Nude Dancers' Expression Should Be Protected by State Constitution (op-ed, Register Guard, March 30, 2009).
by Ofer Raban

The Oregon legislature, once again, is preparing to consider an amendment to the Oregon Constitution's free speech provision that would make it easier to regulate nude dancing establishments. The proposed amendment seeks to overrule Oregon Supreme Court precedents providing more protection to this form of expression than equivalent U.S. Supreme Court decisions. But the federal decisions are poorly reasoned, while the Oregon Court got things right.

Both the U.S. Supreme Court and the Oregon Supreme Court agree that nude dancing is a form of expression protected by constitutional free speech provisions. Also, both courts agree that government regulations that restrict protected expression by reference to its content are presumptively unconstitutional. As the U.S. Supreme Court once put it, freedom of speech means, "above all else…that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

But in a series of intensely divided and poorly-reasoned opinions, the U.S. Supreme Court upheld the constitutionality of a number of regulations targeting nude dancing. The Court conceded that these regulations restricted protected expression by reference to its content; but it then accepted the government's claim that the regulations did not seek to suppress expression, but instead were meant to address prostitution and other related crimes that tended to accompany nude dancing establishments. In some of these cases the Supreme Court did not even require the government to factually support its allegations, relying, instead, on the allegations' "reasonableness." The Court then concluded that since these regulations were not aimed at expression but at its related effects, they were perfectly constitutional.

This distinction, between laws targeting nude-dancing because of its sexual content and laws targeting nude-dancing because of its related effects, was rejected by the Oregon Supreme Court – and for a good reason. The government may very well seek to do both: concern over the potential problems that accompany nude dancing establishments often accompanies and reinforces hostility to the explicit sexual content of such performances. Making free speech protections depend on this judicial hair-splitting was not only unpersuasive – it was disingenuous. Thus the Oregon Court, true to basic free speech principles, refused to allow the government to restrict protected expression simply by claiming it was targeting related problems; instead, said the Court, the government should go after these problems directly. Nude dancing establishment that foster prostitution or other crimes, spread sexually transmitted diseases, or bring about other prohibited forms of public nuisance can be penalized and even shut down. What the government *cannot* do, however, is to directly silence protected expression because of its content.

The reluctance to uphold content-based regulations of expression limits the government's ability to suppress expressions it disfavors – be they sexual, pacifist, or pro-life. This limitation protects us all, whatever our preferred, or detested, forms of expression, and the Oregon Court was correct to defend it. But some Oregon legislators, unhappy with the result, want to get around it by writing into the Oregon Constitution a constitutional exemption from the fundamental right to free speech and expression. The idea that we should bypass sound constitutional principles by using the amendment process to carve exceptions to our constitutional liberties is dangerous and misguided. These legislators should spend their time on imaginative and constitutionally-sound ways of regulating the public nuisance they claim to be concerned with – rather than begin making exceptions to our free speech rights.