NUDE ENTERTAINMENT ZONING

By Stephen Durden

Local government regulation, as opposed to prohibition, of nude entertainment[1] began in earnest in the 1970's.[2] These regulations generally fell into four categories: (1) zoning;[3] (2) prohibiting nude entertainment in conjunction with the service of alcohol;[4] (3) licensing;[5] and (4) regulating conduct, e.g., hours of operation,[6] distance from customers,[7] prohibition of private booths.[8] The proliferation of these many and varied approaches began soon after the Supreme Court

[1] For the purpose of this article, the term "nude entertainment" includes semi-nude topless, and bottomless entertainment. *See e.g.*, Misty's Cafe, Inc. v. Leon County, 640 So. 2d 170 (Fla. Dist. Ct. App. 1994). In many, if not most, of the cases concerning the constitutionality of the regulation of nude entertainment, the entertainment sought to be engaged in was dancing while nude. *See e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000) and New York Liquor Authority v. Bellanca, 451 U.S. 714 (1981). In other cases, the nudity occurred during lingerie modeling. *See e.g.*, Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1999); Bomhower v. City of Virginia Beach, 76 F. Supp. 2d 681 (E.D. Va. 1999); Steinbach v. State, 979 S.W.2d 836 (Tex. App. 1998). Undoubtedly, other forms of nude entertainment are also or have been engaged in.

[2] Commercial nude entertainment, on the other hand, may have begun by the early part of 20th Century. *See e.g.*, Kilpatrick v. Edge, 85 N.J.L. 7, 56 Vroom 7, 88 A. 839 (N.J. Sup. 1913)(concerning a libel suit where the operator of a Turkish bath was falsely accused of permitting men to watch nude women bathe).

[3] Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85 (Minn. Ct. App. 2000).

[4] New York Liquor Authority v. Bellanca, 451 U.S. 714 (1981).

[5] FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).

[6] Schultz v. City of Cumberland, 228 F.3d 831(7th Cir. 2000).

[7] Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998).

[8] Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1999).

in *California v. LaRue*[9] held that nude dancing is, or at least might be, protected by the First Amendment.[10] Prior to *LaRue*, states regularly prohibited nude entertainment via general prohibitions on lewd and lascivious conduct.[11] Even after *LaRue*, Indiana continued to prohibit nude entertainment pursuant to its ban on public nudity.[12] In fact, in 1991, the Supreme Court, in *Barnes v. Glen Theatre*[13] upheld the constitutionality of Indiana's prohibition of public nudity as applied to nude dancing.[14] Nearly a decade later the Court reaffirmed the constitutionality of prohibiting nude dancing pursuant to a ban on public nudity.[15] The Court has taken a very different approach to the zoning of other adult entertainment,[16] but has not reviewed the constitutionality of a zoning ordinance directed

[9] 409 U.S. 109 (1972).

[10] *Id.*

[11] *E.g.*, Hoffman v. Carson, 250 So. 2d 891 (Fla. 1971), appeal dismissed for want of substantial federal question, 404 U.S. 981 (1971). *See also*, cases cited therein.

[12] *See, e.g.*, Dove v. Indiana, 449 U.S. 806 (1980); Clark v. Indiana, 446 U.S. 931 (1980); State v. Baysinger, 397 N.E.2d 580 (Ind. 1979), *appeal dismissed sub nom*; *see also* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Erhardt v. State, 468 N.E.2d 224 (Ind. 1984).

Whether other states continued to prosecute nude entertainment under general prohibitions against public nudity is unclear. It is clear, however, that Florida (and likely other states) stopped using their indecent exposure statutes to prohibit nude entertainment. *See* Stephen Durden, *The Impact of Florida Statute 800.03 on Local Regulation of Nude Dancing Facilities*, 1 FLA. COASTAL L.J. 361 (2000).

[13] 501 U.S. 560.

[14] *Id.*

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

[16] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In *Renton*, the "adult entertainment" involved was "adult" movie theaters. The Court has not itself undertaken to define "adult." The ordinance in *Renton* defined "adult" based on the content of movies shown. The ordinance defined adult movies as those which contained substantial amounts of sex or nudity. The Court reviewed regulations of sexually-oriented services in *FW/BPSS v. Dallas*, 493 U.S. 215, 220 (1990). These "include[d] adult arcades . . ., adult bookstores or adult video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, and sexual encounter centers." *Id.* The Court did not seek to define these businesses. Instead, the Court accepted the definitions in the ordinance code. The Court has not attempted to define the parameters of adult entertainment. Instead, the Court refers to a particular activity as an adult use or adult entertainment.

at nude entertainment. The lower courts have constantly applied the *Renton* test to judge the validity of zoning regulations of all adult entertainment, including nude entertainment.[17] The Court, however, applied the *O'Brien* test to uphold the ban on public nudity as applied to nude dancing.[18] The question reviewed in this article is which test should be applied when courts consider the constitutionality of nude entertainment zoning.

INTRODUCTION

An understanding of the application of the First Amendment to regulation of nudity in general and nude dancing or entertainment in particular must begin with two cases from the 1970s, *Young v. American Mini Theaters, Inc.*,[19] and *California v. LaRue*.[20] While *LaRue* begins the line of cases which expressly recognize the First Amendment protection of nude dancing, *Young* upheld the governmental authority to control nude dancing through zoning.[21] *Later*, in *Barnes*[22] and *City of Erie*,[23] the power to regulate became the power to prohibit.

NUDE DANCE AS PROTECTED EXPRESSION

Justice Douglas wrote, in 1957, "No one would suggest that the First Amendment permits nudity in public places, . . ."[24] Fifteen years later, in *LaRue*, the Court clearly, albeit half-heartedly, suggested otherwise, at least where the nudity occurred during, or as part of, a dance.[25] Rather than boldly proclaiming that nude dance is protected by the First Amendment, the Court recognized the

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[17] *See, e.g.*, *Lady J. Lingerie*, 176 F.3d 1358 (11th Cir. 1999).

[18] The Court applied the test first created in *United States v. O'Brien*, 391 U.S. 367 (1968).

[19] 427 U.S. 50 (1976).

[20] 409 U.S.109 (1972).

[21] *Young*, 427 U.S. at 50.

[22] 501 U.S. 560 (1991).

[23] *City of Erie*, 529 U.S. 277.

[24] Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting).

[25] *LaRue*, 408 U.S. 109.

right to engage in nude expression with a double negative: "This is not to say that all such conduct and performances are without the protection of the First and Fourteenth Amendments."[26] Adding to the Court's evisceration of its own apparent recognition of the right to engage in nude dance, the Court held that nude dance could be banned in establishments selling alcoholic beverages.[27]

Three years later, the Court decided two cases related to nude entertainment. In *Southeastern Promotions, Ltd. v. Conrad,*[28] the Court again assumed, without attempting to demonstrate, that nude entertainment was protected by the First Amendment when it declared invalid a system of prior restraint as applied to a play with some nudity.[29] When it later expressly discussed the First Amendment protection of nude dancing in *Doran v. Salem Inn*, the Court gave, at most, half-hearted respect and protection. "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, . . . , that this form of entertainment *might* be entitled to First and Fourteenth Amendment protection under some circumstances." [30]

The Court began its 1980s review of nude entertainment with *Schad v. Borough of Mount Ephraim.*[31] The Court again used the double negative to recognize the First Amendment protection of nude entertainment, saying, "nude dancing is not without its First Amendment protections from official regulation."[32] Elsewhere in *Schad*, however, the Court gave a much stronger endorsement for the idea that nudity, even public nudity, is protected by the First Amendment when it is part of a larger form of expression. "[N]udity alone does not place otherwise protected material outside the mantle of the First Amendment."[33]

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[26] *Id.* at 118.

[27] *Id.* The Court took a similar approach in *Barnes* when eight members of the Court agreed that nude dancing was protected by the First Amendment, however, four of those eight along with Justice Scalia, agreed that nude dance could be banned, at least at certain camps. *Barnes*, 501 U.S. 560 (1991).

[28] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

[29] *Id.* at 552. According to the Court, it granted certiorari because of the "First Amendment overtones." *Id.*

[30] Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) (emphasis added).

[31] Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

[32] *Id.* at 66 (citations omitted).

[33] *Id.* This statement taken literally would protect far more nudity than the Court has ever protected. For example, public nudity in any public place at any time would be protected by

This overstatement in *Schad* may well have been the zenith of the Court's protection of nude entertainment and would have supported the argument that because dancing is protected expression, indeed fully protected under the First Amendment, then nude dancing is fully protected as well.[34] The prospects of full protection for nude dancing were dashed, however, when only three weeks after *Schad*, in *New York Liquor Authority v. Bellanca*,[35] the Court expressly held that nude entertainment is only partially protected by the First Amendment.[36] Relying on its decision and rationale in *LaRue*, i.e., that the Twenty-first Amendment increased the State's police powers,[37] the Court upheld the Liquor Authority rule prohibiting nudity, even nude dancing, in establishments serving alcoholic beverages.[38] In dissent, Justice Stevens recognized the irony of the Court's approach. "A holding that a state liquor board may prohibit its licensees from allowing [topless] dancing on their premises may therefore be the practical equivalent of a holding that the activity is not protected by the First Amendment."[39]

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the First Amendment as long as the naked person engaged in speech at the same time. This would be particularly true if the speech were political or other protest.

This statement goes to the heart of the First Amendment issue. The question, for which the language of the First Amendment really provides no guidance, is whether, for example, a nude dancer is a dancer who happens to be nude or a nude person who happens to be dancing. *See e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring).

[34] *See supra* note 15 and accompanying text.

[35] 452 U.S. 714 (1981).

[36] *Id.*

[37] The relevant section of the Twenty-first Amendment reads as follows: "The transportation or importation into any State, . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend XXI § 2. The Twenty-first Amendment is clearly tied to importation and transportation and is directed at those 19th Century Commerce Clause cases that held that States could not prohibit the importation of liquor because such a prohibition would violate the Commerce Clause. *See Leisy v. Hardin*, 135 U.S. 100 (1890). Indeed, the State could not prohibit the sale of the liquor as long as it remained in its original package. *Id.* Rather than look at the express language of the Twenty-first Amendment, which refers to "transportation or importation," the Court recognized enhanced police powers.

[38] *Bellanca*, 452 U.S. at 718.

[39] *Id.* at 723 n.10 (Stevens, J. dissenting). Fourteen years later, Justice Stevens wrote the Court's opinion rejecting the *LaRue-Bellanca* rationale, i.e., that the Twenty-first Amendment increased the States' police powers. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514-15 (1996). According to Justice Stevens, the Twenty-first Amendment related only to the

The Twenty-First Amendment was once again used by the Court in *Newport v. Iacobucci*[40] to uphold the authority of a municipality to prohibit nudity in establishments serving alcoholic beverages. Specifically, the Court found that the state's Twenty-First Amendment power could be delegated to local governments.[41] Addressing the relationship between the First and Twenty-First Amendments with regard to nude entertainment, the Court, quoting from *Doran,* held, "In *LaRue* . . . we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program."[42]

A decade later, in *44 Liquormart*, a case which did not concern nudity, the Court expressly rejected the Twenty-First Amendment argument relied on in *LaRue*, *Bellanca*, and *Iacobucci*.[43] The Court's rejection of the Twenty-First Amendment as a source for increasing state police power might have given hope that the Court would more fully protect nude expression. That hope was somewhat weakened by the fact that five years before *44 Liquormart* the Court, in *Barnes*,[44] held, albeit by a five to four vote, that the government did not violate the First Amendment when it prohibited nude dancing with a general law prohibiting all public nudity. Second, in *44 Liquormart*, the Court, in dicta, expressly reaffirmed the result in *LaRue,* and presumably in *Bellanca* and *Iacobucci*, stating: "Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-First Amendment."[45] The Court explained, in

States' powers over commerce. Due to the enactment of the Twenty-first Amendment, "[t]he States' regulatory power over [transportation and importation of liquor] is therefore largely 'unfettered by the Commerce Clause.'" Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); *44 Liquormart*, 517 U.S at 514-15.

[40] 479 U.S. 92 (1986).

[41] *Id.* at 96. The Court's holding that the power over commerce expressly delegated to the States could be delegated by the States to municipalities raises a number of questions, e.g., (1) whether Congress could delegate its power over commerce to municipalities or states; (2) whether municipalities should be entitled to the States' sovereign immunity when exercising the States' constitutionally granted power; (3) whether a State may delegate its power to appoint presidential electors. U.S. CONST. art. II. § 1.

[42] *Id.* at 95 (quoting *Salem Inn*, 422 U.S. at 932-33).

[43] *44 Liquormart*, 517 U.S. at 516 (1996).

[44] 501 U.S. 560 (1991).

[45] *44 Liquormart, Inc.*, 517 U.S. 484, 516.

dicta, that the state had sufficient police power to prohibit nude dancing in establishments selling alcoholic beverages without the need for "extra" police power from the Twenty-First Amendment.[46] The *LaRue*, *Bellanca*, *Iacobucci* line of cases recognized the states' power to prohibit nude dancing in conjunction with the service of alcoholic beverages. They also recognized that nude entertainment had at least some First Amendment protection. This recognition was supported in the non-alcoholic beverages cases such as *Southeastern Promotions*,[47] *Doran*[48] and *Schad*.[49] The question left open was whether the States could validly ban nude entertainment. The related question was whether a State could regulate nude entertainment through zoning.

"ADULT" USE ZONING

During the 1970's and 1980's, while the Court worked on its First Amendment approach to regulation of nude dancing, it considered government regulation of other "adult" expression. In these cases the Court considered the validity of laws, in particular zoning laws, regulating expression which it recognized as constitutionally "protected." The question was whether protected expression could be classified and regulated, or restricted, through zoning.

In *Young v. American Mini Theatres*,[50] the Court upheld the constitutionality of an ordinance that defined "adult" theaters based on the content of the movies shown.[51] "If the theater [was] used to present 'material distinguished or characterized by an emphasis on matter depicting, describing or relating to Specified Sexual Activities or Specified Anatomical Areas,' it [was] an adult establishment."[52] *American Mini Theatres* argued that the Equal Protection Clause prohibited the creation of that category.[53] Justice Stevens, writing for the four member plurality, explained that content-based distinctions are at the heart of

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[46] *Id.* at 515.

[47] *Southeastern Promotions*, 420 U.S. 546 (1975).

[48] *Salem Inn*, 422 U.S 922 (1975).

[49] *Schad*, 452 U.S. 61 (1981).

[50] 427 U.S. 50 (1976).

[51] *Id.* at 72-73. Justice Stevens wrote the lead opinion. Part III of the lead opinion was joined only by Chief Justice Burger and Justices White and Rehnquist.

[52] 427 U.S. at 53 (footnotes omitted).

[53] *Id.* at 58.

First Amendment jurisprudence.[54] "The question of whether speech is, or is not, protected by the First Amendment often depends on the content of the speech."[55] Justice Stevens cited libel, incitation to illegal conduct, and obscenity as examples of constitutionally valid, content-based categories.[56] Without any attempt to explain the rationale, Justice Stevens concluded "that the State may legitimately use the content of [sexually explicit] materials as the basis for placing them in a different classification from other motion pictures."[57] After concluding that the content-based category of sexually-explicit speech did not *per se* violate the Equal Protection Clause, Justice Stevens applied very deferential scrutiny to determine that the ordinance was valid.[58]

Justice Powell, concurring, took a different approach to the attack on the government's classification of "adult" theaters.[59] The Justice more directly considered the application of the First Amendment.[60] Justice Powell noted that the regulation did not prohibit the exhibition of "adult" movies, nor indeed restrict access.[61] The ordinance permitted a sufficient number of theaters to operate to accommodate the demand.[62] Because these movies could be shown in sufficient numbers then the ordinance was content-neutral.[63] Without explanation, Justice

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[54] *Id.* at 65-66. Justice Stevens' discussion begins with a reference to the Equal Protection Clause, but the Equal Protection claim was based on the allegedly impermissible classifications based on speech. Consequently, much of the Equal Protection discussion revolves around the First Amendment.

[55] *Id.* at 66.

[56] *Id.*

[57] *Id.* at 70-71.

[58] *American Mini Theatres,* 427 U.S. at 71. Justice Stevens found that the ordinance would be justified if there was a factual basis in the record to conclude that the ordinance would "preserve the character of its neighborhoods." *Id.* at 71. The record supporting that conclusion appeared to be no more than the City Council's "determination" that the ordinance would work. *Id.* at n. 34.

[59] *Id.* at 73 (Powell, J., concurring).

[60] *Id.* at 76-84 (Powell, J., concurring).

[61] *Id.* at 76-79 (Powell, J., concurring).

[62] *Id.* at 78 (Powell, J., concurring).

[63] *Id.* at 78-79 (Powell, J., concurring).

Powell then concluded that the proper First Amendment test was that set forth in *United States v. O'Brien*.[64] According to Justice Powell, under *O'Brien*, "a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest."[65] Justice Powell found that the zoning regulation easily passed that test.[66] The governmental interests were the general zoning interests in "stable neighborhoods."[67] The regulation was no greater than essential, because it dispersed "adult" theaters, and it was the concentration of "adult" theaters that threatened the city's interests.[68]

A decade later, Justice Rehnquist, writing for the Court, combined the approaches taken by Justice Powell and Justice Stewart in *American Mini Theaters*, by upholding the constitutionality of the Renton, Washington zoning ordinance which regulated the location of "adult" theaters.[69] The Circuit Court of Appeals applied the *O'Brien* test, as Justice Powell had in *American Mini Theaters*.[70] The Supreme Court, while citing Powell's opinion, took a different approach, stating "the Renton ordinance, like the one in *American Mini Theaters*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place and manner regulation."[71]

Before determining to apply to the time, place and manner test, Justice Rehnquist rejected the argument that the regulations, which classified theaters

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[64] *American Mini Theatres*, 427 U.S. at 79 (Powell, J., concurring) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[65] *American Mini Theatres*, 427 U.S. at 79 (Powell, J., concurring).

[66] *Id.* at 80-82 (Powell, J., concurring).

[67] *Id.* at 80 (Powell, J., concurring).

[68] *Id.* at 80-82 (Powell, J., concurring).

[69] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[70] *Id.* at 46.

[71] *Id.*

based on their "adult" content, were content-based,[72] holding that "our definition of 'content-neutral' speech regulations [includes] those that 'are justified without reference to the content of the regulated speech.'"[73] Relying on the opinions of Justices Stevens and Powell in *American Mini Theaters*, Justice Rehnquist held that the regulations were content-neutral because the government was concerned with the "secondary effects" caused by the theaters.[74] Justice Rehnquist noted that "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters,"[75] because such theaters (and presumably not other movie theaters) negatively impact Renton's interests in "prevent[ing] crime, protect[ing] the city's retail trade, maintain[ing] property values and generally protect[ing] and preserv[ing] the quality of [the city's] neighborhoods commercial districts, and the quality of urban life."[76] Relying on Justice Stevens' opinion in *American Mini Theaters*, Justice Rehnquist concluded that the City was combating the "secondary affects" of the theaters[77] and was not seeking " to suppress the expression of unpopular views."[78] According to Justice Rehnquist, if Renton was concerned with the message, "it would have tried to close [the theaters] or restrict their number rather than circumscribe their choice as to location."[79] Because of the City's justification, the Court found the regulations to be content-neutral.[80] As such, the regulations would be valid "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[81]

The next question was whether the city had demonstrated that "the Renton

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[72] *Id.* at 47-50.

[73] *Id.* at 48, (emphasis in original) (quoting Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

[74] *Renton*, 475 U.S. at 49.

[75] *Id.* at 47.

[76] *Id.* at 48 (alteration in original) (quoting from the Appendix to the Jurisdictional Statement.)

[77] *Id.* at 49.

[78] *Id.* at 48.

[79] *Id.* at 48 (quoting *Young*, 427 U.S. at 82, n. 4 (Powell, J., concurring)).

[80] *Renton*, 475 U.S. at 48-49.

[81] *Id.* at 47.

ordinance [was] designed to serve a substantial governmental interest."[82] The Court held that Renton had a "vital governmental interest" "in attempting to preserve the quality of urban life."[83] Only a few vague statements minimally elucidate the meaning of the phrase "quality of urban life." Quoting from other courts the Court said little more than that " 'the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight.' "[84] Justice Rehnquist, for the Court, easily concluded that these vaguely described that government interests were substantial enough to satisfy the substantial government interest test.[85]

Perhaps the only question left to plaintiffs was that the government was required to prove that its asserted interests were furthered by its ordinance. Renton relied on studies in Seattle to demonstrate the substantial harm that could be caused by "adult" theaters.[86] The Court rejected the holding of the Court of Appeals that the City violated the First Amendment by not conducting its own studies related to "particular problems or needs of Renton."[87] According to the Court, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[88]

The Court also rejected the argument that Renton's interests were not substantially served because Renton's choice of solutions was different than Seat-

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[82] *Id.* at 50. Of course, the question of whether the ordinance served a substantial government interest was somewhat redundant, almost superfluous, in light of the Court's earlier discussion of content-neutrality. *See infra* note 212. The Court had already relied on the government's interests in finding the regulation content-neutral. *See supra* notes 67-75 and accompanying text. Rephrased, the Court already had found the ordinance to be content-neutral, because a non-speech governmental interest was the basis of the categorization of "adult" theater. *Id.* Here, the Court merely had to recognize that the interest the government used to categorize the speech was substantial for the Renton statute to meet the substantial government interest test.

[83] *Id.*

[84] *Id.* at 51 (quoting Northend Cinema, Inc. v. Seattle, 585 P.2d 1153, 1155 (1978)).

[85] *Id.* at 50.

[86] *Renton*, 475 U.S. at 51-52.

[87] *Id.* at 50 (quoting Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 537 (1984)).

[88] *Id.* at 51-52.

tle's.[89] The plaintiffs had urged that Renton relied on studies done in Seattle to support its zoning scheme; therefore, Renton was constitutionally required to take the same approach as Seattle.[90] Otherwise, so the plaintiffs argued, the studies done by Seattle would be irrelevant and unreliable as support for the constitutionality of the method chosen by Renton.[91] The Court separated the studies from the legislative remedy.[92] Quoting from the plurality in *American Mini Theaters*, the Court held, "'[T]he city must be allowed to experiment with solutions to admittedly serious problems.'"[93] Accordingly, the Court found that the studies more than adequately served the substantial state interests.[94]

The final time, place and manner question was whether the ordinance allowed for reasonable alternative avenues of communication.[95] Rather than ask whether the ordinance permitted plaintiffs an alternative method by which they could communicate their message on their own property, Justice Rehnquist focused on whether the ordinance permitted the plaintiffs to communicate their message on different properties.[96] The Justice noted that the zoning permitted "adult" theaters to operate on more than 500 acres, or more than five percent, of the land in Renton.[97] This easily would have satisfied the need for available alternatives[98], except that "practically none" of the land was for sale and that none of the appropriately zoned land was "commercially viable."[99] Consequently, the plaintiffs argued that the land was not available and therefore the ordinance substan-

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[89] *Id.*

[90] *Id.*

[91] *Id.* at 52.

[92] *Renton*, 475 U.S. at 52.

[93] *Id.* (quoting *Young*, 427 U.S. at 71).

[94] *Id.*

[95] *Id.* at 53-54.

[96] *Id.* at 53.

[97] *Id.* at 53.

[98] *Renton*, 475 U.S. at 53. Justice Rehnquist concluded that the city must "refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." *Id.* at 53.

[99] *Id.* at 53-54.

tially restricted speech.[100] The Court rejected both the reasoning and conclusion stating:

> That [plaintiffs] must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.[101]

According to Justice Rehnquist, the available land constituted reasonable alternative avenues.[102] The Court held that the ordinance easily met each of the four parts of the time, place, and manner test.[103]

ALTERNATIVE AVENUES OF COMMUNICATION - ZONING

In the years after *Renton*, local governments "experimented" with a variety of regulations of "adult" uses.[104] Many of those experiments were land use or zoning regulations.[105] As might be expected, the lower courts consistently applied the *Renton* time, place and manner analysis[106] when these regulations were zoning regulations. Often, the question narrowed to whether the ordinance allowed a "sufficient number" of locations.[107] A common subject of that question was whether locations, which were legally available under the regulation, were practically available or whether non-legal considerations so burdened a location as to

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[100] *Id.* at 54.

[101] *Id.*

[102] *Id.*

[103] *Renton,* 475 U.S. at 54.

[104] *See supra* note 1.

[105] *See, e.g.*, North Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441 (7th Cir. 1996); Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995).

[106] *Renton*, 475 U.S. at 46.

[107] *See. e.g.*, Lim v. City of Long Beach, 217 F.3d 1050, 1056 (9th Cir. 2000); Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000); David Vincent, Inc. v. Broward County, Fla., 200 F.3d 1325, 1329 (11th Cir. 2000).

make it unavailable for constitutional purposes.[108]

In a number of cases the reviewing court simply looked at the number of locations to determine if that number was sufficient.[109] Courts reviewed ordinances that permitted as few as two locations [110] and as many as one hundred and nine.[111] Other courts focused on the percentage of land available for "adult" use.[112] The percentage might be based on the percentage of all land in the city[113] or the percentage of business property.[114] Each of these inquiries attempted to get at the heart of the issue left somewhat open by the Court in *Renton*, whether the zoning regulation reserves a "sufficient number" of locations.[115] *Renton* left few clues to answer that question because the Court simply looked at numbers and the general concept of economics, i.e., whether the parcels were for sale and whether they were commercially viable.[116] Once the Court determined that the legally available locations were the constitutionally available spaces, the court did not need to, and consequently did not, explain a method for determining "enough." The lower courts, left to their own devices, looked at demand and desire. The question of demand was the micro-economic question of the consumer demand for the product.[117] Desire measured the efforts of the "adult" industry to

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[108] *See, e.g.*, *David Vincent*, 200 F.3d at 1334; Schneider v. City of Ramsey, 800 F. Supp. 815, 821 (D. Minn. 1992).

[109] *See, e.g.*, *Lim*, 217 F.3d at 1056; *Diamond*, 215 F.3d at 1055; *David Vincent*, 200 F.3d at 1329.

[110] *See* 421 Northlake Blvd. Corp. v. Village of N. Palm Beach, 753 So. 2d 754 (Fla. Dist. Ct. App. 2000).

[111] *See* Lim v. City of Long Beach, 12 F. Supp. 2d 1050 (C.D. Cal. 1998).

[112] *See, e.g.*, Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858 (8th Cir. 1994) (6.75 percent of business locations); Specialty Malls of Tampa v. City of Tampa, 916 F. Supp. 1222 (M.D. Fla. 1996) (7.5 percent of city's entire land area).

[113] *See, e.g.*, *Renton*, 475 U.S. at 43; *Specialty Malls*, 916 F. Supp. at 1222.

[114] *See, e.g.*, *Ambassador Books*, 20 F.3d at 860.

[115] *Lim*, 217 F.3d at 1056; *Diamond*, 215 F.3d 1052 at 1055; *David Vincent*, 200 F.3d at 1329.

[116] *See Renton*, 475 U.S. at 54.

[117] *See* Lim v. City of Long Beach, 12 F. Supp. 2d 1050 (C.D. Cal. 1998).

move into the jurisdiction.[118] While the calculus for demand and desire remained uncertain, an ordinance which allowed no "adult" use was invariably declared invalid.[119]

When an ordinance permitted a sufficient number of legally available sites, challengers would assert that some or all of these sites should not be considered constitutionally available for a variety of reasons. A common complaint would be that the location was not commercially desirable.[120] Other factors relied on in the attempt to prove unavailability included: (1) the cost of relocation was too high,[121] (2) no one would sell or lease property on which "adult" uses could legally operate,[122] (3) the site was currently being used for other purposes,[123] (4) no building existed which would accommodate the business,[124] (5) the business would have to build a new facility,[125] (6) a new business would be required to outbid an existing business for a location, [126] (7) the land would need to be subdivided before it would be legally usable as an "adult" facility,[127] (8) the legally available parcels did not contain infrastructure required to support generic commercial enterprise,[128] (9) the available lot was in close proximity to an industrial use,[129] (10) parcels were unavailable due to the contractual relationships of third

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[118] *See* Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999).

[119] *See, e.g*, Nakatomi Investment, Inc., v. City of Schenectady, 949 F. Supp. 988 (N.D.N.Y. 1997); T & D Video Inc. v. City of Revere, 670 N.E. 2d 162 (Sp. Jud. Ct. Mass 1996).

[120] *See, e.g*, *421 Northlake Blvd. Corp.*, 753 So. 2d at 755.

[121] *E.g.*, St. Louis County v. B.A.P., Inc., 18 S.W.3d 397 (Mo. Ct. App. 2000).

[122] *E.g.*, *St. Louis County*, 18 S.W.3d at 397; *see also*, *David Vincent*, 200 F.3d at 1334 (citing Woodall v. City of El Paso, 49 F.3d 1120, 1124 (5th Cir. 1995)).

[123] *St. Louis County*, 18 S.W.3d at 415.

[124] *David Vincent*, 200 F.3d at.1335

[125] *Id.*

[126] *Boss Capital*, 187 F.3d at 1253.

[127] Levi v. City of Ontario, 44 F. Supp. 2d 1042, 1050 (C.D. Cal. 1999).

[128] *Id.* at 1051.

[129] Diamond v. City of Taft, 29 F. Supp. 2d 633, 639 (E.D. Cal. 1998).

parties, i.e., restrictive covenants or leases,[130] and (11) the available property was owned by the city and the city had a policy of not renting to "adult" facilities.[131] Not only did the lower courts use the *Renton* time, place, manner test to review zoning of "adult" uses, they also applied the *Renton* test to regulations restricting days of operation,[132] hours of operation,[133] and size and configuration of signs.[134] One lower court also applied the standard to a regulation requiring open booths, i.e., prohibiting private viewing rooms.[135]

In addition to applying *Renton* beyond zoning, lower courts also applied *Renton* beyond adult movie theaters to other uses including nude dancing and other nude entertainment.[136] *Renton* has been regularly used to test the validity of regulation of nude entertainment. The question is whether that should have been the case after *Barnes*, and more importantly, whether that should be the case after *City of Erie* in that each of those cases relied on *O'Brien*, and each dealt specifically with nude entertainment.

O'BRIEN AND TIME, PLACE, MANNER

O'Brien began as an approach to governmental regulations of conduct that had an incidental impact on expression.[137] Under *O'Brien*, a regulation of conduct, which has an incidental limitation on expressive conduct, is constitutional, "[i]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than essential to the furtherance of

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[130] Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1304-05 (M.D. Fla. 1997).

[131] *Id.* at 1305.

[132] *See* Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 440-41 (6th Cir. 1998).

[133] *Id. E.g., Lady J. Lingerie*, 176 F.3d at 1364-65; Mitchell v. Comm'r of the Comm'n on Adult Entertainment Establishments, 802 F. Supp. 1112, 1118 (D. Del. 1992).

[134] Excalibur Group, Inc. v. City of Minneapolis, 113 F.3d 1216 (8th Cir. 1997).

[135] *Mitchell*, 802 F. Supp. at 1119.

[136] *E.g.*, D.H.L. Assocs. Inc. v. O'Gorman, 199 F.3d 50 (1st Cir. 1999); *Boss Capital*, 187 F.3d 1251 (11th Cir. 1999); *Lady J. Lingerie*, 176 F.3d at 1361; O'Malley v. City of Syracuse, 813 F. Supp. 133 (N.D.N.Y 1993).

[137] United States v. O'Brien, 391 U.S. 367 (1968).

that interest."[138] While this is not identical to the time, place, manner test, it is substantially similar. Indeed, the Court often uses the two interchangeably. For example, in *Clark v. Community for Creative Non-Violence*, the Court held that it would not require the government to show a more significant governmental interest under *O'Brien* than under the *Renton* time, place, manner standard.[139] The Court explained:

> Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech. Thus, if the time, place, or manner restriction on expressive sleeping, if that is what is involved in this case, sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under O'Brien on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served. We note that only recently, in a case dealing with the regulation of signs, the Court framed the issue under O'Brien and then based a crucial part of its analysis on the time, place, or manner cases. [140]

Justice Marshall, in his dissent, "agree[d] with the majority that no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in *United States v. O'Brien.*"[141] In *Ward v. Rock Against Racism*, the Court even more clearly merged the two tests, holding " that the *O'Brien* test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'"[142] An important question is whether application of the two tests results in different outcomes. A related question is which test courts should apply to zoning of nude entertainment.

[138] *Id.* at 377.

[139] Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

[140] *Id.* at 298-99 n.8.

[141] *Id.* at 308 (Marshall, J., dissenting).

[142] Ward v. Rock Against Racism, 491 U.S. 397, 407 (1989) (quoting *Clark*, 468 U.S. at 298).

BARNES V. GLEN THEATER, INC.

In *Barnes*, the Court for the first time directly considered the meaning of the First Amendment protections for nude dancing in light of a statute that purported to proscribe all public nudity.[143] Justice Scalia took the simplest approach. In concurring in the result that the prohibition did not violate the First Amendment, the Justice separated the act of being naked in public from the act of dancing.[144] In his view, the challenged regulation was "not subject to First Amendment scrutiny at all" because the statute was a "general law regulating conduct and not specifically directed at expression."[145] Justice Scalia rejected the notion that conduct is protected by the First Amendment simply because the conduct "was being engaged in for expressive purposes."[146] As he noted, "almost anyone can violate any law as a means of expression."[147] Indeed, Judge Kleinfield of the Ninth Circuit recently noted that the very purpose of civil disobedience, i.e., law violation, as explained by Henry D. Thoreau, Mohandas Ghandi, and Martin Luther King, Jr., is to engage in expression.[148]

The other eight justices disagreed with Justice Scalia's view and held that nude dancing is protected by the First Amendment.[149] Four justices, Chief Justice Rehnquist (with whom Justices O'Connor and Kennedy concurred) and Justice Souter, agreed with Justice Scalia that the law at issue could constitutionally prohibit public nudity even if that public nudity is part of an expressive dance and even if that dance is "protected" by the First Amendment.[150] Those four justices also agreed that the proper standard to apply is *O'Brien*.[151] Neither Chief

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[143] *Barnes*, 501 U.S. at 566.

[144] *Id.* at 572 (Scalia, J., concurring).

[145] *Id.*

[146] *Id.* at 577 (Scalia, J., concurring).

[147] *Id.* at 579 (Scalia, J., concurring).

[148] *See* Forrester v. San Diego, 25 F.3d 804, 814 (9th Cir. 1994) (Kleinfeld, J., concurring).

[149] *Barnes*, 501 U.S. at 562 (Rehnquist, C.J., plurality); *Id.* at 581 (Souter, J., concurring); *Id.* at 587 (White, J., dissenting).

[150] *Barnes*, 501 U.S. at 562 (Rehnquist, C.J., plurality); *Id.* at 581 (Souter, J., concurring).

[151] *Id.*

Justice Rehnquist nor Justice Souter had any trouble holding that the statute was within the constitutional power of the state, i.e., it met the first prong of the *O'Brien* test.[152]

The major difference between the opinions of Justice Rehnquist and Justice Souter concerned the second prong of the *O'Brien* test, whether the statute furthered legitimate state interests.[153] Justice Rehnquist noted the history of the regulation of public indecency and the traditional police power to protect health, safety and morals.[154] He concluded that the statute furthered "a substantial governmental interest in protecting order and morality."[155] Justice Souter, rather than relying on morality and order, relied on a narrow aspect of morality.[156] In the Justice's view, the statute was justified by the state's interest in "preventing prostitution, sexual assault, and associated crimes."[157]

Applying the third part of the *O'Brien* test, each justice found the legitimate government interests to be "unrelated to the suppression of free expression."[158] Chief Justice Rehnquist considered the following factors: (1) the state interest is in protecting morality and order, (2) public nudity injures public order and morality, (3) preventing public nudity protects morality, (4) therefore, the interest is

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[152] *Id.*

[153] *Id.* at 568-69 (Rehnquist, C.J., plurality); *Id.* at 584 (Souter, J., concurring).

[154] *Barnes*, 501 U.S. at 568-69 (Rehnquist, C.J., plurality).

[155] *Id.* at 569 (Rehnquist, C.J., plurality).

[156] Justice Souter did not concede that he was relying on a narrower view of morality, but the conclusion is inescapable. The Justice specifically relied on the police power to prevent a particular category of crime, i.e., prostitution. (Presumably such reliance would be unjustified in those parts of Nevada where prostitution is legal.) Although Justice Souter was not clear as to his reasoning, it appears to be that prostitution is a crime; therefore, the state has an interest in prohibiting conduct that leads to illegal behavior. Making prostitution a crime, however, is a moral judgment by the legislature.

Apparently, the Justice viewed the First Amendment rights of nude dancers as inferior to the government's interest in preventing behavior that is deemed immoral and therefore illegal due to a moral judgment (prostitution), but those First Amendment rights trump the government interest in preventing immoral behavior (i.e., public nudity). Why one moral judgment can supercede First Amendment protections and why another cannot, Justice Souter did explain. Justice Souter ignored the reality that a legislature makes moral value judgments when defining crimes, particularly crimes like prostitution.

[157] *Id.* at 584 (Souter, J., concurring).

[158] *Id.* at 585 (Souter, J., concurring); *Id.* at 570 (Rehnquist, C.J., plurality).

unrelated to suppression of free expression.[159] Justice Souter's approach was different only because he relied on a different public interest.[160] The Justice's analysis accounted for: (1) the state interest is in preventing crime; (2) for unstated reasons, establishments which offer nude dancing are havens for crime; (3) preventing nude dancing helps prevent crime; (4) therefore, the interest is unrelated to suppression of free expression.[161] Without much analysis Justice Souter and Chief Justice Rehnquist concluded that the regulation was no greater than essential.[162] As stated by the Chief Justice, "Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose."[163]

PAP'S A.M. v. CITY OF ERIE

The splintering of the majority in *Barnes* leads to difficulty for the lower courts in reviewing similar ordinances. A number of courts looked to Justice Souter's opinion for precedent on the premise that his opinion constituted the most narrow position among the five member *Barnes* majority.[164] In *City of Erie*, the Pennsylvania Supreme Court, ignoring the *Barnes* result, found that as to the application of the First Amendment to a ban on public nudity, *Barnes* stood for nothing more than that the First Amendment protects nude dancing.[165] By focusing on this aspect of *Barnes* and ignoring the result, the Pennsylvania Supreme Court essentially held that the dissenting opinion was the prevailing

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[159] *Id.* at 570-71 (Rehnquist, C.J., plurality).

[160] *Id.* at 585-86 (Souter, J., concurring).

[161] *Barnes*, 501 U.S. at 585-86 (Souter, J., concurring).

[162] *Id.* at 572 (Rehnquist, C.J., plurality); *Id.* at 587 (Souter, J., concurring).

[163] *Id.* at 572 (Rehnquist, C.J., plurality). *See also*, *Id.* at 587 (Souter, J., concurring) ("Pasties and a G-String moderate the expression to some degree, to be sure, but only to a degree").

[164] *See, e.g.*, Tunick v. Safir, 209 F.3d 67, 83 (2d Cir. 2000) ("I conclude, as have five circuits, that Justice Souter's opinion was the most narrow of the opinions up holding the statute."). *See also* DiMa Corp. v. Town of Hallie, 185 F.3d 823, 830 (7th Cir. 1999); J & B Entm't, Inc. v. City of Jacksonville, 152 F.3d 362, 370 (5th Cir. 1998); Farkas v. Miller, 151 F.3d 900, 904 (8th Cir. 1998); Triplette Grille, Inc. v. City of Akron, 40 F.3d 129, 134 (6th Cir. 1994); Int'l Eateries of Am., Inc. v. Broward County, 941 F.2d 1157, 1160-61 (11th Cir. 1991).

[165] *See* Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998).

opinion. The Supreme Court clarified *Barnes* in *City of Erie*.[166]

In *City of Erie*, the Court reviewed the constitutionality of an ordinance "almost identical" to the public nudity ban upheld in *Barnes*.[167] While the Court again produced four opinions, only two opinions were necessary to create a majority and only two justices, rather than the four in *Barnes*, would have held the ordinance facially unconstitutional.[168] The key to understanding *City of Erie* is that five justices, the plurality plus Justice Souter, agreed that the proper test to apply is the *O'Brien* test;[169] and that six justices, the plurality plus Justices Scalia and Thomas, agreed that the ordinance banning public nudity was constitutional on its face.[170]

Neither the plurality nor Justice Souter clearly explain why *O'Brien* applies.[171] The explanation however, is clearly implied in the plurality's discussion. The plurality notes "nude dancing of the type at issue here is expressive conduct."[172] Next, the plurality questioned whether the *Erie* regulation was "related to the suppression of expression,"[173] holding that if it was then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluation of symbolic speech.[174] In attempting to eliminate the confusion created by *Barnes,* the plurality wrote "we now clarify that government restrictions on public nudity such as the ordinance here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech."[175] Justice Souter

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

[167] *Id.*

[168] *Id.* A majority can be made with the plurality plus Justice Souter or the plurality plus Justice Scalia, with whom Justice Thomas joined. Only Justice Stevens, with whom Justice Ginsburg joined, would hold the ordinance invalid.

[169] *Id.*

[170] *Id.* at 282 (O.Connor, J., plurality); *Id.* at 302 (Scalia, J., concurring in part and dissenting in part).

[171] *Id.* at 282 (O'Connor, J., plurality); *Id.* at 310 (Souter, J., concurring in part and dissenting in part).

[172] *Id.* at 289.

[173] *City of* Erie, 529 U.S. at 289 (internal quotes omitted).

[174] *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)).

[175] *Id.* After explaining that the City's interests were "unrelated to the suppression of the erotic message conveyed by nude dancing," the plurality again found that "[t]he ordinance

agreed that the state's "interest is unrelated to the suppression of expression under *United States v. O'Brien*, . . ., and the city's regulation is thus properly considered under the *O'Brien* standards."[176]

While a majority agreed that the *O'Brien* test was the proper test to apply, two other justices went further.[177] Justice Scalia, in his concurring opinion which Justice Thomas joined, returned to his concurring opinion in *Barnes* where he "voted to uphold the challenged Indiana statute, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all."[178] Again, in *City of Erie,* Justice Scalia emphasized that the ordinance "prohibits. . . the act - irrespective of whether it is engaged in for expressive purposes - of going nude in public."[179] While Justice Scalia did not agree with the majority as to the test to apply, Justice Scalia agreed that essential factor in determining which test to apply is that the government is regulating conduct.[180] Seven justices agreed in principle that the dominant factor in the case was that the activity regulated was conduct.

PURPOSE/EFFECT AND THE STUPID STAFF (OR OFFICIAL)

Before applying the *O'Brien* test, however, the plurality looked at whether the governmental purpose in enacting the regulation was to suppress speech.[181] After much discussion, the plurality concluded that the governmental purpose was not to suppress speech.[182]

The plurality began by noting that the ordinance was facially neutral. [183] This

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prohibiting public nudity is therefore valid if it satisfies the four-factor test from O'Brien for evaluating restrictions on symbolic speech." *Id.* at 296.

[176] *Id.* at 310 (Souter, J. concurring and dissenting). In the prior sentence, Justice Souter "agree[d] with the analytical approach that the plurality employs in deciding this case." *Id.*

[177] *Id.* at 302.

[178] *Id.* at 307-08 (Scalia, J., concurring) (quoting from *Barnes*, 501 U.S. at 572 (Scalia, J., concurring)).

[179] *City of Erie*, 529 U.S. at 308 (Scalia, J., concurring).

[180] *Id.* at 310 (Scalia, J., concurring).

[181] *Id.* at 289-96 (O'Connor, J., plurality).

[182] *City of Erie*, 529 U.S. at 296 (O'Connor, J., plurality).

[183] *Id.*

was not, however, sufficient to end the inquiry. The plurality inquired into the significance of the "stupid staff."[184] The plaintiff and Justice Stevens, in dissent, argued (according to the plurality), that the preamble to the ordinance suggested that the actual purpose of the legislature was "to prohibit erotic dancing of the type performed" at the plaintiff's establishment.[185] In other words, the ordinance was argued to be content-based. The plurality held that the findings only supported the conclusion that the ordinance was directed toward preventing secondary effects of the nude dancing.[186] As the plurality later noted, "there is nothing objectionable about a city passing a general ordinance to ban public nudity. . .and at the same time recognizing that one specific occurrence of public nudity-nude erotic dancing - is particularly problematic because it produces harmful secondary effects."[187]

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[184] In *Lucas v. South Carolina*, the Court, in an opinion by Justice Scalia, considered the argument that the legislation at issue should be considered an effort to mitigate the harm of noxious uses rather than an effort to gain some benefit for the government because the legislative history stated that the intent was to mitigate harm. 505 U.S. 1003, 1025, n.12 (1992). Justice Scalia responded that if it relied on the reports of the legislative body, then the constitutionality of legislation would rise or fall on the basis of whether the staff was too stupid to put the right language in the legislative findings. *Id.* Consequently, the Justice rejected the language of the legislative history as too easily manipulated. *Id.* The Court has taken this approach far too rarely. In *City of Erie*, for example, the staff wrote findings related to nude dancing. 529 U.S. at 290 (O'Connor, J., plurality). These findings provided the basis for the argument that the ordinance was content-based i.e., that the ordinance was directed at nude dance and not public nudity. *Id.* at 290-91 (O'Connor, J., plurality). Rather than reject the argument as fundamentally unsound due to reliance on "stupid staff" the plurality looked into the significance of the findings. *Id.* at 290-92 (O'Connor, J., plurality). The importance of legislative, i.e., staff, findings and legislator statements could be the basis for an entire article and should be carefully considered by the Court. To use Justice Scalia's language, determining the constitutionality of a law should "require[s] courts to do more than insist upon artful (or the absence of inartful)... characterizations 'within' legislative findings." *Lucas*, 505 U.S. at 1025 n.12.

[185] *City of* Erie, 529 U.S. at 290 (O'Connor, J., plurality). Indeed, as noted by Justice Stevens, the ordinance specifically stated that it was enacted "for the purpose of limiting a recent increase in nude live entertainment." *Id.* at 318 (Steven, J., dissenting). This statement, indeed, points to the stupidity of relying on legislative findings, whether written by staff or otherwise. The question is whether an identical ordinance without the findings enacted in a neighboring community is constitutionally distinguishable.

[186] *Id.* at 296 (O'Connor, J., plurality).

[187] *Id.* at 295(O'Connor, J., plurality). The plurality also rejected the argument that the statements by the city attorney indicated that the ordinance was "aimed at suppressing expression." *Id.* at 292 (O'Connor, J., plurality). The plurality stated that the worst that could be said of the city attorney's statements is that they demonstrated an "illicit motive" on the part of the City and added "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Id.*

Much of the plurality's opinion on the merits revolved around secondary effects and whether an ordinance directed at secondary effects was content-based.[188] First, the plurality reaffirmed that an ordinance aimed at secondary effects is not content-based, and distinguished secondary effects from primary effects.[189] Second, the plurality rejected the argument that the ordinance was content-based because the ordinance permitted scantily-clad dancers but prohibited nude dancers.[190] The plaintiffs argued that permitting scantily-clad but not nude dancers demonstrated that the ordinance was directed at the content of the nude dancing.[191] Without discussion or explanation, the plurality simply stated, "a majority of the Court rejected that view in *Barnes*, and we do so again here."[192]

An understanding of the plurality's rejection may be seen in its rejection of a similar argument by Justice Stevens.[193] In summary, Justice Stevens argued that dancing naked always communicated a message different from dancing with some clothing; therefore, to ban nudity was a complete ban on a form of expression.[194] The plurality responded that "simply to define what is being banned as

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[188] *City of Erie*, 529 U.S. at 289-96 (O'Connor, J., plurality).

[189] *Id.* at 291 (O'Connor, J., plurality). The Court has yet to truly explain the significance in the difference. For example, libel laws (within the limits of New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny) are not content-based in a constitutional sense even though they are directed towards punishing harm based solely on the primary effect of the content of speech. Similarly, "fighting words", *see e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), directly harm individuals, and obscenity, *see, e.g.*, Miller v. California, 413 U.S. 15 (1973), directly harms society. The Court does not consider either of these categories content-based even though the categories are defined by their content, and harm caused is a direct result of the speech. The Court has not explained why some categories of speech based on what appear to be "primary effects," e.g., libel, fighting words and obscenity, are not content-based and may be restricted, and yet other categories of speech e.g., nude dancing, may be restricted only if the government bases its regulations on the "secondary effects" of such speech. Perhaps more importantly, the Court has made no effort to explain why some categories of harmful speech can be restricted or prohibited but other harmful speech cannot. The Court has identified neither the degree nor the kind of harm which removes speech from protection.

[190] *City of Erie*, 529 U.S. at 292 (O'Connor, J., plurality).

[191] *Id*,

[192] *Id.*

[193] *Id.* at 293 (O'Connor, J., plurality).

[194] *Id.* at 317-23 (Stevens, J., dissenting).

the 'message' is to assume the conclusion."[195] Instead, relying on *O'Brien,* the plurality argued that the question was whether the justification of the ban "[was] not related to the suppression of expression."[196] The plurality had no trouble finding that the ordinance did not fail that test because the ordinance sought "to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood."[197] Furthermore, the plurality concluded that even if the prohibition on complete nudity impacted the "erotic message" of the dancers, "[a]ny effect on the overall expressions is de minimis."[198]

This analysis epitomizes the differences between the approaches of the plurality and Justice Stevens. The plurality considered the impact of the ordinance on an "erotic message."[199] Justice Stevens, however, looked at the impact on a "nude message."[200] The plurality, then, perceived the nudity as separate conduct which added to or subtracted from the message.[201] The plurality considered the secondary effects of public nudity and the Government's efforts to eliminate or at least minimize the impact of these secondary effects.[202] By taking this approach the plurality had no trouble in concluding that the "ordinance is on its face a content-neutral restriction that regulates conduct."[203] The plurality, however, took a more difficult path before reaching that relatively simple conclusion. First, the plurality noted that the ordinance facially regulated conduct alone.[204] Then, the plurality held that government statements (the preamble and the city attorney's statement) suggesting that the ordinance was directed toward nude dancing did not make the ordinance content-based because (1) an illicit motive will not invalidate an otherwise valid ordinance, (2)

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195 *Id.* at 293. (O'Connor, J., plurality).

196 *City of Erie*, 529 U.S. at 293 (O'Connor, J., plurality).

197 *Id.*

198 *Id.* at 294 (O'Connor, J., plurality).

199 *Id.*

200 *Id.* at 318-19 (Stevens, J., dissenting).

201 *Id.* at 294 (O'Connor, J., plurality).

202 *City of Erie*, 529 U.S. at 296-98 (O'Connor, J., plurality).

203 *Id.* at 298 (O'Connor, J., plurality).

204 *Id.* at 290 (O'Connor, J., plurality).

the purpose of the ordinance was to combat secondary effects (i.e., crime) caused by public nudity, and (3) that even if, the plurality held the nudity ban effected the message, the effect on "overall" expression was de minimis. [205] Therefore, the plurality would not find the otherwise content-neutral ordinance content-based.[206] While the plurality mixed arguments and responses to arguments, the plurality's focus remained on the public nudity, the conduct, and the regulation of the conduct of being naked in public. The opinion ended where it began, holding that the "ordinance is on its face a content-neutral restriction on conduct," which even if directed at nude dance clubs "is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing."[207]

The plurality then applied the *O'Brien* test.[208] The only significant discussion of the *O'Brien* test was whether the local government had "proved" that public nudity caused the claimed secondary effects.[209] According to the plurality, the City properly relied on findings in other cities, and, on findings relied on in other cases.[210] As noted by the plurality:

> Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton, Young v. American Mini Theatres* [ ], and *California v. LaRue* [ ], it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.[211]

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[205] *Id.* at 290-96 (O'Connor, J., plurality).

[206] *Id.* at 294 (O'Connor, J., plurality).

[207] *Id.* at 296 (O'Connor, J., plurality).

[208] *City of Erie*, 529 U.S. at 296 (O'Connor, J., plurality).

[209] *Id.* at 296-300 (O'Connor, J., plurality).

[210] *Id.* at 296-97 (O'Connor, J., plurality).

[211] *Id.* at 296-97 (O'Connor, J., plurality) (citations omitted). Justice Souter based most of his dissent on a disagreement with this approach. *Id.* at 314-15 (Souter, J., concurring and dissenting). According to Justice Souter, a regulation is not valid unless the government "make[s] some demonstration of an evidentiary basis for the harm it claims to flow from the

In addition, the plurality noted that the elected council members, based on their general knowledge of downtown, "would likely have had first-hand knowledge of what took place at and around nude dancing establishments" giving them the ability to make "particularized, expert judgments about the resulting harmful secondary effects."[212] Once the plurality accepted the finding that public nudity caused harm, the plurality easily found that the ordinance complied with the other requirements of *O'Brien*.[213] First, as to whether the regulation furthered a government interest, the plurality found that it was obvious that if public nudity caused harm, then banning public nudity furthered the government interest in eliminating that harm.[214] Second, the plurality found that the ordinance was con-

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expressive activity." *Id.* at 313 (Souter, J., concurring and dissenting). Justice Souter's approach calls for a form of "community standards." *Miller*, 413 U.S. at 24. Apparently, Justice Souter's approach would require City B to provide evidentiary proof of the harm caused by public nudity even if the Supreme Court upheld the validity of an identical public nudity ban enacted in City A. This would lead to the result that some cities would be able to constitutionally ban public nudity while others would not. This would lead into the constitutional quagmire as to whether the First Amendment should be a national or a local standard.

The plurality takes the simple approach that if Indiana can ban public nudity (as the Court permitted in *Barnes*) then the City of Erie can as well. *City of Erie*, 529 U.S. at 296-97 (O'Connor, J., plurality). Or put another way, if public nudity causes harm in Indiana, the City of Erie can assume it causes harm in Erie as well. Justice Souter takes the opposite view. Id. at 310-17 (Souter, J., concurring and dissenting). Even if one city proves that public nudity causes or caused harm, the next city cannot rely on that proof. That leads to another problem. If City B cannot prohibit public nudity until it "proves" that such nudity harms City B, then City B must permit public nudity until harm is proved within City B. This is true, even if the harm has already been "proven" in another City, wherever located.

[212] *Id.* at 297-98 (O'Connor, J., plurality). In some ways this approach is nothing more than suggesting that the Court should defer (perhaps completely) to the judgment of the governing body as to the harm caused by public nudity. Again, Justice Souter disagrees suggesting that no deference should be given to the judgment of the governing body. *Id.* at 314 (Souter, J., concurring and dissenting). Taken to its extreme, the plurality's view is that the First Amendment protects nude dancing unless the legislative body finds that it causes public harm. *See* discussion n. 182 regarding the "stupid staff" test. In the last analysis, this is similar in effect to Justice Scalia's approach in that the First Amendment does not apply.

[213] *Id.* at 297.

[214] *City of Erie*, 529 U.S. at 300-01 (O'Connor, J., plurality). "[I]t is evident that, since crime and other public health and safety problems are caused by the presence of nude dancing establishments like Kandyland, a ban on such nude dancing would further Erie's interest in preventing such secondary effects." *Id.* at 300-01 (O'Connor, J., plurality). Justice Souter never really addresses the logical analysis of this conclusion, focusing more on the failure to prove harm. *Id.* at 300 (O'Connor, J., plurality). The plurality's conclusion is almost inescapable in light of the tests applied by the plurality.

tent-neutral because it was justified without reference to content, or "unrelated to the suppression of expression."[215] Obviously such a finding supported the plurality's conclusion that the ordinance met the third prong of the *O'Brien* test i.e., that "the government interest is unrelated to the suppression of free expression."[216] Finally, without explanation, the plurality simply concluded that "the restriction is no greater than is essential to the furtherance of the government interest,"[217] rejecting the argument that the "least restrictive means analysis" was required because the regulation was content-neutral.[218]

Just as *Renton* clarified and confirmed the holding of *Young, City of Erie* clarified and confirmed the holding of *Barnes*.[219] Just as *Renton* became the standard by which to review adult zoning, *City of Erie* has become the standard by which to review bans on public nudity, including nude entertainment. Notwithstanding the splintering of the Court in *City of Erie*, it cannot be doubted that *City of Erie* sets the standard for judging the validity of a direct ban on public nudity. The problem to be addressed in the rest of the paper is the problem of which approach to take when a zoning ordinance restricts nude entertainment to the extent that it effectively prohibits all locations of nude entertainment.

PUBLIC NUDITY ZONING - *RENTON* OR *ERIE*

The best approach to considering the potential conflict between *Renton* and *City of Erie* is within the context of a hypothetical Public Nudity Zoning

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The first question in this case was really the only question that needed to be answered. The plurality found the ordinance to be content-neutral because it was justified without reference to content. *Id.* at 289-96 (O'Connor, J., plurality). The justification was harm. If a government can categorize speech based on harm caused (and the Court will accept that categorization as legitimate), then a regulation directed at that categorization is justified without reference to content. If the Court subsequently applies the *O'Brien* test, the regulation almost certainly should pass. If a regulation is content-neutral because it is aimed at eliminating a harm, then it seems obvious that it furthers an important or substantial government interest and is unrelated to the suppression of free expression. Finally, the least restrictive means to eliminate the harm caused by a category is to eliminate that category of speech. This question merits more extensive discussion and is beyond the purview of this article.

[215] *Id.* at 290-96 (O'Connor, J., plurality).

[216] *Id.* at 301 (O'Connor, J., plurality). *See supra* note 208.

[217] *Id.*

[218] *City of Erie*, 529 U.S. at 301-02 (O'Connor, J., plurality).

[219] *Id.* at 289-90 (O'Connor, J., plurality).

("PNZ") Ordinance. The PNZ Ordinance might eliminate all locations of nude entertainment establishments in a number of ways. For example, the PNZ could create a public nudity zoning district, but not designate any area as falling within such district. Alternatively, it could require that nude entertainment establishments be at least 500 feet from any residential neighborhood, with such distance limitation resulting in elimination of all available property within the community. That distance limitation could effectively ban all nude entertainment establishments.[220]

For the purpose of this article, the following assumptions must be made: (1) the PNZ Ordinance confines itself to business wherein employees engage in (properly defined) public nudity;[221] (2) the PNZ Ordinance does not attack nude dancing alone;[222] (3) the local government has avoided any "stupid staff" or "stupid legislator" problems;[223] (4) due to location requirements, the PNZ Ordinance eliminates all locations for nude entertainment establishments.

Although *Renton* and *Young* each concerned the zoning of adult motion picture theaters, lower courts, prior to *Barnes*, applied *Renton* to review the validity of any nude entertainment zoning.[224] Subsequent to *Barnes*, lower courts continued their reflexive application of *Renton* to the zoning of nude entertain-

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220 Another alternative would be for the PNZ Ordinance to eliminate all but one or a few locations. A still different, but related, problem would be if the ordinance regulated all adult entertainment establishments including, but not limited to, nude entertainment. For the purposes of this paper, however, it is simplest to assume that the PNZ Ordinance effectively prohibits all nude entertainment establishments, but does not regulate any other establishments.

221 One of the pitfalls of any regulation is definition. In at least one case, a local government prohibited being "topless," allowing the entertainers to engage in "bottomless" entertaining. *See* Misty's Café, Inc. v. Leon County, 640 So. 2d 170 (Fla. Dist. Ct. App. 1994).

222 An ordinance, which is directed at nude dancing alone, may be considered to be content-based. See, e.g. Schultz v. City of Cumberland, 228 F.3d 831, 843 (7th Cir. 2000); State v. Café Erotica, Inc., 500 S.E.2d 574 (Ga. 1998).

223 *See e.g.*, Lucas v. South Carolina, 505 U.S. 1003, 1025 n. 12 (1992). For example, no legislator who supported the legislation said anything like, "God has commanded that we rid the earth of those women who would use their naked bodies to entertain men." While a statement like this may not by itself get the regulation declared invalid, it would not be helpful in the record. As a further note, the "stupid" designation is not meant to impugn the ideals addressed by the fictitious statement. The designation merely suggests that someone who wishes to have a PNZ Ordinance upheld should not put into the record statements that would unnecessarily subject an otherwise valid ordinance to attack.

224 *See, e.g.* S D J, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988); Tollis v. San Bernardino County, 827 F.2d 1329 (9th Cir. 1987); International Food & Beverage Systems v. City of Ft. Lauderdale, 794 F.2d 1520 (11th Cir. 1986).

ment.[225] Perhaps more importantly, these courts did not, for the most part, even consider whether *Barnes* in any way impacted the application of *Renton* to zoning of nude entertainment. Some courts expressly found *Renton* to be the proper test.[226] At least one court expressly rejected *Barnes*.[227] At least one court, however, relied on *Barnes* in applying the *Renton* test.[228] While the application of *Renton* to public nudity zoning made sense before *Barnes*, the question is whether it was appropriate afterwards. More importantly, the question is whether the *Renton* approach is appropriate after *City of Erie*. Put another way, in reviewing the validity of the PNZ Ordinance it must be determined (1) whether *Renton* and *City of Erie* conflict; (2) whether they are the same; (3) whether one trumps the other; or (4) whether they both apply.

The Court in *Renton* derived its test from the time, place, and manner test, purporting to rely on *Young*.[229] This reliance had two difficulties. First, only four justices in *Young* relied on the time, place, and manner test. Justice Powell, who provided the fifth vote to create the majority in *Young*, expressly relied on the *O'Brien* test.[230] Second, the *Young* plurality did not explain why it chose the time, place, and manner template; it simply chose that template as if that were the only and obvious choice.[231] Perhaps the only real insight into the plurality's rationale is its statement that ". . .what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited. . . ."[232] The Court

[225] *See e.g.*, Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251 (11th Cir. 1999); Charette v. Town of Oyster Bay, 159 F.3d 749 (2d Cir. 1998); Buzzetti v. New York, 140 F.3d 134 (2d Cir. 1998); White's Place, Inc. v. Glover, 975 F. Supp. 1333 (M.D. Fla. 1997); El Morocco Club, Inc. v. Richardson, 746 A.2d 1228 (R.I. 2000); Nakatomi Investments, Inc. v. City of Schenectady, 949 F. Supp. 988 (N.D.N.Y. 1997); Mga Susu, Inc. v. County of Benton, 853 F. Supp. 1147 (D. Minn. 1994); Jott, Inc. v. Charter Township of Clinton, 569 N.W.2d 841 (Mich. 1997).

[226] *E.g.*, *Buzzetti* 140 F.3d at 138.

[227] International Eateries of America, Inc. v. Broward County, 941 F.2d 1157, 1161 (11th Cir. 1991).

[228] O'Malley v. City of Syracuse, 813 F.2d 133 (N.D.N.Y. 1993).

[229] *See Renton*, 475 U.S. at 46.

[230] *See Young*, 427 U.S. at 79 (Powell, J., concurring) ("In these circumstances, it is appropriate to analyze the permissibility of Detroit's action under the four-part test of United States v. O'Brien, . . .").

[231] *Id.* at 50 n.18 (Stevens,J., plurality).

[232] *Id.* at 71 (Stevens, J., plurality).

in *Renton* as well, seemed to have assumed that a zoning ordinance is a "place" regulation.[233] The zoning of nude dancing facilities also appears to be a place regulation. The state's justifications for categorizing, and then zoning, nude dancing facilities are indistinguishable from the justifications for categorizing and zoning adult movie theaters. Consequently, lower courts have applied *Renton* to nude entertainment zoning.

Barnes and *City of Erie*, however, suggest that a different test governs regulations of public nudity. A majority of the Court in *City of Erie* held that an ordinance banning public nudity should be judged against the *O'Brien* test. The plurality chose this test because the *City of Erie* ordinance regulated expressive conduct.[234] Justice Souter agreed that *O'Brien* was the correct standard, "agree[ing] with the analytical approach that the plurality employ[ed]."[235] The plurality's language reasonably implies that all regulations of public nudity should be judged under the *O'Brien* test. For example, the plurality held:

> Finally, it is worth repeating that Erie's ordinance is on its face a content neutral restriction that regulates conduct, not First Amendment expression. And the government should have sufficient leeway to justify such a law based on secondary effects.[236]

This statement indicates that the factor that determines the test to apply is whether the ordinance is a facially neutral regulation of conduct that incidentally burdens expression. This conclusion is consistent with the plurality's earlier statements (1) that "government restrictions on public nudity... should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech"[237] and (2) that Erie's "ordinance prohibiting public nudity is therefore valid if it satisfies the four-factor test from *O'Brien* for evalu-

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[233] *See Renton*, 475 U.S. at 46 ("the Renton ordinance .... does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of [specified uses]").

[234] *See City of Erie*, 529 U.S. at 289 (O'Connor, J., plurality) ("...nude dancing of the type at issue here is expressive conduct..."); *Id.* ("[g]overnment restrictions on public nudity... should be evaluated under the framework set forth in [*O'Brien*] for content-neutral restrictions on symbolic speech"); *Id.* (the ordinance bans conduct alone); *Id.* at 298 ("...Erie's ordinance is on its face a content-neutral restriction that regulates conduct, not First Amendment expression").

[235] *Id.* at 310 (Souter, J., concurring).

[236] *Id.* at 298 (O'Connor, J., plurality).

[237] *Id.* at 289 (O'Connor, J., plurality).

ating restrictions on symbolic speech."[238]

In as much as *Renton* demands that zoning restriction of adult entertainment be evaluated under the time, place, manner test and *City of Erie* demands that "restrictions on public nudity" be judged under *O'Brien*, the question is whether *Renton* or *City of Erie/O'Brien* applies to public nudity zoning. As noted before, lower courts have reflexively concluded that public nudity zoning is indistinguishable from adult entertainment zoning; therefore, *Renton* applies. The courts could, just as reflexively, conclude that public nudity zoning is a regulation of public nudity, therefore *City of Erie* applies. One easy approach to solving this conundrum is to use the more recent decision. If *Renton* had been decided in 1850 and *City of Erie* in 2000, using the more recent decision/rationale would easily make sense. It would be easy to argue that much had changed in 150 years. *Renton* and *City of Erie*, however, are only 14 years apart. The lapse in time is not sufficient to cause a reasonable questioning of the validity of *Renton*. Inasmuch as *Renton* and *City of Erie* address different questions, choosing the last in time is a mere avoidance of the conundrum, and not solving it.[239]

Rather than the last-in-time approach, a better approach would be to determine whether the cases are reconcilable. Reconciling the cases may take the form of finding that one test is a subset of the others or that one fact is more important than another. Alternatively, the approaches might be combined. The goal is to eliminate whatever appearance of conflict exists between the two decisions.

First, it should be noted that a zoning ordinance regulating the location of public nudity establishments is a place regulation. The Court used this approach in *Renton* and is consistent with its approach in other cases. For example, in *Clark v. Community for Creative Non-Violence,* the Court reviewed a United States Park Service regulation banning sleeping in Lafayette Park, which is lo-

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[238] *Id.* at 296 (O'Connor, J., plurality).

[239] Choosing the last in time may be the appropriate approach with regard to the PNZ Ordinance the effect of which is to ban public nudity. First, if it is assumed that *Renton* and *City of Erie* rule on the exact same issue, then obviously the last decision in time will be assumed to have overruled the prior decision. If it is assumed that *Renton* and *City of Erie* ruled on similar but not exactly the same issues, then, again, the last case in time overrules the prior decision on overlapping issues to the extent of the conflict. If it is assumed that both *Renton* and *City of Erie* could be applied to determine the constitutionality of a public nudity zoning ban, then it must be assumed that *Renton* and *City of Erie* overlap; and *City of Erie* must overrule *Renton* to the extent of that overlap. Of course, this argument assumes rather than demonstrates an overlap and a conflict between *Renton* and *City of Erie*. A conflict between *Renton* and *City of Erie* could be demonstrated directly if the question were phrased correctly. *City of Erie* arguably stands for the legal proposition that a city may constitutionally prohibit nude dancing in public. This would seem to include zoning ordinances that prohibit public nude entertainment facilities. Consequently, *City of Erie* overrules *Renton*, at least as far as *Renton* could otherwise apply to zoning of nude entertainment facilities.

cated across the street from the White House.[240] The ban did not extend to all National Parks, however, because "...the Park Service neither attempt[ed] to ban sleeping generally nor to ban it everywhere in the parks."[241] The Court considered the ban on sleeping in Lafayette Park to be a time, place, and manner restriction.[242] Indeed, zoning is inherently a place regulation.

Just as zoning is arguably always a place regulation, a regulation of conduct is arguably always a manner regulation. A noise restriction ordinance, for example regulates the manner in which words and music are communicated.[243] Similarly, a ban on public nudity regulates the manner in which erotic expression is communicated.[244] Indeed, the premise of *O'Brien* as it applies to symbolic speech or expressive conduct, is that certain conduct communicates, and as communicative conduct, is protected by the First Amendment.[245] Conduct communicates in one manner, (i.e., through physical actions)[246] whereas speech communicates in another manner. Regulation of conduct, then, is the regulation of the manner of communicating.[247]

Zoning, however, is both a place regulation and a manner regulation. Indeed, the essence of use zoning is determining which use (or conduct) is permitted in which location.[248] For example, a zoning ordinance regulation which restricts

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240 *Clark*, 468 U.S. at 295.

241 *Id.* at 295 (1984).

241 *Id.*

242 *Id.*

243 *See, e.g.* Ward v. Rock Against Racism, 491 U.S. 781 (1989); Howard Opera House Associates v. Urban Outfitters, Inc., 131 F. Supp. 2d 559, 563 (D. Vt. 2001).

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

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

246 *See, e.g.* Loper v. N.Y. City Police Dept., 999 F.2d 699 (2d Cir. 1993)(where the court said "begging implicates expressive conduct or communicative activity").

247 This seems to be an obvious conclusion. If a particular physical activity communicates, then it seems an inescapable conclusion that regulation of that activity is a regulation of communication.

248 *E.g.*, City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 674 n.12 (1976) ("By its nature, zoning 'interferes' significantly with owners' uses of property"); Sammamish Cmty. Council v. City of Bellevue, 29 P.3d 728, 731 (Wash. Ct. App. 2001) ("zoning is commonly understood to regulate the use of property").

the location where people can sleep in public is a regulation of conduct, and it is a regulation of place.[249] Where the conduct is expressive, the Court has provided no basis for deciding which fact is more important, either (1) the fact that the ordinance regulates conduct and therefore incidentally restricts expression or (2) the fact that the ordinance regulates the time or place of expression.[250]

The Court avoided addressing this problem in *Clark* by applying both the *O'Brien*[251] and the time, place, and manner tests[252] without explicitly discussing (1) whether the regulation was required to pass both tests to be constitutional or (2) whether the regulation could pass either test to be constitutional. The Court left it to others to parse through its opinion word-by-word, sentence-by-sentence, to divine the constitutional "truth."

One legitimate position would be that the Court applied both; therefore, a place regulation of expressive conduct must pass both tests in order for it to be valid. This approach would be consistent with the broad constitutional concept that a regulation valid as against one challenge may be invalid as against another, e.g., while the death penalty does not violate Due Process,[253] it does violate the Cruel and Unusual Punishment Clause.[254]

The Court gave a number of examples of this principle in *R.A.V. v. City of St. Paul*:[255]

> The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another

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[249] Clark v. Community for Creative Non-violence, 468 U.S. 288, 294 (1984).

[250] The Court's demonstrable failure is epitomized by its decision in *Clark v. Community for Creative Non-violence*, 468 U.S. 288 (1984) (where the Court, without explanation, applied both the time, place, manner test to a park regulation prohibiting sleeping and the *O'Brien* test because the regulation restricted expressive conduct.) *Id.* at 294-95, 298.

[251] *Id.* at 298-99.

[252] *Id.* at 294-95.

[253] McGautha v. California, 402 U.S. 183 (1971).

[254] Furman v. Georgia, 408 U.S. 238 (1972). Of course, the statement that the death penalty violates the Cruel and Unusual Punishment Clause is an overstatement. The Court did not hold that the death penalty always constitutes cruel and unusual punishment, only that it was unconstitutional under the facts and statutes before the Court at that time. The death penalty statutes in *Gregg v. Georgia* were subsequently declared valid as against a cruel and unusual punishment challenge. 428 U.S. 153 (1976).

[255] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

(e.g., opposition to the city government) is commonplace, and has found application in many contexts. We have long held, for example, that non-verbal expressive activity can be banned because of the action it entails but not because of the ideas it expresses - so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.[256]

The Court, in *R.A.V.*, then applied these principles in a particularly controversial manner,[257] holding that while the government may ban "fighting words," it may not engage in content or viewpoint discrimination by punishing only some "fighting words."[258] The Court also rejected the greater-includes-the-lesser argument in *44 Liquormart, Inc. v. Rhode Island*, holding that the power to ban alcohol sales completely did not include the power to ban speech related to alcohol sales if the government had legalized those sales.[259] These cases each indicate that the Court may require the application of both the *O'Brien* and the time, place, manner tests to a PNZ Ordinance.[260]

Another approach, implied by *Clark*, would be that demonstration of compliance with either test would be sufficient to support the constitutionality of a PNZ ordinance.[261] Indeed, in *Clark*, the Court takes a couple of steps in that direction.[262] First, the Court suggests that there is little difference between the time, place, manner restrictions and the *O'Brien* tests.[263] Second, the Court held that if

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256 *Id.* at 385.

257 The concurring opinion in *R.A.V.* was, to say the least, strident in its attack on the majority approach. *Id.* at 397 (White, J., concurring). Additionally, numerous commentators attacked the opinion. *See, e.g.*, Phillip Weinberg, *R.A.V. and Mitchell: Making Hate Crime a Trivial Pursuit*, 25 CONN. L. REV. 299 (1993).

258 *Id.* at 396.

259 517 U.S. 484 (1996). This decision reversed the Court's approach in *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

260 *R.A.V.* and *44 Liquormart* each reject the greater-includes-the-lesser argument, but neither expressly holds that the greater-includes-the-lesser is never a valid approach.

261 *Clark*, 468 U.S. at 298.

262 *Id.*

263 *Clark*, 468 U.S. at 298 ("the four-factor standard of [O'Brien] . . . is little, if any, different from the standard applied to time, place or manner restrictions").

a regulation survives the time, place, and manner test then it must survive the *O'Brien* test, stating:

> Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech. Thus, if the time, place or manner restriction on expressive sleeping, if that is what is involved in this case, sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served.[264]

A very similar and final approach to determining which test to apply is to assume that they are constitutionally indistinguishable. As the Court said in *Clark*, "[t]he four-factor standard of *United States v. O'Brien*,. . ., in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions."[265] Subsequent to *Clark*, the Court has continued to intermingle the two tests.[266] Yet, the Court has not discarded one or the other.[267] The continued co-mingling of these tests, however, supports the idea that a regulation which passes one test must necessarily pass the other.[268] At the very least, a regulation which

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[264] *Id.* at 299 n. 8.

[265] *Id.* at 298 (footnote omitted).

[266] *See, e.g.*, International Soc'y for Krishna Consciousness Inc. v. Lee, 505 U.S. 672, 704 (1992) (Kennedy, J., concurring).

[267] *See* Hill v. Colorado, 530 U.S. 703, 735 (2000)(Souter, J., concurring)(noting the similarity in the tests when determining content-neutrality); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000)(noting that the "O'Brien intermediate scrutiny for communicative action" is a "similar standard" to that "applicable to merely time, place, and manner restrictions"); *Krishna Consciousness*, 505 U.S. at 704 (Kennedy, J., concurring)("In several recent cases we have recognized that the standards for assessing time, place, and manner restrictions are little, if any different from the standards applicable to regulations of conduct with an expressive component"). While in some ways this question is "Much Ado About Nothing," to the people involved it is significant, because one approach could lead to one result and another approach to a different result.

[268] *Clark*, 468 U.S. at 298

passes one test is likely to pass the other.[269]

Rather than rely on the more theoretical approach to determining how *Renton* and *City of Erie* interact, the standards of each case can be applied to the hypothetical PNZ Ordinance to determine if that application provides further insight. In applying *O'Brien*, the first question, as in *City of Erie*, is whether the PNZ Ordinance is content-neutral, and *City of Erie* provides the answer to the question, "[b]y its terms, the [public nudity zoning] ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it [regulates] all public nudity [establishments], regardless of whether that nudity is accompanied by expressive activity."[270]

As in *City of Erie*, a PNZ Ordinance is not motivated by animus toward speech or expression.[271] Instead, such an ordinance is aimed at "the secondary effects, such as the impacts on public health, safety and welfare, which [the Court has] previously recognized are 'caused by the presence of even one such establishment'".[272] The *City of Erie* plurality imported the "secondary effects" analysis from *Renton* and relied on *Renton* to find the *City of Erie* ordinance content-neutral.[273] The *City of Erie* and *Renton* ordinances were each found to be directed at "deter[ing] crime and the other deleterious effects caused by the presence of such establishment in the neighborhood."[274]

The government's interests in a PNZ Ordinance are similar to those relied on in *City of Erie* and *Renton*, arguably even stronger. The Ordinance is directed at, and regulates, commercial public nudity establishments and is directed at "a particularly problematic instance of public nudity,"[275] i.e., the "commercial exploitation" of public nudity.[276] While the Court has recognized that an activity does not lose its First Amendment protection merely because it is done for compensation or a profit (indeed, the point of most press institutions, e.g., newspaper and television and radio broadcasters, is to make a profit), commercial public nudity

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[269] *City of Erie*, 529 U.S. at 289-96 (plurality opinion);

[270] *Id.* at 290 (O'Connor, J., plurality).

[271] *Id.* at 289-96 (O'Connor, J., plurality).

[272] *Id.* at 291 (O'Connor, J., plurality)(quoting *Renton*, 475 U.S. at 47-50).

[273] *City of Erie*, 529 U.S. 277 (O'Connor, J., plurality).

[274] *Id.* at 293 (plurality opinion)(citing *Renton* 475 U.S. at 50-51).

[275] *Id.* at, 295 (O'Connor, J., plurality).

[276] Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

establishments are different.[277] In *City of Erie*, the Court upheld the right of the government to ban public nudity and, in particular, recognized the substantial government interests in banning public nudity.[278] The government has an even stronger interest in eliminating the commercial incentive to engage in public nudity. By regulating only commercialized public nudity, the government permits that nudity which people are willing to engage in without compensation, thereby allowing some public nudity without taking an all or nothing approach.[279] The difference is not in the expression regulated, but in the form of the regulation. Consequently, a zoning regulation of public nudity should be found to be content-neutral.

As in *City of Erie*, once the regulation is found to be content-neutral because it is directed at secondary effects, then the regulation should have little trouble passing the first three factors of the *O'Brien* test. In *City of Erie*, as to whether a public nudity ordinance is within the police powers of the city, the plurality simply concludes that "Erie's efforts to protect public health and safety are clearly within the city's police power."[280] This conclusion should be true for a zoning ordinance as well.[281] Indeed, there is no reason the two should be treated differ-

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[277] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[278] *City of Erie*, 529 U.S. at 279.

[279] The interests in eliminating the financial incentive to engage in public nudity in commercial establishments is strongly related to, although perhaps not identical to, the government interest in prohibiting sexual harassment, particularly quid pro quo sexual harassment. Commercial establishments probably avoid the common understanding of sexual harassment laws, because the dancers "voluntarily" disrobe. This begs the question of the essence of these establishments, whether the dancers would completely disrobe if their compensation were guaranteed to be the same if they kept their clothes on. A related question is whether the patrons of the establishments would pay as much to watch if they could not see completely naked dancers.

The answer to these questions may lead to the conclusion that the nudity is not all that voluntary. If these establishments can avoid sexual harassment claims by asserting that the dancers voluntarily accepted a job where nudity is required, why cannot other employees create as a job requirement that employees must accept sexual harassment? While there may be distinctions, the question is whether those distinctions should make a legal difference. Regardless of the conclusion, this discussion demonstrates the more than adequate additional support for the governmental interest in regulation commercial public nudity establishments.

[280] *City of Erie*, 529 U.S. at 296 (O'Connor, J., plurality). It is questionable whether this part of the O'Brien test requires any governmental showing.

[281] The Supreme Court has long recognized that zoning is well within the police powers of the government. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 80 (1976) (Powell, J., concurring).

ently.

This reasoning also applies to the second *O'Brien* factor, "whether the regulation furthers an important or substantial government interest."[282] As in *City of Erie*, a public nudity zoning ordinance is directed at "combating the [harmful] secondary effects associated with . . . nude dancing," which the plurality (as well as two concurring justices) found to be "undeniably important."[283] Indeed, this conclusion is virtually inevitable. The *O'Brien* test only applies to regulations that are found to be content-neutral.[284] An ordinance that regulates public nudity is content-neutral because it is justified without reference to content, i.e., it is aimed at eliminating secondary effects. Implicit in that finding is that the secondary effects are harmful.

The second *O'Brien* question is whether eliminating or mitigating those admittedly "harmful secondary effects" is important or substantial.[285] With regard to regulation of or regulating public nudity, *City of Erie* supplies the definitive answer.[286] The plurality in *City of Erie* rejected the "require[ment] [that] Erie . . . develop a specific evidentiary record supporting its ordinance."[287] Instead, the plurality found it to be sufficient that the city relied on (1) "this Court's opinions detailing the harmful secondary effects caused by [public nudity] establishments,"[288] and (2) "[the city council's] own conclusion that the threatened harm is real."[289] These standards can now be met by any local gov-

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[282] *City of Erie*, 529 U.S. at 300-01.

[283] *City of Erie*, 529 U.S. at 296 (O'Connor, J., plurality). *See also, City of Erie*, 529 U.S. at 310 (Scalia, J., concurring) (where Justice Scalia stated, "The traditional power of government to foster good morals (bonos mores), and the acceptability of the traditional judgment (if *Erie* wishes to endorse it) that nude public dancing is itself is immoral, have not been repealed by the First Amendment.").

[284] *See, e.g.*, Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 227 (1997) (Souter, J., concurring in part).

[285] *Id.* at 296. This analysis points to a significant problem with combining the secondary effects with *O'Brien* (indeed with secondary effects in general). The regulation is neutral only because it has categorized speech based on the harm it causes. *O'Brien* only requires that eliminating that harm be a substantial or important government interest.

[286] *Id.* (O'Connor, J., plurality) (where the Justice stated, "The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important.").

[287] *City of Erie*, 529 U.S. at 299.

[288] *Id.* at 300.

ernment by citing to the decision in *City of Erie* and its own conclusion.

The question, whether the regulation actually furthers the government interest as opposed to whether a government interest is legitimate, is answered by *City of Erie* as well.[290] The answer is simplistic and almost tautological: public nudity causes secondary effects; therefore, eliminating public nudity (with g-strings and panties) necessarily furthers the government interest "in preventing such secondary effects."[291] The answer to whether a public nudity zoning ordinance furthers a government interest should be the same. Such an ordinance would seek to mitigate the harm caused by such establishments by regulating their location rather than directly regulating the attire of the performers.[292]

As to the third part of the *O'Brien* test, the plurality admits the obvious.[293] If a regulation is content-neutral because it is justified without reference to content or because it is directed at secondary effects of speech, then the regulation must "satisf[y] *O'Brien's* third factor, that the government interest is unrelated to the suppression of free expression."[294] Again, there is no reason to expect a different result for a zoning ordinance which prohibits or regulates, as opposed to an express ban of public nudity.

The fourth and final *O'Brien* factor, i.e., whether the regulation "is no greater than is essential to the furtherance of the government interest,"[295] provides the most interesting test for a zoning regulation of public nudity. It is at this point that the zoning ordinance must be divided into subtypes. One zoning ordinance

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[289] *Id.* at 301.

[290] *Id.* at 299 (O'Connor, J., plurality).

[291] *City of Erie*, 529 U.S. at 301 (O'Connor, J., plurality).

[292] In a sense, the regulation would allow persons who wore a certain amount of clothing to be free from the zoning restriction on public nudity establishments.

[293] *Id.*

[294] *Id.* at 301 (O'Connor, J., plurality). While the plurality does not expressly hold that an ordinance which is directed at secondary effects must satisfy the *O'Brien*'s third factor, it implicitly does so. The plurality simply states that the *City of Erie* ordinance "satisfies *O'Brien*'s third factor" and then cites to its eight page discussion of how the ordinance is content-neutral. *Id.* Whether the plurality expressly or implicitly noted it, the connection between (1) a finding that a regulation is "content-neutral" because the regulated speech causes adverse secondary effects, and (2) a finding that the government interest is unrelated to the suppression of free expression, is obvious. It is also arguably a problem because it makes government regulation of expression easy to justify.

[295] *Id.* at 301 (O'Connor, J., plurality).

would be an ordinance that eliminated all locations where public nudity establishments could be located. The other would be an ordinance that allowed some public nudity establishments. Additionally, as will be shown below, it is with the *O'Brien* fourth factor where the *O'Brien* test most differs on its face from the application of the *Renton* test to adult use zoning.[296]

As with the *O'Brien* test, the first question raised by the *Renton* test is whether a regulation is content-neutral.[297] A public nudity zoning ordinance is likely to be found to be content-neutral under the *Renton* test.[298] First, there is no reason to suggest that content-neutrality varies based on the test to be subsequently applied.[299] Second, and more importantly, most of the plurality's discussion of content-neutrality in *City of Erie* is expressly based on *Renton*. Indeed, Justice Stevens complained that the plurality "mishandl[ed]" the Court's "secondary effect cases."[300] A public nudity zoning ordinance should be found content-neutral under the *Renton* test.

Under *Renton*, content-neutral "time, place, and manner regulations are ac-

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[296] *Compare Renton*, 475 U.S. at 54 (wherein the Court asked whether the ordinance allows for reasonable alternative avenues of communication) *with City of Erie*, 529 U.S. at 301 (wherein the plurality asked whether a restriction is no greater than essential to the furtherance of the governmental interest).

[297] *Renton*, 475 U.S. at 46-47.

[298] Subsequent to *Renton*, lower courts consistently found that public nudity zoning ordinances were content-neutral. *See, e.g.* Ranch House, Inc. v. Amerson, 238 F.3d 1273, 1277 (11th Cir. 2001) and Stenverson v. City of Vicksburg, Miss., 900 F. Supp. 1, 14 (S.D. Miss. 1994). *City of Erie* only re-affirms that conclusion. A public nudity zoning ordinance categorizes facilities based solely on the fact that in the facilities people are naked in front of the public, i.e., the customers regardless of whether the naked people are singing, dancing, or performing Shakespeare. The public nudity zoning ordinance is concerned with the impact of those facilities on other properties and neighborhoods. These government interests are indistinguishable from the secondary effects with which *City of Erie* was concerned. These impacts are not reduced or increased based on the content of any expressive activity which occurs while persons are naked. By the same token, the content of expression while naked does not modify the effect, impact, or application of the public nudity zoning ordinance. Finally, a Public Nudity Zoning Ordinance regulates, rather than bans public nudity.

[299] *Compare City of Erie*, 529 U.S. at 289 (O'Connor, J., plurality) (where the Justice stated, "[i]f the governmental purpose in enacting the regulation is unrelated to the suppression of expression") *with Renton*, 475 U.S. at 48 (where the Court stated that a regulation is content-neutral if it is "justified without reference to the content of the regulated speech. . .") (emphasis in original).

[300] *City of Erie*, 529 U.S. at 323 (Stevens, J., dissenting). *See also, id.* at 297 (O'Connor, J., plurality) (where Justice O'Connor stated, "Justice Stevens claims that today we [f]or the first time extend *Renton's* secondary effects doctrine. . .").

ceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[301] This question does not differ in any substantial degree from the *City of Erie/O'Brien* questions of "whether there is a substantial government interest and whether the regulation furthers that interest,"[302] i.e., "whether the regulation furthers an important or substantial government interest."[303] Indeed, it is difficult to conceive of any difference between the two. Consequently, under the *Renton* test a public nudity zoning ordinance will likely be found to serve a substantial governmental interest.[304]

This leaves the final *Renton* question, whether the "ordinance allows for reasonable alternative avenues of communication."[305] This language of " alternative avenues" distinguishes *Renton* from *O'Brien*'s "no greater than is essential," at least in verbiage. The question is whether these tests are different, i.e., or whether they require different results.

Lower courts applying the "alternative avenues" test have often focused on whether or not the zoning ordinance permitted enough locations.[306] The question now is whether the application of the "alternative avenues" approach should be different in light of *City of Erie*.

A reflexive application of *Renton* to a PNZ Ordinance which left no locations available would result in invalidation of the ordinance, because no locations means no alternative avenues, and no alternative avenues, means the ordinance fails the *Renton* test and violates the Constitution.[307] *City of Erie* requires at a minimum, however, a reflective, not a reflexive, application of the *Renton* test. Upon a moment of reflection, it does not make sense that the Court, as in *City of*

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[301] *Renton*, 475 U.S. at 46.

[302] *City of Erie*, 529 U.S. at 300. (plurality opinion)

[303] *Id.* at 301.

[304] *See, e.g.*, D.H.L. Associates, Inc. v. O'Gorman, 199 F.3d 50, 59 (1st Cir. 1999) and D.G. Restaurant Corp. v. City of Myrtle Beach, 953 F.2d 140, 145 (4th Cir. 1991). In reaching this conclusion in *City of Erie*, the plurality again heavily relied on *Renton*.

[305] *Renton*, 475 U.S. at 53.

[306] *See, e.g.*, *Boss Capital*, 187 F.3d at 1353; T. & A.'s, Inc. v. Town Bd. of Town of Ramapo, 109 F. Supp. 2d 161, 166, 173 (S.D.N.Y. 2000).

[307] *See, e.g.*, Cochran v. Town of Marcy, N.Y., 143 F. Supp. 2d 235, 238 (N.D.N.Y. 2001); Fifth Column v. Village of Valley View, 100 F. Supp. 2d 493, 497 n.5 (N.D. Ohio 1998); C.R. of Rialto, Inc. v. City of Rialto, 964 F. Supp. 1401, 1405-06 (C.D. Cal. 1997).

Erie, would permit the government to directly prohibit all public nudity including nudity in commercial establishments, and yet, would use the *Renton* test to invalidate a zoning ordinance which effectively banned public nudity, at least in commercial establishments. This is particularly true where the plurality, relying on and quoting from *Renton,* recognized the negative impacts on public health, safety, and welfare "'of even one such' establishment."[308] If the existence of one public nudity establishment justifies a general ban on public nudity, then this should justify a zoning ban on such establishments. Looking at it another way, the premise of alternative avenues is that the speech or expression must be permitted somewhere or in some fashion. For example, picketing in front of a house may be prohibited because picketing, which must be permitted somewhere, is permitted in the neighborhood.[309] That premise is absent with public nudity. As *City of Erie* holds, the government is not required to permit that conduct, even if it is expressive.[310]

Even if *City of Erie* does not trump *Renton, City of Erie* cannot be ignored when applying *Renton* to a Public Nudity Zoning Ordinance. The plurality in *City of Erie* distinguished between nudity and nudity "accompanied by expressive activity."[311] This separation provides the key to properly applying the *Renton* alternative avenues test after *City of Erie.*[312] According to the *City of Erie* plurality, "[t]he public nudity ban certainly has the effect of limiting one particular means of expressing the kind of erotic message being disseminated."[313] Similarly, the plurality concluded that the ordinance passed the fourth part of the *O'Brien* test, because "the restriction leaves ample capacity to convey the danc-

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[308] *City of Erie*, 529 U.S. at 291 (quoting *Renton*, 475 U.S. at 47-48).

[309] Frisby v. Schultz, 487 U.S. 474 (1988).

[310] *City of Erie*, 529 U.S. at 302.

[311] *Id.* at 279, 289.

[312] This separation is also significant of the divergent approaches taken in *City of Erie.* Justice Scalia finds the separation in and of itself to be determinative of the outcome. *See City of Erie,* 529 U.S. at 308 (Scalia, J., concurring) (the ordinance "is not subject to First Amendment scrutiny at all," because it "prohibits not merely nude dancing, but the act-irrespective of whether it is engaged in for expressive purposes - of going nude in public."). On the opposite side, Justice Stevens found that the nudity was inextricably bound to the expression. *City of Erie*, 529 U.S. at 326. ("It is pure sophistry to reason from the premise that the regulation of the nudity component of nude dancing is unrelated to the message conveyed by nude dancers").

[313] *Id.* at 292-93 (O'Connor, J., plurality).

ers's erotic message."[314] The plurality characterized the nude dancers as having "erotic messages" which are enhanced by the nudity, and somewhat limited, but not prohibited, by the ban on public nudity.[315] This characterization makes the ordinance little more than a noise or volume control ordinance. The dancers, then, are allowed to convey their message, just not with the same volume as they would like.

As long as the Court uses this approach to nude dancing, then it can be seen that public nudity zoning ordinances would provide "reasonable alternative avenues" and would, therefore, pass the second part of the *Renton* test. The zoning ordinance would only restrict (or perhaps prohibit) erotic messages given with nudity, not all erotic messages. The alternative avenue would be all erotic messages without public nudity. As a "volume control" ordinance, it becomes indistinguishable from *Ward v. Rock Against Racism* wherein the Court held that a volume control ordinance allowed for alternative avenues.[316] Indeed, the plurality in *City of Erie* noted that the ordinance "leaves ample capacity."[317] This language is indistinguishable in content from "allow[ing] for reasonable alternative avenues."[318] Courts should conclude that a public nudity zoning ordinance, then, passes the *Renton* test.

The Supreme Court's decision in *City of Erie v. Pap's AM* has confirmed the First Amendment status of public nude dancing.[319] While it is "protected" by the First Amendment, it may be banned. This was the essential holding of *Barnes*.[320] Subsequent to *Barnes*, lower courts, for the most part, ignored *Barnes* when considering zoning of public nudity. After *City of Erie*, lower courts should take heed of the significance of *City of Erie* when reviewing public nudity zoning ordinances, even if they do not use *City of Erie* simply to ignore or override *Renton*. If those alterative avenues were not found to be sufficient, a public nudity ordinance may provide other alternative avenues, even for public nudity. Moreover, if the ordinance regulates only commercial establishments, public nudity might be allowed in other locations, e.g., public or private beaches or parks.

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[314] *Id.* at 280.

[315] *Id.* at 292-93.

[316] 491 U.S. 781, 798 (1989).

[317] *City of Erie*, 529 U.S. at 301 (O'Connor, J., plurality).

[318] *Renton*, 475 U.S. at 53.

[319] *City of Erie*, 529 U.S. at 285 (O'Connor, J., plurality).

[320] *Id.* at 302.