THE CONTENT DISTINCTION AND FREEDOM OF EXPRESSION: ARCARA v. CLOUD BOOKS, INC.

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.*

INTRODUCTION

The Supreme Court in Arcara v. Cloud Books, Inc.¹ held that no first amendment issues were raised by the closing of a bookstore pursuant to a content-neutral regulation.² In Arcara, the State of New York had filed a civil complaint under the state's red light abatement statute against Cloud Books, Inc., seeking the closure of the adult bookstore.³ The defendant argued that closing the bookstore would be an unconstitutional infringement upon his first amendment rights.⁴ The United States Supreme Court held that when a regulation of general applicability is aimed at non-expressive conduct, no first amendment issues are raised even though the regulation restricts expression.⁵

This Note examines the history of the Supreme Court's analysis of regulations that affect expression.⁶ Specifically, this Note discusses the difference in the Supreme Court's treatment of those regulations, depending on whether the regulation is content-based or content-neutral.⁷ Further, a review of state court decisions dealing with situations similar to Arcara is undertaken.⁸ Finally, this Note urges courts to use a unified analysis when evaluating the constitutionality of any regulation that affects expression.⁹ This unified analysis, formulated by Professor Redish of Northwestern University, would require a court to apply the same level of judicial scrutiny to all regulations that affect expression.¹⁰

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2. Id. at 3178.
3. Id. at 3173-74.
4. Id. at 3174.
5. Id. at 3177-78.
6. See infra notes 39-105 and accompanying text.
7. See infra notes 135-84 and accompanying text.
8. See infra notes 107-34 and accompanying text.
9. See infra notes 185-207 and accompanying text.
FACTS AND HOLDING

The defendant in *Arcara* was an owner of an adult bookstore that sold sex novelties, sexually explicit books and magazines, and operated several video machines that featured sexually explicit videos.\(^1\) In September of 1982, an investigation into the activities occurring at the bookstore was initiated by the Erie County district attorney.\(^2\) The three-week investigation was conducted by an Erie County deputy sheriff who, while working undercover, witnessed a variety of lewd and illegal acts being committed in the bookstore.\(^3\)

The Erie County district attorney commenced civil proceedings in the New York Supreme Court, requesting that the activities conducted at the store be characterized as a public health nuisance.\(^4\) Such a characterization would have allowed a court to enjoin the operation of the bookstore for a period of one year and to enter an order of abatement directing that all of the furnishings that were used in conducting the nuisance be removed from the bookstore.\(^5\) The complaint was based upon the statutory definition of a public health nuisance as defined in title II, section 2320 of the New York Public Health Law.\(^6\) The defendant moved for partial summary judgment,\(^11\)


\(^{12}\) *Id.*

\(^{13}\) *Arcara v. Cloud Books, Inc.*, 101 A.D.2d 163, —, 475 N.Y.S.2d 173, 175 (1984). The sheriff’s affidavit stated that he “observed patrons masturbating on four different occasions; a female patron fondling a male patron; two males engaged in the act of fellatio; that while at the store the undercover Deputy Sheriff was solicited for sexual conduct in return for a fee on at least four different occasions.” *Arcara v. Cloud Books, Inc.*, 119 Misc. 2d 505, —, 465 N.Y.S.2d 633, 634 (1983). When the deputy sheriff informed the bookstore employees that illegal acts were being committed in the store, the employees responded that they were not concerned with such matters. *Arcara*, 101 A.D.2d at —, 475 N.Y.S.2d at 175.

\(^{14}\) *Arcara*, 101 A.D.2d at —, 475 N.Y.S.2d at 175.

\(^{15}\) *Arcara*, 119 Misc. 2d at —, 465 N.Y.S.2d at 635.

\(^{16}\) N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985) provides:

1. Whoever shall erect, establish, continue, maintain, uses, own, or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance.

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.* Section 2329 further provides:

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 a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance... and shall direct the effectual closing of the building, erection or
contending that the statute was inapplicable to the bookstore because the legislature had intended that the statute apply only to houses of prostitution as that term is generally understood.\textsuperscript{17} The defendant also contended that the statute would constitute an impermissible prior restraint on the exercise of his first amendment rights.\textsuperscript{18} The court denied the defendant's motion.\textsuperscript{19}

The defendant then appealed to the New York Supreme Court, Appellate Division.\textsuperscript{20} In affirming the decision of the trial court, the appellate court found that the nuisance statute applied to bookstores and agreed that the defendant's claim did not raise any first amendment issues.\textsuperscript{21} The defendant's application for leave to appeal to the New York Court of Appeals was granted.\textsuperscript{22} The New York Court of Appeals certified two statutory questions: whether the statute applied to bookstores as well as to houses of prostitution, and whether closing the bookstore raised any first amendment issues.\textsuperscript{23}

The New York Court of Appeals reversed the appellate court's decision in part and held that the closure provision of the statute was unconstitutional as applied to the defendant bookstore.\textsuperscript{24} Agreeing with the appellate court on the first issue, the Court of Appeals held that the application of New York's Public Health Law pertaining to nuisances was not restricted solely to houses of prostitution.\textsuperscript{25} However, the Court of Appeals held that the closure provision of the Public Health Law constituted an impermissible prior restraint on the

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\textsuperscript{17} Arcara, 119 Misc. 2d at 465 N.Y.S.2d at 636. \\
\textsuperscript{18} Id. \\
\textsuperscript{19} Id. at 465 N.Y.S.2d at 639. The New York Supreme Court held that the defendant's reading of the statute in question was unreasonably narrow. \textsuperscript{20} Id. at 465 N.Y.S.2d at 637. The court reasoned that the statute was applicable because the statute covered places "which are 'used for the purpose of lewdness, assignation, or prostitution.'" \textsuperscript{21} Id. (quoting N.Y. PUB. HEALTH LAW § 2320 (McKinney 1985)). In addressing the first amendment claim by the defendant, the court held that the issue was one of abatement of a nuisance and not one involving prior restraint of protected materials. \textsuperscript{22} Id. at 465 N.Y.S.2d at 638. \\
\textsuperscript{23} Id. at 475 N.Y.S.2d at 175. \\
\textsuperscript{24} Id. at 475 N.Y.S.2d at 180. The court held that the plaintiff showed that a consistent pattern of proscribed conduct was occurring at the bookstore and that this was enough to bring the bookstore within the reach of the statute. \textsuperscript{25} Id. at 475 N.Y.S.2d at 178. In response to the first amendment claim, the court stated that the application of the nuisance statute to the bookstore would not constitute prior restraint. \textsuperscript{26} Id. at 475 N.Y.S.2d at 180. The plaintiff sought only to enjoin the illegal conduct that occurred at the bookstore and did not want to regulate the content of materials sold at the bookstore. \\
\textsuperscript{22} Arcara, 65 N.Y.2d at 328, 480 N.E.2d at 1092-93, 491 N.Y.S.2d at 310-11. \\
\textsuperscript{23} Id. at 328, 480 N.E.2d at 1093, 491 N.Y.S.2d at 311. \\
\textsuperscript{24} Id. at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317. \\
\textsuperscript{25} Id. at 329-30, 480 N.E.2d at 1094, 491 N.Y.S.2d at 312.
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defendant's first amendment right to free speech. The court determined that no less restrictive relief was available to the county and that the plaintiff had not demonstrated that the injunctive relief provided for in the New York Public Health law would be an inadequate remedy to abate the nuisance. Thus, the New York Court of Appeals held that closing the bookstore was an "unconstitutional restraint on defendant's First Amendment rights."

The United States Supreme Court granted certiorari and reversed New York's highest court. The Supreme Court stated that the conduct sought to be enjoined "manifest[ed] absolutely no element of protected expression" and therefore, the defendant's first amendment right to free speech was not infringed. The Court pointed out that the regulation was content-neutral and applied to conduct that had "absolutely no connection to any expressive activity." In response to the defendant's argument that the statutory closure remedy impermissibly burdened first amendment book selling activities, the Court stated that this burden was "dubious at best" and that the defendant "remain[ed] free to sell the same materials at another location." The Court held that the first amendment did not protect the bookstore from closure in a situation where a valid statute was aimed solely at terminating the illegal uses of a premises and penalizing the owners.

Justice O'Connor, in a concurring opinion, stated that first amendment concerns would be implicated only if the statute was used as a pretext for closing the bookstore. Because no evidence of such use of the statute was present, Justice O'Connor agreed that no first amendment issues were raised.

Dissenting, Justice Blackmun argued that when a state "directly and substantially impairs First Amendment activities . . . the State must show, at a minimum, that it has chosen the least restrictive means of pursuing its legitimate objectives." Justice Blackmun

26. Id. at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317. The court analogized the closing of the bookstore to the closing of a theater based upon the theater's previous showing of some obscene materials. Id. at 333, 480 N.E.2d at 1096, 491 N.Y.S.2d at 314.
27. Id. at 337, 480 N.E.2d at 1099, 491 N.Y.S.2d at 317.
28. See supra note 21 and accompanying text.
30. Id. at 3176-77.
31. Id. at 3177-78 n.3.
32. Id. at 3177.
33. Id. at 3178. In response to the defendant's argument that the closure remedy was a prior restraint on expression, the Court stated that advance determination of protected materials was required for prior restraint. Id. at 3177 n.2.
34. Id. at 3178 (O'Connor, J., concurring).
35. Id.
36. Id. at 3180 (Blackmun, J., dissenting).
determined that the statutory remedy used against the bookstore was an unnecessary burden on speech.\(^{37}\) Justice Blackmun concluded that the statute was unconstitutional as applied to the bookstore because the statute was not "narrowly tailored to further the asserted governmental interest."\(^{38}\)

**BACKGROUND**

**THE CONTENT-BASED AND CONTENT-NEUTRAL DISTINCTION IN THE FIRST AMENDMENT**

In developing a system for analyzing the extent of first amendment protection of expression, the Supreme Court has developed a "two-tiered approach."\(^{39}\) The Supreme Court has used this approach when determining the constitutionality of governmental regulations that restrict expression.\(^{40}\) The first tier is used to analyze regulations that the Supreme Court has labeled "content-based restrictions."\(^{41}\) Examples of these are laws that prohibit some, but not all, picketing\(^{42}\) and laws that prohibit certain types of movies from being shown, while not prohibiting others.\(^{43}\) These types of restrictions have historically been subjected to the highest level of judicial scrutiny.\(^{44}\)

The second tier is used to analyze regulations that have content-
neutral restrictions.\footnote{45} Content-neutral restrictions are those that restrict expression or expressive conduct without regard to the content of the expression.\footnote{46} The prohibition of overnight sleeping in certain national parks\footnote{47} and a regulation prohibiting a person from reentering a military base after having been previously barred are examples of such restrictions.\footnote{48} The Supreme Court has evaluated content-neutral restrictions with a lower level of judicial scrutiny than it has used for content-based restrictions.\footnote{49}

Of the commentators who have considered the Supreme Court's use of the content distinction in the first amendment area, only one has questioned the validity of the approach.\footnote{50} Professor Redish of Northwestern University stated that the use of the content distinction was "theoretically questionable" and "difficult to apply."\footnote{51} Professor Redish asserted that the Supreme Court should abandon the content distinction and\footnote{52} apply a unified mode of judicial review for all governmental regulations of expression.\footnote{53}

\textbf{HISTORICAL UNDERPINNINGS OF THE CONTENT DISTINCTION}

Early in the development of first amendment rights, courts placed little or no emphasis on the distinction between content-based and content-neutral restrictions of speech.\footnote{54} Rather, the emphasis in these first amendment cases was on whether any legislative abridgment of first amendment rights existed.\footnote{55} The cases of \textit{Hague v. Committee for Industrial Organization},\footnote{56} and \textit{Schneider v. State}\footnote{57} illustrate the Court's early approach to first amendment protection of expression.\footnote{58}

In \textit{Hague}, the defendants challenged a regulation that prohibited the leasing of any hall without a police-issued permit and a regulation that prohibited the distribution of printed matter on public

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\begin{itemize}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Clark, 468 U.S. at 313.
\item Redish, supra note 10, at 114.
\item \textit{Id.}
\item \textit{Id. at 142.}
\item \textit{Id. at 114.} Professor Redish would have the courts "subject all restrictions on expression to the same critical scrutiny traditionally reserved for regulations drawn in terms of content." \textit{Id. at 142.}
\item \textit{Id. at 121.}
\item \textit{Id.}
\item 307 U.S. 496 (1939).
\item 308 U.S. 147 (1939).
\item \textit{Hague}, 307 U.S. at 515-16; \textit{Schneider}, 308 U.S. at 160-64.
\end{itemize}
In finding both regulations void, the Court did not distinguish between content-neutral and content-based restrictions of first amendment rights. However, the Court in effect applied the content-based test by recognizing that police officials had broad discretion in issuing permits for meetings in public places.

The Court again deemphasized the importance of the content factor in deciding the validity of a regulation that affected first amendment rights in Schneider. In Schneider, the plaintiffs challenged several municipal regulations that prohibited or severely restricted the distribution of all handbills or circulars on city streets. In finding the regulations unconstitutional, the Court concluded that equal application of the regulations to all handbills was irrelevant. The Court was not convinced that keeping the streets clean was reason enough to justify the prohibition against distributing literature to one willing to receive it. The Court found that the enforcement of the regulation was not dependent upon the content of the handbills because the regulation restricted the expression of all viewpoints. However, this equal treatment in no way lessened the Court’s recognition of the ordinance’s harmful impact on free expression.

Cox v. Louisiana signaled the Court’s shift toward a different treatment of content-based and content-neutral regulations. In Cox, the leader of a peaceful civil rights demonstration was convicted of breaching the peace and of obstructing a public passage. The leader was convicted even though city officials had allowed other meetings at that location on other occasions. In overturning the leader’s conviction, the Court emphasized that it was not required to “consider the constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings.” The Cox Court shifted the emphasis from a concern about whether a

60. Id. at 518. The court stated that “wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Id.
61. Id. at 516.
62. Schneider, 308 U.S. at 160-64.
63. Id. at 154-58.
64. Id. at 162, 165.
65. Id. at 162.
66. Id. at 163.
67. Id.
69. Id. at 555-56.
70. Id. at 537-38.
71. Id. at 556.
72. Id. at 555.
regulation has infringed upon free expression in any manner to a concern about whether a regulation treated different viewpoints equally under the law.\textsuperscript{73}

**Highest Level of Judicial Scrutiny**

Invariably, when dealing with regulations that directly restrict expression, the Supreme Court has applied the highest level of judicial scrutiny. In *Police Department v. Mosley*,\textsuperscript{74} the Court held unconstitutional an ordinance that prohibited picketing, with one exception for labor picketing, near public schools.\textsuperscript{75} Although the Court relied on the equal protection clause to invalidate the ordinance, the Court also stressed that the case was "closely intertwined with First Amendment interests."\textsuperscript{76} The Court reasoned that all viewpoints must be afforded an equal opportunity to be heard and that selective exclusions of viewpoints from a public forum may not be based or justified on the content of speech alone.\textsuperscript{77}

**Intermediate Judicial Scrutiny**

In what has been called the "most troubling illustration of the Court's modern approach to content-neutral restrictions,"\textsuperscript{78} the Supreme Court in *United States v. O'Brien*,\textsuperscript{79} upheld a demonstrator's conviction for burning his draft card in violation of the law to express his opposition to the Vietnam War.\textsuperscript{80} O'Brien argued that the act of burning the draft card was protected speech under the first amendment and that the law under which he was convicted was unconstitutional as applied to him.\textsuperscript{81} The Court found that even though O'Brien's act constituted speech, this did not mean that the

\begin{itemize}
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} 408 U.S. 92 (1972).
  \item \textsuperscript{75} Id. at 94.
  \item \textsuperscript{76} Id. at 95.
  \item \textsuperscript{77} Id. at 96. The court explained that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Id. at 95. Another case involving a content-based regulation was *Erznoznik v. Jacksonville*, 422 U.S. 205, 211-12 (1975). In *Erznoznik*, the Supreme Court scrutinized an ordinance that prohibited showing films containing nudity if the screen was visible from a public street or place. Id. at 206. In finding the regulation unconstitutional, the Court reasoned that the government could not shield the public from certain kinds of speech simply because one kind of speech may be more offensive than other kinds of speech. Id. at 209. The Court concluded that the ordinance discriminated amongst movies solely on the basis of content. Id. at 211. Citing *Mosley*, the Court stated that the government had no power to restrict expression because of its content. Id. at 215.
  \item \textsuperscript{78} Redish, supra note 10, at 126.
  \item \textsuperscript{79} 391 U.S. 367 (1968).
  \item \textsuperscript{80} Id. at 382.
  \item \textsuperscript{81} Id. at 376-77.
\end{itemize}
regulation was unconstitutional as applied to O'Brien.\textsuperscript{82} The Court then set out what was to become the standard for judging content-neutral regulations.\textsuperscript{83} The Court established a four-part test, stating:

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We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.\textsuperscript{84}
\end{quote}

The \textit{O'Brien} court held that the government had met this intermediate scrutiny test.\textsuperscript{85}

The Court's intermediate scrutiny approach to content-neutral regulations that infringe upon first amendment rights is evident in \textit{Clark v. Community For Creative Non-Violence}.\textsuperscript{86} In \textit{Clark}, a ban on camping in certain parks in Washington, D.C. was challenged as violating a particular group of demonstrator's first amendment rights.\textsuperscript{87} The plaintiffs had sought a permit to conduct a demonstration in two Washington parks in order to illustrate the plight of the homeless.\textsuperscript{88}

\begin{footnotesize}
\begin{enumerate}
  \item Id.
  \item Id. at 377. This Note refers to the \textit{O'Brien} test as one that requires intermediate judicial scrutiny. The test as it is set out in \textit{O'Brien} is not as strict as the highest level of judicial scrutiny. However, it is a stricter standard than a rational-basis test. The Supreme Court has previously used a variety of terms to "characterize the quality of the governmental interest which must appear . . . compelling, substantial, subordinating, paramount, cogent, strong." \textit{Id.} at 376-77.
  \item Id. 391 U.S. at 377.
  \item Id. In other cases involving content-neutral regulations the Supreme Court has consistently applied the intermediate judicial scrutiny test of \textit{O'Brien}. In United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), the Court was called upon to decide the constitutionality of the Hatch Act's prohibition against federal employees taking "'an active part in political management or in political campaigns.'" \textit{Id.} at 550 (quoting 5 U.S.C. § 7324(a)(2) (1982)). The plaintiffs claimed the that Act violated their first amendment right of free expression. \textit{Id.} at 551 n.2. In upholding the constitutionality of the Act, the Court emphasized the government's interest in regulating the conduct of its employees. \textit{Id.} at 557-59. More importantly, the Court noted that the Hatch Act's restrictions were not aimed at particular parties, groups or viewpoints. \textit{Id.} at 564.
  \item Id. at 289.
  \item Id.
  \item Id. at 289.
  \item Id.
\end{enumerate}
\end{footnotesize}
A permit was granted that allowed the erection of numerous tents but prohibited any overnight sleeping. The plaintiffs argued that overnight sleeping was expressive conduct that could not be restricted without violating their first amendment rights. The Court agreed that sleeping was expressive conduct but stated that the conduct was subject to reasonable time, place, and manner restrictions. The Court then noted that "restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." In upholding the statute, the Clark Court stressed that the statute was content-neutral and that the regulation was narrowly focused on the government's interest in maintaining attractive parks. The Court further noted that sleeping in the park would be merely "facilitative" to the plaintiffs' demonstration. The Court concluded by stating that the regulation was a "reasonable time, place, or manner restriction on expression" that was "constitutionally acceptable."

In his dissent, Justice Marshall argued that the majority had failed to seriously consider the plaintiffs' first amendment claim. While agreeing with the majority's finding that sleep was symbolic speech and therefore subject to reasonable time, place, and manner restrictions, the dissent rejected the majority's conclusion that the standard for such restrictions had been satisfied. Justice Marshall criticized the Court's application of a "two-tiered approach to first amendment cases": while content-based regulations are subject to strict scrutiny, regulations that are content-neutral receive only "a

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89. Id. at 291-92.
90. Id. at 292.
91. Id. at 293.
92. Id. (citing City Council v. Taxpayers for Vincent, 466 U.S. 789, 808, 816 (1984)). The Clark Court noted that the restriction of symbolic expression was also subject to the test set out in O'Brien. Id. at 298. Further, the Court stated that the O'Brien standard was "little, if any, different from the standard applied to time, place, or manner restrictions." Id.
93. Id. at 295-96.
94. Id. at 296.
95. Id. at 298.
96. Id. at 301 (Marshall J., dissenting). Justice Marshall felt that the majority had failed to "to subject the alleged interest of the Government to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations." Id.
97. Id. at 308 (Marshall, J., dissenting). Justice Marshall agreed with the majority that "no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in [O'Brien]." Id. at 308 n.6 (Marshall, J., dissenting).
minimal level of scrutiny."98 Justice Marshall further stated that "[b]y narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity."99

In another case dealing with expressive conduct that was affected by a content-neutral regulation, the Supreme Court in United States v. Albertini100 upheld a protester's conviction for entering a military base.101 The defendant had been barred from the military base and was ordered not to reenter the base without permission from the military.102 The defendant later reentered the base without permission and was arrested and convicted.103 In evaluating the regulation, the Court noted that because the regulation was content-neutral and affected expressive conduct, it would have to meet the standard set out in O'Brien.104 The Albertini Court concluded that the regulation was valid and stated that the "incidental burden on speech is no greater than is essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."105

**STATE COURT CASES**

In extending protection to establishments that have been afforded first amendment rights, state courts have applied the intermediate review analysis of O'Brien.106 In People v. American Art Enterprises,107 the California Supreme Court was asked to decide whether California's red light abatement law applied to a place used for publishing purposes,108 and to define the scope of injunctive relief

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98. Id. at 313 (Marshall, J., dissenting).
99. Id.
100. 105 S. Ct. 2897 (1985).
101. Id. at 2900. In Albertini, the defendant had entered Hickman Air Force Base, obtained access to documents, and then destroyed them by pouring "animal blood" on them. Id. at 2901. The defendant was convicted for conspiracy and barred from entering the base without permission. Id. Approximately nine years later the defendant entered the base during an annual open house for the purpose of engaging in a "peaceful demonstration criticizing the nuclear arms race." Id.
102. Id.
103. Id.
104. Id. at 2906. The court stated the the regulation "serv[ed] a significant Government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security." Id.
105. Id. at 2907.
106. See infra notes 107-18, 127-34 and accompanying text.
108. Id. at 526, 142 Cal. Rptr. at 339.
available if the statute applied. The defendants were engaged in
the business of publishing and distributing pornographic materials. Staff photographers were using the company headquarters as a hiring hall, employing men and women to perform sexual acts for the purpose of being photographed at other various locations. All photographs were for use in American Art publications. Acting under California's red light abatement law, the district attorney sought to close American Art's headquarters to abate what he characterized as a statutory nuisance. The court found that since the building was used to "secure the performance of sexual activity for hire," the building was a "nerve center" for prostitution and thus subject to abatement under the law.

Although the California court found that American Art was subject to the abatement law, the court recognized that "[t]here is a necessary tension in application of the Red Light Abatement Law to premises used for constitutionally protected publication." The court noted that even though the abatement statute called for a mandatory closing upon the finding of a nuisance, the statute had been interpreted as vesting the courts with "broad discretion to fashion an appropriate remedy for abatement." As a result, the court held that the four-part test of O'Brien was applicable and required that the injunctive relief be "limited in scope so that infringement upon [the] First Amendment" would be no greater than necessary to prevent prostitution.

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109. Id. Section 11225 of the California Penal Code provides: "Every building or place used for the purpose of . . . lewdness, assignation, or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance." CAL. PENAL CODE §§ 11225 (West 1982).

Section 11230 of the California Penal Code provides: "If the existence of a nuisance is established in an action as provided in this article, an order of abatement shall be entered as a part of the judgment in the case, directing the removal from the building or place of all fixtures . . . and movable property used in conducting, maintaining, aiding or abetting the nuisance, and directing the sale thereof . . . and the effectual closing of the building or place against its use for any purpose, and that it be kept closed for a period of one year, unless sooner released." Id. § 11230 (West 1982).


111. Id.

112. Id.

113. Id. at 528, 142 Cal. Rptr. at 340. The district attorney sought closure of American Art's headquarters under sections 11225 and 11230 of the California Penal Code.

114. Id.

115. Id. at 529, 142 Cal. Rptr. at 341.

116. Id.

117. See supra notes 83-84 and accompanying text.

118. American Art, 75 Cal. App. 3d at 526-27, 142 Cal. Rptr. at 339. Another state case involving a similar situation is People ex rel. Sorenson v. Randolph, 99 Cal. App. 3d 183, 160 Cal. Rptr. 69 (1980), which concerned a nightclub, "The Easy Street Theatre," that had been declared a public nuisance under California's red light abatement law and was ordered closed. Id. at 186, 160 Cal. Rptr. at 70. The Easy Street Theatre
In contrast to the California case, the Pennsylvania court in

provided entertainment by way of pornographic films, nude dancing, and hired female companionship. *Id.* The defendant argued that the order of abatement was an unconstitutional infringement upon his first amendment rights in that it prevented him from showing pornographic films and allowing nude dancing. *Id.* at 189, 160 Cal. Rptr. at 71.

In rejecting the defendant's argument, the court found that the infringement on the defendant's first amendment rights was "minimal" and that the state's interest in abating public nuisances was "substantial." *Id.* at 190-91, 160 Cal. Rptr. at 72. The court held that the owners of the business had "promoted a systematic course of illegal sexual acts such as to warrant closure of the premises as a public nuisance." *Id.* at 187, 160 Cal. Rptr. at 72. The court found evidence that "one Lisa, an Easy Street waitress, attempted to administer a 'handjob' [sic] to an investigating officer, while another waitress, 'Peaches,' proceeded so far with the same activity on the person of another officer, that the latter was obliged to beg her to desist." *Id.* at 188-89, 160 Cal. Rptr. at 71. Citing with approval *American Art* and that court's use of *O'Brien*, the *Randolph* court held that abatement of the Easy Street Theatre was an appropriate remedy. *Id.* at 189-90, 160 Cal. Rptr. at 72. In response to the defendant's argument that closure was too strong a remedy, the court stated that the "Easy Street had a history of police problems and that prior warnings had gone unheeded." *Id.* at 190, 160 Cal. Rptr. at 72. The court then noted that trial courts had "broad discretion ... in fashioning appropriate remedies to abate public nuisances." *Id.*

In another California case, People v. Adult World Bookstore, 108 Cal. App. 3d 404, 166 Cal. Rptr. 519 (1980), the court held that the trial court's application of the red light abatement law was reasonable and did not constitute an abuse of discretion. *Id.* at 411, 166 Cal. Rptr. at 523. After a police investigation into the activities at the bookstore, a Sacramento County district attorney filed complaints against the bookstore seeking an injunction and abatement of the alleged nuisance. *Id.* at 406-07, 166 Cal. Rptr. at 520-21. In support of his complaint, the district attorney submitted declarations of vice officers who had made numerous visits to the bookstore and had observed repeated instances of lewd behavior. *Id.* at 407, 166 Cal. Rptr. at 521. The court stated:

[The vice officers had reported] instances of masturbation and oral copulation observed by them through openings (glory holes), in the partitions between certain of the booths. The officers further reported invitations to them from male patrons ... to share booths for the purpose of engaging in homosexual activities ... invitations for the performance of sexual acts through the partition openings ... and an instance of posted instructions on the outer side of a door of one booth pertaining to the proper signal for a specific form of sexual activity. *Id.*

The trial court enjoined the bookstore from allowing acts of lewdness or assignation from occurring on the premises and also ordered the following:

[The bookstore was to] post conspicuous signs (1) prohibiting more than one person in a booth at a time, (2) prohibiting loitering in the film arcade area, and (3) containing the information that masturbation is a lewd act, that lewdness, assignation and prostitution are prohibited on the premises, and that a violation of any prohibition may result in criminal prosecution, ... [The court also ordered the bookstore to] close all openings in the partitions, to provide employee patrols, to prohibit warnings of police presence, to remove tissue boxes and wastepaper baskets from the booths, to provide higher levels of lighting in the hallway outside the booths, to modify the booth doors ... by replacing them with pulldown screens or "dutch door" type closings with openings for inspection, and to remove inside locks. *Id.* at 407-08, 166 Cal. Rptr. at 521.

The defendant argued that to comply with the order would amount to a prior restraint on its first amendment rights and would be a violation of the abatement statute procedures because it would force the closing of the bookstore. *Id.* at 408, 166 Cal. Rptr. at 521. In rejecting the defendant's arguments, the California court stated that the trial court's actions were reasonable and that those actions protected the right of the public.
Commonwealth v. Allouwill Realty Corp.\textsuperscript{119} did not recognize that closing a bookstore under a red light abatement statute unconstitutionally infringed upon the store owner's first amendment rights.\textsuperscript{120} In Allouwill, the defendant adult bookstores were found to be common nuisances and were ordered closed for one year.\textsuperscript{121} The defendant appealed the closure order and argued that it was void for vagueness and constituted a prior restraint on expression.\textsuperscript{122} The Superior Court of Pennsylvania disposed of the vagueness claim by stating that the statute covered only illegal sexual conduct and that this "obviated any vagueness problem."\textsuperscript{123} As to the question of prior restraint, the court answered that the statute did not prohibit the use of a building to exhibit "obscene" materials.\textsuperscript{124} The court recognized that closure would have an "incidental effect" on dissemination of books sold at the bookstores, but that this was obviated by the fact that the owners were free to sell the books elsewhere.\textsuperscript{125} Accordingly, the court upheld the order closing the bookstore.\textsuperscript{126}

In Commonwealth v. Croatan Books, Inc.,\textsuperscript{127} the Virginia Supreme Court held that closure of a bookstore under the state's red light abatement act was constitutionally permissible.\textsuperscript{128} Unlike in Allouwill, however, the Croatan court held that the regulation under which closure was sought satisfied the O'Brien test.\textsuperscript{129} In Croatan, the State of Virginia had sought to enjoin the illegal activity occurring at Croatan Books and presented evidence that "criminal sexual activity existed on the premises of Croatan Books of such a continuous and pervasive nature as to constitute a public nuisance."\textsuperscript{130} The trial court ordered that measures be taken to prevent the illegal ac-

\textsuperscript{120} Id. at —, 478 A.2d at 1338.
\textsuperscript{121} Id. at —, 478 A.2d at 1336, 1338. The statutory definition of a common nuisance is described as "[a]ny building, or part of a building, or part of a building, used for the purpose of fornication, lewdness assignation, and/or prostitution." PA. STAT. ANN. tit. 68, § 467 (Purdon 1965).
\textsuperscript{122} Allouwill, 330 Pa. Super. at —, 478 A.2d at 1338.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at —, 478 A.2d at 1338-39.
\textsuperscript{126} Id. at —, 478 A.2d at 1338. The court stated that "if, at some time, [the bookstore owners] demonstrate to the Court that the premises are going to be used for proper activities, why certainly, an adjustment may be made." Id.
\textsuperscript{128} Id. at —, 323 S.E.2d at 90.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at —, 323 S.E.2d at 87. The evidence showed that "with the knowledge and occasional complicity of employees, homosexuals congregated to engage in acts of oral sodomy, mutual masturbation, and indecent exposure." Id.
tivity from again occurring.\textsuperscript{131} When this order failed to abate the illegal sexual activity, the trial court conducted another hearing and held that the closure statute was unconstitutional as applied to the facts, because closure of the bookstore went beyond what was necessary to abate the nuisance.\textsuperscript{132} On appeal, the Virginia Supreme Court reversed and held that the closure provisions of the statute were constitutional.\textsuperscript{133} Finding that an earlier order enjoining the illegal activity had failed to stop the activity, the court held that the statute "satisfie[d] the O'Brien test for incidental, permissible infringement on First Amendment freedoms."\textsuperscript{134}

**ANALYSIS**

In *Arcara v. Cloud Books, Inc.*,\textsuperscript{135} the Supreme Court had an opportunity to extend first amendment protection afforded to expression, but instead the Court restricted those protections by adhering to the traditional "two-tiered approach."\textsuperscript{136} In *Arcara*, the defendant bookstore owner was charged with maintaining a public health nuisance.\textsuperscript{137} The statutory remedy against such a nuisance provided for closure of the bookstore.\textsuperscript{138} The defendant, who proposed that the O'Brient standard be used, argued that a forced closing of his bookstore would result in the restriction of his first amendment right to free expression.\textsuperscript{139} Rejecting the application of O'Brien, the Court stated that the lower court "ignored a crucial distinction between the circumstances presented in O'Brien and the circumstances of this case: unlike the symbolic draft card burning in O'Brien, the sexual activity carried on in this case manifests absolutely no element of protected expression."\textsuperscript{140}

While the *Arcara* Court could have extended at least some first

\textsuperscript{131} Id. The trial court ordered that "Croatan Books rope off two of the four movie booth access ways, repair any openings between the booths, and hire uniformed guards to prevent loitering in the hallways and use of any booth by more than one patron at a time." *Id.*

\textsuperscript{132} Id. at —, 323 S.E.2d at 87-88. Virginia's closure statute provides: "If the existence of the nuisance be established in such suit in equity, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case . . . and shall [be] . . . closed for a period of one year." *Va. Code Ann.* § 48-12 (1986).

\textsuperscript{133} Croatan, 228 Va. at —, 323 S.E.2d at 90.

\textsuperscript{134} Id.

\textsuperscript{135} 106 S. Ct. 3172 (1986).

\textsuperscript{136} See infra notes 140-50 and accompanying text. The Court began by stating that the "Court has applied First Amendment scrutiny to a statute regulating conduct which has the incidental effect of burdening the expression of a particular political opinion." *Arcara*, 106 S. Ct. at 3175.

\textsuperscript{137} *Arcara*, 106 S. Ct. at 3173-74.

\textsuperscript{138} Id. at 3174.

\textsuperscript{139} Id.

\textsuperscript{140} Id. at 3176-77.
amendment protection to the defendant by applying the *O'Brien* standard, the Court refused. Instead of applying the *O'Brien* standard, the Court applied a level of judicial scrutiny to the content-neutral regulation that was even lower than that which the *O'Brien* standard demands. The *Arcara* Court stated that the regulation at issue did not single out bookstores and did not impose a disproportionate burden upon the bookstore's first amendment activities.

The Court stressed the regulation's content-neutrality, stating that "neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." In response to the bookstore's claim that the regulation impermissibly burdened its first amendment activities, the Court stated that "[t]he severity of this burden is dubious at best, and is mitigated by the fact that respondents remain free to sell the same materials at another location."

However, in failing to find any first amendment infringement, the *Arcara* Court failed to address the Court's previous statement in *Schneider v. State*. In *Schneider*, the Court stated that "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

The *Arcara* Court concluded that *O'Brien* was not applicable to a content-neutral regulation that imposed restrictions on nonexpressive activity. The Court stated that *O'Brien* was inapplicable, even though the regulation was restricting book selling activities. Moreover, the Court noted that "[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises."

The Court refused to accept the plaintiff's first amendment argument because the Court adhered to the two-tiered approach used for evaluating first amendment claims. *Arcara* however, has created another tier-within-a-tier. This tier-within-a-tier is used to analyze content-neutral regulations that affect conduct that has no

141. *Id.* at 3178.
142. See infra notes 83-84 and accompanying text.
143. *Arcara*, 106 S. Ct. at 3177.
144. *Id.*
145. *Id.*
146. 308 U.S. 147, 163 (1939).
147. *Id.*
149. *Id.*
150. *Id.*
151. See supra notes 140-50 and accompanying text.
expressive element but that does affect speech, as was the very situation in *Arcara*. This tier was necessary after the Supreme Court held that the *O'Brien* analysis applies only when the conduct that is being regulated has an expressive element. The content-neutral regulations that had previously been analyzed under the test set out in *O'Brien* have now been distinguished from content-neutral regulations such as the one in *Arcara*. The level of judicial scrutiny used by the Court in evaluating the regulation in *Arcara* resulted in a standard under which virtually every content-neutral regulation could pass muster. This lower scrutiny, as applied to content-neutral regulations that affect conduct that has no expressive element, has led Justice Marshall to remark on the "unfortunate diminution of First Amendment protection." In refusing to apply the intermediate scrutiny of *O'Brien*, the *Arcara* Court was following precedent. The Court will only apply the highest level of judicial scrutiny to evaluate a content-based regulation, as the Court did in *Mosley*. In *Mosley*, the Court struck down a regulation that prohibited all picketing near schools except labor picketing. In so doing, the Court specifically held that the government had no power to regulate expression on the basis of content.

In *Mosley*, the Court required that the regulation be narrowly tailored and stated, "selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone." In evaluating the regulation before it, the *Mosley* Court further stated that although "the state may have a legitimate interest in prohibiting some picketing . . . . "These justification for selective exclusions from a public forum must be carefully scrutinized," and that a regulation restricting expression based solely on content would be allowed only if it was essential to further an important governmental interest. Thus, it is apparent that the Supreme Court will allow a content based regulation to stand only after applying the highest level of judicial scrutiny.

In sharp contrast to the high level of judicial scrutiny afforded to

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152. *Arcara*, 106 S. Ct. at 3177-78.
153. *Id.*. The Court held that the *O'Brien* test was applicable only to "conduct with a significant expressive element." *Id.* at 3177.
154. *Id.* at 3177-78.
156. See supra notes 78-105 and accompanying text.
157. See supra notes 74-77 and accompanying text.
158. See supra note 75 and accompanying text.
159. See supra note 77 and accompanying text.
161. *Id.* at 98-101.
content-based regulations is the Court’s treatment of content-neutral regulations.162 Beginning with O’Brien and proceeding through Arcara, the Court has repeatedly evaluated content-neutral regulations with what Professor Redish has called “only the most cursory review.”163 Professor Redish’s critique of the content distinction seems intuitively correct. In Arcara, the Court upheld the closure of a bookstore because the court found that the regulation was content neutral.164 Had closure been sought under a regulation that was aimed at the protected expression in the bookstore, the Court would have used the highest level of judicial scrutiny reserved for content-based regulations.165 and would likely have reversed the closure order.

The Clark decision is a good example of the Court’s review of content-neutral regulations.166 The plaintiffs in Clark argued that the denial of a camping permit allowing them to continue their demonstration by sleeping at the park was an impermissible infringement upon their first amendment rights.167 The Court held that a regulation prohibiting overnight sleeping in a park was a valid time, place and manner restriction on expression.168 Clark is illustrative of the Court’s inattentiveness when dealing with first amendment rights that are impinged by content-neutral regulations.

In his dissenting opinion in Clark, Justice Marshall criticized the Court’s differential treatment of regulations affecting expression.169 In sharply criticizing the Court’s “minimal level of scrutiny” applicable to content-neutral regulations, Justice Marshall stated that content-neutral regulations, like content-based regulations, can “unnecessarily [restrict] protected expressive activity.”170 The Court’s differential treatment of content-based regulations and content-neutral regulations has created a “two-tiered approach to First Amendment cases” that Justice Marshall reasoned has “led to an unfortunate diminution of First Amendment protection.”171

This “unfortunate diminution” is apparent in Arcara. Although the bookstore had first amendment rights, the Court refused to find that any constitutional issues were raised.172 The failure of the Court

162. See supra notes 78-105 and accompanying text.
163. Redish, supra note 10, at 125.
164. Arcara, 106 S. Ct. at 3178.
165. See supra notes 74-77 and accompanying text.
166. See supra notes 86-99 and accompanying text.
167. See supra notes 87-88 and accompanying text.
168. See supra note 95 and accompanying text.
169. See supra notes 96-99 and accompanying text.
170. See supra notes 98-99 and accompanying text.
171. See supra note 99 and accompanying text.
172. Arcara, 106 S. Ct. at 3177-78.
to recognize any first amendment issues was a result of the Court's continued use of the content distinction analysis. Until the Court abandons the use of the content distinction analysis, expression will continue to be unnecessarily restricted in situations similar to Arcara.

When faced with a situation like that in Arcara, the courts in both American Art and Croatan have used the O'Brien test; the Allouwill Court, however, failed to recognize any constitutional claims, a failure that was repeated in Arcara. The state court cases analyzed in this Note, which have evaluated red light abatement acts similar to the one in Arcara, have for the most part been protective of a business owners' first amendment rights. The state court cases discussed can be divided into three groups. The California cases are characteristic of the first group. Representative of the California cases is American Art, in which the court held that state regulation of illegal activities occurring at the publishing house must respect first amendment rights. The court applied the O'Brien test to determine the extent to which the regulation could impinge on first amendment rights.

The second group of state court cases includes cases such as Croatan, a case which the Arcara Court used in support of its decision. In Croatan, the Virginia Supreme Court upheld closing a bookstore, noting, however, that O'Brien was applicable. The closure was held to be appropriate only after less restrictive measures failed to abate the nuisance.

The third group is exemplified by the Pennsylvania court's analysis in Allouwill, in which the court held that no first amendment issues were raised because the burden on expression was incidental and the defendants were free to sell their materials elsewhere. The Allouwill court, like Arcara, failed to recognize that any constitutional issues were raised by a content-neutral regulation which incidentally burdened speech.

A common thread runs through the first and second group of cases reviewed: when a state seeks to close an establishment and in doing so implicates first amendment rights, the state must show that

173. See supra notes 107-34 and accompanying text.
174. See supra notes 107-18, 127-34 and accompanying text.
175. See supra notes 107-18 and accompanying text.
176. See supra notes 115-18 and accompanying text.
177. See supra notes 117-18 and accompanying text.
178. Arcara, 106 S. Ct. at 3175.
179. See supra notes 122-29 and accompanying text.
180. See supra note 134 and accompanying text.
181. See supra notes 122-25 and accompanying text.
182. See supra notes 123-26 and accompanying text.
it has met the least restrictive alternative test set out in *O'Brien*.\(^{183}\)

In evaluating content-neutral regulations, the state courts do not distinguish between content-neutral regulations that affect expressive or nonexpressive conduct, but rather apply the same analysis of *O'Brien* to all of the regulations. Moreover, the state courts do not appear to have constructed an additional tier to distinguish between content-neutral regulations that affect expressive conduct and content-neutral regulations that affect nonexpressive conduct and incidentally burden expression. In applying the *O'Brien* test, the state courts have extended at least the minimal protection as required to all those asserting first amendment violations.\(^{184}\)

The Supreme Court in *Arcara* removed the protection of *O'Brien* and applied a lower standard of judicial scrutiny to cases that deal with regulations that are not aimed at expression but that nonetheless affect expression.\(^{185}\) The Court was correct in holding that *O'Brien* only applies when speech and non-speech elements are combined in the same course of conduct. However, the Court's refusal to recognize that a content-neutral regulation that is aimed at nonexpressive conduct can still have a detrimental effect on first amendment rights was erroneous.

The problem with the Court's two-tier analysis is that it provides unequal treatment to plaintiffs who allege a violation of first amendment rights. The distinction between content-based and content-neutral regulations in the Court's analysis can result in situations where expression can be as severely restricted by a content-neutral regulation as by a content-based regulation.\(^{186}\) To correct the problems presented by the unequal treatment of regulations that affect first amendment rights, a unified standard should be used for evaluating these claims.\(^{187}\)

Advocating the abandonment of the content distinction, Professor Redish of Northwestern University begins by stating that "[t]he content distinction is conceptually and pragmatically untenable and should therefore be abandoned."\(^{188}\) The test proposed by Professor Redish to replace the analysis presently used by the Court would greatly enhance the protection afforded to persons who claim infringements upon their first amendment rights.\(^{189}\) Professor Redish proposes a unified test under which the standard of judicial review

\(^{183}\) See supra notes 107-18, 127-34 and accompanying text.

\(^{184}\) See supra notes 107-18, 127-34 and accompanying text.

\(^{185}\) *Arcara*, 106 S. Ct. at 3177-78.

\(^{186}\) Redish, supra note 10, at 128-39.

\(^{187}\) Id. at 142.

\(^{188}\) Id.

\(^{189}\) Id. at 143.
for governmental regulations of expression and for regulations that affect expression would be the same.\textsuperscript{190} The unified test would require that the "same critical scrutiny traditionally reserved for" content-based regulations be applied to all regulations.\textsuperscript{191}

The threshold inquiry of the unified test would initially require a court to determine that speech has been impaired.\textsuperscript{192} The Court should then ask whether the regulation, apart from its effect upon speech, purports to further a "non-negligible"\textsuperscript{193} government interest.\textsuperscript{194} If the answer to this inquiry is "no," then the law is unconstitutional; if the answer is "yes," then the Court should make a further inquiry.\textsuperscript{195} If the regulation furthers a "non-negligible" governmental interest, the Court must ask: "(1) whether the regulation accomplishes the asserted goal; (2) whether 'feasible' less restrictive alternatives are inadequate to accomplish that end; and (3) whether the speaker will have available adequate means to express the same views to roughly the same audience."\textsuperscript{196} If the first two parts of the test are met, then the Court should balance "the compellingness of the state interest served by the law against the availability of alternative means of expression to the speaker."\textsuperscript{197} Use of the unified test would result in a "significant change" in the Court's review of content-neutral regulations.\textsuperscript{198} Since the Court already uses the factors of the proposed unified test in reviewing content-based regulations, the Court should encounter no problems in applying the unified test to all regulations that affect expression.\textsuperscript{199}

An application of Professor Redish's unified test to \textit{Arcara} serves to illustrate the heightened scrutiny that would be required of courts when confronted with content-neutral regulations that regulate nonexpressive conduct and also burden speech. In \textit{Arcara}, the Court upheld the closing of an adult bookstore even though the closing would affect the bookstore owner's first amendment rights.\textsuperscript{200} Pro-

\begin{itemize}
\item \textsuperscript{190} Id. at 142.
\item \textsuperscript{191} Id.
\item \textsuperscript{192} Id. at 143.
\item \textsuperscript{193} In using the term "non-negligible" in his test, Professor Redish stated that as set out in \textit{O'Brien}, the "Court misleadingly labeled [the government's interest as being] 'substantial.'" Id.
\item \textsuperscript{194} Id.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} Id. As used in Professor Redish's test, the compelling need of the state interest should be defined in the "commonsense interpretation of the word: a matter of truly vital and important concern. Thus, government inconvenience or difficulty in dealing with certain kinds of expression is insufficient to justify regulation." Id. at 144.
\item \textsuperscript{198} Id. at 143.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} \textit{See supra} note 33 and accompanying text.
\end{itemize}
Professor Redish's test would require that the same level of judicial scrutiny be applied to all regulations affecting expression. This equal application of judicial scrutiny would replace the content distinction analysis presently used by the Court. 201

The threshold inquiry under Professor Redish's theory requiring that speech be impaired has been met in Arcara. The closure of the bookstore infringed upon the bookstore owner's right to disseminate materials protected by the first amendment. While the Court admitted that the regulations burdened expression, it downplayed the significance of the burden by stating that it was "dubious at best." 202 Next, the Court must view the regulation and ask whether it furthers an important governmental interest. 203 Few would argue that the prevention of prostitution and lewdness is not an important governmental interest. Professor Redish's analysis requires that the Court also ask whether the regulation accomplishes the asserted goal. 204 In Arcara, closing the bookstore would have abated the nuisance and met the goal of the regulation.

Next, the Court must ask whether any feasible, less restrictive alternatives are adequate to abate the public health nuisance. 205 In Arcara, the court did not even consider any alternatives less restrictive than closing the bookstore. Thus, under the Redish analysis, the Court would be required to investigate the viability of alternative remedies that are less restrictive than closure. An example of less restrictive alternatives would include enjoining the premises from allowing prostitution and lewd acts from occurring at the bookstore, and modifying the bookstore's fixtures in such a manner as to stop illegal activities from occurring. 206 Moreover, in his dissenting opinion, Justice Blackmun suggested:

An obvious method of eliminating such acts is to arrest the patron committing them. But the statute in issue does not provide for that. Instead, it imposes absolute liability on the bookstore simply because the activity occurs on the premises. And the penalty—a mandatory 1-year closure—imposes

201. Redish, supra note 10, at 142.
203. Redish, supra note 10, at 143.
204. Id.
205. See supra note 196 and accompanying text. A proponent of the least restrictive alternative test is Justice Blackmun, who, in his dissenting opinion in Arcara stated that "when a State directly and substantially impairs first Amendment activities, such as by shutting down a bookstore, I believe that the state must show, at a minimum, that it has chosen the least restrictive means of pursuing its legitimate objectives." Arcara, 106 S. Ct. at 3180 (Blackmun, J., dissenting). Justice Blackmun went on to state that "[b]ecause the statute is not narrowly tailored to further the asserted governmental interest, it is unconstitutional as applied to respondents." Id.
206. See supra note 118 and accompanying text.
an unnecessary burden on speech.\textsuperscript{207}

Only after a showing that no less restrictive alternative is available would a court need to apply the third part of the unified test. If a court finds that the less restrictive alternative was inadequate to abate the public health nuisance, then the court should ask whether the bookstore owners would have adequate means available to express their views to approximately the same audience.\textsuperscript{208} At this point, a balancing of the compelling state interest "served by the law against the availability of alternative means of expression" to the bookstore must be done.\textsuperscript{209} Although the \textit{Arcara} Court recognized that the bookstore was free to sell its materials at another location, the Court did so only after a cursory review of the regulation and did not inquire into the adequacy of other means available to the bookstore for selling its materials.\textsuperscript{210}

\textbf{CONCLUSION}

The Supreme Court’s decision in \textit{Arcara v. Cloud Books, Inc.}\textsuperscript{211} illustrates the Court’s lack of concern for first amendment rights that are impinged by content-neutral regulations. The Court’s failure to evaluate content-neutral regulations with the same scrutiny that is applied to content-based regulations has resulted in an undue restriction of expression. By ridding itself of the two-tiered analysis presently used by the Court and applying a unified analysis to all regulations that affect expression, the Supreme Court would go a long way in protecting an individual’s first amendment rights while at the same time preserving the government’s duty to govern effectively.

\textit{Victor V. Vicinaiz — '87}

\textsuperscript{207} \textit{Arcara}, 106 S. Ct. at 3180 (Blackmun, J., dissenting).

\textsuperscript{208} Redish, \textit{supra} note 10, at 143.

\textsuperscript{209} \textit{Id.} Professor Redish would have the balancing test work in “reverse correlation: The less likely it is that the speaker will be able to find acceptable alternative methods of expression, the more compelling must be the government’s asserted justification.” \textit{Id.}

\textsuperscript{210} \textit{Arcara}, 106 S. Ct. at 3177-78.

\textsuperscript{211} 106 S. Ct. 3172 (1986).