SEXUALLY ORIENTED BUSINESSES, THE FIRST AMENDMENT, AND THE SUPREME COURT'S 1985-86 TERM: THE NEW PREROGATIVES OF LOCAL COMMUNITY CONTROL

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I. INTRODUCTION

Supreme Court decisions granting first amendment protection to non-obscene but sexually explicit movies, books, magazines, and dancing have created a number of difficult issues concerning the lawful scope of local community control over businesses that deal in these forms of expression.[1] Two of the more troublesome issues have been

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1. *See, e.g.,* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). *See generally* D. MANDELKER, LAND USE LAW § 5.39 (1982); Weinstein, *Regulating Pornography: Recent Legal Trends,* in LAND USE LAW: ISSUES FOR THE EIGHTIES 205 (E.M. Netter ed. 1984).

Unlike books, movies, and theatrical dancing, courts are unlikely to rule that first amendment protection of expression extends to the "conduct" of certain types of adult uses like massage parlors, swing clubs, and escort services. The validity of licensing and regulation of such businesses is based on the ordinary due process standards for validity of police power enactements. *See, e.g.,* Harper v. Lindsay, 616 F.2d 849 (5th Cir. 1980) (massage parlors); People v. Morone, 150 Cal. App. 3d 18, 198 Cal. Rptr. 316 (1983) (swing clubs); IDK, Inc. v. County of Clark, 599 F. Supp. 1402 (D. Nev. 1984) (escort services).

the validity of zoning location restrictions on sexually oriented businesses and the validity of nuisance abatement and license revocation laws based on either illicit sexual activity or obscenity. During the 1985-86 term, the Supreme Court decided cases involving both of these issues. In both cases, the Court upheld forms of regulatoin burdening sexually explicit expression. The decisions, as precedents, clarify and expand the prerogatives of local community control over sexually oriented businesses.

In *City of Renton v. Playtime Theatres, Inc.*[2] the Supreme Court upheld as constitutional a local zoning ordinance imposing special location restrictions on adult theaters. Reversing the decision of the Ninth Circuit Court of Appeals on three separate issues, the Supreme Court resolved all three issues in favor of local regulation. The Court clearly rejected the rather strict interpretation of first amendment standards for validity that courts had applied in recent years to hold such ordinances unconstitutional. In *Arcara v. Cloud Books, Inc.*[3] the Supreme Court upheld as constitutional the enforcement of a generally applicable nuisance abatement law to shut down the operation of an adult bookstore for a one yar period based on illegal acts of prostitution on the premises. Reversing the decision of the New York Court of Appeals, the Court distinguished several earlier decisions and held that first amendment scrutiny of a nuisance abatement law is neither required nor appropriate when such a law is neither directed at nor based on activities that involve forms of protected expression. This article discusses both of these decisions and their significance with respect to the validity of location restrictions and nuisance abatement laws as applied to sexually oriented businesses.

II. Location Restrictions

The Supreme Court's decision in *City of Renton* represents the third time in ten years that the Court has ruled on the constitutionality of zoning restrictions regulating the location of sexually oriented businesses. The significance of *City of Renton* is perhaps best understood by examining the Court's two earlier decisions and the standards for validity applied in a number of recent lower court decisions holding location restrictions unconstitutional.

2. 106 S. Ct. 925 (1986).
3. 106 S. Ct. 3172 (1986).

A. *Early Court Decisions*

Ten years ago, the Supreme Court in *Young v. American Mini Theatres*[4] upheld as constitutional a Detroit ordinance that prohibited the location of sexually oriented theaters, bookstores, and cabarets within 1,000 feet of two other such uses or within 500 feet of any residential area. The ordinance defined regulated "adult" establishments as uses distinguished or characterized by an emphasis on matters depicting, describing, or relating to specified sexual activities or specified anatomical areaa as further defined therein. The Court held that the ordinance was not unconstitutionally vague as applied to an "adults only" movie theater that displayed sexually explicit films on a regular basis.[5]

More importantly, the Court held that while the ordinance singled out sexually oriented businesses for special zoning treatment based on a content classification, the ordinance did not violate the first amendment or the equal protection clause of the fourteenth amendment. The Court found that Detroit's location restrictions on sexually oriented businesses were valid as "content-neutral" time, place, and manner restrictions because the purpose for the ordinance was not to eliminate, suppress, or censor the speech itself but to "preserve the quality of urban life" by avoiding "secondary effects" on the community, such as neighborhood deterioration and increased crime rates, associated with these businesses.[6] The plurality opinion by Justice Stevens referred to the "admittedly serious problems" created by adult theaters and pointed out that the record indicated a "factual basis" for the city to believe that the ordinance would further its asserted purpose.[7] The city's goal of avoiding the secondary effects of adult uses is one, the Court found, that "must be accorded high respect" and is substantial enough to justify the resulting incidental restriction on first amendment expression.[8] The Court in *Mini Theatres*, however, pointed out that the situation would be quite different if the ordinance was motivated simply by a distaste for the content of the speech itself or if the ordinance would have the effect of suppressing or greatly restricting access to this form of expression.[9]

4. 427 U.S. 50 (1976).
5. *Id.* at 61.
6. *Id.* at 70-71.
7. *Id.* at 55, 70-71.
8. *Id.* at 71.
9. *Id.* at 71-72, n.35.

Five years later, the Court in *Schad v. Mount of Ephraim*[10] held unconstitutional a local ordinance that excluded all commercial live entertainment from the community, including nonobscene nude dancing. Distinguishing the "incidental burden" on protected expression imposed by the ordinance in *Mini Theatres*, the Court pointed out that the exclusionary ordinance in *Schad* imposed a "substantial restriction" on a number of forms of protected expression.[11] The Court found the ordinance unconstitutional because the borough had presented no evidence to support its burden of showing that exclusion furthered some legitimate zoning purpose. In fact, it was neither "self-evident" nor "immediately apparent as a matter of experience" that live entertainment presented greater problems with regard to parking, trash, or police protection than other commercial uses such as restaurants, adult bookstores, and taverns allowed in the borough.[12] Furthermore, the *Schad* Court pointed out that even if some forms of live entertainment presented special problems not associated with other permitted commercial uses, the ordinance was unduly restrictive because the borough may have been able to address such problems by more selective, less burdensome controls.[13]

The Supreme Court's decisions in *Mini Theatres* and *Schad* established an analytical framework for determining the constitutionality of local ordinances regulating the location of protected forms of sexually explicit expression. Under *Mini Theatres*, a local ordinance designed to control the "secondary effects" of adult uses through special location restrictions would be valid at least when the regulation did not directly limit the number of uses or greatly restrict access to such uses. Under *Schad*, a local ordinance that excludes sexually explicit forms of protected expression from a community would be subject to closer judicial scrutiny both as to whether the alleged purposes for exclusion are actually furthered by the ordinance and as to whether the ordinance is unduly restrictive.

B. *Later Litigation*

Local government officials construed the Supreme Court's decision in *Mini Theatres* as opening the door for widespread adoption of local

10. 452 U.S. 61 (1981).
11. *Id.* at 72.
12. *Id.* at 73-74.
13. *Id.* at 74.

zoning regulations that imposed special location restrictions on adult uses. Later ordinances, however, generally did not fare well in post-*Mini Theatres* litigation. Although courts held the ordinances unconstitutional on a number of grounds, the later decisions appeared to close the door to regulation by applying a rather strict interpretation of the first amendment standards for validity established in *Mini Theatres*.

For example, some later court decisions held such ordinances unconstitutional because the local community had not met its burden of demonstrating that the ordinance would further the public purpose of controlling the secondary effects of the adult uses regulated.[14] These courts ruled that a "factual basis" in the record must support adult business regulation. This basis consists of testimony by sociologists and urban planners or planning studies that demonstrates how the ordinance would control the "secondary effects" of adult uses in view of local conditions existing in the particular community. Most federal courts adopted this view of a city's burden of proof, focusing on the Supreme Court's "factual basis" language in *Mini Theatres* to support the local ordinances.[15]

Courts also held zoning location restrictions unconstitutional when the ordinance was motivated in part by a desire to suppress the sexually explicit speech itself.[16] In some cases in which courts found an improper intent to suppress, they did not directly address the issue of whether an otherwise valid ordinance would be upheld unless the improper intent was the primary or predominate factor in enactment. Courts addressing this issue, however, ruled that when mixed municipal motives existed, the fact that improper intent to suppress was simply "a motivating factor" would alone be sufficient to invalidate the ordinance.[17]

In addition, a number of decisions held location restrictions unconstitutional because the restrictive ordinance had the effect of suppressing or greatly restricting public access to sexually explicit

14. *See, e.g.*, 754 Orange Ave., Inc. v. City of New Haven, 761 F.2d 105, 112 (2d Cir. 1985); Krueger v. City of Pensacola, 759 F.2d 851, 855 (11th Cir. 1985); Avalon Cinema Corp. v. Thompson, 667 F.2d 659, 661 (8th Cir. 1981).

15. *See* 427 U.S. at 71.

16. *See, e.g.*, Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983); CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983); Avalon Cinema Corp. v. Thompson, 667 F.2d 659 (8th Cir. 1981).

17. *See, e.g.*, Krueger v. City of Pensacola, 759 F.2d 851, 852 (11th Cir. 1985); Tovar v. Billmeyer, 721 F.2d 1260, 1266 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 223 (1984).

speech.[18] These decisions held that location restrictions have the effect of suppressing or greatly restricting public access to adult uses when a substantial number of "allowed locations" under the ordinance are not "realistically available" to a "reasonably prudent investor" desiring to operate this type of retail commercial use within the community.[19] These decisions closely examined the "suitability" of allowed locations to determine whether the locations were commerically feasible and desirable sites for adult-type retail uses. The courts considered factors such as accessibility, the nature of nearby uses, the present availability and occupancy of suitable buildings, and the cost of construction or conversion.[20]

The decision of the Court Appeals for the Ninth Circuit, reversed by the Supreme Court in *City of Renton*, relied on all three of the above described grounds to hold Renton's location restriction ordinance unconstitutional.[21]

C. *Background of* City of Renton

The city of Renton, Washington has a population of approximately 32,000 people and a land area of over sixteen square miles. Renton has a typical mix of land uses including, in addition to residential areas, a substantial number and variety of retail-commercial uses as well as manufacturing and other industrial uses. Prior to the location of any sexually-oriented business in Renton, the city council in 1981 enacted a zoning ordinance imposing special location restrictions on adult theaters. The ordinance prohibited such uses from locating within 1,000 feet of any residential zone, single or multi-family dwelling, church, or park, and within one mile of any school. Under the ordinance's dis-

18. *See, e.g.*, Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982) (confining potential sites to poorly lit industrial zones a great distance from other consumer-oriented uses drastically impairs public access); International Food & Beverage Sys. v. City of Fort Lauderdale, 614 F. Supp. 1517 (S.D. Fla. 1985) (majority of potential sites patently unsuitable because on the outskirts of town near an airport and the city well-fields); North Street Book Shoppe, Inc. v. Village of Endicott, 582 F. Supp. 1428 (N.D.N.Y. 1984) (potential sites in industrial zones where suitable buildings presently occupied by other retail uses and costs of conversion or construction of suitable building were prohibitive); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981) (most potential sites either wholly unacceptable to reasonably prudent investor or presently unavailable due to existing uses).

19. *See supra* note 18.

20. *Id.*

21. Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 534-35 (1984), *rev'd*, City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925, 928-29 (1986).

tancing requirements, the two existing movie theaters in the city were not allowed locations for such uses.

In January 1982, Playtime Theaters acquired the two existing theaters in the city and brought suit in federal court challenging the constitutionality of the location restrictions in Renton's ordinance. While this suit was pending, the city amended its ordinance, adding a detailed statement of reasons for its enactment and reducing the minimum distance from any school to 1,000 feet. Thereafter, the trial court denied Playtime's request for a permanent injunction and entered summary judgment in favor of Renton, upholding the constitutionality of the ordinance as amended.

The court of appeals reversed the decision of the trial court and held that Renton had not met its burden of demonstrating a factual basis to prove the ordinance would control the secondary effects of adult theaters in view of "the particular problems and needs of Renton."[22] On this point, the court ruled that Renton could not rely simply on the experience of, or studies relating to, other cities such as Detroit or Seattle, but must "justify its ordinance in the context of Renton's problems."[23] The court found the detailed purposes for enactment set out in the amended ordinance, relating to controlling the secondary effects of adult theaters, were merely "conclusory and speculative" ad hoc justifications for enactment.[24]

The court of appeals also held the ordinance unconstitutional on the ground that a motivating factor in Renton's enactment of the ordinance appeared to be the city's intent to suppress the speech itself. This inference was drawn from several statements of purpose in the ordinance relating to the offensiveness of the content of such speech and the lack of a specific factual basis for the ordinance. The court ruled that when "mixed motives" were present, an ordinance would be unconstitutional even if a city's predominate concerns in enactment related to controlling the secondary effects of adult theaters.[25]

The court of appeals further held that Renton's ordinance constituted a substantial restriction on speech, rather than merely the incidental burden involved in *Mini Theatres*, because the effect of the ordinance would be to suppress and greatly restrict public access to

22. 748 F.2d at 537.

23. *Id.*

24. *Id.*

25. *Id.*

adult theaters.[26] The court found that a substantial part of the 520 acres of land (five percent of the city) that the Renton ordinance left open for adult theaters was not presently suitable and available for this type of retail commercial use. Much of this land was already occupied by buildings suitable only for industrial use, a race track, a sewage disposal plant, a warehouse and manufacturing facilities, an oil tank farm, and a fully developed shopping center.

D. *The* City of Renton *Decision*

The Supreme Court in a 7-2 decision reversed the court of appeals and expressly rejected all three of the lower court's rulings on the constitutionality of the ordinance. Justice Rehnquist, writing for the majority, relied on *Mini Theatres* to hold that because the Renton ordinance did not completely ban adult theaters but simply regulated their location, the ordinance should be analyzed as a form of time, place, and manner regulation of this form of expression. Again citing *Mini Theatres*, the court found the ordinance content-neutral despite the special location treatment accorded adult theaters because the ordinance was not directed at the content of films shown at adult theaters but rather at the secondary effects of such theaters on the surrounding community. The appropriate test for validity, the Court stated, "is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."[27]

After referring to the amended ordinance's statement of purposes relating to prevention of crime, protection of the city's retail trade, maintenance of property values, and protection of the quality of the city's neighborhoods and commercial districts, the Court found that the city designed the ordinance to serve the substantial public purpose of attempting "to preserve the quality of urban life," an interest that must be accorded "high respect."[28] The Court also found that the Renton ordinance left open "reasonable alternative avenues of communication" for this form of expression because the allowed locations under the ordinance provided adult theaters "a reasonable opportunity to open and operate" within the city.[29]

26. *Id.* at 524.
27. 106 S. Ct. at 929.
28. *Id.* at 930.
29. *Id.* at 932.

The Supreme Court further ruled that unlike the situation in *Schad*, the Renton ordinance was "narrowly tailored" to achieve its goals because it would affect only those theaters shown to produce the unwanted secondary effects.[30] The Court also found that while the ordinance did not regulate other types of adult uses, it was not impermissible as an underinclusive regulation. No other types of adult businesses were located or planning to locate in Renton, and no reason existed to believe that Renton would not amend its ordinance in the future to include other types of adult uses shown to produce the same kinds of secondary effects as adult theaters.[31]

Justice Brennan dissented, joined by Justice Marshall, and would have ruled the ordinance unconstitutional as a content-based restriction on protected speech; in effect, rearguing *Mini Theatres'* characterization of special location restrictions on adult uses as a form of content-neutral regulation.[32] In Justice Brennan's view, the city failed to adequately demonstrate that the ordinance would further the alleged purposes for regulation and that the alleged secondary effects of adult theaters could not be addressed effectively by less intrusive measures. Moreover, according to Justice Brennan, the ordinance failed even if classified as a content-neutral, time, place, and manner restriction because much of the land available under the ordinance for adult theater use was either already occupied or unsuitable for such use. Thus, the ordinance had the effect of denying this form of protected speech a reasonable opportunity to locate within the community.[33]

E. *Effect As Precedent*

The Supreme Court's decision in *City of Renton* clearly reopens the door that had been partially closed in post-*Mini Theatres* litigation holding adult use location restrictions unconstitutional. Expressly rejecting all three rulings of the court of appeals, the *City of Renton* decision undermines the precedential effect of a number of post-*Mini Theatres* decisions that relied on one or more of these rulings. The Supreme Court's decision and its effect as precedent on each of these issues, is set out below.

30. *Id.* at 931.
31. *Id.* at 931-32.
32. *Id.* at 933.
33. *Id.* at 938.

1. Substantial Public Purpose

With respect to the issue of whether the city had met its burden of showing that the location restriction ordinance furthers a substantial public purpose, the Supreme Court expressly rejected the appellate court's finding that the Renton ordinance was enacted without the benefit of studies specifically relating to the problems or needs of Renton. Such a standard for validity, the Court held, imposes on a city an unnecessarily rigid burden of proof.[34] The Court ruled that a city may properly rely on the experience of, and studies produced by, other cities such as Detroit or Seattle in regard to the secondary effects of adult theaters. On this point the Court stated: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[35] Furthermore, cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." A court's function is not "to appraise the wisdom" of a city's decision to concentrate adult theaters, as in Renton, rather than to disperse such uses, as in Detroit.[36] Pointing out that at the time of enactment the Renton city council had before it the Washington Supreme Court's opinion in *Northend Cinema, Inc. v. Seattle*,[37] which summarized Seattle's studies and findings relating to the secondary effects of adult theaters, the Court held that a reasonable basis existed for Renton to believe that the ordinance would further its stated purposes even though its ordinance as enacted was not identical to Seattle's.[38]

City of Renton makes clear that cities no longer have the burden to, as one lower court recently put it, "reinvent the wheel"[39] every time an

34. *Id.* at 930.

35. *Id.* at 931.

36. *Id.*

37. 90 Wash. 2d 709, 713, 585 P.2d 1153, 1156 (1978), *cert. denied*, Apple Theater, Inc. v. Seattle, 441 U.S. 946 (1979).

38. 106 S. Ct. at 931.

39. International Food & Beverage Sys. v. City of Fort Lauderdale, 614 F. Supp. 1517, 1521 (S.D. Fla. 1985). Commenting on "conventional thinking" in regard to a city's burden of proof in regulating adult uses, the federal district court stated:

> Any local government can hire a group of experts to say that "adult" entertainment produces undesirable consequences. To perpetuate the legal fiction that a city must first establish objective evidence in support of a legitimate reason for enacting a zoning regulation ignores the basic truth that "adult" entertainment causes simi-

adult use location ordinance is enacted. Under the *City of Renton* ruling, a city council may now rely on the experience and findings of other cities, as summarized in court opinions such as *Mini Theatres* and *Northend Cinema*, to enact an ordinance like Renton's to either disperse or concentrate adult uses. Moreover, because the factual basis for regulation in *Mini Theatres* related to a variety of sexually-oriented businesses,[40] the *City of Renton* ruling on a city's burden of proof would seem applicable to regulation of other types of adult uses, including adult bookstores and cabarets. Rather than a significant limitation on the use of such studies, the Supreme Court's statement that cities may rely on such studies as long as they are "reasonably believed to be relevant" may actually serve more as a shield to insulate adult use zoning decisions from second guessing by reviewing courts when issues of relevance and zoning policy are fairly debatable. In this respect, the Supreme Court's ruling on a city's burden of showing that a location restriction ordinance furthers a substantial public purpose directly parallels the Court's earlier rulings on local regulation of signs and billboards. These earlier rulings outline the judicial deference to be accorded a reasonably plausible legislative judgment that such regulation will promote a city's interests in aesthetics and traffic safety.[41]

2. Intent To Suppress

In *City of Renton* the Supreme Court expressly rejected the appellate court's ruling that when intent to suppress speech itself is simply "a motivating factor" for enactment, the ordinance is unconstitutional. The Supreme Court held that as long as a city's predominate concerns relate to controlling the secondary effects of adult uses, regulation should not be held invalid on the basis of an improper intent to suppress the speech itself.[42] In this respect the Court relied on its earlier decision in *United States v. O'Brien*, which stated that a court should "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[43]

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lar problems in municipalities of similar composition and character. Local governments should not have to reinvent the wheel every time a zoning ordinance is enacted. . . .

Id.

40. 427 U.S. at 52 n.3.

41. *See* Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

42. 106 S. Ct. at 929.

43. 391 U.S. 367, 383 (1968).

The ruling in *City of Renton* on this issue is significant for a number of reasons. The issue of improper legislative intent to suppress with regard to adult use location restrictions is usually deemed to be a triable issue of fact, properly determined by relevant objective circumstances such as the language in the ordinance, the effect of regulation, comparison to prior law, the record of proceedings, and the facts surrounding enactment.[44] As a first amendment standard for validity, the Supreme Court in *City of Renton* makes clear that a location ordinance should be held unconstitutional only when a city's primary concern in enactment is an intent to suppress the speech itself. In addition, the Supreme Court approved of the district court's finding that Renton's predominate concerns related to controlling the secondary effects of adult uses and were unrelated to the suppression of free expression. The lower court arrived at this finding even though Renton had not independently demonstrated a factual legislative basis for the ordinance prior to enactment and had included a number of findings in the ordinance itself that clearly expressed a distaste for the subject matter regulated.

In post-*Mini Theatres* litigation, a number of courts had relied on just such an absence of a legislative factual basis for regulation along with official expressions of dislike for the subject matter to find an improper legislative intent to suppress the speech itself.[45] Read together, *City of Renton's* rulings on a city's burden of proof and improper intent to suppress may undercut any presumptive finding of an invalidating legislative intent to suppress based simply on the absence of a detailed factual basis for regulation and expressions of dislike for the subject matter. Similarly, the Court's ruling on the reasonable alternative locations issue would seem to undercut any presumed finding of an improper legislative motive based simply on the fact that many allowed locations for adult uses are either already occupied or not commercially viable.

3. Reasonable Alternative Locations

The Supreme Court in *City of Renton* expressly rejected the appellate court's finding that the 520 acres left open for adult uses was not truly "available" land and, therefore, imposed a substantial restriction

44. *See* City of Las Vegas v. Foley, 747 F.2d 1294 (9th Cir. 1984).

45. *See, e.g.*, CLR Corp. v. Henline, 702 F.2d 637 (6th Cir. 1983); Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

on speech by greatly restricting public access to adult theaters. The Court accepted the finding of the trial court that the 520 acres consisted of "ample, accessible real estate" crisscrossed by freeways, highways, and roads.[46] The Court rejected Playtime's argument that the no commercially viable adult theater sites were available due to the fact that existing businesses already occupied some of the acreage and that most of the undeveloped land was not currently for sale or lease. Pointing out that the inquiry for first amendment purposes does not involve economic impact, the Court stated that Renton had met its obligation under *Mini Theatres* by providing "reasonable opportunity to open and operate an adult theater within the city."[47] The Court observed that because adult theaters "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation."[48] No obligation exists "to insure that adult-theaters, or any other kinds of speech related business for that matter, will be able to obtain sites at bargain prices."[49]

As precedent, the Court's decision that the Renton ordinance easily met the test of providing reasonable alternative locations for adult theaters within the community significantly undercuts the rationale of a number of post-*Mini Theatres* decisions holding location restrictions unconstitutional.[50] Under the *City of Renton* holding, as long as the land zoned for an adult use is ample and accessible, the fact that many potential sites are not realistically available because they are already occupied, not for sale or lease, or not commercially viable is irrelevant for first amendment analysis.[51] The Court's ruling on this issue appears to leave cities with the discretion to zone adult uses to the outskirts of town, where many potential sites are either undeveloped or occupied, as long as these locations are ample and accessible.[52] Rejecting the economic impact of available sites on adult use owners as the test for validity,[53] *City of Renton* clearly rejects a "presently available for a reasonably prudent investor" standard to determine whether

46. 106 S. Ct. at 932.
47. *Id.*
48. *Id.*
49. *Id.*
50. *See supra* note 18 and accompanying text.
51. 106 S. Ct. at 932.
52. *Id.*
53. *Id.*

an ordinance provides reasonable alternative locations for an adult use within a community.

City of Renton indicates that courts should strike down only the most restrictive adult use location ordinance as suppressing or greatly restricting public access to adult uses. Perhaps, as in *Basiardanes v. City of Galveston*,[54] when the city concentrates potential sites for adult uses in industrial zones with few roads, poor lighting, and only warehouses, shipyards, undeveloped areas, and swamps, *City of Renton* may support a finding that the land available for adult use is not readily accessible. Amortization ordinances that force the relocation of adult uses may also be invalidated if the ordinances either prohibit new uses or reduce the number of existing adult uses in a community to directly suppress public access to this form of speech, or fail to provide ample alternative locations for such uses.[55]

F. *Comments*

City of Renton clarifies and reformulates the first amendment standards, established in *Mini Theatres*, that apply to adult use location ordinances. A clear majority of the *City of Renton* Court reaffirmed the earlier characterization of such ordinances as content-neutral time, place, and manner restrictions on this form of expression. As reformulated by the Court, such an ordinance will be upheld if it: (1) is designed to serve a substantial governmental interest; and (2) allows for reasonable alternative avenues of communication. While a number of other constitutional grounds exist upon which courts might rely to hold adult use location restrictions unconstitutional,[56] the Supreme

54. 682 F.2d 1203 (5th Cir. 1982).

55. *See* Alexader v. City of Minneapolis, 698 F.2d 936 (8th Cir. 1982) (amortization ordinance prohibiting new uses and reducing number of existing adult uses held unconstitutional); Adult Bookstore v. City of Fresno, 758 F.2d 1348 (9th Cir. 1985) (ordinance held unconstitutional due to lack of relocation sites available to existing adult uses).

In states that allow amortization of nonconforming uses, the courts may uphold amortization of adult uses if the time period for termination of the use is reasonable and the ordinance leaves alternative locations open for such use. *See, e.g.*, Hart Bookstores v. Edmisten, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (six month amortization period upheld); Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978) (90 day amortization period upheld).

56. In post-*Mini Theatres* litigation, court decisions have invalidated ordinances on constitutional grounds that *City of Renton* not directly address. In some cases, courts have held facially neutral ordinances unenforceable due to selective and discriminatory application to adult uses. *See, e.g.*, E.-Bru, Inc. v. Graves, 566 F. Supp. 1476 (D.N.J.

Court's decision clearly undermines the rationale of a number of post-*Mini Theatres* decisions and grants a much greater degree of discretion and control to local communities in regulating the location of adult uses.

City of Renton did not expressly address the constitutionality of an ordinance that completely excludes adult uses from a community. The requirement of providing "reasonable alternative locations" is simply the second prong of the test of a content-neutral time, place, and manner restriction that incidentally burdens adult uses within a community. The Court clearly would have held such an ordinance unconstitutional under the stricter scrutiny for a total exclusion required by *Schad*, based on the amount of undeveloped land available and the number and types of commercial uses existing within Renton. At least five Justices in *Schad*, however, indicated that they might uphold a total ban in certain circumstances,[57] presumably when a community is largely developed and residential in character. In such a case, the city would no doubt be required to produce a factual legislative record to support such exclusion and demonstrate that exclusion is the least restrictive means of achieving legitimate planning objectives.[58]

As a final comment, the extent of control granted by the *City of Renton* Court to local communities with respect to the location of adult uses surprised even those persons who expected a favorable ruling on the ordinance. More than a little truth exists in Justice Brennan's assertion that the majority opinion nearly invites local communities to

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1983) (denial of license for adult bookstore improper since parking restrictions not enforced against other businesses). Ordinances have been held unconstitutional when narrowly drawn and objective standards for guiding officials in issuing licenses or permits were not established. *See, e.g.*, 15192 Thirteen Mile Rd. v. City of Warren, 593 F. Supp. 147 (E.D. Mich. 1984) (standards for special permit and site plan review held invalid prior restraints on first amendment rights); Little v. City of Greenfield, 575 F. Supp. 656 (E.D. Wis. 1983) (question whether adult use is compatible with nearby development or contrary to general welfare does not sufficiently establish standards for regulating first amendment rights). Courts have also held ordinances unconstitutional on grounds of vagueness and overbreadth. *See, e.g.*, Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981) (definition of adult bookstore would include federal courthouse); Morris v. Municipal Court, 32 Cal. 3d 553, 652 P.2d 51 (1982) (ordinance prohibiting nude entertainment except in establishments devoted to "theatrical performances" presumptively overbroad).

57. Schad v. Mount Ephraim, 452 U.S. 61 (1981). The concurring opinions of Justices Powell, Stewart, and Stevens and the dissenting opinion of Chief Justice Burger, joined by Justice Rehnquist, all indicated that a total ban on commercial entertainment might be upheld in certain circumstances.

58. *See supra* notes 10-13 and accompanying text.

attempt to suppress adult uses in a community by imposing restrictive location controls. Adult use location ordinances such as Renton's, however, clearly are unlikely to eliminate or significantly curtail public access to sexually explicit forms of expression. In a relative context, the *City of Renton* decision simply "cools the heels" of lower federal courts whose decisions in recent years had reached the point of granting new pornography businessses greater first amendment protection than that accorded to new churches or religious uses.[59]

III. Nuisance Closure and License Revocation

In recent years, local communities have attempted to control the operation of adult uses through nuisance closure and license revocation proceedings. If successful, these proceedings may shut down an adult business at its present location for a specified period of time or revoke an adult use owner's business license to operate within the community. Enforcement of such laws is usually based on either sale or exhibition of obscene materials or a finding that the adult use owner permitted illegal sexual activities on the premises. Nuisance closure and license revocation laws as applied to adult uses have been the subject of much recent litigation concerning whether these laws constitute unconstitutional prior restraints on nonobscene but sexually explicit protected expression or whether they otherwise violate the first amendment.

During the 1985-86 term, the Supreme Court in *Arcara v. Cloud Books, Inc.*[60] upheld the enforcement of a nuisance closure law to shut down an adult bookstore for a one-year period based on illicit sexual activities on the premises. The decision in *Arcara* is significant because

59. For example, compare the sensitivity of the federal courts to the economic impact of regulation and the suitability of allowed locations with respect to adult use location ordinances, noted *supra* at note 18, with Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 72 (1983), which upheld the constitutionality of an ordinance prohibiting new churches in nearly 90% of the city. The *Lakewood* court ruled that the "incidental economic burden" was irrelevant and that the first amendment "does not require the city to make all land or even the cheapest or most beautiful land available to churches." *Id.*

Similarly, compare the requirement of a demonstrated factual basis for enactement of an adult use location ordinance, noted *supra* at note 14, with the absence of such a first amendment standard for validity in *Lakewood* and Holy Spirit Ass'n for Unification of World Christianity v. Town of New Castle, 480 F. Supp. 1212, 1216 (S.D.N.Y. 1979) (holding religious institutional use subject to same standards for grant of conditional use permit as secular use, citing *Mini-Theatres*).

60. 106 S. Ct. 3172 (1986).

it is the first Supreme Court decision to constitutionally bless this type of law, and because the framework for analysis established by the Court to adjudge the validity of such a law provides an important context for analysis of first amendment and prior restraint issues when municipalities impose similar forms of nuisance closure and license revocation laws against adult uses.

A. *Legal Background*

Nuisance closure and license revocation laws of the type involved in *Arcara* generally operate to shut down an adult use or revoke its license to operate based on past sale or exhibition of obscene materials or knowing use of the premises for illicit sexual activities. These forms of closure or revocation should be distinguished from so-called moral nuisance laws or proceedings that seek to enjoin the future sale or exhibition of named or unnamed obscene materials. The Supreme Court, in *Vance v. Universal Amusement Co.*,[61] expressly held that such an injunction constitutes an impermissible prior restraint on protected speech, at least when the injunction would be violated without regard to ultimate adjudication of the obscenity or nonobscenity of the subject matter.

While the Supreme Court has never expressly addressed the constitutionality of an injunction proceeding after defects like those noted in *Vance* had been corrected,[62] a few later court decisions have upheld such injunctions.[63] Other recent court decisions have upheld the constitutionality of injunctions that prohibit the sale or exhibition of materials already adjudged obscene under state law.[64] The Supreme Court has ruled that in the latter type of proceeding, obscenity may be proved by "clear and convincing" evidence rather than the more strict "beyond a reasonable doubt" standard.[65]

On the prior restraint issue, a leading case often cited is the early decision of the Supreme Court in *Near v. Minnesota*.[66] In *Near* the Court held that enforcement of a nuisance statute enjoining a newspa-

61. 445 U.S. 308 (1980).

62. *See* Avenue Book Store v. City of Tallmadge, 459 U.S. 997, 998 (1982) (White, J., dissenting to denial of certiorari).

63. *E.g.*, Chateau X v. State, 302 N.C. 321, 275 S.E.2d 443 (1981).

64. *E.g.*, City of Chicago v. Festival Theatre Corp., 91 Ill. 2d 295, 438 N.E.2d 159 (1982).

65. Cooper v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 91-93 (1981).

66. 283 U.S. 697 (1931).

per from publishing malicious, scandalous, or defamatory material was an unconstitutional prior restraint on political expression. Speaking for the Court, Chief Justice Hughes stated that if "the object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical" in the future, and "the statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an affective censorship," then the statute constitutes a prior restraint.[67]

Prior to the Supreme Court's decision in *Arcara*, the earlier decisions of the Court in *Vance* and *Near* provided the controlling framework for analysis of the restraint issue with regard to the enforcement of nuisance closure and licence revocation laws against adult uses. Also, because the Supreme Court had not yet directly addressed the constitutionality of any of the various forms of closure or revocation laws, some courts applied the first amendment standards set out in *United States v. O'Brien*.[68] Under the *O'Brien* rule, a law that incidentally burdens protected expression will be upheld only if it furthers a substantial public purpose unrelated to the suppression of protected speech and is no more broad than necessary to achieve its purpose.[69]

In recent litigation, nuisance closure and license revocation laws based on exhibition or sale of materials found to be obscene have met with mixed results in the courts. While a few court decisions have upheld such laws,[70] most recent court decisions have ruled that such laws are an unconstitutional prior restraint on sexually explicit protected expression.[71] Conversely, nuisance closure laws based on illicit sexual activities on the premises generally have been upheld in recent litigation.[72] In addition, license revocation laws based on illicit sexual activities on the premises have posed problems for courts,[73] even though a

67. *Id.* at 709-12.

68. 391 U.S. 367 (1968).

69. *Id.* at 376-77.

70. *See infra* notes 91, 98 (Court decisions upholding such laws).

71. A compilation of court decisions that held obscenity-based nuisance closure and license revocation laws unconstitutional is found in Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F. Supp. 777, 785 (D. Utah 1980).

72. *See infra* note 87 (court decisions upholding the constitutionality of nuisance closure laws based on illicit sexual activities).

73. In some cases, courts have held license revocation ordinances unconstitutional as applied to adult uses because of vagueness and a lack of specificity of standards for taking such action. *E.g.*, Barry v. City of Oceanside, 107 Cal. App. 3d 257, 165 Cal. Rptr. 697 (1980) (city used standards of "public health, welfare, or safety").

number of court decisions have upheld the constitutionality of such laws.[74]

B. *The* Arcara *Case*

An adult bookstore located in Erie County, New York that sold sexually explicit books and magazines and that had booths available for viewing sexually explicit movies became the target of a police investigation into reports that illicit sexual activities were occurring on the premises. The investigation found instances of solicitation of prostitution and other lewd conduct occurring on the premises with knowledge of the proprietor. A civil complaint was brought against the owner,. seeking closure of the premises for a one-year period under a New York public health statute that defined as a nuisance and authorized closure with respect to "any building, erection, or place used for the purpose of lewdness, assignation or prostitution." Both the trial court and appellate court rejected the defendant's motion for summary judgment, with both courts ruling that the statute applied to the premises in question and that closure under the statute did not constitute an impermissible prior restraint on sexually explicit speech protected by the first amendment. On appeal, the New York Court of Appeals reversed. While agreeing that the closure law applied not only to houses of prostitution but also to the premises in question, the New York court held that closure of the bookstore would constitute a prior restraint on protected speech and that closure of the bookstore would not meet the *O'Brien* test because the regulation, which incidentally burdened first amendment rights, was broader than necessary to achieve its purpose.

C. *The* Arcara *Decision*

The Supreme Court in a 6-3 decision reversed the New York court on both the prior restraint issue and application of the *O'Brien* test. On the prior restraint issue, the *Arcara* Court held that the closure order differed in two significant respects from an unconstitutional prior restraint under *Near v. Minnesota*.[75] First, "the order would impose no restraint at all on the dissemination of particular materials since respondent is free to carry on his bookselling business at another location, even if such locations are difficult to find," and second, "the

74. *See infra* note 89 (Court decisions upholding the constitutionality of license revocation laws based on illicit sexual activity).

75. 283 U.S. 697 (1931).

closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials in prohibited."[76]

The Supreme Court further ruled that the *O'Brien* test is neither appropriate nor applicable to such a closure order. Distinguishing prior decisions, the Court found that the *O'Brien* test is appropriate only when the regulated conduct has a significant expressive element, or when regulation has the inevitable effect of singling out those engaged in expressive activity.[77] The Court found that neither situation existed with respect to the closure order. Illicit sexual activity, the Court stated, "manifests absolutely no element of protected expression,"[78] and the closure law does not "inevitably single out bookstores or others engaged in First Amendment protected activities."[79] Pointing out that "First Amendment values may not be invoked by merely linking the words 'sex' and 'books',"[80]the Court noted that it had "not traditionally subjected every criminal and civil sanction imposed through the legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction."[81] In conclusion, the Court characterized the law as a legitimate legislative attempt "to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities."[82]

The majority opinion by Chief Justice Burger and the concurring opinion by Justice O'Connor noted that the situation would be quite different if the defendant had been able to establish that enforcement of the closure law was simply a pretext for a speech-suppressive motive or policy.

In a sharp dissent, Justice Blackmun, joined by Justices Brennan and Marshall, argued that prior first amendment cases could not "be distinguished" as involving non-speech conduct "intimately related to expressive conduct."[83] Finding that the closure law caused a substantial infringement of first amendment rights, Justice Blackmun would have

76. 106 S. Ct. 3172, 3177 n.2 (1986).
77. *Id.* at 3177-78.
78. *Id.* at 3177.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 3178.
83. *Id.* at 3179.

ruled the closure order invalid under the *O'Brien* test because the state's interest in controlling illicit sexual activity did not justify the severe and unnecessary impact of a one-year closure on the first amendment rights of a bookseller.[84]

D. *Effect As Precedent*

The Supreme Court's decision in *Arcara* holds that the first amendment does not bar enforcement of a generally applicable nuisance closure law against adult uses based on knowing use of the premises for illicit sexual activities.[85] According to the Court, such closure is neither an impermissible prior restraint on protected speech nor otherwise subject to first amendment scrutiny under the *O'Brien* "balancing" and "least restrictive" means tests.[86] As precedent, the *Arcara* decision affirms a number of recent state court decisions that uphold the constitutionality of closure laws prohibiting illicit sexual activities on the premises.[87] Moreover, *Arcara* makes clear that even a remedy as severe as a one-year closure of the entire premises of an adult use is constitutionally permissible.[88] In addition, the *Arcara* decision provides some guidance to analyze the first amendment issues raised by other forms of nuisance closure and license revocation laws.

1. License Revocation—Illicit Sexual Activity

Local ordinances may provide for revocation of a general business license necessary to operate within a community when the premises are used for illicit sexual activities. This sanction, which denies a business the opportunity to thereafter reopen within the community, is obviously more severe than the location closure in *Arcara*. When such a revocation ordinance is generally applicable to all businesses in the city, courts have upheld their constitutionality as applied to adult uses, ruling that the laws serve the substantial public purpose of preventing

84. *Id.* at 3180-81.

85. *Id.* at 3178.

86. *Id.* at 3175-77.

87. *E.g.*, Commonwealth v. Croatan Books, Inc., 228 Va. 383, 323 S.E.2d 86 (1984); Commonwealth *ex rel.* Lewis v. Allouwill Realty Corp., 330 Pa. Super. 32, 478 A.2d 1334 (1984); 660 Linbergh, Inc. v. City of Atlanta, 492 F. Supp. 511 (N.D. Ga. 1980).

88. In some cases, courts have hesitated to close down entire premises, but have issued a closure order directed only at that part of the establishment where illicit sexual activity has occurred. *See* College Art Theatres, Inc. v. DeCarlo, 476 So. 2d 40 (Ala. 1985) (ordering closure of mini-movies part of bookstore).

the operation of businesses used for illegal activities.[89]

The Supreme Court's decision in *Arcara* affirms the rationale of these decisions. On the prior restraint issue, license revocation laws like the closure law in *Arcara*, which prohibit illicit sexual activity on the premises, are not designed to restrain sexually explicit expression and are not imposed "on the basis of an advance determination that the distribution of particular materials is prohibited." Also, as in *Arcara*, such license revocation laws should not be subject to first amendment "least restrictive" scrutiny, because they are not based on conduct having "a significant expressive element" and do not have "the inevitable effect of singling out those engaged in expressive activity." Courts may hold, as in *Arcara*, that the burden on protected expression resulting from license revocation is simply a "speech-inhibiting consequence" of a lawful civil remedy.[90]

2. Nuisance Closure—Obscenity

Conflicting court decisions exist on the constitutionality of nuisance closure laws based on the sale or exhibition of obscene materials on the premises. While some courts have upheld such laws,[91] most court decisions have held the laws unconstitutional as prior restraints on protected speech or as unduly restrictive under the *O'Brien* test.[92] On the prior restraint issue, the *Arcara* decision suggests that, contrary to the rationale of many recent court decisions, such closure laws may not be properly characterized as impermissible prior restraints on protected expression. As in *Arcara*, an owner is free to carry on his protected expression at other locations in the community and the closure is not imposed "on the basis of an advance determination that the distribution of particular materials is prohibited."[93] Obscenity-based closure

89. Iacobucci v. City of Newport, 785 F.2d 1354 (6th Cir.), *rev'd*, 107 S. Ct. 383 (1986) (per curiam); Chulchian v. City of Indianapolis, 633 F.2d 27 (7th Cir. 1980); Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978).

90. 106 S. Ct. at 3178 (O'Connor, J., concurring).

91. *E.g.*, Fehlhaber v. North Carolina, 675 F.2d 1365 (4th Cir. 1982); State *ex rel.* Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P.2d 622 (1981), *apeal dismissed sub nom.* U.S. Marketing, Inc. v. Idaho, 455 U.S. 1009 (1982).

92. *E.g.*, Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981); People *ex rel.* Bush v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied*, 429 U.S. 922 (1976); State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P.2d 760 (1976).

93. *See also* Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478, 1489 (1983) (points out that

laws, however, would clearly be subject to the *O'Brien* least restrictive means test in view of the *Arcara* ruling as to when that test is triggered. Obscenity-based closure laws, unlike the closure in *Arcara*, are obviously based on conduct such as the sale of books and exhibition of movies that have a significant expressive element. These laws also single out for regulation businesses engaged in protected expression. Nevertheless, courts may uphold closure laws like the location ordinance in the recent Supreme Court decision in *City of Renton*[94] on the ground that such laws further a substantial public purpose and leave open reasonable alternative locations for sexually explicit, protected expression within the community. The Supreme Court has not strictly applied the *O'Brien* test to location restrictions on adult uses. Instead, as in *City of Renton*, the Court has applied the more lenient, "narrowly tailored" standard that grants wide discretion to local communities in choosing appropriate methods to implement legitimate state interests.[95]

The Supreme Court, after the *City of Renton* decision, might characterize an obscenity-based closure law as imposing only an incidental burden on protected expression.[96] Also, the Court may, as it did with respect to the location ordinance in *City of Renton*, refuse to second guess the "wisdom or appropriateness" of closure as a remedy to sanction and deter the sale and exhibition of obscene materials. The burden on protected expression that results from closure at a particular location might simply be characterized as a "speech-inhibiting consequence" of a lawful civil remedy.[97]

3. License Revocation—Obscenity

Courts have disagreed over the constitutionality of obscenity-based license revocation laws. While some courts have upheld such laws,[98] most recent court decisions indicate that obscenity-based license revocation laws that have the effect of denying the owner the opportunity to

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courts have assumed that obscenity-based nuisance closure laws are prior restraints without engaging in substantive analysis of prior restraint doctrine).

94. 106 S. Ct. 925 (1986).

95. *Id.* at 931.

96. *See* City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463, 469-70 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986) (suggesting support for this analysis and distinguishing obscenity based closure laws from more intrusive obscenity based license revocatoin laws).

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

98. *E.g.*, West Gallery Corp. v. Salt Lake City Bd. of Comm'rs, 586 P.2d 429 (Utah 1978).

operate within the community are most susceptible to judicial invalidation.[99] Such a law is likely to be held to violate the first amendment as either an impermissible prior restraint on future expression or as an intrusive and burdensome method of deterring obscenity. Unlike a location restriction or closure law, a license revocation that bans future sexually explicit expression by a business imposes more than an "incidental burden" on protected expression, and may properly be subject to heightened judicial scrutiny like the ban on live entertainment in *Schad*.[100] Unlike the closure law in *Arcara*, such a license revocation law may be characterized not as a "speech-inhibiting consequence" of a lawful civil remedy, but as an unduly intrusive remedy to sanction and deter the distribution of obscene materials.[101]

E. *Comments*

Arcara clearly holds that the first amendment is no impediment to enforcement of nuisance closure laws that prohibit the use of premises for illicit sexual activity. Moreover, the *Arcara* rationale suggests support for the constitutionality of generally applicable license revocation laws as applied to adult uses, based on use of premises for illicit sexual activity. *Arcara* may even be read, along with *City of Renton*, to support the constitutionality of nuisance closure laws based on obscenity. Whether state and lower federal courts will interpret *Arcara* to support the latter types of laws may well prove to be simply an academic question in view of the availability of the remedy upheld in *Arcara*.[102]

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99. *E.g.*, City of Paducah v. Investment Entertainment, Inc., 791 F.2d 463 (6th Cir.), *cert. denied*, 107 S. Ct. 316 (1986); Gayety Theatres, Inc. v. City of Miami, 719 F.2d 1550 (11th Cir. 1983); Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F. Supp. 777 (D. Utah 1980).

100. *See supra* note 10 and accompanying text.

101. The Supreme Court has indicated that the burden of supporting a prohibition on a future exhibition of presumptively protected expression is even heavier than the burden of justifying the imposition of a criminal sanction for past communication. *See* Vance v. Universal Amusement Co., 445 U.S. 308, 315-16 (1980).

102. Many states have so-called "Red Light Laws" similar to the closure law involved in *Arcara*. Moreover, such laws may be enacted by local communities with state home rule powers in other states.

NOTES