“The main hang up in the world today is hypocrisy and insecurity. If people can’t face up to the fact of other people being naked or smoking pot, or whatever they want to do, then we’re never going to get anywhere. People have got to become aware that it’s none of their business and that being nude is not obscene. Being ourselves is what’s important. If everyone practiced being themselves instead of pretending to be what they aren’t, there would be peace.”

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I. INTRODUCTION

The cover of John Lennon’s 1968 record *Two Virgins* shocked the world by showing Lennon and Yoko Ono naked, which was an unheard of act of controversy for a popular celebrity at the time. Today, however, public nudity in the context of protest has become prevalent around the world. This trend holds true in the United States as well, as there are numerous examples of protesters utilizing nudity as a method of protest. Many groups have

2. Yoko Ono & John Lennon, *UNFINISHED MUSIC NO. 1: TWO VIRGINS* (Apple Records 1968), cover image available at http://articles.absoluteelsewhere.net/Articles/lennon_nudity.html. John Lennon and Beatles enthusiast Jean Teeters discussed her belief that Lennon was a true advocate of nudity and wanted others to realize that the naked body is not obscene. See Teeters, supra note 1.
3. See Upsurge of Naked Protest; Women in the Nude Is the Ultimate Act of Civil Disobedience in Opposition to Global Misogyny, THE MERCURY, June 13, 2012, at 10 (explaining prevalence of naked protests around world). Throughout the recent global uprisings and “revolutionary rumblings,” women have utilized nudity in protests. See id. In Egypt, during spring 2011, a blogger named Aliaa Magda al-Mahdi posted pictures of herself nude on her blog in an act of protest calling for freedom of expression in Egypt. See id. Women in Uganda protested nude in June 2012 to oppose the arrest of a leading female opposition politician. See id. Further, women in Cambodia protested evictions and housing backlogs naked. See id.
recognized that the utility of and prominent reasons for protesting nude include the ways in which it immediately garners attention, fosters discussion in the media, and places the protesters’ messages into the public sphere.\(^5\)

The recent phenomenon of protesting nude raises legal questions concerning conduct as protected speech and freedom of expression.\(^6\) The Supreme Court has recognized that not all forms of expressive conduct are protected as “speech” under the First Amendment to the U.S. Constitution.\(^7\) The act of protesting nude, however, is likely not protected under the First Amendment.\(^8\) Several court decisions have highlighted that utilizing nudity in protest is only protected under the First Amendment if the protester’s message is intertwined with the conduct itself.\(^9\) While protesting nude is likely not protected under the First Amendment that does not mean it is not otherwise protected.\(^10\)

Federalism is one of the bedrock principles upon which this country was founded, and in the late 1970s the Supreme Court started to return to the fundamental promises “wrought by the blood of those who fought our War between the States” and to recognize that both state and federal government play a role in protecting individual rights.\(^11\) Justice William J. Brennan said, “state courts no less than federal are and ought to be the guardians of our
liberties." Even though the U.S. Constitution may not protect or recognize an individual right, the states may interpret their own constitutions to afford that right. Specifically, the rights afforded under the First Amendment have been greatly expounded upon by individual state constitutions. Public nudity laws differ among states, but the right to protest nude has been acknowledged by some state courts as protected speech under their respective state constitutions.

This Note will analyze the implications of discordant federal and state laws on the issue of protecting protesting in the nude, as well as discuss which states’ models work best for handling this controversial issue. This Note will begin by providing the history of protected speech under the First Amendment, particularly focusing on why nude protesting, as of now, is not likely protected speech under the Federal Constitution. Next, it will offer an overview of the concept of federalism and its foundational principles. This Note will then analyze the implications of having varying state and federal laws on nude protesting. Further, it will discuss at what level nude protesting should be regulated, whether it be on a national, state, or municipal level. Lastly, this Note will provide different state models for regulating personal liberties and decide which model is best suited for regulating nude protesting.

II. HISTORY

A. First Amendment

The right to free speech, which is embodied in the First Amendment, is one

12. Id. at 491.
14. See Brennan, supra note 10, at 495 (explaining state constitutions can construe counterpart provisions of Federal Bill of Rights differently). Justice Brennan cites examples where states utilize their authority to define the rights of their citizens separately from the Federal Constitution’s meaning of these same rights. See id. at 499-501. He highlights a quote from the California Supreme Court where the court stated: “We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution.” Id. at 499 (alteration in original) (quoting People v. Dibrow, 545 P.2d 272, 280 (Cal. 1976)).
16. See infra Part II.A.
17. See infra Part II.B-C.
18. See infra Part III.A.
19. See infra Part III.B.
20. See infra Part III.C.
of the fundamental cornerstones of American society. The First Amendment, although simple in its construction, encompasses extensive legal protections. The text of the First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, or the press . . . .” Fundamentally, the First Amendment prohibits government restrictions on expression based on the expression’s content. Over time, the few words that comprise the First Amendment have come to protect more than just speech in a strictly literal sense; they protect “symbolic speech” as well.

In the seminal case of United States v. O’Brien, the Supreme Court recognized that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct,” the First Amendment may protect both the speech and nonspeech aspects. Legal commentators have even remarked that there is


\[\text{22. Daniel A. Farber, The First Amendment 1 (3d ed. 2010) (“[T]he bare text of the First Amendment provides only a hint of the ultimate contours of legal protection.”).}

\[\text{23. U.S. Const. amend I. The meaning of these few words has become very complex. See Farber, supra note 22, at 1. The First Amendment speaks only of Congress, but “free expression is also protected against abridgment by the President and the federal courts.” Id. Further, within the last century the reach of the Fourteenth Amendment was enhanced to encompass the First Amendment, extending protection of free expression to state governments. See id. With respect to the words “no law,” Justice Black noted that “no law means no law,” yet courts have not viewed the First Amendment as an unconditional absolute, allowing for some justifiable regulations of free speech. See id. As for the words “of speech, or of the press,” they do not only refer to printed or oral communications, but also to other forms of communication like electronic media and “symbolic speech” forms, like flag burning. See id.; see also infra note 25 and accompanying text (discussing symbolic speech).}

\[\text{24. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its subject matter, or its content.” (quoting Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972))).}

\[\text{25. See Joshua Waldman, Note, Symbolic Speech and Social Meaning, 97 Colum. L. Rev. 1844, 1847 (1997); see also Brian J. Pollock, Case Note, City of Erie v. Pap’s A.M., 120 S.Ct. 1382 (2000), 11 SETON HALL CONST. L.J. 151, 151 (2000) (“[T]he Court has held ‘speech’ . . . to include conduct meant to communicate an idea.”). Courts have classified many types of activity as symbolic speech, including protesting, picketing, leafleting, flag burning, and nude dancing. See Johnson, 491 U.S. at 404 (collecting cases); Waldman, supra, at 1863 (discussing protesting as form of symbolic speech). The Court has held that the act of protesting itself can be symbolic speech. See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 568 (1995) (“[T]he inherent expressiveness of marching to make a point explains our cases involving protest marches.”).}

\[\text{26. 391 U.S. 367 (1968).}

\[\text{27. Id. at 376 (describing test to determine applicability of First Amendment to conduct). In O’Brien the Court set forth a “four-prong test to determine whether the government regulation was sufficiently important to}
little distinction between speech and conduct under the First Amendment. Nonetheless, the Court has not recognized that the right to free speech and expression is absolute. There are several recognized exceptions to the right of free speech including illegal activity, fighting words, and obscenity.

Notwithstanding these exceptions, at minimum, conduct will be constitutionally protected as expression or speech if the person intended to convey a message through it. The Court, however, has sustained laws that prohibit such expressive conduct, but only as an incidental effect of proscribing the activity for other reasons. The level of scrutiny a court applies to a

justify the limitation on free speech.” Wertheimer, supra note 21, at 832; see O’Brien, 391 U.S. at 377. The four elements are as follows: “(1) the conduct is such that it may be constitutionally regulated; (2) the regulation furthers a substantial government interest; (3) the government interest is unrelated to the suppression of free speech; and (4) the limitations on speech are no greater than what are essential to further the asserted government interest.” Wertheimer, supra note 21, at 832; see O’Brien, 391 U.S. at 377. In Clark v. Community for Creative Non-Violence, the Supreme Court faced the question of whether sleeping in a national park to protest the plight of homelessness was covered by the First Amendment as symbolic speech, and began its analysis by assuming that the conduct was in fact expressive and therefore potentially subject to First Amendment protection. See 468 U.S. 288, 293 (1984); see also FARBER, supra note 22, at 39 (discussing Clark Court’s approach to symbolic speech). In particular, the Court observed that conduct may be protected if it is intended to be communicative in nature and “would reasonably be understood by the viewer to be communicative,” but ultimately sustained the Park Service’s regulation prohibiting camping in non-designated areas after holding that the regulation satisfied the O’Brien test. Clark, 468 U.S. at 293, 298-99; see FARBER, supra note 22, at 39. But see Clark, 468 U.S. at 301 (Marshall, J., dissenting) (contending protest conduct in question amounted to symbolic speech protected by First Amendment).

28. See Chris Joe, Note, Can We Express Ourselves Dancing Naked—Barnes v. Glen Theatre, Inc.—The First Amendment and Freedom of Expression, 46 SMU L. REV. 263, 267 (1992); see also W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (“Symbolism is a primitive but effective way of communicating ideas . . . . a short cut from mind to mind.”); Louis Henkin, The Supreme Court, 1967 Term—Foreword: On Drawing Lines, 82 HARV. L. REV. 63, 79 (1968) (discussing distinction between speech and conduct). Professor Henkin states that “[a] constitutional distinction between speech and conduct is specious. Speech is conduct, and actions speak. There is nothing intrinsically sacred about wagging the tongue or wielding the pen; there is nothing intrinsically more sacred about words than other symbols.” Henkin, supra, at 79.

29. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 539 (3d ed. 2006) (“[T]he Supreme Court never has accepted the view that the First Amendment prohibits all government regulation of expression.”); see also Henkin, supra note 28, at 79-80 (“The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct.”); Joe, supra note 28, at 267 (noting “not all conduct constitutes constitutionally protected speech”); Wertheimer, supra note 21, at 799-801 (explaining right to freedom of speech not absolute at all times).

30. See Moriber, supra note 8, at 468 (listing exceptions to First Amendment’s protections).

31. See FARBER, supra note 22, at 39 (articulating meaning of symbolic speech); Joe, supra note 28, at 267 (“Conduct is classified as constitutionally protected expression only if the actor intended to communicate or convey a message by his conduct.”). “Whatever else may or may not be true of speech, as an irreducible minimum it must constitute a communication.” Melville B. Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 UCLA L. REV. 29, 36 (1973). In Clark, the Court observed that “a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.” Clark, 468 U.S. at 294 (citing Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969)).

32. See Joe, supra note 28, at 267 (discussing laws invalidated by Supreme Court). See also, e.g., United States v. Eichman, 496 U.S. 310, 318-19 (1990) (describing why flag burning considered symbolic
challenged law weighs heavily on whether it will be upheld or struck down, and
often accounts for discrepancies between two otherwise similar laws.\textsuperscript{33} If the
purpose for enacting a challenged ordinance or regulation was to suppress
expression, then the court will apply the strict scrutiny test.\textsuperscript{34} If the purpose
behind enacting the ordinance or regulation was unrelated to suppressing
expression, however, then a court will apply the less exacting \textit{O'Brien} test.\textsuperscript{35}

Further, even though the First Amendment applies to the federal
government, the Fourteenth Amendment prohibits state governments from
depriving any citizen of their liberty without due process of law, which, through analyzing the Amendment’s history, has come to protect freedom of speech.\textsuperscript{36} It was not until the early twentieth century that the Court recognized
the application of the First Amendment to the states.\textsuperscript{37} The Court construed

\begin{quote}

\textsuperscript{33} See James S. Malloy, Recent Decision, \textit{A Content Neutral Public Nudity

\textsuperscript{34} See Malloy, supra note 33, at 708 (explaining appropriate conditions for application of strict scrutiny). Under a strict scrutiny analysis, an ordinance will only be upheld if it is necessary to achieve a compelling government purpose and it is the least restrictive way of fulfilling that purpose. See Moriber, supra note 8, at 467.

\textsuperscript{35} See Aaron Brogdon, Note, \textit{Improper Application of First-Amendment
Scrutiny To Conduct-Based Public Nudity Laws:} City of Erie v. Pap’s A.M. Perpetuates the Confusion Created by Barnes v. Glen Theatre, Inc., 17 BYU J. PUB. L. 89, 93-94 (2002) (discussing four-part \textit{O'Brien} test and its application to Indiana statute); see also Malloy, supra note 33, at 708 (considering proper circumstances for applying \textit{O'Brien} test); Pollock, supra note 25, at 158 (“In \textit{O'Brien}, the Court held that the government can regulate such conduct provided the purpose of the regulation is unrelated to the suppression of free speech.”).

\textsuperscript{36} See U.S. CONST. amend. XIV; FARBER, supra note 22, at 10-11. One of the key provisions of the Fourteenth Amendment says that no person shall be deprived of liberty without due process of the law. See U.S. CONST. amend. XIV, § 1. The Court said in \textit{NAACP v. Alabama} that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” 357 U.S. 440, 460 (1958).

\textsuperscript{37} See Gitlow v. New York, 268 U.S. 652, 666 (1925) (“[F]reedom of speech[,] . . . protected by the First Amendment from abridgement by Congress[,] is among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); Wertheimer, supra note 21, at 800 (discussing application of Fourteenth Amendment); see also Fiske v.
this protection narrowly, however, allowing states to freely regulate the speech of their citizens. 

B. Nude Protesting Under the First Amendment

Public nudity itself is not protected expression under the First Amendment. Courts have continuously held that “unassociated nudity”—nakedness that is not tied to some type of protected expression—is subject to governmental regulations. If such nudity is not interrelated or highly intertwined with a form of protected speech, it is within the states’ police powers to regulate. In instances where public nudity is significantly interrelated with the protected

Kansas, 274 U.S. 380, 387 (1927) (reversing defendant’s conviction for criminal syndicalism due to infringement of liberty in violation of Fourteenth Amendment); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (explaining First Amendment protection within word “liberty” of Fourteenth Amendment).

38. See Wertheimer, supra note 21 at 800. Before 1925, the Court never questioned that the First Amendment meant what it literally stated: “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend I; see Wertheimer, supra note 21, at 800. At this point in U.S. history, the states were free to regulate the speech of their own citizens subject only to the restraints of their respective state constitutions. See Wertheimer, supra note 21, at 800. When the Court finally acknowledged that the First Amendment applied to the states, it did so modestly, affording states latitude to regulate their own citizens, and acting under this authority states often promulgated regulations that violated the Constitution. See id.

39. See Moriber, supra note 8, at 468 (“There is no fundamental right to be nude in public . . . .”). In City of Seattle v. Buchanan, the Washington Supreme Court announced that nudity “does not fall within the[] right[] of expression, religion, petition, political action, or association, or the[] right[] to privacy, or within any marital familial, educational . . . occupational, property, economic, or social interest . . . .” 584 P.2d 918, 921 (Wash. 1978). Justice O’Connor noted in Erie that the state of nudity is not inherently expressive itself. See City of Erie v. Pap’s A.M., 529 U.S. 277, 289 (2000).

40. See Moriber, supra note 8, at 468 (“Unassociated nudity is nakedness that is not tied or related to a form of protected expression per se.”). Regulation of unassociated nudity does not run afoul of the First Amendment. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66, 572 (1991) (holding nude dancing within outer boundaries of First Amendment); McGuire v. State, 489 So.2d 729, 731 (Fla. 1986) (explaining public nudity falls within regulation of state police powers).

41. See Moriber, supra note 8, at 468 (recognizing states may appropriately regulate nudity); 16A C.J.S. Constitutional Law § 611 (2013) (defining scope of police power). Police powers allow states to provide for the safety, health, and welfare of its citizens. See 16A C.J.S. Constitutional Law § 611 (2013). See generally Santiago Legarre, The Historical Background of the Police Power, 9 U. PA. J. CONST. L. 745 (2007) (explaining authority of state police power). Many states used their police powers to enact statutes regulating public nudity. See, e.g., Ark. Code Ann. § 5-14-112(a) (West 2013) (“A person commits indecent exposure if, with the purpose to arouse or gratify a sexual desire of himself or herself or of any other person, the person exposes his or her sex organs[,]”); Conn. Gen. Stat. Ann. § 53a-186(a)(1)-(2) (West 2014) (“A person is guilty of public indecency when he performs . . . in a public place . . . [a]n act of sexual intercourse . . . or a lewd exposure of the body with intent to arouse or to satisfy the sexual desire of the person[,]”); N.H. Rev. Stat. Ann. § 645:1(I)(1) (2013) (“A person is guilty of a misdemeanor if such person fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm . . . .”); N.Y. Penal Law § 245.01 (McKinney 2013) (“A person is guilty of exposure if he appears in a public place in such a manner that the private or intimate parts of his body are unclothed or exposed.”); Or. Rev. Stat. Ann. § 163.465(1)(a), (c) (West 2013) (“A person commits the crime of public indecency if while in, or in view of, a public place the person performs: [a]n act of sexual intercourse; . . . or [a]n act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person.”).
speech, the nudity may be protected.\textsuperscript{42}

Nudity, in the context of the First Amendment, has been most prevalent in the context of nude dancing.\textsuperscript{43} The Court has recognized that nude dancing is “within the outer ambit of the First Amendment;” however the reason for enacting an anti-nudity statute is determinative of the level of scrutiny to be applied in evaluating its constitutionality.\textsuperscript{44} In \textit{City of Erie v. Pap’s A.M.},\textsuperscript{45} the Court considered the City of Erie’s ordinance that made intentionally appearing nude in public a summary offense—requiring workers at a club to wear G-strings and pasties to comply with the statute—and held that it was constitutional.\textsuperscript{46} The City enacted the statute to combat the secondary public health and safety effects of nude dancing, including public intoxication, sexual harassment, and prostitution; the suppression of expression, therefore, was not the City’s main objective.\textsuperscript{47} The Court held that general bans on conduct are not subject to the traditional strict scrutiny standard, like other First Amendment challenges, but rather are subject to the less stringent test created in \textit{United States v. O’Brien}.\textsuperscript{48} Applying the \textit{O’Brien} test to the Erie city ordinance, the Court held that it was constitutional.\textsuperscript{49}

\textsuperscript{42} See Moriber, supra note 8, at 468-69 (“[W]hen nudity is associated with another form of highly valued speech, it is protected.”). Topless sunbathing, for example, will probably not be considered protected expression because it is not interrelated with a form of protected expression; a nude dance performance, on the other hand, may be protected because the expression of dance itself may be protected. See Sole v. Wyner, 551 U.S. 74, 83 (2007) (discussing interrelatedness of protected speech and nude protesting); S. Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 610-11 (11th Cir. 1984).

\textsuperscript{43} See \textit{Erie}, 529 U.S. at 290-91 (discussing bans on public nudity and nude dancing); \textit{Barnes}, 501 U.S. at 566, 572 (holding nude dancing may be within outer parameters of First Amendment); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (“[N]ude dancing is not without its First Amendment protections from official regulation.”) (citing \textit{Doran v. Salem Inn, Inc.}, 422 U.S. 922 (1975); \textit{S.E. Promotions, Ltd. v. Conrad}, 420 U.S. 546 (1975)); see also Brogdon, supra note 35, at 89 (“[T]he United States Supreme Court was asked to decide whether the First Amendment protected the owners of two nude dancing establishments from an Indiana state law that banned public nudity.”).

\textsuperscript{44} See Malloy, supra note 33, at 708 (citing \textit{City of Erie v. Pap’s A.M.}, 529 U.S. 277, 289 (2000)).

\textsuperscript{45} 529 U.S. 277 (2000).

\textsuperscript{46} See id. at 302 (determining city ordinance satisfied \textit{O’Brien} test).

\textsuperscript{47} See id. at 296-302 (explaining purpose of statute and applying elements of \textit{O’Brien} test to ordinance); Malloy, supra note 33, at 710-12 (explaining how Court found ordinance within City’s regulatory powers); Pollock, supra note 25, at 159 (discussing coining of term “secondary effects” in \textit{Young v. American Mini Theatres, Inc.}, 427 U.S. 50 (1976)).

\textsuperscript{48} See \textit{Erie}, 529 U.S. at 296 (stating ordinance content neutral); \textit{United States v. O’Brien}, 391 U.S. 367, 376-77 (1968) (articulating test distinguishing speech and non-speech elements); Pollock, supra note 25, at 154 (explaining when less stringent test applied). The \textit{O’Brien} standard came about because “the Court refused to accept the argument that expressive conduct was entitled to full First Amendment protection, deciding that symbolic speech was entitled only to limited protection.” Joe, supra note 28, at 269.

\textsuperscript{49} See \textit{Erie}, 529 U.S. at 296; Malloy, supra note 33, at 711-14 (explaining how City of Erie’s ordinance met all four factors of \textit{O’Brien} test). The Court held that the ordinance met the four-part \textit{O’Brien} test and was content neutral because the ordinance generally banned public nudity, but not nude dancing specifically. See \textit{Erie}, 529 U.S. at 279. First, it was constitutionally proper for the City to enact such an ordinance because it was within its police powers “to protect public health and safety.” \textit{Erie}, 529 U.S. at 279. Second, the ordinance furthered the government interest of combating the negative secondary effects associated with nude dancing. See id. Secondary effects are those that impact the “public health, safety, and welfare,” which the
The Court has looked at the question of nude dancing in other cases, but has not offered much additional insight regarding whether nudity itself is protected as expressive conduct under the First Amendment. Although the Supreme Court has never specifically ruled on the issue of whether nude protesting is protected by the First Amendment, existing case law supports the proposition that unassociated nudity is not protected, leaving, therefore, only a narrow context in which nude protesting would be protected. Nudity is often linked to sexual or obscene conduct, but whether nudity itself is labeled as obscene, protected expression, or speech is context specific. In Roth v. United States, the Supreme Court distinguished between material that is obscene and material that should be safeguarded by the First Amendment. In the context of protesting, nudity has become a popular method for protesters to both attract attention and convey their messages. When protesters use nudity for the sake of nudity itself, or because they try to attract additional attention to their message, it is unlikely that a court will uphold the nudity as protected speech.
under the First Amendment.\textsuperscript{56}

In order for the act of nudity to obtain First Amendment protection it must be considered symbolic speech because the act of being nude alone is not expressive conduct.\textsuperscript{57} The Court in \textit{O'Brien} stated that symbolic speech cases will turn on the question of whether alternative avenues of communication exist.\textsuperscript{58} The Court held that if there are other satisfactory modes of communication, then the conduct at issue would not be protected as long as there is a “sufficiently important governmental interest in regulating the non-speech element.”\textsuperscript{59} Consequently, when nudity is unassociated or not sufficiently intertwined with the message being protested, the nudity will be considered conduct and thus subject to government regulation.\textsuperscript{60} Conversely, if the nudity is sufficiently intertwined with the message being communicated, it falls within the modest segment of messages that relate to nudity, and the act will be protected as symbolic speech.\textsuperscript{61} As such, it appears that the only time nude protesting will be protected under the First Amendment is when women are protesting their inability to be topless in public or unequal treatment between men and women regarding appropriate dress.\textsuperscript{62}

\textbf{C. Federalism: States Granting Greater Rights Under State Constitutions}

Federalism is one of the foundational principles upon which the United

\textsuperscript{56} See Moriber, supra note 8, at 473-74 (giving examples of when nude protest sufficiently intertwined with protected expression). In \textit{Moll v. Meissner}, the United States District Court for the Middle District of Florida held that protesting nude on the beach with a “Vote for Clinton/Gore” sign was not a political protest, and upheld a public nudity conviction because the nudity did not relate to the protest’s content. No. 99-659 CIV ORL18C, 1999 WL 34803714, at *2-3 (M.D. Fla. Oct. 21, 1999).

\textsuperscript{57} See United States v. O’Brien, 391 U.S. 367, 376-77 (1968) (discussing when conduct sufficiently connects to expression and therefore protected under First Amendment); see also 16A C.J.S. Constitutional Law § 740 (2013) (“Nudity is protected as speech only when combined with some mode of expression that itself is entitled to First Amendment protection.”); supra note 25 and accompanying text (reviewing symbolic speech).

\textsuperscript{58} See Moriber, supra note 8, at 475. With respect to protest, this means that if other sufficient avenues existed to communicate the message without using nudity, the nudity would not be protected as symbolic speech. \textit{Id.} This issue arose in the context of nude dancing in \textit{Barnes v. Glen Theatre, Inc.} See 501 U.S. 560, 562-63 (1991) (plurality opinion). A plurality of the Supreme Court characterized nude dancing as communicative conduct, but went on to hold that the First Amendment did not protect such conduct. \textit{See id.} at 570-71. The Court ruled the statute’s requirement that dancers in adult-entertainment establishments wear G-strings and pasties was within Indiana’s interest to regulate. \textit{See id.} at 567-68. Further, a plurality of the Court said that this requirement did “not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.” \textit{Id.} at 571. The plurality determined that sufficient alternative avenues of communication existed through which the dancers could express their erotic message. \textit{See id.} at 570-71.

\textsuperscript{59} \textit{O’Brien}, 391 U.S. at 376.

\textsuperscript{60} See Moriber, supra note 8, at 475 (explaining when nude protesting not protected).

\textsuperscript{61} See \textit{id.}

\textsuperscript{62} See Moriber, supra note 8, at 484. With respect to protesting the right to be topless, the nudity would be sufficiently intertwined with the message and there are no alternative avenues of communication that could get across the exact same message. \textit{See id.} at 475.
The concept of federalism refers to the developing relationship between the federal government and individual state governments. The strength of such a system is derived from its “provision of a double source of protection for the rights of [its] citizens.” All of the fifty state constitutions and the Federal Constitution provide protections for individual rights.

Before the passage of the Fourteenth Amendment, the Bill of Rights exclusively applied to federal (not state) action. Long before the Bill of Rights was expanded to reach the states through the Fourteenth Amendment, however, state courts were interpreting individual rights under state law the way the Supreme Court construed individual rights under federal law. When the United States Supreme Court dramatically expanded individual rights under

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63. See U.S. Const. Amend. X. “Federalism, as reflected in the constitutional allocation of powers between the federal government and the states, preserves the integrity, dignity, and residual sovereignty of the states, and the federal balance is, in part, an end in itself to ensure that states function as political entities in their own right.” James L. Buchwalter, Annotation, Construction and Application of 10th Amendment by United States Supreme Court, 66 A.L.R. Fed. 2d 159, 169 (2012). The concept of American Federalism is most significantly revealed in the individual state constitutions than in any other practice. See Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 491 (1954).

64. See Beasley, supra note 13, at 681-82.

65. See Brennan, supra note 10, at 503.

66. See id. at 501; see also Joseph Blocher, What State Constitutional Law Can Tell Us About the Federal Constitution, 115 Penn. St. L. Rev. 1035, 1036 (2011) (stating rights protected by Bill of Rights first in state constitutions). Justice Brennan stated that “[p]rior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.” Brennan, supra note 10, at 501.

67. See Brennan, supra note 10, at 493-95 (explaining when certain amendments in Bill of Rights expanded to reach states). In 1925, with Gitlow v. New York, the Court first suggested that the protections of the First Amendment might extend to the individual states via the Due Process Clause of the Fourteenth Amendment. See 268 U.S. 652, 666 (1925). In 1949, the Fourth Amendment’s prohibition of unreasonable searches and seizures was made applicable to state action. See Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). This extension was not as great as it seemed on its face, however, because the states themselves were still left to decide “whether any effective means of enforcing the guarantee was to be made available.” Brennan, supra note 10, at 493. Between 1962 and 1969, “nine of the specifics of the Bill of Rights” were extended to the states. See Brennan, supra note 10, at 493. This was a dramatic change to the face of the law, as it required extensive involvement of state courts in applying federal law. See id. In 1962, the Eighth Amendment’s prohibition of cruel and unusual punishment was held to reach state action. See Robinson v. California, 370 U.S. 660, 666-67 (1962). Then, in 1964 the Supreme Court held that the Fifth Amendment’s protection against self-incrimination reached the states as well. See Malloy v. Hogan, 378 U.S. 1, 6 (1964). Next, in 1965 a criminal defendant’s Sixth Amendment right to confront the witnesses against him was extended to the states, and 1967 saw three more extensions of the Sixth Amendment: the right to a speedy trial, the right to a trial by an impartial jury, and the right to have compulsory process for obtaining witnesses. See generally Klopf v. North Carolina, 386 U.S. 213 (1967) (extending right to speedy trial); Washington v. Texas, 388 U.S. 14 (1967) (extending right to compulsory process for obtaining witnesses); Parker v. Gladden, 385 U.S. 363 (1966) (providing right to impartial jury extends to states); Pointer v. Texas, 380 U.S. 400 (1965) (holding Sixth Amendment’s guarantee of accused’s confrontation right applicable to states via Fourteenth Amendment).

68. See Brennan, supra note 10, at 501. The drafters of the Federal Bill of Rights “drew upon corresponding provisions in various state constitutions.” Id. Thus, the Federal Bill of Rights and rights afforded by state constitutions were, at first, interpreted the same way. See id. at 501-502.
the Federal Bill of Rights to the states in the 1960s, state constitutional law unsurprisingly seemed to become subordinate to federal constitutional law. In the 1970s, Supreme Court Justice William Brennan suggested that a new age of federalism was upon the country. This new age was one in which “state courts . . . beg[an] to emphasize the protections of their states’ own bill of rights.”

This new wave of federalism, however, only emphasized fundamental principles that already existed—“[t]he United States Supreme Court is the final court that interprets the United States Bill of Rights. . . . [and] [t]he state supreme courts are the final courts that interpret their bill of rights.” State courts began to base decisions on their own constitutions and their interpretations thereof in order to fully protect their citizens. “A state may see its constitution’s protection of rights as overlapping; identical to; independent, separate, and distinct from; or greater or lesser than the protections contained in the federal Constitution.” This new concept of federalism permitted states to provide more protection of individual rights than their federal counterparts.

State courts began to independently look at the merits of constitutional arguments and declined to follow the opinions of the United States Supreme Court, even in instances where state and federal constitutional provisions shared identical phrasing. When dealing with issues of state constitutions and


Because the Federal Constitution seemed, [at the time,] to supply a reasonably complete set of constitutional norms, and because these federal norms by law displaced any inconsistent norms contained in state constitutions, state courts often acted as though they need not bother to look any further than the shared national principles embodied in the U.S. Constitution.

Id. at 1233.

70. See Brennan, supra note 10, at 495. This new age came about as more and more state courts began to construe their constitutions as granting more individual rights to their citizens than their federal counterparts. See id.

71. Id. This new judicial federalism has been described as “the development of state court interpretations of some state constitutional rights provisions to be more protective than the same or similar federal Constitutional provisions as interpreted by the United States Supreme Court.” ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 111 (2009); see Scott L. Kafker, America’s Other Constitutions: Book Review of the Law of American State Constitutions, 45 NEW ENG. L. REV. 835, 841 (2011).

72. Beasley, supra note 13, at 684. Retired Chief Judge of the Georgia Court of Appeals Dorothy Beasley states that “[i]f a state court rules that the state’s constitution protects the individual, it is moot whether the federal constitution does or does not do so.” Id. Conversely, if a state does not recognize the right, a claim under the U.S. Constitution is the “last straw” for the litigant. See id. This relationship between state and federal constitutions has led the courts to consider the constitutions differently. See id at 684-85.

73. See id. at 685-86 (describing tensions in state courts regarding constitutional interpretations).

74. Id. at 684-85. If a state provides lesser rights than the Federal Constitution, however, then it still must apply the greater protection of the Federal Constitution. See id. at 685.

75. See Brennan, supra note 10, at 495 (discussing states ability to protect greater rights).

76. See id. at 500 (explaining states use of own constitutional arguments); see also Jeffery A. Parness,
law, state court interpretations of state constitutions and state laws cannot be overturned (or even reviewed) by the Supreme Court, which can only review whether state court decisions violate federal rights.\textsuperscript{77} The wave of new federalism demonstrates that state constitutional provisions are meant to stand independently and were not simply adopted to mirror the Federal Constitution.\textsuperscript{78} In fact, the phenomenon even suggests that the drafters of the Federal Bill of Rights “drew upon corresponding provisions in the various state constitutions,” further indicating that the state constitutions provide more independent protections than those provided in the Federal Constitution.\textsuperscript{79} Justice Brennan stated that the essential point is not that “the United States Supreme Court is necessarily wrong in its interpretation of the Federal Constitution . . . it is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”\textsuperscript{80}

In order for the dual system to work, it is essential that state constitutions are not “clones” or mere copies of the Federal Constitution.\textsuperscript{81} Each constitutional

\textit{American State Constitutional Equalities, 45 GONZ. L. REV. 773, 776 (2010) (contrasting state and federal constitutional law).} Parness observes that “[s]tate constitutional rights can be read independent of . . . federal constitutional rights even when the federal and state constitutions are both applicable and employ the same or similar language.” Parness, supra, at 777. The Hawaii Supreme Court noted, when deciding not to follow the Supreme Court’s interpretation of a similarly phrased constitutional provision, that “[w]hile this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law.” State v. Kaluna, 520 P.2d 51, 58 n.6 (Haw. 1974). Similarly, when the California Supreme Court rested its 1974 opinion in \textit{Burrows v. Superior Court} solely on state constitutional law regarding the expectation of privacy by bank depositors in their bank records, it ultimately stood in stark contrast to the United States Supreme Court’s subsequent ruling in the 1976 landmark case of \textit{United States v. Miller} that bank records regarding individual accounts are not entitled to Fourth Amendment protection. \textit{Compare United States v. Miller, 425 U.S. 435, 440-41 (1976) (holding respondent’s bank records constituted business records and not constitutionally protected private papers), with Burrows v. Superior Court, 529 P.2d 590, 594-95 (Cal. 1974) (holding bank customers have legitimate expectation of privacy in financial records bank voluntarily provided to police). See generally Brennan, supra note 10, at 500-01 (listing state court decisions not following federal principles of constitutional law).}

\textsuperscript{77} Brennan, supra note 10, at 501. The Supreme Court is without jurisdiction to review state decisions based on state law. \textit{See id.} The Court cannot even review state determinations of state law even if the case also involved federal issues. \textit{See id. at 501 n.80. See generally Murdock v. City of Memphis, 87 U.S. 590 (1874).} In \textit{Herb v. Pitcairn}, Justice Jackson stated that the Supreme Court’s “only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion . . . .” 324 U.S. 117, 125-26 (1945). Thus, any decision that is anchored in state law and based on state constitutional interpretation is precluded from being reviewed by the United States Supreme Court. \textit{See Brennan, supra note 10, at 501 (describing Supreme Court’s lack of jurisdiction over state-court decisions regarding state law).}

\textsuperscript{78} \textit{See Brennan, supra note 10, at 501 (describing limitations of federal constitutional law over state constitutional law).}

\textsuperscript{79} \textit{See id.} The rights protected in the Federal Bill of Rights had all previously been protected in one or more state constitutions; these federal provisions are essentially copies of the individual liberties the states had already been protecting. \textit{See id.}

\textsuperscript{80} \textit{Id. at 502.}

\textsuperscript{81} \textit{See Kafker, supra note 71, at 838 (emphasizing importance of having two distinct forms of}
system has its own distinctive responsibilities, yet the systems together provide
dual protection for individual rights.82 This system of federalism is not one that
“require[s] . . . one level of government [to] take a back seat to the other” when it
comes to protecting an individual’s civil or political rights. 83 One system should never be abdicating its responsibilities to the other, but rather should provide the dual protection that the Founders and Framers intended. 84

By design, state constitutions are more “democratic” than the Federal
Constitution. 85 While the Federal Constitution sets out powers that are
enumerated and limited, state constitutions contain a greater variety of subject
matter, including educational, environmental, and other “policy-oriented”
provisions.86 State constitutions also allow for the public to be more directly
involved in the decision-making process through referenda, initiatives, recall
provisions, and the election of judges. 87 State constitutions are not fixated on
what the Founders intended, thus allowing for more fluidity in the
interpretation of their provisions.88 This fluidity permits state courts to
interpret the language of their respective state constitutions more
synonymously with the voices of the voters.89 As a result, the laws are
amenable to change.90

Today the dual constitutional system has allowed for the development of
great discrepancies between state and federal laws.91 Individual liberties are

constitutions). Although there must be distinctions between the two types of constitutions, they form an
“interconnected whole” that shapes the national constitutional forum. See id.  
82. See id.  
83. See William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as
dual constitutional structure).  
84. See id. (opining both state and federal systems should work together). Federalism is only served
when both systems are functioning and working properly; the system does not fulfill its function when one half
of the protections it offers are crippled. See id.  
85. See Kafker, supra note 71, at 839.  
86. See id. (discussing differences in subject matter of state and federal constitutions).  
87. See id. Historically, state constitutions have tried to indoctrinate public “virtue” through a great deal
of provisions including provisions directed at regulating education, religion, and vice. See id. at 839-40.  
88. See id. at 849. The Federal Constitution is centered on the views of a few framers from centuries
ago. Id.  
89. See Kafker, supra note 71, at 849. (allowing state constitutions to better relate to people’s voices).  
90. See id. This interpretation, however, requires different tools and must be utilized in a different way
than those interpreting the Federal Constitution. See id. State constitutional provisions are to be interpreted the
way the people themselves would interpret them. See id. at 850. “Consequently, technical interpretations,
particularly in the context of initiative amendments, are to be avoided.” Id.  
91. See Sam Kamin, Medical Marijuana in Colorado and the Future of Marijuana Regulation in the
United States, 43 McGeorge L. REV. 147, 151-52 (2012) (discussing discrepancy between state and federal
marijuana laws). Because such a system is employed, it allows for great discrepancies in how certain activities
are regulated. See id. at 151. One such example of this is the current state of medical marijuana in the United
States. See id. at 151-52. Today in the United States, medical marijuana is “treated at . . . three different
levels—it is seen as a serious felony . . . at the federal level, as something akin to a constitutional right at the
state level, and either a nuisance to be regulated or as a tax source to be exploited at the local level.” Id.
regulated in the United States on three levels—federal, state, and local. Such a system has led to contradictory laws as between the federal government and individual states. States have essentially been able to grant more rights to their citizens than the federal government has. Several states, including Alaska, California, Massachusetts, and Oregon, have interpreted their constitutions differently than the Federal Constitution, thus resulting in the development of new rights pursuant to state constitutions.

In Robins v. Pruneyard Shopping Center, the California Supreme Court held that the California Constitution granted more rights than the First Amendment. Under the First Amendment to the U.S. Constitution, an individual is not allowed on private property for purposes of protesting, without the consent of the property owner. The California Supreme Court, however, held that there is a right to free speech and a right to protest in shopping malls, even though such malls are privately owned, thus affording greater free speech protection under the state constitution.

In Oregon, nude protesting is protected, regardless of whether there is an underlying message, because the Oregon Constitution provides more rights than the First Amendment. In San Francisco, California, however, the city


94.  See Mark Cooke, Federal v. State Marijuana Law Conflict—More Contentious Than Ever, ACLU (July 8, 2011), http://www.aclu-wa.org/blog/federal-v-state-marijuana-law-conflict-more-contentious-ever. There are at least fourteen states that have decriminalized the possession of marijuana, while under federal law possession of marijuana is still a criminal offense. Id.


96.  592 P.2d 341 (Cal. 1979), aff’d, 447 U.S. 74 (1980).

97.  See id. at 347 (holding California can grant more rights than First Amendment provides).


99.  See Robins, 592 P.2d at 347 (“We conclude that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.”).

100.  See Oregon Judge Clears Naked Bike Rider, SEATTLE TIMES, Nov. 14, 2008 http://seattletimes.com/html/localnews/2008390686_webnuderscyclist14m.html [hereinafter Naked Bike Rider] (“In Portland . . . cycling naked has been anointed as a ‘well-established tradition’ and understood as a form of ‘symbolic protest.’”); see also Caulfield, supra note 15 (characterizing act of stripping down naked at airport as protected
board passed a law in early 2013 banning the exact behavior that is protected in Oregon. The Alaska Supreme Court has recognized that the Alaska Constitution may provide more rights than the First Amendment by allowing nude dancing to constitute protected speech. Finally, the Massachusetts Supreme Judicial Court has recognized that the Massachusetts Constitution can grant more rights than the Federal Constitution. In short, this wave of new federalism has “helped transform state supreme courts into the keepers of the nation’s conscience.”

III. ANALYSIS

A. Effects of Dual Constitutions

The dual constitutional system in the United States provides more benefits than burdens on American citizens. An important implication of the U.S. system is that the states provide a laboratory-like setting for the federal government. These “laboratories” are areas of experimentation for new laws and policies. Accordingly, the federal government is provided with and benefits from a “straightforward way . . . to learn from those lab experiments.” Then, the new laws and policies that states experiment with can be either adopted by the federal government, if such laws are successful, or not. This practice is also evidenced by the fact that before the adoption of

under Oregon Constitution); Gomez, supra note 3 (quoting protester John Brennan who stated, “nudity is one of my forms of protest”); Sarah Mirk, Portland’s “Naked American Hero” on Trial—Not Guilty!, PORTLAND MERCURY (July 18, 2012, 3:00 PM), http://blogtown.portlandmercury.com/BlogtownPDX/archives/2012/07/18/portlands-naked-american-hero-on-trial (“As long as nudity is an intentional protest and the nudity is symbolic, Brennan seems to be on pretty solid legal ground.” (emphasis omitted)).


104. See Blocher, supra note 66, at 1038-39 (explaining how federal government’s use of states as laboratories where experimentation with law and policy encouraged).

105. See Parness, supra note 76, at 776 (“[I]n constitutional matters states are more able “to experiment, to improvise, [and] to test new theories.”’” (alteration in original) (quoting Stanley Mosk, The Power of State Constitutions in Protecting Individual Rights, 8 N. Ill. U. L. REV. 651, 652 (1988))

106. See id. (noting how federal government can ultimately borrow state policies after states have
the Federal Constitution, “each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.”

States, as laboratories, can experiment with allowing public nudity in protesting. While the federal government does not currently allow nudity in protesting, some states protect this type of behavior. The states’ ability to enact different laws than the federal government allows for the laws to be tested for their effectiveness. In certain cities, like San Francisco, for example, public nudity has become widely accepted. Such nudity, however, has recently been subject to regulation for public policy reasons. Indeed, this small “experiment” is likely to prove useful to the federal government when deciding if public nudity should be regulated differently on a national scale.

The dual constitutional system in the United States allows for other benefits as well. The United States prides itself on being made up of many diverse populations and ethnic groups. This permits each state to have a particular style of government and “offer different qualities of life.” This important benefit is evidenced by the public nudity and protesting laws within the United States.

In states like Oregon and California where public nudity is more prevalent, nude protesting has been protected under the state’s respective constitutions in favorably experimented with them).


111. See Blocher, supra note 66, at 1038 (asserting states’ experiments encourage new laws and policies); supra note 41 and accompanying text (describing states’ power to individually regulate nudity for their citizens).

112. See supra note 100 and accompanying text (explaining Oregon citizens’ ability to protest nude within state constitutional bounds); see also supra note 102 and accompanying text (expressing nudity protected in Alaska as freedom of expression in dance). An Oregon trial court upheld a man’s right to protest the TSA by stripping naked in the airport. See Caulfield, supra note 15. The judge stated that mere nudity is protected as symbolic speech under the Oregon Constitution. Id.

113. See Blocher, supra note 66, at 1038-39; see also supra note 91 (describing different levels of regulation for medical marijuana).

114. See Estes, supra note 101 (pointing out even city leaders proponents of public nudity). Reporter Adam Clark Estes opines that the city has taken away the protected “fun” of public nudity. See id.

115. See Elias, supra note 101 (stating residents and visitors complained of “unsightly and unsanitary nudity in a plaza”); Estes, supra note 101 (explaining policy reasons behind ban). Estes’ article covering the new ban on public nudity in San Francisco begins by saying, “[i]t’s official guys: San Francisco has banned public nudity.” See Estes, supra note 101. He expresses the city’s outrage through sarcasm, pointing to how common nudity was in San Francisco. See id.

116. See Beasley, supra note 13, at 691-92 (setting forth benefits of dual system); Moriber, supra note 8, at 474 (discussing possible regulation of nudity on federal level).

117. See Beasley, supra note 13, at 691-97.

118. See id. (“The states are comprised of differing populations and ethnic groupings, which bring a diversity of views and different cultures into the fabric of each.”).

119. See id. (describing flexibility for states to accommodate different populations and their values).

120. See supra note 41 (mentioning laws within United States dealing with public nudity).
certain contexts, while federal laws do not protect such behavior. 121 In San Francisco, the public has attested to this key benefit, as nudity laws have recently changed. 122 After years of allowing the citizens of San Francisco to express themselves through nudity and nude protesting, the city passed an anti-nudity law, requiring the covering of one’s “genitals, perineum, and anal region.” 123 Ultimately, the dual constitutional system allows for individual rights to be regulated at the local-government level, thereby taking into consideration the values of particularized groups of citizens. 124

Additional benefits to having a dual constitutional system include: the system permits more immediate and localized responsibility from the states’ constitutions as state governments are closer to their citizens than the federal government is, and the system provides a check and balance on each government from infringing on individual rights. 125 The court decisions of each system provide a “two-way vertical dialogue” between the states and federal government as well as a “fifty-by-fifty-way dialogue horizontally” among the states. 126 The states can thus learn from each other, especially with respect to nude protesting, and decide how to interpret their own constitutions. 127 Because, logistically speaking, states are closer to their citizens, they have the ability to better manage citizens’ rights and change laws and policies more easily and more quickly. 128 In San Francisco, anti-nudity laws were recently changed in a mere two months by a vote of the Board of Supervisors, to the dismay of local citizens. 129 These benefits strongly indicate that nude protesting would be best regulated with a bottom-up approach. 130

**B. Regulating Nude Protesting: Top Down or Bottom Up?**

The federal government does not protect nude protesting under the First Amendment, but some states, under their individual state constitutions, do allow for nude protesting as an individual right protected either as free speech

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121. See Gomez, supra note 4 (reporting story of Oregon man stripping in protest of TSA whose conduct ultimately protected under Oregon law); supra note 101 (observing current nudity laws in San Francisco and community outrage at prohibition).
122. See Elias, supra note 101 (discussing San Francisco nudity ban).
123. See id. (highlighting six to five result of vote in passing nudity ban).
124. See Beasley, supra note 13, at 691 (explaining dual system of constitution protection); Kafker, supra note 71, at 839 (noting state constitutions can protect individuals and “inculcate public ‘virtue’”). The dual system “allows flexibility for each state to accommodate these distinctions, which are related to the size of the country and heterogeneity of its population and environments.” Beasley, supra note 13, at 691.
125. See Beasley, supra note 13, at 693-94 (listing additional benefits to dual constitutional system).
126. Id. at 693 (illuminating modes of dialogue).
127. See supra notes 100-01 and accompanying text (describing differences in treatment of nude protesting between California and Oregon).
128. See Beasley, supra note 13, at 693-94 (outlining states better ability to manage citizens).
129. See Tyler, supra note 101 (reporting how new public nudity ban under fire before going into effect).
130. See infra Part III.B (emphasizing bottom-up approach as preferable).
or under the umbrella of freedom of expression. An important question, when it comes to individual rights, is how they should be regulated—that is, from the bottom up or the top down? The dual constitutional system allows for such regulation to occur at multiple levels. The United States has an extremely heterogeneous population and this diversity is a major reason why a bottom-up approach to regulation is ideal.

Nudity, while becoming more prevalent around the country and throughout the world, is not widely accepted in the United States. However, there are certain states and municipalities that believe nudity should be protected as political speech. The state and local laws may differ from the federal government. Providing for a bottom-up approach, with regard to nude protesting, will encourage both states and municipalities to respect the views of their citizens.

Justice Scott Kafker of the Massachusetts Appeals Court notes, “state constitutional law is more fluid and less fixated on the views of . . . framers from centuries past. As a result, state constitutional text can and must be interpreted as a more direct expression . . . of the voters, speaking at different historical moments, and expressly amending their views over time.”

Changing political views are an important feature of American society and states are better equipped to regulate according to local political preferences. Because state constitutional decision-making processes more directly involve the public, states are better suited to reflect individual views at a certain time period than the federal government. As the public’s view of nudity and

131. See supra note 39 and accompanying text (emphasizing nude protesting not protected under First Amendment); supra note 100 (observing right to protest naked protected by Oregon state constitution).

132. See Beasley, supra note 13, at 681 (“In the American constitutional system, which is federal and includes dual sovereignty, who decides about individual rights, and how?”).

133. See supra note 39 and accompanying text (discussing lack of federal constitutional protection for act of public nudity unrelated to protected expression); supra notes 100-01 and accompanying text (offering Oregon and California approaches to nude protesting at state and municipal levels); see also supra note 91 and accompanying text (describing differences in state and federal law with regard to regulation of marijuana).

134. See Kafker, supra note 71, at 837-41 (highlighting advantages to diverse country of bottom-up approach).

135. See supra notes 3-5 and accompanying text (stressing rise in public nudity around world); supra note 8 (explaining nudity not likely protected under First Amendment).

136. See Naked Bike Rider, supra note 100 (explaining judges holding to “let it all hang out” in Oregon); Elias, supra note 101 (“DI)strok]ing these days in San Francisco is de facto political speech because of the law and the publicity surrounding it.”); Plenda, supra note 4 (“There’s no law against being naked, but you can’t be lewd or lascivious [in Keene, New Hampshire].” (quoting Lieutenant Darryl Madden of Keene Police)). Further, a Portland, Oregon judge noted that “cycling naked has been anointed as a ‘well-established tradition’ and understood as a form of ‘symbolic protest.’” Naked Bike Rider, supra note 100.

137. See supra Part II.C (explaining why states can grant more rights than federal government).

138. See Kafker, supra note 71, at 849 (emphasizing states’ abilities to respect voices of their citizens).

139. Id. (expressing how states can better adapt to societal norms and morals).

140. See infra Part III.C (discussing California’s regulation of nudity on local level).

141. See Kafker, supra note 71, at 839-40 (explaining state constitutions “inculcate public ‘virtue’ through a variety of provisions”).
protesting changes, so can the courts’ interpretation of state constitutional rights.142

Another important reason why a bottom-up approach to regulating the use of nudity in protesting works best is because state and local governments are the first line of defense with respect to individual rights.143 Often the first place where problems are confronted and solved is within the local community.144 Even if nude protesting is not recognized federally, under the First Amendment, states and local communities that believe such protesting is an individual right that should be protected as free speech and/or free expression can still do so.145 In an ever-changing world, where morals, virtues, and values are constantly evolving, “state constitutional law can serve as a relatively ‘objective’ measure of current constitutional values.”146 A bottom-up approach, thus, is the best approach to regulating and protecting nude protesting.147

C. State Models: California and Oregon Approaches

States have the ability to protect the individual rights of their citizens, even beyond those rights protected by the Federal Constitution.148 Nude protesting, as mentioned above, is not protected under the Federal Constitution, but individual states have taken it upon themselves to recognize nude protesting as an individual right protected by state constitutions.149 The states of Oregon and California have a history of recognizing and protecting nudity in protesting.150 The two states, however, have protected nude protesting in different manners.151

Oregon is famous for its World Naked Bike Ride.152 Indeed, nudity has been a part of Oregon culture for many years.153 In 1985, the Oregon Court of Appeals ruled that nudity in public “can be a protected form of expression if it’s done in political protest and should be considered on a case-by-case basis.”154 The presiding judge in the 1985 case said that nudity laws simply do

142. See id. (assuring that states can meld to societal values at certain time).
143. See Hart, supra note 63, at 491-92 (highlighting first defense of local governments).
144. See id. (commenting on importance of local authorities).
145. See infra Part III.C (giving examples where such protesting is protected at local level).
146. See Blocher, supra note 66, at 1039.
147. See supra notes 3-5 and accompanying text (summarizing change attitudes in United States and throughout world with regard to protesting).
148. See supra Part II.C (discussing dual constitutional system).
149. See supra Part II.C (listing examples of states providing more rights than Federal Constitution affords).
150. See infra notes 152-68 and accompanying text (outlining approaches taken by Oregon and California).
151. See infra notes 152-68 and accompanying text.
152. See Naked Bike Rider, supra note 100 (mentioning recurring naked bike ride in Portland, Oregon).
153. See id.
154. See Naked Bike Rider, supra note 100 (referring to 1985 Oregon Court of Appeals case). See
not apply in protesting situations.\footnote{See Caulfield, supra note 15; see also Gatewood, 708 P.2d at 617-18.}

In April 2012, a man stripped down in front of the Transportation Security Authority (TSA) in the Portland airport in protest of TSA procedures.\footnote{See Caulfield, supra note 15; Gomez, supra note 4.} Oregon trial judge David Rees stated, “[i]t is the speech itself that the state is seeking to punish, and that it cannot do.”\footnote{Caulfield, supra note 15 (quoting Judge Rees).} The Oregon Constitution protects the right to freedom of speech, and within that right, nude protesting is protected.\footnote{See id. (looking to Oregon Constitution).} Statewide, nude protesting is a valid exercise of free speech.\footnote{See id. (stating nude protesting allowed in Oregon).}

While nudity has been a prevalent part of California’s culture, the state has regulated nudity on a more local level.\footnote{See Wollan, supra note 4 (discussing perception and treatment of public nudity in San Francisco).} Specifically, nudity is regulated at the municipal level, and not at the state level.\footnote{See id. (discussing different nudity laws among various cities in California).} Public nudity, until February 2013, was not banned in San Francisco, as long as it was not combined with “lewd thoughts or acts,” unlike nearby cities such as Berkeley and San Jose where a ban exists.\footnote{See id. (“Other nearby cities like Berkeley and San Jose have passed laws prohibiting public nudity, but in San Francisco it remains legal.”).} Nudity is a part of San Francisco’s culture, and a localized approach to regulating nudity allows for San Francisco citizens’ values to be protected.\footnote{See id. (“In San Francisco, public nudity is a big part of a lot of social street events, and that’s a good thing[,]” (quoting “Nude-In” organizer Mitch Hightower)).}

On February 1, 2013, a ban on nudity went into effect in San Francisco.\footnote{See Tyler, supra note 101 (characterizing nudity ban to go into effect in February 2013).} The outraged response by citizens and the extremely close vote by the city council in upholding the ban are illustrative of the values that San Franciscans cherish.\footnote{See id. (“[Citizens] are asking a judge for a preliminary injunction to stop the city’s ban on what they call ‘body freedom.’”)}. Citizens have retained lawyers to fight on their behalf for their individual liberties as they feel that their “constitutional rights are being violated because they believe baring it all is a matter of freedom of speech.”\footnote{See Estes, supra note 101 (quoting San Francisco city supervisor).} One of the city supervisors who opposed the ban said, “I’m concerned about civil liberties, about free speech, about changing San Francisco’s style and how we are as a city. . . . I cannot and will not bite this apple and I refuse to put on this fig leaf.”\footnote{See Tyler, supra note 101 (discussing California cities’ views on nudity); Wollan, supra note 4 (characterizing new ban in San Francisco).} Nudity will remain a hot topic in California, at least while the state’s cities decide how it should be regulated.

IV. CONCLUSION

American culture is always changing, and what we as Americans value and cherish is forever evolving. Nude protesting is just another area where this concept reared its head. The times have evolved and brought us to a place where nudity is protected at the state and local levels. Only time will tell if this right will evolve and become part of the American culture as a whole, melding its way into the federal definition of protected free speech.

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