CONSTITUTIONAL LAW—FREEDOM OF SPEECH, EXPRESSION: PROTECTING MAIN STREET? THE NORTH DAKOTA SUPREME COURT ANALYZES WHETHER AN ORDINANCE REGULATING EXOTIC DANCING AND ADULT ENTERTAINMENT VIOLATES FREE SPEECH AND CONSTITUTES A REGULATORY TAKING

McCrothers Corp. v. City of Mandan, 2007 ND 28, 728 N.W.2D 124

I. FACTS

Two bars, the Tree City Bar and Silver Dollar Bar, were located on Main Street in Mandan, North Dakota.[1] The bars, owned and operated by McCrothers Corporation and Luke Berger, offered exotic dancing for fourteen and twenty-two years, respectively.[2] In 2003, David Moos expressed interest in opening another adult themed business on Main Street in the vicinity of the other two establishments.[3]

Since 1979, Mandan has had an ordinance in place which prohibits nude dancing in establishments that serve alcohol.[4] In June of 2003, subsequent to the rumors of a new establishment on Main Street, the Mandan Board of City Commissioners adopted new city ordinances to regulate the zoning of cabaret establishments.[5] The commissioners modeled the ordinances after the ordinance upheld by the North Dakota Supreme Court in *Olson v. City of West Fargo*[6] in 1981.[7] Mandan Ordinance No. 961 prohibited alcoholic beverage licensees from providing adult entertainment for more than one day of the week without obtaining a cabaret license.[8]

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1. McCrothers Corp. v. City of Mandan, 2007 ND 28, ¶ 5, 728 N.W.2d 124, 127.
2. *Id.*
3. Brief for Appellant at ¶ 17, *McCrothers*, 2007 ND 28, 728 N.W.2d 124 (No. 20060127).
4. *McCrothers*, ¶ 2, 728 N.W.2d at 126 (citing MANDAN, N.D., CODE OF ORDINANCES § 12-01-18(2)(d) (1994)).
5. *Id.*
6. 305 N.W.2d 821 (N.D. 1981).
7. *McCrothers*, ¶ 2, 728 N.W.2d at 126 (citing *Olson*, 305 N.W.2d at 831).
8. *Id.* (citing MANDAN, N.D., CODE OF ORDINANCES § 12-01-18 (2003)). Ordinance No. 961 states in part:

> 2. No alcohol beverage licensee under this title shall permit entertainment for more than one day a week any given week without first having obtained a cabaret license as hereinafter provided. . . . 5. No live performances are permitted on an alcoholic beverage licensed premise which contains any form of dancing. Such prohibition of dancing does not include the incidental movement or choreography of singers or musicians which are made in connection with their singing or playing of a musical instrument, provided the dancing does not include the acts prohibited under this section.

Ordinance No. 962 created a moratorium on new adult cabaret licenses.[9] Additionally, Ordinance No. 963 declared the purpose for regulating adult entertainment establishments and defined adult cabaret entertainment.[10] It also provided for a two year period for nonconforming uses.[11] Ordinance No. 964 declared the purposes of regulating adult entertainment and the standards of conduct for the adult establishments and the revocation of licenses.[12] Under the definition of adult entertainment, the entertainment

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> This restriction applies to all alcoholic beverage licensed premises whether or not they have a cabaret license. . . . 6. No live performances are permitted on an alcoholic beverage licensed premise which involve the removal of clothing, garments or any other costume.

Id.

9. *McCrothers*, ¶ 2, 728 N.W.2d at 126 (citing MANDAN, N.D., CODE OF ORDINANCES § 12-01-18. Ordinance No. 962 states: "An Ordinance to establish a moratorium for issuance of cabaret licenses or certificates of occupancy for any building or structure which use meets the definition of adult cabaret entertainment." MANDAN, N.D., CODE OF ORDINANCES § 12-01-18.

10. *McCrothers*, ¶ 3, 728 N.W.2d at 126 (citing MANDAN, N.D., CODE OF ORDINANCES § 12-01-18. Ordinance No. 963 states in part:

> 1. Amends the current zoning provision relating to adult establishments to include more definitions of adult uses, namely: adult arcades, adult cabaret entertainment, specified sexual activities; adult uses-accessory; adult uses—principal; adult uses body painting studio; adult use—bookstore; adult use—companionship establishment; adult use—health/sport club; adult use—hotel/motel; adult use—massage parlor; adult use—modeling studio; adult use—motion picture arcade; adult use—novelty business; adult use—sauna; adult use—steam room/bathhouse facility. . . . 2. Amends the current definitions of adult uses and the new uses by including a more objective standard, namely, a use which excludes minors by virtue of age and use, depiction of activity which is distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas.

MANDAN, N.D., CODE OF ORDINANCES § 12-01-18 (2003). "Adult business," "adult entertainment," "adult establishments," and "adult cabarets" are terms of art, and one should look to the individual ordinance to see each definition. *See generally id.* (defining adult establishments as arcades, cabaret, and sexual activities); MINOT, N.D ORDINANCE art. 3, div. 2, § 18-190 (2008) (defining an adult cabaret as an establishment that features go-go dancers, exotic dancers, strippers, or similar entertainers); GRAND FORKS, N.D., CITY CODE, ch. 18-0204 (2008) (defining an adult bookstore as an enclosed structure housing materials that emphasize sexual activities and excludes minors; adult cabarets, as those featuring go-go dancers, exotic dancers, strippers, adult cinema as that which includes a projection of specified sexual activities; and adult entertainment as any of the previously mentioned or a combination). One adult entertainment attorney describes the adult entertainment industry as, "erotic entertainment in every medium from the Internet to prerecorded DVDs to magazines to gentlemen's clubs (nee 'strip joints'), but includes every other medium that conveys either 'erotica' or 'sleaze,' depending on your view of such things." Clyde DeWitt, *Representing the Adult Entertainment Industry*, 22 WTR ENT. & SPORTS L. 1, 1 (2005).

11. *McCrothers*, ¶ 3, 728 N.W.2d at 126 (citing MANDAN, N.D., CODE OF ORDINANCES § 12-01-18.

12. *Id.* ¶ 4, 728 N.W.2d at 126-27. Ordinance No. 964 states:

> 1. Purpose: It is the purpose of this ordinance to regulate adult entertainment establishments in order to promote the health, safety, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the delirious secondary effects and concentrations of adult entertainment establishments within the City. The provisions of this ordinance have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexual oriented materials. Similarly, it is neither

offered at both bars fell within the provisions of these ordinances.[13] As such, if the bars desired to continue offering adult entertainment, it was necessary to stop serving alcohol, obtain a cabaret license, and relocate to an appropriately zoned area.[14]

In June 2005, McCrothers and Berger brought separate actions to enjoin the enforcement of the ordinances.[15] They alleged a taking of property under article I, section twelve of the North Dakota Constitution and the Fifth Amendment to the United States Constitution.[16] The district court issued orders to show cause, and McCrothers and Berger consolidated the actions.[17] The court vacated a temporary injunction due to lack of cause shown.[18] The injunction was effective September 9, 2005.[19]

On October 4, 2005, the court granted a motion to amend the complaints.[20] McCrothers and Berger additionally alleged that the ordinances violated freedom of speech rights under the First Amendment to the United

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> the intent nor effect of this ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this ordinance to condone or legitimize the distribution of obscene material. . . . Definitions: "Adult Cabaret" means any commercial premises or private club. . . . "Adult Entertainment" means: 1. Any exhibition, performance or dance of any type conducted in any premise where such exhibition, performance, or dance involves a person(s) who performs in such clothing or sheds clothing to a point where the area below the top to the bottom of the areola of a female breast or any portion of pubic area, anus, buttocks, vulva or genitals are covered by opaque material, or wearing any device or covering exposed to view which simulates the appearance of any portion of the female breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals, or human genitals in a discernibly turgid state, even if completely or opaquely covered; or 2. Any exhibition, performance or dance which includes any of the following: . . . . d. Appearances, entertainment or performances of any type consisting of or containing any nude performer, or topless female dancer. (1) "nude performer" or "nude dancer" means any person who performs in attire such that any portion of the pubic area, anus, vulva or genitals is exposed to view or not covered with an opaque material. (2) "Topless female performer" or ["]topless female dancer" means any female who performs or appears in attire such that any portion of her breasts below the top of the areola is exposed to view or not covered with an opaque material.

MANDAN, N.D., CODE OF ORDINANCES § 13-02.1-01, 02.

13. Transcript of Trial, McCrothers Corp. v. City of Mandan, No. 30-05-C-0435 at 3-4 (Morton Co. Mar. 14, 2006) ("Although no evidence was offered as to the precise nature of the dancing entertainment that was offered at both the Silver Dollar Bar and the Tree City Bar, it appears it would be classified as adult entertainment.").

14. *McCrothers*, ¶ 5, 728 N.W.2d at 127.

15. *Id.* ¶ 6.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

States Constitution.[21] The parties filed cross-motions for summary judgment.[22] Both parties stipulated that the issues regarding Ordinance No. 962 were moot.[23] The district court granted the City of Mandan's motion and dismissed the complaints after oral arguments.[24] McCrothers and Berger appealed from the judgment.[25] The North Dakota Supreme Court heard the case on March 17, 2007 and affirmed the district court's ruling.[26] The North Dakota Supreme Court held that the ordinances did not violate the First or Fifth Amendments.[27]

II. LEGAL BACKGROUND

Adult entertainment cases are complex.[28] The United States Supreme Court has not produced a majority rationale in these cases.[29] In order to understand the adult entertainment jurisprudence, it is useful to begin with the basic, constitutional framework.[30] The next section addresses the power to regulate adult businesses through local ordinances and zoning.[31] Then, it is beneficial to analyze whether "adult" expressive conduct, like nude dancing, is classified as obscenity or protected expression.[32] Next, it is necessary to focus on the regulations of symbolic conduct under the First Amendment.[33] After the basic tests are established, the next section

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21. *Id*.

22. *Id*. McCrothers and Berger argued that the City was regulating speech illegally because it did not study the effects of the establishments on the neighborhoods in Mandan. Transcript of Trial, *supra* note 12, at 13-14. Additionally, McCrothers and Berger argued that the ordinances constituted a taking because the ordinances denied them the opportunity to provide adult entertainment and the income diminished for both establishments. *Id*. at 17-18. The City of Mandan argued that there were no issues of fact and, therefore, the ordinances were constitutional under both the First and Fifth Amendments. *Id*. at 22-23.

23. Brief for Appellant, *supra* note 3, ¶ 4.

24. *McCrothers*, ¶ 6, 728 N.W.2d at 127.

25. *Id*., ¶ 1, 728 N.W.2d at 126.

26. *Id*.

27. *Id*. ¶¶ 32, 35, 728 N.W.2d at 140-41.

28. *See* Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 708-09 (7th Cir. 2003) ("While the question presented is rather straightforward, the issue is significantly complicated by a long series of Supreme Court decisions involving the application of the First Amendment in the adult entertainment context.").

29. *See, e.g*., City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 429 (2002) (plurality opinion) (producing two different rationales for analyzing a zoning ordinance); City of Erie v. Pap's A.M., 529 U.S. 277, 282 (2000) (plurality opinion) (producing a splintered rationale analyzing a general nudity ordinance).

30. *See* discussion *infra* Part II.A (providing the basic foundation of the First and Fifth Amendments).

31. *See* discussion *infra* Part II.B (addressing the power to enact ordinances).

32. *See* discussion *infra* Part II.C (discussing whether adult entertainment constitutes obscenity).

33. *See* discussion *infra* Part II.D (focusing on the three tests used to analyze symbolic conduct: content-neutral, content-based, and secondary effects).

discusses the development of the constitutional doctrines regulating speech beginning with the Twenty-First Amendment.[34] After establishing relevant Twenty-First Amendment case law, it is useful to address the development of the First Amendment regulation of adult businesses.[35] Finally, adult entertainment challenges are discussed under the Fifth Amendment Takings Clause.[36]

A. BASIC CONSTITUTIONAL ISSUES: THE FIRST AND FIFTH AMENDMENTS

The First Amendment of the United States Constitution 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 to peaceably to assemble, and to petition the Government for a redress of grievances."[37] The United States Supreme Court has held that freedom of speech is a fundamental right that applies to the states through the Due Process Clause of the Fourteenth Amendment.[38] The First Amendment protects more than the written or spoken word; it also protects expressive conduct.[39] Even though expressive conduct is protected, the government has a "freer hand" in regulating it.[40] Moreover, the United States Supreme Court has held that nude dancing is protected expressive conduct.[41] The free speech provision of the North Dakota Constitution similarly provides: "Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege."[42]

The constitutionality of nude dancing ordinances has also been challenged under the Fifth Amendment Takings Clause when adult

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34. *See* discussion *infra* Part II.E (analyzing the development of case law utilizing the Twenty-First Amendment analysis of adult entertainment).

35. *See* discussion *infra* Part II.F (providing the development of First Amendment analysis of adult entertainment ordinances).

36. *See* discussion *infra* Part II.G (analyzing the development of challenges under the Fifth Amendment).

37. U.S. CONST. amend. I.

38. Gitlow v. New York, 268 U.S. 652, 666 (1925) (citing U.S. CONST. amend. XIV).

39. Texas v. Johnson, 491 U.S. 397, 404 (1989) (stating that the First Amendment literally only forbids the abridgment of "speech," but the Court has long recognized that its protection does not end at the spoken or written word).

40. *Id*. at 406.

41. *See, e.g*., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565 (1991) (plurality opinion) (stating that some nude dancing is expressive conduct within the "outer perimeters" of the First Amendment).

42. N.D. CONST. art. I, § 4.

businesses allege an ordinance has taken the business's ability to operate.[43] An ordinance may be a taking if it deprives the landowner of all reasonable uses of the property.[44] The Takings Clause states that "private property [shall not] be taken for public use, without just compensation."[45] Like the First Amendment, the Fifth Amendment applies to the states through the Fourteenth Amendment.[46] The North Dakota Constitution also has a takings provision which states, "[p]rivate property shall not be taken or damaged for public use without just compensation."[47] In addition to basic constitutional issues, adult entertainment cases regularly involve municipal ordinances.[48] Therefore, a brief overview of ordinances and zoning is provided.[49]

B. THE POWER TO REGULATE ADULT BUSINESSES THROUGH LOCAL ORDINANCES AND ZONING

An ordinance is a local law passed by a municipality that has the power to regulate its affairs.[50] Ordinances have a presumption of validity.[51] Moreover, ordinances may impose more stringent regulations than the state legislatures, as long as the two do not conflict.[52] The proliferation of adult businesses is often viewed as a danger to property values.[53] As a result,

43. *See, e.g.*, SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1278 (5th Cir. 1988) (holding that a nude dancing zoning ordinance did not constitute a taking within the Fifth Amendment).

44. Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 17, 705 N.W.2d 850, 856. An ordinance will not be a taking if it lessens or does not allow the best use of the property. *Id.*

45. U.S. CONST. amend. V.

46. U.S. CONST. amends. I, V, XIV; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 n.1 (2002) (citing Chi., B. & Q.R. Co. v. Chicago, 166 U.S. 266, 239 (1897)) (finding that the Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment).

47. N.D. CONST. art. I, § 16.

48. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (upholding a municipal zoning ordinance that regulated the location of adult movie theaters).

49. *See* discussion *infra* Part II.B (discussing regulation through ordinances and zoning).

50. *See* City of Detroit v. Detroit United Ry., 184 N.W. 516, 518-19 (Mich. 1921) (finding that local authorities may control street use as long as it is not inconsistent with state law).

51. Tower Realty, Inc. v. City of East Detroit, 196 F.2d 710, 718 (6th Cir. 1952).

52. *See, e.g.*, Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n, 355 N.W.2d 234, 237 (Wis. 1984) (finding that a city could regulate through its home rule powers even though there was a statewide concern). Historically, home rule powers enabled a municipality to exercise powers in areas where the state legislature had not acted. *See, e.g.*, *In re* Condemnation of Blocks 13, 14, and 15, Koehler's Subdivision, City of Grand Island, 12 N.W.2d 540, 541 (Neb. 1943) (holding that a property statute was a state interest). The North Dakota Supreme Court determined that home-rule authority must be granted by the North Dakota Legislature. Litten v. City of Fargo, 294 N.W.2d 628, 631 (N.D. 1980).

53. Dana M. Tucker, Comment, *Preventing the Secondary Effects of Adult Entertainment Establishments: Is Zoning the Solution?*, 12 J. LAND USE & ENVTL. L. 383, 384 (1997).

communities often enact zoning ordinances to provide control and orderly development of land within a neighborhood and community.[54]

The first United States Supreme Court case to affirm the government's zoning power is *Village of Euclid v. Ambler Realty Co.*,[55] which analyzed the validity of a zoning ordinance.[56] In *Euclid*, a landowner challenged an ordinance that limited his ability to sell his land.[57] The land in question was originally classified as industrial.[58] After the ordinance was enacted, the land was zoned as residential.[59] The landowner alleged that this classification would lower his profit by $100 per front foot.[60] The Court rejected this challenge and found that the landowner had not been deprived of due process under the Fourteenth Amendment because the municipality had broad police powers that could be used in such circumstances to regulate the orderly growth of a municipality.[61] Additionally, the Court stated that regulation cannot be arbitrary or unreasonable.[62] Rather, it has to have a substantial relation to public health, safety, and morals, or general welfare in order to qualify as constitutional.[63]

Although *Euclid* provides the default zoning standard, courts do not apply the deferential *Euclid* standard when the First Amendment is implicated.[64] Instead, courts rely on the First Amendment.[65] Thus, zoning ordinances are often analyzed under the First Amendment.[66] Therefore, it is beneficial to review the First Amendment tests and case law regulating adult business ordinances.[67]

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54. Ahearn v. Town of Wheatland, 2002 WY 12, ¶ 10, 39 P.3d 409, 414.

55. 272 U.S. 365 (1926).

56. *Euclid*, 272 U.S. at 397 (holding that the ordinance, which established a plan for regulating the location of industries, businesses, the height of buildings, and the size of lots, was a valid exercise of power).

57. *Id.* at 384.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 397.

62. *Id.* at 395.

63. *Id.*

64. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 520-21 (1981) (analyzing a zoning ordinance under the First Amendment because the ordinance restricted speech on billboards).

65. *Id.*

66. Matthew L. McGinnis, Note, *Sex, But Not the City: Adult-Entertainment Zoning, the First Amendment, and Residential and Rural Municipalities*, 46 B.C. L. REV. 625, 625 (2005). *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding a zoning ordinance under the secondary effects First Amendment test).

67. *See* discussion *infra* Part II.C (discussing whether adult entertainment is obscenity or protected expressive speech).

C. CLASSIFYING WHETHER ADULT ENTERTAINMENT IS OBSCENITY OR PROTECTED FIRST AMENDMENT EXPRESSION

The Supreme Court has not extended First Amendment protection to obscene speech.[68] Adult entertainment presents a unique challenge because it invokes moral, religious, and First Amendment responses.[69] Even though nude dancing and similar non-pornographic adult entertainment have been held to be protected speech, the Supreme Court's adult entertainment decisions have been fractured.[70] Therefore, in order to understand whether the expression is obscenity, it is first necessary to review the history of the obscenity doctrine.[71] Then, it is beneficial to address the development of the modern obscenity doctrine.[72]

1. *History of Obscenity Doctrines That Regulated Adult Businesses*

Adult businesses were first regulated through obscenity laws.[73] The common law offense of obscenity was first recognized in Great Britain in

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68. *See* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

69. *See* Karen Cynn, Casenote, City of Littleton v. Z.J. Gifts D-4, L.L.C.: *Are We Losing the First Amendment, or Just Adult Businesses?*, 12 VILL. SPORTS & ENT. L.J. 227, 228-29 n.14 (2005) (explaining that organizations, such as the First Amendment Lawyers Association of America, Publishers and the National League of Cities filed amici curiae briefs in support of and in opposition to an adult bookstore ordinance).

70. *See, e.g.*, Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 708-09 (7th Cir. 2003) ("[T]he issue is significantly complicated by a long series of Supreme Court decisions involving the application of the First Amendment in the adult entertainment context."). The jurisprudence consists of a number of plurality opinions based on different rationales that have caused difficulties for courts analyzing whether regulations violate the First Amendment. *See, e.g.*, Barnes v. Glen Theatre, Inc. 501 U.S. 560, 572 (1991) (plurality opinion) (finding that a zoning ordinance was constitutional using three rationales). At least one justice has stated that many of the adult ordinances should not be analyzed under First Amendment analysis. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 307-10 (2000) (Scalia, J., concurring) (arguing that the First Amendment should only be utilized if the ordinance is aimed only at the communicative nature of the action). Justice Scalia, in his concurring opinion, noted that:

> In *Barnes*, I voted to uphold the challenged Indiana statute "not because it survives some lower level of First Amendment scrutiny . . . but because it is not subject to First Amendment scrutiny at all." . . . The traditional power of government to foster good morals (*bonos mores*), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing *itself* is immoral, have not been repealed by the First Amendment.

Id.

71. *See* discussion *infra* Part II.C.1 (reviewing the history of the obscenity doctrine).

72. *See* discussion *infra* Part II.C.2 (explaining modern obscenity standards).

73. Bryant Paul et al., *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355, 357 (2001).

1727.[74] In 1815, a United States court heard an obscenity case.[75] The Pennsylvania Supreme Court held that any offense "may be punishable, if in its nature and by its example, it tends to the corruption of morals."[76]

2. *Modern Development of the Obscenity Doctrine*

In 1957, the United States Supreme Court held in *Roth v. United States*[77] that obscene material was not protected by the First Amendment.[78] This test is referred to as the *Roth* test.[79] The obscenity doctrine continued to develop in the 1960s.[80] In 1970, the United States Presidential Commission on Obscenity and Pornography found no harmful effects from sexually explicit materials and recommended legalization of all forms of sexually explicit communication.[81]

The United States Supreme Court case, *Miller v. California*,[82] provided the modern standard for obscenity in 1973.[83] Miller violated California obscenity laws when he mailed sexually explicit brochures that contained graphic sexual materials.[84] The Court vacated Miller's conviction and developed a test for determining obscenity.[85] This test applied to "hard-core"

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74. Dominus Rex v. Curll, 2 Str. 789, 93 Eng. Rep. 849 (1727). A publisher was convicted of obscenity when he published Venus in the Cloister, or the Nun in Her Smock, an "intemperate dialogue about lesbian love in a convent." FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 5 (The Bureau of Nat'l Affairs 1976).

75. *See* Commonwealth v. Sharpless, 1815 WL 1297 at *7 (Pa. Dec. 1815) (involving a case where six men were convicted of displaying a painting of a man in an improper position with a woman).

76. *Id.*

77. 354 U.S. 476 (1957).

78. *See Roth*, 354 U.S. at 488-89 (finding that obscene material is defined as material that "appeal[s] to a prurient interest" in sex, that is presented in a patently offensive way).

79. Paul et al., *supra* note 73, at 357-58.

80. *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689-90 (1959) (holding that a film based on Lady Chatterley's Lover was protected by the First Amendment); Memoirs v. Massachusetts, 383 U.S. 413, 420 (1966) (opining that obscene materials must be without socially redeeming value).

81. *See generally* COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 23-27, 51-64 (1970)) (discussing a program used to determine the effects of explicit sexual materials, which resulted in a recommendation of legislative action).

82. 413 U.S. 15 (1973).

83. *Miller*, 413 U.S. at 36-37; *see also* Michael J. Mazurczak, *An Assessment of the Value Inquiry of the Obscenity Test*, 76 ILL. B.J. 512, 513 (1988) (explaining that the Supreme Court agreed that *Miller* would be utilized to analyze obscenity).

84. *Miller*, 413 U.S. at 18. The brochures included advertisements for the books "Intercourse," "Man-Woman," "Sex-Orgies Illustrated," "An Illustrated History of Pornography," and a film, "Marital Intercourse," as well as pictures depicting men and women engaged in sexually explicit activities. *Id.*

85. *Id.* at 24-25. The test provides:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the

pornography.[86] After the Court's decision in *Miller*, adult entertainment, with the exception of certain forms of pornography, has been protected by the First Amendment.[87] It is therefore necessary to review the standards for symbolic conduct under the First Amendment.[88]

D. REGULATIONS OF SYMBOLIC CONDUCT UNDER THE FIRST AMENDMENT

Because most adult entertainment does not constitute obscenity, it is typically analyzed under the Supreme Court's standards for expressive conduct.[89] The United States Supreme Court began its modern analysis of First Amendment conduct during the Vietnam War.[90] At that time, courts addressed the constitutionality of war protests.[91] In *Police Department of Chicago v. Mosley*,[92] the Court found "above all else, the First Amendment means that [the] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[93] Two years later in *Spence v. Washington*,[94] the Court established a standard for expressive speech.[95] Expressive speech must be communicative and convey a particularized message that those present would be able to understand.[96] If the conduct is expressive speech, the courts must then determine whether the

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> work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citations omitted).

86. *Id.* at 27.

87. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (plurality opinion) ("[N]ude dancing . . . is expressive conduct with the outer perimeters of the First Amendment, though we view it as only marginally so.").

88. *See* discussion *infra* Part II.D (analyzing the regulations of symbolic conduct under the First Amendment).

89. *See generally* Shima Baradaran-Robison, *Viewpoint Neutral Zoning of Adult Entertainment Businesses*, 31 HASTINGS CONST. L.Q. 447, 453-59 (2004) (explaining that the standards for expressive conduct are: (1) content-neutral, where the ordinance restricts speech without any intention to restrict a message; (2) content-based, where the ordinance restricts speech due to its message; and (3) secondary effects, where the ordinance's focus is the business' effects on the surrounding community).

90. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 102 (1972) (holding that an ordinance prohibiting picketing in front of schools was unconstitutional).

91. *See id.* (analyzing a picketing ordinance in 1972); United States v. O'Brien, 391 U.S. 367, 369-72 (1968) (upholding a statute that prohibited burning draft cards).

92. 408 U.S. 92 (1972).

93. *Mosley*, 408 U.S. at 95.

94. 418 U.S. 405 (1974).

95. *Spence*, 418 U.S. at 410.

96. *Id.* The courts' analyses tend to focus not on whether the conduct is expressive, but whether it is content-neutral or content-based. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 405-07 (1989) (finding that the conduct was expressive and then analyzing the content-neutral and content-based distinctions).

ordinance is content-based, content-neutral, and whether the secondary effects doctrine applies.[97] Additionally, the courts analyze ordinances to determine whether they meet the standard for overbreadth.[98]

1. *Expressive Speech Tests: Content-Based, Content-Neutral, and Secondary Effects*

Even though the Supreme Court has not provided clear guidelines for the distinction between content-neutral and content-based laws, one scholar categorized it as, "whether the regulation is 'aim[ed] at ideas of information,' or . . . whether the regulation is aimed at the communicative impact."[99] Under this analysis, a content-neutral regulation is aimed at the "noncommunicative" impact of speech, while the content-based regulation is aimed at the "communicative impact" of the speech.[100] In order to understand what level of scrutiny the court will utilize, it is necessary to review the content-based, content-neutral, and secondary effects tests.[101]

a. Content-based Test

A content-based regulation is aimed at the subject of the speech, or the suppression of expression, and is analyzed under a strict scrutiny standard.[102] This standard is almost always fatal.[103] The government is prohibited from restricting speech unless it can meet the strict scrutiny standard.[104] Therefore, courts presume these regulations are invalid.[105] In *Texas v. Johnson*,[106] the United States Supreme Court held that burning the American flag was expressive conduct protected by the First Amendment.[107] Therefore, a statute prohibiting flag burning failed the higher strict scrutiny test for content-based regulations because it was aimed at the suppression of

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97. *See* discussion *infra* Part II.D.1 (explaining the standards for the three expressive speech tests).

98. *See* discussion *infra* Part II.D.2 (addressing the overbreadth doctrine).

99. Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 554 (2000) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789-90 (2d ed. 1988)).

100. *Id.*

101. *See* discussion *infra* Part II.D.1.a-c (reviewing three expressive speech tests).

102. Texas v. Johnson, 491 U.S. 397, 412 (1989). The strict scrutiny standard requires the state to have a compelling interest and the interest must be narrowly tailored to accomplish that goal. R.A.V. v. City of St. Paul, 505 U.S. 377, 405 (1992).

103. Burson v. Freeman, 504 U.S. 191, 200 (1992).

104. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

105. *R.A.V.*, 505 U.S. at 382.

106. 491 U.S. 397 (1989).

107. *Texas*, 491 U.S. at 420.

expression.[108] Moreover, the New York Court of Appeals found that it is the motive of the legislature, not an individual legislator that is determinative when analyzing intent.[109] If the court finds that the ordinance is not aimed at the subject of the speech, then the court will move to the content-neutral test.[110]

b. Content-Neutral Tests: *O'Brien* and *Ward*

A content-neutral regulation is unrelated to the subject of the speech and is judged by a lesser standard—intermediate scrutiny.[111] Under this standard, the regulations are generally permitted as long as they do not interfere with the message of the speech and leave alternate channels for communication.[112] The government can restrict expression in time, place, or manner, as long as these regulations are content-neutral.[113]

In *United States v. O'Brien*,[114] the United States Supreme Court developed the primary content-neutral test when David O'Brien burned his Selective Service registration certificate in protest of the Vietnam War.[115] O'Brien argued that this act was symbolic speech protected by the First Amendment.[116] The Court rejected this argument in order to prevent a "limitless variety of conduct" from being categorized as protected speech.[117] The Court established a test that government regulations must satisfy in order to retain constitutionality when regulating expressive conduct: (1) the regulation must further an important or substantial governmental interest; (2) the governmental interest must be unrelated to the suppression of free expression; and (3) the restriction on the alleged First Amendment freedoms must be no greater than is essential to the furtherance

108. Stringfellows of N.Y., Ltd. v. City of New York, 91 N.Y.2d 382, 399 (N.Y. 1998). In *Stringfellows*, individual legislators indicated that their intention was to suppress protected expression. *Id.* Even so, the court refused to invalidate a municipal zoning ordinance regulating adult business locations based on intent of the individuals. *Id.* at 406.

109. *Id.*

110. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (utilizing the content-neutral standard to analyze a municipal ordinance).

111. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294-96 (1984).

112. *Ward*, 491 U.S. at 791.

113. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 244 (1990) (White, J., concurring in part and dissenting in part).

114. 391 U.S. 367 (1968).

115. *O'Brien*, 391 U.S. at 369-70.

116. *Id.* at 376.

117. *Id.*

of that interest.[118] This test is still applied in modern jurisprudence to symbolic conduct.[119]

The United States Supreme Court also developed a similar doctrine to determine whether regulations restricting the time, place, and manner of speech will survive First Amendment scrutiny.[120] The leading case is *Ward v. Rock Against Racism*,[121] where the Court held that the regulation must be "justified without reference to the content of the regulated speech . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[122] In the 1980s, the Court acknowledged that these tests shared some common characteristics and began applying the *Ward* and *O'Brien* tests interchangeably.[123] Despite the differences and distinctions between the two content-neutral doctrines, the Court has essentially merged these doctrines.[124] In addition to the content-neutral and content-based tests, the secondary effects doctrine often applies in adult entertainment cases.[125]

c. Secondary Effects Test

The secondary effects test developed with adult entertainment cases.[126] This test complicates the expressive speech analysis because it essentially combines the content-neutral and content-based tests.[127] Under the secondary effects test, the ordinance may be content-based, but it is analyzed under intermediate scrutiny if the goal is to combat the secondary effects of

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118. *Id.* at 376-77.

119. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (applying a modified version of the *O'Brien* test); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (applying a form of the *O'Brien* test to a public indecency statute).

120. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 796-97 (2007).

121. 491 U.S. 781 (1989)

122. *Ward*, 491 U.S. at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

123. *See* Bhagwat, *supra* note 120, at 796-97 (explaining that the tests were used interchangeably); *Barnes*, 501 U.S. at 566 (stating that the standards from *Ward* & *O'Brien* are essentially the same); *Clark*, 468 U.S. at 298 n.8 (combining the *O'Brien* test with the *Ward* time, place, or manner analysis).

124. *See* Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 166-72 (1995) (explaining that the United States Supreme Court's tests for expressive conduct, and time, place or manner regulations are essentially identical and merged).

125. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976) (recognizing that the ordinance was aimed at the "secondary effect" of crimes associated with adult theatres).

126. *See, e.g.*, *id.* (discussing the secondary effects of adult businesses); City of Erie v. Pap's A.M., 529 U.S. 277, 296-97 (2000) (plurality opinion) (expanding the test to illustrate the requirements of proof).

127. Raban, *supra* note 99, at 556 (stating that the distinction between the content tests was clear until the secondary effects doctrine).

the conduct.[128] Secondary effects have included increased criminal activity, prostitution, noise, economic vitality, property values, and street crime.[129]

This test concerns some legal commentators because it changes the level of scrutiny for content-based laws.[130] By utilizing the secondary effects doctrine, the courts analyze laws under a content-neutral or intermediate scrutiny standard.[131] Nevertheless, the United States Supreme Court applies the secondary effects doctrine when adult businesses are involved.[132] In addition to the level of scrutiny applied, the courts often analyze whether the ordinances are overbroad.[133]

2. *Overbroad Regulations*

Ordinances may also be found unconstitutional under the First Amendment if they are facially overbroad.[134] Ordinances that are overly broad limit both protected and unprotected speech.[135] However, in order for a court to invalidate a statute for overbreadth, the overbreadth must be substantial.[136] The United States Supreme Court has stated that the overbreadth doctrine is manifestly "strong medicine," which should be used sparingly and only as a last resort.[137]

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128. *Id*. at 556-57.

129. David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms*," 37 WASHBURN L.J. 55, 77 (1997).

130. *Id*. at 59-61. One scholar reasons that, since all speech causes effects, the doctrine "eviscerates free expression by allowing government officials to characterize content-based regulations as content-neutral." *Id*. at 61. Another suggests that the secondary effects test is utilized because public pressure influences the judge's decision to regulate unpopular speech. Richard A. Posner, Comment, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741-42 (2002). However, another commentator argues that this test weakens zoning power. *See* Baradaran-Robison, *supra* note 89, at 449 (arguing that weaknesses include: (1) evidentiary burdens that preclude cities from experimenting with zoning solutions; (2) cities who must rely on "quantifiable" effects; and (3) burdening businesses that must remain viable).

131. Hudson, *supra* note 129, at 60.

132. *See Pap's A.M*., 529 U.S. at 297 (applying the secondary effects test to a public nudity ordinance); *see also* discussion *infra* Part II.F (reviewing the cases that apply the secondary effects doctrine in detail).

133. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (analyzing whether an ordinance was overbroad).

134. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.").

135. Kraimer v. City of Schofield, 342 F. Supp. 2d 807, 814 (W.D. Wis. 2004).

136. Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987). The North Dakota Supreme Court provided an option to challenge the constitutionality of an ordinance for its potential to infringe on free speech, even though a plaintiff's rights may not have been violated. Bolinske v. N.D. State Fair Ass'n, 522 N.W.2d 426, 429-39 (N.D. 1994).

137. *Broadrick*, 413 U.S. at 613.

The high standard required to find overbreadth is demonstrated in *Broadrick v. Oklahoma*,[138] where the United States Supreme Court upheld the constitutionality of a statute that regulated the political party membership of certain employees.[139] The Court explained that, especially when conduct is involved, the overbreadth must be substantial.[140] The majority rejected the argument that the statute was substantially overbroad because it might regulate employees expressing private political views.[141] Because the statute applied only to clearly partisan political activity, the Court found this regulation acceptable and disagreed that the statute might chill speech.[142]

Ordinances were also challenged in the state court system, and in *City of Minot v. Central Avenue News, Inc.*,[143] the North Dakota Supreme Court considered overbreadth.[144] In *Central Avenue News*, the owners of an adult entertainment center challenged the constitutionality of an ordinance requiring them to provide the chief of police with fingerprints and prior criminal records of the adult center's employees.[145] The North Dakota Supreme Court found that this ordinance met the standard for an overbroad ordinance.[146] The court reasoned that there were some criminal convictions that would have no relation to managing an adult business center.[147] Because some of those convictions would have no relation to the adult business operation, the court found the City needed to narrow the applicability of the ordinance.[148]

In *Bolinske v. North Dakota State Fair Association*,[149] the North Dakota Supreme Court again considered overbreadth in 1994.[150] Robert Bolinske supported a legislative measure to create and fund an environmental and recycling fund and was informed that he needed to rent a booth at the fair if he intended to circulate a petition to gather the requisite number of signatories.[151] He refused to apply for a booth and filed a lawsuit to

138. 413 U.S. 601 (1973).
139. *Broadrick*, 413 U.S. at 618.
140. *Id.* at 616.
141. *Id.* at 617-18.
142. *Id.* at 618. Moreover, the Board interpreted the statute to include everything not within active partisan political campaigning. *Id.* at 617.
143. 308 N.W.2d 851 (N.D. 1981).
144. *Cent. Ave. News*, 308 N.W.2d at 863.
145. *Id.* at 862-63.
146. *Id.* at 863.
147. *Id.*
148. *Id.*
149. 522 N.W.2d 426 (N.D. 1994).
150. *Bolinske*, 522 N.W.2d at 429-30.
151. *Id.* at 428.

enjoin the fair from stopping his petition circulation.[152] In *Bolinske*, the court allowed a free speech challenge even though the appellant had never applied to be a part of the event he was challenging.[153] The court made this allowance because under the overbreadth doctrine, the action could be challenged because it had the potential to chill or infringe speech, even if it was not the appellant who suffered the harm.[154] The court refused to hold that the North Dakota Constitution prohibited any regulation on public property.[155]

In summary, when the First Amendment is implicated by conduct, the court must first decide whether the speech is obscenity or protected conduct.[156] If the conduct is protected, then the court must decide whether the ordinance is content-neutral or content-based.[157] If the ordinance is content-based, then the court will use a strict scrutiny standard.[158] If the ordinance is content-neutral the court may then apply the *O'Brien* test, the *Ward* test, the secondary effects test, or a combination thereof.[159] Additionally, the ordinance may always be challenged as overbroad.[160] The courts have applied these tests in both the Twenty-First and First Amendment analyses.[161]

E. THE HISTORY OF ADULT ENTERTAINMENT CASES: THE USE OF THE TWENTY-FIRST AMENDMENT BEFORE THE FIRST AMENDMENT

Although courts use the First Amendment to analyze adult entertainment in current cases, adult entertainment was first regulated through the

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152. *Id*. at 428-29.

153. *Id*. at 429.

154. *Id*. at 429-30.

155. *Id*. at 437 (citing N.D. CONST. art. III, § 1).

156. *See* Miller v. California, 413 U.S. 15, 24-25 (1973) (explaining the obscenity test). The test for obscenity is:

> (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citations omitted).

157. *See, e.g*., Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (analyzing and explaining the difference between content-based and content-neutral ordinances).

158. *See* Texas v. Johnson, 491 U.S. 397, 412 (1989) (explaining that content-based statutes are analyzed under strict scrutiny).

159. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (explaining that the *Ward* and *O'Brien* tests are essentially the same).

160. *See, e.g*., Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) (holding that a ban on child pornography was overbroad because it also banned protected speech).

161. *See* discussion *infra* Part II.E (analyzing the adult entertainment cases).

Twenty-First Amendment of the United States Constitution.[162] Section one of the Twenty-First Amendment repealed the prohibition of alcohol.[163] Section two provides, "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[164] Congressional legislative history indicates that the amendment was passed to provide dry states the power to regulate alcohol entering and leaving their individual states.[165] Cities and municipalities have used the Twenty-First Amendment to justify ordinances that prohibit alcohol at venues where nude dancing is present.[166]

In *California v. LaRue*,[167] the United States Supreme Court first addressed the constitutionality of a nude dancing ordinance in 1972.[168] The ordinance in *LaRue* prohibited sexual acts and nudity from establishments licensed by the California Department of Alcoholic Beverage Control.[169] In *LaRue*, the Court held that the ordinance was constitutional.[170] The city presented evidence that suggested a connection between adult entertainment and criminal activity.[171] The Court determined that the Twenty-First Amendment gave the ordinance a presumption of validity.[172] The Court reasoned that the Twenty-First Amendment conferred additional powers on the states regarding the traditional police powers of public health, welfare,

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162. U.S. CONST. amend. XXI. *See, e.g.*, California v. LaRue, 409 U.S. 109, 118-19 (1972) (plurality opinion) (finding that the State had the power to regulate nude dancing through an alcohol ordinance under the Twenty-First Amendment).

163. U.S. CONST. amend. XXI, § 1.

164. U.S. CONST. amend. XXI, § 2.

165. 76 CONG. REC. 4141 (1933) (statement of Sen. John Blaine); *see*, *e.g.*, McCormick & Co. v. Brown, 286 U.S. 131, 141 (1932) (concluding that neither the Eighteenth Amendment nor the National Prohibition Act superseded state laws). However, the amendment has been interpreted as providing individual states additional power regarding alcohol. *LaRue*, 409 U.S. at 114.

166. *LaRue*, 409 U.S. at 114.

167. 409 U.S. 109 (1972).

168. *LaRue*, 409 U.S. at 110.

169. *Id.* at 111-12. The ordinance prohibited:

> (a) The performance of acts, or simulated acts, or "sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;" (b) The actual or simulated "touching, caressing or fondling on the breast, buttocks, anus or genitals;" (c) The actual or simulated "displaying of the pubic hair, anus, vulva or genitals;" (d) The permitting by a licensee of any person to remain in or upon the licensed premises who exposes to public view "any portion of his or her genitals or anus;" and, by a companion section, (e) The displaying of films or pictures depicting acts a live performance of which was prohibited by the regulations quoted above.

Id. (citing LaRue v. State of California, 326 F. Supp. 348, 350-51 (C.D. Cal. 1971)).

170. *Id.* at 119.

171. *Id.* at 111.

172. *Id.* at 118-19.

and morals.[173] Therefore, the State had the power to regulate the location of the performances, rather than the content of the performances.[174] According to the majority, this regulation of the location did not implicate a First Amendment violation of freedom of expression.[175] The regulation did not expressly forbid the performances; it only regulated the location of such performances.[176]

The North Dakota Supreme Court relied on *LaRue* in *Olson v. City of West Fargo*,[177] regarding a cabaret ordinance.[178] The ordinance prohibited live performances containing any form of dancing, removal of clothing, or performance of certain sexual acts.[179] It also required the licensee to provide identification of all performers to the West Fargo Police Department.[180] The North Dakota Supreme Court held that the cabaret ordinance was not an unconstitutional infringement of free speech or expression because the Twenty-First Amendment gave the State additional police power.[181] It also rejected the argument that the cabaret ordinance was too vague or irrational.[182] According to the court, a reasonable person would be able to differentiate between the prohibited and acceptable conduct.[183] Moreover, the identification requirement was rationally intended to keep minors off the premises.[184] Finally, it determined that West Fargo had the power to enact the cabaret ordinance because the North Dakota Legislature wanted cities to have the authority to control obscene conduct in liquor establishments.[185]

Fifteen years later, the United States Supreme Court addressed the regulation of adult entertainment through the Twenty-First Amendment a second time in *44 Liquormart Inc. v. Rhode Island*[186] in 1996.[187] Rhode

173. *Id.* at 114.
174. *Id.* at 118.
175. *Id.* at 115-16.
176. *Id.* In his dissenting opinion, Justice Marshall asserted that the ordinance legally allowed nightclubs to present a variety show, but if the show involved sex, it was unconstitutional. *Id.* at 138 (Marshall, J., dissenting). The classification was based on content, and the Court traditionally viewed those classifications with suspicion under the First Amendment standards. *Id.* at 139.
177. 305 N.W.2d 821 (1981).
178. *Olson*, 305 N.W.2d at 822.
179. *Id.* at 823.
180. *Id.*
181. *Id.* at 827.
182. *Id.* at 828-30.
183. *Id.* at 829.
184. *Id.* at 830.
185. *Id.* at 831.
186. 517 U.S. 484 (1996) (plurality opinion).
187. *44 Liquormart*, 517 U.S. at 489.

Island liquor stores challenged a state ban on liquor price advertising alleging it violated their First Amendment rights.[188] The State relied on *LaRue* and the power of the Twenty-First Amendment to justify the ordinance.[189] Nevertheless, the Court rejected its reasoning from *LaRue* and ended the line of cases which held that the Twenty-First Amendment essentially superseded the First Amendment.[190] The Court held that the Twenty-First Amendment did not supersede the prohibition against laws abridging freedom of speech.[191] Even though the Court abandoned the rationale in *LaRue*, it did not specifically question the holding that the ordinance in *LaRue* was constitutional.[192] After the analysis in *LaRue*, the United States Supreme Court regulated adult entertainment ordinances through the First Amendment.[193]

F. THE DEVELOPMENT OF THE FIRST AMENDMENT REGULATION OF ADULT BUSINESSES

Many forms of adult entertainment, such as adult bookstores and movie theatres, did not serve alcohol on their premises and were not subject to liquor licenses and the Twenty-First Amendment.[194] These businesses were regulated through the First Amendment and zoning ordinances.[195] One decision in particular had a confusing effect on the adult entertainment zoning jurisprudence.[196] In addition to these zoning challenges, ordinances were also challenged as a violation of the First Amendment.[197] After the varied United States Supreme Court jurisprudence, the Seventh Circuit Court of Appeals adopted a test that synthesized the Supreme Court precedent.[198]

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188. *Id.* at 492-93.

189. *Id.* at 515.

190. *Id.* at 516; *see, e.g.*, Olson v. City of West Fargo, 305 N.W.2d 821, 827 (1981) (holding the Twenty-First Amendment gave the city the power to regulate alcohol and nude dancing).

191. *44 Liquormart*, 517 U.S. at 516.

192. *Id.* at 515.

193. *See* discussion *infra* Part II.F (analyzing adult entertainment cases regulated through the First Amendment).

194. *Compare* California v. LaRue, 409 U.S. 109, 114 (1972) (holding that a liquor establishment was subject to regulation under police powers and the Twenty-First Amendment), *with* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (challenging a zoning ordinance under the First Amendment where no alcohol was served).

195. *See Young*, 427 U.S. at 63 (upholding a zoning ordinance to regulate property uses in a neighborhood with adult businesses); *see also* discussion *infra* Part II.F.1 (discussing the development of the secondary effects test).

196. *See* discussion *infra* Part II.F.2 (analyzing the case law after the first zoning cases).

197. *See* discussion *infra* Part II.F.3 (focusing on the general ordinance adult entertainment cases that involve nude dancing specifically).

198. *See* discussion *infra* Part II.F.4 (explaining the new synthesized test).

1. *Courts Approve the Use of Zoning and Develop the Secondary Effects Test*

In *Young v. American Mini Theatres, Inc.*,[199] Detroit, Michigan enacted an "Anti-Skid Row Ordinance" after discovering that certain property uses, some relating to adult businesses, harmed a neighborhood.[200] The Court allowed the city council to support its ordinances with expert opinions about the decline in the quality of life, or the "secondary effects" in neighborhoods with adult establishments.[201] Even though the First Amendment prohibits the government from wholly suppressing sexual materials, the *Young* opinion demonstrates how the government can regulate the content of materials by placing them in a different classification.[202]

Soon thereafter, the North Dakota Supreme Court, like the United States Supreme Court, upheld an ordinance regulating the zoning of an adult entertainment business in *Central Avenue News*.[203] Central Avenue News, Inc. opened a bookstore in downtown Minot and offered sexually explicit written materials and booths that played explicit films.[204] Central Avenue News, Inc. planned to open another entertainment center.[205] Subsequently, the City of Minot enacted a $300 annual license fee in addition to a new zoning restriction.[206] Central Avenue News, Inc. challenged the ordinance in court.[207] Using *Young*'s plurality rationale, the North Dakota Supreme Court held that Minot was within its constitutional rights under the First Amendment in charging a reasonable licensing fee.[208] According to the court, the city was within its wide-reaching power to zone under the police powers.[209]

Five months after *Central Avenue News*, the Eighth Circuit Court of Appeals considered *Avalon Cinema Corp. v. Thompson*,[210] an adult

199. 427 U.S. 50 (1976).

200. *Young*, 427 U.S. at 54. The harm included undesirable transients, decreasing property values, increasing crime, especially prostitution, and out-migration. *Id.* at 55.

201. *Id.* at 71-73.

202. *See id.* at 70 ("[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theatres of our choice.").

203. City of Minot v. Cent. Ave. News, Inc., 308 N.W.2d 851, 863 (1981).

204. *Id.* at 855.

205. *Id.*

206. *Id.* at 855-56.

207. *Id.* at 857.

208. *Id.* at 861.

209. *Id.* at 858-59. "Licensing fees levied on practices or business the nature of which revolves around the exercise of First Amendment rights will withstand a constitutional attack only if they are nominal and imposed only as a regulatory measure to defray the expenses of policing the activities in question." *Id.* at 859.

210. 667 F.2d 659 (8th Cir. 1981).

entertainment case.[211] In *Avalon*, the Little Rock City Council discovered that the city's first adult movie theatre was scheduled to open.[212] Therefore, it enacted a zoning ordinance that prohibited sexually explicit film showings.[213] The Eighth Circuit found the ordinance unconstitutional under the *O'Brien* factors because the ordinance was content-based and lacked justification as a reasonable regulation of time, place, and manner of lawful speech.[214] The Eighth Circuit also distinguished *Young*, where the city council made specific findings about the adverse effects of the entertainment establishments.[215] The court was suspicious about the lack of specific findings and the timing of the emergency ordinance, especially when coupled with a city alderman's comments that he hoped the ordinance would prohibit the theatre from opening.[216]

In *City of Renton v. Playtime Theatres, Inc.*,[217] the United States Supreme Court upheld another ordinance restricting the location of adult entertainment movie theatres.[218] Renton, Washington passed an ordinance that required adult theatres to be located outside residential zones.[219] Playtime Theatres, an adult movie theatre, challenged the ordinance on First Amendment grounds.[220]

The Court recognized the difficulty in analyzing these ordinances.[221] It reasoned that the business' First Amendment rights were threatened when a municipality denied the business a reasonable opportunity to operate.[222] Nevertheless, the Court concluded that the ordinance was not aimed at the content of the films, or at suppression of free speech, but at the secondary

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211. *Avalon*, 667 F.2d at 660. While this case is unlikely to appear in most analyses of First Amendment jurisprudence, McCrothers and Berger relied on it in their arguments. McCrothers Corp. v. City of Mandan, 2007 ND 28, ¶ 11, 728 N.W.2d 124, 128-29.

212. *Avalon*, 667 F.2d at 660.

213. *Id.*

214. *Id.* at 662-63. The *O'Brien* factors are: (1) the regulation must further an important or substantial governmental interest; (2) the governmental interest must be unrelated to the suppression of free expression; and (3) the restriction on the alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968).

215. *Avalon*, 667 F.2d at 661.

216. *Id.* at 662-63.

217. 475 U.S. 41 (1986).

218. *Renton*, 475 U.S. at 43.

219. *Id.* at 44.

220. *Id.* at 43. The Ninth Circuit Court of Appeals held that the ordinance failed the *O'Brien* test because Renton relied on the experiences of other cities in supporting its rationale and failed to demonstrate its interests were unrelated to the suppression of expression. *Id.* at 46.

221. *Id.* at 47. "At first glance, the Renton ordinance . . . does not appear to fit neatly into either the 'content-based or the content-neutral' category." *Id.*

222. *Id.* at 54.

effects.[223] The majority determined that cities and municipalities should have the opportunity to experiment to find solutions to the alleged problems.[224] Finally, the Court found that a zoning ordinance would be upheld if it was intended to serve a substantial governmental interest, and did not restrict alternative avenues of communication.[225] In the aftermath of the *Renton* decision, circuit courts continued to analyze whether ordinances were constitutional and interpreted the Supreme Court precedent differently.[226] The Supreme Court did not address the confusion until 2002.[227]

2. *The Supreme Court Addresses the Confusion Surrounding Zoning Cases*

In 2002, the United States Supreme Court addressed the issue of adult entertainment in *City of Los Angeles v. Alameda Books, Inc.*,[228] when an adult business challenged an ordinance that prohibited multiple adult entertainment businesses in one building.[229] The district court and Ninth Circuit Court of Appeals held the ordinance unconstitutional under the *Renton* standard because the city failed to produce substantial evidence of the problems related to multi-level adult entertainment establishments in the same building.[230] In the plurality opinion, five Justices agreed that the ordinance was unconstitutional, but used different rationales.[231]

Justice O'Connor, writing for the plurality, found that the City of Los Angeles reasonably relied on a 1977 study.[232] The city used the study to infer that areas with high concentrations of adult entertainment also had high

223. *Id.* at 53.

224. *Id.* at 52.

225. *Id.* at 47.

226. *See, e.g.*, Spokane Arcade, Inc. v. City of Spokane, 75 F.3d 663, 667 (9th Cir. 1996) (holding that an ordinance that required arcade booths to be visible to employees was constitutional because it did not prohibit the activity completely); Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1533-34 (9th Cir. 1993) (concluding that a zoning ordinance created too much hardship for adult businesses and was unconstitutional); Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1258-60 (5th Cir. 1992) (relying on *Renton* to endorse the secondary effects doctrine in finding a zoning ordinance constitutional because the city council had considered the secondary effects).

227. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 429 (2002) (plurality opinion).

228. 535 U.S. 425 (2002) (plurality opinion).

229. *Alameda Books*, 535 U.S. at 429.

230. *Id.* at 432-33.

231. *Id.* at 429, 443-53.

232. *Id.* at 435-36. Justice O'Connor stated: "In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech." *Id.* at 438. She relied on the finding in *Renton*, that a city may rely on evidence that is "reasonably believed to be relevant," to show a connection between regulation of speech and a substantial governmental interest. *Id.*

crime rates.[233] The plurality also reaffirmed the power of the secondary effects doctrine in regulating speech.[234]

Moreover, the plurality found that a municipality must supply a rational basis for addressing the secondary effects, with evidence that fairly supports its rationale.[235] The challenger must cast direct doubt "by demonstrating that the municipality's evidence does not support the rationale or by furnishing evidence that disputes the municipality's factual findings."[236] If the challenger succeeds, then the burden shifts back to the municipality to supplement the record.[237] The Court found that the challengers did not raise a significant issue with the study and refused to reverse the summary judgment.[238] While these cases focused on zoning ordinances, the Supreme Court also addressed adult business through general nude dancing ordinances.[239]

3. *Nude Dancing and the First Amendment*

The United States Supreme Court has also faced difficulty when attempting to analyze nude dancing, as a subset of adult businesses, under the First Amendment.[240] The ordinances regulating adult entertainment may be in the form of zoning ordinances as previously discussed, or general ordinances, such as the nude dancing ordinances.[241] The Court produced two plurality opinions, with the Justices disagreeing with the applications and rationale of the First Amendment tests.[242]

In *Barnes v. Glen Theatre, Inc.*,[243] two adult entertainment establishments from South Bend, Indiana and individual dancers brought an action to enjoin the enforcement of an Indiana statute.[244] The statute required

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233. *Id.* at 430. The Court found it reasonable to interpret a study on concentrations of adult businesses and infer the results to adult businesses located in the same building. *Id.*

234. *Id.*

235. *Id.* at 438-39.

236. *Id.*

237. *Id.* at 439.

238. *Id.* at 443.

239. *See* discussion *infra* Part II.F.3 (addressing the general ordinance adult entertainment cases that involve nude dancing specifically).

240. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 283 (2000) (plurality opinion) (analyzing an ordinance prohibiting nudity); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 562-63 (1991) (plurality opinion) (discussing a statute requiring dancers to wear pasties and g-strings).

241. *Compare* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986) (analyzing a zoning ordinance) *with Barnes*, 501 U.S. at 562-63 (addressing a general ordinance requiring g-strings and pasties).

242. *Erie*, 529 U.S. at 277-81; *Barnes*, 501 U.S. at 560-61.

243. 501 U.S. 560 (1991) (plurality opinion).

244. *Barnes*, 501 U.S. at 562-63.

dancers to wear pasties and g-strings.[245] The plaintiffs alleged that the statute violated their First Amendment rights to freedom of expression.[246]

Justice Rehnquist first acknowledged that nude dancing is expressive conduct marginally protected by the "outer perimeters" of the First Amendment.[247] In his opinion, he analyzed the statute under the *O'Brien* factors.[248] As such, Justice Rehnquist determined that: (1) the public indecency statute was designed to protect the public's health, morals, and order; (2) it was unrelated to the suppression of expression; (3) public nudity was an evil that the State had the power to prohibit; and (4) the statute was narrowly tailored by requiring the dancers to wear pasties.[249]

Unlike Rehnquist, Justice Scalia would not subject the ordinance to any First Amendment analysis because the law regulated nudity and not dancing.[250] Justice Souter wrote the final plurality opinion and agreed that *O'Brien* was the correct test.[251] He asserted, however, that the secondary effects doctrine should be used to justify the ordinance, citing the *Renton* decision as precedent.[252]

After the *Barnes* decision produced the three rationales, the circuit courts applied the standards with difficultly.[253] Then, the United States Supreme Court decided *City of Erie v. Pap's A.M.*[254] in 2000.[255] The City of Erie, Pennsylvania enacted an ordinance that prohibited public nudity.[256] The owner of Kandyland, an establishment that featured nude female dancers, argued that statements made by the city attorney implied that the ordinance was aimed at nude dancing specifically.[257] The Pennsylvania Supreme Court, demonstrating the confusion after the *Barnes* opinion, held

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245. *Id.* at 563.

246. *Id.* at 564.

247. *Id.* at 565-66.

248. *Id.* at 566-67.

249. *Id.* at 567-72.

250. *Id.* at 572 (Scalia, J., concurring). Justice Scalia further disagreed with the conclusion that dancing is "inherently expressive." *Id.*

251. *Id.* at 582 (Souter, J., concurring).

252. *Id.* at 582-87.

253. *See, e.g.*, Colacurcio v. City of Kent, 163 F.3d 545, 550 (9th Cir. 1998) (explaining the confusion surrounding the Supreme Court cases). The court applied the *O'Brien* test to an ordinance that regulated the distances after acknowledging that the Supreme Court cases dealing with nude dancing resulted in a lack of guidance in applying the First Amendment to these cases. *Id.* The court also determined that the appropriate test was whether the business has a reasonable opportunity to operate. *Id.* at 557.

254. 529 U.S. 277 (2000) (plurality opinion).

255. *Pap's A.M.*, 529 U.S. at 277.

256. *Id.* at 282.

257. *Id.* at 292. The city attorney stated that the public nudity ban was not intended to apply to legitimate theater productions. *Id.*

that the ordinance violated the First Amendment because the Supreme Court's *Barnes* opinion did not create clear precedent for the lower courts to follow.[258]

The United States Supreme Court, in another plurality opinion, found that the Erie ordinance was content-neutral and should be analyzed under the *O'Brien* test.[259] Moreover, the Court determined that it would not strike ordinances on the basis of alleged illicit motives.[260] The Court also reaffirmed the city's ability to rely on evidence found in other cities about the negative effects adult entertainment has on the neighborhood.[261] Because the ordinance's goal was to combat these negative secondary effects, the Court ultimately accepted the rationale that the city's goal was not to suppress expression.[262] *Erie* and *Alameda Books* provided the most recent Supreme Court opinions, and the Seventh Circuit subsequently developed a test to synthesize the precedent.[263]

4. *The Seventh Circuit Test Synthesizes the United States Supreme Court Precedent*

Courts struggled with the *Erie* decision.[264] In 2003, the Seventh Circuit Court of Appeals in *Ben's Bar, Inc. v. Village of Somerset*,[265] devised a

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258. *Id.* at 285.

259. *Id.* at 289-90. If the Court had found the ordinance was related to suppression of expression, the ordinance would have had to meet the more stringent standard. *Id.* at 289.

260. *Id.* at 292. The Court found it important that the ordinance did not prohibit nudity that contained an erotic message, but prohibited all nudity regardless of activity. *Id.* at 290.

261. *Id.* at 297. Even though the Court reaffirmed the ability of cities to rely on other cities for their information, the Court in *Erie* found that the city had relied on its own findings. *Id.*

> [T]he Council of the City of Erie, has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.

Id. (emphasis omitted).

262. *Id.* This demonstrated the highly deferential attitude given to the city. *Id.* The Court also analogized the Erie City Council's power over its city to that of an administrative agency and criticized Kandyland for foregoing the opportunity to challenge the ordinance during the fact finding stage. *Id.* at 298.

263. *See* discussion *infra* Part II.F.4 (analyzing the new Seventh Circuit test).

264. *See, e.g.*, Gary v. City of Warner Robins, 311 F.3d 1334, 1336-40 (11th Cir. 2002) (upholding an ordinance prohibiting nude dancers under twenty-one years of age from entering a non-eating establishment selling alcohol because it prohibited her entrance privileges); Giovani Carandola, Ltd. v. Fox, 396 F. Supp. 2d 630, 636 (M.D.N.C. 2005) *aff'd in part, rev'd in part, and vacated in part on other grounds*, 470 F.3d 1074 (4th Cir. 2006) (concluding that the state could not justify the burden of suppressing erotic dancing because it prohibited nude conduct and entertainment); City of Elko v. Abed, 677 N.W.2d 455, 464-65 (Minn. Ct. App. 2004) (stating that a general study refuting the secondary effects was insufficient to shift the burden back to a municipality).

265. 316 F.3d 702 (7th Cir. 2003).

test to analyze adult business and nude dancing ordinances.[266] This test synthesizes the decisions in *O'Brien*, *Renton*, *Erie*, *Young*, and *Alameda Books*.[267] In *Ben's Bar*, the court held that in order for an ordinance to be constitutional:

> (1) [T]he State must be regulating pursuant to a legitimate governmental power; (2) the regulation cannot completely prohibit adult activity; (3) the regulation must be aimed at the negative secondary effects caused by adult entertainment, not suppression of expression; and[] (4) the regulation must serve a substantial governmental interest, narrowly tailored, and it must keep a reasonable alternative avenue of communication open.[268]

Under the new test, the Seventh Circuit analyzed an ordinance that prohibited the sale of alcohol at a sexually oriented business.[269] Ben's Bar argued that the city needed to provide reports showing the connection between alcohol, nude dancing, and secondary effects.[270] The city claimed it was trying to reduce the adverse secondary effects from the combination of adult entertainment and alcohol.[271]

The court held the first prong of the test, whether the State was that regulating with a legitimate power, was met because the regulation was within the city's general police powers.[272] The court explained that the next two prongs of the test were designed to determine the correct level of scrutiny to apply to the ordinance.[273] The court also held that the regulations at issue, which prohibited only the combination of alcohol and nude dancing, did not completely prohibit the activity.[274] Moreover, the court agreed that Somerset's predominant concern was to combat the secondary effects of the speech.[275] The analysis for the fourth factor required the court to address

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266. *Ben's Bar*, 316 F.3d at 713. The North Dakota Supreme Court adopted this test. McCrothers Corp. v. City of Mandan, 2007 ND 28, ¶ 18, 728 N.W.2d 124, 135.

267. *Ben's Bar*, 316 F.3d at 713 (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) (plurality opinion); City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (plurality opinion); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion)).

268. *Id*. at 722 (citations omitted).

269. *Id*.

270. *Id*. at 725.

271. *Id*.

272. *Id*. at 722-23.

273. *Id*. at 723.

274. *Id*. This satisfies the second prong of the test, which is whether the regulation completely prohibits the activity. *Id*. at 722.

275. *Id*. at 723-24. The regulation included language stating that it was not attempting to "restrict or deny access by adults to sexually oriented-materials protected by the First Amendment," but instead intended to "address[] the secondary effects of Sexually Oriented Businesses."

two questions: "(1) what proposition does a city need to advance in order to sustain a secondary-effects ordinance"; and "(2) how much evidence is required to support the proposition."[276] In this case, the city's rationale was that the alcohol prohibition would reduce the secondary effects that result from the combination of nude dancing and alcohol.[277] It accepted this rationale and rejected Ben's Bar's argument that the city needed to complete its own study.[278] Therefore, the Seventh Circuit held that the ordinance was constitutional.[279] While there is presently a synthesized First Amendment test, adult entertainment cases have also been analyzed under the Fifth Amendment.[280]

G. ADULT ENTERTAINMENT CHALLENGES UNDER THE FIFTH AMENDMENT

In addition to the First Amendment, plaintiffs have challenged regulations under the Takings Clause of the Fifth Amendment.[281] The Takings Clause of the Fifth Amendment establishes the government's right to take property from individual owners in certain situations.[282] The policy behind the takings concept is that the government should not force individuals to bear public burdens, which "in all fairness and justice" should be borne by the public.[283]

The primary issue is a factual analysis that asks whether the individual has been deprived of all economically viable uses of land.[284] The issue

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Id. at 724. This satisfies the third prong of the test, which requires that the ordinance address the secondary effects of the adult businesses instead of suppressing expression. *Id*. at 722.

276. *Id*. at 724.

277. *Id*. at 725. The city cited studies from St. Croix, Wisconsin, and the Attorney General's report from Minnesota. *Id*.

278. *Id*. The court also rejected the argument that the city needed to produce written records of the effects of alcohol in nude dancing establishments. *Id*. at 725-26.

279. *See id*. at 728 ("Perhaps a sober patron will find the performance less tantalizing, and the dancer might therefore feel less appreciated. . . . But the First Amendment rights of each are not offended when the show goes on without liquor.").

280. *See* discussion *infra* Part II.G (analyzing the adult entertainment Fifth Amendment challenges).

281. *See, e.g*., U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."); N.W. Enterprises, Inc. v. City of Houston, 352 F.3d 162, 186 (5th Cir. 2003) (requiring adult mini-theatres and adult arcades to conform to certain structural designs); P.M. Realty & Invs., Inc. v. City of Tampa, 779 So. 2d 404, 408-09 (Fla. Dist. Ct. App. 2000) (finding that a zoning ordinance regulating the location of adult businesses was constitutional under the Fifth Amendment); Dandy Co., Inc. v. Civil City of S. Bend, 401 N.E.2d 1380, 1386 (Ind. Ct. App. 1980) (analyzing a zoning ordinance under the Fifth Amendment).

282. U.S. CONST. amend. V. *See also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (explaining that the government may take private property).

283. Armstrong v. United States, 364 U.S. 40, 49 (1960).

284. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

regarding whether the land use is advancing a public interest is a mix of both fact and law.[285] A city or municipality has broad police powers to regulate land-usage through zoning.[286] Ordinances and regulations are often zoning ordinances in adult entertainment cases.[287] It is important to note that a zoning ordinance does not constitute a taking "merely because it diminishes the value of the regulated property or disallows the best and highest use of the property."[288]

The Supreme Court has identified the following situations as per se regulatory takings: "(1) where government requires an owner to suffer a permanent physical invasion of her property," however minor; and "(2) where regulations completely deprive an owner of *all* economically beneficial use[s] of [his or] her property," which is the determinative factor.[289] If the regulation does not fall into these two narrow categories, then courts follow the factors set out in *Penn Central Transportation Co. v. New York City*[290] when evaluating takings cases.[291]

In *Penn Central*, a prominent railway terminal in New York received a landmark preservation designation.[292] The owners were subsequently denied permission to build an apartment building over the terminal.[293] They sued, alleging that the denial of developmental opportunities constituted a taking.[294] The United States Supreme Court developed the following test to determine whether there has been a taking: (1) "the economic impact of the regulation on the claimant and, particularly"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."[295] Under these factors, the

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285. City of Monterey v. Del Monte Dunes at Moneterey, Ltd., 526 U.S. 687, 720-21 (1999).

286. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (upholding a municipality's right to zone even when it affected landowners).

287. *See* City of Renton v. Playtime Theatres, Inc., 473 U.S. 41, 43 (1986) (upholding an adult entertainment zoning ordinance in Detroit); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (plurality opinion) (analyzing an "Anti-Skid Row" zoning ordinance that affected adult businesses).

288. Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987). It will constitute a taking of property for public use if the governmental regulation prohibits all or substantially all of the property use. *Id.*

289. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 528 (2005).

290. 438 U.S. 104 (1978).

291. *See, e.g.*, *Lingle*, 544 U.S. at 537 (reviewing the *Penn Central* factors); Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 9, 705 N.W.2d 850, 856 (analyzing the *Penn Central* factors).

292. *Penn Central*, 438 U.S. at 115.

293. *Id.* at 117.

294. *Id.* at 119.

295. *Id.* at 124. Under the third factor, the court explained that whether the prohibition amounts to a physical invasion or affects property interest through public program, it is adjusting the benefits and burdens of economic life to promote the common good. *Id.*

Court in *Penn Central* held that the prohibition did not constitute a taking.[296]

The North Dakota Supreme Court has utilized the *Penn Central* factors in its case analyses.[297] The North Dakota constitutional takings provision has been interpreted as conferring broader property rights than the federal constitution.[298] Article I, section 16 states, "[p]rivate property shall not be taken or damaged for public use without just compensation."[299] The North Dakota Supreme Court in *Wild Rice River Estates, Inc. v. City of Fargo*[300] addressed the takings issue.[301] In *Wild Rice*, developers claimed that a moratorium on building interfered with investment expectations.[302] The court analyzed this claim using the *Penn Central* factors, and found that the investment-backed expectations were unreasonable because factors beyond the moratorium affected the investment.[303]

Zoning ordinances that require bars to obtain special licenses have also been held constitutional under the Fifth Amendment.[304] In *SDJ, Inc. v. Houston*,[305] bar owners challenged an ordinance with an amortization provision for nonconforming uses.[306] The district court and Fifth Circuit held that the municipality had broad police powers to restrict the use of property.[307] Additionally, the ordinance did not prevent all reasonable uses of the bar owners' property.[308] More recently, an adult nightclub owner argued in *P.M. Realty & Investment, Inc. v. City of Tampa*,[309] that a zoning ordinance constituted a taking because it suppressed access to lawful speech.[310] Because the zoning ordinance allowed thirty-eight alternative categories for usage, the court refused to classify it as a taking.[311] The

296. *Id.* at 138.

297. *See Wild Rice*, ¶ 12, 705 N.W.2d at 854-55 (citing *Penn Central*, 438 U.S. at 124) (utilizing the *Penn Central* factors in its analysis).

298. *Id.* ¶ 16, 705 N.W.2d at 856 (citing Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987)).

299. N.D. CONST. art. I, § 16.

300. 2005 ND 193, 705 N.W.2d 850.

301. *Wild Rice*, ¶ 1, 705 N.W.2d at 852.

302. *Id.* ¶ 21, 22, 728 N.W.2d at 857.

303. *Id.* ¶ 24, 728 N.W.2d at 858-59.

304. *See* SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1271-72 (5th Cir. 1988) (requiring bar owners to obtain a permit to continue adult usage).

305. 837 F.2d 1268 (5th Cir. 1988).

306. *SDJ*, 837 F.2d at 1272.

307. *Id.* at 1271-72.

308. *Id.* at 1278.

309. 779 So. 2d 404 (Fla. Dist. Ct. App. 2000).

310. *P.M. Realty*, 779 So. 2d at 408-09.

311. *Id.*

North Dakota Supreme Court applied this analysis to *McCrothers Corp. v. City of Mandan*[312] in 2007.[313]

III. ANALYSIS

The North Dakota Supreme Court issued a unanimous decision in *McCrothers* with Chief Justice VandeWalle writing for the court.[314] Twenty-one years after it first considered an adult entertainment ordinance in *Olson*, the *McCrothers* court reconsidered whether the use of the Twenty-First Amendment was appropriate in the adult entertainment analysis.[315] The court began its analysis by reviewing the history and legal standard.[316] Then, it analyzed whether the ordinance is content-neutral or content-based.[317] The court adopted the Seventh Circuit Court of Appeals test to analyze the constitutionality of the ordinance under the First Amendment.[318] The court briefly considered and dispensed with an argument that the ordinance constituted a regulatory taking.[319] Finally, the court addressed the state constitutional issues.[320]

A. HISTORY AND LEGAL STANDARD

The *McCrothers* court began by reviewing the facts, ordinances, and procedural posture of the case.[321] Then the court addressed the summary judgment standard, namely, that the question before the court is a question of law and not fact.[322] The parties had already maintained that there were no disputed issues of material fact; instead, the only issues were of constitutional law.[323]

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312. 2007 ND 28, 728 N.W.2d 124.

313. *See* discussion *infra* Part III (analyzing *McCrothers*).

314. McCrothers v. City of Mandan, 2007 ND 28, ¶ 1, 728 N.W.2d 124, 126.

315. *Id.* ¶ 17, 728 N.W.2d at 134-35 (citing Olson v. City of West Fargo, 305 N.W.2d 821, 823 (N.D. 1981)).

316. *Id.* ¶¶ 2-6, 728 N.W.2d at 126-27.

317. *Id.* ¶¶ 10-16, 728 N.W.2d at 128-34.

318. *Id.* ¶ 18, 728 N.W.2d at 135; *see supra* note 267 and accompanying text (explaining the Supreme Court cases that the test synthesized).

319. *Id.* ¶¶ 33-35, 728 N.W.2d at 140-41. The court only needed three paragraphs to analyze the Fifth Amendment issue. *Id.*

320. *Id.* ¶ 36, 728 N.W.2d at 141-42.

321. *Id.* ¶¶ 2-6, 728 N.W.2d at 126-27.

322. *See id.* ¶ 7, 728 N.W.2d at 127 ("Summary judgment is a procedural device . . . [when] there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law.").

323. *Id.* ¶ 8, 728 N.W.2d at 127-28.

B. THE COURT REJECTED A STRICT SCRUTINY STANDARD

After reaffirming First Amendment protection for nude or semi-nude dancing, the court began its analysis to determine whether the ordinance would be judged under a strict scrutiny standard or the "less stringent standard."[324] McCrothers and Berger argued that the ordinances ought to be judged under strict scrutiny due to the analogous qualities of *Avalon*.[325] The *McCrothers* court distinguished *Avalon* for four reasons.[326] First, in *Avalon*, the city council enacted an ordinance only after learning about an imminent adult business opening.[327] Conversely, Mandan allowed adult entertainment to operate for years before the ordinances.[328] Additionally, the Mandan City Council allowed public hearings and produced findings that were numerous and specific.[329] Second, *Avalon* was decided before *Renton*.[330] This was important to the *McCrothers* court.[331] The court noted that after *Renton*, zoning restrictions on adult businesses were largely upheld.[332] Third, even though Mandan city commissioners and members of the public disclosed their displeasure with the adult entertainment establishments, the court did not believe the moral aversion constituted the predominant factor in enacting the ordinance.[333] Fourth, the court concluded that Mandan's main interest in enacting the ordinance was combating the negative secondary effects of adult establishments, which did not include an intention to violate the First Amendment.[334] Therefore, according to the *McCrothers* court, the ordinance was properly analyzed as a content-neutral time, place, and manner regulation and not a content-based strict scrutiny regulation.[335]

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324. *Id.* ¶ 10, 728 N.W.2d at 128.

325. *Id.* ¶¶ 10, 11 (citing Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 660 (8th Cir. 1981)).

326. *Id.* ¶¶ 12-16, 728 N.W.2d at 129-34.

327. *Id.* ¶ 12, 728 N.W.2d at 129 (citing *Avalon*, 667 F.2d at 661).

328. *Id.*

329. *Id.*

330. *Id.* ¶ 13 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986)); *see also Avalon*, 667 F.2d at 661 (finding that the ordinance was enacted after the city learned that an adult theatre was opening). The United States Supreme Court found that a city was allowed to rely upon other experiences, even if restricting First Amendment Rights was a motivating factor. *Id.*

331. *McCrothers*, ¶ 13, 728 N.W.2d at 129-30.

332. *Id.* at 130 (citing C. Crocca, Annot., *Validity of Ordinances Restricting Location of Adult Entertainment or Sex-Oriented Businesses*, 10 A.L.R. 5th 538 (1993)).

333. *Id.* ¶ 16, 728 N.W.2d at 134.

334. *Id.*

335. *Id.*

C. THE COURT REPLACED THE TWENTY-FIRST AMENDMENT ANALYSIS FROM *OLSON* WITH A NEW TEST

The *McCrothers* court acknowledged the disseverment of the Twenty-First Amendment analysis in cases involving alcohol and adult entertainment.[336] Since this analysis was abandoned, courts have struggled with the frameworks under which to analyze zoning and public indecency regulations.[337] Therefore, the court adopted a new test from the Seventh Circuit Court of Appeals which was based on the *O'Brien* test and attempted to synthesize the existing Supreme Court precedent.[338] Under the new test, a regulation is constitutional when:

> (1) the state is regulating pursuant to a legitimate governmental power; (2) the regulation does not completely prohibit adult entertainment; (3) the regulation is aimed not at the suppression of expression, but rather at combating the negative secondary effects caused by adult entertainment establishments; and (4) the regulation is designed to serve a substantial government interest, narrowly tailored, and reasonable alternative avenues of communication remain available; *or*, alternatively, the regulation furthers an important or substantial government interest and the restriction on expressive conduct is no greater than is essential in furtherance of that interest.[339]

After the court analyzed the Seventh Circuit test, it also addressed the possibility of overbreadth.[340]

1. *First Prong Analysis—Whether the Ordinance is a Legitimate Governmental Regulation*

The court began its analysis by evaluating the first prong of the new test.[341] Even though neither party disputed the legitimacy of the government power, the court explained that the inherent police powers give states the ability to regulate the sale of alcoholic beverages, even without relying on the Twenty-First Amendment.[342] Furthermore, both the United States Supreme Court and the North Dakota Supreme Court have held that states

336. *Id.* ¶ 17, 728 N.W.2d at 134-35.

337. *Id.* at 135 (citing Giovani Varandola, Ltd. v. Fox, 396 F. Supp. 2d 630, 638 (M.D.N.C. 2005), *aff'd in part, rev'd in part, and vacated in part on other grounds*, 470 F.3d 1074 (4th Cir. 2006)).

338. *Id.* ¶ 18.

339. *Id.*

340. *Id.* ¶ 27, 728 N.W.2d at 138-39.

341. *Id.* ¶ 19, 728 N.W.2d at 135-36.

342. *Id.*

have the power to regulate in order to maintain quality of life.[343] Moreover, a North Dakota statute provides that a local body may enact ordinances that will regulate alcohol licensees, including dancing or forms of entertainment.[344] Therefore, Mandan was regulating under a legitimate governmental power; thus, the ordinance met the first prong of the new test.[345]

2. Second Prong Analysis—Whether the Ordinance is a Complete Prohibition

The second prong determined whether the regulation completely prohibits adult entertainment.[346] Because no adult entertainment businesses were operating in Mandan, McCrothers and Berger contended that the ordinance completely prohibited adult entertainment.[347] The court rejected this argument, primarily because the ordinances in question did not prohibit the establishment and operation of adult establishments.[348] The ordinance only prohibited the location of the businesses and whether alcohol was served.[349] Furthermore, the test for "whether an adult business' rights are threatened is whether the government has 'effectively denied' the business a 'reasonable opportunity to open and operate.'"[350] The reasonableness test is whether the business could operate, not whether the business will operate successfully.[351] Therefore, the court concluded that McCrothers' and Berger's argument failed because the businesses had the opportunity to operate.[352]

3. *Third Prong Analysis—Whether the Ordinance Is Suppressing Expression or Combating Secondary Effects*

The court effectively analyzed the third prong earlier in the decision.[353] While determining whether the ordinance should be analyzed as a content-neutral or content-based regulation, the court held that the City of Mandan had satisfied its burden of proving that it was primarily concerned with the

343. *Id.* (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); Olson v. City of West Fargo, 305 N.W.2d 821, 823 (N.D. 1981)).
344. *Id.* (citing N.D. CENT. CODE § 5-02-09 (2007)).
345. *Id.* at 136.
346. *Id.* ¶ 20.
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.* (citing Colacurcio v. City of Kent, 163 F.3d 545, 557 (9th Cir. 1998)).
351. *Id.*
352. *Id.*
353. *Id.* ¶ 13, 728 N.W.2d at 129.

secondary effects of adult entertainment in enacting its ordinance.[354] The court drew from numerous indicators to affirm that Mandan's intent was indeed combating secondary effects.[355] Thus, the court found that Mandan met this prong.[356]

4. *Fourth Prong Analysis—Whether the Restriction is Essential in Furtherance of the Interest*

In the fourth prong of the analysis, the court addressed whether the ordinance was designed to serve a substantial governmental interest, and whether the restriction on expressive conduct was no greater than was essential in furtherance of that interest.[357] The court rejected McCrothers' and Berger's argument that the city failed to show a substantial governmental interest.[358] Instead, the court relied on *Alameda Books* and *Renton*, where the United States Supreme Court explicitly allowed a city to rely on evidence that it reasonably believed to be relevant for the connection between the governmental interest and speech.[359]

If McCrothers and Berger had been able to establish a significant doubt on Mandan's reasoning and rationale, the burden would have shifted back to the municipality to justify the ordinance.[360] McCrothers and Berger argued that the many comments from the public hearing met this standard, but the court disagreed.[361] People reported they were bothered by the noise, concerned that dancers came from other cities, and that the establishments promoted adverse images of the downtown area.[362] Moreover, a former dancer testified that nude dancing was a front for prostitution.[363] Additionally, the police chief stated that thirty-eight percent of the dancers had past criminal convictions.[364]

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354. *See generally id*. ¶¶ 13-16, 728 N.W.2d at 129-34 (analyzing the content of the ordinance and finding it to combat secondary effects).

355. *Id*. ¶ 14, 728 N.W.2d at 131. The purpose of the ordinance was to "prevent the deleterious secondary effects and concentrations of adult entertainment establishments within the City." MANDAN, N.D., CODE OF ORDINANCES § 13-02.1-01 (2003). It also stated that adult entertainment establishments lead to deleterious secondary effects including sexual behavior of employees, sexual acts, unsanitary activities, illegal drugs, and communicable diseases. *Id*.

356. *McCrothers*, ¶ 16, 728 N.W.2d at 134.

357. *Id*. ¶ 21, 728 N.W.2d at 137.

358. *Id*. ¶ 26, 728 N.W.2d at 138.

359. *Id*. ¶ 22, 728 N.W.2d at 137 (citing City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 435 (2002); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986)).

360. *Id*. ¶ 23.

361. *Id*. ¶ 24, 728 N.W.2d at 137-38.

362. *Id*. at 138.

363. *Id*.

364. *Id*.

Moreover, the court rejected McCrothers' and Berger's reliance on an article that criticized the methodology of many of the studies that Mandan relied upon.[365] Other courts refused to overturn ordinances due to critical commentary, and the North Dakota Supreme Court joined these courts in its refusal.[366] The court hinted that McCrothers' and Bergers' arguments may have raised an issue of fact, but summary judgment was inappropriate to resolve those issues.[367] The court concluded that the ordinances serve a substantial governmental interest, and thereafter considered McCrothers' and Berger's contention that the ordinances were overbroad and not narrowly tailored to the governmental interest.[368]

5. *Fifth Prong Analysis—Whether the Ordinance is Overbroad or Narrowly Tailored*

The McCrothers court noted that the United States Supreme Court stated that the overbreadth doctrine is "'manifestly, strong medicine' which should be used sparingly and only as a last resort."[369] McCrothers and Berger argued that the ordinance in its current form was overbroad because it could extend to cheerleaders at sporting events, dance troupes, garter auctions, and bachelor and bachelorette parties.[370] The court stated that because the ordinances were specific to dancing "*for consideration, monetary or otherwise*," it did not meet the standard for overbreadth.[371]

McCrothers and Berger challenged the requirement under Ordinance No. 964 to disclose certain criminal convictions for permit applications as overbroad.[372] The court refused to find this ordinance overbroad, even though the North Dakota Supreme Court found a very similar statute

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365. *Id.* ¶ 26.

366. *Id.* (citing SOB, Inc. v. County of Benton, 317 F.3d 856, 863-64 (8th Cir. 2003); City of Elko v. Abed, 677 N.W.2d 455, 464 (Minn. Ct. App. 2004)). The cities commonly use ten empirical studies to justify the secondary effects of adult establishments and one scholar argues that these studies provide no legitimate basis for regulating adult businesses. Paul et al., *supra* note 73, at 391.

367. *McCrothers*, ¶ 26, 728 N.W.2d at 138.

368. *Id.* ¶¶ 26, 27.

369. *Id.* ¶ 27, 728 N.W.2d at 139 (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

370. *Id.* ¶ 28.

371. *Id.*

372. *Id.* ¶ 29 (citing MANDAN, N.D., CODE OF ORDINANCES § 13-02.1-04(A)(5) (2003)). Ordinance No. 964 states:

> For the applicant and all applicant control persons, any and all criminal convictions or forfeitures within five (5) years immediately preceding the date of the application, other than parking offenses or minor traffic infractions including the dates of conviction, nature of the crime, nature and location of court and disposition.

Id.

unconstitutional in *Central Avenue* in 1981.[373] Mandan included a time requirement on the ordinance and the Commission's findings were more extensive than *Central Avenue*.[374] While the court refused to overrule the overbreadth holding in *Central Avenue*, it did acknowledge that criminal background checks have become more common and would be relevant to a city trying to combat the adverse secondary effects of adult entertainment establishments.[375] The court concluded that McCrothers' and Berger's First Amendment rights were not violated when Mandan enacted Ordinance Nos. 961, 963, and 964.[376] After the court concluded its First Amendment analysis, it addressed the Fifth Amendment arguments.[377]

D. WHETHER THE ORDINANCES CONSTITUTED A REGULATORY TAKING

In addition to the First Amendment analysis, McCrothers and Berger challenged that Mandan had taken their properties.[378] The court relied on the *Penn Central* factors in its analysis of the regulatory taking issue.[379] McCrothers' and Berger's establishments decreased revenues from $66,809 to $21,066 and $142,080 to $68,872 respectively over the same four-month period, before and after the ordinances.[380] Nevertheless, the court refused to grant a taking because they were still able to operate their businesses.[381] Moreover, the court noted that the investment backed expectations were unlikely reasonable.[382] There was a long history of zoning and general regulations of adult entertainment that should have provided notice to McCrothers and Berger.[383] McCrothers and Berger also had the opportunity to relocate their businesses if they wished to continue operating with adult entertainment.[384] The court concluded that this did not constitute a

373. *McCrothers*, ¶¶ 30, 31, 728 N.W.2d at 140 (citing City of Minot v. Cent. Ave. News, Inc., 308 N.W.2d 851, 863 (N.D. 1981)).

374. *Id.* ¶ 31.

375. *Id.* (citing N.D. CENT. CODE §§ 4-41-02(1), 5-02-02(8), 12-60-24(1), 15.1-13-14, 15.1-13-23, 43-30-02.1, 50-11-02.4, 50-11-06.8, 50-11.3-01, 50-12-03.2; 54-12-20(6) (2007)).

376. *Id.* ¶ 32.

377. *Id.* ¶ 33.

378. *Id.*

379. *See id.* ¶ 34, 728 N.W.2d at 141 (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (restating the *Penn Central* factors: (1) "the economic impact of the regulation on the claimant and, particularly;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action").

380. *Id.* ¶ 33, 728 N.W.2d at 140.

381. *Id.* ¶ 35, 728 N.W.2d at 141.

382. *Id.*

383. *Id.*

384. *Id.*

taking.[385] After the court concluded the takings issue, it addressed the state constitutional issues.[386]

E. STATE CONSTITUTIONAL ISSUES

The Court mentioned that McCrothers and Berger also challenged the ordinance under North Dakota constitutional provisions.[387] Because McCrothers and Berger failed to address why the results would differ from the results reached under federal law, the court declined to address state constitutional issues.[388] Therefore, the *McCrothers* court affirmed the summary judgment granted by the trial court for the City of Mandan.[389]

IV. IMPACT

Adult entertainment generates billions of dollars each year.[390] Even so, communities are unlikely to welcome the industry.[391] Ordinances are a tool that communities utilize in planning and zoning.[392] Nationally, adult entertainment ordinances have been struck down as unconstitutional by some courts.[393] Therefore, in lieu of confusing United States Supreme Court precedent, it is important that the North Dakota Supreme Court demonstrated its method of analysis for adult entertainment businesses.[394]

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385. *Id.* The court also mentioned that other courts held similarly. *Id.* (citing SDJ, Inc. v. City of Houston, 827 F.2d 1268, 1278 (5th Cir. 1988); P.M. Realty & Invs., Inc. v. City of Tampa, 779 So. 2d 404, 408-09 (Fla. Dist. Ct. App. 2000); DiaRaimo v. City of Providence, 714 A.2d 554, 564 (R.I. 1998)).

386. *Id.* ¶ 36, 728 N.W.2d at 141-42.

387. *Id.*

388. *Id.* at 142.

389. *Id.* ¶ 37.

390. DeWitt, *supra* note 10, at 22 (stating that the adult entertainment industry has been estimated to make ten to fourteen billion dollars every year).

391. David A. Thomas, *Tips for Successfully Regulating Sexually Oriented Businesses*, 22 PROB. & PROP. 43, 43 (2008).

392. *See, e.g.*, City of Detroit v. Detroit United Ry., 184 N.W. 516, 518 (Mich. 1921) ("[L]ocal authorities may control within reason, the use of their streets for any purpose whatsoever, not inconsistent with state law.").

393. *See, e.g.*, Conchatta Inc. v. Miller, 458 F.3d 258, 268 (3d Cir. 2006) (finding an ordinance that prohibited lewd entertainment at a liquor licensed establishment violated the First Amendment); Eggert Group, LLC v. Town of Harrison, 372 F. Supp. 2d 1123, 1144 (E.D. Wis. 2005) (invalidating an ordinance that prohibited the combination of nude dancing and alcohol).

394. *See McCrothers*, ¶ 18, 728 N.W.2d at 135 (adopting the Seventh Circuit test); s*ee also* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002) (plurality opinion) (stating that a city may reasonably infer information from other cities' experiences); City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (plurality opinion) (upholding a general nudity ordinance in another plurality opinion); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-72 (1991) (plurality opinion) (producing three rationales in the plurality); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-54 (1986) (plurality opinion) (discussing the secondary effects test).

The *McCrothers* decision should be utilized by city planners, city council members, and adult business owners in North Dakota.[395] By utilizing the court's analysis in *McCrothers*, city planners can pattern ordinances on those upheld in *McCrothers*.[396] Cities should note that first and foremost, adult entertainment is protected by the First Amendment, and a city may not completely eliminate adult entertainment from its limits.[397] Moreover, as long as cities only regulate part of the business—alcohol or dancing—the governing court should subject the ordinance to a content-neutral standard, which is easier to uphold than content-based ordinances.[398]

Certain elements in the *McCrothers* decision have likely made it more difficult for adult entertainment to continue in its present state if new ordinances are enacted.[399] Under the *McCrothers* standard, it is significantly easier for cities and municipalities to depend upon traditional empirical studies to prove the negative impact adult entertainment establishments have on their cities.[400] Because cities are able to rely on these negative impacts of other cities, city councils may justify an ordinance with a problem that is not present in their cities.[401] Moreover, there is no requirement for a city to accomplish its own study.[402] Without a radical departure from prior precedent, the North Dakota Supreme Court will continue to respect the fact findings of the municipality, making it easier for the cities to enact these ordinances.[403]

Even though the courts give great deference to municipalities, there remains an uncertainty.[404] The ordinances in question narrowly regulate

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395. *See McCrothers,* ¶ 36, 728 N.W.2d at 142 (upholding Mandan's ordinances). A Minot group formed to pursue an ordinance prohibiting adult entertainment. *Anti-Strip Club Group Is Formed in Minot*, BISMARCK TRIB., Jan. 22, 2008, http://www.bismarcktribune.com/articles/2008/01/22/news/state/147110.txt.

396. *See, e.g.*, MANDAN, N.D., CODE OF ORDINANCES § 12-01-18 (2003) (providing language from the "Entertainment and Live Performances Upon Licensed Premises" ordinance).

397. *See, e.g., Barnes*, 501 U.S. at 565-66 (stating that some nude dancing is expressive conduct within the "outer perimeters" of the First Amendment).

398. Thomas, *supra* note 391, at 44.

399. *See McCrothers*, ¶ 36, 728 N.W.2d at 140 (upholding the current ordinance so as to endorse the ability for cities to separate alcohol and adult entertainment as long as the ordinance meets the First Amendment standard).

400. *Id.*

401. Paul et al., *supra* note 73, at 361-62. The traditional studies often cited have been accomplished in cities such as Los Angeles, Houston, Detroit and Indianapolis, which have larger populations than most North Dakota cities, including Mandan. *Id.*

402. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52 (1986) (holding that a city does not need to complete its own studies as long as the studies it relies on are reasonably believed to be relevant).

403. *McCrothers*, ¶ 25, 728 N.W.2d at 138 (refusing to accept McCrothers' and Berger's argument that the ordinance did not serve a governmental interest).

404. *See* Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702, 714 (7th Cir. 2003) (discussing similar standards for public indecency, zoning, and liquor regulations).

dancing through an ordinance regulating liquor and zoning.[405] The United States Supreme Court has produced different rationales, depending on the type of ordinance.[406] It is unclear whether the North Dakota Supreme Court would utilize the same analysis if a statute prohibited something related, like nudity or lewdness.[407] Additionally, because the court stated that this test is for the combination of alcohol and nude or semi-nude dancing, it is unclear whether this test would apply to another business establishment like an adult bookstore or adult theatre, where alcohol may or may not be served.[408]

Adult businesses should also be on notice that they must satisfy the *Penn Central* elements to allege a taking in adult entertainment cases in North Dakota.[409] An ordinance prohibiting the location of an adult business in its current zone is constitutional, as long as it provides an area for relocation and the business may still operate.[410] Business owners and their investors should be aware of those implications because they are unlikely to win a takings argument under that assertion.[411] Even if a city or municipality has not enacted ordinances yet, the business owners will not be able to approach the court and argue their investment-backed expectations were not met.[412] Therefore, this decision will likely have a significant impact on both city planners and business owners.[413]

V. CONCLUSION

In *McCrothers*, the North Dakota Supreme Court adopted a new test for determining the constitutionality of adult entertainment establishment ordinances.[414] The new test, which the court adopted from the Seventh Circuit is: (1) whether the government is regulating pursuant to a legitimate governmental power; (2) whether it prohibits adult entertainment; (3) whether it is aimed at secondary effects or suppression of expression; and

405. *See* MANDAN, N.D., CODE OF ORDINANCES § 12-01-18 (2003) (regulating the combination of alcohol and nude dancing).

406. *Compare Renton*, 475 U.S. at 41 (upholding an ordinance regulating the location of adult theatres) *with* City of Erie v. Pap's A.M., 529 U.S. 277, 282-83 (2000) (upholding an ordinance that prohibited public nudity).

407. *See McCrothers*, ¶ 18, 728 N.W.2d at 135 (adopting the Seventh Circuit test to apply it specifically to the ordinance that restricted the combination of alcohol and nude or semi-nude dancing).

408. *Id.*

409. *Id.* ¶ 34, 728 N.W.2d at 141.

410. *Id.* ¶ 35.

411. *Id.*

412. *Id.*

413. *See id.* ¶ 18, 728 N.W.2d at 135 (adopting the Seventh Circuit test).

414. *Id.*

(4) whether the regulation is narrowly tailored or furthers a substantial governmental interest.[415] The court held that the ordinance was content-neutral, did not violate the four-part test, and did not meet the standard for overbreadth.[416] Therefore the ordinance was constitutional under the First Amendment.[417] Additionally, the ordinance did not deprive the business owners of all economic uses so it did not constitute a regulatory taking.[418] Finally, the court refused to address the state constitutional issues because appellants did not offer any reason why the results would have differed.[419]

Leah Johnson Ellis[*]

415. *Id.*
416. *Id.* ¶¶ 16, 26, 28, 31, 728 N.W.2d at 134, 138-39.
417. *Id.* ¶ 32, 728 N.W.2d at 140.
418. *Id.* ¶ 35, 728 N.W.2d at 141.
419. *Id.* ¶ 36, 728 N.W.2d at 142.

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