City of Erie v. Pap's A.M. The First Amendment: Wounded in the War for Freedom of Expression

Rondi Thorp*

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*. Candidate for J.D., Gonzaga University School of Law, 2002; B.A., cum laude, California State University Northridge, 1999. Special thanks to Joe and Ronnell Thorp, Jodi Thorp and David Turplesmith for all their love and support. This Article is dedicated to my family, Professor John Morey Maurice, Pam Pschirrer, and the Thomas More Scholars. You have all helped me so much through law school and have been wonderful friends.

I. INTRODUCTION

The Supreme Court has long held that freedom of non-verbal expression is a right deserving of First Amendment protection.[1] The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble."[2] In *City of Erie v. Pap's A.M.*,[3] the Court solidified its previous opinion in *Barnes v. Glen Theatre Inc.*,[4] which had garnered only plurality support, and found that nude dancing deserved limited First Amendment protection.[5] The Court found that nude dancing often resulted in deleterious secondary effects.[6] Interestingly, the *Pap's A.M.* analysis departed from precedent, which typically analyzed whether similar ordinances regulated the time, place, or manner in which a message could be communicated.[7] Instead, the *Pap's A.M.* Court concentrated on the content neutrality of the ordinance[8] and proceeded to apply

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1. "The First Amendment literally forbids the abridgment only of 'speech,' but [courts] have long recognized that its protection does not end at the spoken or written word." Texas v. Johnson, 491 U.S. 397, 404 (1989).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. I

3. 120 S. Ct. 1382 (2000).

4. 501 U.S. 560 (1991).

5. *Pap's A.M.*, 120 S. Ct. at 1389, 1391 (explaining that even though nude dancing deserved First Amendment protection, the interest was in the "outer ambits" of the right).

6. *Id.* at 1393.

7. *See, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (zoning ordinance of an adult theater was upheld as a constitutional time, place and manner restriction); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (zoning ordinance regulating location of adult theater was held not to violate the First Amendment).

8. ERIE, PA., ORDINANCE 75-1994, states in pertinent part:

(1) A person who knowingly or intentionally in a public place:

a. engages in sexual intercourse;

b. engages in deviant sexual intercourse as defined by the Pennsylvania Crimes Code;

c. appears in a state of nudity, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

(2) "Nudity" means the showing of the human male or female genitals, pubic hair 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; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola.

(3) "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such

the four-prong test established in *O'Brien v. United States*.[9] The Court determined that the ordinance met the *O'Brien* test and upheld the restriction. In doing so, it increased the power of local governments to regulate previously protected expression when the expression results in undesirable secondary effects.[10] This decision weakens the First Amendment.

This Note will begin by examining the extension of First Amendment protection to conduct, especially as it relates to the adult entertainment industry. The Note will then present the facts and procedural history of *Pap's A.M.*. Next, the Note will explore the plurality, concurring, and dissenting opinions. The Note will then argue that the Court incorrectly applied the *O'Brien* analysis. This Note will next discuss why the Court should have applied the doctrine of overbreadth or the obscenity standard to reach its conclusion so that the First Amendment was not weakened. Finally, this Note will contemplate the Court's departure from precedent and the ramifications of the plurality's opinion on freedom of expression, giving special regard to the potential local impact of the Court's decision.

II. HISTORICAL BACKGROUND

A. *History of Conduct as Expression Protected Under the First Amendment*

Different types of communication receive different levels of protection.[11] For example, speech enjoys greater protection than expressive conduct.[12] Similarly, content-neutral restrictions are not as closely scrutinized as content-based restrictions. When a government adopts a statute that is not attempting to regulate the message or expression of the speech's content, the statute is

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places of entertainment, taverns, restaurant, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

9. United States v. O'Brien, 391 U.S. 367, 377 (1968) (O'Brien burned his draft card in opposition to the war). The *O'Brien* Court set out a four-part test to determine if symbolic speech could be restricted by regulation: (1) the regulation must be within the government's constitutional authority; (2) it must further an important or substantial government interest; (3) the governmental interest must be unrelated to the expression; and (4) the restriction must be no greater than necessary to further that interest. *Id.*

10. "The Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles . . . [u]nder today's opinion a state may totally ban speech based on its secondary effects." *Pap's A.M.*, 120 S. Ct. at 1409 (Stevens, J., dissenting).

11. *O'Brien*, 391 U.S. at 376.

12. *Id.*

considered content-neutral.[13] A content-based restriction is reviewed under strict scrutiny, requiring that the measure serve a compelling government interest that is narrowly tailored.[14] Conversely, a content-neutral restriction governing the time or manner in which a message can be sent is subject only to intermediate scrutiny.[15] Intermediate scrutiny requires a substantial government interest that is unrelated to the suppression of free speech and that restricts no more speech than necessary to further the government's interest.[16] Therefore, content-neutral regulations are more likely to withstand constructional scrutiny.[17] As a result, the government will be allowed more latitude in regulating expression when a statute is deemed content-neutral.[18] Ordinarily, upon the application of the court's balancing test, First Amendment interests prevail over the government's interests. This is because free speech is generally too important to be subject to governmental control.[19]

Similarly, expressive conduct is constitutionally protected. The Supreme Court has held that certain conduct employed as expression should be protected under the First and Fourteenth Amendments.[20] In *Spence v. Washington*,[21] the Court proffered a two-part test to determine when conduct deserves First Amendment protection. First, the Court determines whether there is an intent to convey a particularized message.[22] Second, the Court determines the likelihood that the message will be understood by those who view it.[23] If the conduct can meet both elements of the test affirmatively, it is expression deserving of First Amendment protection.[24]

Once it is determined that the expressive conduct deserves First Amendment protection, the test set forth in *United States v. O'Brien* is used to determine if a regulation violates the Constitution.[25] *O'Brien* involved an individual who faced criminal sanctions resulting from burning his draft card

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13. *Id.* (holding that the regulation prohibiting the destruction of draft cards was unrelated to the message to conveyed).

14. Abrams v. Johnson, 521 U.S. 74, 91 (1997).

15. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

16. *Id.* at 289.

17. Chicago Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972).

18. *Id.*

19. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, 792 (2d ed. 1988).

20. *See e.g.*, Spence v. Washington, 418 U.S. 405 (1974); Texas v. Johnson, 491 U.S. 397 (1989).

21. *Spence*, 418 U.S. at 405.

22. *Id.* at 410-11.

23. *Id.*

24. *Id.*

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

publicly to show his opposition to the war.[26] To determine if his punishment for the expressive conduct violated the Constitution, the *O'Brien* Court set out a four-factor test to determine if the communication could be regulated by the government.[27] First, the court must determine whether the regulation was within the government's constitutional authority.[28] Second, the court must determine whether the regulation furthers an important or substantial government interest.[29] Third, the governmental interest must be unrelated to the expression.[30] Fourth, the restriction must be no greater than necessary to further the interest.[31] If these elements are met, the regulation passes constitutional scrutiny.

B. *Courts May Analyze Regulations Under an Overbreath Standard*

A statute regulating speech may also be struck down if it is overbroad.[32] Statutes are considered overbroad if they restrict both unprotected speech and protected speech.[33] In the past, the doctrine of overbreadth has existed as a means for the court to determine if a statute is constitutionally sound and provides extra protection for constitutionally protected speech.[34] The doctrine acts as an exception to the requirement of standing because it allows a regulation to be challenged by those who may be affected by the regulation.[35] When the court determines that a statute is overbroad, the entire statute has generally been struck down.[36] Courts apply the overbreadth doctrine to curtail the chilling effects on protected speech and the prevention of the selective enforcement of a statute.[37] Thus, in order for a statute to be ruled unconstitutional due to overbreadth, the overbreadth must be substantial.[38] This is a difficult standard to meet.

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26. *Id.* at 367.
27. *Id.* at 376-77.
28. *Id.*
29. *Id.*
30. United States v. O'Brien, 391 U.S. 367, 377 (1968).
31. *Id.*
32. Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940).
33. *Id.* at 100-01.
34. TRIBE,, *supra* note 19, at 1022-23.
35. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).
36. *Id.* at 615.
37. *Id.*
38. *Id.* (The Court held in a five to four vote, that there should be an additional requirement of "substantial" overbreadth to invalidate a statute. Justice Brennan, predicted in his dissent, that this may result in Courts rarely invalidating a facially overbroad statute.).

C. *Speech With Little Value Receives Little Protection*

When regulated speech deserves less protection, an ordinance regulating that speech is more likely to withstand constitutional scrutiny. Some speech has been judged unworthy of receiving the same level of protection afforded to verbal speech.[39] For example, obscenity and fighting words are two areas of expression deemed by the Court to be less deserving of constitutional protection.[40] In *Roth v. United States*, the Court formulated a standard for what would constitute obscenity.[41] It held that a message is obscene where the average person "applying contemporary community standards [would find] the dominant theme of the material taken as a whole [as appealing to the] prurient interest."[42] Obscene material would have little social, artistic, or other redeeming value to make it worthy of First Amendment protection.[43] The Court had a difficult time implementing the definition of obscenity into its subsequent decisions. In the next sixteen years after *Roth*, no court would agree on what constituted obscenity. In *Jacobellis v. Ohio*, this difficulty in definition became apparent when Justice Stewart stated in his concurring opinion that he might not be able to describe "hard-core pornography . . . but [that he knew it when he saw it]."[44]

Miller v. California offered the Court a chance to revise its definition of obscenity.[45] In *Paris Adult Theatre I v. Slaton*, a case decided on the same day as *Miller*, Justice Brennan expressed strong concern that the state's interest in suppressing obscenity was weak compared to the danger the First Amendment faced from such regulation.[46] While nude dancing has not been deemed obscene by the Supreme Court, other courts have reached an opposite conclusion.[47]

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39. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (Chaplinsky called the marshall a "goddamned racketeer and a "damned fascist." Subsequently, he was arrested under an offensive language statute which the Court upheld because his language incited a fight, thus creating the fighting words doctrine). *Cf.* Cohen v. California, 403 U.S. 15 (1971) (Cohen wore a coat to a courthouse that was explicitly critical of the draft and was arrested for disturbing the peace in violation of his First Amendment rights.).

40. *Chaplinsky*, 315 U.S. at 572.

41. Roth v. United States, 354 U.S. 476, 485 (1957).

42. *Id.* at 489.

43. *Id.* at 484 (Justices Douglas and Black dissented, claiming that it was neither the courts' nor the legislatures' role to determine the social worth of speech).

44. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

45. Miller v. California, 413 U.S. 15 (1973).

46. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54 (1973).

47. Lisa Malmer, Comment, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1278-80 (1991).

Obscenity does not provide societal value and is therefore subject to greater governmental control.[48] Of course, the government cannot favor one type of expression over another.[49] Therefore, when a law is directed at the message of the conduct itself, then it must be justified by the strict scrutiny the First Amendment requires.[50] However, in other cases, where a regulation serves a substantial government interest or where the restricted communication has lesser societal value, the ordinance can withstand constitutional scrutiny.[51]

D. *History of Adult Entertainment as Protected Speech*

Nude dancing, however, has long been held to be protected speech because it constitutes expressive conduct that intends to convey a message.[52] In *Doran v. Salem Inn*, the Court reiterated that such expressive dancing was entitled to First Amendment protection.[53] Similarly, non-obscene adult movies, television, and live adult entertainment have all been held to be expression protected by the First Amendment.[54] In *Schad v. Borough of Mount Ephraim*, Justice White, speaking for the majority, stated that nudity in and of itself would not strip First Amendment protections from certain expressive acts.[55] The *Pap's A.M.* and *Barnes* Courts have also acknowledged that nude dancing is protected speech, but only on the "outer ambits" of the First Amendment.[56]

E. *Legislative History of Ordinance 75-1994*

On September 28, 1994, the City Council of Erie, Pennsylvania, in a 4-2 vote, enacted a public indecency ordinance.[57] The portion of Ordinance 75-1994 that was at issue regulated nudity in public locations.[58] Public locations were

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48. *Roth*, 354 U.S. at 476 (This was the first case in which the Court considered the issue of obscene material being protected by the First Amendment. The *Roth* Court found that obscenity was not protected speech, but held that the acceptable definition of obscenity would be limited by First Amendment concerns.).

49. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

50. R.A.V. v. St. Paul, 505 U.S. 377, 385-86 (1992).

51. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

52. California v. LaRue, 409 U.S. 109, 118 (1972) (holding that nude dancing is expression that deserves some protection under the First Amendment).

53. Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).

54. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981).

55. *Id.* at 66.

56. *Pap's A.M.*, 120 S. Ct. at 1390 (Justice O'Connor stated that being in a "state of nudity" is not an inherently expressive condition, but the Court has held that it does deserve some protection).

57. ERIE, PA., ORDINANCE 75-1994, *supra* note 8.

58. *Id.*

defined as any outdoor places or places open to the public.[59] The ordinance made it a crime to appear in a state of nudity; thus, the genitals, anal region, and the female nipple were required to be covered.[60] Similarly, garments that simulated those body parts were expressly prohibited in the ordinance.[61]

The city council prefaced the ordinance with a statement that its intention was to adopt the public indecency laws of the State of Indiana that were previously upheld by the Supreme Court in *Barnes v. Glen Theatres Inc.*[62] The council announced that the statute was enacted to combat the recent increase in nude dancing entertainment within the city.[63] Additionally, the council claimed that nude dancing had a negative impact on the health and safety of the community.[64] However, this claim is suspect, since four of the council members present stated that they supported the ordinance because they wanted to promote morality in the community.[65]

III. THE COURT'S DECISION IN PAP'S A.M.

A. *Facts and Case History*

The City of Erie, Pennsylvania, enacted an ordinance restricting nudity in public places.[66] Pap's A.M., a Pennsylvania corporation, owned Kandyland, an adult-oriented business that presented nude dancing performances by women.[67] In order to comply with the Erie ordinance, Kandyland required all dancers to wear "G-strings" and "pasties" that partially covered the dancers.[68]

In response to the restrictive nature of the ordinance, Pap's A.M. filed suit against the City of Erie and city officials, requesting declaratory relief and a permanent injunction against the enforcement of the ordinance.[69] The Court of Common Pleas struck down the ordinance as unconstitutional because it was overly broad.[70] The Commonwealth Court reversed this decision, citing

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59. *Id.*
60. *Id.*
61. *Id.*
62. ERIE, PA., ORDINANCE 75-1994, *supra* note 8.
63. *Pap's A.M.*, 120 S. Ct. at 1392.
64. *Id.*
65. *Id.* at 1412.
66. ERIE, PA., ORDINANCE 75-1994, *supra* note 8.
67. *Pap's A.M.*, 120 S. Ct. at 1388.
68. *Id.*
69. *Id.*
70. Pap's A.M. v. Erie, No. CIV.A.:60059-1994, 1995 WL 610276, at *9 (Pa. Com. Pl. Jan. 18, 1995).

Barnes.[71] That court held that the ordinance was not overly broad and did not violate the First Amendment.[72] The Pennsylvania Supreme Court granted review and reversed, finding the ordinance violated Pap's A.M.'s First and Fourteenth Amendment Rights.[73] The Pennsylvania court held that in addition to the ordinance's stated purpose of combating secondary effects, the ordinance also had a silent purpose intending to "impact negatively on the erotic message of the dance."[74] Therefore, the Court held the ordinance was related to the suppression of the message that was being communicated by the dance, and thus the ordinance could not overcome the strict scrutiny standard.[75]

The City of Erie filed for a writ of certiorari, which the United States Supreme Court granted.[76] Based on this, Pap's A.M. then filed a motion to dismiss on the grounds that the case was moot due to the fact the business was no longer operated as a nude club, and that Pap's did not operate any other clubs of this nature.[77] Justice O'Connor authored an opinion on this issue, declaring the case was not moot since the possibility remained that Pap's could go back into business.[78] In addition, the Court declared that the city would be prejudiced if the Court did not allow review because it would suffer an "ongoing injury" because it would be unable to defend the regulation's validity.[79] The Court then reversed the decision by the Pennsylvania Supreme Court, thereby upholding Erie's ordinance, and the ability of granting governments the power to place restrictions on public nudity when it serves a governmental interest.[80]

B. *Justice O'Connor's Plurality Opinion*

Pap's A.M. allowed the Court to revisit its plurality decision in *Barnes*. This afforded the Court the opportunity to form a more succinct and united opinion regarding what level of protection nude dancing should receive under

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71. Pap's A.M. v. Erie, 674 A.2d 338, 341-48 (Pa. Commw. Ct. 1996).
72. *Id.* at 346.
73. *Id.* at 276-81.
74. *Id.* at 279.
75. *Pap's A.M.*, 120 S. Ct. at 1389.
76. *Id.*
77. *Id.* at 1390.
78. *Id.*
79. *Id.* (The record also indicates the Court's annoyance that the petition to declare the case moot was not filed with Pap's brief for opposition of the writ of certiorari. Justice O'Connor accused Pap's A.M. of "attempting to manipulate the Court's jurisdiction to insulate a favorable decision," which also played a role in the Court's finding that the issue was not moot.).
80. Erie v. Pap's A.M., 120 S. Ct. 1382, 1398 (2000).

the First Amendment. However, no approach received majority support in *Pap's A.M.*. Justice O'Connor authored the plurality opinion and was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer.[81]

The plurality in *Pap's A.M.* determined that the regulation on public nudity was a content-neutral regulation because it was a restriction on all public nudity, not just that which occurred at Kandyland or similar businesses.[82] Thus, it was correctly analyzed under the less stringent *O'Brien* standard.[83] The plurality found the Erie ordinance met the first element of *O'Brien* since it was within Erie's police powers to promote the public safety and welfare of its citizens.[84] Second, the ordinance furthered Erie's interest in combating harmful secondary effects by regulating the conduct of its citizens.[85] The plurality argued the third element was met because the "government[al] interest [was] [not] related to the suppression of [the] expression."[86] The effect on the expression was insignificant because the dancers were still able to express themselves as long as they complied with the requirements.[87] Furthermore, Justice O'Connor candidly stated that even if the statute did minimally alter the "portion of the expression that occurs when the last stitch is dropped," the dancers were still able to continue their performance, so long as they agreed to don the requisite pasties and G-string.[88] The ability of the government to regulate conduct, thereby reducing secondary effects associated with adult entertainment establishments, was cited by the plurality as a primary concern.[89] However, Justice O'Connor acknowledged that the addition of "garments" to the dancers might not substantially reduce these effects.[90] This was not a major concern to the plurality, however, since *O'Brien* only required that the regulation "further the interest of combating such effects."[91] The plurality drew a parallel between *Pap's A.M.* and *O'Brien*, reasoning that both regulations were content-neutral because the activities the government sought to control, the

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81. *Id.* at 1387.

82. *Id.* at 1394.

83. *Id.* at 1394-95.

84. *Id.* at 1395.

85. Erie v. Pap's A.M., 120 S. Ct. 1382, 1395 (2000).

86. *Id.* at 1397.

87. *Id.* at 1391 (citing *Clark*, 468 U.S. at 288 (national park regulation preventing camping was upheld when protestors wanted to sleep in the mall in Washington D.C. to protest homelessness)).

88. *Pap's A.M.*, 120 S. Ct. at 1393.

89. *Id.* at 1395.

90. *Id.* at 1397 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that the state was able to control the volume of a concert because the state had a substantial interest in maintaining the tranquility of the nearby sheep meadow)).

91. *Pap's A.M.*, 120 S. Ct. at 1397.

destruction of draft cards or harmful secondary effects to nude dancing, were unrelated to the content of the expression.[92]

Pap's assertion that the city council was motivated solely by its desire to decrease nude dancing was unconvincing to the plurality, which explained that it would "not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."[93] The government's policy of fostering morality and standards in the community were recognized as important by the plurality and reinforced.[94] The Court also acknowledged its deference to the city council's findings regarding the secondary effects Erie was experiencing, which included public intoxication, prostitution, the promotion of violence, and other criminal activity.[95] The plurality admonished Pap's A.M. for challenging the city council's findings on secondary effects without ever providing their own counter-studies.[96] Ultimately, O'Connor reasoned that the city's interest in maintaining a lawful society was more important than the minimal suppression of the dancer's message.[97]

C. *Justice Scalia's Concurring Opinion*

Justice Scalia's concurrence agreed with the Court's decision that the ordinance was constitutional, but disagreed with the reasoning employed by the plurality to reach its decision.[98] Scalia believed *Pap's A.M.* should not have been heard by the Court because the case was moot.[99] Further, Scalia argued that this was not a First Amendment issue because the ordinance banned all nudity, not just nude dancing as a form of expression.[100] He explained that the ordinance was not unconstitutional simply because there was a chance that it was enacted specifically to limit the expressive message of nude dancing.[101] Nor was Scalia convinced that the addition of pasties and a G-string could actually

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92. *Id.* at 1392.

93. *Id.*

94. *Id.* at 1395.

95. *Id.* at 1395-96.

96. Erie v. Pap's A.M., 120 S. Ct. 1382, 1396 (2000).

97. *Id.* at 1397.

98. *Id.* at 1400.

99. *Id.* at 1398 (Justice Scalia noted that Pap's sought to dismiss the case for mootness, asking that the judgment below be vacated. This would support the notion Pap's was not simply seeking to insulate the favorable verdicts in the lower courts.).

100. *Id.* at 1401. Justice Scalia was the only Justice in *Barnes* that would not agree that nude dancing deserves First Amendment protection. *Barnes*, 501 U.S. at 560. He follows this in *Pap's A.M.* by refusing to judge the case as a First Amendment issue. *Pap's A.M.*, 120 S. Ct. at 1400-01.

101. *Pap's A.M.*, 120 S. Ct. at 1402.

result in a reduction of secondary effects.[102] Scalia stated that "[t]he traditional power of government to foster good morals . . . and the acceptability of the traditional judgment . . . that nude public dancing itself is immoral, have not been repealed by the First Amendment."[103] Therefore, Scalia reasoned that the city could do what it needed to foster and promote good morals within the community.

D. *Justice Souter's Concurrence in Part and Dissent in Part*

Justice Souter joined the Court regarding the question of justicability and held the case was not moot.[104] His dissent focused on Erie's statute and its validity under the First Amendment.[105] Souter argued that although the plurality decided the case using the appropriate content-neutral standard,[106] it failed to insist that sufficient evidence be presented to establish that the secondary effects were as pervasive and harmful to the city as was claimed.[107] In addition, Souter opined that evidence was necessary to establish the correlation between nude dancing and such effects.[108] Another argument Souter advanced is that the ordinance did not meet the fourth requirement of the *O'Brien* test because the incidental restriction of the speech was greater than necessary to achieve the government's goals.[109] Therefore, Souter proposed vacating the judgment of the Pennsylvania Supreme Court and remanding the case for further proceedings.[110]

E. *Justice Stevens' Dissenting Opinion*

In his dissent, Justice Stevens, in agreement with Justice Ginsberg, expressed displeasure with the Court's decision and concern for the future of the First Amendment.[111] While the dissent recognized that past decisions had allowed the regulation of the *location* of adult businesses associated with

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102. *Id.* Justice Scalia states that he does not even find it necessary to consider whether secondary effects constitute a viable governmental purpose. *Id.*

103. *Id.*

104. *Id.*

105. Erie v. Pap's A.M., 120 S. Ct. 1382, 1402 (2000). Justice Souter agrees that the statute was correctly defined as content-neutral and that the *O'Brien* test should apply. *Id.*

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

107. *Pap's A.M.*, 120 S. Ct. at 1405.

108. *Id.* at 1402-04.

109. *Id.* at 1405.

110. *Id.* at 1402.

111. *Id.* at 1406.

causing secondary effects, it asserted that the expression of the Kandyland dancers was greatly altered by the G-string and pasties requirement.[112] The dissent argued that upholding the Erie ordinance would result in the complete ban of the expression; therefore, the statute should be invalid under the First Amendment.[113] Stevens declared the Court was taking a serious step when it allowed the complete ban of protected First Amendment expression for potentially trivial interests.[114]

Stevens furthered his analysis by suggesting that the difference in the message conveyed by a nude dancer, as opposed to one partially covered, may be substantial, but the plurality disagreed, contending that this difference would be *de minimus*.[115] Stevens argued that even if this were true, the message would still be completely censored.[116] In the end, the result would be a complete ban on a form of expression that should receive First Amendment protection.[117]

The dissent stated that the use of the secondary effects test was not supported by precedent for use as a complete ban on protected expression.[118] In support of this notion, Stevens referred to *Young v. American Mini Theaters*.[119] There, a zoning restriction was placed on an adult theater due to secondary effects; however, none of the content was changed nor was the message altered.[120] Because of *Young*, the dissent reasoned that a time, place, and manner restriction must "leave open ample alternative channels for communication of information" and a complete ban on the expression could not meet this requirement.[121] Stevens argued that the plurality did not correctly apply *Ward v. Rock Against Racism* when seeking precedent for more restrictive secondary effects rationale, since *Ward* was a time, place, manner restriction, and not a secondary effects case.[122] Stevens compared *Pap's A.M.*,

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112. *Pap's A.M.*, 120 S. Ct. at 1406-07 (citing Justice Stevens cites: Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54-55 (1986) (upholding zoning restrictions to combat secondary effects); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding restrictions on placement of Detroit adult theaters because of secondary effects)).

113. *Pap's A.M.*, 120 S. Ct. at 1406-07.

114. *Id.* at 1407.

115. *Id.* at 1406 (Justice Stevens cites Judge Posner's view on this matter from *Miller v. South Bend*, 904 F.2d 1081, 1089-104 (7th Cir. 1990) (holding that the differences between the messages conveyed by a nude dancer and one partially clothed are substantial)).

116. *Id.* at 1407.

117. *Id.* at 1409.

118. Erie v. Pap's A.M., 120 S. Ct. 1382, 1406 (2000).

119. *Id.* at 1408-09.

120. *Young*, 427 U.S. at 78 (reasoning that "Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them").

121. *Pap's A.M.*, 120 S. Ct. at 1408; Ward v. Rock Against Racism, 491 U.S. 781 (1989).

122. *Pap's A.M.*, 120 S. Ct. at 1408-09.

to *Schad v. Mount Ephraim*, where the Court struck down an ordinance that prohibited adult theaters altogether, rather than controlling them through zoning.[123] He reasoned that both cases resulted in a total ban of dancing.

The dissent also rejected the theory that the addition of pasties and a G-string would have any substantial impact on the crime rate.[124] Thus, the Court's reasoning that the test would be satisfied if the regulation "furthers the interest of the government" was faulty, since it substantially reduced the level of harm a government could claim in order to ban protected expression.[125] The dissent asserted that because there was no proof of such an impact, the interest was not furthered.[126]

Stevens distinguished the ordinance at issue in *Pap's A.M.* from the one in *Barnes*.[127] The dissent asserted that Erie's ordinance revealed that the true intent of the city council was to ban nude dancing.[128] Stevens argued that this is relevant because it would preclude the Court from relying on *Barnes* to the extent it does in *Pap's A.M.*.[129] The dissent expressed concern that the drafters of the ordinance had the specific type of nude dancing in mind that was found at Kandyland.[130] It noted that the city testified that it would not enforce the ordinance against productions such as *Hair* and *Equus*.[131] Thus, the dissent contended the ordinance was discriminatory to the type of expression found at places like Kandyland.[132] Stevens rejected Justice Scalia's opinion that nude dancing was immoral per se.[133] The dissent, questioning the rationale behind this argument, stated that this claim could not be supported, since the ordinance only singled out one form of nude dancing and did not restrict the theatrical displays.[134] In fact, Stevens opined that the target of the law was made implicitly clear by an analysis of the city council's record.[135] According to Stevens, the illicit motive was not simply alleged in *Pap's A.M.*; it was expressly stated time and time again.[136] Stevens also referenced Justice White's

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123. *Id.* at 1408.
124. *Id.* at 1409.
125. *Id.*
126. *Id.*
127. Erie v. Pap's A.M., 120 S. Ct. 1382, 1413 (2000).
128. *Id.*
129. *Id.* at 1411.
130. *Id.* at 1412.
131. *Id.* at 1411 (both of these productions feature nudity, violence, and explicit language).
132. Erie v. Pap's A.M., 120 S. Ct. 1382, 1411 (2000).
133. *Id.* at 1412 n.14.
134. *Id.* at 1412.
135. *Id.*
136. *Id.* at 1412-13.

dissent in *Barnes*, which remained applicable to the *Pap's A.M.* dissent.[137] The dissent concluded that the Erie ordinance should have been held to be patently invalid since the expression it sought to restrict was protected under the First Amendment.[138]

IV. ANALYSIS

A. *Content Neutral or Content Based?*

Using established precedent, the Court should have analyzed the Erie ordinance as a content-based regulation. The *Pap's A.M.* Court was mistaken in its determination that the Erie ordinance was content-neutral and thus should have applied the less restrictive *O'Brien* standard.[139] When analyzing the ordinance and the city council members' intent in its creation, it becomes evident that this was a content-based restriction.[140] This is supported by promises from the city that the ordinance would not be enforced against other nude dancing that occurs in productions such as *Hair*.[141] This makes the statute expressly content specific and therefore facially discriminatory.

The plurality refused to acknowledge the extrinsic evidence that proved that Erie enacted a content-based restriction.[142] Justice Scalia's concurrence essentially stated that it was within the government's power to legislate the moral climate of its city.[143] Thus, the Court allowed the government to determine what expression was morally sound for its citizens. The erotic message was what the city of Erie successfully suppressed. Therefore, the Court incorrectly applied the *O'Brien* test in determining whether the city was violating the First Amendment. Instead, the Court should have applied the strict scrutiny standard. The Pennsylvania Supreme Court correctly analyzed the ordinance under this standard and determined that the ordinance was a direct violation of the First and Fourteenth Amendments.[144] Justice Stevens' dissent also reiterated that this was not a content-neutral ordinance.[145]

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137. Erie v. Pap's A.M., 120 S. Ct. 1382, 1414 (2000). Justice White's dissent in *Barnes*, expressed the view that the statute should be held invalid because nude dancing enjoys First Amendment protection, the state was not content-neutral, and the statute was not narrowly drawn so as not to restrict other more protected speech. *Barnes*, 501 U.S. at 593-94.

138. *Pap's A.M.*, 120 S. Ct. at 1413-14.

139. *Id.* at 1398.

140. *Id.* at 1411-13.

141. *Id.*

142. *Id.* at 1412.

143. Erie v. Pap's A.M., 120 S. Ct. 1382, 1402 (2000).

144. *Pap's A.M.*, 719 A.2d. at 280.

145. *Pap's A.M.*, 120 S. Ct. at 1412.

Justices Scalia and Thomas candidly admitted their belief that governments should be allowed to dictate the moral climate of the community.[146] However, when this results in restriction of freedom of expression, the Constitution is in serious jeopardy. One can only imagine what other areas of expression could be censored if the government is allowed to regulate the content of protected expression on the basis of immorality and potentially insubstantial secondary effects. *Pap's A.M.* makes additional, more general, governmental censorship a potential reality.

Similarly, had Erie enacted a zoning ordinance that limited adult entertainment establishments to places where law enforcement could better handle the secondary effects, a more just solution would have resulted. These "zoning" ordinances have been upheld in numerous cases because the area in which these businesses can be located, rather than speech, is restricted.[147] In that case, intermediate scrutiny would have been appropriate. Had the Court applied the time, place, and manner test, the Erie statute would most likely not have been upheld. This is because regulations controlling the way in which a message can be sent still allow the message to be sent. The message merely needs to be communicated in a different manner or in a different location. Therefore, those regulations do less violence to the First Amendment.

The legislative history of the statute sheds considerable light on the subject of content-neutrality.[148] The city council admitted the ordinance was intended to curb the recent increase in nude entertainment.[149] The city council also admitted it was attempting to enhance the moral climate of the city.[150] Therefore, the legislative intent should have been considered when the plurality decided the ordinance is content-neutral, as the legislative history clearly establishes that it was not.[151] Had the intent to suppress an immoral message been considered, the strict scrutiny standard would have applied. Only then would the First Amendment have been given adequate protection. Only then would the court's precedent be given effect. Disregarding these protections was unsound.

B. *The Doctrine of Overbreadth*

Alternatively, Ordinance 75-1994 could have been successfully struck

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146. *Id.* at 1402.

147. *Id.* at 1406.

148. *Id.* at 1412.

149. *Id.*

150. Erie v. Pap's A.M., 120 S. Ct. 1382, 1412 (2000).

151. Michael McBride, Note, *Pap's A.M. v. City of Erie: The Wrong Route to the Right Decision*, 33 AKRON L. REV. 289, 307-308 (2000).

down using an overbreadth analysis. The Erie ordinance is substantially overbroad. As it is written, the ordinance equally applies to "theatrical nudity" and to the type featured at Kandyland.[152] Although a production of *Equus* was featured in Erie under of the ordinance, the city council stated it did not enforce the ordinance to the theatrical nudity.[153] One of the reasons attributed to this is that nobody complained.[154] This should have been a warning bell to the Court. Could this mean that if future theatrical productions involving nudity visit Erie and someone does complain that the ordinance will be enforced?

The plurality appears to take the city council's word that it would not enforce the statute where theater rather than nudity is implicated. However, reliance on the council's word places the First Amendment at risk. Perhaps in the future the city will decide theatrical nudity reduces the morals of the community and causes deleterious secondary effects. The plurality of *Pap's A.M.* has substantially freed them to make such a claim and the ordinance currently in effect would allow the city to quash the production. Apparently, under the rationale of the plurality, the city would not even need to produce evidence that the secondary effects actually exist.[155] The city would only be required to show that the ordinance served a substantial interest or that there was a possibility that the ordinance would combat these effects.[156] Therefore, as long as a government claims these productions reduce the morality of the community and cause secondary effects, it will be able to censor at will.

C. *Nude Dancing as Obscenity*

Had the Court desired to uphold the ordinance, its only viable option for doing so without violating the First Amendment would have been to rule that the type of exotic nude dancing found at establishments such as Kandyland was obscene. Obscene material does not have First Amendment protection.[157] This would not have been a perfect solution, but perhaps it would have been less dangerous to the First Amendment and other productions that feature nudity in a performance such as *Equus*.

The test from *Miller* for determining if conduct is obscene could potentially be met.[158] The *Miller* Court set forth the elements to be considered for determining obscenity. First, the average person applying today's community

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152. *Pap's A.M.*, 120 S. Ct. at 1407.
153. *Id.* at 1411-12.
154. *Id.* at 1401.
155. *Id.* at 1395.
156. *Id.* at 1397.
157. *Miller*, 413 U.S. at 23.
158. *Id.* at 24.

standards must find that the work on a whole appeals to the prurient interests.[159] This would be relatively simple to conclude, as the essence of the message being conveyed by the dancer is eroticism; most people in the community would find this to be true. Second, the work must depict in a "patently offensive way" particular types of sexual conduct.[160] Many people would also agree that the type of movements and nudity that are being displayed meet this criteria as well. The final requirement is that the work must lack serious artistic, literary, political or scientific value.[161] Justice Scalia's concurrence comes close to suggesting this in determining that the ordinance should be upheld because nude dancing is immoral.[162] Although this logic is arguable, it is reasonable to conclude the Court could find this form of nude dancing to be obscene. However, for many individuals there is an underlying morality that the nude body is supposed to be beautiful and unashamed. To label it obscene may potentially stifle these individual's statements.

On the other hand, there is a movement that would believe obscenity an appropriate classification for nude dancing.[163] Indeed, some jurisdictions have already labeled nude dancing obscene.[164] Had the *Pap's A.M.* court analyzed the Erie ordinance under an obscenity standard, the First Amendment would not have been as weakened. The regulation could have been upheld as a result of the limited protection given to obscenity. The Court could have justifiably determined that the dancing was obscene, even though it would have been forced to depart from precedent to do so. This would have been preferable to an application of intermediate scrutiny analysis solely on the basis that the measure was content-neutral. While such an analysis would have far-reaching impacts upon establishments featuring this expressive dancing, the decision would not affect every content-neutral regulation of speech. As it stands, the decision serves as a basis for applying intermediate scrutiny on any regulation that is facially content-neutral, no matter its impact once applied. This places the First Amendment in peril.

However, the Supreme Court has refused to label nude dancing obscene. Arguably, it has moved closer to this viewpoint in deciding that nude dancing falls in the "outer ambit" of First Amendment protection.[165] In addition, its determination that the government's perceived interests are more important than

159. *Id.*

160. *Id.*

161. *Id.*

162. *Pap's A.M.*, 120 S. Ct. at 1401-02.

163. Malmer, *supra* note 47, at 1278-80.

164. *Id.* (the Eighth Circuit held that nude dancing was obscene under the *Miller* test, in *Walker v. Kansas City*, 911 F.2d 80, 87 (8th Cir. 1990)).

165. *Pap's A.M.*, 120 S. Ct. at 1391.

the dancer's freedom of expression demonstrates that nude dancing protection could be downgraded even further. If the Court had held the type of nude dancing found at Kandyland was obscene rather than allowing for an across-the-board ban against public nudity, other expressions and performances featuring nudity, such as *Equus*, may have remained better protected. While upholding the ordinance under an obscenity analysis poses some problems, it does not disregard First Amendment jurisprudence. By construing this ordinance as content-neutral despite its clear impact and legislative purpose, the Court misapplies precedent and weakens First Amendment protections for all.

D. *Departure from Precedent and its Potential Ramifications*

The Court's decision to allow a city to ban protected expression on the basis of unproven secondary effects alone will have widespread ramifications.[166] The impact of the *Pap's A.M.* decision was most likely immediately felt by those in the nude dancing business. This is not a matter involving the morality of nude dancing, but one of freedom of speech and the strength of the Constitution. Justice Stevens points to the Court's departure from precedent in his dissent by stating that "the Court's holding rejects the explicit reasoning in *American Mini Theatres* and *Renton* and the express holding in *Schad*."[167] A total ban on a protected expression is a violation of the First Amendment.

Indeed, the immorality of nude dancing appears to be the plurality's true focus.[168] Unfortunately, these opinions fail to recognize that there are several examples of expressive conduct that are not acceptable to the masses. However, we allow White Supremacists to march,[169] pornography to be distributed at newsstands,[170] and the American flag to be burned.[171] We allow these expressions not because we like or approve of the message, but because this country is founded on the freedom expounded in the First Amendment.[172] *Pap's A.M.* takes a dangerous step away from that freedom.

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166. *Id.* at 1409.
167. *Id.*
168. *Id.* at 1395, 1397, 1402.
169. Nat'l Socialist Party of America v. Vill. of Skokie, 432 U.S. 43, 43-44 (1977).
170. Hamling v. United States, 418 U.S. 87, 125-29 (1974).
171. Texas v. Johnson, 491 U.S. 397, 408 (1989).
172. *Id.* at 414.

V. THE LOCAL IMPACT OF THE PAP'S A.M. DECISION

Since the Supreme Court released its decision, Spokane, Washington, and several other local communities have clamored for increased regulations and an end to nude dancing. In Idaho, upon hearing the Court's decision in Pap's A.M., Kootenai County Commissioner Ron Rankin immediately released his plan to adopt an ordinance similar to Erie's.[173] Commissioner Rankin stated, "Now that somebody has paid the bills to get it through the Supreme Court and found it to be constitutional, we can do the same thing."[174] Among Rankin's chief concerns were increases in crime, prostitution, and drug use near adult entertainment establishments.[175]

Since 1995, Spokane, Washington has adopted additional zoning and behavioral restrictions regarding adult entertainment establishments.[176] These ordinances have resulted in a reduction of adult entertainment in Spokane and a shift of patrons and performers across the border to State Line, Idaho, where local ordinances are described as "very liberal."[177] In Idaho, a bill similar to Erie's ordinance, sponsored by Jeff Alltus, a Republican from Hayden, Idaho, died in the Idaho House of Representatives in March.[178] Although Spokane County's ordinance is much stricter than many in Idaho, it has not reached the level of restriction upheld in Erie. Conversely, State Line's ordinance is quite liberal in comparison to Erie's.[179] The State Line ordinance does not provide patron-entertainer distance requirements and nude dancing is permitted. In contrast, the Spokane city ordinance sets limits on how close the performers can be to the patrons while nude and mandates lighting requirements.

In 1997, Spokane County in Washington adopted a comprehensive Adult Entertainment Establishment Ordinance.[180] This ordinance is similar to the City of Spokane's and applies to unincorporated areas of the county. Patty Connolly Walker, Special Prosecuting Attorney for Spokane, wrote the county's new, more restrictive ordinance and stated that it was likely that other jurisdictions

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173. Jenny Slater & Thomas Clouse, *Rankin Hopes to Prohibit Nude Dancing: High Court Ruling Encourages Commissioner to Propose Ordinance*, SPOKES-REV., Apr. 1, 2000, at A1.

174. *Id.*

175. *Id.*

176. Laura Shireman, *Business Booming for New Strip Club: Idaho's Looser Laws Give Exotic Dancers More Freedom than their Counterparts in Washington*, SPOKES-REV., Dec. 23, 1998, at B1.

177. *Id.*

178. H.B. 724, 55th Leg., 2d Reg. Sess. (Idaho 2000).

179. Slater, *supra* note 173.

180. SPOKANE, WASH., ORDINANCES ch. 7 art. 80 § 10 - 250 (1997).

would face problems, from "prostitution to urban blight," if more restrictive ordinances were not adopted.[181] Spokane County's ordinance requires performers, managers, and establishments to be licensed.[182] The ordinance also requires nude dancers to be at least four feet from their audience and on an elevated stage.[183]

Although Idaho has been more liberal in the past, the effect of the Erie ordinance on Spokane may encourage cities in Idaho to tighten restrictions as well. Post Falls, Idaho, a city immediately adjacent to State Line, has expressed concern that the adult entertainment establishments may be fleeing across the border now that Spokane has tightened its ordinances.[184] Post Falls citizens have begun a petition drive and are seeking legislation that would keep dancers six feet from customers and require health checks and minimal clothing.[185] Petitioners have sought the help of The Community Defense Counsel, a non-profit legal defense group based in Scottsdale, Arizona.[186] The Community Defense Counsel helps state and county governments outlaw adult oriented businesses.[187] This organization states that its main goal is not to prevent freedom of speech, but to protect communities from the harmful secondary effects of adult entertainment, such as sexually transmitted diseases and crime.[188]

The Court's decision in *Pap's A.M.* will enable local governments to adopt stricter regulations on adult entertainment businesses. In the past, prudent jurisdictions carefully drafted ordinances so they would not be in violation of the First Amendment. The Supreme Court's decision in *Pap's A.M.* now allows governments greater freedom in drafting restrictive ordinances since it reduces a government's concern of being drawn into a lengthy court battle where the ordinance may be struck down. In the end, these ordinances could potentially endanger other forms of constitutionally protected expression.

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181. Laura Shireman, *Risque Business in Store for Idaho? Spokane County Crusade May Push Smut Across the Boarder*, SPOKES-REV, Aug. 31, 1998, at A1.

182. SPOKANE, WASH., ORDINANCES, ch. 7 art. 80 § .080 (1997).

183. *Id.* at § .090.

184. Julie Titone, *Hundreds Rally Against Nude Dancers at State Line: Protestors Want Dance Club Shuttered*, SPOKES-REV., Feb. 28, 2000, at A6.

185. *Id.*

186. Beth Bow & Jenny Slater, *Alltus Wants Dancers on Stage, Out of Laps Measure Would License Clubs*, SPOKES-REV, Mar. 8, 2000, at B1.

187. *Id.*

188. *Id.* This justification is markedly similar to the claimed justification in Erie.

VI. CONCLUSION

In upholding Erie's ordinance under the Constitution, the Court has opened a door for regulations that restrict First Amendment rights. The Court in *Pap's A.M.* had the opportunity to revisit the issue presented in *Barnes* regarding public nudity statutes and their effect on the First Amendment.[189] In a plurality decision, the *Pap's A.M.* Court found that governmental interests in reducing secondary effects would justify ordinances requiring nude dancers to wear pasties and G-strings.[190] The Court reasoned the ordinance was content-neutral, and applied the minimal *O'Brien* standard.[191] This was an incorrect analysis. The Court should have determined the ordinance was content-based and applied the strict scrutiny standard. In the alternative, the Court could have struck the ordinance down using an overbreadth analysis, finding that the ordinance applied to both protected and unprotected speech indiscriminately.

Had the Court desired to uphold the ordinance, it could have done so. Perhaps classifying nude dancing as obscene would have been less of an assault on the First Amendment. The Court's departure from precedent in this area enters dangerous legal ground. This decision may return to haunt the Court in coming years when governments begin to use *Pap's A.M.* as a basis to control and censor citizens' expressions. Local communities are already looking at the Court's decision and have begun adopting more restrictive ordinances.[192] Justice Stevens' strong dissent provides hope that the Court could revisit this issue again. Unfortunately, the First Amendment was not the Court's primary consideration in *Pap's A.M.*, and the effects of this could be felt for years to come.

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189. *Pap's A.M.*, 120 S. Ct. at 1392.
190. *Id.* at 1395.
191. *Id.* at 1391, 1394, 1398.
192. *See* Bow, *supra* note 186; Slater, *supra* note 173.