

The Intersection of Zoning Regulations, Religious House Meetings, and the Constitution

Samuel A. Green*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof¹

I. INTRODUCTION

During the last half-century, Christians in the United States of America have witnessed a revival of the New Testament model of church services, especially regarding the location of the meetings.² Early Christians gathered for worship almost exclusively in the homes of fellow Christians.³ While the exact number of house congregations is unknown, it is undisputed that such groups exist and meet regularly throughout the world.⁴ The United States has a rich tradition of protecting the rights of its residents to worship freely, and the founding fathers embodied this protection in the First Amendment to the United States Constitution.⁵ During the mid-twentieth century, the United States Supreme Court established a strict standard to evaluate governmental restrictions on the free exercise of religion; however, by the end of the century, the Court had essentially interpreted the Free Exercise Clause out of the Constitution.⁶ Zoning regulations often restrict or foreclose the use of one's home for religious purposes, and consequently, these land-use restrictions have often trumped explicit constitu-

* B.A. 2006, Fort Hays State University; J.D. Candidate 2009, Washburn University School of Law. I dedicate this work to my Lord Jesus Christ. I thank Shannon and Ethan for allowing me the time to complete this project. I also thank Professor Bill Rich, Aaron Martin, and Mark Lippelmann for their invaluable help, guidance, and editing.

1. U.S. CONST. amend. I.

2. See Michael Alison Chandler & Arianne Aryanpur, *Going to Church by Staying at Home: Clergy-Less Living Room Services Seen as a Growing Trend*, WASH. POST, June 4, 2006, at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/03/AR2006060300225.html>; The Barna Group, *Rapid Increase in Alternative Forms of the Church Are Changing the Religious Landscape*, Oct. 24, 2005, <http://www.barna.org/FlexPage.aspx?Page=BarnaUpdateNarrow&BarnaUpdateID=202> (citing studies from the Barna Group that indicate alternatives to the traditional congregational church are on the rise, including house churches).

3. See *infra* note 14 and accompanying text.

4. See discussion *infra* Part II.A.

5. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (discussing the history behind free exercise principles, the views of the Constitution's framers regarding free exercise, and the process by which the Free Exercise Clause became a part of the Constitution).

6. See discussion *infra* Part IV.A.

tional protections that courts should afford to religious house meetings.⁷ In the first decade of the twenty-first century, it remains unclear just how much protection the “land of the free” provides for those who choose to worship in their homes.⁸

This Note will explore the legal issues surrounding religious house meetings. Part II will provide both an overview of house churches, including their historical and present significance, and an overview of constitutional law pertaining to zoning regulations. Part III will include a discussion of situations in which zoning regulations have come into conflict with religious land uses in general and with religious house meetings more specifically. Part IV will examine aspects of constitutional law that have potential applicability in the context of house meetings, including a description of the Supreme Court’s free exercise jurisprudence as it has developed over the last half-century and an outline of various other constitutional rights potentially implicated in the religious house-meeting context. Part V will discuss the application of these constitutional protections to zoning regulations and religious house meetings, including suggestions for drafting constitutional zoning ordinances.

II. BACKGROUND

“Few principles are more venerable or more passionately held in American society than those of local control over land use and the right to assemble and worship where one chooses.”⁹ Religious house meetings are one of the visible signs of the ability of Americans to choose where they gather for worship.¹⁰ The history of house churches transcends time and national borders, and it is a history rich with tales of persecution, dissension, resiliency, and community.¹¹ While lacking the rich history that house churches possess, land-use regulations have grown and developed in the United States over the preceding century as local governments have dealt with “changing interactions in the modern world of demography, technology, and economic development.”¹² Today, American zoning laws have become “truly representative of American culture” as society works toward the perfect balance of protecting individual liberties and the overall good of the community.¹³

7. See discussion *infra* Part III.B.

8. FRANCIS SCOTT KEY, *Star Spangled Banner* (1814), available at <http://www.whitehouse.gov/national-anthem/usa-full.html>; see discussion *infra* Part III.B.

9. *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 963 (N.D. Ill. 2003).

10. See discussion *infra* Part II.A.

11. See discussion *infra* Part II.A.

12. Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1011-13 (1996).

13. *Id.* at 1018-20 (describing how land use and zoning embody American political ideals and values, including concepts of individual sovereignty, material well-being, and a need to balance individual rights with those of the community).

A. House Churches

The deep roots of house churches are especially prevalent within the Christian tradition in which fellowship has always been a key component of the religion. The early Christian church met almost exclusively in the homes of the Christian converts.¹⁴ Persistent persecution by the Roman Empire was a principle reason why the early church continued to meet in unofficial locations.¹⁵ In fact, Christians began to replace their tight-knit fellowships and intimate services with government-sponsored church buildings and services only after Christianity became the official religion of the Roman Empire.¹⁶ In the aftermath of the Protestant Reformation, house churches experienced a renewal. For example, because both Protestants and Catholics viewed the Anabaptists as a divisive and heretical group, the Anabaptists faced widespread persecution, including torture and death.¹⁷ Such religious persecution drove many Anabaptists to meet in their homes or face a potential death sentence.¹⁸ Many Mennonites today, however, believe the Anabaptists—who were attempting to revitalize Christianity as set forth in the New Testament—also met in homes for another reason, namely to symbolize the community of believers they were creating.¹⁹ The Amish, especially the Old Order Amish, continue to meet in the homes of the group's members, and even refuse to build separate meetinghouses.²⁰

In addition to this rich Christian tradition, people in almost all religious groups gather in their homes at one time or another for reasons motivated by their faith. For example, while Jews typically meet in a synagogue, small groups of Jews that do not have ready access to a synagogue often meet together in homes for prayer, to celebrate feasts and holy days, to conduct worship services, and to discuss other items of interest to the Jewish community.²¹ Likewise, Hindus, Buddhists, Mus-

14. See WALTER OETTING, *THE CHURCH OF THE CATACOMBS* 25 (1964) (“If you had asked, ‘Where is the church?’ in any important city of the ancient world where Christianity had penetrated in the first century, you would have been directed to a group of worshiping people gathered in a house.”); see also *Acts* 2:41-47, 12:12; *Romans* 16:5; 1 *Corinthians* 16:19; *Colossians* 4:15; *Philemon* 2.

15. See OETTING, *supra* note 14; JOHN FOXE, *FOXES’ BOOK OF MARTYRS* 9-42 (William Byron Forbush ed., Hendrickson Publishers 2004) (1563) (“It has been said that the lives of the early Christians consisted of ‘persecution above ground and prayer below ground.’”).

16. See Global Anabaptist Mennonite Encyclopedia Online, <http://www.gameo.org/encyclopedia/contents/H688ME.html> (last visited Sept. 20, 2008). But see OETTING, *supra* note 14, at 26 (noting that Christians under the Persian sphere of influence began using church buildings by the middle of the third century, but many of these buildings were destroyed by the persecutions under Diocletian).

17. See Global Anabaptist Mennonite Encyclopedia Online, *supra* note 16.

18. See *id.*

19. See *id.*

20. ReligiousTolerance.org, *The Amish: Practices of Various Groups*, <http://www.religious-tolerance.org/amish4.htm> (last visited Sept. 20, 2008).

21. See *Konikov v. Orange County*, 410 F.3d 1317, 1320 (11th Cir. 2005); *Farhi v. Comm’rs of Deal*, 499 A.2d 559, 560 (N.J. Super. Ct. Law Div. 1985); see also Winona’s Cultural History, *The Jewish People in Winona*, <http://www.rschooldtoday.com/demographics/jewish/Information.html> (last visited Sept. 20, 2008).

lims, Wiccans, and the followers of Zen have all met in homes for worship, celebration of religious holidays, and other religious reasons.²²

Internationally, house churches often provide the only alternative for worshippers whose beliefs contradict those of the society in which they live. China is perhaps the most infamous example. Following the rise of communism, China attempted to oust Christianity from the country, and today, its government only permits officially sanctioned churches.²³ Despite persecution, torture, and death, Chinese house churches have thrived and are expanding at a rapid pace; presently, Chinese Christians are estimated to number from seventy million to one hundred million.²⁴

In the United States, house churches are on the rise, and estimates of participants range from the tens of thousands to over a million.²⁵ While historical house churches existed largely due to persecution, a variety of ideals and factors both inspire and necessitate modern house churches. The motivations behind worshiping in the home include: a renewal of New Testament models of worship; general dissatisfaction with local churches; lack of church buildings in close vicinity to the congregants' homes; lack of funds to purchase a building; ability to choose the structure and style of a worship service; and so forth.²⁶ Regardless of one's religious tradition, the principles underlying the legal analysis regarding religious house meetings extend to all religions as well as the adherents of such religions who choose to gather and worship in their homes.

22. See Cedar Rapids Zen Ctr., Inc. v. City of Cedar Rapids, No. C02-115 LRR, 2004 WL 1234133, at *2 (N.D. Iowa Apr. 23, 2004) (Zen); Church of Iron Oak, Inc. v. City of Palm Bay, 868 F. Supp. 1361, 1362 (M.D. Fla. 1994) (Wicca); Kali Bari Temple v. Bd. of Adjustment of Readington Twp., 638 A.2d 839, 840 (N.J. Super. Ct. App. Div. 1994) (Hinduism); Tran v. Gwinn, 554 S.E.2d 63, 65 (Va. 2001) (Buddhism); see also London Muslim Mosque, *A Brief History of Muslims in London*, http://www.londonmosque.com/index.php?option=com_content&task=view&id=26&Itemid=57 (last visited Sept. 20, 2008) (noting that the first Muslims in London, Ontario, "would meet in each other's homes every weekend to socialize and teach religion and culture"); Shalini Sharma, *The Life of Hindus in Britain*, INT'L INST. FOR ASIAN STUD. NEWSL. 27, Mar. 2002, at 23, available at http://www.iias.nl/iiasn/27/23_IIASNewsletter27.pdf.

23. See Chris Mitchell, *China's House Churches Grow Despite Persecution*, CHRISTIAN WORLD NEWS, <http://www.cbn.com/CBNNews/CWN/042106ChinaHouseChurches.aspx> (last visited May 22, 2008); Wikipedia.org, *Chinese House Church*, http://en.wikipedia.org/wiki/Chinese_house_church (last visited Sept. 20, 2008).

24. Mitchell, *supra* note 23.

25. GEORGE BARNA, REVOLUTION 62-64 (2005) (observing growing trends in the spiritual landscape in America and noting the role house churches are playing in this shift); Chandler & Aryanpur, *supra* note 2 (describing the increase in house churches during the 1960s and 1970s attributable to the Jesus Movement and the Charismatic Renewal and the more recent increases that have been facilitated largely by the Internet).

26. See *Kali Bari Temple*, 638 A.2d at 843 (noting that the Kali Bari Temple would be the only Hindu temple in the area); *Farhi*, 499 A.2d at 560 (observing that the congregants could not drive on the Sabbath, and the home was much closer than the synagogue); BARNA, *supra* note 25, at 62-64; David Van Biema & Rita Healy, *Why Home Churches Are Filling Up*, TIME, Feb. 27, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1167737,00.html>; Chandler & Aryanpur, *supra* note 2; Loren Smith, *The House Church Movement*, HOUSE CHURCH BASICS, http://www.housechurch.org/basics/lorin_smith.html (last visited Sept. 20, 2008).

B. Zoning Regulations Generally

Zoning regulations pose one of the greatest threats to religious house meetings in the United States.²⁷ The Supreme Court upheld the rights of the states and local governments to issue zoning regulations in *Village of Euclid v. Ambler Realty Co.*²⁸ The Court concluded that it is constitutionally permissible for states and local governments to issue zoning regulations, provided the regulations have a “*substantial* relation to the public health, safety, morals, or general welfare,” and so long as they are reasonable and not arbitrary.²⁹ Thus, such ordinances and regulations “must find their justification in some aspect of the police power, asserted for the public welfare.”³⁰ While nuisance laws provide useful guidance when assessing the proper scope of the police power as applied to zoning regulations, a hard and fast line is impossible to draw because each situation is unique and must be analyzed based on its individual circumstances and conditions.³¹ To that end, when the legitimacy of a state or local government’s exercise of this police power is fairly debatable, the legislative decision will govern.³²

Since *Euclid*, the Court has consistently upheld zoning regulations as valid exercises of police power. The Court has defined public welfare in broad terms that encompass a wide range of governmental purposes. In *Berman v. Parker*,³³ the Court described the police power as “broad and inclusive,” and the “values it represents are spiritual as well as physical, aesthetic as well as monetary.”³⁴ Further, in *Village of Belle Terre v. Boraas*,³⁵ the Court concluded that noise and vehicle restrictions, as well as limits on the number of people that can inhabit a single home, are valid goals of a land-use plan aimed at creating a family-friendly environment.³⁶

While courts have generally given the police power a broad interpretation, it does have its limits. When a court reviews a zoning ordinance, the standard of review will depend on the nature of the right infringed rather than the actual power exercised.³⁷ As such, courts usually

27. See discussion *infra* Part III.B.

28. 272 U.S. 365 (1926).

29. *Id.* at 395 (emphasis added); see *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

30. *Euclid*, 272 U.S. at 387.

31. *Id.*; see *Belle Terre*, 416 U.S. at 4-5 (summarizing *Euclid* and noting that the absence of a nuisance will not necessarily invalidate a zoning ordinance).

32. *Euclid*, 272 U.S. at 388.

33. 348 U.S. 26 (1954).

34. *Id.* at 33 (“It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”).

35. 416 U.S. 1 (1974).

36. *Id.* at 9 (“The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample 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.”).

37. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (citing *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945)).

subject zoning laws to rational basis review, which requires the statute to be “rationally related to a legitimate state interest.”³⁸ However, when a zoning ordinance classifies groups based upon constitutionally protected characteristics or infringes upon constitutionally protected liberties, courts will subject the ordinance to a compelling interest standard.³⁹ Under this standard, a zoning law “must be narrowly drawn and must further a sufficiently substantial governmental interest.”⁴⁰

III. ZONING REGULATIONS AND RELIGIOUS LAND USES

While the Supreme Court has not addressed the issue, many courts have applied zoning regulations to religious institutions and religious land uses.⁴¹ These courts have used the broad interpretation of the police power to hold religious land uses to the same standards as other land uses. Thus, although “‘deliberate [religious] persecution is not the usual problem in this country,’”⁴² zoning and land-use regulations pose a direct threat to religious house meetings in the United States. This Note will divide the examples of religious land uses affected by zoning ordinances into two groups. The first group includes situations in which zoning regulations affected actual religious buildings and other properties with a principal religious use. The second group involves situations in which a conflict between zoning regulations and religious house meetings developed.

A. Religion as a Property’s Principal Use

Many courts have addressed situations where zoning regulations prohibited, restricted, or burdened the ability of churches to locate within areas zoned for specific uses. In *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*,⁴³ the City’s zoning regulations limited the placement of church buildings to ten percent of the City’s area except upon special approval by the City’s zoning board.⁴⁴ The board, however, denied the congregation’s request for an exception to construct a church building on residentially zoned land,

38. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); see *Belle Terre*, 416 U.S. at 9.

39. *Cleburne*, 473 U.S. at 439-40. For a discussion of zoning ordinances and constitutionally protected liberties, see discussion *infra* Part IV.B (free speech), *infra* Part IV.C (due process), and *infra* Part IV.D (equal protection).

40. *Schad*, 452 U.S. at 68.

41. See *Congregation of Kol Ami v. Abington Twp.*, 309 F.3d 120, 133 (3d Cir. 2002) (“[T]he Supreme Court has not yet directly addressed the constitutional incidents of municipal restrictions on use of land by religious institutions . . .”).

42. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (quoting *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 334 (1993) (statement of Douglas Laycock)).

43. 699 F.2d 303 (6th Cir. 1983).

44. *Id.* at 305.

reasoning that the church could create traffic and noise problems, decrease area property values, and cause other various problems.⁴⁵ Likewise, in *Christian Gospel Church v. City & County of San Francisco*,⁴⁶ the court addressed a situation in which the City denied a church's request for a special use permit to hold meetings in a single-family residence that did not serve as the home for any of the church members.⁴⁷ The City concluded that using the property as a church "could create noise, traffic and parking problems and . . . would adversely affect the character of the neighborhood."⁴⁸ In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,⁴⁹ the County denied the church a conditional use permit in an effort to control scattered and disorganized development and to preserve the agricultural nature of the land.⁵⁰

Many zoning regulations completely prohibit religious uses within certain districts. *Midrash Sephardi, Inc. v. Town of Surfside*⁵¹ involved a zoning scheme that restricted churches and synagogues to a residential

45. *Id.* The land that the congregation planned to use as a construction site for its Kingdom Hall was zoned as residential, which required an exception permit before the property could be used for a church. *Id.* at 304-05. Upon the board's denial of the application, the congregation sued the City, alleging violations of its First and Fourteenth Amendment rights. *Id.* at 305. A similar situation occurred in *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988). In that case, the Church purchased eighty acres of land zoned for agricultural use. *Id.* at 821. Initially, the zoning regulations completely prohibited religious use within the agricultural district, and accordingly, the County denied the Church's request for a building permit for the property. *Id.* at 821-22. The County later amended the regulations to allow church use upon issuance of a special use permit, but when the Church applied for such a permit, the County denied the application for various reasons, including "access problems, erosion hazards, and the fact that fire protection for the site was wholly inadequate." *Id.* at 822.

46. 896 F.2d 1221 (9th Cir. 1990).

47. *Id.* at 1222-23. In determining whether to grant or deny the application, the City used criteria contained within the zoning regulations, which included the following considerations:

(1) the proposed use must be necessary or desirable for, and compatible with, the neighborhood or the community; (2) the use will not be detrimental to the health, safety, convenience or general welfare of persons residing in the vicinity; (3) the use must comply with the applicable provisions of the code and will not adversely affect the City's Master Plan.

Id. at 1223.

48. *Id.* at 1223. One hundred and ninety members of the neighborhood also signed a petition opposing the permit, but it is unclear whether this factored into the City's decision. *Id.* For a court reaching the opposite result, see generally *Lucas Valley Homeowners Ass'n, Inc. v. County of Marin*, 233 Cal. App. 3d 130 (1991). In *Lucas Valley*, a Jewish congregation wanted to convert a single-family dwelling into a synagogue. *Id.* at 139-40. The zoning commission granted the congregation a special use permit, but upon petition of surrounding homeowners, the trial court reversed the zoning commission's grant of the permit. *Id.* at 139-40. The appellate court reversed the trial court, noting that zoning permit processes must focus on the use rather than "feared or anticipated abuse." *Id.* at 164.

49. 456 F.3d 978 (9th Cir. 2006).

50. *Id.* at 982-84 (noting that the society had previously been denied a conditional use permit out of area citizens' fears about the resulting noise and traffic). For other examples of cases in which special permit processes have been challenged by churches, see *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 758 (7th Cir. 2003) (challenging the process for obtaining a special use permit); *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1085 (C.D. Cal. 2003) (challenging denial of conditional use permit); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 36-37 (Wash. 2000) (en banc) (challenging the permit process itself and the requirement that churches apply for conditional use permits).

51. 366 F.3d 1214 (11th Cir. 2004).

district, one of the Town's eight zoning districts.⁵² In accordance with the zoning regulations, the Town forbade two synagogues from conducting worship services in one of the Town's business districts.⁵³ In *Congregation of Kol Ami v. Abington Township*,⁵⁴ the municipality had denied a rabbi's request to relocate a synagogue to property zoned for residential use where the zoning regulations did not allow religious uses in the district as a matter of right or by special exception.⁵⁵ Likewise, in *Cornerstone Bible Church v. City of Hastings*,⁵⁶ the United States Court of Appeals for the Eighth Circuit analyzed a zoning ordinance that forbade churches from locating in the City's central business district, thereby precluding the church from using its property located within that district.⁵⁷

The churches in these cases asserted various constitutional and statutory claims against the municipalities.⁵⁸ The constitutional issues

52. *Id.* at 1219 (observing that the one district available for religious uses still required a conditional use permit before a religious institution could locate within that zone).

53. *Id.* at 1221-22 (stating that the Town's reason for refusing to allow the synagogues to continue operating in the district was a fear that allowing such institutions in the district would lower the tax base and result in economic hardship and instability). Other examples of zoning regulations prohibiting religious uses within business districts include *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 257-59 (3d Cir. 2007) (describing the City's Redevelopment Plan and zoning ordinance, both of which prohibited the church from using its property located in the central business district as a place of worship); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 965, 970 (N.D. Ill. 2003) (observing that zoning ordinance foreclosed church from using its property located in an office district for worship services); *Petra Presbyterian Church v. Village of Northbrook*, No. 03 C 1936, 2003 WL 22048089, at *2-*4 (N.D. Ill. Aug. 29, 2003) (noting that the church owned property located in an industrial zone, which prohibited all religious use except those uses in effect before the zoning ordinances became effective).

54. 309 F.3d 120 (3d Cir. 2002).

55. *Id.* at 124.

56. 948 F.2d 464 (8th Cir. 1991).

57. *Id.* at 467. The City also forbade churches from locating in areas of the city zoned for industrial uses, but the Church's suit focused on the central business district. *Id.*

58. The statutory claims have typically been brought pursuant to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc (2001). A complete analysis of RLUIPA is beyond the scope of this Note, but for a general description of the statute and how it applies, see *infra* notes 148-155 and accompanying text. See also *Lighthouse*, 510 F.3d at 270, 272-73 (finding that a redevelopment plan did not violate RLUIPA because there was no showing that churches were treated differently than similar uses with similar effects on the district, but finding that the zoning ordinance violated RLUIPA because the City unjustifiably treated religious assembly halls differently than all other assembly halls); *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 981, 990 (9th Cir. 2006) (holding that the denial of a conditional use permit violated the church's statutory rights under RLUIPA where the primary reason for denying the permit was to avoid scattered and disorganized development); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1218-19, 1222 (holding that a zoning ordinance prohibiting synagogues from locating in the business district violated RLUIPA where private clubs and lodges were permitted within the district); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760-62 (7th Cir. 2003) (affirming the district court's grant of summary judgment for the City on plaintiffs' RLUIPA claims because the zoning ordinance, while perhaps creating a "burden," did not create a "substantial burden" on free exercise and because religious assemblies were treated equally with other assemblies); *Kol Ami*, 309 F.3d at 124 (considering situation in which city denied rabbi's request to relocate synagogue to property zoned for residential use); *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1096, 1104 (C.D. Cal. 2003) (holding that the denial of a conditional use permit to a church violated the church's statutory rights under RLUIPA, but further holding RLUIPA to be unconstitutional); *Vineyard*, 250 F. Supp. 2d at 991-93 (finding no RLUIPA violations because the zoning ordinance did not create a substantial burden and because the court construed the nondiscrimination provision of RLUIPA to be a subset of the substantial burden provision, meaning there could only be

raised included free exercise and free speech claims pursuant to the First Amendment and equal protection and due process claims pursuant to the Fourteenth Amendment.⁵⁹ Because of the broad scope of the police power as applied to zoning regulations, courts generally resolve these constitutional issues in favor of the municipal use of such police power.⁶⁰ Nonetheless, zoning ordinances are not above constitutional attack, and the courts have struck down arbitrary, irrational, or overly broad ordinances affecting religious land uses.⁶¹

B. Religious House Meetings and Zoning Regulations

Zoning ordinances and land-use enforcements have also conflicted with religious house gatherings. Unlike the cases involving religion as the principle use in which courts have not hesitated to analyze the difficult constitutional issues, there is a greater tendency among courts to dismiss cases involving religious house meetings without reaching a decision on the merits.⁶² In *Cedar Rapids Zen Center, Inc. v. City of Cedar Rapids*,⁶³ the plaintiff conducted activities “devoted to the practice and teaching of Zen” from her home, including meditation sessions, teaching, and silent retreats.⁶⁴ Upon learning of these activities, the City informed the plaintiff that she could not continue using her home for religious activity or “invite people to sit with her in her home” without conducting extensive modifications to the home to convert it for “commercial use.”⁶⁵ While the City issued the plaintiff a cease-and-desist letter, it took no further action to enforce the ordinance, so the court dismissed the case for lack of an actual injury.⁶⁶

In *Church of Iron Oak, Inc. v. City of Palm Bay*,⁶⁷ the plaintiffs held Wiccan gatherings in their home on various Wiccan holy days throughout the year.⁶⁸ The City determined that the plaintiffs were violating a zoning ordinance by operating a church without the required permit in an area zoned for single-family residences.⁶⁹ The plaintiffs

discrimination if there was a substantial burden).

59. See, e.g., *Lighthouse*, 510 F.3d at 273 (free exercise); *Civil Liberties for Urban Believers*, 342 F.3d at 765 (free speech); *Kol Ami*, 309 F.3d at 133 & n.3 (equal protection); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 822 (10th Cir. 1988) (due process).

60. See discussion *infra* Part IV.

61. See discussion *infra* Part IV.

62. These cases are discussed in some detail here because they help illustrate the extent to which religious house meetings have come into conflict with zoning codes.

63. No. C02-115 LRR, 2004 WL 1234133 (N.D. Iowa Apr. 23, 2004).

64. *Id.* at *2.

65. *Id.* (“[The city official] informed [plaintiff] that the Zen Center was a religious organization and could not be located in a ‘single family neighborhood’ or in a ‘single family dwelling.’”).

66. *Id.* at *5 (finding the injury to be speculative because no action had been taken to enforce the cease-and-desist letter and there was no evidence that any enforcement action would ever be taken).

67. 868 F. Supp. 1361 (M.D. Fla. 1994).

68. *Id.* at 1362.

69. *Id.*

sought a restraining order prohibiting the City's enforcement of the ordinance and investigation of the premises, but because the matter was scheduled for a hearing before the City's enforcement board, the court declined to rule on the issues.⁷⁰ Likewise, the plaintiffs in *Murphy v. Zoning Commission of New Milford*⁷¹ held weekly prayer meetings in their home for six years before neighbors began complaining about on-street parking, parking in the plaintiffs' yard, and other traffic concerns such as a fear for the safety of neighborhood children playing in the cul-de-sac.⁷² Thereafter, the city began investigating the plaintiffs' use of their home, and ultimately the city's zoning commission found their use did not constitute a "customary accessory use" of the home and ordered the plaintiffs to cease holding the prayer meetings.⁷³ The cease-and-desist order issued to the plaintiffs only prohibited regularly scheduled meetings attended by twenty-five to forty non-family members.⁷⁴ While the trial court ruled in favor of the plaintiffs, on appeal, the United States Court of Appeals for the Second Circuit dismissed the case, finding that the controversy had never been ripe for adjudication.⁷⁵

Notwithstanding these dismissals, several courts have reached deci-

70. *Id.* at 1362-63 (stating that principles of federalism required the court to await the local decision before proceeding).

71. 289 F. Supp. 2d 87 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005). The court vacated the decision because it found that the action was not ripe for adjudication.

72. *Id.* at 93-95. The meetings were not open to the public but were by invitation only. *Id.* at 93.

73. *Id.* at 93-96 (noting that the city first informed the plaintiffs that the assemblies were not permitted and then issued a cease-and-desist order three weeks later). The zoning ordinances at issue allowed only those uses specifically permitted, and all other uses required a special use permit. *Id.* at 106. The zoning ordinances did not define "customary accessory use," and the zoning commission made decisions regarding individual uses on a case-by-case basis. *Id.* at 95. Moreover, the decisions were completely subjective and based on "good common sense and investigation." *Id.* at 95 n.4 (quoting Transcript of Preliminary Injunction Hearing at 132-33 (Jan. 18, 2001)). The zoning commission stated that the city's zoning ordinances did not allow large gatherings of people in single-family residential neighborhoods, but the size of a prohibited gathering depended on the impact the gathering had on the neighborhood, not on the number of those gathered. *Id.* at 96 & n.5. In this instance, the city determined that a gathering of more than twenty-five people would be "too large." *Id.* at 97.

74. *Id.* at 98.

75. *Murphy v. Zoning Comm'n of New Milford*, 402 F.3d 342, 344-45 (2d Cir. 2005). The trial court subjected the cease-and-desist order to strict scrutiny after finding that the individual order was not neutral or of general applicability. *Murphy*, 289 F. Supp. 2d at 105-08 (observing that the zoning commission issued the order against a single family with the purpose of suppressing religious conduct). While the zoning commission had a compelling interest in enforcing the city's zoning ordinances, the court held that the cease-and-desist order was not narrowly tailored and thus violative of the plaintiffs' free exercise protections. *Id.* at 108-09 (finding that a restriction on the number of attendees at a meeting was not narrowly tailored to protect the stated concerns involving the amount of traffic and vehicles parked on the street). Moreover, because RLUIPA's provisions mirror those of the Free Exercise Clause and the court had already ruled on the constitutional issue, the court found that the zoning ordinances also violated the plaintiffs' statutory rights under RLUIPA. *Id.* at 113 & n.27 ("The court need not decide whether the elements of a RLUIPA claim and Free Exercise claim are the same, despite minor differences in wording. In this case, the minor differences do not warrant a different conclusion."). As the appellate court described it, the problem stemmed from the fact that the plaintiffs filed suit following the zoning commission's determination that the use of their home for religious meetings violated the city's zoning ordinances without first seeking a variance and exhausting administrative remedies. *Murphy*, 402 F.3d at 351-52. Further, the court noted that the cease-and-desist order did not cause the plaintiffs actual injury. *Id.* at 351.

sions in favor of the house gatherings, and interestingly, they decided these cases on a variety of grounds. In *Konikov v. Orange County*,⁷⁶ a Jewish rabbi held religious meetings in his home at least twice a week.⁷⁷ The County issued a notice of violation, claiming that the rabbi was “operating a ‘religious organization from a residential property without special exception approval.’”⁷⁸ When the rabbi failed to acquire the necessary approval, the County attached a lien against the property and began assessing the rabbi a fine of \$50 per day.⁷⁹ In upholding an as-applied Religious Land Use and Institutionalized Persons Act of 2000⁸⁰ (RLUIPA) challenge to the zoning ordinance, the court determined that the County had not been enforcing the ordinance on equal terms, subjected the differential treatment to strict scrutiny, and held that the County had been “impermissibly target[ing] religious assemblies.”⁸¹

Two courts have decided similar cases on procedural due process grounds. In *State v. Cameron*,⁸² a city charged a minister with violation of a zoning regulation for repeatedly hosting approximately twenty-five people in his home for weekly church services.⁸³ The ordinance in question only allowed single-family homes in the zone where the minister lived while other residential zones expressly allowed “churches and similar places of worship.”⁸⁴ The city charged the minister with holding a prohibited “worship service” in his home, but the New Jersey Supreme Court found the ordinance unconstitutionally vague as applied to the minister.⁸⁵ Similarly, in *Nichols v. Planning & Zoning Commission*

76. 410 F.3d 1317 (11th Cir. 2005).

77. *Id.* at 1320 (“Konikov held meetings on Friday nights and Saturday mornings, in addition to other meetings for Torah study and celebration of holidays.”).

78. *Id.* at 1321 (quoting a Code Violation Notice issued by the County to plaintiff on Feb. 4, 2002) (internal alterations and punctuation omitted).

79. *Id.*

80. 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

81. *Konikov*, 410 F.3d at 1327-29 (noting that a group would not be in violation of the County’s regulations if the purpose of the gathering was related to social or familial functions such as cub scout meetings and birthday parties, regardless of the frequency of these other gatherings). In upholding the application of the ordinance against the plaintiff, the trial court relied heavily upon the decision of the United States Court of Appeals for the Eleventh Circuit in *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983). *Konikov v. Orange County*, 302 F. Supp. 2d 1328, 1338-43 (M.D. Fla. 2004), *rev’d on other grounds*, 410 F.3d 1317 (11th Cir. 2005) (“*Grosz* is indistinguishable from the instant case and is therefore controlling.”). In *Grosz*, a Jewish rabbi and his wife made an unattached garage into a religious meetinghouse and conducted services in the building twice daily. *Grosz*, 721 F.2d at 731. The zoning regulation limited use in the area in which the house was located to single-family dwellings. *Id.* The City issued the couple a notice of violation for violating the zoning regulation. *Id.* at 732. The Eleventh Circuit balanced the City’s interest in using its police powers for the welfare of the community against the Groszs’ free exercise interests and determined that “the burden upon government to allow [the] conduct outweighs the burden upon the . . . free exercise interest.” *Id.* at 739-41. Thus, the court concluded the zoning ordinance that prohibited the meeting and worshiping together in a home did not violate the Constitution. *Id.* at 741.

82. 498 A.2d 1217 (N.J. 1985).

83. *Id.* at 1218-19.

84. *Id.* at 1218 (quoting FRANKLIN TOWNSHIP, N.J., ORDINANCE 832, §§ 501.1.c, 502.1.b, 511.1.b (1976)).

85. *Id.* at 1219, 1224. The concurring justice believed that the majority had sidestepped the main issue of whether a city can regulate and forbid people from meeting in a home for a worship

of *Stratford*,⁸⁶ the plaintiff and other followers of the plaintiff's religious sect regularly gathered in one another's homes for religious fellowship and meetings.⁸⁷ After a neighbor complained of the meetings, the city informed the plaintiff that all property used for religious purposes had to be approved by the city and failure to comply with the ordinance would result in criminal sanctions.⁸⁸ The plaintiff filed for injunctive relief, claiming that the wording of the statute, "other religious use," was unconstitutionally vague.⁸⁹ The court agreed, finding that the regulation would not alert a reasonable citizen of when he was in violation, it contained no standards by which enforcement would be anything but arbitrary, and it gave administrative officials too much discretion in its enforcement.⁹⁰

One court decided a case on state constitutional grounds and another on state statutory grounds. *Farhi v. Commissioners of Deal*⁹¹ involved a rabbi who used his home for daily prayer gatherings, weekly religious meetings, as well as other religious gatherings.⁹² City officials alerted the rabbi of a zoning violation for using his residence for something other than a dwelling, but after the rabbi applied for a use variance, the city denied the request.⁹³ After noting the minimal traffic, noise, and aesthetic problems created by the rabbi's use, the court held that the state constitution "foreclose[d] any use by a municipal authority of its zoning power to prohibit the free exercise of religious activity in the privacy of one's home."⁹⁴ Likewise, *Kali Bari Temple v. Board of Adjustment of Readington Township*⁹⁵ involved a Hindu cleric seeking

service. *Id.* at 1225-26 (Clifford, J., concurring) ("I would end this bizarre episode once and for all by declaring that constitutional considerations beyond 'vagueness' foreclose any use of any of Franklin Township's powers to prohibit the foregoing activities in defendant's home between 11:00 a.m. and noon on Sundays."). Shortly after the *Cameron* decision, the New Jersey Superior Court addressed the issue directly, holding that "the guaranty of freedom of worship as set forth by [the New Jersey] Constitution forecloses any use by a municipal authority of its zoning power to prohibit the free exercise of religious activity in the privacy of one's home." *Farhi v. Comm'rs of Deal*, 499 A.2d 559, 563 (N.J. Super. Ct. Law Div. 1985).

86. 667 F. Supp. 72 (D. Conn. 1987).

87. *Id.* at 75.

88. *Id.* at 75-76.

89. *Id.* at 77.

90. *Id.* at 77-79.

91. 499 A.2d 559 (N.J. Super. Ct. Law Div. 1985).

92. *Id.* at 560 (observing that the closest synagogue was over a mile away, making it difficult for Jews, whose faith prohibits them from driving on the Sabbath, to make the trip to the synagogue). The weekly meetings had an average attendance of fifteen to twenty-five, with all attendees arriving on foot, and the daily gatherings had a lower average attendance, with some of these attendees arriving on foot and some driving. *Id.*

93. *Id.* at 560-61. The applicable portion of the zoning code stated: "[N]o building on premises shall be used for other than one of the following purposes: a. A dwelling for one family or for one private, noncommercial housekeeping unit." *Id.* at 561 (quoting BOROUGH OF DEAL, N.J., ORDINANCE § 18-6.2 (1967)). As the court noted, however, the entire ordinance in effect at the time of the lawsuit did "not provide for the use of a church within any district of the Borough of Deal." *Id.*

94. *Id.* at 562-63.

95. 638 A.2d 839 (N.J. Super. Ct. App. Div. 1994).

permission to use a portion of his home for religious gatherings.⁹⁶ The Township denied the request, finding that the simultaneous use of the property as a residence and a religious place of worship did not particularly fit the property in question, that it would cause a decline in neighborhood prices, and that “the use . . . did not appear to be consistent with the zoning ordinance or with the master plan.”⁹⁷ The court ultimately ordered the Township to grant the variance, finding the property value, noise, and traffic concerns to be without merit and “largely illusory.”⁹⁸

In some instances, courts have ruled in favor of the municipalities. A Buddhist monk used his residence as a place of worship in *Tran v. Gwinn*,⁹⁹ and the city found that the monk’s use of his residence violated a zoning ordinance that prohibited the use of property as a church or other place of worship without a special use permit.¹⁰⁰ After the city filed suit to enforce the zoning ordinance and enjoin the monk from continuing to use the property to hold worship services, the court held the ordinance was neutral and of general applicability, and it only imposed a minimal burden upon the monk’s free exercise of religion.¹⁰¹ Likewise, a woman who had operated a church from her home for twenty years was convicted of violating a zoning ordinance for “illegally operating a church in a residential district.”¹⁰² Only after the woman placed a sign on her property, however, did the city seek to enforce the zoning ordinances against her.¹⁰³ Nonetheless, the Ohio Court of Appeals upheld the woman’s conviction and sentence, which originally carried a sentence of sixty days in jail and a \$1,000 fine.¹⁰⁴

IV. CONSTITUTIONAL PROTECTIONS

One of the great wonders of the United States constitutional system is that numerous constitutional provisions often afford an individual or group protection from the power of the state. Thus, an evaluation of the level of protection the Constitution affords to house churches re-

96. *Id.* at 840-41.

97. *Id.* at 841-42.

98. *Id.* at 844-45.

99. 554 S.E.2d 63 (Va. 2001).

100. *Id.* at 65. The monk claimed he only used his home for private worship, but because he failed to appeal the trial court’s determination that he was operating a church, the state supreme court accepted the trial court’s finding of fact regarding the use of the property. *Id.* at 66.

101. *Id.* at 65, 67-68.

102. *City of Fairfield v. Pepper*, No. CA99-02-032, 1999 WL 699867, at *1, *3 (Ohio Ct. App. Sept. 7, 1999).

103. *Id.* at *1.

104. *Id.* at *2-*3. The trial court changed the sentence to two years of good behavior before the case reached the appellate court. *Id.* at *2. The trial court also imposed a parking restriction on the property; however, the appellate court overruled this restriction because it was beyond the ability of the court to prohibit people from parking on the street in front of the woman’s residence. *Id.* at *2-*3.

quires an examination of many constitutional rights. In addition to the Free Exercise Clause, the First Amendment includes other constitutional protections such as freedom of speech and freedom of association, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments. Furthermore, each of these issues must be considered against the backdrop of a strong public policy regarding the sanctity and privacy of the home.¹⁰⁵

A. *The Free Exercise Clause*

“[T]he product of religious pluralism and intense religious sectarianism in the American states and colonies,” the Free Exercise Clause has been described as “the most philosophically interesting and distinctive feature of the American Constitution.”¹⁰⁶ The Free Exercise Clause guarantees the American people that Congress will pass no law prohibiting the free exercise of religion, and this guarantee applies to the states through the Fourteenth Amendment.¹⁰⁷ The clause first gained status as a freestanding clause within the First Amendment in *Sherbert v. Verner*.¹⁰⁸ After being discharged by her employer, Sherbert found herself unable to secure new employment because, based on her religious beliefs, she refused to work on Saturdays.¹⁰⁹ The South Carolina Em-

105. See *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (citing early English authorities regarding the common-law maxim, “A man’s home is *his* castle”); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (“[T]he common law generally protected a man’s house as ‘his castle of defense and asylum’” (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *288)); *Frisby v. Schultz*, 487 U.S. 474, 484-86 (1988) (discussing the increased protection the home deserves and how this alters a free speech analysis); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (“Our decisions reflect no lack of solicitude for the right of an individual ‘to be let alone’ in the privacy of the home”); *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring) (referring to the home as “the sacred retreat to which families repair for their privacy and their daily way of living” and “the last citadel of the tired, the weary and the sick”); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (finding that the State could not constitutionally intrude upon the privacy of the home so as to control obscene videos); *Mapp v. Ohio*, 367 U.S. 643, 646 (1961) (“[T]he Fourth and Fifth Amendments . . . apply to all invasions on the part of the government . . . of the sanctity of a man’s home [I]t is the invasion of his indefeasible right of personal security, personal liberty and private property” that constitutes the essence of the offense. (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))) (internal quotations, footnotes, and alterations omitted); *United States v. Peterson*, 483 F.2d 1222, 1236 & nn.93-94 (D.C. Cir. 1973) (collecting cases in support of the idea that a man is under no duty to retreat from an attack within his home because the home is the man’s castle and sanctuary); see also U.S. CONST. amend. III (prohibiting the nonconsensual quartering of soldiers in the home); U.S. CONST. amend. IV (guaranteeing security within the home from unwarranted intrusions); U.S. CONST. amend. V (protecting against deprivations of property).

106. McConnell, *supra* note 5, at 1513.

107. “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.” U.S. CONST. amend. I; see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). An amendment incorporated through the Fourteenth Amendment becomes enforceable against the states, meaning the state governments must also abide by the text of the incorporated amendment. See *Palko v. Connecticut*, 302 U.S. 319, 324-26 (1937).

108. 374 U.S. 398 (1963).

109. *Id.* at 399.

ployment Security Commission, however, refused to grant her request for unemployment compensation when it determined that Sherbert had failed to accept employment without good cause in violation of the applicable statute.¹¹⁰ Finding that the statute imposed a burden upon Sherbert's free exercise, the Supreme Court observed that the denial of benefits "force[d] her to choose between following the precepts of her religion and forfeiting benefits [or] abandoning one of the precepts of her religion in order to accept work."¹¹¹ Because of this burden on Sherbert's free exercise rights, the Court subjected the statute to a compelling interest test.¹¹² The Court concluded that the State did not have a compelling interest, and even if the State could have shown a compelling interest, there was no indication that the statute was narrowly tailored to limit the constitutional infringements.¹¹³

The Court expanded its use of the compelling interest test in *Wisconsin v. Yoder*.¹¹⁴ The dispute in *Yoder* involved compulsory school attendance laws whereby the State required all children to attend school until they reached the age of sixteen.¹¹⁵ Members of the Old Order Amish and the Conservative Amish Mennonite Church refused to send their children to school beyond the eighth grade because "[f]ormal high school education beyond the eighth grade is contrary to Amish beliefs."¹¹⁶ The Court began by recognizing the fact that a state has a significant interest in and responsibility for the education of its children, but courts must still balance this interest against the constitutional protections afforded through the First and Fourteenth Amendments.¹¹⁷ Specifically, the Court stated, "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."¹¹⁸ Because the entire way of life, including education, was inseparable from Amish religious beliefs and practices, the State's compulsory attendance laws directly infringed upon pro-

110. *Id.* at 400-01. The unemployment compensation statute applicable at the time "provide[d] that, to be eligible for benefits, a claimant must be 'able to work and . . . is available for work'; and, further, that a claimant is ineligible for benefits '[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . .'" *Id.* (quoting S.C. CODE ANN. §§ 68-113(3), 68-114(3) (1952)).

111. *Id.* at 403-04 ("Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.")

112. *Id.* at 406 ("[N]o showing merely of a rational relationship to some colorable state interest [will] suffice.")

113. *Id.* at 407-08.

114. 406 U.S. 205 (1972).

115. *Id.* at 207 & n.2.

116. *Id.* at 207, 211. The Amish believed high-school-aged students needed to learn the Amish values and ways of life through hands-on education within the Amish community. *Id.* at 211. They felt the formal high school environment did not instill proper appreciation of physical labor, and it promoted unnecessary competitiveness, bad manners, and worldly styles. *Id.* at 210-12. The Amish believed, however, that elementary education was both proper and necessary. *Id.* at 212.

117. *Id.* at 213-14.

118. *Id.* at 215.

tected religious liberties.¹¹⁹ Moreover, the laws interfered with the Amish parents' liberty interests in educating and raising their children according to the tenets of their faith.¹²⁰ With these two interests in mind, the Court noted, "[W]hen the interests of parenthood are combined with a free exercise claim . . . 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."¹²¹ Thus, the Court concluded that the State's asserted interests in forcing children to attend school for an additional year or two did not outweigh the constitutional protections afforded the Amish, and that the State had not shown how granting an exemption to the Amish would adversely affect its educational goals.¹²²

*Employment Division, Department of Human Resources v. Smith*¹²³ changed the free exercise analysis that the Court had applied for the preceding quarter century. At issue was a state law criminalizing peyote use, even when used for religiously motivated reasons.¹²⁴ After two members of the Native American Church used peyote as part of a religious ceremony, their employers fired them and the State denied them unemployment benefits because they were fired for "misconduct."¹²⁵ The Court, unwilling to allow each person "to become a law unto himself,"¹²⁶ ruled that the Free Exercise Clause did not allow an individual to escape the reach of a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."¹²⁷ Accordingly, the Court declined to apply the *Sherbert* compelling interest test to generally applicable criminal laws, noting that it had refrained from applying the test outside the unemployment compensation field in recent years.¹²⁸ Rather, the Court held the test inapplicable to such "across-the-board criminal prohibition[s] on a particular form of conduct."¹²⁹

The compelling interest standard applies when the government seeks to classify on the basis of race or religion, or when it seeks to regulate speech; however, when a neutral law applies to all groups equally,

119. *Id.* at 216-18 (observing that the attendance laws forced the Amish to either abandon their beliefs, which would result in assimilation into the larger society, or move to other areas that would tolerate their religious practices).

120. *See id.* at 231-33 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)).

121. *Id.* at 233.

122. *Id.* at 224-25, 234-36.

123. 494 U.S. 872 (1990).

124. *Id.* at 874.

125. *Id.*

126. *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

127. *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

128. *Id.* at 883-84 (noting that *Sherbert* had only been used to invalidate government action in the unemployment compensation field, and all other applications of the *Sherbert* test resulted in the government action being upheld).

129. *Id.* at 884-85.

the state is not forced to enunciate a compelling interest, even if a religious practice is thereby burdened.¹³⁰ If, however, the government “has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”¹³¹ Moreover, the Court stated that only claims involving “the Free Exercise Clause in conjunction with other constitutional protections” have alleviated the necessity of complying with neutral laws of general applicability.¹³² Consequently, if a generally applicable law burdens the free exercise of religion, it is the role of the political process rather than the courts to remedy the situation.¹³³

The Court applied its *Smith* decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹³⁴ In response to members of the Santeria religion’s attempt to build a church within Hialeah, the City passed a series of ordinances prohibiting animal sacrifices, one of the principal forms of worship or devotion practiced by the church.¹³⁵ After citing *Smith* for the proposition that the government was not required to justify a neutral law of general applicability with a compelling interest, the Court conducted an analysis of Hialeah’s ordinances to determine whether they were neutral and of general applicability.¹³⁶ Noting that neutrality and general applicability are interrelated, the Court stated that a violation of one of these requirements would likely result in a violation of the other requirement.¹³⁷ In examining neutrality, the Court looked to the object of the laws and concluded that “[t]he design of these laws accomplishes . . . a ‘religious gerrymander,’ an impermissible attempt to target [the church] and [its] religious practices.”¹³⁸ To be of general applicability, the law must do more than merely impose burdens upon religiously motivated conduct, and religious groups and religiously motivated practices must be treated on equal terms with other groups and non-religiously motivated conduct.¹³⁹ In applying this prong of the

130. *Id.* at 885-86 & n.3 (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1961)).

131. *Id.* at 884 (citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

132. *Id.* at 881 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)).

133. *Id.* at 890 (“But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.”).

134. 508 U.S. 520 (1993).

135. *Id.* at 524-26.

136. *Id.* at 531-32, 542. The Court also reaffirmed its statement from *Smith* that a compelling interest is required to support a law when the government has in place a system of individualized exemptions from the general requirements of the law. *Id.* at 537.

137. *Id.* at 531.

138. *Id.* at 533, 535 (“[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”).

139. *Id.* at 542-43 (citing *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 148 (1987)).

test, the Court determined that the laws in question only advanced the City's stated interests against religiously motivated conduct and were thus not of general applicability.¹⁴⁰ Because the laws were not neutral or of general applicability, the Court subjected them to strict scrutiny, determined the City's stated interests were not compelling, and invalidated the laws.¹⁴¹

In response to the *Smith* decision, Congress passed the Religious Freedom Restoration Act (RFRA).¹⁴² One of the congressional goals in passing RFRA was to reinstate the compelling interest test enunciated in *Sherbert* to free exercise claims.¹⁴³ The Court, however, struck down much of RFRA in *City of Boerne v. Flores*,¹⁴⁴ finding the Act exceeded Congress's remedial and preventative power under the Fourteenth Amendment and thus violated principles of federalism.¹⁴⁵ Some courts and scholars have concluded that RFRA still applies to federal legislation because it is a valid exercise of congressional authority as applied to federal laws.¹⁴⁶ Nevertheless, RFRA is inapplicable in the land-use arena because zoning is the province of local governments.¹⁴⁷

Following the Court's ruling in *Boerne*, Congress passed RLUIPA,

(Stevens, J., concurring)).

140. *Id.* at 545.

141. *Id.* at 546-47 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.")

142. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000); see *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005); *In re Young*, 141 F.3d 854, 857 (8th Cir. 1998); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 192 (2001) ("Congress remained more attuned to the liberty and separation values, and it believed that *Smith's* general rule gave too little protection to religious conduct.")

143. 42 U.S.C. §§ 2000bb(a)(4)-(5), 2000bb-1(b)(1)-(2); see Berg, *supra* note 142, at 192-93.

144. 521 U.S. 507 (1997).

145. *Id.* at 532, 536. As the Court recited its standard for evaluating preventative legislation, it stated that such rules require "a congruence between the means used and the ends to be achieved." *Id.* at 530. To this end, "remedial measures must be considered in light of the evil presented." *Id.* Not only did Congress not provide examples of "generally applicable laws passed because of religious bigotry," but the legislative record actually indicated that "deliberate persecution is not the usual problem in this country." *Id.* (quoting *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 334 (1993) (statement of Douglas Laycock)). The Court determined RFRA could not possibly be viewed as remedial legislation because of this lack of unconstitutional, religious discrimination. *Id.* at 531-32. Further, the Court noted the extremely broad and sweeping scope of RFRA, which "ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* at 532.

146. See Berg, *supra* note 142, at 201 & n.57 (citing *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 831-33 (9th Cir. 1999); *In re Young*, 141 F.3d 854 (8th Cir. 1998); *EEOC v. Catholic Univ.*, 83 F.3d 455, 470 (D.C. Cir. 1996)). In *Young*, the Eighth Circuit applied RFRA to a federal bankruptcy case after finding that it did not violate the separation of powers when applied to federal law. 141 F.3d at 856, 860-61; see also *Sutton*, 192 F.3d at 831-33 ("[M]ost courts that have considered the issue have concluded that the Supreme Court invalidated RFRA only as applied to state and local law." (citing *Adams v. Comm'r*, 170 F.3d 173, 175 n.1 (3d Cir. 1999); *Young*, 141 F.3d at 858; *Spies v. Voinovich*, 173 F.3d 398, 403 (6th Cir. 1999); *Peterson v. Shanks*, 149 F.3d 1140, 1145 (10th Cir. 1998))).

147. *Cf. Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-90 (1926) (noting that municipalities are independent political entities with a right to govern themselves and exercise their own police power through the use of reasonable zoning restrictions).

a more refined and limited version of RFRA.¹⁴⁸ Once again, Congress implemented the pre-*Smith* compelling interest test in situations in which a government imposes a “substantial burden” on religious exercise or treats religious assemblies “on less than equal terms” with nonreligious assemblies.¹⁴⁹ Unlike its predecessor, however, RLUIPA contains jurisdictional elements that limit its application to situations in which Congress has constitutional authority to act, and as such, RLUIPA only applies to certain land-use regulations and regulations affecting institutionalized persons.¹⁵⁰ Moreover, to cure the deficiencies the Court had found with RFRA, Congress documented many instances of religious discrimination and restrictions on free exercise rights prior to passing RLUIPA.¹⁵¹ While the Court has upheld the constitutionality of the institutionalized persons portion of RLUIPA, it has not yet considered the Act’s land-use provisions.¹⁵² Lower courts, on the other hand, have interpreted RLUIPA’s land-use provisions with mixed results.¹⁵³ These courts have recognized that RLUIPA’s substantial bur-

148. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 931 (2001).

149. 42 U.S.C. § 2000cc(a)(1); *Cutter*, 544 U.S. at 715.

150. *Cutter*, 544 U.S. at 715-16 (noting that RLUIPA is based on Congress’ authority under the Spending and Commerce Clauses); *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006) (observing that RLUIPA only applies when one of three jurisdictional elements is satisfied). RLUIPA limits its application to the following situations:

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance . . . (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes . . . or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. § 2000cc(2).

151. *Cutter*, 544 U.S. at 716-17 (reciting congressional findings regarding institutionalized persons).

152. *See id.* at 715 n.3, 725.

153. *Compare* *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270-72 (3d Cir. 2007) (finding no RLUIPA violation where zoning ordinance specifically prohibited religious institutions from locating in a business district), *Konikov v. Orange County*, 410 F.3d 1317, 1323-26 (11th Cir. 2005) (finding no substantial burden in the permit process and concluding the church at issue was not similarly situated to allowed uses, including family day cares, model homes, and home occupations, because these uses did not constitute assemblies or organizations), *and* *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 762 (7th Cir. 2003) (finding no substantial burden and thus holding RLUIPA inapplicable to requirement that churches seek special use permits), *with* *Guru Nanak*, 456 F.3d at 981, 990 (holding that the denial of a conditional use permit violated the church’s statutory rights under RLUIPA where the primary reason for denying the permit was to avoid scattered and disorganized development); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1218-19, 1222 (11th Cir. 2004) (holding that a zoning ordinance prohibiting synagogues from locating in the business district violated RLUIPA where private clubs and lodges were permitted within the district). In *Lighthouse*, the court concluded that the equal terms provision of RLUIPA is separate from the substantial burden provision, alleviating a RLUIPA plaintiff from demonstrating a substantial burden under an equal terms claim. 510 F.3d at 262. Moreover, the court stated that the equal terms provision requires a comparison of a secular use that is similarly situated to the religious use in terms of the regulation’s purpose, and the equal terms provision does not invoke strict scrutiny because it is a strict liability provision. *Id.* at 268-69. Using this framework, the court analyzed a re-development plan prohibiting churches from locating in a business district. *Id.* at 270. The purpose of the plan was to create an entertainment area full of restaurants, bars, and clubs, but a state law

den provision creates a test analogous to the pre-*Smith* free exercise jurisprudence.¹⁵⁴ The constitutional issues surrounding house meetings add value, authority, and scope to RLUIPA claims, in addition to supplementing those claims with additional arguments derived from constitutional jurisprudence.¹⁵⁵

Regarding free exercise claims in the zoning and land-use context, courts have generally required a showing of how the zoning ordinances actually affect or burden religious exercise.¹⁵⁶ This inquiry does not require a court to weigh the substantiality of a burden; it merely requires “a plaintiff to articulate why it is a burden *on its religious exercise* (as opposed, for instance, to its pocketbook or its convenience).”¹⁵⁷ Consequently, inconveniences, added expenses, and aesthetic concerns are mere incidental burdens not deserving of constitutional protection.¹⁵⁸ Thus, because “a church [does not] have a constitutional right to build its house of worship where it pleases,” free exercise claims rarely prevail

prohibited the issuance of liquor licenses within a certain distance of churches. *Id.* at 270-71. The court held the plan did not violate the equal terms provision of RLUIPA because the religious use was not similarly situated to non-religious uses in terms of the purpose of the plan. *Id.* at 270. The court explained that allowing religious uses into the area “would fetter [the City’s] ability to allow establishments with liquor licenses into the [area].” *Id.* On the other hand, because the City’s zoning ordinance did not contain a documented reason for the exclusion of religious institutions from business districts, the court found the ordinance did violate RLUIPA’s equal terms provision. *Id.* at 272-73.

154. See *Lighthouse*, 510 F.3d at 264 (“It is undisputed that, when drafting the Equal Terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause.” (citing 146 CONG. REC. 16699 (2000) (statement of Sens. Hatch & Kennedy))); *Guru Nanak*, 456 F.3d at 988 (defining “substantial burden” in accordance with pre-*Smith* free exercise cases).

155. A full and complete examination of RLUIPA is beyond the scope of this Note. For a more detailed analysis of the Act, see generally Storzer & Picarello, Jr., *supra* note 148; Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001).

156. See *Lighthouse*, 510 F.3d at 274 (“[W]hen a religious plaintiff makes a Free Exercise challenge to a zoning regulation, it must explain in what way the inability to locate in the specific area affects its religious exercise.”); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 825-26 (10th Cir. 1988) (“A church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases.” (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971))); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 985-86 (N.D. Ill. 2003) (stating that a plaintiff must demonstrate a substantial burden on free exercise before the court will conduct a neutral, generally applicable analysis).

157. *Lighthouse*, 510 F.3d at 275.

158. See *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306-07 (6th Cir. 1983). In *Lakewood*, the court conducted a two-part inquiry to determine whether the zoning ordinance infringed protected free exercise rights, which included an analysis of “the nature of the religious observance at stake” and “the nature of the burden placed on religious observance.” *Id.* at 306. The court believed that the religious observance constituted the construction of the church, but such construction was “a desirable accessory of worship, not a fundamental tenet” of the congregation’s faith. *Id.* at 307. Because the regulation did not prohibit or deter the congregation from meeting or practicing its religion but merely made the practice more expensive by preventing the “purely secular act” of constructing a building, the court determined the burden was not substantial and resulted in no free exercise infringement. *Id.* at 307-08; see also *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006) (prohibiting church from locating its day care in a particular district constituted an incidental burden on religious exercise); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-73 (8th Cir. 1991) (concluding that the zoning ordinance did not regulate religious conduct or dictate beliefs and thus only had an incidental burden on free exercise according to *Smith*); *Christian Gospel Church v. City & County of S.F.*, 896 F.2d 1221, 1224 (9th Cir. 1990) (finding burdens of convenience and expense to be minimal).

when challenging land-use regulations.¹⁵⁹

B. Other First Amendment Protections

The First Amendment undoubtedly protects actual speech and symbolic speech as well as a host of other communicative activities, including expressive conduct.¹⁶⁰ Disagreement with the message conveyed serves as the lynchpin for determining whether a regulation is content-based.¹⁶¹ Such content-based governmental actions that impede or restrict speech are presumptively invalid.¹⁶² Upon a finding that a regulation is content-based, courts apply a strict scrutiny review, upholding the regulation only where the government can “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”¹⁶³

Reasonable time, place, and manner restrictions, however, are applicable in many situations and subject to less exacting review. “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”¹⁶⁴ Thus, the government’s purpose becomes the primary consideration, and a regulation restricting speech must be “*justified* without reference to the content of the regulated speech” to be considered content-neutral.¹⁶⁵ A finding that the restriction is content-based will automatically remove the ordinance from the time, place, and manner analysis.¹⁶⁶ To be a valid time, place, and manner restriction, a regulation must not only be content-neutral, but it must also be narrowly tailored to a compelling governmental interest and it must provide alternative, viable channels of communication.¹⁶⁷ While such content-neutral regulations must be narrowly tailored, they do not have to be the least restrictive or intrusive means available.¹⁶⁸ The narrow-tailoring prong merely requires a “substantial government interest that

159. *Messiah Baptist*, 859 F.2d at 826 (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). *But see* *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (“By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of religion.”).

160. *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991); *Texas v. Johnson*, 491 U.S. 397, 402-06 (1989).

161. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

162. *R.A.V.*, 505 U.S. at 382 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (Kennedy, J., concurring); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980); *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972)).

163. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

164. *Ward*, 491 U.S. at 791 (“The government’s purpose is the controlling consideration.”).

165. *Id.* (quoting *Clark*, 468 U.S. at 293).

166. *See* *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1286 (11th Cir. 1999) (“If [the relevant government conduct] is content based, we never reach the time, place, and manner analysis, applying instead the strict scrutiny test . . .”).

167. *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

168. *Id.* at 798-99 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

would be achieved less effectively absent the regulation,” although the government cannot burden more speech than is necessary.¹⁶⁹ Provided a regulation does not completely foreclose any particular speech and in fact leaves open alternative channels of communication, the regulation will satisfy the third prong of the test.¹⁷⁰

Courts typically review free speech claims in the land-use context as time, place, and manner restrictions.¹⁷¹ For example, the Supreme Court analyzed a zoning ordinance as a time, place, and manner restriction in *Schad v. Borough of Mount Ephraim*.¹⁷² *Schad* involved a zoning ordinance that prohibited all forms of live entertainment within the city’s commercial zone.¹⁷³ Live entertainment is protected expression under the First and Fourteenth Amendments, and the city’s zoning regulation strictly curtailed its citizens’ protected speech.¹⁷⁴ Applying strict scrutiny, the Court weighed the substantiality of the ordinance’s justifications as asserted by the city and found them to be lacking and insufficient to uphold the ordinance.¹⁷⁵ Specifically, the city’s across-the-board ban on live entertainment was not narrowly tailored, and further, the justifications proposed by the city addressed more theoretical than actual problems.¹⁷⁶

The same standards apply to land-use restrictions regulating church locations. While such regulations appear to be content-based restrictions, courts have had little difficulty determining that most zoning ordinances are content-neutral because the municipalities do not justify the restrictions based on the content of the speech.¹⁷⁷ Moreover, courts have found the governmental interest in regulating land use to be compelling, and determining where different institutions can locate is gener-

169. *Id.* at 799 (quoting *Albertini*, 472 U.S. at 689).

170. *See id.* at 802; *Clark*, 468 U.S. at 295.

171. *See Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 765 (7th Cir. 2003); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 469-70 (8th Cir. 1991); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 983 (N.D. Ill. 2003).

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

173. *Id.* at 63. The ordinance specifically allowed certain listed uses and contained a clause that prohibited any use not expressly listed. *Id.* at 63-64. The express conditions of the ordinance did not allow live entertainment of any form, and the New Jersey courts had construed the statute to preclude live entertainment citywide. *Id.* at 65. Pursuant to the ordinance, the city charged the plaintiffs/appellants, who owned an adult bookstore in Mount Ephraim, with violating the ordinance after they installed coin-operated machines that allowed patrons to view live, nude dancers. *Id.* at 62-63.

174. *Id.* at 65.

175. *Id.* at 69, 72-74.

176. *Id.* at 72-74. The city also asserted that the restriction was a valid time, place, and manner restriction, but the Court did not accept this argument. *Id.* at 74.

177. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 765 (7th Cir. 2003) (finding the zoning scheme to be content-neutral because it was not enacted out of disagreement with the regulated church message but upon legitimate goals of efficient land use); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 468 (8th Cir. 1991) (observing that the religious content of the speech determined whether a church could locate within the applicable zone, but the City was only concerned with the secondary effects of religious institutions within the zone, so the regulation was considered content-neutral); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 982 (N.D. Ill. 2003) (stating that the City’s goals of encouraging business and economic development in the zone were content-neutral).

ally a legitimate exercise of police power.¹⁷⁸ As was the case in *Schad*, however, courts have reached different conclusions regarding the narrow tailoring requirement, and consequently, free speech claims challenging religious land-use restrictions have succeeded more often than similar free exercise claims.¹⁷⁹

Freedom of association, or the right to associate with whomever one wishes, is an implied right derived from the various other First Amendment rights. *NAACP v. Alabama ex rel. Patterson*¹⁸⁰ first recognized the right of association as the Court refused to compel the National Association for the Advancement of Colored People to turn over its membership lists.¹⁸¹ The freedom of association protects “the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.”¹⁸² In the land-use context, the freedom of association is an inherent aspect of the free speech issue, and any impermissible regulation of speech will also be an unconstitutional infringement of the freedom of association.¹⁸³

C. Due Process

The Supreme Court has interpreted the Due Process Clauses of the Fifth and Fourteenth Amendments to embody both procedural and substantive components.¹⁸⁴ At its core, procedural due process serves two important ideals: “the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking [sic] process.”¹⁸⁵ Procedural due process claims often involve the question of whether an individual received ade-

178. *Civil Liberties for Urban Believers*, 342 F.3d at 765 (stating that cities have a substantial interest in regulating land use); *Cornerstone*, 948 F.2d at 469 (finding zoning scheme in question to be a legitimate means of obtaining a legitimate municipal objective); *Vineyard*, 250 F. Supp. 2d at 983-84 (concluding that the City’s goals of promoting economic development and preserving capacity for future development were legitimate municipal goals).

179. Compare *Cornerstone*, 948 F.2d at 469-70 (concluding that the City did not support its claims of potentially adverse secondary effects with factual studies, and as such, the City could not show it was not restricting more speech than was necessary), and *Vineyard*, 250 F. Supp. 2d at 984 (holding that exclusion of religious groups but not cultural groups from zone without sufficient justification created unconstitutionally underinclusive zoning scheme), with *Civil Liberties for Urban Believers*, 342 F.3d at 765 (stating that land-use regulations need not be the least restrictive means to achieve the city’s goals, they only have to make the achievement of substantial interests more effective, which the zoning scheme at issue accomplished).

180. 357 U.S. 449 (1958).

181. *Id.* at 460, 466.

182. *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

183. Cf. *Vineyard*, 250 F. Supp. 2d at 979 n.12 (citing *N.Y. State Club Ass’n, Inc. v. City of N.Y.*, 487 U.S. 1, 13 (1988)) (treating free speech and free association claims alike in land-use context). In *N.Y. State Club Ass’n*, the Court noted the freedoms of speech and assembly have a close nexus whereby the “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association” 487 U.S. at 13.

184. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (noting that due process is more than mere procedural safeguards).

185. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citing *Carey v. Phipus*, 435 U.S. 247, 259-62, 266-67 (1978)).

quate procedural protections such as notice and the opportunity to be heard after being deprived of life, liberty, or property.¹⁸⁶ Due process, however, also requires consideration of whether the applicable law or regulation provides meaningful enforcement guidance and standards.¹⁸⁷ The standards and guidelines must be sufficient “to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute” and to prevent arbitrary and completely discretionary enforcement of the law or regulation.¹⁸⁸ Without such standards, a zoning ordinance is void for vagueness.¹⁸⁹

As the Court observed in *Papachristou v. City of Jacksonville*,¹⁹⁰ laws that grant authorities unbridled discretion and allow for arbitrary enforcement provide avenues whereby city officials could impose “the life style [they] deem[] appropriate” by punishing any “groups deemed to merit their displeasure.”¹⁹¹ Moreover, in *NAACP v. Button*,¹⁹² the Court noted that laws impeding upon protected First Amendment activities must meet a more rigid standard of definiteness than other laws so as not to inhibit people from engaging in such protected conduct.¹⁹³ In other words, courts have been wary of laws touching upon First

186. In his dissenting opinion in *Poe*, Justice Harlan stated:

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Thus the guaranties of due process, though . . . considered as procedural safeguards “against executive usurpation and tyranny,” have in this country “become bulwarks also against arbitrary legislation.”

Poe, 367 U.S. at 541 (Harlan, J., dissenting) (internal citations omitted). The Fifth Amendment provides, in relevant part, that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V. Likewise, the Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

187. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991) (O’Connor, J., dissenting) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

188. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)) (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 301 U.S. 242 (1937)). In *Papachristou*, the Court determined a Florida vagrancy law was void for vagueness because it made actions criminal “which by modern standards are normally innocent,” and because the ordinance “permit[ted] and encourage[d] an arbitrary and discriminatory enforcement of the law.” *Id.* at 163, 170. *Papachristou* makes clear that courts will closely examine broad, discretionary statutes when they encroach upon fundamental interests. *Id.* at 163-64 (considering walking and strolling, specifically at night, to be unwritten amenities of life deserving of constitutional protection).

189. See *Pac. Mut.*, 499 U.S. at 44 (O’Connor, J., dissenting).

190. 405 U.S. 156 (1972).

191. *Id.* at 170.

192. 371 U.S. 415 (1963).

193. *Id.* at 432-33 (citing *Smith v. California*, 361 U.S. 147, 151 (1959); *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 142 (1948); *Winters v. New York*, 333 U.S. 507, 509-10, 517-18 (1948); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Stromberg v. California*, 283 U.S. 359 (1931)); see *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (“Where a statute’s literal scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.”).

Amendment rights because these laws have a “chilling effect” on First Amendment activity as people “steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.”¹⁹⁴ While *Button* specifically involved the freedoms of expression and association, the Court specifically stated, “First Amendment freedoms need breathing space to survive.”¹⁹⁵ Accordingly, some courts have found zoning regulations touching upon such First Amendment protections as freedom of association and free exercise to be void for vagueness when such regulations granted unbridled discretion to city officials in the application and enforcement of the regulations.¹⁹⁶

Substantive due process serves as a “bulwark[] . . . against arbitrary legislation” by providing constitutional protection for fundamental rights and liberties, including rights not explicitly enunciated in the Constitution.¹⁹⁷ The Court has acknowledged the difficulties associated with providing protection to rights without textual guidance from the Constitution and the dangers that inhere when the scope of substantive due process is expanded.¹⁹⁸ One of the fears associated with substantive due process jurisprudence is that the lack of textual limits to the contours of the clause can result in the Court using it as a mechanism to enforce its policy preferences.¹⁹⁹ To avoid these types of problems, the Court has relied upon a “careful ‘respect for the teachings of history and[] solid recognition of the basic values that underlie our society’” in its devel-

194. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 474 (8th Cir. 1991) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations and alterations omitted)).

195. *Button*, 371 U.S. at 433; see *Goguen*, 415 U.S. at 573 n.10 (citing cases in a comparison of the application of the more stringent requirements of vagueness in the First Amendment context with the less stringent requirements found in purely economic regulations).

196. See *supra* notes 81-88 and accompanying text.

197. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)). Justice Harlan described the contours of substantive due process as follows:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints

Id. at 543.

198. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking [sic] in this uncharted area are scarce and open-ended.” (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (internal alterations omitted))); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977).

199. *Glucksberg*, 521 U.S. at 720 (citing *Moore*, 431 U.S. at 502). Compare *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that the right to contract a liberty interest is protected by the Fourteenth Amendment), with *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423-25 (1952) (stating that state legislatures had authority to limit and control labor practices), and *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.”).

opment of limits to substantive due process.²⁰⁰ Accordingly, the Court only extends substantive due process protections to those fundamental liberties that are “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”²⁰¹ Nonetheless, the Court has not hesitated to extend constitutional protection when it determines that legitimate, fundamental interests are at stake.²⁰²

Many of the Court’s substantive due process cases have involved a right to privacy. “The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”²⁰³ While the early cases in this line reveal some disagreement among the members of the Court as to where this right was to be found in the Constitution, they also demonstrate the many and varied constitutional provisions that support the protection of fundamental interests.²⁰⁴ By the time of the Court’s decision in *Roe v. Wade*,²⁰⁵ the Court had settled on inferring the right of privacy from the Due Process Clause of the Fourteenth Amendment.²⁰⁶ The right to privacy “is the right of the *individual* . . . to be free from unwarranted governmental intrusion,” and as such, substantive due process provides constitutional protection to a variety of fundamental liberty interests affecting individual rights.²⁰⁷ These fundamental liberties include: the right of parents to raise their children as they see fit and to direct their education;²⁰⁸ the right of a person to choose whether to procreate;²⁰⁹ the right of individuals to choose their family relationships;²¹⁰ the right of an individual to marry the person of one’s choice;²¹¹

200. *Moore*, 431 U.S. at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965)) (internal alterations omitted).

201. *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503; *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

202. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). But see *Glucksberg*, 521 U.S. at 728 (finding no fundamental liberty interest in being assisted with suicide).

203. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (internal citations omitted).

204. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (First Amendment); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (Fourth and Fifth Amendments); *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (Fourth Amendment); *Griswold*, 381 U.S. at 484 (penumbras of the Bill of Rights); *id.* at 490-92 (Goldberg, J., concurring) (Ninth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (Fourteenth Amendment).

205. 410 U.S. 113 (1973).

206. *Id.* at 152-53 (citing *Stanley*, 394 U.S. at 564; *Terry*, 392 U.S. at 8-9; *Katz*, 389 U.S. at 350; *Griswold*, 381 U.S. at 484-85 (Goldberg, J., concurring); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Meyer*, 262 U.S. at 399; *Boyd v. United States*, 116 U.S. 616 (1886)).

207. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to use contraceptives to unmarried persons because of the individual nature of the right of privacy); see *Roe*, 410 U.S. at 152-53 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer*, 262 U.S. at 399).

208. *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-400.

209. *Skinner*, 316 U.S. at 541-42.

210. *Moore v. City of E. Cleveland*, 431 U.S. 494, 504-05 (1977); *Prince*, 321 U.S. at 166-67.

211. *Loving*, 388 U.S. at 12.

the right to possession of obscene videos in one's home;²¹² the right of a woman to choose whether to have an abortion;²¹³ the right to refuse life-saving medical treatment;²¹⁴ and the right of consenting adults to engage in whatever sexual conduct they desire in the privacy of their own homes.²¹⁵

A number of these fundamental liberty interests have been specifically recognized or afforded increased protection precisely because the underlying activity occurred within the privacy of one's home. For example, in *Stanley v. Georgia*,²¹⁶ a man had been convicted under a state law for possession of obscene videos within his home.²¹⁷ The Court concluded that mere possession of obscene material did not justify an invasion of a person's First and Fourteenth Amendment liberties in a state's effort "to control men's minds."²¹⁸ Central to the Court's holding was the fact that the possession occurred within the home, and as the Court noted, the "State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."²¹⁹ Further, in *Lawrence v. Texas*,²²⁰ while the Court concluded that consenting adults have a fundamental interest in choosing their personal relationships and sexual conduct, it stressed the fact that the State had no business interfering with such personal decisions when they occurred "in the most private of places, the home."²²¹

While the courts have not always been consistent in the articulation of the proper standard to use when evaluating substantive due process claims, the applicable test is essentially an "undue burden" test.²²² An undue burden analysis involves a weighing of "the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."²²³ Thus, as state interests increase in importance and significance, greater burdens will be tolerated, but the burdens must still be narrowly drawn in furtherance of the state's interests.²²⁴

212. *Stanley v. Georgia*, 394 U.S. 557, 566-68 (1969).

213. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

214. *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990).

215. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

216. 394 U.S. 557 (1969).

217. *Id.* at 558-59.

218. *Id.* at 565-66, 568 ("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

219. *Id.* at 564-67 (finding that the State could not restrict freedom of thought based on a fear that some activities would lead to deviant or criminal behavior).

220. 539 U.S. 558 (2003).

221. *Id.* at 567, 578 ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

222. See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 874-78 (1992) (describing the undue burden standard and noting that an undue burden is an unconstitutional burden).

223. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

224. See *Casey*, 505 U.S. at 876-78 (noting that the state has a substantial interest in the life of

The Court has also invoked substantive due process and the undue burden test in the land-use context.²²⁵ The zoning power “must be exercised within constitutional limits,” and the proper constitutional test to apply to zoning regulations will depend upon the “nature of the right assertedly threatened or violated.”²²⁶ In *Moore v. City of East Cleveland*,²²⁷ a zoning ordinance limited the occupants of a dwelling to a single family, but the statutory definition of “family” restricted those who could be considered part of the family to a select few.²²⁸ The Court observed that the sanctity of the family, including the extended family, is a constitutionally protected liberty interest, which precludes the government from narrowly defining and standardizing families within a zoning district.²²⁹ Because the City arbitrarily defined what constituted a family, the Court subjected it to heightened scrutiny by weighing “the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”²³⁰ The challenged ordinance only marginally accomplished the City’s goals, and accordingly, the Court invalidated it as an unconstitutional attempt to standardize families.²³¹

In most zoning disputes, however, courts have concluded that zoning regulations affect property rights rather than liberty interests, and consequently, the courts have applied the rational relationship test set forth in *Euclid*.²³² The decision to exclude churches from certain zones is not arbitrary in most instances, but rather such decisions are a necessary and reasonable result of zoning ordinances seeking to promote the general welfare.²³³ Moreover, when municipalities follow proper legisla-

the unborn, but laws seeking to further that interest cannot intentionally or effectively create a “substantial obstacle” that would interfere with a woman’s ability to exercise her fundamental right to an abortion); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68-70 (1981) (stating that a zoning law infringing upon First Amendment rights must be narrowly drawn in furtherance of a substantial government interest).

225. See *Moore*, 431 U.S. at 495-96.

226. *Schad*, 452 U.S. at 68 (quoting *Moore*, 431 U.S. at 514 (Stevens, J., concurring)) (citing *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945)).

227. 431 U.S. 494 (1977).

228. *Id.* at 495-96. Due to the strange definition of family in the statute, the plaintiff had been charged with violating the statute even though the only occupants of her house were herself, her son, and her two grandchildren, at least one of whom the plaintiff was raising due to the death of the child’s parent. *Id.* at 496-97.

229. *Id.* at 499, 503-04, 506 (“[P]ersonal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974))).

230. *Id.* at 499; see *infra* notes 224-226 and accompanying text.

231. *Id.* at 499-500 (listing the City’s goals as the prevention of overcrowding, traffic, parking congestion, and avoidance of undue financial burden on the City’s school system).

232. See *supra* notes 28-36 and accompanying text; *Messiah Baptist Church v. Jefferson County*, 859 F.2d 820, 823 (10th Cir. 1988) (observing that the County denied the church the ability to build a church and worship where it pleased, but it did not restrict a religious preference); *Lakewood, Ohio Congregation of Jehovah’s Witnesses v. City of Lakewood*, 699 F.2d 303, 308-09 (6th Cir. 1983) (noting that the ordinance affected location, not a fundamental liberty).

233. *Messiah Baptist*, 859 F.2d at 822-23 (finding the ordinance to be reasonable and not arbitrary, even though it defined allowed and prohibited uses, because the choice of making such differ-

tive and appellate processes that provide notice and an opportunity to be heard, and the zoning regulations provide adequate guidance for enforcement and notification of violations, procedural due process will likely be satisfied.²³⁴ Courts have reached this result notwithstanding the potential chilling effect on First Amendment freedoms because such land-use regulations only tangentially affect religion.²³⁵

D. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.”²³⁶ When a governmental classification impedes a fundamental right or classifies on the basis of a suspect classification such as race, religion, alienage, or gender, a court will subject the statute or regulation to heightened scrutiny.²³⁷ If, on the other hand, the classification does not infringe upon a fundamental right or rest upon suspect groupings, the classification need only be rationally related to a legitimate legislative concern.²³⁸

In *City of Cleburne v. Cleburne Living Center*,²³⁹ the Court examined a zoning ordinance that required a special use permit for the operation of group homes for the mentally retarded.²⁴⁰ The City rejected the

entiations belongs with the legislature); *Lakewood*, 699 F.2d. at 308-09 (“[T]he ordinance does not offend the Due Process Clause because it is a legitimate exercise of the City’s police power. [It] merely frustrates the Congregation’s desire to locate itself in a more pleasant, more convenient and less expensive location.”).

234. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 767-68 (7th Cir. 2003) (stating that the legislative process provides all the process that is due); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 473-74 (8th Cir. 1991) (concluding that the ordinance was not vague in defining terms and consequently, church would know it was in violation, and City officials did not have unbridled discretion in enforcement of ordinance); see *supra* notes 185-196 and accompanying text.

235. *Cornerstone*, 948 F.2d at 474; see *supra* notes 185-196 and accompanying text.

236. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). The Equal Protection Clause provides that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

237. *Cleburne*, 473 U.S. at 440; *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The Court has created differing levels of heightened scrutiny that apply to different classifications. Courts subject classifications based on race, alienage, or national origin to a strict scrutiny review. *Cleburne*, 473 U.S. at 440. A regulation under strict scrutiny review will be upheld only if it is “justified by a compelling governmental interest and [is] ‘necessary . . . to the accomplishment’ of [a] legitimate purpose.” *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (quoting *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)) (ellipses in original) (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). Under this type of review, the “necessary” requirement is only satisfied when the classification is narrowly tailored to achieve the government’s compelling interest. See *Cleburne*, 473 U.S. at 440. The Court has employed the same standard when a regulation impedes a fundamental right. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (citing *Carrington v. Rash*, 380 U.S. 89, 96 (1965)). Sex-based classifications and classifications based on illegitimacy receive an intermediate level of scrutiny in which the classification must be “substantially related to a legitimate state interest.” *Cleburne*, 473 U.S. at 441 (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)); see *Craig v. Boren*, 429 U.S. 190, 204 (1976).

238. *Cleburne*, 473 U.S. at 440; *Dukes*, 427 U.S. at 303.

239. 473 U.S. 432 (1985).

240. *Id.* at 435-36. The ordinance required a special use permit for “hospitals for the insane or feeble-minded, or alcohol[] or drug addicts, or penal or correctional institutions.” *Id.* at 436 (internal alterations, quotations, and corrections omitted).

application for the permit, and the company attempting to open the group home sued the City for a violation of the equal protection rights of the mentally retarded.²⁴¹ The Court determined mental retardation is not a suspect or quasi-suspect classification, which precluded an application of heightened scrutiny.²⁴² Nonetheless, the Court held the City had acted with an illegitimate motive toward the mentally retarded and invalidated the ordinance because the City's "irrational prejudice" did not constitute a rational basis for treating group homes for the mentally retarded differently than other group homes.²⁴³

In the context of religious land use, courts generally apply the rational basis test "[a]bsent evidence of purposeful discrimination based on religious status."²⁴⁴ Courts have typically determined that zoning classifications are rationally related to governmental interests and have upheld the ordinances.²⁴⁵ Nonetheless, there have been mixed results regarding religious land uses even under a rational basis review. For instance, in *Cornerstone Bible Church* the court applied a rational basis test but concluded that the City had treated similarly situated entities differently than it had the church without advancing even a rational basis for the differential treatment.²⁴⁶

When, however, a regulation classifies on the basis of religion, it will be subjected to strict scrutiny.²⁴⁷ A secular, content-neutral classification will not be held to the compelling interest standard when it merely "ha[s] the effect of disproportionately disadvantaging" a religious group.²⁴⁸ Thus, in *Vineyard Christian Fellowship* the court con-

241. *Id.* at 437.

242. *Id.* at 442 (noting that states do have a legitimate interest in legislating for the welfare of those who are unable to care for themselves). The court of appeals determined the classification based on mental retardation was a quasi-suspect classification under the Equal Protection Clause, applied an intermediate level of scrutiny, and invalidated the ordinance because it did not further an important governmental interest. *Id.* at 437-39.

243. *Id.* at 448-50 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.")

244. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 n.13 (8th Cir. 1991).

245. See generally *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 766-67 (7th Cir. 2003) ("To the extent that the [zoning code] treats churches any differently from nonreligious assembly uses, it does not disfavor churches. More importantly, any such difference is rationally related to [the city's] legitimate interest in regulating land use . . ."); *Congregation of Kol Ami v. Abington Twp.*, 309 F.3d 120, 135 (3d Cir. 2002) ("[A]bsent . . . animus or other improper motive, a land use ordinance will typically be upheld.")

246. *Cornerstone*, 948 F.2d at 471-72 ("The City has failed to support its exclusion of the Church with any justification beyond the conclusory statements in the affidavits of the city planners."). This type of analysis accords with the approach used in *Cleburne* in which the Court concluded an "irrational prejudice" caused the City to treat group homes for the mentally retarded differently than similarly situated uses and held that the ordinance did not pass rational basis review. See *supra* notes 239-243 and accompanying text.

247. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part) (quoting *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886 n.3 (1990)); see *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 975-77 (N.D. Ill. 2003).

248. See *Smith*, 494 U.S. at 886 n.3; see also *Civil Liberties for Urban Believers*, 342 F.3d at 766-67 (refusing to apply heightened scrutiny where the zoning ordinance only incidentally and insubstan-

cluded that, although the zoning ordinance did not single out a particular religious group, it did classify on the basis of religion because the ordinance treated religious groups differently than their similarly situated counterparts.²⁴⁹ As the court observed, the church could stage a theatrical production at the relevant site, even a religious production, but the City would not permit any sort of religious use of the property.²⁵⁰

V. DISCUSSION

People choose to gather and worship in their homes for a multitude of reasons.²⁵¹ Regardless of the reason, the right to worship as one chooses, the choice to associate with whomever one wishes, the choice to speak without governmental restraint, the right to be treated equally regardless of one's particular situation or point of view, and the right to privacy within the comforts of one's home are all liberties protected by the Constitution.²⁵² How zoning regulations affect these liberties is a matter of concern, especially for those against whom "[t]he might, majesty, dominion, and power" of the state has been used "to combat [house meetings], through enforcement of [] zoning restriction[s] . . . in order to stifle the religious activities . . ." ²⁵³ Following *Smith*, there are several arguments that can be made in defense of religiously motivated house gatherings, all of which should increase the level of scrutiny applied by the courts. These arguments include: (1) systems of individualized exemptions within statutory schemes present an ideal situation to apply the *Sherbert* balancing test;²⁵⁴ (2) zoning regulations that classify house gatherings based on the content of the speech and the nature of the meeting often offend free exercise, free speech, and equal protection values because they are not neutral or of general applicability;²⁵⁵ and (3) the Free Exercise Clause cannot be separated from numerous other constitutional guarantees in the religious house-meeting context.²⁵⁶

A. *Systems of Individualized Exemptions Place Many House Churches Within the Sherbert Framework*

Many zoning schemes have a system in place whereby the govern-

tially impinged upon the plaintiffs' free exercise rights).

249. *Vineyard*, 250 F. Supp. 2d at 976-77. In comparing religious uses to other uses such as cultural and membership organizations, the court observed that the only real difference between the classifications was the purpose and content of the assembly. *Id.* (citing *Love Church v. City of Evanston*, 671 F. Supp. 515, 518-19 (N.D. Ill. 1987), *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990)).

250. *Id.* at 976.

251. *See supra* note 26 and accompanying text.

252. *See discussion supra* Part IV.

253. *State v. Cameron*, 498 A.2d 1217, 1226 (N.J. 1985) (Clifford, J., concurring).

254. *See discussion infra* Part V.A.

255. *See discussion infra* Part V.B.

256. *See discussion infra* Part V.C.

ment can issue an exception, permit, or variance to the general zoning restrictions.²⁵⁷ A common theme running throughout those cases in which house churches have come into conflict with zoning regulations is that most of them specifically involved either a failure to obtain a special use permit or a denial of such an exemption.²⁵⁸ Other cases involve governmental decisions regarding what constitutes a “customary and accessory use” of the home.²⁵⁹ Requiring special approval for religious use of a home, as well as the necessary determinations for what constitutes a “customary and accessory use,” raise two distinct issues. The first issue concerns the classifications themselves and whether the classifications violate various constitutional protections either facially or in their enforcement.²⁶⁰ The second issue is whether the government must have a compelling interest to deny requests for special approval for religious use in such a system of individualized exemptions.²⁶¹

Since the *Smith* decision, there has been disagreement as to what constitutes a system of individualized exemptions, with one of the points of disagreement being the extent to which a system of exemptions must evaluate each particular case in order to rise to the level of a system of individualized exemptions. The United States Court of Appeals for the Third Circuit has held that a police department policy of allowing medical exemptions to a “no beard” requirement created a system of individualized exemptions wherein the department’s refusal to allow a religious exemption to the policy failed to pass heightened scrutiny.²⁶² As the court reasoned, the policy underlying *Smith*’s individualized exemptions was a concern that the government would view secular motivations as more important than religious motivations for particular conduct.²⁶³

The United States Court of Appeals for the Tenth Circuit has taken a different approach, defining a system of individualized exemptions as “one that ‘gives rise to the application of a subjective test.’”²⁶⁴ The subjectivity requirement stems from the fact that an individualized assessment must be able to consider and evaluate each case and its

257. See discussion *supra* Part III.B.

258. See discussion *supra* Part III.B.

259. See *Murphy v. Zoning Comm’n of New Milford*, 289 F. Supp. 2d 87, 106-07 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005) (noting that the zoning scheme was permissive, so any use not specifically listed would only be allowed if it was a “customary and accessory use” or upon approval of a special use permit); see also *Colts Run Civic Ass’n v. Colts Neck Twp. Zoning Bd. of Adjustment*, 717 A.2d 456, 461 (N.J. Super. Ct. Law Div. 1998) (considering whether raising and breeding pigeons as a hobby constituted an accessory use).

260. See discussion *infra* Part V.B.

261. See *supra* note 131 and accompanying text.

262. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-67 (3d Cir. 1999) (stating that the individualized exemptions exception to *Smith* extends to categorical exemptions if secular exemptions are granted but religious ones are not).

263. *Id.* at 365.

264. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (quoting *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 701 (10th Cir. 1998)).

unique circumstances.²⁶⁵ Thus, when a statute provides categorical exemptions for groups of objectively defined persons, the level of evaluation each case receives “is qualitatively different from” the evaluation a case receives when all of its particular circumstances can be taken into account.²⁶⁶ In other words, a categorical exemption requires a determination of whether an individual fits the objectively defined class—almost a yes or no determination.²⁶⁷

The Tenth Circuit has also applied its definition of individualized exemptions to land-use regulations, concluding that the mere existence of a process for obtaining special approvals to zoning regulations does not create a system of individualized exemptions.²⁶⁸ The court’s approach, both in the land-use context and generally, has been to determine whether a given law is of general applicability.²⁶⁹ Thus, in a situation where the zoning regulation was generally applicable and no evidence of “a pattern of ad hoc discretionary decisionmaking [sic]” existed, the court determined that the approval procedure did not amount to such an individualized system.²⁷⁰

The Tenth Circuit’s land-use approach raises problems when applied to religious house meetings. Even though a zoning ordinance might contain a list of uses that are allowed by special permit, decisions to grant or deny a permit or determinations of whether a use is customary and accessory are fact-specific inquiries that require a consideration of a host of factors.²⁷¹ The factors involved vary with each zoning scheme, but they typically involve considerations pertaining to the general health and welfare such as noise, traffic, and adjacent property values.²⁷² The fact-specific nature of these inquiries precludes simple yes

265. *Id.* (quoting *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 884 (1990)).

266. *See id.* at 1298 (citing *Swanson*, 135 F.3d at 701; *Hicks v. Halifax County Bd. of Educ.*, 93 F. Supp. 2d 649, 657 n.4 (E.D.N.C. 1999)).

267. *See id.*; *cf. Swanson*, 135 F.3d at 701 (holding that a system of exemptions where only strictly defined persons were entitled to the exemption did not create a system of individualized exemptions because, essentially, the exemption was granted if the individual had a single, qualifying characteristic).

268. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 655 (10th Cir. 2006).

269. *Id.* at 650-55; *Swanson*, 135 F.3d at 701 (reinforcing the determination that categorical exemptions did not create individualized exemptions by noting that there was no evidence of religious categorization or discrimination); *see Mount St. Scholastica, Inc. v. City of Atchison*, 482 F. Supp. 2d 1281, 1293 n.2 (D. Kan. 2007) (“Some courts divide the tests for general applicability and whether there is a system of individualized exemptions. The Tenth Circuit does not follow this approach”).

270. *Grace United*, 451 F.3d at 650-55.

271. *See Konikov v. Orange County*, 410 F.3d 1317, 1323 (11th Cir. 2005) (“The [government] must determine in each case whether a particular use of the land goes beyond occasional, casual gatherings and constitutes an ‘organization’ in violation of the Code.”).

272. *See Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 983-84 (9th Cir. 2006) (listing factors considered in determining whether to grant a group permit to build a church as traffic, property values, effect on surrounding land, and coherent development plan); *Kali Bari Temple v. Bd. of Adjustment of Readington Twp.*, 638 A.2d 839, 841-42 (N.J. Super. Ct. App. Div. 1994) (listing factors considered in denial of use variance as whether use would be beneficial to property in question; effect on surrounding property values; whether use would be consistent with zoning scheme, parking, traffic, fire code, and building capacity; and handicap access).

or no determinations, making them subjective assessments.²⁷³ Thus, the subjective nature of the assessments creates a system of individualized exemptions.²⁷⁴ If, however, a use is never allowed in a zone, the determination would in fact be a yes or no decision, and in such situations, there would be no system of individualized exemptions.²⁷⁵

The Tenth Circuit's blending of the generally applicable and individualized assessment analyses creates another problem. That court has stated that strict scrutiny applies to individualized assessment procedures to ensure that "individuals do not suffer unfair treatment on the basis of religious animus."²⁷⁶ Further, the court has interpreted *Hialeah* to stand for the proposition that laws enacted out of religious animus lend themselves to a system of individualized exemptions.²⁷⁷ In *Hialeah*, however, the Supreme Court first concluded that the city had designed the laws to accomplish a "religious gerrymander," an impermissible attempt to target . . . religious practices."²⁷⁸ The Court reached this conclusion in its determination of whether the laws were neutral, and after making this determination, the Court supported subjecting the laws to strict scrutiny by noting that the laws employed a system of individualized exemptions.²⁷⁹ Only after conducting the neutrality analysis did the Court consider whether the laws were generally applicable.²⁸⁰ Thus, *Hialeah* used the fact that the laws in question required individualized determinations as to the reason behind the prohibited conduct as an *additional* reason to subject the laws to strict scrutiny.²⁸¹

The subjectivity of the permit processes involved in assessing whether a city will allow an individual to hold religious gatherings in his home creates a system of individualized exemptions and may place review of the constitutionality of a law or ordinance within the *Sherbert* framework.²⁸² When such an individualized system of exemptions is in

273. *Murphy v. Zoning Comm'n of New Milford*, 289 F. Supp. 2d 87, 106-07 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005) (noting that the city's determinations regarding acceptable land uses were subjective as to each assessment); *see supra* notes 265-267 and accompanying text.

274. *Konikov*, 410 F.3d at 1323 (considering the approval procedures to be systems of individualized exemptions that served as a jurisdictional source for RLUIPA claims); *Murphy*, 289 F. Supp. 2d at 106-07 ("This case is specifically *about* individualized governmental assessments on exemptions from a general requirement.").

275. *See Grace United*, 451 F.3d at 653-54.

276. *Id.* at 651 (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 884 (1990)).

277. *Id.* at 653 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993)).

278. *Hialeah*, 508 U.S. at 533, 535; *see supra* note 138 and accompanying text.

279. *Hialeah*, 508 U.S. at 533, 536-37 ("[C]areful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished. . . . A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.").

280. *Id.* at 542.

281. *Id.* at 537-38 (finding that the City was using the individualized exemptions to further its religious gerrymander).

282. *See supra* notes 271-275 and accompanying text.

place, a compelling reason is required to deny the special approval to cases of religious hardship.²⁸³ Given the Court's reluctance to determine what constitutes a "central" religious belief or to evaluate the merits of a religious belief, it is unclear what would constitute a case of religious hardship.²⁸⁴ Nevertheless, courts should review zoning regulations that infringe upon free exercise rights under a strict scrutiny approach when a system is already in place whereby the government can make specific determinations regarding one's conduct.²⁸⁵ The review process lessens the likelihood that a person will become a law unto himself.²⁸⁶

B. Lack of Neutrality and General Applicability of Many Zoning Ordinances Necessitates Strict Scrutiny Review

A second argument for subjecting land-use restrictions that impede religious house meetings to heightened scrutiny is the lack of neutrality and general applicability. Many zoning regulations that inhibit the free exercise of house churches are not neutral and of general applicability because they single out religious conduct that occurs within the home, requiring religious gatherings to obtain a permit while other social, home-based gatherings are not subjected to the permit process.²⁸⁷ This selective and differential treatment raises at least three distinct issues. First, zoning laws often classify the type of home gathering based on the content of the participants' speech, thereby implicating free speech issues.²⁸⁸ Second, the classifications themselves implicate equal protection concerns because the ordinances arbitrarily classify different house meetings on constitutionally protected criteria and subject religious meetings to differential treatment.²⁸⁹ Third, targeting one type of house meeting and subjecting it to differential treatment raises free exercise concerns under the *Smith* framework because such ordinances lack neutrality and general applicability.²⁹⁰

1. Regulating House Meetings Based on the Content of Speech

Zoning ordinances typically allow certain activities within areas zoned for residential use as a matter of right while other uses are only allowed by special permit or are altogether prohibited.²⁹¹ Not a single

283. See *supra* note 131 and accompanying text.

284. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886-87 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

285. See *supra* notes 271-275 and accompanying text.

286. See *supra* note 127 and accompanying text.

287. See discussion *supra* Part III.B.

288. See discussion *infra* Part V.B.1.

289. See discussion *infra* Part V.B.2.

290. See discussion *infra* Part V.B.3.

291. See discussion *supra* Part III.B. A common form of zoning scheme in the cases in which house churches have been targeted is a permissive scheme wherein certain uses within a district are

case documents ordinances that completely foreclosed all meetings and gatherings within residential homes, but as the cases demonstrate, zoning ordinances only subject certain types of meetings to special treatment.²⁹² While different zoning ordinances contain different methods of classification, the determination is often based on the nature or content of the meeting itself.²⁹³ As noted above, a regulation based on the content of certain speech is not content-neutral and cannot be considered a valid time, place, and manner restriction.²⁹⁴ Such content-based restrictions foreclose the time, place, and manner analysis and automatically subject a zoning ordinance to heightened scrutiny.²⁹⁵ A regulation is only content-based, however, if the asserted justification for the regulation is content-based.²⁹⁶ Most zoning ordinances that restrict religious gatherings do so based on neutral concerns such as parking, traffic, and harmonious and efficient land use, and consequently, such zoning ordinances are generally content-neutral on their face.²⁹⁷

Many of the courts that have analyzed the intersection of zoning ordinances, religious uses, and free speech issues have done so not in the context of house meetings but in the context of church buildings and other primarily religious uses.²⁹⁸ The courts in these cases have generally found the governmental interests in zoning and regulating land use to be compelling.²⁹⁹ The differing conclusions reached in these cases, however, were based on the narrow tailoring requirement and the fact

allowed as a matter of right, other uses require special approval, and other uses are altogether prohibited. See, e.g., *Konikov v. Orange County*, 410 F.3d 1317, 1320 (11th Cir. 2005) (listing allowed uses and those requiring special approval).

292. For the closest instance to a complete foreclosure of all meetings, see *Cedar Rapids Zen Center, Inc. v. City of Cedar Rapids*, No. C02-115 LRR, 2004 WL 1234133, at *2 (N.D. Iowa Apr. 23, 2004). While the zoning inspector had informed the plaintiff that she could not “invite people to sit with her in her home” without violating the zoning ordinance, the opinion makes clear that the real controversy stemmed from the fact that the city ordinance required a permit to change the use of a home, and the City believed that the use of the home for religious gatherings constituted a change of use that required a building permit. *Id.*

293. See, e.g., *Konikov*, 410 F.3d at 1328 (describing the zoning code as treating meetings with a religious purpose differently than meetings with a social or family-related purpose such as cub scout troop meetings, birthday parties, holiday celebrations, and friends gathering to watch a sporting event). But see *Murphy v. Zoning Comm’n of New Milford*, 289 F. Supp. 2d 87, 96 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005) (noting that the zoning regulations prohibited regularly scheduled gatherings of large, diverse groups, which the zoning commission defined in that instance as groups of twenty-five to forty non-family members).

294. See discussion *supra* Part IV.B.

295. See *supra* note 166 and accompanying text.

296. See *supra* notes 164-165 and accompanying text.

297. See *supra* note 177 and accompanying text; see, e.g., *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 765 (7th Cir. 2003) (“[S]uch regulation is motivated not by any disagreement that Chicago might have with the message conveyed by church speech or assembly, but rather by such legitimate, practical considerations as the promotion of harmonious and efficient land use.”); *Konikov v. Orange County*, 302 F. Supp. 2d 1328, 1353 (M.D. Fla. 2004), *rev’d on other grounds*, 410 F.3d 1317 (11th Cir. 2005) (finding no free speech violation where the city’s stated interests involved “maintaining the residential character of neighborhoods” and “controlling traffic and congestion”).

298. See *supra* notes 177-179 and accompanying text.

299. See *supra* note 178 and accompanying text.

that some zoning codes have been found to be underinclusive.³⁰⁰

While these cases are instructive in analyzing a house meeting, the nature of house meetings magnifies the problems associated with creating narrowly tailored zoning regulations that will not fail an underinclusive challenge.³⁰¹ Typical governmental interests include such concerns as controlling traffic and congestion and maintaining the character of residential neighborhoods.³⁰² A religious house meeting, however, is not much different from a birthday party or a weekly gathering in which the participants play a rousing game of Bridge in that these gatherings pose the same type of threats to a residential neighborhood as do religious meetings. Traffic and congestion are not affected differently just because of the meeting's content. It is hard to determine how a meeting's content alters noise levels, changes property values, or affects the character of a neighborhood. A regulation that places restrictions on religious house meetings without placing similar restrictions on non-religious house gatherings can hardly be considered narrowly tailored.³⁰³

Cities often justify this differential treatment by comparing religious uses to other uses, including occupational and economic uses, day cares, and cultural uses.³⁰⁴ Comparisons such as these miss the point in many cases. While some similarities might exist between such comparisons, a house meeting in which religion is the topic of discussion is much closer to a house meeting in which the World Series is the topic of discussion than it is to operating a retail store from the home.³⁰⁵ For example, in regulating home-based occupations, a city is restricting economic activity.³⁰⁶ Regulating the content of a gathering within the home is much different.³⁰⁷ Home assemblies typically involve people gathering to engage in a specific activity or to discuss certain topics.³⁰⁸ While restrictions on religious house meetings might be content-neutral, they are not narrowly tailored because they restrict more speech than is necessary to accomplish a city's goals and they essentially regulate permissible reasons for people to associate.³⁰⁹ Thus, subjecting religiously motivated meetings to heightened restrictions while other house gatherings

300. See *supra* note 179 and accompanying text.

301. See *supra* notes 105 and 179 and accompanying text.

302. See *supra* notes 272 and 297 and accompanying text.

303. See *supra* text accompanying note 169.

304. See discussion *supra* Part III.B.

305. Cf. *Konikov v. Orange County*, 410 F.3d 1317, 1325-26 (11th Cir. 2005) (analyzing whether religious assemblies are similarly situated to home day cares, model homes, and home occupations for purposes of applying RLUIPA).

306. Cf. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-95 (1926) (concluding that a city has a legitimate interest in segregating business, industrial, and residential uses).

307. See *supra* text accompanying note 253.

308. See *Konikov*, 410 F.3d at 1325 ("An 'assembly' is defined as 'a company of persons collected together in one place and usually for some common purpose.'" (quoting WEBSTER'S NEW INTERNATIONAL UNABRIDGED DICTIONARY 131 (3d ed. 1993))).

309. See discussion *supra* Part IV.B.

are not subjected to such heightened restrictions is an underinclusive method of achieving a city's zoning goals.³¹⁰ Such regulations cannot pass review as valid time, place, and manner restrictions and are therefore violative of free speech rights.

Restrictions based on content will often result in underinclusive regulations regarding house meetings, but there are other ways that a city can achieve its interests in maintaining residential character within a neighborhood. Perhaps a better approach is to restrict the size of permitted house meetings.³¹¹ For instance, restricting permitted gatherings to twenty-five non-family members or less would better serve the interests of regulating traffic and congestion than would a ban on only a single type of gathering.³¹² Another possibility would be to limit the frequency with which a resident could hold meetings of a certain size.³¹³ These types of regulations would be far more successful at achieving a city's zoning goals, and if properly drawn and applied, would be a constitutionally sound method.

2. Classification Based on the Type of Gathering

Restrictions that affect religious house meetings differently than other house gatherings, such as Super Bowl and birthday parties, also pose equal protection concerns.³¹⁴ The equal protection analysis resembles the free speech analysis in that courts look to the content or nature of the meeting itself to determine which meetings are allowed and which are subjected to special requirements.³¹⁵ The real gist of an equal protection analysis in the religious land-use arena is whether religious uses are treated less favorably than similarly situated land uses.³¹⁶ When religious use is a property's principal or sole use, courts have considered religious organizations to be similarly situated to such uses as cultural

310. See *supra* notes 167-169 and accompanying text.

311. For an example of such an approach, see *Murphy v. Zoning Commission of New Milford*, 289 F. Supp. 2d 87, 96 n.5 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005), wherein the city determined that the plaintiffs could not hold meetings of a certain size or frequency.

312. *Contra Murphy*, 289 F. Supp. 2d at 105 (observing that a limit on the number of people at a gathering does little if the people all walk or carpool). Restrictions on the number of vehicles that could park on the street in front of a home would likely prove unworkable in that it would expose a person to liability if *anyone* parked on the street. Cf. *City of Fairfield v. Pepper*, No. CA99-02-032, 1999 WL 699867, at *3 (Ohio Ct. App. Sept. 7, 1999) (concluding that trial court's limit on street parking was vague and improper).

313. To place a limit on the frequency of any and all meetings would likely prove to be both undesirable and unworkable. The most significant problem would be defining what constitutes a meeting. If a neighborhood's residents were only allowed to hold gatherings twice a week and a neighbor stops by after the maximum number of meetings had been held, the resident would be forced to send his neighbor on his way without offering him a refreshing beverage. This is not a desirable outcome for anyone, and the result would be no different if the definition of a gathering included a number such as five non-family members because in such a case, the resident would be forced to send the entire neighbor family on its way after the two meeting maximum had been met.

314. See discussion *supra* Part IV.D.

315. See *supra* note 293.

316. See *supra* notes 236 and 246-250 and accompanying text.

facilities and membership organizations.³¹⁷ Regarding religious house meetings, however, the comparator has often been uses such as day care centers and economic activities.³¹⁸ As is the case in the free speech context, however, the better comparison is with other types of house meetings.³¹⁹

A restriction on religiously motivated house meetings might be based on religion itself, which would be a suspect classification and would subject the zoning ordinance to heightened scrutiny.³²⁰ In most instances, however, a court would only apply a rational basis review “[a]bsent evidence of purposeful discrimination based on religious status.”³²¹ Nonetheless, a city must still have a rational reason for treating religious house gatherings differently from similarly situated uses such as other house gatherings.³²² If the city bases the classification and differential treatment on illegitimate motives unsupported by evidence that such differential treatment does in fact further the city’s interests in regulating land use, the ordinance would not pass rational basis review.³²³

3. Lack of Neutrality and General Applicability

The free exercise requirement enunciated in *Smith* that a regulation be neutral and generally applicable was expounded upon by the Supreme Court in *Hialeah*, where the Court observed that the two terms “are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.”³²⁴ Courts have applied different tests in analyzing these requirements, but seldom have the courts deemed zoning ordinances to be anything other than neutral and generally applicable.³²⁵ Nonetheless, as the free speech and equal protection analyses expose, zoning regulations that regulate house meetings are not often neutral or of general applicability because they regulate gatherings based on the content of the meeting and treat house gatherings motivated by religious purposes differently from meetings motivated by secular purposes.³²⁶ This selective treatment of religious

317. See *supra* note 249.

318. See *supra* notes 304-308 and accompanying text.

319. See *supra* notes 305-308 and accompanying text.

320. See *supra* notes 249-250 and accompanying text.

321. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 n.13 (8th Cir. 1991); see *supra* notes 244-246 and accompanying text.

322. See *supra* note 243 and accompanying text.

323. See *supra* note 243 and accompanying text.

324. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

325. See discussion *supra* Part III. In one situation in which the court did not find a zoning enforcement to be neutral or of general applicability, the appellate court reversed the decision, finding that the controversy was not ripe for adjudication. Compare *Murphy v. Zoning Comm’n of New Milford*, 289 F. Supp. 2d 87, 106-07 (D. Conn. 2003), *rev’d on other grounds*, 402 F.3d 342 (2d Cir. 2005), with *Murphy v. Zoning Comm’n of New Milford*, 402 F.3d 342, 344-45 (2d Cir. 2005).

326. See discussion *supra* Parts V.B.1-2.

house meetings, which often has the effect of suppressing religious speech and exercise, requires strict scrutiny review.³²⁷

C. Hybrid Claims Giving Rise to Strict Scrutiny

A third argument in the context of religious house meetings is the hybrid theory enunciated in *Smith*.³²⁸ There is much disagreement as to the validity of a hybrid rights claim and just how such a claim works.³²⁹ The leading approach requires the second claim to be “colorable,” or in other words, it must have a “fair probability or a likelihood, but not a certitude, of success on the merits.”³³⁰ Regardless of the definition, most courts and commentators have argued that the hybrid rights theory should be narrowly construed or it would swallow the general rule regarding free exercise claims.³³¹

As applied to house churches, however, numerous elements converge, resulting in a strong public policy argument in favor of treating religiously motivated house meetings as a valid hybrid right and subject to strict scrutiny. First, the traditional public policies regarding the sanctity and privacy of the home create both a realistic and desirable incentive to develop a workable hybrid rights claim and an additional layer of traditional constitutional protection that should extend to house churches.³³² Second, the Constitution explicitly recognizes the right to freely exercise one’s religion without governmental interference.³³³ Third, gatherings to discuss a given topic, even controversial ones, implicate the right to association.³³⁴ Fourth, there are multiple, “colorable” claims that can be combined with the free exercise claim when it comes to religious house meetings.

As previously discussed, there are, at a minimum, “colorable”

327. See *supra* notes 123-141 and accompanying text.

328. See *supra* note 132 and accompanying text.

329. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (examining different approaches to a hybrid rights claim); see also *Hialeah*, 508 U.S. at 567 (Souter, J., concurring) (“The distinction *Smith* draws strikes me as ultimately untenable. . . . [I]f a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.”); William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 216 (1998) (“No one seems to understand what constitutes such a claim or where its boundaries should be drawn.”) (footnotes omitted).

330. *Axson-Flynn*, 356 F.3d at 1295-97 (quoting *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999)) (listing other approaches taken by courts, which include requiring the second claim to be non-frivolous or requiring the second claim to be successful).

331. See *id.*; see also Esser IV, *supra* note 329, at 240; Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1068 (2000) (concluding that the litany of potential hybrid claims leads courts to restrict such claims to those enumerated in *Smith*). But see *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that the Free Exercise Clause and Establishment Clause created a hybrid right that served to subject a university policy of hiring male ministers to a compelling interest test).

332. See *supra* note 105.

333. See *supra* note 107.

334. See *supra* notes 180-183 and accompanying text.

claims regarding free speech and equal protection rights when zoning ordinances restrict religiously motivated house meetings.³³⁵ Another “colorable” claim is available in the fundamental liberty aspect of due process.³³⁶ Worship in one’s home with like-minded people is a traditional activity that people have engaged in both throughout history and in recent years.³³⁷ Regardless of the motivating reasons, the concept of worshipping together, celebrating religious holidays together, and seeking fellowship with others of a similar faith is both “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”³³⁸ Moreover, the idea of the government regulating speech and controlling men’s minds within the privacy of their own home “is repulsive to the notions of privacy,”³³⁹ and “[o]ur whole constitutional heritage rebels at [this] thought.”³⁴⁰ The historical tradition of house churches and the concept of ordered liberty surrounding the freedoms of speech, association, and privacy result in the conclusion that worshipping within the confines of the home is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

When coupled with the Free Exercise Clause, this claim presents a situation not unlike that found in *Yoder*.³⁴¹ Much like the Amish in *Yoder*, many people’s entire way of life, including their choice in worship practices, is inseparable from their religious beliefs.³⁴² People choose to attend religious house meetings for a variety of reasons, but many of these are intricately intertwined with their religious beliefs and the tenets of their faith.³⁴³ The Supreme Court, however, has taken a step away from making determinations as to what constitutes a “central” religious belief, so the motivating factors behind choosing to worship in the home become less relevant.³⁴⁴ Nonetheless, *Yoder* remains valid law, and the fundamental liberty interest in worshipping in the privacy of one’s home adds teeth to a person’s choice to engage in religious meetings within the home. Consistent with *Smith*, courts should subject such zoning restrictions impeding this fundamental liberty interest and free exercise right to strict scrutiny.³⁴⁵

335. See discussion *supra* Parts V.B.1-2.

336. See discussion *supra* Part IV.C.

337. See discussion *supra* Part II.A.

338. Cf. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

339. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

340. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

341. See *supra* notes 114-122 and accompanying text.

342. See *supra* note 119 and accompanying text; see also discussion *supra* Part II.A.

343. See *supra* note 26 and accompanying text.

344. See *supra* note 284 and accompanying text.

345. See *supra* note 132 and accompanying text.

VI. CONCLUSION

The Supreme Court's decision in *Smith* severely restricted application of the Free Exercise Clause. House churches and religiously motivated house meetings are a traditional and legitimate form of religious exercise. In recent years, however, such meetings have often come into conflict with zoning ordinances enacted pursuant to the police power. The nature of the zoning process whereby individual uses can be exempted from the general requirements often leads to a system of individualized exemptions, as contemplated in *Smith*, warranting strict scrutiny review. The methods by which these ordinances single out religiously motivated conduct and treat it differently than other types of house meetings raise serious free speech and equal protection concerns. Moreover, the tradition of house churches and the notion of governmental interference with worshipers in the privacy of the home necessitate a finding that the choice to gather for religiously motivated reasons in the comforts and privacy of one's own home is a constitutionally protected fundamental liberty. Many of these arguments can be freestanding claims. When combined with the Free Exercise Clause, however, these claims take on an added dimension, as was the case in *Yoder*. These combinations create situations in which courts should subject free exercise claims to strict scrutiny review, and the traditional notions of sanctity and privacy surrounding the home only strengthen this conclusion. Ultimately, the Constitution offers protection to religious house meetings, and courts should subject zoning laws that impede upon such gatherings to strict scrutiny review.