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NOTES

A REVIEW OF *BARNES V. GLEN THEATRE, INC.* CALLS FOR A REEXAMINATION OF THE *O'BRIEN* TEST

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.[1]

—William J. Brennan, Jr.,
Associate Justice, United States Supreme Court, 1956-1990

I. INTRODUCTION

These words reflected the Supreme Court's view of the First Amendment as recently as three years ago. Yet in the recent case of *Barnes v. Glen Theatre, Inc.*,[2] in which the Court was confronted with a challenge to an Indiana statute banning nude dancing, an activity protected by the First Amendment, the Court found the law to be constitutional. In so doing, the Court acknowledged the values embodied in Justice Brennan's words above—then undermined them.

In a five-to-four decision, a "confused and fractured majority"[3] of the Court reversed the *en banc* ruling of the Seventh Circuit Court of Appeals and upheld Indiana's regulatory scheme. In reaching its conclusion that Indiana may prohibit nude dancing, the Supreme Court based nearly all of its analysis upon an application of the *O'Brien* test, a four-part inquiry articulated in *United States v. O'Brien*.[4]

This Note first will examine the *O'Brien* test and its application in *Barnes v. Glen Theatre, Inc.*[5] Next, this Note will focus on the extent to which the result in *Barnes* calls for a reexamination of the *O'Brien* test.[6] Following this inquiry, some recommendations for the test's future use will

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1. Texas v. Johnson, 491 U.S. 397, 414 (1989).
2. 111 S. Ct. 2456 (1991).
3. John P. Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 15 (1992).
4. 391 U.S. 367 (1968).
5. *See infra* part IV.A-B.
6. *See infra* part IV.B-D.

be offered and explored.[7] From these recommendations it is hoped that a new First Amendment methodology may be forged—a methodology not only effective enough to handle difficult free speech issues like those raised in *Barnes,* but also durable enough to survive without needing to be redesigned at every turn.

II. BACKGROUND OF THE LAW: THE FIRST AMENDMENT

Perhaps no right is more sacred and revered in our constitutional scheme than the right to free expression. The right to express oneself free from governmental intervention is secured by the Constitution's "most majestic guarantee,"[8] the Free Speech Clause of the First Amendment.[9] Justice Brandeis believed that the Constitution was premised upon the notion that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[10] Similarly, Justice Holmes, in defending the virtues of a political system that places a high value on free speech, stressed the importance of "free trade in ideas."[11]

Through the course of our country's history, the Supreme Court has developed a framework for analyzing governmental restrictions on speech. In general, the First Amendment protects speech from governmental intrusion. However, not all speech is equally protected. There are certain categories of expression that the Court has deemed to be beyond the First Amendment's protection. The Court has ruled, for instance, that the government may prohibit speech that threatens to incite violent or illegal conduct.[12] The Court has also held that the First Amendment does not extend to so-called fighting words—words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[13]

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7. *See infra* part V.

8. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785 (2d ed. 1988).

9. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The Free Speech Clause was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

10. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

11. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

12. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). The Court held that the state may not forbid advocacy of the use of force or the violation of the law except where the advocacy is directed to inciting imminent lawless action and is likely to produce such action. *Id.* at 447.

13. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Similarly, the Court has concluded that speech determined to be obscene, according to certain standards, is unprotected.[14] Finally, the Court has held that speech depicting child pornography also falls outside the protection of the First Amendment.[15]

A. *Protected Speech: Content-Based vs. Content-Neutral*

If the government attempts to restrict speech falling outside of the unprotected categories, the Court will analyze the restriction to determine if the First Amendment has, in fact, been violated. The Supreme Court's First Amendment analytical framework has been characterized as consisting of two "tracks."[16] The first track provides a rigorous level of scrutiny to government restrictions of protected speech while the second track provides one less demanding.[17]

The first track applies to regulations which are content-based—those that seek to discourage or prohibit speech *because of its very message.*[18] A statute banning, for instance, discussion of a political candidate is an example of a content-based regulation.[19] The government has extremely limited power to restrict expression because of its message, ideas, or subject matter. If a regulation is content-based, it is subjected to strict scrutiny.[20] To satisfy this standard, the government must show that the law (1) promotes a compelling interest, and (2) is narrowly tailored to achieve that interest.[21]

The second track is reserved for content-neutral restrictions—those aimed not at content but at some noncommunicative aspect of speech.[22] A statute prohibiting loudspeakers in residential neighborhoods is an

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14. Miller v. California, 413 U.S. 15 (1973). The Court defined obscenity according to the following standards:

> (a) whether "the average person, applying contemporary community standards" would find that the [speech], taken as a whole, appeals to the prurient interest; (b) whether the [speech] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the [speech], taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)) (citation omitted).

15. *See* New York v. Ferber, 458 U.S. 747 (1982).

16. TRIBE, *supra* note 8, § 12-2, at 789-92.

17. *See id.* at 791-92.

18. *Id.* at 789.

19. *See id.* (citing Mills v. Alabama, 384 U.S. 214 (1966)).

20. *See* Boos v. Barry, 485 U.S. 312, 321 (1988).

21. *Id.*

22. *See* TRIBE, *supra* note 8, § 12-2, at 792.

example of a content-neutral restriction on speech.[23] The statute is unconcerned with the content of any messages that might be broadcast and seeks the reduction of noise as its only purpose. In general, content-neutral restrictions are constitutional unless they unduly constrict the flow of information or ideas.[24] A content-neutral regulation, though targeting the noncommunicative aspects of speech, may nonetheless have an adverse impact on speech. If the impact is severe, the regulation may be invalidated depending on the level of governmental interest sought to be protected.[25] The Court must balance the various interests involved and make a determination.

B. *Expressive Conduct*

In First Amendment analysis, not only is the subject matter of speech significant, but so is the way in which the speech is expressed. Up to this point, this discussion has assumed that the speech involved has been expressed in a traditional manner, the written or spoken word. This traditional type of speech is known as pure speech.[26] The Supreme Court has recognized, however, that speech conveyed in indirect ways, such as through conduct, is likewise protected by the First Amendment.[27] Speech expressed by conduct is known as symbolic speech or expressive conduct.[28]

The standard of review for evaluating restrictions on expressive conduct is less demanding than that used for evaluating restrictions on pure speech.[29] The Court first expressly articulated this standard of review in *United States v. O'Brien.*[30] Under the *O'Brien* test, a regulation of expressive conduct is justified if: (1) it is within the constitutional power of the government, (2) it furthers a substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free expression, and

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23. *See id.* at 790 (citing Kovacs v. Cooper, 336 U.S. 77 (1949)).

24. TRIBE, *supra* note 8, § 12-2, at 792.

25. *Id.*

26. *See, e.g.,* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2468 (1991) (Souter, J., concurring).

27. *See, e.g.,* Texas v. Johnson, 491 U.S. 397 (1989) (burning American flag is protected speech); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing armbands is protected speech); Stromberg v. California, 283 U.S. 359 (1931) (flying flag is protected speech).

28. *See, e.g., Barnes,* 111 S. Ct. at 2460.

29. *See generally* United States v. O'Brien, 391 U.S. 367 (1969).

30. *Id.*

(4) the incidental restrictions on First Amendment freedoms are no greater than is necessary to the furtherance of that interest.[31]

C. Nude Dancing

The Supreme Court has held that nude dancing is expressive conduct protected by the First Amendment.[32] In finding that nude dancing does not fall into the unprotected category of obscenity, the Court has stated that "nudity alone does not place otherwise protected material outside the mantle of the First Amendment."[33] The precise level of protection the Court has given to nude dancing, however, has never been clearly articulated.

The Court first announced that nude dancing was entitled to protection in *Schad v. Borough of Mount Ephraim*.[34] In *Schad*, the Court struck down as violative of the First Amendment a zoning ordinance prohibiting all adult entertainment.[35] But, because the holding in *Schad* rested upon overbreadth grounds,[36] no clear standard of review emerged for evaluating restrictions as they applied specifically to nude dancing.[37] It was clear, however, that any such standard would not be exceedingly strict.[38] The *Schad* Court, in articulating the level of protection afforded nude dancing, held that nude dancing was "not without its protections . . . ."[39]

Despite the absence of clearly defined guidelines, a pattern has emerged in the Court's treatment of nude dancing and other adult entertainment. The Court's focus seems to be on the *kind* of restriction the government has chosen to employ. The *Schad* Court used overbreadth analysis.[40] In *California v. LaRue*,[41] the Court's decision to affirm a

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31. *Id.* at 377.

32. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See* Schad v. Borough of Mount Ephraim, 452 U.S 61, 66 (1981). In an overbreadth or facial challenge, litigants are permitted to challenge a statute not on the basis that their own rights of free expression might have been violated, but because the law, on its face, might cause others to refrain from constitutionally protected speech or expression. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

37. *See Schad*, 452 U.S. at 66.

38. *See generally* FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that offensive or indecent speech merits a lesser degree of protection).

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

40. *See id.*

41. 409 U.S. 109 (1972).

regulation of nude dancing hinged upon the states' exclusive power under the Twenty-First Amendment[42] to regulate establishments serving alcohol.[43] In these cases, the analysis and discussion centered not on the level of scrutiny necessary to protect nude dancing as expression, but on the appropriate inquiry for the type of restriction at hand. In this respect, as we shall see, *Barnes* was no exception.[44]

III. STATEMENT OF THE CASE: *BARNES V. GLEN THEATRE, INC.*

The Kitty Kat Lounge, an establishment serving alcoholic beverages in South Bend, Indiana, desired to offer its patrons totally nude "go-go dancing" entertainment.[45] Indiana's public indecency statute, however, prohibited anyone from appearing nude in a public place.[46] Indiana officials interpreted the statute to require the dancers to wear G-strings[47] and pasties[48] during their performances.[49] In 1985, the Kitty Kat Lounge, along with another such establishment, the Glen Theatre, and two nude dancers working there (hereinafter the "respondents" collectively), filed suit in the United States District Court for the Northern District of

42. The Twenty-First Amendment to the Constitution provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

43. *See* California v. LaRue, 409 U.S. 109 (1972).

44. *See infra* part IV.

45. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2458 (1991).

46. Indiana's public indecency statute provides that:

> (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 covered male genitals in a discernibly turgid state.

IND. CODE ANN. § 35-45-4-1 (Burns 1985).

47. "[A] loincloth or breechcloth, usually secured by a cord at the waist." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 846 (2d ed. 1987).

48. "[A] pair of small, cuplike coverings for the nipples of a striptease dancer . . . ." *Id.* at 1420.

49. *See Barnes*, 111 S. Ct. at 2460.

Indiana.[50] Seeking to enjoin enforcement of the Indiana statute, the respondents argued that the statute was facially overbroad.[51] They also contended that the statute, as applied to their nude dancing, improperly interfered with their right to free expression under the First Amendment.[52]

A. Holdings of the Lower Courts

The district court granted the injunctive relief and struck down the statute, finding it to be facially overbroad.[53] The Seventh Circuit Court of Appeals reversed, holding that the interpretation previously given to the statute by the Indiana Supreme Court insulated the law from a challenge for overbreadth.[54] The case was remanded to the district court with instructions to determine whether the statute, as applied to nude dancing, violated the First Amendment.[55]

On remand, the district court upheld the statute, finding that the nude dancing sought to be performed was not expressive activity protected by the First Amendment.[56] On appeal, the Seventh Circuit again reversed, holding that nude dancing was expressive conduct and thus protected by the

50. Glen Theatre, Inc. v. Civil City of South Bend, 726 F. Supp. 728 (N.D. Ind. 1985), *rev'd sub nom.* Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986), *on remand,* Glen Theatre v. Civil City of South Bend, 695 F. Supp. 414 (N.D. Ind. 1988), *rev'd sub nom.* Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), *aff'd,* 904 F.2d 1081 (7th Cir. 1990) (en banc), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

51. *Id.* at 731; *see supra* note 37.

52. *Id.*

53. *Id.* at 732-33.

54. *See* Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986), *on remand,* Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414 (N.D. Ind. 1988), *rev'd sub nom.* Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), *aff'd,* 904 F.2d 1081 (7th Cir. 1990) (en banc), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991). In State v. Baysinger, 397 N.E.2d 580 (1979), *appeal dismissed sub nom.* Clark v. Indiana, 446 U.S. 931 (1980), the Indiana Supreme Court limited the application of § 35-45-4-1, stating that "[Indiana] may be constitutionally required to tolerate . . . some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Id.* at 587.

55. Glen Theatre, Inc. v. Pearson, 802 F.2d at 291.

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

First Amendment.[57] After a rehearing *en banc*,[58] a majority of the Seventh Circuit agreed that nude dancing was protected expression and that Indiana's public indecency statute impermissibly infringed upon that expression.[59] In reaching its decision, the Seventh Circuit noted that "[s]exual expression which is . . . not obscene is protected by the First Amendment."[60]

B. Holding of the Supreme Court

The Supreme Court granted certiorari[61] and reversed the Seventh Circuit.[62] Although the Justices differed widely in their reasoning, a five-to-four majority upheld the statute.[63] A four member bloc consisting of Chief Justice Rehnquist, and Justices O'Connor, Kennedy and Souter concluded that while nude dancing was entitled to marginal protection under the First Amendment, Indiana's regulation of public nudity was not an impermissible interference.[64] Justice Scalia, also upholding the statute, rested his decision on other grounds and wrote a separate concurring opinion. Justice Souter also filed a concurring opinion. Justices White, Marshall, Blackmun, and Stevens dissented from the Court's holding.

1. The Plurality Opinion

The Chief Justice, writing for a three-member plurality which included Justices O'Connor and Kennedy, found nude dancing to be expressive conduct and thus subjected Indiana's statute to a lessened degree of scrutiny.[65] Applying the test articulated in *United States v. O'Brien*, the

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

58. "[T]he Circuit Courts of Appeal usually sit in panels of [three] judges but for important cases may expand the bench to a larger number when they are said to be sitting *en banc*." BLACK'S LAW DICTIONARY 526-27 (6th ed. 1990); *see* FED. R. APP. P. 35.

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

60. *Id.* at 1086 (quotations omitted). All parties agreed that the nude dancing sought to be performed was not obscene. *Id.* at 1082.

61. 111 S. Ct. 38 (1990).

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

63. *See id.*

64. *See id.*

65. *See id.* at 2460 (plurality opinion).

plurality held that the Indiana statute was constitutional.[66]

The plurality determined that the public indecency statute satisfied *O'Brien's* first requirement that the regulation be within the constitutional power of the government.[67] Indiana's public indecency law was within the states' traditional police power to provide for the public health, safety, and morals.[68] The plurality observed that at the time of the decision, similar public indecency statutes were in effect in at least forty-seven states.[69]

Applying the second criterion of the *O'Brien* test, the plurality concluded that the Indiana statute furthered a substantial governmental interest—namely, that of protecting order and morality.[70] The Chief Justice quoted from the noted case of *Bowers v. Hardwick*[71] to support the observation that "[t]he law . . . is constantly based on notions of morality."[72]

The plurality next determined that the third criterion of the *O'Brien* test was satisfied—that Indiana's purpose in banning public nudity was unrelated to the suppression of free expression.[73] The plurality reasoned that dancers who are required to wear only pasties and G-strings are not thereby prevented from expressing their erotic message.[74] As the Chief Justice noted: "[T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."[75]

The fourth criterion of the *O'Brien* test requires that the incidental restriction on First Amendment freedoms be no greater than is essential to the furtherance of the governmental interest.[76] The plurality concluded that the statute was "narrowly tailored" to achieve its end, the elimination of public nudity.[77] Therefore, the plurality reasoned, the incidental restric-

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66. *See id.* at 2460-63. Plurality opinions, as they are not endorsed by a majority of the Court, carry less precendential value under the doctrine of stare decisis. BARRON'S LAW DICTIONARY 327 (1984).

67. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2461 (1991) (plurality opinion).

68. *Id.* at 2462.

69. *Id.* at 2461.

70. *Id.* at 2462.

71. 478 U.S. 186 (1986) (upholding a ban on homosexual sodomy).

72. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462 (1991) (plurality opinion) (quoting *Bowers,* 478 U.S at 196).

73. *Id.*

74. *Id.* at 2463.

75. *Id.*

76. United States v. O'Brien, 391 U.S. 367, 377 (1968).

77. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2463 (1991).

tions on free expression are no greater than is essential.[78] "Indiana's requirement that the dancers wear at least pasties and a G-string," the Chief Justice claimed, "is modest, and the bare minimum necessary to achieve the state's purpose."[79]

2. The Concurring Opinions

a. Justice Souter

Justice Souter concurred in the result and filed a separate opinion in *Barnes*.[80] Interestingly, the concurrence represents Justice Souter's first discussion of the First Amendment as a member of the Supreme Court.[81] Justice Souter agreed with the plurality that nude dancing is expressive conduct within the purview of the First Amendment.[82] He also agreed with the plurality that the *O'Brien* test supplied the appropriate level of scrutiny.[83]

The Justice did not agree, however, with the plurality's analysis under the second criterion of the *O'Brien* test. In Justice Souter's view, the protection of public morality does not advance a substantial governmental interest.[84] Instead, the Justice rested his decision on the sufficiency of Indiana's interest in regulating the so-called secondary effects of nude dancing.[85] According to Justice Souter, the secondary effects of nude dancing include prostitution, sexual assault, and other criminal activity.[86] Justice Souter went on to conclude that Indiana's statute satisfied the remainder of the *O'Brien* test.[87]

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78. *Id.*

79. *Id.*

80. *Id.* at 2468 (Souter, J., concurring).

81. Ingrid Kristin Campagne, Note, Barnes v. Glen Theatre, Inc.: *Application of Indiana's Public Indecency Statute to Nude Dancing—Is the Supreme Court Stripping Away First Amendment Protection to Reveal a New Standard?* 25 LOY. L.A. L. REV. 595, 606 n.98 (1992) (asserting that *Barnes* represents the Court's development of a theory of "lesser value speech").

82. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2468 (1991) (Souter, J., concurring).

83. *Id.*

84. *Id.*

85. *Id.* at 2468-69; *see also infra* part IV.C.

86. *Id.* at 2469.

87. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2471 (1991) (Souter, J., concurring).

b. Justice Scalia

Justice Scalia believed that the respondents' activities in *Barnes* did not implicate the First Amendment.[88] In his view, nude dancing is not expression meriting constitutional protection.[89] The key inquiry to Justice Scalia is whether the statute in question is targeted at expression.[90] In this case, the Justice believed Indiana's statute to be a general proscription of conduct and not one related to expression.[91] Statutes like the one in *Barnes* are unrelated to expression, the Justice reasoned, "unless we view . . . topless hot dog vendors as speech."[92] Accordingly, Justice Scalia would have required Indiana's statutory scheme to meet only a "rational basis" test.[93]

3. The Dissenting Opinion

Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented from the Court's holding.[94] The dissent readily agreed with the plurality that the respondents' nude dancing fell within the purview of the First Amendment as protected expression.[95] However, the dissent did not agree that Indiana's statute was constitutional.[96]

Specifically, the dissent believed that *O'Brien*'s third criterion—requiring that the statute's purpose be unrelated to suppression of expression—had not been satisfied.[97] Justice White reasoned that since nudity was an expressive ingredient of the dance,[98] requiring the dancers to wear pasties and G-strings will necessarily change the essence of their performance, and thus their message.[99] Therefore, the dissent believed

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

89. *Id.* at 2463-64.

90. *Id.* at 2465.

91. *Id.*

92. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2464 (1991) (Scalia, J., concurring) (quotations omitted).

93. *Id.* at 2468. The rational basis test is the least restrictive level of review applied by the Court. Webster v. Reproductive Health Servs., 492 U.S. 490, 543 (1989) (opinion of Justice Blackmun). A challenged law will satisfy this standard if there is merely a rational basis for its enactment. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

94. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2471 (1991) (White, J., dissenting).

95. *Id.* at 2472.

96. *Id.* at 2476.

97. *Id.* at 2473-74.

98. *Id.* at 2474.

99. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2474 (1991) (White, J., dissenting).

that such a regulation must have as its purpose the suppression of expression.[100] Accordingly, the dissent would have subjected the Indiana statute to strict scrutiny.[101]

While both the majority and dissent left open the question of whether Indiana's interests in this case might be compelling, the dissent took the view that, in any event, the regulation was not narrowly drawn.[102] Justice White pointed out that banning an entire category of expressive activity, such as occurred here, normally will not satisfy the Court's narrow tailoring requirement.[103] In response to Justice Souter's concurring opinion, the dissent suggested some alternative strategies that Indiana officials might have employed to tailor their regulatory scheme more narrowly toward combating the secondary effects of nude dancing. These alternatives included prescribing that a minimum distance be kept between dancers and spectators, limiting nude entertainment to certain hours, and dispersing throughout the city those establishments providing nude entertainment.[104]

IV. ANALYSIS

The *Barnes* Court based almost all of its analysis on the *O'Brien* test. The test, however, was carelessly developed by the Warren Court[105] and, consequently, fails to address adequately the free speech issues implicated in *Barnes*.[106] This is first evidenced by the *Barnes* Court's troubling application of the test.[107] The problem is further underscored by the fact that the statute in *Barnes*, in practice, acts as a content-based restriction—a type of regulation the *O'Brien* test is wholly unsuited to evaluate.[108] Indeed, if the *O'Brien* test is expected to remain an effective part of the Court's free speech methodology, it must be significantly improved.[109] Otherwise, it must ultimately be discarded.[110]

Professor Keith Werhan[111] has said: "[T]he Court's *O'Brien* machin-

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100. *See id.*
101. *Id.*
102. *Id.* at 2475.
103. *Id.*
104. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2475 (1991) (White, J., dissenting).
105. *See infra* part IV.A.1.
106. *See infra* part IV.A.2.
107. *See infra* part IV.B.
108. *See infra* part IV.C.
109. *See infra* part V.A.
110. *See infra* part V.B.
111. Professor of Law, Western New England College School of Law.

ery requires calibration."[112] Another commentator has called the *O'Brien* decision the "most troubling illustration" of the Court's approach to content-neutral restrictions[113] and a "[p]rime candidate[] for reexamination."[114] As will be shown, the Court's application of the *O'Brien* test to *Barnes* demonstrates the continuing validity of these observations.

A. *Development of the* O'Brien *Test*

On March 31, 1966, David O'Brien, before a sizeable crowd on the steps of the South Boston Courthouse, burned his draft card in protest of the Vietnam War.[115] O'Brien was arrested and later convicted of violating a federal statute prohibiting the destruction of draft cards.[116] O'Brien challenged his conviction, arguing that the statute violated his First Amendment right to free speech.[117] The Supreme Court, in an opinion authored by then Chief Justice Warren, found O'Brien's activities to be expressive conduct, thus meriting lessened protection under the First Amendment.[118] The *O'Brien* Court concluded that:

> A government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[119]

Applying its analysis, the Court upheld O'Brien's conviction.[120]

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112. Keith Werhan, *The* O'Briening *of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 649 n.87 (1987).

113. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 126 (1981).

114. *Id.* at 146.

115. *See* United States v. O'Brien, 391 U.S. 367, 369-70 (1968); Werhan, *supra* note 112, at 635.

116. *O'Brien*, 391 U.S. at 369.

117. *See generally* O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), *vacated*, 391 U.S. 367 (1968).

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

119. *Id.* at 377.

120. *Id.* at 386.

1. The *O'Brien* Court

It can hardly be said that the *O'Brien* test arose from a Court that was indifferent to First Amendment values.[121] The Warren Court handed down many decisions in which free speech values were exalted in spirit as well as result.[122] Despite this seeming commitment to the First Amendment, the *O'Brien* Court has been criticized as disposing of its free-speech issues in an "astonishingly cavalier manner."[123] Thus, the problems with the *O'Brien* test may have arisen more out of carelessness or neglect rather than indifference or disdain.

> [The *O'Brien* Court] chose not to deal with the complexities of the matter . . . . [I]t made no attempt to discuss, let alone to answer, the difficult and disturbing constitutional questions presented. Instead, it trivialized the issues and handed down an opinion that has all the deceptive simplicity and superficial force that can usually be achieved by begging the question.[124]

This failure to appreciate the complex free-speech issues in *O'Brien* is surely at the root of the problems caused by the Court's later application of the test to *Barnes*.[125]

Justice Frankfurter, in discussing the First Amendment, once warned: "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[126] It is possible that the *O'Brien* Court was so concerned with the social and political issues surrounding the Vietnam War that the decision was overly result-oriented and thus a poorly crafted tool for future use. The *Barnes* case, taking the *O'Brien* test to the extreme, fully exposes the test's imperfections. And, while the *Barnes* decision may not quite threaten the independence of the judiciary, as feared by Justice Frankfurter,

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121. *See* Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 1 (1968).

122. *See, e.g.*, Street v. New York, 394 U.S. 576 (1969) (reversing conviction for violation of statute prohibiting public mutilation of the flag); Stanley v. Georgia, 394 U.S. 557 (1969) (reversing conviction for violation of statute prohibiting possession of obscene material); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (reversing conviction for violation of statute prohibiting advocacy of criminal acts).

123. Alfange, *supra* note 121, at 2.

124. *Id.* at 3.

125. *See infra* part IV.B.

126. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance).

it most certainly jeopardizes the free-speech values that make up the very fabric of the First Amendment.

2. *O'Brien* Balancing and Scrutiny

Scholars have sharply criticized the *O'Brien* test as not providing a sufficient balancing of free speech interests. Because all four prongs focus only on the challenged law,[127] the test has been assailed as not requiring any real measurement of the expression sought to be regulated.[128] Cases involving restrictions of expressive conduct, critics contend, "can hardly be satisfactorily decided by means of a formula that makes it unnecessary to evaluate [a statute's] impact upon speech."[129] The result is that the *O'Brien* test provides an empty analysis which invariably results in the challenged restriction on expression being upheld.[130] "The [*O'Brien*] test nowhere asks whether the asserted governmental interest is sufficiently substantial to justify the incidental impact on free expression. Under these conditions, it is practically inconceivable that an asserted governmental purpose will not qualify."[131]

This lack of serious balancing within the *O'Brien* test predictably has led commentators to scoff at the level of protection it provides for expressive conduct. Harvard Law Professor John Hart Ely has characterized the *O'Brien* test's scrutiny as a useless approach that would uphold all but "gratuitous inhibitions" of speech.[132] Similarly, Professor Werhan has decried *O'Brien*'s "lowly" scrutiny,[133] contending that the test operates as a "presumption of nonprotection" for expression sought to be regulated.[134]

On its face, the *O'Brien* test appears to require a demanding analysis akin to strict scrutiny. The Court seemed to create a test well-suited to identifying unlawful restrictions on expressive conduct. Closer examination

127. Alfange, *supra* note 121, at 18.

128. *Id.*

129. *Id.*

130. *See* Werhan, *supra* note 112, at 655 n.124; *see also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV 46, 50-52 (1987); John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485-86 (1975); David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 505 (1988).

131. Redish, *supra* note 113, at 127.

132. Ely, *supra* note 130, at 1485.

133. Werhan, *supra* note 112, at 647-48.

134. *Id.* at 645.

reveals, however, that, in practice, the *O'Brien* test provides a level of scrutiny that has been described as "useless."[135]

The language used by the *O'Brien* Court may be the root of this apparent deceptiveness. In defining the level of scrutiny that it was about to apply, the *O'Brien* Court discussed the level of government interest sufficient to sustain a restriction on expressive conduct. The Court declared that such an interest must be either "compelling" or "substantial."[136] The Court's use of the term "compelling" might signal to many that a form of "strict scrutiny" was to be applied. A "substantial interest" requirement, however, has been found only in lower levels of scrutiny.[137] By equating terms that traditionally have been used in distinct situations, the *O'Brien* Court has actually amplified the very imprecision that it had complained "inheres in these terms."[138]

At first, the distinction between the terms "compelling" and "substantial" may seem trifling. But, after considering the importance the Court has attached to these two terms and the practical result of using each, the significance becomes clear. A compelling interest is "a matter of truly vital and important concern."[139] In practice, the "compelling interest" component of the strict scrutiny test has been a powerful tool that the Court has used to invalidate numerous unlawful restrictions on free speech.[140] In other contexts, such as in modern Equal Protection analysis, the "compelling interest" requirement of the strict scrutiny test is an exacting standard,[141] characterized by one commentator as being "strict in theory and fatal in fact."[142] A "substantial interest" requirement, on the other hand, is a standard normally reserved for lessened degrees of scrutiny.[143] The Court's use of the term "substantial" is best understood to mean

135. Redish, *supra* note 113, at 127.

136. United States v. O'Brien, 391 U.S. 367, 376 (1968). In fact, the Court used a variety of terms to describe this governmental interest, including "subordinating," "paramount," "cogent," and "strong." *Id.* at 376-77.

137. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (applying "time, place, and manner" test).

138. *O'Brien*, 391 U.S. at 377.

139. Redish, *supra* note 113, at 144.

140. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating city ordinance which exempted labor picketing from general ban on picketing).

141. *See, e.g.*, Palmore v. Sidotti, 466 U.S. 429 (1984) (using strict scrutiny to invalidate a child custody award based upon race as violative of the Equal Protection Clause).

142. Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (quotations omitted).

143. *See supra* note 137.

"having substance" or "not imaginary," rather than meaning "considerable" or "large."[144] In light of the widely divergent meanings the Court has given to "compelling" and "substantial," it is hard to imagine why the *O'Brien* Court would use them interchangeably.

In using the term "compelling," it was most likely the Court's intention to give the impression that the *O'Brien* test would provide a rigorous, demanding scrutiny. Any such impression was quickly dispelled in its first application, however, as the Court upheld the federal statute prohibiting the destruction of draft cards and reinstated O'Brien's conviction.[145] Since *O'Brien*, the Court has applied the *O'Brien* test in the same deferential manner, causing it to be viewed by some as nothing more than a rational basis test.[146] In the words of Professor Ely, the *O'Brien* test, "honestly applied, will invalidate nothing."[147]

B. Application of the O'Brien *Test to* Barnes v. Glen Theatre, Inc.

Even though nude dancing is not regarded by the Court as fully protected speech,[148] based on the foregoing discussion, the *O'Brien* test provided a seriously deficient level of protection for the expressive activity sought to be regulated in *Barnes*. The *O'Brien* test, it will be shown, was an inappropriate analysis.[149]

Barnes demonstrates precisely the situation to which Justice Harlan referred in his separate opinion in the *O'Brien* decision. Though he concurred in the result, Justice Harlan was concerned with the test's ability to address future cases presenting First Amendment issues more intricate than those encountered in *O'Brien*. In the following passage, the Justice correctly predicted the difficulty with the *O'Brien* test currently presented in *Barnes*:

> I wish to make explicit my understanding that [the *O'Brien* test] does not foreclose consideration of . . . those rare instances when an "incidental" restriction upon expression, imposed by a

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144. Alfange, *supra* note 121, at 23.

145. United States v. O'Brien, 391 U.S. 367, 386 (1968).

146. *See* Ely, *supra* note 130, at 1486 n.18; Stone, *supra* note 130, at 50; Day, *supra* note 130, at 505.

147. Ely, *supra* note 130, at 1490.

148. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 (1991) (plurality opinion) (nude dancing within "outer perimeters" of First Amendment protection); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) (nude dancing involves only "barest minimum" of protected expression).

149. *See infra* part IV.D.

> regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.[150]

Barnes v. Glen Theatre, Inc. presents one of those instances of which Justice Harlan has warned. Even if Indiana's facially neutral public indecency statute satisfies *O'Brien's* requirements, application of the *O'Brien* test in *Barnes* certainly has the effect of entirely preventing a group of speakers from meaningfully reaching their audience. The dancers cannot otherwise lawfully communicate their precise message to their intended audience. Wearing pasties and G-strings, the dancers in *Barnes* cannot convey a message with quite the same emotional impact as when they are nude.[151] Recognizing the communicative impact of the speech at issue in *Barnes,* Judge Posner, in the Seventh Circuit's *en banc* ruling, astutely observed that, in today's moral climate, a striptease leaving the stripper clothed would lack "erotic punch."[152] Application of the *O'Brien* test in this context, therefore, serves to ban an entire category of expression—totally nude dancing—thereby preventing the dancers at the Glen Theatre from communicating their unique message.

It should be noted that *O'Brien* did not present such a case. That is, application of the test did not have the effect of preventing Mr. O'Brien from reaching his audience.[153] If Mr. O'Brien had burned a copy or replica of his draft card on the courthouse steps, his message would have retained all of its force and emotional impact, yet his actions would have been in compliance with the federal statute.[154] This presents a significant distinction between the facts of *O'Brien* and those of *Barnes.*

In the face of this distinction, the Court applied the *O'Brien* test to *Barnes.* Not surprisingly, the results are troubling. The Court's analysis under the various prongs of the test was scant and conclusory. A more detailed analysis reveals that the plurality's application of the *O'Brien* test's four criteria to *Barnes* was at best flawed.

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150. United States v. O'Brien, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring).

151. *See Barnes,* 111 S. Ct. at 2474 (White, J., dissenting).

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

153. *O'Brien,* 391 U.S. at 389 (Harlan, J., concurring).

154. *See* TRIBE, *supra* note 8, § 12-23, at 983.

1. Within the Constitutional Power of the Government

O'Brien's first requirement, that the regulation be within the constitutional power of the government, is not a significant part of the test's free-speech analysis. In fact, Professor Ely characterizes the *O'Brien* test as a three-pronged inquiry, disregarding the first criterion.[155] Accordingly, since it did not play an important role in the *Barnes* Court's analysis, further discussion of the first prong, for the purposes of this Note, would not be profitable.

2. Substantial Governmental Interest

The plurality's application of *O'Brien*'s second criterion is the most disturbing part of the opinion. After a lengthy discussion leading to the determination that the protection of public morality was generally within the constitutional power of the states, the plurality quickly concluded: "Thus, [Indiana's] public indecency statute furthers a substantial governmental interest in protecting order and morality."[156] Nothing further was said on the issue.[157]

While the members of the plurality regarded the satisfaction of the second prong to be a foregone conclusion, the remaining six Justices carefully considered the question and came to a contrary result. Disbelief that the protection of morality was a sufficient interest in this case was precisely what motivated Justice Souter to write a separate opinion.[158] Siding with the plurality on all other points, Justice Souter could not rest his concurrence on the "sufficiency of society's moral views to justify the [free speech] limitations at issue . . . ."[159]

Justice Scalia was also moved to address this point in his concurring opinion. The Justice was disturbed by the plurality's misplaced reliance on precedent in their application of *O'Brien*'s second criterion. Justice Scalia pointed out that the cases cited by the plurality[160] did not stand for the proposition that the protection of morality was a substantial interest.[161]

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155. *See* Ely, *supra* note 130, *passim*.

156. *Barnes*, 111 S. Ct. at 2462 (plurality opinion).

157. *Id.*

158. *Id.* at 2468 (Souter, J., concurring).

159. *Id.* *See infra* part IV.C.

160. In its discussion, the plurality cited Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), and Bowers v. Hardwick, 478 U.S. 186 (1986). *Barnes*, 111 S. Ct. at 2462.

161. Barnes v. Glen Theatre, Inc.,, 111 S. Ct. 2456, 2467 (1991) (Scalia, J., concurring).

Rather, in those cases, the government's interest amounted to nothing more than "a *rational basis* for regulation."[162] Justice Scalia noted that in *Paris Adult Theatre I*, because the material sought to be prohibited was obscene, the state's interest in maintaining a decent society provided a "legitimate basis" for regulation.[163] The Justice also pointed out that in *Bowers*, the Court held that to comply with the Due Process Clause, society's moral views provided a "rational basis" for prohibiting homosexual sodomy.[164] Upon exposing this flaw in the plurality's reasoning, Justice Scalia expressed his dissatisfaction with "a method of analysis [requiring] judicial assessment of the importance of government interests—and especially of government interests in various aspects of morality."[165]

Academic critics of the *Barnes* decision have also been uneasy with the proposition that the protection of morality might advance a substantial governmental interest. Harvard Law Professor Kathleen Sullivan observed that "[*Barnes*] happens to be the first time ever that mere moral disapproval has counted enough to satisfy any standard of scrutiny stricter than mere rationality review."[166] Another commentator, also unconvinced that society's moral views can raise a substantial interest, stated the larger problem:

> 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 [the] particular expression against state interests in order and morality.[167]

How then, in light of the compelling arguments to the contrary, could the plurality have determined in such a conclusory fashion that moral disapproval provided Indiana with a substantial interest for prohibiting nude dancing?[168] The answer is probably bound up in the criticisms advanced earlier that the *O'Brien* test provides an inadequate level of scrutiny arising in part from a highly deferential application.[169] The *O'Brien* test, it has been said, has a propensity for "mechanical applications that crank out

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162. *Id.*

163. *Id.* at 2468 (citing *Paris*, 413 U.S. at 59-60) (quotations omitted).

164. *Id.* (citing *Bowers*, 478 U.S. at 196).

165. *Id.* at 2467 (quotations omitted).

166. *Constitutional Law Conference*, 60 U.S.L.W. 2253, 2265 (Oct. 22, 1991).

167. Stuart Taylor, Jr., *1st Amendment Peril: Bad Issues Making Worse Law*, N.J. L.J., Aug. 29, 1991, at 66.

168. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462 (1991) (plurality opinion).

169. *See infra* part IV.A.2.

results without any true balancing of the interests at stake."[170] Consequently, with the practical significance attached to the term "substantial" in the second criterion, the Court all but guarantees that the *O'Brien* test will provide no protection at all.[171] If Professor Geoffrey Stone[172] is correct in saying that "[t]he test of a test is not its formulation, but its application,"[173] then it is likely the *O'Brien* test has failed.

3. Unrelated to the Suppression of Expression

The third criterion of the *O'Brien* test requires that the government's purpose be unrelated to the suppression of expression.[174] This criterion is, in effect, a requirement that the law be content-neutral.[175] That a regulation does not satisfy the third criterion does not necessarily mean that the law is unconstitutional. It means only that the inquiry will be shifted to the Court's "first track" analysis.[176] Accordingly, the Court has suggested that this criterion serve as the threshold question for the other prongs in the test.[177]

The plurality held that Indiana's asserted interest in protecting order and morality was unrelated to the suppression of expression.[178] There is strong evidence to the contrary, however. The statute suppresses the erotic message conveyed by totally nude dancing in favor of the less offensive one expressed when the dancers wear pasties and G-strings. As the dissent aptly noted, nudity is not merely incidental conduct, but rather part of the message to be conveyed, and thus itself constitutes expression.[179] Pasties and G-strings therefore have the effect of changing the dancers' message.[180] Since Indiana permits the dancers to perform if they wear pasties and G-strings but forbids them from dancing when nude, it is precisely because of the distinctive, expressive content of nude dancing, therefore,

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170. Werhan, *supra* note 112, at 655 n.124.

171. Ely, *supra* note 130, at 1485-86.

172. Professor of Law, The University of Chicago.

173. Stone, *supra* note 130, at 52.

174. United States v. O'Brien, 391 U.S. 367, 377 (1968).

175. *See* Day, *supra* note 130, at 505.

176. *See supra* part II.A; *see also* Ely, *supra* note 130, at 1484 ("more demanding" analysis applied to regulations failing *O'Brien*'s third prong).

177. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 81 n.4 (1976) (Powell, J., concurring); Buckley v. Valeo, 424 U.S. 1, 65 n.76 (1976) (per curiam).

178. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462-63 (1991) (plurality opinion).

179. *See id.* at 2474 (White, J. dissenting).

180. *See id.*

that the state seeks to apply its prohibition.[181]

In *Texas v. Johnson*,[182] the Court expressed its view toward governmental restrictions that turn on the expressive nature of conduct:

> The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. [The First Amendment] makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription.[183]

The plurality maintained, however, that the statute in *Barnes* prohibited nude dancing not because of its expressive qualities but because of the nudity alone.[184] Even if this were the case, a finding that the law is unrelated to the suppression is still precluded because the nudity sought to be prohibited is inextricably intertwined with the expression of the dance. In *Buckley v. Valeo*,[185] the Court held that federal limits on campaign contributions failed *O'Brien*'s unrelatedness requirement.[186] Distinguishing the regulation before it from the one in *O'Brien*, the *Buckley* Court stated: "*O'Brien* was not a case where the alleged governmental interest in regulating the conduct [arose] in some measure because the communication allegedly integral to the conduct [was] itself thought to be harmful."[187] *Buckley* has been interpreted to mean that a regulation aimed only at conduct will nevertheless be considered related to the suppression of expression if the conduct it purports to restrict is "inevitably related" to speech.[188]

Applying this analysis to *Barnes*, the nudity Indiana seeks to restrict is, by definition, inevitably related to nude dancing. Justice White, dissenting in *Barnes*, explained that "nudity is itself an expressive component of the dance, and not merely incidental conduct."[189] Thus, following the reasoning in *Buckley*, Indiana's interest in protecting morality arises in large measure because public nudity, which is inextricably

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181. *Id.*

182. 491 U.S. 397 (1989) (reversing a conviction for violation of Texas statute prohibiting the desecration of the American flag).

183. *Id.* at 406 (quoted in *Barnes*, 111 S. Ct. at 2466-67 (Scalia, J. concurring)).

184. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462 (1991) (plurality opinion).

185. 424 U.S. 1 (1976) (per curiam).

186. *See id.* at 16-17.

187. *Id.* at 16 (quotations omitted).

188. *See* Day, *supra* note 130, at 509.

189. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2474 (1991) (White, J., dissenting) (quotations omitted).

intertwined with nude dancing, is thought to be harmful. For this reason, Indiana's public indecency law must be considered related to the suppression of expression.

The Court's decision in *Consolidated Edison Co. of New York v. Public Service Commission of New York*[190] further illustrates this point. In that case, the Court found that a regulation that prohibited the use of inserts in utility bills to discuss political matters was related to the suppression of expression.[191] Professor David Day[192] has advanced the theory that since the restriction in *Consolidated Edison* amounted to a complete ban on all billing inserts, the decision demonstrates that "subject matter regulations" will fail *O'Brien*'s unrelatedness prong.[193] As we have seen, the restriction in *Barnes* also acted as a total ban.[194] Consequently, Indiana's public indecency law, as applied to nude dancing, must also be considered a subject matter regulation and therefore related to the suppression of expression.

Looking at Indiana's public nudity law in the light of the Court's decisions in *Johnson, Buckley,* and *Consolidated Edison,* the position taken by the plurality in *Barnes* appears untenable. The better conclusion seems to be that, based upon Indiana's asserted interest of protecting the public morals, the statute targets conduct that cannot be severed from its expressive attributes. The regulation thus fails *O'Brien*'s threshold requirement of unrelatedness. Accordingly, the *Barnes* Court properly should have subjected the law to strict scrutiny.

4. No Greater Than is Essential

The fourth criterion of the *O'Brien* test demands that the incidental restrictions of the challenged regulation upon free speech be no greater than is essential to achieving the government's purpose.[195] This is one variety of the Court's narrow tailoring requirement. Since Indiana's public indecency law operates to ban nude dancing altogether, a more rigorous examination of this requirement than that performed by the plurality in *Barnes* is necessary.

The plurality's analysis under the fourth criterion consisted of a brief

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190. 447 U.S. 530 (1980).
191. *See id.* at 537.
192. Professor of Law, University of South Dakota School of Law.
193. *See* Day, *supra* note 130, at 513.
194. *See supra* part IV.B.
195. United States v. O'Brien, 391 U.S. 367, 377 (1968).

statement that Indiana's statute was "narrowly tailored."[196] The plurality stated that the requirement that the dancers wear pasties and a G-string was "an end in itself" and the "bare minimum" necessary to serve Indiana's interest in the societal disapproval of nudity.[197] It was upon these bare conclusions that the plurality rested its determination that *O'Brien*'s fourth criterion was satisfied.[198]

The dissent did not agree that the Indiana statute was narrowly tailored.[199] Because they believed that Indiana's purpose was related to the suppression of expression, the dissenters would have applied strict scrutiny.[200] Thus, the dissent's narrow tailoring analysis was conducted as part of a discussion of the Court's strict scrutiny.[201] Believing that the plurality's arguments overlooked the broader picture, Justice White wrote: "Banning an entire category of expressive activity . . . generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny."[202] Justice Harlan, in light of his concurrence in *O'Brien*, undoubtedly would have shared this view.[203] The dissent, using a hypothetical presented by Justice Scalia in his concurrence,[204] made its point clear:

> We agree with Justice Scalia that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosierdome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation . . . but clearly the statute does not reach such activity.[205]

It is interesting that both the plurality and dissent addressed only the question of whether the statute was "narrowly tailored" to its purpose.

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196. *Barnes*, 111 S. Ct. at 2463 (plurality opinion).
197. *Id.*
198. *Id.*
199. *Id.* at 2475 (White, J., dissenting).
200. *Id.* at 2474.
201. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2475 (1991) (White, J., dissenting).
202. *Id.* at 2475.
203. *See supra* part IV.B.
204. Justice Scalia said, "The purpose of Indiana's nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another, even if there were not an unintended innocent in the crowd." *Barnes*, 111 S. Ct. at 2465 (Scalia, J., concurring).
205. *Id.* at 2475-76 (White, J., dissenting).

Neither side conducted the precise inquiry directed by the *O'Brien* test's fourth criterion: whether the restrictions on First Amendment freedoms are no greater than is essential to achieve the state's purpose. The dissent explained that it was applying the narrow tailoring requirement as part of a strict scrutiny analysis.[206] The plurality, on the other hand, never fully accounted for its approach.[207] The plurality simply concluded that the statute was narrowly drawn.[208] This type of freewheeling approach has provoked sharp criticism of *O'Brien*'s fourth criterion from Professor Ely. Pointing to the ambiguous and subjective nature of the fourth criterion, Professor Ely assails the wide variability and unpredictability of the Court's analysis when applying this prong.

> In practice [the fourth criterion's] application involves a choice between different conceptions of its standard, a choice made by reference to factors neither *O'Brien* nor any other Supreme Court decision has yet made explicit. This variability in the content of criterion [four] is important: it reduces the reliability of what at first might seem to be the most restrictive element of *O'Brien*'s test.[209]

Even if the plurality had articulated the precise inquiry—that the statute in *Barnes* posed restrictions on First Amendment freedoms no greater than was essential to promote the state's purpose—the "latent ambiguity" in the fourth criterion would still exist.[210] Professor Ely asserts that, "[w]eakly construed, [the fourth criterion] could require only that there be no less restrictive alternative capable of serving the state's interest *as efficiently as it is served by the regulation under attack*."[211] In this case, as the plurality made very clear, nothing could be more efficient than a total ban. Thus, by focusing on the efficiency of Indiana's regulatory scheme and not on the restrictions being placed upon First Amendment freedoms, the *Barnes* Court failed to conduct a meaningful analysis. This characteristic of the Court's application of the fourth criterion—appearing to conform to the criterion's requirements while never really performing the true balancing seemingly demanded by the test—must certainly lie close to the heart of all criticism of the *O'Brien* test.

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206. *Id.* at 2475.
207. *See id.* at 2463 (plurality opinion).
208. *Id.*
209. Ely, *supra* note 130, at 1484.
210. *Id.*
211. *Id.* at 1484-85.

C. *The Secondary Effects of Nude Dancing: Justice Souter's Concurrence Revisited*

Justice Brennan, a champion of First Amendment values,[212] was the previous owner of Justice Souter's seat on the Supreme Court. Because the *Barnes* case was decided by a five-to-four margin, had Justice Brennan heard the case, his vote presumably would have obviated the need for this very discussion.[213] Justice Souter's involvement in the *Barnes* case, however, is significant for reasons other than Justice Brennan's departure.

Justice Souter refused to agree that Indiana's asserted purpose in regulating for the public morality was a sufficient interest under the second criterion of the *O'Brien* test.[214] This criticism, as we have seen, uncovers one of the difficulties of applying the *O'Brien* test to *Barnes.*[215] Justice Souter advanced another argument, however. He believed that Indiana's purpose in combating the so-called secondary effects of nude dancing advanced a sufficient interest.[216] This view is significant in that it imputes a governmental purpose to the Indiana statute that, at first, appears more likely to satisfy *O'Brien*'s second criterion than will the governmental interest in the protection of morality.[217]

The Court has previously affirmed the right of the government to regulate adult entertainment on the basis of combating its secondary effects.[218] In *City of Renton v. Playtime Theatres, Inc.,*[219] the Court upheld an ordinance limiting the placement of adult theaters showing non-obscene nude films based on the city's asserted purpose of eliminating the secondary effects caused by the presence of the theaters.[220] *Playtime Theatres* is distinguishable from *Barnes,* however, in that the ordinance in *Playtime Theatres* did not act as a total ban.[221] In fact, the *Playtime Theatres* Court's determination that the regulation was content-neutral

212. *See, e.g.,* United States v. Eichman, 496 U.S. 310 (1990) (invalidating law prohibiting flag burning); Texas v. Johnson, 491 U.S. 397 (1989) (same); Frisby v. Schultz, 487 U.S. 474 (1988) (Brennan, J., dissenting) (upholding law prohibiting "focused picketing").

213. *See* Taylor, *supra* note 167, at 66.

214. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2468 (1991) (Souter, J., concurring).

215. *See supra* part IV.B.

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

217. *See supra* part IV.B.2.

218. *See, e.g.,* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding zoning ordinance limiting movie theaters showing non-obscene adult entertainment to a certain area).

219. 475 U.S. 41 (1986).

220. *Id.* at 47.

221. *Id.* at 54.

rested upon the observation that the ordinance left some areas of the city open for the protected communication.[222] In *Barnes*, this was not the case. Application of Indiana's public indecency law completely eliminated nude dancing. While the Court has made it clear that the elimination of secondary effects is a sufficient interest when the government seeks merely to regulate adult entertainment, it is questionable that the Court would uphold such an interest when the government seeks to ban a category of adult entertainment completely. Justice Scalia, writing for the majority in the recent case of *R.A.V. v. City of St. Paul*,[223] expressed doubts that an ordinance that completely proscribed a specified category of speech could ever be considered to be directed only to the secondary effects of the speech.[224] Thus it is likely that the words of Professor Sullivan would reflect the Court's current position on secondary effects: "No one would uphold a ban on political rallies because they may be assumed to lead to litter and brawls."[225]

Justice Souter has been criticized for reaching his decision regarding the secondary effects of nude dancing without the benefit of full briefing by the parties.[226] Professor Sullivan called the secondary effects issue a "last minute" argument advanced by the state.[227] Pointing to the lack of proof in the record, she charged that Justice Souter just assumed that prostitution and sexual assault go hand in hand with nude dancing.[228] Professor Sullivan concluded that Justice Souter's opinion "was not based on a shred of empirical evidence . . . ."[229] More than a decade ago, the Court was fully briefed on the issue of the secondary effects of adult entertainment in *Schad*.[230] Unpersuaded by the government's argument, the Court found that live adult entertainment presented no unusual problems that justified its total proscription.[231]

This is not to say that Justice Souter's argument is without force. The notion of prohibiting a category of offensive speech for its secondary effects may, in some future case, attract a majority of the Court. It is foreseeable that the Court might encounter a category of speech giving rise

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222. *Id.*
223. 112 S. Ct. 2538 (1992).
224. *Id.* at 2549.
225. *Constitutional Law Conference*, 60 U.S.L.W. 2253, 2266 (Oct. 22, 1991).
226. *See id.* at 2265-66.
227. *Id.* at 2266.
228. *Id.* at 2265.
229. *Id.* at 2266.
230. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).
231. *See id.* at 73-74.

to certain secondary effects, the elimination of which would provide sufficient justification to ban the speech completely. But, given that the *Barnes* Court stood eight-to-one on this issue, it is clear that nude dancing is not such a category.

D. Content-Based

Even assuming that the four prongs of the *O'Brien* test were analyzed thoroughly and applied correctly, a deeper problem remains. A compelling case can be made that the public indecency statute in *Barnes* is content-based. This conclusion would render the *O'Brien* test inapposite and shift the analysis to the Court's first track, thereby subjecting Indiana's law to strict scrutiny.

The *O'Brien* test was not designed to evaluate content-based restrictions of speech.[232] "By requiring that the governmental interest be unrelated to the suppression of free expression, the Court made it clear that the remainder of its analysis was intended solely for content-neutral restrictions."[233] The Court emphasized this point in *Spence v. Washington.*[234] In striking down a Washington statute that forbade the exhibition of a United States flag with a peace symbol attached to it, the Court concluded that because the government could not advance an interest unrelated to the suppression of expression, the *O'Brien* test did not apply.[235]

In light of this approach, it is especially troubling that the Court chose to use the *O'Brien* formulation in *Barnes*. In *R.A.V.*, Justice Scalia, writing for a majority which included Chief Justice Rehnquist, and Justices Kennedy, Souter, and Thomas, intimated that the regulation in *Barnes* was content-based.[236] In striking down a hate-speech ordinance as impermissibly based on subject matter, the majority in *R.A.V.* referred to the nude dancing in *Barnes* as a "content-based subcategory" of speech.[237]

In *Erznoznik v. City of Jacksonville,*[238] the Court struck down an ordinance that prohibited drive-in theaters from showing films depicting

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232. *See* Werhan, *supra* note 112, at 659.

233. Redish, *supra* note 113, at 127 (quotations omitted).

234. 418 U.S. 405 (1974).

235. *Id.* at 414 n.8.

236. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992).

237. *Id.* Justice Scalia went on to say that the speech in *Barnes* could be proscribed because it was "swept up incidentally within the reach of a statute directed at conduct rather than speech." *Id.*

238. 422 U.S. 205 (1975).

nudity if the film was visible from any public place.[239] Although invalidating the statute on overbreadth grounds, the Court nevertheless concluded that the statute was content-based.[240] The similarities between *Erznoznik* and *Barnes* are striking. Each statute essentially prohibits nudity in public places. The statute in *Erznoznik* aims only at nudity in films visible from a public place while the statute in *Barnes* targets all public nudity. The main distinction between the cases is that in *Erznoznik* pure speech was being regulated, while in *Barnes* expressive conduct was at issue. The Court found the law in *Erznoznik* to be content-based, and found the statute in *Barnes* to be merely an "incidental" regulation.[241] Carrying out this reasoning, the statute in *Barnes* would have been considered content-based if it had sought to prohibit an expression of pure speech—the same nude dancing, for instance, projected on television screens. While the difference between pure speech and expressive conduct may help to assess the relative values of each in the constitutional scheme, it does not follow that it should form the basis for the distinction between content-based and content-neutral.

The Court has also found that the elimination of an entire category of speech will cause a regulation to be considered content-based.[242] In *Boos v. Barry*,[243] the Court struck down a District of Columbia statute prohibiting the display of signs within 500 feet of a foreign embassy that tended to bring that foreign government into public disrepute.[244] The Court found that because the government had abolished an entire category of speech (displays critical of foreign governments), the statute was impermissibly content-based.[245] While the difference between the two laws is evident—the statute in *Boos* is content-based on its face, and the one in *Barnes* is facially neutral—the effect of each statute is the same. Each law eliminates a category of protected speech. Since the *Boos* Court did not condition its analysis upon a finding that the statute was *facially* content-based,[246] the determination in *Barnes* must be the same: Indiana's statute, by reason of its complete proscription of a category of speech, is content-based.

Still, some would find the facial neutrality of the statute in *Barnes* to

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239. *Id.* at 217.
240. *Id.* at 211.
241. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2461 (1991) (plurality opinion).
242. *See* Boos v. Barry, 485 U.S. 312 (1988).
243. *Id.*
244. *Id.*
245. *See id.* at 318-19.
246. *See id.*

be a principled distinction from the *Boos* decision. There nevertheless remains another compelling basis for concluding that Indiana's effort to ban nude dancing is content-based. Though no one can deny that Indiana's public nudity law is content-neutral on its face, the same cannot be said of the statute *as enforced*. Indiana's application of its public indecency statute has not been evenhanded. Since it was enacted, the statute has not been used to prosecute any acts of nudity in plays, ballet, or opera.[247] In oral argument to the Seventh Circuit, the Indiana attorney general conceded that the respondents' same dance routines would be protected expression if they had been, for example, part of a graduate Ph.D thesis.[248]

Northwestern University School of Law Professor Martin Redish observes that exemptions carved out of seemingly content-neutral regulations tend to controvert any content-neutral justification asserted by the government.[249] "[The exemptions] reveal that the government does not really believe that its asserted content-neutral justification is valid; for if it were, the government would presumably not exempt anyone from the regulation."[250] In *Barnes*, selective enforcement of the public indecency law undercuts Indiana's content-neutral justification that the statute is a general proscription of conduct. In other words, because the statute has been applied only to "barroom style" nude dancing, Indiana's argument that the statute is content-neutral is betrayed. As Justice White wrote for the dissent in *Barnes*: "[T]he State's failure to enact a truly general proscription requires closer scrutiny of the reasons for the distinctions the State has drawn."[251] Consequently, through selective enforcement of its public nudity law, Indiana officials have created a content-based regulation.

Once it is determined that Indiana's attempt to eliminate nude dancing is content-based, the *O'Brien* test does not apply and the analysis must shift to the strict scrutiny of the Court's first track.[252] That the statute restricts expressive conduct and not pure speech does not affect the inquiry. The Court has said: "The First Amendment generally prevents government from proscribing [pure] speech *or even expressive conduct* because of

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247. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2473 (1991) (White, J., dissenting) (relying on the affidavit of Sgt. Timothy Corbett).

248. Miller v. Civil City of South Bend, 904 F.2d 1081, 1086 (7th Cir. 1990) (en banc), *rev'd sub nom.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991).

249. *See* Redish, *supra* note 113, at 145.

250. *Id.*

251. *Barnes*, 111 S. Ct. at 2476 (White, J., dissenting).

252. *See supra* part II.A.

disapproval of the ideas expressed."[253] The Court has been unmistakably clear that content-based restrictions are subjected to "the most exacting scrutiny."[254] Once a strict scrutiny analysis is applied to Indiana's public indecency statute, in view of the Court's belief that content-based regulations are presumptively invalid,[255] one would expect the statute to fall.[256]

V. RECOMMENDATIONS: A REEXAMINATION OF THE *O'BRIEN* TEST

To some, the *O'Brien* decision signalled the beginning of what has become a gradual decline in the Court's willingness to uphold First Amendment freedoms.[257] Professor Day charges that *O'Brien*, taken together with the cases to which it was later applied, demonstrates "an eroding judicial commitment to free speech values."[258] *Barnes v. Glen Theatre, Inc.* has now brought the *O'Brien* test to the point where a reexamination of its purpose and criteria is necessary. Part V explores the possibilities of (1) reformulating the *O'Brien* test in a way that addresses its most significant weaknesses, and (2) abandoning the *O'Brien* test as part of the Court's First Amendment framework.

A. *Reformulation: Alternative Channels of Communication*

The greatest shortcoming of the *O'Brien* test, as Justice Harlan had foreseen, is that it can permit the complete elimination of a category of speech.[259] In other words, *O'Brien* presents no barrier to subject matter regulations.[260] The most worthwhile modification of the *O'Brien* test, then, is one that will address this problem. Such a modification can be achieved by amending the *O'Brien* test to include a requirement found in another of the Court's tests—a requirement that the challenged regulation leave open adequate alternative channels of communication.

In its First Amendment framework, the Court has developed another

253. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (citations omitted) (emphasis added).

254. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988).

255. *R.A.V.*, 112 S. Ct. at 2542.

256. *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2475 (1991) (White, J., dissenting).

257. *See* Day, *supra* note 130, at 506.

258. *Id.*

259. *See supra* part IV.B.

260. *See* Day, *supra* note 130, at 513 n.179.

test providing an intermediate level of scrutiny to regulations of speech: the "time, place, and manner" test.[261] This test was formulated to evaluate content-neutral regulations targeting only the time, place, or manner of speech.[262] According to the test, a regulation is justified if it is tailored to serve a significant governmental interest and leaves open adequate alternative avenues of communication.[263]

In recent cases, the Court has equated the *O'Brien* and "time, place, and manner" tests. In *Clark v. Community for Creative Non-Violence*,[264] for example, the Court recognized that the two tests have much in common.[265] Each test applies only to content-neutral restrictions, each requires an important governmental interest, and each contains some form of narrow tailoring analysis. Further, the plurality in *Barnes* stated that the "time, place, and manner" test "has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*."[266]

Although the Court has declared the two tests to be nearly the same, there is one critical difference. Only the "time, place, and manner" test requires that the challenged regulation leave open adequate alternative channels of communication.[267] This distinction goes directly to the heart of the difficulty with the *O'Brien* test in cases like *Barnes*. Nevertheless, the *Barnes* Court went on to apply only the *O'Brien* test with no further mention of the "time, place, and manner" test or its requirement of adequate alternative channels of communication.[268]

If the *Barnes* Court had applied the "time, place, and manner" test to Indiana's public indecency law, the statute would necessarily have failed.[269] Because the statute bans all nude dancing, it does not leave

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261. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

262. *See Playtime Theatres, Inc.*, 475 U.S. at 46-47.

263. *Id.* at 50.

264. 468 U.S. 288 (1984).

265. *See id.* at 298 & n.8 (citing City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-05, 808-10 (1984)).

266. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 (1991) (plurality opinion) (citation omitted).

267. *Compare* United States v. O'Brien, 391 U.S. 367, 377 (1968) *with* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

268. *Barnes*, 111 S. Ct. at 2460-61 (plurality opinion).

269. *Cf.* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981) (total exclusion of adult entertainment does not leave open adequate alternative channels of communication). For a good discussion of the "time, place, and manner" test as applied to *Barnes* see Campagne, *supra* note 81, at 609-13.

open adequate alternative channels of communication.[270] Why then would the *Barnes* Court, after announcing that the two tests are nearly the same, apply the one that lacks the precise element necessary for meaningful scrutiny of the statute at issue? If the Court is serious when it says that the two tests embody the same principles and serve the same purposes, the better approach is to combine the two tests.

Combining the two tests could be achieved simply by amending the *O'Brien* test to include a fifth requirement that the challenged law leave open adequate alternative channels of communication. Reformulating the *O'Brien* test in this way would serve two important functions for the Court. First, it would create an effective level of analysis for restrictions of expressive conduct. This level of analysis, while certainly not strict scrutiny, would ensure that restrictions like the one in *Barnes* will receive more than just an illusory examination. Second, by combining the important features of each, reformulation would clarify and effectuate the Court's attempts to equate the *O'Brien* and "time, place, and manner" tests. This would create one consistent level of scrutiny for all content-neutral regulations of pure speech and expressive conduct alike. It is critical to note, however, that reformulation of the *O'Brien* test would be a useless task if the Court continued to apply the test in a way that ignores the free-speech side of the balance.[271] As with any test, the reformulated *O'Brien* test would be effective only when earnestly and candidly applied to give meaning to the free speech principles incorporated within it.

B. Abandonment: The Court's Content Distinction

The surest, and certainly the harshest way to deal with the problems created by the *O'Brien* test would be to abandon it completely. This raises the question: What would become of the Court's First Amendment methodology? The answer might be found in ending the disparate treatment of content-based and content-neutral regulations. Professor Redish has urged the Supreme Court to abandon what he calls the "content distinction" in the Court's approach to the First Amendment.[272]

Professor Redish contends that the Court should treat content-based and content-neutral regulations equally. The justification for such an approach, he explains, is that:

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270. *See* Redish, *supra* note 113, at 116.

271. *See* Werhan, *supra* note 112, at 673; *see also supra* part IV.B.2.

272. *See* Redish, *supra* note 113, at 114.

> [The content] distinction labor[s] under two misconceptions. The first is that the interests and values of free expression are necessarily more seriously threatened by governmental regulations aimed at content than those which are not; the second is that it is always possible to draw a conceptual distinction between content-based and content-neutral regulations.[273]

Professor Redish asserts that a "unified" approach to regulations of speech is preferred.[274] Under this approach, all governmental regulations of expression would be subjected to a form of strict scrutiny.[275] Accordingly, every restriction of expression must demonstrate that it serves a compelling interest and satisfy a demanding means analysis.[276]

Professor Redish maintains that this approach would not alter the fact that content-based restrictions can and should be overturned more often than content-neutral restrictions.[277] This is not because content-neutral regulations pose any less of a threat to First Amendment values. Rather, it is because content-neutral regulations are more likely to withstand a given level of scrutiny than will those that are content-based.[278] This unified approach also would not affect the categorical rules the Court has created, such as for obscenity and fighting words. In fact, Professor Redish asserts that his approach might lend itself to the creation of similar categories for content-neutral restrictions.[279]

While Professor Redish's proposal may seem like a radical departure from the Court's established framework, a unified approach arguably resembles a strict, traditional view of the First Amendment. Justice Black, an ardent strict constructionist, has stated:

> [I do not subscribe] to the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of this Court thinks that a State might have interest sufficient to

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273. *Id.*

274. *Id.* at 150.

275. *See id.* at 142.

276. *See id.* at 142-43. Specifically, Professor Redish's approach asks:

> (1) whether the regulation accomplishes the asserted goal; (2) whether "feasible" less restrictive alternatives are inadequate to accomplish that end; and (3) whether the speaker will have available adequate means to express the same views to roughly the same audience. If the government satisfies the court that the first two factors are present, the court should balance the compellingness of the state interest served by the law against the availability of alternative means of expression to the speaker.

Redish, *supra* note 113, at 143.

277. *See id.* at 134.

278. *Id.*

279. *See id.* at 144-45.

justify abridgement of those freedoms . . . . I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the balancing that was to be done . . . .

. . . .

. . . I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it.[280]

Justice Black no doubt would have approved of Professor Redish's unified approach. Abandoning the Court's content distinction would have the effect of eliminating balancing tests such as the one in *O'Brien* which all too often leave speech bare and unprotected.

VI. CONCLUSION

In the end, and in the name of morality, the Supreme Court in *Barnes v. Glen Theatre, Inc.*, upheld Indiana's total ban on nude dancing. Almost in direct defiance of the words of Justice Brennan that opened this Note, the Court affirmed the government's ability to suppress the expression of an idea precisely because society found that idea disagreeable.[281] Setting aside the free-speech issues, the *Barnes* decision to some might recall the puritanism of a time long since faded. Its holding is reminiscent of a Victorian society where a woman's bare ankle could create a stir and "even the legs of furniture were sometimes clad for the sake of decency."[282]

Indeed, in the midst of the debate, it is tempting to reject a marketplace-of-ideas approach and wonder why expression like nude dancing is worth protecting at all. As a result, many will welcome the *Barnes* decision as a triumph from a moral, ethical, or even religious standpoint.[283] In response, Justice Black's fierce dissent in *Beauharnais v.*

280. Konigsberg v. State Bar, 366 U.S. 36, 61, 63 (1961) (Black, J., dissenting) (upholding state's denial of bar admission for refusing to answer questions regarding Communist Party membership).

281. *See supra* text accompanying note 1.

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

283. To illustrate, such groups as the American Family Association, National Family Legal Foundation, and Children's Legal Foundation, among others, filed briefs as *amici curiae* on behalf of the petitioners in *Barnes. See* Briefs for the Petitioners, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

Illinois[284] seems particularly apt: "If there be . . . groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark:

Another such victory and I am undone."[285]

David W. Stuart[*]

284. 343 U.S. 250 (1952) (upholding a ban on anti-racial leafletting).

285. *Id.* at 275 (Black, J., dissenting) (quotations omitted).

* This Note is dedicated to Malcolm Stuart, a legal scholar at heart. The author would like to thank Joslyn Salm for her valuable suggestions, patience, and support.