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Bachelor Parties Beware: The Third Circuit Grapples with Alcohol, Strip Clubs and the Constitutionality of Morality Legislation

Gregory S. Voshell

BACHELOR PARTIES BEWARE: THE THIRD CIRCUIT GRAPPLES WITH ALCOHOL, STRIP CLUBS AND THE CONSTITUTIONALITY OF MORALITY LEGISLATION

> "The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex."
>
> - Justice Antonin Scalia[1]

I. THE FIRST AMENDMENT AND EROTIC EXPRESSION

The First Amendment, by its own terms, limits its protections to "speech" and makes no explicit textual reference to expression or conduct.[2] Nevertheless, the Supreme Court has stated, on numerous occasions, that nude dancing is "expressive conduct" and is therefore entitled to some First Amendment protection.[3] Not surprisingly, this controversial and somewhat fragile stance is the source of intense debate, pitting the fundamental protections and freedoms guaranteed by the First Amendment against the reasonable desire for "societal order and morality."[4] Consequently, within this context a battle has developed between adult

1. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 443-44 (2002) (Scalia, J., concurring) (arguing that First Amendment is not implicated by conduct-based regulation at issue).

2. *See* U.S. CONST. amend. I. In full, the First Amendment provides: "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 redress of grievances." *Id.* (emphasis added).

3. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (acknowledging reluctantly that nude dance is "within the outer ambit of the First Amendment's protection"); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (plurality opinion) (reasoning that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment"); *see also* Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1114 (2005) (describing Supreme Court's treatment of nude dance under First Amendment as "speech, but only scarcely so"); Clay Calvert & Robert D. Richards, *Stripping Away First Amendment Rights: The Legislative Assault on Sexually Oriented Businesses*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 294 (2004) (citing Court's willingness to extend First Amendment protection to some nude performances).

4. *See Barnes*, 501 U.S. at 569-70 (allowing use of morality as means of justifying state action); *see also* Adler, *supra* note 3, at 1122 (admitting that "nude dancing cases have provoked significant criticism"); Clinton P. Hansen, Note, *To Strip or Not to Strip: The Demise of Nude Dancing and Erotic Expression Through Cumulative Regulations*, 35 VAL. U. L. REV. 561, 573-75, 585-99 (2001) (discussing fact that state legislatures responded to adult entertainment industry with numerous, cumulative and burdensome requirements).

entertainment clubs (strip clubs) and the cities and states in which strip clubs operate.[5]

For several reasons, state legislatures have consistently, and with a large degree of success, regulated the activities of strip clubs through various statutory licensing schemes.[6] After obtaining a license, a strip club faces heavy penalties, such as a revocation of its license and fines, if it fails to comply with the statutorily mandated standards.[7] Requirements for general licensing can include bans on total nudity, required distances between dancers and patrons, limitations on interaction between two or more dancers, zoning regulations distancing strip clubs from schools and residential areas, and a potential regulation forcing individual dancers to obtain permits.[8] Licensing schemes aimed at strip clubs are generally justified as targeting "secondary effects," including crime and prostitution occurring within the strip club's immediate vicinity.[9] Along these same lines,

5. *Compare* Troy Graham, *Court: Strippers' Work Not Covered*, PHILADELPHIA INQUIRER, July 20, 2006, at B1 (discussing recent Third Circuit opinion that New Jersey statute regulating sex-orientated establishments was constitutional), *and* Terry Kemple, *Voters Gave Clear Mandate to Regulate Sex Businesses*, TAMPA TRIB., Jan. 6, 2007, at 15 (detailing devastating impact sex-oriented business has in community), *with* Shannon P. Duffy, *Risque Move Pays Off: Topless Bar Topples Lewdness Law*, LEGAL INTELLIGENCER, Aug. 16, 2006, at 1 (announcing Third Circuit's decision to strike down Pennsylvania lewdness statute, which had placed restrictions on strip club industry), *and* Dan Margolies, *Nudity Law Is Struck Down*, KAN. CITY STAR, Dec. 20, 2006, at C1 (reporting that adult entertainment industry tallied victory when Missouri Supreme Court struck down law placing restrictions on strip clubs).

6. *See* N.J. ADMIN. CODE § 13:2-23.6(a)(1) (2005) (using statutory scheme to regulate lewd and immoral activity on liquor licensed premises); PA. CONS. STAT. § 4-493(10) (2006) (regulating strip clubs through liquor licensing statute); *see also* Calvert & Richards, *supra* note 3, at 290 (acknowledging paradox wherein strip clubs are becoming more popular and profitable while local municipalities "tighte[n]" laws regulating sex industry); Hansen, *supra* note 4, at 585-99 (noting that regulations have expanded from simple alcohol restrictions "to include restraining hours of operation, requiring minimum distance between patrons and dancers, and eliminating all contact between dancers and patrons").

7. *See, e.g.*, MO. REV. STAT. § 311.710(1) (2006) (listing suspension and revocation of license as potential penalty and establishing jurisdiction over hearings related thereto); PA. CONS. STAT. § 4-493(10) (2006) (rendering violators subject to suspension or revocation of liquor license); S.C. CODE ANN. § 61-4-580 (2006) ("A violation of . . . this section is a ground for the revocation or suspension of the holder's permit."); UTAH CODE ANN. § 32A-5-107 (2006) (penalizing clubs in breach of requirements with "a suspension or revocation of the license or other disciplinary action"); W. VA. CODE § 60-7-12(c) (2006) (making violation of provisions misdemeanor with potential penalties including jail time and fines).

8. *See* Calvert & Richards, *supra* note 3, at 292-93 (discussing arsenal of regulations possessed by state legislatures); Dana M. Tucker, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?*, 12 J. LAND USE & ENVTL. L. 383, 406-07 (1997) (detailing impact of zoning regulation on sex entertainment industry).

9. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 293 (2000) (plurality opinion) (noting that statute's aim "[i]n trying to control the secondary effects of nude dancing, [was] . . . to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood"); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) ("In Seattle, as in Renton, the adult

the consumption of alcohol is often a predominant aspect of attending a strip club.[10] Accordingly, state statutory schemes often are aimed at alcohol distribution and consumption in strip clubs as a means of off-setting or mitigating potential secondary effects.[11]

Recently, strip club owners began fighting back, and have presented the Third Circuit with challenges to Pennsylvania and New Jersey licensing

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theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood."); *see also* Adler, *supra* note 3, at 1119 ("Under the secondary effects doctrine, speech may be regulated only when it is aimed at combating effects which are not related to the meaning or 'the content of the . . . speech.'"). Adler goes on to discredit the secondary effects doctrine, arguing it is illogical to believe "that the addition of pasties and a G-string can really solve such grave problems as disease, mayhem, and violence." *Id.* at 1127 (discussing secondary effects doctrine); *see also* Tucker, *supra* note 8, at 398-99 (discussing use of time, place and location restrictions on sex industry to combat secondary effects).

10. *See* Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 572 (2006) (equating strip clubs with old saloon). "Like the old saloon, the patrons in nude dancing clubs are almost exclusively male, the atmosphere is highly sexualized, *excessive drinking is encouraged* and prostitution is a frequent occurrence." *Id.* (emphasis added); *see also* Ron Kalyan, Comment, *Regulation of Nude Dancing in Bring Your Own Bottle Establishments in the Commonwealth of Pennsylvania: Are the Commonwealth's Municipalities Left to Fend for Themselves?*, 99 DICK. L. REV. 169, 172 (1994) (discussing fact that Pennsylvania regulates strip clubs mainly through alcohol restrictions contained in state liquor code). *See generally* Tracy Swartz, *State High Court Looks at Strip Club Law: City Restricts What Dancers Can Wear When Booze Is Served*, CHI. SUN TIMES, Apr. 3, 2006, at 9 (detailing state's argument that excessive alcohol consumption at erotic dance establishments has "undesirable secondary impact" on community).

11. *See, e.g.*, ALA. ADMIN. CODE r. 20-X-6-.11(1)-(4) (2005) (proscribing activities from occurring on licensed premises, including "bottomless dancing," and simulation of "sexual intercourse"); ARK. CODE ANN. §3-9-306(4) (2006) (prohibiting clubs with liquor license from allowing "lewd, immoral, or improper entertainment"); 804 KY. ADMIN. REGS. 5:060 (2006) (prohibiting "lewd, immoral, or obscene entertainment" from occurring on premises licensed to sell liquor); MO. REV. STAT. § 311.710(1)(3) (2006) (creating grounds for license removal if club permits "any lewd, immoral, or improper entertainment"); N.J. ADMIN. CODE § 13:2-23.6(a)(1) (2005) (proscribing "[a]ny lewdness or immoral activity" on licensed premises); PA. CONS. STAT. § 4-493(10) (2006) (restricting licensee from allowing "dancing, theatricals or floor shows" connected with "lewd, immoral or improper entertainment"); S.C. CODE ANN. § 61-4-580(4) (2006) (restricting clubs with liquor license from "permit[ting] lewd, immoral, or improper entertainment"); UTAH CODE ANN. § 32A-5-107(38)(a)-(g) (2006) (listing several sexual acts and forms of erotic expression deemed by statute to be "contrary to public welfare and morals"); W. VA. CODE § 60-7-12(2) (2006) (making it unlawful for licensee to permit "obscene, lewd, immoral or improper entertainment" to occur on licensed premises).

schemes.[12] In both *Conchatta Inc. v. Miller*[13] and *181 South Inc. v. Fischer*,[14] the Third Circuit analyzed multiple constitutional challenges launched against each of the respective state statutes.[15] To complicate the problem, the Third Circuit was operating in an area of Supreme Court jurisprudence not heralded for its clarity.[16] The Third Circuit upheld the New Jersey statute, while striking down the similarly-worded Pennsylvania statute.[17] In doing so, the Third Circuit joined several other circuit courts in contributing to the uncertainty surrounding the proper constitutional analysis to be applied to constitutional challenges in the sex industry context.[18]

This Casebrief will show that the Third Circuit's recent approach to the regulation of exotic dance establishments is incomplete, in that (1) it

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12. *See* N.J. ADMIN. CODE § 13:2-23.6(a)(1) (2005) (limiting aspects of nude dance in premises with liquor licenses through use of language substantially equivalent to Pennsylvania statute); PA. CONS. STAT. § 4-493(10) (2006) (prohibiting clubs with liquor licenses from permitting litany of activities on premises). In relation to erotic dance, the Pennsylvania statute reads: "It shall be unlawful . . . to permit in any licensed premises or in any place operated in connection therewith any *lewd, immoral or improper entertainment*, regardless of whether a permit to provide entertainment has been obtained or not." *Id.* (emphasis added).

13. 458 F.3d 258 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844).

14. 454 F.3d 228 (3d Cir. 2006).

15. *Compare Conchatta*, 458 F.3d at 266-68 (applying combination of Supreme Court plurality approaches and holding Pennsylvania statute was overly broad because it regulated "mainstream" entertainment), *with 181 South*, 454 F.3d at 231-34 (avoiding complex constitutional analysis by finding "limiting construction" and, accordingly, upholding New Jersey statute).

16. *See* Andy's Rest. & Lounge, Inc. v. City of Gary, 466 F.3d 550, 553 (7th Cir. 2006) (admitting that "[t]here is some confusion about which line of cases should be used" when evaluating ordinances regulating strip clubs); Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 713-15 (7th Cir. 2003) (acknowledging two lines of Supreme Court case law, one dealing with time and place regulations and another focusing on suppression of expressive conduct); Petition for Writ of Certiori at 14, Miller v. Conchatta, Inc., No. 06-844 (Dec. 14, 2006), 2006 WL 3740634 ("While the Court has addressed the regulation of nudity, nude dancing and adult entertainment on several occasions, the lower courts . . . are not sure how to apply these decisions to new cases."); *see also* Bradley J. Shafer & Andrea E. Adams, *Jurisprudence of Doubt*, 84 MICH. B.J. 22, 22 (2005) ("Perhaps no topic of law has proven more troublesome for members of the Supreme Court to reach a consensus as that of the jurisprudence dealing with sex."). *See generally* Adler, *supra* note 3, at 1121-22 (discussing Supreme Court's inconsistent and non-binding analyses in nude dance regulation context).

17. *See* Jason Cato, *Court Strips State of Nude Dance Ban*, PITT. TRIB. REV., Aug. 19, 2006, at B1 (discussing recent Third Circuit decisions and impact on strip clubs in respective states); Carrie Weimer, *Free Speech or Scantily Clad Lewd Behavior?*, ST. PETERSBURG TIMES, Sept. 25, 2006, at 1A (noting that one commentator stated "I can't answer why there was a different decision made by the same judges . . . [in] cases with identical facts . . . ." For a further discussion of the divergent holdings in *Conchatta* and *181 South*, see *infra* notes 106-34 and accompanying text.

18. For a further discussion of the growing variances among the circuit courts in approaching the regulation of sex-based businesses, see *infra* notes 63-105 and accompanying text.

is arguably discordant with the Supreme Court precedent and (2) it impractically rejects the application of an "implied narrowing construction."[19] Part II of this Casebrief discusses the Supreme Court's fractured and contentious jurisprudential approach to sex industry regulations, and describes the approaches other circuit courts apply when confronting similar statutory challenges.[20] Part III focuses on the analytical structure of the Third Circuit's recent decisions.[21] It also discusses suggested amendments to the Pennsylvania statute and proposes a synthesized analytical guide for practitioners who may challenge similar statutes in the future.[22] Finally, Part IV places the recent Third Circuit cases into the larger societal context—the battle over whether morality legislation has its place in current state statutory frameworks.[23]

II. BACKGROUND

A. *The Supreme Court's Approaches to Erotic Expression Regulations*

Because the Supreme Court has not spoken definitively on the issue of alcohol regulation at strip clubs, circuit courts are forced to adopt an analytical framework by analogy.[24] As referenced, the Supreme Court has

19. For a further discussion of why the Third Circuit's approach is arguably incomplete, see *infra* notes 135-57 and accompanying text.

20. For a further discussion of the varying approaches the Supreme Court has adopted, see *infra* notes 24-62 and accompanying text. For a discussion of how the other circuit courts have disposed of similar statutory challenges, see *infra* notes 63-105 and accompanying text.

21. For a further discussion of the Third Circuit's holdings in *Conchatta* and *181 South*, see *infra* notes 106-34 and accompanying text.

22. For a further discussion of the likely amendments to the Pennsylvania statute struck down in *Conchatta*, and a synthesized analytical approach to adopt when challenging the amended statute, see *infra* notes 135-57 and accompanying text.

23. For a further discussion of the recent Third Circuit opinions within a larger societal context, see *infra* notes 158-63 and accompanying text.

24. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (holding that Twenty-first Amendment did not justify abridging First Amendment right to free speech); California v. LaRue, 409 U.S. 109, 114-20 (1972) (relying on Twenty-first Amendment to justify state regulation of nightclub). In *LaRue*, the court was presented with the precise issue that the Third Circuit was presented with in *Conchatta* and *181 South*. *See LaRue*, 409 U.S. at 111-12 (reciting alcohol regulations). The Department of Alcohol Beverage Control promulgated regulations restricting "topless" and "bottomless" dance clubs from engaging in certain activities. *See id.* at 112 (detailing challenged ordinance). Relying on the Twenty-first Amendment, the Court held that the regulations were constitutional. *See id.* at 118-19 (stating holding). Had this decision stood, the recent Third Circuit cases could have been more easily decided. The Court, however, drastically undercut the reasoning in *LaRue* when releasing its *44 Liquormart* decision. *See 44 Liquormart*, 517 U.S. at 515-16 (limiting *LaRue*'s precedential value). The Court backed away from the Twenty-first Amendment approach taken in *LaRue*, reasoning that "the Court's analysis in *LaRue* would have led to precisely the same result if it had placed no reliance on the Twenty-first Amendment." *Id.* (resting holding on different reasoning than in *LaRue*); *see also* Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 710 (7th Cir. 2003) (reasoning that Court's holding in *44 Liquormart* "severely diminished" precedential value of Court's decision in *LaRue*); Yablon,

acknowledged that the First Amendment provides some minimal protection to erotic expression.[25] The Court, however, has not taken a clear or binding approach when evaluating the constitutionality of state and local restrictions on nude or semi-nude dance.[26] Although littered with plurality opinions, two lines of analysis have been fleshed out and applied by the circuit courts.[27] Importantly, each line of analysis implements a standard of review less stringent than strict scrutiny, as the Court found the challenged statutes to be content-neutral.[28] The distinction between content-based statutes and content-neutral statutes often determines the outcome of a First Amendment challenge.[29] Content-neutral statutes are unrelated to the suppression of expression; content-based statues involve governmental interests focused on the content of expression.[30] Although the distinction between content-based and content-neutral statutes exists, the Court has yet to provide a clear method for discerning when a statute falls

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supra note 10, at 567-68 ("[R]ecent Supreme Court decisions seem to indicate that the Twenty-First Amendment cannot be used to regulate nude dancing, although for decades courts had been upholding such regulations based on the power granted to states under the Twenty-First Amendment.").

25. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (reasoning that erotic dance is protected speech). For a further discussion of the Court's cautioned willingness to expand the First Amendment to protect erotic dance, see *supra* note 3 and accompanying text.

26. *See* Andy's Rest. & Lounge, Inc. v. City of Gary, 466 F.3d 550, 553 (7th Cir. 2006) (admitting that there was "some confusion" about which line of Supreme Court cases to follow when analyzing statutes similar to statute Third Circuit recently confronted); *see also* Kevin Case, Note, *"Lewd and Immoral": Nude Dancing, Sexual Expression, and the First Amendment*, 81 CHI.-KENT L. REV. 1185, 1186 (2006) (acknowledging that Supreme Court's confrontations with nude dancing cases have "proved vexing" and recent cases have "failed to yield a majority opinion"); Lynn Mills Eckert, *Language Games: Regulating Adult Establishments and the Obfuscation of Gender*, 15 S. CAL. REV. L. & SOC. JUST. 239, 242-45 (2006) (discussing convoluted background of Supreme Court decisions concerning sex industry establishments).

27. *See Andy's Rest.*, 466 F.3d at 553 (noting two lines of Supreme Court case law floating close to, but not directly on point with issue). For a further discussion of the two case lines, see *infra* notes 28-62 and accompanying text.

28. *See* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 335 (2006) ("Similarly, 'content-based discriminations are subject to strict scrutiny because of the weight of government behind the disparagement or suppression of some messages . . . .'").

29. *See* Wright, *supra* note 28, at 333-34 (noting that commentators have gone as far as stating that "'virtually every free speech case turns on . . . the distinction between content-based and content-neutral laws'").

30. *See Pap's A.M.*, 529 U.S. at 289 (stating test for determining nature of statute).

> If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard.

Id. (citations omitted).

into these categories.[31] Nevertheless, when a statute is deemed content-neutral, the Court is less concerned with states infringing upon constitutional rights, and is more willing to apply a less searching standard of review.[32]

The first line of analysis is derived from the Court's holdings in *City of Los Angeles v. Alameda Books, Inc.*[33] and *City of Renton v. Playtime Theatres, Inc.*[34] In these cases, the Court classified the challenged statutes as time, place and manner restrictions aimed at combating the secondary effects of adult entertainment.[35] By couching the discussion as such, the Court established a lower level of requisite state justification for the statutes.[36] In both cases, the Court confronted zoning ordinances aimed at locating strip clubs in specific areas throughout the city.[37] In *Renton*, the Court outlined a three step inquiry: (1) whether the regulation was a total ban on the activity; (2) whether the regulation was content-neutral; and (3) whether the time, place and manner regulation "was designed to serve a substantial governmental interest and [did] not unreasonably limit alter-

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31. *See* Wright, *supra* note 28, at 334-37 (discussing distinction between content-neutral and content-based statutes). Wright further notes that "[i]n attempting to [determine the nature of the statute], courts incompatibly talk both of focusing their inquiry on the text or face of the regulation, and of a broader judicial inquiry into the legislative intent, purpose, and justification of the regulation." *Id.* at 337 (detailing courts' approaches to distinguishing between content-based and content-neutral statutes).

32. *See, e.g.*, *Pap's A.M.*, 529 U.S. at 289 (discussing method for determining correct standard of review); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (holding that statute was content-neutral, and reasoning that appropriate standard was "whether the Renton ordinance [was] designed to serve a substantial governmental interest").

33. 535 U.S. 425 (2002) (plurality opinion).

34. 475 U.S. 41, 50-52 (1986) (holding that city's zoning ordinance, requiring adult theaters to be located in specific areas, was constitutional and did not offend First Amendment protections).

35. *See Alameda*, 535 U.S. at 438 ("In *Renton*, we specifically refused to set . . . a high bar for municipalities that want to address merely the secondary effects of protected speech."); *Renton*, 475 U.S. at 48 ("In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations . . . ."); *see also* Adler, *supra* note 3, at 1119-21 (discussing impact of *Renton*'s secondary effects analysis on later cases, reasoning that it "paved the way" for the Court's decision in *Pap's A.M.*).

36. *See Alameda*, 535 U.S. at 438 (acknowledging that Court was explicit in declining to adopt high standard of justification for state's wanting to address secondary effects).

37. *See id.* at 426 (discussing facts). In *Alameda*, the Los Angeles Police Department had conducted a study, and found that robbery and prostitution rates, as well as other crimes, grew at a faster rate in areas with concentrated adult entertainment establishments. *See id.* (same). As a result, the city ordinance banned multiple adult entertainment businesses from operating in the same building. *See id.* (detailing content of city ordinance). In *Renton*, the city council "imposed a moratorium" on adult entertainment businesses in certain zoned areas throughout the city. *See Renton*, 475 U.S. at 44-45 (explaining zoning scheme).

native avenues of communication."[38] After analyzing the factual backdrop to the legislation, the Court upheld the zoning ordinance, reasoning that a "city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'"[39]

Likewise, the plurality in *Alameda* followed the holding and analysis set forth in *Renton*, and placed its focus on the standard by which such zoning regulations were to be adjudicated.[40] Even though the Court eventually settled on the three-prong test established in *Renton*, the Court was by no means in agreement on this standard of review.[41] Interestingly, in his concurrence, Justice Scalia explained that the First Amendment was entirely inapplicable.[42] Despite Justice Scalia's spirited concurrence and the splintered opinion, at least one circuit has applied the *Renton/Alameda* line of cases to similar statutory challenges.[43]

The second line of analysis, established in *United States v. O'Brien*[44] and upheld in *Barnes v. Glen Theatre, Inc.*,[45] is directly applicable to regula-

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38. *Renton*, 475 U.S. at 50. (establishing "appropriate inquiry" for analyzing challenged zoning statute).

39. *Id.* (quoting Young v. Am. Mini Theaters, 427 U.S. 50, 71 (1976)) (detailing weight given by Court to developed state interests); *see also* Tucker, *supra* note 8, at 402 (examining what municipalities should include in prospective legislation in light of *Renton* line of cases). Specifically, Tucker proposes that legislation should contain the following:

> (1) a legislative record sufficient to show a nexus between adult uses and particular secondary effects and a legislative finding that the legislation addresses those secondary effects; (2) a definition section which is neither vague nor overbroad; and (3) sufficient available land for the location or relocation of adult businesses.

Id.

40. *See Alameda*, 535 U.S. at 438-39 (discussing impact of *Renton* on analysis). Specifically, the Court reasoned that "we specifically refused to set . . . a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence . . . for demonstrating a connection between speech and a *substantial, independent* government interest." *Id.* at 438 (emphasis added).

41. *See id.* at 443 (beginning concurring opinions). Justices Scalia and Kennedy concurred in the Court's decision. *See id.* at 443-53 (discussing reasons for concurrence). Justices Souter, Stevens, Breyer and Ginsburg dissented. *See id.* at 453-55 (announcing dissent).

42. *See id.* at 443-44 (concurring in Court's order); *see also* Case, *supra* note 26, at 1194-95, 1205-06 (discussing Justice Scalia's approach and detailing fact that Scalia does not find First Amendment to be implicated).

43. *See* Andy's Rest. & Lounge, Inc. v. City of Gary, 466 F.3d 550, 553 (7th Cir. 2006) ("The *Alameda Books/Renton* line of cases deal with zoning ordinances aimed at dispersing adult entertainment businesses throughout a community, which are considered time, place, and manner restrictions."); *see also* Petition for Writ of Certiori at 19-20, Miller v. Conchatta, Inc., No. 06-844 (filed Dec. 14, 2006), 2006 WL 3740634 (discussing various lines of Supreme Court reasoning currently being applied in circuit courts).

44. 391 U.S. 367 (1968).

45. 501 U.S. 560, 567 (1991) (plurality opinion) (applying four-prong *O'Brien* test to Indiana public indecency statute and holding that statute was justified "despite its incidental limitations on some expressive activity").

tions that have the incidental effect of curtailing or suppressing some expressive conduct.[46] Under the *O'Brien* standard, a governmental suppression of expressive conduct is justified if:

> (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[47]

In *Barnes*, when deciding whether a statute requiring nude dancers to wear "pasties" and "G-strings" was constitutional, the Court, in another fractured plurality, applied the four-prong test posited in *O'Brien*.[48] Although the *Barnes* Court upheld the Indiana statute, a majority approach was not attained.[49] Justice Rehnquist rested his decision on moral grounds, reasoning that the statute's purpose of "protecting societal order and morality" provided a sufficient justification.[50] Again, Justice Scalia concurred, arguing that the statute was not subject to First Amendment scrutiny at all.[51] Justice Souter also concurred, and appearing to rely on the reasoning presented in *Renton*, he furthered the confusion by focusing

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46. *See id.* at 563-65 (evaluating constitutionality of case and statute proscribing public nudity); *O'Brien*, 391 U.S. at 373-75 (confronting statute that directly prohibited *act of* destroying draft card); *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (discussing proper standard of review). The decision between strict and intermediate scrutiny in this context hinges on legislative intent. If the legislature intends to suppress speech, courts are likely to apply strict scrutiny; however, if the legislature's intent is benign, intermediate scrutiny is appropriate (even if some speech is suppressed incidentally). For a further discussion of the proper standard of review, see *supra* notes 28-32 and accompanying text.

47. Conchatta v. Miller, 458 F.3d 258, 267 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844) (citing to standard of review established in *O'Brien* for content-neutral regulation); *see also* Tucker, *supra* note 8, at 395-96 (discussing and detailing four-prong approach announced in *O'Brien* for non-expressive conduct).

48. *See Barnes*, 501 U.S. at 567-72 (applying *O'Brien* standard to statute and holding that statute was sufficiently justified).

49. *See* Adler, *supra* note 3, at 1119 (discussing Court's inability to reach majority decision).

50. *Barnes*, 501 U.S. at 568 (discussing history of morality legislation). In his analysis of morality legislation, Justice Rehnquist reasoned:

> Public indecency statutes of this sort are of ancient origin and presently exist in at least 47 States. Public indecency, including nudity, was a criminal offense at common law, and this Court recognized the common-law roots of the offense of 'gross and open indecency'. . . . Public indecency statutes such as the one before us reflect moral disapproval of people appearing in the nude among strangers in public places.

Id. (detailing purpose of statute).

51. *See id.* at 572 (concurring in Court's holding). Justice Scalia explained that in his view, "the challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regu-

his inquiry on the state's interest in combating the secondary effects of strip clubs.[52]

Later, in *City of Erie v. Pap's A.M.*,[53] a majority of the Court agreed that the four-pronged *O'Brien* standard applied to public nudity cases; however, the majority could not agree on whether the statute at issue furthered a substantial state interest.[54] Importantly, the Court's focus shifted away from the plurality opinion authored by Justice Rehnquist in *Barnes*.[55] Instead of resting the decision on the importance of maintaining a level of morality, four of the Justices placed the issue within the purview of secondary effects.[56] After determining that the law was content-neutral, in that it was aimed at curtailing harmful secondary effects rather than suppressing expression, the Court applied the *O'Brien* analysis and upheld the statute.[57] Justice Stevens was not fond of the newly created synergy between *O'Brien* and the secondary effects doctrine relied on in *Renton*.[58] In his dissent, Justice Stevens argued that the *O'Brien* test is aimed at incidental restrictions on expression, while the secondary effects doctrine was to

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lating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." *Id.*

52. *See id.* at 583-84 (discussing *Renton*'s impact on *O'Brien* analysis).

53. 529 U.S. 277 (2000) (plurality opinion).

54. *See id.* at 295-99 (discussing facts of case in context of *O'Brien* test). The Court's opinion, authored by Justice O'Connor, first found that Pennsylvania was acting within the scope of its police powers. *See id.* at 296 (discussing first prong of analysis). Second, because the nude dancing that sought to be regulated was the same as in *Renton*, the secondary effects argument was upheld to fulfill the second prong of the *O'Brien* test. *See id.* at 297 (allowing secondary effects to fulfill *O'Brien* prong). The Court also noted that the statute was a content-neutral statute, aimed at regulating conduct and not expression—thereby giving the state "sufficient leeway" when justifying the statute. *See id.* at 298 (holding *O'Brien* test was satisfied).

55. *See* Adler, *supra* note 3, at 1119-21 (detailing shift in analytical approach in *Pap's A.M.*). "In a break from *Barnes*, however, five members of the [*Pap's A.M.*] Court adopted a new analysis. Employing this analysis, the four-member plurality justified the purpose of the law banning nudity not by an appeal to morality, but by a concern for 'secondary effects.'" *Id.* at 1119 (same).

56. *See Pap's A.M.*, 529 U.S. at 296 ("We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing."); *see also* Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 456-58 (2004) (detailing emergence of secondary effects test under *Renton*, reasoning that such ordinances are aimed at "limit[ing] negative secondary effects of adult businesses, rather than suppress[ing] speech").

57. *See Pap's A.M.*, 529 U.S. at 296-302 (applying *O'Brien* test).

58. *See id.* at 317 (Stevens, J., dissenting) (reasoning that plurality, for first time, applied secondary effects to total suppression of expression situation). Justice Stevens explained that "[t]he present use of [the secondary effects] rationale, however, finds no support whatsoever in our precedents. Never before have we approved the use of that doctrine to justify a total ban on protected First Amendment expression." *Id.* at 319 (indicting plurality's approach as lacking foundation).

be applied to cases involving the direct regulation of speech by targeting its harmful secondary effects.[59]

After digesting the foregoing case law, it is not surprising that circuit courts have struggled to apply a consistent standard when addressing statutes aimed at regulating nudity in the public context.[60] Moreover, Supreme Court precedent does not necessarily speak directly to the statutes regulating alcohol consumption that were at issue in the recent Third Circuit cases.[61] Accordingly, lower courts have wavered between the standards and justifications set forth in *Renton* and *O'Brien*.[62]

B. *Confusion Abound: Circuit Courts Struggle to Find Consistency*

Currently, when considering state regulation of strip clubs (and other similar adult entertainment clubs), circuit courts are split in two respects.[63] First, circuit courts have struggled with implementing a correct and consistent analytical framework.[64] Second, circuit courts are split over

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59. *See id.* at 326 ("But [the plurality] cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.").

60. *See, e.g.*, Giovani Carandola, Ltd. v. Fox, 470 F.3d 1074, 1084-87 (4th Cir. 2006) (focusing more on limiting construction as opposed to *Barnes* or *Renton* analysis); Andy's Rest. & Lounge, Inc. v. Gary, 466 F.3d 550, 553 (7th Cir. 2006) (choosing not to decide between lines, but applying *Renton* line of cases based on procedural posture of case); Conchatta, Inc. v. Miller, 458 F.3d 258, 267-68 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844) (applying *O'Brien* analysis to challenged statute); Artistic Entm't, Inc. v. Warner Robins, 223 F.3d 1306, 1308-09 (11th Cir. 2000) (explicitly applying *O'Brien* analysis to prohibition on sale of alcohol at adult entertainment venues); Triplett Grille, Inc. v. Akron, 40 F.3d 129, 134-35 (6th Cir. 1994) (relying on Justice Souter's concurring opinion in *Barnes* when framing analysis).

61. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996) (removing Twenty-first Amendment as means of justifying state regulation of adult entertainment industry). For a further discussion of reasons the Court lacks a direct stance on alcohol regulations, see *supra* note 24 and accompanying text.

62. For a discussion of wavering views, see *supra* note 60 and accompanying text.

63. For a further discussion of the circuit splits, see *infra* notes 64-105 and accompanying text.

64. *See, e.g., Giovani Carandola*, 470 F.3d at 1081-82 (citing to both *Renton* and *Pap's A.M.* in establishing analytical framework); *Andy's Rest.*, 466 F.3d at 553-54 (declining to choose proper standard, but nevertheless operating under *Renton*); Fantasy Ranch, Inc. v. Arlington, 459 F.3d 546, 558 (5th Cir. 2006) (applying *O'Brien* with secondary effects test developed by Justice Souter); R.V.S., LLC v. Rockford, 361 F.3d 402, 410 (7th Cir. 2004) (discussing challenged ordinance in purview of *Renton* and progeny); SOB, Inc. v. County of Benton, 317 F.3d 856, 862 (8th Cir. 2003) (discussing Supreme Court case law in area and analyzing secondary effects justification); *Triplett Grille*, 40 F.3d at 133-35 (acknowledging that "*Barnes* is the law of the land" but still relying on Justice Souter's secondary effects analysis). For a further discussion of the Third Circuit's new approach, see *infra* notes 106-34 and accompanying text.

whether to accept an implied narrowing construction as a means of saving overly broad statutory language.[65]

1. *Dancing Around the Correct Standard of Review*

Circuit courts agree that the Supreme Court has been far from clear in establishing proper review standards.[66] As the Tenth Circuit stated, Supreme Court jurisprudence in this area is littered "[with] fractured decisions with no majority opinion and no clear statement of controlling doctrine."[67] As a result, it appears that circuit courts are either: (1) applying *Renton* and its progeny; or (2) applying some combination of *Renton* and *O'Brien* in light of Justice Souter's plurality opinion in *Pap's A.M.*[68]

The Seventh Circuit has applied the *Renton* line of analysis, although the court admits that "some confusion" exists over which standard to apply.[69] Specifically, the court has been unsure whether to address the statute as a time, place and manner restriction (and therefore subject to *Renton*) or as a regulation of expressive conduct (thereby relegated to the synthesized *O'Brien* analysis).[70] Recently, the Seventh Circuit noted that

65. *Compare* Odle v. Decatur County, 421 F.3d 386, 396 (6th Cir. 2005) (holding administrative practice fails as narrowing construction), *and* Ways v. City of Lincoln, 274 F.3d 514, 519-20 (8th Cir. 2001) (holding implication alone cannot cure statute's broad language), *with SOB*, 317 F.3d at 864-65 (accepting County Attorney's promise as sufficient implied narrowing construction), *and* Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 483 (5th Cir. 2002) (using administrative practice as narrowing construction).

66. *See, e.g.*, *Andy's Rest.*, 466 F.3d at 553 (noting that "some confusion" exists over which standard of review to follow); Heideman v. S. Salt Lake City, 348 F.3d 1182, 1184-85 (10th Cir. 2003) (detailing "fractured" nature of Supreme Court's jurisprudence in this area); Peek-a-Boo Lounge v. Manatee County, 337 F.3d 1251, 1255 (11th Cir. 2003) (indicating that no clear majority had emerged in Court's decisions); LLEH, Inc. v. Wichita County, 289 F.3d 358, 365 (5th Cir. 2002) (acknowledging that First Amendment protection to nude dancing exists, but admitting that standard of review for such cases is not clear); *Triplett Grille*, 40 F.3d at 133 (declaring that choice of review was "vexing").

67. *Heideman*, 348 F.3d at 1184-85 (discussing applicable standard of review).

68. *Compare Andy's Rest.*, 466 F.3d at 553-54 (applying *Renton* and progeny to non-alcohol related ordinance), *with SOB*, 317 F.3d at 863-64 (relying on combination of *Alameda* and *Pap's A.M.* in granting locality large amount of deference when combating secondary effects of live nude dance).

69. *See Andy's Rest.*, 466 F.3d at 553-54 (applying *Renton*'s secondary effects analysis). The Seventh Circuit detailed two potential lines of Supreme Court analysis before it decided to proceed under *Renton* and its progeny. *See id.* at 553 (determining which analytical framework to apply); *R.V.S.*, 361 F.3d at 407-08 (subjecting zoning ordinance to *Renton* and *Alameda* analysis); Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 713 (7th Cir. 2003) ("While the *O'Brien* test is still utilized by the Supreme Court in analyzing the constitutionality of public indecency statutes, the Court currently evaluates adult entertainment zoning ordinances as time, place, and manner regulations.") (citation omitted).

70. *See Ben's Bar*, 316 F.3d at 714 ("Therefore, it is not entirely clear whether Section 5(b) should be analyzed as a time, place, and manner restriction or as a regulation of expressive conduct under *O'Brien*'s four-part test."). Section 5(b) prohibited the sale of alcohol on the premises of a sexually oriented business. *See id.* at 705-06 (describing challenged statute).

under either line of cases, the "crucial analytical step" was the same—intermediate scrutiny was appropriate.[71] Further, the court expressly disclaimed that its choice between approaches was not to have binding effect in the circuit.[72] Nevertheless, pursuant to the most recent Seventh Circuit decisions, the circuit currently operates under the standards set forth in *Renton* when addressing statutes aimed at regulating strip clubs.[73]

The second line of analysis is a synthesized standard that has its roots in the Court's plurality opinion in *Pap's A.M.*[74] As in *Pap's A.M.*, circuits have adopted Justice Souter's approach from *Barnes*, which arguably combines *Renton*'s secondary effects doctrine with the *O'Brien* analysis relied on in *Barnes*.[75] Reasoning that Justice Souter's opinion was a "common underlying approach," the Sixth Circuit has adopted Justice Souter's secondary effects concurrence.[76] The Eighth Circuit has also adhered to Justice Souter's synthesized standard.[77] In one case, when a strip club challenged a public indecency ordinance, the Eighth Circuit applied the first three prongs of the *O'Brien* analysis, and adopted the secondary effects doctrine

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71. *See Andy's Rest.*, 466 F.3d at 553 (discussing similarities between approaches).

72. *See id.* (deciding to operate under *Renton* because both parties briefed the case within *Renton* context).

73. *See id.* (applying *Renton* analysis to zoning statute). For a further discussion of the Seventh Circuit's current approach, see *supra* notes 69-73 and accompanying text.

74. *See* Erie v. Pap's A.M., 529 U.S. 277, 295-96 (2000) (plurality opinion) (conducting *O'Brien* analysis with emphasis on *Renton*'s secondary effects analysis); *see also* Adler, *supra* note 3, at 1119 ("[T]he four-member plurality [in *Pap's A.M.*] justified the purpose of the law banning nudity not by an appeal to morality, [as was the case in *Barnes*,] but by a concern for '*secondary effects.*'") (emphasis added); Case, *supra* note 26, at 1201 (discussing Justice O'Connor's use of secondary effects in conjunction with *O'Brien* analysis).

75. *See, e.g.*, Conchatta, Inc. v. Miller, 458 F.3d 258, 265-66 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844) (discussing whether statutory language satisfied *Pap's A.M.* standards); Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546, 557 (5th Cir. 2006) (applying synthesized approach); SOB, Inc. v. County of Benton, 317 F.3d 856, 862 (8th Cir. 2003) (isolating critical inquiry, within context of *O'Brien*, as whether purpose justifying statute was grounded in secondary effects); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 133-35 (6th Cir. 1994) (announcing *Barnes* as "law of the land" but also focusing inquiry on secondary effects doctrine).

76. *See Triplett Grille*, 40 F.3d at 133 (discussing *Barnes* and secondary effects doctrine). The court explained that "[it] agree[d] with the district court that Justice Souter's opinion [in *Barnes*] may properly be regarded as providing the proper framework for addressing the question presented here." *Id.* at 135. It is interesting to note that in *Triplett*, the Seventh Circuit adopted Justice Souter's *Barnes* concurrence (the secondary effects analysis) prior to the plurality of the Court adopting it in *Pap's A.M.* *See id.* at 129 (issuing decision in 1994).

77. *See SOB*, 317 F.3d at 862 ("Applying these Supreme Court precedents to this case, we can quickly isolate the critical inquiry . . . [whether] the [statute's] purpose is to combat harmful secondary effects . . . ."). In making this statement, the Eighth Circuit cites directly to the Court's plurality decision in *Pap's A.M.* *See id.* (citing *Pap's A.M.*).

as the fourth prong of the test.[78] Likewise, the Fourth Circuit has accepted the combined standard, citing to both *Renton* and *Pap's A.M.*[79] As in the Sixth and Eighth Circuits, the Fourth Circuit focused its inquiry on the alleged secondary effects that provided justification for the statute.[80] Recently, the Fifth Circuit also relied on *Pap's A.M.* and the secondary effects analysis, ultimately holding that the purpose behind the challenged statute was "predominately [to target] . . . the prevention of secondary effects."[81] As this Casebrief discusses, it appears that the Third Circuit has also adopted this synthesized approach.[82]

2. *Extending Too Far: Saving Shakespeare from Overly Broad Statutory Language*

A judicially-created narrowing construction is a statutory interpretation by a state court or state agency that limits the reach of statutory phrases or terms, thus allowing a federal court to avoid finding a statutory provision to be overbroad solely because of the statutory language.[83] As the Third Circuit has explained, "[a] narrowing construction can save an otherwise unconstitutional statute by eliminating the statute's substantial overbreadth."[84] Judicially-created narrowing constructions are freely accepted by federal courts when interpreting the breadth of state statutes.[85]

78. *See id.* at 862-63 (discussing whether sufficient evidence of harmful secondary effects exists while conducting four-prong *Barnes* analysis). Interestingly, the Eighth Circuit applied the secondary effects analysis after noting that the public indecency ordinance was outside the scope of *Renton* and *Alameda*. *See id.* at 860 (noting that "[t]his case involves the second type of regulation, use of a public indecency ordinance to totally prohibit live nude dancing").

79. *See* Giovani Carandola, Ltd. v. Fox, 470 F.3d 1074, 1082 (4th Cir. 2006) (confronting revised statute after initially declaring statute unconstitutional in previous hearing).

80. *See id.* (allowing, pursuant to *Pap's A.M.*, state to rely on evidentiary findings of harmful secondary effects established in *Renton*).

81. Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546, 557 (5th Cir. 2006) (noting that *Pap's A.M.* was good starting point for determining level of scrutiny to apply to challenged statute).

82. *See* Conchatta, Inc. v. Miller, 458 F.3d 258, 267 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844) (targeting secondary effects sufficient for Third Circuit to apply *O'Brien* intermediate standard of review). For a further discussion of *Conchatta*, see *infra* notes 121-34 and accompanying text.

83. *See* 181 South, Inc. v. Fischer, 454 F.3d 228, 234-35 (3d Cir. 2006) (discussing application of narrowing construction). The *181 South* court reasoned that "[a] limiting construction may be found where a state court or enforcement agency has opined as to how the statute should be interpreted." *Id.* at 234 (same).

84. *See Conchatta*, 458 F.3d at 263 (3d Cir. 2006) (determining whether narrowing construction to state statute had been supplied by state courts or state enforcement agencies). The Third Circuit acknowledged the impact of a narrowing construction, but cautioned that it would not "rewrite a state law to conform it to constitutional requirements." *Id.* (contemplating effect of narrowing construction).

85. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (holding that judicially-created narrowing construction can save overly broad statutory language); *Conchatta*, 458 F.3d at 263 (reasoning that court *must* "consider any limiting con-

An implied narrowing construction relies on past administrative practice, such as enforcement tendencies, rather than on a state court holding as a means of limiting the statute's breadth.[86] Although the implied narrowing construction is, in principle, a practical judicial solution to an overly broad statutory term or phrase, circuit courts presented with the argument have split on whether to accept the concept.[87] The Third, Sixth and some Eighth Circuit precedent have rejected implied narrowing constructions.[88] Meanwhile, the Fifth and other Eighth Circuit precedent have accepted administrative practice as a viable narrowing technique.[89]

The Sixth Circuit has expressly declined to accept an implied narrowing construction when no judicially-created limitation was present.[90] For example, in *Odle v. Decatur County*,[91] the County argued that the court should uphold statutory language requiring "adult-oriented businesses" to obtain licenses because there were no venues in the county wherein mainstream performances were likely to occur; thus, it was impossible to enforce the statute broadly.[92] The court quickly dismissed the argument, stating that "the fact that [the] County purportedly lacks, at the present

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struction that a state court or enforcement agency has proffered"); Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 517 (4th Cir. 2002) (expressing willingness to accept narrowing construction, but finding that no judicially-created narrowing construction was readily available).

86. *See Conchatta*, 458 F.3d at 265 (noting that state proffered "past practice" as impliedly narrowing breadth of statutory language); *Odle v. Decatur County*, 421 F.3d 386, 396 (6th Cir. 2005) (acknowledging implied narrowing construction argument, but declining to accept same); SOB, Inc. v. County of Benton, 317 F.3d 856, 865 (8th Cir. 2003) (allowing past practice to suffice as implied narrowing construction).

87. *Compare Conchatta*, 458 F.3d at 265 (rejecting concept of implied narrowing construction), *Odle*, 421 F.3d at 396 (holding administrative practice alone does not create narrowing construction), *and* Ways v. City of Lincoln, 274 F.3d 514, 519-20 (8th Cir. 2001) (refusing to limit statute's reach in light of statute's excessively large scope), *with SOB*, 317 F.3d at 864-65 (accepting implied narrowing construction on basis of County Attorney's affidavit), *and* Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 483 (5th Cir. 2002) (allowing past and anticipated future administrative practice to satisfy narrowing construction requirements).

88. *See Conchatta*, 458 F.3d at 265 (refusing to acknowledge narrowing construction); *Odle*, 421 F.3d at 396 (holding administrative practice insufficient means of limiting statute's reach); *Ways*, 274 F.3d at 519-20 (rejecting implied narrowing construction).

89. *See SOB*, 317 F.3d at 864-65 (acknowledging implied narrowing construction); *Baby Dolls Topless Saloons*, 295 F.3d at 483 (adopting narrowing construction based on administrative practice).

90. *See Odle*, 421 F.3d at 396 (analyzing implied narrowing construction argument). Specifically, the statute required "all operators of 'adult-oriented establishments'. . . to obtain licenses from the Board." *See id.* at 388-89 (detailing challenged statute).

91. 421 F.3d 386 (6th Cir. 2005).

92. *See id.* at 388-89 (reasoning that defendants wanted to avoid overbreadth on ground that it was not reasonably likely for mainstream entertainment to occur within geographical area covered by statute).

time, venues likely to hold performances of literary or artistic value should [not] affect our construction of the ordinance's plain language."[93] The Sixth Circuit continued its attack, reasoning that to adopt an implied narrowing construction would be "in contrast to the great weight of the pertinent case law."[94] Likewise, the Eighth Circuit refused to accept a narrowing construction of statutory terms even though defendants posited that the statute could have been interpreted to extend only to sexual arousal and touching.[95] The Eighth Circuit held, on this occasion, that the statutory language had "far greater range" than the defendants envisioned.[96]

Conversely, other Eighth Circuit panels and the Fifth Circuit have been willing to accept administrative practice as a sufficient narrowing construction.[97] In *SOB, Inc. v. County of Benton*,[98] the Eighth Circuit strayed from past case law while confronting an overly broad statute regulating public indecency.[99] The Eighth Circuit relied on two factors in deciding to accept the current administrative practice as an implied narrowing construction: (1) a sworn and uncontradicted affidavit by the County Attorney attesting that there were no mainstream theaters in Benton that could potentially be affected by the overly broad language; and (2) a stipulation that the County's prosecutorial intent was not, nor would it be, aimed at mainstream entertainment establishments.[100] On this basis, the Eighth Circuit held that "the record does not support an inference that protected theatrical activity is presently being chilled, or that the

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93. *Id.* (stating reasons for rejecting implied narrowing construction argument). The court further explained that "[i]n cases where an ordinance or statute survived review it was because an express exception in the law's text or other specific language made the law 'readily susceptible' to a limiting construction." *Id.* at 396.

94. *Id.* (criticizing defendant's case law support).

95. *See* Ways v. City of Lincoln, 274 F.3d 514, 519-20 (8th Cir. 2001) (arguing for implied narrowing construction on ground that language would not reach mainstream expression). The court reasoned that "[e]ven if the prohibitions were interpreted to reach only conduct intending sexual arousal, the city's net was still cast too broadly because constitutionally protected artistic expression may legitimately intend to titillate or arouse members of the audience." *Id.* (describing potential impact of statutory phrases).

96. *See id.* (stating holding).

97. *See* SOB, Inc. v. County of Benton, 317 F.3d 856, 864-65 (8th Cir. 2003) (accepting implied narrowing construction); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 483 (5th Cir. 2002) (allowing administrative practice to satisfy narrowing construction requirements).

98. 317 F.3d 856 (8th Cir. 2003).

99. *See id.* at 864 (determining whether ordinance had chilling effect on protected First Amendment speech).

100. *See id.* at 865 (describing statements made by County Attorney in affidavit in support of inference that County Attorney's office would not pursue enforcement of statute against mainstream entertainment).

County will ever enforce the genital-fondling prohibition against the cast of a theatrical production."[101]

Similarly, the Fifth Circuit accepted the implied narrowing construction argument in *Baby Dolls Topless Saloons, Inc. v. City of Dallas*.[102] After upholding the statute under the *Renton* analysis, the Fifth Circuit conducted a facial overbreadth analysis, reviewing a statute that potentially gave enforcement officials the power to declare mainstream entertainment businesses as sexually oriented (thus subjecting them to additional regulation).[103] Although no state court or administrative decision was cited, the Fifth Circuit relied on the city's "established history of not classifying mainstream businesses as [sexually oriented businesses]" as sufficient evidence of administrative practice.[104] As a result, the Fifth Circuit adopted the narrowing construction and rejected the overbreadth challenge.[105]

III. ANALYSIS

A. *The Third Circuit Undresses the Issues in* Conchatta *and* 181 South

Within a short period of time, the Third Circuit rendered two rulings concerning the constitutionality of Pennsylvania and New Jersey statutes forbidding lewd behavior in liquor-licensed clubs.[106] The Third Circuit first confronted the issue when a New Jersey regulation was challenged in *181 South*.[107] An adult cabaret named Moulin Rouge challenged a New Jersey statute prohibiting "lewd or immoral" activity in clubs with liquor licenses.[108] Moulin Rouge was afraid that its main attraction, "topless dance performances that include sexually explicit dance routines," would violate the statute, thus forcing the club to incur "substantial financial pen-

101. *Id.* (describing reasons for accepting implied narrowing construction).

102. *See Baby Dolls Topless Saloons*, 295 F.3d at 483 (relying on established history of enforcement when accepting narrowing construction).

103. *See id.* at 480-81 (discussing *Renton* analysis).

104. *Id.* at 483 (detailing reasons for accepting narrowing construction).

105. *See id.* (discussing holding).

106. *See* Conchatta, Inc. v. Miller, 458 F.3d 258 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844) (filing opinion on August 15, 2006); 181 South, Inc. v. Fischer, 454 F.3d 228 (3d Cir. 2006) (filing opinion on July 18, 2006).

107. *See* 181 South, Inc. v. Fischer, 454 F.3d 228, 230 (3d Cir. 2006) (granting review to consider constitutional challenge to New Jersey statute forbidding lewd behavior in liquor licensed clubs).

108. *See id.* (detailing facts and regulation language). Specifically, the regulation proscribed "lewdness or immoral" activity in a licensed premises. *See id.* at 229-30 (stating statute's language). The appellant, 181 South, Inc., owned and operated an "adult cabaret called Moulin Rouge" in Atlantic City, New Jersey. *See id.* (noting facts).

alties."[109] The Third Circuit initially applied the *O'Brien* analysis.[110] First, the court found that regulating the sale of alcoholic beverages fell within the realm of "police powers" granted to the states, thereby fulfilling the first prong of the *O'Brien* test.[111] Second, the court was explicit in reasoning that the state's interest in curtailing immoral behavior was "important and substantial."[112] Third, the court found that the regulation was not a complete bar on expression, "[r]ather, it only prohibit[ed] such activity from taking place on the premises of liquor-licensed establishments."[113] Finally, the court held that the means set forth by the statute were tailored appropriately to its goals.[114] Accordingly, the Third Circuit held that the statute fulfilled the *O'Brien* test and did not, in nature, violate the First Amendment.[115]

Although the Third Circuit acknowledged that the *O'Brien* test was satisfied, the court conducted a separate overbreadth analysis, impliedly accepting petitioner's argument that the statute could be constitutional under *O'Brien*, but unconstitutionally overbroad by its terms.[116] Although

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109. *Id.* at 230 (discussing facts prompting 181 South, Inc. to file for declaratory and injunctive relief). The Alcoholic Beverage Control ("ABC") had cited 181 South, Inc. for three separate violations of ABC regulations. *See id.* (discussing facts). The citations stemmed from an undercover investigation wherein the undercover agent viewed a dancer "rubbing her breast and vagina while onstage." *Id.* at 231 (same). The undercover agent also viewed similar acts conducted with the participation of patrons, including a one-on-one dance. *See id.* (same).

110. *See id.* at 232-34 (declining to follow Court's holding in *LaRue* and applying *O'Brien* to facial overbreadth challenge). The Third Circuit acknowledged the diminished precedential value of *LaRue* prior to embarking on the *O'Brien* analysis. *See id.* at 233 (detailing Supreme Court guidance). For a further discussion of the limited precedential value of *LaRue*, see *supra* note 24 and accompanying text.

111. *See id.* at 234 (addressing first prong of *O'Brien* test relating to requisite state power in enacting statute).

112. *See id.* (citing City of Erie v. Pap's A.M., 529 U.S. 277, 296-97 (2000) (plurality opinion)) (couching state interest as "curtailing 'unacceptable social behavior' that can arise in conjunction with adult entertainment").

113. *Id.* (detailing third prong of *O'Brien* analysis). "In other words, the Regulation 'is not a restriction of erotic expression, but a prohibition of nonexpressive conduct (i.e., serving and consuming alcohol)' on premises where such expression takes place." *Id.* (quoting Ben's Bar, Inc. v. Vill. of Somerset, 316 F.3d 702, 726 (7th Cir. 2003)) (confronting statute similar to regulation in *181 South*).

114. *See id.* (reasoning that "the Regulation's restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest").

115. *See id.* (acknowledging that court "[was] thus satisfied" that First Amendment protection of freedom of expression was not violated under *O'Brien* analysis).

116. *See id.* at 234-35 (analyzing facial overbreadth challenge). The court stated the plaintiff's burden to be the following: "[i]n order to show that a statute is unconstitutionally overbroad, 181 South must show that the Regulation is not readily subject to a narrowing construction by the state courts and that its deterrent effect on legitimate expression is both real and substantial." *Id.* at 234 (internal quotations omitted). Although the Third Circuit treated the *O'Brien* analysis and the overbreadth analysis separately, it would appear that *O'Brien* practically incorporates facial overbreadth claims. Under the Third Circuit's analysis, if a statute's language is overbroad on its face (as opposed to its application), then a court would likely find that (1) the legislature lacked the constitutional power to enact

the Third Circuit found the phrase "lewd or immoral activities" to be somewhat overbroad, the court was quick to accept a judicially-created narrowing construction of the phrase as stated by the New Jersey Superior Court.[117] Previously, the New Jersey Superior Court limited the reach of the statute to "entertainment where 'the predominant object and natural effect upon the observers-patrons of one portion of the performance [is] erotic excitation.'"[118] The Third Circuit was satisfied that the judicially-created limitation on the statute's reach was sufficient to ensure that mainstream entertainment would not be subject to the statute's penalties.[119] As a result, the Third Circuit upheld the New Jersey statute.[120]

Just a few months later, the Third Circuit confronted the same issue surrounding the provisions and application of a Pennsylvania statute.[121] *Conchatta* originally reached the Third Circuit in 2002, when the plaintiffs sought a preliminary injunction against a Pennsylvania statute banning "lewd or immoral" behavior in premises licensed by the Liquor Control Board.[122] Although holding, in a per curiam opinion, that the plaintiff failed to demonstrate irreparable harm, the Third Circuit acknowledged that the plaintiffs had "made a strong case that the statute [was] overbroad" on the merits.[123]

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the statute (*O'Brien*'s first prong) or (2) the reach of the overbroad language was not supported by a substantial governmental interest (*O'Brien*'s second prong). For a further discussion of this issue, see *infra* note 131 and accompanying text.

117. *See id.* at 234-35 (accepting narrowing construction created by state court).

118. *Id.* (discussing state court opinion). Not only did the state court decision limit the reach of the statute to certain activities, it also offered guidance to enforcement officials investigating potential violations. *See id.* (determining scope of narrowing construction). The state court held that "exposing breasts and bare anal area to patrons constitutes a violation of the Regulation." *Id.* (citing G. & J.K. Enter. v. Div. of Alcohol Beverage Control, 500 A.2d 43, 46 (N.J. Super. Ct. App. Div. 1985)) (limiting scope of liquor control statutory language).

119. *See id.* at 235 (reasoning that state court's narrowing construction "limits [regulation's] reach mainly to entertainment similar to that shown at Moulin Rouge").

120. *See id.* (upholding regulation's constitutionality). The Third Circuit also rejected 181 South's contention that the Regulation was unconstitutionally vague. *See id.* (rejecting 181 South's vagueness argument because "the conduct observed on 181 South's premises clearly falls within the ambit of the conduct the Regulation proscribes at liquor-licensed businesses").

121. *See* Conchatta Inc. v. Miller, 458 F.3d 258, 261 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844) (presenting challenge to Pennsylvania statute proscribing "lewd, immoral or improper entertainment" on licensed premises).

122. *See* Conchatta, Inc. v. Evanko, 83 Fed. App'x 437, 438-39 (3d Cir. 2003) (per curiam) (non-precedential opinion) (seeking preliminary injunction against Liquor Control Board). Conchatta, Inc. operates Club Risque, an adult entertainment club, where the dancers "[are] clothed and then strip until they are wearing only G-strings and latex covering over their nipples. They then circulate among the patrons seeking tips." *Id.* (discussing facts).

123. *See id.* at 441 (discussing merits of plaintiffs' claims). The Third Circuit reasoned that although the Supreme Court had authored a number of decisions

When *Conchatta* reached the Third Circuit for the second time, the plaintiffs successfully challenged the Pennsylvania statute.[124] Unlike *181 South*, where the Third Circuit began its discussion with the applicability of the *O'Brien* standard, the court in *Conchatta* began with a lengthy discussion of narrowing constructions.[125] After analyzing past state court and regulatory cases, the Third Circuit could not find a judicially-created limitation.[126] Moreover, the court declined to adopt the concept of an implied narrowing construction.[127] The Liquor Control Board Commissioner argued that the court should construe the statutory language narrowly because the statute was applied "only to live dancing involving exposure of genitals or involving physical sexual contact between patrons and dancers."[128] Unlike other circuits willing to accept administrative practice as a narrowing construction, the Third Circuit expressly rejected this concept, stating that "[p]ast practice does not constitute a narrowing construction."[129] After declaring the implied construction argument unconvincing, the Third Circuit focused on the language of the statute, finding that it potentially applied to "'plays, musicals, concerts, political satires, comedies . . . and art shows.'"[130]

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concerning erotic dancing, the "central language in the Pennsylvania statute [had] not been revamped in more than a half-century." *Id.* (noting statutory language). Still, however, the Third Circuit avoided answering the question on the merits because the plaintiffs failed to show irreparable harm caused by the denial of a motion for preliminary injunction. *See id.* (stating reason for denying preliminary injunction).

124. *See Conchatta*, 458 F.3d at 267 (holding that challenged provisions of Pennsylvania liquor statute were overly broad).

125. *See id.* at 263 (listing "Availability of a Limiting Construction" as first heading under "Overbreadth" section). An overbreadth challenge seeks to answer whether "a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep . . . ." *See id.* at 262-63 (internal quotations omitted) (discussing appropriate standard of review).

126. *See id.* at 263-64 (searching for and failing to find narrowing construction in Pennsylvania's past state court and regulatory actions). Although the Third Circuit found that the statute had been challenged a number of times in state court, the court was not convinced that any of the state court decisions actually narrowed the potential reach of the statute. *See id.* (searching for narrowing construction). Rather, past cases simply discussed the history of the statute's enforcement. *See id.* (detailing history of same).

127. *See id.* at 265 (rejecting implicit narrowing construction posited by respondent). The Commissioner argued that "an implicit narrowing construction has emerged." *Id.* The Third Circuit cited to a number of circuits where the idea of an implied narrowing construction was rejected. *See id.* (rejecting implied narrowing construction argument).

128. *Id.* (stating respondent's argument for implied narrowing construction of Pennsylvania statute provision).

129. *Id.* (declining to adopt limiting construction argument). For further discussion of other circuit courts' approaches to the concept of an implied narrowing construction, see *supra* notes 87-105 and accompanying text.

130. *Id.* at 266 (citing Conchatta, Inc. v. Evanko, 83 Fed. App'x 437, 444 (3d Cir. 2003)) (discussing impact on mainstream entertainment).

The Third Circuit embarked on the *O'Brien* analysis only after it found the statutory provision to be overly inclusive.[131] The court concluded that the challenged provisions failed the *O'Brien* test because the government interest in regulating the strip clubs did not apply to other mainstream entertainment that was nonetheless covered by the reach of the statute.[132] The Third Circuit emphasized the lack of evidence supporting a link between the statute's purpose of combating harmful secondary effects and regulating mainstream performances or concerts, reasoning that "[w]ithout evidence of such a connection, there is no state interest to justify a substantial fraction of the Challenged Provisions' scope."[133] Accordingly, the Third Circuit held that the challenged provisions of the Pennsylvania statute were unconstitutional.[134]

B. *Stripping Away Confusion: Guidance for Practitioners and State Legislators*

As strip clubs begin to challenge state regulations with increasing frequency, practitioners and legislators must develop new drafting nuances and legal arguments that can withstand Third Circuit scrutiny.[135] Practitioners should focus their arguments on the existence of secondary effects and the availability of a narrowing construction.[136] Meanwhile, legislators

131. *See id.* at 267-68 (discussing secondary effects standard and content-neutral nature of statute). After citing to the four-prong *O'Brien* test, the Third Circuit quickly found the fourth prong violated because the statute burdened non-targeted establishments. *See id.* at 267 (announcing holding). This is an example of how overly broad language, generally a separate constitutional concern, is practically incorporated into the *O'Brien* analysis.

132. *See id.* at 267-68 (stating reasons for holding).

> With respect to nude or topless dancing at clubs or bars, an interest in limiting harmful secondary effects *may* justify the Challenged Provisions. . . . With respect to ordinary theater and ballet performances, concerts, and other similar forms of entertainment, however, the Commissioner provides no evidence that the Challenged Provisions prevent harmful secondary effects.

Id. (emphasis added) (discussing reason that challenged provisions violated First Amendment).

133. *See id.* at 268. (detailing evidence required to prove that state interest is served by current tailoring of language).

134. *See id.* (stating holding). Because the challenged provisions "punish[ed] a 'substantial' amount of protected free speech," the Third Circuit held the statute to be overly broad. *Id.* (discussing holding).

135. *See generally* Giovani Carandola, Ltd. v. Fox, 470 F.3d 1074 (4th Cir. 2006) (releasing decision December 15, 2006); *Conchatta*, 458 F.3d at 258 (deciding case in late 2006); Andy's Rest. & Lounge, Inc. v. City of Gary, 466 F.3d 550 (7th Cir. 2006) (releasing decision in late 2006); 181 South, Inc. v. Fischer, 454 F.3d 228 (3d Cir. 2006) (announcing decision just one month prior to *Conchatta* decision).

136. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289-91 (2000) (plurality opinion) (applying *O'Brien* test, but injecting discussion of secondary effects into plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-54 (1986) (resting holding on secondary effects analysis); *Conchatta*, 458 F.3d at 267 (discussing secondary effects doctrine); SOB, Inc. v. County of Benton, 317 F.3d 856, 864-65 (8th Cir. 2003) (accepting implied narrowing construction argument); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 483 (5th Cir. 2002)

should expressly limit the expansive language of regulatory statutes and add an "exception clause" to prevent enforcement officials from regulating mainstream entertainment facilities.[137]

1. *Constitutional Challenges: Advice for Attorneys*

When challenging or defending the constitutionality of a statute regulating a strip club, practitioners should first obtain a favorable standard of review—either intermediate scrutiny if trying to uphold the statute or strict scrutiny if attempting to have the statute declared unconstitutional.[138] As referenced, statutes regulating the sex-based industry are generally considered content-neutral (either aimed at secondary effects or couched as a zoning regulation), thereby subjecting the statutes to intermediate scrutiny under *O'Brien*, *Renton* or some combination thereof.[139] Consistent with the majority of other circuits, the Third Circuit has operated under *O'Brien* while also emphasizing the secondary effects analysis presented in *Renton*.[140] Nevertheless, practitioners challenging the statutes should argue that the statutes are pretextual and aimed solely at suppressing expression in the hopes of obtaining a strict scrutiny review.[141] Conversely, when attempting to overcome challenges, practitioners should

(applying implied narrowing construction). For a further discussion of the importance of secondary effects to the standard of review, see *supra* notes 35-39, 56 and accompanying text. For a further discussion of the impact of narrowing constructions when construing overly broad statutory language, see *supra* notes 83-89 and accompanying text.

137. *Compare* Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 515-18 (4th Cir. 2002) (striking down statute as overly broad for failing to narrowly tailor language and failing to include exception clause), *with Giovani Carandola*, 470 F.3d at 1084 (upholding constitutionality of same statute after language was limited in scope and exception clause was included).

138. *See* Wright, *supra* note 28, at 334, 349-51 (explaining impact of standard of review and how to determine same under content-based versus content-neutral distinction). For a further discussion of the Supreme Court's analysis when deciding whether to lower the standard of review in the First Amendment context, see *supra* notes 28-32 and accompanying text.

139. *See* Adler, *supra* note 3, at 1118-22 (explaining current constitutional standards for regulatory statutes indirectly implicating First Amendment). For a further discussion of the *O'Brien* and *Renton* standards of review, see *supra* notes 33-52 and accompanying text.

140. *See Conchatta*, 458 F.3d at 267 (applying *O'Brien* with emphasis on secondary effects doctrine); *181 South*, 454 F.3d at 234 (using secondary effects doctrine to satisfy fourth prong of *O'Brien* analysis).

141. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 447 (2002) (plurality opinion) (finding that law at issue was not suspect and, therefore, not subject to strict scrutiny regardless of inference that it was covertly attacking speech); City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) ("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.'") (citation omitted).

justify the statute's constitutionality with evidence of secondary effects, thus subjecting it to a reduced standard of review.[142]

Even if the secondary effects are real and substantial, the Third Circuit, in both *Conchatta* and *181 South*, has emphasized the importance of narrowly defining the scope of challenged provisions.[143] Depending on the nature of the provision, practitioners may need to supply proof of a narrowing construction.[144] The Third Circuit has been somewhat contradictory when addressing narrowing constructions.[145] As eager as the Third Circuit was to accept a twenty-year-old state court construction in *181 South*, it was just as eager to reject the concept of an implied narrowing construction in *Conchatta*.[146] When arguing to uphold statutory language, practitioners should first look for a judicially-created narrowing construction.[147] If unavailable, Third Circuit practitioners should be prepared to present evidence of past administrative practice in the hopes that the Third Circuit will recognize the practicality of the implied narrowing construction.[148] When challenging a statute, practitioners should discredit any judicially-created construction and rely on the Third Circuit's current stance on implied constructions.[149]

2. *Dodging a Lawsuit: Advice for Legislators*

To avoid the Third Circuit's recent concerns over the reach of statutory language, legislators should carefully limit the scope of a statute by

142. *See Alameda*, 535 U.S. at 438 (reasoning that "[the Court] specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech"); *Pap's A.M.*, 529 U.S. at 289 (declaring that regulations that are unrelated to suppression of expression are disposed of under intermediate scrutiny standards set forth in *O'Brien*).

143. *Compare Conchatta*, 458 F.3d at 263-64 (beginning discussion with analysis of available narrowing constructions), *with 181 South*, 454 F.3d at 234-35 (concluding discussion with analysis and eventual acceptance of narrowing construction).

144. *See Conchatta*, 458 F.3d at 263-64 (holding that secondary effects were legitimate in some, but not all, of entertainment industries affected by challenged statute, leading Third Circuit in search of narrowing construction).

145. For a further discussion of Third Circuit inconsistency, see *infra* note 146 and accompanying text.

146. *Compare Conchatta*, 458 F.3d at 263-65 (refusing to accept narrowing construction and refusing to imply the same), *with 181 South*, 454 F.3d at 234-35 (applying narrowing construction from New Jersey state court to save statute).

147. For a further discussion of why federal courts prefer judicially-created narrowing constructions, see *supra* notes 85, 87 and accompanying text.

148. *See* SOB, Inc. v. County of Benton, 317 F.3d 856, 865 (8th Cir. 2003) (relying on affidavit as implied construction of statute); Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 483 (5th Cir. 2002) (citing to evidence of past administrative practice in upholding statute).

149. *See Conchatta*, 458 F.3d at 263-65 (declining to accept implied narrowing construction based on past administrative practice). "Although Pennsylvania courts and agencies have addressed the Statute . . . on numerous occasions, no clear narrowing construction of the Challenged Provisions has emerged." *Id.* at 263 (discussing state court cases interpreting challenged provisions).

implementing three drafting nuances.[150] First, in the statute's preamble, legislators should clearly justify the statute as "combating the secondary effects" of strip clubs.[151] This drafting nuance will remove any ambiguity surrounding the statute's justifications, and will likely result in the Third Circuit adopting intermediate scrutiny when reviewing challenged provisions.[152] Second, to supplement provisions prohibiting "lewd or immoral" activity, legislators should include a limiting provision, setting forth an illustrative list of actions considered lewd or immoral.[153] Such a provision will narrow the scope of the statute and likely alleviate some of the Third Circuit's recent First Amendment concerns.[154] Finally, legislators should include an "exception" clause that explicitly removes the power of enforcement agencies to regulate "persons operating theaters, concert halls, art centers" and other mainstream entertainment facilities.[155] By including the exception provision, legislators could textually cure overregulation anxieties.[156] By applying these three statutory drafting suggestions, Third Circuit legislators can avoid (or at least overcome) overbreadth challenges.[157]

IV. NOTHING GOOD EVER HAPPENS AFTER TWO A.M.

The recent Third Circuit opinions reflect the uncertainty surrounding the constitutionality of current state regulations targeting strip clubs.[158] As a national debate continues over whether exotic dance

150. *See* Giovani Carandola, Ltd. v. Fox, 470 F.3d 1074, at 1081-83 (detailing amendments made to statute that was previously held to be unconstitutional); *see also* Tucker, *supra* note 8, at 402 (describing drafting and evidentiary advice for legislators crafting statutory language to regulate sex-based industries). For a further discussion of the three drafting nuances, see *infra* notes 151-56 and accompanying text.

151. *See Carandola*, 470 F.3d at 1081-82 (citing to preamble of amended statute when addressing justifications for statute).

152. For further discussion of the importance of intermediate scrutiny, see *supra* notes 28-32 and accompanying text.

153. *See Carandola*, 470 F.3d at 1083 (describing new statutory language that specifically proscribed behavior, including "fondling" and "simulated sexual acts").

154. For a further discussion of the Third Circuit's concerns in relation to mainstream expression, see *supra* note 130, 132-34 and accompanying text.

155. *See, e.g., Carandola*, 470 F.3d at 1084 (discussing impact of exception clause and upholding statute partially based on its adoption); Odle v. Decatur County, 421 F.3d 386, 396-97 (6th Cir. 2005) (reminding litigants that statutes in this context survive because of exception clause or another limiting feature in language); Farkas v. Miller, 151 F.3d 900, 905 (8th Cir. 1998) (finding that "the statute's exception . . . saves it from being overbroad").

156. For a further discussion of the Third Circuit's recent overbreadth concerns regarding the New Jersey and Pennsylvania statutes, see *supra* notes 116-20, 125-30, 133-34 and accompanying text.

157. For a further discussion of the potential impact of these drafting techniques, see *supra* notes 137, 155 and accompanying text.

158. *See* Adler, *supra* note 3, at 1122-23 ("[C]ritics have attacked the Court's expansion of the secondary effects doctrine in *Pap's*; the questionable legitimacy of morality as a justification for banning speech in *Barnes*; the Court's tortured and

should be afforded more constitutional protection, Third Circuit practitioners and legislators are left with the unsavory task of grappling with a transient and politicized constitutional issue.[159] It is likely that, after scanning the current legal landscape, the Supreme Court will soon step in to cure the confusion.[160] Until such time, however, divergent political views coupled with an unstable Supreme Court stance will provide ammunition and emotion to this current First Amendment debate.[161] Underneath the political and social debate, states are struggling to retain regulatory power, while individuals are fighting for enhanced constitutional protection.[162] If recent Third Circuit cases are any indication of the future outcome, the battle is far from over.[163]

Gregory S. Voshell

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fractured opinions in *Barnes*; and the attempt in both cases to categorize the regulations as content-neutral."); Shafer & Adams, *supra* note 16, at 23 ("Further complicating these matters is the fact that subsequent to the U.S. Supreme Court's decision in *Pap's*, the Court revisited the secondary effects doctrine in . . . *Alameda*[.]"); *see also* Alan R. Levy, *Lewdness Divides Along Delaware River: Third Circuit Decides Pennsylvania, New Jersey Topless-Bar Cases Differently*, N.J. L.J., Oct. 9, 2006, at 43 (discussing recent Third Circuit cases that resulted in divergent holdings). For a further discussion of the confusion currently afflicting circuit courts, see *supra* notes 66-68 and accompanying text.

159. *See* Cato, *supra* note 17, at 1 ("Freedom of expression in Pennsylvania now includes a lap dance and a drink."); Duffy, *supra* note 5, at 15 (detailing Third Circuit's holding in *181 South*); Luke E. Saladin, *Strip Clubs Plan to Appeal Ruling*, KY. POST, Oct. 4, 2006, at A1 (discussing recent district court decision that upheld ordinance regulating strip clubs).

160. *See* Petition for Writ of Certiorari, Miller v. Conchatta, Inc., No. 06-844 (Dec. 14, 2006), 2006 WL 3740634 (U.S. filed Dec. 14, 2006) (petitioning for review of Third Circuit's decision in *Conchatta* in light of circuit confusion over which standards to apply when assessing constitutionality of regulations targeting adult entertainment facilities and venues). For a discussion of the confusion that may prompt the Supreme Court to grant certiorari in *Conchatta*, see *supra* notes 66-68, 87-89 and accompanying text.

161. *See* Baradaran-Robison, *supra* note 56, at 447 (stating that "[z]oning of strip clubs, adult video stores, and other adult entertainment businesses is a frequent source of controversy and litigation in many American cities"); *see also* Adler, *supra* note 3, at 1124-25 (arguing that sexual expression through nude dance is not as harmful as some may perceive). Adler argues that the protections of the G-string (and other similar protections) are illusory. *See id.* at 1127-28 (stating that G-string does not provide much practical protection anyway).

162. *See* Calvert & Richards, *supra* note 3, at 289 (noting that states are increasing use of their regulatory power by regulating more often as nude dancing becomes more popular); *see also* Adler, *supra* note 3, at 1127 (attacking court's reasoning, arguing that "the Court's analysis unwittingly replicates a deeper cultural trope in which the nude woman's body stands for danger, debasement, crime, violence, [and] disease. . . ."). *See generally* Mills Eckert, *supra* note 26, at 242-50 (discussing state regulatory schemes and Court's responses thereto).

163. *See* Conchatta Inc. v. Miller, 458 F.3d 258, 266-68 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3333 (U.S. Feb. 20, 2007) (No. 06-844) (striking state statutory language); 181 South, Inc. v. Fischer, 454 F.3d 228, 234-35 (3d Cir. 2006) (upholding state statute); *see also* Petition for Writ of Certiorari, Miller v. Conchatta, Inc., No. 06-844 (Dec. 14, 2007), 2006 WL 3740634 (detailing vast amount of confusion

currently facing circuit courts). *See generally* Calvert & Richards, *supra* note 3, at 288-89 ("Whether targeting the location of sexually oriented businesses or restricting what goes on inside them, large cities, small towns, and scattered counties throughout the United States are stepping up efforts to regulate the purveyors of adult entertainment.").