tation of sex.[1397] But broad implications for First Amendment doctrine are probably unwarranted.[1398] The Indiana statute was not limited in application to barrooms; had it been, then the Twenty-first Amendment would have afforded additional authority to regulate the erotic dancing.

In *Erie v. Pap's A.M.*,[1399] the Supreme Court again upheld the application of a statute prohibiting public nudity to an "adult" entertainment establishment. Although there was again only a plurality opinion, parts of that opinion were joined by five justices. These five adopted Justice Souter's position in *Barnes*, that the statute satisfied the *O'Brien* test because it was intended "to combat harmful secondary effects," such as "prostitution and other criminal activity."[1400] Justice Souter, however, although joining the plurality opinion, also dissented in part. He continued to believe that secondary effects were an adequate justification for banning nude dancing, but did not believe "that the city has made a sufficient evidentiary showing to sustain its regulation," and therefore would have remanded the case for further proceedings.[1401] He acknowledged his "mistake" in *Barnes* in failing to make the same demand for evidence.[1402]

The plurality opinion found that Erie's public nudity ban "regulates conduct, and any incidental impact on the expressive element

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[1397] The Court has not ruled directly on such issues. *See* Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (invalidating the denial of use of a public auditorium for a production of the musical "Hair," in the absence of procedural safeguards that must accompany a system of prior restraint). Presumably the *Barnes* plurality's public-morality rationale would apply equally to the "adult" stage and to the operatic theater, while Justice Souter's secondary effects rationale would not. But the plurality ducked this issue, reinterpreting the lower court record to deny that Indiana had distinguished between "adult" and theatrical productions. 501 U.S. at 564 n.1 (Chief Justice Rehnquist); id. at 574 n.2 (Justice Scalia). On the other hand, the fact that the state authorities disclaimed any intent to apply the statute to theatrical productions demonstrated to dissenting Justice White (who was joined by Justices Marshall, Blackmun, and Stevens) that the statute was *not* a general prohibition on public nudity, but instead was targeted at "the communicative aspect of the erotic dance." Id. at 591.

[1398] The Court had only recently affirmed that music is entitled to First Amendment protection independently of the message conveyed by any lyrics (Ward v. Rock Against Racism, 491 U.S. 781 (1989)), so it seems implausible that the Court was signaling a narrowing of protection to only ideas and opinions. Rather, the Court seems willing to give government the benefit of the doubt when it comes to legitimate objectives in regulating expressive conduct that is sexually explicit. For an extensive discourse on the expressive aspects of dance and the arts in general, and the striptease in particular, *see* Judge Posner's concurring opinion in the lower court's disposition of *Barnes*. Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (7th Cir. 1990).

[1399] 529 U.S. 277 (2000).

[1400] 529 U.S. at 292, 291.

[1401] 529 U.S. 310–311.

[1402] 529 U.S. at 316.