.[147] California passed regulations that prohibited licensed bars or nightclubs from showing entertainment that was more gross sexuality than expression.[148] Even though recognizing that some of these performances are within the constitutional limits of the protection for freedom of expression, the *LaRue* Court upheld the regulations because they only regulated and did not prohibit such acts.[149]

The next case to arise dealing with nude dancing and freedom of expression was *Schad* v. *Borough of Mount Ephraim*.[150] Schad operated an adult bookstore in the Borough of Mt. Ephraim in which there was a coin-operated machine where one could view live nude dancers.[151] Criminal penalties were imposed on Schad for

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142. *Id.*

143. *Id.*

144. *Id.* at 377.

145. *O'Brien*, 391 U.S. at 377. The Court found that the government met these requirements in the *O'Brien* case. *Id.*

146. *Id.* at 383.

147. 409 U.S. 109 (1972).

148. *Id.* at 118.

149. *Id.*

150. 452 U.S. 61 (1981).

151. *Id.* at 62.

violating a zoning ordinance prohibiting nude dancing.[152]

The issue in *Schad* was whether the zoning ordinance, which prohibited all live entertainment, violated the constitutional right of freedom of expression.[153] The Court held that the ordinance, by excluding live entertainment throughout the Borough, prohibited a wide range of expression that is protected by the First Amendment.[154] In doing so, the Court recognized that nude dancing is not outside of First Amendment protections and that restrictions on such activity must be justified.[155] Unfortunately for Mt. Ephraim, the Court perceived no justification, such as the interests in avoiding parking or trash collection problems, which could justify the ordinance.[156]

Clark v. *Community for Creative Non-Violence*[157] was a subsequent case also construing an ordinance targeted at combating secondary effects.[158] Community for Creative Non-Violence ("CCNV") conducted a demonstration during which they erected a city of tents on the Mall in Washington, D.C., but they were not allowed to sleep in them according to a Park Service regulation.[159] The Court held that even assuming that sleeping is expressive conduct, the regulation was content-neutral because it

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152. *Id.* at 63. Section 99-15B of the Mount Ephraim zoning ordinance stated:

"B. Principal permitted uses on the land and in buildings.

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

Id. at 63 n.1.

Section 99-4 of the Borough's code provides that "all uses not expressly permitted in this chapter are prohibited." *Id* at 64.

153. *Id.* at 65.

154. *Id.* The First Amendment requires a sufficient justification for the prohibition of a wide range of protected speech and the Borough failed to provide such a justification. *Id.* at 67-69.

155. *Schad*, 452 U.S. at 66.

156. *Id.* at 72-77. The borough produced no evidence that nude dancing caused some of the secondary effects they were trying to prevent, such as littering and crime. *Id.* at 73.

157. 468 U.S. 288 (1984).

158. *Id.*

159. *Id.* at 291-92. A National Park Service regulation (36 CFR § 50.27(a)) designates areas as campgrounds where people are permitted to sleep; the Mall was not designated as such. *Id.* at 290.

was designed to preserve the parks, and that de minimis intrusions on expression must be allowed if the government is to combat secondary effects.[160]

In *City of Renton* v. *Playtime Theaters, Inc.*, the Court elaborated on the secondary effects doctrine and applied it to conduct occurring on private property.[161] Respondents attempted to open adult theaters in the City of Renton and sought declaratory and injunctive relief from the Renton zoning ordinance prohibiting such theaters on respondent's land.[162] The Court concluded that the ordinance was constitutional because it was aimed at the secondary effects of the theaters on the surrounding area, it did not ban the theaters but simply regulated their locations, and it was narrowly tailored to affect only those theaters that produced the secondary effects.[163] The Court allowed Renton to rely on other cities' findings of secondary effects to substantiate its regulation.[164] As in *O'Brien*, the majority noted that the city must be allowed to experiment with solutions to admittedly serious problems and an alleged illicit legislative motive will not invalidate an otherwise constitutional statute.[165]

Texas v. *Johnson*,[166] a flag burning case, set forth the framework for analyzing restrictions on expressive conduct that would later be used in *City of Erie*.[167] Johnson was convicted under a Texas penal law for burning an American flag in protest at the Republican

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160. *Id.* at 293-99.

161. 475 U.S. 41 (1986).

162. *Id.* at 44-45. The ordinance prohibited:

> [A]ny "adult motion picture theater" from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school. The term "adult motion picture theater" was defined as an enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas for observations by patrons therein.

Id. at 44.

163. *Id.* at 47-52. Narrow tailoring helped the ordinance avoid the overbreadth flaw that was fatal to the ordinance in *Schad* v. *Borough of Mount Ephraim*. *Id.* at 52.

164. *Id.* at 51. The Court stated that:

> The First Amendment does not require a city, before enacting such an ordinance (as here), to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Id.

165. *Renton*, 475 U.S. at 52.

166. 491 U.S. 397 (1989).

167. *Id.* at 397.

National Convention.[168] In *Johnson*, the Court took a four-step approach to analyzing the regulation of expressive conduct: (1) determine whether the conduct is expressive; (2) if so, then determine whether the state regulation relates to the suppression of free expression; (3) if the state's regulation is not related to the suppression of expression, then apply the less stringent *O'Brien* test; (4) if the regulation is related to the suppression of expression, a more demanding strict scrutiny test should be applied.[169]

The Court recognized, and the State of Texas conceded, that Johnson's conduct was expressive.[170] The Court stated that the government has a "freer hand" in regulating expressive conduct than traditional speech.[171] The Court decided that the *O'Brien* test did not apply because the regulation was related to the suppression of expression.[172] Consequently, the strict scrutiny test was applied.[173] After applying strict scrutiny, the Court concluded that the state's asserted interests in preventing breaches of the peace and in preserving national unity did not support Johnson's conviction and did not justify regulating his freedom of political expression.[174]

Ward v. *Rock Against Racism*,[175] decided the day after *Texas* v. *Johnson*, extended the secondary effects doctrine into the public forum.[176] The City of New York passed regulations governing noise levels in Central Park after numerous complaints from patrons of a

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168. *Id.* at 399. TEXAS PENAL CODE ANN. § 42.09 (West 1989) provides in full:

(a) A person commits an offense if he intentionally or knowingly desecrates:
(1) A public monument; (2) a place of worship or burial; or (3) a state or national flag.

(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense under this section is a Class A misdemeanor.

Id. at 400 n.1.

169. *Id.* at 403 (citing Spence v. Washington, 418 U.S. 405 (1974)).

170. *Johnson*, 491 U.S. at 405. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Id.* (citing *Spence*, 418 U.S. at 410-11).

171. *Johnson*, 491 U.S. at 406.

172. *Id.* at 407.

173. *Id.* at 420.

174. *Id.*

175. 492 U.S. 781 (1989).

176. *Id.* at 781.

nearby sheep meadow.[177] The Court held that the regulation was content-neutral because the city's principal justification was controlling noise and not the content of the music.[178] Furthermore, the Court held that the secondary effects doctrine could be used to regulate speech in a public forum as long as a regulation is narrowly tailored and leaves open an alternative channel for communication of the curtailed speech.[179]

The final case in this line, and the one most relied upon by the Court in *City of Erie*, is *Barnes* v. *Glen Theatre, Inc.*[180] The issue in *Barnes* was the constitutionality of an Indiana public indecency statute that prohibited public nudity.[181] Respondents were proprietors who wanted to have dancers totally nude, but the statute required the dancers to wear G-strings and pasties.[182] The Court acknowledged that nude dancing was expressive conduct, but found the regulation content-neutral because the Indiana statute was aimed at public nudity across the board, not solely at nude dancing, and was, therefore, unrelated to the suppression of free expression.[183] Consequently, the plurality held that the statute satisfied the four-part *O'Brien* test and was, therefore, a valid regulation despite its incidental limitation on some expressive activity.[184]

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177. *Id.*

178. *Id.* at 785-803.

179. *Id.* at 790-91. This was an extension of the secondary effects doctrine to the public forum. *Id.* Until this point, the Court had applied the secondary effects doctrine to zoning ordinances affecting commercial enterprises such as in *Renton* and *Schad. Id.*

180. 501 U.S. 560 (1991). This decision was split into four opinions (three justices joined the plurality opinion, two filed separate concurring opinions, and four joined in the dissent).

181. *Id.* INDIANA CODE § 35-45-4-1 (1988) provides:

> Public indecency; indecent exposure
>
> §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.

Id. at 569 n.2.

182. *Id.* at 563.

183. *Id.* at 565-70.

184. *Id.* at 567-72. The plurality rested its decision on the proposition that "the statute's purpose [was] protecting societal order and morality." *Id.* at 568.

The Court's holding in *City of Erie* v. *Pap's A.M.* followed its decision in *Barnes* and is consistent with recent nude dancing cases. The plurality's opinion clarified *Barnes* by stating that bans on public nudity should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.[185] Because the Court has continually held nude dancing to be expressive conduct, the application of the *O'Brien* test and the *Texas* v. *Johnson* analysis were appropriate as well.[186] With the *City of Erie* ruling (following *Barnes*), the Court has established a precedent for lower courts to follow that will hopefully bring certainty to an area that courts across the nation have struggled with for decades.

However, the Court's decision may have greater effects than are readily apparent. The decisions in *City of Erie* and *Barnes* have shown an acceptance by the Court of the movement away from the use of zoning ordinances, as in *Renton* and *Young*, toward the use of public nudity bans to deal with the issue of nude dancing. Cities across the nation now have a template to follow in framing ordinances to regulate nude dancing. Legislatures in all fifty states now know that the Supreme Court will uphold public nudity ordinances that have substantial justifications and only have de minimis effects on the expressive element of erotic dancing.

According to the holding in *City of Erie*, as long as an ordinance is content-neutral and is targeted at combating negative secondary effects, governments can regulate erotic dancers and require them to wear G-strings and pasties. The Supreme Court's adherence to allowing local governments to use past court decisions to substantiate the presence of secondary effects makes the governments' tasks easier. Local governments merely have to look to the Court's decisions in *Erie*, *Barnes*, *Renton*, or *Young* for sufficient evidence of secondary effects. This fact should make nude dancers and dance club proprietors everywhere shake in their "go-go" boots because they might be next.

The soundness of the decision in *City of Erie* will vary depending upon one's views on erotic dancing. The Court's decision undoubtedly allows governments to restrict an area of expression in the name of combating secondary effects. This is a contraction and not an expansion of an individual's right of expression. As Justice Stevens said in his dissent, "The Court's use of the

185. *City of Erie*, 529 U.S. at 289.

186. *Id.*

secondary effects rationale to permit a total ban has grave implications for basic free speech principles."[187] This might be overstating the lasting implications of the decision, but it illustrates that it does authorize governments to entrench upon first amendment speech and expression rights.

Although the *City of Erie* Court viewed the difference in expression when the last stitch is dropped as de minimis, others might disagree.[188] As one author has stated, "while entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person at the local pub."[189] Earlier regulations on nude dancing were centered on societal order and public morality.[190] The Court's holding in *City of Erie* now allows the justification to be the prevention of secondary effects such as crime, alcohol abuse, and prostitution.

Regardless of one's thoughts on nude dancing, the value of the Supreme Court's ruling in *City of Erie* v. *Pap's A.M.* cannot be questioned. The Court's decision was based on sound constitutional principles that are firmly established in precedent. As previously noted, the Court has long struggled to establish a permanent test for judging nude dancing regulations. It established such a test in *City of Erie* by applying the *O'Brien* factors. Opponents and proponents, alike, now have two consecutive decisions, *City of Erie* and *Barnes*, that illustrate the Court's position in this area and present the framework for future litigation.

James S. Malloy

187. *Id.* at 324 (Stevens, Ginsburg, JJ., dissenting).

188. *Id.* at 294. Justice Stevens argued that the ordinance is a complete ban on expression. *Id.* at 319. (Stevens, Ginsburg, JJ., dissenting).

189. Michael McBride, Note, Pap's A.M. v. City of Erie: *The Wrong Route to the Right Decision*, 33 AKRON L. REV. 289, 289 (2000).

190. *See Barnes*, 501 U.S. at 568.