AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

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

*In 1994, the city council of Erie, Pennsylvania, adopted an ordinance making it unlawful to knowingly appear in a public place in a state of nudity. Pap’s A.M. operated Kandyland in Erie, which featured nude erotic dancing. Pap’s filed suit in in state court seeking an injunction against the enforcement of the ordinance. The local court granted the injunction, but the state supreme court reversed on the grounds that the ordinance violated the First Amendment. The city appealed to the U.S. Supreme Court. In a 7-2 decision, the Supreme Court reversed the state court and upheld the ordinance as consistent with the First Amendment. The justices could not agree on a majority opinion, but the plurality concluded that nude dancing was entitled to constitutional protection but that Erie’s regulation had minimal implications for the expressive conduct and was directed to reducing the secondary effects associated with nude dancing.*

JUSTICE O’CONNOR announced the judgment of the Court and delivered an opinion.

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Being "in a state of nudity" is not an inherently expressive condition. As we explained in *Barnes v. Glen Theatre, Inc.* (1991)*,* however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection.

To determine what level of scrutiny applies to the ordinance at issue here, we must decide "whether the State's regulation is related to the suppression of expression." *Texas v. Johnson* (1989).

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. . . By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. . . .

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Even if we had not already rejected the view that a ban on public nudity is necessarily related to the suppression of the erotic message of nude dancing, we would do so now because the premise of such a view is flawed. The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. . . .

[E]ven if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is *de minimis.* . . .

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Here, Erie's ordinance is on its face a content-neutral restriction on conduct. Even if the city thought that nude dancing at clubs like Kandyland constituted a particularly problematic instance of public nudity, the regulation is still properly evaluated as a content-neutral restriction because the interest in combating the secondary effects associated with those clubs is unrelated to the suppression of the erotic message conveyed by nude dancing.

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[W]e conclude that Erie's ordinance is justified under *United States v. O'Brien* (1968)*.* The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And in terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities" to demonstrate the problem of secondary effects, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." . . .

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*Reversed*.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

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[E]ven were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only "[w]here the government prohibits conduct precisely because of its communicative attributes." Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some "secondary effects" associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals *(bonos mores),* and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.

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JUSTICE SOUTER, concurring.

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The upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed. . . .

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By these standards, the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, but the pickings are slim. . . .

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There is one point, however, on which an evidentiary record is not quite so hard to find, but it hurts, not helps, the city. The final *O'Brien* requirement is that the incidental speech restriction be shown to be no greater than essential to achieve the government's legitimate purpose. To deal with this issue, we have to ask what basis there is to think that the city would be unsuccessful in countering any secondary effects by the significantly lesser restriction of zoning to control the location of nude dancing, thus allowing for efficient law enforcement, restricting effects on property values, and limiting exposure of the public.

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JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship. . . .

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Erie's ordinance, therefore, burdens a message protected by the First Amendment. If one assumes that the same erotic message is conveyed by nude dancers as by those wearing miniscule costumes, one means of expressing that message is banned; 2 if one assumes that the messages are different, one of those messages is banned. In either event, the ordinance is a total ban.

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The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition whereas a total ban is the most exacting of restrictions. The State’s interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden. Yet it is perfectly clear that in the present case . . . the city of Erie has totally silenced a message the dancers at Kandyland want to convey. The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship. . .

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 In what can most delicately be characterized as an enormous understatement, the plurality concedes that “requiring dancers to wear pasties and G-strings may not greatly reduce these secondary effects.” To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible. . . .

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 The Court is also mistaken in equating our secondary effects cases with the “incidental burdens” doctrine applied in cases such as *O’Brien*; and it aggravates the error by invoking the latter line of cases to support its assertion that Erie’s ordinance is unrelated to speech*.* The incidental burdens doctrine applies when “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct,” and the government’s interest in regulating the latter justifies incidental burdens on the former. Secondary effects, on the other hand, are indirect consequences of protected speech and may justify regulation of the places where that speech may occur. . . .

Of course, the line between governmental interests aimed at conduct and unrelated to speech, on the one hand, and interests arising out of the effects of the speech, on the other, may be somewhat imprecise in some cases. In this case, however, we need not wrestle with any such difficulty because Erie has expressly justified its ordinance with reference to secondary effects. Indeed, if Erie’s concern with the effects of the message were unrelated to the message itself, it is strange that the only means used to combat those effects is the suppression of the message. . . .

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. . . . As presented to us, the ordinance is deliberately targeted at Kandyland’s type of nude dancing (to the exclusion of plays like *Equus*), in terms of both its applicable scope and the city’s enforcement.

This narrow aim is confirmed by the expressed views of the Erie City Councilmembers who voted for the ordinance. The four city councilmembers who approved the measure (of the six total councilmembers) each stated his or her view that the ordinance was aimed specifically at nude adult entertainment, and not at more mainstream forms of entertainment that include total nudity, nor even at nudity in general. One lawmaker observed: “We’re not talking about nudity. We’re not talking about the theater or art. . . . We’re talking about what is indecent and immoral. . . . We’re not prohibiting nudity, we’re prohibiting nudity when it’s used in a lewd and immoral fashion.” . . . In my view, we need not strain to find consistency with more general purposes when the most natural reading of the record reflects a near obsessive preoccupation with a single target of the
law.

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