CONSTITUTIONAL LAW—FIRST AMENDMENT—STATE'S PROHIBITION AGAINST NUDE DANCING IS CONSTITUTIONAL BECAUSE ITS INTEREST IN PRESERVING SOCIETAL ORDER AND MORALS IS BOTH SUFFICIENTLY SUBSTANTIAL AND CONTENT NEUTRAL—*Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991)(plurality).

The First Amendment, which provides that the government shall not abridge the freedom of speech,[1] is considered by some to be the cornerstone of all other constitutional freedoms.[2] This fundamental protection is hardly absolute,[3] however, particularly when the issue involves non-verbal or "symbolic" speech.[4] The

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[1] The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The United States Supreme Court has applied the First Amendment to the states through the Fourteenth Amendment since 1925. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[2] *See* Whitney v. California, 274 U.S. 357 (1927). In *Whitney*, Justice Brandeis eloquently stated:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375-76 (Brandeis, J., concurring) (footnote omitted). *See also* Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (the abridgment of freedom of speech impairs discussion and education "essential to effective exercise of the power of correcting error through the processes of popular government"); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom").

[3] *See generally* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.01, at 2-3 (1984) ("an absolutist position, whereby any law which for any reason and in any degree punishes or restricts speech is said to be unconstitutional, has never been accepted by the Supreme Court").

[4] The Supreme Court first determined that "speech" included non-verbal communication in Stromberg v. California, 283 U.S. 359 (1931), where the Court held that a statute prohibiting the display of a red flag as a form of government opposition was unconstitutional. *Id.* at 369. Since *Stromberg*, the Court has held that many types of non-verbal conduct constitute protected speech. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404, 2407-08 (1990) (burning of flag is protected symbolic activity); Texas v. Johnson, 491 U.S. 397, 420 (1989) (flag burning is protected under First Amendment); Buckley v. Valeo, 424 U.S. 1, 44 (1976) (limiting cam-

Supreme Court has never afforded the same level of constitutional protection to conduct used to convey messages or ideas that it has granted to the expression of thought through words or "pure" speech.[5] Symbolic expression differs, by nature, from pure speech because it has two distinct components: the message conveyed and the act used to convey it.[6] Because states retain the right to regulate conduct through their police powers, governmental power to restrain symbolic speech extends beyond its control over pure speech.[7]

The legislature's purpose for drafting the regulation determines the level of constitutional protection afforded symbolic

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paign expenditures infringes candidates' First Amendment rights); Spence v. Washington, 418 U.S. 405, 409-10 (1974) (per curiam) (peace symbol attached to American flag deemed protected speech); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (First Amendment protects the wearing of black armbands in protest of Vietnam War); Brown v Louisiana, 383 U.S. 131, 142 (1966) (public library sit-in is protected expression); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (flag salute held protected First Amendment activity); Thornhill v. Alabama, 310 U.S. 88, 99, 102 (1940) (picketing is protected under First Amendment).

On the importance of non-verbal speech as a form of protected expression, see Smith v. Goguen, 415 U.S. 566, 589 (1974) (White, J., concurring) ("Although neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment."); *Brown*, 383 U.S. at 142 (1966) (First Amendment rights "are not confined to verbal expression [but] embrace appropriate types of action"); Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring) ("This Court has never limited the right to speak . . . to mere verbal expression.") (citation omitted); *see also* FREDRICH HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 6 (1981) ("Symbolic behavior is one of the most fundamental ways in which human beings express and fulfill themselves. Its exercise thus lies at the core of free society.").

[5] *See Johnson*, 491 U.S. at 406 ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."); Cox v. Louisiana, 379 U.S. 536, 555 (1965) ("We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct . . . as [they] afford to those who communicate ideas by pure speech.").

[6] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

[7] *See Cox*, 379 U.S. at 563. Justice Goldberg explained:

> The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited. The most classic of these was pointed out long ago by Mr. Justice Holmes: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic." . . . [A]s the Court said in *Giboney*, . . . "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

Id. (quoting Schenck v. United States, 249 U.S. 47, 52 (1919); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)).

speech.[8] Governmental regulations aimed at suppressing the content of speech are undisputedly subject to the strictest judicial scrutiny and, therefore, often fail constitutional review.[9] In the unique context of symbolic speech, determining whether heightened scrutiny applies is a challenging task because courts must ascertain whether the state law seeks either to regulate the conduct component of the expression or to suppress the act's intended message.[10]

Recently, in *Barnes v. Glen Theatre, Inc.*,[11] the United States Supreme Court considered whether nude dancing is protected symbolic expression under the First Amendment and, if so, to what extent the state may restrict this form of speech.[12] In a plurality opinion, the Court determined that, although nude dancing is protected symbolic conduct, an Indiana anti-nudity

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8 *See Johnson*, 491 U.S. at 403 (regulations unrelated to suppression of free expression are subject to a less stringent standard; regulations aimed at inhibiting speech are subject to a more demanding standard).

9 *See id.* at 412 (statute prohibiting flag burning designed to suppress ideas and failed to survive strict level of scrutiny); Boos v. Barry, 485 U.S. 312, 315, 321 (1988) (statute prohibiting display of signs in front of foreign embassy that tended to bring that government into "public disrepute" failed under "the most exacting scrutiny"). *See also* United States v. Grace, 461 U.S. 171, 177 (1983) ("[a]bsolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest"); Widmar v. Vincent, 454 U.S. 263, 270 (1981) (in cases where a regulation is content-based, the government must prove that "its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam) (when prosecution is supported by regulation aimed at expression of ideas, government's interest must be examined "with particular care").

10 *See O'Brien*, 391 U.S. at 377 (regulation which prohibited the burning of draft registration certificates upheld, regardless of the fact that it resulted in an incidental hindrance of free expression, because it was not directed at the communicative aspect of the actor's conduct); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (ordinance prohibiting trucks which emit "loud and raucous" noises was upheld based upon government's interest in protecting "quiet and tranquility" and because the ordinance was not directed at the "communicative aspect" of the sounds being broadcasted). In general, any government action which limits the "time, place or manner" in which expressive activity is carried out also falls within this category because it regulates speech without making reference to its communicative content. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.47, at 1087 (4th ed. 1991). For cases which discuss time, place or manner restrictions, see *infra* note 77.

One commentator advocates the abrogation of the "content-based/content-neutral" analysis in favor of one which requires proof of a compelling government interest each time the government regulates expression. *See* MARTIN H. REDISH, FREEDOM OF EXPRESSION, A CRITICAL ANALYSIS 125-26 (1984).

11 111 S. Ct. 2456 (1991) (plurality).

12 *See id.*

statute could be applied to regulate nude dancing.[13] The Court concluded that a low level of scrutiny applied because the statute was not directed at the communicative impact or content of the dancing and the state's interest sufficiently maintained an interest in preserving societal morals and order.[14]

Respondent, The Kitty Kat Lounge, Inc., was an establishment in South Bend, Indiana, that sold alcoholic beverages and provided "go-go dancing."[15] Respondent, Glen Theatre, was an adult "bookstore," also in South Bend, that offered live nude or semi-nude dancing performances.[16] Both proprietors wanted to provide totally nude dancing, but Indiana's public indecency statute, which prohibited public nudity,[17] effectively required the entertainers to wear some covering, such as a "G-string"[18] or "pasties,"[19] while performing.[20]

Respondents commenced suit in the United States District Court of the Northern District of Indiana to enjoin enforcement of the statute.[21] The respondents alleged that the prohibition against total nudity in public places violated the First Amendment.[22] The district court granted the injunction, finding that the regulation's prohibition of complete nudity in all contexts

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13 *Id.* at 2460, 2461.

14 *Id.* at 2462-63.

15 *Id.* at 2458. A go-go girl is "a performer of lewd dances in strip-tease clubs." THE JONATHAN DAVID DICTIONARY OF POPULAR SLANG 462 (1980).

16 *Barnes*, 111 S. Ct. at 2459. Patrons may enter a booth and insert coins into a mechanism to view the nude performer through a glass panel for a specified period of time. *Id.*

17 Indiana Code § 35-45-4-1 provides:

> (a) A person who knowingly or intentionally, in a public place:
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity; or
> (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernably turgid state.

Barnes, 111 S. Ct. at 2462 n.2 (quoting IND. CODE § 35-45-4-1 (1988)).

18 A G-string is "an abbreviated covering of the genitals worn by strip-tease dancers." ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL LANGUAGE 64 (8th ed. 1984).

19 Pasties are "decorated disks worn pasted over the nipples by striptease dancers." *Id.* at 114-15.

20 *Barnes*, 111 S. Ct. at 2458-59.

21 *Id.*

22 *Id.* at 2459.

was facially overbroad.[23] The United States Court of Appeals for the Seventh Circuit reversed, holding that prior Indiana judicial interpretations of the statute precluded an overbreadth challenge.[24] Remanding the case to the district court, the Seventh Circuit instructed the respondents to pursue the more specific claim that the statute violated the entertainers' rights under the First Amendment when applied to nude dancing.[25]

On remand, the district court concluded that nude dancing was not constitutionally protected expressive activity and rendered judgment for the State.[26] A panel of Seventh Circuit judges reversed, holding that nude dancing was protected.[27] Subsequently, the Seventh Circuit reheard the case *en banc* and concluded that the First Amendment provides protection for non-obscene nude dancing, and that the application of the Indiana statute to nude dancing offended the First Amendment because the State's objective was to hinder the performer's erotic message.[28]

The United States Supreme Court granted certiorari to de-

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[23] *Id.*

[24] Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 290 (7th Cir. 1986). Writing for the United States Supreme Court, Chief Justice Rehnquist noted that the Indiana Supreme Court appeared to limit the construction of the public indecency statute when it held that "it *may* be constitutionally required to tolerate or to allow some nudity . . . when the communication of ideas is involved." *Barnes*, 111 S. Ct. at 2459 n.1 (alteration in original) (quoting State v. Baysinger, 397 N.E.2d 580, 587 (Ind. 1979), *appeal dismissed sub nom.* Clark v. Indiana, 446 U.S. 931 *and* Dove v. Indiana, 449 U.S. 806 (1980)).

[25] *Pearson*, 802 F.2d at 290-91.

[26] Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 419 (N.D. Ind. 1988). Specifically, the district court stated:

> After viewing the proffered evidence, this court must conclude that in light of the Indiana Supreme Court decisions, the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States. These strip tease dances are not performed in any theatrical or dramatic context. Further, their conduct falls squarely within the prohibitions of Indiana's Public Indecency statute, which has been found constitutional.

Id. at 419.

[27] Miller v. Civil City of South Bend, 887 F.2d 826, 827 (7th Cir. 1989). The appellate court stated the following:

> In substance, nude-dancing is still expression . . . . What we have in this case are plaintiffs who wish to present non-obscene nude dancing as expressive entertainment. As such, no matter how little artistic value may be found in such performances, it is entitled to limited protection under the [F]irst [A]mendment.

Id. at 830.

[28] Miller v. Civil City of South Bend, 904 F.2d 1081, 1085, 1088 (7th Cir. 1990) (en banc).

termine whether the statute's application to nude dancing unconstitutionally infringed First Amendment freedoms.[29] In a plurality opinion, the Court reversed the Seventh Circuit, and held that, although nude dancing was entitled to limited First Amendment protection, Indiana's requirement that dancers wear G-strings and pasties was justified.[30] The plurality recognized that the state maintained a substantial interest in preserving societal order and morals and that the legislature did not design the statute to suppress expression.[31] The plurality, therefore, concluded that statutorily requiring dancers to wear pasties and G-strings did not impermissibly infringe upon the respondents' First Amendment rights.[32]

Although the First Amendment appears to afford absolute protection for individual speech rights,[33] the Court has long held that not all forms of expression are safeguarded.[34] In *Chaplinsky v. New Hampshire*,[35] the United States Supreme Court established that certain classes of speech were not constitutionally protected.[36] A jury convicted Walter Chaplinsky of violating a New Hampshire statute by calling a city official a "damned Fascist" and a "God-damned racketeer."[37] Justice Murphy, writing for a unanimous Court, espoused that the First Amendment did not protect such "fighting words."[38] The Justice added, in dicta, that

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29 Barnes v. Glen Theatre, Inc., 111 S. Ct. 38 (1990).

30 Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2461-63 (1991).

31 *Id.*

32 *Id.* at 2460.

33 *See supra* note 1.

34 *See supra* note 3 and accompanying text. *See also* Schenck v. United States, 249 U.S. 47, 52 (1919) (speech which creates a "clear and present danger" that an illegal act would occur is not protected); Marianne Benevenia, Note, *First Amendment Does Not Preclude Closure of Adult Bookstore Where Illegal Activity Occurs on Premises*, 17 SETON HALL L. REV. 382 (1987) (First Amendment protections are not absolute).

35 315 U.S. 568 (1942).

36 *Id.* at 571-72.

37 *Id.* at 569. Specifically, the statute stated:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. (citation omitted).

38 *Id.* at 572. Justice Murphy defined "fighting words" as those words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* (citing ZECHARIAN CHAFEE, FREE SPEECH IN THE UNITED STATES 149-50 (1941)). The fighting words doctrine has been criticized by some commentators. *See, e.g.*, Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 581

other classes of speech, including obscenity, lewdness,[39] libel and profanity,[40] were likewise unprotected.[41] Justice Murphy opined that such utterances were not essential parts of the communication of ideas.[42] The Justice further found that society's interest in morality and order easily outweighed any good derived from such words or phrases.[43] Lastly, the Court concluded that the state's police power authorized the prohibition of words likely to instigate a breach of the peace and that the New Hampshire statute did not unnecessarily restrict otherwise protected speech.[44] Therefore, the Court held that the legislature had narrowly drafted the statute and that it passed constitutional scrutiny.[45]

(1980) ("When considered in light of the predominant societal interest in free and uninhibited expression, even candid and unpleasant expression, the fighting words doctrine cannot withstand [F]irst [A]mendment scrutiny.").

39 *Chaplinsky*, 315 U.S. at 572. *See also* Roth v. United States, 354 U.S. 476 (1957). In *Roth*, the Court upheld a federal statute that prohibited the use of the mails to circulate "obscene, lewd, lascivious, or filthy" publications. *Id.* at 479, 492. Justice Brennan clearly stated that obscenity did not fall within the realm of First Amendment protection. *Id.* at 485. Justice Brennan explained that only ideas possessing a minimum of redeeming social importance were guaranteed full constitutional protection. *Id.* at 484. The Justice ascertained that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* Thus, Justice Brennan concluded that art, literature and scientific works that depict sexual material receive First Amendment protection, but "material which deals with sex . . . in a manner appealing to prurient interest" do not. *Id.* at 487. For a further discussion of *Chaplinsky* and other obscenity cases, see Mark J. Oberstaedt, Note, *States May Proscribe the Private Possession of Non-Obscene Child Pornography*, 21 SETON HALL L. REV. 410 (1991).

40 *Chaplinsky*, 315 U.S. at 572. *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (First Amendment does not protect false statement of fact about public figure "made with actual malice, i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true"); Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967) (First Amendment does not protect "false reports of matters of public interest" about private individuals if published with actual malice); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (calculated falsehoods about public officials published with "actual malice" receive no First Amendment protection).

41 *Chaplinsky*, 315 U.S. at 572. The Court stated the following: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 573. Specifically, Justice Murphy stated:

> This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.

Chaplinsky's pronouncement that the Constitution did not protect all types of speech opened the door for the seminal case of *United States v. O'Brien*,[46] where the Court developed a test for determining when non-verbal speech may be regulated.[47] A jury convicted O'Brien for illegally burning his draft registration card in protest against the Vietnam War.[48] O'Brien argued that the federal statute, which prohibited the destruction of draft cards, was unconstitutional as applied to him because its purpose was to abridge anti-war speech.[49]

Chief Justice Warren, writing for the Court, rejected O'Brien's argument observing that not all conduct could be labeled protected "speech" simply because the actor intended to convey some idea.[50] When a course of conduct involved both "speech" and "non-speech" elements, the Court explained that incidental limitations on First Amendment rights were justified if the government had a sufficient interest in controlling the non-

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Id. at 574.

46 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968).

47 *Id.* at 376-77. For a discussion of *O'Brien*, see John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975) (*O'Brien* test is significant but incomplete); James R. Goodwin, Comment, *Draft Card Burning Denied Symbolic Speech Protection Under Governmental Interest Rationale*, 6 SAN DIEGO L. REV. 81, 91 (1969) (the Court must not rely solely on a valid governmental interest to abridge free speech but must also examine the substantiality of the expressive conduct); David N. Sexton, *Recent Decision*, 20 SYRACUSE L. REV. 98, 101 (1969) ("The [*O'Brien*] Court has possibly stretched to uphold the statute, and to find a substantial government interest, it may have deferred the 'preferred position' of [F]irst [A]mendment rights.") (footnote omitted); Howard R. Green, *Recent Decision*, 37 GEO. WASH. L. REV. 596, 603 (1968) ("The Court . . . ignored the balancing process that has long been the controlling [F]irst [A]mendment test.").

48 *O'Brien*, 391 U.S. at 370. The registration certificate was a two-inch by three-inch white card that specified the registrant's name, registration date, and the address and number of the Board with which the party was registered. *Id.* at 373. O'Brien stated that he publicly burned the certificate "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider [his] position." *Id.* at 370. O'Brien was convicted under a provision of the Universal Military Training and Service Act of 1948, which prohibited the destruction of such certificates. *Id.* The indictment specifically charged that O'Brien "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate . . . in violation of [50 U.S.C. § 462(b)]." *Id.* In 1965, Congress amended § 462(b) to include any person "who forges, alters, *knowingly destroys*, *knowingly mutilates*, or in any manner changes any such certificate." *Id.* (emphasis in original).

49 *Id.* O'Brien contended that his actions were protected symbolic speech under the First Amendment because he was communicating his anti-war beliefs through his conduct. *Id.* at 376.

50 *Id.*

speech element.[51]

More specifically, the *O'Brien* Court set forth a four-part test for determining when a governmental interest sufficiently justified incidental First Amendment limitations.[52] The Court announced that a government regulation was sufficiently substantial if: (1) the government acted pursuant to its constitutional powers; (2) the regulation furthered a substantial or important governmental interest; (3) the governmental interest was not related to the suppression of speech; and (4) the incidental restraint on First Amendment freedom was no more than necessary to further the governmental interest.[53] The Supreme Court held that the federal regulation in question satisfied each prong of the test and, therefore, justified any incidental limitation on free expression.[54]

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[51] *Id.* The Court noted, therefore, that O'Brien's actions were not automatically protected simply because they embodied some communicative aspect which implicated the First Amendment. *Id.*

[52] *Id.* at 377. Prior to the adoption of this four-part test, the Court employed various terms to describe the quality of the state interest necessary to justify incidental First Amendment limitations. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438, 444 (1963) ("compelling" or "substantial"); Bates v. Little Rock, 361 U.S. 516, 524 (1960) ("subordinating" or "cogent"); Thomas v. Collins, 323 U.S. 516, 530 (1945) ("paramount"); Sherbert v. Verner, 374 U.S. 398, 408 (1963) ("strong"). *See also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 83 (1970).

[53] *O'Brien*, 391 U.S. at 377.

[54] *Id.* at 382. The Court recognized satisfaction of the first prong because Congress can constitutionally raise and support armies and conscript and classify manpower. *Id.* at 377 (citing Lichter v. United States, 334 U.S. 742, 755-58 (1948); Selective Draft Law Cases, 245 U.S. 366 (1918)). The Court found that the prohibition on destroying one's Draft Registration Certificate "serves a legitimate and substantial purpose in the system's administration," thereby satisfying the second prong. *Id.* at 378. The Court opined that the third prong was satisfied because the government's regulation was "limited to the noncommunicative aspect of O'Brien's conduct," that is, the actual destruction of the certificate and its effect on the efficiency of the Selective Service process, and was not directed at the message that such conduct conveyed. *Id.* at 381-82. Finally, the Court concluded that the fourth step of the test was satisfied because the regulation was "an appropriately narrow means of protecting . . . [the government's] interest." *Id.* at 382.

The Court rebuffed O'Brien's argument that the statute should fail because Congress's "purpose" in enacting the legislation was one of suppressing dissent. *Id.* at 382-83. The Court espoused that legislative motive was irrelevant provided there was some legitimate state interest supporting the statute, and that the efficient operation of the Selective Service System satisfied that interest. *Id.* at 385-86. Some commentators have suggested that the *O'Brien* Court, in an attempt to evade the symbolic speech issue, incorrectly decided the case. *See* EMERSON, *supra* note 52, at 83 ("*O'Brien* is a serious setback for First Amendment theory."); Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968) (*O'Brien* Court should have considered, among other things, the understandability of the form of communication and the lack of effective alternative modes of expression).

One year later, however, the Court demonstrated that speech limitations were not justified if their singular purpose was to suppress speech content.[55] In *Tinker v. Des Moines Independent Community School District*,[56] school officials suspended three students for wearing black armbands in protest of the Vietnam War.[57] Justice Fortas, writing the Court's opinion, espoused that the students' conduct paralleled "pure speech" and, therefore, should have been afforded "comprehensive" First Amendment protection.[58] After determining that the armband regulation directly related to the students' attempted message,[59] the Court stated that it could not sustain the restriction absent a showing that the conduct materially and substantially interfered with the school's operation.[60] Moreover, the Court pointed out that the school's tolerance of other symbols, such as political buttons and Nazi swastikas, further supported its conclusion that the officials prohibited the armbands solely for the political message the armbands conveyed.[61] Consequently, the majority concluded that

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55 *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 510-11 (1969). While *Tinker* did not specifically refer to the *O'Brien* test, the Court nonetheless stated: "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.*

56 393 U.S. 503 (1969).

57 *Id.* at 504. Two of the students attended high school, while a third was a junior high school student. *Id.* After receiving notice of the planned protests, Des Moines' school officials instituted a policy stating that all students wearing armbands must remove them or face suspension. *Id.*

58 *Id.* at 505-06. The majority found that the protestors were being punished "for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance" and that the actions of the protestors did not interfere with school work or the rights of other students. *Id.* at 508. Justice Fortas stressed that mere fear of disturbance resulting from the message conveyed by the wearing of armbands did not justify their prohibition. *Id.*

59 *Id.* at 510-11. One commentator has noted that, while the *Tinker* Court did not refer to the *O'Brien* test, the armband regulation would have violated *O'Brien's* third prong because it was directly related to free expression. *See* NOWAK & ROTUNDA, *supra* note 10, § 16.49, at 1108 ("the regulation was *not* unrelated to the suppression of free expression") (emphasis in original).

60 *Tinker*, 393 U.S. at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). Specifically, Justice Fortas stated: "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Id.* at 508 (citing Terminiello v. Chicago, 337 U.S. 1 (1949)). The Justice did concede, however, that the state had a valid interest in maintaining discipline. *Id.* at 513. Specifically, the Justice stated: "[C]onduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.*

61 *Id.* at 510-11.

the armband regulation impermissibly infringed the students' First Amendment rights.[62]

Five years later, in *Spence v. Washington*,[63] the United States Supreme Court expanded the protections surrounding symbolic speech by determining that courts must consider both the communicative and non-communicative aspect of non-verbal speech.[64] A Washington court convicted Spence, a college student who affixed a peace symbol to an American flag as a form of protest,[65] under a state statute that prohibited the placing of figures or designs on an American flag.[66]

The United States Supreme Court overturned the conviction stating that courts must consider the nature of the activity, the environment in which the communication was made and the factual context in which it was presented before concluding whether the constitution would protect a communication as symbolic speech.[67] After examining these factors, the Court determined that Spence's conduct was communicative because he intended his conduct to communicate an idea and because other people

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62 *Id.* at 514. In a dissenting opinion, Justice Black posited that the regulation should be upheld because freedom of speech could not be absolute in the school system. *Id.* at 517 (Black, J., dissenting) (quoting Cox v. Louisiana, 379 U.S. 536, 554 (1965)). For further discussion of Justice Black's viewpoint on the First Amendment, see JUSTICE HUGO BLACK AND THE FIRST AMENDMENT (Everette E. Dennis et al. eds. 1978); Feiner v. New York, 340 U.S. 315 (1951) (Black, J., dissenting).

63 418 U.S. 405 (1974) (per curiam). For an in-depth discussion of *Spence*, see Michael W. Hoge, Note, *Flag Misuse and the First Amendment*, 50 WASH. L. REV. 169 (1974).

64 *Spence*, 418 U.S. at 409-10. This reasoning slightly deviated from the holding in *O'Brien*, where the Court considered only the non-communicative aspect of O'Brien's conduct and not the communicative aspect or motivation behind it. *See* NOWAK & ROTUNDA, *supra* note 10, at 1110.

65 *Spence*, 418 U.S. at 406-08. Spence made the peace symbol out of black tape attached to both sides of the flag and hung the flag upside down outside his window in protest of the invasion of Cambodia and the Kent State killings. *Id.* at 406, 408.

66 *Id.* at 406-07. The statute provided in pertinent part:

> No person shall, in any manner, for exhibition or display:
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement . . . .

Id. at 407 (quoting WASH. REV. CODE § 9.86.020 (1977)).

67 *Id.* at 409-10. The Court stated: "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Id.*

likely understood his message.[68] Explaining that the Washington court convicted Spence solely on the communicative aspect of his actions, the majority reversed the conviction because the state's interests did not survive a stringent level of constitutional scrutiny.[69]

The Court demonstrated in 1984, however, that restrictions on non-verbal speech could still be justified if the state invoked a sufficiently substantial interest unrelated to the speaker's message.[70] In *Clark v. Community for Creative Non-Violence*,[71] a federal agency permitted a group to demonstrate the plight of the homeless by erecting symbolic "tent cities" in two public parks.[72] A federal regulation banning camping on park grounds, however, prohibited the demonstrators from sleeping in the tents.[73]

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68 *Id.* at 410.

69 *Id.* at 411, 415. The Court explained the shortcomings of each state interest. *Id.* at 412. The Court posited that there was nothing in the record that supported a breach of the peace claim. *Id.* Moreover, the Court expounded that protecting the sensibilities of passersby was not a sufficient interest because "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* (quoting Street v. New York, 394 U.S. 576, 592 (1969)). Likewise, the Court noted that Spence could not be punished for failing to exhibit proper respect for the flag. *Id.* (citing Street v. New York, 394 U.S. 576, 593 (1969)). As for preserving the flag as an "unalloyed symbol of our country," the Court expostulated that, even if a legitimate state interest existed, it would be unconstitutional as applied to Spence's conduct. *Id.* at 412-14.

One commentator suggested that *Spence* represents a subtle shift from the "speech/conduct" distinction employed in *O'Brien* to a general balancing of an individual's First Amendment rights versus government interests. *See* NOWAK & ROTUNDA, *supra* note 10, at 1110. For other symbolic speech cases involving the American flag, see Texas v. Johnson, 491 U.S. 397 (1988) (burning flag in protest of Reagan administration policies is protected activity); Smith v. Goguen, 418 U.S. 566 (1974) (state could not constitutionally punish an individual for wearing a replica of the flag on the seat of his pants); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state cannot constitutionally punish a student for failing to salute the flag).

70 The Court originally determined that non-verbal speech may be restricted in United States v. O'Brien, 391 U.S. 367 (1968). For a discussion of *O'Brien*, see *supra* notes 46-54 and accompanying text.

71 468 U.S. 288 (1984). For a comprehensive discussion of *Clark*, see Susan H. Hicks, Note, 15 U. BALT. L. REV. 181 (1985) and *The Supreme Court, 1983 Term—Leading Cases*, 98 HARV. L. REV. 87, 216 (1984).

72 *Clark*, 468 U.S. at 291-92. The city's permit allowed for the presence of 20 tents accommodating 50 demonstrators in Lafayette Park and 40 tents accommodating up to 100 demonstrators in the park referred to as the Mall. *Id.* at 292.

73 *Id.* at 290-92. The statutory definition of camping was: "the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep . . . or using any tents or . . . other structure . . . for sleeping." *Id.* at 290-91. (citing 36 C.F.R. § 50.27(a) (1983)). Camping was only allowed in areas "designated for that purpose." *Id.* at 290 (citing 36 C.F.R. § 50.27(a) (1983)). Neither Lafayette Park nor the Mall had designated camping areas. *Id.*

The group claimed that the no-camping statute violated their First Amendment right of free expression.[74] The United States Supreme Court, per Justice White, upheld the regulation both as a reasonable "time, place or manner" restriction and as a valid limitation on symbolic speech under *O'Brien*.[75] While characterizing the demonstration's sleeping component as protected symbolic expression,[76] the majority declared that the time, place or manner test applied to such conduct.[77] Applying this standard, the Court tolerated the camping ban as a permissible limitation because: (1) the state did not enforce the statute to suppress the demonstrator's message;[78] (2) the no-camping prohibition served the state's important interest in maintaining the parks;[79] and (3) the demonstrators could adequately communicate the plight of the homeless by simply excluding sleeping in the park from their strategy.[80] Noting that an *O'Brien* analysis produced the same conclusion,[81] the Court summarized that the regulation fell within the government's constitutional power, addressed a sub-

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74 *Id.* at 292. The demonstrators claimed that sleeping in the tents augmented the message concerning the problems of the homeless. *Id.* at 296.

75 *Id.* at 293-94. The Court perceived these two areas of First Amendment jurisprudence to impose similar standards on speech regulations. *Id.* at 298. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).

76 *Clark*, 468 U.S. at 293 (citing *O'Brien*, 391 U.S. at 376). The Justice recognized that conduct delivers a message if the actor intends to communicate that message and the viewer understands the communicative nature of the act. *Id.* at 294 (citing Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)).

77 *Id.* The time, place or manner test provides that expressive activity may be regulated if the restriction is "justified without reference to the content of the regulated speech, . . . serve[s] a significant government interest, and . . . leave[s] open ample alternative channels for communication." *Id.* For additional cases dealing with time, place or manner restrictions, see Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (city's requirement that rock and roll musicians use city-provided equipment is a valid time, place or manner restriction); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984) (city regulation banning use of signs on public property is a valid time, place or manner restriction because the aesthetic objectives of the city represented a substantial government interest); Saia v. New York, 334 U.S. 558, 560-61 (1948) (statute prohibiting use of amplification devices without permission of police chief was invalid because it gave uncontrolled discretion to chief). The *Clark* Court also noted that the criteria for determining a regulation's validity is virtually identical whether one uses the *O'Brien* test or the time, place or manner standard. *Clark*, 468 U.S at 298. For a discussion of *O'Brien*'s impact on the *Clark* decision, see Keith Werhan, *The* O'Brien*ing of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 646-49 (1987).

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

79 *Id.* at 296.

80 *Id.* at 295.

81 *Id.* at 298-99. For discussion of the *O'Brien* test, see *supra* notes 46-54 and accompanying text.

stantial governmental interest, did not relate to the suppression of ideas, and was narrowly tailored to further the government's interest in park maintenance.[82]

More recently in *Renton v. Playtime Theatres, Inc.*,[83] the Court further weakened protection for non-verbal speech by upholding state regulation of symbolic conduct that might cause harmful "secondary effects" in the community.[84] The city of Renton enacted a zoning ordinance that restricted the location of adult movie theaters.[85] Respondents, who acquired two existing movie theaters within the proscribed area for the purpose of showing adult films, claimed the ordinance violated their First and Fourteenth Amendment rights and sought a permanent injunction against its enforcement.[86] Justice Rehnquist, writing for the Court, noted that the Renton city ordinance did not ban all adult theaters but merely limited their permissible locations.[87]

Applying time, place or manner standards,[88] the *Renton* Court found the ordinance sufficiently content-neutral because it was not aimed at the ideas the movies conveyed, but at the harmful "secondary effects"[89] that adult theaters have on the sur-

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82 *Clark*, 468 U.S. at 298-99. In a dissenting opinion, Justice Marshall stated that the camping ban was not a narrowly-tailored method of achieving the goal of maintaining the appearance of the parks. *Id.* at 308 (Marshall, J., dissenting).

83 475 U.S. 41 (1986).

84 *Id.* at 50.

85 *Id.* at 44. Specifically, "[t]he ordinance prohibited any 'adult motion picture theater' from locating within 1000 feet of any residential zone, single or multiple-family dwelling, church, or park, and within one mile of any school." *Id.*

86 *Id.* at 45. The United States District Court for the Western District of Washington denied the permanent injunction, finding that the "ordinance did not substantially restrict First Amendment interests [and] . . . that the purposes of the ordinance were unrelated to the suppression of free speech." *Id.* The Ninth Circuit reversed. *Id.* at 46.

87 *Id.*

88 *Id.* For a time, place or manner restriction to be valid, it must be "justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981). For further discussion of time, place or manner restrictions, see *supra* note 77 and accompanying text.

89 *Id.* at 47. Many commentators characterized as a drastic change in First Amendment analysis, the shift from examining only the face of the statute to examining the motive behind the statute as well, a practice expressly prohibited in *O'Brien*. *See* Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1924 (1989) (*Renton* makes "what most commentators fear is a cursory inquiry into motive."); Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 COOLEY L. REV. 1, 35 (1989) ("Free speech will continue to receive inadequate protection as long as the Court continues along the path it charted with the secondary effects analysis in *Renton*"); Andrea Oser, *Motiva-*

rounding community.[90] The Court perceived the city's interest in preserving social morals as substantial[91] and additionally found the ordinance narrowly tailored because it affected only those theaters that generated unwanted secondary effects.[92] Finally, the Court pointed out that respondents could still exercise their First Amendment rights at alternative Renton locations.[93]

Despite *Renton's* threatening precedent, the Court soon after reaffirmed constitutional protection for symbolic speech in *Texas v. Johnson.*[94] Johnson burned an American flag to protest the policies of both the Reagan administration and some Dallas-based

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tion Analysis In Light of Renton, 87 COLUM. L. REV. 344, 359 (1987) ("Any test that hinges on the permissibility of government motivation is ripe for attack"); *The Supreme Court— Leading Cases*, 100 HARV. L. REV. 100, 196 (1986) ("This reasoning marks a startling break with traditional [F]irst [A]mendment jurisprudence.").

90 *Renton*, 475 U.S. at 47. The Court opined that the legislature drafted the ordinance to preserve and protect the quality of life, prevent crime, and defend Renton's retail trade. *Id.* at 48. The Court expostulated that such zoning options should be analyzed under conventional "time, place and manner regulations." *Id.* at 49.

91 *Id.* at 50. In arriving at this determination, the Court stressed that Renton's reliance on the experiences of surrounding cities, such as Seattle, which experienced the secondary effects of adult theaters, was justified and required no additional independent testing. *Id.* at 51-52.

92 *Id.* at 52. *Cf.* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (attempt to ban *all* live entertainment was not narrowly tailored); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (statute banning *all* offensive material is too broad in its scope).

93 *Renton*, 475 U.S. at 53. The Court noted that 520 acres, or 5% of Renton's total land area, was not subject to the ordinance and, therefore, was still available for adult theaters. *Id.* The Court also refuted respondents' argument that much of that land was already occupied or did not provide viable theater sites by stating that the "respondents must fend for themselves in the real estate market . . . ." *Id.* at 54. In a stinging dissent, Justice Brennan stated:

> The fact that adult movie theaters may cause harmful "secondary" land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. Because the ordinance imposes special restrictions on certain kinds of speech on the basis of *content*, I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies.

Id. at 56-57 (Brennan, J., dissenting).

94 491 U.S. 397 (1989). For further discussion of *Johnson*, see Eric A. Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A. L. REV. 535 (1990); Deborah T. Eversole, Note, *A Voyage Through Murky Waters: Assessing Flag Misuse Prohibitions in the Wake of* Texas v. Johnson, 17 FLA. ST. L. REV. 869 (1990). *See also* Kent Greenwalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 947 (1990) ("[T]he Supreme Court did well in *Johnson* not to carve out an exception from ordinary [F]irst [A]mendment principles."); Arnold H. Loewy, *The Flag-Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165, 175 (1989) ("The Supreme Court has struck a major blow for freedom in *Johnson*.").

companies.[95] A Texas state jury found Johnson guilty of violating a state statute that prohibited "the desecration of a venerated object."[96] The Texas Court of Criminal Appeals reversed Johnson's conviction, holding that the statute violated the First Amendment.[97]

After reviewing relevant precedent regarding non-verbal speech,[98] Justice Brennan, writing for a majority of the United States Supreme Court, stated that the First Amendment protected Johnson's flag burning because Johnson intended to convey an opinion understandable by all who witnessed his conduct.[99] The Court maintained that Texas's proposed interest

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[95] *Johnson*, 491 U.S. at 399. The protest took place in 1984 on the steps of Dallas city hall during the Republican National Convention. *Id.* While the protestors did not injure anyone, numerous witnesses stated that the protestor's actions gravely offended them. *Id.*

[96] *Id.* at 400. Section 42.09 of the Texas penal statutes provided:

> (a) A person commits an offense if he intentionally or knowingly desecrates:
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> (1) a public monument;
>
> (2) a place of worship or burial; or
>
> (3) a state or national flag.
>
> (b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
>
> (c) An offense under this section is a Class A misdemeanor.

TEX. PENAL CODE ANN. § 42.09 (1989).

[97] *Johnson*, 491 U.S. at 400 (citing Johnson v. State, 755 S.W.2d 92 (Tex. Crim. App. 1988) (en banc)).

[98] *Id.* at 403-04. Justice Brennan articulated that the Court must first determine whether Johnson's activity was expressive conduct which implicated the First Amendment. *Id.* (citing Spence v. Washington, 418 U.S. 405, 409-11 (1974)). If the conduct was indeed expressive, Justice Brennan posited that the Court must then determine whether the legislature designed the law to suppress the expression of ideas. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 377 (1968); Spence v. Washington, 418 U.S. 405, 414 n.8 (1974)). If the statute did not relate to the suppression of expression, the Justice opined that it would be subject to the *O'Brien* test. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)). Conversely, if the statute was directly related to the suppression of expression, the Justice declared that the state's interest must be subject to strict scrutiny. *Id.* (citing Spence v. Washington, 418 U.S. 405, 411 (1974)). Finally, the Justice opined that a state interest not supported by the record must be discounted all together. *Id.* (citing Spence v. Washington, 418 U.S. 405, 411 (1974)). The Court dismissed Texas's interest in avoiding breaches of the peace as not viable because the record did not support it. *Id.* at 407-08. The Court emphasized that an expressive message can not be stymied simply because it may provoke violence in those to whom it is communicated. *Id.* at 408-09 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[99] *Id.* at 404-06 (citing Spence v. Washington, 418 U.S. 405, 410-11 (1974)). Justice Brennan pointed out that the Court never hesitated in previous cases to find expressive activity in flag-related conduct. *Id.* at 404-05 (citing Spence v. Washing-

in preserving the flag as a symbol of national unity and nationhood was directly related to the suppression of speech.[100] Consequently, the majority determined that the statute must be subject to the highest degree of constitutional scrutiny.[101] Because the state's recognized interest in preserving the American flag did not justify criminal sanctions, the Court concluded that the statute failed close First Amendment scrutiny.[102]

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ton, 418 U.S. 405, 409-10 (1974); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943); Stromberg v. California, 283 U.S. 359, 368-69 (1931)). The Court also stated that Johnson's decision to burn his flag with the convening of the Republican National Convention added credibility to the conclusion that his conduct was expressive. *Id.* at 406.

100 *Johnson*, 491 U.S. at 410. Specifically, the majority stated:

> The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood or national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*.

Id.

101 *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

102 *Id.* at 420. Justice Brennan went so far as to suggest that permitting flag burning as a form of expression might actually *strengthen*, rather than weaken, national reverence for the flag as a national symbol. *Id.* at 419. The Justice eloquently remarked:

> It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today. The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by . . . according its remains a respectful burial.

Id. at 419-20. (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

In dissent, Chief Justice Rehnquist opined that state regulation of flag burning did not violate the First Amendment because "[t]he flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." *Id.* at 429 (Rehnquist, C.J., dissenting). In addition, the Chief Justice stated that the burning of the flag so inherently inflamed many citizens that it necessarily created breaches of the peace and made the burner's actions similar to the "fighting words" proscribed in *Chaplinsky v. New Hampshire*. *Id.* at 431 (Rehnquist, C.J., dissenting)(citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

As a result of *Johnson*, Congress passed the Flag Protection Act of 1989, criminalizing the conduct of any person who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" an Ameri-

Most recently, the Court considered the boundaries of First Amendment symbolic-speech rights regarding nude dancing in *Barnes v. Glen Theatre, Inc.*[103] Chief Justice Rehnquist, writing a plurality opinion, began by recognizing the respondent's symbolic speech as constitutionally protected expressive conduct.[104] The Chief Justice qualified this protection, however, by positing that nude performances approached the border between protected and unprotected speech.[105]

Chief Justice Rehnquist next set forth the Court's two-part inquiry: 1) what level of First Amendment protection to afford nude dancing; and 2) whether the Indiana regulation impermissibly encroached on protected symbolic speech.[106] Consequently, the plurality applied the four-part *United States v. O'Brien* standard.[107] Applying steps one and two of the *O'Brien* test concurrently, the plurality examined the state's purpose in passing the public indecency statute.[108] Although Indiana statutes did not set forth a legislative history, the plurality explained that the public indecency statute's text and history clarified the state's intent

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can flag. United States v. Eichman, 110 S. Ct. 2404, 2407 (1990) (quoting 18 U.S.C. § 700 (Supp. 1990)). In *Eichman*, however, the Court held the Act unconstitutional. *Id.* at 2410. While the new Act did not explicitly contain any content-based limitations, the Court nonetheless held that the government's interest clearly "related to the suppression of speech." *Id.* at 2408 (citing Texas v. Johnson, 491 U.S. 397, 410 (1989)).

103 111 S. Ct. 2456 (1991).

104 *Id.* at 2460. In making this determination, the Court relied on both *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) ("Although . . . 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 . . . Amendment protection under some circumstances.") (citation omitted) and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 ("[N]ude dancing is not without its First Amendment protections from official regulation."). *Barnes*, 111 S. Ct. at 2460. *See also* California v. LaRue, 409 U.S. 109, 118-19 (1972) (while nude dancing is not without First Amendment protection, the state can use the Twenty-First Amendment to ban nude dancing as part of its liquor licensing program); Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene . . . .").

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

106 *Id.* The plurality explained that the Indiana regulation proscribed *all* public nudity, not nude dancing in particular. *Id.* Chief Justice Rehnquist added that the Supreme Court of Indiana, in its interpretation of the statute, found a prohibition against nudity in all places of "public accommodation." *Id.*

107 *Id.* at 2460-63. The State suggested that the Court consider Indiana's law as a time, place or manner restriction, but the plurality observed the similarity between this approach and an analysis under symbolic speech law and opted to apply the *O'Brien* test instead. *Id.* at 2460. For a discussion of the four-part *O'Brien* test, see *supra* notes 52-54 and accompanying text.

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

to protect morality and societal order.[109] The plurality further explained that the common law considered public nudity a crime and an act *malum en se*.[110] Public indecency statutes, the plurality stressed, cast moral disapprobation on those who wished to appear nude in public places.[111]

Chief Justice Rehnquist also noted that the Indiana legislature had previously passed numerous other laws prohibiting all public nudity.[112] Moreover, the Chief Justice pointed out that the public indecency statute—a general prohibition—predated the genesis of the respondents' nude barroom dancing.[113] Thus, the plurality concluded that the statute easily satisfied the first prong of the *O'Brien* test because the state's interest in protecting morals and societal order fell squarely within its constitutional power.[114] Likewise, the plurality found the prong fulfilled because the state's interest was substantial and the legislature furthered that interest through the statute's enactment.[115]

Shifting to the test's third prong, the plurality characterized Indiana's interest in morality and societal order as "unrelated to the suppression of free expression."[116] The plurality refuted the respondents' argument that any morally based prohibition of nudity must necessarily be related to expression or that the statute purposely censored the erotic message that nude dancing conveyed.[117] Supporting this determination, the plurality charged that while almost all conduct, including unclad public appearances, may be expressive, the Court had long rejected

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109 *Id.* at 2461. The Court noted the ancient origin and the common existence of public indecency statutes. *Id.* The Court also stressed that such statutes prevailed in almost all fifty states. *Id.*

110 *Barnes*, 111 S. Ct. at 2461 (citation omitted). *Malum en se* means "a wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law." BLACK'S LAW DICTIONARY 965 (6th ed. 1990).

111 *Barnes*, 111 S. Ct. at 2461.

112 *Id.*

113 *Id.*

114 *Id.* at 2462. The Court referenced Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973) ("legislature could legitimately . . . protect 'the social interest in order and morality' ") *and* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed."). *Barnes*, 111 S. Ct. at 2462.

115 *Id.*

116 *Id.*

117 *Id.* at 2462-63. For a discussion of Justice White's dissenting argument, see *infra* notes 152-73 and accompanying text.

such an elastic definition of "expressive conduct."[118] Moreover, the plurality pointed out that numerous other erotic performances continued free from state interference so long as the performers wore at least scant amounts of clothing.[119] The plurality added that G-strings and pasties did not eliminate the dancer's erotic message; they merely made the message less graphic.[120] The plurality stressed that the public indecency statute attempted to forestall the true evils of public nudity, whether that nudity intermingled with expressive activity or not.[121]

Applying *O'Brien's* final prong, Chief Justice Rehnquist determined that Indiana narrowly tailored its statute by requiring the "bare minimum" necessary to accomplish the state's goals, i.e., that dancers wear pasties and G-strings.[122] The plurality therefore concluded that the statute's incidental limitations on expressive activity did not violate First Amendment protections.[123]

In a concurring opinion, Justice Scalia agreed to uphold the public indecency statute but did so on the conviction that nude dancing was not even protected expressive conduct under the First Amendment.[124] Justice Scalia opined that the statute escaped First Amendment scrutiny because it was a general prohibition regulating conduct rather than a specific law aimed at regulating expression.[125]

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118 *Id.* at 2462. The Court bolstered this claim by quoting both United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.") and Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."). *Barnes*, 111 S. Ct. at 2462.

119 *Id.* at 2463.

120 *Id.*

121 *Id.* The plurality supported this conclusion by making reference to *O'Brien*. *Id.* The *O'Brien* Court concluded that, although O'Brien's act of burning his draft card did contain a protected communicative element, he could nonetheless be convicted based on the non-communicative aspect of his conduct. *Id.* (citing United States v. O'Brien, 391 U.S. 367, 382 (1968)). Similarly, while the *Barnes* Court conceded that nude dancing contained a communicative element, it nonetheless prohibited this conduct because of the non-communicative act of nudity. *Id.*

122 *Id.*

123 *Id.*

124 *Barnes*, 111 S. Ct. at 2463 (Scalia, J., concurring).

125 *Id.* Justice Scalia reminded: "Indiana does not regulate dancing. It regulates public nudity. . . . Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech." *Id.* at 2464 (Scalia, J., concurring) (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1120 (7th Cir. 1990) (Easterbrook, J., dissenting)). Justice Scalia fur-

Attacking the dissent's position, Justice Scalia asserted that no person may constitutionally do whatever he or she pleases as long as no one is injured or offended.[126] Indeed, the Justice commented that the public indecency statute would likely be violated if 60,000 fully consenting adults gathered in the Hoosierdome to flaunt their genitals, even though the activity did not offend anyone present.[127] Justice Scalia explained that throughout history societies have prohibited certain conduct, not because it brings about harm to others, but because society considers the conduct immoral.[128] Justice Scalia asserted that, absent distinct constitutional protection for the conduct involved, the Constitution did not forbid these prohibitions solely because they regulated morality.[129] Justice Scalia posited that the Indiana statute enforced the customary moral belief that people should not indiscriminately expose their private parts, whether or not it offended those who viewed the exhibition.[130] Consequently, the Justice concluded that the public indecency statute did not fall within the ambit of First Amendment protection.[131]

In support of his claim, Justice Scalia distinguished written and oral speech from expressive conduct.[132] The Justice noted that the First Amendment invariably protected speech and that any law hindering speech, even if unrelated to the suppression of expression, must meet high First Amendment scrutiny.[133] On the other hand, the Justice emphasized that nearly all laws re-

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ther noted that the statute does not proscribe messages of eroticism; it merely proscribes public nudity. *Id.*

126 *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring). The dissent contended that the statute's application was unjustified because only consenting, adult customers viewed the performances; therefore, the activity did not harm the public at large. *See infra* notes 170-72 and accompanying text.

127 *Id.*

128 *Id.* *See* IRVING KRISTOL, ON THE DEMOCRATIC IDEA IN AMERICA 33 (1972) ("Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles.").

129 *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring). *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (private homosexual sodomy prohibited solely because the majority of the population believed it was immoral and unacceptable); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (fact that adult theatre would only cater to consenting adults does not curtail the state's power to regulate).

130 *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring).

131 *Id.* at 2468 (Scalia, J., concurring).

132 *Id.* at 2465 (Scalia, J., concurring).

133 *Id.* at 2465-66 (Scalia, J., concurring) *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 44 (1976) (placing limit on amount of money electoral candidates may spend on campaigns must meet high level of scrutiny); Saia v. New York, 334 U.S. 558, 560

strict conduct and that a person may perform virtually any prohibited conduct as a means of expressing one's self—even if the actor simply expressed that he or she disagreed with the prohibition.[134] Consequently, Justice Scalia considered it inherently unreasonable to require every law that regulated conduct to possess a substantial state interest or survive First Amendment scrutiny simply because the law incidentally restricted expression.[135]

Moreover, the Justice questioned the plurality's application of an intermediate level of scrutiny because it required the judiciary to determine which state interests were important or substantial.[136] Instead, when a regulation does not target speech directly, Justice Scalia indicated that the Court should employ a less-stringent "rational basis" test, particularly when the issue involves morality.[137] In this case, the Justice concluded that moral

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(1948) (city's proscription of sound amplification devices except with permission of police chief violates First Amendment).

134 *Barnes*, 111 S. Ct. at 2466 (Scalia, J., concurring). *See, e.g.*, South Florida Free Beaches, Inc. v. Miami, 734 F.2d 608, 609 (11th Cir. 1984) (sunbathers appeared nude in protest of a regulation restricting public nudity).

135 *Barnes*, 111 S. Ct. at 2466 (Scalia, J., concurring). While conceding that strictly content-based restrictions are unconstitutional, the Justice stressed that the Constitution permits incidental restrictions of expression resulting from regulations not aimed at the communicative aspect of conduct. *Id. Compare* Texas v. Johnson, 491 U.S. 397, 420 (1989) (regulation prohibiting flag burning deemed unconstitutional because it was aimed at the communicative aspect of the act); Spence v. Washington, 418 U.S. 405, 411 (1974) (statute which banned defacing of the American flag struck down because it was related to the act's communicative message) *and* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) (school's prohibition on wearing symbolic black armbands was unconstitutional because it was aimed at the student's communicative message) *with* United States v. Albertini, 472 U.S. 675, 687-89 (1985) (prohibiting an individual from entering a military base was constitutional because he was not banned for the communicative nature of his act, but because he previously had been banned from the base); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984) (ban on sleeping in parks upheld because of governmental interest in maintaining park, not because of any opposition to the communicative impact of the act) *and* United States v. O'Brien, 391 U.S. 367, 382 (1968) (law prohibiting destruction of draft card upheld because it was not aimed at the act's communicative impact, but at its non-communicative element). Specifically, Justice Scalia stated:

> All our holdings . . . support the conclusion that "the only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court then proceeds to determine whether there is substantial justification for the proscription."

Barnes, 111 S. Ct. at 2467 (Scalia, J., concurring) (citation omitted).

136 *Id.*

137 *Id.* at 2467-68 (Scalia, J., concurring). To support this assertion, Justice Scalia made reference to *Bowers*, where the Court held that a rational basis sufficiently

opposition towards public nudity satisfied a rational-basis standard.[138]

Justice Souter, in a separate concurring opinion, agreed with the plurality's view that the First Amendment afforded nude dancing some protection and reasoned that nude dancing conveyed an expressive message of eroticism.[139] The Justice likewise agreed that application of the four-step *O'Brien* test appropriately determined the level of First Amendment protection.[140] The Justice explained, however, that the state's interest in censuring nude dancing was not limited to protecting societal morals, but also included combatting the "secondary effects" of establishments such as Glen Theater and the Kitty-Kat Lounge.[141] Justice Souter insisted that secondary effects should not be ignored simply because the state legislature and the courts failed to pronounce these effects as a justification for regulation.[142] The Justice advanced that Indiana's interest in preventing secondary effects, such as sexual assault, prostitution and other criminal activity sufficiently justified enforcement of the public indecency statute.[143]

Applying the *O'Brien* test, Justice Souter noted that the state's constitutional power encompassed the prerogative to prevent the evils associated with secondary effects and easily satisfied the first prong.[144] Addressing the second prong, Justice Souter offered that the state's substantial interest in preventing secondary effects indicated that a complete prohibition against nude dancing could further that interest.[145]

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supported a law prohibiting private homosexual sodomy, and that moral opposition to homosexuality provided that rational basis. *Id.* (citing Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).

138 *Id.*

139 *Id.* at 2468 (Souter, J., concurring). Justice Souter explained that nudity by itself expressed nothing except the view that the condition is somewhat suitable to the circumstances. *Id.* When nudity merged with expressive activity, however, the Justice asserted that the state of being nude added to the force of expression, and that the activity be afforded some level of First Amendment protection. *Id.*

140 *Id.* For a discussion of the four prongs of the *O'Brien* test, see *supra* notes 52-54 and accompanying text.

141 *Barnes*, 111 S. Ct. at 2468-69 (Souter, J., concurring).

142 *Id.* at 2469 (Souter, J., concurring). Specifically, Justice Souter wrote: "Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Id. See* McGowan v. Maryland, 366 U.S. 420 (1961).

143 *Barnes*, 111 S. Ct. at 2469 (Souter, J., concurring).

144 *Id.*

145 *Id.* To support his assertion that the regulation at issue actually *furthered* the

The statute satisfied *O'Brien*'s third prong, Justice Souter expounded, because Indiana's interest in combatting secondary effects was unrelated to the suppression of expression.[146] Justice Souter declared that while nude dancing establishments produced harmful secondary effects, "the persuasive effect of the expression inherent in nude dancing" did not necessarily cause the effects.[147] Rather, the Justice suggested a correlation between the effects and the presence of nude dancing establishments without revealing the exact reasons for the correlation.[148] Because Indiana's interest stemmed from the superficial correlation between the dance and other evils, and not specifically from the dance's persuasive effect, Justice Souter stressed that the state's interest remained unrelated to the suppression of expression.[149]

Addressing *O'Brien's* final prong, Justice Souter noted that the government's interest necessitated the minimum action—the donning of a G-string and pasties.[150] The Justice concluded, therefore, that the *O'Brien* test was satisfied and that the public

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state's interest in preventing secondary effects, Justice Souter pointed out that Indiana was not required to justify its restrictions with a specific study of how nude dancing would adversely impact its cities. *Id.* (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986)). Instead, the Justice posited that the state may rely on the experiences of other states where the toleration of nude dancing led to the secondary effects Indiana sought to prevent. *Id.* (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986)). Because Indiana need not present localized proof, the Justice concluded that the prohibition against nude dancing furthered the state's interest in preventing secondary effects and, consequently, satisfied the second prong of *O'Brien*. *Id.* at 2470 (Souter, J., concurring). For a further discussion of the "secondary effects" justification, see *supra* notes 83-93 and accompanying text.

146 *Barnes*, 111 S. Ct. at 2470 (Souter, J., concurring).

147 *Id.*

148 *Id.* (emphasis added). Specifically, the Justice stated:

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

Id. at 2470-71 (Souter, J., concurring).

149 *Id.* at 2471 (Souter, J., concurring). In furtherance of this point, Justice Souter compared *Barnes* to *Renton*. *Id.* In *Renton*, the Court held that the regulation of adult theaters based on a correlation between such theaters and harmful secondary effects was content-neutral because it was "*justified* without reference to the content of the regulated speech." *Id.* (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)). *Contra* Boos v. Barry, 485 U.S. 312, 319 (1988) (statute prohibiting the display of signs in front of a foreign embassy that tended to bring public disrepute to foreign government *not* considered content-neutral).

150 *Barnes*, 111 S. Ct. at 2471 (Souter, J., concurring).

indecency statute should stand.[151]

Justice White, in a stinging dissent, disagreed with the plurality and both concurrences in several material respects.[152] Justice White argued that all previously upheld speech restrictions aimed at protecting societal order and morals involved truly general prohibitions of individual conduct.[153] In that respect, the dissent distinguished the Indiana statute because it did not apply to nudity at all times or in all places.[154] Moreover, Justice White cited an Indiana Supreme Court decision that held that the public indecency statute permitted "nudity as a part of some larger form of expression meriting protection when the communication of ideas is involved."[155]

Because the public indecency statute did not proscribe all conduct generally, Justice White maintained that a mere interest in furthering morality and societal order did not sufficiently justify the prohibition.[156] Instead, the dissent required a closer examination of the statute's purpose.[157] The dissent observed that the purpose of banning public nudity in such places as beaches, parks and hot dog stands was to shield others from what many people find offensive.[158] Justice White reasoned that this argument could not justify the prohibition of nude dancing, however, because all of the viewers were consenting adults who paid to eye the performances.[159] Instead, the dissent suggested that Indiana purposely attempted to shield patrons from what the state per-

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151 *Id.*

152 *Id.* at 2471-76 (White, J., dissenting).

153 *Id.* at 2472 (White, J., dissenting). Specifically, the Justice pointed to *United States v. O'Brien*, 391 U.S. 367 (1968), which prohibited the destruction of draft registration certificates "at any time and in any place," and *Bowers v. Hardwick*, 478 U.S. 186 (1986), where a state proscribed homosexual sodomy regardless of where it took place, including in the home. *Id.*

154 *Barnes*, 111 S. Ct. at 2472 (White, J., dissenting). Particularly, the Justice referred to at-home nudity as an example of what the Indiana statute left uncovered. *Id.*

155 *Id.* at 2473 (White, J., dissenting) (citing State v. Baysinger, 397 N.E.2d 580 (Ind. 1979)). The dissent further noted that Indiana would not apply the public indecency statute to theatrical productions such as *Hair* or *Salome*, and that the state never attempted to apply the statute to ballets, plays or operas that involved nudity. *Id.*

156 *Id.*

157 *Id.* Specifically, Justice White articulated: "In other words, when the state enacts a law which draws a line between expressive conduct which is regulated and nonexpressive conduct of the same type which is not regulated, *O'Brien* places the burden on the State to justify the distinctions it has made." *Id.*

158 *Id.*

159 *Id.*

ceived as the harmful message communicated through nude dancing.[160] Thus, the dissent concluded that the statute did not satisfy *O'Brien*'s third prong because Indiana's interest directly suppressed expression.[161]

Expanding on this conclusion, Justice White reasoned that because the state allowed dancers wearing G-strings and pasties to perform, but prohibited totally nude dancing, the state clearly attempted to ban the distinctive message conveyed by nude dancing.[162] Indiana attempted to proscribe nude dancing, the dissent contended, because nude performances may breed emotions and feelings of sensuality and eroticism in the viewers' minds which could lead to increased degradation of women and prostitution.[163] Because generating ideas, emotions and thoughts "is the essence of communication," the dissent did not accept the state's justification.[164]

Justice White further noted that the nudity component of the dancers' performances could not be categorized "as mere 'conduct' independent of any expressive component of the dance."[165] Because the public indecency statute aimed directly at the expression nudity conveyed, Justice White stressed that the Court could only uphold a strictly drawn statute that satisfied a compelling state interest.[166] The dissent articulated that the state established no such compelling interest to support the public indecency statute.[167] Moreover, even if a compelling interest existed, Justice White maintained that the Indiana statute remained unconstitutional because the law was not narrowly tailored.[168]

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160 *Id.*

161 *Id.* at 2473-74 (White, J., dissenting).

162 *Id.* at 2474 (White, J., dissenting).

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.* (citing United States v. Grace, 461 U.S. 171, 177 (1983); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989)). Thus, the dissent advocated a content-based treatment of the public indecency statute. *See supra* note 22 and accompanying text. The dissent further noted that the case should be decided based on settled law, not the artistic value of nude dancing. *Id.* at 2474-75 (White, J., dissenting). The plurality's opinion that nude dancing was not a high art should excuse ignoring or disturbing settled law. *Id.* at 2474 (White, J., dissenting). *See also* Texas v. Johnson, 491 U.S. 397, 414 (1988) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

167 *Barnes*, 111 S. Ct. at 2475 (White, J., dissenting).

168 *Id.* Justice White posited that prohibiting an entire class of expressive activity generally does not meet the narrow tailoring requirement of the First Amendment.

Attacking Justice Souter's position, the dissent opined that if increased prostitution and other secondary effects truly concerned Indiana, the state should adopt restrictions that did not clash with the expressiveness of the nude dancing performances.[169]

Attacking Justice Scalia's "Hoosierdome" hypothetical,[170] Justice White pointed out that the same 60,000 individuals who would be violating the public indecency statute while nude within the Hoosierdome would not be violating the law if they drove to their respective homes and, once there, paraded around, cavorted and reveled in the nude before friends and relatives.[171] Justice White found no reason why Indiana's interest in morality should diminish when the conduct occurred in private, especially if nudity was as inherently evil as Justice Scalia suggested.[172]

In conclusion, Justice White reiterated his position that Indiana prohibited nude dancing solely for the message that it communicated; therefore, the statute creating the prohibition was unconstitutional.[173]

In *Barnes*, the plurality applied symbolic speech law in a result-oriented and troubling manner. By justifying the Indiana regulation, the plurality protected society from the "evils" of risque, but non-obscene, expression. Unfortunately, the Court enforced its mores at the expense of well-rooted First Amendment protections.

The plurality's characterization of the Indiana statute as content-neutral is flawed for numerous reasons. First, the plurality exceeded its judicial function by stepping into the role of the legislature. In examining whether a particular statute intentionally suppresses speech, the Court must determine the legislative purpose underlying the regulation.[174] Because the Indiana legisla-

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Id. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 485 (1988) (complete ban on picketing of homes upheld only because it targets no more than the precise source of the evil it seeks to redress).

169 *Barnes*, 111 S. Ct. at 2475 (White, J., dissenting). The dissent suggested that the state could limit nude dancing to certain hours, disperse the establishments throughout the city or require patrons to remain a minimum distance from the performers. *Id.* The dissent further stated that Indiana could have appropriately invoked its Twenty-First Amendment powers as a means of regulating nude dancing. *Id.* (citations omitted). Finally, the dissent noted that the state had the power to criminalize obscene behavior and prostitution. *Id.*

170 For a discussion of this hypothetical, see *supra* notes 126-31 and accompanying text.

171 *Barnes*, 111 S. Ct. at 2471-76 (White, J., dissenting).

172 *Id.* at 2476 (White, J., dissenting).

173 *Id.*

174 Through examination of the legislative purpose, the Court determines

ture did not articulate the governmental interest supporting its public indecency statute, Justice Rehnquist determined that the lawmakers designed the statute to preserve societal order and morals.[175] The Justice, however, should have used more objective factors in determining Indiana's purpose, rather than imposing his personal opinion about the goal of regulating public nudity.[176]

The Indiana Supreme Court's interpretation of the public indecency statute clearly reveals that the legislature did not intend to suppress nudity in all artistic performances.[177] Chief Justice Rehnquist concluded that the public indecency statute was not aimed at the erotic message inherent in nude dancing, but rather at all public nudity.[178] By contrast, the Indiana Supreme Court stated that the statute allowed nudity "as a part of some larger form of expression where the communication of ideas is involved."[179] Additionally, the petitioner admitted that theatrical performances involving nudity, such as *Hair* or *Salome*, would not violate the statute.[180] It is difficult to dispute the argument that the state sought to prohibit nude dancing not for nudity alone, but because nudity conveys an erotic message.[181] Certainly, individuals who undress in gymnasium locker-rooms, models who bare all in art classes or parents who allow young children to frolic naked would all violate the public indecency statute. The state would not likely prosecute these individuals, however, because nudity in these instances does not convey a communicative message that the state deems harmful.

Furthermore, Chief Justice Rehnquist's rationalization that semi-clothed, erotic performances equaled nude erotic performances exposes his difficulty with the message conveyed by nude dancing.[182] The Chief Justice articulated: "the requirement that

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whether the statute in question is content-based or content-neutral. *See supra* notes 9-10 and accompanying text.

175 *Barnes*, 111 S. Ct. at 2461.

176 It is true that "[p]ublic indecency statutes . . . are of ancient origin" and that this particular Indiana statute follows a "long line" of public indecency statutes. *Id.* Nowhere, however, in the Indiana statutes is the purpose of protecting morality articulated. *See id.*

177 *Barnes*, 111 S. Ct. at 2459 n.1 (citing State v. Baysinger, 397 N.E.2d 580, 587 (Ind. 1979)).

178 *Id.* at 2463.

179 *Id.* at 2459 n.1 (citing State v. Baysinger, 397 N.E.2d 580, 587 (Ind. 1979)).

180 *Id.* at 2473 (White, J., dissenting).

181 For the dissent's discussion of this argument, see *supra* notes 162-64 and accompanying text.

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

the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."[183] Facially, this statement indicates that the message conveyed by nude dancing concerns both the state and the Court, thus making the statute content-based and demanding of a strong level of judicial scrutiny—a level that a mere interest in societal order and morals leaves unsatisfied.

Finally, even if one assumes a content-neutral public indecency statute, the interest in preserving morality does not sufficiently justify First Amendment restrictions. If the logic of the *Barnes* plurality is extended there comes the danger that any form of expression advocating a shift from the views of the moral majority will be suppressed.[184]

Justice Scalia's position is even more disturbing. Justice Scalia's declaration that any law not explicitly aimed at expression does not warrant a de minimis amount of First Amendment protection[185] sets dangerous precedent. A crafty legislature could draft a statute that is not facially aimed at conduct, but nonetheless suppresses that communicative component through application.[186] While every "incidental" hindrance of First Amendment freedom need not pass First Amendment scrutiny, the Court must recognize that not all hindrances are incidental. The Court, at a minimum, must explore the statute to determine if any First Amendment restrictions are truly incidental.

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183 *Id.*

184 *See* Stuart Taylor Jr., *1st Amendment Peril: Bad Issues Making Worse Law*, 128 N.J. L. J. 1334 (1991), which noted:

> [I]f its logic is extended, *Barnes* could prove to have broad implications, for majoritarian morality has not previously been held to be a sufficiently compelling state interest to justify restrictions on speech. A great deal of expressive conduct with a weightier claim to First Amendment protection than nude dancing can also give offense to majoritarian morality and might be threatened if the Court were to balance the value of particular expression against state interests in order and morality.

Id.

185 *Id.* at 2463 (Scalia, J., concurring).

186 *See* Oser, *supra* note 89, at 359. The author stated:

> [S]uppose that a statute forbidding *all* parades on the first day of every month was passed because the legislature wanted to prevent people from hearing pro-socialist opinions on May Day. Such a law would have been subject to balancing, despite the fact that the government regulation strikes at the First Amendment's core. The content test tempts a legislature with illicit motives to sneak a view-point restriction by the courts in the form of a content-neutral regulation and is therefore under-inclusive.

Id. (footnote omitted).

By shifting the state's interest from societal order and morals to that of preventing harmful secondary effects,[187] Justice Souter concededly proffered an interest which would more likely pass judicial scrutiny. Admittedly, preventing sexual assault, prostitution and other crimes creates a strong state interest. Although direct proof that such transgressions will occur is lacking, this interest is nonetheless more viable than a subjective interest in morality. This does not mean, however, that Justice Souter's disposition of the case is acceptable.

First, Justice Souter, not the Indiana legislature, created the state interest in the prevention of secondary effects. Thus, the same objectivity problems that plagued Chief Justice Rehnquist's analysis also plague Justice Souter's argument.[188] Additionally, prevention of secondary effects as a justification for inhibiting expressive speech is problematic and has been widely criticized.[189] Indeed, legislators can circumvent the Court's strict review by cloaking their content-based regulations in "secondary-effects" clothing.[190] Individuals wishing to partake in free expression should not have to concern themselves with every possible effect their conduct causes.

In summary, the Court must place a greater emphasis on First Amendment rights than on the states' governmental interests asserted to suppress those rights.[191] Indeed, the Court must erect greater protection of First Amendment rights and develop a test recognizing their significance.[192] Free expression must

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187 *Id.* at 2468-69 (Souter, J., concurring).

188 For criticism of Chief Justice Rehnquist's analysis, see *supra* note 184 and accompanying text.

189 *See supra* note 89 and accompanying text. *See also* Boos v. Barry, 485 U.S. 312, 334 (Brennan, J., concurring in part and concurring in the judgment) ("I write separately . . . to register my continued disagreement with the proposition that an otherwise content-based restriction on speech can be recast as 'content-neutral' if the restriction 'aims' at 'secondary effects' of the speech . . . .").

190 *See* Note, *supra* note 89, at 1923, which stated:

> [T]o avoid strict scrutiny, legislators could always defend a regulation as a means of preventing a litany of secondary effects that any large scale expressive activity in a public forum would produce — such as interference with pedestrian and automobile traffic, or the creation of a threat of violence from the presence of large crowds. To avoid this result, courts must conduct more than a cursory motive inquiry.

Id.

191 *See* Comment, *supra* note 47, at 91 ("The balancing test will be validly applied to 'symbolic speech' situations only when the Court proceeds to thoroughly examine the substantiality of the alleged expressive element.").

192 *See* REDISH, *supra* note 10, at 125-26 (author suggests "that all governmental regulations of expression [should] be subjected to a unified 'compelling interest'

flourish.[193] The unveiling of messages advocating change must be allowed if we are to remain a free society, even if a majority of the population disagrees with the message.[194] Nude dancing should not be prohibited simply because certain people find its message offensive or disagreeable. If nude dancing is suppressed, other forms of expression, that the general populous does not deem frivolous, may not be far behind.

Carmen J. DiMaria

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analysis"). *See also* Prygoski, *supra* note 89, at 34-35 (suggests an approach where "the protection afforded different kinds of protected speech is the same, but the level of protection is the one reserved for core First Amendment expression. This is the only approach which gives adequate consideration to the marketplace of ideas envisioned by the drafters of the [F]irst [A]mendment"); Oser, *supra* note 89, at 361-67 (commentator suggests a test which takes access to alternative means of communication into account in determination of free expression cases).

193 *See* Thomas I. Emerson, *Toward A General Theory Of The First Amendment*, 72 YALE L. J. 877, 955 (1963) ("conditions in a modern democratic society demand that a deliberate, affirmative, and even aggressive effort be made to support the system of free expression").

194 *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). *See also supra* note 20 (for Justice Brandeis's concurring opinion in Whitney v. California, 274 U.S. 357 (1927)).