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> Zoning, important as it is within limits, is too rapidly becoming a legalized device to prevent property owners from doing whatever their neighbors dislike . . . . The security and repose which come from protection of the right to be different in matter of aesthetics, taste, thought, [and] expression . . . are not to be cast aside without violating constitutional privileges and immunities.[1]

> The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the marketplace of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.[2]

I. INTRODUCTION

Ever since the Supreme Court gave zoning its constitutional stamp of approval in the 1926 case of *Village of Euclid v. Ambler Realty Co.*,[3] zoning has soared in importance as a land use control device.[4] All major cities in the United States, except Houston, and most smaller city and county governments have seized the opportunity to control their community's quality of life through local land use regulation.[5] States uniformly have delegated to local government units, or in some cases to regional bodies, the police power to control land use in order to promote public health, safety, welfare, and morals.[6] Local officials have balanced the interests of establishing

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1. People v. Stover, 191 N.E.2d 272, 278 (N.Y. 1963) (Van Voorhis, J., dissenting).

2. Young v. American Mini Theatres, Inc., 427 U.S. 50, 88 (1976) (Stewart, J., dissenting).

3. 272 U.S. 365 (1926).

4. *See Young*, 427 U.S. at 74 (Powell, J., concurring) ("Zoning has become an accepted necessity in our increasingly urbanized society.").

5. *See* DANIEL R. MANDELKER, LAND USE LAW § 1.01, at 1 (3d ed. 1993).

6. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 692 (1973). Before the Court's 1926 decision in *Euclid*, 368 municipalities employed zoning ordinances. *See id.* Four years after the *Euclid* decision, that number had swelled to over one thousand. *See id.* By 1967, more than nine

and preserving their community's desire for healthy, peaceful, and beautiful surroundings with the economic pressures of growth and the need for an adequate revenue base. Unfortunately, important constitutional rights have been compromised by local efforts to control landowners' use of property in the belief "that the community should be beautiful as well as healthy, spacious as well as clean."[7]

"Regulatory takings," "exclusionary zoning," "inclusionary zoning," and "growth controls" are just some of the phrases that have developed as a result of constitutional clashes involving Fifth Amendment, Equal Protection Clause, and Due Process Clause rights.[8] First Amendment rights[9] also have suffered due to the nation's embrace of zoning as the vehicle of choice in the pursuit of America's dream community.[10] Although this author is not yet prepared to accept in its entirety the common law property rights system, or so-called "laissez faire distribution of property rights,"[11] this Article will attempt "to clip the wings of zoning authorities"[12] in the area of First Amendment rights.[13]

Tapering local government regulation in First Amendment territory is particularly crucial in light of recent Supreme Court decisions that threaten to eviscerate constitutional concepts of free speech and free exercise of religion by ignoring constitutional protections against content-neutral infringements on First

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thousand municipalities wielded zoning authority, and by 1973, nearly 97% of all cities with a population greater than five thousand had added zoning to their police power arsenal. *See id.*

7. Berman v. Parker, 348 U.S. 26, 33 (1954).

8. *See, e.g.*, Suitum v. Tahoe Reg'l Planning Agency, 117 S.Ct. 1659 (1997); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Pennell v. City of San Jose, 485 U.S. 1 (1988); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

9. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

10. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (upholding content-neutral, generally applicable regulations); Renton v. Playtime Theatres, 475 U.S. 41 (1985) (approving a "secondary effects" analysis).

11. Ellickson, *supra* note 6, at 684.

12. Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong With Euclid*, 5 N.Y.U. ENVTL. L.J. 277, 290-91 (1996).

13. *See id.*; *see also* Richard A. Epstein, Address at New York University School of Law (Apr. 25, 1995).

Amendment rights.[14] Some Justices' recent positions on this issue clash with the older view that there exists "a deep tradition in First Amendment law that government may not escape scrutiny of its attempts to suppress speech merely by labeling its action as neutral regulation; it is the operation and effect of government action, not its form, that matters."[15] The contrary position, championed by Justice Scalia, disregards burdens placed on First Amendment rights by generally applicable, content-neutral regulations, and is an open call to local officials to implement, without reproach, the local community's concept of creating "a sanctuary for people,"[16] at the expense of property rights and minority viewpoints.[17] Somewhat ironically, Justice Scalia expressed concern in *Lucas v. South Carolina Coastal Council*[18] that state legislators "must do more than proffer the legislature's declaration that the uses [a landowner] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*."[19] This concern applies with equal, if not greater, force to land use decisions impacting First Amendment rights.[20] "Instead, as [they] would be required to do if [they] sought to restrain [a landowner] in a common-law action for public nuisance,[21] [local officials] must identify background principles of

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14. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572-81 (1990) (Scalia, J., concurring) (stating that laws affecting free speech will implicate the First Amendment only if such laws represent an attempt to suppress speech); *Smith*, 494 U.S. at 882 (stating that laws which infringe on religious practices will not violate the First Amendment unless such laws represent an attempt to regulate religious practices); *see also* Elliott Mincberg, *A Look at Recent Supreme Court Decisions: Judicial Prior Restraint and the First Amendment*, 44 HASTINGS L.J. 871, 875 (1993) (stating that Justice Scalia's theory that the First Amendment does not apply to legislative actions not intended to affect free speech rights "is an extremely dangerous view that ignores the special status of religion, speech, and the press under the First Amendment").

15 G. & A. Books, Inc. v. Stern, 604 F. Supp. 898, 901 (S.D.N.Y. 1985) (citing Near v. Minnesota *ex rel.* Olson, 283 U S. 697, 708 (1931)), *aff'd*, 770 F.2d 288 (2d Cir. 1985).

16 Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

17. *See Smith*, 494 U.S. at 872 (Scalia, J., delivering the majority opinion).

18. 505 U.S. 1003 (1992).

19 *Id.* at 1031.

20 *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (noting that "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position" to economic interests); *see also id.* at 121 (Reed, J., dissenting) ("None of the provisions of our Constitution is more venerated by the people or respected by legislatures and the courts than those which proclaim for our country the freedom of religion and expression.").

21. Note that the declaration that a particular use is a public nuisance has been deemed a

nuisance and property law that prohibit the uses [the landowner] intends in the circumstances in which the property is presently found."[22] Some may argue that background principles of nuisance law would not prohibit, for example, a landowner from building a house on his or her own property, but would prohibit pornography or nude dancing. However, just as local officials historically have used public nuisance statutes to protect flood plains, the First Amendment historically has protected pornographic and adult activities.[23]

To facilitate the tapering of local government regulation, this Article proposes that, as a matter of constitutional policy, the courts should analyze zoning as a prior restraint when the challenged regulation has the potential to impact First Amendment rights.[24] Zoning actions invalidated by the Court as prior restraints can then be adjudicated as common law nuisance actions that address those actual harms caused by the alleged offending land use activities. Admittedly, this proposal turns current constitutional jurisprudence "on its head." However, if courts can use "secondary effects"[25] to give less protection to "lower-level" forms of expression, such as adult uses and commercial visual blight, then why shouldn't courts use the doctrine of prior restraint to give an extra level of protection to "higher-level" First Amendment rights, such as religious exercise?

Resolving the conflict between First Amendment rights and government's fundamental concerns of "public health and safety, public peace and order, defense,"[26] and revenue-raising requires

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prior restraint. *See* Vance v. Universal Amusement Co., 445 U.S. 308, 316 (1980) (deeming a prior restraint a Texas statute that designated as a public nuisance the display of any films by an adult theatre that had formerly displayed obscene films). Therefore, any action for nuisance, either private or public, must be brought only after the offending conduct has occurred.

22. *Lucas*, 505 U.S. at 1031.

23. *See* Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 344-52 (1995); *see also*, Janis Searles, *Sexually Explicit Speech and Feminism*, 63 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 471, 475 (1994) (analyzing First Amendment protection for pornography, and adult or erotic establishments).

24. This Article will focus on the First Amendment rights of religious exercise, freedom of speech and expression, and freedom of association. This Article does not address the Establishment Clause.

25. "Secondary effects" is the phrase used to describe those unwanted activities at which government regulation is aimed to justify the restriction of First Amendment rights. *See infra* notes 126-29 and accompanying text.

26. J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969); *see also* Employment Div. v. Smith, 494 U.S. 872, 910 (1990) (Blackmun, J.,

careful balancing.[27] While the government traditionally has great latitude in land use planning,[28] in a clash between government regulation and constitutional rights, the courts, and indeed regulating governments, must give ample weight to those rights protected by the Bill of Rights.[29] Indeed, some advocate that where a conflict exists

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dissenting); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) ("Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.").

27. Benjamin Franklin once said, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." JOHN BARTLETT, BARTLETT'S FAMOUS QUOTATIONS 227 (Morley & Everett eds., 1951).

28. *See* G. & A. Books, Inc. v. Stern, 604 F. Supp. 898, 901 (S.D.N.Y. 1985) ("it has long been settled that the political branches of government have broad latitude in land use planning") (citing Berman v Parker, 348 U.S. 26 (1954)), *aff'd*, 770 F.2d 288 (2d Cir. 1985); *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) ("[A] city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.").

29 *See* West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 638 (1943). The *Barnette* Court stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id, *see also* Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part) ("Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens."); 815 Foxon Road, Inc. v. Town of East Haven, 605 F. Supp. 1511, 1516 (D. Conn. 1985) ("Municipalities may regulate land use, but they may not regulate the exercise of First Amendment rights.") (citing Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977)); *G. & A. Books, Inc.*, 604 F. Supp. at 901 (stating that deference to local government for planning and achieving land use goals "must give way in the face of a substantial claim of infringement on a constitutionally protected right"); *id.* at 908 (stating that "the traditional deference which federal courts must accord to legislative and executive judgments regarding land use is inappropriate when First Amendment Values are implicated") (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), *and* Berman v. Parker, 348 U.S. 26, 75 (1954)). *But see* Metromedia, Inc. v. City of San Diego, 453 U S 490, 550 (1981) (Stevens, J., dissenting) ("I believe a community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interests in uninhibited expression by means of words and pictures in public places."); *Young*, 427 U.S. at 80 (Powell, J., concurring). In his concurrence in *Young*, Powell argued that while

> no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas

between the police power and First Amendment rights, the constitutional considerations must outweigh the fundamental right of a community to protect the public good.[30]

The conflict between zoning and First Amendment rights has been particularly troublesome to resolve because of the factual settings in which these conflicts have arisen. For example, many of the zoning activities that have generated free speech concerns have involved nude dancing, adult movies or bookstores, and commercial blight, such as billboards and advertising pamphlets. Admittedly, it would be a difficult decision to march our children "off to war to preserve the . . . right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[31] Nevertheless, the issue in the zoning context is whether or not we will permit such a theater to be located in our community. This author appreciates the opportunity to live in a community unafflicted by visual blight, but does not wish to have local officials threaten or restrict either her First Amendment[32] or Fifth Amendment[33] rights in order to achieve such a community.

Clashes between zoning authorities and religious uses have also become more prevalent as our society has moved from a relatively homogeneous Christian society to a community that encompasses diverse religious beliefs. As our religious base has diversified, local authorities have increased the "content-neutral" prohibitions against religious exercise in the community.[34] Nevertheless, as members of a

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of a city, is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."

Id. (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

30. *See, e.g., Schad*, 452 U.S. at 77 (Blackmun, J., concurring) ("[The] presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment."); St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935, 938 (N.J. Super. Ct. App. Div. 1983) ("Regardless of how the City's zoning ordinance is construed, a municipality may not exercise its zoning power in violation of the fundamental tenets of the First Amendment."); American Friends of the Soc'y of St. Pius, Inc. v. Schwab, 417 N.Y.S.2d 991, 994 (N.Y. App. Div. 1979).

31. *Young*, 427 U.S. at 70.

32. For example, local officials should not have the power to deny a citizen the right to conduct a weekly Bible class in her home.

33. For example, local officials should not have the power to prohibit a citizen from building a house on her property in order to preserve an aesthetically-pleasing open space zone.

34. Clashes between zoning authorities and religious groups commonly have involved

democratic society, we must recognize that our commitment to First Amendment freedoms is tested the most when unpopular, unfamiliar, distasteful, or obnoxious uses present themselves for protection.[35] Decision-makers, both legislative and judicial, must give First Amendment rights the high level of deference that they deserve in zoning conflicts. The same judges that find impermissible under the Fifth Amendment any legislative action that forces a landowner to bear the burden of society's determination of what constitutes beneficial legislation must also be mindful of any legislative action that impacts, even if unintentionally, the exercise of First Amendment rights.[36]

Commentators generally accept that the Court's decision to uphold the constitutionality of zoning in *Euclid*[37] was motivated, to a large extent, by the economic and quality-of-life advantages that inhere to the privileged class of single-family homeowners through their ability to obviate nuisance-like activities by controlling land use.[38] Justice Sutherland, initially an opponent of the governmental

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Jehovah's Witnesses, Orthodox Jews, and Hari Krishnas. *See, e.g.*, Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F 2d 293 (5th Cir. 1988); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983); Columbus Park Congregation of Jehovah's Witnesses, Inc. v. Board of Appeals of Chicago, 182 N.E.2d 722 (Ill. 1962); Bethel Evangelical Lutheran Church v. Village of Morton, 559 N.E.2d 533 (Ill. App 1990); Allendale Congregation of Jehovah's Witnesses v. Grosman, 152 A.2d 569 (N.J. 1959), Burlington Assem. of God Church v. Zoning Bd. of Florence, 570 A.2d 495 (N.J. Super. Ct Law Div. 1989); Lakewood Residents Assoc. v. Congregation Zichron Schneur, 570 A.2d 1032 (N.J. Super. Ct. Law Div. 1989); Jehovah's Witnesses v. Woolwich Township, 537 A.2d 1336 (N.J. Super. Ct. App Div. 1988); Apostolic Holiness Church v. Zoning Bd. of Appeals of Babylon, 633 N.Y.S.2d 321 (N Y. App. Div. 1995).

35 *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U S. 1, 137 (1961) (Black, J., dissenting) ("I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."); United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."), *overruled by* Girouard v. United States, 328 U.S. 61 (1946); International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 447 (2d Cir 1981) ("The unpopular traditions, practices, and doctrines of alien religions need not receive our approval or support, but must be tolerated if our freedoms are to be preserved.").

36. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Pennell v. City of San Jose, 485 U.S. 1, 15-24 (1988) (Scalia, J., concurring in part and dissenting in part).

37. 272 U.S. 365 (1926).

38. *See* SEYMOUR TOLL, ZONED AMERICAN 196-97 (1969); Kenneth Baar, *The National*

regulation of property rights, delivered the decision that paved the way for the proliferation of local zoning ordinances.[39] His statements that "very often the apartment house is a mere parasite,"[40] and, "[in some environments,] apartment houses . . . come very near to being nuisances"[41] suggest his aversion to those land uses that were unfamiliar and threatening to his concept of a residential neighborhood. In all likelihood, it was Sutherland's anticipation of nuisances from these "parasites" that motivated him to depart from his conservative stance against legislative activity.[42]

This Article proposes that we return to the fork in the road at the *Euclid* signpost and limit or entirely restrict the use of zoning when it interferes with First Amendment rights beyond a de minimis amount.[43] Instead, courts and regulators should employ the common law nuisance theory, the ring that Sutherland grabbed to support proactive zoning authority,[44] to reactively control land use activities involving an exercise of First Amendment rights. This Article does not suggest that we discontinue zoning regulation in areas affecting First Amendment rights. Rather, this Article proposes a constitutional policy of using an analytical framework for zoning regulation that may effectively achieve the same purpose.[45]

Movement to Halt the Spread of Multifamily Housing, 1890-1926, 58 J. AM. PLAN. ASS'N 39 (1992); Abigail T. Baker, Book Note, 30 U. RICH. L. REV. 1093, 1094 (1996) (reviewing Charles M. Haar's book, *Suburbs Under Seige: Race, Space and Audacious Judges*).

39. *See* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (1951).

40. *Euclid*, 272 U.S. at 394.

41. *Id.* at 395.

42. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 560-61 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). One can only speculate whether the Court's decision in *Euclid* would have been different if the zoning scheme operated to exclude traditional houses of worship from residential areas.

43. *But see* Kimberly K. Smith, Comment, *Zoning Adult Entertainment: A Reassessment of* Renton, 79 CAL. L. REV. 119, 120 (1991) (arguing that "the Supreme Court's relaxed scrutiny of adult-use zoning ordinances is justified because such regulations pose less risk of censorship than other types of content-based speech restrictions").

44. *See Euclid*, 272 U.S. at 387 ("In solving doubts [as to the justification for using police power for public welfare], the maxim *sic utere tuo ut alienum non laedas* which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew.").

45. *See* Jefferey S. Trachtman, Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478, 1501 (1983) (noting that because only extraordinary and compelling state interests that cannot be served by less

This new framework requires the use of the doctrine of prior restraint. Some have viewed this as "a doctrine 'showing signs of age' and having 'outlived its usefulness.'"[46] The Supreme Court recently revitalized this doctrine, however, in *FW/PBS, Inc. v. City of Dallas*[47] by invalidating a business licensing scheme as an unconstitutional prior restraint on protected speech.[48] If zoning actions, either legislative or administrative, are viewed as prior restraints when they potentially affect First Amendment rights, they will be subject to a heavy presumption against constitutionality.[49] Such restraints may only be justified if they: (1) fall into one of the narrowly defined exceptions to the prohibition against prior restraints; (2) prevent "direct, immediate and irreparable damage"; (3) are the least restrictive means of doing so; and (4) meet required procedural safeguards.[50] If a litigant attempts to justify a prior restraint under this test, a court may apply as it deems appropriate either a content-based strict scrutiny standard or a content-neutral time, place, or manner analysis. Use of the prior restraint doctrine will invalidate many of the zoning actions that courts have allowed to restrict individuals' First Amendment rights under rational basis and content-neutral analyses. Moreover, the doctrine will require communities to use common law nuisance actions to address any secondary effects that result from disputed uses.[51]

Part II of this Article discusses the prior restraint doctrine and its

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restrictive means will justify prior restraints, a court determination that a government action is a "prior restraint[] virtually amounts to a determination of [its] unconstitutionality").

46. Steven Helle, *Prior Restraint by the Backdoor: Conditional Rights*, 39 VILL. L. REV. 817, 817 (1994) (quoting Jeffrey A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 440 (1987), *and* Note, *Prior Restraint — A Test of Invalidity in Free Speech Cases?*, 49 COLUM. L. REV. 1001, 1006 (1949) [hereinafter *A Test of Invalidity*]).

47. 493 U.S. 215 (1990).

48. *See id.* at 229.

49. *See* Trachtman, *supra* note 45, at 1501 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

50. *See* Bernard v. Gulf Oil Co., 619 F.2d 459, 473-74 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981).

51. *See* G. & A. Books, Inc. v. Stern, 604 F. Supp. 898, 901 (S.D.N.Y. 1985) ("It is a deep tradition in First Amendment law that government may not escape scrutiny of its attempts to suppress speech merely by labeling its action as neutral regulation; it is the operation and effect of government action, not its form, that matters.") (citing Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 708 (1931)), *aff'd*, 770 F.2d 288 (2d Cir. 1985).

application to the zoning context. Part III examines the application of this doctrine to the rights of free speech and expression. Part IV considers the operation of the prior restraint doctrine as a guard against infringements of religious exercise, while Part V reviews the use of the prior restraint doctrine to protect associational rights. Part VI explores the impact of using a common law nuisance theory instead of zoning regulations as a means of land use control over protected First Amendment activities and includes a discussion of economic theories that support this method of land use control. This Article concludes by summarizing a proposed approach to land use control that will require courts and legislatures to put our First Amendment rights ahead of the majoritarian ideals of "open spaces and attractive surroundings."[52]

II. ZONING ACTIONS AND THE PRIOR RESTRAINT DOCTRINE

A. The Prior Restraint Doctrine

The prior restraint doctrine restricts the government from suppressing expression before it has been communicated, even though such expression may be subject to punishment after dissemination.[53] This doctrine finds its roots in sixteenth-century England where the Crown required royal sponsorship of printing as a means of restraining access to the medium of printed expression.[54] During the seventeenth and eighteenth centuries, in both England and America, licensing acts served as a system of prior restraint similar to the system used in sixteenth-century England.[55] Licensing acts restrained the publication of seditious and heretical books and

52. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

53. *See* Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1983) ("Under the prior restraint doctrine, the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination."); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 245 (1982) ("The prior restraint doctrine precludes, except in certain limited circumstances, state-imposed restraints with respect to the publication of speech.")

54. *See* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650 (1955).

55. *See id.*

pamphlets as well as unlicensed material not approved by the government printing monopoly.[56] For various reasons, this system of licensing laws dissolved during the eighteenth century, and freedom of the press assumed the status of a common law or natural right.[57] It was in this setting that the Framers drafted and adopted the First Amendment, which was designed to prevent the development in America of a prior restraint system such as the licensing acts in England.[58]

The United States Supreme Court first recognized prior restraint as a constitutional principle in the 1931 case of *Near v. Minnesota* ex rel. *Olson*.[59] In *Near*, the Court invalidated as a prior restraint a statute that provided for the "abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.'"[60] The Court made clear that its interpretation and application of the prior restraint doctrine was not based on narrow historical precedent.[61] The Court applied the doctrine to a modern problem based on the statute's "operation and effect."[62] Unfortunately, the Court did not express clearly its conception of a prior restraint or provide guidelines as to when the doctrine properly should be used. As a result, various commentators and judges have expressed widely varying opinions about when, how, and even whether the doctrine should be applied.[63]

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56. *See id.* at 650-51

57 *See id.* at 651. Blackstone summarized the law as follows:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Id. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52).

58. *See id.* at 652.

59 283 U.S. 697 (1931).

60. *Id.* at 701-02 (quoting 1925 Minn. Laws 285).

61 *See* Emerson, *supra* note 54, at 654-55.

62. *Id* at 655 (quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 708 (1931)).

63. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 51 (1976) (holding that a city zoning ordinance prohibiting an adult movie theater from locating within one thousand feet of any two other regulated uses was not a prior restraint); 754 Orange Ave., Inc. v. City of West Haven 761 F 2d 105 (2d Cir. 1985) (holding that a zoning ordinance regulating

Perhaps the most effective approach to understanding the underpinnings and application of the prior restraint doctrine was outlined by Thomas Emerson in his 1955 article entitled *The Doctrine of Prior Restraint*.[64] Professor Emerson concluded that "in a democratic society, such as ours, a system of prior restraint based upon executive approval will operate as a greater deterrent to free expression and cause graver damage to fundamental democratic rights than a system of subsequent punishment."[65] If prior restraint is viewed as "not simply an arbitrary historical accident, but a rational principle of fundamental weight in the application of the First Amendment,"[66] then we may employ such a doctrine as a vibrant defense against government regulation that constrains our First Amendment freedoms. Zoning legislatively restricts in advance activity that may be protected under the First Amendment and, at times, administratively requires prior approval of First Amendment exercise in the form of special or conditional use permits. Thus, zoning regulations that are designed to prevent offenses—such as secondary effects that rise to the level of a nuisance—are a classic example of a restraint based upon executive approval, in the form of zoning action, rather than subsequent punishment, in the form of a common law nuisance action.

Commentators also have equated the intellectual foundation for the doctrine against prior restraint with the libertarian principles of: "(1) distrust of government; (2) acceptance of the risk inherent in

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adult bookstores was an unconstitutional prior restraint); Emerson, *supra* note 54, at 670-71 (advocating application of the rule to all areas of expression, with certain exceptions, to address dangerous situations arising today from "growing pressures for preventive controls over many forms of expression"); Helle, *supra* note 46, at 877 (proposing application of the doctrine to an explicit ban on abortion counseling at federally funded family planning clinics and lamenting that "[i]f a Supreme Court majority does not develop an appreciation for the richly nuanced harmonics of the First Amendment in our constitutional scheme and of the doctrine against prior restraint in cases of conditioned speech rights, then the doctrine, like Mozart's grave, may be lost"); John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 434 (1983) (suggesting that "the conventional doctrine of prior restraint should be retired from active service in First Amendment adjudication"); Smith, *supra* note 46, at 449 (describing the doctrine as "showing signs of age"); *A Test of Invalidity*, *supra* note 46, at 1006 (describing the doctrine as having "outlived its usefulness").

64. Emerson, *supra* note 54.

65. *Id.* at 660.

66. *Id.*

speech; and (3) individual autonomy from government."[67] The third principle particularly "reflects the belief of the framers of the Constitution that exercise of [fundamental personal] rights lies at the foundation of free government by free men"[68] and that the restriction of these rights and liberties should be prevented. Commentators and courts have debated vigorously the *raison d'être* for the prior restraint doctrine when judicial prior restraints on expression appear to be no more harmful to First Amendment interests than subsequent punishment systems.[69] However, as Professor Redish adroitly concluded,[70] "administrative restraints present problems unique to prior restraints and therefore should continue to receive the special disdain of the prior restraint doctrine."[71]

According to the Supreme Court, "the term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'"[72] General zoning regulations that forbid certain uses protected by the First Amendment—religious worship, nude dancing, or adult bookstores—operate as prior restraints because they regulate constitutionally protected activity in advance of its occurrence. This Article proposes a constitutional policy that recognizes the ability of zoning regulation to chill protected First Amendment activity, but does not expand the prior restraint doctrine beyond the Court's First Amendment jurisprudence. The Court has adopted a broader interpretation of the term "prior restraint" than was used in English common law, but it continues to recognize the distinction between prior restraints and subsequent punishments.[73] The policy proposed here also recognizes this distinction by treating zoning restrictions as prior restraints and

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67. Helle, *supra* note 46, at 835.

68. *Id.*

69. *See* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage,* 66 MINN. L. REV. 11, 13-14 (1981) (examining the validity of analogizing injunctions and administrative licensing systems for purposes of prior restraint analysis); Smith, *supra* note 46, at 444-46.

70. Redish, *supra* note 53, at 90.

71. *Id*

72. Alexander v. United States, 509 U.S. 544, 550 (1993) (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984)).

73. *See id.* at 553-54.

substituting nuisance law as a valid subsequent punishment that incidentally may affect First Amendment rights.

B. Zoning as a Prior Restraint and the Exceptions that Justify Restraint

Zoning actions, either legislative or administrative, are prior restraints when they unconstitutionally abridge First Amendment rights because "the constitutional right to freedom of expression can be abridged only in the presence of a truly compelling governmental interest and . . . only an independent judicial forum can adequately decide whether particular expression is unprotected by the First Amendment."[74] Allowing local governments to prohibit, segregate, or otherwise designate the proper location of certain land uses, either by regulation or by special exception, presents the danger of permitting local officials to discriminate against constitutionally protected activities by reference to "viewpoint-neutral criteria such as potential parking, noise, and litter problems,"[75] particularly when local officials are inclined to stretch such concepts to disallow a particular land use that might be controversial and "offensive to the politics or sensibilities of some citizens."[76] Indeed, in *Schad v. Borough of Mount Ephraim*,[77] Chief Justice Burger declared in his dissenting opinion that "[c]itizens should be free to choose to shape their community so that it embodies their conception of the 'decent life.'"[78] Burger declared that this should be the case even if it means that certain activities such as gas stations, bookstores, and "surely live nude shows [] will not be allowed."[79] Burger's statements seem to contradict directly the concept of protecting fundamental constitutional rights against majoritarian infringement and, thus, further illustrate the danger of "content-neutral" zoning discrimination.

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74. Redish, *supra* note 53, at 77.

75. TJ's South, Inc. v. Town of Lowell, 895 F. Supp. 1124, 1130 (N.D. Ind. 1995) (holding that a town ordinance requiring an eating-and-drinking establishment to obtain a special exception before presenting entertainment is unconstitutional as a prior restraint).

76. *Id.*

77. 452 U.S. 61 (1981).

78. *Id.* at 87 (Burger, C.J., dissenting).

79. *Id.*

Once zoning actions that impact First Amendment rights are viewed as prior restraints, they come to the courts with a "heavy presumption" against constitutional validity.[80] This presumption follows from the doctrine's concern with the nature and form of governmental regulation, rather than the "content or substantive character of the particular expression."[81] The doctrine thus prohibits, or creates a strong presumption against the legality of, schemes that have the potential to permit suppression of rights protected by the First Amendment.[82] However, as described in Part I,[83] prior restraints may be constitutional if they: (1) fall into one of the narrowly defined exceptions to the prohibition; (2) prevent "direct, immediate and irreparable damage"; (3) are the least restrictive means of doing so; and (4) meet the required procedural safeguards.[84] The exceptions to the general prohibition against prior restraints were identified by the Court in the landmark prior restraint case *Near v. Minnesota* ex rel. *Olson*[85] and include: "wartime publication of sensitive military information, obscenity, and 'incitement to acts of violence.'"[86] The Court created an additional potential exception in *Nebraska Press Ass'n v. Stuart*[87] for prior restraints that might operate to preserve a defendant's Sixth Amendment right to a fair trial.[88] Nevertheless, the Court in *Nebraska Press Ass'n* reaffirmed that "the barriers to prior restraint remain high and the presumption against its use continues

80. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

81 Redish, *supra* note 53, at 53.

82. *See* New York State Ass'n of Career Schs. v. State Educ. Dep't, 823 F. Supp. 1096, 1099 (S.D.N.Y. 1993) (citing New York State Ass'n of Career Schs. v. State Educ. Dep't, 749 F. Supp. 1264, 1272 (S.D.N.Y. 1990)).

83 *See supra* note 50 and accompanying text.

84. *See* Bernard v. Gulf Oil Company, 619 F.2d 459, 473-74 (5th Cir. 1980), *aff'd*, 452 U.S 89 (1981).

85. 283 U.S. 697 (1931).

86. Laura M. Grover, Casenote, *The Twilight Zone of Prior Restraint*, 14 HAMLINE L. REV 379, 385-86 (1991) (quoting *Near*, 283 U.S. at 716); *see also* Emerson, *supra* note 54, at 660-61.

87. 427 U.S. 539, 562 (1976).

88 *See id.* (employing a balancing test to determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger") (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)), *see also* LEARNED HAND, THE BILL OF RIGHTS 58-61 (1958).

intact."[89] Courts have maintained such high barriers to prior restraint by requiring that there be "an imminent, not merely a likely, threat to the administration of justice"[90] and that such threats immediately imperil society.[91]

Even if prior restraints fall into one of the above-described exceptions and prevent an imminent threat, they must also be "narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms."[92] In addition, any prior restraint must meet "procedural safeguards designed to obviate the dangers of a censorship system."[93] These safeguards require: (1) that the regulators prove that the affected rights are unprotected under the First Amendment; (2) that the restraint is limited to a preservation of the status quo for the shortest period that comports with sound judicial procedure; and (3) that a prompt final judicial determination of nonprotection be made.[94]

Much of the focus in the application of the prior restraint doctrine has centered on freedom of expression issues, most likely because of the doctrine's historical roots in the licensing acts controversy.[95] However, the fundamental principle that "the First Amendment forbids the Federal Government to impose any system of prior restraint, with certain limited exceptions, in any area of expression that is within the boundaries of that Amendment"[96] can be applied with equal force to prior restraints on the free exercise of religion and

89. 427 U.S. at 570.

90. Craig v. Harney, 331 U.S. 367, 376 (1947); *accord* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978); Wood v. Georgia, 370 U.S. 375, 385 (1962); Dennis v. United States, 341 U.S. 494, 532 (1951) (Frankfurter, J., concurring); United States v. Columbia Broad. Sys., Inc., 497 F.2d 102, 104 (5th Cir. 1974); *see also* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("Only an emergency can justify repression."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

91. *See Craig*, 331 U.S. at 376.

92. CBS, Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975) (citing Carroll v. President and Comm'r of Princess Anne, 393 U.S. 175, 183 (1968)).

93. Freedman v. Maryland, 380 U.S. 51, 58 (1965).

94. *See Freedman*, 380 U.S. at 58-59. *But cf.* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 228-30 (1990) (distinguishing factually the *Freedman* case to apply less strict procedural safeguards).

95. *See generally* Emerson, *supra* note 54, at 650-55.

96. *Id.* at 648 (noting that the same limitations apply to the states "[b]y incorporating the First Amendment in the Fourteenth").

the rights of assembly, petition, and association.[97] Given the recent strains on our system of protecting the civil liberties of the American people[98] and the necessity for religious institutions to respond to the societal ills of homelessness, drug-abuse, and the disintegration of the family unit, there never has been a greater need to reaffirm our commitment to preserving First Amendment freedoms against unrestrained government regulation.

III. PRIOR RESTRAINTS ON FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT

The government can abridge freedom of speech[99] in two ways. First, the government may adversely target speech because of its message or viewpoint.[100] Alternatively, the government may target the effect that speech produces, regardless of its message or viewpoint.[101] When the government restricts speech in the first way, a content-based infringement, the restriction is unconstitutional unless the government can show that "the message being suppressed poses a

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97. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969) (stating that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"); Niemotko v. Maryland, 340 U.S. 268, 271 (1951). The *Niemotko* Court, summarizing previous cases involving unconstrained government discretion over speech and related activities, stated:

> In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid.

Id.

98. *See, e.g.*, City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (holding that the Religious Freedom Restoration Act is unconstitutional as applied to state and local governments).

99. For the purposes of this Article, the term "freedom of speech" will include all freedoms, other than those relating to religion and association, that are protected from government interference under the First Amendment. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785 n.2 (2d ed. 1988) (using freedom of speech as shorthand for these freedoms).

100. *See id.* § 12-2, at 789-90.

101. *See id.* (referring to these abridgments as "government actions *aimed at communicative impact*" and "government actions *aimed at noncommunicative impact*" having "adverse effects on communicative opportunity").

'clear and present danger,' constitutes a defamatory falsehood,"[102] or otherwise falls outside the protection of the First Amendment.[103] When the government restricts speech in the second way, a content-neutral abridgement, the restriction is constitutional "so long as it does not unduly constrict the flow of information and ideas."[104] Courts determine on a case-by-case basis whether a restriction of this second type properly balances the "values of freedom of expression and the government's regulatory interests."[105] In contrast to the balancing test that courts apply to content-neutral abridgment, courts take an "absolutist" approach to content-based abridgements, prohibiting virtually all such instances of abridgment.[106] Courts have adapted this "two track"[107] constitutional analysis to zoning cases that involve First Amendment infringement claims by applying strict scrutiny[108] to content-based regulations,[109] and the *O'Brien* test,[110] the *Central Hudson* test,[111] or a similar balancing analysis[112] to content-neutral regulations.[113]

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102. *Id.* at 791-92.

103. *See id.*

104. *Id.* at 792.

105. *Id.*

106. *See id.*

107. *Id.*

108. A regulation subjected to strict scrutiny "can be upheld only if it furthers a compelling governmental interest by the least restrictive means available." Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2429 (1996).

109. *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 148 (1992) (citing Simon & Schuster, Inc. v. Members of the N.Y. Crim. Victims Bd., 502 U.S. 105, 117-19 (1991); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657-61 (1990); *and* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 576 (1991)).

110. *See* United State v. O'Brien, 391 U.S. 367, 377 (1968); *see also* Andrew E. Forshay, Note, *The First Amendment Becomes a Nuisance*, 37 CATH. U. L. REV. 191, 203 (1987).

111. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

112. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (stating that the *O'Brien* test is essentially the same standard as that applied to time, place, and manner restrictions).

113. *See* Excalibur Group, Inc. v. City of Minneapolis, 116 F.3d 1216, 1220 (8th Cir. 1997); Kuznich v. County of Santa Clara, 689 F.2d 1345, 1347-48 (9th Cir. 1982); Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497, 504 (7th Cir. 1980); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 825-26 (4th Cir. 1979); Bad Frog Brewery, Inc. v. New York State Liquor Auth., 973 F. Supp. 280, 283 (N.D.N.Y. 1997), *modified*, 134 F.3d 87 (2d Cir. 1998); Wilson v. City of Louisville, 957 F. Supp. 948, 951 (W.D. Ky. 1997); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1226-27 (N.D. Ga. 1981); Borrago v. City of Louisville,

Under the content-neutral *O'Brien* test, courts will uphold as constitutional a regulation that incidentally infringes on protected speech if it is "within the constitutional power of the Government,"[114] if it serves "an important or substantial governmental interest,"[115] if that interest is "unrelated to the suppression of free expression,"[116] and if the protected speech is abridged "no greater than is essential to the furtherance of that interest."[117] Under the *Central Hudson* test, courts will conduct a four-part inquiry to determine the constitutionality of governmental restraints on commercial speech.[118] This test requires that: (1) the commercial speech concern lawful activity and not be misleading; (2) the restriction seek to implement a substantial governmental interest; (3) the restriction directly advance the substantial governmental interest; and (4) the restriction reach no further than necessary to accomplish the objective.[119] Finally, as an alternative to passing the *Central Hudson* or *O'Brien* tests, a content-neutral abridgement may be permissible under the First Amendment if it is a reasonable regulation of the time, place, and manner of protected speech, if it is "necessary to further significant governmental interests,"[120] and if it "leave[s] ample alternative

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456 F Supp. 30, 33 (W.D. Ky. 1978); Goldrush II v. City of Marietta, 482 S.E.2d 347 (Ga. 1997); City of Rochester Hills v. Shultz, No. 193500, 1997 WL 355318, at *2 (Mich. App. June 24, 1997) (per curiam); Hamilton Amusement Ctr., Inc. v. Poritz, 689 A.2d 201, 205 (N.J. Super. Ct. App. Div. 1997); Ino Ino, Inc. v. City of Bellvue, 937 P.2d 154, 168-69 (Wash. 1997), *modified*, 943 P.2d 1358 (Wash. 1997). *But see* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68-69 (1981) (citing *O'Brien* but not explicitly using the *O'Brien* test); Young v. American Mini Theatres, Inc., 427 U.S. 50, 79 (1976) (distinguishing *O'Brien* on the facts); Stephanie L. Bunting, Note, *Unsightly Politics: Aesthetics, Sign Ordinances, and Homeowners' Speech in* City of Ladue v. Gilleo, 20 HARV. ENVTL. L. REV. 473, 491 (1996) (arguing that the majority in *City of Ladue v. Gilleo* analyzed the zoning ordinance as a content-neutral restriction, but did not specifically articulate the traditional track-two formula).

114. *O'Brien*, 391 U S. at 377.

115. *Id.*

116. *Id.*

117 *Id.*

118. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981).

119. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

120. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (upholding a ban on the willful making of any noise on grounds adjacent to a school if such noise might disturb the good order of the school session); *see also* Cox v. Louisiana, 379 U.S. 559, 573 (1965) (upholding a ban on demonstrations in or near a courthouse with the intent to obstruct justice); Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (upholding a limitation on the use of sound trucks).

channels for communication."[121]

The conflict between zoning regulation and First Amendment protection has been especially keen when the Court classifies a content-based regulation as content-neutral.[122] The Court has justified such classifications on the basis that it must accord high respect to a "city's interest in attempting to preserve the quality of urban life"[123] or that the regulation targets those secondary effects anticipated to result from the regulated speech. The latter secondary effects analysis has been applied simplistically by both the Supreme Court and lower courts to uphold zoning regulations that operate as prior restraints on First Amendment freedom by restricting certain "offensive" uses prior to the occurrence of their anticipated adverse effects. For example, in *City of Renton v. Playtime Theatres, Inc.*,[124] the Court upheld a zoning ordinance that, on its face, discriminated against adult-use theaters.[125] The Court justified its holding on the basis that the ordinance was aimed at the secondary effects of such theaters on surrounding communities rather than at the content of the films.[126] This doctrine, as adopted in *Renton*, is one that "could gravely erode First Amendment protections."[127] Some courts have recognized this danger to First Amendment protections and have found that zoning that limits the activities of bookstores and movie theaters dealing in sexually oriented materials is an unconstitutional infringement of First Amendment rights, even if the ordinance was not enacted with

121. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980) (citing Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 93 (1977), *and* Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)).

122. *See Smith*, *supra* note 43, at 120 ("There can be little doubt that adult use zoning ordinances are content-based restrictions: they classify businesses based on the content of the material they sell.").

123. Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976).

124. 475 U.S. 41 (1986).

125. *See id.* at 54-55.

126. *See id.* at 47-48.

127. TRIBE, *supra* note 99, § 12-3, at 798-99 n.17 (noting that this doctrine "will likely prove to be an aberration limited to the context of sexually explicit materials"); *see also* David L. Hudson, Jr., *'Secondary Effects' Doctrine Is Fertile Ground for Abuse*, 147 N.J.L.J. 1347 (1997) (discussing Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997), in which city officials passed a restrictive zoning law against adult businesses without articulating any information about harmful secondary effects, possibly because they "passed the law not because of secondary effects, but out of a hostile desire to suppress free expression").

the intent to suppress constitutionally protected speech.[128] Indeed, "[v]irtually all governmental controls of expression are directed, not at the expression itself, but at the harm thought to result from engaging in it."[129]

In a recent case, the Supreme Court recognized the danger of applying the content-neutral approach it used in *Renton* to a regulation that restricted First Amendment rights based on content. In *FW/PBS, Inc. v. City of Dallas*,[130] the Court invalidated as a prior restraint a city ordinance that regulated adult entertainment and that did not provide the essential safeguards required for a system of censorship.[131] The Court did not distinguish *Renton*[132] or *Young v. American Mini Theatres, Inc.*,[133] two of its prior decisions upholding ordinances regulating adult uses, even though the Fifth Circuit had upheld the Dallas ordinance as a content-neutral time, place, and manner regulation under *Renton*.[134] Accordingly, the dissent noted that

> *Renton* and *Young* also make clear that there is a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them and that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral.[135]

As the dissent in *FW/PBS* demonstrates, certain members of the

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128. *See* Glenn Rudolph, Comment, *RICO: The Predicate Offense of Obscenity, The Seizure of Adult Bookstore Assets, and the First Amendment*, 15 N. KY. L. REV. 585, 601 (1988) (citing Bayside Enters., Inc. v. Carson, 450 F. Supp. 696, 702-03 (M.D. Fla. 1978), *and* Hart Book Stores, Inc. v. Edmisten, 450 F. Supp. 904, 907-08 (E.D.N.C. 1978)).

129. Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 472 (1980); *see also* Smith, *supra* note 43, at 127 (observing that commentators have noted that most restrictions on speech can be justified under "secondary effects" doctrine) (citing John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-1502 (1975)).

130. 493 U.S. 215 (1990).

131. *See id.* at 229.

132. 475 U.S. 41 (1986).

133. 427 U.S. 50 (1976).

134. *FW/PBS*, 493 U.S. at 222 (citing FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298, 1303 (1988)).

135. *Id.* at 244 (White, J., concurring in part and dissenting in part).

Court continue to support the "secondary effects" doctrine as a valid method of giving less First Amendment protection to offensive uses. These members of the Court would apply a "content-neutral" label to those regulations that specifically target the anticipated adverse effects of certain uses.[136]

The low value that society gives to both sexual speech[137] and commercial speech may justify attempts by the Court to balance the suppression of free expression against a locality's attempt to "protect the quality and character of community life."[138] However, the Court should acknowledge that this is lower-value speech deserving less protection, rather than using a lower level of scrutiny in zoning cases that impact higher-value speech.[139] One mechanism that the Court has used to retain constitutional protection for higher-level speech, while restricting lower-value speech, categorizes speech into intermediate levels deserving less protection.[140] Such categories include "commercial speech, near-obscene and offensive speech, non-obscene child pornography, defamation, and possibly the speech of public employees."[141] The danger with this categorization model of First Amendment analysis is that such "pigeonholing endangers the

136. The *FW/PBS* dissent further argued that the prior restraint doctrine applied in earlier cases was not applicable because "the ordinance does not regulate content and thus it is unlike the content-based prior restraints that this Court has typically scrutinized very closely." *Id.* at 246 (White, J., concurring in part and dissenting in part) (citing Vance v. Universal Amusement Co., 445 U.S. 308 (1980); National Socialist Party of Am. v. Skokie, 432 U.S. 43 (1977); Freedman v. Maryland 380 U.S. 51 (1965); *and* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931)).

137. *See* FCC v. Pacifica Found., 438 U.S. 726, 743 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976); *see also* Employment Div. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring) (discussing the greater deference shown by the courts to military and prison regulations that restrict speech); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (suggesting that "[c]onstitutional protection should be accorded only to speech that is explicitly political" and that "[t]here is no basis for judicial intervention to protect any other form of expression, be it scientific, literary, or that variety of expression we call obscene or pornographic").

138. TRIBE, *supra* note 99, § 12-19, at 947 (quoting HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 159 (1965)).

139. *But see* Smith, *supra* note 43, at 137-38 (endorsing a lower level of scrutiny for zoning regulations that impact First Amendment rights on the basis that the purposes for zoning relate to economics in the form of protecting property values, aesthetics, and regulatory efficiency, which "are probably not compelling interests").

140. *See* TRIBE, *supra* note 99, § 12-18, at 929-44.

141. *Id.* at 930.

pigeon: if one parses First Amendment doctrine too finely, one may soon discover that little protection for expression remains."[142] The counter-argument to this position is that if we too broadly protect offensive activities, we may inadequately protect community values. The rebuttal to this counter-argument, however, is that common law concepts of nuisance can be used to control, albeit after the fact, the adverse effects of the more offensive activities.

A. Regulation of Adult Uses

The regulation of adult uses in communities has produced, by far, the greatest number of First Amendment conflicts with zoning activity. The major Supreme Court cases in this area include *Young v. American Mini Theatres, Inc.*,[143] *Schad v. Borough of Mount Ephraim*,[144] *City of Renton v. Playtime Theatres, Inc.*,[145] and *FW/PBS, Inc. v. City of Dallas*.[146] In addition, the public nuisance and indecency cases of *Erznoznik v. City of Jacksonville*,[147] *Vance v. Universal Amusement Co.*,[148] *Arcara v. Cloud Books*,[149] and *Barnes v. Glen Theatre, Inc.*[150] have added to the development of First Amendment principles involving adult uses such as nude dancing, adult theaters, and adult bookstores.

1. Regulating Secondary Effects

In *Paris Adult Theatre I v. Slaton*,[151] the Supreme Court held that "a government interest may justify prohibiting an individual from

142. *Id.* at 943-44; *see also* Day, *supra* note 109, at 202 (calling for the abandonment of the speech-restrictive public forum doctrine which "premises the degree of judicial protection on generous presumptions about the intentions of government officials"); Smith, *supra* note 43, at 142-43 (advocating the use of the secondary effects doctrine for zoning cases, but recognizing the danger "that the doctrine may be used to justify more and more creative and oppressive restrictions on speech in the name of protecting the quality of life").

143. 427 U.S. 50 (1976).

144. 452 U.S. 61 (1981).

145. 475 U.S. 41 (1986).

146. 493 U.S. 215 (1990) (plurality opinion).

147. 422 U.S. 205 (1975).

148. 445 U.S. 308 (1980).

149. 478 U.S. 697 (1986).

150. 501 U.S. 560 (1991).

151. 413 U.S. 49 (1973).

using his property to display obscene materials."[152] This decision set the stage for the treatment of protected nonobscene speech in *Young v. American Mini Theatres, Inc.*[153] In *Young*, the Court specifically addressed an argument that ordinances prohibiting adult theaters from exhibiting adult films protected by the First Amendment are prior restraints on free speech.[154] The *Young* plurality dismissed the argument, however, reasoning that it could not invalidate a zoning regulation merely because material generally protected by the First Amendment is the subject of a zoning regulation.[155]

The Court found that the regulation of the location where adult films could be shown did not violate the First Amendment, even though it acknowledged that the ordinance treated adult theaters differently from general-audience theaters.[156] In addition, the Court recognized that the ordinance clearly was aimed at the content of the material shown in the respective theaters.[157] The plurality, however, rather than analyzing the ordinance as a content-based restriction on free expression,[158] justified the ordinance as a content-neutral reasonable time, place, and manner regulation of protected speech based on the city's inherent interest in regulating property for commercial purposes.[159]

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152. Shannon McLin Carlyle, Note, *Ban on Nude Dancing Strips Away First Amendment Rights to Protect "Order and Morality" in* Barnes v. Glen Theatre, Inc., 19 PEPP. L. REV. 1337, 1358 (1992) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-59 (1973)).

153. 427 U.S. 50 (1976).

154. *See Young*, 427 U.S. at 62.

155. *See id.*

156. *See id.* at 63.

157. *See id.*

158. The dissenting opinions of both Justice Stewart and Justice Blackmun noted that the content-based restrictions contained in the ordinance amounted to a prior restraint on the expression of material fully protected by the First Amendment. *See id.* at 84 (Stewart, J., dissenting); *id.* at 91 n.4 (Blackmun, J., dissenting).

159. *See id.* at 62; *see also supra* notes 122-36 and accompanying text (discussing the Court's common justifications for classifying seemingly content-based regulations as content-neutral).

Justice Powell's concurrence similarly applied the four-part *O'Brien* test and found that all four parts were met because: (1) the ordinance was within the police power of the city to preserve the character of specific areas of a city; (2) the interests of stable residential and commercial neighborhoods were furthered by the ordinance, which protected against urban deterioration; (3) the city did not intend to suppress free expression; and (4) the ordinance only impacted those adult establishments that had been shown to contribute to deterioration of surrounding areas. *See id.* at 79-82 (Powell, J., concurring).

Like the *Young* Court, the Court in *City of Renton v. Playtime Theatres, Inc.*[160] employed a misguided analysis to validate an ordinance that restricted the operation of adult theaters.[161] Recognizing that the Renton ordinance "does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category,"[162] the Court analyzed the ordinance as a content-neutral time, place, and manner regulation.[163] The Court explained that such an analysis was appropriate because the ordinance, in the Court's eyes, was aimed at the secondary effects of the adult theaters, not the content of the films.[164] In addition, the *Renton* Court distinguished the prior decisions of *Schad* and *Erznoznik*, which struck down content-based regulations, on the grounds that the ordinance in *Renton* was narrowly tailored to affect only those theaters that were likely to produce unwanted secondary effects.[165]

As a result of the *Young* and *Renton* decisions, cities are now effectively permitted to regulate adult theaters by either dispersing them or concentrating them.[166] As discussed above,[167] resorting to a secondary effects argument to justify content-based regulation will allow municipalities to restrict constitutionally protected expression without subjecting their regulations to strict judicial scrutiny.[168] By not requiring municipalities to prove under a strict scrutiny standard that they have established a narrowly tailored means of serving a compelling governmental interest, we are not able to "insure that cities will not use their zoning powers as a pretext for suppressing constitutionally protected expression."[169]

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160. 475 U.S. 41 (1986).
161. *See id.* at 48-49.
162. *Id.* at 46-47.
163. *See id.*
164. *See id.* at 49.
165. *See id.* at 52.
166. *See id.*
167. *See supra* notes 122-36 and accompanying text.
168. *See Renton*, 475 U.S. at 62 (Brennan, J., dissenting).
169. *Id.* (Brennan, J., dissenting). Justice Scalia confirmed that municipalities indeed have resorted to such a pretext in his dissenting opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (Scalia, J., concurring in part and dissenting in part). He lamented that some communities wishing to eliminate sexually oriented business in order to "prevent the erosion of public morality" have been unsuccessful at doing so because "focusing upon the individual books, motion pictures, or performances that these businesses market" will not be tolerated

2. Applying the Prior Restraint Doctrine to Adult Use Regulation

Zoning ordinances that restrict adult uses should be analyzed as prior restraints and invalidated unless they fall within one of the narrow exceptions and contain sufficient procedural safeguards.[170] The decision to classify an ordinance as either content-based or content-neutral should be made only when a court determines that the regulation is a permissible prior restraint. Otherwise, the regulation likely will be invalidated anyway based on the heavy presumption against such restraints on First Amendment rights.[171]

The use of the prior restraint doctrine in cases involving adult use regulations is supported by the Supreme Court's opinion in *Schad v. Borough of Mount Ephraim*.[172] In *Schad*, the Court invalidated a zoning ordinance that prohibited the exhibition of live dancing in a commercial zone.[173] The Court set aside the statutory imposition of criminal penalties against several bookstore owners who had displayed live nude dancing, finding that the complete exclusion of all live entertainment, including constitutionally protected nonobscene nude dancing, was unconstitutional, even as a time, place, and manner regulation.[174] Although the Court did not utilize the prior restraint doctrine, it noted the possibility for a successful overbreadth challenge based on the Mount Ephraim ordinance's prohibition against all "commercial production of plays, concerts,

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under the Court's stringent obscenity test which is "designed to avoid any risk of suppressing socially valuable expression." *Id.* at 251-52. Instead, Justice Scalia indicated, these "communities have resorted to a number of other means, including stringent zoning laws." *Id.* at 252 (citing Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), *and Renton*, 475 U.S. 41 (1986)). Justice Scalia admitted that "these oblique methods" are less than effective at eliminating "the perceived evil at which they are directed (viz., the very existence of sexually oriented business anywhere in the community that does not want them)." *Id.*

170. *See supra* notes 85-94 and accompanying text.

171. The Court has, in fact, used the prior restraint and overbreadth concepts to invalidate adult use ordinances without using either a content-based or content-neutral framework for appraising such ordinances. *See* FW/PBS, Inc. V. City of Dallas, 493 U.S. 215 (1990); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). In contrast to the content-neutral analysis of *Young* and *Renton*, the Court in both *Schad* and *FW/PBS* invalidated municipal ordinances aimed at adult entertainment.

172. 452 U.S. 61 (1981).

173. *See id.* at 62.

174. *See id.* at 76.

musicals, dance, or any other form of live entertainment."[175] Because overbreadth challenges involving First Amendment issues are quite similar in function and result to challenges under the prior restraint doctrine, the *Schad* decision supports the use of a prior restraint analysis in First Amendment zoning cases.[176] Consistent with this position, the *Schad* Court cautioned that zoning power is subject to judicial review and that the standard of review will be determined by the nature of the threatened right and not simply by the power being exercised or by the limitation being imposed.[177]

Going a step further than it did in *Schad*, a plurality of the Court in *FW/PBS, Inc. v. City of Dallas*[178] invalidated a Dallas licensing scheme that employed zoning restrictions to regulate sexually oriented businesses on the basis that it was an unconstitutional prior restraint on First Amendment speech.[179] In analyzing the Dallas licensing scheme, the Court substantially relied upon its earlier holding in *Freedman v. Maryland*.[180] The *Freedman* Court held that the burden of proving that a form of speech is not protected by the First Amendment lies with the party seeking to limit or ban the speech.[181] The *Freedman* Court further held that a scheme must allow for a judicial determination of whether the speech in question indeed is entitled to First Amendment protection.[182] Recognizing that "prior restraints are not unconstitutional per se,"[183] the *FW/PBS* Court scrutinized the procedural safeguards available in the Dallas licensing scheme and then determined that it was not necessary to examine the full list of procedural protections outlined in *Freedman*.[184] Examining

175. *Id.* at 66 (noting that the bookstore owners "are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own" in asserting their First Amendment claim).

176. *See* Michael L. Charlson, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 CAL. L. REV. 962, 981-82 (1984) (discussing the various criticisms of prior restraint as compared to overbreadth); Jeffries, *supra* note 63, at 433-34 (suggesting that the overbreadth doctrine replace the prior restraint doctrine).

177. *See Schad*, 452 U.S. at 68 (citing Thomas v. Collins, 323 U.S. 516, 529-30 (1945)).

178. 493 U.S. 215 (1990).

179. *See id.* at 229.

180. *See id.* at 223-30 (citing Freedman v. Maryland, 380 U.S. 51 (1965)).

181. *See Freedman*, 380 U.S. at 59.

182. *See id.*

183. *FW/PBS*, 493 U.S. at 225.

184. *See id.* at 228. *But see id.* at 239 (Brennan, J., concurring) (finding that all three of the

only the first two safeguards required by *Freedman*, that "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and [that] there must be the possibility of prompt judicial review in the event that the license is erroneously denied,"[185] the Court held that "the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity."[186]

Thus, by applying the doctrine of prior restraint to a zoning ordinance aimed at combating the secondary effects of adult entertainment[187] and by concluding that the Dallas scheme lacked adequate procedural safeguards,[188] the *FW/PBS* Court avoided the issue of whether the Dallas licensing scheme should be viewed as a content-neutral time, place, and manner restriction.[189] This Article's proposed framework for analyzing zoning ordinances that involve First Amendment rights is quite similar to the analytical structure used by the *FW/PBS* Court: (1) courts should label as a prior restraint the challenged zoning ordinance or licensing scheme; (2) if the restraint falls within one of the exceptions to the doctrine, such as obscenity, then courts should determine the restraint's constitutionality according to the procedural requirements of *Freedman*; and (3) if the procedural safeguards are sufficient, courts should analyze the restraint under either a content-based strict scrutiny analysis or the content-neutral *O'Brien* test (or a similar time, place, and manner test).

The Supreme Court has been relatively consistent in its treatment of First Amendment zoning cases by applying the *O'Brien* test, or an equivalent time, place, and manner test, rather than the prior restraint doctrine, to regulations that prohibit protected activities that allegedly generate offensive secondary effects. In contrast, as described below, several lower federal courts and state courts have followed the

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procedural safeguards identified in *Freedman* should be applied).

185. *Id.* at 228.

186. *Id.* at 229.

187. *See id.* at 225-30.

188. *See id.* at 229.

189. *See id.* at 223.

approach used in *Schad* and *FW/PBS* and have applied the prior restraint doctrine to invalidate zoning ordinances that impact First Amendment rights.[190] For example, in *Entertainment Concepts, Inc. v. Maciejewski*,[191] the Seventh Circuit Court of Appeals permanently enjoined the enforcement of an ordinance requiring the revocation or suspension of a movie theater's license upon a finding of obscenity.[192] The court found that such a penalty was an unconstitutional prior restraint that did not meet the procedural safeguards of *Freedman*.[193] Similarly, in *Spokane Arcades, Inc. v. Brockett*,[194] the Ninth Circuit held that a statute permitting a court to close a place of business temporarily "because obscene materials *may* have been sold, distributed, or exhibited on the premises is an impermissible prior restraint."[195]

In addition, the Eleventh Circuit, in *Redner v. Dean*,[196] held that a county ordinance requiring owners of adult entertainment establishments to obtain an operator's license was a prior restraint on protected speech and lacked appropriate procedural safeguards.[197] The court analogized the ordinance to the licensing scheme in *FW/PBS*[198] and distinguished it from the regulatory scheme in *Barnes v. Glen Theatre, Inc.*,[199] finding that "[w]hile *Barnes* involved some incidental limitations on the conduct associated with the expressive activity, the instant case presents a complete restraint of protected expression."[200]

Recently, in *11126 Baltimore Boulevard, Inc. v. Prince George's County*,[201] the Fourth Circuit directly responded to the Supreme Court's decision in *FW/PBS* by holding that an adult bookstore ordinance that "focused directly at the placement of bookstores

190. *See infra* notes 191-210, 215-25, 233-37 and accompanying text.
191. 631 F.2d 497 (7th Cir. 1980).
192. *See id.* at 505-06.
193. *See id.* at 506.
194. 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981).
195. *Id.* at 139.
196. 29 F.3d 1495 (11th Cir. 1994).
197. *See id.* at 1499-1503.
198. *See id.* at 1499-1500 (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)).
199. *See id.* at 1499 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)).
200. *Id.*
201. 58 F.3d 988 (4th Cir. 1995).

selling non-obscene adult materials that are engaged in conduct protected by the First Amendment"[202] is an unconstitutional prior restraint on protected speech because it does not meet the procedural safeguards required by *Freedman*.[203] The Fourth Circuit distinguished the ordinance at issue in *Baltimore Boulevard* from the zoning ordinance upheld in *Renton*.[204] The court noted that the ordinance at issue in *Renton* did not require permission to engage in protected speech because individuals were immediately free to engage in such speech anywhere in the city that the limiting ordinance was not in effect.[205] In contrast, the ordinance at issue in *Baltimore Boulevard* required parties who wished to engage in conduct proscribed by the ordinance to seek the county's permission in the form of a special exception.[206] The *Baltimore Boulevard* court stated that

> [f]ollowing the decision in *Renton*, the [Supreme] Court has made clear that otherwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the *Freedman* procedural safeguards.[207]

The *Baltimore Boulevard* court thus rejected the county's argument, which was based on Justice White's concurrence in *FW/PBS*,[208] that the adult bookstore ordinance was "merely a content-neutral time, place, and manner zoning restriction directed at the secondary effects of such establishments"[209] and therefore not subject to prior restraint

202. *Id.* at 994.

203. *See id.* at 1001-02; *see also* Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005, 1010 (4th Cir. 1995) (stating that "as we explain[ed] more fully ... in *11126 Baltimore Blvd.*, ... licensing schemes directed at sexually oriented businesses engaged in protected expressive activity pose special problems because of the risks of censorship and suppression associated with prior restraints on speech").

204. *See* 58 F.3d at 995.

205. *See id.*

206. *See id.*

207. *Id.*

208. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 244-49 (1990) (White, J., concurring in part and dissenting in part).

209. *Baltimore Blvd.*, 58 F.3d at 996.

analysis.[210]

Determining whether a zoning ordinance is a prior restraint, based upon its form as either an outright ban on certain uses in certain parts of a locality or as a ban that allows a special exception if permission is granted, is a disingenuous and ineffective method of avoiding the *Renton* content-neutral analysis.[211] Instead, as the Supreme Court made clear in *Near v. Minnesota* ex rel. *Olson*,[212] a use restriction should be tested by its "operation and effect."[213] Even without an application requirement for a special use or permit, a zoning ordinance operates as a prior restraint due to the implicit threat that the municipality will enforce the zoning regulation against a nonconforming use.[214] In fact, zoning regulations that do not provide for special exceptions or conditional uses operate all the more as a prior restraint because they essentially deny use permission in advance—they do not even allow a landowner to seek such permission.

Federal district courts also have invalidated zoning ordinances based on the prior restraint doctrine and ordinances' failure to meet the procedural safeguards of *Freedman*. Several recent decisions since *FW/PBS* have applied prior restraint concepts, rather than the *Renton* approach, to zoning regulations that abridge protected speech. Courts have justified this approach on the grounds that zoning regulations requiring a special exception or conditional use permit place "an unconstitutional level of substantive discretion in the hands of city officials."[215] Admittedly, such zoning regulations are much closer in appearance to the licensing scheme invalidated as a prior

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210. *See id.* at 996.

211. *See, e.g.*, Gascoe, Ltd. v. Newtown Township, 699 F. Supp. 1092 (E.D. Pa. 1988) (finding that a municipality's "use [of] its zoning power to prohibit entirely the distribution of adult films within its jurisdiction . . inflicts an unconstitutionally overbroad prior restraint on free speech"). The court in *Gascoe* distinguished *Young* by noting that the statute in *Young* "did not purport to approve the total exclusion from the city of theaters showing adult, but not obscene, materials." *Id.* at 1096.

212. 283 U.S. 697 (1931).

213. *Id.* at 708.

214. *See, e.g.*, 754 Orange Ave., Inc. v. City of West Haven, 761 F.2d 105, 111 (2d Cir. 1985) ("To anyone who would contemplate establishing a bookstore business within the City's jurisdiction, the City's threat to enforce its zoning and licensing ordinances against [plaintiff] operates as a prior restraint.")

215. Dease v. City of Anaheim, 826 F. Supp. 336, 343 (C.D. Cal. 1993).

restraint in *FW/PBS*. However, local officials have substantive discretion to draft and enact restrictive and exclusive regulations that do not require permit approval, but that nevertheless present a danger of self-censorship and "the difficulty of 'effectively detecting, reviewing, and correcting content-based censorship "as applied" without standards by which to measure the censor's action.'"[216] Thus, all types of zoning regulations, regardless of whether or not they require a special permit, should be analyzed under the prior restraint framework.

The district court in *Dease v. City of Anaheim*[217] employed an analysis that attempted to harmonize the *Renton* decision and the *FW/PBS* decision.[218] The court analyzed the constitutionality of a conditional use permit ordinance by asking whether it constituted a "'content-neutral, time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses,'"[219] or whether it was an unconstitutional prior restraint on protected speech.[220]

Some state courts have also attempted to reconcile *Renton* and *FW/PBS*, but have applied the doctrine of prior restraint to invalidate local ordinances that impact free speech rights.[221] In California, for

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216. *Id.* (quoting Lakewood v. Plain Dealer Co., 486 U.S. 750, 759 (1988)). Admittedly, it also can be argued that addressing these problems using nuisance law instead of zoning regulation merely transfers unbridled discretion to the courts.

217. 826 F. Supp. 336 (C.D. Cal. 1993).

218. *See id.* at 341-44.

219. *Id.* at 342 (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990)); *see also* Nakatomi Investments, Inc. v. City of Schenectady, 949 F. Supp. 988, 1002 (N.D.N.Y. 1997) (following the analytical approach of *Dease* when examining the constitutionality of an ordinance); Younes Dia v. City of Toledo, 937 F. Supp. 673, 677 (N.D. Ohio 1996) (finding that *Renton* applies to a content-neutral zoning ordinance, but not a licensing scheme); Santa Fe Springs Realty Corp. v. City of Westminster, 906 F. Supp. 1341, 1363 (C.D. Cal. 1995) (stating that "[i]n determining the constitutionality of a conditional use permit ordinance, the court must engage in a second level of analysis beyond the *O'Brien* test and deal with the issue of prior restraints").

220. *See Dease*, 826 F. Supp. at 342.

221. *See, e.g.*, Antico v. City of Indianapolis, 441 N.E.2d 999 (Ind. App. 1982) (holding that an ordinance may not impose prior restraint on protected speech by preventing access to adult businesses); Landover Books, Inc. v. Prince George's County, 566 A.2d 792, 804 (Md. Ct. Spec. App. 1989) (finding that an "application procedure for a special exception is an unconstitutional prior restraint since it leaves an improper degree of discretion in the local zoning officials which exceeds the scope permitted in the First Amendment context"); Town of Wayne v. Bishop, 565 N.W.2d 201, 202 (Wis. Ct. App. 1997) (concluding that a town's zoning

example, the court in *Smith v. County of Los Angeles*[222] followed the *Dease* court's reasoning and adjudged the constitutionality of a conditional use permit (CUP) requirement for adult businesses by first determining whether the ordinance was a content-neutral time, place, and manner restriction aimed at secondary effects or an unconstitutional prior restraint on free speech.[223] After concluding that the Los Angeles CUP ordinance constituted a prior restraint,[224] the court held that the ordinance was unconstitutional because, as a land use regulation affecting adult entertainment, it did not use "'narrow, objective and definite' standards focused on the secondary effects of these businesses."[225]

This Article proposes that, instead of attempting to reconcile *Renton* and *FW/PBS*, the following approach should be used to analyze the constitutionality of zoning regulations. First, treat the zoning action as a prior restraint and check to see whether it falls within one of the narrowly defined exceptions. If the zoning action falls within one of the exceptions, apply the procedural safeguards analysis to see whether the restraint is permissible. Finally, if the procedural safeguards are met, and the regulation is not content-based, apply a content-neutral time, place, and manner analysis.[226]

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scheme "worked as an unconstitutional prior restraint on the defendants' First Amendment rights"). *But see* Annapolis Road, Ltd. v. Anne Arundel County, 686 A.2d 727, 736-42 (Md. Ct. Spec. App. 1996) (affirming the issuance of an injunction against adult uses that violated a zoning ordinance by finding that under *Renton* reasonable alternative means of communication were allowed and under *FW/PBS* little or no administrative discretion was allowed) (citing 11126 Baltimore Blvd. v. Prince George's County, 58 F.3d 988 (4th Cir. 1995), *and* Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005 (4th Cir. 1995)), *rev'd*, No. 20, 1998 WL 35377 (Md. App. Jan. 28, 1998).

222. 29 Cal. Rptr. 2d 680 (Cal. Ct. App. 1994).

223. *See id.* at 685 (citing Dease v. City of Anaheim, 826 F. Supp. 336 (C.D. Cal. 1993)).

224. *See id.* at 687.

225. *Id.* at 692; *see also* People v. Library One, Inc., 280 Cal. Rptr. 400, 401-02, 405-06 (Cal. Ct. App. 1991) (finding that Los Angeles Code provisions requiring a conditional use permit for an adult bookstore and picture arcade were content-neutral time, place, and manner restrictions, but deciding that "the absence of any specified time limit on the denial or issuance of a business license or a conditional use permit renders the ordinance an invalid prior restraint"). *But see* City of National City v. Wiener, 838 P.2d 223, 225 (Cal. 1992) (finding "a zoning ordinance that combines both distance regulations and an exception for location of adult businesses in certain shopping malls" constitutional under the *Renton* standard without even mentioning *FW/PBS*).

226. For an example of this approach, see the discussion of the analytical approach used by the court in *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir.

The district court in *G. & A. Books, Inc. v. Stern*[227] used an analytical structure similar to this Article's proposed approach by first examining the contested zoning action under the prior restraint doctrine and then subjecting it to a content-neutral analysis.[228] The court held that a city redevelopment plan affecting existing adult uses did not constitute a prior restraint and was not "unnecessarily suppressive under the *O'Brien* standard."[229] The court noted that a government land use regulation is not immunized from scrutiny and must be examined to determine whether "it constitutes a prior restraint on protected speech."[230] The court concluded that "if it does [constitute a prior restraint] we must enjoin it unless the government carries the almost insurmountable burden of justifying such a restraint."[231] The court further concluded that if the government regulation "does not act as a prior restraint on protected speech, it must still pass the somewhat less rigorous scrutiny mandated by *United States v. O'Brien*."[232]

The court in *TJ's South, Inc. v. Town of Lowell*[233] also employed an analysis similar to the one proposed in this Article. The *TJ's South* court evaluated the constitutionality of a zoning ordinance that required eating-and-drinking establishments to obtain a special exception from local authorities before presenting entertainment.[234] Contrary to the approach taken in *Dease*, the court in *TJ's South* first analyzed the ordinance as a prior restraint on speech that was subject to constitutional limitations.[235] After concluding that the ordinance was an unconstitutional prior restraint, the court determined that the ordinance could not be saved even if "it passes the time, place, and manner restriction test."[236] The court noted that "once deemed an unconstitutional prior restraint, a permit scheme is simply

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1995), *supra* notes 201-10 and accompanying text.

227. 604 F. Supp. 898 (S.D.N.Y. 1985), *aff'd*, 770 F.2d 288 (2d Cir. 1985).

228. *See id.* at 910-12.

229. *Id.* at 909.

230. *Id.* at 908.

231. *Id.*

232. *Id.*

233. 895 F. Supp. 1124 (N.D. Ind. 1995).

234. *See id.* at 1126.

235. *See id.* at 1129 (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 225 (1990)).

236. *Id.* at 1134.

unconstitutional, and no strong showing under time, place, and manner doctrine can change that."[237] As previously advocated, this approach to analyzing special use permits should also be employed when analyzing general zoning ordinances, which effectively operate in advance of landowner action to preclude certain uses potentially protected by the First Amendment.

3. Public Nuisance and Indecency Statutes

Municipalities also have regulated offensive land uses by using public nuisance and public indecency statutes instead of, or in addition to, general zoning ordinances and special permit and licensing schemes. This type of regulation was involved in a series of four Supreme Court cases: *Erznoznik v. City of Jacksonville*,[238] *Vance v. Universal Amusement Co.*,[239] *Arcara v. Cloud Books*,[240] and *Barnes v. Glen Theatre, Inc.*[241] In each of these cases, the Supreme Court evaluated the application of public nuisance or public indecency statutes to adult entertainment activity protected as First Amendment expression.

In *Erznoznik*, the Court invalidated a city ordinance that declared as a public nuisance the exhibition of films containing nudity at a drive-in movie theater when the theater's screen is visible from a public place.[242] Although the Court's decision was not based on the concept of prior restraint, the Court evaluated the ordinance as a content-based restriction on protected expression.[243] The City of

237. *Id.* (noting that even if it should analyze the ordinance under a time, place, and manner test, the litigants had not addressed the issue and the court could not independently do so). One of the more recent district court decisions, *Franken Equities v. City of Evanston*, 967 F. Supp. 1233 (D. Wyo. 1997), followed the *FW/PBS* approach in rejecting a city's contention that its special use permit requirement should be analyzed under *Renton* as a content-neutral time, place, and manner regulation. *See id.* at 1236-37. The court instead analyzed the city's ordinance as a prior restraint and proceeded to determine that the procedural safeguards of *Freedman* had not been met. *See id.* at 1237.

238. 422 U.S. 205 (1975).

239. 445 U.S. 308 (1980).

240. 478 U.S. 697 (1986).

241. 501 U.S. 560 (1991).

242. *See* 422 U.S. at 206-07.

243. *See id.* at 211 (noting that the "ordinance discriminates among movies solely on the basis of content").

Jacksonville argued that the purposes of the ordinance were to protect citizens against unwilling exposure to offensive materials,[244] to protect minors from the display of films containing nudity,[245] and to facilitate traffic regulation by protecting passing motorists from the distraction of nudity on a drive-in movie screen.[246] However, the Court held that even these legitimate interests failed to satisfy the demanding constitutional standards that apply when the government regulates expression on the basis of its content.[247] Thus, while the *Erznoznik* Court did not use a prior restraint approach, its content-based analysis is protective of expression and is, therefore, consistent with the analytic framework proposed in this Article. If a regulation is not invalidated as a prior restraint, it must be evaluated as either a content-based or content-neutral restriction. In *Erznoznik*, the regulation was content-based and, therefore, could not satisfy the strict review standard applied by the Court.

The Supreme Court has indeed viewed the public nuisance form of regulation as a prior restraint in at least one zoning case involving adult uses. In *Vance v. Universal Amusement Co.*,[248] the Court refused to enforce a Texas public nuisance statute that prohibited the exhibition of motion pictures in an adults-only theatre absent a judicial finding that the films were not obscene.[249] The Court upheld the Fifth Circuit's decision that the statute was a prior restraint on First Amendment rights and lacked the "'procedural safeguards required under *Freedman v. Maryland*.'"[250] However, unlike the Court's *Vance* decision, in *Arcara v. Cloud Books*,[251] the Court rejected a prior restraint analysis and refused to apply the *O'Brien* test to a New York statute that authorized the closure of an adult bookstore.[252] The Court declared that "the First Amendment is not

244. *See id.* at 208.
245. *See id.* at 212.
246. *See id.* at 214.
247. *See id.* at 217.
248. 445 U.S. 308 (1980).
249. *See id.* at 311, 317.
250. *Id.* at 314 (quoting Vance v. Universal Amusement Co., 587 F.2d 159, 169 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980)).
251. 478 U.S. 697 (1986).
252. *See id.* at 707. The lower court had found that the closure of a bookstore under a public nuisance statute was an unconstitutional prior restraint because the closure infringed

implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books."[253] The Court then went on to hold that the closure sanction was a constitutional exercise of legislation "directed at unlawful conduct having nothing to do with books or other expressive activity."[254] Although the *Arcara* Court failed to apply the prior restraint doctrine, *Arcara* factually supports this Article's proposal to use common law nuisance to resolve land use disputes that arise when First Amendment activities generate actual harmful effects.[255]

In *Barnes v. Glen Theatre, Inc.*,[256] the Court was confronted with an Indiana public indecency statute that required dancers in adult entertainment establishments to wear, at a minimum, pasties and G-strings.[257] The Court analyzed the restriction under a content-neutral approach and, after applying the four-part *O'Brien* test, upheld the indecency statute.[258] In applying the *O'Brien* test to measure the conduct's level of First Amendment protection, the Court found that Indiana's interest in protecting morals and public order was not a form of suppression of free expression because "[p]ublic nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity."[259] Justice Souter, in his concurring opinion, also applied the *O'Brien* test to uphold the indecency statute.[260] However, Souter characterized the government's interest as "combating the secondary effects of adult entertainment establishments,"[261] like the

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upon protected bookselling activities. *See id.* at 701.

253. *Id.* at 707.

254. *Id.*

255. For an extensive discussion of *Arcara*, see Forshay, *supra* note 110.

256. 501 U.S. 560 (1991).

257. *See id.* at 565. The Court had held in earlier cases that nude dancing is a protected form of expression. *See id.* (citing California v. LaRue, 409 U.S. 109, 118 (1972), *and* Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981) (both holding that nude dance is expressive conduct within the "marginal" protection of the First Amendment)).

258. *See id.*

259. *Id.* at 571. Justice White aptly noted in dissent, however, that "the purpose of applying the law to the nude dancing performances in respondents' establishments is to prevent their customers from being exposed to the distinctive communicative aspects of nude dancing" and "[w]here the government prohibits conduct precisely because of its communicative attributes, we hold the regulation unconstitutional." *Id.* at 596 (White, J., dissenting).

260 *See id.* at 583-87 (Souter, J., concurring).

261. *Id* at 582.

government's interest in *Renton*,[262] rather than as an interest in "society's moral views."[263] Justice Souter's approach in *Barnes* is, thus, just as misguided as the approaches taken by the Court in *Young* and *Renton* because it regulates expression based on its content in an effort to address secondary effects. However, Souter's concurrence is at least consistent with *Renton* and *Young* and, thus, lends itself to this Article's proposal that communities use common law nuisance to combat harmful secondary effects associated with adult entertainment establishments.

The frightening aspect of the *Barnes* decision, and its impact on First Amendment protection, emerged in Justice Scalia's concurrence, wherein he suggested that free speech principles should be handled in the same way that the Court handled a free exercise claim in *Employment Division v. Smith*.[264] Justice Scalia urged that the Court uphold the challenged Indiana regulation, not based upon the *O'Brien* test, but "because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all."[265] To encourage the adoption of such a regime in the free speech area, Justice Scalia argued that "[t]here is even greater reason to apply this approach to the regulation of expressive conduct"[266] because "[r]elatively few can plausibly assert that their illegal conduct is being engaged in for religious reasons, but almost anyone can violate almost any law as a means of expression."[267]

While this author agrees that the Court should afford as much First Amendment protection to freedom of speech and expression as it does to religious exercise, the Court should achieve such equality by *increasing* the level of protection for free exercise of religion, rather than by decreasing the level of protection for speech. Those scholars who support an increased level of scrutiny for regulation that abridges free exercise should be careful to avoid passively allowing

262. *See supra* notes 160-65 and accompanying text.
263. *Barnes*, 501 U.S. at 582 (Souter, J., concurring).
264. *See id.* at 579 (Scalia, J., concurring) (citing Employment Div. v. Smith, 494 U.S. 872 (1990)).
265. *Id.* at 572.
266. *Id.* at 579.
267. *Id.*

zoning to compromise free speech rights merely because most of the cases involve aesthetically displeasing uses or offensive adult uses. The concern expressed by Justice Black in *Communist Party v. Subversive Activities Control Board*,[268] that "the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish,"[269] has never been greater than it is now, particularly because we have witnessed another attack on the cherished protection of religious freedom in *City of Boerne v. Flores*.[270]

4. An Example of Applying a New Constitutional Approach to Protect Expression

The control of sexually oriented businesses in our communities is a difficult land use issue because majoritarian principles generally conflict with allowing these adult uses to locate close to our neighborhoods. However, if our society determines that such uses are deserving of at least minimal free speech protection,[271] we cannot let our distaste for such activity reduce the level of First Amendment protection that we afford such activity when examining zoning regulations. If a zoning ordinance restricts the location of sexually oriented uses, or requires a license or special permit prior to allowing such an adult use, the regulation constitutes a prior restraint on protected speech. Zoning officials and city council members must not

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268. 367 U.S. 1 (1961)

269 *Id.* at 137 (Black, J., dissenting).

270 117 S. Ct. 2157; *see also* discussion *infra* notes 432-40 and accompanying text. Justice O'Connor stated in her *Boerne* dissent:

> The Religion Clauses of the Constitution represent a profound commitment to religious liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law.... Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is altogether reasonable to conclude that both should be treated with the highest degree of respect.

Id. at 2185 (O'Connor, J., dissenting).

271. This author assumes that society's values are generally reflected in Supreme Court decisions and in the Constitution.

be allowed to use "unbridled discretion" to prevent speech that they find to be offensive. Protecting the community against offensive secondary effects generated by protected speech is a goal that can be achieved more efficiently by using common law nuisance and, perhaps, private covenants.[272]

Regulation of adult uses is based upon a classification of the content of the expression as sexually explicit, but not obscene. Such content-based restrictions of protected speech must be justified by a compelling state interest.[273] If, however, a regulation is truly content-neutral, such as a ban on *all* movie theaters in a city, then the Supreme Court's approach in *Young* and *Renton* would be appropriate. Under such circumstances, courts should evaluate a regulation as a time, place, and manner restriction, or analyze it under the *O'Brien* test to verify the restriction's constitutionality.

The following hypothetical illustrates the author's proposed constitutional approach as applied to an adult entertainment business. Suppose that a city enacts a zoning law which requires that, subject to the issuance of a conditional use permit, all adult entertainment businesses may be established only within two designated zoning districts. If the owner of a tavern located outside of these two designated districts wishes to offer nude dancing, the tavern owner will be unable to do so unless she relocates the tavern to one of the two designated districts. This burden on free expression restricts First Amendment rights in advance of the communication and operates as a prior restraint. Even if the tavern owner's business is located in one of the designated districts, the requirement that she obtain a conditional use permit before offering adult entertainment is also a prior restraint. Whether the regulation is viewed as a prior restraint because it restricts free expression in all but two districts, or, alternatively, because it requires that a government official issue a permit, such a prior restraint bears a heavy presumption against constitutional validity.[274] Such a prior restraint will only be

272. *See* discussion *infra* Part VI.

273. *See* Wooley v. Maynard, 430 U.S. 705, 716-17 (1977) (holding unconstitutional a New Hampshire statute requiring the phrase "Live Free or Die" on motor vehicle registration plates).

274. *See, e.g.*, Organizing For a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

permissible if it falls within one of the exceptions already identified by the Court.[275] Because this hypothetical regulation against adult entertainment does not prevent the publication of sensitive military information, prevent an incitement to an act of violence, prevent obscene expression, or attempt to preserve a defendant's right to a fair trial, it cannot be allowed as a prior restraint.[276]

Even if the above hypothetical city successfully argues that its regulation is a permissible prior restraint because its purpose is to prevent obscene expression, the city must still establish that it has implemented "procedural safeguards [that are] designed to obviate the dangers of a censorship system."[277] This would require the city to prove: (1) that the affected right, nude dancing, is unprotected under the First Amendment; (2) that the restraint is limited to a preservation of the status quo for the shortest period that comports with sound judicial procedure; and (3) that a court will make a prompt, final judicial determination of whether the expression is obscene and, therefore, not protected under the First Amendment.[278] Because nude dancing is protected under the First Amendment and the regulation will not be subject to a prompt, final judicial determination that it is obscene, the hypothetical zoning ordinance does not meet the procedural safeguards of *Freedman*.[279]

Hence, according to this Article's suggested constitutional approach to balancing First Amendment rights and zoning regulations, the hypothetical adult-entertainment zoning ordinance should be invalidated as an impermissible prior restraint. Even if we assume that the city could satisfy the procedural requirements of *Freedman*, by restricting in advance only obscene adult entertainment, such a regulation would still be subject to judicial scrutiny as either a content-based or content-neutral restriction. Because the city has targeted only adult entertainment, rather than, for example, the opera or ballet, the regulation must be considered content-based. Such a content-based restriction on protected

275. *See supra* notes 83-94 and accompanying text.
276. *See supra* notes 83-94 and accompanying text.
277. Freedman v. Maryland, 380 U.S. 51, 58 (1965).
278. *See id.* at 58-59.
279. *See id.*; *see also supra* notes 93-94 and accompanying text.

expression will be subject to strict judicial scrutiny. The fact that this type of entertainment may be considered distasteful or morally repugnant to city officials and their constituents is not a sufficiently compelling interest to uphold the restriction under strict scrutiny. Moreover, the anticipated secondary effects, such as crime and decreased property values, are probably also insufficiently compelling governmental interests if the adverse effects have not yet occurred.

Even if we use the *Renton* approach of viewing the hypothetical zoning regulation as a content-neutral regulation aimed at curbing adult entertainment's deleterious secondary effects, the regulation must still be evaluated under either a time, place, and manner test, or the *O'Brien* test. Under the *O'Brien* test, the city's interest in regulating adult entertainment must be substantial and unrelated to the suppression of free expression, and the regulation must restrict expression no more than is necessary to achieve the city's interest. In order to satisfy the requirements of a permissible time, place, and manner regulation, the city will need to show that there are suitable sites available in the two districts where adult entertainment is permitted. The city will also need to show that the secondary effects generated by such uses are sufficiently likely to occur and will be substantially detrimental to the other zoning districts.

As this hypothetical illustrates, using the prior restraint doctrine will more generously accommodate protected speech and will require government officials to discontinue using their discretion to shield the public from certain types of expression that they consider to be offensive. Expressive conduct cannot be regulated in advance of adverse secondary effects occurring, even if the reasons for the regulation are unrelated to the suppression of speech. Moreover, when regulation of protected expression cannot withstand scrutiny as either a prior restraint, a content-based restriction, or even a content-neutral regulation, nuisance law can still serve as the mechanism to control land uses that substantially interfere with the rights of others in the community.

B. Regulation of Commercial and Noncommercial Billboards and Signs

Another difficult land use issue arises when communities attempt to zone their locales for aesthetic purposes by restricting or eliminating the "blight" of billboards and signs. Until the mid-1970s, the Free Speech Clause protected only noncommercial speech against land use regulations.[280] The Supreme Court extended free speech protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[281] In *Virginia Board of Pharmacy*, the Court found unconstitutional a Virginia law that prohibited prescription drug price advertising, even though Virginia had a strong interest in promoting "professionalism on the part of licensed pharmacists."[282] *Virginia Board of Pharmacy*'s extension of constitutional protection to commercial speech quickly engendered much litigation and uncertainty about a community's ability to regulate commercial speech under the scope of the police power. However, not until 1981 did the Court fully consider a case involving a First Amendment challenge to a regulation that limited the use of billboards.[283] The Court's subsequent analysis of billboard and sign ordinances has varied based on whether an ordinance affects commercial or noncommercial speech, and whether the ordinance is a content-based or content-neutral restriction.

1. Regulation of Commercial Billboards and Signs

An ordinance regulating the content of commercial communication, as opposed to the form of such communication, must

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280. *See* MANDELKER, *supra* note 5, § 2.44, at 67.

281. 425 U.S. 748, 770 (1976) (holding that a statute prohibiting commercial advertisement of prescription drug prices is unconstitutional). This decision was preceded by *Bigelow v. Virginia*, 421 U.S. 809 (1975), which held that a statute prohibiting advertisement, encouragement, or procurement of an abortion was unconstitutional because speech that is protected does not lose protection just because it appears in the form of a paid advertisement. *See id.* at 818.

282. *Virginia Bd. of Pharmacy*, 425 U.S. at 766.

283. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). Prior to 1981, the Court chose "on several occasions summarily to affirm decisions sustaining state or local legislation directed at billboards." *Id.* at 498.

be justified by both the compelling importance of the state's interest in such regulation and evidence that the regulation is necessary to meet the government's stated purpose or objective.[284] In *Linmark Associates, Inc. v. Township of Willingboro*,[285] a case involving the content of commercial speech, the Supreme Court invalidated a township's ordinance prohibiting the posting of "For Sale" or "Sold" signs.[286] The township's stated purpose for the ordinance was "to stem what it perceive[d] as the flight of white homeowners from a racially integrated community."[287] Here, as in *Virginia Board of Pharmacy*,[288] the purpose of the ordinance was to regulate the content of communication, not just its form.[289] The Court recognized the importance of the township's goal to promote stable, racially-integrated housing, but concluded that the township's goal in enacting the ordinance did not distinguish the case from *Virginia Board of Pharmacy*.[290] Thus, in both *Virginia Board of Pharmacy* and *Linmark*, the Court determined that the respective regulations were not necessary to achieve the government's stated objective, and that the First Amendment precludes government from achieving its goals "by restricting the free flow of truthful information."[291]

In *Metromedia, Inc. v. City of San Diego*,[292] the Court considered a case involving both a content-neutral regulation of commercial speech and an incidental regulation of noncommercial speech.[293] The ordinance at issue regulated billboards for traffic safety and aesthetic purposes, and applied only to permanent structures that displayed

284. *See* Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 94-95 (1977).
285. 431 U.S. 85 (1977).
286. *See id.* at 97.
287. *Id.* at 86.
288. *See* 425 U.S. 748, 771 (1976).
289. *See* 431 U.S. at 94.
290. *See id.* at 95.
291. *Id.* Content-based regulation of commercial speech is still dangerous when the government attempts to "single out certain messages for suppression," 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507 (1996), and the "mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *Id.* The *Linmark* Court left open the question of "whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression." *Linmark*, 431 U.S. at 94 n.7.
292. 453 U.S. 490 (1981).
293. *See id.* at 494 n.2.

commercial or other noncommercial advertisements.[294] The ordinance did, however, provide for certain exceptions to the City's general ban on signs. These exceptions included permitting the property occupant to advertise his own goods or services.[295]

The *Metromedia* Court separately evaluated the ordinance's effect on commercial and noncommercial speech.[296] The Court first applied the four-part test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*[297] to the less-protected, content-neutral commercial speech restriction.[298] Finding that the San Diego ordinance met the constitutional requirements of *Central Hudson*,[299] the *Metromedia* Court then analyzed the general ban on signs carrying noncommercial advertising to determine its constitutional validity.[300] The Court acknowledged that noncommercial speech is given greater protection under the First Amendment than commercial speech[301] and refused to apply a time, place, and manner analysis to an ordinance that distinguished "between permissible and impermissible signs at a particular location by reference to their content."[302] Accordingly, the Court held that the San Diego ordinance was unconstitutional on its face because of its prohibition of noncommercial speech.[303]

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294. *See id.* at 503 (quoting Metromedia, Inc. v. City of San Diego, 610 P.2d 407 (Cal. 1980)).

295 *See id.*

296. *See id.* at 504-05.

297. 447 U.S. 557, 563-66 (1980).

298. *See Metromedia*, 453 U.S. at 507. As discussed earlier, the *Central Hudson* test, which the Court applies to commercial speech, requires that: (1) the commercial speech concerns lawful activity and is not misleading; (2) the restriction seeks to implement a substantial governmental interest; (3) the restriction directly advances that interest; and (4) the restriction reaches no further than necessary to accomplish the objective. *See Central Hudson*, 447 U.S. at 563-66.

299. *See Metromedia*, 453 U.S. at 512.

300. *See id.* at 512-13.

301. *See id.* at 513.

302. *Id.* at 516-17.

303. *See id.* at 521. The Court noted, however, that "the California courts may sustain the ordinance by limiting its reach to commercial speech." *Id.* at 522 n.26. Following the *Metromedia* decision, the Supreme Court adopted the *Central Hudson* test for evaluating the constitutional validity of commercial billboard and sign regulations. The Court later modified *Central Hudson*'s four-prong test in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), which held that the protection of commercial speech requires a restriction "that employs not necessarily the least restrictive means, but . . . a means narrowly tailored to

Commercial speech restrictions are not limited to regulations designed to combat the secondary effects of visual blight and aesthetics. Government officials also have attempted to restrict advertising's content in order to combat the effects it may have on listeners' conduct. This type of restriction was at issue in *44 Liquormart, Inc. v. Rhode Island*.[304] In *44 Liquormart*, a Rhode Island statute banned liquor vendors from advertising outside of their stores the retail price of any alcoholic beverage.[305] The stated purposes of the statute were to promote temperance and to control the traffic in alcoholic beverages.[306] After examining the commercial speech restriction, the Court held that the statute was invalid because it abridged speech protected by the First Amendment.[307] To determine the statute's constitutionality, the Court applied the four-prong *Central Hudson* test.[308] The Court did not distinguish between a content-based commercial speech restriction that targets speech's effect on a listener's conduct and a content-neutral commercial speech regulation that is directed at the secondary effects of speech. However, in his concurrence, Justice Thomas aptly noted that where "the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace,"[309] the *Central Hudson* balancing test should not be

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achieve the desired objective." *Id.* at 480. The Supreme Court applied the *Fox* "reasonable fit" test along with the *Central Hudson* factors in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), to find that Cincinnati's ban on commercial newsracks was not valid because the city did not "establish a 'reasonable fit' between its legitimate interests in safety and esthetics," *id.* at 416, and its prohibition of newsracks as a way of satisfying its goals. *See id.* This requirement of a "reasonable fit" is used to evaluate the fourth prong of the *Central Hudson* test, which requires that the restriction be no more extensive than necessary to serve the stated interest. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1521 (1996) (O'Connor, J., concurring) (citing *Central Hudson*, 447 U.S. at 566); *see also* Dwight E. Merriam et al., *The First Amendment in Land Use Law*, 1993 LAND USE INSTITUTE 1007, 1017 (noting that although not a "sign case," *Fox* may be important for commercial sign cases because of its holding that protection of commercial speech does not require that government restrictions satisfy the "least restrictive means" test).

304. 116 S. Ct. 1495 (1996).

305. *See id.* at 1501.

306. *See id.* at 1502 n.4.

307. *See id.* at 1515. The Court also noted that the ordinance was "not shielded from constitutional scrutiny by the Twenty-First Amendment." *Id.* at 1501.

308. *See id.* at 1506-13. *But see id.* at 1521-23 (O'Connor, J., concurring) (advocating a more stringent standard under *Central Hudson*).

309. *Id.* at 1518 (Thomas, J., concurring).

applied.[310] Justice Thomas stated that the Court, instead, should adhere to the doctrine adopted in *Virginia Pharmacy Board* and strike down a regulation as impermissible if it attempts to "dissuade legal choices by citizens by keeping them ignorant . . . ."[311]

Regulation of commercial speech by zoning ordinances that restrict such expression in advance of its occurrence should be analyzed under the prior restraint doctrine. Such a prior restraint will be impermissible unless it falls within a recognized exception and meets the *Freedman* procedural requirements.[312] If such a regulation is upheld as a permissible prior restraint, it then must be evaluated as either a content-based or content-neutral restriction. If the restriction is based on the content of the commercial message conveyed, it must meet the compelling state interest test. Alternatively, if the restriction is content-neutral, courts must apply the less rigorous *Central Hudson* test.

2. Regulation of Noncommercial Billboards and Signs

In *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,[313] the Court analyzed the constitutionality of a Los Angeles ordinance that restricted noncommercial political speech. The ordinance restricted the posting of signs on public property, including sidewalks, utility poles, and trees.[314] Noting that "the text of the ordinance is [content-]neutral—indeed it is silent—concerning any speaker's point of view,"[315] the Court employed a time, place, and manner analysis using the *O'Brien* test.[316] The Court held that the ordinance was a valid, view-point neutral restriction on protected speech, and that it was justified by the city's substantial interest in

310 *See id*

311. *Id* at 1520 (Thomas, J., concurring); *see also* State Bd. of Va. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (time, place, and manner test determined to be inappropriate because challenged statute "singles out speech of a particular content and seeks to prevent its dissemination completely").

312. *See supra* notes 83-94 and accompanying text.

313. 466 U.S. 789 (1984).

314 *See* Merriam, *supra* note 303, at 1023-24 (citing *Vincent*, 466 U.S. at 791).

315. *Vincent*, 466 U.S. at 804.

316 *See id.*

aesthetic and safety objectives.[317]

In *City of Ladue v. Gilleo*,[318] the Court confronted the issue of whether an ordinance prohibiting homeowners from displaying most types of signs on their property violated a resident's right to free speech.[319] The Court compared signs, as a form of expression, with oral speech and noted that signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."[320] Nevertheless, the Court recognized that regulating signs affects communication itself and, therefore, it was required to examine the ordinance for constitutional validity.[321] After analyzing the city's ordinance as a content-neutral restriction on protected speech, the Court held that "Ladue's ban on almost all residential signs violates the First Amendment."[322]

Justice O'Connor, in her concurrence with a unanimous Court, protested the Court's failure to follow the general constitutional inquiry, which is "first, to determine whether a regulation is content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of scrutiny."[323] In other words, Justice O'Connor believed that the Court should have analyzed the ordinance as a content-based, rather than a content-neutral, restriction on protected speech. A content-based restriction would have required a compelling state interest in order to restrict protected speech; but, consistent with *Young* and *Renton*, the Court applied a "track two" analysis[324] because the purpose of the restriction "was not censorship, but rather a desire to 'preserve the quality of urban life' by avoiding the 'secondary effects'"[325] of such uses on the community.[326]

317. *See id.* at 816-17.
318. 512 U.S. 43 (1994).
319. *See id.* at 45-46.
320. *Id.* at 48.
321. *See id.* at 48-51.
322. *Id.* at 58.
323. *Id.* at 59 (O'Connor, J., concurring).
324. *See supra* notes 106-13 and accompanying text.
325. Bunting, *supra* note 113, at 495 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).
326. *See id.*

3. The Prior Restraint Doctrine Applied to Billboards and Signs

Unlike its analysis of adult use restrictions, the Supreme Court has not yet employed the doctrine of prior restraint to invalidate either a commercial or noncommercial billboard or sign regulation. Nevertheless, in at least two recent district court cases, courts have used the doctrine to prohibit municipalities from restricting protected speech on the basis of safety and aesthetic concerns.[327] In *Abel v. Town of Orangetown*,[328] a political candidate sued to enjoin Orangetown officials from removing political signs that he had placed along the unpaved portion of a public right of way.[329] The officials sought to remove the signs pursuant to an ordinance which provided that "[n]o sign other than signs placed by agencies of the government shall be placed on any public property unless written consent is first obtained from the Orangetown Town Board."[330] The candidate argued that the ordinance violated his First Amendment right to freedom of speech.[331] The district court held that the regulation was "an unacceptable prior restraint on speech"[332] because the ordinance granted the town unbridled discretion in deciding whether to grant permission to post the signs,[333] and because the ordinance did not contain standards to guide the town decision.[334]

Similarly, in *MacDonald Advertising Co. v. City of Pontiac*,[335] a federal district court held that a zoning ordinance that required the issuance of a special exception permit before a billboard could be erected[336] was facially invalid and violated the First Amendment.[337] The *MacDonald* court was concerned that "when a city institutes a permit system to engage in activities which have a close nexus to

327. *See* MacDonald Adver. Co. v. City of Pontiac, 916 F. Supp. 644 (E.D. Mich. 1995); Abel v. Town of Orangetown, 759 F. Supp. 161 (S.D.N.Y. 1991).
328. 759 F. Supp. 161 (S.D.N.Y. 1991).
329. *See id.* at 162-63.
330 *Id* at 162.
331. *See id.* at 162-63.
332. *Id* at 163-64.
333 *See id.* at 163.
334. *See id.* at 65.
335. 916 F. Supp. 644 (E.D. Mich. 1995).
336. *See id.* at 645.
337. *See id.* at 650.

expression,"[338] the city must ensure that the final permit decision is not based on the content or viewpoint of the protected expression.[339] The *MacDonald* court declared that, without neutral criteria to guide an official's decision, such "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."[340] Having held that the ordinance was an invalid prior restraint, the court found it unnecessary to determine whether the ordinance was valid under *Central Hudson*.[341] Nonetheless, the court noted that the ordinance regulating commercial speech would be invalid under the governmental-interest prong of the *Central Hudson* test because "esthetics alone is an insufficient reason for governmental use restrictions let alone restrictions on speech."[342]

Communities have a legitimate interest in regulating the proliferation of signs and billboards in order to promote traffic safety and aesthetics.[343] A majority of courts have held that aesthetic concerns alone sufficiently justify governmental land use regulation.[344] The government generally will address aesthetic concerns by enacting content-neutral regulations aimed at the adverse secondary effects generated by the form of an expression. However, cities may also attempt to regulate advertising in order to protect their citizens from the message being conveyed.[345] This latter type of

338. *Id.* at 648.

339. *See id.* at 648-49 (citing City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 760 (1988)).

340. *Id.* (citing *Plain Dealer*, 486 U.S. at 759).

341. *See id.* at 650 n.9.

342. *Id.* (citations omitted).

343. *Cf.* Berman v. Parker, 348 U.S. 26 (1954) (upholding the taking of private property to eliminate slums and beautify the nation's capital).

344. *See* MANDELKER, *supra* note 5, § 11.05, at 460. *But see* Desert Outdoor Adver., Inc. v. City of Moreno, 103 F.3d 814, 819 (9th Cir. 1996) (holding that a provision of a city sign ordinance violated the First Amendment by giving city officials unbridled discretion to deny a permit for an off-site sign determined to be harmful to the city's health, welfare, or "aesthetic quality"); *Bunting*, *supra* note 113, at 478 (explaining that "some courts view[] aesthetic values 'not as preventing public harm but as a legislative attempt to confer a benefit on the public at the expense of a private landowner without paying for it,' thus likening aesthetic zoning to a taking of property" (quoting James P. Karp, *The Evolving Meaning of Aesthetics in Land-Use Regulation*, 15 COLUM. J. ENVTL. L. 307, 310 (1990))).

345. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).

regulation is necessarily content-based and should require a higher level of constitutional scrutiny than that given to content-neutral regulations. Whether zoning regulation of billboards and signs is used to protect aesthetics or to protect citizens from the actual message, when such regulation impacts expression protected by the First Amendment, courts must scrutinize the constitutional limits of such governmental restrictions.

This Article proposes that courts should evaluate zoning restrictions on billboards and signs with the same constitutional scrutiny that they use to evaluate zoning restrictions on adult uses. Courts should employ the same level of scrutiny regardless of whether such ordinances require a permit, license, or special exception before the expression is allowed. Zoning regulations of billboards and signs should be invalidated as prior restraints unless they fall into one of the identified exceptions and meet the procedural safeguards of *Freedman*.[346] If the regulation at issue is not an invalid prior restraint, a court must then ask whether the restriction is content-based or content-neutral. If it is content-based, the court should invalidate the regulation unless it is justified by a compelling governmental interest that cannot be achieved by less restrictive means. Alternatively, if the regulation is content-neutral, and is directed at the secondary effects of visual blight or interference with traffic safety, a court must analyze it according to whether the speech it seeks to restrict is commercial or noncommercial. If the content-neutral restricted speech is noncommercial, a court must evaluate the restriction under the *O'Brien* test to determine its constitutionality. However, if the content-neutral restricted speech is commercial, it is given less protection. A court evaluating a regulation that restricts such speech should apply the four-prong *Central Hudson* test. Here again, common law nuisance actions will serve well as the mechanism for addressing actual adverse effects that governments cannot legislatively regulate in advance of their occurrence.[347]

346. *See supra* notes 83-94 and accompanying text.
347. *See* discussion *infra* Part VI.

C. Regulation of Speech Activities on Public Streets and Sidewalks

Another category of land use regulations that affect protected speech is regulations that restrict expression on public streets or sidewalks. Such regulations have been challenged as First Amendment violations in contexts involving varied forms of expression. These forms of expression include sound amplification devices,[348] demonstrations,[349] solicitations,[350] marches,[351] freestanding newsracks,[352] art vendors,[353] and abortion protests.[354] While several of these cases have involved permit systems, even general regulations restricting protected expression in public areas may invoke the prior restraint doctrine. *Saia v. New York*[355] is a case that illustrates why the doctrine of prior restraint is an important vehicle for protecting such First Amendment freedoms.

In *Saia*, the city prohibited the use of sound amplification devices unless an individual had obtained from the Chief of Police permission to use such devices.[356] The city denied a minister's request for renewal of his permit because residents had registered complaints regarding amplified lectures that he gave in a public park.[357] The Court held that the ordinance, which sanctioned fines and jail sentences against the minister when he continued to use amplification equipment without a permit, was unconstitutional on its face as a prior restraint on the right of free speech.[358] Describing the type of problems that could result from such a permit scheme, the Court said:

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348. *See, e.g.*, Saia v. New York, 334 U.S. 558 (1948).

349. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536 (1965).

350. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Staub v. City of Baxley, 355 U.S. 313 (1958).

351. *See, e.g.*, Forsyth County v. The Nationalist Movement, 505 U.S. 123 (1992).

352. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

353. *See* Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996).

354. *See, e.g.*, Schenck v. Pro-Choice Network, 117 S. Ct. 855 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

355. 334 U.S. 558 (1948).

356. *See id.* at 558.

357. *See id.* at 559.

358. *See id.* at 559-60.

> In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.[359]

The Court emphasized that, when balancing community interests against the freedoms of the First Amendment, the First Amendment is in the preferred position.[360]

1. Permits for Public Solicitation and Demonstrations

The prior restraint doctrine has been used to invalidate regulations that restrict the solicitation of membership for organizations. For example, a permit system at issue in *Staub v. City of Baxley*[361] made it an offense to "'solicit' citizens of the City of Baxley to become members of any 'organization, union or society' which requires 'fees [or] dues' from its members without first applying for and receiving from the Mayor and Council of the City a 'permit.'"[362] The Court noted that the city's ordinance made "the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official."[363] Consequently, the Court invalidated the ordinance as an unconstitutional prior restraint on First Amendment freedoms.[364]

The civil rights movement of the 1960s generated conflicts between community interests in preserving peace and tranquillity, and the First Amendment freedom to protest the denial of civil rights through demonstrations and marches. In *Cox v. Louisiana*,[365] the Court overturned protest-related convictions for disturbing the peace, obstructing public passages, and picketing before a courthouse.[366]

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359. *Id* at 562.
360. *See id.*
361. 355 U.S. 313 (1958).
362. *Id* at 321.
363. *Id.* at 322.
364. *See id.* at 325 (citing Cantwell v. Connecticut, 310 U.S. 296, 307 (1940)).
365. 379 U.S. 536 (1965).
366. *See id.* at 538. The arrests and convictions had resulted from a civil rights

Although the Court recognized the inherent right of a government to regulate the use of public property to assure public safety and convenience,[367] the Court reversed the conviction because local officials in Baton Rouge were allowed unfettered discretion in regulating the use of the streets for peaceful parades and meetings.[368]

Likewise, in *Shuttlesworth v. City of Birmingham*,[369] the Court reversed the conviction of a civil rights march leader for violating a Birmingham statute that made illegal the participation in any parade or other public demonstration without a permit from the Birmingham City Commission.[370] The Court found that the Birmingham ordinance gave the City Commission nearly unlimited power to restrict such activity, and that the City Commission's decision was "guided only by [its] own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'"[371] The Court held that the ordinance was unconstitutional because it subjected "the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority."[372]

More recently, in *Forsyth County v. Nationalist Movement*,[373] the Court analyzed and invalidated an ordinance that required the organizers of public demonstrations to obtain a demonstration permit, the cost of which was contingent on the stated content of the demonstration's speech.[374] The Nationalist Movement challenged the

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demonstration protesting racial segregation. *See id.*

367. *See id.* at 554 (citing Poulos v. New Hampshire, 345 U.S. 395 (1953); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948); Largent v. Texas, 318 U.S. 418 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939); *and* Lovell v. Griffin, 303 U.S. 444 (1938)).

368. *See id.* at 558.

369. 394 U.S. 147 (1969).

370. *See id.* at 148.

371. *Id.* at 150.

372. *Id.* at 150-51 (citing Staub v. City of Baxley, 355 U.S. 313, 322 (1958)).

373. 505 U.S. 123 (1992).

374. *See id.* at 126-37. The county enacted the ordinance in response to a 1987 civil rights demonstration that required over $670,000 in police protection. *See id.* at 126. The high costs were required to control the one thousand counter-demonstrators, some of whom sporadically threw rocks at the group of over twenty thousand marchers. *See id.* at 125-26. In addition, it took more than three thousand state and local police and National Guardsmen to contain the

ordinance after the county charged a one hundred dollar fee for the Movement to demonstrate in opposition to the federal holiday commemorating Martin Luther King, Jr.'s birthday.[375] Because the ordinance required a county administrator to examine the content of the message to be conveyed in order to assess accurately the cost of security for parade participants, the ordinance could not be analyzed as a content-neutral regulation.[376] The county argued that its permit fees were needed to raise revenue, and the Court noted that the county's purpose was indeed an important interest.[377] The Court found, however, that the county's purpose was not sufficient to justify a content-based permit fee.[378] The Court held that requiring a permit and fee prior to allowing protected speech constitutes a prior restraint in violation of the procedural safeguards of *Freedman*.[379]

Government officials typically attempt to use permit and license schemes to control activity that occurs on public streets and sidewalks. This type of regulation is particularly well suited to a prior restraint analysis because of the discretionary power that local ordinances generally grant local officials to control expression. Nevertheless, all general restrictions on protected First Amendment activities exercised in a public forum also should be evaluated as a prior restraint on expression because of their potential to chill

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counter-demonstrators. *See id.*

375 Although the Movement did not hold the rally or pay the fee, it filed suit challenging the imposition of the fee. *See id.* at 127.

376. *See id.* at 134 (noting that, "[t]hose wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit"). *But see* Northeast Ohio Coalition for the Homeless v. City of Cleveland, 105 F.3d 1107, 1110 (6th Cir. 1996) (upholding as constitutional a content-neutral ordinance provision for a fifty-dollar license fee because all street peddlers are required to pay the fee).

377. *See Nationalist Movement*, 505 U.S. at 136.

378. *See id.*

379. *See id.* at 130 ("[A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication."); *see also* Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth., 984 F.2d 1319, 1327 (1st Cir. 1993) (finding that subway system guidelines requiring prior authorization to engage in noncommercial expressive activity are a prior restraint, but are permissible because they incorporate the appropriate safeguards); Community for Creative Non-Violence v. Turner, 714 F. Supp. 29, 33 (D.D.C. 1989) (noting that regulation requiring permit for people seeking to engage in free speech activities on the publicly owned property of Washington Metropolitan Area Transit Authority is an impermissible prior restraint on protected speech), *modified*, 893 F.2d 1387 (D.C. Cir. 1990).

protected expression.

2. Permits for Free-Standing Newsracks on Public Property

In *City of Cincinnati v. Discovery Network, Inc.*,[380] the Supreme Court held that a city's refusal to allow the distribution of advertisements through freestanding commercial newsracks located on public property is a constitutionally impermissible regulation of commercial speech.[381] The Court's holding relied heavily upon the fact that the city permitted other commercial publications to remain on public property.[382] The Court recognized that the city had an important interest in aesthetics, but found that the commercial newsracks were no greater nuisance than the newsracks that were permitted to remain on the city's sidewalks.[383] The Court rejected the city's attempt to rely on *Renton*'s secondary effects approach because any secondary effects caused by the commercial newsracks were indistinguishable from those caused by the newsracks the city permitted to remain on the public sidewalks.[384] Moreover, Cincinnati could not justify its content-based ban on commercial newsracks as a legitimate time, place, and manner restriction.[385] Although the Court agreed with the city that commercial speech receives a lower level of constitutional protection, even under the standards of *Central Hudson*

380. 507 U.S. 410 (1993).

381. *See id.* at 430.

382. *See id.*

383. *See id.* at 425.

384. *See id.* at 430. *But see* Graff v. City of Chicago, 9 F.3d 1309, 1319 (7th Cir. 1993) (comparing the restriction of newsstands in *Graff* to the *Renton* and *Young* cases and arguing that "[s]urely if a city can restrict speech through the planning, regulation, and zoning of property because of the secondary effects of adult motion pictures on the neighborhood, Chicago should be allowed to regulate property on which newsstands could be located" (citations omitted)).

385. *See Discovery Network*, 507 U.S. at 430. The very basis for the regulation at issue was "the difference in content between ordinary newspapers and commercial speech." *Id.* at 429. For cases involving permit schemes regulating newsracks and other public sidewalk activities, see One World One Family Now v. City of Key West, 852 F. Supp. 1005, 1011-12 (S.D. Fla. 1994) (finding that an ordinance requiring a permit to operate as a mobile vendor on public sidewalks is a prior restraint upon speech, and city's aesthetic concerns were not sufficient to allow abridgment of First Amendment rights); City of Hallandale v. Miami Herald Pub. Co., 637 So. 2d 929, 932-33 (Fla. App. 1994) (stating that a flat license fee imposed on vending machines on public property is an invalid prior restraint on First Amendment rights) (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

and *Fox*, the commercial newsrack ban could not withstand such a lower level of scrutiny.[386] The Court, therefore, did not decide whether a content-based restriction of commercial speech "should be subjected to more exacting review."[387]

The Second Circuit also has recently addressed the issue of governmental restrictions on free expression in public spaces. In *Bery v. City of New York*,[388] the government restriction at issue was a "General Vendors Law" that barred "visual artists from exhibiting, selling or offering their work for sale in public places in New York City without first obtaining a general vendors license."[389] Although the court did not employ a prior restraint analysis, it did hold that the license requirement for selling artwork in public spaces was an unconstitutional infringement on First Amendment rights.[390] The court noted that it was not clear that the ordinance was content-neutral because the ordinance distinguished between written and visual communication and effectively barred an entire medium of expression—the sale of artwork in public places.[391] However, the court found that the ordinance would be invalid even under the less restrictive standard applied to a content-neutral regulation.[392] The Second Circuit noted that regulations that are enacted to control crowds, prevent congestion, or allow unimpeded passage over public thoroughfares must (1) be content-neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) "'leave open ample alternative channels for communication.'"[393]

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386. *See Discovery Network*, 507 U.S. at 416 n.11.

387. *Id.* Justice Blackmun concurred with the result, but wrote separately to express his view that *the Central Hudson* intermediate level of scrutiny was appropriate for a restraint on commercial speech that is related to time, place, or manner, but "not for a regulation that suppresses truthful commercial speech to serve some other government purpose." *Id.* at 431 (Blackmun, J., concurring). ***But see*** Rubin v. City of Berwyn, 553 F. Supp. 476, 479 (N.D. Ill. 1982) (stating that requiring a permit to operate a newsstand constitutes a prior restraint and the "right to sell and disseminate public information is protected by the First Amendment, and any governmental restriction of this right must be supported by a compelling state interest"), *aff'd*, 698 F.2d 1227 (7th Cir. 1982).

388. 97 F.3d 689 (2d Cir. 1996).

389. *Id.* at 691.

390. *See id.* at 698.

391. *See id.* at 696-97.

392. *See id.* at 697.

393. *Id.* (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

Applying the constitutional policy advocated in this Article, regulations that restrict any protected expression on public thoroughfares should be invalidated as prior restraints unless they fall within one of the narrowly defined exceptions.[394] If the prior restraint survives the heavy presumption against constitutionality and satisfies the examination of procedural safeguards, it must still be evaluated as either a content-based or content-neutral regulation and appropriately analyzed under a strict scrutiny or time, place, and manner analysis. Instead of using local regulations to control crowds, prevent congestion, and allow passage over public streets and sidewalks, municipalities should be required to use nuisance law to control activity that actually interferes with public safety and welfare.[395]

3. Injunctions Against Certain Public Protests and Gatherings

Another emotion-laden type of land use regulation—restrictions against antiabortion demonstrations—was at issue in *Madsen v. Women's Health Center, Inc.*[396] In *Madsen*, the Supreme Court upheld the provisions of an injunction that established a thirty-six-foot buffer zone on a public street outside of an abortion clinic in order to exclude antiabortion demonstrators.[397] Analyzing the injunction as a content-neutral restriction on protected speech, the Court applied an intermediate level of scrutiny with "a somewhat more stringent application of general First Amendment principles."[398]

The *Madsen* Court rejected the demonstrators' contention that the injunction restricting only antiabortion protesters' speech was content or viewpoint based, and that it, thus, required examination of the injunction under a strict scrutiny standard.[399] The Court explained

394. These exceptions include obscenity and incitement to acts of violence. *See, e.g.*, Board of County Comm'rs v. Umbehr, 116 S. Ct. 2361, 2368 (1996) (Scalia, J., dissenting); *see also supra* notes 83-91 and accompanying text.

395. *See* discussion *infra* Part VI.

396. 512 U.S. 753 (1994); *see also* Schenck v. Pro-choice Network, 117 S. Ct. 855 (1997). The *Schenck* decision will not be discussed because it bears many similarities to the *Madsen* case and does not illuminate any of the issues addressed in this Article.

397. See *Madsen*, 512 U.S. at 776.

398. *Id.* at 765. The Court used this more stringent application because the restriction was achieved by an injunction rather than a general ordinance. *See id.*

399. *See id.* at 762 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37,

that if the injunction, on its face, appeared to be viewpoint based, it was only because all injunctions, by their very nature, must apply to a particular group.[400] Moreover, the Court noted that while the injunction did not target pro-choice groups, the lack of targeting could be justly attributed to the lack of previous demonstrations by pro-choice groups or the lack of any request that such demonstrations be included in the injunction.[401] The Court also refused to adopt a prior restraint analysis, even though prior restraints historically have taken the form of injunctions.[402]

An injunction was also at issue in *People* ex rel. *Gallo v. Acuna*,[403] a case involving a new anti-gang weapon based upon public nuisance law.[404] Gang members who were enjoined from "[s]tanding, sitting, walking, driving, gathering, or appearing anywhere in public view with any other defendant,"[405] along with other restrictions,[406] argued that the injunction was "an impermissible prior restraint on their First Amendment rights of speech and association."[407] Finding that some of the provisions of the injunction were "unequivocally content-

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45 (1983) (holding that a content-based exclusion requires showing that a regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end)).

400. *See id.*; *see also* Horizon Health Ctr. v. Felicissimo, 622 A.2d 891, 903 (N.J. Super. Ct. App. Div. 1993) ("The injunction entered here may not be construed as a content-based restriction on expression. It must be construed as focusing specifically and exclusively on the location and manner of expression."), *modified*, 638 A.2d 1260 (N.J. 1994).

401. *See Madsen*, 512 U.S. at 762.

402. *See id.* at 763-64 n.2. Justice Scalia, in dissent, identified the injunction as a prior restraint and declared that "the judicial creation of a 36-foot zone in which only a particular group . . . cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with our First Amendment precedents and traditions." *Id.* at 785 (Scalia, J., dissenting). Appropriately, Justice Scalia argued that the restriction is content-based and deserves the application of strict scrutiny, and that, therefore, the restriction must be "'necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.'" *Id.* at 791 (Scalia, J., dissenting). Scalia also asserted that such a content-based restriction may be designed to suppress ideas rather than achieve a proper governmental goal, *see id.* at 792, and such a restriction in the form of "an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint." *Id.* at 797.

403. 929 P.2d 596 (Cal. 1997).

404. *See id.* at 602.

405. *Id.* at 608.

406. *See id.*

407. People *ex rel.* Gallo v. Acuna, 40 Cal. Rptr. 2d 589, 593 (Cal. Ct. App. 1995), *vacated*, 929 P.2d 596 (Cal. 1997).

related,"[408] the appellate court noted that the "First Amendment strictly forbids such restrictions."[409] However, the California Supreme Court held that the activities of the gang and its members were not protected under the First Amendment because their activities were not "'private' or 'intimate' as constitutionally defined"[410] within the protected rights of association.[411] This type of regulation will continue to generate litigation in the future because other cities have added this "new weapon to [their] arsenal in the war against gangs."[412]

Certainly, any restriction on First Amendment rights that is based on the content of the expression, whether it be in the form of a general ordinance or an administrative or judicial act,[413] is a prior restraint on protected values unless it falls within one of the exceptions and meets certain procedural safeguards. Courts should treat as prior restraints any restriction on adult uses, commercial or noncommercial billboards and signs, or demonstrations that generate difficulties because of either their secondary effects or the content of their messages. When labeled as prior restraints, courts will view the restrictions with a "'heavy presumption' against [their] constitutional validity."[414] This analytical framework should effectively prevent constitutional jurisprudence from becoming distorted by cases involving regulations that affect controversial subject areas such as pornography, gangs, and abortion.[415]

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408. *Id.* at 596.

409. *Id.* (citing Madsen v. Women's Health Center, Inc., 512 U.S. 753, 763 (1994)).

410. *Gallo*, 929 P.2d at 609.

411. *See id.*

412. *Gallo*, 40 Cal. Rptr. 2d at 592. *See generally* Jose Cardenas, *Alarcon Proposes Anti-Gang Injunction*, L.A. TIMES, Aug. 14, 1997, at A1 (Valley edition); Bruce Fein, *Weapon in the Fight Against Street Gangs*, WASH. TIMES, Aug. 12, 1997, at A12; V. Dion Haynes, *L.A. Anti-Gang Plan*, CHI. TRIB., May 30, 1997, at 4; David Rosenzweig & Matea Gold, *Sweeping Order to Limit Activity of 18th Street Gang*, L.A. TIMES, July 12, 1997, at A1; David G. Savage & Carla Rivera, *Court Upholds Injunction Against Gangs*, L.A. TIMES, June 28, 1997, at A1.

413. *See Madsen*, 512 U.S. at 797-98 (Stevens, J., dissenting) (agreeing with the Court that a different standard should apply to generally applicable legislation than that which applies to judicial remedies, but arguing that "injunctive relief should be judged by a more lenient standard than legislation").

414. *Id.* at 798 (citations omitted).

415. *See id.* at 784-85 (Scalia, J., dissenting).

IV. PRIOR RESTRAINT AND FREE EXERCISE

The First Amendment to the United States Constitution[416] supplies the textual basis for giving religious liberty the same protection that is afforded to speech, press, assembly, and the right to petition.[417] An historical view of the relationship between the church and state, as it existed during the time that the First Amendment was drafted and ratified, reveals that the Framers and other political leaders viewed freedom of religion as a paramount right.[418] Indeed, history shows that the Framers perceived free exercise of religion as part of one's individual liberty, in accord with the right to free speech and the right to be free from unjust taking of property.[419] However, the Supreme Court's holding in *Employment Division v. Smith*[420] dramatically departed from this historical view of First Amendment jurisprudence, striking an unnecessary blow to religious liberty.[421]

In *Smith*, the Court upheld Oregon's denial of unemployment compensation to workers who were dismissed after using peyote as part of their religious practices.[422] The Court refused to apply to the facts of *Smith* the balancing test set forth in *Sherbet v. Verner*,[423]

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416 U.S. CONST. amend. I. The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

417. *See* R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?*, 27 LOY. L.A. L. REV. 147, 189 (1993) ("even the application of one of the most basic principles of textual exegesis would give some significance to the location of the religion clauses in the text of the First Amendment"). *But see* Leo Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1121 (1973) (discussing "elevat[ing] free exercise and perhaps establishment values above all other first amendment claims"); Jennifer E. Spreng, Comment, *Failing Honorably: Balancing Tests, Justice O'Connor and Free Exercise of Religion*, 38 ST. LOUIS U. L.J. 837, 839 (1994) (suggesting that "[o]nly a jurisprudential principle placing free exercise rights at the top of the constitutional hierarchy can protect those rights"). Indeed, the "boundaries of protected free exercise activity should be defined by the boundaries of free speech." William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 361 (1990) (arguing that religious claims should not be constitutionally protected "unless protection is also extended to parallel objections based on non-religious grounds, such as those of moral philosophy").

418. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2185 (1997) (O'Connor, J., dissenting).

419. *See id.* (citing P. KAUPER, RELIGION AND THE CONSTITUTION 17 (1964)).

420. 494 U.S. 872 (1990).

421. *See id.* at 891 (O'Connor, J., concurring).

422. *See id.* at 890.

423. 374 U.S. 398 (1963).

which requires that governmental actions that substantially burden a religious practice be justified by a compelling governmental interest.[424] The Court held that the *Sherbert* test should not be used to analyze free exercise challenges[425] and warned that "[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[426]

Such dire forecasts by the Court fail to recognize that a compelling-interest test can be applied to restrict First Amendment freedoms when society's needs are sufficiently important to justify such a restriction. Indeed, in her *Smith* concurrence, Justice O'Connor's application of the compelling interest test to the denial of unemployment benefits resulted in the same disposition achieved by the majority decision.[427] The test applied by the *Smith* majority ignores the burden that a law places on religious belief, so long as the law is generally applicable and is not motivated by a governmental intent to affect religion. Without a compelling interest test, certain religious practices may be restricted by laws of general application unless the political process is used to obtain an exemption from the offending regulation.[428] Justice Scalia admitted that requiring legislative action to obtain relief from restrictive regulations will "place at a relative disadvantage those religious practices that are not widely engaged in,"[429] but concluded that such a result is just the "unavoidable consequence of democratic government."[430] Justice O'Connor, however, expressed the view that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with

424. *See Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402-03).
425. *See id.* at 885.
426. *Id.* at 887.
427. *See id.* at 903 (O'Connor, J., concurring).
428. *See id.* at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."); *see also* Carrie Johnson, *Parish To Go To Court To Save Feeding Plan*, RICHMOND TIMES DISPATCH, June 15, 1997, at A6 (stating that a parish that feeds the homeless despite a city ordinance that restricts feeding programs in residential districts will have a difficult time winning its case against the city without the Religious Freedom Restoration Act).
429. *Smith*, 494 U.S. at 890.
430. *Id.*

hostility."[431]

Congress enacted the Religious Freedom Restoration Act of 1993[432] (RFRA) in direct response to the *Smith* decision.[433] Congress intended that RFRA would "restore the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and guarantee its application in all cases where free exercise of religion is substantially burdened."[434] However, in *City of Boerne v. Flores*,[435] the Supreme Court held that Congress exceeded its enforcement power under the Fourteenth Amendment when it enacted RFRA.[436] As a result, the Court defeated Congress's attempt to enforce more rigorously the Free Exercise Clause, and returned First Amendment jurisprudence to the *Smith* standard, which does not require courts to make a searching inquiry into the possibilities of reasonably accommodating religious practice.[437] Concurring with the *Boerne* decision, Justice Scalia defended his *Smith* opinion, arguing that the issue presented by *Smith* was whether the people or the Court should control the outcome of cases involving unreasonable burdens on religious practice.[438] According to Justice Scalia, the Court's holding in *Smith* proclaimed that "[i]t shall be the people."[439] It is, thus, ironic that Justice Scalia elaborated such a defense of his *Smith* position in the *Boerne* case for *Boerne* was an opinion overturning a Congressional act that was

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431. *Id* at 902 (O'Connor, J., concurring).

432. 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

433 *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2160 (1997).

434. 42 U.S.C. § 2000bb(b) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972), *and* Sherbert v. Verner, 374 U.S. 398 (1963)); *see also City of Boerne*, 117 S. Ct. at 2162.

435. 117 S. Ct. 2157 (1997).

436 *See id.* at 2160 (explaining that the Archbishop, in reliance on RFRA, challenged San Antonio's denial of a building permit to enlarge a church located in a historic district). Although this Article does not intend to address the correctness of the Court's decision to hold RFRA unconstitutional, Justice O'Connor's dissent is persuasive on this point in that it points out a fundamental flaw in the Court's analysis of RFRA, namely, an assumption that *Smith* correctly interprets the Free Exercise Clause. *See id.* at 2176-77 (O'Connor, J., dissenting); *id.* at 2186 (Souter, J., dissenting) (expressing strong "doubts about the precedential value of the *Smith* rule and its entitlement to adherence. These doubts are intensified . . . by the historical arguments going to the original understanding of the Free Exercise Clause presented in JUSTICE O'CONNOR's opinion . . . which raises very substantial issues about the soundness of the *Smith* rule.").

437. *See id.* at 2177 (O'Connor, J., dissenting).

438. *See id.* at 2175-76 (Scalia, J., concurring).

439. *Id.* at 2176.

enacted by the people "through their elected representatives."[440]

Because the Supreme Court has returned to the constitutional standard in *Smith*, which tolerates religious expression "only when it does not conflict with a generally applicable law,"[441] it is necessary to offer an alternative approach, at least as to land use regulation.[442] Such an approach must support the historical understanding of the Free Exercise Clause "as an affirmative guarantee for the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application."[443] This Article proposes that similar principles and standards of constitutional jurisprudence should be used to evaluate land use regulations that burden any of the rights protected by the First Amendment. If a zoning regulation is either generally applied or requires a permit or special exception, and directly or indirectly impacts First Amendment rights, it should be treated as a prior restraint. Regulations that act as prior restraints will be valid only if they fall into one of the narrowly drawn exceptions and contain sufficient procedural safeguards against official censorship. A valid prior restraint regulation can then be evaluated as either a content-based or content-neutral regulation. Zoning regulations that are content-based or target the exercise of a First Amendment right must be evaluated using a strict scrutiny standard. Content-neutral regulations must be examined under a lower level of scrutiny as time, place, and manner restrictions. While applying this analysis to land use regulations that allegedly infringe upon religious

440. *Id.*

441. *Id.* at 2185 (O'Connor, J., dissenting).

442. This Article does not suggest that the prior restraint doctrine would necessarily be applicable to government regulation that is not related to land use. For example, the denial of unemployment compensation in the *Smith* decision would not constitute a prior restraint under the proposed constitutional policy because it is not a land use regulation. *See* Thomas v. Review Bd., 450 U.S. 707, 707 (1981) (Jehovah's Witness denied unemployment benefits after he quit his job because his religious beliefs did not allow him to be involved in the production of war materials). *But see* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 388-92 (1990) (designating as an unconstitutional prior restraint a requirement that an organization pay a tax prior to engaging in protected activity, but designating as constitutional a requirement that an organization pay a generally applicable tax on retail sales of religious materials unless the organization can demonstrate that the mere act of paying such tax violates sincerely held religious beliefs).

443. *City of Boerne*, 117 S. Ct. at 2185 (O'Connor, J., dissenting).

liberty will require that the Court retreat from its decision in *Smith*,[444] the Court should adopt this approach on the basis that it will better combat what Justice Scalia has called "the greatest threat to First Amendment values, the prior restraint."[445]

A. Prior Restraints on Religious Exercise: Supreme Court Decisions

The prior restraint doctrine has been applied to regulations impinging on religious freedom. In fact, several of the Supreme Court cases that have evaluated prior restraints on religious exercise have involved the religious practices of the Jehovah's Witnesses.[446] In *Cantwell v. Connecticut*,[447] three Jehovah's Witnesses who claimed to be ordained ministers were arrested after soliciting contributions for religious publications, including some that attacked the Catholic religion,[448] while going from door to door in a neighborhood where close to ninety percent of the residents were Roman Catholic.[449] The three Jehovah's Witnesses were charged under a Connecticut statute that required them to obtain a certificate before soliciting support for their views.[450] The Supreme Court noted that a general regulation of solicitation would not be unconstitutional as a prior restraint, even if it obstructed or delayed the collection of funds for a religious purpose.[451] However, the Connecticut statute required that the application be approved by an official who was empowered to decide whether the applicant's cause was religious in nature.[452] The Court

444. *See* Rainey, *supra* note 417, at 190 (arguing that the Rehnquist Court should begin to repair the breach between law and religion by abandoning the *Smith* decision "at the earliest possible opportunity in favor of religious liberty and its liberal accommodation").

445. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 797 (1994) (Scalia, J., dissenting) ("The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'" (quoting Alexander v. United States, 509 U.S. 544, 548 (1993))).

446. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Follett v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940).

447. 310 U.S. 296 (1940).

448. *See id.* at 300-01.

449. *See id.* at 301.

450. *See id.* at 303-04.

451. *See id.* at 305.

452. *See id.*

held that "[s]uch a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment. . . ."[453] Although the Court recognized that a state may regulate the time and manner of solicitation to promote public safety, peace, comfort, or convenience, it made clear that a state has no authority to determine what constitutes a legitimate religious cause.[454]

Like *Cantwell*, the case of *Cox v. New Hampshire*[455] involved several Jehovah's Witnesses who had been convicted of violating a New Hampshire statute that required individuals to obtain a special license before parading on a public street.[456] The five Jehovah's Witnesses asserted that they were ordained ministers, that their purpose in participating in the march was to disseminate information, and that such dissemination was one of their forms of worship.[457] The Court distinguished the statute at issue in *Cox* from the one at issue in *Cantwell* on the basis that the statute in *Cox* did not interfere with religious worship or the practice of religion—it was simply an exercise of local control over the public streets.[458] The statute at issue in *Cantwell*, on the other hand, authorized an official to determine whether a cause was religious and, thus, established a censorship of religion.[459] The *Cox* Court acknowledged that a municipality's authority to regulate the use of public highways is consistent with preserving civil liberties and is indeed one of the means by which a city may safeguard its citizens and ensure the order upon which the citizenry ultimately depends.[460] As a corollary, noted the court, a municipality has the authority to regulate the use of public streets as to time, place, and manner without interfering with any constitutional right.[461] Accordingly, the *Cox* Court upheld the constitutionality of

453. *Id.*

454. *See id.* at 306-07. The Court also reversed the breach of the peace conviction because it found that Cantwell's playing a phonograph record that attacked the Catholic Church was not a breach of the peace, even though his communication aroused the animosity of listeners. *See id.* at 309-11.

455. 312 U.S. 569 (1941).

456. *See id.* at 570-71.

457. *See id.* at 573.

458. *See id.* at 578.

459. *See id.*

460. *See id.* at 574.

461. *See id.* at 576.

the New Hampshire statute.[462]

Once again, in *Murdock v. Pennsylvania*,[463] a state court convicted Jehovah's Witnesses of distributing literature from door to door and soliciting contributions in violation of a municipal ordinance.[464] The local ordinance in *Murdock* required solicitors to pay a license fee as a condition to pursuing their solicitation activities.[465] Unlike the ordinance in *Cantwell*, however, the ordinance at issue in *Murdock* did not require a determination of whether the cause was religious.[466] Instead, the ordinance was similar to the statute at issue in *Cox*, in that it applied generally to anyone wishing to use the public streets.[467] Nevertheless, the Court in *Murdock* held that a flat license tax that is required as a condition to pursuing activities protected under the First Amendment serves as a prior restraint on the freedoms of press and religion, and "inevitably tends to suppress their exercise."[468]

In holding that the ordinance constituted a prior restraint, the *Murdock* Court distinguished *Cox* on the basis that the ordinance in *Cox* was a "regulation of the streets to protect and insure the safety, comfort, or convenience of the public,"[469] while the ordinance at issue in *Murdock* "[was] not narrowly drawn to prevent or control abuses or evils arising from that activity. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid."[470] While it is difficult to see the distinction the Court makes between these two cases,[471] it is certain that denying the Witnesses access to residential areas for their religious practice of solicitation, unless a tax is paid, is a restraint on

462. *See id.*
463 319 U.S. 105 (1943).
464. *See id.* at 106-07.
465. *See id.* at 106.
466. *See id.*
467. *See id.*
468. *Id.* at 114. The Court noted that it was immaterial that the ordinance was nondiscriminatory on its face. *See id.* at 115.
469. *Id.* at 116.
470. *Id* at 117.
471. *See id.* at 132 (Reed, J., dissenting) ("The sale of these religious books has, we think, relation to their religious exercises, similar to the 'information march,' said by the Witnesses to be one of their 'ways of worship' and by this Court to be subject to regulation by license in *Cox v. New Hampshire*." (citations omitted)).

the free exercise of religion.[472]

The Court confronted yet another Jehovah's Witness's challenge to a licensing scheme in *Follett v. Town of McCormick*.[473] In *Follett*, a Jehovah's Witness had been convicted of distributing books from house to house and seeking donations in support of his preaching activities without having first paid a requisite license fee.[474] The Supreme Court framed the issue as "whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional."[475] The Court concluded that if a license tax on pulpit preachers would be constitutionally invalid, then the license tax in the case of door-to-door or street preaching must also fail.[476]

The result of the Court's decisions in *Murdock* and *Follett* "is that distribution of religious literature in return for money when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment and therefore immune from interference by the requirement of a license."[477] Thus, these early decisions established that even content-neutral, nondiscriminatory licensing schemes that have the effect of suppressing religious conduct are invalid as a prior restraint on First Amendment rights.

B. Prior Restraints on Religious Exercise: Lower Court Decisions

Lower courts also have evaluated certain land use regulations as possible prior restraints on free exercise.[478] In *International Society*

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472. *See id.* at 117.

473. 321 U.S. 573, 574 (1944).

474. *See id.* at 574. The South Carolina Supreme Court had distinguished this case from *Murdock* on the basis that "the principle of the *Murdock* decision was applicable only to itinerant preachers [and Follett] was not an itinerant but was a resident of the town." *Id.* at 575. In addition, the South Carolina Supreme Court had concluded that the "license was required for the selling of books, not for the spreading of religion." *Id.* (citations omitted).

475. *Id.* at 576.

476. *See id.* at 577.

477. *Follett*, 321 U.S. at 720 (Reed, J., concurring) (disagreeing with the Court's holding in *Follett*, but recognizing the *Follett* opinion as the "law of the land").

478. *See, e.g.*, Nichols v. Planning and Zoning Comm'n, 667 F. Supp. 72, 78 (D.C. Conn. 1987) (holding that a regulation requiring residents to obtain a permit before holding prayer meetings in their home is an unconstitutional prior restraint on religious exercise); Hickey v. Village of Schaumburg, No. 78-C4427, 1980 U.S. Dist. LEXIS 10582, at *8 (N.D. Ill. March 13, 1980) (holding that an ordinance requiring a license for soliciting charitable donations is a

for Krishna Consciousness, Inc. (ISKCON) v. Barber,[479] the United States Court of Appeals for the Second Circuit held that a New York State Fair rule that prohibited peripatetic solicitations and, thus, incidentally prevented members of an unorthodox Eastern religion from engaging in the religious ritual of Sankirtan, was a prior restraint on religious solicitation.[480] The court suggested that "resort to the penal laws, which punish undesirable conduct after it occurs, is a more appropriate response to ISKCON misconduct than a sweeping prohibition on all solicitation, fraudulent and nonfraudulent."[481] Similarly, common law nuisance is a more appropriate means of controlling the undesirable effects of conduct after they occur, rather than using a sweeping zoning regulation that prohibits offensive as well as inoffensive land uses.

The United States Courts of Appeals for the Fifth Circuit and the Tenth Circuit also have invalidated certain land use regulations as prior restraints on religious exercise.[482] In *Fernandes v. Limmer*,[483] the Fifth Circuit held that an ordinance requiring licensing for solicitation constitutes a prior restraint on religious exercise when it affects a religious group.[484] The ordinance at issue in *Fernandes* restricted Krishna members from practicing Sankirtan by requiring that the members purchase a permit prior to soliciting public funds and distributing literature.[485] The Fifth Circuit evaluated the permit requirement and noted that the "prior restraint doctrine has been invoked to strike down content-neutral permit systems that regulate

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prior restraint on the Unification Church's religious activities); *In re* American Rescue Workers, Inc. v. Smith, 228 N.Y.S.2d 85, 90 (N.Y. App. Div. 1962) (holding that a city ordinance requiring permits for solicitation is an unconstitutional prior restraint on religious exercise). *But see* Love Church v. City of Evanson, 671 F. Supp. 508, 512 (N.D. Ill. 1987) (finding that plaintiffs had failed to state a claim under the prior restraint doctrine because the challenged zoning ordinance restricting church location options did not restrain plaintiffs from worshipping), *vacated*, 896 F.2d 1082 (7th Cir. 1990); Grace Community Church v. Town of Bethel, 615 A.2d 1092 (Conn. Super. Ct. 1992).

479. 650 F.2d 430 (2d Cir. 1981).

480. *See id.* at 445 (citing *Cantwell* and *Murdock* as precedent).

481. *Id.* at 446.

482. *See* Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981); Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).

483. 663 F.2d 619 (5th Cir. 1981)

484. *See id.* at 633.

485. *See id.* at 623.

protected First Amendment activities."[486] The court then examined the regulation and found insufficient the procedural safeguards required under *Freedman* for such prior restraint permit systems.[487] In addition, the court found that the daily permit fee of six dollars was an unconstitutional tax on free exercise based on the *Cox* and *Murdock* decisions.[488]

Similarly in *Espinosa v. Rusk*,[489] the Tenth Circuit held that an ordinance requiring an application for a permit was an unconstitutional prior restraint because it required a government official to make a determination of whether a cause was religious or secular.[490] Under the ordinance at issue in *Espinosa*, the Seventh Day Adventist Church was required to submit an application in order to obtain a permit for its annual solicitation drive to support activities such as medical, community, evangelical, and educational services.[491] The city stated that the purpose for the official inquiry was not to censor activity, but rather to determine the legitimacy of the religious affiliation, which, in turn, was to prevent fraud and other similar conduct.[492] Nonetheless, the court found that the "conception of religion entertained by the City in this very case was that it had to be purely spiritual or evangelical."[493] The court concluded that, as a result of the city's conception of religion, the city impermissibly determined that "the charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor was . . . subject to regulation."[494]

Unlike *Espinosa*, in *Messiah Baptist Church v. County of Jefferson*,[495] the Tenth Circuit distinguished between the regulation of religious belief and the regulation of religious conduct.[496] Using such

486. *Id.* at 628.
487. *See id.*
488. *See id.* at 632-33.
489. 634 F.2d 477 (10th Cir. 1980), *aff'd*, 456 U.S. 951 (1982).
490. *See id.* at 480 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943), *and* Cantwell v. Connecticut, 310 U.S. 296 (1940)).
491. *See id.* at 478-79.
492. *See id.* at 481.
493. *Id.*
494. *Id.*
495. 859 F.2d 820 (10th Cir. 1988).
496. *See id.* at 824.

an approach, the court analyzed as a regulation of religious conduct an ordinance requiring a special-use permit for churches.[497] Finding that the construction of a church did not relate to any underlying religious beliefs of the Baptist Church,[498] the court held that the zoning regulations did not violate First Amendment rights because there was "no conflict between the zoning ordinances and the religious tenets or practices of [the Baptist] Church."[499]

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497. *See id.* ("'[T]he [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute . . . .'" (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)) (alteration in original)). For an extensive commentary on the belief/conduct paradigm, see generally Marci A. Hamilton, *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993).

498 *Messiah Baptist Church*, 859 F.2d at 824.

499 *Id.* at 825; *see also* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) (holding that a city can deny to any religious group a request to build a house of worship in a residential neighborhood without running afoul of the First Amendment). The dissent in *Messiah Baptist Church*, however, argued that the content-neutral regulation that burdened the church's religious worship should be analyzed under a time, place, and manner standard, just as when the government prohibits the use of buildings for live entertainment. *See Messiah Baptist Church*, 859 F.2d at 828-29 (McKay, J., dissenting) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981)). Suggesting that courts apply a standard higher than rational basis review to zoning ordinances prohibiting the use of buildings as churches, the dissent posited an approach that it adopted from a student comment:

> "A better solution would be to acknowledge that zoning ordinances can affect religious freedom and to subject them to an analysis that explicitly confronts the first amendment interests at stake. Because zoning regulations do not prohibit belief or outlaw behavior that is central to any faith, the government should not have to prove a compelling interest to justify a zoning ordinance. Rather, the analysis appropriate for a neutral government act, like a zoning ordinance, that restricts religious expression should be the same as for neutral government acts that circumscribe secular expression. That analysis, well-established as applied to ordinances regulating the time, place, and manner of a person's speech, requires that the government justify every such regulation by proving not only that it serves an important government purpose, but also that the purpose could not be accomplished by a means less restrictive of expressive freedom."

Id. at 831 (quoting Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. PA. L. REV. 1131, 1153 (1984) [hereinafter *Zoning Ordinances Affecting Churches*]).

A district court in *Cornerstone Bible Church v. City of Hastings*, 740 F. Supp. 654 (D.C. Minn. 1990), *aff'd in part, rev'd in part*, 948 F.2d 464 (8th Cir. 1991), similarly suggested that an ordinance specifying locations in which churches are permitted, but not prohibiting completely the establishment of churches in the city, should be analyzed as a time, place, and manner regulation because of its resemblance to the ordinance at issue in *Renton*. *See id.* at 660 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (finding that an ordinance did not

Zoning regulations, particularly those that require a special or conditional use permit, are structurally similar to the licensing schemes discussed above that have been invalidated as unconstitutional prior restraints.[500] They require a government official to decide either in advance or on review of an application for a permit, which religious uses or activities will be permitted in which areas. Unless the regulation meets the procedural safeguards of *Freedman*, there is a danger that officials will use unbridled discretion to infringe impermissibly on First Amendment rights.[501] Courts should, therefore, start with the assumption that a zoning regulation that has the effect of suppressing religious exercise should be evaluated under the prior restraint doctrine. If a court decides that a regulation is a valid prior restraint because it meets the procedural safeguards of *Freedman*, this Article proposes that the ordinance should then be evaluated as a content-neutral time, place, and manner regulation under an intermediate scrutiny standard similar to the *O'Brien* test.[502]

C. A New Approach to Analyzing Burdens on Free Exercise

The above decisions illustrate how courts have applied the doctrine of prior restraint to burdens on religious exercise. Based on this review, this Article proposes that zoning ordinances of general

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ban adult theatres, but merely regulated where they could be located)).

500. *See supra* notes 178-86, 191-95 and accompanying text.

501. *See* Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 829 (10th Cir. 1988). As the court stated in *Messiah Baptist Church*:

> The outright prohibition or the discretionary power (unaccompanied by adequate standards) to deny parade or protest permits on public property surely is not more odious to the First Amendment than the outright prohibition or legally discretionary power to deny the right to use buildings for worship, religious communication, and religious assembly on one's own property.

Id.

502. This analytical structure presumes that the regulation does not directly regulate either religious belief or religious conduct based on its content. *See id.* at 825 (finding unconstitutional zoning regulations that regulate religious beliefs, as opposed to religious conduct, and stating that "'[i]f the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect'" (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961))).

application, as well as regulations requiring a special exception or permit, operate as a prior restraint on free exercise when they burden religious beliefs or practices more than a de minimis amount. As a prior restraint, the regulation will not be invalid per se, but must fall within one of the narrowly interpreted exceptions and satisfy the procedural safeguard requirements of *Freedman* in order to be upheld. If the prior restraint is valid, then a court still may invalidate the restraint if it is content-neutral and impermissibly burdens free exercise under a time, place, and manner test similar to the one announced in *O'Brien*.[503] This intermediate scrutiny test for content-neutral regulation of religious beliefs or practices is less strict than the *Sherbert* and *Yoder* compelling interest test,[504] but it still would require a greater level of scrutiny than the courts currently require under the *Smith* rational basis test[505] for those zoning regulations that are not invalidated as prior restraints. This Article further proposes that a regulation that targets a belief should continue to be absolutely prohibited,[506] and a content-based regulation that targets a particular religious practice should be subject to strict scrutiny. Such strict scrutiny requires a compelling governmental interest to justify a restriction of protected rights.[507]

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503. If a regulation incidentally affects protected exercise, it is constitutional as long as: (1) it is within the constitutional power of the Government; (2) it serves an important or substantial governmental interest; (3) that interest is unrelated to the suppression of free exercise; and (4) protected exercise is abridged no more than is essential to the furtherance of that interest. *See supra* notes 114-17 and accompanying text.

504. *See* Bangor Baptist Church v. Maine, 549 F. Supp. 1208, 1217 (D.C. Me. 1982). The *Bangor* court stated:

> The test presently applied in determining whether regulation of religiously-motivated conduct violates the free exercise clause contemplates a three-part determination: 1. whether the challenge is motivated by, and rooted in, a legitimate and sincerely-held religious belief; 2. whether and to what extent state regulation burdens free exercise rights; and 3. whether any such burden is justified by a sufficiently compelling state interest.

Id. (citing Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

505. *See supra* notes 422-28.

506. *See* Hamilton, *supra* note 497, at 747 (discussing the *Smith* Court's adherence to the *Reynolds* rule, which "is the most extreme form of the belief/conduct paradigm: Belief is absolutely protected; conduct is automatically trumped by the state's interest").

507. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531-32 (1993). The *Hialeah* court stated:

> [A] law that is neutral and of general applicability need not be justified by a

Free exercise of religion warrants at least as much, if not more, protection from restrictive governmental land use regulation than is warranted for adult uses or commercial speech. The analysis that the courts currently apply to content-neutral regulations that impact religious practices or conduct requires only the lowest level of scrutiny under *Smith*. When ordinances impact religious exercise, courts should apply a constitutional analysis that is parallel to the one this Article proposes for zoning regulations that burden protected speech. The prior restraint doctrine is the baseline analysis, but regulations that survive examination under *Freedman*'s procedural inquiry should also be subjected to either a strict scrutiny standard, for content-based regulations, or a time, place, and manner examination, similar to the *O'Brien* test, for content-neutral regulation. However, when the exercise of First Amendment rights creates actual, rather than anticipated, adverse effects on a community's peace and order, common law nuisance should be used as the primary land use control method.[508]

> compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Id. (citations omitted). *But see* Spreng, supra note 417, at 848 (discussing *United States v. Carolene Products'* "footnote 4" as the justification for strict scrutiny analysis and noting that Professor Michael McConnell "argues that the Court has never applied a true compelling interest standard in free exercise cases consistently" (citing Michael McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 187-88 (1992))).

508. Using alternative public remedies to protect the welfare of the community was also suggested by the Court in *Kunz v. New York*, 340 U.S. 290, 294-95 (1951). In *Kunz*, a state court had convicted and fined Kunz, a Baptist minister, for violating a New York City ordinance that required a permit to be obtained before holding a public worship meeting on the street. *See id.* at 290-92. Kunz had applied for and received a permit, but the police commissioner revoked it after evidence presented at a hearing demonstrated that Kunz had "ridiculed and denounced other religious beliefs in his meetings." *Id.* at 292. Kunz applied for a permit each of the following two years, but the city denied his requests after ascertaining that a permit had previously been revoked "for good reasons." *Id.* at 293. Based upon the Supreme Court's assessment that the ordinance gave "an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York," *id.*, the Court held that the ordinance was "clearly invalid as a prior restraint on the exercise of First Amendment rights." *Id.* However, while the Court disallowed the city from restricting in advance the public worship meetings, the Court suggested that the city should employ alternative public remedies to protect the welfare of the community in the event that the meetings resulted in violence. *See id.* at 294-95 (citing Near v. Minnesota *ex rel.* Olson, 283

V. FREEDOM OF ASSOCIATION

In *NAACP v. Alabama* ex rel. *Patterson*,[509] the Supreme Court recognized the right of association as a First Amendment right arising from the freedoms of speech and assembly.[510] As the definition of this right has evolved, the Court has articulated at least three different aspects of the right to associate or not to associate as follows: (1) the right to achieve economic or other goals not connected to any fundamental constitutional right; (2) the right to choose one's spouse and maintain family and other highly personal relationships, as protected by the fundamental right to privacy; and (3) the right to exercise free speech, assembly, and religious liberty within the First Amendment.[511] Because the right of free association is not absolute, courts have recognized a continuum of protection that greatly limits the government's ability to interfere with intimate and personal gatherings.[512] This continuum allows less constitutional protection as a group becomes larger and more open to the community, particularly when an act of association involves a business organization.[513]

A. Applying the Doctrine of Prior Restraint to Associational Rights

Courts have applied the doctrine of prior restraint, albeit infrequently, to regulations impacting freedom of association.[514] For

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U.S. 697, 715 (1931)). The Court stated without any specificity that "[t]here are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence." *Id.* The Court noted, however, that "'[i]n the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment.'" *Id.* at 294 (quoting *Near*, 283 U.S. at 715).

509. 357 U.S. 449 (1958).

510. *See* JOHN E. NOWAK & RONDALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.41, at 1118 (5th ed. 1995).

511. *See id.* at 1118-19. Therefore, if a qualifying association is found, "any activity that would merit First Amendment protection if engaged in outside the context of the association will suffice to constitute a right of association." Walker v. City of Kansas City, 911 F.2d 80, 89 & n.11 (8th Cir. 1990) (explaining also that the right of association is not absolute and may be subject to countervailing principles that prevail).

512. *See* Elks Lodge No. 719 v. Department of Alcoholic Beverage Control, 905 P.2d 1189, 1195 (Utah 1995).

513. *See id.*

514. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972); McKenna v. Peekskill Hous. Auth., 647 F.2d 332, 334, 336 (2d Cir. 1981) (finding that a housing authority rule requiring tenants to obtain approval before inviting an overnight guest to their home was a prior restraint violating

example, in *Healy v. James*,[515] a group of students wishing to form a local chapter of Students for a Democratic Society complained that a state college's refusal to officially recognize the organization was a denial of their First Amendment rights of expression and association.[516] The Supreme Court held that by unjustifiably denying the organization official recognition, the college had infringed upon the student organization's right to freedom of association.[517] The Court also noted that the college's decision to deny the students official recognition was a form of prior restraint because the student organization was denied the opportunity to engage in associational activities such as using campus facilities for meetings, using campus bulletin boards, and having ready access to the school newspaper.[518] While such a restraint may have been justified by the college's legitimate interest in preventing campus unrest, the court placed on the college a "heavy burden"[519] to show the appropriateness of the denial of recognition and the existence of procedural safeguards.[520]

Another case that illustrates the application of the prior restraint doctrine to associational rights under the First Amendment is *New York State Association of Career Schools v. State Education Department (NYSACS II)*.[521] In *NYSACS II*, the district court determined that a statute regulating school curricula did not violate schools' First Amendment rights of freedom of association and

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their First Amendment right to freedom of association); Gay Lib v. University of Mo., 558 F.2d 848, 857 (8th Cir. 1977) (holding that a university's refusal to recognize Gay Lib as a campus organization constitutes a prior restraint of the First Amendment right of association); Marin v. University of P.R., 377 F. Supp. 613, 616-17, 620 (D.P.R. 1973) (holding that suspension under college rules imposed prior restraints on students' rights to freedom of speech and association and their right to petition for the redress of grievances). *But see* New York State Ass'n of Career Schs. v. State Educ. Dep't, 823 F. Supp. 1096, 1102-06 (S.D.N.Y. 1993) (holding that curriculum review procedures are prior restraints on schools' freedom of association and expression, but are constitutionally valid under the four-pronged *O'Brien* test).

515. 408 U.S. 169 (1972).

516. *See id.* at 170, 177.

517. *See id.* at 181.

518. *See id.* at 181, 184.

519. *Id.* at 184.

520. *See id.* (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971); Freedman v. Maryland, 380 U.S. 51, 57 (1965); *and* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713-16 (1931)).

521. 823 F. Supp. 1096 (S.D.N.Y. 1993).

freedom of speech.[522] For the purposes of a summary judgment motion, the court assumed that the curriculum review procedures restricted the schools' freedom of association and expression as prior restraints.[523] However, the court then examined the statute under "the stringent requirements of the four-pronged *O'Brien* test"[524] to determine whether these prior restraints were, nevertheless, constitutionally valid.[525] Analyzing the statute as content-neutral, the court determined that: (1) it was within the police power of New York State to regulate private schools; (2) the interests of the State in regulating proprietary schools are important and substantial; (3) the statute was unrelated to the suppression of protected speech; and (4) the regulatory scheme was narrowly tailored to address the legitimate interests of the State.[526] In addition to evaluating the statute under the *O'Brien* test, the court remarked that suppression of speech and association under a licensing or regulatory scheme requires a court to consider both "the scope of the restrictive reach of the scheme"[527] and "the procedural safeguards built into the scheme."[528] The court held that New York's regulatory scheme was not overly broad in scope, and the appropriate procedural safeguards were built into the regulatory scheme.[529]

The standards that the court in *NYSACS II* applied to the First Amendment claim are quite similar to the standards suggested in this Article. However, this Article proposes that the analysis of a content-neutral regulatory or licensing scheme that affects First Amendment rights should begin with the prior restraint doctrine and a review of the *Freedman* procedural safeguards. If this analysis results in a finding that the regulation is a valid prior restraint, only then should it be subjected to the four-prong *O'Brien* test. Because few, if any, land use cases have analyzed as prior restraints zoning restrictions that affect associational rights, the remainder of this section will focus on

522. *See id.* at 1106.
523. *See id.* at 1102.
524. *Id.*
525. *See id.*
526. *See id.* at 1102-06 (applying the *O'Brien* test).
527. *Id.* at 1104 (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 222 (1990)).
528. *Id.* (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965)).
529. *See id.* at 1105-06.

those zoning decisions that have addressed a general challenge under First Amendment protection of associational rights.

B. Zoning Decisions Affecting Associational Rights

The landmark case of *Village of Belle Terre v. Boraas*[530] involved a zoning ordinance limiting the use of land in a small village to single-family dwellings.[531] Six college students, not related by blood, adoption, or marriage, rented and shared a home in the village.[532] After receiving an "Order to Remedy Violations" from the village, the homeowners and three of the tenants brought suit to enjoin the village from taking further action and to declare the ordinance unconstitutional.[533] The owners and tenants alleged that the ordinance infringed upon associational rights under the First Amendment.[534] The Court upheld the regulation finding that it did not violate the First Amendment because the ordinance's definition of the term "family" did not ban "other forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it likes."[535] In finding the ordinance constitutional, the Court noted the potential problems that a multi-family dwelling might cause, and concluded that a city's interest in maintaining quiet neighborhoods falls within the police power.[536]

Courts have continued to reject challenges to zoning regulations that restrict residential living arrangements when such challenges are based on alleged violations of associational rights under the First Amendment.[537] In *Moore v. City of East Cleveland*,[538] a city housing

530. 416 U.S. 1 (1974).

531. *See id.* at 2.

532. *See id.* at 2-3.

533. *See id.* at 3.

534. *See id.* at 10 (Brennan, J., dissenting).

535. *Id.* at 9. In his dissent, Justice Marshall viewed the classification that resulted from the ordinance's definition of "family" as a burden on the students' fundamental rights of association and privacy. *See id.* at 13 (Marshall, J., dissenting). Justice Marshall argued that the Court should have judged the regulation according to the strict scrutiny standard rather than the rational basis standard. *See id.*

536. *See id.* at 8-9.

537. *See, e.g.*, Doe v. City of Butler, 8 F.2d 315, 322 (3d Cir. 1989) (denying freedom of association claim asserted by abused women and their children living in a shelter with other battered women).

ordinance limited the occupancy of a dwelling unit to members of the same family. The city convicted Moore of violating the ordinance on the basis that her son and two grandsons lived with her and did not fall within the ordinance's definition of "family."[539] The Court refused to apply either *Belle Terre* or *Euclid* because the city's ordinance was such an intrusive regulation of the family that it did not justify the normal standard of deference to the legislature.[540] The Court invalidated the ordinance as a violation of substantive due process because "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[541] Although the majority did not respond to Moore's claim that the ordinance violated her right of association, Justice Stewart in his dissent remarked that "[t]o suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect."[542] Instead, associational rights are for purposes relating to the promotion of speech, assembly, the press, or religion and "do not extend to those who assert no interest other than the gratification, convenience, and economy of sharing the same residence."[543]

1. Group Homes

Group homes generally have been unsuccessful in claiming constitutional protection from zoning regulation based on freedom of association.[544] Communities typically oppose group homes because

538. 431 U.S. 494 (1977).
539. *See id.* at 497-98.
540. *See id.* at 499.
541. *Id* at 503.
542. *Id.* at 535 (Stewart, J., dissenting).
543. *Id.* at 535-36.
544. *See, e.g.*, City of Chula Vista v. Pagard, 159 Cal. Rptr. 29 (Cal. Ct. App. 1979) (holding that religious family households associated with a Baptist church violated a zoning ordinance requiring conditional use and were not protected by the constitutional right of association based on the *Belle Terre* decision), *vacated*, 171 Cal. Rptr. 738 (Cal. Ct. App. 1981); Association for Educ. Dev. v. Hayward, 533 S.W.2d 579, 587-88 (Mo. 1976) (holding that use of a group home by laymen, who have as their common tie a religious motivation, but whose use is not necessarily incidental to that of a church, is not a use protected by the

of economic, safety, and aesthetic concerns.[545] Although many studies have shown that there is no basis for these concerns, communities continue to discriminate against the handicapped and other nontraditional households.[546] Zoning power exercised to preserve the "character of the community" thus becomes "a regulatory tool shaping not only the physical character of the neighborhood, but 'the socioeconomic character of a community' as well."[547] For example, in *City of Cleburne v. Cleburne Living Center*,[548] the city denied a group home for the mentally retarded a special use permit because the Cleburne City Council was concerned about the negative attitudes and fears of the neighboring property owners.[549] Although the Court held that mental retardation is not a quasi-suspect classification under the Equal Protection Clause,[550] it nevertheless found that, under a rational basis review, the city's denial of the special permit was a violation of the Equal Protection Clause.[551] Because the litigants did not present a claim for violation of their associational rights, the Court did not discuss that issue.

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constitutional right of association). *But see* Alber v. Illinois Dep't of Mental Health and Developmental Disabilities, 786 F. Supp. 1340, 1347, 1375 (N.D. Ill. 1992) (determining that a married couple living together on a family farm with their natural minor child, an adult with cerebral palsy who was adopted when he was eleven years old, and two adopted adults afflicted with Downs Syndrome, constituted a constitutional "family" for purposes of asserting a claim for freedom of association); Zavala v. City and County of Denver, 759 P.2d 664 (Colo. 1988) (remanding the case to determine whether a zoning ordinance restricting family dwellings to related people deprived an unmarried couple of their associational rights); New Jersey v. Baker, 386 A.2d 890 (N.J. Super. Ct. App. Div. 1978) (reversing convictions of a minister who violated a zoning ordinance that limited the number of unrelated people living together on the basis that the ordinance's definition of family impermissibly infringed on freedom of association under the New Jersey State Constitution), *aff'd*, 405 A.2d 368 (N.J. 1979).

545. *See* Cindy Lee Soper, Note, *The Fair Housing Act Amendments of 1988: New Zoning Rules for Group Homes for the Handicapped*, 37 ST. LOUIS U. L.J. 1033, 1041 (1993).

546. *See id.* at 1041-42; *see also* City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1997) (finding that "Edmonds' zoning code provision describing who may compose a 'family' is not a maximum occupancy restriction exempt from the FHA" and leaving lower courts to decide whether a city's actions against a house sheltering recovering alcoholics and drug addicts violates the FHA's discrimination prohibitions).

547. J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 777-78 (1982) (quoting James F. Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 LAW & CONTEMP. PROBS. 5, 11 (1979)).

548. 473 U.S. 432 (1985).

549. *See id.* at 448.

550. *See id.* at 446.

551. *See id.* at 447-50.

In *Doe v. City of Butler*,[552] however, the litigants did assert a violation of their right to freedom of association.[553] In *Butler*, a city ordinance placed a six-resident limitation on transitional dwellings, making it infeasible to operate a shelter for abused women and their children.[554] The women claimed that "the residency limit adversely affect[ed] their right to live in a dwelling with other battered women through which they could get sustenance from each other and counseling for all."[555] In denying this claim, the court echoed the rationale expressed by Justice Stewart in his dissent in *Moore*: "[t]he right to association . . . does not reach as far as plaintiffs suggest."[556] The court relied on *Belle Terre* and explained that "[t]he zoning occupancy limitation challenged here does nothing to prevent plaintiffs from associating with each other, and with others similarly situated. It merely provides that for zoning purposes, a reasonable occupancy limit must be observed."[557]

2. Non-Residency Association Claims

Claims of a constitutional right to free association in zoning cases involving uses other than group homes also have been unsuccessful.[558] In *City of Dallas v. Stanglin*,[559] the Supreme Court

552. 892 F.2d 315 (3d Cir. 1989).
553. *See id.* at 316.
554. *See id.* at 322.
555. *Id.*
556. *Id.*
557. *Id.* at 323.
558. *See, e.g.*, Qutb v. Strauss, 11 F.3d 488, 495 n.9 (5th Cir. 1993) (holding that it is questionable whether a fundamental right of association is implicated by curfew ordinance restricting minors, but even if it is, "[this] curfew ordinance satisfies strict scrutiny, and any negligible burden on the individual's right to associate is outweighed by the compelling interests of the state"); Walker v. City of Kansas City, 911 F.2d 80, 95 (8th Cir. 1990) (holding zoning ordinance restricting semi-nude dancing in drinking establishment is not a burden on freedom of association); Greene v. Town of Blooming Grove, 483 F. Supp. 804, 806, 808 (S.D.N.Y. 1980) (stating in dictum that zoning ordinance requiring landowner to obtain a permit before holding a three-day rock concert on his property does not infringe on his constitutional rights of expression and association); People *ex. rel.* Gallo v. Acuna, 929 P.2d 596, 597 (Cal. 1997) (holding that a gang statute does not violate associational rights under the First Amendment because gang members are free to gather outside the restricted area); City of Los Altos v. Barnes, 5 Cal. Rptr. 2d 77, 82-83 (Cal. Ct. App. 1992) (holding that a zoning ordinance restricting home occupation in a residential area does not violate constitutionally protected rights of privacy or association); Elysium Inst., Inc. v. County of Los Angeles, 283

upheld a Dallas ordinance that restricted admission to certain dance halls to persons between the ages of fourteen and eighteen.[560] The owner of a skating rink, which required a dance hall license, sued to enjoin the city from enforcing the age and hour restrictions of the ordinance.[561] In holding that the First Amendment does not secure any right for minors to associate with older persons,[562] the Supreme Court discussed two distinct views on the right of association. First, the Court noted that "'freedom of association receives protection as a fundamental element of personal liberty.'"[563] Second, the Court stated that the right to associate is recognized "'for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.'"[564] Finding that the dance-hall patrons "are not engaged in the sort of 'intimate human relationships' referred to in *Roberts*"[565] and that "the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment"[566] and, therefore, is not a form of "'expressive association' as those terms were described in *Roberts*,"[567] the Court held that the Constitution does not recognize a generalized right of "'social association' that includes chance encounters in dance halls."[568] Accordingly, the Court upheld the constitutionality of the Dallas ordinance.[569]

Cal. Rptr. 688 (Cal. Ct. App. 1991) (holding that a county zoning ordinance restricting nudist camps does not unconstitutionally restrain federal and state constitutional rights of free expression, freedom of association, privacy, and personal liberty); *cf.* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 474 n.19 (8th Cir. 1991) (on appeal from the district court's summary judgment ruling against the church, the church did not raise its freedom of association claim based on a zoning ordinance excluding churches).

559. 490 U.S. 19 (1989).

560. *See id.* at 20, 28.

561. *See id.* at 20. The Texas Court of Appeals upheld the hour restrictions, but invalidated the age restrictions as a violation of the First Amendment associational rights of minors. *See* 744 S.W.2d 165, 168 (Tex. Ct. App. 1987).

562. *See* 490 U.S. at 20-21.

563. *Id.* at 24 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984)).

564. *Id.*

565. *Id.*

566. *Id.* at 25.

567. *Id.*

568. *Id.*

569. *See id.* at 28.

Before the Supreme Court decided *Stranglin*, the Ninth Circuit declined to find either an intimate or expressive association relationship between an escort and a client in *IDK, Inc. v. County of Clark*,[570] a case involving the regulation of escort services and their employees.[571] Although the court concluded that dating and other social activities may be protected constitutionally because of their value as intimate and expressive associations, the escort services lacked the "constitutional aspects of intimate associations."[572] Therefore, the escort services could not be protected as expressive associations because their "activities and purposes are primarily commercial rather than communicative."[573] The court held that the licensing regulation did not operate as a prior restraint on expression because "the activities of the escort services and their employees do not implicate substantial First Amendment rights."[574]

C. The Prior Restraint Approach to Associational Claims

Case law is not available to illustrate this Article's proposed analytical approach to First Amendment claims as it relates to right of association claims.[575] However, the right of association is so closely tied to the right of free speech, and other First Amendment rights, that it should not be difficult for courts to adapt and apply this Article's proposed analytical framework to zoning regulations that burden associational rights. Such an adaptation may prove unnecessary, however, because in most cases, courts will likely resolve a right of association claim as a free speech issue. For

570. 836 F.2d 1185, 1196 (9th Cir. 1988).

571. *See* 836 F.2d 1185.

572. *Id.* at 1196.

573. *Id.*

574. *Id. But see id.* at 1199 (Reinhardt, J., dissenting) (stating that the "[l]icensing scheme, because it is targeted directly at people's ability to associate with one another, regulates constitutional freedom of association and should therefore be carefully scrutinized").

575. *But see id.* at 1201-04 (Reinhardt, J., dissenting) (analyzing the licensing scheme as a prior restraint and applying a compelling state interest and least restrictive means test to invalidate the regulation); Walker v. City of Kansas City, 911 F.2d 80, 98 (8th Cir. 1990) (Lay, J., dissenting) (noting that the district court found the land use ordinance at issue unconstitutional under rules of prior restraint and that the Eighth Circuit improperly reversed the district court by upholding the ordinance under the Twenty-first Amendment using *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), which was based on a right of association claim).

example, in *Grace Community Church v. Town of Bethel*,[576] a church requested a declaratory judgment that a zoning regulation requiring a special permit to build a church in certain zones was a prior restraint on the free exercise of religion.[577] As part of its free exercise claim, the church alleged that the special permit provisions resulted in a denial of its constitutional rights of assembly, association, and free speech.[578] The Appellate Court of Connecticut found that the Town of Bethel had an important interest in protecting the residential character of its neighborhoods and promoting the health, safety, and welfare of its citizens.[579] The court noted that the zoning regulation at issue was completely free of any reference to religious practices and, thus, found that the regulation was content-neutral.[580] Because the regulation was content-neutral, and the town had a legitimate interest in promoting its purpose, the court held that the statute did not violate the First Amendment rights of assembly, association, and free speech.[581]

Another example of a right of association claim being analyzed as a free speech issue can be found in *C.L.U.B. v. City of Chicago*.[582] In *C.L.U.B.*, an organization whose purpose was "to challenge zoning laws restricting the free exercise of religion and other freedoms of its members and of people of all faiths"[583] challenged a zoning regulation requiring the builders of churches, but not other organizational buildings, to obtain a special use permit before building a church in certain zones within the city.[584] For the purposes of its analysis, the court treated alike the plaintiff's First Amendment claims for freedom of speech and freedom of assembly.[585] The court

576. No. 306994, 1992 Conn. Super. LEXIS 2131 (Conn. Super. Ct. July 16, 1992), *aff'd*, 622 A.2d 591 (Conn. App. Ct. 1993).

577. *See id.* at *2.

578. *See* 622 A.2d at 595-96.

579. *See id.* at 596.

580. *See id.* The court noted that the statute applied equally to churches, clubs, schools, and other organizations. *See id.*

581. *See id.* at 595-96.

582. No. 94-C6151, 1996 U.S. Dist. LEXIS 2230 (N.D. Ill. Feb. 27, 1996) (memorandum opinion and order granting in part and denying in part defendant's motion to dismiss).

583. *Id.* at *40.

584. *See id.* at *78-79.

585. *See id.* at *75 (citing New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988), *and* NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 460 (1958)).

supported this merging of the free speech and free association analysis by reference to the U.S. Supreme Court decision in *New York State Club Ass'n v. City of New York*,[586] in which the Court stated that "[t]he ability and the opportunity to combine with others to advance one's views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government."[587] Recognizing that a content-neutral regulation of church locations would be analyzed as a time, place, and manner restriction under *Renton*'s secondary effects approach, the *C.L.U.B.* court found that the special use permit requirement was not content-neutral.[588] The court, thus, refused to dismiss the plaintiffs' First Amendment claims.[589]

Infringements on the First Amendment right of association by zoning regulations are analogous to issues involving free speech and religious exercise. Such infringements should, therefore, be analyzed according to the structure proposed earlier in this Article for free speech and religious exercise infringements. Infringements on associational rights should be considered prior restraints that may be valid if there is a finding that appropriate procedural safeguards exist. If the regulation is not invalid as a prior restraint, but is content-based and targets associational rights, it must be invalidated unless there is a compelling state interest that cannot be achieved by less restrictive means. If the zoning regulation is not invalid as a prior restraint, but is content-neutral, it should be analyzed under the *O'Brien* test as a time, place, and manner restriction aimed at secondary effects. Assuming, however, that a zoning regulation directed at secondary effects is invalidated as a prior restraint, the community is not without a remedy for abating any actual adverse effects that do occur. Common law nuisance claims can be used to resolve land use conflicts between First Amendment rights and the police power to regulate the public health, safety, and welfare of the community.

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586. 487 U.S. 1 (1988).

587. *Id.* at 13 ("'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.'" (quoting *NAACP*, 357 U.S. at 460)).

588. *See C.L.U.B* at *76-78

589. *See id.* at *75-79.

VI. NUISANCE AS A REMEDY AND AS AN ALTERNATIVE TO REGULATION

When a government's attempt to regulate land use is unsuccessful due to conflicts with First Amendment rights, nuisance law is available as an alternative system of controlling activities that adversely affect either the public good or private property rights of use and enjoyment. Common law nuisance arose in thirteenth-century England as a criminal writ for "invasions of the plaintiff's land due to conduct wholly on the land of the defendant."[590] Eventually, this writ was superseded by the common law action for nuisance, which became the remedy for an interference with the use or enjoyment of land.[591]

In the United States, nuisance law was used extensively by landowners during the 1920s and 1930s to enjoin actual or threatened deleterious uses in their communities.[592] These cases created an expensive litigation process that, along with confusion about the basic principles of nuisance,[593] led to the expectation that public regulation systems, such as zoning, would solve land use control issues.[594] Zoning was indeed upheld as constitutional in *Village of Euclid v. Ambler Realty Co.*,[595] bolstered by the understanding that such regulation would operate to control nuisances such as apartment buildings in residential neighborhoods.[596]

A. Nuisance as a Remedy for Harm Created by Protected Activities

This section will explore the efficacy of using nuisance law as an alternative method of land use control when zoning regulation operates as a prior restraint on protected First Amendment activities.[597] This section will evaluate the use of both public and

590. W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 86, at 617 (5th ed. 1984).
591. *See id.*
592. *See* Ellickson, *supra* note 6, at 721.
593. *See* KEETON ET AL., *supra* note 590, at 616 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'").
594. *See* Ellickson, *supra* note 6, at 722.
595. 272 U.S. 365, 397 (1926).
596. *See id.* at 394-95.
597. The author accepts as valid the arguments that using nuisance law merely transfers

private nuisance law based upon decisions that have weighed protected personal rights against public health, safety, and welfare concerns. Likewise, this section will discuss briefly the economic efficiency of using nuisance law rather than zoning regulation by examining proposals that have advocated alternative land use control methods.[598] This section proposes that a nonzoning system may be just as efficient as a zoning system at allocating land uses and notes that "zoning does not guarantee either elimination or internalization of nuisance costs."[599]

1. Public vs. Private Nuisance

As a method of land use regulation, nuisance law typically has taken the form of public nuisance actions used to protect the community good under the aegis of police power. Nevertheless, private nuisance actions also can be an effective means of controlling undesirable local uses that have adverse effects. These two forms of nuisance law, and the fact that they "have almost nothing in common, except that each causes inconvenience to someone,"[600] have generated confusion and uncertainty as to the exact definition of nuisance.[601]

Public nuisance is broader than private nuisance and includes

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"unbridled discretion" from government officials to the courts, and that the existence of potential liability under nuisance could arguably "chill" First Amendment activity even more than it is "chilled" by advance regulation because nuisance liability and litigation costs are less predictable than the regulatory guidance of land use activities.

598. Certainly zoning has been misused, not only to inhibit First Amendment rights, but also to protect individual property interests by actions such as stopping or slowing local development. *See* Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 79 (1981).

599. Ellickson, *supra* note 6, at 694.

600. KEETON ET AL., *supra* note 590, § 86, at 618. As Professor Keeton has explained:

> A private nuisance is a civil wrong, based on a disturbance of rights in land. The remedy for it lies in the hands of the individual whose rights have been disturbed. A public or common nuisance, on the other hand, is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure. As in the case of other crimes, the normal remedy is in the hands of the state.

Id. (citations omitted).

601. *See id.*

conduct other than that which interferes with the use and enjoyment of private property.[602] Conduct that interferes with the public health, safety, or general welfare may be considered criminal and punishable as such,[603] or may generate tort liability for harm sustained by the general public.[604] A public official may seek redress for a public nuisance, but an individual acting in a personal capacity may bring suit only if he or she can show that his or her damage is distinguishable from "that sustained by other members of the general public."[605] In other words, "a private individual cannot complain of public nuisance either by way of maintaining a tort action for damages or by way of obtaining an abatement of the so-called nuisance unless the conduct has resulted in the commission of an independent tort to the plaintiff."[606] In determining whether the tort against the individual is identical to the tort against the public, it is necessary to examine the social interest that public nuisance law protects.

To determine whether a social interest protected by public nuisance law is independent of a private interest protected by tort law, public nuisances can be classified based on the individual interests that they affect.[607] For example, the social interest protected by public nuisance in many First Amendment cases is morality.[608] In such cases, activities are considered a nuisance "because of their possible effect on the morals of the people, such as houses of prostitution, obscene movies, and massage parlors."[609] However, because "[t]he law of torts does not attempt to give redress to those who have been led into sin by watching obscene pictures or using massage parlors,"[610] private individuals will not suffer a tort independent of the public interest in protecting morality and, thus,

602. *See id.* § 90, at 643.
603. *See id.* at 645.
604. *See id.* at 646.
605. *Id.*
606. *Id.* at 650-51.
607. *See id.* at 651 (applying such a classification scheme to the example of an obstruction that interferes with freedom of travel on a highway or sidewalk).
608. *See id.*
609. *Id.* at 652.
610. *Id.*

will not be able to bring suit for a public nuisance.[611] However, the location of these uses may constitute a common law private nuisance if such uses interfere with the use and enjoyment of private property.[612]

A common law private nuisance is actionable in tort when a party interferes with the use and enjoyment of another's land in a manner that is either intentional and unreasonable, or negligent, reckless, or abnormally dangerous.[613] Determining that such conduct constitutes a private nuisance requires that the interference be "substantial and unreasonable, and such as would be offensive or inconvenient to the normal person."[614] The requirement that the interference be unreasonable refers to the interference itself, not to the defendant's conduct.[615] An unreasonable interference occurs "'where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.'"[616] This definition requires a balancing of factors to determine whether the gravity of the harm outweighs the utility of the conduct.[617] A substantially similar analysis may be used by courts to determine liability for a public nuisance.[618]

Once a court determines that a common law private nuisance is

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611. *See id.*
612. *See id.*
613. *See id.* § 91.
614. *Id.* § 87, at 620.
615. *See id.* at 623.
616. *Id.* § 88, at 629 (quoting RESTATEMENT (SECOND) OF TORTS § 822 cmt. j (1977)).
617. *See id.* at 630. Professor Keeton suggests six balancing factors:

> (1) the amount of the harm resulting from the interference; (2) the relative capacity of the plaintiff and the defendant to bear the loss by way of shifting the loss to the consuming public at large as a cost of doing business or by other means such as some type of insurance; (3) the nature of the plaintiff's use of his property; (4) the nature of the defendant's use of his property; (5) the nature of the locality; and (6) priority in time as to the respective activities of the plaintiff and the defendant in the area.

Id.; *see also* RESTATEMENT (SECOND) OF TORTS § 827(a) (1977). The *Restatement (Second)* states that the factors to be weighed in assessing gravity of harm to plaintiff versus utility of defendant's conduct include: extent and character of harm involved; social value of the interest invaded; suitability of the use to the character of the locality; burden on the injured person of avoiding harm; social value of the offending conduct; suitability of the conduct to the character of the locality; and impracticability of preventing or avoiding the invasion. *See id.*

618. *See* People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 604-05 (Cal. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 821B (1977)).

actionable, either damages or injunctive relief may be granted to remedy the interference with private rights.[619] When injunctive relief is sought, the plaintiff must show that the defendant's conduct is unreasonable and that damages do not furnish an adequate remedy.[620] Although some courts have required issuance of an injunction at this point, "the modern and best approach is to grant the equitable remedy of injunctive relief [only] when the gravity of the harm from the activity exceeds the utility of the conduct."[621] If a court finds that the utility of the conduct outweighs the harm, the court may choose not to grant injunctive relief.[622] However, courts typically will award damages when a defendant's conduct is so unreasonable that he or she should pay for the harm.[623] Equitable relief in the form of an injunction may be granted based on a threat of harm that has not yet occurred;[624] however, it must be highly probable that an activity will

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619. *See* KEETON ET AL., *supra* note 590, §§ 87, 88A.

620. *See id.* § 88A, at 631-32.

621. *Id.* at 632; *see also* George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 689-90 (1995) (explaining that most state courts use a balancing test when deciding whether to grant injunctive relief for nuisance and focus on "the character of the conduct of the parties, the relative economic costs to the parties, and the impact on the community and the general public of the grant or denial of an injunction").

622. *See* KEETON ET AL., *supra* note 590, § 89, at 641.

623. *See id.* Indeed, commentators generally recognize at least four remedial options from which courts may choose when resolving nuisance disputes. Guido Calabresi and A. Douglas Melamed were the first in a line of scholars to explain these options in terms of the competing rules of property and liability. *See* Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2091-93 (1997) (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)). As such, a court may choose to avail itself of one of four alternatives when adjudicating a nuisance action: (1) a court may grant an injunction; (2) a court may grant damages; (3) a court may permit a defendant to continue the challenged activity without awarding plaintiff any remedy; or (4) a court may grant an injunction to the plaintiff, but require the plaintiff to pay the defendant to cease the challenged activity (or to pay for something such as relocation costs). This fourth approach was, and perhaps still is, relatively revolutionary. *See* Epstein, *supra*, at 2091-93; James E. Krier & Stewart J. Schwab, The Cathedral *at Twenty-Five: Citations and Impressions*, 106 YALE L.J. 2121, 2121-22 (1997); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2150-53 (1997). The most famous case applying the fourth alternative is *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706 (Ariz. 1972) (holding that a housing developer could enjoin the operations of a cattle feedlot, which was present before the development's inception, but requiring the developer to compensate the feedlot for shutdown costs).

624. *See* KEETON ET AL., *supra* note 590, § 89, at 640. *But see supra* note 69 and

lead to nuisance before a court may issue an injunction.[625] If the possibility of nuisance is uncertain or contingent, a court may require the plaintiff to wait until after the threatened nuisance has occurred before seeking damages.[626]

The use of private nuisance by individuals raises interesting questions about how to approach First Amendment rights. Most of the issues involving the intersection of torts and the First Amendment have arisen in the area of the communicative torts such as libel and the right of privacy.[627] However, it is not difficult to imagine how First Amendment concerns could be handled in a private nuisance action. In determining whether or not an interference with an individual's use and enjoyment of his or her land is unreasonable, one of the factors that must be considered is the social value of the defendant's conduct. If the defendant's activities are an exercise of protected First Amendment rights, then the balance may tip in favor of finding the interference to be reasonable under the circumstances; however, if the defendant's activities involve adult uses, a court may find that even First Amendment protection does not raise the social

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accompanying text (discussing injunctive relief as a prior restraint on First Amendment freedoms).

625. *See* KEETON ET AL., *supra* note 590, § 89, at 640.

626. *See id.* at 641.

627. *See, e.g.*, Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 847 (1985) ("The *Restatement (Second) of Torts* attempts to limit the impact upon first amendment values by specifically exempting from liability published materials of 'legitimate public interest.'"); Jonathan L. Kranz, *Sharing the Spotlight: Equitable Distribution of the Right of Publicity*, 13 CARDOZO ARTS & ENT. L.J. 917, 938 n.119 (1995) ("'Usually, torts of public disclosure and false light are found to conflict with the First Amendment because of the impact upon dissemination of information to the public.'" (quoting Michael I. Rudell, *Refusal to Enjoin:* Elizabeth Taylor v. Miniseries, N.Y.L.J., Dec. 23, 1994, at 3)); John W. Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671 (1977); Steven J. Weingarten, Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744 (1984); Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 187 (1979) (tracing the "historical development of the right to privacy and the common law public disclosure action"); *see also* New York Times v. Sullivan, 376 U.S. 254, 265 (1965) (holding that it is irrelevant that a law which is claimed to restrict freedom of speech is applied in a civil action and is only common law: "[the] test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

value of the conduct, that is generally disfavored by the community, to a level deserving protection. If the remedy sought is injunctive relief, then the balancing of harm against the utility of the conduct should also include a similar consideration of First Amendment rights.

A legislature may prohibit certain conduct by declaring it a punishable and enjoinable public nuisance or a tortious private nuisance. Alternatively, a legislature may authorize activity that normally constitutes a public or private nuisance by permitting the activity under a zoning ordinance or a licensing scheme.[628] Although such authorizing legislation generally does not shelter an activity from a nuisance claim, the authorization of a specific use "would seem to be a declaration that it is in the public interest for the activity to be conducted at that particular place."[629] Legislative action, however, is subject to normal constitutional constraints, including First Amendment protection.[630] Indeed, "[i]n the public nuisance context, the community's right to security and protection must be reconciled with the individual's right to expressive and associative freedom."[631]

2. Public Nuisance as a Prior Restraint

The common law of public nuisance may not be used "both to define the standards of protected speech and to serve as the vehicle for its restraint."[632] The Supreme Court's most important opinion on the prior restraint doctrine, *Near v. Minnesota* ex rel. *Olson*,[633] involved an injunction used to abate as a public nuisance a newspaper that published malicious attacks on grand jurors and city officials.[634] The Court held that a statute that enjoins as a nuisance the publication

628. *See* KEETON ET AL., *supra* note 590, § 88B, at 632-33.

629. *Id.*

630. *See id.*; *see also* Jennifer L. Radner, Comment, *Phone, Fax and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 391 (1993) ("[W]hen nuisance law is used in prevention of core First Amendment free speech rights, courts have not reached a consensus as to the propriety of the doctrine's applicability.").

631. People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

632. Grove Press, Inc. v. City of Philadelphia, 418 F.2d 82, 88 (3d Cir. 1969).

633. 283 U.S. 697 (1931).

634. *See id.* at 702-03.

of a malicious, scandalous, and defamatory newspaper, magazine, or other periodical, is invalid because the injunction would virtually censor the periodical's publisher[635] and operate as a prior restraint.[636]

After the *Near* decision, many courts treated all injunctions as prior restraints and grouped them "together with licensing systems for special disfavored treatment under the First Amendment."[637] Grouping injunctions with licensing systems is appropriate because "they both must rely upon adjudication in the abstract, they both encourage regulatory agents to overuse the power to regulate, and they both adversely affect audience reception of controversial messages."[638] Therefore, injunctions and licensing systems, as the two principal methods of prior restraint, should be disfavored.[639] Nevertheless, nuisance actions that are based on actual harm, rather than the threat of harm, should be used in place of zoning regulation because zoning regulation also acts as a prior restraint when it restricts First Amendment activity.

While public nuisance is often used as a tool to regulate morality in a community, injunctions and abatement actions based on nuisance will collide with the doctrine of prior restraint when they attempt to regulate future conduct.[640] For example, in *Cinevision Corp. v. City of*

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635. *See id.* at 713.

636. *See id.* at 723.

637 Blasi, *supra* note 69, at 13.

638. *Id.* at 92-93.

639. *See id.* at 93.

640. *See, e.g.*, Leonardson v. City of East Lansing, 896 F.2d 190, 198-99 (6th Cir. 1990) (holding that an ordinance permitting the use of police lines to prevent a "drunken, raucous semi-annual event" as a public nuisance is a prior restraint on the exercise of First Amendment rights of speech and association); City of New York v. Allied Outdoor Adver., Inc., 659 N.Y.S.2d 390 (N.Y. 1997) (holding that a public nuisance abatement action against owners and operators of a billboard sign and structure is unconstitutional because it favors onsite commercial advertising over noncommercial messages); State *ex rel.* Eckstein v. Video Express, No. CA96-05-104, 1997 Ohio App. LEXIS 1692, *17-18 (Ohio Ct. App. April 29, 1997) (holding that a public nuisance abatement order against a videotape rental store is an unconstitutional prior restraint); City of Portland v. Tidyman, 759 P.2d 242, 243 (Or. 1988) (holding that a public nuisance injunction against adult bookstores is an invalid restraint on free expression). *See generally* Steven T. Catlett, Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616 (1984); Smith, *supra* note 46; William J. Boyce, Note, *Restraining Prior Restraint, or a Call for Balancing in Evaluating Obscenity Abatement Statutes:* City of Paducah v. Investment Entertainment, Inc., 82 NW. U. L. REV. 181 (1987).

Burbank,[641] the Ninth Circuit held that the City of Burbank violated Cinevision's First Amendment rights when it refused to allow certain performers to use the municipally owned amphitheater.[642] The refusal was unconstitutional because it was based on "the content of the performers' expression and other arbitrary factors"[643] such as the "lifestyle or race of the crowd that a performer would attract."[644] In City Council meetings, some Council members expressed an assumption that all hard rock concerts are a public nuisance.[645] The court rejected the city's suggestion that "hard rock" concerts are a per se public nuisance and found that "a general fear that state or local narcotics or other laws will be broken by people attending the concerts cannot justify a content-based restriction on expression."[646] Thus, the court did not allow the city to regulate protected First Amendment rights in advance of encountering actual adverse effects created by the presence of certain performers.[647]

The use of public nuisance abatement power to control obscenity was scrutinized by the Sixth Circuit in *City of Paducah v. Investment Entertainment, Inc.*[648] Finding "no precedent in which courts have upheld an obscenity law that provided for the revocation of obscenity dealers' business licenses,"[649] the court held that Paducah's license revocation ordinance, which was based on public nuisance, was a prior restraint on freedom of expression.[650] The city's use of license revocation was for the impermissible purpose of controlling "future

641. 745 F.2d 560 (9th Cir. 1984).
642. *See id.* at 577.
643. *Id.*
644. *Id.*
645. *See id.* at 572.
646. *Id.*
647. *See id.* at 577. As the Oregon Supreme Court said in *City of Portland v. Tidyman*, 759 P.2d 242 (Or. 1988), "Expression that is offensive to many is likely also to be seen as harmful, and there is little political incentive to repeal laws made in apprehension of harm from offensive expression when the danger fails to materialize.... Thus, it is important that the constitutional guarantee restricts lawmakers...." *Id.* at 250.
648. 791 F.2d 463 (6th Cir. 1986).
649. *Id.* at 467.
650. *See id.* at 470. The court observed that federal and state courts have addressed the First Amendment concerns presented by the use of laws and local ordinances designed to abate public nuisances. *See id.* at 467 (discussing laws that abate nuisances by revoking the general business license of the offending business and the so-called padlock laws that use temporary or permanent injunctions to close the business).

expression by businesses that have been subjected to the nuisance abatement procedure,"[651] and, as a prior restraint, it did not contain the procedural safeguards required by the Supreme Court in *Freedman v. Maryland*.[652]

When public nuisance law is used to remedy a circumstance in which protected First Amendment activity has already caused a harm, courts generally have upheld the use of remedies such as abatement, forfeiture, and injunctive relief.[653] For example, in *Arcara v. Cloud Books, Inc.*,[654] the Court sustained an order issued under a general nuisance statute that closed down an adult bookstore that was being used for prostitution and other lewd activity.[655] Rejecting the argument that the closure was a prior restraint,[656] the Court found that

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651. *Id.* at 470 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), *and* Freedman v. Maryland, 380 U.S. 51 (1965)).

652. *See id.*

653. *See, e.g.*, Kreimer v. Bureau of Police, 958 F.2d 1242, 1246-47 (3d Cir. 1992) (upholding rules that allowed public library to expel homeless man because he often exhibited offensive and disruptive behavior and his body odor was so offensive that library patrons could not use certain portions of the library); E.W.A.P., Inc. v. City of Los Angeles, 65 Cal. Rptr. 2d 325 (Cal. Ct. App. 1997) (defeating a prior restraint challenge by upholding an ordinance that targets nuisance activities of an adult bookstore in light of evidence showing that 117 arrests made in the previous two and one-half years were directly attributable to the presence of the bookstore); Planned Parenthood League of Mass., Inc. v. Bell, 677 N.E.2d 204, 206-07 (Mass. 1997) (upholding an injunction against an abortion protester based on common law public nuisance grounds after making specific findings that the protester's tactics created a nuisance that "disrupted the clinic's efforts to provide safe medical services and interfered with patients' exercise of their right to abortion"); Commonwealth *ex rel.* Lewis v. Allouwill Realty Corp., 478 A.2d 1334 (Pa. Super. 1984) (upholding the closure of a bookstore under a public health nuisance statute based on illicit activity); Commonwealth v. Croatan Books, Inc., 323 S.E.2d 86 (Va. 1984) (upholding the closure of a bookstore under a public health nuisance statute based on illicit sexual activities occurring on the premises). *But cf.* City of National City v. Wiener, 838 P.2d 223, 341 (Cal. 1992) (Mosk, J., concurring in part and dissenting in part) (stating in dissent that the majority had improperly upheld as constitutional a zoning ordinance regulating adult entertainment establishments when such bookstore could have been abated as a common law public nuisance).

654 478 U.S. 697 (1986).

655. *See id.* at 704-07; *see also* O'Connor v. City and County of Denver, 894 F.2d 1210, 1216 (10th Cir. 1990) (relying on *Arcara* and holding that the city's action in response to public nuisances "does not implicate or trigger First Amendment protections"). The closure order in *Arcara* was a response to evidence obtained by an undercover investigation that found illegal sexual activity on the bookstore premises and formed the basis of a civil complaint. *See Arcara*, 478 U.S. at 698.

656. *See id.* at 705-06. The Court noted that:

> The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of

the regulation allowing the closure sanction was directed at unlawful conduct that was not related to books or other expressive activity.[657] The Court stressed that "[b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises."[658]

Even though the *Arcara* Court did not employ the prior restraint doctrine, the decision illustrates this Article's proposal to use common law nuisance to deal with actual harmful effects resulting from potentially constitutionally protected activities. Rather than zoning in advance to prohibit the adult bookstore, the county officials used public nuisance law to address actual harmful effects accompanying the protected activity of running a bookstore. Under a nuisance balancing test that heavily weighs First Amendment rights, it is conceivable that a court could find that a state's decision to shut down an adult bookstore is not the least restrictive means of pursuing its objectives and that a more favorable approach would involve arresting the patron who is actually committing the illegal acts.[659]

Sanctioning injunctive relief against known gang members also was upheld as a valid application of public nuisance law in *People* ex rel. *Gallo v. Acuna*.[660] In *Acuna*, the California Supreme Court found that the enjoined activity fell under California's statutory definition of public nuisance, and that the provisions of the ordinance complied with the constitutional standard that they "burden no more speech

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> particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

Id. at 705 n.2.

657. *See id.* at 707.

658. *Id.* Similarly, in *Alexander v. United States*, 509 U.S. 544 (1993), the Supreme Court upheld the use of the Racketeer Influenced and Corrupt Organization Act's forfeiture provisions to effectively shut down an adult entertainment business after a full criminal trial had determined that some of the magazines and videotapes were obscene and that "the other forfeited assets were directly linked to petitioner's commission of racketeering offenses." *Id.* at 552-53.

659. *See Arcara*, 478 U.S. at 711 (Blackmun, J., dissenting).

660. 929 P.2d 596 (Cal. 1997).

than necessary to serve a significant governmental interest."[661] The court observed that "there was sufficient evidence before the superior court to support the conclusions that the gang and its members present in Racksprings were responsible for the public nuisance."[662] Thus, the court reconciled "the community's right to security and protection ... with the individual's right to expressive and associative freedom"[663] by allowing the use of public nuisance doctrine to maintain public order, while at the same time requiring the government to prove that actual or imminent harm resulted from the defendants' association.[664]

While public nuisance actions are used by local officials to control land use, private nuisance actions can also be an effective land use tool, allowing private individuals to control adverse effects generated by neighboring landowners. First Amendment rights must be taken into consideration when either of these actions are used. As discussed above, public nuisance actions that directly target imminent harm or harm that already has occurred generally will be upheld against claims of First Amendment violations. Private nuisance actions, and requests for injunctive relief, also should be upheld if when a court balances a defendant's First Amendment concerns with a plaintiff's nuisance claim, the court determines that the defendant has interfered unreasonably with the plaintiff's use and enjoyment of his or her land. Private plaintiffs who can demonstrate that substantial harmful effects are being generated by a defendant's protected activity are particularly likely to prevail when the defendant's conduct involves an expressive activity that garners a somewhat lower level of protection, such as an adult use or commercial speech.

B. Nuisance as an Efficient Alternative to Zoning

Nuisance law can be an economically efficient replacement for zoning regulation. Zoning is a method of prospectively locating uses to reduce the impact of harmful effects generated by such uses.[665]

661. *Id.* at 614 (citing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994)).
662. *Id.* at 618.
663. *Id.* at 603.
664. *See id.*
665. For example, single-family residential areas are considered sensitive uses that are

Although prospectively locating these uses "reduce[s] the nuisance costs that would occur if land uses were randomly distributed[,] . . . [u]rban land markets automatically reduce nuisance costs far below the level that would be found with random land use distribution."[666] In his book, *Land Use Without Zoning*,[667] Bernard H. Siegan undertook and documented a study of the land use experience of Houston, Texas—the only major city in the United States that has never adopted zoning.[668] Siegan postulated that studying Houston "discloses what presently occurs in the nonzoned areas and what is likely to occur in zoned areas if zoning were to be removed."[669] Arguing for the elimination of zoning, Siegan's study purports to show that "the market offers protection to homeowners in the absence of zoning, principally through restrictive covenants."[670] As stated previously, this Article is not prepared to advocate eliminating all zoning, but it does suggest that where zoning conflicts with First Amendment rights, common law nuisance and private covenants[671] can serve as viable alternatives to zoning regulation.

Professor Robert C. Ellickson, in his notable article on land use, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*,[672] concludes that "[t]he most prevalent systems of land use control in the United States are neither as efficient nor as equitable as available alternatives."[673] Urging the curtailment, and possibly even the replacement, of zoning, Ellickson proposes alternative systems of land use control such as nuisance law, covenants, fines, and selected uniform mandatory standards that rely on decentralized internalization devices to reduce the "potential for

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clustered and located as far away as possible from more undesirable uses such as industrial plants, highways, railroad tracks, and even apartment buildings.

666. Ellickson, *supra* note 6, at 693 (explaining that industrial plants are not attracted to residential areas because they naturally will cluster along railroad tracks).

667. BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972).

668. *See id.* at 23.

669. *Id.*

670. *Id.* at 231.

671. While private covenants are an excellent alternative for controlling land use, this Article does not address this method for resolving First Amendment conflicts.

672. Ellickson, *supra* note 6.

673. *Id.* at 779.

high prevention costs inherent in centralized approaches."[674] Ellickson took a reformulated approach to nuisance law to avoid the doctrinal problems that have developed primarily as a result of plaintiffs' insistence on injunctive relief.[675] Under Ellickson's approach, neighbors would enforce the law by initiating private lawsuits to redress substantial injuries caused by nuisances.[676] Professor Ellickson proposes the following reformulation of nuisance law to take into account administrative costs and fairness when distributing property rights among neighboring landowners:

> A landowner who intentionally carries out activities, or permits natural conditions to develop, that are perceived as unneighborly under contemporary community standards shall be liable for all damages (measured by the diminution in the market value of plaintiff's land plus bonuses for diminutions in widely held subjective values) to all parties who are thereby substantially injured, and continuation of the activity may be enjoined by any party willing to compensate the landowner for any losses he suffers from that injunction.[677]

Ellickson's reformulation of nuisance law would require that the adjudicator take First Amendment concerns into account when deciding whether the activities are "unneighborly under contemporary community standards."[678] One possible shortcoming of this approach is that such a standard may not sufficiently protect minority interests from majoritarian rule.[679] Professor Ellickson also suggests that this land use reformulation should include a defense to a nuisance action when the remedy violates fundamental liberties, such as freedom of expression.[680] This defense likely can be used for other First Amendment violations, as illustrated in this Article's example of

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674. *Id.* at 779-81.

675. For a detailed discussion on available remedies, see *id.* at 738-48.

676. *See id.* at 780.

677. *Id.* at 748.

678. *Id.*

679. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1934) (suggesting a narrower scope of review and a stricter scrutiny when legislation on its face restricts or impacts specifically delineated constitutional freedoms).

680. *See* Ellickson, *supra* note 6, at 748-49.

how to employ nuisance law in lieu of zoning regulation that affects free exercise.[681] Professor Ellickson's article is an exceptional analysis of the economic and fairness issues pertaining to zoning regulation and alternative systems, such as private covenants and nuisance law, and supports this Article's assertion that nuisance law can be an efficient replacement for zoning regulation that conflicts with First Amendment activities.[682]

Other scholars and commentators also have suggested replacing zoning regulation with alternative systems of land use control.[683] Professor Douglas W. Kmiec proposed an alternative system to zoning (less extreme than the approach of Siegan or Ellickson, Kmiec's former professor) that retains public control in situations where private decisions will not be able to reach an optimal result.[684] The use of nuisance law is an integral part of this alternative system, which employs Professor Ellickson's suggested analysis that characterizes a "system as efficient when it minimizes the sum of nuisance, prevention, and administrative costs."[685] Professor Kmiec's alternative system uses nuisance law to remedy externalities or spillovers that are imposed on neighbors, while de-emphasizing injunctive relief to make its use more effective.[686] Public regulation is used to control safety and health issues, such as population density and public improvements, while tasks such as regulating competition and promoting aesthetic or social preferences are reserved for nuisance law and private decision-making through covenants.[687]

In order to test the efficiency of nuisance law as a zoning replacement, let us suppose that a Presbyterian church decides to

681. *See infra* notes 696-97 and accompanying text.

682. *See infra* notes 690-92 and accompanying text.

683. *See, e.g.*, MARTIN A. GARRETT, JR., LAND USE REGULATION: THE IMPACTS OF ALTERNATIVE LAND USE RIGHTS (1987); Kmiec, *supra* note 598; Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980); Robert H. Nelson, *Zoning Myth and Practice—From Euclid into the Future*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP (Charles M. Haar & Jerold S. Kayden eds., 1989); John M. Ross, Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972); *see also* Radner, *supra* note 630, at 412 (proposing the use of nuisance law as the "market" for allocating rights associated with electronic commercial speech).

684. *See* Kmiec, *supra* note 598, at 34.

685. *Id.* at 39.

686. *See id.* at 84.

687. *See id.* at 93.

open a homeless shelter on its church campus in an affluent, single-family residential neighborhood.[688] We must presume that a church-run homeless shelter is a religious use, protected by the Free Exercise Clause.[689] We will also assume that there are no private covenants preventing such a use. A local zoning ordinance allows churches and religious institutions as conditional uses in this hypothetical residential neighborhood. The zoning ordinance defines "Church and Religious Institutions" as "a building or set of buildings used for the sole purpose of worship and customarily related activities," and it further adds that "homeless shelters and food banks are not 'customarily related activities.'" After the church's request for a conditional use permit is denied, the church files suit and the court invalidates the ordinance as a prior restraint on religious exercise because it does not have the procedural safeguards required under *Freedman*. The church then opens its homeless shelter and four families occupy a portion of one of the church's buildings. One of the families has a teenage son who is a member of a local gang. Several of the gang members begin to "hang around" the church campus and soon the neighborhood begins to experience increased litter, loud noise and music late into the evening, minor graffiti, and even public drinking and urination. Disturbed by the adverse effects generated, albeit indirectly, by the shelter occupants, several neighbors join together and file a private nuisance action to enjoin the operation of the homeless shelter.

If the overall goal of land use control from an efficiency standpoint is the minimization of the sum of nuisance costs, prevention costs, and administrative costs,[690] then we must look at

688. This type of religious activity is becoming more prevalent as the level of governmental resources devoted to feeding and sheltering the homeless has not kept up with the demand for these charitable services. *See, e.g., Orange County Perspective; Finding the Common Ground*, L.A. TIMES, Sept. 25, 1997, at B8 (reporting that a judge sentenced Reverend Wiley S. Drake to fifteen hundred hours of community service after a jury convicted him of violating Buena Park zoning laws by sheltering homeless men, women, and children in a church parking lot and patio).

689. *See* Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 KENTUCKY L.J. 507, 512-25 (1995-96) (discussing religious uses and accessory uses).

690. *See* Ellickson, *supra* note 6, at 690.

how these costs pertain to this scenario. First, nuisance costs include harmful externalities, such as the gang member problems, that decrease the utility and, therefore, the value of the neighborhood property. Nuisance costs also include the costs to each homeowner to monitor the harm to their property, the costs to associate with neighbors to oppose the harm either through political lobbying or litigation, the costs associated with neighbors exiting the community, and the costs of litigation to challenge the operation of the shelter as a nuisance. Despite such numerous nuisance costs, zoning, as an alternative form of land use control, will not necessarily reduce the aggregate sum of nuisance costs, prevention costs, and administrative costs. This follows from the relatively high prevention and administrative costs that inhere in zoning's centralized regulatory approach.[691] Moreover, if we take into consideration Bernard Siegan's conclusion that the market mechanism in a nonzoning system would allocate uses just as efficiently as zoning, then nuisance law can serve as a superior tool for addressing those land uses that interfere with other landowners' rights because "zoning does not guarantee either elimination or internalization of nuisance costs."[692]

1. Nuisance Costs

In the above hypothetical, the church will have several incentives to mitigate the effects of the gang-related activity, despite the absence of potential liability under a pertinent zoning ordinance. The church will have a strong incentive to confront the harmful effects created by the shelter's resident gang member because members of the church use the church campus for worship, bible study, youth meetings, and social events. In addition, it will be important to the church to keep its campus attractive so that visitors and potential new members will be induced to attend church functions. Because churches frequently draw their membership from the local community, it will also be important to the church to maintain a positive relationship with its surrounding neighborhood. Not all neighbors will share the belief

691. *See id.* at 779-81.
692. *Id.* at 693-94 (discussing Siegan's study of nonzoning in Houston).

held by church members that sheltering the homeless is a religiously or socially desirable activity that must be conducted in the local community. Therefore, the church must be cognizant of community opposition to such activities and must be responsive to these concerns in order to avoid drops in membership or litigation. The church may be able to guard against community opposition by increasing communication and education in the local community about its socially responsible efforts. Finally, the threat of a potential nuisance suit will also deter church officials from neglecting problems generated by the shelter.

If the above incentives are not sufficient to prevent the gang-related harms from occurring, the risk of loss from these external harms will be placed on the church through common law nuisance. Necessarily, as with any defendant in a nuisance action, a church with limited financial resources may be "judgment proof" and unable to compensate its neighbors for any harm caused by its activities. However, if the church congregation wishes to remain in existence and protect its existing assets, the threat of a nuisance suit ultimately should deter it from using its facility in a way that unreasonably harms neighboring landowners.

The social utility of the church's conduct in housing the homeless may outweigh the shelter's harm to the nearby homeowners, so as to preclude a court from issuing an injunction to close the shelter. However, the effect of issuing an injunction against the church shelter, which might involve placing four families on the street, should not influence a court's decision as to whether the interference is unreasonable and, therefore, a nuisance. The church should still be responsible for the adverse social consequences of its religious mission in the form of damages if the adverse effects rise to the level of actionable nuisance.[693]

693. Professor Ronald Coase theorized that when parties are able to bargain without transaction costs, the parties will reach an efficient outcome regardless of the parties' initial rights or liabilities. *See* Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 246 n.3 (1987) (citing Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)). Applying the Coase Theorem, with the assumption that administrative costs are zero, if the cost to the church of closing its shelter is less than the neighbors' gains from the elimination of adverse effects caused by the gang members, the church will close its shelter regardless of how rights are distributed initially. The problem with this theorem, as Coase

Employing Professor Ellickson's prima facie nuisance analysis, the church is intentionally housing the homeless and permitting one of its occupants to create adverse effects that, presumably, would be perceived as unneighborly under contemporary community standards.[694] The church should, therefore, be liable for all damages to neighbors who live within close proximity to the church campus and are affected by the visual blight, disturbances of the peace, and property value reduction. Moreover, the neighbors may elect to enjoin the operation of the shelter if they are willing to pay the church for losses that it would suffer by closing the shelter.[695] However, under the Ellickson analysis, the church would have a defense that the remedy of forcing the shelter to close upon payment from the residents would violate the church's fundamental liberty of free exercise.[696] Allowing such a defense "serves as a useful reminder that maximization of wealth and the assurance of its fair distribution are not the sole social goals."[697]

Assuming that a court would consider the hypothetical adverse effects to be substantial, under the traditional nuisance analysis outlined by the *Restatement (Second) of Torts*,[698] the court would need to balance several factors to determine whether or not the interference with the church neighbors' use and enjoyment of their property was unreasonable. The court would examine: (1) the extent and character of the adverse effects on the neighbors; (2) the suitability of an affluent residential neighborhood for the location of a homeless shelter; (3) the social values of the church's conduct in

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recognized in the application of his theorem to pollution problems, is that the high transaction costs involved in bargaining with the many potential victims in the community would preclude the use of this model of economic efficiency. *See generally* Coase, *supra*.

694. Residents in an affluent neighborhood do not expect that litter, noise, and unseemly conduct will regularly occur, rather they expect that "the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Berman v. Parker, 348 U.S. 26, 33 (1954).

695. In this case, the neighbors may have to compensate the church to help it relocate the shelter to another location where the adverse effects would not be as severe, such as an industrial area.

696. *See* Ellickson, *supra* note 6, at 748-50. Although Professor Ellickson specifies a defense for freedom of expression, this author will assume that he intended that any of the First Amendment liberties would qualify as a defense.

697. *Id.* at 750.

698. RESTATEMENT (SECOND) OF TORTS § 827 (1977).

filling a need for private social responsibility and the neighbors' right to live in a quiet and peaceful neighborhood; and (4) the burden on the neighbors to avoid the harm and the church's ability to prevent the harm. The fact that the church is exercising its First Amendment right of free exercise should weigh in favor of allowing the church to continue operating the homeless shelter. In addition, while the adverse effects may be substantial enough to justify a finding of nuisance that would require the church to pay damages or even close the shelter, the church should be able to obviate such effects by encouraging the destructive occupant to discontinue the offending behavior, by removing the destructive occupant, or, if necessary, by removing the destructive occupant's entire family from the shelter. Moreover, the church should have an incentive to take these preventive measures prior to resolving the dispute through litigation because of the likelihood that a court in this circumstance would determine that a nuisance exists.

2. Prevention Costs

Because economic efficiency is evaluated by determining whether the sum of nuisance, prevention, and administrative costs is minimized, it is necessary to look more closely at prevention costs. Prevention costs include "nonadministrative expenditures made, or opportunity costs incurred, by either a nuisance maker or his injured neighbor to reduce the level of nuisance costs."[699] In our hypothetical, the city attempted to eliminate homeless shelters operated by churches or religious institutions in certain residential areas. If homeless shelters were similarly banned in all areas, the nuisance costs would be avoided, but the prevention costs could be high. The homeless would incur prevention costs by being forced to suffer the hardship of surviving without shelter. In addition the city would need to find other solutions to the homeless problem, without the aid of private religious organizations, in order to prevent the costs of crime and urban blight that might result if the homeless are unable to obtain shelter and care and are forced to live on the streets or in the parks.

699. Ellickson, *supra* note 6, at 688.

Business owners also might incur prevention costs by bearing the impact of reduced patronage caused by the homeless sleeping on public sidewalks in front of their stores. Thus, "[p]revention costs in this instance would probably far exceed the eliminated nuisance costs, and overall efficiency would not be enhanced."[700]

3. Administrative Costs

Administrative costs include "both public and private costs of getting information, negotiating, writing agreements and laws, policing agreements and rules, and arranging for the execution of preventive measures."[701] Unlike most nuisance actions, a public land use control system requires the expenditure of public funds for direct and indirect costs such as salaries for zoning officials, volunteer labor for zoning appeals boards and planning commissions, and general governmental support costs.[702] In addition, developers may incur private administrative costs when they investigate zoning restrictions and attempt to obtain permits or amend zoning regulations. Similarly, landowners may incur private administrative costs when they organize local lobbies to oppose developers. Fees for the zoning attorneys that assist in these activities may even exceed the direct costs of running a public zoning agency.[703] As Professor Ellickson has observed, "[t]hese costs, when added to the high prevention costs zoning is likely to involve, may be so great that an entire zoning ordinance is inefficient; that is, the reduction in nuisance costs is less than the concomitant prevention and administrative costs."[704] Thus, using nuisance law to govern activities that implicate the First Amendment would likely be an efficient and equitable alternative to zoning regulation as a method of resolving land use conflicts.

The administrative costs of a zoning scheme, when added to prevention costs and nuisance costs, cannot justify zoning away First Amendment rights on the basis of economic efficiency. Zoning does

700. *Id.* at 689.
701. *Id.*
702. *See id.* at 697.
703. *See id.* at 697-98 (noting that "[b]y crude measurement zoning now produces almost four times as many appellate opinions as nuisance and covenant law disputes combined").
704. *Id.* at 699.

not guarantee that nuisance costs associated with First Amendment activity will be reduced by locational decisions or decisions banning offensive, but protected, First Amendment activities. Prevention costs, such as dealing with the homeless problem, will be borne by others in the community if religious institutions are restricted from helping. Although nuisance costs generated by housing the homeless may be reduced by regulating and restricting these uses in advance, the *sum* of nuisance costs, prevention costs, and administrative costs under a zoning scheme will likely exceed nuisance costs under a scheme that restricts zoning regulation of First Amendment activities. Therefore, common law nuisance, which requires a case-by-case examination of competing interests when adverse effects actually occur, will be a more efficient land use approach than zoning regulation which may restrict First Amendment rights. Most importantly, common law nuisance will allow the call for First Amendment individual freedoms to be heard above the voice of the majority.

VII. CONCLUSION

First Amendment rights are precious to our society and should be preserved, even when protecting them means sacrificing some degree of our "quality of life" expectations. Land use regulations, either in the form of a general ordinance or a conditional use permit scheme, have the potential to impermissibly restrict protected speech, expression, religious exercise, and associational rights. This Article has proposed that courts should apply a consistent constitutional policy against zoning actions that potentially restrict any First Amendment freedom. A land use regulation that burdens any of the rights protected under the First Amendment should be treated as a prior restraint. Regulations that are a prior restraint should be valid only if they: (1) fall into one of the narrowly drawn exceptions to the prohibition, such as military secrets, obscenity, or incitements to acts of violence; (2) prevent direct, immediate and irreparable damage; (3) are the least restrictive means of doing so; and (4) meet the *Freedman* procedural safeguards against official censorship.

If a land use regulation that affects First Amendment rights survives the heavy presumption against constitutionality, it must then

be evaluated as either a content-based or content-neutral regulation. Zoning regulations that are content-based, or that target the exercise of a First Amendment right, must be evaluated using a strict scrutiny standard, requiring a compelling government interest that cannot be achieved by a less restrictive means. A regulation that targets religious belief should continue to be absolutely prohibited, and a content-based regulation that targets a particular religious practice should be subject to the strict scrutiny standard.

Content-neutral regulation should be examined under a lesser level of scrutiny as a time, place, and manner restriction. The *O'Brien* test, currently used to evaluate content-neutral regulation of protected speech, should be used to evaluate content-neutral restrictions on protected speech, expression, religious exercise, and associational rights. Courts should apply the *Central Hudson* four-prong test, along with the *Fox* narrow-tailoring standard, to content-neutral land use regulation of commercial speech. In addition, courts should discard the *Renton* "secondary effects" analysis as an impermissible attempt to allow content-based restrictions to masquerade as content-neutral regulation.

Free exercise deserves at least as much, if not more, protection from restrictive government land use regulation as is enjoyed by adult uses and commercial speech. The use of the *O'Brien* test as an intermediate scrutiny standard for content-neutral regulation of religious beliefs or practices will offer less protection to religious exercise than the *Sherbert/Yoder* compelling interest test, but it will require a greater level of scrutiny than currently is required under the *Smith* rational basis test. However, because it is unlikely that prior restraints on religious exercise will survive scrutiny, courts will invalidate most restrictions before it is even necessary to decide whether they are content-based or content-neutral.

If a land use regulation directed against the adverse "secondary effects" generated by the exercise of a First Amendment right is invalid as a prior restraint, the community is not without a remedy for abating any actual adverse effects that do occur. Communities may use common law nuisance claims to resolve such land use conflicts between First Amendment rights and the police power to regulate for

the public health, safety, and welfare of the community. Resting on the ancient legal maxim *sic utere tuo ut alienum non laedas*,[705] nuisance is an efficient means of land use control that will adequately address community needs when unrestrained regulation of First Amendment freedoms is no longer permitted.

"[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."[706] Protecting residential areas from the undesirable effects of certain uses that might be perceived as detrimental to residential land use is not a sufficiently compelling government interest to justify the restriction of First Amendment rights. First Amendment rights occupy a higher position in our society than a state or local government's exercise of police power to promote the general health, safety, and welfare of its citizens. Protecting First Amendment rights can be reconciled with exercising police power by resurrecting two, sometimes forgotten and sometimes scorned, principles: the concept of prior restraint and the common law of nuisance.

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705. This phrase essentially means that "every person should so use his own property as not to injure that of another." Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953).

706. NAACP v. Button, 371 U.S. 415, 438 (1963).