Bare-Naked Ladies (and Gentlemen): Analyzing Protection of Nude Protesting Under the First Amendment and State Constitutions

"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."[1]

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.[2] Today, however, public nudity in the context of protest has become prevalent around the world.[3] This trend holds true in the United States as well, as there are numerous examples of protesters utilizing nudity as a method of protest.[4] Many groups have

1. Jean Teeters, *Lennon and Nudity: Pushing the Envelope in 1968, John Lennon Posed Nude for an Unprepared World*, ABSOLUTEELSEWHERE.NET, http://articles.absoluteelsewhere.net/Articles/lennon_nudity.html (last visited Mar. 3, 2014) (quoting John Lennon).

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.*

4. *See id.* The Occupy movement's protests throughout the United States involved a significant amount of public nudity along their picket lines. *See id*; *see also* Mark Gomez, *Man Who Stripped To Protest TSA Before San Jose Flight Not Guilty of Indecent Exposure*, SAN JOSE MERCURY NEWS, July 19, 2012, http://mercurynews.com/top-stories/ci_21109789/man-who-stripped-protest-tsa-before-san-jose (recounting episode of man stripping down in airport to protest TSA); Melanie Plenda, *No Law Against Topless*, THE UNION LEADER, July 20, 2010, at 2 (reporting on "Free Keene" protests and nude participants); Malia Wollan, *Protesters Bare All over a Proposed San Francisco Law*, NY TIMES, Sept. 25, 2011, http://www.nytimes.com/2011/09/26/us/san-francisco-nudity-restrictions-provoke-the-nakedly-ambitious.html?scp=1&sq=protesters+bare

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

+all&st=nyt&_r=0 (discussing "Nude-In" protest against proposed law prohibiting restaurant nudity and requiring covering of public seats).

5. *See* Dialika Neufeld, *The Body Politic: Getting Naked To Change the World,* SPIEGEL ONLINE INT'L (May 11, 2012), http://www.spiegel.de/international/europe/femen-activists-get-naked-to-raise-political-awareness-a-832028.html. FEMEN, an infamous women's activist group known for its public nudity displays, realized that such protests create scandal, and such scandal can quickly translate into power. *See id.*; *see also* Pat Schneider, *Council Finds Public Nudity a Legitimate Form of Protest and Artistic Expression*, THE CAP TIMES (July 7, 2011, 12:05 PM), http://host.madison.com/news/local/govt-and-politics/council-finds-public-nudity-a-legitimate-form-of-protest-and/article_98f1dc16-a8bb-11e0-9df2-001cc4c002e0.html#ixzz27sqR4ILv (discussing use of nudity to attract attention to political and social issues); *About*, FEMEN, http://femen.org/about (last visited Mar. 3, 2014).

6. *See* State v. Immelt, 208 P.3d 1256, 1259 (Wash. Ct. App. 2009) ("Although the First Amendment protects only 'speech,' conduct may be sufficiently imbued with elements of communication to fall within the ambit of the First Amendment." (quoting Texas v. Johnson, 491 U.S. 397, 404 (1989)), *rev'd en banc*, 267 P.3d 305 (2011).

7. *Id*. In order for conduct to be recognized as speech, the conveyed message must be particularized "in circumstances where it is likely that the message would be understood." *Id.* at 1259-60.

8. *See* Danielle Moriber, Note, *A Right To Bare All? Female Public Toplessness and Dealing with the Laws that Prohibit*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 453, 473 (2010) (explaining nudity unrelated to speech at issue likely not protected).

9. *See* Moll v. Meisner, No. 99 659 CIV ORL18C, 1999 WL 34803714, at *3 (M.D. Fla. Oct. 21, 1999) (stating nude protest of politics on beach not protected because nudity unrelated to protest); Duvallon v. State, 404 So.2d 196, 198 (Fla. Dist. Ct. App. 1981) (overturning exposure-of-sexual-organs conviction because of connection between woman's protest and protected expression).

10. *See* William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 490-91 (1977) (discussing state constitutions affording more rights than Federal Constitution). "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Id.* at 491.

11. *Id.* at 490.

liberties."[12] 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.[13] Specifically, the rights afforded under the First Amendment have been greatly expounded upon by individual state constitutions.[14] 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.[15]

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.[16] Next, it will offer an overview of the concept of federalism and its foundational principles.[17] This Note will then analyze the implications of having varying state and federal laws on nude protesting.[18] Further, it will discuss at what level nude protesting should be regulated, whether it be on a national, state, or municipal level.[19] Lastly, this Note will provide different state models for regulating personal liberties and decide which model is best suited for regulating nude protesting.[20]

II. HISTORY

A. First Amendment

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

12. *Id.* at 491.

13. *See* Dorothy Toth Beasley, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, 11 GA. ST. U. L. REV. 681, 681-82 (1995) ("[T]he ultimate guardians of individual rights in the United States are the federal constitution and the fifty state constitutions, as interpreted by the highest courts.").

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. Disbrow, 545 P.2d 272, 280 (Cal. 1976)).

15. *See* Philip Caulfield, *Judge Acquits Portland Man Who Stripped Naked at TSA Checkpoint*, N.Y. DAILY NEWS, July 19, 2012, http://articles.nydailynews.com/2012-07-19/news/32751341_1_john-e-brennan-tsa-agents-full-body-scanner (discussing Oregon judge's holding protecting nude protest under Oregon Constitution).

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.[21] The First Amendment, although simple in its construction, encompasses extensive legal protections.[22] The text of the First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or the press . . . ."[23] Fundamentally, the First Amendment prohibits government restrictions on expression based on the expression's content.[24] 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.[25]

In the seminal case of *United States v. O'Brien*,[26] 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.[27] Legal commentators have even remarked that there is

21. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (stating "bedrock principle" of First Amendment bars prohibition of ideas based on disagreeable position); Speiser v. Randall, 357 U.S. 513, 530 (1958) (Black, J., concurring) (asserting freedoms secured by First Amendment "absolutely indispensible for the preservation of a free society"); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (opining freedom of speech constitutes "the indispensable condition, of nearly every other form of freedom"); Hurvitz v. Hoefflin, 101 Cal. Rptr. 2d 558, 565 (Cal. Ct. App. 2000) ("The right to free speech is, of course, one of the cornerstones of our society."); Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793, 793 (1994) ("No fundamental right is more glorified in American society than the right to 'freedom of speech.'"). Not only is the right to free speech a fundamental aspect of American culture but it is also "one of the centerpieces of democracy." Wertheimer, *supra*, at 799.

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.").

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).

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 ideas, its subject matter, or its content." (quoting Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

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.").

26. 391 U.S. 367 (1968).

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.[28] Nonetheless, the Court has not recognized that the right to free speech and expression is absolute.[29] There are several recognized exceptions to the right of free speech including illegal activity, fighting words, and obscenity.[30]

Notwithstanding these exceptions, at minimum, conduct will be constitutionally protected as expression or speech if the person intended to convey a message through it.[31] The Court, however, has sustained laws that prohibit such expressive conduct, but only as an incidental effect of proscribing the activity for other reasons.[32] 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 nondesignated 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 POLICES 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 ("[*C*]*onduct* 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." Mellville 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. Cmty. 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.[33] If the purpose for enacting a challenged ordinance or regulation was to suppress expression, then the court will apply the strict scrutiny test.[34] If the purpose behind enacting the ordinance or regulation was unrelated to suppressing expression, however, then a court will apply the less exacting *O'Brien* test.[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.[36] It was not until the early twentieth century that the Court recognized the application of the First Amendment to the states.[37] The Court construed

speech); Texas v. Johnson, 491 U.S. 397, 420 (1989) (discussing flag burning); Spence v. Washington, 418 U.S. 405, 415 (1974) (invalidating conviction for taping peace symbols to American flag); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (reversing dismissal of student's complaint against school's policy prohibiting wearing black arm bands in protest of Vietnam War); Brown v. Louisiana, 383 U.S. 131, 143 (1966) (holding public library sit-in constitutionally protected activity); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (reversing defendant's conviction for flying red flag in opposition of organized government). In *Texas v. Johnson*, the Court explained that the government cannot "proscribe particular conduct because it has expressive elements." *Johnson*, 491 U.S. at 406 (emphasis omitted). Symbolic speech, however, "can be regulated by the government provided the regulation is not directed at the content of the message." Pollock, *supra* note 25, at 151-52. Once it has been decided that the regulation imposed by the government is not based on the content of the message, the government intervention can be justified if an important state interest exists. *See id.* at 152.

33. *See* James S. Malloy, Recent Decision, *A Content Neutral Public Nudity Ordinance that Satisfies the* O'Brien *Test May Require Erotic Dancers To Wear G-Strings and Pasties Without Violating Their First Amendment Right of Freedom of Expression:* City of Erie v. Pap's A.M., 39 DUQ. L. REV. 705, 708-09 (2001) (explaining when different types of scrutiny applied). In *Erie,* the Court stated that "whether the ordinance is related to the suppression of expression" dictates the applicable level of scrutiny. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (citing Texas v. Johnson, 491 U.S. 397, 403 (1989)); *see* Malloy, *supra*, at 708.

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.

35. *See* Aaron Brogdon, Note, *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 *O'Brien* test and its application to Indiana statute); *see also* Malloy, *supra* note 33, at 708 (considering proper circumstances for applying *O'Brien* test); Pollock, *supra* note 25, at 158 ("In *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.").

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 *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. 449, 460 (1958).

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.[38]

B. Nude Protesting Under the First Amendment

Public nudity itself is not protected expression under the First Amendment.[39] Courts have continuously held that "unassociated nudity"—nakedness that is not tied to some type of protected expression—is subject to governmental regulations.[40] If such nudity is not interrelated or highly intertwined with a form of protected speech, it is within the states' police powers to regulate.[41] 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* Wetheimer, *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) (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.[42]

Nudity, in the context of the First Amendment, has been most prevalent in the context of nude dancing.[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.[44] In *City of Erie v. Pap's A.M.*,[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.[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.[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 *United States v. O'Brien*.[48] Applying the *O'Brien* test to the Erie city ordinance, the Court held that it was constitutional.[49]

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).

43. *See Erie*, 529 U.S. at 290-91 (discussing bans on public nudity and nude dancing); *Barnes*, 501 U.S. at 566, 572 (holding nude dancing may be within outer parameters of First Amendment); Schad v. Borough of Mount Ephriam, 452 U.S. 61, 66 (1981) ("[N]ude dancing is not without its First Amendment protections from official regulation." (citing Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); 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.").

44. *See* Malloy, *supra* note 33, at 708 (citing City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000)).

45. 529 U.S. 277 (2000).

46. *See id.* at 302 (determining city ordinance satisfied *O'Brien* test).

47. *See id.* at 296-302 (explaining purpose of statute and applying elements of *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 *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

48. *See Erie*, 529 U.S. at 296 (stating ordinance content neutral); 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 *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.

49. *See 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 *O'Brien* test). The Court held that the ordinance met the four-part *O'Brien* test and was content neutral because the ordinance generally banned public nudity, but not nude dancing specifically. *See 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." *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.[50] 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.[51] Nudity is often linked to sexual or obscene conduct, but whether nudity itself is labeled as obscene, protected expression, or speech is context specific.[52] In *Roth v. United States*,[53] the Supreme Court distinguished between material that is obscene and material that should be safeguarded by the First Amendment.[54] In the context of protesting, nudity has become a popular method for protesters to both attract attention and convey their messages.[55] 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

Court previously noted can be caused by the presence of an establishment like a strip club. *See id.* at 291 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 50 (1986)). Thirdly, the government interest in question was unrelated to the suppression of freedom of expression, but rather related to the secondary effects. *See id.* at 280. And lastly, the regulation met the fourth factor that "the restriction is no greater than is essential to the furtherance of the government interest." *Id.* The need for dancers to wear G-strings and pasties was "a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message." *Id.*

50. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (considering nude dancing within adult-entertainment establishment); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981) (stressing Court's precedent not indicative of upholding total bans on all live, adult entertainment); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) ("Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." (internal citation omitted)).

51. *See* Moriber, *supra* note 8, at 468 ("[W]hen nudity is associated with another form of highly valued speech, it is protected."); *see also* Sole v. Wyner, 551 U.S. 74, 85 (2007) ("[E]nforcement of the Bathing Suit Rule was necessary to 'preserv[e] park aesthetics' and 'protect the experiences of the visiting public.'"); S. Fla. Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 610-11 (11th Cir. 1984) (discussing topless sunbathing not protected, but nude performance possibly protected because expressive).

52. *See* Moriber, *supra* note 8, at 468 (suggesting determination of whether particular speech protected or not becomes "line-drawing exercise").

53. 354 U.S. 476 (1957).

54. *See id* at 487-88 (highlighting constitutionally relevant distinction). Justice Brennan, writing for the majority, explained,

> sex and obscenity are not synonymous. Obscene material is material, which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to the prurient interest.

Id. (footnotes omitted).

55. *See* Moriber, *supra* note 8, at 473 ("[S]peakers feel that nudity is necessary to convey their specific message."); *see also supra* note 5 and accompanying text (noting use of nude protesting around world).

under the First Amendment.[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.[57] The Court in *O'Brien* stated that symbolic speech cases will turn on the question of whether alternative avenues of communication exist.[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."[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.[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.[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.[62]

C. Federalism: States Granting Greater Rights Under State Constitutions

Federalism is one of the foundational principles upon which the United

56. *See* Moriber, *supra* note 8, at 473-74 (giving examples of when nude protest sufficiently intertwined with protected expression). In *Moll v. Meisner*, 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).

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).

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. *Id.* This issue arose in the context of nude dancing in *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. *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. *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." *Id.* at 571. The plurality determined that sufficient alternative avenues of communication existed through which the dancers could express their erotic message. *See id.* at 570-71.

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

60. *See* Moriber, *supra* note 8, at 475 (explaining when nude protesting not protected).

61. *See id.*

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. *See id* at 475.

States was built.[63] The concept of federalism refers to the developing relationship between the federal government and individual state governments.[64] The strength of such a system is derived from its "provi[sion] [of] a double source of protection for the rights of [its] citizens."[65] All of the fifty state constitutions and the Federal Constitution provide protections for individual rights.[66]

Before the passage of the Fourteenth Amendment, the Bill of Rights exclusively applied to federal (and not state) action.[67] 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.[68] When the United States Supreme Court dramatically expanded individual rights under

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 50l.

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* Klopfer 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.[69] In the 1970s, Supreme Court Justice William Brennan suggested that a new age of federalism was upon the country.[70] This new age was one in which "state courts . . . beg[an] to emphasize the protections of their states' own bill of rights."[71]

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."[72] State courts began to base decisions on their own constitutions and their interpretations thereof in order to fully protect their citizens.[73] "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."[74] This new concept of federalism permitted states to provide more protection of individual rights than their federal counterparts.[75]

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.[76] When dealing with issues of state constitutions and

69. *See* James A. Gardner & Jim Rossi, *Foreword: The New Frontier of State Constitutional Law*, 46 WM. & MARY L. REV. 1231, 1232-33 (2005) (discussing notion of state constitutions subordinate to Federal Constitution).

> 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.[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.[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.[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."[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.[81] Each constitutional

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 *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 *United States v. Miller* that bank records regarding individual accounts are not entitled to Fourth Amendment protection. *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).

77. Brennan, *supra* note 10, at 501. The Supreme Court is without jurisdiction to review state decisions based on state law. *See id.* The Court cannot even review state determinations of state law even if the case also involved federal issues. *See id.* at 501 n.80. *See generally* Murdock v. City of Memphis, 87 U.S. 590 (1874). In *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. *See* Brennan, *supra* note 10, at 501 (describing Supreme Court's lack of jurisdiction over state-court decisions regarding state law).

78. *See* Brennan, *supra* note 10, at 501 (describing limitations of federal constitutional law over state constitutional law).

79. *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. *See id.*

80. *Id.* at 502.

81. *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 Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986) (articulating importance of United States' 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.[92] Such a system has led to contradictory laws as between the federal government and individual states.[93] States have essentially been able to grant more rights to their citizens than the federal government has.[94] 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.[95]

In *Robins v. Pruneyard Shopping Center*,[96] the California Supreme Court held that the California Constitution granted more rights than the First Amendment.[97] 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.[98] 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.[99]

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.[100] In San Francisco, California, however, the city

92. *See id.* at 151.

93. *See* Eliot C. McLaughlin, *Marijuana Advocates Hope To Rise from 'Prohibition'*, CNN (Dec 4, 2012, 10:16 AM), http://www.cnn.com/2012/12/01/us/marijuana-legalization-and-prohibition/index.html (discussing discrepancy in federal and state marijuana laws). Washington and Colorado became the first states to legalize marijuana for recreational use. *See* Kristen Wyatt, *Drug War Challenged After Colorado and Washington Vote To Allow Recreational Pot*, HUFFINGTON POST (Nov 7, 2012, 9:40 PM), http://www.huffingtonpost.com/2012/11/08/drug-war_n_2091985.html. These two new laws are in direct opposition to federal law, which criminalizes marijuana use. *See* Matt Ferner, *States Legalizing Marijuana Will Violate Federal Law, Trigger Constitutional Showdown: DEA, Drug Czars*, HUFFINGTON POST (Oct. 15, 2012, 3:13 PM), http://www.huffingtonpost.com/2012/10/15/dea-drug-czars-states-leg_n_1967363.html.

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.*

95. *See* Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 296-97 (2005) (discussing states granting more rights than Federal Constitution affords).

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).

98. *See* Hudgens v. N. L. R. B., 424 U.S. 507, 520-21 (1976) (holding labor union members had no First Amendment right to picket inside private shopping center); *see also* ACLU N.C., *Right to Protest*, DEMOCRATS.COM (1996), http://www.democrats.com/right-to-protest (explaining free speech activity generally cannot take place on private property absent consent by owner).

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_webnudecyclist14m.html [hereinafter *Naked Bike Rider*] ("[I]n 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.[101] 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.[102] Finally, the Massachusetts Supreme Judicial Court has recognized that the Massachusetts Constitution can grant more rights than the Federal Constitution.[103] In short, this wave of new federalism has "helped transform state supreme courts into the keepers of the nation's conscience."[104]

III. ANALYSIS

A. Effects of Dual Constitutions

The dual constitutional system in the United States provides more benefits than burdens on American citizens.[105] An important implication of the U.S. system is that the states provide a laboratory-like setting for the federal government.[106] These "laboratories" are areas of experimentation for new laws and policies.[107] Accordingly, the federal government is provided with and benefits from a "straightforward way . . . to learn from those lab experiments."[108] 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.[109] 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)).

101. *See* Paul Elias, *San Francisco Nudity Ban Block Considered By Judge*, HUFFINGTON POST (Jan. 17, 2013, 8:53 PM), http://www.huffingtonpost.com/2013/01/17/san-francisco-nudity-ban-_n_2496846.html (discussing judge's decision finding public nudity not akin to flag burning); Adam Clark Estes, *San Francisco's Naked Days Are Over*, ATLANTIC WIRE (Nov. 20, 2012, 9:03 PM), http://www.theatlanticwire.com/national/2012/11/san-franciscos-naked-days-are-over/59209 (explaining nudity banned but maybe not all year round); Carolyn Tyler, *Nudists Take SF Ban to Federal Court*, ABC (Jan. 18, 2013), http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=8958161 (reporting statements made by federal judge during trial over challenge to San Francisco's nudity ban).

102. *See* Mickens v. City of Kodiak, 640 P.2d. 818, 821-23 (Alaska 1982).

103. *See generally* Mendoza v. Licensing Bd., 827 N.E.2d 180 (Mass. 2005) (discussing how Massachusetts Constitution provides greater rights than Federal Constitution); Commonwealth v. Mavredakis, 725 N.E.2d 169 (Mass. 2000) (same).

104. Schwaiger, *supra* note 95, at 297.

105. *See* Beasley, *supra* note 13, at 691-97 (pointing out benefits of dual constitutional system).

106. *See* Blocher, *supra* note 66, at 1038-39 (observing federal government's use of states as laboratories where experimentation with law and policy encouraged).

107. *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)).

108. Blocher, *supra* note 66, at 1039 (explaining ease of using states as laboratories).

109. *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."[110]

States, as laboratories, can experiment with allowing public nudity in protesting.[111] While the federal government does not currently allow nudity in protesting, some states protect this type of behavior.[112] The states' ability to enact different laws than the federal government allows for the laws to be tested for their effectiveness.[113] In certain cities, like San Francisco, for example, public nudity has become widely accepted.[114] Such nudity, however, has recently been subject to regulation for public policy reasons.[115] 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.[116]

The dual constitutional system in the United States allows for other benefits as well.[117] The United States prides itself on being made up of many diverse populations and ethnic groups.[118] This permits each state to have a particular style of government and "offer different qualities of life."[119] This important benefit is evidenced by the public nudity and protesting laws within the United States.[120]

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).

110. Brennan, *supra* note 10, at 501.

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

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.[131] 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?[132] The dual constitutional system allows for such regulation to occur at multiple levels.[133] The United States has an extremely heterogeneous population and this diversity is a major reason why a bottom-up approach to regulation is ideal.[134]

Nudity, while becoming more prevalent around the country and throughout the world, is not widely accepted in the United States.[135] However, there are certain states and municipalities that believe nudity should be protected as political speech.[136] The state and local laws may differ from the federal government.[137] Providing for a bottom-up approach, with regard to nude protesting, will encourage both states and municipalities to respect the views of their citizens.[138]

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."[139] Changing political views are an important feature of American society and states are better equipped to regulate according to local political preferences.[140] 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.[141] 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 ("[D]isrobing 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.[155]

In April 2012, a man stripped down in front of the Transportation Security Authority (TSA) in the Portland airport in protest of TSA procedures.[156] Oregon trial judge David Rees stated, "[i]t is the speech itself that the state is seeking to punish, and that it cannot do."[157] The Oregon Constitution protects the right to freedom of speech, and within that right, nude protesting is protected.[158] Statewide, nude protesting is a valid exercise of free speech.[159]

While nudity has been a prevalent part of California's culture, the state has regulated nudity on a more local level.[160] Specifically, nudity is regulated at the municipal level, and not at the state level.[161] 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.[162] 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.[163]

On February 1, 2013, a ban on nudity went into effect in San Francisco.[164] 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.[165] 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."[166] 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."[167] Nudity will remain a hot topic in California, at least while the state's cities decide how it should be regulated.[168]

generally City of Portland v. Gatewood, 708 P.2d 615 (Or. Ct. App. 1985).

155. *See* Caulfield, *supra* note 15; *see also Gatewood*, 708 P.2d at 617-18.

156. *See* Caulfield, *supra* note 15; Gomez, *supra* note 4.

157. Caulfield, *supra* note 15 (quoting Judge Rees).

158. *See id.* (looking to Oregon Constitution).

159. *See id.* (stating nude protesting allowed in Oregon).

160. *See* Wollan, *supra* note 4 (discussing perception and treatment of public nudity in San Francisco).

161. *See id.* (discussing different nudity laws among various cities in California).

162. *See id.* ("Other nearby cities like Berkeley and San Jose have passed laws prohibiting public nudity, but in San Francisco it remains legal.").

163. *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)).

164. *See* Tyler, *supra* note 101 (characterizing nudity ban to go into effect in February 2013).

165. *See id.* ("[Citizens] are asking a judge for a preliminary injunction to stop the city's ban on what they call 'body freedom.'").

166. *See id.* (conveying San Francisco's citizens' outrage).

167. *See* Estes, *supra* note 101 (quoting San Francisco city supervisor).

168. *See* Tyler, *supra* note 101 (discussing California cities' views on nudity); Wollan, *supra* note 4 (characterizing new ban in San Francisco).

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.

Mary C. Ambacher