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SIX CONSERVATIVES IN SEARCH OF THE FIRST AMENDMENT: THE REVEALING CASE OF NUDE DANCING

VINCENT BLASI*

If we think to regulate printing, thereby to rectify manners, we must regulate our recreations and pastimes, all that is delightful to man. No music must be heard, no song be set or sung, but what is grave and Doric. There must be licensing dancers, that no gesture, motion, or deportment be taught our youth but what by their allowance shall be thought honest

. . . .
. . . . Impunity and remissness, for certain, are the bane of a commonwealth; but here the great art lies, to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work.

If every action which is good or evil in man at ripe years were to be under pittance, and prescription, and compulsion, what were virtue but a name, what praise could be then due to well-doing, what grammery to be sober, just, or continent?

—John Milton, *Areopagitica* (1644)¹

I. INTRODUCTION

The future of political freedom in the United States hardly

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1. JOHN MILTON, *AREOPAGITICA AND OF EDUCATION* 33, 35 (Michael Davis ed., 1967) (1644).

turns on whether women have a First Amendment right to dance in the nude in bars and peep shows. The future of artistic freedom is perhaps implicated by this question, but only if the law's demand for general principle prohibits judges from treating expressive nudity in those environments as fundamentally different from expressive nudity in ballet performances, museum exhibitions, and films. *Barnes v. Glen Theatre, Inc.*² is an interesting and potentially important case not because of the significance of the specific issue it decided, but because it provoked a lively debate among several articulate judicial conservatives. By looking closely at that debate, we may discern some of the themes and tensions that will be played out as the First Amendment enters a period of conservative dominance of the federal judiciary.

Between 1937 and 1941 President Franklin D. Roosevelt appointed seven Justices to the Supreme Court.³ As a result of this rapid change of personnel, the Court seemed dangerously monolithic. Its dialogue on the great constitutional issues of the day ran the risk of becoming impoverished due to the lack of ideological diversity.

Of course, nothing of the sort happened. The Court of the 1940's and 1950's was deeply divided, probably fractious to a fault. The divisions of those years produced a clash of judicial philosophies that continues to set the terms of modern constitutional debate.⁴

2. 111 S. Ct. 2456 (1991).

3. Justice Black joined the Court in 1937, Justice Reed in 1938, Justices Frankfurter and Douglas in 1939, Justice Murphy in 1940, and Justices Byrnes and Jackson in 1941. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW app. A (7th ed. 1991).

4. Regarding interpretation of the First Amendment, see, for example, *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding statute forbidding group libels by five-to-four vote); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding statute that criminalized revolutionary speech by six-to-two vote); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (invalidating statute forbidding speech that caused breach of the peace by five-to-four vote); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating statute requiring pledge of allegiance in schools by six-to-three vote); *Bridges v. California*, 314 U.S. 252 (1941) (reversing contempt convictions related to newspaper articles by five-to-four vote). Regarding the rights of the accused, see, for example, *Adamson v. California*, 332 U.S. 46 (1947) (upholding statute allowing court and counsel to comment on accused's failure to testify by five-to-four vote); *Betts v. Brady*, 316 U.S. 455 (1942) (holding that state need not provide defense counsel in every criminal case by six-to-three vote), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963). Regarding the separation of church and state, see, for example, *Zorach v. Clauson*, 343 U.S. 306 (1952) (holding program that released public school pupils to attend religious classes constitutional by six-to-three vote); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upholding reimbursements for busing expenses of parochial school students by five-to-four vote).

With the resignation of Justice Thurgood Marshall and his replacement by Justice Clarence Thomas, we now have a Supreme Court that looks just as monolithic as the Court of 1941. Republican presidents appointed all but one of the sitting Justices. Many of those appointments were made with careful and explicit attention to the ideological predispositions of the appointee. For the first time since 1876, no committed civil libertarian sits on the Court.⁵

Will the Supreme Court of the 1990's achieve the unity of purpose and vision that eluded its New Deal predecessor? Or will the next chapter of the Court's history be shaped by emer-

5. The first Justice John Marshall Harlan joined the Court in 1877. He is best known for his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting), but he also wrote important dissenting opinions urging considerably broader interpretations of the freedom of the press and the rights of the accused than were acceptable to his colleagues. *See, e.g.*, *Patterson v. Colorado*, 205 U.S. 454, 463-65 (1907) (Harlan, J., dissenting); *Hurtado v. California*, 110 U.S. 516, 538-58 (1884) (Harlan, J., dissenting). Harlan's tenure on the Court overlapped with that of Justice (later Chief Justice) Charles Evans Hughes, whose landmark majority opinions in *Near v. Minnesota*, 283 U.S. 697, 701-38 (1931); *Brown v. Mississippi*, 297 U.S. 278, 279-87 (1936); *De Jonge v. Oregon*, 299 U.S. 353, 356-65 (1937); and *Lovell v. Griffin*, 303 U.S. 444, 447-53 (1938), elevated the civil liberties perspective from a dissenting point of view to an authoritative interpretation of the Constitution. Hughes left the Court (later to return) the same year that Justice Louis Brandeis joined it. Brandeis's magisterial opinions in cases such as *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring), and *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting), did much to enhance the American legal culture's regard for human rights. Brandeis, in turn, served with the First Amendment's foremost champion on the Court, Justice Hugo Black, whose tenure overlapped with that of Justices Brennan and Marshall. Some might contend that Justices Stevens and Blackmun of the contemporary Court deserve to be called civil libertarians. Compared to their brethren, these two Justices have been relatively receptive to civil liberties claims, but not with the same consistency, range, devotion, or vision that characterized the work of the Justices mentioned above. Concerning the rights of the accused, Justice Blackmun has often read the provisions of the Bill of Rights narrowly. *See, e.g.*, *California v. Acevedo*, 111 S. Ct. 1982, 1984-91 (1991) (upholding warrantless search of container in automobile over Marshall's dissent); *Oregon v. Hass*, 420 U.S. 714, 714-24 (1975) (permitting evidence obtained in violation of the requirements of *Miranda v. Arizona* to be used for impeachment purposes, over dissents by Brennan and Marshall). Justice Stevens has frequently taken a narrow view of the freedom of speech. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 436-39 (1989) (Stevens, J., dissenting) (characterizing flag burning as conduct rather than protected expression); *Meese v. Keene*, 481 U.S. 465, 467-85 (1987) (upholding the authority of the United States Government to classify certain films of foreign origin as "political propaganda" for the purpose of imposing registration and labelling requirements); *FCC v. Pacifica Found.*, 438 U.S. 726, 728-52 (1978) (upholding FCC order prohibiting "indecent" broadcast). On civil liberties issues, the opinions of Justices Blackmun and Stevens tend to be qualified and situation-specific; their rhetoric tends to be restrained. They are judges who give civil liberties claims careful and sympathetic consideration, but they are not forceful advocates of the civil liberties perspective in the way that Justices Harlan, Hughes, Brandeis, Black, Brennan, and Marshall (as well as several others) were.

ging divisions in the conservative philosophy of constitutional interpretation? On many issues, including some of the most politically divisive and intellectually difficult, there is every reason to expect the new conservative Court to rule decisively and dramatically, unhampered by dissenting voices or divergent rationales. Conservatives on the Court are likely to agree on narrow readings of the Fourth,⁶ Eighth,⁷ and Ninth Amendments,⁸ and on an expansive reading of the Fourteenth Amendment regarding the issue of affirmative action.⁹ There is a distinct possibility that the conservative Justices may achieve a unity of understanding in favor of a broad reading of the Tenth Amendment.¹⁰

One can be much less confident in predicting what the triumph of conservatism portends for the First Amendment, particularly the clauses that guarantee the freedoms of speech, press, and assembly. For there are tensions in conservative thought that have important implications for the various rights of free expression. Some of those tensions are revealed in the way six prominent, unusually intelligent judicial conservatives, two on the Court of Appeals for the Seventh Circuit and four on the Supreme Court, grappled with the seemingly trivial yet philosophically challenging and doctrinally complex question of whether a state's prohibition of public nudity can be enforced against topless dancing performed before a paying, willing, and forewarned audience discreetly assembled.

II. THE FACTS

Indiana's public indecency statute makes it a misdemeanor to appear in a public place knowingly or intentionally "in a state of

6. *See, e.g.*, *California v. Hodari D.*, 111 S. Ct. 1547 (1991) (establishing a restrictive definition of "seizure"); *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (holding that random "consensual" bus searches are constitutional).

7. *See, e.g.*, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (holding that life sentence for possession of cocaine was not cruel and unusual punishment); *Tison v. Arizona*, 481 U.S. 137 (1987) (holding that Eighth Amendment did not prohibit death penalty for participation in felony resulting in murder).

8. *See, e.g.*, *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) (holding that various restrictions on the availability of abortions did not violate the Constitution); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that sodomy statute did not violate constitutional rights).

9. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding affirmative action plan unconstitutional under Equal Protection Clause).

10. *See, e.g.*, *South Carolina v. Baker*, 485 U.S. 505, 528 (1988) (Scalia, J., concurring) (arguing for broad constitutional protection of states' rights); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580-89 (1985) (O'Connor, J., dissenting) (arguing for broad constitutional protection of states' rights).

nudity.”¹¹ The statute contains a detailed definition of “nudity”:

“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 covered male genitals in a discernibly turgid state.¹²

The law forbids not only common forms of public indecency such as streaking, mooning, and lewd exhibitionism, but also by its terms appears to prohibit a woman from appearing in public in a see-through blouse. Neither the statute nor the Indiana case law specifies what a fully clothed male must do to avoid criminal liability should his genitals become discernibly turgid in a public place. Would he satisfy the mens rea element of the crime by remaining in the public place, or would it be a defense that he tried his best to forestall, and indeed was distressed by, his physiological reaction?

The Indiana Supreme Court declined several opportunities to construe the statute narrowly to avoid possible constitutional problems. *State v. Baysinger*¹³ reversed a lower court determination that the public indecency statute was unconstitutionally vague and overbroad.¹⁴ Explicitly rejecting the course taken by its counterparts in Arizona and Oregon, the Indiana Supreme Court refused to define public place “to exclude places where persons willingly enter.”¹⁵ Instead, the court interpreted the prohibition on public nudity to extend to “‘any place where the public is invited and are free to go upon special or implied invitation—a place available to all or a certain segment of the public.’”¹⁶ In the same decision, the justices acknowledged that some forms of public nudity within the literal reach of the statute, such as in a play or ballet, might enjoy First Amendment protection.¹⁷ Instead of producing a limiting construction of the public indecency law to take account of this difficulty, however, the

11. IND. CODE § 35-45-4-1(a) (1985).

12. *Id.* § 35-45-4-1(b).

13. 397 N.E.2d 580 (Ind. 1979), *appeal dismissed sub nom.* Clark v. Indiana, 446 U.S. 931, *and appeal dismissed sub nom.* Dove v. Indiana, 449 U.S. 806 (1980).

14. *Id.* at 587.

15. *Id.* at 585.

16. *Id.* at 583 (quoting Peachey v. Boswell, 167 N.E.2d 48, 56-57 (Ind. 1960)).

17. *Id.* at 586.

court simply concluded that the possibility of unconstitutional applications of the law did not render it substantially overbroad in violation of the First Amendment.¹⁸

The case of *Erhardt v. State*¹⁹ presented another opportunity to narrow the statute. The defendant was convicted for a dance performance she gave while competing with seven other women in the Miss Erotica of Fort Wayne contest held at the Cinema Blue Theatre.²⁰ The event was held before a paying audience and consisted of a question-and-answer session, a bathing suit contest, and a dance competition.²¹ During the second of the two songs to which she danced, the defendant removed her negligée and panties and "completed her performance wearing a g-string and scotch tape criss-crossed over her nipples."²² The Indiana Court of Appeals dismissed the prosecution, holding that "nonobscene nude dancing performed in an enclosed theatre for the entertainment of paying spectators, all as occurred here, is presumptively protected as expression under the First Amendment."²³ The Indiana Supreme Court reversed, however, and reinstated the conviction, endorsing a dissent in the court below which concluded that the defendant's conduct fell within the statute's prohibition and that she had waived her right to raise a constitutional objection to her conviction.²⁴ Because the defendant clearly had raised the issue of statutory interpretation, the Court necessarily ruled that Indiana's public indecency law extends to a nonobscene dance in a theatre before a paying audience performed with the minimal amount of clothing with which the defendant was adorned.

Against the background of these state supreme court decisions, two actions were filed in federal court seeking to enjoin the State of Indiana from enforcing its public indecency law against nude dancing performances in a bar and in an adult bookstore.²⁵

18. *Id.* at 587.

19. 463 N.E.2d 1121 (Ind. Ct. App.), *rev'd*, 468 N.E.2d 224 (Ind. 1984).

20. *Id.* at 1122.

21. *Id.*

22. *Id.*

23. *Id.* at 1126.

24. *Erhardt v. State*, 468 N.E.2d 224, 225 (Ind. 1984).

25. *Glen Theatre, Inc. v. Civil City of S. Bend*, 726 F. Supp. 728 (N.D. Ind. 1985), *rev'd sub nom.* *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), *and on remand*, *Miller v. Civil City of S. Bend*, 695 F. Supp. 414 (N.D. Ind. 1988). The cases were consolidated, along with a third case, *Diamond v. Civil City of South Bend*, Civ. No. S85-722 (N.D. Ind. 1985), which was not appealed to the United States Supreme Court.

The Kitty Kat Lounge and its dancer, Darlene Miller, claimed a First Amendment right to present nude go-go dancing on a stage to music from a juke box in an enclosed setting in which alcoholic beverages were being sold.²⁶ Ms. Miller was not paid a set wage for her performances but rather received a 100% commission on the first sixty dollars in drink sales during her performance.²⁷ She described her activity as "just entertaining, just dancing."²⁸ Only one of the four dances she performed was choreographed.²⁹ The district court found that the "avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later,"³⁰ and that "Ms. Miller wants to dance nude because she believes she would make more money doing so."³¹ The state conceded that Ms. Miller's dance performances were not obscene under prevailing constitutional standards.³²

An adult bookstore and entertainment center, Glen Theatre, claimed a constitutional right to present live nude dancing in an enclosed setting in which books were sold and films were shown.³³ The dancers performed behind glass panels and customers could view them by sitting in a booth and inserting coins in a timing mechanism.³⁴ The plaintiff sought to enjoin prosecution for nude dances scheduled to be performed by Ms. Gayle Ann Marie Sutro, an experienced entertainer who had performed nationwide and who also could be seen in a film showing in the area.³⁵ The district court found that "Sutro is a professional actress, stunt woman and ecdysiast . . . and has danced, modeled and acted professionally for more than fifteen years and is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild and AFTRA [the American Federation of Television

26. *Glen Theatre, Inc. v. Civil City of S. Bend*, 695 F. Supp. 414, 420 (N.D. Ind. 1988), *rev'd sub nom. Miller v. Civil City of S. Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd*, 904 F.2d 1081 (7th Cir. 1990) (en banc), *and rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

27. *Id.*

28. *Id.*

29. *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1091 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

30. *Glen Theatre*, 695 F. Supp. at 420.

31. *Id.*

32. *Miller v. Civil City of S. Bend*, 887 F.2d 826, 829 n.3 (7th Cir. 1989), *rev'd*, 904 F.2d 1081 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

33. *Glen Theatre*, 695 F. Supp. at 415, 420.

34. *Id.* at 419.

35. *Id.* at 420.

and Radio Artists]."³⁶ Ms. Sutro's affidavit stated that her dances were choreographed and were "an attempt to communicate as well as to entertain."³⁷ The State conceded that the dances Ms. Sutro was scheduled to perform were not legally obscene.³⁸

III. THE BACKGROUND

The First Amendment issue posed by the prohibition of topless dancing reached the United States Supreme Court at an opportune time. The ascendancy of legal conservatism generated by a decade of centrally managed, ideologically screened appointments to the federal bench has given renewed impetus to the claim that the enforcement of morals is a legitimate function of law. The political mobilization of moralists over issues such as abortion, obscenity, and homosexuality has had a carry-over effect that has helped to focus public attention on the full spectrum of sexual practices and attitudes. Some prominent feminists have challenged the premises of libertarianism from the left, claiming that many forms of erotic display and depiction cause serious harm to women.³⁹ Recently, traditional liberals were provoked and energized when conservative efforts to enforce morality strayed outside the confines of sleazy settings and extended to critically acclaimed museum exhibitions and government funding for avant-garde theatre.⁴⁰

In intellectual as well as political circles, the regulation of topless dancing raises issues that resonate. One of the best articulated, most intelligent debates of modern legal scholarship is that between Lord Patrick Devlin⁴¹ and Professor H.L.A. Hart⁴²

36. *Id.* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 718 (Philip Babcock Grove ed., 1986) defines an "ecdysiast" as a "stripteaser" and "ecdysis" as "the act of molting or shedding an outer cuticular layer (as in insects and crustaceans)."

37. *Glen Theatre*, 695 F. Supp. at 420.

38. *Miller v. Civil City of S. Bend*, 887 F.2d 826, 829 n.3 (7th Cir. 1989), *rev'd*, 904 F.2d 1081 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

39. The feminist critique of pornography and the political action engendered by that critique are chronicled in DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1989).

40. The controversy surrounding museum exhibitions of the disturbing, graphic photography of Robert Mapplethorpe and the effort by Senator Jesse Helms to restrict federal funding for the arts is described in Stephen F. Rohde, *Art of the State: Congressional Censorship of the National Endowment for the Arts*, 12 HASTINGS COMM. & ENT. L.J. 353, 358-73, 393-94 (1990).

41. See generally PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (arguing that laws must embody morals if society is to survive).

42. See generally H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963) (arguing against

regarding the proper role of law in the enforcement of morality. Among the most balanced, comprehensive, and rigorous treatises of recent times is Professor Joel Feinberg's four-volume *The Moral Limits of the Criminal Law*,⁴³ which discusses the enforcement of morals in the context of an elaborate, careful taxonomy of the various interests served by the criminal law. The high quality of the Hart-Devlin debate and the spotlight cast on the issue of the regulation of homosexuality by the Supreme Court's decision in *Bowers v. Hardwick*⁴⁴ have spurred a large number of legal scholars and philosophers to explore the justifications for and proper limits on the enforcement of morality.⁴⁵ Seldom has the Court addressed a constitutional question with a more impressive—both in quantity and quality—body of scholarship upon which to draw.

The decision in *Bowers* adds interest to the Court's confrontation with the constitutional claims of topless dancers for another reason. Despite the difficulty of the issue and the sophistication of the academic literature, in *Bowers* the Justices did not produce thoughtful opinions on the question whether the enforcement of morals is a legitimate basis for limiting individual liberty. The majority opinion, upholding state authority to prohibit homosexual relations, emphasized the absence of a specific textual basis for the claim that sexual freedom enjoys even *prima facie* con-

legal enforcement of morality); H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967) (arguing that society would not disintegrate absent the enforcement of a common morality).

43. JOEL FEINBERG, HARMLESS WRONGDOING (1988); JOEL FEINBERG, HARM TO SELF (1986); JOEL FEINBERG, OFFENSE TO OTHERS (1985); JOEL FEINBERG, HARM TO OTHERS (1984).

44. 478 U.S. 186 (1986).

45. See, e.g., WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 188-228 (1976) (criticizing the Court for underenforcing morality); ROBERT H. BORK, THE TEMPTING OF AMERICA 241-50 (1990) (discussing inevitability of legislating morals); HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY (1969) (arguing for some censorship of obscenity); FEINBERG, HARMLESS WRONGDOING, *supra* note 43, at 39-175 (arguing against strict legal moralism); BASIL MITCHELL, LAW, MORALITY, AND RELIGION IN A SECULAR SOCIETY (1967) (discussing Hart and Devlin); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966) (criticizing the enforcement of the moral consensus); Raymond D. Gastil, *The Moral Right of the Majority to Restrict Obscenity and Pornography Through Law*, 86 ETHICS 231 (1976) (arguing that a majority has a moral right to regulate obscenity and pornography); Graham Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962) (criticizing Lord Devlin's theories of enforcing morals); C.L. Ten, *Enforcing a Shared Morality*, 82 ETHICS 321 (1972) (arguing against enforcing a shared morality). Two of the classic works of nineteenth century political theory, John Stuart Mill's ON LIBERTY (1859) and James Fitzjames Stephen's LIBERTY, EQUALITY, FRATERNITY (1873), deal in large part with the enforcement of morals.

stitutional protection.⁴⁶ The dominant theme of the opinion was the impropriety of recognizing novel unenumerated rights. By contrast, the claim in *Glen Theatre* that morals enforcement is an inappropriate basis for limiting textually recognized liberties presented the Court with an occasion to think harder about the issues raised by the Hart-Devlin debate. The topless dancers claimed to be exercising an enumerated constitutional right: they invoked not the Ninth Amendment but the First.

In this regard also the topless dancing case reached the Supreme Court at an interesting time. One of the questions raised by the emerging conservative dominance on the Court is whether the freedom of speech will continue to occupy a special place among constitutional liberties, and if so, what form that special regard will take. The Court has long since rejected the absolutist claim that *no* restrictions on speech are permissible, but has nonetheless developed an elaborate set of doctrines that subjects most efforts to regulate speech to unusually demanding standards of justification.

The famous clear-and-present-danger test is an example. Under the modern formulation of the test, adopted in *Brandenburg v. Ohio*⁴⁷ in 1969 and followed ever since,⁴⁸ speech cannot be punished on the ground that it may, or even probably will, cause serious harm in the indefinite future. Only advocacy that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" can be the subject of sanctions.⁴⁹ This harm principle is restrictive. It reflects the high place of the freedom of speech in the constitutional order, and a distrust of regulatory authority grounded in claims of harm that are necessarily speculative due to the diffuse character of the harm or the contingent quality of the causal connection. A constitutional jurisprudence that prized speech less than has been traditional in our legal culture, or that distrusted regulatory authority less, would permit justifications for the regulation of speech based on plausible scenarios of delayed or diffuse harm of the sort invoked by moralists and feminists alike. Some conservative legal scholars have argued specifically that speech can be restricted when it causes moral as well as material harm, that

46. *Bowers*, 478 U.S. at 191, 195.

47. 395 U.S. 444 (1969) (per curiam).

48. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam).

49. *Brandenburg*, 395 U.S. at 447 (footnote omitted).

the First Amendment does not create an exception to the general principle that government has constitutional authority to enforce morality by means of the criminal law.⁵⁰

The timing of the *Glen Theatre* litigation helped to sharpen the issues raised by the case for yet another reason. Perhaps the most hotly debated contemporary free speech dispute concerns the wisdom and constitutionality of efforts by university officials, and occasionally by state legislatures, to regulate speech that is perceived by various groups, particularly women and members of racial minority groups, to denigrate, intimidate, or silence their members.⁵¹ On this issue, some conservatives challenge on principle the authority of officials to enforce a morality of personal respect, even as applied to particular instances of speech that are concededly intemperate, degrading, crude, and devoid of any kind of rational exposition.⁵² The First Amendment is indivisible, these conservatives say, and hate-speech codes inevitably will be applied indiscriminately. Liberals, on the other hand, seem more comfortable with the enforcement of morality in this context, and less concerned about the expansive potential of the censorial mentality.⁵³ Can a principled conservative approve

50. See, e.g., BERNIS, *supra* note 45, at 188-228; BORK, *supra* note 45, at 241-50.

51. See Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95 (arguing that mutual communication is the best way to eliminate racial and sexual biases; therefore, all speech expressing opinions on these issues should be allowed); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 437 (supporting the regulation of racial epithets in certain situations not limited to those involving face-to-face encounters); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991) (concluding that the reasons typically given for prohibiting hate speech are not totally persuasive either in educational communities or in less specialized settings); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990) (outlining current approaches to First Amendment concerns about several types of speech and conduct and attempting to provide permissible controls of several forms of speech); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 (responding to Professor Lawrence's article, *supra*, and addressing the general issues involved in regulating campus hate speech).

52. See, e.g., George F. Will, *Liberal Censorship*, WASH. POST, Nov. 5, 1989, at C7.

53. See, e.g., Lawrence, *supra* note 51, at 472-76; Smolla, *supra* note 51, at 206-09. Few liberals who support hate-speech regulation would admit that they seek to enforce morality as an end in itself. Instead, they would describe this type of regulation as designed to prevent the material harm of intimidation of persons who are, as individuals or members of identifiable groups, targeted by the hate speech. But conservative moralists also claim to be victimized when their moral precepts are flouted in public, causing them personal distress and a diminished ability to inculcate in their children the moral values they hold dear. The harms of intimidation and silencing that proponents of hate speech regulation invoke would never satisfy the *Brandenburg* test, see *supra* text accompanying note 49,

the enforcement of morals in the context of erotic dancing but not in the context of group vilification? Can a principled liberal argue that topless dancing is protected by the First Amendment but not the shouting of racial epithets? Important differences between the two categories of speech regulation may exist—hate speech ordinarily is not confined to settings in which every member of the audience has made a choice to receive the message, but hate speech also seems more political in character—but the response of many conservatives to the hate speech issue at least suggests that they do not invariably prefer a narrow interpretation of the First Amendment and do not always take a broad view of the state's power to enforce morality.

As the hate speech issue illustrates, the question of the proper scope of the state's power to enforce morality often is raised in conjunction with the question of what counts as "speech" in the constitutional sense. The ascendancy of conservatives on the federal bench may yield a conception of speech different from that which the courts have developed over the last fifty years. Just as in most contexts conservatives tend to be more concerned with diffuse harms to the moral fabric than are persons of other political persuasions, conservatives tend to emphasize qualities such as excellence, prudence, and civility.⁵⁴ The more visceral, rambunctious, or flamboyant modes of communication may strike some conservative judges as outside the ambit of First Amendment concern, and thus not entitled to whatever protective doctrines govern disputes over genuine "speech." In an even more restrictive vein, Robert Bork once claimed that the First Amendment covers only explicitly political speech, that scientific communication and artistic expression enjoy no constitutional protection whatsoever.⁵⁵ That position was ridiculed during Judge Bork's confirmation hearings; Bork himself did not attempt to defend it before the Senate Judiciary Committee, and none of his supporters came to his rescue on this point.⁵⁶ Yet the impli-

for lack of both specificity and temporal imminence. Recall that *Brandenburg* itself involved explicitly racist and antisemitic speech, coupled with threats of "revengeance," though the case was decided on the overbreadth of the statute. *Brandenburg*, 395 U.S. at 446, 448.

54. See, e.g., CLINTON ROSSITER, *CONSERVATISM IN AMERICA* 26 (1962) (defining a good individual as one who cultivates these virtues).

55. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 27-28 (1971).

56. SENATE COMM. OF THE JUDICIARY, *NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT*, S. EXEC. REP. NO. 2, 100th Cong., 1st Sess. 269-77 (1987).

cations of applying First Amendment principles in the realm of artistic expression are not easy to contain. If works of art, presumably including visual art, qualify for constitutional protection, why not artistic dances? Is a painting of a nude displayed in a museum more entitled to consideration under the First Amendment than a nude scene in a ballet or opera? And if a ballerina or a diva can legally disrobe, why not a go-go dancer?

A natural response would be to distinguish varieties of purported artistic expression on the basis of such factors as the presumed motivation of the dancers and their voyeurs and the degree to which the activity under review requires training and skill. Perhaps conservatives who value excellence are more willing than others to make these kinds of judgments, but they are judgments that are bound to turn heavily on the personal values of those who do the judging. In recent years, a central tenet of conservative constitutional thought has been the paramount responsibility of judges not to render decisions that depend heavily on their personal values.⁵⁷ This tension between the quest for excellence and the fear of judicial subjectivity helps to make the issue of topless dancing a good test of judicial conservatism.

The conservative critique of judicial subjectivity is implicated in still another way. One of the complaints raised by conservatives against the liberal constitutional doctrines developed during the 1960's and 1970's was that the Justices indulged in essentially "legislative" modes of reasoning, reaching decisions not by enforcing basic, time-honored principles but rather by inventing and applying elaborate, multifactor tests that bore the stamp of subjectivity and arbitrariness.⁵⁸ The multiple levels of scrutiny that came to be a familiar feature of equal protection doctrine were cited by some conservatives as an example of judicial reasoning run amok.⁵⁹ So too was the three-part test introduced in *Lemon v. Kurtzman*⁶⁰ for identifying impermissible establish-

57. See, e.g., BORK, *supra* note 45, at 251-59; RUSSELL KIRK, *THE CONSERVATIVE CONSTITUTION* 99-114 (1990); Lino A. Graglia, *How the Constitution Disappeared*, in *INTERPRETING THE CONSTITUTION* 35, 35-50 (Jack N. Rakove ed., 1990); William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 705-06 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 864 (1989).

58. See, e.g., Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 *HARV. L. REV.* 143, 144, 149, 154 (1964); Robert F. Nagel, *The Formulaic Constitution*, 84 *MICH. L. REV.* 165, 165-69, 180-82 (1985).

59. See, e.g., Nagel, *supra* note 58, at 166 n.6.

60. 403 U.S. 602, 612-13 (1971).

ments of religion.⁶¹ Doctrinal complexity was seen by conservatives as an important indicator of judicial illegitimacy. In view of the troubling analogies that haunt the prohibition of topless dancing, conservatives addressing the issue faced the challenge of giving reasons and drawing lines without producing doctrines as complex and arbitrary as the ones they had spent the last decade criticizing on just that account.

Finally, a fascinating aspect of the background to *Barnes v. Glen Theatre, Inc.*⁶² is that the most carefully reasoned Supreme Court precedent regarding the First Amendment and the enforcement of morality is *Cohen v. California*,⁶³ in which Justice John Marshall Harlan, the quintessential judicial conservative, wrote an opinion for the majority holding unconstitutional a state's prohibition on the use of profane words in public. Harlan's opinion relied heavily on the conservative virtue of self-reliance, claiming that "each of us," not the government, has the responsibility to develop and abide by norms of permissible language use.⁶⁴ He observed that the defendant's employment of a four letter word was neither legally obscene nor forced upon a captive audience,⁶⁵ characteristics shared by the topless dances at issue in *Glen Theatre*. That a judge so conservative and so steeped in civility as Justice Harlan should have found in the First Amendment a bar against the enforcement of a morality of language illustrates how difficult it is to identify an orthodoxy of conservative thought regarding the freedom of speech.

IV. THE OPINIONS

The *Glen Theatre* litigation caused judges at all levels of the federal judiciary to grapple with the various First Amendment issues raised by Indiana's prohibition of nude dancing. Twelve different judges published opinions. Although some other opinions are worthy of study, particularly those written by Judges Flaum and Coffey in the Seventh Circuit Court of Appeals,⁶⁶ I shall examine the opinions written by six judges who have achieved

61. See, e.g., Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 825-31 (1984); Nagel, *supra* note 58, at 166 n.4.

62. 111 S. Ct. 2456 (1991).

63. 403 U.S. 15 (1971).

64. *Id.* at 24.

65. *Id.* at 20-22.

66. See *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1081-89 (7th Cir. 1990) (Flaum, J.) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *id.* at 1104-20 (Coffey, J., dissenting).

special prominence as contributors to the conservative philosophy of constitutional interpretation. A close look at how each of these judges went about resolving this difficult case may enrich our understanding regarding what the ascendancy of legal conservatism portends for the freedom of speech.

A. *Richard Posner*

In the Seventh Circuit, Judges Richard Posner and Frank Easterbrook, longtime colleagues on the University of Chicago Law School faculty and leading lights of the law-and-economics movement,⁶⁷ engaged in a debate of a quality one rarely encounters in the pages of the law reports. Posner and Easterbrook share much more than an institutional affiliation and a taste for economic analysis. Both judges command forensic skills of the first order. In addition, judging by the erudition displayed in their opinions in the topless dancing case,⁶⁸ both men are deeply interested in and knowledgeable about the performing and visual arts. Despite their many affinities, the two judges sharply and passionately disagreed over whether striptease dancing is "speech" within the meaning of the First Amendment.

Judge Posner focused his analysis on the claim, accepted by the district court,⁶⁹ that a striptease dance is "conduct" rather than "expressive activity" and hence outside the ambit of First Amendment concern.⁷⁰ Posner called this conclusion "indefensible and a threat to artistic freedom."⁷¹ Perhaps reflecting the conservative economist's unwillingness to employ external criteria to ascribe differential value to personal preferences, Posner was at pains in his opinion to avoid letting class bias or aesthetic evaluation influence his assessment of the legal status of the dancing at issue. He equated for constitutional purposes Darlene Miller's nude dancing in the Kitty Kat Lounge in South Bend with the nude (under Indiana's definition) performance of the

67. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

68. *Miller*, 904 F.2d 1081.

69. See *Glen Theatre, Inc. v. Civil City of S. Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988), *rev'd sub nom. Miller v. Civil City of S. Bend*, 887 F.2d 826 (7th Cir. 1989), *rev'd*, 904 F.2d 1081 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

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

71. *Id.* at 1090.

Dance of the Seven Veils in a recent production of the opera *Salome* at the Chicago Lyric Opera.⁷²

One might suppose that a defining feature of legal conservatism would be the willingness to notice some of the contextual differences between nude dancing in bars and in classical ballet performances. Conservatives pride themselves on their sensitivity to social context and their distrust of abstractions that lump together divergent, distinctive phenomena.⁷³ Judge Posner duly noted the elements of barroom striptease that might cast doubt on its claim to First Amendment protection:

Because the dancers at the Kitty Kat Lounge are not professional dancers, because three of the four dances were not choreographed, because the music to which they dance is canned, and because the dancers sell drinks to the customers afterward, it is tempting to suppose that the "expressive" elements of their "performance" are phony—that the dance and the music are figleaves to conceal the absence of figleaves.⁷⁴

But he was not persuaded. He recounted the long and varied history of striptease dancing from the satyr plays of ancient Greece to the scandalous performances of Sally Rand, Gypsy Rose Lee, and Isadora Duncan.⁷⁵ He found in this history a refutation of the claim that striptease has more the quality of sexual encounter than artistic statement:

The striptease was not invented in order to place a cultural patina on displays of naked women. Of course, there would be no female stripteases without a prurient interest in the female body; but that is just to say that there would be no erotic art without Eros. Though there is no striptease without some stripping—in today's moral climate, without a great deal of stripping—the dancing and the music are not distractions from the main theme, patched on to fool the censor; they are what make a given female body expressive of a specifically sexual emotion. The striptease is the ensemble of the music, the dance, the disrobing, and the nude end state; it is more erotic than

72. *Id.* at 1103.

73. *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 52-55 (J.G.A. Pocock ed., 1987) (1790); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 54-70 (1960); MICHAEL OAKESHOTT, *On Being Conservative*, in RATIONALISM IN POLITICS AND OTHER ESSAYS 168-96 (1967).

74. *Miller*, 904 F.2d at 1091 (Posner, J., concurring).

75. *Id.* at 1089-90.

any of its components; and what makes it more erotic than the body itself, or the disrobing itself, is, precisely, that it is *expressive* of erotic emotion.⁷⁶

Judge Posner specified what striptease dancing expresses that mere nudity does not:

[N]udity and disrobing are not *invariably* associated with sex. The goal of the striptease—a goal to which the dancing is indispensable—is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex.⁷⁷

Having established to his satisfaction that striptease makes a statement, Posner considered the argument that such dancing “is not the *type* of expression that the First Amendment protects, because it is not the expression of ideas or opinions.”⁷⁸ He concluded that such a limitation on the scope of the First Amendment would have disturbing implications for the arts:

If the striptease dancing at the Kitty Kat Lounge is not expression, Mozart’s piano concertos and Balanchine’s most famous ballets are not expression. This is not to suggest that striptease dancing is indistinguishable from these other forms of expression. But they cannot be distinguished on the ground that a piano concerto and a (nonpantomimic) ballet express ideas and a striptease expresses emotion. If the concert and the ballet have meaning—and I do not doubt that there is a meaningful sense in which they do—so has the striptease.⁷⁹

Judge Posner reinforced the point with a detailed analysis of Titian’s painting of a voluptuous nude, *Venus with a Mirror*, on permanent display in the National Gallery of Art:

We might try to close the gap between the intellectual and the emotional by saying that the painting expresses a *concept* of beauty, of opulence, of balance, and so forth. But among the “so forth” are feminine sexuality and desirability, and if these

76. *Id.* at 1091-92.

77. *Id.* at 1091.

78. *Id.* at 1093.

79. *Id.*

are "concepts" in *Venus with a Mirror* they are "concepts" in a striptease (or in a *Playboy* pin-up) in just the same sense. The striptease version is coarse, unsubtle, "artless," even degraded, but the two works are "conceptual" to the same degree.⁸⁰

But even if a limiting principle based on the difference between intellectual and emotional appeal might seem troubling on close analysis, the nagging objection remains that the First Amendment is somehow debased when interpreted to protect the raw sexuality of the barroom striptease. Judge Posner confronted this objection head-on:

One can argue from the text and background of the First Amendment that the constitutional protection of freedom of speech is limited to the discursive and the didactic, that non-didactic art should be totally excluded, or at the very least that low-grade erotic entertainment should be—the Founding Fathers would writhe in their graves if they knew that the nude dancers of the Kitty Kat Lounge could enwrap themselves with the First Amendment.⁸¹

For Judge Posner, however, the difficult task of elaborating a nondiscriminatory First Amendment could not be avoided by resort to originalism, especially not by employing a standard so unprincipled as whether the framers "would writhe in their graves":

[O]ne can reply that such arguments merely demonstrate the inadequacy of original understanding as a guide to constitutional interpretation; that they would if accepted change the Constitution from a living document into a petrified reminder of the limits of human foresight; that a conception of free speech which privileges the burning of the American flag but permits government to ban performances of twelve-tone music is more absurd than one that protects flag burning, twelve-tone music, and striptease; and that if the purpose and scope of the First Amendment's speech and press clauses are exhausted in the protection of political speech, because freedom of political speech is all that is necessary to preserve our democratic political system, this implies the exclusion from the amendment's protections not only of all art (other than the

80. *Id.* at 1094.

81. *Id.* at 1095.

political) but also of science. For one can have democracy without science, just as one can have democracy without art.⁸²

To fail in the effort to place striptease dancing outside the ambit of First Amendment concern is not necessarily to conclude that such dancing is constitutionally immune from regulation. The State of Indiana argued that even if the striptease is speech in the First Amendment sense, it can be regulated under the state's power to enforce morality.⁸³ Judge Posner rejected this contention. His analysis reveals why he had viewed as the central issue in the case, and had explored at such length, the question whether nude dancing is the type of expression with which the First Amendment is concerned at all.

Posner rejected the proposition that as a general matter the Constitution forbids government from attempting to enforce morality. He put the point forcefully:

I do not argue that legislation, to be valid, must have some empirical basis or serve some utilitarian end. The modern state is not forbidden to interfere with transactions between consenting, competent adults merely because it is unable to show that third parties are harmed. The state is free to embody in legislation the moral opinions of its dominant groups, or for that matter of any group influential with the legislature—is free, therefore, to make hostility to nonmarital sex, disgust at public displays of nudity, revulsion at vulgar erotic entertainment, and embarrassment at public displays of nudity premises of state action even though it is difficult to ground these moralistic emotions in pragmatic social concerns.⁸⁴

Just as the Fourteenth Amendment (or the Ninth Amendment) does not enact Herbert Spencer's *Social Statics*,⁸⁵ neither does it enact John Stuart Mill's *On Liberty* or H.L.A. Hart's *Law, Liberty, and Morality*.

In Judge Posner's view, however, the balance between individual freedom and state authority shifts once the First Amendment becomes implicated:

[T]he state is free to act upon the moral preferences of the majority only up to the limits set by the federal Constitution.

82. *Id.* at 1096 (citation omitted).

83. *Id.* at 1102.

84. *Id.* at 1104.

85. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

Those limits are not the sky when the activity restricted by state legislation is expressive activity in a sense that I believe encompasses erotic dance performances in general and the striptease in particular.⁸⁶

Posner did not deny Indiana all power to regulate nude dancing. He surmised that special social harms might be associated with the barroom setting, as well as special regulatory authority under the Twenty-First Amendment.⁸⁷ But he read the First Amendment to prohibit a state from enforcing in the name of morality a comprehensive prohibition on striptease dancing without regard to setting or proven material harm.

Judge Posner did not explain why he considered the enforcement of morality an insufficient basis for limiting First Amendment rights. In contrast to his patient exploration of the proper scope of First Amendment concern, his rejection of the claim that speech can be regulated in order to serve moral values was conclusory. He did not say whether he considered moral justifications for limiting speech too inherently expansive to be reconciled with the purposes of the First Amendment, or whether he saw in the freedom of speech a commitment to open-ended moral as well as political evolution.⁸⁸ It is a weakness of his long, erudite, and thoughtful opinion that he did not treat Indiana's claim to enforce its morality even against First Amendment activities with the same care that he treated the state's claim that nude dancing is not speech in the First Amendment sense.

One might ask what is distinctively conservative about the Posner opinion. The proposition that drives his analysis is egalitarian in spirit: vulgar forms of erotic entertainment cannot be made illegal when much of what we call art is also, in essence, erotic entertainment for the better educated classes. Egalitarianism is not a value one usually associates with conservatism.⁸⁹ A close reading of Judge Posner's opinion, however, reveals that

86. *Miller*, 904 F.2d at 1104 (Posner, J., concurring).

87. *Id.* at 1102; see also *California v. LaRue*, 409 U.S. 109, 114-16 (1972). The Twenty-first Amendment, which ended Prohibition, "has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *Id.* at 114.

88. For an argument about the implications of such a commitment to an open process for determining the public morality regarding pornography, see T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 542-50 (1979).

89. For a conservative meditation on the costs of equality, see ROBERT NISBET, *TWILIGHT OF AUTHORITY* 194-229 (1975). See also HAYEK, *supra* note 73, at 85-102 (arguing that equality of rules is the only kind of equality conducive to liberty).

his concern for equal treatment in the regulation of erotica derives from premises that are indeed conservative.

First, conservative economists are generally skeptical about the capacity of central planners to make interpersonal comparisons of utility, to decide which products provide the most value to consumers.⁹⁰ These economists are respectful of the divergent preferences of different consumers and hesitant to base public policy on a centralized decision that one product (such as a particular form of erotic entertainment) has more intrinsic value for most persons than another product (such as a different form of erotic entertainment). In this view, preferences revealed in market behavior provide the best test of consumer value. The market for barroom and peep show striptease seems robust and resilient. Consumer preference is not the only factor to be taken into account—there remain serious questions of external harm, for example—but conservative economists consider consumer preference an important starting point for determining social value.⁹¹ Judge Posner no doubt was drawing on his background as a conservative economist when he wrote: “The Constitution does not look down its nose at popular culture even if its framers would have done so.”⁹²

Second, the conservative aversion to judicial subjectivity seems to have played a major role in Judge Posner’s analysis. He was quite willing to make the personal aesthetic judgment that the striptease dances at issue in the case were performed “with vigor but without accomplishment.”⁹³ He opined:

Although much of today’s high culture began as popular entertainment, the likelihood that the videotape of the Kitty Kat stripteases will one day achieve the cultural renown of [Manet’s painting including a nude, *Déjeuner sur l’herbe*, which caused a scandal when first exhibited] is vanishingly close to zero. Anyone who doubts this is carrying relativism and skepticism too far.⁹⁴

90. See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 15 (1962). The locus classicus of this proposition is Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *ECON. J.* 635 (1938). See also KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 9 (2d ed. 1963) (remarking on the difficulty of comparing personal utilities).

91. *Id.*

92. *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1098 (7th Cir. 1990) (en banc) (Posner, J., concurring), *rev’d sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

93. *Id.* at 1091.

94. *Id.* at 1098.

But Judge Posner did not believe that aesthetic judgments, his own or those of other judges, ought to play a role in demarcating the boundaries of the First Amendment:

[A]esthetic quality cannot be the standard that judges use to determine which erotic performances can be forbidden and which cannot be. There are no objective standards of aesthetic quality, and while we allow obscene works to be "redeemed" by "evidence" of aesthetic quality, it hardly follows that we should allow works that are not obscene to be condemned on the basis of evidence suggesting a lack of aesthetic quality.⁹⁵

Third, modern conservatives profess a disdain for paternalism, not only for its inefficiency in economic terms but also for its adverse effect on character.⁹⁶ Paternalism can be seen as a feudal impulse, a practice that engenders passivity, stasis, and hierarchical relationships, and that discourages experimentation and initiative. This view of the paternalism inherent in censorship seems to have informed Judge Posner's view of the topless dancing case:

What kind of people make a career of checking to see whether the covering of a woman's nipples is fully opaque, as the statute requires?⁹⁷

The practical effect of letting judges play art critic and censor would be to enforce conventional notions of "educated taste," and thus to allow highly educated people to consume erotica but to forbid *hoi polloi* to do the same. The robust paternalism and class consciousness that once permitted such a distinction have lost their legitimacy.⁹⁸

As our study of some of the other opinions will show, Judge Posner certainly did not speak for all conservatives when he concluded that striptease dancing enjoys the protection of the First Amendment. His opinion nonetheless represents an effort to bring conservative values to bear on the resolution of the issue.

95. *Id.*

96. *See, e.g.,* CHANDRAN KUKATHAS, HAYEK AND MODERN LIBERALISM 136 (1989) (discussing Hayek's view that liberty is not valuable for the goal it enables one to reach but because of the striving and learning it requires).

97. *Miller*, 904 F.2d at 1100 (Posner, J., concurring).

98. *Id.* at 1098.

B. Frank Easterbrook

Possibly provoked by Judge Posner's analysis, Judge Frank Easterbrook devoted most of his opinion to a call for precisely the kind of line drawing that Posner argued is illegitimate. Easterbrook saw differences of constitutional significance between barroom striptease and nude ballet. He considered the First Amendment to be concerned exclusively with the expression of "ideas," "thoughts," and "messages," not "emotions" as such.⁹⁹ He disputed Judge Posner's contention that the striptease dances at issue conveyed a message of eroticism to barroom and peep show audiences in a manner comparable to the way such a message might be communicated by serious works of art:

Sophisticates go to the museum and see Renoir's *Olympia* or to the opera and see a soprano strip during the Dance of the Seven Veils in Strauss' *Salome*. If the First Amendment protects these expressions, the argument goes, Joe Sixpack is entitled to see naked women gyrate in the pub. Why does this follow? That a dance in *Salome* expresses something does not imply that a dance in JR's Kitty Kat Lounge expresses something, any more than the fact that Tolstoy's *Anna Karenina* was a stinging attack on the Russian social order implies that the scratching of an illiterate is likely to undermine the Tsar.¹⁰⁰

In defense of his refusal to draw lines between various forms of entertainment, Judge Posner had made much of the point that abstract art and nonprogrammatic music have less of an articulable message than a striptease.¹⁰¹ Posner labelled as "philistine" the "notion that all art worthy of the name has a 'message.'" ¹⁰² He could not believe that under the First Amendment "Beethoven's string quartets are entitled to less protection than *Peter and the Wolf*."¹⁰³ Drawing on his own considerable knowledge of the fine arts, Judge Easterbrook responded that for all serious works of art, those in which narrative does not predominate as well those in which it does, there *is* a message in the sense required by the First Amendment:

99. *Id.* at 1125-26 (Easterbrook, J., dissenting).

100. *Id.* at 1125 (citation omitted).

101. *Id.* at 1093-94 (Posner, J., concurring).

102. *Id.* at 1094.

103. *Id.*

Bach's *Mass in B Minor*, Beethoven's *Pastoral (Sixth) Symphony*, Wagner's *Parsifal*, Mahler's *Resurrection (Second) Symphony*, the Beatles' *Sergeant Pepper's Lonely Hearts Club Band*, like other vocal, religious, and program music, tell stories—sometimes sexually explicit ones, as in Orff's *Carmina Burana*, which, if it were not sung in Latin, could not be put on the airwaves. People may fairly dispute whether absolute music, such as LaMonte Young's *Well-Tuned Piano*, communicates thoughts, but surely it embodies them (the right place for the major third, etc.); all that we call music is the product of rational human thought and appeals at least in part to the same faculties in others. . . .

Like mimes, ballets tell stories, often erotic stories, and clothing (or lack of it) may help the tale unfold. No one can miss the sensual message in Stravinsky's *Le Sacre Du Printemps* or the fairy tale in Tchaikovsky's *Nutcracker*. Ballet rarely approaches absolute music in abstraction. Even Balanchine's choreography to Stravinsky's *Agon*, a model of spare movement, does not suppress the contest to which the title refers. People objected to Nijinsky and Isadora Duncan because of the message rather than the medium.¹⁰⁴

Easterbrook found no real message in striptease: "Barroom displays are to ballet as white noise is to music."¹⁰⁵

In contrast to Judge Posner's near hypersensitivity concerning the perils of cultural elitism, Judge Easterbrook seemed almost to relish the opportunity to draw lines, "to distinguish serious art from swill."¹⁰⁶ One might be tempted to read into the Easterbrook opinion a judicial embrace of what some conservatives would call standards of excellence. The opinion is more complicated than that. Judge Easterbrook's ambitious effort to distinguish art from entertainment was at least as much the product of his concern about excessive judicial power as any view he may have about popular culture. He did, in fact, say that he would find the nude scene in the musical *Hair* to fall within the protection of the First Amendment.¹⁰⁷

For Judge Easterbrook, the obligation to interpret the First Amendment requires of a judge the willingness to draw lines, and to do so via the medium of categorical rules. Unless the ambit of First Amendment concern is demarcated with relative

104. *Id.* at 1125 (Easterbrook, J., dissenting) (citation omitted).

105. *Id.* at 1126.

106. *Id.*

107. *Id.* at 1128.

clarity, and demarcated in a way that excludes the all-embracing phenomenon of entertainment, courts would wind up evaluating the reasonableness of all legislative attempts to regulate entertainment. That would be substantive due process reincarnate. Judges can best prevent its recurrence "by insisting on categorical rules." With characteristic certitude, Judge Easterbrook explained his categorical understanding of the First Amendment: "'Conduct' and 'speech' are the principal categories, and observing that distinction is essential if we wish to maintain the boundary between legislative and judicial roles in a democratic society."¹⁰⁸

No doubt referring to the speech-conduct distinction among others, Judge Posner had described the case as presenting "a symphony of sterile dichotomies."¹⁰⁹ Judge Easterbrook, however, offered an unapologetic, and indeed both sophisticated and spirited, defense of his dichotomy:

Any sentient being knows that categories are imperfect. Lawyers are trained to disparage line-drawing by showing that no matter where the line goes you can frame essentially indistinguishable cases on either side. Such a line is nonsensical, comes the *coupe de grace*. The exercise is child's play in the domain of art and entertainment, for "what is art?" is a question unanswered for centuries. . . .

. . . .

Judges who see the many facets of a subject, who know that just as a line cannot bisect a sphere so no one-dimensional rule can partition a multi-dimensional world, also must understand the role lines play in governance and the allocation of functions.¹¹⁰

Easterbrook invoked Holmes in support of this point, and even produced a good imitation of a Holmesian aphorism: "Complex reality mocks rules, yet we must deny ourselves the comfort of requiring the law to match the universe."¹¹¹

Is a preference for categorical rules truly a conservative position? Historically, conservatives have accused liberals of being too doctrinaire, too prone to abstraction, too insensitive to the complexity and ambiguity of the human condition, too inclined to

108. *Id.* at 1130.

109. *Id.* at 1099 (Posner, J., concurring).

110. *Id.* at 1130 (Easterbrook, J., dissenting).

111. *Id.*

prefer logic over tradition.¹¹² Justices Frankfurter, Harlan, and Jackson, the leading conservative Justices of the postwar period, repeatedly criticized their brethren for oversimplifying constitutional issues, for failing to take into account numerous relevant variables.¹¹³ Has the wheel now turned completely?

Judge Easterbrook's call for categorical rules must be understood in the context of the modern conservative hostility to judicial review.¹¹⁴ For Easterbrook, any departure from categorical rules as a mode of legal analysis is likely to expand the power of the judiciary, in the case at hand by expanding the scope of First Amendment coverage. His opinion is replete with warnings about judicial overreaching:

Concern about the limits of *judicial* power, about the authority for an official with life tenure to countermand a decision of the elected legislature, must be at the forefront in every constitutional case. . . .

. . . .
Political society depends on stable lines to govern a world of continuums. Anything else transfers the locus of power.¹¹⁵

Justices Frankfurter, Harlan, and Jackson were also deeply interested in limiting the role of the judiciary, but they believed the way to do that was to take into account the many variables that might bear on a case, reasoning that a judge aware of the complexity of a dispute would define his role narrowly.¹¹⁶ If Judge Easterbrook is representative, perhaps several decades of accumulated frustration over judicial activism have led modern legal conservatives to question that judgment and to opt instead for a more categorical approach to constitutional interpretation.

A second and important example of Judge Easterbrook's reliance on categorical reasoning to limit judicial review is provided

112. See, e.g., MICHAEL OAKESHOTT, *Rationalism and Politics*, in RATIONALISM IN POLITICS AND OTHER ESSAYS, *supra* note 73, at 1-7.

113. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 589-625 (1964) (Harlan, J., dissenting); *Dennis v. United States*, 341 U.S. 494, 517-56 (1951) (Frankfurter, J., concurring); *Terminiello v. City of Chicago*, 337 U.S. 1, 13-37 (1949) (Jackson, J., dissenting).

114. For a striking example of Judge Easterbrook's refusal to hold unconstitutional a state antitakeover law of a type he had criticized in his scholarship, compare *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir. 1989) with Frank H. Easterbrook and Gregg A. Jarrell, *Do Targets Gain from Defeating Tender Offers?*, 59 N.Y.U. L. REV. (1984) (arguing that antitakeover mechanisms are detrimental to target shareholders).

115. *Miller*, 904 F.2d at 1130 (Easterbrook, J., dissenting).

116. See cases cited *supra* note 113.

by his alternative basis for rejecting the First Amendment claims of the topless dancers. Even if go-go dancing is speech in the First Amendment sense, he stated, Indiana can regulate the activity in the course of enforcing a general prohibition on public nudity:

Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech. Unclothed dancing is a tiny fraction of the ambit of the rule, and what plaintiffs need is an exemption from a well-justified norm.

Conduct that plays a role in expression is not exempt from neutral regulation.¹¹⁷

This passage echoes a familiar refrain of Justice Scalia, a refrain the Justice would repeat in his opinion in the *Glen Theatre* case in the Supreme Court.¹¹⁸ Judge Easterbrook acknowledged his debt to Scalia on this point.¹¹⁹ Discussion of the general prohibition principle is best postponed until we examine Justice Scalia's opinion.¹²⁰

One question of great importance for the future of the First Amendment under conservative trusteeship was raised but not really resolved by Judge Easterbrook's endorsement of categorical reasoning. The question is basic: do modern judicial conservatives really believe that the freedom of speech, properly understood, deserves strong protection against encroachment by legislatures and officials? Categorical analysis may narrow the scope of the freedom of speech, but may by the same token strengthen the protection that is accorded the speech that is found to be of First Amendment concern. A broader freedom, determined by a reasoning process that takes account of numerous variables, concerns, and contingencies, is likely to be a more qualified, diluted freedom. It would not be paradoxical for a conservative to narrow the scope of the First Amendment out of a genuine desire to preserve its vitality. Unlike many of their forbears, modern conservatives do not typically defend privilege

117. *Miller*, 904 F.2d at 1120 (Easterbrook, J., dissenting).

118. See *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2465-67 (1991) (Scalia, J., concurring); see also *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting) (arguing that laws that proscribe communicative conduct for reasons unrelated to communication do not violate the First Amendment), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

119. *Miller*, 904 F.2d at 1121-22 (Easterbrook, J., dissenting).

120. See *infra* notes 153-80 and accompanying text.

or seek a society impervious to change. That part of contemporary conservatism that celebrates the free market in fact places a premium on such qualities as diversity, independence, dynamism, and adaptability.¹²¹ Historically, the freedom of speech has fostered those qualities. It is not simply a rhetorical accident that the most compelling metaphor in the First Amendment tradition invokes the marketplace.¹²² Could it be that Judge Easterbrook employed categorical reasoning not to weaken the First Amendment but rather to strengthen it? The most fervent champion of free speech ever to sit on the Court, Justice Hugo Black, was also an unrepentant practitioner of categorical reasoning.¹²³ A judge committed to categorical reasoning might, for example, be unwilling to balance the freedom of speech against the values of national security,¹²⁴ fiduciary obligation,¹²⁵ or personal reputation.¹²⁶

Judge Easterbrook's opinion leaves unresolved the question whether his version of conservatism might yield strong protection for speech at the center of First Amendment concern. Some of his rhetoric suggests this possibility—"the First Amendment is designed to get government out of the business of regulating

121. See, e.g., HAYEK, *supra* note 73, at 22-53. For a valuable guide to Hayek's thought see KUKATHAS, *supra* note 96; see also ALEXANDER H. SHAND, *FREE MARKET MORALITY: THE POLITICAL ECONOMY OF THE AUSTRIAN SCHOOL* (1990) (arguing that modern economics is defined not by a conflict between classes, but by a conflict between voluntary self-chosen action and state coercion). Michael Oakeshott identifies conservatism with a respect for diversity and adaptability. See OAKESHOTT, *On Being Conservative*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS*, *supra* note 73, at 168, 186-89.

122. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

123. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714-20 (1971) (Black, J., concurring); *Mills v. Alabama*, 384 U.S. 214, 218-20 (1966); *Konigsberg v. State Bar*, 366 U.S. 36, 60-80 (1961) (Black, J., dissenting); *Barenblatt v. United States*, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting).

124. See *Dennis v. United States*, 341 U.S. 494, 579-81 (1951) (Black, J., dissenting) (stating that the benefits of unfettered political speech are worth the risk to the safety of the nation).

125. See *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (holding that a former CIA employee breached his fiduciary duty when, contrary to agreement, he published a book about his experiences without the agency's prior approval). For Judge Easterbrook's view of the *Snepp* decision, see Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 339-53. This article is daunting, for it demonstrates how in Judge Easterbrook's hands the preference for categorical reasoning can cut *against* rather than in favor of the protection of speech that many persons would place at the core of First Amendment concern; in *Snepp*, the publication of nonclassified information revealed government ineptitude and duplicity. The Supreme Court majority in *Snepp* also employed categorical reasoning to uphold the censorship of *Snepp's* criticism of the CIA. *Snepp*, 444 U.S. at 507-16.

126. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (holding publisher of matters of public interest subject to liability for defamation of private individual).

speech"¹²⁷—but his rhetoric critical of judicial review is more frequent and more impassioned.¹²⁸ Conservatives committed to a relatively narrow conception of the First Amendment will have to decide whether a narrow-but-strong freedom of speech is consistent with their skepticism concerning the institution of judicial review.

C. *William Rehnquist*

One conservative who cannot be accused of attempting to strengthen the First Amendment by narrowing it is Chief Justice William Rehnquist. His opinion in *Glen Theatre* has precisely the opposite thrust: by finding topless dancing within the ambit of First Amendment concern, Rehnquist tried to seize the occasion to win acceptance for the proposition that the enforcement of morality is a proper basis for limiting the freedom of speech.¹²⁹ His effort was only partially successful: only Justices Kennedy and O'Connor joined the Rehnquist opinion.¹³⁰ Justices Scalia and Souter went out of their way to avoid having to endorse Chief Justice Rehnquist's proposition.¹³¹

The Chief Justice built his analysis around the four-part test developed by the Court in *O'Brien v. United States*:

"[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."¹³²

127. *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1130 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting), *rev'd sub nom.* *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

128. In arguing that Indiana's ban on nude dancing should be upheld, Judge Easterbrook narrowly construed his own speech-protective opinion in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (striking down an Indianapolis ordinance prohibiting the "graphic sexually explicit subordination of women"), *aff'd*, 475 U.S. 1001 (1986); see also *Miller*, 904 F.2d at 1131 (Easterbrook, J., dissenting). Judge Posner believed that *American Booksellers* required invalidation of the nude dancing prohibition. *Id.* at 1092-93 (Posner, J., concurring).

129. *Glen Theatre*, 111 S. Ct. at 2460-63.

130. *Id.* at 2458.

131. *Id.* at 2463-68 (Scalia, J., concurring); *id.* at 2468-71 (Souter, J., concurring).

132. *Id.* at 2461 (Rehnquist, C.J.) (quoting *O'Brien v. United States*, 391 U.S. 367, 377 (1968)).

The test is directive in the sense that it enumerates four steps of analysis, but how protective the test turns out to be in application depends on what meaning is ascribed to two extremely open-textured criteria. First, what determines whether a governmental interest invoked to justify the regulation of speech qualifies as "important or substantial"? Do most interests routinely served by general legislation meet this test or does the special value of the freedom of speech mean that proposed restrictions must serve interests of unusual significance, say interests that are highly tangible, immediately threatened, and considered by most persons to be of high priority? Second, what makes an interest "unrelated to the suppression of free expression"? Does "unrelated" mean simply that one could desire to promote the interest by legislation while remaining indifferent to the predictable impact of the legislation on speech activities? Or does "unrelated" mean something stronger: that any impact on free expression of legislation promoting the interest is speculative, say, or contingent, or marginal? If the *O'Brien* test is to be applied broadly, and that tendency was evident long before the Court's decision in *Glen Theatre*,¹³³ the future of the freedom of speech will depend to a large extent on how these questions are answered.

If the "important or substantial governmental interest" requirement of the *O'Brien* test¹³⁴ means something more than "legitimate," more than the minimum regulatory interest that would suffice to justify a law that restricted a liberty other than the freedom of speech, one might suppose that the interest in enforcing morality might have difficulty satisfying the test. Not only is this interest controversial in both scholarly and popular debate,¹³⁵ but also claims of moral harm are exceedingly difficult to specify, confine, or calibrate. Because the enforcement of morality is the kind of interest that can be neither tested nor balanced against competing interests, its invocation is likely to operate as a trump card in constitutional analysis. These problems need not force a judge to adopt as a matter of constitutional interpretation the moral philosophy of Professor Hart in preference to that of Lord Devlin.¹³⁶ But in the limited realm of First

133. See, e.g., *Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984).

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

135. See *supra* note 45.

136. See DEVLIN, *supra* note 41; HART, *supra* note 42.

Amendment adjudication, they might lead a judge to conclude that the otherwise legitimate state interest in enforcing morality ought not to be considered the kind of "important or substantial"¹³⁷ governmental interest that can justify the regulation of speech that falls within the ambit of First Amendment concern.

Chief Justice Rehnquist was not persuaded by this line of argument. He recounted the venerable statutory history of morals regulation, in Indiana and elsewhere, and noted also the common law roots of the public indecency concept.¹³⁸ Reciting the familiar trilogy of legitimate governmental interests, he refused to relegate morals enforcement to any kind of inferior status as a justification for limiting personal liberty: "[t]he traditional police power of the States is defined as the authority to provide for the public health, safety, and morals."¹³⁹ He observed also that the Supreme Court had recognized the legitimacy of moral interests when it upheld state prohibitions on private, consensual homosexuality and obscenity.¹⁴⁰ Pointedly, Rehnquist disclaimed any effort to bolster the interest in morals enforcement with an appeal to instrumental concerns, observing that "the governmental interest served by the text of the prohibition is societal disapproval of nudity in public places and among strangers. The statutory prohibition is not a means to some greater end, but an end in itself."¹⁴¹

The approval of the enforcement of morality as a justification for regulating speech—even an approval so emphatic and enthusiastic as that expressed by the Chief Justice—need not inexorably have sweeping implications. First, the morality justification could be confined to regulations of speech that are "unrelated to the suppression of free expression."¹⁴² That concept, one of the four elements of the *O'Brien* test,¹⁴³ could be interpreted to include only regulatory efforts to control harms that derive not from the communicative impact of an activity but rather from its ancillary physical consequences. If, for example, due to the physical concentration of a receptive clientele, prostitution were shown to flourish in areas in which adult entertainment establishments are located, the interest in enforcing morality might

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

138. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461-62 (1991).

139. *Id.* at 2462.

140. *Id.*

141. *Id.* at 2463.

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

143. *See supra* text accompanying note 132.

justify some sort of a dispersal requirement. Second, the morality justification could be confined to regulations of "low value" speech, instances of communication that are neither outside the ambit of First Amendment concern nor at the "core." In *Glen Theatre*, Chief Justice Rehnquist addressed the first suggested limitation explicitly and used ambiguous qualifying language that might be read to lend support to the second.¹⁴⁴

The Chief Justice declined to interpret the "unrelated to the suppression of free expression" element of the *O'Brien* test to mean that the harm that justifies the regulation must not be a product of the communicative impact of the activity the state wishes to regulate.¹⁴⁵ Instead, he considered the appropriate inquiry to be whether by regulating the activity the state seeks to prevent a message from reaching an audience.¹⁴⁶ It would be difficult to maintain that the moral objection to nude dancing is not a consequence of the communicative impact of the activity, and Rehnquist did not so maintain. Whether the moral objection relates to a "message" is more open to dispute. Rehnquist found the state's concern broader than that, and hence in his view "unrelated to the suppression of free expression":

[W]e 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. Presumably numerous other erotic performances are presented at these establishments and similar clubs without any interference from the state, so long as the performers wear a scant amount of clothing. Likewise, the requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity.¹⁴⁷

Rehnquist did not indicate whether he thought a clothing requirement could ever amount to an effort to suppress a message. If, for example, dancers were required to wear tutus or leotards, or if museums were forced to add figleaves to depictions of nudes, would the state's moral interest be "unrelated to the suppression of free expression"?

144. *Glen Theatre*, 111 S. Ct. at 2462-63.

145. *Id.* at 2462.

146. *Id.* at 2463.

147. *Id.*

The Chief Justice refused to regard striptease dancing as outside the ambit of First Amendment concern, but he qualified his conclusion in a way that might suggest a limitation on the potential sweep of the morality justification. He stated: "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."¹⁴⁸ Perhaps the enforcement of morality is a permissible justification in the realm of the First Amendment only when the activity regulated is "expressive conduct" rather than verbal speech. Or perhaps expressive conduct, nonverbal as well as verbal, is not subject to moral prohibition when the activity is more political, or in some other sense less peripheral, than is nude dancing. That notion might serve to distinguish the flagburning decisions.¹⁴⁹ Perhaps by his comment about marginality, the Chief Justice meant to invoke a distinction between high culture and low culture such that impresarios and museum directors have nothing to fear from the decision in *Glen Theatre*. The logic of the Rehnquist opinion could accommodate some or all of these limitations on the power to enforce morality, but the opinion itself leaves these possibilities of containment unexplored.

In the last analysis, what is most notable about Chief Justice Rehnquist's opinion in the case is how little the issue of morals enforcement engaged his intellect. In contrast to all the other conservative judges who wrote opinions, Rehnquist seemed untroubled by the expansive potential of the morality justification as applied to speech. Given the high quality and spirited clash of the opinions in the Court of Appeals, this reaction seems surprising. Moreover, in light of the lengthy, informed discussions by Judges Posner and Easterbrook regarding the government's authority to enforce morality in the fine arts, not to mention the recent public turmoil over this question,¹⁵⁰ it is troubling (and perhaps revealing) that Chief Justice Rehnquist did not explain how, under his interpretation of the First Amendment, Indiana would not have the power to prohibit nudity in museum paintings or ballet performances, examples that were raised repeatedly during the litigation.¹⁵¹

148. *Id.* at 2460.

149. See *United States v. Eichman*, 110 S. Ct. 2404 (1990) (striking down a statute that criminalized flagburning); *Texas v. Johnson*, 491 U.S. 397 (1989) (same).

150. See Rohde, *supra* note 40, at 358-73, 393-94.

151. See, e.g., *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1086 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *id.* at 1093, 1096, 1102, 1104 (Posner, J., concurring); *Glen Theatre*, 111 S. Ct. at 2473 (White, J., dissenting).

One has to believe that if the Chief Justice had in mind a distinction that would exempt the fine arts from morals enforcement he would have disclosed it. His silence on the point suggests that he is indeed prepared to countenance a return to figleaves. A judge could reach that position by embracing what might be termed, ironically, the populist version of legal conservatism.

The central tenet of populist conservatism is a faith in the wisdom and responsibility of legislative majorities and electorally accountable executive officials. In this view, the overriding value of constitutional democracy is majority rule. When in the course of legal argument a party challenges a claim of state authority by pointing to its potentially far reaching consequences, the conservative populist response is "trust the people." Majoritarian moralists will not try to censor ballet performances. They will tolerate nudity in museums. And if the censorial impulse does reach into those precincts, artists and their patrons are not lacking in political clout. Judge Bork put the point well: "Freedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives. That is hardly a terrible fate. At least a society like ours ought not to think it so."¹⁵²

Chief Justice Rehnquist's ambiguous, unelaborated opinion in *Glen Theatre* does not provide enough direction to mark him as a conservative populist on the question of morals enforcement over the arts. One of the curious developments of modern political argument in the United States, however, is the extent to which self-described conservatives have come to be skeptical about rights and trusting of majorities. In other areas of constitutional dispute, the Chief Justice has been in the forefront of this development.¹⁵³ A major question facing legal conservatives now that they dominate the federal judiciary is whether this improbable populism was largely a reactive posture, a way to attack liberal judicial decisions, or whether it reflects a deeper current in the conservative philosophy, one that will survive the pressures and responsibilities that accompany the acquisition of power.

D. Antonin Scalia

Justice Antonin Scalia also rejected the contention that topless dancing enjoys constitutional protection, but he devoted a good

152. Bork, *supra* note 55, at 28.

153. See, e.g., *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841 (1990) (Rehnquist, C.J.); *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

part of his opinion in *Glen Theatre* to an effort to contain the doctrinal implications of that judgment. Like both Chief Justice Rehnquist¹⁵⁴ and Judge Easterbrook,¹⁵⁵ Scalia attributed much significance to the generality of Indiana's prohibition on public nudity.¹⁵⁶ He noted that "Indiana officials have brought many public indecency prosecutions for activities having no communicative element."¹⁵⁷ This generality principle has appealed to Justice Scalia for some time,¹⁵⁸ and recently has been invoked by other conservative judges in a variety of contexts.¹⁵⁹ If applied indiscriminately, the principle could be used to rewrite a great deal of First Amendment doctrine protective of speakers. It is important, therefore, that Justice Scalia, the judge who has given the principle its fullest articulation and defense, viewed the generality principle as applicable to only one subset of free speech disputes, cases involving the regulation of expressive conduct.

Many laws used to punish unpopular speakers are not specifically targeted against, or restricted in application to, activities that enjoy First Amendment protection. The most ignominious instances of political repression in this century involved the application of a federal law making it a crime to "obstruct the recruiting service."¹⁶⁰ That law prohibited obstruction of the draft by any means, not just by persuasion. The government claimed authority to enjoin publication of the Pentagon Papers under a law directed against espionage.¹⁶¹ Probably the most common

154. See *Glen Theatre*, 111 S. Ct. at 2460 (Rehnquist, C.J.).

155. *Miller*, 904 F.2d at 1120.

156. See *Glen Theatre*, 111 S. Ct. at 2464 (Scalia, J., concurring).

157. *Id.*

158. See *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (defending the generality principle).

159. See, e.g., *Leathers v. Medlock*, 111 S. Ct. 1438, 1444 (1991) (holding that a state's extension of its generally applicable sales tax to cable television services alone, while exempting print media, does not violate First Amendment); *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513, 2518 (1991) (deciding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news).

160. See *Schenck v. United States*, 249 U.S. 47, 49 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205 (1919); *Debs v. United States*, 249 U.S. 211, 212 (1919); see also *Goldman v. United States*, 245 U.S. 474 (1918) (upholding conviction of conspiracy for attempting to persuade individuals to refuse to register under the Selective Draft Law).

161. See *New York Times Co. v. United States*, 403 U.S. 713 (1971). The government unsuccessfully invoked 18 U.S.C. § 793(e) (1970) as well as the inherent power of the President. *Id.* at 718.

basis for prosecuting civil rights protesters during the 1960's was for "breach of the peace" or "disorderly conduct,"¹⁶² crimes that cover a broad spectrum of antisocial activities, most of them nonverbal and outside the ambit of First Amendment concern. Were the Supreme Court to apply only deferential constitutional review whenever speech is regulated under laws not targeted specifically against expression, the First Amendment would be as easy to circumvent as the constitutional prohibition against laws impairing the obligation of contracts has come to be.¹⁶³

In *Glen Theatre*, Justice Scalia evinced no desire to employ the generality principle to rewrite First Amendment doctrine on a grand scale. So long as "oral and written speech" is involved, he expressed a willingness to subject state regulation to the traditionally demanding standard of scrutiny without regard to the generality of the prohibition: "When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance to reduce noise, to regulate election campaigns, or to prevent littering), we insist that it meet the high, First-Amendment standard of justification."¹⁶⁴ Moreover, for nonverbal forms of communication he would apply a comparably stringent level of judicial review "where the government prohibits conduct *precisely because of its communicative attributes*."¹⁶⁵ Interestingly, in the flag burning cases Justice Scalia joined the majority opinions upholding the First Amend-

162. See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

163. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-06 (1987) (holding that the Contracts Clause should not be read literally to disallow reasonable exercises of the States' police power to protect the public health and welfare); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (holding that prohibition against states impairing contract obligations must be accommodated to inherent police power of state to "safeguard the vital interests of its people"); *El Paso v. Simmons*, 379 U.S. 497, 508 (1965) (holding that the Contracts Clause prohibition "is not an absolute one and is not to be read with literal exactness like a mathematical formula"); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (stating that Contracts Clause is "general" and thus requires construction to "fill in the details"). The Contracts Clause is not a dead letter, see *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242-44 (1978) (stating that Contracts Clause does impose *some* limits on power of a state to abridge existing contractual relationships); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 16 (1977) (stating that Contract Clause is not "without meaning" or "illusory" in its limitation of state power); but neither is it a significant check on the regulatory power of government.

164. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2465-66 (1991) (Scalia, J., concurring) (citations omitted).

165. *Id.* at 2466.

ment claims of the protesters.¹⁶⁶ Scalia discerned an appropriate way to confine his generality principle by utilizing the familiar distinction between speech and conduct: Laws that restrict "speech" are not saved by the fact that by design and definition they also restrict nonspeech activities,¹⁶⁷ but laws that restrict nonverbal communicative conduct that falls within the ambit of First Amendment concern *can* be saved by their generality unless "suppressing communication was the object of the regulation of conduct."¹⁶⁸

Thus, Justice Scalia employed the speech-conduct distinction for a narrower purpose than did Judge Easterbrook in the court below, who viewed the distinction as the basis for a comprehensive categorical interpretation of the First Amendment.¹⁶⁹ Scalia also declined to follow Judge Easterbrook's lead in developing definitions of "speech" and "conduct" that would place ballet on the "speech" side of the line. Although his opinion is not as explicit on this important point as one would like, Justice Scalia presumably would consider photography, film, painting, and sculpture to be "speech" even when words are not employed, but dance and mime "conduct" even when the gestures are stylized, choreographed, and unmistakably of narrative import. Apparently, the physical immediacy of live, human movement is the essential phenomenon that delimits the boundary of First Amendment concern except when such conduct is prohibited precisely because of the message it conveys.¹⁷⁰ The implication of this analysis is that Justice Scalia would find no First Amendment violation in a state's application of its general public indecency statute against nude ballet (opera is more difficult because a diva might be singing or declaiming while disrobing), but would strike down the enforcement of such a statute against nonobscene depictions of nudes in painting, sculpture, or photography. Strauss's *Salome* is at risk, but Titian's *Venus* is safe.

As these examples illustrate, almost any effort to limit the scope of First Amendment concern is bound to generate perplex-

166. See *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

167. See *Glen Theatre*, 111 S. Ct. at 2466.

168. *Id.*

169. See *Miller v. Civil City of S. Bend*, 904 F.2d 1081, 1123-30 (7th Cir. 1990) (en banc), *rev'd sub nom. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991); *supra* notes 108-19.

170. See *Glen Theatre*, 111 S. Ct. at 2465-66.

ing, even embarrassing, problems of definition and application. Justice Scalia is a bold thinker but not a foolish one.¹⁷¹ Why would he embrace a distinction so vulnerable as that between “speech” and “conduct”? The answer, it seems, can be found in his concern about the limitless character of the morality justification.

Like Judge Posner before him, Justice Scalia rejected the contention that state authority to restrict liberty must be premised on some finding of harm, if only offense to inadvertent viewers: “[T]here is no basis for thinking that our society has ever shared that Thoreauvian ‘you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else’ beau ideal—much less for thinking that it was written into the Constitution.”¹⁷² Citing examples ranging from cockfighting to suicide, he noted that “society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, ‘contra bonos mores,’ i.e. immoral.”¹⁷³ Given the prevalence and general acceptance of the regulation of harmless wrongdoing, Justice Scalia found no basis for a comprehensive constitutional limitation on the enforcement of morality:

While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them) there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate “morality.”¹⁷⁴

Scalia stated his defense of the constitutional legitimacy of morals enforcement in the strongest terms, but he also offered a qualification that explains why he felt a great need to confine the scope of application of First Amendment principles. He said the enforcement of morality is not problematic “absent specific constitutional protection for the conduct involved.”¹⁷⁵ By clear implication, Justice Scalia was reluctant to permit morality to serve as a constitutionally sufficient basis for the regulation of

171. For sophisticated analyses of Justice Scalia’s judicial philosophy, see Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1 (1990); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

172. *Glen Theatre*, 111 S. Ct. at 2465.

173. *Id.*

174. *Id.*

175. *Id.*

activities that qualify as "speech" in the First Amendment sense. He criticized Chief Justice Rehnquist's plurality opinion for finding the dancing at issue to be subject to First Amendment principles but then upholding Indiana's law on the ground that it served an important governmental interest. "[W]e should avoid wherever possible," Justice Scalia said, "a method of analysis that requires judicial assessment of the 'importance' of government interests—and especially of government interests in various aspects of morality."¹⁷⁶

Scalia took the Chief Justice to task for relying in his opinion on the Court's acceptance in earlier cases of moral justifications for the regulation of homosexuality and obscenity.¹⁷⁷ Those cases, Scalia observed, did not involve activities within the ambit of First Amendment concern, and thus do not support the conclusion that the enforcement of morality can justify restrictions on the freedom of speech.¹⁷⁸ All that was required to uphold laws prohibiting homosexuality and obscenity was the permissive due process standard of "rational basis," and that is the only standard the enforcement of morality has been found to satisfy.¹⁷⁹ Because in his view dancing is conduct, not speech, Scalia felt that he could invoke the state's interest in morals enforcement and the authority of the cases on homosexuality and obscenity in a way that Chief Justice Rehnquist, with his broader view of the scope of the First Amendment, could not: "I would uphold the Indiana statute on precisely the same ground: moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed."¹⁸⁰

Justice Scalia's First Amendment may be narrow in scope, but within its ambit it may be a genuine and powerful constraint on majority rule. In this regard, Justice Scalia's brand of judicial conservatism has more in common with that of Judge Posner, and possibly Judge Easterbrook, than with the rather different conservatism of Chief Justice Rehnquist.

E. David Souter

Probably the most universally respected Justice to sit on the Court during the last fifty years was the conservative John

176. *Id.*

177. *Id.*

178. *Id.* at 2466.

179. *Id.* at 2467-68.

180. *Id.* at 2468.

Marshall Harlan. What made Justice Harlan an impressive judge, even in the eyes of those who disagreed with his conclusions on issues large and small, was his unfailing intellectual integrity.¹⁸¹ He did not try to push propositions further than they would go, and, even more remarkably, he seemed really to want to understand and deal fairly with opposing arguments. Justice Harlan's opinions typically illuminate even when they do not persuade, and this even though the Justice possessed neither unusual eloquence nor extraordinary analytic power. He possessed something more important for a judge: an open mind. Many people, some of them judges, are openminded out of apathy, laziness, ignorance, or a desire to please. Justice Harlan was openminded, I believe, for different reasons. He knew too much and cared too much about the American constitutional tradition to stop thinking inquisitively about it once he had identified his own major premises of constitutional analysis.

It is unfair to ask a judge to be "the next Harlan." (So many young golfers over the years have been touted as "the next Nicklaus" that wags now ask who is "the next next Nicklaus.") With that disclaimer, it is nonetheless worth noting that of the six opinions by conservative judges under discussion, the one that most resembles the work of Justice Harlan is that by Justice David Souter. Justice Souter voted to uphold the application of Indiana's law to prohibit nude dancing; Justice Harlan might have reached the opposite conclusion. But the Souter opinion displays those qualities of attention to the complexity of a dispute and care about the reach of a proposition that so marked the opinions of Justice Harlan.

Justice Souter agreed with Judge Posner and Chief Justice Rehnquist, and disagreed with Judge Easterbrook and Justice

181. For admiring portraits of Justice Harlan, see the articles in the issue of the *Harvard Law Review* dedicated to the Justice: Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382 (1971); J. Edward Lumbard, *John Harlan: In Public Service 1925-1971*, 85 HARV. L. REV. 372 (1971); Charles Nesson, *Mr. Justice Harlan*, 85 HARV. L. REV. 390 (1971); Earl Warren, *Mr. Justice Harlan, As Seen by a Colleague*, 85 HARV. L. REV. 369 (1971); John E.F. Wood, *John M. Harlan, As Seen by a Colleague in the Practice of Law*, 85 HARV. L. REV. 377 (1971); see also Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283 (examining Justice Harlan's opinion in *Cohen* in a favorable way); Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1002-14 (1972) (comparing Justice Powell with the "master craftsman," Justice Harlan, and analyzing the Harlan judicial model); J. Harvie Wilkinson III, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971) (examining the effect of Justice Harlan's analytic and objective jurisprudence on the evolution of the Court).

Scalia, that striptease dancing enjoys "a degree of First Amendment protection."¹⁸² Not all nude display is expression in the First Amendment sense nor is all dancing, ballroom and aerobic dancing for example. But "dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience."¹⁸³ Souter conceded that nudity by itself can be expressive. He thought, however, that the First Amendment requires more:

[T]he voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless.¹⁸⁴

He found the extra dimensions of expression provided by the integration of music, dance, and disrobing sufficient to differentiate striptease from common forms of indecent public exposure.¹⁸⁵

Souter also agreed with Chief Justice Rehnquist that the four-part *O'Brien* test¹⁸⁶ applied. Justice Souter reached that judgment, however, only because the case involved "the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation."¹⁸⁷ In contrast, the Chief Justice cited cases involving films and music in asserting the applicability of *O'Brien*,¹⁸⁸ thus indicating that he was prepared to apply that not-so-protective standard beyond its original domain of disputes over symbolic physical conduct.¹⁸⁹

182. *Glen Theatre*, 111 S. Ct. at 2468.

183. *Id.*

184. *Id.*

185. *Id.*

186. *United States v. O'Brien*, 391 U.S. 367 (1968); see discussion *supra* notes 132-33 and accompanying text.

187. *Glen Theatre*, 111 S. Ct. at 2468.

188. *Id.* at 2460 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (holding municipal noise regulations affecting music performances did not violate the free speech rights of performers); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (holding that a zoning ordinance setting limitations on the location of adult motion picture theaters was a valid governmental response and satisfied the dictates of the First Amendment)).

189. See *supra* notes 145-47 and accompanying text.

Both in his effort to delineate the scope of the First Amendment's concern with expressive conduct and in his effort to confine the domain of the *O'Brien* test, Justice Souter displayed a willingness to search for limiting principles. That aspect of his temperament may also explain why he could not accept Chief Justice Rehnquist's proposition that the state's interest in the enforcement of morality can serve as a justification for restricting activities that enjoy First Amendment protection. After noting his areas of agreement with the Chief Justice's view of the case, Souter said: "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 establishments of the sort typified by respondents' establishments."¹⁹⁰

Justice Souter plainly considers material harms to be the preferable, and possibly the exclusive, basis for restricting First Amendment rights of expression. In the case of striptease dancing, he found those material harms in the possible link between such dancing in certain settings and "prostitution, sexual assault, and associated crimes."¹⁹¹ Of course, such a causal link is disputable, and certainly was not proven in the record to have existed regarding the particular dances at issue. Moreover, even if prostitutes were shown to have solicited outside the Kitty Kat Lounge or if rapes had been committed by patrons of the Glen Theatre, the standard of causation the Court applies to speech at the center of First Amendment concern would not have been satisfied. Presumably no one would claim that the dances of Ms. Miller and Ms. Sutro were "directed to inciting or producing imminent lawless action and likely to incite or produce such action."¹⁹² One reason those who would regulate expression seek the authority to invoke moral justifications is that justifications grounded in claims of material harm are more susceptible to demands for evidence and requirements of temporal proximity.

Justice Souter acknowledged this difficulty with his analysis but proposed a way to avoid the demanding standard of causation that has been a central feature of First Amendment doctrine since the opinions of Holmes and Brandeis.¹⁹³ Souter reasoned that although sexually explicit expressive conduct enjoys "a degree of First Amendment protection,"¹⁹⁴ it does not warrant the

190. *Glen Theatre*, 111 S. Ct. at 2468-69.

191. *Id.* at 2470.

192. See *supra* text accompanying notes 48-50.

193. Justice Holmes introduced the clear-and-present-danger test in *Schenck v. United*

level of protection accorded the most highly valued forms of expression.¹⁹⁵ Twice in his opinion he made this point, each time citing the cases in which the Supreme Court had upheld zoning restrictions on theaters showing sexually explicit but nonobscene films on the basis of a presumed, generalized causal connection between the presence of such theaters and neighborhood deterioration.¹⁹⁶ In one of those cases Justice Stevens, writing for a plurality, said: “[S]ociety’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.”¹⁹⁷ Justice Souter quoted this statement with approval.¹⁹⁸

Justice Souter’s willingness to apply special, less protective First Amendment standards to striptease dancing on the ground “that the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression”¹⁹⁹ raises a number of questions. First, if we are to have such a multitiered First Amendment, perhaps the enforcement of morality ought to be considered a cognizable regulatory interest on the lower tiers. Souter seems to have rejected this course in *Glen Theatre*. He strained to find a sufficient causal connection to material harm in order to avoid having to rely on the morality justification, even when the speech at issue ranks low on his scale of First Amendment value.

Second, if generalized, undocumented claims of causal connection to material harm can justify the regulation of sexually explicit expression, what constitutional principle protects nude ballet, painting, sculpture, and “serious” film? Souter suggested that the likelihood of material secondary effects varies depending on the setting in which the sexually explicit expression is viewed.²⁰⁰ That variation supplies the elusive principled basis for distinguishing high-culture nudity from its low-life counterpart:

States, 249 U.S. 47, 52 (1919). Justice Holmes in his dissent in *Abrams v. United States*, 250 U.S. 616, 627-29 (1919), and Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 376-78 (1927), construed the test to require specific, imminent, material harm. The modern formulation of the test emphasizes the requirement of temporal proximity. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

194. *Glen Theatre*, 111 S. Ct. at 2468; see *supra* text accompanying note 183.

195. *Glen Theatre*, 111 S. Ct. at 2470.

196. *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)); *id.* at 2471 n.3 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

197. *American Mini Theatres*, 427 U.S. at 70.

198. *Glen Theatre*, 111 S. Ct. at 2470 (quoting *id.*).

199. *Id.* at 2471 n.3.

200. *Id.* at 2470 n.2.

It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of *Renton*-type adult entertainment was correlated with such secondary effects.²⁰¹

Third, if speculative, delayed effects can sometimes justify the regulation of First Amendment expression "of lesser societal importance,"²⁰² can sexist, racist, and other varieties of stereotyping employed in nonpolitical speech be regulated on account of the long-term harm such speech causes members of the groups so stereotyped? Justice Souter did not address this question, but he defined "secondary effects" in such a way that the diffuse, delayed, but nonetheless potentially substantial consequences of stereotyping would not qualify. If the material harms could result only from "the persuasive effect" of speech, he said, they cannot serve as a justification for regulation under the secondary effects rationale.²⁰³ Only harms that are caused in some other way count as "secondary effects." With regard to nude dancing:

It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those nude bodies are engaged in expression or not. In neither case would the chain of causation run through the persuasive effect of the expressive component of nude dancing.²⁰⁴

Souter did not explain how Indiana's requirement that go-go dancers wear pasties and a G-string could be thought, even speculatively, to have any incremental impact on the secondary effects he had posited.

On the evidence of his opinion in *Glen Theatre*, Justice Souter's brand of judicial conservatism builds on the virtues of careful attention to nuance and context and the disinclination to employ sweeping propositions. That type of conservatism can produce

201. *Id.*

202. *Id.* at 2471 n.3; see *supra* note 195 and accompanying text.

203. *Glen Theatre*, 111 S. Ct. at 2470.

204. *Id.* at 2470-71.

doctrines that are overly complex and judgments that lack courage. On the other hand, humility and patience are conservative virtues of the first order that often correlate with the willingness to notice distinctions and the desire to identify limiting principles. For those who believe that the concept of conservatism speaks to temperament more than to first principles, Justice Souter may better deserve the label than any of his brethren.

Justice Souter may be a true conservative in the sense just described, but his opinion does not leave one convinced that he is a judge worthy of being compared with Justice Harlan in the matter of intellectual self-discipline. Why was Justice Souter so quick to credit without any evidence the claim that nonobscene nude dancing bears a significant causal connection to rape or sexual assault? Why did he not address the troubling point for his rationale that if nonobscene nude dancing might indirectly lead to a higher incidence of sexual assault, so too might live erotic dancing by partially clothed women as well as sexually suggestive depictions and plots in nonobscene films? A judge can be perceptive, rhetorically restrained, and sensitive to nuance and still be rather result oriented. The Souter opinion in *Glen Theatre* is a good deal more illuminating than the opinions of Chief Justice Rehnquist and Justice Scalia, but one still is not left with the impression that Justice Souter approached the case with a willingness to follow his analysis wherever it might lead. Of course, few judges possess that kind of temperament. Justice Harlan did, and that is largely why his performance as a judicial conservative is the demanding standard by which current Justices tend to be measured.

F. *Byron White*

Some might question whether Justice Byron White, the lone member of the Supreme Court appointed by a Democratic president (Kennedy), should be considered a conservative. In his early years as a Justice, White took a broad view of the Equal Protection Clause in cases involving alleged discrimination on the basis of race or poverty.²⁰⁵ In recent years he frequently has found himself agreeing with conservative Justices, but typically has not indulged in the rhetoric or displayed the zeal that characterizes the modern conservative challenge to the Warren Court legacy. As the pendulum has swung ever farther to the

205. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 67-68 (1973)

right, Justice White lately has begun to dissent from conservative rulings, even in the area of criminal procedure in which his general tendency ever since he joined the Court has been to interpret the rights of the accused narrowly.²⁰⁶

With regard to the First Amendment, however, Justice White's credentials as a conservative are impeccable. He has written many of the Court's opinions rejecting the First Amendment claims of journalists.²⁰⁷ He dissented from the Court's decisions holding flagburning to be constitutionally protected.²⁰⁸ He even wrote an opinion questioning the continuing soundness of *New*

(White, J., dissenting) (finding that great disparity in property values between rich and poor school districts made the Texas system of public school financing violative of the Equal Protection Clause); *Reitman v. Mulkey*, 387 U.S. 369, 372-73 (1967) (upholding a California Supreme Court decision that the Equal Protection Clause prevents a state from supporting racial discrimination in private housing matters).

206. His early dissents from liberal decisions of the Warren Court in the area of criminal procedure include *United States v. Wade*, 388 U.S. 218, 250-59 (1967) (White, J., dissenting) (objecting to a constitutional requirement that counsel be present at any identification of the accused by a witness because the rule was too broad, without a factual basis, and interfered with the state's interests); *Miranda v. Arizona*, 384 U.S. 436, 526-45 (1966) (White, J., dissenting) (criticizing the new constitutional requirement that warnings be given to a person in custody prior to questioning because the opinion lacked factual and textual bases, and lacked a thorough analysis of the interest in law enforcement); *Griffin v. California*, 380 U.S. 609, 617-23 (1965) (White, J., joining in dissenting opinion of Stewart, J.) (criticizing the holding that a state prosecutor's comments and jury instructions that commented on an accused's failure to testify violated the Self-Incrimination Clause of the Fifth Amendment because the compulsion involved was not the serious type contemplated by the Amendment, and was merely a state's policy choice to bring into the light of rational discussion a fact already clearly known to the jury). Recent instances in which Justice White dissented from decisions denying the constitutional claims of criminal defendants include *California v. Acevedo*, 111 S. Ct. 1982, 1994 (1991) (White, J., dissenting) (disagreeing with the holding that a warrant is not required to search a particular container within a automobile when police have probable cause to believe the container holds contraband or evidence); *Arizona v. Fulminante*, 111 S. Ct. 1246, 1253-57 (1991) (White, J., dissenting) (holding a defendant's confession was coerced and was not harmless, but dissenting from the holding that the harmless error rule applied to admission of involuntary confessions); *Schad v. Arizona*, 111 S. Ct. 2491, 2507-13 (1991) (White, J., dissenting) (disagreeing with the holding that a conviction under a state jury instruction that did not distinguish between premeditated murder and felony murder did not deny due process, and also dissenting from the holding that the failure to instruct regarding a lesser included offense of robbery did not render the first degree murder verdict the result of an impermissible choice when the jury was given the option of convicting for the lesser included offense of second degree murder); *Harmelin v. Michigan*, 111 S. Ct. 2680, 2709-19 (1991) (White, J., dissenting) (dissenting from the holding that the imposition of a mandatory term of life in prison without possibility of parole and without consideration of mitigating factors did not constitute cruel and unusual punishment; and asserting that the Eighth Amendment imposes a general proportionality requirement, even in noncapital cases, and as such was violated in this case).

207. *See, e.g.*, *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991); *Herbert v. Lando*, 441 U.S. 153 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

208. *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990) (White, J., joining in

York Times Co. v. Sullivan,²⁰⁹ the Court's landmark decision granting extraordinary First Amendment protection to defamatory criticism of government officials.²¹⁰ His vote to prevent the government from suppressing the Pentagon Papers was based not on a grand reading of the First Amendment but rather on a rejection of the expansive claims of presidential power to impose a prior restraint, unsupported by congressional authorization, that were presented in the case;²¹¹ White all but invited the government to proceed against the publishers of the Papers by means of criminal prosecution under the Espionage Act.²¹² Just as today he shuns conservative rhetoric regarding the intentions of the framers or the perils of judicial activism, Justice White has always declined to wax eloquent about the nobility of the inquiring mind or the watchdog function of an independent press.

Justice White appears to view the freedom of speech much like he views all claims of individual liberty: with a tough-minded skepticism, particularly toward arguments grounded in claims of human dignity. One gets the impression that Justice White is disdainful of the elaborate, partly symbolic exaltation of "the individual" that characterizes so much of our constitutional tradition. Harry Kalven once described the First Amendment as "gallant, almost quixotic."²¹³ Byron White is probably the least quixotic Justice of the modern era. He is the quintessential Legal Realist, interested in material consequences not symbols or fancies of the mind.

In *Glen Theatre*, Justice White wrote a dissenting opinion that Justices Blackmun, Marshall, and Stevens joined.²¹⁴ It is noteworthy that a Justice with such a conservative history regarding interpretation of the First Amendment should have concluded that nude dancing enjoys constitutional protection. That Justice White wrote the Court's opinion in *Bowers v. Hardwick*,²¹⁵ upholding a state's enforcement of morality against consensual homosexual relations, adds further interest to his dissent in *Glen Theatre*.

dissenting opinion of Stevens, J.); *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (White, J., joining in dissenting opinion of Rehnquist, C.J.).

209. 376 U.S. 254 (1964).

210. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765-67 (1985) (White, J., concurring).

211. See *New York Times Co. v. United States*, 403 U.S. 713, 732 (1971) (White, J., concurring).

212. See *id.* at 733-37.

213. Harry Kalven was my teacher at the University of Chicago Law School. I recall him saying this in class.

214. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2471-76 (1991).

215. 478 U.S. 186 (1986).

It seems that with regard to the effort to criminalize nude dancing, Justice White's longstanding hostility to legal claims of a symbolic, unspecific character worked to the detriment of the state's assertion of regulatory authority. He plainly was skeptical regarding what Indiana hoped to achieve by this law. He noted that "it is impossible to discern the exact state interests which the Indiana legislature had in mind when it enacted the Indiana statute."²¹⁶ He criticized Chief Justice Rehnquist's opinion for accepting "societal order and morality" as a sufficiently specific and informative description of the state's regulatory interest.²¹⁷ White then tried to supply the missing specification on his own. The state could not be concerned with protecting unwilling or inadvertent viewers from offense because the dances at issue were performed indoors before willing, fully forewarned audiences. Nor could the state be enforcing a judgment that nudity in the presence of other persons is always indecent or degrading because Indiana asserted no authority or desire to start prosecuting the full range of nude encounters, for example among friends and relatives in homes or among strangers in locker rooms. On this point, Justice White distinguished the Court's prior decisions upholding comprehensive prohibitions, applicable without regard to setting or context, on the destruction of draft cards, the practice of homosexuality, and the smoking of peyote.²¹⁸

Because nudity per se is not the evil to be addressed, Justice White concluded that the rationale for the law must have something to do with the state's desire to protect willing viewers from the impact of the experience of viewing nude figures in certain settings, as contrasted with other settings in which the impact would be different. But what is special, in terms of the impact on viewers, about the setting of a bar or a theater in which nude women perform dances to music? What is special, Justice White concluded, is the erotic message that is conveyed by that variety of nudity:

Legislators do not just randomly select certain conduct for proscription; they have reasons for doing so and those reasons illuminate the purpose of the law that is passed The purpose of the proscription in these contexts is to protect the

216. *Glen Theatre*, 111 S. Ct. at 2472.

217. *Id.*

218. *Id.* (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *United States v. O'Brien*, 391 U.S. 367 (1968)).

viewers from what the State believes is the harmful message that nude dancing communicates.²¹⁹

The state denied that it sought to prevent the communication of an erotic message by noting that all sorts of erotic dances, including those employing the barest minimum of clothing (pasties and a G-string), remained outside the reach of the law.²²⁰ Nudity, not an erotic message, was the trigger of illegality. Justice White was not convinced: "The sight of a fully clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental 'conduct.'"²²¹

To conclude that when unpacked analytically the State's interest in "order and morality" reduces to an interest in protecting audiences from certain erotic messages still does not prove that the state interest is constitutionally insufficient. Many conservatives would not deny that the harm in nude dancing is indeed in the message it communicates, and would claim that a proper function of government is to prevent the degradation of the society, including the degradation that is caused by certain messages.²²²

This type of argument might appeal to many conservatives, but not to a tough-minded, skeptical conservative like Justice White, who values both analytical precision and proof of harm. He is not impressed by quixotic gestures in defense of morality or speculative judgments regarding the long-term cultural consequences of certain messages. He concluded that both legislatures and judges must have more solid grounding before overriding the First Amendment principle against content regulation:

That the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine. The Court's assessment of the artistic merits of nude dancing performances should not be the determining factor in deciding

219. *Id.* at 2473.

220. *Id.*; see also *id.* at 2464 n.1 (Scalia, J., concurring) (stating that the state's argument was that the statute was neutral and not directed at expression); *id.* at 2463 (presuming the state does not interfere with other erotic performances if a scant amount of clothing is worn).

221. *Id.* at 2474.

222. See, e.g., BERNIS, *supra* note 45, at 212-28.

this case. In the words of Justice Harlan, "it is largely because governmental officials cannot make principled decisions in this area that the Constitution leaves matters of taste and style so largely to the individual."²²³

Justice White applied his demand for analytical precision also to the "secondary effects" rationale articulated by Justice Souter. Again, he found that the regulatory justification failed to survive critical scrutiny:

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.²²⁴

From Edmund Burke to Michael Oakeshott, leading conservative thinkers traditionally have been skeptical of ideology, partly because a devotion to ideology can lead one to a single-minded pursuit of objectives and a failure to appreciate the complexity of life, the relevance of history, and the efficacy of arrangements that have survived the evolutionary process.²²⁵ Justice White appears to share those sentiments. Not all conservatives would consider the moral objection to public nudity to be an ideology, nor the common practice of nude go-go dancing to be a social institution worthy of respect by virtue of the fact that it has evolved and commands a market. But regulation in the name of

223. *Glen Theatre*, 111 S. Ct. at 2474-75 (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

224. *Id.* at 2474 n.2 (citation omitted) (quoting *Glen Theatre*, 111 S. Ct. at 2471 (Souter, J., concurring)) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

225. Russell Kirk's anthology, *The Portable Conservative Reader*, contains many statements in this vein. See JOHN ADAMS, DISCOURSES ON DAVILA, in RUSSELL KIRK, THE PORTABLE CONSERVATIVE READER 65 (1982); EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, in KIRK, *supra*, at 5, 7, 16-19; Walter Bagehot, *Intellectual Conservatism*, in KIRK, *supra*, at 241-42; BENJAMIN DISRAELI, A VINDICATION OF THE ENGLISH CONSTITUTION, in KIRK, *supra*, at 223-24; Michael Oakeshott, *On Being Conservative*, in KIRK, *supra*, at 589; John Randolph, *Speech Before the Virginia Convention of 1829-30*, in KIRK, *supra*, at 145. For a particularly intelligent critique of ideology, see HAYEK, *supra* note 73, at 54-70.

morality does often tend to have a zealous quality about it. Moreover, because the exact interests at stake are seldom specified, moral regulation is not easily subjected to the disciplining influence of law. Those characteristics need not trouble a conservative when the activities in dispute enjoy no constitutional protection. However, a conservative who views erotic dancing as a form of "speech" within the meaning of the First Amendment has to be troubled by the boundless quality of the moral justification for regulating speech. In turning against moralists the conservative disdain for excess and reductionism and the conservative regard for analytical rigor, Justice White challenged his fellow conservatives to develop an understanding of the First Amendment that is true to their professed principles.

V. CONCLUSION

The six opinions I have discussed provide a revealing tableau of conservative legal analysis. Although none of the judges asserted that as a general matter government lacks the authority to enforce morality, they differed dramatically over how the power to enforce morality is limited by the First Amendment and whether nude dancing is a First Amendment activity.

What can one discern from these opinions regarding the likely future of the freedom of speech in conservative hands? With the possible exception of Chief Justice Rehnquist, these conservative judges displayed no inclination to denigrate the freedom of speech, no inclination to permit speech at the center of First Amendment concern to be regulated on the basis of political or moral preference alone. Apart from the Chief Justice, those judges who ruled that nude dancing can be prohibited either found First Amendment principles inapplicable to such dancing (Easterbrook,²²⁶ Scalia²²⁷) or found a basis for upholding the prohibition independent of the desire to enforce morality (Souter²²⁸). Even Chief Justice Rehnquist did not say explicitly that morals enforcement would be permissible against art he would consider serious and valuable, although that may be the implication of his opinion.²²⁹

With regard to the proper ambit of First Amendment protection, the opinions reveal no conservative consensus. Judge Eas-

226. See *supra* notes 99-108 and accompanying text.

227. See *supra* notes 164-71 and accompanying text.

228. See *supra* notes 183-98 and accompanying text.

229. See *supra* notes 132-49 and accompanying text.

terbrook drew a sharp distinction between speech and conduct, placing music and ballet on the speech side of the line but barroom striptease on the conduct side. The key for him was whether the activity communicates a genuine message. Justice White similarly looked to message, but concluded that the striptease was regulated precisely because of its erotic message. Justice Scalia also drew a distinction between speech and conduct, but excluded nude dancing from the reach of the First Amendment, not for lack of a message, but for its physical immediacy and lack of purely representational quality. Both Judge Posner and Justice Souter analyzed this question of First Amendment coverage carefully and concluded that despite its crudity nude dancing in the barroom setting must be considered a form of expression governed by First Amendment principles. In the years ahead disagreement will certainly continue within the Court regarding what activities fall within the scope of First Amendment concern.

Perhaps the most important question concerning the future of the First Amendment is whether speech that qualifies for protection will be subject to regulation on the basis of general assertions of danger or social need. The moral justification for regulating speech may be distinctive in one sense, but it can also be viewed as a subset of the category of justifications that invoke unspecific harms (to national security, for example, or to community harmony) and speculative causal scenarios. In the argot of formulaic legal standards, the question can be framed in terms of whether the basic concept behind the clear-and-present-danger test (concrete and specific harm, imminent time frame) will be replaced by the basic concept behind the compelling-state-interest test (unspecified measures of harm and causation). On this question the opinions discussed say little, but five of the six judges went to great lengths to avoid affirming the proposition that core First Amendment speech can be regulated on the basis of so unspecific and illimitable a rationale as the desire to enforce public morality.

Thus, the opinions in *Glen Theatre* are reassuring in that all but one of the conservative judges who wrote displayed an appreciation of how serious a step it would be to permit moral concerns alone to justify the regulation of speech. On the other hand, one has to be troubled by the relative ease with which Justices Scalia and Souter reached the conclusion that the dances at issue, though concededly nonobscene, were not entitled to the full measure of First Amendment protection. (Judge Easterbrook

reached the same conclusion, but recognized the difficulty of the issue and defended his judgment much more carefully than did either Justice Scalia or Souter.) It is disturbing also that Justices Kennedy and O'Connor saw fit to join Chief Justice Rehnquist's casual, sloppy, yet potentially far-reaching opinion. Given the high quality of the opinions in the court below, there can be no excuse for the failure of these Justices to grapple more thoroughly with the important and intriguing question of the proper scope of a state's authority to enforce morals.

The First Amendment tradition need not suffer and might even be enriched during a period of conservative trusteeship, but only if the trustees are as concerned to examine thoughtfully the implications of their conservative premises as were Judges Posner and Easterbrook. Conservatism is a philosophy that has diverse sources and many contemporary strands. Different conservative thinkers place varying emphasis on productivity, stability, continuity, civility, self-reliance, authority, excellence, liberty, social cohesion, initiative, and prudence. Those values might be capable of successful integration for the purpose of informing constitutional interpretation, and so integrated they might even be reconcilable with the Madisonian project to forestall, confine, and countermand the tyranny of the majority. But we will learn precious little about such questions if our conservative judges give us opinions so result-oriented, so artificially circumscribed, so skittish about the power of judicial review, and so conclusory as those that were produced by the Supreme Court Justices in the majority in *Glen Theatre*.