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A Property Rights View: Commentary on "Property and Speech" by Robert A. Sedler

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INTRODUCTION

The First Amendment protects an individual's rights to free expression and religion.[1] Professor Sedler analyzes the impact of this protection on property rights by explaining how the First Amendment can be used as a "sword" against property owners who seek to exclude free expression with claims of private ownership rights, and as a "shield" against government attempts to restrict individual rights by regulating property use.[2] This dual analysis approach to property rights and the First Amendment illustrates how the Constitution can be used not only to protect individuals against government actions (as a "shield"), but also to allow individuals to assert their free expression rights to restrict the property rights of other citizens (as a "sword").

The First Amendment can be used as a "sword" when expressive activities conflict with real property ownership, to permit picketing, protests, home solicitation, and access to non-public forums. The First Amendment may also be used as a sword to allow activities that conflict with personal property ownership, such as boycotts against businesses and products, or to protect against liability for copyright infringement and antitrust violations. I begin by exploring whether

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

2. *See* Robert A. Sedler, *Property and Speech*, 21 WASH. U. J.L. & POL'Y 123 (2006).

the First Amendment, as a sword, obscures the difference between state and private action by constitutionally preventing private property owners from interfering with an individual's free expression rights. Thus, private property owners, who are not otherwise held to constitutional standards, cannot block activities of others that invade their property interests because these activities are protected by the First Amendment.

Using the First Amendment as a "shield" is the category with which I am most familiar as a land use professor and scholar. Much of my academic writing has focused on the intersection of First Amendment rights and land use, and I often discuss churches and adult businesses in the same breath. Both religious and adult business land uses are protected by the First Amendment. Regulation of adult businesses is subject to intermediate scrutiny under the constitutional doctrine of "secondary effects,"[3] while regulation of religious land uses is subject to strict scrutiny under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[4]

This Commentary will address an additional category, not mentioned by Professor Sedler in his Article—the government's use of eminent domain, which can be used as a "sword" against land uses protected by the First Amendment. For example, the government has used eminent domain to shut down adult businesses by condemning the property as blighted.[5] Local government has also attempted to convert church property into revenue-producing property by condemning it and allowing private commercial development.[6] RLUIPA[7] acts as a "shield" against government land use decisions that impact religious land uses by requiring heightened judicial scrutiny.[8] However, adult business land uses are not similarly protected against eminent domain actions, and receive only

3. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

4. 42 U.S.C. § 2000cc (2000); *see also infra* notes 53–70 and accompanying text.

5. *See* Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 658 (2004) (citing *In re G. & A. Brooks, Inc.*, 770 F.2d 288 (2d Cir. 1985), as an example of such an adult business shutdown).

6. *See* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1214–15 (C.D. Cal. 2002).

7. 42 U.S.C. §§ 2000cc, 2000cc-1-5 (2000).

8. *See* Saxer, *supra* note 5, at 664.

intermediate scrutiny to protect the landowners' First Amendment rights.[9]

Professor Sedler concludes that because the First Amendment has been used to significantly interfere with property rights, protection of free expression is strong in the United States.[10] Alternatively, this may show just how weak property rights have become, given that many of these decisions balance private property rights against First Amendment rights. Although I agree with Professor Sedler that the Rehnquist Court has shown a strong commitment to protecting free expression,[11] I believe that the Court's decisions regarding adult businesses and religious uses fail to adequately protect landowners' property rights. Professor Sedler's Article is extensive, and I will not attempt to comment on all of the territory he covers. Instead, I will limit my Commentary to selected areas that illustrate that the Rehnquist Court has reduced the protection of private property rights against government action, while restricting private property owner's' rights to exclude private actors who trespass or substantially interfere with their use and enjoyment of property interests.

I. USING THE FIRST AMENDMENT AS A SWORD: STATE ACTION

When the First Amendment is used as a sword, private property owners cannot exclude others or restrict expressive activities that interfere with their use and enjoyment of personal property. These private property rights are potentially protected by the common law actions of trespass, nuisance, and wrongful interference with business interests, as well as by statutory copyright infringement, antitrust liability, and other intellectual property actions.[12] However, when the First Amendment precludes private property owners from prevailing on one of these actions, the owner is subjected to constitutional constraints in the same way that the government is restricted from asserting control over individuals who exercise their First

9. *See id.* at 658–60.
10. Sedler, *supra* note 2, at 154.
11. *See id.* at 124.
12. *See, e.g.*, John R. Thomas, *Liberty and Property in the Patent Law*, 39 HOUS. L. REV. 569, 599–606 (2002) (discussing cases involving the balancing of intellectual property rights and the First Amendment).

Amendment rights in conjunction with property ownership. Thus, private citizens are treated similarly to state actors when they attempt to protect their property rights against other private citizens who wish to exercise their First Amendment rights.

A major Supreme Court decision involving property, *Shelley v. Kraemer*,[13] blurred the distinction between private and state action to discourage racial discrimination in property transactions. In *Shelley*, the Court held that state judicial enforcement of racially restrictive private land covenants violated the Equal Protection Clause of the Fourteenth Amendment.[14] However, although the *Shelley* decision involved property rights in the form of real covenants, the conflicting constitutional right was not a First Amendment claim.

The landmark case of *New York Times Co. v. Sullivan*,[15] which also blurred the distinction between private and state action, was not a property rights decision. Instead, it involved the balancing of a common law claim of defamation against First Amendment rights. The *Sullivan* Court held that, in a civil lawsuit between private parties, the state action rule does not protect a state court judgment from constitutional scrutiny when a state law restricts freedoms of speech and press.[16] The decision was limited to restricting "a State's power to award damages for libel in actions brought by public officials against critics of their official conduct"[17] absent a finding of actual malice; it did not extend constitutional protection to "defamatory statements directed against the private conduct of a public official or private citizen."[18]

Subsequent Supreme Court cases involving First Amendment conflicts with common law actions of libel and defamation continued to find state action where state rules of law are applied by state courts to restrict First Amendment freedoms.[19] However, the Court has also

13. 334 U.S. 1 (1948).
14. *Id*. at 20.
15. 376 U.S. 254 (1964).
16. *See id*. at 265 (refusing to insulate an Alabama state court decision from constitutional review based on the state action doctrine).
17. *Id*. at 283.
18. *Id*. at 301 (Goldberg, J., concurring).
19. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (citing Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)).

noted that there is an "equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[20] In the final analysis, and notwithstanding Supreme Court precedent, the state action doctrine remains a murky area of law, and not all courts apply it consistently in libel cases involving First Amendment claims against private actors.[21]

In *Pruneyard Shopping Center v. Robins*,[22] Justice Rehnquist confronted a conflict of Fifth Amendment private property rights against the First Amendment right of free speech. *Pruneyard* involved a private shopping mall owner's attempt to prohibit private citizens from engaging in publicly expressive activities on its property, including the circulation of petitions, unless they related to the mall's commercial purposes.[23] The Court held that neither the private owner's "federally recognized property rights nor their First Amendment rights have been infringed" by the California state court decision that recognized the private citizens' expression and petition rights.[24]

Professor Sedler emphasizes that picketing and protesting on adjacent public streets and sidewalks are permissible interferences with a private owner's use and enjoyment of property because the activities take place in a public forum.[25] Although Professor Sedler states that this First Amendment protection would be lost if the activities occurred on privately owned property because they would then be considered illegal trespasses,[26] the Court in *Pruneyard* noted that while individuals who wished to exercise their free speech and

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20. *Cohen*, 501 U.S. at 669–70 (noting that the "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations").

21. *See, e.g.*, Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188 (9th Cir. 1989). The Ninth Circuit refused to abandon what they called "the well-established state action doctrine," and upheld the dismissal of civil rights claims by feminists against Hustler Magazine and Larry Flynt on the basis that the defendants were not state actors. *Id.* at 1200.

22. 447 U.S. 74 (1980).

23. *See id*. at 77.

24. *Id*. at 88.

25. Sedler, *supra* note 2, at 126–27.

26. *Id.* at 127.

petition rights "physically invaded" the owner's private property, that was not determinative of whether they violated constitutional property rights.[27] Instead, the Court determined that this physical invasion was not a "taking" of property under the Fifth Amendment because the property owner's right to exclude others was not "essential to the use or economic value of their property."[28]

This Commentary is much too brief to explore all of the issues involved in evaluating the expressive rights of private citizens on private property. If, perhaps, the shopping mall owner in *Pruneyard* had asserted a trespass or nuisance cause of action rather than a "taking," the Court may have protected his right to exclude other private citizens, even those wishing to express First Amendment rights. However, the *Pruneyard* landowner's ability to assert his property rights may have been limited by the public's right to "regulate it in the common interest."[29] The New Jersey Supreme Court limited a landowner's property right to assert trespass for public policy reasons in *State v. Shack*.[30] In *Shack*, the court held that entry by federal agents onto a farm owner's property for the purpose of aiding a migrant farm worker was beyond the reach of the state's trespass statute.[31]

Professor Sedler points out that the First Amendment cannot be used as a sword to gain access to someone's home for purposes of expression because the common law action of trespass allows the property owner to exclude others.[32] However, the *Shack* court reduced the scope of the common law of trespass when it attempted to balance the rights of individuals against each other by allowing government workers unauthorized access to private property to facilitate communication with migrant farm workers.[33] Moreover, in *Pruneyard*, the Supreme Court refused to find a "taking" of private

27. *Pruneyard*, 447 U.S. at 83–84.

28. *Id.* at 84.

29. *Id*. at 84–85 ("[N]either property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest." (quoting Nebbia v. New York, 291 U.S. 502 (1934))).

30. 277 A.2d 369, 374–75 (N.J. 1971).

31. *Id*. at 374.

32. *See* Sedler, *supra* note 2, at 126–27.

33. *Shack*, 277 A.2d at 375. However, the case was not decided on First Amendment or other constitutional grounds. *Id.* at 371–72.

property under the Fifth Amendment, even though it allowed private citizens to physically invade private property to exercise their First Amendment rights.[34] The question arises: If a private property owner asserts a common law action of nuisance or trespass to protect his or her property rights, will the invading individuals be able to trump these rights by asserting the First Amendment?[35] If the answer is yes, we are requiring these private property owners to observe constitutional limitations against restricting their fellow private citizens' free expression by limiting the effectiveness of common law nuisance or trespass claims.

Picketing or protesting in front of someone's home or business may substantially interfere with the property owner's use and enjoyment of their property, and may be considered a common law nuisance.[36] The judicial remedy for such an injury is either injunctive relief or damages. However, the Rehnquist Court cases involving abortion protestors, *Madsen v. Women's Health Center, Inc.*[37] and *Schenck v. Pro-Choice Network*,[38] were not argued on a medical clinic's right not to have its use and enjoyment substantially interfered with, but rather on whether an injunction against anti-abortion demonstrators violated the protestors' First Amendment rights.[39] Consequently, lower court decisions to grant injunctive relief, based in whole or in part on the invasion of property rights, were abrogated to some extent by *Madsen* and *Schenck* because of

34. *Pruneyard*, 447 U.S. at 84.

35. *Id.* at 95 (White, J., concurring). Justice White noted that precedent cases "hold that the First and Fourteenth Amendments do not prevent the property owner from excluding those who would demonstrate or communicate on his property." *Id.* (citing Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 557 (1972)).

36. *See, e.g.*, Lucero v. Trosch, 121 F.3d 591, 599 n.12 (11th Cir. 1997) (reviewing district court's issuance of a preliminary injunction against abortion protestors, and rejecting the argument that state nuisance laws are not applicable when First Amendment concerns are present); *see also* St. David's Episcopal Church v. Westboro Baptist Church, Inc., 921 P.2d 821, 827 (Kan. Ct. App. 1996) (discussing temporary injunction against picketing granted on the basis of nuisance); Kaplan v. Prolife Action League, 431 S.E.2d 828, 839–40 (N.C. Ct. App. 1993), *cert. denied*, 512 U.S. 1253 (1994) (discussing the balancing of nuisance activity against the First Amendment rights of the picketers); Hritz v. United Steel Workers of Am., No. CA2002-10-108, 2003 WL 22283508 (Ohio Ct. App. Oct. 6, 2003) (involving plaintiffs' request for protection against an invasion of their privacy from protests outside their homes).

37. 512 U.S. 753 (1994) (Rehnquist, C.J., majority opinion).

38. 519 U.S. 357 (1997) (Rehnquist, C.J., majority opinion).

39. *See Schenck*, 519 U.S. at 361; *Madsen*, 512 U.S. at 757.

First Amendment constraints.[40] Those constitutional rights were implicated because the medical clinics' desired remedy required state action. Similar to the *Pruneyard* situation in which private property owners could not exclude private citizens exercising their First Amendment rights, the private medical clinics could not use common law nuisance to protect their property rights without subjecting such protection to First Amendment restrictions that are generally only applicable to state actors.

The government has attempted to protect property rights against abortion protestors by establishing a border around private medical clinics' property.[41] It similarly attempted to limit home solicitation to prevent the unwanted "trespass" of information into a private home.[42] If the government restricts expression through the regulatory process, such regulations should be subject to scrutiny under the First Amendment. However, if a court merely protects private property rights by granting judicial remedies under the common law actions of nuisance or trespass, such remedies should not be subject to First Amendment scrutiny, unless the state action rule in *Shelley v. Kraemer* is extended to reach more than private actions supporting a racially restrictive covenant.[43]

When the government is the property owner seeking to exclude individuals from entry onto public property, its restrictions on free expression should also be subject to First Amendment scrutiny. Whether or not the government property is considered a public forum, it is appropriate to limit the restrictions under the First Amendment because the government is a state actor.[44] The strictness

40. *See Schenck*, 519 U.S. at 374–80 (striking down "floating buffer zones" imposed by the injunction because they burdened speech more than was necessary to serve a significant government interest); *Madsen*, 512 U.S. at 768–76 (striking down various buffer zones and a sign restriction on the same grounds).

41. *Schenck*, 519 U.S. at 361; *Madsen*, 512 U.S. at 757.

42. *See* Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004) (upholding the national "do not call" registry against a First Amendment challenge).

43. *See* Shelley Ross Saxer, Shelley v. Kraemer*'s Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 61–63 (1998).

44. This Commentary does not attempt to describe the different judicial tests used to determine whether an actor is sufficiently involved with the government to make him or her a state actor. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 303–04

of these limitations can vary based on whether the government property is a public forum, but, as Professor Sedler states, "[u]nlike private property owners, the government does not have full control over its own property, and can only impose reasonable restrictions on access of expressive activity to a non-public forum."[45]

The fact that First Amendment rights can be used to significantly interfere with property rights shows how property rights protections have been reduced (and also illustrates Professor Sedler's contention that such interference shows how strongly we protect free expression).[46] Whenever First Amendment rights of free expression arise in a private property context, the courts have essentially converted private property owners into state actors when they have sought and received judicial redress.[47] Private property owners' actions are subject to constitutional limitations based on the First Amendment protection of free expression, even though they are not state actors.

Noteworthy commentators, such as Professors Erwin Chemerinsky and Kenneth Karst, have argued that the state action doctrine should be eliminated, or at least limited, so that individual constitutional rights that protect vital liberties will be safeguarded against private interference.[48] Chemerinsky notes that Justice Rehnquist took the position that constitutional rights are only protected against infringement by the state, not by non-governmental actors.[49] Professor Henry Strickland has written that Chief Justice

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(1995); Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 592–93 (1991).

45. Sedler, *supra* note 2, at 139.

46. *Id.* at 154.

47. This judicial redress, even when received, is limited by the First Amendment. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982) (concluding that a state may not impose liability for economic harm caused by desegregation boycott); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 524 (4th Cir. 1999) (holding that ABC was not liable for harm caused to a food market by videotape of unwholesome food practices); *see also* Copyright Act, 17 U.S.C. § 107 (2000) (fair use defense prevents copyright holder from asserting property rights to exclude others from using copyrighted property).

48. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 556–57 (1985); *see also* Harold W. Horowitz & Kenneth L. Karst, *The Proposition Fourteen Cases*, 14 UCLA L. REV. 37, 45 (1966) (noting that all private infringements involve state action because "state action, in the form of state law, is present in all legal relationships among private persons").

49. *See* Chemerinsky, *supra* note 48, at 520 (citing as an example *Flagg Bros., Inc. v.*

Rehnquist's state action decisions purported to apply existing state action concepts, but instead reflected "a restrictive model of the state action doctrine that seldom treats private conduct as state action."[50] Nevertheless, decisions during the Rehnquist Court era have at times reduced the sphere of private action by insisting that private landowners comply with the First Amendment when their property rights conflict with citizens' rights to free expression on private property.[51]

II. USING THE FIRST AMENDMENT AS A SHIELD AGAINST THE GOVERNMENT

As we have seen, the Rehnquist Court has arguably given expansive protection to free expression when the First Amendment is used as a "sword" to gain access to property. However, it has done so at the expense of private property rights, by making private property owners subject to constitutional limitations as implicit state actors. Conversely, the Rehnquist Court has restricted the free expression of private property owners by allowing greater government regulation of unpopular, but constitutionally protected, land uses.

As non-traditional religious groups invade local communities, bringing with them traffic problems, noise, and outsiders, local authorities apply general zoning regulations with little regard for First Amendment protections.[52] Similarly, the growth of the sex industry and the proliferation of adult businesses have generated local fears regarding the adverse impacts of these land uses on the community. As local governments struggle to deal with these undesirable land uses and their concomitant impacts on the community, they are confronted with constitutional limitations on their ability to restrict expression.

Brooks, 436 U.S. 149, 160 n.10 (1978)).

50. Strickland, *supra* note 44, at 645.

51. *See supra* notes 37–39 and accompanying text. *But see* Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 665 (1995) (asserting that "[t]he "Burger and Rehnquist Courts have subsequently strengthened the doctrine").

52. Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1, 8 (1998).

A. Religious Land Use

Prior to the Court's decision in *Employment Division v. Smith*,[53] religious land uses were protected under the First Amendment against any government action that substantially burdened the free exercise of religion, unless the regulation could be justified by a compelling government interest and it was the least restrictive means of achieving that interest.[54] In *Smith*, the Rehnquist Court lessened this protection by holding that neutral laws of general application, even those that substantially burdened free exercise or impacted other First Amendment rights, would not be subject to strict scrutiny.[55] In response to this reduced protection under the First Amendment, Congress first enacted the Religious Freedom Restoration Act (RFRA) and then RLUIPA to restore the more protective standard that existed before the *Smith* decision.[56]

RLUIPA's constitutionality has been upheld by the Court as to its institutionalized persons provision,[57] but it is still under constitutional challenge in several courts across the country.[58] Nevertheless, religious land uses are currently protected under RLUIPA against

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53. 494 U.S. 872 (1990).

54. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

55. *See Smith*, 494 U.S. at 879–81 (noting that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press").

56. *See* 42 U.S.C. § 2000cc(a)(1) (2000).

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless the government demonstrates that imposition of the burden on that person . . . (A) is in furtherance of a compelling government interest and (B) is the least restrictive means of furthering that interest.

Id. Further, the subsection applies "even if the burden results from a rule of general applicability." *Id.* § 2000cc(a)(2)(A).

57. *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) ("RLUIPA's institutionalized-persons provision [is] compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise.").

58. *See, e.g.*, Elsinore Christian Ctr. v. City of Lake Elsinore, No. 04-55320, 2006 U.S. App. LEXIS 21571 (9th Cir. Aug. 22, 2006) (upholding the constitutionality of RLUIPA land use provisions).

government regulation that substantially burdens free exercise.[59] This protection was provided by Congress, not by the Rehnquist Court.

B. Adult Businesses

Adult businesses have not fared well either under the Rehnquist Court, based on accepted First Amendment principles of applying strict scrutiny to content-based regulation. Beginning with the Court's decision in *Young v. American Mini Theatres, Inc.*,[60] sexually-oriented businesses have received lesser protection from content-based regulation than have other First Amendment protected activities.[61] In *American Mini Theatres*, Justice Rehnquist joined Justice Stevens' majority opinion to hold that zoning ordinances that classified motion picture theaters on the basis of whether or not they exhibited adult movies were constitutional, even though based on the content of expression, traditionally protected by the First Amendment.[62] Normally, whenever the government regulates expression based on its content, such regulation is subject to strict scrutiny.[63] However, regulations regarding adult businesses have only been subject to intermediate scrutiny, even when they are regulated based on the content of their protected expression.

In the first year of the Rehnquist Court, but before his appointment to Chief Justice, Justice Rehnquist authored the majority opinion in *City of Renton v. Playtime Theatres, Inc.*,[64] which established the "secondary effects doctrine."[65] This doctrine allowed

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59. *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1239–43 (11th Cir. 2004) (holding RLUIPA to be constitutional under Section Four of the Fourteenth Amendment, the Establishment Clause, and the Tenth Amendment).

60. 427 U.S. 50 (1976).

61. *See id.* at 63 n.18 (analyzing the content-based regulation necessary to further a significant government interest as a time, place and manner regulation); *id.* at 70 ("[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials . . . it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude.").

62. *See id.* at 71–72.

63. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 574 (2001) (noting that the Court has "consistently applied strict scrutiny to . . . content-based regulations of speech").

64. 475 U.S. 41 (1986).

65. "[Z]oning ordinances designed to combat the undesirable secondary effects of [adult] businesses are to be reviewed under the standards applicable to 'content neutral' time, place, and manner regulations." *Id.* at 49. Such secondary effects include crime, depreciating property

the Court to apply intermediate scrutiny to content-based regulations of sexually-oriented businesses, as though they were content-neutral time, place, and manner regulations.[66] This doctrine has continued to allow local authorities "to impair the economic viability of the sexually-oriented businesses in the hope that they will close down,"[67] even though, as Professor Sedler notes, "the First Amendment protects the message of erotica conveyed by sexually-oriented entertainment."[68] Although it is possible that the secondary effects doctrine may not remain viable in the future,[69] for now it allows the regulation of sexually-oriented entertainment, so long as there are adverse secondary effects from the business and ample alternative avenues of communication available.[70]

Professor Sedler also discusses the licensing of sexually-oriented businesses and the standards for such regulation under the prior restraint doctrine.[71] In *FW/PBS, Inc. v. City of Dallas*,[72] the Rehnquist Court invalidated a Dallas licensing scheme that used zoning restrictions to regulate sexually-oriented businesses, declaring the scheme an unconstitutional prior restraint on First Amendment speech.[73] Justice O'Connor's plurality opinion established that a licensing law must not allow unbridled discretion in the hands of a government official, such that a license might be denied on the grounds of censorship.[74] In addition, there must be a time limit on the license decision-making process to prevent unreasonable delays that result in censorship.[75] Professor Sedler concludes that "the First

values, and a decline in the quality of urban life. *Id.* at 48.

66. *See id*. at 46–50. "'[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47.

67. Sedler, *supra* note 2, at 142 n.79.

68. *Id.* at 141.

69. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (noting that the secondary effects doctrine is a fiction that is "perhaps more confusing than helpful," and has not "commanded our consistent adherence").

70. *See id.* at 434 (citing *Renton*, 475 U.S. at 47–50).

71. *See* Sedler, *supra* note 2, at 142–44.

72. 493 U.S. 215 (1990).

73. *Id*. at 229.

74. *Id.* at 225–30.

75. *Id.*; *see also* Scott D. Bergthold, *Effective Licensing of Sexually Oriented Businesses*, *in* PROTECTING FREE SPEECH AND EXPRESSION: THE FIRST AMENDMENT AND LAND USE LAW 61 (Daniel R. Mandelker & Rebecca L. Rubin eds., 2001).

Amendment provides a high degree of protection to those engaged in the business of expression when the state requires that they obtain a license to do so."[76] I agree with this conclusion, but I also argue that the prior restraint doctrine should be applied *instead* of the secondary effects doctrine to give this high degree of protection to First Amendment land uses when government discretion in regulation is involved.[77] Thus, when zoning regulations require conditional use or special use permits, they operate as a licensing system and should be analyzed under the prior restraint doctrine, rather than the secondary effects doctrine that treats even content-based government regulation in this context as content-neutral.

III. EMINENT DOMAIN–THE GOVERNMENT'S SWORD

The final comment I would add to Professor Sedler's piece regards the use of eminent domain as the government's sword against First Amendment rights. For example, if the government desires to close an adult entertainment business, it can indirectly do so by condemning the real property interest for the asserted purpose of eliminating community blight or increasing the city's revenue base.[78] In this way, the government can eliminate the undesirable use without being subject to strict scrutiny, even though it indirectly targets free expression. Instead, in these situations courts have applied intermediate scrutiny as articulated in *United States v. O'Brien*,[79] which requires that:

> (1) the action is within the constitutional power of the government; (2) the action furthers important or substantial government interests; (3) the interests furthered are unrelated to the suppression of free speech; and (4) the restriction on

76. Sedler, *supra* note 2, at 144.

77. *See* Saxer, *supra* note 52, at 33–37.

78. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2665–66 (2005) (holding that the "public purposes" that allow a city's eminent domain condemnation included a city's desire for "economic development," even if accomplished by private interests).

79. 391 U.S. 367, 378–80 (1968).

> First Amendment freedoms is no greater than is essential to the furtherance of the government interests.[80]

Even when there is evidence that the government is using its eminent domain power to suppress undesirable but protected expression, courts have still applied intermediate scrutiny and upheld condemnation actions when other legitimate purposes, such as eliminating blight or increasing the tax base, justify the use of this power.[81] Thus, private property interests are not sufficiently protected against the government's use of its eminent domain power as a sword against property used for protected expression. The government can suppress protected adult entertainment expression by using eminent domain, so long as there is also a legitimate public purpose unrelated to this suppression.[82]

Similarly, local officials have targeted religious land uses to redevelop church-owned property for commercial use, which would bring additional tax revenue not available from a religious non-profit use.[83] Because RLUIPA applies strict scrutiny review when a land use regulation substantially burdens religious exercise, eminent domain actions that target religious uses require the government to show that it has a compelling interest in taking such action and that doing so is the least restrictive means of achieving the asserted interest.[84] Consequently, the enactment of RLUIPA assures that

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80. *In re* G. & A. Books, Inc., 770 F.2d 288, 296 (2d Cir. 1985) (applying the four-part test from *United States v. O'Brien* to a New York rehabilitation program for Times Square that proposed to condemn buildings containing adult retail stores).

81. *Id.* at 297 (finding that subjective motivation to suppress speech did not make the action unconstitutional because "important governmental interests unrelated to suppression of speech exist, independent of any desire to suppress speech"); *see also* Forty-Second St. Co. v. Koch, 613 F. Supp. 1416, 1420 (S.D.N.Y. 1985) (upholding an eminent domain action against claims by the property owners that their theaters were "being singled out for condemnation because defendants object to the content of the movies they exhibit, which include low-budget martial arts and horror movies along with some mainstream Hollywood fare and sexually explicit films"); *In re* Condemnation by Urban Redev. Auth., 823 A.2d 1086, 1095 (Pa. Commw. Ct. 2003) (affirming a lower court ruling that hostile comments by city officials about the adult theater being condemned were not sufficient to justify applying strict scrutiny to a project addressing other primary public purposes).

82. *See* Saxer, *supra* note 5, at 660–61.

83. *See, e.g.*, Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002).

84. *See id*. at 1228–29 (determining that the City's interests in generating revenue and eliminating blight were not sufficiently compelling to justify the resulting burden on religious

religious uses will receive greater protection from targeted condemnation actions by local government than sexually-oriented expression.

CONCLUSION

Professor Sedler's article provides an exhaustive coverage of the First Amendment and its impact on property rights. As always, his work demonstrates the practical aspects of these legal principles as he seeks to advance the goal of applying academic scholarship to litigation practice. The Rehnquist Court sharpened the edge of the First Amendment "sword," as it has allowed private citizens to gain access to private property for free expression purposes, despite countervailing property rights.[85] Undeniably, this demonstrates the high degree of protection afforded to freedom of expression by the American constitutional system, but it also shows how property rights have received diminished protection, even from a Court that is deemed to have been protective of private property rights.[86] By effectively treating private property owners as state actors when they request judicial relief against those seeking expressive access to their properties, the Court has subjected them to First Amendment limitations and restricted their ability to exclude or prevent activities harmful to their property interests.

Property owners' First Amendment "shield" against the government has also been dented by the Rehnquist Court's *Smith*

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exercise created by the City's use of its eminent domain power).

85. *See, e.g.*, *supra* notes 22–24 and accompanying text.

86. *See, e.g.*, Cass R. Sunstein, *The Rehnquist Revolution*, NEW REPUBLIC, Dec. 27, 2004, *available at* http://www.powells.com/review/2005_01_06.html (reviewing MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005)) ("Since joining the Court as associate justice in 1971, Rehnquist has had a clear agenda for constitutional interpretation … to increase the protection of private property. . . . The Rehnquist Court has not always acted in accordance with the views of William Rehnquist, but it has moved dramatically in his preferred directions."); *see also* James Salzman, *Earth in the Judicial Balance*, THE NATION, Oct. 9, 2000, *available at* http://www.thenation.com/doc/20001009/salzman ("The Rehnquist Court has applied the takings clause aggressively and shifted the balance toward greater compensation for property owners. . . . The net result has been expanded protections for private property owners and cost constraints on legislatures seeking to protect public resources.").

decision and its secondary effects doctrine.[87] However, although the *Smith* decision reduced religious exercise protection when neutral laws of general application impact religious land uses, these uses are now protected by federal and state legislation such as RLUIPA, which subjects government regulation that burdens religious exercise to strict scrutiny.[88] While the legislature has protected religious land uses, adult businesses have not fared as well and are often subject to content-based regulation under the secondary effects doctrine. This doctrine, which treats content-based regulation of adult businesses as content-neutral because of the adverse impact of these businesses on the community, subjects adult business land uses only to intermediate scrutiny, not to the strict scrutiny typically required for the content-based regulations of protected free expression.

Finally, Professor Sedler did not discuss eminent domain as a government "sword" against First Amendment land uses. Eminent domain is a powerful government tool that can be used to target undesirable uses, such as adult businesses or churches, to eliminate blight or increase the tax revenue base. After the Court's decision in *Kelo v. City of New London*,[89] municipalities only need to show some public purpose, including private development, to condemn property otherwise protected by the First Amendment. Although RLUIPA may act as an effective legislative protection when eminent domain is used against a religious land use, adult businesses will, at most, receive intermediate scrutiny protection against such condemnations.

The Rehnquist Court has reduced private property rights by giving private citizens access to private property for expressive activity, even though the state action doctrine should not normally subject private property owners to constitutional limitations. The Court has also reduced the protection of First Amendment land uses by subjecting neutral laws of general application to rational basis scrutiny, even if such laws burden religious exercise, and by subjecting content-based regulation of adult uses to intermediate scrutiny only under the secondary effects doctrine. The eminent domain sword continues to allow the government to target First

87. *See supra* notes 53–55 and accompanying text.
88. *See* 42 U.S.C. § 2000cc (2000).
89. Kelo v. City of New London, 125 S. Ct. 2655 (2005).

Amendment land uses to control undesirable land uses. Private property rights have suffered when balanced against the expressive rights of other private citizens and against the government's desire to regulate protected First Amendment land uses.