CONSTITUTIONAL LAW—FIRST AMENDMENT — FIRST AMENDMENT DOES NOT PRECLUDE CLOSURE OF ADULT BOOKSTORE WHERE ILLEGAL ACTIVITY OCCURS ON PREMISES — *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172 (1986).

The first amendment commands that freedom of speech may not be abridged.[1] Although the amendment speaks in clarion terms, its guarantees have never been treated as absolute by the Supreme Court.[2] As a result, commentators and judges have made recurrent attempts to elucidate the true values served by the first amendment and the state interests which warrant its infringement.[3] The incidental abridgment of speech occasioned by laws designed to serve nonspeech interests does not ordinarily raise a first amendment issue.[4] Recently, the United States

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[1] The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I., *reprinted in* L. TRIBE, AMERICAN CONSTITUTIONAL LAW lxiii (1978). The Supreme Court applied first amendment protection of freedom of expression to the states through the fourteenth amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925).

[2] One author has stated:

> This absolutist position [regarding first amendment guarantees], whereby any law which for any reason and in any degree punishes or restricts speech is said to be unconstitutional, has never been accepted by the Supreme Court, and, in fact, has been denied by the Court in a long series of opinions, both those which upheld the free speech claim, and those which denied it.

M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.01, at 2-3 (1984). The following cases have upheld freedom of speech claims: Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976); Terminiello v. Chicago, 337 U.S. 1 (1949); Near v. Minnesota, 283 U.S. 697 (1931). For cases in which the Supreme Court has denied free speech claims, see *e.g.*, Saia v. New York, 334 U.S. 558 (1948); Jones v. Opelika, 316 U.S. 584 (1942); Gitlow v. New York, 268 U.S. 652 (1925); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918); Robertson v. Baldwin, 165 U.S. 275 (1897).

[3] *See* M. REDISH, FREEDOM OF EXPRESSION, A CRITICAL ANALYSIS 9 (1984). Additionally, the Supreme Court in a series of recent decisions has delineated the boundaries for determining the extent to which the government may constitutionally regulate protected speech. *See, e.g.*, United States v. Grace, 461 U.S. 171 (1983); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983); Widmar v. Vincent, 454 U.S. 263 (1981); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

[4] *See* TRIBE, *supra* note 1, §§ 12-2, -3, at 580-88. *See also* Konigsberg v. State Bar, 366 U.S. 36, 49-51, *reh'g denied*, 368 U.S. 869 (1961). Infringement of speech may be divided into two categories—one based on the content of the speech and the other based on an incidental intrusion. *See* Case Comments, *Relevance of Improper Motive to First Amendment Incidental Infringement Claims*, 61 NOTRE DAME L. REV.

Supreme Court addressed this unique circumstance in *Arcara v. Cloud Books, Inc.*[5] The *Arcara* Court held that illegal sexual conduct is not entitled to first amendment protection simply because such activity occurred in a bookstore selling constitutionally protected material.[6]

Cloud Books, Inc. (Cloud Books) operated the Village Books and News Store (Village Books) in Kenmore, New York.[7] Cloud Books described itself as an adult bookstore specializing in the sale of books, magazines, and novelties of a sexually frank nature.[8] In addition, coin-operated booths were available on the premises for viewing sexually explicit movies.[9]

In September 1982, the Erie County District Attorney commenced an investigation concerning alleged illegal activities occurring on the premises of Village Books.[10] An undercover police officer visited the bookstore on various occasions for a period of approximately three weeks and witnessed patrons of the store engaged in lewd and illegal conduct.[11] Specifically, the officer claimed to have personally observed instances of fondling, fellatio, and masturbation all within the plain view of the proprietor.[12] The policeman reported that periodically patrons were exposed to solicitation of prostitution and, in fact, was himself solicited to engage in sexual acts for renumeration on at least four separate occasions.[13] The officer asserted that the management of Village Books knew of the sexual activity taking place on

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272, 277 (1986). One commentator noted that the "incidental impact [on speech] can occur when the government directs its actions at the noncommunicative elements of a particular activity." *Id.* at 279.

5 106 S. Ct. 3172 (1986).

6 *Id.* at 3178.

7 *Id.* at 3173. Charles Ottaviano, owner of the premises, was also named as a defendant in the action. People *ex rel.* Arcara v. Cloud Books, Inc., 101 A.D.2d 163, 164 n.1, 475 N.Y.S.2d 173, 175 n.1 (1984), *rev'd*, 65 N.Y.2d 324, 480 N.E. 2d 1089, 491 N.Y.S.2d 307 (Ct. App. 1985), *rev'd*, 106 S.Ct. 3172 (1986). This case, however, concerns only the activities of Cloud Books, Inc., and any use of "respondent" refers exclusively to the establishment.

8 *Arcara*, 106 S. Ct. at 3173.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* Cloud Books denied both the occurrence of such acts on its premises and its knowledge thereof. People *ex. rel.* Arcara v. Cloud Books, 119 Misc. 2d 505, 506, 465 N.Y.S.2d 633, 635 (Sup. Ct. 1983), *aff'd*, 101 A.D.2d 163, 475 N.Y.S.2d 173 (1984), *rev'd*, 65 N.Y.2d 324, 480 N.E.2d 1089, 491 N.Y.S.2d 307 (Ct. App. 1985), *rev'd*, 106 S. Ct. 3172 (1986).

the premises.[14]

Subsequently, the District Attorney filed a civil complaint against Cloud Books seeking to close the store.[15] The state charged that the operation of Village Books constituted a nuisance in violation of the New York Public Health Laws.[16] Cloud Books moved for partial summary judgment[17] asserting that the statute was inapplicable to bookstores[18] and further contended that closure of the premises would impermissibly interfere with

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[14] *Arcara*, 106 S. Ct. at 3173. In an affidavit relating his observations, the officer alleged that he brought this behavior to the attention of the store employees but was informed that they were not concerned with such activity as long as the patrons involved were spending money in the store. *Arcara*, 65 N.Y. 2d at 326, 480 N.E.2d at 1091-92, 491 N.Y.S.2d at 309.

[15] The complaint also requested a preliminary injunction, but this relief was denied by both the trial court and the appellate division. *Arcara*, 65 N.Y. 2d at 327 n.2, 480 N.E.2d at 1092 n.2, 491 N.Y.S.2d at 310 n.2.

[16] *Arcara*, 106 S. Ct. at 3174. The action was brought under Title 2 of Article 23 of the New York Public Health Laws. *Arcara*, 106 S. Ct. at 3173-74. Under § 2321, the district attorney is authorized to institute an action enforcing the Article's provisions. *Id.* at 3174. Section 2320 of the New York Public Health Law characterizes "places of prostitution, lewdness, and assignation as public health nuisances:"

> 1. Whoever shall erect, establish, continue, maintain, use, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.
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> 2. The building, erection, or place, or the ground itself, in or upon which any lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and movable property used in conducting or maintaining such nuisance, are hereby declared to be a nuisance and shall be enjoined and abated as hereafter provided.

*Id.* (quoting N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985)). In addition, § 2329 provides for the closure of any building found to be a public health nuisance under § 2320, and states:

> 1. If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in any court, an order of abatement shall be entered as part of the judgment in the case. . . and shall direct the effectual closing of any building, erection or place against its use for any purpose, and so keeping it closed for a period of one year. . . .

*Id.* (quoting N.Y. PUB. HEALTH LAW § 2329 (McKinney 1985)).

[17] *Arcara*, 106 S. Ct. at 3174. The complaint consisted of two counts, the first of which alleged a common law nuisance. *Arcara*, 65 N.Y.2d at 327, 480 N.E.2d at 1092, 491 N.Y.S.2d at 310. The trial court dismissed this count, and thus it was not at issue on appeal. *Id.*

[18] *Arcara*, 106 S. Ct. at 3174. The argument advanced by Cloud Books was that the statute was inapplicable to the store because it was directed only at houses of prostitution as the term is generally understood. *Arcara*, 101 A.D. 2d at 166, 475 N.Y.S. 2d at 176. The appellate court, however, rejected this argument noting that "[i]f the statute were intended to apply exclusively to houses of prostitution, . . .the Legislature would [not] have given such a broad definition to the term 'nuisance.'" *Id.*, 475 N.Y.S.2d at 176-77.

their first amendment right of free speech.[19]

The trial division of the New York Supreme Court denied the motion for summary judgment and held that the statute was applicable to Cloud Books.[20] The court also rejected Cloud Books' constitutional claim, reasoning that the closure order did not involve a prior restraint warranting the protection of the first amendment.[21] Further, the court maintained that an adult book store should not be permitted to invoke constitutional rights and protections to shield illegal activity.[22]

The appellate division affirmed the trial court's decision and expressly adopted the rationale espoused by the lower court.[23] Additionally, the court granted Cloud Books' application for leave to appeal to the New York Court of Appeals.[24] On appeal, New York's highest court determined that the scope of the New York statute was intended to reach establishments other than houses of prostitution.[25] The court, however, reversed the lower courts' holding on first amendment grounds,[26] reasoning that closure of the bookstore would entail an unconstitutional restraint on the right of the store and its patrons to disseminate and purchase expressive material.[27]

The state filed a petition for a writ of certiorari from the de-

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19 *Arcara*, 106 S. Ct. at 3174.

20 *Arcara*, 119 Misc. 2d at 514, 465 N.Y.S. 2d at 639. The trial court determined that the New York Public Health Laws are applicable to enjoin a nuisance occurring on premises other than a house of prostitution if there is a factual finding that a pattern of use including lewdness, assignation, or prostitution exists. *Id.* at 510-11, 465 N.Y.S.2d at 637.

21 *Arcara*, 106 S. Ct. at 3174.

22 *Id.*

23 *Arcara*, 101 A.D. 2d at 172-74, 475 N.Y.S.2d at 180-81.

24 *Arcara*, 106 S. Ct. at 3174. The motion was granted with respect to both questions—whether the statute encompassed establishments other than traditional houses of prostitution and the first amendment claim. *Id.*

25 *Arcara*, 65 N.Y. 2d at 329-31, 480 N.E. 2d at 1093-95, 491 N.Y.S. 2d at 311-13. Courts in other states have applied their nuisance statute to places which were not "traditional" houses of prostitution. *See, e.g.*, People *ex rel.* Van de Kamp v. American Art Enters., Inc., 75 Cal. App. 3d 523, 142 Cal. Rptr. 338 (1977) (applied to book publisher's building); State *ex rel.* Wayne County Prosecuting Attorney v. Levenburg, 406 Mich. 455, 280 N.W.2d 810 (1979) (applied to bar).

26 *Arcara*, 106 S. Ct. at 3174.

27 *Id.* The New York Court of Appeals reasoned that an order closing a bookstore or movie theatre because of distribution of obscene materials at the premises was an unconstitutional prior restraint. *Arcara*, 65 N.Y.2d at 332, 480 N.E.2d at 1095, 491 N.Y.S.2d at 313. *See, e.g.*, Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550 (11th Cir. 1983); General Corp. v. Alabama *ex rel.* Sweeton, 294 Ala. 657, 320 So.2d 688 (1975), *cert. denied*, 425 U.S. 904 (1976); People *ex rel.* Busch v. Projection Room Theater, 17 Cal. 3d 42, 550 P. 2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theater, 429 U.S. 922 (1976).

cision of the New York Court of Appeals.[28] The United States Supreme Court granted the writ[29] and reversed the New York Court of Appeals' decision.[30] Chief Justice Burger, writing for the majority, determined that the first amendment does not preclude closure of an adult bookstore when illegal activities have taken place on the premises.[31]

The first amendment prohibits the government from taking any action which unduly infringes the exercise of free speech.[32] Within the meaning of the Constitution, speech encompasses both verbal and nonverbal communications.[33] It is well established, however, that all forms of speech are not protected by the first amendment[34] and that certain forms of "symbolic speech"

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28 Brief for Petitioner at 7, Arcara v. Cloud Books, Inc., 106 S. Ct. 3172 (1986) (No. 85-437).

29 Arcara v. Cloud Books, Inc., 106 S. Ct. 379 (1985). The decision of the New York Court of Appeals conflicted with decisions by the Virginia Supreme Court and the Pennsylvania Superior Court which both upheld the closure of bookstores under public health nuisance statutes based on illicit sexual activities occurring on the premises. *See* Commonwealth *ex rel.* Lewis v. Allouwill Realty Corp., 330 Pa. Super. 32, 478 A. 2d 1334 (1984); Commonwealth v. Croatan Books, Inc., 228 Va. 383, 323 S.E. 2d 86 (1984).

30 *Arcara*, 106 S. Ct. at 3178.

31 *Id.*

32 *See supra* note 1 (text of first amendment).

33 The notion that speech may be nonverbal was recognized by the Supreme Court as early as 1931 in Stromberg v. California, 283 U.S. 359 (1931). There the Court declared invalid a state statute, which prohibited the display of a red flag as a symbol of opposition to organized government, as an impermissible abridgment of freedom of speech. *Id.* at 361, 369-70. The Supreme Court subsequently applied first amendment analysis to nonverbal communications. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (nude dancing entitled to first amendment protection); Buckley v. Valeo, 424 U.S. 1, 21 (1976) ("a [campaign] contribution serves as a general expression of support for the candidate and his views"); Spence v. Washington, 418 U.S. 405 (1974) (peace symbol affixed to flag held protected speech); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (student wearing of black armbands to protest Vietnam War protected under first amendment); Brown v. Louisiana, 383 U.S. 131, 142 (1966) (first amendment "rights are not confined to verbal expression. They embrace appropriate types of action" [as in the instant case, a silent sit-in in a public library]); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (flag salute held to be a "form of utterance"); Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing held protected by first amendment).

34 In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Supreme Court noted that certain types of speech are not worthy of constitutional protection because they are not an "essential part of any exposition of ideas." *Id.* at 572. If the Supreme Court determines that certain speech falls within its definitions of obscenity, child pornography, fighting words, or advocacy of violence, a governmental regulation of the speech will be sustained if the regulation constitutes a rational means of pursuing a rational goal. *See* New York v. Ferber, 458 U.S. 747, 756, 764-65 (1982) (child pornography); Paris Adult Theater I v. Slaton, 413 U.S. 49, 53-55

may be constitutionally regulated.[35]

In 1968, the Supreme Court, in *United States v. O'Brien*,[36] articulated what has remained a viable and fundamental test for determining the extent of first amendment protection afforded symbolic speech.[37] In that case, David O'Brien publicly burned his draft card on the steps of the South Boston Courthouse in protest of the Vietnam War.[38] Subsequently, he was convicted of violating the federal draft laws.[39] O'Brien argued that the draft law provisions were unconstitutional as applied to him because they restricted his freedom of expression.[40]

In rejecting this contention, the Supreme Court noted that not all forms of conduct may be labelled as "speech" simply because the actor intends to express an idea.[41] The *O'Brien* Court reasoned that even when conduct manifests a communicative element sufficient to invoke first amendment guarantees, full protection is not automatic.[42] Rather, the Court recognized that "when

(1973) (obscenity); Miller v. California, 413 U.S. 15, 23-24 (1973) (obscenity); Gooding v. Wilson, 405 U.S. 518, 521-23 (1972) (fighting words); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (advocacy of violence); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words).

35 *See* United States v. O'Brien, 391 U.S. 367, 376-77, *reh'g denied*, 393 U.S. 900 (1968).

36 *Id.*

37 *See* M. NIMMER, *supra* note 2, § 3.06 [D] at 3-47.

38 *O'Brien*, 391 U.S. at 369. The registration certificate which O'Brien burned listed his name, age, selective service number, physical description, and the local registration board's address. *Id.* at 373. The notice of classification listed O'Brien's name, selective service number, and his current classification. *Id.* at 373-75. *See* 32 C.F.R. § 1617.1 (1962) (requiring possession of registration certificate); 32 C.F.R. § 1623.5 (1962) (requiring possession of notice of classification).

39 *O'Brien*, 391 U.S. at 370. The indictment upon which O'Brien was tried charged that he " 'willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service Systems Form No. 2) in violation of Title 50, App. United States Code, Section 462 (b).' " *Id.* (citations omitted). As amended by Congress in 1965, § 462(b) made it an offense for any person who "forges, alters, knowingly destroys, knowingly mutilates . . ." or changes any such certificate in any manner. *Id.*

40 *Id.* Although O'Brien's actions lacked a verbal element, free speech protections have never been predicated upon symbolic conduct related to that verbal expression. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157 (1961) (sit-in). Moreover, symbolic communication has never been limited to acts traditionally associated with speech. *Compare* Brown v. Louisiana, 383 U.S. 131 (1966) (allowing sit-in demonstration); Edwards v. South Carolina, 372 U.S. 229 (1963) (allowing protest march); *with* Thornhill v. Alabama, 310 U.S. 88 (1940) (disallowing peaceful picketing).

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

42 *Id.* The Court is required to balance the free speech interest against "the magnitude of the public interests which . . . [the statute is] designed to protect" and "the pertinence . . . [it bears] to the protection of those interests." Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 93 (1961). *See* Cox v.

speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[43]

Proceeding with its analysis in light of these considerations, Chief Justice Warren enunciated a four-part test for determining when a governmental interest justifies regulation of expressive conduct.[44] According to the *O'Brien* Court, such a regulation will be upheld (1) if it falls within the constitutional power of government; (2) if the regulation advances "an important or substantial governmental interest;" (3) if that governmental interest is not related to a restraint of free expression; and (4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[45] The Court found that all of these requirements were satisfied[46] and thus

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Louisiana, 379 U.S. 536 (1965) (breach of peace conviction not justified simply because violation was possible); Barenblatt v. United States, 360 U.S. 109 (1959) (witness refusing to answer question relating to Communist Party affiliations held in contempt because of important government interest); NAACP v. Alabama, 357 U.S. 449 (1958) (compulsory disclosure of membership lists subject to closest scrutiny because may curtail freedom of association).

[43] *O'Brien*, 391 U.S. at 376.

[44] *Id.* at 377.

[45] *Id.* In characterizing the importance of the governmental interest which must be evident, the Supreme Court has defined the following descriptive terms related to the *O'Brien* test: "compelling" (NAACP v. Button, 371 U.S. 415, 438 (1963); Sherbert v. Verner, 374 U.S. 398, 403 (1963)), "substantial" (NAACP v. Button, 371 U.S. 415, 444 (1963); NAACP v. Alabama, 357 U.S. 449, 464 (1958)), "subordinating" (Bates v. Little Rock, 361 U.S. 516, 524 (1960)), "paramount" (Thomas v. Collins, 323 U.S. 516, 530 (1945)), "cogent" (Bates v. Little Rock, 361 U.S. 516, 524 (1960)) and "strong" (Sherbert v. Verner, 374 U.S. 398, 408 (1963)).

The *O'Brien* test has been limited to governmental action aimed at regulating the noncommunicative elements of an activity as evidenced by the Court's refusal to apply the test to governmental action regulating communicative aspects of conduct. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (striking down governmental attempts to limit political contributions and expenditures as violative of first amendment protection of speech).

[46] *O'Brien*, 391 U.S. at 377. The 1965 Amendment of the Universal Military Training and Service Act met the first part of the *O'Brien* test because the government has constitutional power "to raise and support armies and to make all laws necessary and proper to that end. . . ." *Id.* The Court also determined that part two of the test was satisfied because the Selective Service certificate served purposes beyond notification. *Id.* at 377-78. These purposes included quick induction in time of national crisis, facilitation of communication between registrants and draft boards, delinquency in service obligations, changes in an individual's status, and deterrence for deceptive use of certificates. *Id.* at 378-79. Part three of the test was satisfied because governmental interests were directed at the noncommunicative aspect of O'Brien's conduct. *Id.* at 381-82. Finally, the Court concluded that the 1965 Amendment was limited to insure smooth administrative functioning of the Selective Service System. *Id.* at 382.

concluded that the governmental interest at stake, namely the efficient administration of the selective service system, was sufficiently important and substantial to override O'Brien's first amendment rights.[47]

One year later, the Supreme Court decided *Tinker v. Des Moines Independent Community School District*,[48] which involved a similar form of expressive conduct.[49] In *Tinker*, several high school students were suspended for violating a school policy which forbade the wearing of armbands while at school.[50] The policy had been adopted by the local school district in anticipation of student protest of the Vietnam War.[51] Subsequently, the students, through their parents, brought an action seeking to enjoin the school officials from disciplining the students.[52] The district court dismissed the complaint on the ground that the school district's policy was a reasonable means of preventing disruption in the classrooms.[53] The Court of Appeals for the Eighth Circuit affirmed.[54]

On appeal, the Supreme Court reversed.[55] In reaching its decision, the Court characterized the wearing of the armbands as an action which involved "direct, primary First Amendment rights," which enabled the petitioners to invoke the provision's safeguards.[56] The Court further observed that the school policy, which forbade the display of the armbands, failed the third part of the *O'Brien* test because the regulation was directly related to the suppression of free speech.[57] Justice Fortas, writing for the majority, distinguished the school district's policy from the statute involved in *O'Brien*. Justice Fortas posited that the *O'Brien* statute prohibited the burning of all draft cards, whereas the

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47 *Id.* at 382. The *O'Brien* decision has been criticized by commentators for its failure to dispose of O'Brien's actions by a more traditional first amendment balancing of speech and nonspeech interests. *See* Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 10-11. Specifically, it has been stated that the Court should have dealt in greater detail with the constitutional impact of the speech element in O'Brien's conduct instead of the statute's non-regulatory aspects. *Id.* at 17-18.

48 393 U.S. 503 (1969).

49 *Id.* at 504.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.* at 504-05.

54 *Id.* at 505. Due to a divided Eighth Circuit, the lower court's decision was affirmed without opinion. *Id.*

55 *Id.* at 514.

56 *Id.* at 508.

57 *Id.* at 510-11.

school district's policy in *Tinker* proscribed only the display of black armbands, but permitted the wearing of other symbolic apparel.[58] Consequently, the Court applied a general first amendment standard of review[59] to the ordinance at issue and concluded that the school district's attempt to single out a particular symbolic activity constituted a suppression of the student's right to free expression.[60] Hence, the student's right to wear the armbands was upheld.[61]

In 1974, the Supreme Court further elaborated the *O'Brien* test in *Spence v. Washington.*[62] In that case, the Court determined that an individual's alteration of a United States flag, in certain instances, constituted protected expression under the first amendment.[63] Spence had attached peace symbols to an American flag which he displayed upside down outside his window[64] in protest of the Cambodian invasion and the Kent State killings.[65] He was convicted under the state's "improper use" statute which prohibited placing a figure, design, or mark on a United States

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58 *Id.* The school did not attempt to ban all symbols of political or controversial significance. *Id.* Some students wore political campaign buttons and others displayed the Iron Cross, the traditional symbol of Nazism. The regulation did not apply to these symbols. *Id.* at 510.

59 When the government regulates the noncommunicative aspect of an act and that regulation is challenged, courts invoke a balancing test which weighs an individual's free speech interest against the government's interest in the regulation. L. TRIBE, *supra* note 1, § 12-2, at 582. In *Tinker*, the Court determined that failure to satisfy the third prong of the *O'Brien* test caused the regulation to be analyzed under the strict balancing test. *Tinker*, 393 U.S. at 510-11. Thus, the Court balanced the student's first amendment rights against those of the school authorities. *See id.* at 509.

60 *Tinker*, 393 U.S. at 509. The Court, in balancing the student's exercise of first amendment rights against the prohibition of wearing armbands, stated that such conduct could not be prohibited unless it " 'materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.' " *Id.* (citation omitted).

61 *Id.* at 514. The *Tinker* Court refused to consider the constitutionality of school regulations dealing with hair or skirt length, or other aspects of personal appearance which might be forms of symbolic expression. *Id.* at 507-08. *See generally*, Recent Cases, *Prohibition of Long Hair Absent Showing of Actual Disruption Violates High School Student's Constitutional Rights*, Breen v. Kahl; *Requirement That High School Students Shave Is Valid if Founded on a Rational Basis*, Stevenson v. Board of Education, 84 HARV. L. REV. 1702 (1971) (discussing whether certain aspects of personal appearance are symbolic speech entitled to first amendment protection).

62 418 U.S. 405 (1974) (per curiam).

63 *Id.* at 406.

64 *Id.* The flag was displayed on a privately-owned building in Seattle, Washington. *Id.*

65 *Id.* at 408. The appellant claimed that his purpose in displaying the flag in this manner "was to associate the American flag with peace instead of war and violence." *Id.*

flag or exposing any such flag to view.[66]

The Supreme Court reversed the conviction reasoning that the defendant had engaged in an expressive activity worthy of constitutional protection.[67] The Court opined that the presence of a first amendment interest called for application of the *O'Brien* test, requiring a determination whether the governmental interest in curtailing protected activity was adequately justified.[68] Unlike the *O'Brien* Court, however, the *Spence* Court considered not only the nature of the defendant's activity, but also the "factual context and environment in which it was undertaken."[69] The employment of these considerations by the Court represented a departure from the unqualified assumptions delineated in *O'Brien*.[70] Moreover, the Court shifted from the speech/content distinction relied upon in *O'Brien* and invoked a balancing test which weighed the individual's first amendment interests against those of the government.[71] The *Spence* majority conceded that the governmental interest involved, namely, "preserving the physical integrity of a privately owned flag," was not substantial enough to support the conviction.[72]

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66 *Id.* at 407. The defendant was convicted under an improper use statute which provided in pertinent part:

> No person shall, in any manner, for exhibition or display:
> (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or
> (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement. . . .

*Id.* (quoting WASH. REV. CODE § 9.86.020 (1977)).
It is interesting to note that Spence was not found guilty under Washington's flag desecration statute. *Id.* at 406; *see also id.* at 406-07 (citing WASH. REV. CODE § 9.86.030 (1977)).

67 *Id.* at 415. The Court determined that the defendant engaged in a form of communication using his own flag on private property and, more importantly, the record was devoid of evidence regarding a risk of a breach of the peace. *Id.* at 408-09.

68 *Id.* at 409.

69 *Id.* at 410. In relating the defendant's activity to the Cambodian invasion and the Kent State killings, the communicative component of the peace symbol attached to the flag was better understood. *Id.* The Court recognized that this was not an act of anarchy by the appellant but an expression of actual concern about current government affairs. *Id.* at 410-11.

70 *See id.* In *O'Brien*, the Court did not consider the communicative nature of the draft card burning or defendant's motivation behind its destruction. *O'Brien*, 391 U.S. at 381-82.

71 *Spence*, 418 U.S. at 414-15.

72 *Id.* at 415.

In recent years, the Supreme Court has continued to apply the orthodox *O'Brien* test to cases involving governmental regulation of conduct which manifests an expressive element.[73] In *Clark v. Community for Creative Non-Violence*,[74] for example, the Supreme Court held that symbolic speech is not absolutely protected under the first amendment.[75] *Clark* involved a round-the-clock demonstration by members of a concerned religious group to dramatize the plight of the homeless.[76] The demonstrators obtained a permit from the National Park Service in Washington, D.C., which allowed the group's "sleeping demonstration" to be conducted in all but certain temporary structures on the park's grounds.[77] The Park Service based the restrictions on the premise that sleeping in the non-designated areas would violate the park's revised "anti-camping" regulations.[78]

The demonstrators alleged that the regulations stifled their first amendment guarantees by frustrating their use of symbolic speech.[79] The Supreme Court found that the sleeping activity, in connection with the demonstration, constituted symbolic expression; therefore, the constitutionality of the park regulations was subject to review under the *O'Brien* test.[80] The Court refused to invalidate the regulations simply because less burdensome alter-

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73 *See Arcara*, 106 S. Ct. at 3176-77.

74 468 U.S. 288 (1984).

75 *Id.* at 289, 299.

76 *Id.* at 291-92. The demonstration's purpose "was to impress upon the Reagan Administration, the Congress, and the public the plight of the poor and the homeless." Community for Creative Non-Violence v. Watt, 703 F.2d 586, 587 (D.C. Cir. 1983) (en banc) (plurality opinion), *rev'd sub nom.* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

77 *Clark*, 468 U.S. at 291-92. The National Park Service issued a renewable seven-day permit to conduct a continuous demonstration in Washington, D.C. *Clark*, 468 U.S. at 291-92. The permit allowed the erection of two "symbolic campsites" — one in Lafayette Park across from the White House and the other on the Mall near the Washington Monument. *Id.*

78 *Id.* at 290. The revised regulations permit camping, defined in part as "the use of park land for living accommodation purposes such as sleeping activities," only in designated campgrounds. *Id.* (quoting 36 C.F.R. § 50.27(a) (1983)). The park, in this case, contained no such designated areas. *Id.* These regulations, however, do permit the construction of temporary structures "for the purpose of symbolizing a message or meeting logistical needs" as long as these structures are not used "for living accommodation activities such as sleeping." *Id.* at 291 n.2 (quoting 36 C.F.R. § 50.19(e)(8)). Thus, the Park Service permit allowed the demonstrators to erect their symbolic tents, but prohibited them from actually sleeping in them. *See Community for Creative Non-Violence*, 703 F.2d at 587.

79 *Clark*, 468 U.S. at 292.

80 *Id.* at 293. The Court assumed, without deciding, that the activity of the demonstrators constituted symbolic expression. *See id.* The Court, citing *Spence* and *Tinker*, recognized that an individual may profess an idea by acting in a manner

natives might be available.[81] Rather, the *Clark* majority opined that the incidental burden on speech was no greater than essential, and therefore, permissible under the *O'Brien* test.[82] Proceeding in light of these considerations, the Supreme Court held that there was a substantial governmental interest in maintaining the parks in the heart of our nation's capital.[83]

Most recently, the Supreme Court examined the basic tenets of *O'Brien* and its progeny in *United States v. Albertini*.[84] In *Albertini*, the Court examined a military statute making unlawful the attempt to reenter a military base subsequent to having been barred from the base.[85] The defendant, James Albertini, received a letter in 1972 from a Hawaiian airforce base barring him from reentering the base without governmental permission.[86] Albertini was sent this letter because of his previous misconduct concerning the destruction of government documents[87] and his subsequent conviction for conspiring to destroy government property.[88]

Nearly ten years later, in 1981, Albertini reentered the base in order to engage in a peaceful demonstration criticizing the nuclear arms race.[89] Albertini and four friends passed out leaflets

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intended and understood by others viewing such conduct as a form of communication. *Id.* at 294.

81 *Id.* at 295.

82 *Id.* at 294.

83 *Id.* at 295. In dissent, Justices Marshall and Brennan were unconvinced that any substantial governmental interest was advanced by the Park Service's restrictions. *Id.* at 311-12 (Marshall, J., dissenting).

84 472 U.S. 675 (1985).

85 *Id.* at 677. *See also* 18 U.S.C. § 1382 (1984). The statute at issue provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or unlawful regulation; or Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—Shall be fined not more than $500 or imprisoned not more than six months, or both.

*Id.*

86 *Albertini*, 472 U.S. at 677.

87 *Id.* In 1972, Albertini and a companion improperly entered Hickam Air Force Base in Hawaii and defaced government documents by pouring animal blood on them. *Id.* Subsequent to this illegal activity, Albertini received letters barring him from various Hawaiian military bases. *Id.* at 678.

88 *Id.* at 677. Albertini was convicted of violating 18 U.S.C. §§ 371 and 1361. *Albertini*, 472 U.S. at 677.

89 *Albertini*, 472 U.S. at 678. Albertini entered Hickam Air Force Base again during an open house for the 32nd Annual Armed Forces Day. *Id.*

and displayed a banner.[90] The group, although they did not disrupt the activities of the open house, were escorted off the base and Albertini was convicted of trespass.[91] Albertini charged that his conviction should be set aside because, among other things, his conduct at the base was protected under the first amendment.[92] In affirming the conviction, the Supreme Court recognized that the expressive nature of the defendant's conduct was subject to governmental regulation.[93] In applying the *O'Brien* test, the Court maintained that the statute was content-neutral and did not violate Albertini's first amendment liberties because it was merely a time, place, and manner regulation.[94] Further, the majority reiterated the reasoning espoused by the *Clark* Court that "such regulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech."[95] Under this rationale, the Court concluded that the government's interest in assuring the security of its military installations was sufficient to justify an incidental burden on speech.[96]

It was against the historical application of *O'Brien* that the case of *Arcara v. Cloud Books* was decided. In *Arcara*, the United States Supreme Court expressly rejected the *O'Brien* test as a standard for evaluating conduct which does not manifest an element of protected expression.[97] Chief Justice Burger, writing for the majority, began his opinion by noting that the purpose of the *O'Brien* test was to protect against unwarranted governmental regulation of conduct which contains an expressive element.[98] The Chief Justice then recognized that the Supreme Court has consistently applied *O'Brien* to situations in which the government directed its regulation at conduct as opposed to conduct coupled with protected speech.[99] The Court thereafter reiter-

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90 *Id.* The banner which was placed in front of a B-52 Bomber read "Carnival of Death." *Id.*

91 *Id.* at 679.

92 *Id.*

93 *Id.* at 682-84.

94 *Id.* at 688-89. In determining the extent of the substantial government interest delineated by the statute, the Court posited that nothing in the first amendment requires military personnel to wait until persons subject to a valid bar order have entered the base to see whether they will conduct themselves in a proper manner. *Id. Cf.* Perry Educ. v. Perry Local Educators' Ass'n., 460 U.S. 37, 52 n.12 (1983).

95 *Albertini*, 472 U.S. at 689.

96 *Id.*

97 *Arcara*, 106 S. Ct. at 3175-77.

98 *Id.* at 3176.

99 *Id.*

ated that first amendment analysis may be employed to analyze a statute which may have the incidental effect of burdening speech.[100] The Court noted that it was willing to apply first amendment scrutiny to statutes that, although directed at non-communicative activity, disproportionately burden protected first amendment activities.[101]

Chief Justice Burger pointed out that *Arcara* was not a case which involved protected expression.[102] Thus, he disagreed with the results obtained by the New York Court of Appeals in its application of the *O'Brien* test to illicit sexual activity.[103] The Chief Justice reasoned that the symbolic draft card burning in *O'Brien* possessed, at the very least, a semblance of expressive activity whereas the public display of illicit sexual conduct enjoys no first amendment safeguards.[104]

Addressing the constitutionality of the New York statute, Chief Justice Burger asserted that the provision was tailored to serve an important governmental interest: the health of the community.[105] According to the Court, such an interest is unrelated to the suppression of speech and is independent of any desire to suppress speech.[106] Chief Justice Burger emphatically rejected Cloud Books' contention that the effects of the statutory closure

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100 *Id.* at 3175-76.

101 *Id.* at 3177 (citing Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)). The *Minneapolis Star* case involved a challenge to a Minnesota statute which imposed a use tax on the cost of paper and ink consumed during the production of newspapers and other periodic publications. *Minneapolis Star*, 460 U.S. at 577. While the Court recognized that the raising of revenue is a legitimate state interest, it determined that the effects of the statute imposed a disproportionate burden on the newspaper industry due to their substantial consumption of ink and paper. *Id.* at 586-88. The Court found that enactment of such a statute created an unconstitutional burden on the press. *Id.* at 591-92. The Court stated that the "[d]ifferential taxation of the press . . . places such a burden on the interests protected by the First Amendment [which cannot be tolerated] unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585.

102 *Arcara*, 106 S.Ct. at 3176-77 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973)). The Chief Justice noted that *Paris* underscored the fallacy of attempting to invoke first amendment protections to unlawful sexual activity by "attributing protected expressive attributes to that conduct." *Id.* at 3177.

103 *Id.*

104 *Id.* at 3175.

105 *Id.* at 3177.

106 *Id.* The Chief Justice stated that if the city invoked closure penalties for health hazards, such as inadequate sewage system or fire code violations, the first amendment would not protect the owner of the premises if he caused such violations to continue. *Id.*

remedy substantially curtailed protected bookselling activity.[107] The majority reasoned that this argument was tenuous because Cloud Books was free to continue the legitimate aspect of its business at a different location.[108] Moreover, the Chief Justice observed that, although it may be inconvenient to relocate the bookstore, the Court was not bound to the "least restrictive means" of scrutiny.[109] The majority further noted that the only circumstances which warrant application of such scrutiny occur when the conduct in question possesses a "significant expressive element that [draws] the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity. . . ."[110] Finally, the majority stated that otherwise illicit conduct could not be cloaked in legality by the mere presence of a first amendment protected activity such as bookselling.[111] Thus, Chief Justice Burger concluded that the first amendment does not preclude the closure of a bookstore where illegal activity takes place on its premises.[112]

Justice O'Connor wrote a separate opinion, concurring in the Court's judgment.[113] Although she agreed with the majority that the application of a first amendment standard of review was without merit when the subject of the governmental regulation did not involve speech or an incidental effect on speech,[114] Justice O'Connor emphasized that if Cloud Books established that the city invoked the nuisance statute merely as a pretext for closing down an "undesirable" bookstore, such action would be impermissible.[115] Justice O'Connor pointed out, however, that the bookstore in *Arcara* failed to assert that closure of its premises was in any way motivated by a desire to suppress protected speech.[116] Therefore, the Justice agreed with the Court's conclu-

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107 *Id.*

108 *Id.*

109 *Id.* *See generally* J. NOWACK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW, § 16.10 at 848 (3d ed. 1986) (explaining least restrictive means test).

110 *Arcara*, 106 S.Ct. at 3177-78.

111 *Id.* at 3178.

112 *Id.*

113 *Id.* at 3178 (O'Connor, J., concurring).

114 *Id.* Justice O'Connor reasoned that any other conclusion would result in an automatic application of first amendment analysis whenever government action could be traced to some speech-inhibiting circumstances. *Id.*

115 *Id.*

116 *Id.* Justice O'Connor stated that "[w]ere respondents (Cloud Books) able to establish the existence of such a speech suppressive motivation or policy on the part of the District Attorney, they might have a claim of selective prosecution." *Id.*

sion that a first amendment argument was misplaced.[117]

In a strong dissenting opinion, Justice Blackmun disagreed with the majority's rejection of a first amendment standard of review to the facts at bar.[118] He explained that the first amendment's protections extend to all laws "abridging the freedom of speech," not just those aimed at conduct with a communicative element.[119] This conclusion, he implied, was supported by both the text of the amendment and Supreme Court interpretations.[120]

Noting the Court's previous acknowledgment that the challenged statute " 'must be tested by its operation and effect,' "[121] the dissent maintained that the results of such examination should be scrutinized by the courts.[122] Specifically, the Justice contended that when a statute abridges first amendment freedoms, it must be duly justified.[123] Supporting his position that a challenged statute which attempts to regulate nonspeech should be declared invalid if it is found to infringe protected speech, Jus-

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n.4 (O'Connor, J., concurring) (citing Wayte v. United States, 105 S. Ct. 1524 (1985)).

In Near v. Minnesota, 283 U.S. 697 (1931), the government sought restrictions on the basis of an *advance* determination of expressive materials. *Id.* at 703. In this classic case articulating the heavy presumption against prior restraints, the Court struck down a state procedure which closed, as a public nuisance, a newspaper which criticized local officials. *Id.* at 722-23. *See also* City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925 (1986) (city ordinance prohibiting adult movie theatres from locating within 1000 feet of certain property held constitutional because ordinance was predominately aimed at secondary effects of adult uses and not its content); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (order restraining media from publishing or broadcasting accounts of confessions, admissions, or other facts implicating accused); Young v. American Mini Theatres, 426 U.S. 50 (1976) (upholding zoning ordinance requiring theatres specializing in "adult movies" and "adult bookstores" be geographically dispersed on grounds that total ban on sexually explicit materials did not occur); New York Times Co. v. United States, 403 U.S. 713 (1971) (order enjoining publication of Pentagon Papers); Bantam Books Inc. v. Sullivan, 372 U.S. 58 (1963) (invalidating administrative book review procedure which identified "objectionable" books and effectively prevented their continued publication and circulation).

117 *Arcara*, 106 S. Ct. at 3178 (O'Connor, J., concurring).

118 *Id.* (Blackmun, J., dissenting). Justice Blackmun was joined in dissent by Justices Brennan and Marshall. *Id.*

119 *Id.* at 3178-79 (Blackmun, J., dissenting).

120 *See id.* at 3179 (Blackmun, J., dissenting). The language of the first amendment speaks in absolute terms, allowing no exceptions. *See* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. Certain Supreme Court decisions have held the amendment's language to be absolute. *See, e.g., supra* note 2.

121 *Arcara*, 106 S.Ct. at 3179 (Blackmun, J., dissenting) (quoting Near v. Minnesota, 283 U.S. 697, 708 (1931)).

122 *Id.*

123 *Id.*

tice Blackmun relied on earlier Supreme Court decisions.[124] Accordingly, he posited that the state's interest in regulating an activity must be balanced against the imposition placed on the fundamental right.[125]

Justice Blackmun noted that the state has a legitimate interest in curtailing public sexual activity.[126] Yet, the dissent maintained that, when a first amendment activity is substantially impaired, the state should be required to prove that it has employed the "least restrictive means" of attaining its legitimate objectives.[127] The Justice opined that the one year closure penalty in *Arcara* presented a substantial infringement on Cloud Books' first amendment rights.[128] Justice Blackmun commented that while the bookstore was permitted to continue its bookselling activity at an alternate site, local zoning laws might disallow such an option, effectively stifling protected first amendment interests.[129] The Justice strongly criticized the majority's decision as "creat[ing] a loophole through which counties like Erie, [in *Arcara*] can suppress 'undesirable' protected speech without confronting the protections of the First Amendment."[130] He feared that allowing a state the untrammeled license to use a nuisance statute to suppress speech, without requiring specific and substantial justification, would cause the freedom of speech to lose its "transcendent value."[131]

In light of the Supreme Court's prior decisions, the *Arcara* Court's refusal to apply the *O'Brien* standard is well-founded. The Court's traditional and consistent application of *O'Brien* has repeatedly sought a necessary pre-condition—requiring the existence of conduct with an expressive element.[132] In its review of the salient facts and circumstances pertinent to the determination of a first amendment issue, the *Arcara* Court concluded that

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124 *Id.* (citing Marsh v. Alabama, 326 U.S. 501 (1946); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

125 *Id.*

126 *Id.* at 3180 (Blackmun, J., dissenting).

127 *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)). Justice Blackmun suggested arresting the patrons involved in the illicit activity as an alternative remedy. *Id.* The Justice also maintained that the District Attorney failed to demonstrate that a less restrictive remedy would be inadequate to abate the nuisance. *Id.*

128 *Id.*

129 *Id.*

130 *Id.* (citing New York v. P.J. Video, Inc., 106 S. Ct. 1610 (1986); New York v. Uplinger, 467 U.S. 246 (1984)).

131 *Id.* at 3181 (Blackmun, J., dissenting) (citing Speiser v. Randall, 357 U.S. 513, 525 (1958)).

132 *See O'Brien*, 391 U.S. at 376.

the sexual activity sought to be controlled on the bookstore's premises included no expressive element, distinguishing *Arcara* from *O'Brien* and its progeny.[133] While a bookstore should not be able to claim special immunity from governmental regulation simply by virtue of its protected first amendment activities,[134] courts should be cognizant of the fact that, in certain instances, there may indeed be a legitimate first amendment issue.

Despite its previous recognition that activities of commercial bookstores are constitutionally protected,[135] the majority in *Arcara* adamantly refused to acknowledge the presence of a first amendment issue.[136] Instead, the Court focused on the sexual conduct involved, the non-expressive activity, rather than the sale of books as a means to effectuate approval of the closure.[137] By its blanket refusal to acknowledge a first amendment issue, the Court may be viewed as adhering to a policy that commands ignorance of the first amendment whenever the government has a legitimate interest in regulating particular conduct or conditions.

In its broadest terms, the first amendment protects against "all laws abridging the freedom of speech, not just those directed at expressive activity."[138] It cannot be disputed that the closure order in *Arcara* would infringe upon the right of the bookstore to disseminate and its patrons to purchase sexually explicit but non-obscene material. Irrespective of this premise, the *Arcara* decision allows a state to suppress speech without justification as long as it does so through uniformly applicable regulations that are divorced from expressive conduct.[139] Moreover, as the dissent maintained, the Court has consistently struck down statutes which attempt to regulate nonspeech when the statutes unduly infringed the speech interest involved.[140] In an attempt to refute this argument, the majority maintained that the instances where such statutes have been declared invalid are limited to cases in which the "nonspeech" activity drawing the sanction was inti-

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133 *Arcara*, 106 S. Ct. at 3176-77.

134 *Id.* at 3177.

135 *See, e.g.*, Smith v. California, 361 U.S. 147, 150 (1959) (commercial bookstores have place in facilitation of free expression).

136 *See Arcara*, 106 S. Ct. at 3175-78.

137 *Id.* at 3177. *See also supra* note 102.

138 *Arcara*, 106 S.Ct. at 3179 (Blackmun, J., dissenting). *See also supra* note 1 (text of first amendment).

139 *Arcara*, 106 S.Ct. at 3179 (Blackmun, J., dissenting).

140 *Id.*

mately related to protected expressive conduct.[141] The majority, however, noted that the illegal sexual activity in *Arcara* was totally unrelated to the bookselling.[142] In this regard, the majority's reasoning must fail. Under the Court's theory, a bookstore which sold materials that induced illicit sexual activity ironically would be entitled to a greater degree of protection than one whose merchandise had no effect on the outward sexual behavior of its patrons.[143]

In examining the legislative intent, it has been recognized that enforcement of a statute providing for abatement of a public nuisance is clearly within the police power of the state.[144] In abatement of a nuisance, the relief should not exceed that which is necessary to achieve the legitimate end.[145] Although the government has an interest in eliminating criminal sexual activity, the means by which it may accomplish this result may be effectuated without considerable infringement on first amendment freedoms.

Despite the limited duration of criminal conduct alleged in *Arcara*, the Supreme Court was anxious to reject the New York Court of Appeals' rationale that the nuisance could have been abated through a means less restrictive than closure.[146] Such refusal may be construed as an attempt to regulate the content of speech through valid legal measures. While closure might be the most efficient means, "considerations of this sort do not empower a [state] to abridge the freedom of speech. . . ."[147] The dissent conceded that closure may have been appropriate, but only after alternative measures were attempted and failed.[148] While the law should not work to eviscerate community protec-

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141 *Id.* at 3177 n.3.

142 *Id.* at 3176-77.

143 *See id.* at 3179 (Blackmun, J., dissenting).

144 *See* Lane v. City of Mount Vernon, 38 N.Y. 2d 344, 342 N.E.2d 571, 379 N.Y.S. 2d 798 (1976); Lawton v. Steele, 119 N.Y. 226, 23 N.E. 878, 101 N.Y.S. 2d 334 (1894), *aff'd*, 152 U.S. 133 (1894).

145 *See, e.g.*, People v. Mason, 124 Cal. App. 3d 348, 177 Cal. Rptr. 284 (1981); Township of Lacey v. Mahr, 119 N.J. Super. 135, 290 A.2d 450 (App. Div. 1972).

146 The allegations which preceded the litigation consisted of statements made by an undercover police officer regarding illegal activity on the premises of Cloud Books as a result of a nineteen day investigation in 1982. *Arcara*, 101 A.D. 2d at 164, 475 N.Y.S. 2d at 175.

147 *See* Schneider v. State, 308 U.S. 147, 164 (1939).

148 *Arcara*, 106 S. Ct. at 3180 (Blackmun, J., dissenting). The Court would have isolated the unprotected activity without adversely impacting free speech. This could have been accomplished by an application of the New York Penal Laws or a permanent injunction against illegal conduct.

tions provided by public nuisance statutes, such statutes should not be utilized when less drastic measures accomplishing the identical governmental objective are available. The *Arcara* majority, however, did not adopt this reasoning and upheld the closure as permissible under the nuisance statute.[149]

The *Arcara* case may be viewed as an expression of the Supreme Court's disapproval of stores which peddle "undesirable" materials. Taken alone, the Court's decision is not a momentous one, but when considered in the light of recent decisions regarding morality and individual rights,[150] the opinion is emblematic of a renewed moral militancy evident in communities around the country.[151] This attitude, however, should not be permitted to override basic constitutional guarantees. Under a system of first amendment jurisprudence that claims to protect the vitality of our system of free expression, courts must not risk elimination of unlawful activity at the expense of precious lawful expression.

*Marianne Benevenia*

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149 *Id.* at 3178.

150 *Arcara* was decided during a series of conservative Supreme Court decisions. *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986) (Court upheld school sanction of student who gave speech colored by sexual innuendo); Posadas de Puerto Rico Assoc. v. Tourism Co., 106 S. Ct. 2968 (1986) (Puerto Rican statute restricting advertising of casino gambling aimed at residents of Puerto Rico could be restricted to protect health, safety, and welfare of citizens); Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (Georgia sodomy statute held not violative of fundamental rights of homosexuals).

151 *See* Stengel, *Sex Busters*, TIME, July 21, 1986, at 12.