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# WHEN CAN THE MORAL MAJORITY RULE?: THE REAL DILEMMA AT THE CORE OF THE NUDE DANCING CASES*

ALAN J. HOWARD**

For the second time in less than a decade, the United States Supreme Court will consider whether a state ban on nude dancing violates the First Amendment. This term the Court will review a decision of the Supreme Court of Pennsylvania that held that the First Amendment bars the City of Erie from enforcing against nude dancers a city ordinance criminalizing public nudity.[1] The Pennsylvania Court's decision is directly contrary to the United States Supreme Court's decision in 1991 in the case of *Barnes v. Glen Theatre, Inc.*[2] in which the Court rejected by a vote of five to four a First Amendment challenge by nude dancers against an Indiana law criminalizing public nudity. The Court's willingness to readdress this deceptively complex issue creates an excellent opportunity to clarify the muddy and conflicting analyses of the nine Justices that rendered the *Barnes* decision incomprehensible and virtually useless as precedent for lower courts.[3] In *Barnes*, the five justice majority needed three separate opinions and three different rationales to explain why the public nudity ban could be applied constitutionally to nude dancing.[4] This short essay will explain what the proper analysis should be and why all three rationales in *Barnes* leave much to be desired.

* That I have selected this essay as my contribution to this special issue of the *Law Journal*, published in honor of Eileen Searls, on her retirement as law librarian at Saint Louis University, should not lead anyone to infer that there is necessarily some connection between the topic of the essay and anything about Eileen.

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1. City of Erie v. Pap's A.M., No. 98-1161, 2000 WL 313381, at *1 (U.S. Mar. 29, 2000) *rev'd*, Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998). Editor's Note: The United States Supreme Court handed down its decision in *City of Erie v. Pap's A.M.* on March 29, 2000, after Professor Howard's article had been submitted and edited. Professor Howard's article, however, remains highly relevant because in *Erie*, as in *Barnes*, the Court failed to produce a majority opinion, instead spawning a series of opinions that reflect the same confusion found in the various opinions in *Barnes* towards whose clarification Professor Howard's article is directed.

2. 501 U.S. 560 (1991).

3. In his majority opinion for the Pennsylvania Supreme Court, Justice Cappy characterized the decision in *Barnes* as "hopelessly fragmented." *Pap's A.M.*, 719 A.2d at 276.

4. *See infra* notes 5-38 discussing the various opinions in *Barnes*.

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In fairness to the Court, the issue of First Amendment protection of nude dancing raises a uniquely fundamental conflict between two well-established constitutional principles. The first constitutional principle is that the political majority can regulate on any rational basis, including moral grounds, conduct which is not constitutionally protected.[5] The state ban on sodomy is an example of constitutionally permissible morality-based regulation of non-constitutionally protected conduct.[6] The Court has said that such legislation is constitutional, even if the only basis for the law is the moral judgment of the majority.[7] This principle is operating in the nude dancing cases as four of the justices in *Barnes* found that the state legislature had banned public nudity solely because it considered the conduct immoral.[8] The second constitutional principle operating in the nude dancing cases is the principle that moral judgment alone is never sufficient to justify a state regulation of conduct that is constitutionally protected. An example of this principle is *Kingsley International Pictures Corp. v. Regents of the University of the State of New York* in which the Court held that a state could not ban the showing of a film that was protected under the First Amendment simply because the state found the film to be immoral.[9] Let's call this principle the "Rights Rule." This principle is also operating in the nude dancing cases because, as eight justices found in *Barne*s, nude dancing is expressive conduct and is protected by the First Amendment.[10]

5. *See Barnes*, 501 U.S. at 575 (Scalia, J., concurring) (noting that "absent specific constitutional protection for the conduct involved, the Constitution does not prohibit [government prohibitions of conduct] simply because they regulate 'morality'").

6. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986). *See also Barnes*, 501 U.S. at 575 (Scalia, J., concurring) (citing to *Bowers* as upholding the prohibition of private homosexual sodomy "enacted solely on the 'presumed belief of majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable'").

7. *See Barnes*, 501 U.S. at 580 (Scalia, J., concurring) ("[I]n *Bowers*, we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis.").

8. *See id.* at 568 (Rehnquist, C.J., joined by O'Connor & Kennedy, JJ.) (plurality opinion) (asserting that "the statute's purpose of protecting societal order and morality is clear from its text and history"); *see also id.* at 575 (Scalia, J., concurring) (asserting that "[t]he purpose of the Indiana statute, as both its text and manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified.").

9. 360 U.S. 684 (1959). The constitutional guarantee of free speech "is not confined to the expression of ideas that are conventional or shared by the majority." *Id*. at 689.

10. *See Barnes*, 501 U.S. at 565 (Rehnquist, C.J., joined by O'Connor & Kennedy, JJ.) (plurality opinion) ( "[S]everal of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment."); *see also id.* at 581 (Souter, J., concurring) ("I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment

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At this point it would be fair to ask, so what's the conflict? If under the "Rights Rule" conduct protected by the Constitution cannot be regulated on purely moral grounds, then a morality-based anti-public nudity law must be unconstitutional as applied to constitutionally protected nude dancing.[11] The reason why this is not a simple application of the Rights Rule is because of the *manner* in which the protected conduct is regulated. The ban on public nudity is a ban on a whole set of conduct, which just happens to include expressive conduct.[12] It regulates, for example, nude sunbathers no less than nude dancers.[13] In other words, it is not a ban targeting expressive conduct because of its expressive message. The restriction on the expressive conduct of the nude dancers is an incidental result of the general ban on public nudity. Herein lies the dilemma: Does the Rights Rule fully protect constitutionally protected expressive conduct which is *incidentally* swept up in a law adopted for admittedly morality-based reasons, but for reasons *unrelated* to the expressive aspects of the conduct? If it does, then the nude dancers win. If it does not, the nude dancers lose.

One can discuss both options beginning with Option One, which I will call the "Broad Option," whereby the nude dancers win. Here, the argument is that the Rights Rule broadly protects expressive nude dancing from a morality-based law, whether the law restricts the nude dancing as immoral expression or as immoral generic nudity. The former is an easy case. At a minimum, the Rights Rule says the majority cannot directly restrict protected expression because the majority thinks the expressive aspect of the conduct is immoral.[14]

protection."); *id.* at 588 (White, J., joined by Marshall, Blackmun, & Stevens, JJ. dissenting) (asserting that "nude dancing performed as entertainment enjoys First Amendment Protection"). Only Justice Scalia left open the question whether nude dancing performed as entertainment was expressive conduct deserving of First Amendment protection. *See id.* at 578 n.4 (Scalia, J., concurring) (asserting that "['inherently expressive'] conduct. . . is normally engaged in for the purpose of communicating an idea, or perhaps an emotion, to someone else. I am not sure whether dancing fits the description.").

11. Of course this conflict can be avoided if it is found that the anti-public nudity law is justified by more than mere morality, for example if it was passed as a public health measure to protect people from catching colds. But in *Barnes* several justices saw the anti-public nudity law solely as morality-based, i.e., the state's moral disapproval of people appearing in the nude among strangers in public places. *See supra* note 8.

12. *See Barnes*, 501 U.S. at 571 (Rehnquist, C.J., joined by O'Connor & Kennedy, JJ.) ("[P]ublic nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity.").

13. *See id.* ("[T]he perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it.").

14. *See Kingsley*, 360 U.S. at 688; *see also* Johnson v. Texas, 491 U.S. 397, 414 (1989) ("[I]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *see also Barnes*, 501 U.S. at 577 (Scalia, J., concurring) ("[T]his is not to say that

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The argument for the latter is less obvious, but also tenable — once conduct is found to be protected, it cannot be regulated for purely moral reasons, perhaps because these reasons are too intangible and uncompelling. Moral reasons may be weighty enough to be a "rational" basis for regulating *unprotected* conduct,[15] but they are never strong enough to support a regulation of *protected* conduct. Protected speech is entitled to a presumption of immunity from regulation, and morality-based reasons are inherently too weak to rebut the presumption. Under the First Amendment, it does not matter whether the regulation targets the conduct because of its expressive aspects or because of some other element. Either way, the Rights Rule applies and the speech wins. The Broad Option emphasizes individual liberty as the core value deserving of constitutional protection and sees the Rights Rule as designed to protect individual liberty from insufficiently justified abridgements, regardless of whether the abridgements target expressiveness or not.

But Option Two, or the "Narrow Option," by which the nude dancers lose, is also viable. Here the argument would be that the Rights Rule only protects speech narrowly from a morality-based law when the moral judgment of the government or legislature is judging the morality of the *speech* aspects of the conduct, in other words, the aspect of the conduct that renders it expressive. The Narrow Option uses a narrow interpretation of the Rights Rule which interprets the rule as only barring the government from limiting protected speech solely because it thinks the "message" of the speech is immoral, that is because the government "disagrees" with the "message" on moral grounds. That of course would be a classic case of censorship, and it would constitute a clear violation of the First Amendment.[16] Limiting the Rights Rule narrowly to these kinds of cases, however, might be seen as problematical because it requires a somewhat tortured and, arguably, artificial separation between the "medium" and the "message" of expressive conduct.[17] But it is not illogical.

the First Amendment affords no protection to expressive conduct. Where the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.").

15. *See supra* note 7 and accompanying text.

16. *See* cases cited *supra* note 14 and accompanying text.

17. At various places in his dissenting opinion in *Barnes*, Justice White explained the difficulty of separating "form" from "substance," especially in the context of nude dancing. At one point, Justice White cited language from Judge Posner's concurring opinion below where Judge Posner wrote that "the nudity of the dancer is an integral part of the emotions and thoughts that a nude dancing performance evokes." 501 U.S. at 592. (quoting Miller v. Civil City of South Bend, 904 F.2d 1081, 1090-98 (1990)). Later in his opinion, Justice White explained that "[t]he sight of a full clothed, or even a partially clothed, dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed. The nudity is itself an expressive component of the dance, not merely incidental 'conduct.'" *Id.* at 592. And still later in his opinion Justice White wrote that "[t]he nudity element of nude dancing

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For example, a legislature could conceivably set a dusk curfew because it decides that being out in public after dark for any reason is immoral (compare morality-based Moslem prohibitions on women showing their faces in public day or night). Such a curfew would incidentally limit many kinds of public speakers, for example, those who want to lecture about constellations visible in the night sky. While the First Amendment (and the Rights Rule) might prevent a legislature from banning night lectures on constellations because it thought such *lectures* were immoral,[18] the Narrow Option of the First Amendment would allow such speakers to be incidental victims of a morality-based curfew law so long as it did not focus on the morality of the expressive element of the celestial speech.[19] The Narrow Option sees constitutional "harms" not in terms of insubstantially justified abridgements of liberty, but rather in terms of abridgments that rest on illegitimate or otherwise impermissible reasons, such as censorship or the suppression of minority speech by a "moral majority," which simply thinks the minority message is immoral.

In the Broad Option, the nude dancers win because the Rights Rule protects speech from regulations that are based solely on morality. Moral reasons are deemed to be inherently too weak to support the abridgment of constitutionally protected speech. In the Narrow Option, the nude dancers lose because the Rights Rule only protects speech from morality-based, speech-based "censorship" and not from regulations, even morally-based ones, which are speech-blind (or speech-deaf, if you will).

Returning to the Court's 1991 decision in *Barnes*, it might seem surprising that the Court would have been in such a disarray in deciding the case, especially when one considers that as to several of the central issues presented by the case, the justices were in unanimous or near unanimous agreement. Eight of the nine justices were in agreement that the kind of nude dancing at issue in the case was expressive conduct that was deserving of First Amendment protection.[20] Moreover, all nine justices at earlier times had indicated support for the principle that in order for the government to prohibit conduct deemed by the Court to be constitutionally protected, the government must articulate a compelling, not merely a legitimate, justification, and that an interest in maintaining a "decent" and "moral" society alone is *not* a sufficiently compelling interest to support a prohibition of constitutionally protected conduct.[21] But even near unanimity by the justices with respect to

performances cannot be neatly pigeonholed as mere 'conduct' independent of any expressive component of the dance." *Id.* at 592-93.

18. *See* cases cited *supra* note 14 and accompanying text.

19. As discussed later, this is the position taken both by Chief Justice Rehnquist in his plurality opinion and by Justice Scalia in his separate concurrence.

20. *See supra* note 10 and accompanying text.

21. *See, e.g.*, United States v. Grace, 461 U.S. 171, 177 (1983) ( "[R]estrictions such as an absolute prohibition of a particular type of expression will be upheld only if narrowly drawn to

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both of these two basic principles was not enough common ground from which even a bare majority of the Court could reason to a single rationale for deciding the case.

As previously noted, the five justices forming the majority needed three separate opinions and three separate rationales to explain their support of the state's ban on nude dancing. Only one of the three opinions, that written by Chief Justice Rehnquist, obtained the support of any of the other justices making up the majority. While Chief Justice Rehnquist was able to get Justices O'Connor and Kennedy to join his opinion, the other two justices who made up the bare majority—Justices Scalia and Souter—each had to be content with writing a separate, lone concurrence. A careful dissection of the various opinions serves to identify the difficulties that plague the decisions. The primary difficulty was the dilemma illustrated by the two Options described earlier.

Both Chief Justice Rehnquist's plurality opinion and Justice Scalia's separate concurrence in *Barnes*, seemed to employ the Narrow Option. Both found the state's ban on nude dancing to be based on moral reasons, but both also found that the state's enforcement of its anti-nudity ban against nude dancing resulted *incidentally* from the state's general prohibition of public nudity for non-speech reasons, i.e., simply moral opposition to public nudity.

As between the two opinions, Justice Scalia's was arguably more consistent with the Narrow Option since he concluded that a content-neutral general law that banned a constitutionally unprotected category of conduct—in this case public nudity—need not be measured by any heightened constitutional standard of justification.[22] What was missing from Justice Scalia's opinion, however, was a coherent theory for his opting for the Narrow Option and its narrow interpretation of the Rights Rule. Nowhere did he defend his choice, for example, by arguing along the lines of the theory offered in the earlier discussion.

Instead, Justice Scalia simply offered two flawed observations in support of the narrow interpretation of the Rights Rule. First, he argued that it was necessary to adopt the narrow interpretation of the Rights Rule in order to allow the majority to ban unprotected conduct for moral reasons. Were the Court to opt for the Broad Option, he argued, every regulation of non-protected conduct could be seen as a regulation of First Amendment protected expressive

accomplish a compelling governmental interest."); *see also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (noting the same).

22. Thus Justice Scalia began his concurring opinion in *Barnes* by stating that "the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Barnes*, 501 U.S. at 572.

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conduct since virtually all conduct can be used for expressive purposes.[23] Therefore, Justice Scalia argued, the government might be precluded from enforcing any general morality-based ban of unprotected conduct.[24] The Court might conclude that the particular enforcement involved conduct that the actor had engaged in for the purpose of communicating an idea or even merely an emotion. In such cases, for the government to be able to ban the immoral conduct without violating the First Amendment, the government would need to offer an additional justification for the ban, besides its moral opposition to the conduct.

There are at least two responses to the bleak picture Justice Scalia tried to paint. First, Justice Scalia is overstating the problem. The need for the Court to apply a heightened standard of review would only occur if, and when, the actor could persuade the Court, under the test the Court announced in *Spence v. Washington*,[25] that his nonverbal conduct was expressive in nature.

The other response to Justice Scalia's first observation—a more telling one—is that the picture he painted need not be seen as bleak at all. That is, there is not necessarily anything objectionable with courts requiring the state to offer in justification of any law restricting expressive conduct something more compelling than moral opposition. The critical question Justice Scalia does not answer is, why should it matter whether the restriction was done directly or incidentally? Implicit in Justice Scalia's critique is his belief that the government *should* be able to ban morally offensive conduct, even if the actor engaged in the conduct to communicate an idea or an emotion so long as the conduct was suppressed for non-censorial reasons. In other words, the Narrow Option. But why is that so? Again, Justice Scalia offered no answer. If he had attempted to do so, he would have needed to have drawn the distinction between understanding constitutional rights in terms of protecting liberty from insubstantially defended abridgments (the Broad Option) versus understanding constitutional rights in terms of protecting people from having their liberty abridged for bad or illegitimate reasons (the Narrow Option).

Justice Scalia's second observation that he believed supported the Narrow Option was that it conformed to precedent. He wrote, "We have never invalidated the application of a general law simply because the conduct that it reached was being engaged in for expressive purposes and the government

23. *Id.* at 576.

24. *Id.*

25. 418 U.S. 405 (1974) (per curiam). In *Spence*, the Court set out the test to apply in determining whether or not any given nonverbal conduct is expressive in nature within the meaning of the First Amendment. To qualify for First Amendment protection for his nonverbal conduct, the actor has the burden of proof to show both an intent to convey a particularized message and that in the surrounding circumstances the likelihood was great that the message the actor was seeking to communicate would be understood by those who viewed it. *Id.* at 410-12.

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could not demonstrate a sufficiently important state interest."[26] While Justice Scalia's observation about the government having never lost an "incidental effect expressive conduct" case in the United States Supreme Court is correct;[27] Justice Scalia was incorrect in suggesting that these cases support the Narrow Option. To the contrary, none of the cases hold that the government can adopt morally-based incidental restrictions on expressive conduct; in each of these cases the government offered in support of the restriction a non-moral-based justification.[28] Moreover, the cases cited by Justice Scalia actually conflict with the Narrow Option because they hold that laws which incidentally restrict protected speech must satisfy a stricter First Amendment test, as required by the Broad Option eschewed by Justice Scalia.

Although purporting to apply also the Narrow Option, Chief Justice Rehnquist's plurality opinion confusingly and incoherently seemed to merge both the Broad and Narrow Options. Consistent with the Broad Option, the plurality opinion subjected the state's enforcement of the ban against nude dancing to the intermediate level of First Amendment scrutiny established in *United States v. O'Brien*, [29] even though it found the state ban on nude dancing

26. *Barnes*, 501 U.S. at 577.

27. Justice Scalia cited *United States v. O'Brien*, 391 U.S. 367 (1968) and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) as examples of cases in which the Court rejected First Amendment challenges to government prohibitions of expressive conduct and where the Court found the suppression of the communicative use of the conduct was merely the incidental effect of the government's forbidding the conduct for non-speech related reasons. *Barnes*, 501 U.S. at 577-78.

28. In *O'Brien* the federal government defended its prohibition of the knowing destruction of draft cards in terms of protecting the draft process. *O'Brien*, 391 U.S. at 382. In *Clark* the government's reason for barring people from sleeping in certain federal parks was to protect the parks from various forms of physical damage that might occur were people allowed to camp out in the park. *Clark*, 468 U.S. at 296.

29. 391 U.S. 367 (1968). *See also Barnes*, 501 U.S. at 579 (Scalia, J.) ("The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be 'important or substantial.'"). In *O'Brien*, the Court fashioned a four prong test that it stated it would apply to laws incidentally restricting expressive conduct. The Court noted:

> This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important government interest in regulating the non-speech element can justify limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation 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.

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was only *incidental* to the broader ban on public nudity. The Chief Justice subjected the state's enforcement of its anti-public nudity law against nude dancing to the *O'Brien* test because he found that the nude dancing was expressive conduct entitled to some First Amendment protection. The Narrow Option confines heightened First Amendment review to those laws where the government prohibits conduct "because of" (and not "regardless of") its communicative attributes. As a matter of formal logic, therefore, like Justice Scalia, the plurality, if it truly had adopted the Narrow Option, should not have subjected the state application of its anti-nudity law to nude dancing to *any* heightened standard of review. But if the plurality was applying the Broad Option, it made a mistake in how it applied the Option, and, therefore, it contradicted established precedent. As explained above, any regulation of constitutionally protected speech or conduct cannot be based solely on moral purposes. Yet the plurality found the government's interest to be solely moral, and found that moral purposes were important enough to meet the heightened demands of the *O'Brien* test.[30] Not surprisingly the plurality could offer no authority in support of its novel finding that a moral-based justification of a government ban on First Amendment protected activity comports with the *O'Brien* requirements. Moreover, faithful adherence with the Broad Option, not to mention with the *O'Brien* test, would have led the plurality to come out the other way in the case—in favor of the nude dancers, because the precedents are clear on the point that moral purposes alone do not satisfy the requirements of heightened First Amendment review.[31]

Justice Souter provided the fifth vote in *Barnes* to uphold the state's enforcement of its anti-nudity ban against nude dancing. Like the plurality and unlike Justice Scalia, Justice Souter also believed it necessary to apply the *O'Brien* test to the state's enforcement of its ban against nude dancing.[32] His

*O'Brien*, 391 U.S. at 376-77. As recently as its decision in *Nixon v. Shrink*, 120 S. Ct. 897 (2000), the Court reaffirmed its view of the *O'Brien* test as representing an intermediate standard of review.

30. *See Barnes*, 501 U.S. at 569.

31. Mention should also be made of the plurality's application of part three of the *O'Brien* test. Part three of the *O'Brien* test requires the government to show that its interest—in this case the majority's moral opposition to public nudity—is unrelated to the suppression of free expression. The plurality found the government's enforcement of its morality-based, anti-nudity law against nude dancing to be unrelated to the suppression of expression because, like Justice Scalia, the plurality saw the perceived evil that the state sought to address was not erotic dancing but public nudity. Again this attempt by the plurality to view the "nudity" of nude dancing as distinct from the erotic message conveyed by nude dancing, while it is consistent with Option Two, is subject to the criticisms made by Justice White in his dissent who finds such efforts as artificial and wrong. *See* cases cited *supra* note 17 and accompanying text.

32. *Barnes*, 501 U.S. at 582 (Souter, J., concurring) ("I also agree with the plurality that the appropriate analysis to determine the actual protection required by the First Amendment is the

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selection of the *O'Brien* test suggests that, like the plurality, Justice Souter also opted to apply the Broad Option in the case. That the law impacted on expressive speech only incidentally was not reason enough to Justice Souter for not subjecting the restriction to First Amendment heightened review. But unlike the plurality, Justice Souter did not rely on a government interest in morality in upholding the state's enforcement of its anti-nudity ban against the nude dancers.[33] Rather, he found the state's enforcement of its anti-public nudity law against nude dance establishments as justified in furtherance of the state's substantial interest in concrete, non-moral reasons, namely, combating prostitution and other criminal activity that the state argued were related to the existence of nude dancing establishments.[34]

Justice Souter's reliance on a non-moral-based justification to uphold the state's incidental restriction of expressive conduct superficially is consistent with the Broad Option, which only prohibits the government from banning expressive conduct for reasons only of morality. But alas, Justice Souter's effort to shoe horn the case into a Broad Option problem is also flawed. Like the plurality, Justice Souter misapplied several prongs of the *O'Brien* test, beginning with the second prong which requires that the government further an important or substantial government interest. While a state interest in combating prostitution and other criminal activity is clearly substantial, the problem in the case, as Justice Souter conceded, was that the state offered no evidence that its purpose for the ban and/or enforcement against nude dancing was to combat criminal activity.[35] Nor did the state provide the Court with any evidence that the harms it claimed were correlated with nude dancing in fact existed. Under its mere rationality review standard, it is common practice for

four-part inquiry described in *United States v. O'Brien* for judging the limits of appropriate state action burdening expressive acts as distinct from pure speech or representation.").

33. *See id.* ("I [nonetheless] write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitation at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondent's establishments.").

34. *Id.*

35. Thus Justice Souter conceded that "[i]t is, of course, true that this justification has not been articulated by Indiana's legislature or by its courts." *Barnes*, 501 U.S. at 582. But he went on to argue that "[w]hile it is certainly sound in such circumstances to infer general purposes 'of protecting societal order and from morality. . . from [the statute's] text and history,' [cite] I think that we need not so limit ourselves in identifying the justification for the legislation as issue here, and may legitimately consider petitioners' assertion that the statue is applied to nude dancing because such dancing 'encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity.'" *Id.* He went on to write, "Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Id.* It is revealing that after this sentence, Justice Souter cited as authority *McGowan v. Maryland*, 366 U.S. 240 (1961), one of the Court's leading mere rationality review decisions. *Id.*

the Court, for example, on its own to accept as legitimate *conceivable* as opposed to *actual* governmental purposes for the law.[36] But, as the Court has stated on several occasions in other First Amendment cases, when the government seeks to regulate protected speech, the burden is on the government to show that the regulation addresses a real harm and to identify that harm through the introduction of substantial evidence that establishes the relationship between the speech and the harm.[37] By letting the state off the hook by disregarding the state's noncompliance with its evidentiary burdens, Justice Souter's opinion, while purporting to apply an intermediate standard of review, in reality, like the plurality, subjected the state ban to mere rationality review.[38]

An interesting (and lengthier) article could be written analyzing the two options discussed in this essay for looking at the Rights Rule in the context of the nude dancing cases, and arguing why one is right and the other is wrong. This short essay does not attempt that difficult task. Instead, this essay simply points out that the Court must address this dilemma if it is going to decide the question at the heart of the nude dancing cases in a coherent and precedent

36. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

37. *See, e.g.*, Colorado v. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1998); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); United States v. National Treasury Employees Union, 513 U.S. 454 (1995). These cases support the proposition that the government, under an intermediate standard of review, has the duty to demonstrate both that its regulation addresses a real harm and that the regulation will lessen the harm in a substantial way.

38. As pointed out by Justice White in his dissenting opinion, Justice Souter's watering down of the *O'Brien* test is apparent not only in his application of the second prong of the *O'Brien* test but is equally present in his application of the final prong that requires that the government regulation be no greater than essential to further the government's interest. Justice Souter found that the ban met this prong because, so he reasoned, the state still allowed the dancers to dance erotically just so long as they wore pasties and a G-string. *Barnes*, 501 U.S. at 587. As Justice White points out, Justice Souter's application of prong four of the *O'Brien* test is substantially off the mark. Under prong four, applied correctly, what the state must show is not that its regulation is not as broad as the state could have made it (i.e., by disallowing only total nudity and allowing partial nudity) but that the government can not further its substantial interests in combating crime short of banning nude dancing. *Id.* at 594. As Justice White pointed out, were Justice Souter to have applied prong four of the *O'Brien* test correctly, he would have had to acknowledge that the state could adopt many kinds of restrictions that could be seen to combat criminal activity without having to ban protected expressive conduct, i.e., the performance of non-obscene dancing. Justice White noted:

> For instance, the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed through out the city. Likewise, the State clearly has the authority to criminalize prostitution and obscene behavior. Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny.

*Id.* (citation omitted).

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setting manner. There are many ways to avoid answering this question to which the various opinions in *Barnes* attest. But so long as the justices avoid the central question discussed in this essay, there will be no road map, and no coherent constitutional doctrine to guide lower courts. Instead, courts will be left to their own devices, and more often than not, will be tempted to follow the detours that undermined the *Barnes* decision. The question at the heart of the nude dancing cases is simple: Does the First Amendment allow a legislature to enforce a morality-based law against protected speech so long as the law was intended to restrict a broad category of conduct for moral reasons unrelated to the expressive nature of the conduct. The answer could be "no" because speech, as a protected liberty, is immune from morality-based regulation, regardless of whether its impact is direct or indirect. Or the answer could be "yes," because speech is only immune from regulation that affects the speech for morality-based reasons that judge the expressive aspect of the conduct, such as censorship. Either way, the Court must pick one answer, and explain why. In *Barnes* the majority did neither. It now has another opportunity to do so this term, if it will only see the dilemma clearly and confront it.