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Nude Dancing Conveying a Message or Eroticism and Sexuality Is Protected by the First Amendment but Can Be Limited under State Police Powers Provided the Government Establishes a Substantial, Content-Neutral Purpose.

Fred S. Wilson

CONSTITUTIONAL LAW—Freedom of Expression—Nude Dancing Conveying a Message of Eroticism and Sexuality Is Protected by the First Amendment but Can Be Limited Under State Police Powers Provided the Government Establishes a Substantial, Content-Neutral Purpose.

Barnes v. Glen Theatre, Inc.,
__ U.S. __, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991).

In 1985, the Kitty Kat Lounge and Glen Theatre, operated businesses in South Bend, Indiana that offered nude and semi-nude dancing.[1] Darlene Miller and Gayle Ann Marie Sutro were employed as performers with the Kitty Kat Lounge and Glen Theatre, respectively.[2] The Kitty Kat Lounge, Glen Theatre, Miller, and Sutro challenged the enforcement of the Indiana Public Indecency Statute contending that its ban on nudity in public places violated the First Amendment.[3] The United States District Court for the

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1. Barnes v. Glen Theatre, Inc., __ U.S. __, __, 111 S. Ct. 2456, 2458-59, 115 L. Ed. 2d 504, 509-10 (1991). The Kitty Kat Lounge sold alcoholic beverages and offered "go-go dancing." *Id.* at __, 111 S. Ct. at 2458, 115 L. Ed. 2d at 509. Glen Theatre operated a "bookstore" which, along with printed materials and movie showings, offered booths with glass panels through which adult customers could pay to view nude and semi-nude female performers. *Id.* at __, 111 S. Ct. 2459, 115 L. Ed. 2d 509-10.

2. *Id.* at __, 111 S. Ct. at 2459, 115 L. Ed. 2d at 509, 510. Miller worked only as a dancer but Sutro was a professional dancer, model, and actress and could also be seen in a pornographic movie at a local theater. *Id.*

3. *Id.* at __ n.2, 111 S. Ct. at 2459 n.2, 115 L. Ed. 2d at 510 n.2. The Indiana Public Indecency Statute, IND. CODE § 35-45-4-1 (1988) provides:

> Public Indecency
> Sec. 1. (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 discernibly turgid state.

Id. at __, 111 S. Ct. at 2462, 115 L. Ed. 2d at 513. The Kitty Kat Lounge and Glen Theatre desired to present nude dancing but required its dancers to wear pasties and a G-string to avoid violation of the Indiana statute. *Id.* at __, 111 S. Ct. at 2458-59, 115 L. Ed. 2d at 509-10. Miller, whose pay was based on a commission of drink sales, believed her pay would increase if

Northern District of Indiana granted an injunction against enforcement of the statute finding the statute facially overbroad.[4] The Court of Appeals for the Seventh Circuit reversed and remanded the district court's decision on the basis that previous litigation in the Indiana Supreme Court precluded an overbreadth challenge.[5] On remand, the district court determined that the application of the statute to the nude dancing did not violate the First Amendment.[6] The case was once more appealed to the Seventh Circuit which reversed the decision of the district court and rendered a decision *en banc*, concluding that the nude dancing qualified as expression worthy of First Amendment protection and, therefore, the indecency statute could not validly be applied to such conduct.[7] The United States Supreme Court granted certiorari to determine the constitutionality of applying the Indiana Public Indecency Statute to the nude dancing involved.[8] Held—*Reversed*. Nude dancing conveying a message of eroticism and sexuality is protected by the First Amendment but can be limited under state police powers provided the government establishes a substantial, content-neutral purpose.[9]

Although the First Amendment expressly guarantees only the right of free speech, it has been interpreted as encompassing forms of non-verbal expression.[10] However, because most forms of conduct carry some expressive

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she were able to dance completely nude. *Id.* Sutro contended that application of the Indiana statute to her dancing would unconstitutionally limit the erotic and sexual message she sought to convey. *Id.* at __, 111 S. Ct. at 2460, 115 L. Ed. 2d at 511.

4. *Id.* at __, 111 S. Ct. at 2459, 115 L. Ed. 2d at 510. The district court determined that the statute was facially overbroad because its sanctions applied to all individuals who appeared nude in public without any exception. *Id.*

5. *Barnes*, __ U.S. at __, 111 S. Ct. at 2459, 115 L. Ed. 2d at 510. The court of appeals determined that, to save the public indecency statute from a facial overbreadth attack, the Indiana Supreme Court had given the statute a limiting construction providing that although there is no right to appear nude in public, nudity may have to be constitutionally allowed where it is part of a larger form of expression that qualifies for constitutional protection. *Id.* The court of appeals then remanded the case to the district court for a decision as to whether the Indiana statute violated the First Amendment rights of the businesses and dancers as applied to the nude dancing involved. *Id.*

6. *Id.* at __, 111 S. Ct. at 2459, 115 L. Ed. 2d at 510. The district court determined that the nude dancing involved did not qualify as expression protected by the First Amendment. *Id.*

7. *Id.* at __, 111 S. Ct. at 2459-60, 115 L. Ed. 2d at 510-11. The court of appeals held that the Indiana statute, the purpose of which was to prohibit the dancers from conveying a message of eroticism and sexuality, violated First Amendment protection of expression. *Id.*

8. *Id.* at __, 111 S. Ct. at 2460, 115 L. Ed. 2d at 911.

9. *Barnes*, __ U.S. at __, __, 111 S. Ct. at 2462, 2463, 115 L. Ed. 2d at 514, 515. The Indiana Public Indecency Statute's requirement that the dancers employed by the establishments involved wear pasties and a G-string is valid under the First Amendment. *Id.*

10. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969) (students wearing armbands as symbol of protest of Vietnam War determined to be symbolic act within Free Speech Clause of First Amendment); Brown v. Louisiana, 383 U.S.

quality, it is necessary to determine whether the given conduct embodies sufficient communicative elements so as to qualify for First Amendment protection.[11] The Supreme Court has formally established that conduct qualifies for First Amendment protection only where there has been an intentional conveyance of a particularized message with a great likelihood that the message will be understood.[12]

Once conduct has been determined to qualify as expression protected by the First Amendment, it becomes necessary to determine what protection such conduct deserves.[13] In making this decision, the Court has tradition-

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131, 141 (1966) (conduct of five blacks in refusing to leave racially segregated reading room of public library qualified as speech protected by First Amendment); Stromberg v. California, 283 U.S. 359, 369 (1931) (holding regulation prohibiting display of red flag as symbol of opposition to organized government unconstitutional). The term "freedom of expression" is commonly used to avoid the strict connotations associated with the term "freedom of speech" and thus includes other forms of protected activity. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 50 (1982). An endearing example of this concept is The Boston Tea Party. *See* James E. Leahy, *"Flamboyant Protest" The First Amendment and the Boston Tea Party*, 36 BROOK. L. REV. 185, 210 (1970) (although "Indians" made no verbal expression they clearly conveyed a message).

11. *Compare* Dallas v. Stanglin, 490 U.S. 19, 24 (1989) (holding conduct of dance hall patrons not sufficiently expressive to qualify for First Amendment protection) *with* Spence v. Washington, 418 U.S. 405, 410 (1974) (explaining that although placing peace symbol on American Flag could be interpreted as bizarre behavior, majority of viewers would understand actor's intent to convey message of disfavor with government). *Cf.* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting) (all speech contains some element of conduct). Reversing Holmes' aphorism—that every incitement is an idea—all conduct is capable of conveying an idea or message. MELLVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH, A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 3-44 (1984).

12. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) (recognizing burning of American Flag as expression protected by First Amendment); *Spence*, 418 U.S. at 410-11 (1974) (recognizing peace symbol affixed to American Flag as expression protected by First Amendment). The essential element of this test is the intent to convey a message. Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1109-10 (1968). Furthermore, such intent will generally be assertive in nature, characterized by a departure from the actor's standard behavior that can best be explained as a desire to communicate a particular message. *Id.* However, the actor's intent to convey a message does not necessarily have to be assertive. *See* Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 37 (1973) (individual's choice of clothing may be made with intent to convey personal message). It is also important to note that the Court has interpreted the First Amendment to protect the right not to engage in expressive conduct. *See* Wooley v. Maynard, 430 U.S. 705, 713 (1977) (recognizing right to not display state motto on automobile license plate).

13. *See, e.g*, Walker v. City of Birmingham, 388 U.S. 307, 316 (1967) (requiring parade and demonstration permits recognized as potentially violative of First Amendment); Cox v. Louisiana, 379 U.S. 535, 555 (1965) (expressive conduct is not afforded the same constitutional protection as pure speech); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (allowing state to prohibit union picketing under antitrade restraint law). The view taken by the Court in these cases could be based on a realization that most conduct can feasibly qualify as expression. *See* FREDERICH SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 52

ally applied what can be labeled a "two-track" approach to determine the constitutionality of a regulation of expressive conduct.[14] Track-one deals with governmental regulations which are aimed at curtailing the communicative impact of expressive conduct.[15] Such regulations are commonly labeled as "content-based."[16] Under track-one analysis, content-based regulations are subject to strict judicial scrutiny.[17] Track-two analyzes the

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(1982) (because almost any activity can be self-expression, more expressive forms of expression should be isolated). *But see* Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 114 (1989) (because of emotive power, non-verbal expression can be more effective in conveying speaker's feelings than verbal speech alone).

14. This approach has its roots in established case law. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (Constitution does not grant absolute right to free speech). However, the term "two-track" was coined by Professor Laurence Tribe. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789 (2d ed. 1988). Similar analyses have been advanced by other commentators, most notably the "two-level theory" developed by Professor Harry Kalven, Jr. *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10-12 (Professor Kalven's theory is for all practical purposes identical to Professor Tribe's two-track approach).

15. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 534, 537 (1980) (recognizing prohibition of literature addressing nuclear power as curtailing communicative impact of such material); Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975) (recognizing prohibition of films containing nudity as curtailing communicative impact of such material); Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (recognizing ordinance prohibiting all picketing, except labor picketing, as curtailing communicative impact of such conduct). Regulations which restrict the communicative impact of expression are presumptively at odds with the First Amendment. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 792 (2d ed. 1988).

16. *See, e.g, Erznoznik*, 422 U.S. at 211 (labelling ordinance which prohibited only films containing nudity as content-based); *Mosley*, 408 U.S. at 99 (recognizing ordinance prohibiting picketing but making exception for labor disputes as content-based). Premier examples of content-based legislation are regulations prohibiting desecration of the American Flag. *See* Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 114 (1989) (flag desecration statute invalid). Another example is a Texas law making desecration of the American Flag a criminal offense which was held to be content-based. *Johnson*, 491 U.S. at 412. Because "desecrate" was defined as an act that would "seriously offend," the regulation was necessarily aimed at curtailing the communicative impact of such an act. *Id.* at 411.

17. *See, e.g., Consolidated Edison*, 447 U.S. at 536 (heightened scrutiny is necessary when regulation is content-based); First Nat'l Bank of Boston v. Belotti, 435 U.S. 765, 786 (1978) (subjecting statute prohibiting corporate expenditures made to influence voters to exacting scrutiny); *Mosley*, 408 U.S. at 98-99 (holding that state's justification for prohibiting only certain forms of picketing must be carefully scrutinized). Some authorities would hold content-based restrictions on free speech presumptively unconstitutional. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 791-94 (2d ed. 1988). Three bases for this particularly harsh view are: (1) the distortion of public debate caused by content-based regulations, (2) the presumption that content-based regulations represent the government's impermissible attempt to restrict a particular message, and (3) the presumption that content-based regulations represent the government's impermissible attempt to curtail the communicative impact of speech. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57 (1987).

validity of regulations which are aimed at the noncommunicative impact of expressive conduct but nevertheless have an effect on the actor's ability to convey a message.[18] Such regulations are labeled as "content-neutral."[19] The predominant test under track-two analysis was formulated in *United States v. O'Brien*.[20] Under the four-part *O'Brien* test, a regulation of expressive conduct will be justified: (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial government interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[21]

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18. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) (analyzing validity of ordinance regulating noise levels at municipal amphitheater and its potential interference with artistic judgment); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984) (analyzing regulation preventing camping in national park and its effect on demonstrators seeking to protest plight of homeless); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648-50 (1981) (analyzing validity of regulation limiting number of organizations at state fair and its effect on religious sect seeking to distribute literature). Such regulations are generally valid so long as they do not overly restrict the flow of information. Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-2, at 792 (2d ed. 1988).

19. *See, e.g.*, *Ward*, 491 U.S. at 792 (labeling regulation of noise levels at municipal amphitheater as content-neutral method of avoiding intrusion into residential areas); *Clark*, 468 U.S. at 295 (labeling restriction of camping in national park as content-neutral method of maintaining condition of park); *Heffron*, 452 U.S. at 648-49 (limiting number of organizations allowed to distribute material at state fair not based on content). A simple example of a content-neutral regulation is a law limiting the speed on a city's streets. Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 112 (1989). Under such a law, an individual who speeds because he is late for a speaking engagement, or even an individual who speeds as a symbolic statement of dissatisfaction with the posted speed limit, will have his speech curtailed not because of the content of his message but rather because his reckless behavior endangers fellow citizens. *Id.* However, the distinction between content-based and content-neutral is often subtle. *Compare* Grayned v. City of Rockford, 408 U.S. 104, 110-11 (1972) (city ordinance prohibiting demonstrations near schools content-neutral because it curtailed only disruptive conduct not demonstrators' message) *with Mosley*, 408 U.S. at 94 (city ordinance prohibiting all demonstrations near schools content-based because it contained exception for labor picketing).

20. 391 U.S. 367, 377 (1968).

21. *O'Brien*, 391 U.S. at 377. The four part test in *O'Brien* has been the prevailing test used to examine the validity of content-neutral legislation. *See, e.g.*, United States v. Albertini, 472 U.S. 675, 687 (1985) (statute prohibiting re-entry to military base upheld against First Amendment claims of demonstrator); Wayne v. United States, 470 U.S. 598, 611 (1985) (upholding indictment of individual who failed to register under the Military Selective Service Act); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (regulation prohibiting posting of campaign signs upheld). However, the *O'Brien* test has been criticized because of its requirement that a regulation of expressive conduct be only "no greater than is essential" to further the government's interests. *See* John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1488-89 (1975) (this requirement can be interpreted to

A common form of regulation restricts expressive conduct by placing limitations on the time, place, or manner of such conduct.[22] Where such regulations are content-neutral, the appropriate track-two analysis is to determine if the regulation serves a significant governmental interest, and in serving that interest, leaves open ample alternative channels for communication.[23] Under this analysis, the more restrictive the regulation is of expressive conduct, the more substantial the governmental interest must be.[24]

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prohibit only a "gratuitous inhibition of expression"). Further criticism is based upon the argument that the government can, under *O'Brien*, intentionally curtail conduct because of its message. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212, 1215-16 (1970) (motive of curtailing expression because of its message could be disguised with facially valid regulations).

22. *See, e.g.*, *Ward*, 491 U.S. at 797-98 (municipal noise ordinance regulating noise levels at amphitheater is valid content-neutral regulation of place and manner of expressive conduct); *Clark*, 468 U.S. at 298-99 (regulation prohibiting camping in park is valid as applied to demonstrators); *Heffron*, 452 U.S. at 649-50 (regulation limiting number of groups allowed to distribute merchandise at state fair is valid). *See generally* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937 (1983) (discussing time, place, and manner regulations).

23. *See, e.g.*, *Heffron*, 452 U.S. at 647-48 (regulation which limited organizations at state fair valid as applied to religious sect); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (regulating advertising of prescription drug prices unconstitutional because governmental interest did not justify total prohibition of such information); Cantwell v. Connecticut, 310 U.S. 296, 304-08 (1940) (requiring state approval before soliciting invalid prior restraint of protected speech leaving no alternative channels for communication). In recent decisions, the Court has treated this standard as interchangeable with the *O'Brien* test. *Albertini*, 472 U.S. at 687-90 (reconciling *O'Brien* test with traditional time, place, and manner analysis by stating that regulation need not be least restrictive alternative); *Clark*, 468 U.S. at 293-94 (upholding content-neutral regulation of expressive conduct under both *O'Brien* test and time, place, and manner analysis); *Taxpayers for Vincent*, 466 U.S. at 805-08 (combining *O'Brien* test and time, place, and manner analysis). The *Clark* and *Taxpayers for Vincent* decisions show that the two tests are not only fungible but have possibly been merged by the Court. David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 215 (1987). Where time, place, and manner regulations are determined to be valid, they serve merely to channel expressive conduct into more appropriate avenues and do not substantially eliminate the message expressive conduct seeks to convey. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 67 (1987). However, time, place, and manner regulations that seek to restrict expressive conduct because of its content have commonly been subjected to the same judicial scrutiny as other content-based regulations. ARCHIBALD COX, FREEDOM OF EXPRESSION 52 (1981).

24. *Compare* Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551, 566-67 (1972) (upholding regulation prohibiting distribution of handbills within privately-owned shopping center) *with* Schneider v. State, 308 U.S. 147, 162 (1939) (governmental interest in limiting noise, litter, and traffic insufficient justification for ordinance entirely prohibiting political, labor, and religious handbilling). *See also* Greer v. Spock, 424 U.S. 828, 839 (1976) (upholding regulation preventing political candidates from speaking on military base). Thus, the rule that has developed concerning content-neutral regulations is that, absent a significant abridgement of an actor's ability to convey his message, the government need only show a rational relationship between the regulation and the desired goal. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL

Time, place, and manner regulations which restrict expressive conduct based on either the subject-matter of the message or on the viewpoint of the actor have traditionally been classified as content-based.[25] The Court has traditionally subjected all content-based time, place, and manner regulations to track-one analysis, upholding them only where the state can show that its regulation is narrowly drawn to accomplish a compelling governmental interest.[26] Thus, the distinction between subject-matter and viewpoint based time, place, and manner regulations was not important.[27] For example, in

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LAW § 12-23, at 982 (2d ed. 1988). However, where sufficient alternative avenues of communication do exist, content-neutrality alone should not be enough to justify a regulation of expression. *See* John Hart Ely, *Legislative and Administrative Motivation in Consitutional Law*, 79 YALE L.J. 1205, 1335 (1970) (state has obligation to protect channels of communication even if this requires sacrificing state's interest). Thus, there is a requirement that the government do more than avoid only gratuitous burdens on expressive conduct. *Id.* at 1340.

25. *See Consolidated Edison*, 447 U.S. at 544 (holding unconstitutional prohibition of all inserts in utility bills addressing issue of nuclear power). The commission in *Consolidated Edison* argued that because its regulation restricted all information, both for and against nuclear energy, it was acceptable. *Id.* The commission contended that its regulation was content-neutral because it was aimed at a particular subject-matter (nuclear energy) and not a particular viewpoint concerning that subject. *Id.* However, the Court refused to distinguish between the two forms of regulation and ruled that the regulation was an unconstitutional, content-based restriction of protected speech. *Id.* When the Court has made a distinction between viewpoint and subject matter it has traditionally looked at the express language of the regulation. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1906 (1989). For example, a regulation prohibiting all handbilling regarding abortion would be considered a subject-matter regulation. *Id.* But, a regulation that prohibited all pro-choice handbilling would be considered a viewpoint regulation. *Id.* This distinction can be difficult. *Compare Grayned*, 408 U.S. at 110-11 (prohibiting all demonstrations in vicinity of school labeled content-neutral regulation) *with Mosley*, 408 U.S. at 94 (prohibiting all demonstrations in vicinity of school labeled as subject-matter based regulation because of labor-picketing exception).

26. *See, e.g., Consolidated Edison*, 447 U.S. at 544 (governmental interest of maintaining operation of public utility insufficient to prohibit inclusion of information in public utility bills concerning nuclear energy); *Belotti*, 435 U.S. at 795 (governmental interest of protecting citizens insufficient to justify prohibiting corporate, political contributions). Routinely, the determination as to whether a regulation is content-based has been made by examining the face of the regulation. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 211 (1983). *See* New York v. Ferber, 458 U.S. 747, 765 (1982) (labeling regulation of child pornography content-based despite content-neutral purpose of protecting children). However, if a regulation is facially content-neutral but the underlying governmental motivation was to restrict the communicative impact of expressive conduct, the regulation may still be invalid. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 794 (2d ed. 1988).

27. *See Erznoznik*, 422 U.S. at 211-12 (holding subject-matter based regulation of movies displayed at drive-in theaters invalid); *see also* Schneider v. State, 308 U.S. 147, 164 (1939) (requiring municipal approval before distributing handbills held invalid). Time, place, and manner regulations based on the content of the message conveyed have traditionally represented the government's impermissible attempt to suppress "harmful" information. ARCHI-

decisions such as *Police Department of Chicago v. Mosley*,[28] the Court held that an ordinance banning picketing within the vicinity of public schools was invalid because its exception for labor disputes, made the ordinance content-based and therefore unconstitutional.[29] However, a study of the Supreme Court's more recent treatment of content-based time, place, and manner regulations provides a unique view of the Court's changing attitude towards nude dancing and similar conduct.[30]

In *Erznoznik v. City of Jacksonville*,[31] the Court was content to apply track-one analysis as developed in *Mosley*.[32] Confronted with an ordinance which regulated drive-in theaters because of the nudity in the films they displayed, the Court labeled the regulation as an unconstitutional attempt to restrict expression based on the content of its message.[33] However, the Court has moved away from this traditional view and has allowed significant inroads towards the restriction of sexually oriented businesses.[34]

BALD COX, FREEDOM OF EXPRESSION 59-60 (1981). Typically, once a regulation was been determined to be content-based, it would be held invalid regardless of governmental attempts to give a content-neutral basis for the regulation. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1906-07 (1989).

28. 408 U.S. 92 (1972).

29. *Mosley*, 408 U.S. at 98-100. It is important to note that the Court conceded that a city might have a significant interest in prohibiting the disruption of public schools. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 204 (1983). However, because the ordinance in *Mosley* prohibited picketing based on content it was necessarily invalid. *Id.* at 203-04.

30. *Compare* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211-12 (1975) (holding subject-matter based regulation of movies displayed at drive-in theaters unconstitutional) *and Mosley*, 408 U.S. at 100 (holding selective restriction of picketing based on subject-matter unconstitutional) *with* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (upholding subject-matter based regulation of adult theaters) *and* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (upholding subject-matter based regulation of adult theaters). This transition in the Court's treatment of subject-matter based time, place, and manner regulations has been contradictory and imprecise. Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 99 (1978). For example, the rationale for allowing content-based time, place, and manner regulations varied between the similar fact situations of *Renton* and *American Mini Theatres*. *See* Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1909-11 (1989). In *American Mini Theaters*, the Court based its decision on sexually oriented material's lower expressive value. However, in *Renton*, the Court labeled the regulation as content-neutral.

31. 422 U.S. 205 (1975).

32. *See Erznoznik*, 422 U.S. at 209 (explaining that government cannot act as censor to shield public from offensive speech..

33. *Id.* at 211-12. The Court stated that, although the government could use time, place, and manner regulations to protect the privacy rights of individuals, the government could not shield the public from the films simply because it found the content of the message conveyed to be offensive. *Id.* at 209.

34. *See, e.g. Renton*, 475 U.S. at 48 (upholding subject-matter based regulation of adult

Sexually oriented businesses, such as those offering nude dancing, are often associated with criminal and other undesirable behavior.[35] The Court has accepted the governmental interest in curtailing such secondary effects as justification for subject-matter based regulations of expressive conduct.[36] In *Young v. American Mini Theatres, Inc.*,[37] the Court ruled that an ordinance which regulated the location of adult theaters based on the subject-matter of the material they displayed was not in conflict with the First Amendment.[38] Although the Court's decision focused on the lower protection granted sexually oriented material,[39] it also hinted that subject-matter based regulations could be justified as a method of combatting the secondary effects which are associated with sexually oriented businesses.[40]

Recognizing the paradox between the decisions in *Erznoznik* and *American Mini Theatres*, the Court soon attempted to bring its changing attitude

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theaters as content-neutral regulation of expressive conduct); *American Mini Theatres*, 427 U.S. at 63 (upholding subject-matter based regulation of adult theaters because of conduct's lower expressive value); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973)(upholding ordinance regulating commercial exhibition of obscene material on private property). This line of cases granted municipalities considerable discretion in placing time, place, and manner restrictions on sexually oriented businesses. *See* Ronald M. Stern, Note, *Sex, Lies, and Prior Restraints: "Sexually Oriented Business"—The New Obscenity*, 68 U. DET. L. REV. 253, 273 (1991) (discussing impact of *Renton*). As such, this trend marked a substantial revision of First Amendment doctrine. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1908 (1989).

35. *See, e.g.* Northend Cinema, Inc. v. Seattle, 585 P.2d 1153, 1156 (1978) (recognizing harmful effects of adult theaters on surrounding neighborhood); *Renton*, 475 U.S. at 51 (recognizing validity of *Northend Cinema* finding); *American Mini Theatres*, 427 U.S. at 71 n.34 (acknowledging community's interest in curtailing secondary effects of adult theaters).

36. *See Renton*, 475 U.S. at 54, 55 (governmental interest in curtailing secondary effects sufficient to justify regulating location of adult theaters); *see also American Mini Theatres*, 427 U.S. at 71 (acknowledging city's interest in preserving quality of community life). Although the Court initially labeled sexually oriented material as low value speech, it has moved away from this distinction. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1911 (1989). Therefore, later decisions did much to erode that part of the *American Mini Theatre* decision which classified sexually oriented conduct as lower in expressive value. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (explaining that nudity alone will not deny First Amendment protection).

37. 427 U.S. 50 (1976).

38. *American Mini Theatres*, 427 U.S. at 63. The city of Detroit, Michigan sought to disperse movie theaters and other businesses which displayed "specified sexual activities" or "specified anatomical areas" by prohibiting such businesses from being operated within 1000 feet of a similar business or within 500 feet of a residential area. *Id.* at 52-53.

39. *Id.* at 70-71.

40. *See American Mini Theatres*, 427 U.S. at 71 (acknowledging community's interest in curtailing secondary effects at adult theaters). The Court explained that such a regulation could be justified if it was aimed at curtailing secondary effects and not at restricting "offensive" expressive conduct. *See id.* at 71 n.34 (comparing valid ordinance with ordinance held unconstitutional in *Erznoznik*).

towards adult entertainment back into the traditional two-track approach.[41] In *City of Renton v. Playtime Theatres, Inc.*,[42] the Court was faced with an ordinance that was strikingly similar to that of *American Mini Theatres*.[43] In *Renton*, adult theaters were regulated based on the subject-matter of the material they displayed.[44] Following the reasoning developed in *American Mini Theatres*, the Court determined that the ordinance sought to regulate the theaters based on the secondary effects of such businesses and not based on the content of the material displayed.[45] The Court then took its secondary effects analysis one step further explaining that because the ordinance was not regulating the adult theaters based on the material they displayed, it could validly be labeled a content-neutral regulation.[46] Accordingly, the Court determined that the appropriate test for determining the validity of such an ordinance was whether the ordinance was "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication"—the traditional track-two test for content-neutral time, place, and manner regulations of expressive conduct.[47]

Although prior Supreme Court decisions hinted at applying less demanding scrutiny to content-based time, place, and manner regulations, the *Renton* test[48] marked a significant revision in the Court's First Amendment

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41. *Renton*, 475 U.S. at 47 (subject-matter based regulation of adult theaters is content-neutral). Prior to *Renton*, there had been no attempt to create a new form of content-neutrality based on secondary effects. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1909 (1989).

42. 475 U.S. 41 (1986).

43. *Compare Renton*, 475 U.S. at 44 (grouping adult theaters by prohibiting their location within 1000 feet of residential zone) *with American Mini Theaters*, 427 U.S. at 52 (dispersing adult theaters by prohibiting their location within 1000 feet of similar businesses). The facts in *Renton* were virtually a clone of those in *American Mini Theatres*. Ronald M. Stern, *Sex, Lies, and Prior Restraints: "Sexually Oriented Business"—The New Obscenity*, 68 U. DET. L. REV. 253, 271-72 (1991).

44. *Compare Renton*, 475 U.S. at 44 *with American Mini Theaters*, 427 U.S. at 53 (defining "adult motion picture theater" as facility displaying "specified sexual activities" or "specified anatomical areas").

45. *Renton*, 475 U.S. at 47.

46. *Id.* at 48.

47. *Id.* at 50. The Court granted even more room for the regulation of sexually oriented business by providing that the city need not prove the detrimental effects of the theaters in question but could instead rely on studies performed in other cities to support its regulation. *Id.* at 51-52. Furthermore, although the ordinance appeared under-inclusive in its application to only adult theaters, the Court explained that there was no reason why the city could not choose to address the potential problems associated with adult theaters before it addressed the harmful secondary effects of other businesses. *Id.* at 52-53.

48. A regulation aimed at the secondary effects of a particular conduct and not at the message conveyed will qualify as a content-neutral regulation and therefore will be valid so long as it serves "substantial government interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 47-50.

analysis.[49] Furthermore, consistent application since its development tends to show that the *Renton* test has become an established doctrine.[50]

Revised interpretations of established constitutional doctrines have not been the only tool used by the Supreme Court to allow more room for the regulation of nude dancing and other adult entertainment.[51] In *Arcara v. Cloud Books, Inc.*,[52] the Court clearly established that incidental infringements upon First Amendment freedoms will not invoke First Amendment analysis of a content-neutral regulation.[53] In *California v. LaRue*,[54] the

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49. *Compare Renton*, 475 U.S. at 48 (upholding subject-matter based regulation of expressive conduct) *with Mosley*, 408 U.S. at 99 (holding subject-matter based regulation of expressive conduct unconstitutional). The track-two analysis used by the Court in *Renton* provides the potential for circumventing the strict judicial scrutiny traditionally applied to content-based regulations. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1923 (1989) (content-based legislation can always be defended as attempt to curtail secondary effects). Therefore, the *Renton* test potentially removes the constitutional protection from forms of expressive conduct recognized as falling within the boundaries of the First Amendment. *See* Ronald M. Stern, Note, *Sex, Lies, and Prior Restraints: "Sexually Oriented Business"—The New Obscenity*, 68 U. DET. L. REV. 253, 282 (1991) (Court stripped First Amendment protection from protected expression in *Renton*).

50. *See* FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1303 (5th Cir. 1988), *rev'd*, 493 U.S. __, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (following *Renton* test to uphold ordinance which regulated sexually oriented business based on secondary effects of such businesses). However, it is important to note that the Court has kept the potential discriminatory power of the *Renton* test in check. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. __, __, 110 S. Ct. 596, 606, 107 L. Ed. 2d 603, 620 (1990) (striking down subject-matter based time, place, and manner regulation). The Court has suggested that the *Renton* test could be applicable to expressive conduct other than that offered by sexually oriented businesses. *See* Boos v. Berry, 485 U.S. 312, 321 (1988) (government could use secondary-effects to justify restriction of political expression with sufficient content-neutral purpose).

51. *See, e.g.*, Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986) (closure of adult bookstore valid application of statute prohibiting prostitution); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (declining constitutional protection to obscene material); California v. LaRue, 409 U.S. 109, 114 (1972)(expanding Twenty-First Amendment to include power to regulate sexual performances offered within establishments selling alcohol). *But see* Doran v. Salem Inn, Inc., 422 U.S. 922, 931-33 (1975) (upholding temporary injunction preventing enforcement of ordinance which prohibited topless dancing). Thus, the Court has moved away from a rigid application of the two-track approach. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1917 (1989). This trend shows an inclination to apply less demanding scrutiny to speech determined to be lower in expressive value. *Id.*

52. 478 U.S. 697 (1986).

53. *Arcara*, 478 U.S. at 706-07. *Arcara* dealt with a New York statute which authorized the closing of any building used as a place for prostitution. *Id.* at 699-700. The Court determined that because the regulation was aimed at curtailing prostitution and not at interfering with the right to sell books, the First Amendment was not implicated. *Id.* at 706-07. Therefore, because the statute was a proper attempt to protect the community from illegal activity, it was necessarily valid. *Arcara*, 478 U.S. at 707.

54. 409 U.S. 109 (1972).

Court explained that the powers granted to the states in provisions of the Constitution can provide a basis for regulating adult entertainment.[55] Finally, in *Paris Adult Theatre I v. Slaton*,[56] the Court declined to recognize the right of consenting adults to view pornographic material as within the "zone of privacy"[57] established in previous decisions.[58]

Despite the considerable inroads allowing regulation of nude dancing and similar conduct, the Supreme Court has made it clear that such conduct is protected by the Constitution and can in no way be prohibited entirely.[59] It was with recognition of this precedent that Justice Rehnquist, joined by Justices O'Connor and Kennedy, began his analysis in *Barnes v. Glen Theatre, Inc.*[60] Because of this precedent, Chief Justice Rehnquist found no reason to determine if the conduct in question qualified as expression under the First Amendment.[61] Chief Justice Rehnquist was quick to point out that the Indiana Public Indecency Statute was not aimed at banning nude dancing but rather it prohibited nudity in any public place.[62] After defining the Indiana statute as a time, place, and manner regulation, Chief Justice Rehnquist established the *O'Brien* test as the appropriate method of analysis and set out

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55. *See LaRue*, 409 U.S. at 118-19. The Twenty-first Amendment's allowance for regulation of intoxicating liquors gives a state power not only to regulate the dispensing of alcohol in drinking establishments, but also power to regulate sexual performances offered in such establishments. *Id.*

56. 413 U.S. 49 (1973).

57. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (including right to distribute contraceptives within zone of privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (including individuals' interest in choosing to bear or beget a child within zone of privacy regardless of marital status); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (establishing zone of privacy). *But see* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (holding right to engage in homosexual sodomy as outside zone of privacy). *See generally* Note, *Fornication, Cohabitation, and the Constitution*, 77 MICH. L. REV. 252 (1978) (arguing that zone of privacy should include decisions concerning fornication).

58. *See Paris Adult Theatre*, 413 U.S at 65-68 (conduct which could be validly regulated on public streets does not become protected simply because it is moved to bar or stage).

59. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981) (recognizing nude dancing as worthy of First Amendment protection); *Doran*, 422 U.S. at 932 (nude dancing can be entitled to First Amendment protection although it may contain only minimal expressive qualities); *LaRue*, 409 U.S. at 118 (because some adult entertainment is worthy of constitutional protection such expression cannot be prohibited entirely). Although nude dancing does not convey the messages one normally thinks of protecting, it seems well established that it is protected by the First Amendment. R. GEORGE WRIGHT, THE FUTURE OF FREE SPEECH LAW 12 (1990). Wright explains that nude dancing does not convey what he labels "Millian Values." *Id.* at 12. Wright defines Millian values as embodying "a more or less discernible idea, doctrine, conception, or argument of a social nature where 'social' is understood to include broadly political, religious, ethical, and cultural concerns." *Id.* at 6.

60. Barnes v. Glen Theatre, Inc., __ U.S. __, __, 111 S. Ct. 2456, 2460, 115 L. Ed. 2d 504, 511 (1991).

61. *Id.*

62. *Id.*

to apply the four elements of the test.[63] Because the indecency statute was clearly within Indiana's constitutional power, Justice Rehnquist focused on determining if it furthered a substantial government interest.[64] Acknowledging that the exact governmental interest behind the statute was unclear, Justice Rehnquist utilized the historical development of the statute to determine that its purpose was to protect "societal order and morality."[65] The Chief Justice relied on the rhetoric of previous decisions such as *Paris Adult Theatre I v. Slaton*[66] and *Bowers v. Hardwick*[67] to justify societal order and morality as a substantial governmental interest.[68] In determining the third element of the *O'Brien* test—whether the governmental interest is unrelated to the suppression of free expression—Justice Rehnquist found it necessary to elaborate the fact that virtually all conduct conveys some message.[69] Chief Justice Rehnquist then separated the governmental interest of upholding societal order and morality from the impermissible goal of prohibiting nude dancing by explaining that public nudity was the evil that Indiana sought to curtail, whether it was combined with expressive conduct or not.[70] Finally, the Chief Justice explained that the last element of the *O'Brien* test—that the regulation of expressive conduct be no more than is essential to further the government's interest—was easily met because requiring dancer's to wear pasties and a G-string would not noticeably diminish the message the dancers sought to convey.[71]

Justice Scalia, although concurring in the plurality's decision, took a view

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63. *Id.* at __, 111 S. Ct. at 2460-61, 115 L. Ed. 2d at 511-12.

64. *Barnes*, __ U.S. at __, 111 S. Ct. at 2461, 115 L. Ed. 2d at 512.

65. *Id.* at __, 111 S. Ct. at 2461-62, 115 L. Ed. 2d 512-13. The Chief Justice traced the development of the statute from as early as 1831 and included an 1877 decision which relied on Biblical references to justify the statute. *Id.*

66. 413 U.S. 49, 59-60 (1973) (upholding morality as basis for regulation of obscene material).

67. 478 U.S. 186, 196 (1986) (upholding morality as basis for upholding regulation prohibiting homosexual sodomy).

68. *Barnes*, __ U.S. at __, 111 S. Ct. at 2462, 115 L. Ed. 2d at 513.

69. *Id.* at __, 111 S. Ct. at 2462, 115 L. Ed. 2d at 514. Justice Rehnquist employs the rhetoric used in *O'Brien* and *Stanglin* which acknowledges the limitless variety of conduct which can feasibly qualify as speech. *Id.*

70. *Id.* at __, 111 S. Ct. at 2463, 115 L. Ed. 2d at 514. Chief Justice Rehnquist achieved this separation by analogy. *Id.* In the analogy, Justice Rehnquist noted that appearing nude at the beach conveys little if any message and is necessarily restricted. *Id.* Furthermore, the Chief Justice fell back upon the facts in *O'Brien* and found the government's goal of maintaining selective service registration certificates, regardless of the political view of the registrant who destroyed his certificate, analogous to Indiana's goal of preventing public nudity, regardless of the message some may seek to convey by their nudity. *Id.*

71. *Id.* at __ , 111 S. Ct. at 2463, 115 L. Ed. 2d at 515. Justice Rehnquist delivered this final point with a subtle pun. *Id.* The Chief Justice observed that requiring dancers to wear pasties and a G-string would be the bare minimum necessary in achieving the state's goal of upholding morality and order. *Id.*

resembling the Court's analysis in *Arcara*.[72] In Justice Scalia's view, the Indiana statute was general law that was not specifically targeted at nude dancing but public nudity in general.[73] As such, no First Amendment analysis was necessary.[74] Therefore, Justice Scalia disagreed with the plurality's application of the *O'Brien* test.[75] In particular, Justice Scalia disagreed with *O'Brien's* requirement of measuring the "importance" of governmental interests.[76] Justice Scalia argued that the Indiana Public Indecency Statute was valid, not because cases like *Bowers* and *Roth* had proven the upholding of morality to be a substantial government interest, but simply because "moral opposition to nudity supplies a rational basis for its prohibition."[77]

In his concurrence, Justice Souter agreed with the plurality that the *O'Brien* test was the appropriate analysis to be employed.[78] However, unlike Justices Rehnquist and Scalia, Justice Souter relied not on society's view of morality to justify the Indiana statute, but rather on the state's substantial interest in curtailing the secondary effects of sexually oriented business.[79] Thus, Justice Souter chose to directly follow the analysis developed in *Renton* and ruled that it was reasonable for Indiana to conclude that forbidding totally nude dancing furthered the governmental interests of curtailing prostitution, sexual assault, and other crimes related with such conduct.[80]

Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued that the plurality opinion was erroneous in several respects.[81] Justice

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72. *Compare Barnes*, __ U.S. at __, 111 S. Ct. at 2463, 115 L. Ed. 2d at 515 (Scalia, J., concurring) (public indecency statute not subject to First Amendment analysis because it was general law not directed at expression) *with* Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986) (statute was general law directed at prohibiting prostitution and using it to close adult bookstore raised no First Amendment issues).

73. *Barnes*, __ U.S. at __, 111 S. Ct. at 2463, 115 L. Ed. 2d at 515 (Scalia, J., concurring).

74. *Id.*

75. *Id.* at __, 111 S. Ct. at 2467, 115 L. Ed. 2d at 520.

76. *Barnes*, __ U.S. at __, 111 S. Ct. at 2467, 115 L. Ed. 2d at 520. In particular, Justice Scalia disliked the idea of measuring the importance of the state's interests in upholding morality. *Id.*

77. *Id.* at __, 111 S. Ct. at 2468, 115 L. Ed. 2d at 521. Justice Scalia stressed that although morality had served as a rational basis for the regulation of conduct that is not protected by the First Amendment, it has never been established as anything more than that. *Id.* Therefore, Justice Scalia explained, it may be insufficient to justify a content-neutral abridgement of free expression. *Id.*

78. *Barnes*, __ U.S. at __, 111 S. Ct. at 2468, 115 L. Ed. 2d at 521 (Souter, J., concurring).

79. *Id.* at __, 111 S. Ct. at 2468-69, 115 L. Ed. 2d at 521. Justice Souter chose to follow the petitioner's assertion that nude dancing encourages prostitution, sexual assault, and other crimes. *Id.* at __, 111 S. Ct. at 2469, 115 L. Ed. 2d at 522.

80. *Id.* at __, 111 S. Ct at 2470, 115 L. Ed. 2d at 523. Furthermore, Justice Souter argued that Indiana need not present localized proof of harmful secondary effects but could reasonably conclude that prohibiting nude dancing would limit the impact of such effects. *Id.*

81. *Id.* at __, 111 S. Ct. at 2472, 115 L. Ed. 2d at 526 (White, J., dissenting).

White argued that although the *O'Brien* test was the appropriate analysis, the regulation in *Barnes* differed significantly from that in *O'Brien* and similar cases.[82] Justice White stressed that regulations such as those in *O'Brien* and *Bowers* were general prohibitions which restricted the conduct in question under any circumstance.[83] However, because the Indiana Statute was not enforced against plays, ballets, or operas that contain nudity, Justice White argued that the regulation was not applied as a general prohibition.[84] Furthermore, as Justice White explained, it would not be within Indiana's constitutional power to enact a general prohibition of nudity because such a regulation would necessarily invade constitutionally protected areas such as one's home.[85] However, Justice White's principal argument was that the plurality's concession that requiring a dancer to wear pasties and a G-string would diminish the actors' ability to convey a message was in fact a concession that the regulation was related to the suppression of expressive conduct.[86] As such, Justice White contended that the Indiana Statute was a content-based regulation and could only be upheld if it was "narrowly drawn to accomplish a compelling governmental interest."[87] Therefore, according to Justice White, the Indiana statute would fail this test even if a compelling interest were present because the State had ignored alternative regulations that would not interfere with the expressiveness of nude dancing.[88] As such, the regulation was not narrowly tailored and was necessarily invalid.[89]

Justice White's dissent is an attempt to bring the Court's analysis of time, place, and manner regulations back into the traditional two-track approach.[90] Although the Court is not willing to take the expansive view of-

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82. *Barnes*, __ U.S. at __, 111 S. Ct. at 2472-73, 115 L. Ed. 2d at 526-27.

83. *Id.* at __, 111 S. Ct. at 2472, 115 L. Ed. 2d at 526.

84. *Id.* at __, 111 S. Ct. at 2473, 115 L. Ed. 2d at 527.

85. *Id.* at __, 111 S. Ct. at 2472, 115 L. Ed. 2d at 526.

86. *See Barnes*, __ U.S. at __, 111 S. Ct. at 2474, 115 L. Ed. 2d at 528. Justice White explained that the communicative impact of the dancers' message was increased by the nudity of the dancers. *Id.* For example, the sight of a clothed dancer has a different impact on the viewer than does the sight of a nude dancer. *Id.* Therefore, argued Justice White, nudity is an expressive component of the message conveyed. *Id.*

87. *Id.* at __, 111 S. Ct. at 2474, 115 L. Ed. 2d at 529.

88. *Id.* at __, 111 S. Ct. at 2475, 115 L. Ed. 2d at 529. Justice White listed a number of alternative methods of achieving the governmental interests presented by both Justices Rehnquist and Souter. *Id.* Among these were: requiring that dancers remain at a minimum distance from spectators; limiting nude dancing to certain hours; dispersing such entertainment throughout the community; or criminalizing prostitution and related behavior. *Id.*

89. *Barnes*, __ U.S. at __, 111 S. Ct. at 2475, 115 L. Ed. 2d at 530.

90. *See* Barnes v. Glen Theatre, Inc., __ U.S. __, __, 111 S. Ct. 2456, 2474, 115 L. Ed. 2d 504, 528-29 (White, J., dissenting) (Indiana Public Indecency Statute was content-based regulation that could not be upheld unless it was narrowly tailored to achieve compelling state interest).

fered by Justice Scalia,[91] it is clear that the Court supports increasing the state's power to restrict expressive conduct via subject-matter based regulations.[92]

To understand the impact of *Barnes*, it is necessary to realize that *Renton*, although presented as an attempt to re-establish the traditional two-track approach,[93] was actually the instrumental case in developing an intermediate level of scrutiny for subject-matter based regulations of expressive conduct.[94]

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91. *See id.* at __, 111 S. Ct. at 2465, 115 L. Ed. 2d at 517-18 (Scalia, J., concurring) (no First Amendment analysis necessary if regulation not specifically aimed at curtailing expressive conduct).

92. *Compare* Erznoznik v. City of Jacksonville, 422 U.S. 205, 217 (1975) (striking down subject-matter based restriction of expressive conduct as unconstitutional content-based regulation) *with* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54-55 (1986) (upholding subject-matter based restriction of expressive conduct as valid, content-neutral regulation). The turning point in the Court's analysis was that it looked beyond the face of the regulation to find a content-neutral purpose. *See* Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1907-08 (1989) (Court used content-neutral purpose of curtailing secondary effects to justify less demanding scrutiny although ordinance in *Renton* content-based on its face). This is a break with the Court's previous approach. *See* New York v. Ferber, 458 U.S. 747, 765 (1982) (upholding child pornography regulation because such material is not protected by the First Amendment). It is important to note that the Court has approved regulations based on content prior to this trend. *See* Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 728 (1980) (regulations restricting obscenity, misleading advertising, and "indecent" language on radio have been upheld). However, when this has been the case, the expression in question has generally been determined to be low in expressive value. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 82 (1978) ("low value" expression determined to deserve less than full protection of First Amendment).

93. *See Renton*, 475 U.S. at 48 (labeling ordinance based on subject-matter consistent with previous definitions of content-neutral regulations of expressive conduct).

94. *Compare Renton*, 475 U.S. at 950 (applying lower level of scrutiny to subject-matter based regulation of expressive conduct) *with Erznoznik*, 422 U.S. at 217-18 (1975) (applying strict scrutiny to subject-matter based regulation of expression). The *Renton* test followed a trend in the Court's analysis that allowed for intermediate scrutiny of content-based regulations determined to be lower in expressive value. *See* Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1917-18 (1989) (explaining that two-track approach developed by Warren Court has been replaced with intermediate level of scrutiny of low value speech). This trend was a reaction to the rigid nature of the traditional two-track approach. *See id.* at 1918 (rigid application of two-track approach results in denial of constitutional protection for deserving forms of expression). However, an intermediate level of scrutiny has its drawbacks as well. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18, at 940-43 (2d ed. 1988). The approach requires the difficult process of classifying and defining types of expression. *Cf.* Virginia State Board of Pharmacy v. Viriginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976) (acknowledging near impossibility of differentiating between commercial and non-commercial speech). As such, the criteria for granting constitutional protection vary and the risk of impermissible content-based restrictions of expressive conduct exists. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18, at 943-44 (2d ed. 1988). Because expression may eventually be categorized by the level of scru-

Under the Court's present approach, content-based regulations of expressive conduct are subjected to traditional track-one analysis and upheld only where the government proves that its regulation is narrowly drawn to achieve a compelling state interest.[95] Regulations that are determined to be content-neutral restrictions of expressive conduct will be subjected to track-two analysis and upheld so long as they serve a substantial governmental interest without unreasonably limiting alternative avenues of communication.[96] At an intermediate level of scrutiny, subject-matter based regulations of expressive conduct can receive the less demanding scrutiny applied on track-two if the government advances a sufficient, content-neutral purpose for the regulation.[97]

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tiny applied, government could seek to impermissibly regulate content via categories that receive less demanding scrutiny. *Id.*

95. *Barnes*, 501 U.S. at __, 111 S. Ct. at 2474, 115 L. Ed. 2d at 529 (White, J. dissenting). This is consistent with traditional track-one analysis. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1989) (holding content-based regulation invalid because it was not precisely drawn to serve compelling state interest); *see also* First Nat'l Bank v. Belotti, 435 U.S. 765, 786 (1978) (striking down statute prohibiting corporate contributions made to influence voters because state failed to advance compelling interest). Generally stated, the rule under track-one analysis is that "whenever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 833-34 (2d ed. 1988). This rule is a realization of the dangerous potential of content-based regulations. *See* Note, *The Content Distinction in Free Speech Analysis after* Renton, 102 HARV. L. REV. 1904, 1913-14 (1989) (content-based regulations which favor particular views can be influential in determining outcome of publice debate).

96. *See, e.g.*, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981) (regulation limiting number of organizations at state fair valid as applied to religious sect); *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 (total prohibition on advertising of prescription drug prices as exceeding governmental interest in maintaining professionalism among licensed pharmacists); Cantwell v. Connecticut, 310 U.S. 296, 304-08 (1940) (requirement of state approval before soliciting invalid prior restraint of protected speech). This approach allows for efficient balancing between the protection of First Amendment freedoms and legitimate governmental interests. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 77 (1987). The approach allows the Court to examine regulations that seriously infringe upon First Amendment rights, but does not sacrifice governmental interests when First Amendment rights are only incidentally affected. *Id.* Simply stated, "the greater the interference with effective communication, the greater the burden on government to justify the restriction." Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983).

97. *See Renton*, 475 U.S. at 50-51 (ordinance grouping adult theaters in one location provided sufficient alternative avenues of communication). *But see Erznoznik*, 422 U.S. at 211-12 (ordinance prohibiting display of movies containing nudity at drive-in theaters left no adequate alternative avenues of communication). It is important to note that although the Court in *Barnes* stated that it was applying the *O'Brien* test, its analysis in *Barnes* resembled the "alternative avenues of communication" approach. *See Barnes*, __ U.S. at __, 111 S. Ct at 2463, 115 L. Ed. 2d at 514-15 (construing statute to be "narrowly tailored"). However, this approach arguably contradicts the meaning of content-neutrality. *See* MARTIN H. REDISH,

As Justice White's dissent elaborates, because the Indiana Public Indecency Statute was selectively enforced only against nude dancing offered in businesses such as the Kitty Kat Lounge, it was not content-neutral.[98] In fact, the statute was aimed at curtailing a particular subject-matter of expressive conduct, erotic nude dancing.[99] However, the Court met with a stumbling block in *Barnes* because, unlike *Renton*, where the government sought to regulate the location of businesses offering nude dancing and similar expressive conduct, the Indiana Public Indecency Statute sought to enter such businesses and regulate the manner in which expressive conduct was performed.[100] However, as the dissent's analysis of Justice Souter's opinion elaborated, requiring a dancer to wear pasties and a G-string will have little effect on the criminal activity associated with a business offering nude danc-

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FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 120 (1984) (regulation legitimately aimed only at curtailing conduct should apply to all who engage in that conduct regardless of message conveyed). This violates the principle of equality which is the basis of the First Amendment's protection against government regulation of expressive content. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (arguing that equal application of First Amendment promotes self governance, search for truth, individual self-worth).

98. *Barnes*, __ U.S. at __, 111 S. Ct. at 2474, 115 L. Ed. 2d at 528 (White, J., dissenting).

99. *Cf. Erznoznik*, 422 U.S. at 211 (ordinance which prohibited drive-in theaters from showing films containing nudity labeled subject-matter based). Because the Indiana statute prohibits any expression containing nudity, it appeared to be a subject-matter based regulation. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 239 (1983) (defining subject-matter regulations as those directed at entire field of expression). Furthermore, the Indiana statute is consistent with other regulations the Court has determined to be subject-matter based. *See Consolidated Edison*, 447 U.S. at 537 (labeling regulation subject-matter based because it restricted any material addressing issue of nuclear power). However, regulations that appear to be based only on subject-matter can, through application, be used to disadvantage a particular viewpoint. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 109-10 (1978) (explaining that because one side of issue may be more affected by subject-matter restriction, government can effectively disadvantage that side's position).

100. *Compare Barnes*, __ U.S. at __ n.2, 111 S. Ct. at 2462 n.2, 115 L. Ed. 2d at 513 n.2 (public indecency statute prohibits specific conduct) *with Renton*, 475 U.S. at 44 (ordinance sought to exclude businesses offering sexually oriented conduct from certain locations). This was a step beyond traditional time, place, and manner regulations because no alternative method of conveying the message existed. *See Heffron*, 452 U.S. at 654-55 (upholding limitation on number of organizations distributing material at state fair). Thus, the statute in *Barnes* not only had an impact on the dancers but also affected the community. *Cf.* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 222 (1983) (denying some avenues of expression may significantly impair free circulation of ideas). This greater impact can be an indication of improper legislative motive. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 110-11 (1978) (narrowly defined subject-matter regulations having an impact on single issue, or narrow class of issues, indicate potential legislative intent to restrict expression concerning that issue).

ing.[101] As such, the secondary effects analysis developed in *Renton* was not available to qualify the Indiana statute as a content-neutral regulation.[102] The Court instead had to develop morality as a new content-neutral basis for justifying a subject-matter based regulation of expressive conduct.[103] Thus, *Barnes* is a reinforcement of the principal that, given a purpose removed from the regulation of content, the government can use subject-matter based regulations to circumvent the strict scrutiny that track-one applies to content-based restrictions of expression.[104]

The decision in *Barnes* represents a powerful tool that can be implemented by government to infringe upon protected forms of expressive conduct.[105]

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101. *See Barnes*, __ U.S. at __ n.2, 111 S. Ct. at 2474 n.2, 115 L. Ed. 2d at 528 n.2 (White, J., dissenting) (*Erznoznik* effects not causually related to nude dancing).

102. *Compare Barnes*, __ U.S at __, 111 S. Ct. at 2461, 115 L. Ed. 2d at 512-13 (protecting societal order and morality served as content-neutral basis for statute prohibiting nudity) *with Renton*, 475 U.S. at 49 (curtailing harmful secondary effects acknowledged as content-neutral purpose for ordinance regulating location of adult theaters).

103. *Barnes*, __ U.S. at __, 111 S. Ct. at 2462, 115 L. Ed. 2d at 513.

104. *Compare Barnes*, __ U.S. at __, 111 S. Ct. at 2461-62, 115 L. Ed. 2d at 513 (governmental goal of protecting morality sufficient to justify less demanding scrutiny of regulation based on subject-matter of expressive conduct) *with Renton*, 475 U.S. at 48 (governmental goal of curtailing harmful secondary effects sufficient to justify less demanding scrutiny of subject-matter based regulation of expressive conduct). Given a content-neutral purpose, the Court can justify applying traditional track-two analysis. *Cf. Virginia State Bd. of Pharmacy*, 425 U.S. at 771 (defining content-neutral regulations as those justified without reference to content of speech being regulated). This principal is very disturbing because it allows the government to look beyond the face of an otherwise impermissible regulation to find a content-neutral justification. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 798 n.17 (2d ed. 1988) (logical conclusion of such practice is erosion of First Amendment protection). Even more foreboding was the *Renton* Court's limitation of this examination to a search for only good motive. *See Renton*, 475 U.S. at 48 (otherwise valid regulation will not be struck down because alleged, impermissible motive exists). However, the Court has lessened the potential impact of this approach in more recent decisions, requiring that there be an objective, causal connection between the government's content-neutral goal and the regulation. *See* Boos v. Berry, 485 U.S. 312, 321 (1988) (governmental purpose of preventing psychological damage to diplomats insufficient to justify prohibiting picket signs outside embassies). Absence of a causal connection is an indication of governments attempt to impermissibly regulate expressive conduct. Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1923 (1989). However, such an absence is unlikely because the government has a number of potential content-neutral goals available to justify its regulation. *Id.* Therefore, more than a cursory investigation of the government's motive is necessary. *Id.*

105. *See Barnes*, __ U.S. at __, 111 S. Ct. at 2462-63, 115 L. Ed. 2d at 513-15 (content-neutral purpose of protecting morality sufficient to justify complete prohibition of nude dancing); *Cf. Renton*, 475 U.S. at 54-55 (content-neutral purpose of curtailing secondary effects sufficient to justify regulation of adult theaters because of subject-matter displayed). Furthermore, the Court has shown some indication that this tool could be applied to speech outside the realm of sexually oriented business. *See Boos*, 485 U.S. at 321 (hinting that sufficient content-neutral purpose would justify regulation of political speech). However, the scope of this tool remains unclear. *See* Note, *The Content Distinction in Free Speech Analysis After* Renton,

Simply by advancing a purpose removed from the restriction of the message conduct conveys, government can effectively abridge or even eliminate a form of expression.[106] The impact of this tool is tempered by the requirements that subject-matter regulations serve a substantial governmental interest and leave open alternative avenues of communication.[107] However, the Court in *Barnes* did not apply this balancing test appropriately.[108] Because nudity was an essential part of the message the dancers' sought to convey, a restriction on nudity left no alternative method of communicating that message.[109] Furthermore, the Court sent a signal that virtually any content-

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102 HARV. L. REV. 1904, 1912 (1989) (the issue remains unclear because three justices in *Boos* dissented on jurisdictional grounds).

106. *See Barnes*, __ U.S. at __, 111 S. Ct. at 2462-63, 115 L. Ed. 2d at 513-14 (protection of morality and societal order sufficient to justify prohibition of nude dancing); *see also Renton*, 475 U.S. at 50 (governmental interest in curtailing secondary effects sufficient to justify regulation of adult theaters). This rule developed from reinterpretation of established constitutional doctrine. *Cf. Virginia State Bd. of Pharmacy*, 425 U.S. at 771 (defining content-neutral regulations as those justified without reference to content of speech being regulated). It is important to note that many of the Court's decisions in this area have upheld paternalistic regulations. *See Barnes*, __ U.S. at __, 111 S. Ct. at 2462, 115 L. Ed. 2d at 513 (protecting morality and societal order); *see also Renton*, 475 U.S at 48 (protecting neighborhoods surrounding adult theaters). The Court has traditionally taken an antipaternalistic view of the First Amendment. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212-13 (1983) (ordinarily government cannot restrict information based on a belief that citizens will make undesirable decisions with such information).

107. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76-77 (1981) (refusing to recognize availability of nude dancing in neighboring community as adequate alternative avenue of communication); *see also Erznoznik*, 422 U.S. at 217 (requiring a higher fencing around drive-in theaters before allowing display of films containing nudity would be impractical alternative). This balancing approach provides a method of correcting many of the problems associated with traditional two-track analysis. *See* Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1919 (1989) (this approach can effectively accommodate peripheral First Amendment interests as well as provide full First Amendment protection for more valued forms of speech). Thus, if properly applied, the balancing approach allows the Court to weigh government's substantial interests on one side and the extent to which protected expression is abridged on the other. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 979 (2d ed. 1988). However, the Court has not always applied this test rigorously. *See Renton*, 475 U.S. at 51-52 (allowing city to rely on data from other communities to establish regulation of secondary effects as substantial governmental interest).

108. *See Barnes*, __ U.S. at __, 111 S. Ct. at 2475, 115 L. Ed. 2d at 529-30 (White, J., dissenting) (because state ignored less restrictive means of protecting order and morality, statute not narrowly drawn).

109. *See id.* at __, 111 S. Ct. at 2474, 115 L. Ed. 2d at 528 (White, J., dissenting) (because nudity was integral part of message dancers sought to convey, prohibition of nudity removed ability to convey that message). Because Indiana denied the dancers any alternative avenues of communication it ignored its responsibility to keep the channels of communication open. *See* John Hart Ely, *Legislative and Administration Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1335 (1970) (state is obligated to protect avenues of communication). As such, the danc-

neutral purpose will justify a subject-matter based regulation of expressive conduct by allowing morality to stand as a substantial governmental interest.[110] As such, *Barnes* stands as a foreboding signal of potentially drastic reductions in First Amendment freedoms.[111]

The decision in *Barnes v. Glen Theatre, Inc.* provides government with a tool that can infringe upon protected forms of expressive conduct. By advancing a purpose removed from the restriction of the message conduct conveys, government can effectively abridge or even eliminate a form of

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ers were denied the ability to communicate their ideas to others. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 193 (1983) (limiting particular areas of communication potentially eliminates individual's ability to communicate particular views). Furthermore, nude dancing is conduct recognized as worthy of First Amendment protection. *Barnes*, __ U.S. at __, 111 S. Ct. at 2460, 115 L. Ed. 2d at 510-11. As such, restricting it entirely contradicts established First Amendment doctrine. *See Schad*, 452 U.S. at 75-76 (complete prohibition of nude dancing unconstitutional).

110. Morality has served as the basis for curtailing conduct in previous Supreme Court cases. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (protection of morality sufficient to justify prohibition of homosexual sodomy); *see also*, Roth v. United States, 354 U.S. 476, 485 (1957) (morality sufficient justification for prohibition of obscene material). However, those cases can easily be distinguished from *Barnes* because the conduct regulated did not qualify for constitutional protection. *See Bowers*, 478 U.S. at 192 (finding no constitutional right to engage in homosexual sodomy); *see also Roth*, 354 U.S. at 485 (obscenity is not protected by First Amendment). Further, nude dancing has been recognized as worthy of First Amendment protection. *Barnes*, __ U.S. at __, 111 S. Ct. at 2460, 115 L. Ed. 2d at 511. Even if the Indiana statute is analyzed as a content-neutral regulation, the Court's approach should have been to critically examine a regulation that seriously infringed upon First Amendment freedoms. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 193 (1983) (under Court's content-neutral balancing approach, greater impact on First Amendment interests warrants more critical examination of regulation). As such, Indiana should have had to prove that an important governmental objection would be sacrificed by a regulation that was less restrictive than a complete prohibition of nude dancing. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 984 (2d ed. 1988) (even under content-neutral analysis, a significant infringement upon free expression warrants more stringent analysis). Thus, the Court's decision in *Barnes* appears to be at odds with established constitutional doctrine. *Cf. Erznoznik*, 422 U.S. at 209 (government cannot selectively shield public from expression determined to be more offensive than others).

111. *See Barnes*, __ U.S. at __, 111 S. Ct. at 2463, 115 L. Ed 2d at 515 (protection of morality sufficient justification for complete prohibition of conduct protected by First Amendment). The government has an obligation to keep the channels of communication open. John Hart Ely, *Legislative and Administration Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1335-36 (1970) (government's content-neutral purpose may need to be sacrificed to accommodate freedom of expression). This obligation was not met in *Barnes*. *See Barnes*, __ U.S. at __ n.2, 111 S. Ct. at 2462 n.2, 115 L. Ed. 2d at 513 n.2 (prohibiting nude dancing entirely). Therefore, the decision in *Barnes* ultimately allows all but "gratuitous inhibitions" of speech. *Cf.* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorizing and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1488 (1975) (government need only advance a content-neutral purpose to justify regulation of expressive conduct under *O'Brien* test).

expression. At first glance, this appears to be a major revision in First Amendment doctrine. However, properly understood, *Barnes* represents merely the most recent step in an evolving trend that gives the government greater room for regulating expression. Traditionally, any content-based regulation of expressive conduct was upheld only where it was narrowly drawn to achieve a compelling governmental interest. However, in cases such as *Young v. American Mini Theatres, Inc.* and *Renton v. Playtime Theatres, Inc.* the Court subtly revised this established constitutional doctrine. As the most recent step in this trend, *Barnes* provides that given virtually any content-neutral purpose, subject-matter based regulations can be used to significantly curtail expressive conduct.

Although the Court requires that such regulations of expression advance a substantial interest and provide alternative methods of communication, the Court in *Barnes* did not properly apply this rule. The use of morality as the purpose for prohibiting nude dancing resulted in the complete restriction of a form of expression protected by the First Amendment. This result is disturbing to say the least. It is an established principal of constitutional law that where an actor intends to convey a message by his conduct and there is a great likelihood that his message will be understood, that expression is protected by the First Amendment. The bedrock principal of the First Amendment is that government can not abridge expression based on its content. *Barnes* effectively erodes this principal.

Fred S. Wilson