

**[J-159-2000]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

PAP'S A.M. T/D/B/A KANDYLAND,	:	Nos. 16 & 17 WAP 1997
	:	
Appellant	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered on March
v.	:	27, 1996, at Nos. 445CD1995 and
	:	446CD1995, reversing the Order of the
	:	Court of Common Pleas of Erie County
THE CITY OF ERIE, JOYCE A.	:	entered on January 18, 1995, at No. 1994-
SAVOCCHIO, CHRIS E. MARAS, MARIO	:	60059.
S. BAGNONI, ROBERT C. BRABENDER,	:	
DENISE ROBISON, AND JAMES N.	:	Order reversed on October 21, 1998,
THOMPSON, IN THEIR OFFICIAL	:	553 Pa. 348, 719 A.2d 273 (1998)
CAPACITIES,	:	
	:	Remand from the United States Supreme
Appellees	:	Court entered on March 29, 2000, at No.
	:	98-1161, 529 U.S. 277 (2000).
	:	
	:	
	:	SUBMITTED: August 30, 2000

**DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: DECEMBER 19, 2002**

Although a historical basis exists within the Court's Article I, Section 7 jurisprudence for extending greater protection to communication than that provided under the First Amendment, such enhanced protection has previously been applied to forms of pure speech as opposed to the communicative aspects of conduct or symbolic speech. See, e.g., Commonwealth v. Tate, 495 Pa. 158, 168-171, 432 A.2d 1382, 1387-88 (1981). I am thus reluctant to accord the prior cases controlling significance where, as here, the regulation at issue facially applies to conduct. Moreover, I would

give some weight to the stated purpose of the ordinance, namely, to combat the negative secondary effects of crime caused by the presence of adult entertainment establishments, and evaluate the ordinance under the intermediate scrutiny test articulated in United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968).

Nevertheless, as the majority notes, there are legitimate concerns with "unmentioned purposes" of regulations such as the one at issue here and the extent to which protected expression may be impacted. Rather than extending the strict scrutiny test to this area, however, I would adopt as a matter of our constitutional jurisprudence under Article I, Section 7, the more stringent application of the O'Brien test proposed by Mr. Justice Souter in his concurring opinion in City of Erie v. Pap's A.M., 529 U.S. 277, 310-13, 120 S. Ct. 1382, 1402-04 (2000) (Souter, J., concurring), and require an evidentiary basis for the alleged secondary effects and the remedial effect of the proposed regulation. Such requirement, in my view, adequately accommodates the historic concerns of Article I, Section 7, and appropriately balances legitimate governmental interests with the points articulated by the majority. As the record in this case is insufficiently developed under this standard, I would remand to the trial court for an evidentiary hearing. Accord City of Erie v. Pap's A.M., 529 U.S. at 310-13, 120 S. Ct. at 1402-04 (Souter, J., concurring).