TO WHAT EXTENT DOES THE CONSTITUTION PROTECT RELIGIOUS HOUSE MEETINGS FROM GOVERNMENT REGULATION?

Senior Seminar Paper

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Introductory Note: This paper was undertaken as a seminar course in my final year of law school. As my family had recently began attending a house church, I was inspired to research the fundamental liberty interests of house meetings and current cases reflecting the legal issues. I hope this may provide you with pertinent information. Please feel free to contact me should you have comments.

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TABLE of CONTENTS

PRECIS I

INTRODUCTION 1

PART I - PUBLIC POLICY AND RECENT ILLUSTRATIONS 1

A. PUBLIC POLICY 1

B. RECENT ILLUSTRATIONS 6

PART II - LEGAL ANALYSIS 10

A. GOVERNMENT POWER TO REGULATE LAND USE THROUGH ZONING 11

B. ZONING AS APPLIED TO RELIGIOUS CONGREGATIONS AND HOUSE MEETINGS 12

C. PROTECTION DERIVED FROM THE FREE EXERCISE CLAUSE 15

D. FREE SPEECH 17

E. EQUAL PROTECTION 22

F. DUE PROCESS - VOID FOR VAGUENESS 24

G. OTHER CONSTITUTIONAL PROTECTIONS 25

PART III - ALTERNATIVES AND PRINCIPLES 28

A. NUISANCE LAW – AN ALTERNATIVES TO ZONING LAW 28

B. BIBLICAL ANALYSIS 29

1. Biblical Principles for Government Regulation of Religious Exercise 29

2. Biblical Principles for those Conducting and Attending a House Meeting 33

C. PERMISSIBLE TYPES OF GOVERNMENT REGULATION 34

CONCLUSION 35

TO WHAT EXTENT DOES THE CONSTITUTION PROTECT RELIGIOUS HOUSE MEETINGS FROM GOVERNMENT REGULATION?

PRECIS

The use of one's house for religious meetings has a long history. From passover sedars of the Hebrews in ancient Egypt, to First Century Christians meeting from house to house, to the Anabaptists of the Middle Ages separating from the state churches of Europe, to the modern-day Chinese in their unregistered house churches; people of minority faiths have conducted religious gatherings in their houses. This comment examines the extent that the U.S. Constitution protects religious house meetings from government interference and how recent cases have been resolved. In addition, public policy issues are discussed and some principles and alternatives are recommended.

The United States has a unique and precious heritage with regards to religious liberty. The cries of spilt blood from thousands of years of state-sponsored religious persecution were heard by the Founders of this country. They recognized that a primary purpose of government was to secure and protect inalienable rights. Of these inalienable rights, the right of religious liberty is considered central as shown by the Founder's memorialization in the First Amendment to the Constitution. However, modern constitutional jurisprudence has faced several dilemmas in how to balance religious liberty with generally applicable laws. This has led to uncertainties as to how much protection the free exercise clause provides. In recent U.S. Supreme Court decisions, the free exercise clause has been substantially limited. Congress and President Clinton have passed a civil rights law that sought to expand religious liberty protections. However, the Supreme Court has overturned this attempt because of jurisdictional issues. As of this writing, Congress is making another attempt to provide greater protection of religious liberties.

This comment limits the focus on religious liberties to the balance between government's power to regulate land use through zoning laws and an individual's liberty to hold religious gatherings in one's residence. Specifically, those liberty interests are analyzed using the protections of the free exercise, free speech, equal protection, and due process clauses. Other constitutional protections such as the right of privacy and the freedom of association doctrines are also evaluated.

The need for wisdom is great because this issue of religious house meetings is basic to any meaningful religious liberty. However, our more densely populated cities and suburbs with an increasing diversity of cultures and religions have the potential to test the tolerance of neighbors and governments. Therefore, this comment also discusses basic principles and alternative checks and balances that should be considered. If religious gatherings at one's house that reasonably do not interfere with neighboring properties are not substantially protected from government interference, then the basic civil and inalienable rights of the Declaration of Independence and the Bill of Rights have little meaning. However, it remains for the courts and legislative bodies to clearly and consistently speak the law to the issue of religious house meetings.

TO WHAT EXTENT DOES THE CONSTITUTION PROTECT RELIGIOUS HOUSE MEETINGS FROM GOVERNMENT REGULATION?

Introduction

The age-old problem for religious liberty has been how various religiously-motivated people conflict with one another and with the society at-large. This has become all the more common with the increasing variety of diverse religious expressions as our public society has grown more secularized. The government, vested with the police power for the protection of health, safety, morals, and general welfare has historically trumped the individual except as constrained by the judiciary branch. The courts and legislatures have sought to define the lines of jurisdiction between government, church, family, and individual since the birth of this country. Due to the complexity of the infinite number of scenarios, bright line rules have been elusive. This comment seeks to focus on the limited question: To what extent does the U.S. Constitution protect religious house meetings from government regulation?

PART I - PUBLIC POLICY AND RECENT ILLUSTRATIONS

A. Public Policy

Several prominent public policy issues must be considered when evaluating the question of regulating religious practices in a residential setting. These including the importance of private practice of religion that fosters a sound moral foundation for society, the greater protection and privacy that is afforded to a person's house, and the

vulnerability of minority faiths with the need for protecting their inalienable rights. However, these considerations must be balanced with the government's responsibility to maintain a level of public health, safety, morals, and order.

The following discussion is prefaced with the understanding that there are balancing policy considerations. There is a potential for some religiously-motivated conduct to interfere with the health, safety, and morals of the surrounding community. The government has legitimate responsibilities, especially as regards to protecting the rights of neighbors to intervene to preserve the health, safety, and morals when there are *substantial* breaches. Such a situation could be large noisy late-night party in a densely populated area. So too, a religious gathering in a person's home could excessively affect the surrounding neighborhood to bring it within the health, safety, and morals jurisdiction of the government. The issue is where does legitimate government interests begin and what are the balancing principles?

Free exercise of religion is not only constitutionally protected, it is good public policy. America was founded on a bold and novel premise. While religion is a foundational support for individual morality and good government, the Bill of Rights grants freedom from governmental enforcement of religious doctrine and dogma.[1] This was a major break with the European tradition from which America was birthed. Many European governments of colonial times were synonymous with state churches and religious coercion. In fact, it was this very coercion that brought many of the colonists to

[1] U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ...")

the shores of America, including the Pilgrims, Quakers, and Mennonites. (Even in the nineteenth and twentieth centuries, immigration due to religious persecution continued with the Irish Catholics and the German Jews, to the present day immigration of Jews from the former Soviet Union.) The United States embarked on a great experiment of limiting governmental jurisdiction over matters of faith and religious doctrine. Yet, it was clear that the Founders of the country recognized the supreme importance of religious influence to provide motivation for morality and self-restraint.[2] However, they also recognized that government's tool of coercion was unable to direct and insure the development of voluntary religiously-motivated behavior.[3] Rather, it was incumbent on the people themselves, to be responsible to initiate and pursue the development of faith, morality, and their duty to their Creator. The Founders' experiment was whether in recognizing the inalienable right of persons to fulfill their duty to their Creator through voluntary associations, sufficient individual and civic morality would be maintained to sustain self-governance.

It was in this context that the Free Exercise Clause was framed and ratified. As government was limited from regulating religious matters through the prohibition on

[2] George Washington, Address of George Washington, President of the United States … Preparatory to his Declination, 22 – 23 (Baltimore: George and Henry S. Keatinge, 1796). ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness.") DAVID BARTON, ORIGINAL INTENT 319 (Aledo, Texas: Wallbuilder Press, 2nd ed., 1997). ("The Founders believed that religion and morality were inseparable from good government and that they were essential for national success. Consequently, the promotion of the principles of religion and morality was accepted as sound public policy.")

[3] John Adams, The Works of John Adams, Second President of the United States, V. 9, 229 (Charles Frances Adams, ed., Boston: Little, Brown and Company, 1854), (To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts on October 11, 1798. "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. … Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.")

establishment, the individual liberty for religious exercise was recognized in the same First Amendment to the Constitution.[4] From George Washington to Vice President Albert Gore, public officials have recognized the indispensable role that religion plays in our society.[5] Yet, these same officials recognize that government is incapable of filling the void where morality and religion are missing.[6] Therefore, it is of utmost importance that the government fosters an environment where the free exercise of religion can flourish while limiting governmental infringement on an individual's practice of religion. The Founders saw that the very survival of our country hung on a moral and religious people who would voluntarily restrain their conduct and choose to do right.

A public policy issue that is related to worship in one's house is the need to be secure in one's house. The U.S. Supreme Court recently citing from an old English case stated, "the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose."[7] While the U.S. Supreme Court was applying this to a Fourth Amendment, unreasonable secure and seizure case, one's home has been recognized under the Fourth Amendment as worthy of receiving heightened protection. It is sound public policy to continue to grant wider latitude to religious

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[4] *See supra* note 1.

[5] Marvin Olasky, *Gore Woos Seeker Moms*, The Wall Street Journal, May 28, 1999, at A18. (discussing Vice President Gore's recent speech regarding the central role of faith-based organizations in addressing the ills of society. Vice President Gore is quoted as saying: "I believe that faith in itself is something essential to spark a personal transformation – and to keep that person from falling back into addiction, delinquency, or dependency.")

[6] *Id.*, ("Avuncularly referring to faith-based organizations as FBOs, Gore pledged that such church groups 'will be integral to the policies set forth in my administration.'") *See also supra* notes 2 and 3. Benjamin Franklin, The Works of Benjamin Franklin, V. 10, 297 (Jared Sparks, ed., Boston: Tappan, Whittemore and Mason, 1840). (To Messrs. The Abbes Chalut and Arnaud on April 17, 1787, "[O]nly a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.")

[7] Charles H. Wilson, ex ux, et al. v. Harry Layne, Deputy United States Marshal, etc, et al, No. 98-83, (U.S. Supreme Court May 24, 1999). *Quoting* from Semayne's Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K. B.).

expression in one's house because that is often the last or only refuge for those of minority or non-conformist faiths.

In addition, there are many that express a belief that one's home is of special significance for demonstrating one's faith or religious expression. The Amish have long eschewed church buildings or meeting houses because they adhered to a conviction that religious services should be held in the private houses of the local members of each district.[8] Meetings of believers in the New Testament days of early Christianity were primarily based on gatherings in private houses.[9] There is a growing movement of house churches that also hold the conviction that the home is to be the primary location for religious meetings.[10] Many institutional churches are embracing the need for home groups, care groups, or home cells meeting in private houses. These home groups are seen as the place where relationships, discipling, outreach, and service most naturally occur. Synagogues, especially Orthodox Jewish, have long found that the home is an important, if not the primary place of their religious expression. Orthodox Jewish religious convictions, such as being within walking distance for Shabbat services and daily prayer meetings, have made the use of one's house vital to religious services in some parts of the country.

In addition, history is replete with examples of one's house being the final refuge

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[8] BERND G. LÄNGIN, PLAIN AND AMISH, AN ALTERNATIVE TO MODERN PESSIMISM 122 - 23 (Jack Thiessen trans., Herald Press 1994). ("...that all Amish congregations who built their own house of prayer departed from the true way, sooner or later. Church buildings are a sign of arrogance similar to buttons on Sunday jerkins or zippers on men's trousers. ... On this matter they have adhered to the old ways even if conducting services in private houses within their community sometimes leads to problems.")
[9] *Acts* 2:46, 5:42, 20:20, *Romans* 16:5, 1 *Corinthians* 16:19, *Philemon* 2.
[10] Judy Bradford, *House of God, Church in Homes Offer Individuality without Hierarchy*, South Bend

for out-of-favored and persecuted believers. In China, an estimated 20 to 30 million believers meet in unregistered house churches.[11] Chinese house church leaders are currently enduring increased persecution and imprisonment.[12] This pattern can be found over and over again where people belonging to minority and nonconformist faiths are oppressed by the powers-that-be. As stated above, this country was populated and founded in significant part by people fleeing persecution of their minority religious status.

Lastly, new and fledging congregations many times have to meet in private houses due to a lack of resources.[13] Public policy and jurisprudence must allow for small communities as well as established, well-funded institutions, and use common sense to understand the distinctions in worship facilities.[14]

B. Recent Illustrations

Tribune, Feb. 6, 1998, D1.

[11]Timothy C. Morgan, *A Tale of China's Two Churches; Eyewitness Reports of Repression and Revival*, Christianity Today, July 13, 1998, at 30. ("During the intervening 30 years, Xu evangelized, planted new house churches, and trained local church leaders, eventually creating what some call the Born Again Movement (BAM), which has an estimated 3 million followers independent of the official registered church in China. Spinoffs from BAM, one of the fastest-growing religious groups in China, have an estimated 20 million followers, nearly twice the size of the registered church, which was re-established in 1979.")

[12] *Id*. ("This year, however, Xu will not be celebrating the thirtieth anniversary of his mountaintop plea. Last December he was sentenced to serve three years in a "re-education-through-labor" camp in Henan. Chinese authorities arrested Xu, now 58, on charges of being a leader of a banned religious cult, disrupting public order, and spreading religious heresy about the imminent end of the world.")

[13] State of New Jersey v. Robert J. Cameron, 498 A.2d 1217, 1226 (1985). ("It therefore meets in the humble residence of its minister, traditionally a practice of new congregations.")

[14] *Id.* at 1226. ("One should therefore erase from the mind any image of, say, the Most Reverend and Right Honorable Robert Alexander Kennedy Runcie, M.C., D.D., 102nd Archbishop of Canterbury and Primate of all England, plopping down Canterbury Cathedral in the middle of bucolic Somerset County, or of the Camerons' neighborhood being transformed into St. Peter's Square. We are talking about a few folks gathering at someone's home.")

Over the last 200 years, the United States has been a leader in setting a new paradigm for protecting religious liberties. This experiment has allowed private religious faith to flourish. While we are not currently seeing believers imprisoned for refusing to submit to government regulation of their church or synagogue, just how much protection do current laws and prevailing jurisprudence provide to believers to meet in their houses? The following discussion is a selection of some of the conflicts that have come to the public attention either through the press or the judicial system.

In 1981, a minister in Franklin Township, New Jersey was charged with violating a zoning ordinance because he was using his home "for activities other then [sic] permitted use."[15] The basis of the charge was that the minister conducted an one-hour service for approximately twenty-five people in his home once a week. The enforcement action "arose after one of the defendant's neighbors reported that the religious service could be heard eighty feet from the defendant's home, and that cars parked on the street by those attending the service hindered the passage of traffic."[16] The minister had to fight the case through the New Jersey Supreme Court which decided the zoning ordinance was unconstitutionally over-broad and void for vagueness. The minister, ordained in a small denomination, resorted to conducting services in his house because they could no longer afford the rent for the local school.[17]

Also in 1981, a rabbi in Miami Beach, Florida was threatened with prosecution

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[15] *Id.* at 1219.
[16] *Id.*
[17] *Id* at 1226. The defendant, Robert J. Cameron, is a minister in the Reformed Episcopal Church, a denomination that includes, nationwide, some six or seven thousand adherents and 101 clergy.

for conducting religious meetings at his house in violation of the city zoning ordinance.[18] Services usually consisted of between ten to thirty people, but occasionally reached fifty people during the winter.[19] "Daily services usually cause no substantial disturbance to the neighborhood, but well-attended services have disturbed neighbors as a result of persons seeking directions to the Grosz shul, as a result of chanting and singing during the services ..."[20] The rabbi, Armin Grosz, and his wife, Sarah Grosz, filed a suit in federal district court seeking declaratory judgment and injunctive relief from prosecution. The district court refused to find that the zoning ordinance was vague or overbroad, but the court did find it substantially burdened the Grosz's free exercise rights without having a compelling state interest. However, the appeals court found that the trial court erred in its compelling interest balancing test and reversed the finding of unconstitutionality.

More recently, a house synagogue in a neighborhood of Los Angeles sought City Counsel approved of a special zoning permit needed to legally operate.[21] The City Counsel unanimously rejected their request although the synagogue had a 25 year history in that neighborhood. The synagogue originally operated out of the home of the father of the current rabbi. When the father grew too old, the son moved the services to a rented house on a busy intersection three blocks away from the father's home. The Hancock Homeowners Association was the leading opponent of the special use permit. However, a neighbor did testify that the synagogue had no discernable impact on the

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[18] Grosz v. City of Miami Beach, Fla., 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827, 83 L. Ed. 2d 52, 105 S. Ct. 108 (1984).
[19] *Id.* at 731.
[20] *Id.*
[21] Jodi Wilgoren, *Troubled House of Worship; Zoning: Council Bars Orthodox Synagogue from Residential Street. Rabbi Says Religious Freedom Suffered Blow*, LOS ANGELES TIMES, July 9, 1997, at B1.

neighborhood.[22]

Another recent controversy involving home synagogues occurred in the Village of Airmont, New York.[23] Several small villages had been incorporated in the area. "A couple of the villages were formed by Orthodox Jewish groups for the admitted purpose of creating Hasidic enclaves so that the village residents could comply with Orthodox Jewish law."[24] However, the Village of Airmont was incorporated and implemented changes in the housing and zoning laws which some Orthodox Jewish rabbis of house synagogues viewed as discriminatory towards Orthodox Jews. A Federal appeals court reversed a trial court's interpretation of a jury verdict and found that the Village violated the rabbi's Free Exercise Clause rights.

A resident of Stratford, Connecticut was charged with violating the zoning code because he was holding fellowship meetings of up to ten people three times per week in his house.[25] In response to a complaint from a neighbor that religious services were being conducted in William Nichols' house, a zoning enforcement officer initiated an inspection. The enforcement officer then threatened Nichols with $100 to $250 fines per violation if he did not cease all religious meetings in his house. He appealed the zoning officer's decision to the local zoning appeals board and his appeal was rejected. A Federal district court found that the special permit requirement for "other religious use"

[22] *Id.* ("Brian Cartwright, a Hancock Park resident who frequently jogs past 3rd and Highland, testified that the synagogue has "no discernible impact" on the neighborhood. 'How this could be disturbing to anyone remains a mystery to me,' he testified during the council hearing.")
[23] Rabbi Yitzchok Leblanc-Sternberg et al v. Robert Fletcher et al, 922 F. Supp. 959 (S.D. NY 1996).
[24] *Id* at 960.
[25] Nichols and Keane v. Planning and Zoning Commission of the Town of Stratford, 667 F. Supp. 72 (D. Conn. 1987).

of a residence was unconstitutionally vague, both on the face and as applied.[26]

In Denver, a women is currently fighting a cease-and-desist order that is seeking to limit her home prayer meetings to no more than once a month.[27] Diane Reiter had been holding weekly bible studies in her home. Between nine and 15 women would begin with dinner and spend two to three hours praying and discussing the Bible. After losing an appeal before the zoning board, Ms. Reiter has filed a suit for violation of her constitutional rights. An issue in this case appears to be whether the zoning ordinance is applied neutrally to all residential gatherings or specifically to religiously oriented gatherings. This case is still pending at the time of this writing.

The majority of conflicts do not appear to be a result of communities and states actively seeking to strictly enforce zoning laws, but rather local zoning boards or local political bodies responding to neighbor complaints. However, once the government enforcement mechanisms go into effect, persons find themselves on the receiving end of government prosecution.[28]

PART II - LEGAL ANALYSIS

[26] *Id.*
[27] Valerie Richardson, *Bible Study in Home Makes Woman Lawbreaker*, Washington Times, August 12, 1999, at A3.
[28] *New Jersey v. Cameron*, 498 A.2d at 1226. (Clifford, J., concurring, "The offensive effect of the group's conduct, as testified to at the municipal court hearing, amounted to no more than a complaint by one of Cameron's neighbors that singing could be heard from a distance of eighty feet away and that on one occasion a guest's car was parked in front of his house. The might, majesty, dominion, and power of the State of New Jersey are marshalled to combat these conditions, through enforcement of a zoning restriction against churches in a residential zone, in order to stifle the religious activities described above.")

A. Government Power to Regulate Land Use through Zoning

Most modern urban and suburban areas of the United States use zoning ordinances to regulate land use. Typically, heavy industry land use is separated from commercial land use which is separated from residential use. The U.S. Supreme Court recognized the government's police power to regulate land use in *Village of Euclid v. Ambler Realty Co.*[29] In this case, the Court upheld zoning regulations that had a rational relationship to public health, safety, morals, or general welfare as long as they were not clearly arbitrary and unreasonable.[30]

In *Belle Terre v. Borass,*[31] the Supreme Court upheld the use of zoning laws to exclude more than two non-related persons from living in an area zoned for "single-family dwellings."[32] The Court specifically recognized the legitimate government power "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[33]

While the Supreme Court upheld housing regulations that gave families protection and preference over unrelated groups of people, in *Moore v. City of East Cleveland,*[34] the Court struck down a zoning ordinance that limited extended family members from living

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[29] Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926). This case involved the Village's zoning plan that specifically set aside certain areas for residential land use. A realtor complained that this plan reduced the value of land that it held.
[30] *Id.*
[31] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Six college students renting a house were found to have violated the zoning ordinance that limited its entire residential area to single family dwellings. The Supreme Court upheld the definition of the word "family" as being "one or more persons related by blood, adoption, or marriage, living and cooking together as a single house-keeping unit ..."
[32] *Id.*
[33] *Id.* at 9.
[34] Moore v. City of East Cleveland, 431 U.S. 494 (1977).

in the same house. The court found that the ordinance substantial interfered with the family in violation of the family's substantive due process rights. "The tradition of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[35] This is an important case because it limits the zoning power of the state when it substantially burdens fundamental rights of individuals. Similarly, in *Schad v. Borough of Mount Ephraim*,[36] the Court held that when zoning laws conflict with other rights, the appropriate constitutional standards must be used to evaluate the zoning ordinance.[37] However, where no fundamental rights are involved, the Court will give deference to a legislature's decision as long as it is reasonably related to health, safety, morals or general welfare and is not arbitrary.[38]

B. Zoning as Applied to Religious Congregations and House Meetings [39]

The majority of cases involving zoning and religious congregations involve religious institutional facilities or conversion of existing buildings for religious use. When it comes to siting church buildings, courts have generally upheld the right of municipalities to regulate where churches may or may not locate their facilities. The reasoning has been that facility siting has generally not been found to be fundamental to

[35] *Id*.
[36] Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).
[37] *Id*. at 68.
[38] *Belle Terre*, 416 U.S. at 4.
[39] For a more detailed analysis of zoning and religious institutions, *see* Laurie Reynolds, *Zoning the Church: The Police Powers Versus the First Amendment* , 64 B.U. L. Rev. 767 (1985), Michael W. Macleod Ball, *The Future of Zoning Limitations Upon Religious Uses of Land: Due Process or Equal Protection?* , 22 Suffolk U. L. Rev. 1087, 1087 (1988), Scott David Godshall, Note, *Land Use Regulations and the Free Exercise Clause*, 84 COLUM. L.REV. 1562 (1984).

the "tenet of faith" or a "cardinal principle" of religions but rather is a secular activity.[40] Courts have generally found that, even apart from the siting of religious buildings, zoning laws can be used to regulate religious activities in existing facilities that were built for non-religious purposes.[41] These courts have decided in many cases that zoning ordinances place a minimal burden on the congregations and the ordinances have a reasonable or important governmental interest.[42] This analysis has even been used to satisfy the *Shebert*[43] compelling interest test and the Religious Freedom Restoration Act of 1993 (RFRA) requirements.[44] Zoning laws have also been used to compel churches to maintain structures that have been designated for historic preservation[45] and to prohibit established churches from traditional roles such as feeding the poor[46] or providing shelter

[40] Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d. 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983). (upholding the city's denial of allowing a church to build on land zoned for residential use.) *See also*, Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 822 (10th Cir. 1988) (upholding the county's denial of a church's request to build on land zoned for agricultural use.)
[41] International Church of the Foursquare Gospel v. City of Chicago Heights, No. 96 C 4183, 1996 U.S. Dist. LEXIS 11125 (N.D. Ill. Aug. 1, 1996). Church was denied use of a former grocery store because it was not a commercial establishment that would generate tax revenue. The Court finding that the zoning ordinance placed no substantial burden on the church stated, "mere inconvenience and economic expenditure do not rise to the level of a substantial burden under the Religious Freedom Restoration Act or the United States Constitution."; Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991). An ordinance that excludes churches from central commercial and industrial areas can be valid time, place, and manner restrictions.; Christian Gospel Church, Inc., v. City and County of San Francisco, et al., 896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1991). (upholding the city denial of a special use permit for residential dwelling in an area zoned for single-family dwellings. The court found the burden to be minimal on the small church of 50 people as compared with a strong governmental interest in maintaining the quality of the neighborhood.)
[42] *Id.*
[43] *In* Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), the Court established the compelling interest test to balance an individual's free exercise clause rights when conflicting with government interests. The test holds that for a government statute to be valid when it substantially burdens a person's right to free exercise of religion, the law must be the least restrictive means of furthering a compelling governmental interest.
[44] The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 requires the use of the compelling interest test from *Sherbert*. However, the U.S. Supreme Court, in the very controversial case of City of Boerne v. Flores overturned the Act as it applies to nonfederal governments.
[45] St. Bartholomew's Church v. City of New York 914 F.2d 348 (2d Cir. 1990). Church must maintain historic church building rather than be allowed to tear it down and develop the property. City of Boerne v. Flores, 117 S.Ct. 2157 (1997). The underlying issue in this case was whether a church must maintain a historic structure that no longer met its needs.
[46] Daytona Rescue Mission, Inc. & Gabriel J. Varga v. The City of Daytona Beach, & The City of Daytona Beach City Commission, 885 F. Supp. 1554, (M.D. FL 1995).

for the homeless.[47] Courts have generally discounted the burden that zoning ordinances have on religious congregations which has allowed most zoning ordinances to stand.

The exceptions tend to be grouped where there appears to be some discrimination towards a particular group[48] or an equal protection question.[49] With regards to house meetings in residential areas, exceptions are also found for vagueness of the zoning law in some cases.[50] However, in other cases, the courts have found the zoning ordinances to be valid and the burden on the house meeting to be minimal.[51] This is due to the availability of alternative venues even though they are not in one's own home.[52]

The issue of religious house meetings conflicting with zoning laws remains unsettled. The U.S. Supreme Court has declined to take any cases with this issue.[53] The deciding factor in these cases appears to be the extent to which the house meeting

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[47] First Assembly of God of Naples, Fla., Inc. v. Collier Co., Fla., 20 F.3d 419, (11th Cir.), opinion modified on denial of reh'g, 27 F.3d 526 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 730 (1995). *But in* Western Presbyterian Church, et al v. The Board of Zoning Adjustment of the District of Columbia, et al, 849 F. Supp. 77 (DC 1994) ("The fact is, this well-run and necessary effort to minister to the less fortunate residents of this city ought not be arbitrarily restricted and relegated to the less desirable areas of the city because of the unfounded or irrational fears of certain residents. The program cannot be likened to an activity which has no redeeming social justification and must therefore be confined to a so-called 'combat zone.' To the extent the feeding program does not constitute a nuisance, the plaintiffs should be allowed to resume this exemplary service at the Church's new location which is only a few blocks from where it has conducted its very worthwhile program for over 10 years without incident.")

[48] Islamic Center of Mississippi, Inc., et al., v. City of Starkville, Mississippi, 840 F.2d 293, (5th Cir. 1988). Denial of a special use permit was found to be discriminatory due to a substantial number of permits granted to other religions in similarly situated circumstances. Rabbi Yitzchok Leblanc-Sternberg et al v. Robert Fletcher et al, 922 F. Supp. 959 (S.D. NY 1996). Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993). Ordinance deliberately targeted religious practice of the church.

[49] Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991). Church was prohibited from locating in a commercially zoned area. However, other non-profit entities were allowed in the same commercial zone.

[50] *State of New Jersey v. Robert J. Cameron*, *see supra* note 13. *Nichols and Keane v. Planning and Zoning Commission of the Town of Stratford*, *see supra* note 25.

[51] *Grosz*, *see supra* note 18.

[52] *Id* at 739. A temple was available four blocks away.

[53] *Id. Also see Christian Gospel Church, Inc., v. City and County of San Francisco*, *supra* note 41.

prohibition is shown to substantially burden another constitutional right, such as equal protection, due process, or freedom of speech. Apart from cases of obvious discrimination, the Free Exercise Clause does not seem to provide much protection standing alone.

C. Protection Derived from the Free Exercise Clause [54]

The Free Exercise and the Establishment Clauses of the First Amendment, also known as the Religion Clauses, were extremely important to the Founders of this country.[55] Several states refused to ratify the U.S. Constitution until these and other important rights were guaranteed. However, the Free Exercise Clause is currently interpreted by the U.S. Supreme Court to provide little of the protection originally intended, especially in the aftermath of the *Smith*[56] decision.[57] The Court did accept a more broad view of the Free Exercise Clause for a time,[58] but *Smith*[59] was a clear return

[54] For a more detailed analysis of the Free Exercise Clause jurispurdence and original intent, *see* Michael W. McConnell*, The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, MAY, 1990. *Also see*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U.Chi. L. Rev. 1109 (1990).

[55] *Id.* (speaking of John Locke, McConnell states, "Writing in the aftermath of religious turmoil in England and throughout Europe, he viewed religious rivalry and intolerance as among the most important of political problems. Religious intolerance was inconsistent both with public peace and with good government.") *McConnell, The Origins,* at 1453 (quoting James Madison, "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him." Madison went on to state that this duty to the Creator is "precedent both in order of time and degree of obligation, to the claims of Civil Society, ... therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society.")

[56] Employment Div. Ore. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990).

[57] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U.Chi. L. Rev. 1109 (1990).

[58] Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). (The Court developed the compelling interest test for Free Exercise Clause issues. This test stated that for a government statute to be valid when it substantially burdens a person's right to free exercise of religion, the law must be the least restrictive means of furthering a compelling governmental interest.) The *Shebert* compelling interest test was then applied to cases for the next 25 years. In several cases, the Court found the burden on Free

to a narrow view of the Clause.[60]

A central issue in the development and controversy over the Free Exercise Clause jurisprudence has been whether the Clause incorporates belief alone or to what extent is conduct that is motivated by belief protected. While many recognize the fallacy of trying to divide religiously motivated behavior from belief,[61] this division has prevailed such that freedom to believe is considered absolute, but religiously-motivated conduct receives far less protection. The holding in *Smith,* that government need not grant exceptions for free exercise from "the obligation to comply with a valid and neutral law of general applicability" seems to eliminate any substantial protective content for religiously-motivated behavior from the Free Exercise Clause. The Court in *Lukumi Babalu Aye*[62] held invalid government action that was deliberately motivated to infringe on a targeted group's free exercise rights. However, this provides no protection from the infringement of secularly motivated laws that unintentionally create a substantial burden on one's religiously-motivated conduct.[63] Through *RFRA*, Congress attempted to roll back *Smith*

Exercise Clause rights to be substantial enough to grant exceptions from a generally applicable law.

[59] The Court held that, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes ... conduct that his religion prescribes. ..."

[60] *See McConnell, Free Exercise Revisionism.*

[61] *McConnell, Origins,* at 1452, (Historian Thomas Curry recounts the 1651 flogging of Obediah Holmes, a Baptist, for holding a religious meeting in Lynn, Massachusetts: "To the familiar argument that he was sentenced not for conscience but for practice, Clark replied that there could be no such thing as freedom of conscience without freedom to act.")

[62] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

[63] Chuck Colson, *The RFRA Case as a Crisis of Constitutional Authority*, 2 Nexus J. Op. 21, 26-27 (1997). ("... because we live in a secularized society, legislatures often will act in ignorance of the religious needs of their citizens. Even without any intent to suppress a religious practice, legislatures and bureaucracies today often do not think it important to consider possible religious objections. The huge growth of federal, state, and local government creates a virtual certainty of frequent clashes between government action and private conscience as in the case of Catholic hospitals refusing to teach doctors and nurses abortion procedures which accreditation procedures may require; or owners of apartments refusing to rent to unmarried couples which is consistent with their deepest religious convictions but required by local ordinances against discrimination.")

and legislatively mandate a return to the broader protection of *Sherbert*. However, the U.S. Supreme Court struck down *RFRA* in a controversial decision in *Borne v. Flores*.[64]

The *Smith* decision did not completely overturn *Sherbert* but rather limited it. *Smith* maintained the *Sherbert* compelling interest test for situations where another fundamental right was also at stake, so called hybrid rights.[65] Despite the importance of the Free Exercise Clause to the founders and ratifiers of the Bill of Rights,[66] significant protection is currently provided only in cases of intentional discrimination or where other Constitutional rights are substantially burdened. For protection of house meetings, this means that there must be a showing of other constitutional infringements in order to bootstrap the Free Exercise protection into action.

D. Free Speech

The vast majority of cases that deal with residential religious meetings involve zoning laws that, either explicitly or as applied, require religious congregations to obtain

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[64] City of Boerne v. Flores, 117 S.Ct. 2157 (1997). Numerous commentators have reviewed this decision. For a detailed analysis, *see* Michael W. McConnell, *The Supreme Court, 1996 Term: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, Nov, 1997.
[65] *Smith*, 494 U.S. at 881. ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press…") *Also see*, Wisconsin v. Yoder, 406 U.S. 205, 233 (1972). ("… the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment.")
[66] *See supra* notes 51, 53, and 54. *See also, Smith*, 494 U.S. at 909, (Blackmun, J., dissenting, "This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford, ante, at 888, and that the repression of minority religions is an 'unavoidable consequence of democratic government.' Ante, at 890. I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty -- and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.")

special use permits or excluding religious use within that zoning category.[67] A major issue is whether religious speech is being singled out in an ordinance or in the enforcement of an ordinance. If so, this would be a content-based restriction of speech.[68] Religious and political speech are considered to be in a Constitutional protected category of speech along with most other types of speech. The U.S. Supreme Court only allows content-based regulation of protected speech if the ordinance passed the strict scrutiny test.[69] For example, if a locality permits a resident to have a weekly gathering of 15 visitors to watch a sporting event or have a meeting of friends for any other secular purpose, and then prohibits another resident from holding a religious meeting of a similar number of people, this would be considered a regulation based on the content of one's speech. In *Widmar v. Vincent*,[70] the Supreme Court held that a state university can not prohibit student groups from using its facilities for religious purposes when it allows other student groups to use it facilities for non-religious purposes.[71] The Court found that this regulation was based on the content of the expression. The strict scrutiny test that the court applied required that the regulation must be: (1) necessary to serve a compelling state interest and, (2) narrowly drawn to achieve that interest.[72] It is extremely difficult to imagine a legitimate compelling government interest that would be served by regulating the content of Constitutional protected speech spoken in the privacy of one's house. For

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[67] *See supra* notes 15, 18, 21, 25.
[68] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'")
[69] Widmar v. Vincent, 454 U.S. 530 (1981); Cohen v. California, 403 U.S. 15 (1971); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976).
[70] 454 U.S. 263 (1981).
[71] *Id.*

[72] *Id* at 270.

a zoning ordinance not to run afoul by being content-based, it must burden all speech equally and without discrimination. This should be done by focusing on the secondary effects that are associated with the speech rather than with the content of the speech. An example of a content-neutral ordinance directed at some potential problems with house meetings would be to limit the number of guests to a house in a given zoning district (e.g., no more than 30 people in a single townhouse). That type of restriction would only need to have a rational government interest (e.g., to limit excessive noise, traffic). Alternatively, content-neutral ordinances could directly address noise levels or parking arrangements. These types of ordinances would equally burden all residents that desire to have large gatherings regardless of the content of the speech at the meeting.

The U.S. Supreme Court did find that the government may use time, place, and manner restrictions to regulate content-neutral speech under certain circumstances.[73] Time, place, and manner regulations provide zoning laws with the ability to regulate permissible activities within various zones even though the activities may have an impact on free speech. This type of permissible regulation is typically the basis for regulating church locations. But in order to be content-neutral, the regulation must be evenly applied to all assembly halls. In *Cornerstone Bible Church v. City of Hastings*,[74] the court found a time, place, and manner restriction could be validly applied to church locations if the city could offer an important rationale regarding the potential reduction of economic activity resulting from a church occupying commercial space that could have

[73] Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984).
[74] 948 F.2d 464.

been commercially used.[75] A valid time, place, and manner restriction must: (1) be narrowly tailored to serve a significant governmental interest, and (2) leave open ample alternative channels for communication of the information.[76] This type of regulation may also be used to effectively prohibit groups that want to use a residential dwelling primarily for meeting purposes (i.e., no one actually maintains a residence in the dwelling).[77] A valid time, place, and manner restriction can specify that a dwelling within a residentially zoned area must not be used for assembly purposes if it is not occupied primarily as a residence.[78] This would be content-neutral because it focuses equally on all specified behavior without regard to the content of what is expressed in such a gathering. This distinction, whether the meeting is held in someone's primary residence verses a dwelling that is converted primarily to serve assembly purposes,[79] would seem to provide two categories for cases dealing with religious meetings in areas zoned for residential use.[80] These two categories are entitled to receive differing levels of constitutional protections. The use of a house for assembly purposes that is not

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[75] *Id*. at 469. (However, in this case, the court found that this rationale was not evenly applied to other non-commercial entities residing within the central business district. In addition, the court found that the city had not supported their rationale with evidence of the potential impact. Therefore, the case was remanded for further fact finding in these areas.)

[76] *Ward*, 491 U.S. at 791; *Cornerstone Bible Church*. 948 F.2d 464.

[77] *Christian Gospel Church, Inc.*, 896 F.2d 1221.

[78] In *Belle Terre*, 416 U.S. at 9. The U.S. Supreme Court held that a rational purpose for residential zoning is "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

[79] To limit activities within a residential zoned area, a rational government purpose exists to distinguish between assembles and gatherings within a person's primary residence and meetings that do not have the sanction of being conducted in someone's primary residence.

[80] *Christian Gospel Church, Inc.*, 896 F.2d 1221; and Lucas Valley Homeowners Association, Inc., et al, v. County of Marin et al., 233 Cal. App. 3d 130; 1991 are examples of congregations that seek to use a

dwelling for assembly purposes where the dwelling is not someone's primary residence. This type of case would fall into the non-primary residence category. However, *New Jersey v. Cameron*, *see supra* note 15; *Nichols and Keane v. Stratford* (note 23); *Grosz v. Miami Beach*, *see supra* note 18; and *Rabbi Yitzchok Leblanc-Sternberg et al v. Robert Fletcher et al*, *see supra* note 25, are each cases of a person being restricted from conducting religious meetings at their primary residence. These cases would be in the primary residence category.

someone's primary residence can be strictly regulated as a valid time, place, and manner restriction because it is content-neutral. However, the regulation of religious meetings and gatherings at a person's primary residence can only be burdened to the same extent as gatherings for secular purposes (e.g., football parties, Boy Scout patrol meetings, social gatherings, etc.) because of the need to use only content-neutral ordinances.

Therefore, a home-based congregation or other type of assembly that meets in someone's primary residence should receive substantial protection under the Freedom of Expression Clause of the First Amendment[81] because any ordinance affecting this activity must be content-neutral. Incidentally, because a content-based ordinance that burdened religious speech would be a violation of the Freedom of Expression Clause, the compelling interest test of the Free Exercise Clause also would be triggered under the hybrid rights theory of *Smith.* However, this test is essentially the same as the strict scrutiny test that is triggered by the Freedom of Expression Clause. There are still content-neutral ordinances that can substantially limit or curtail a home-based congregation such as noise limits, parking restrictions, and occupancy limits. However, these limits and restrictions have to be worded and applied equally to social gatherings, graduation parties, political meetings and the like.

This analysis is at variance with outcome of the *Grosz* case[82] which is in the primary residence category. In that case, the Federal appellate court focused its entire analysis on the proper balancing of the Free Exercise Clause tests and did not consider the content-neutral requirements of the Freedom of Expression Clause. In the other

[81] U.S. CONST. amend. I. ("Congress shall make no law … abridging the freedom of speech, or of the press … ")

primary residence category cases evaluated in this comment, the outcome has been consistent, but for other reasons. In *Cameron*[83] and *Nichols*,[84] the courts never arrived at consideration of the free speech analysis because they found the ordinances void for vagueness. In *Leblanc-Sternberg*,[85] the court focused on the free exercise analysis without considering the free speech analysis.

However, the other category of congregations that seek to locate in a residential area, the non-primary residence category, do not receive significant protection from the Freedom of Expression Clause because content-neutral time, place, and manner restrictions can be used to strictly regulate this activity in residentially zoned areas. Therefore, the distinction as to whether the assembly is gathering in someone's primary residence is very vital to the level of available Constitutional protection.

E. Equal Protection

An analysis of the Equal Protection Clause[86] rights for houses meetings somewhat parallels the free speech analysis. The Equal Protection Clause essentially provides "that all persons similarly situated should be treated alike."[87] The U.S. Supreme Court has found that an ordinance can distinguish between classifications of people if the distinction has some rational relationship to some legitimate legislative objective.[88] In a

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[82] *See supra* note 18.
[83] *See supra* note 13.
[84] *See supra* note 25.
[85] *See supra* note 23.
[86] U.S. CONST. amend. XIV. ("[N]o state shall make or enforce any law which shall … deny to any person within its jurisdiction equal protection of the laws.")
[87] *Cornerstone*, 948 F.2d at 471 quoting from City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).
[88] Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911); Daniel v. Family Security Life Ins. Co., 336

residential area, the government can show that a legitimate objective is controlling traffic and noise to provide a quiet environment that fosters family life.[89] They can also show that prohibiting unrelated group housing is rationally related to this objective.[90] Similarly, the case can be made that prohibiting a group that seeks to use a residential dwelling for a group meeting house is similarly rationally related to the legitimate government interest of fostering a quiet neighborhood. However, can a distinction be made between secular gatherings verses religious gatherings at one's primary residency? Both have the potential to create similar traffic, parking, and noise effects on the neighborhood. How could such a distinction, between secular and religious meetings, be rationally related in serving a legitimate government interest? Both gatherings occur with people similarly situated, that is people gathering in a person's primary residence.

In *City of Cleburne v. Cleburne Living Center, Inc.*,[91] the U.S. Supreme Court considered a case involving a requirement for a special permit for a group home for mentally impaired residents. This group home was in an area zoned for boarding houses, apartment buildings, and hospitals. These other uses did not have to obtain special use permits. The Court found that the effects on the neighborhood and other legitimate concerns relevant to a group home for the mentally impaired were essentially the same as if it were a boarding house with non-mentally impaired residents or a hospital.[92] They

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U.S. 220 (1949).
[89] *Belle Terre*, 416 U.S. at 9.
[90] *Id.*
[91] 473 U.S. 432.
[92] *Id.* at 450. ("In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston

found that there was no legitimate government interest served by distinguishing between mentally impaired and non-mentally impaired persons in the case of this zoning ordinance.[93] It can be similarly argued that most residential zoning ordinances do not restrict residents from having social gatherings of a reasonable number of people at reasonable times of day. Therefore, if an ordinance makes a distinction between secular and religious gatherings in a primary residence of similar neighbors, this would be a violation of the Equal Protection Clause under the *Cleburne* holding. This has a very similar results to the content-neutral analysis supra. So again, the critical distinction for the government's ability to strictly regulate the use of residential dwellings for house meetings is whether the meeting is being held in someone's primary residence. The Equal Protection Clause would also prohibit the government from treating a gathering of people for religious purposes any differently than a secular gathering. This violation would combine with a charge of violation of the Free Exercise Clause and produce a hybrid rights situation. Under *Smith*, a compelling interest test would then be triggered.[94] However, a group seeking to convert a dwelling into a meeting house when it does not serve as a person's primary residence would not receive the same protection. This is because there are legitimate government interests in making distinctions between primary residences and other uses that are not connected to a primary residence.[95]

F. Due Process - Void for Vagueness

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for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.")

[93] *Id.* at 448. The Court avoided making a determination whether mentally retarded persons comprise a quasi-suspect class that deserved heightened scrutiny because they found that the ordinance did not even serve a legitimate government interest.

[94] *See supra* note 65.

[95] *Belle Terre*, 416 U.S. at 9.

Several religious house meeting cases have turned on the issue of void for vagueness.[96] The U.S. Supreme Court has found that a regulation is void for vagueness if it is unclear as to providing notice of what is prohibited or is unclear as to how the regulation is to be applied.[97] Courts have found residential zoning prohibitions like "for activities other then [sic] permitted use"[98] and "other religious use"[99] are void for vagueness because it is unclear what is prohibited. Usually this problem can be avoided with careful drafting. However, because describing general types of religious activities can be difficult to capture specific actions in a few sentences, legislation which targets religious exercise can usually be challenged as being void for vagueness. In addition, drafters may also be trying to avoid the prohibitions against content-based regulation of speech by using general language. Protection for house meetings under this right is limited to requiring drafters to make clear what is prohibited. In the case of properly drafted ordinances that infringe on house meetings, defendants need to resort to more substantial constitutional protections discussed supra.

G. Other Constitutional Protections

The rights under the Freedom of Expression Clause, the Equal Protection Clause, and the Free Exercise Clause provide the most formidable protection for house meetings in a primary residence. However, other Constitutional protections may provide some

[96] *New Jersey v. Cameron*, *see supra* note 13; *Nichols and Keane v. Stratford*, *see supra* note 25.
[97] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("a statute is void if persons of common intelligence must guess at its meaning and differ as to its application"); Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972).
[98] *Cameron*, 498 A.2d at 1219.
[99] *Nichols and Keane v. Stratford*, 667 F.Supp. at 12. (…"other religious use" does not provide for the citizen of ordinary intelligence a clear standard by which to regulate his activities. For example, @ 4.1.6.3. does not assure with certainty whether one may hold Passover Seder in his home, whether he may light a Hannakuh Menorah, meet with a group of youths in one's home to prepare them for the reception of the

additional support for house meetings. These include the right to privacy and the freedom of association.

According to the U.S. Supreme Court in *Griswold*, [100] the right to privacy is not provided for in an explicit section of the Constitution, but emanates from several of the Bill of Rights guarantees to create a "penumbra" or zone of privacy. The Court has found that this right of privacy provides some protection to many morally repugnant activities, including possession of contraceptives,[101] abortion,[102] and possession of Constitutionally unprotected obscene movies in one's house.[103] The right to privacy must be implicated when it comes to the government evaluating what type of gathering is occurring in someone's home. Referring to examples of what the right to privacy has been used to protect, Justice Clifford of the New Jersey Supreme Court, in his concurring opinion wrote, "and yet the State, in disregard of the thrust of all these decisions, resorts to Franklin Township's zoning ordinance … to prohibit private religious observances within the confines of one's own home."[104] Therefore, the right of privacy should also provide additional protection for house meetings being conducted within one's own home.

The right to freedom of association similarly is not an expressed right, but has been found to be implied by the explicit rights of speech, press, assembly, and petition.

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sacraments of confirmation or communion, or gather with friends to discuss the Bible.")

[100] Griswold v. Connecticut, 381 U.S. 479 (1965).
[101] *Id*.
[102] Roe v. Wade, 410 U.S. 113 (1973).
[103] Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

Freedom of association is “a right to join with others to pursue goals independently protected by the First Amendment.”[105] The U.S. Supreme Court has found that the rights under freedom of association protect individuals from prosecution or government discrimination for mere membership in a group, even if the group has a stated illegal purpose.[106] Some judges emphasis that there is a significance to a house meeting being connected to an organized religion.[107] An argument can be made that the issue of whether a house meeting is in relation to an organized religion can not be determinative as to whether the meeting is permissible or not. Therefore, like-minded people gathering in someone’s primary residence would also receive some protection from the right to freedom of association.

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[104] *Cameron*, 498 A.2d at 605.
[105] Lawrence Tribe, *American Constitutional Law*, 1013 (Foundation Press, 2nd Ed. 1988).
[106] Cole v. Richardson, 405 U.S. 676 (1972).
[107] *Cameron*, 498 A.2d at 610. (Garibaldi, J., dissenting, “I would hold that a home is a church when it is used as the regular site for the traditional services of an organized, recognized religious body, which services are presided over by the ordained minister of that body. When all these elements are present, the use is within the Ordinance's commonly-accepted meaning of "church and similar places of worship." Because all of these conditions are met here, I would hold that the Rev. Mr. Cameron's home was used as a church within the meaning of the Ordinance.”)

PART III - ALTERNATIVES AND PRINCIPLES

A. Nuisance Law – An Alternatives to Zoning Law[108]

The zoning ordinance is not the only check on potential adverse impact to neighbors from house meetings. The common law provides a private action for nuisance when a person unreasonably interferes with the use and enjoyment of a neighbor's land. Even the origin of zoning ordinance jurisprudence is founded in nuisance law.[109] Shelley Ross Saxer wrote an article proposing the need to move away from zoning and return back to nuisance law to regulate property used by religious organizations.[110] The thrust of Saxer's article dealt with the problem of church accessory uses, such as feeding and sheltering the poor. However, this proposal carries much merit as applied to house meetings. The prevalent trigger to enforcement and prosecution is usually a few disgruntled neighbors, sometimes only one.[111] However, a single complaint can then activate the full force of the prosecutorial powers of the government. This potential for a lack of proportionality is described by Justice Clifford:

> The offensive effect of the group's conduct […] amounted to no more than a complaint by one of Cameron's neighbors that singing could be heard from a distance of eighty feet away and that on one occasion a guest's car was parked in front of his house. The might, majesty, dominion, and power of the State of New Jersey are marshaled to combat these conditions, through enforcement of a zoning restriction against churches in a residential zone, in order to stifle the religious activities described

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[108] For a more detailed discussion of nuisance law verses zoning law as applied to religious activities, *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 Ky. L.J. 507, 1995.

[109] *Id*. at 508. *Referring* to *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 388. ("The Court supported its decision by reference to nuisance law which bases the acceptability of land use on "the circumstances and the locality," not necessarily the use itself.")

[110] *Id* at 552. ("Religious land uses should be restricted only when they interfere with another's use and enjoyment and the benefit of the religious use is outweighed by the burden on the other landowners' use of their property. Nuisance litigation, not zoning regulation, is the least restrictive means of furthering compelling governmental interests that substantially burden the religious exercise of ministering to those in need.")

[111] *Cameron*, 498 A.2d at 1226 (Clifford, J., concurring).

above.[112]

In a case like *Cameron*, a private nuisance action appears to be a far more balanced recourse for a disgruntled neighbor. If there is merit to a claim of nuisance, then judicial relief through a private nuisance action is available to the neighbor. However, a private resident, such as in *Cameron,* who is reasonably conducting a gathering in his home should not face government prosecution all the way through the state supreme court because of one neighbor who may have been unreasonable.

In the search for wisdom, the principle of private nuisance action as opposed to government zoning ordinance should be considered as a far more proportionate check-and-balance in regards to house meetings. Private nuisance action provides for a case by case balancing of the rights to hold religious gatherings in one's own home and the rights of neighbors not to be unreasonably deprived of the use and enjoyment of their land. In addition, it relieves the government from problems of Constitutional infringements such imposing a prior restraint and creating a chilling effect on free speech and free exercise of religion.[113]

B. Biblical Analysis

1. Biblical Principles for Government Regulation of Religious Exercise

Conflicts over governmental infringement of religious exercise existed as far back

[112] *Id.*
[113] *Saxer* at 512. ("Nuisance litigation provides a possible remedy to landowners who are actually damaged by an unreasonable interference with the quiet enjoyment of their property. Nuisance litigation also provides a less restrictive means than zoning for regulating religious land uses and avoids the problem of prior restraint that is inherent in proactive zoning regulation. However, even when nuisance law is used and the court balances the gravity of the harm to the residential landowner with the utility of the conduct of the religious institution, a heavy thumb should be placed on the scale of a religious use which serves a greater

as God's challenge to Pharaoh to "Let my people go, that they may serve me in the wilderness."[114] It was typical throughout most of history that government operated in strong partnership with the religious leaders such that there was no distinction in jurisdiction. The state religious authority was either one-in-the-same or in close relationship with the governmental authority. In most societies, there was little toleration for differences with the state religion. This was true in ancient Egypt, Old Testament Israel, Babylon,[115] Greece, and Rome. This system of monolithic state religion has been termed sacralism.[116]

Jesus Christ brought about a complete shift to the idea that all citizens of a country must be of a homogenous religion. The Gospel of Matthew tells of an account where the Pharisees sought to entangle Jesus.[117] They asked Jesus, "Is it lawful to give tribute unto Caesar, or not?"[118] The reason that this was such a dilemma was that the Pharisees saw that paying tribute as inherently part of honoring the state religious system. Jesus was not trapped in the same dilemma because He did not accept the sacralist view of a national religion. Rather Jesus set forth the concept of separate jurisdictions in His response, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[119] Christ reinforced this concept by instructing his followers to

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social purpose -- helping those in need.")

[114] *Exodus* 7:16.

[115] *Daniel* 3:10 ("Thou, O king, hast made a decree, that every man that shall hear the sound of … all kinds of musick, shall fall down and worship the golden image.")

[116] Leonard Verduin, *The Reformers and their Stepchildren*, (Wm B. Eerdmans Publishing Co. Grand Rapids, MI, 1964) 23-24. ("By the word 'sacral,' … we mean 'bound together by a common religious loyalty.' By sacral society we mean society held together by a religion to which all the members of that society are committed.")

[117] *Matthew* 22:15.

[118] *Matthew* 22:17.

[119] *Matthew* 22:21.

allow for unbelievers to exist along next to believers.[120] This revolutionary concept recognized that a community of believers could exist within a nation without being subsumed by the nation.[121] In addition, Christ did not envision maintaining the old order of state religions by convert a nation through removing the existing national object of worship and substituting a "Christian" object in its place.[122]

Maintaining conformity to a state religion has inevitably required the state to exercise coercion of its dissidents. Historically, states have not been hesitant in employing the coercion necessary to maintain adherence to the state religion. Unfortunately, this is exactly what happened when Constantine declared that Christianity was the state religion of the Roman Empire. "Christianity" replaced the old national object of worship. This changed in religion was enforced through the power of the Emperor's sword just as every other change in the empire was enforced. Even a thousand years later, the Reformation churches continued to embrace the sacralist model of church state relations.[123] It was not until the emergence of the United States that the Biblical principle of limited governmental jurisdiction was officially recognized and applied to religious practice and belief. This monumental paradigm shift represented a victory of the Biblical conviction of a much persecuted remnant of Christians, generally known as

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[120] *In Matthew* 13:24-30, Jesus tells the parable of the wheat and the tares to describe the kingdom of heaven. In response to the question of whether the servant should gather up the tares, Jesus said, "Nay; lest while ye gather up the tares, ye root up also the wheat with them. Let both grow together until the harvest: and in the time of harvest I will say to the reapers, Gather ye together first the tares, and bind them in bundles to burn them: but gather the wheat into my barn."

[121] *John* 17:14-18. Jesus spoke of his followers as being in the world but not of the world.

[122] *John* 18:36. ("Jesus answered, My kingdom is not of this world: if my kingdom were of this world, then would my servants fight, that I should not be delivered to the Jews: but now is my kingdom not from hence.")

[123] *Verduim* at 46. ("For the Reformers were not minded to repudiate the Constantinian change. Their ambition was not to get rid of 'Christian sacralism'; rather was it their ambition to overlay the 'Christian sacralism' that was partial to Catholicism with a 'Christian sacralism' that was partial to Protestantism.")

Ana-baptists. They opposed the churches' embrace of government power, whether it be the Roman Catholic Church or the other state churches of the Reformation. They saw the sacrilist view of the government-church relationship as being inconsistent with Christ's teaching. The principle of limited government in the areas of conscience and religious practice is a New Testament concept that stands in stark contrast with world history. The attempt to replace a non-christian state religion with a "Christian" state religion was a corruption of New Testament teaching not a fulfillment of it.

The triumph of religious freedom that took place in the United States was a fulfillment of the New Testament instruction to allow "the tares and the wheat to grow together." This principle is further illustrated by the instructions given for church discipline. The most severe discipline given for the church to practice was to disfellowship the unrepentive, "let him be unto thee as an heathen man and a publican."[124] Inherent in this principle is tolerance and respect for others to choose how they will worship. A most basic practical ramification of this principle is the respect for one's home. In addition, the allowance for like-minded people to gather in house meetings of reasonable size is only a logical conclusion of freedom of religion. During New Testament times, the predominant meeting place of believers was in one another's houses.[125] Therefore, it is in keeping with New Testament principles and a most unique and precious heritage that the United States recognizes and protects a person's inalienable right to worship according to the dictates of his conscience. For this to have any

[124] *Matthew* 18:17.
[125] *Acts* 2:46, 5:42, 20:20, *Romans* 16:5, *I Corinthians* 16:19, *Philemon* 2.

meaning, gatherings in one's own home that do not unreasonably interfere with the use and enjoyment of other's property would also necessarily receive protection. As Joshua said, "And if it seem evil unto you to serve the LORD, choose you this day whom ye will serve; … but as for me and my house, we will serve the LORD."[126]

2. Biblical Principles for those Conducting and Attending a House Meeting

Scripture provides clear principles for the proper manner of treatment of neighbors. In framing the Golden Rule, Jesus stated, "Thou shalt love thy neighbour as thyself."[127] Christians behavior should be such that it is beyond reproach and not interfering with a neighbor's reasonable use and enjoyment of his property.[128] Therefore, those that seek to hold house meetings should provide no cause for a reasonable offense or violation of legitimate ordinances.[129] For those who fear God and are on the receiving end of discrimination or prosecution, the first principle is to trust God for deliverance. It may be that God has raised up this conflict for an opportunity for His Gospel to be demonstrated.[130] After Moses appealed to Pharaoh, the only recourse that the Hebrews had was to cry out to God and trust His deliverance from Egyptian persecution. God's subsequent deliverance was stupendous, confounding the conventional geo-strategic thinking of the day.

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[126] *Joshua* 24:15.
[127] *Matthew* 19:19.
[128] *Roman* 13:10. ("Love worketh no ill to his neighbour: therefore love is the fulfilling of the law.")
[129] *1Peter* 2:12-17. ("Having your conversation honest among the Gentiles: that, whereas they speak against you as evildoers, they may by your good works, which they shall behold, glorify God in the day of visitation. Submit yourselves to every ordinance of man for the Lord's sake: whether it be to the king, as supreme; Or unto governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well. For so is the will of God, that with well doing ye may put to silence the ignorance of foolish men: As free, and not using your liberty for a cloke of maliciousness, but as the servants of God. Honour all men. Love the brotherhood. Fear God. Honour the king.")
[130] *Romans* 9:17 quoting from *Exodus* 9:16 ("For the scripture saith unto Pharaoh, Even for this same purpose have I raised thee up, that I might shew my power in thee, and that my name might be declared

C. Permissible Types of Government Regulation

For house meetings in someone's primary residence, the government can regulate secondary effects such as parking, noise, and occupancy levels provided that the ordinance is non-discriminatory on its face and as enforced. In addition, regulation of these secondary effects can be prescribed for limited time periods in a day (e.g., noise limits are in effect from 11 p.m. to 7 a.m.). These regulations must also have a rational basis in addressing a legitimate government interest.

In a current Denver case,[131] a zoning ordinance was regulating the frequency of the house meetings (i.e., residential gatherings no more that once per month). This type of regulation could be neutrally worded on the face and neutrally applied. However, this type of regulation raises other issues, such vagueness (i.e., what is considered a gathering?) and whether the government has a legitimate interest in regulating how often a resident can have guests over to their house. To tightly control such a personal liberty, would also raise issues such as freedom of speech, freedom of association, and privacy. A regulation that constrains gatherings at one's house to no more than once per month can be a substantial loss of liberty, especially if a gathering is defined to include as few people as six or eight.

However, this comment suggests that, for the sake of liberty, it is far better to not impose such limits too narrowly. It has been said that a government that governs least,

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throughout all the earth.")

[131] *See supra* note 27.

governs best. When it comes to private gatherings in a person's house, this is a most appropriate principle. It is far better for neighbors to work out conflicts between themselves rather than resorting to the government for prosecution for slight offenses. This paper suggests that the government should provide regulations only for clearly substantial breaches of the peace. More minor controversies can be resolved among neighbors in a civilized manner. Should that fail, the private action of nuisance is always available so that a judge can sort out the "wheat from the chaff" on a case by case basis.

Organizations that wish to use a residential dwelling as a dedicated meeting facility so that it is not serving as a residence will receive far less Constitutional protection. Because the government has a legitimate interest to differentiate between primary residences and non-residences, the government can employ time, place, and manner restrictions. Therefore, the government can require special permits and variance hearings before allowing an organization to occupy and convert a house for non-residential purposes. This comment suggests that one of the determining factors to what level of constitutional protection is available is whether a religious house meeting is being conducted in someone's primary residence. If not, then the government has much greater lead way at distinguishing between this use and the normal type of gatherings that occur at a person's primary residence.

Conclusion

The Constitution of the United States provides substantial protection for house meetings and gatherings in one's own residence. The government is forbidden from

discriminating based on the speech content of the house meeting. In addition, the government must have a legitimate basis for classifying one group for different treatment than another. The government does not have a legitimate interest in applying stricter requirements on gatherings with religious purposes than it does on gatherings with secular purposes. Heighten protection is available to one's primary residence. Furthermore, the government is prohibited from regulating a house meeting in a person's primary residence because the meeting is related to an organization.

The U.S. Supreme Court's current jurisprudence regarding the free exercise of religion does not provide substantial protection to house meetings unless it can be coupled with the violation of other fundamental rights. As discussed supra, there are several fundamental Constitutional liberties that do provide substantial protection for house meetings. However, one must show that these liberties are being substantially burdened before the Free Exercise Clause will bring protection.

As some homeowner associations have become intolerant of minor house alterations, and governments feel the pressure to respond to every citizen complaint, it is of great importance that foundational, inalienable rights do not become trampled or forgotten. It remains for law-makers to protect our great heritage of liberty from the swings in political pressure. Should law-makers succumb, it remains to the judiciary to uphold the guarantees provided by U.S. Constitution. However, it remains for Christians to have unreproachable conduct towards their neighbors, bearing injustice with joy, trusting that God will use their situations for His purposes.