WHERE TO PRAY? RELIGIOUS ZONING AND THE FIRST AMENDMENT

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INTRODUCTION

Zoning regulations have historically enjoyed a strong presumption of validity, and courts have applied the deferential "mere rationality" standard of review to assess their constitutionality.1 In recent years, however, the Supreme Court has stated in several contexts that this usual deference to local zoning decisions does not prevail when fundamental interests are implicated.2 The most notable example is in the area of free speech, where the Court has applied an intermediate standard of scrutiny in reviewing zoning ordinances.3 Lower courts have responded in a significant number of cases to this mandate, primarily when reviewing restrictions on adult entertainment and billboards, the two principal areas affected.4

Despite this emerging recognition that the normal rules do not apply when zoning affects first amendment activities, the Supreme Court has not yet definitively addressed zoning restrictions that affect the exercise of religion.5 As with other land uses, churches have

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2. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 498-99 (1977) (plurality opinion) (zoning ordinance which prohibited grandmother from living with grandson "slic[ed] deeply into the family" and was therefore subject to greater judicial scrutiny).


5. The Supreme Court has dismissed, for lack of a substantial federal question, appeals from decisions of several state court cases which upheld the validity of particular zoning
long been made subject to a variety of zoning restrictions. Despite various constitutional issues that arise in this setting, until recently, church zoning decisions have been the exclusive realm of the state courts. Most states, although recognizing the legitimacy of some zoning controls on churches, have traditionally restricted a municipality's ability to regulate church location. Surprisingly, these restrictions usually have been based on substantive due process and not first amendment grounds.

As both the goals of land use planning and the nature of churches have changed, municipal tolerance for, and judicial protection of, religious land uses has waned. In the last several decades there has been a significant and increased move toward developing residential neighborhoods and even entire residential communities. In many ways the low density residential use has emerged as the pinnacle of land use planning. The Supreme Court itself has recognized the substantial interests of municipalities in creating residential enclaves and preserving them from the intrusions accompanying more intense land uses.

restrictions as applied to churches. See Minney v. City of Azusa, 164 Cal. App. 2d 12, 330 P.2d 255 (1958), appeal dismissed, 359 U.S. 436 (1959); Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, appeal dismissed, 338 U.S. 805 (1949), reh'g denied, 338 U.S. 939 (1950); Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 610 P.2d 273 (1980), appeal dismissed, 450 U.S. 902 (1981). The Supreme Court has noted that its dismissal of an appeal for lack of a substantial federal question is a decision on the merits and therefore binding precedent as to "the precise issues presented and necessarily decided by those actions." Metromedia, Inc., 453 U.S. at 499. At the same time, however, the Court has noted that such summary actions do not have as much precedential authority as decisions rendered after plenary consideration, are very limited in scope, and are not binding to the extent that more recent developments in Supreme Court doctrine might change the outcome of the case. See id. at 500.

The Supreme Court in dictum has also noted that churches can be made subject to the zoning power. See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (building and zoning regulations are necessary and permissible forms of government regulation of churches). This general recognition that churches may be subject to zoning restrictions, however, does not address the potential limits of such regulations.

6. Churches can be made subject to the various zoning controls typically applied to land uses. Generally, these are locational controls on where churches can locate, site development controls such as setback, sideyard, and bulk restrictions, and restrictions regarding what are considered permissible accessory uses. See generally 3A N. Williams, supra note 1, §§ 77.01, 77.18-19 (rev. ed. 1985).


8. See D. Mandelker, LAND USE LAW § 1.3 (1982).

Concurrent with the growing municipal desire to establish and preserve residential communities has been the emergence of the modern church as a multi-purpose facility that serves a variety of functions. Churches no longer meet only for worship on a limited basis or serve only those in the immediate vicinity. The increased mobility of our society has changed the membership composition of churches, and people frequently travel great distances to attend a particular church. More significantly, churches today often engage in a variety of activities throughout the week that range from traditional functions, such as worship and study, to various social and educational ministries. As a result, churches are more intense land users than their predecessors and are viewed with growing frequency as incompatible with residential surroundings.

Sensitive to these changes, courts are beginning to respond more favorably to church zoning restrictions, especially those which exclude churches from residential neighborhoods. In particular, lower federal courts that have begun to address church zoning issues have adopted an approach which allows substantial restrictions on church land uses. In so doing, these federal decisions have shown varying sensitivity to the first amendment concerns implicit in regulating religious exercise. In perhaps, the leading and most controversial federal church zoning decision, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, the Sixth Circuit Court of Appeals applied a "mere rationality" standard of review and upheld a zoning ordinance that excluded churches from ninety percent of a residential community.

The changing judicial attitude toward church zoning is accompanied by the emergence of several new issues in the religious land

10. See 2 A. RATHKOPF, supra note 7, § 20.01.

11. See Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 367 (1984); see also 2 A. RATHKOPF, supra note 7, § 20.01; 3A N. WILLIAMS, supra note 1, § 77.01.


use zoning context. The central concern surrounding church zoning has been and still remains locational restrictions on conventional church buildings, both in terms of blanket exclusions from residential neighborhoods and special-use permit requirements. As suggested by Lakewood, however, a related issue of growing significance, due to the emergence of communities that are exclusively residential, is to what extent churches may be limited within a municipality. This concern is particularly significant in suburban areas where entire towns might be dedicated to residential use.

A second emerging issue in church zoning concerns the types of secondary activities that can be conducted on church premises. Of particular importance in the last several years is whether a church may operate a private religious school or day care center on its property. In the last decade there has been tremendous growth in the number of private religious schools in the United States. This growth is primarily attributable to a growing dissatisfaction by conservative religious groups with public education. Due to financial restraints, most of these new religious schools are housed in churches, and yet are often regulated by separate zoning and building codes. A result has been a burgeoning area of case law in the last several years, with inevitably much more to follow.

A third emerging issue is the extent to which church zoning ordinances can be used to limit religious assembly in private homes. Several recent appellate decisions have addressed the issue with regard to formal religious services held in private homes. Further,


religious organizations have reported numerous attempts by municipalities to apply zoning ordinances to prohibit more informal religious gatherings such as home Bible studies or prayer groups. These incidents, although not yet generating any case law, suggest the need for a clear understanding of a municipality’s ability to regulate religious activities in private homes.

This article will attempt a comprehensive review and analysis of the church zoning issues outlined above. The general thesis of this article is that, although churches can be made subject to zoning ordinances and other forms of land use controls, Supreme Court precedent indicates that the Constitution requires application of the intermediate level of review to ordinances regulating churches, rather than the “mere rationality” standard normally applied to zoning ordinances. This intermediate level of review was recently applied by the Court in cases involving zoning of protected speech. It was developed with regard to time, place and manner restrictions on expressive activity and focuses on content-neutrality, precision of regulation, and available alternatives for exercise of the restricted right. As applied, this intermediate level of review suggests that the traditional position in the majority of states that zoning ordinances cannot exclude churches from residential areas is unwarranted. At the same time, the “mere rationality” approach of Lakewood fails to provide sufficient scrutiny of zoning restrictions on churches.

The article will first discuss principles and judicial attitudes toward church zoning. Part two will discuss first amendment considerations in church zoning, examining the scope of free exercise protection, time, place, and manner restrictions, and zoning restrictions on first amendment conduct. Part three of the article will then apply that analysis to locational restrictions on churches, examining both blanket exclusions from residential districts and the regulation of church location through special use permits. Part four will examine the permissible scope of accessory activities a church can conduct on its property, with special attention to the question of church schools. Finally, part five will discuss the regulation of religious activities in the home.

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18. The Center for Law and Religious Freedom has reported over one hundred such incidents over the last several years. See Center for Law and Religious Freedom, 12 BRIEFLY 3 (1983); see also Comment, Zoning Ordinances, Private Religious Conduct, and the Free Exercise of Religion, 76 NW. U.L. REV. 786 (1981) (listing five such incidents).
I. ZONING CHURCHES

A. Zoning in General

Zoning is a relatively recent phenomenon. Often viewed as an outgrowth of the law of nuisance, it developed in the early part of this century as a more elaborate means of regulating land and insuring compatibility of uses.\textsuperscript{19} Whereas nuisance doctrine assesses compatibility on a case-by-case basis, zoning is premised on a speculative classification system that separates land uses based on generalizations made regarding those uses. Zoning ordinances typically divide a municipality into various districts. Ordinarily, the primary classifications separate residential, commercial, and industrial uses. These general classifications are then further divided into a number of gradations, with low density residential zones as the highest or most important use.\textsuperscript{20} Besides segregating categories of land uses, zoning further regulates the individual use of land within each district through density and site development controls, such as setback, sideyard, bulk, area, and height requirements.\textsuperscript{21}

By its very nature, therefore, zoning tolerates imprecision. That is, it does not regulate land based on the actual external effects generated by a particular use, but upon generalizations about the anticipated impact of that type of use. This inevitably results in some imprecision, since a particular use might be more or less compatible with its surroundings than is normal for that category of use. For example, the effects generated by a small commercial enterprise might actually be less than those accompanying a large single family dwelling, yet zoning ordinances typically will exclude commercial uses from residential districts. The administrative advantages of using a speculative classification system are deemed to outweigh the resulting imprecision.

Although controversial at first, the constitutionality of zoning was established in 1926 in the seminal decision of \textit{Village of Euclid v. Ambler Realty Co.},\textsuperscript{22} Euclid involved a challenge to a comprehensive zoning ordinance in its totality, alleging that the restrictions imposed on the claimant’s land violated substantive due process. The Court viewed zoning as a form of economic and social legislation and stated that a zoning ordinance would be unconstitutional only if it was “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”\textsuperscript{23}

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\item[19.] See D. Mandelker, supra note 8, § 1.3.
\item[20.] Id. § 5.1.
\item[21.] Id.
\item[22.] 272 U.S. 365 (1926).
\item[23.] Id. at 395.
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The Court found that the various segregation of uses at issue in *Euclid*, such as low density residential homes from apartments, was a reasonable means of serving legitimate state interests, such as noise and traffic reduction, and, therefore, it upheld the ordinance. Although the Court recognized that the ordinance was overinclusive because some harmless activities would necessarily be restricted, it stated that a reasonable margin of error was necessary for effective enforcement and would not render the legislation invalid.

The Court recently affirmed this deferential approach to zoning established in *Euclid* in *Village of Belle Terre v. Boraas*. In *Belle Terre*, the Court reviewed an ordinance that prohibited more than two unrelated adults from living in the same household. After noting that the ordinance did not implicate any fundamental liberties, the Court applied a mere rationality standard of review, stating that a zoning restriction will be upheld as long as it "bears a rational relationship to a [permissible] state objective." Significantly, the Court recognized the preservation of quiet residential neighborhoods as an important value served by zoning restrictions, stating:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . 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.

Shortly after *Belle Terre*, however, the Court established, in a series of decisions, that the normal deference afforded zoning legislation does not apply when fundamental rights are implicated. On facts similar to *Belle Terre*, the Court, in *Moore v. City of East Cleveland*, invalidated a zoning ordinance which restricted living ar-

24. *Id.* at 394-95.
25. *Id.* at 388-89.
27. *Id.* at 8 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).
28. *Id.* at 9. The Court most recently applied the mere rationality standard to invalidate a zoning ordinance in *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985), suggesting that the standard is not completely deferential. In *Cleburne*, the Court held that an ordinance which required a special use permit for a group home for the mentally handicapped but not for boarding houses, homes for the aged, or fraternities was not rationally related to a legitimate government interest and thus invalid. The Court declined to apply heightened scrutiny, stating that the mentally handicapped do not qualify as a suspect or quasi-suspect class. *Id.* at 3258. The Court proceeded to find, however, that the restriction failed even minimal scrutiny, stating that there was no legitimate distinction between the Cleburne Living Center and permitted uses involving group living situations. The Court concluded that the special permit restriction on the mentally handicapped was based on irrational prejudice rather than legitimate government interests. *Id.* at 3259-60.
rangements to a narrowly defined class of relatives and thereby prohibited a woman from living with her grandson. Justice Powell's plurality opinion characterized the ordinance as one "slicing deeply into the family itself," thus requiring greater scrutiny than normally applied to zoning legislation. The fundamental nature of the right to familial relationships required that the Court "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." Applying this "greater scrutiny," the plurality found the ordinance invalid because it only marginally served the city's purported interests in preventing overcrowding, minimizing parking and traffic congestion, and avoiding undue financial burdens on the city.

More importantly for issues of church zoning, the Court has recently examined zoning ordinances that affect first amendment activities. The Court, in a series of opinions, has stated that, although zoning restrictions can regulate land uses involving the first amendment, a higher standard of scrutiny applies in such situations. These decisions will be examined in part two of this article.

B. Judicial Attitudes Toward Church Zoning

Municipalities inevitably address churches, like other land users, in comprehensive zoning schemes. Although municipalities can make churches subject to a variety of zoning regulations, restrictions on their location are the most basic method and have generated the most caselaw. The two primary issues concerning locational

30. East Cleveland's zoning ordinance limited occupancy of dwelling units to members of a single family. It narrowly defined family, however, to include only a few categories of related individuals. Mrs. Moore lived with her son and two grandsons, who were cousins rather than brothers. The ordinance did not define family to include cousins, and thus Mrs. Moore's living arrangement violated the ordinance. Id. at 495-96.
31. Id. at 498.
32. Id. at 499.
33. Id. at 500. Justice Stevens' concurring opinion was necessary to form a majority in Moore. Justice Stevens applied the mere rationality standard but found the ordinance invalid, stating that the ordinance had not been shown to further the public welfare. Despite couching his analysis in mere rationality language, Justice Stevens applied a sliding scale approach, since a factor in finding the ordinance unconstitutional was that it "cuts so deeply into a fundamental right normally associated with the ownership of residential property." Id. at 520. 34. See City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925 (1986); Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).
35. In addition to location restrictions, churches can be made subject to site development restrictions, such as setback and sideyard requirements, and restrictions on accessory uses. See 3A N. Williams, supra note 1, §§ 77.-19 (rev. ed. 1985).
restrictions on churches are whether churches can be excluded altogether from residential neighborhoods, and the manner in which the special-use permit process can be used to regulate church location.

Although the need for churches and the services they provide might at times favor their inclusion in residential neighborhoods, a number of undesirable byproducts of churches may justify their exclusion. Most significant among these negative byproducts is the increased traffic and its accompanying safety and parking problems. A second significant concern is the noise generated by church activities. Finally, churches in residential districts frequently have negative fiscal effects on neighborhoods, both because of the reduced property values of land immediately surrounding churches and the decreased tax base caused by the property tax exemption given to churches.

Municipalities have responded to these concerns in several ways. Some critics, perceiving that the benefits from churches outweigh their harms, allow churches as of right in residential districts. Policy makers in these cities believe that the negative effects of churches in such situations are sufficiently controlled by site development requirements, such as sideyard and setback restrictions and parking requirements. More often, however, municipalities provide for locational restrictions on churches in one of two ways. First, municipalities frequently exclude churches from low density residential neighborhoods, locating them instead in higher-density residential districts or in commercial zones. A second approach allows churches to locate in residential neighborhoods subject to special-use permits. This approach requires that a church first meet certain criteria, usually designed in part to ensure that the church is compatible with surrounding property uses, before it is allowed to locate in a residential zone.

State courts have responded to these locational restrictions in several ways. The "majority position" is that a blanket exclusion of churches from a residential district is invalid. Although as many as

36. In assessing a proper zoning classification for a church, a municipality might consider a number of factors, including the needs of churches, the services they provide for a particular community, and their perceived compatibility with surrounding land. See generally id. § 77.01.

37. Id. See generally J. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND 71-134 (1964).

38. See 2 A. RATHKOPF, supra note 7, § 20.01[1].

39. See generally 3A N. WILLIAMS, supra note 1, § 77.02 (rev. ed. 1985).

40. See 2 A. RATHKOPF, supra note 7, § 20.01[4].

41. See 2 R. ANDERSON, AMERICAN LAW OF ZONING § 12.22 (3d ed. 1986); 8 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.131 (3d ed. 1983); 2 A. RATHKOPF, supra note 7, § 20.01[2][a]; 3A N. WILLIAMS, supra note 1, § 77.02 (rev. ed. 1985).
eleven states might be placed in this category, commentators have noted that many of these court decisions can be explained on other grounds and that some of the decisions purported to follow the "majority position" only discussed the question in dictum. Indeed, many majority decisions do not necessarily reflect the absolutism regarding churches' immunity from residential restrictions often attributed to them.

Nevertheless, a substantial majority of state courts that have discussed the exclusion issue in some fashion have either directly held, or employed reasoning to the effect, that any complete exclusion of churches from residential districts is invalid. The primary rationale for invalidating such exclusions has not stemmed from concern with freedom of religion, but rather from a due process analysis which concludes that such exclusions are arbitrary and capricious and fail to promote the public health, safety, morals or welfare. In so holding, courts have reasoned that churches, by their very nature, are "clearly in furtherance of the public morals and general welfare," often emphasizing the moral guidance they provide to communities. Despite this frequent emphasis on substantive due process analysis, a close reading of these decisions suggests that


44. See, e.g., Ellsworth v. Gercke, 62 Ariz. 198, 156 P.2d 242 (1945) (invalidating ordinance which excluded churches but allowed other types of public land uses such as hospitals and schools); Congregation Temple Israel v. City of Creve Coeur, 320 S.W.2d 451 (Mo. 1959) (interpreting state enabling statute as prohibiting exclusion of churches).

45. See cases cited supra note 2.

46. See, e.g., Apostolic Christian Church, 146 Colo. at 380, 362 P.2d at 175; Simms, 143 Tex. at 119-20, 183 S.W.2d at 417. See generally 2 A. RATHKOPF, supra note 7, § 20.01[2][a].

religious freedom has also been involved in the courts’ reasoning and has occasionally been articulated as a primary reason for invalidating locational restrictions.

The degree of protection afforded churches under the majority position varies considerably, however. Although most jurisdictions prohibit the complete exclusion of churches, they do allow reasonable site development regulations, such as setback and sideyard restrictions, that are designed to alleviate the adverse effects of churches. Further, most majority states allow municipalities to subject churches to special-use permit requirements. These states closely scrutinize permit denials, however, to ensure that the denial was necessitated by the facts of the case.

In contrast to the majority view, the “minority position” provides that municipalities can completely exclude churches from residential districts without violating either their right to substantive due pro-

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48. Commentators have frequently stated that the prohibition against church exclusions is based on substantive due process and not freedom of religion concerns. See, e.g., 2 A. RATHKOPF, supra note 7, § 20.01. Although this has certainly been the primary emphasis in most cases, and in particular earlier decisions, courts have also expressed concern about the burden on freedom of religion. See, e.g., Rogers v. Mayor of Atlanta, 110 Ga. App. 114, 116, 137 S.E.2d 668, 671 (1964); State v. Maxwell, 62 Haw. 556, 561-62, 617 P.2d 816, 820 (1980); Congregation Temple Israel, 320 S.W.2d at 455; Simms, 143 Tex. at 119-20, 183 S.W.2d at 416-17.


50. The most extreme majority state position is that taken by New York courts, which have long closely scrutinized any zoning restrictions on churches. New York decisions have not only rejected church exclusions from residential districts, see, e.g., Diocese of Rochester, 1 N.Y.2d at 525-26, 136 N.E.2d at 834, 154 N.Y.S.2d at 861-62, but have also scrutinized even such basic zoning requirements as setback requirements. See Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor, 38 N.Y.2d 283, 342 N.E.2d 534, 379 N.Y.S.2d 747 (1975). For a view that New York's extreme protectionist approach violates the establishment clause, see Reynolds, supra note 43, at 790-95.


53. This is most clearly seen with regard to permit denials based on traffic concerns. Although at times upholding such denials, courts have frequently struck down special-use
cess or freedom of religion. As with the majority position, the states following the minority position defy rigid categorization, with some decisions applying a balancing test which gives some consideration to burdens on religious freedom. Broadly speaking, however, these decisions represent the view that the secondary effects generated by churches, such as noise, parking, and traffic concerns, justify their exclusion from residential districts. This deferential standard has even been applied to permit exclusion of churches from low density residential neighborhoods when other uses such as parks, libraries, and museums have been allowed.

As noted above, federal courts have only recently begun to address religious land use zoning. In doing so, they have consistently followed the minority approach and have held that churches can be made subject to reasonable zoning restrictions, including exclusion from residential neighborhoods. The leading federal case is *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood.* In this case, the Sixth Circuit Court of Appeals

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54. See 2 A. Rathkopf, *supra* note 7, § 20.01; 3A N. Williams, *supra* note 1, § 77.03.

55. The minority position is most frequently associated with California, which first established that churches could be excluded from residential neighborhoods in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville,* 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed,* 338 U.S. 805 (1949), *reh’g denied,* 338 U.S. 939 (1950). The minority position has also been adopted in Florida, see *Miami Beach United Lutheran Church v. City of Miami,* 82 So. 2d 880 (Fla. 1955); New Jersey, see *State v. Cameron,* 189 N.J. Super. 404, 460 A.2d 191 (App. Div. 1983), *rev’d on other grounds,* 100 N.J. 586, 498 A.2d 1217 (1985); Oregon, see *Milwaukie Co. of Jehovah’s Witnesses v. Mullen,* 241 Or. 281, 330 P.2d 5 (1958), cert. denied, 359 U.S. 436 (1959); and possibly Wisconsin, see *State ex rel. Lake Drive Baptist Church v. Village Bd. of Trustees,* 12 Wis. 2d 585, 108 N.W.2d 288, 299 (1961) (stating that ordinance which excludes churches from residential districts must pass balancing test, implying that the ordinance is not per se invalid). Although not necessarily adopting the minority position, language or reasoning in opinions from several other states suggests sympathy with the minority position. See *West Hartford Methodist Church v. Zoning Bd. of Appeals,* 143 Conn. 263, 121 A.2d 640 (1956); *Columbus Park Congregation of Jehovah’s Witnesses v. Board of Appeals,* 25 Ill. 2d 65, 182 N.E.2d 722 (1962); *Mooney v. Village of Orchard Beach,* 333 Mich. 389, 53 N.W.2d 308 (1952).


58. See *supra* note 12.

upheld a zoning ordinance that excluded churches from ninety percent of a municipality and required issuance of a special-use permit in the remaining ten percent. The court employed a two-part analysis to resolve the case. It first examined whether the restriction violated the free exercise right of the congregation and held that since the ordinance only regulated church location, an essentially secular consideration, there was no violation. It then proceeded to test the restriction under the mere rationality standard and concluded that the ordinance was valid since it furthered a legitimate state interest of insulating residential neighborhoods from the traffic, parking, and noise accompanying churches.

The emerging federal case law, along with the minority state position, reflects a clear rejection of the majority due process analysis, which insulates churches from zoning restrictions because of their perceived benefits to society. This rejection is well-warranted. The majority's due process analysis is problematic in several regards. First, to the extent that it relies on the normally deferential arbitrary and capricious standard to strike down church exclusion from residential neighborhoods, it ignores several legitimate state interests sufficient to support zoning, most notably the traffic, noise, and parking problems generated by churches. The Supreme Court in Belle Terre recognized the important interest municipalities have in preserving the "quiet seclusion" of residential neighborhoods; church exclusion from residential neighborhoods is rationally related to that interest.

A second and more fundamental problem with the majority due process approach is that it is an implicit balancing of interests that necessarily involves judicial perceptions of the benefits derived from churches. Although the consideration of a particular use's benefits to a community can and should be relevant in a city's initial zoning determination, judicial review of zoning restrictions typically focuses on the adverse, external effects of excluded uses rather than the benefits derived from such uses. This is because substantive due process only requires that the legislation be related to some legitimate governmental objective, not that it be the best course of

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60. Id. at 306-08.
61. Id. at 308.
63. See, e.g., id., where the Supreme Court justified a prohibition on more than two unrelated adults living in the same household by examining the negative, external effects to be avoided by such a regulation. The Court saw this in the greater traffic and noise generated by multiple living arrangements. Id. at 9. See Reynolds, supra note 43, at 782-83 n.89. n.89.
action. Therefore, if the external effects generated by a particular use justify its restriction, that is enough to meet the minimal scrutiny applied regardless of the perceived benefits of the regulated activity.

The emerging federal case law, together with the minority state position, is correct in rejecting substantive due process as a basis for insulating churches from zoning restrictions. To the extent that special consideration should be given to churches when reviewing zoning restrictions, it should be premised on free exercise concerns. The exact extent to which the first amendment insulates churches from zoning restrictions, however, is unclear. Although some courts have been willing to balance religious concerns against zoning values in reaching decisions, other courts have assumed that the only alternative to substantive due process was mere rationality. Lakewood is particularly troublesome because the court applied only the deferential due process standard of review in examining an ordinance which came close to totally excluding churches from a municipality.

This failure to recognize the requirements of the free exercise clause might be attributable, in part, to the Supreme Court's rather limited, and at times confusing, treatment of the clause. The Court has made clear in other contexts, however, that when zoning ordinances implicate fundamental liberties, such as free speech, the normal deference afforded zoning does not apply. This same analysis should apply when zoning restricts religious exercise. As the next section will demonstrate, this rejection of the mere rationality standard does not preclude locational restrictions on churches, but does require that greater scrutiny be applied than is normal.

The next section of the article will examine the correct standard to be applied in analyzing zoning restrictions on churches. It will first examine the free exercise clause and its application to church zoning. It will then discuss the Court’s treatment of time, place, and manner restrictions, specifically examining its application in the zoning context.

II. FIRST AMENDMENT FRAMEWORK

A. Free Exercise Clause

Recent commentary has also argued in favor of its use to prohibit the blanket exclusions of churches from residential areas. Yet, courts have demonstrated significant difficulty in relating free exercise jurisprudence to church zoning restrictions.

This difficulty results, in part, from the limited factual context in which free exercise analysis has developed. Current free exercise analysis provides for strict scrutiny when a state action substantially burdens a belief "rooted in religion." The substantial burden requirement, however, has been construed in only two contexts: where a direct governmental action prohibits religious conduct, and where the receipt of important government benefits is conditioned on foregoing a religious belief. Because of the narrow factual context in which claims have been addressed, the Court has not clearly articulated the nature of the burden that will give rise to a free exercise infringement.

Prior to 1963, the Supreme Court gave little independent substance to the free exercise clause as a source of protection for religious freedom. Although the Court had frequently protected religious exercise, that protection was usually grounded in other constitutional guarantees, most notably the right to free speech. In Sherbert v. Verner, however, the Court for the first time gave an expanded reading to the protections provided by the free exercise clause. In Sherbert, the Court reviewed a South Carolina statute that denied unemployment benefits to a Seventh Day Adventist because she refused to work on Saturday due to her religious beliefs.

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67. See Comment, supra note 14, at 1143-49; Note, Justice Douglas' Sanctuary, supra note 14, at 1034-35.
70. Perhaps the leading decision of this era was Braunfeld v. Brown, 366 U.S. 599 (1961), in which the Court rejected the claim that Sunday closing laws violated the free exercise rights of Orthodox Jews whose religious beliefs required them also to close on Saturdays. Justice Warren's plurality opinion acknowledged that the law potentially had a substantial adverse economic effect on Jewish merchants, but viewed the burden as only indirect, emphasizing that the legislation only made the exercise of religion more expensive but did not prohibit it. Id. at 605-06. Although Braunfeld is difficult to reconcile with subsequent free exercise cases, the Court has never overruled it, suggesting that financial burdens in and of themselves do not necessarily infringe free exercise rights. See infra note 90.
71. For a discussion of the manner in which the free speech clause has been used to protect religious exercise, see infra text accompanying notes 94-107.
73. Id. at 400-02.
finding the denial of benefits unconstitutional, the Court revealed a two step analysis for resolving free exercise questions. First, a court must determine whether the government is in fact infringing upon free exercise rights of the claimant. Second, if such rights are in fact infringed upon, the state must justify the infringement by a compelling interest in the least restrictive means possible.

In finding that the denial of benefits in *Sherbert* did in fact infringe upon the claimant’s free exercise rights, the Court focused on the coercive effect this denial placed on the claimant to abandon a cardinal tenet of her religion. Although the Court noted that there were no criminal sanctions directly compelling the claimant to forego the religion, suggesting that she, in effect, was being penalized for her ween following her religious beliefs and obtaining government benefits. Importantly, the Court emphasized that the claimant’s ineligibility for benefits derived “solely from the practice of her religion,” suggesting that she, in effect, was being penalized for her religious beliefs. This forced choice placed the same kind of burden on her beliefs as a direct prohibition and, therefore, upon the claimant’s free exercise rights. The state failed to establish a compelling interest sufficient to justify this infringement since the state’s interest could still be met by creating an exemption for Sabbatarians.

The principles enunciated in *Sherbert* were further refined in *Wisconsin v. Yoder* and *Thomas v. Review Board*. In these cases, the Court again stated that a free exercise violation was contingent on state action that substantially burdened a belief rooted in religion. In *Yoder*, the Court found such an infringement in Wisconsin’s compulsory education law, which contravened the Amish religion’s belief against high school education. The Court noted that the law substantially burdened the Amish’s belief by forcing them to abandon it or move elsewhere. The Court applied a similar analysis in *Thomas*, where it held that the denial of unemployment benefits to a Jehovah’s Witness, who quit his job...
because of religious convictions, violated his free exercise rights.\textsuperscript{84} The Court in finding a free exercise infringement, again emphasized the law's coercive effect upon the claimant's religious beliefs and\textsuperscript{85} stated:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs, a burden upon religion exists.\textsuperscript{86}

The \textit{Sherbert} line of cases demonstrates the narrow factual setting in which free exercise infringements have been found.\textsuperscript{87} Strict judicial scrutiny in each case was required because of the state's coercion of the abandonment of a mandated religious belief or practice. In \textit{Yoder}, the coercion was by direct prohibition of the practice, while in \textit{Sherbert} and \textit{Thomas}, the state indirectly coerced abandonment by conditioning receipt of important governmental benefits upon actions contrary to the claimants' religion. In both settings, however, the Court stressed the substantial pressure on the adherent to abandon or modify religious beliefs.

The coercion necessary to trigger strict scrutiny is obvious in the case of a direct prohibition; the claimant is forced to choose between religious beliefs and obeying the law. The coercion inherent in conditioning receipt of governmental benefits is not as readily apparent since it effectively amounts to a financial burden, which the Court prior to \textit{Sherbert} had recognized as in itself not sufficient to trigger

\textsuperscript{84} 450 U.S. at 714-15.

\textsuperscript{85} The Court in \textit{Thomas} apparently expanded free exercise protection to cover not only core tenets of established religions but any sincerely held religious belief. \textit{Id.} at 714-15. In both \textit{Sherbert} and \textit{Yoder}, the Court stressed the central role the burdened belief played in the adherent's religion. \textit{See}, e.g., \textit{Sherbert v. Verner}, 374 U.S. 398, 406 (1963) ("cardinal principle"); \textit{Yoder}, 406 U.S. at 218 ("basic religious tenets and practice of the Amish faith"). The emphasis on centrality in those decisions, however, was made in the context of establishing sincerity and thus is not necessarily inconsistent with the more expansive language in \textit{Thomas}.

\textsuperscript{86} \textit{Thomas}, 450 U.S. at 717-18.

\textsuperscript{87} The Supreme Court's free exercise analysis as articulated in \textit{Sherbert}, \textit{Yoder}, and \textit{Thomas} is best viewed as a two-tiered form of definitional balancing, since a threshold showing of coercive effect upon a mandated belief is necessary to trigger strict judicial scrutiny. This strict scrutiny, however, appears to contain an element of balancing once an infringement is established, since the state's interest in not granting an exemption is weighed against the burden on religion. \textit{See}, e.g., \textit{Yoder}, 406 U.S. at 221. Language in \textit{Yoder} and the court's later decision in \textit{United States v. Lee}, 455 U.S. 252 (1982), however, suggests an even more open balancing approach in which burdens on religion would be weighed against the state's interest. \textit{See Yoder}, 406 U.S. at 214 ("a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First
strict scrutiny. Arguably, though, conditioning benefits penalizes the religious adherent for his or her beliefs, since it is the religious belief which uniquely disqualifies the adherent from the benefit. As such, it substantially coerces abandonment of the belief and encourages conformance to societal norms. This should be contrasted to the inevitable costs attendant to broad regulatory programs, in which case the costs are not uniquely attributable to religious doctrine and thus do not coerce abandonment of beliefs.

This analysis suggests that zoning restrictions that exclude churches from residential districts or subject them to the special-use permit process do not infringe upon free exercise rights as developed in Sherbert, Yoder, and Thomas. Under those cases, state action must be assessed in terms of the coercive effect it has upon a mandated religious belief. Although locating a church on a particular site might be viewed as a religiously motivated decision, rarely will church location be mandated. Rather, it involves a secular choice regarding how to pursue the central belief of religious worship and assembly. Religious worship, of course, might be burdened by locational restrictions in several significant ways: by the increased financial costs in obtaining alternative sites, the inconvenience to religious adherents because of less accessible churches, and because of less conducive surroundings. Yet, none of these burdens necessarily coerce abandonment of religious worship itself. Religious adherents still have the op-

88. In its earlier decision in Braunfeld v. Brown, 366 U.S. 599 (1961), both the plurality and concurring opinions stated that financial burdens in and of themselves do not necessarily constitute a free exercise infringement. See id. at 605-06 (plurality opinion); McGowan v. Maryland, 366 U.S. 420, 521-22 (1961) (Frankfurter, J., concurring also applying to Braunfeld). The Court emphasized in Sherbert that it was not overruling Braunfeld. Sherbert, 374 U.S. at 408-09.

89. In both Sherbert and Thomas the Court emphasized that the religious claimant’s “ineligibility for benefits derive[d] solely from the practice of her religion.” 374 U.S. at 404; 450 U.S. at 717.

90. Implicit in holding that religious conduct is subject to reasonable state regulations is that there will often be some attendant costs in order to comply with such regulations. For instance, the Court’s dictum in Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), that building and zoning regulations are permissible forms of government regulation of churches necessarily recognizes that such regulations will impose costs on churches. Similarly, state regulation of religious education, which the Court has viewed as permissible, see, e.g., Board of Educ. v. Allen, 392 U.S. 236, 247 (1968), necessarily involves increased costs. The Court has never suggested that these costs infringe upon free exercise rights. Indeed, the Court recently suggested in a first amendment zoning context that zoning’s economic impact on first amendment activity is irrelevant. See City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925, 932 (1986) (“The inquiry for First Amendment purposes is not concerned with economic impact.”) (quoting Young v. American Mini Theaters, Inc., 427 U.S. 50, 71 n.35 (1976)).
tion to worship in other locations, albeit with some greater difficulty and increased expense.

Importantly, such burdens are not uniquely attributable to the adherents' religious beliefs. Rather, they are commonly shared by all regulated land uses. As such, the religious adherent burdened by a church zoning ordinance is not penalized for religious beliefs in the same way as the claimants in *Sherbert* and *Thomas*. Instead, the burden on religion is best viewed as the inevitable consequence of government regulation from which religion is not immune. 91

The absence of a *Sherbert*-style free exercise infringement, however, should not automatically legitimize government regulation. The regulation of first amendment activity, including religious exercise, requires justification independent of its coercive burden on exercise. 92 Such protection, with its genesis in free speech, requires that government regulations on the time, place and manner of first amendment exercise must meet what has often been described as an intermediate level of review. This form of scrutiny recognizes the legitimacy of such regulations despite their consequential burdens, but requires that they be narrowly tailored to serve a significant governmental interest and that they leave open ample alternatives 93 for exercise of the right.

For this reason, *Lakewood* and other decisions that treat church zoning no differently than any other zoning are troublesome. Although in most situations an intermediate level of review will not invalidate church zoning, such a standard does require added constitutional inquiries too often ignored by courts such as the Sixth Circuit panel in *Lakewood*. The next subsection of this article will establish the relevancy of this standard of review to church zoning.

**B. Time, Place, and Manner Regulations of Religious Conduct**

The limited scope of free exercise analysis heretofore is due, at least in part, to the Supreme Court's propensity to decide cases involving religious exercise on free speech, rather than free exercise, grounds. 94 Analysis of government restrictions on affirmative religious conduct, as opposed to acts of conscience, has consistently occurred within the framework of the free speech clause because of the expressive nature that such conduct takes. This does not preclude extending

91. *See supra* note 90.
92. *See infra* text accompanying notes 94-145.
93. *See infra* note 124.
free exercise protection to affirmative expressive religious conduct, but does suggest that the extension of free exercise protection to such conduct should parallel the protection afforded similar conduct under the free speech clause.

The application of first amendment protection to religiously motivated activity via the free speech clause began long before Sherbert; it finds its genesis in the public forum cases of the 1930s and 1940s. These early cases involved religious activities, such as proselytizing, the sale of religious literature, and preaching, and addressed the permissibility of time, place, and manner restrictions on, rather than the outright prohibition of, expressive conduct. The level of protection developed for this type of religious conduct, therefore, did not involve strict scrutiny but instead an intermediate level of review.

Although the Court acknowledged that expressive activities can be made subject to reasonable time, place, and manner restrictions, it noted that such restrictions must be content-neutral, serve significant government interests, and be narrowly tailored. The Court was particularly sensitive in these cases to discretionary licensing schemes which gave rise to potential content discrimination. The Court recognized that permit schemes might be necessary to the orderly exercise of expression, but struck down licensing schemes which lacked standards and, thus, vested too much discretion in an issuing

95. See, e.g., Thomas v. Review Bd., 450 U.S. 707, 718 (1981), where the Court stated that a free exercise infringement can occur where the state denies an important benefit "because of conduct mandated by religious belief," indicating that affirmative conduct as well as acts of conscience are protected under the free exercise clause.


Commentators have noted that during this period the rights of religious adherents were almost exclusively protected by the free speech clause, with no independent protection afforded through the free exercise clause. See, e.g., Marshall, supra note 94, at 561-65; Pfeffer, The Supremacy of Free Exercise, 61 Geo. L.J. 1115, 1130 (1973). Although the Court occasionally based its decision on free exercise grounds, in doing so it applied analysis essentially derived from free speech cases. See Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (invalidating licensing scheme on free exercise grounds but applying analysis previously developed in free speech cases).

98. See, e.g., Saia, 334 U.S. at 563; Martin, 319 U.S. at 143; Cantwell, 310 U.S. at 304.

99. See, e.g., Saia, 334 U.S. at 561; Lovell, 303 U.S. at 450.

Thus, the Court wanted to provide for evenhanded regulation of speech that avoided unnecessary burdens.

The Supreme Court in recent years has continued to apply this intermediate standard of review to time, place, and manner restrictions on speech, again including such restrictions on expressive religious activities. In *Heffron v. International Society for Krishna Consciousness Inc.*, the Court held that a locational restriction on the distribution of literature at the Minnesota state fair was a time, place, and manner restriction on the free speech rights of the International Society for Krishna Consciousness. Although the Court found the restriction valid, it applied intermediate scrutiny by requiring that the regulation be content-neutral, serve a significant state interest in the least restrictive means possible, and leave open ample alternative channels of communication. Moreover, the Court in *Widmar v. Vincent* struck down, on content-neutrality grounds, a regulation which prohibited religious groups from meeting on a university campus but allowed other groups to meet, and expressly held that corporate worship and prayer are expressive activities protected by the free speech clause.

These Supreme Court decisions suggest two rationales for applying this analysis to the regulation of religious exercise that falls short of the coercive burden necessary to trigger strict judicial scrutiny.


104. *Id.* at 647-48. Although the Krishna's trial court complaint, based on 42 U.S.C. § 1983, alleged a violation of both the free exercise and free speech clauses, in its brief and in oral argument the Krishna said it did not seek special treatment because of its religion and noted that "whatever exemption they were entitled to under the First Amendment would apply to other organizations seeking similar rights," indicating their argument was based upon their right to free speech. *Id.* at 652 n.15.

105. *Id.* at 647-55. The Court found the restriction to be content-neutral because it applied evenhandedly to everyone wanting to distribute materials or solicit funds. *Id.* at 649. It served a significant governmental interest in controlling crowds at the state fair and thus protected the "safety and convenience" of persons using a public forum. *Id.* at 650. The regulation was deemed the least restrictive means of achieving that governmental interest, since any exemption from the regulation could not be limited to just the Krishnas but would have to extend to all groups desiring to engage in the regulated activities. This would defeat the government interest being sought. *Id.* at 652-53. Finally, the regulation left open ample alternative channels of expression, since it allowed the Krishnas to distribute literature and solicit funds from a booth within the fairgrounds, and they were free to pursue those same activities unrestricted outside the fairgrounds. *Id.* at 654-55.


107. In *Widmar*, the Court held that a public university could not prohibit a religious group from using campus facilities when use of such facilities was extended to non-religious
First, the Court has consistently applied a broad definition of “speech” under the first amendment, which includes most affirmative religious conduct. This definition has included not only activities such as preaching and proselytizing, but also such core religious conduct as the corporate worship and prayer that were recently protected in *Widmar.* The central role that worship plays in the life of a church suggests that restrictions on church location can be considered a restriction on speech.

Second, the rationales that support an intermediate level of review for time, place, and manner restrictions on speech suggest that parallel protection should also be afforded to expressive religious exercise independently under the free exercise clause. The essence of the intermediate standard is that the protections afforded by the free speech clause go beyond the protection against the direct suppression of speech and include some protection against indirect regulatory burdens. This protection from indirect burdens is required both because fundamental free speech rights require some accommodation relative to nonspeech interests, and because such protection ensures that the state does not indirectly or inadvertently suppress speech while furthering legitimate nonspeech interests. Thus, although the Court will tolerate incidental burdens on speech from
reasoned regulations, the fundamental nature of the right affected requires inquiry into the restriction's scope, purpose, and effect to ensure a proper accommodation of interests.\textsuperscript{113}

These same concerns apply with equal force to time, place, and manner restrictions on conduct falling within the free exercise clause.\textsuperscript{114} The Supreme Court has frequently emphasized the fundamental value and importance of free exercise interests,\textsuperscript{115} suggesting the need to accommodate that interest at least to the same extent as speech interests. Moreover, the effect upon, and potential threat to, religious exercise by time, place, and manner regulations is similar to that found in speech contexts. Although such restrictions do not constitute \textit{Sherbert}-style infringements, they do incidentally burden a fundamental right and potentially threaten its effective exercise. Similar inquiries into the restriction's scope, purpose, and effort are appropriate to ensure a proper accommodation of interests and the effective exercise of the right.\textsuperscript{116}


\textsuperscript{114} Commentators have frequently spoken of time, place, and manner analysis as a "balancing" of state interests and first amendment rights, \textit{see}, \textit{e.g.}, L. \textit{Tribe}, supra note 112, § 12-20, or ensuring a "fair accommodation" of speech and nonspeech interests. \textit{See Stone}, supra note 96, at 241. Although not clearly articulated as such by the Court, ensuring a proper accommodation of interests seems implicit in the various aspects of the intermediate standard of review by focusing on the precision of regulation, substantiality of interest, and availability of alternatives.


\textsuperscript{115} \textit{See Sherbert} v. \textit{Verner}, 374 U.S. 398 (1963), where the Court in discussing the standard of review for free exercise infringements stated that "in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitations.'" \textit{Id.} at 406 (quoting \textit{Thomas} v. \textit{Collins}, 323 U.S. 516, 540 (1945)). Similarly, in \textit{Yoder}, 406 U.S. at 214-15, the Court characterized free exercise as a "fundamental right," noting that the values underlying the religion clauses have been "zealously protected, sometimes at the expense of other interests of admittedly high social importance." The Court concluded that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." \textit{Accord Thomas}, 450 U.S. at 718.

\textsuperscript{116} The particular problems addressed by the intermediate standard would also exist and be relevant to restrictions on free exercise conduct. The fundamental nature of the right affected argues in favor of precision in regulation as reflected in the narrowly tailored requirement. Similarly, the fundamental nature of religious exercise should require a significant or substantial interest to justify even incidental burdens on religious exercise as occur under locational restrictions. Even more important is the concern reflected in the "ample alternatives" requirement that the state not inadvertently eliminate the effective exercise of a fundamental right when furthering otherwise important interests. That inquiry seems necessary to protect
The early public forum case of Cantwell v. Connecticut\textsuperscript{117} provides support for going beyond free speech analysis and recognizing a parallel time, place, and manner jurisprudence under the free exercise clause. In Cantwell, the Court examined a discretionary licensing scheme which required that, before a person could solicit contributions for a religious cause, a licensing officer had to certify the cause was in fact religious.\textsuperscript{118} Although the Court had previously used the free speech clause to strike down licensing schemes which affected religious exercise,\textsuperscript{119} in Cantwell it specifically based its decision on the free exercise clause.\textsuperscript{120} The Court noted that municipalities could make religious exercise subject to time, place, and manner restrictions,\textsuperscript{121} but found that the discretionary nature of the statute constituted a prior restraint and violated the free exercise clause.\textsuperscript{122} In so holding, however, the Court relied on prior restraint principles developed in free speech cases,\textsuperscript{123} suggesting that a separate but parallel analysis for time, place, and manner restrictions on religious conduct exists under the free exercise clause.

In sum, the intermediate standard of review developed for time, place, and manner restrictions on speech is appropriate to apply to restrictions on religious activities, both because of the expressive nature of such activities and because a parallel analysis can also be supported under the free exercise clause. Although the Supreme Court has articulated the standard in different ways, it has generally required that a regulation serve a significant state interest in a narrowly tailored fashion, leave ample alternatives for exercise of the first amendment right, and be content-neutral.\textsuperscript{124} The Court has also

\textsuperscript{117} 310 U.S. 296 (1940).

\textsuperscript{118} The statute in Cantwell provided that before a person could solicit contributions for a religious cause, he had to apply for and receive a certificate, the grant of which was based upon a determination by "the secretary of the public welfare council . . . [that the] cause is a religious one . . . and conforms to reasonable standards of efficiency and integrity." Id. at 301-02.

\textsuperscript{119} See Schneider v. Town of Irvington, 308 U.S. 147 (1939).

\textsuperscript{120} 310 U.S. at 303-04. Indeed, it was in Cantwell that the Court first incorporated the free exercise clause into the fourteenth amendment. Id. at 303.

\textsuperscript{121} Id. at 304.

\textsuperscript{122} Id. at 306-07.

\textsuperscript{123} Id. at 305-07 (citing Near v. Minnesota, 283 U.S. 697 (1931)).

demonstrated in recent years that this standard applies when the state regulates expressive activity through zoning, which it has viewed as a form of time, place, and manner restriction. Because, as shown above, time, place, and manner jurisprudence developed with regard to speech is also applicable to comparable restrictions on religious conduct, these zoning cases regarding speech reflect constitutional principles that are applicable to zoning cases under either the first amendment's free speech or free exercise clause.

The right of municipalities to regulate expressive conduct through zoning was first recognized in Young v. American Mini Theatres, Inc., in which the Court upheld a Detroit ordinance that prohibited the location of adult theaters within 1000 feet of another adult theater or other specified regulated uses. Both Justice Stevens' plurality opinion and Justice Powell's concurrence articulated the need to apply a heightened standard of review for any zoning restriction on speech. They readily accepted the validity of imposing locational restrictions on theaters in general, however, because of the important interests served by land use controls and because the restrictions did not restrain the theater market. Further, both opinions found that the more restrictive treatment of adult theaters was

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125. Although most decisions involved restrictions on adult uses, the Court also reviewed a zoning restriction on first amendment rights in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), in which it struck down a San Diego billboard ordinance. The ordinance prohibited most noncommercial billboards and all offsite commercial billboards, but allowed onsite commercial billboards and some noncommercial billboards based on message. Justice White's plurality opinion, though upholding the distinction between onsite and offsite commercial billboards, found the provisions regulating noncommercial billboards invalid because they violated content-neutrality. Justice Brennan's concurring opinion, necessary for a majority, treated the ordinance, in effect, as a total ban on noncommercial billboards and stated that the city had not proved a sufficiently substantial interest in aesthetics to justify such a ban, relying on an underinclusive analysis. Id. at 530-34 (Brennan, J., concurring in the judgment). A majority of the Court in Metromedia, however, stated that a municipality's interest in aesthetics is sufficient to justify a prohibition of billboards. See id. at 507-08 (plurality opinion); id. at 552 (Stevens, J., dissenting in part); id. at 559-60 (Burger, C.J., dissenting); id. at 570 (Rehnquist, J., dissenting).


127. Id. at 63 n.18 (plurality opinion) (viewing zoning restriction on first amendment use as time, place, and manner restriction which to be valid must be "necessary to further significant government interests"); id. at 79-80 (Powell, J., concurring) (requiring, inter alia, that regulation "further an important or substantial interest" and that it be "essential to the furtherance of that interest") (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

128. Id. at 62-63 (plurality opinion); id. at 82 (Powell, J., concurring).
justified because of the distinct secondary effects accompanying those theaters. An emphasis on the fact that the restriction did not greatly suppress speech was central to both opinions.

The Young approach was recently affirmed in City of Renton v. Playtime Theaters, Inc. in which the Court upheld a zoning restriction similar to that in Young. The Court again viewed the ordinance as a time, place, and manner restriction on first amendment activity and justified the more restrictive treatment of adult theaters on the distinct secondary effects accompanying adult theaters. Unlike the ordinance in Young, however, the restriction in Playtime appeared to significantly limit speech rights by allowing adult uses in only about five percent of the city, with much of that property currently occupied by businesses. Despite this apparent burden, the Court held that the ordinance did not suppress speech and was constitutional. Emphasizing that the city was not obligated to provide land at bargain prices, the Court stated that the first amendment only required that there be a “reasonable opportunity” to exercise the right in question.

In contrast to Young and Playtime, the Court in Schad v. Borough of Mt. Ephraim struck down a zoning restriction that effectively excluded all live entertainment from the Borough of Mt. Ephraim, a small suburban community. The Court stressed the

129. Although Justice Stevens readily accepted the validity of locational restrictions on theaters in general, he viewed as more problematic the potential equal protection violation posed by regulating adult theaters more restrictively than other theaters. He justified the greater restrictions, however, both by suggesting that pornography was deserving of only limited first amendment protection, id. at 70, and by emphasizing the distinct secondary effects generated by adult bookstores, such as deterioration of surrounding neighborhoods and increased crime. Id. at 71-72, 71 n.34. Justice Powell’s concurring opinion saw no need to afford less protection to pornographic speech, but instead justified the disparate treatment because of the differing secondary effects. Id. at 82 n.6.

130. Id. at 71 n.35; id. at 77-79. Justice Stevens said “[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech.” Id. at 71 n.35.


132. Id. at 928.

133. Id. at 929. The Court stated that although at first glance the ordinance might appear to violate content-neutrality by regulating adult theaters differently than others, it found the ordinance consistent with the content-neutrality requirement because the greater restrictions were based on the distinct secondary effects accompanying adult theaters. Id.

134. See id. at 932.

135. Id.


137. See id. at 62-65. Although the ordinance in Schad was applied against an adult bookstore which included live nude dancers, the Court treated the issue as involving a complete ban on all commercial live entertainment, including plays, concerts, musicals, dance, and other forms of live entertainment fully protected by the first amendment. Id. at 65-66.
significant limitation upon free speech and found the ordinance unconstitutional in two respects. First, the Borough failed to establish that live entertainment in general created problems greater than those generated by commercial uses that were allowed, thus undermining the substantiality of its interest in singling out live entertainment for regulation. The Court also noted that to the extent that certain types of live entertainment might pose distinct problems, the city failed to show that means less restrictive than a total ban on adult entertainment were unavailable to address those problems.

Second, the ordinance was also unconstitutional because it failed to establish that adequate alternatives were available for exercise of the first amendment right in light of the total ban within the Borough. Although the Court emphasized the suppressive effect of the ordinance in evaluating the Borough’s asserted interests, it appeared to hold that the total ban was an independent ground for invalidating the ordinance. The Court did not preclude the validity

138. See id. at 73-75 (live entertainment did not present trash, parking, and traffic problems more significant than that accompanying permitted commercial uses). The Court also stated that under a time, place, and manner analysis the Borough failed to show that live entertainment was incompatible with permitted uses in the commercial district from which it was banned. Id. at 75-77.

139. Id. at 74. The Court stated:
Yet this ordinance is not narrowly drawn to respond to what might be the distinctive problems arising from certain types of live entertainment, and it is not clear that a more selective approach would fail to address those unique problems if any there are. The Borough has not established that its interests could not be met by restrictions that are less intrusive on protected forms of expression.

Id.

140. See id. at 71.

141. The Court was unclear in establishing how the ordinance’s suppressive effect affected its standard of review. In the first part of the opinion, the Court emphasized the suppressive impact of the ordinance in establishing its standard of review, stating that “because the ordinance challenged in this case significantly limits communicative activity within the Borough, we must scrutinize both the interests advanced by the Borough to justify this limitation on protected expression and the means chosen to further those interests.” Id. at 71. This suggests that the heightened scrutiny was contingent on a significantly suppressive impact. Yet, the Court acknowledged in a footnote that even small and incidental restrictions on first amendment conduct require heightened scrutiny. Id. at 69 n.7 (citing United States v. O’Brien, 391 U.S. 367 (1968)). This is consistent with time, place, and manner jurisprudence which subjects any regulation of first amendment activity to an intermediate standard of review.

Later in the decision that Court analyzed the validity of the restriction as a time, place, and manner regulation, finding it invalid for two separate reasons. First, the Borough failed to show that live entertainment was incompatible with other uses in the district, using reasoning similar to its earlier underinclusiveness analysis. Second, the Court indicated that the ordinance also was invalid because it failed to establish available alternatives. Id. at 75-77. Whereas in the first part of the decision the Court made reasoning that merely heightened review, in the second part of the decision the Court suggested that it was an independent basis for rejecting the ordinance. These positions are best reconciled by finding that a zoning restriction fails as a time, place, and manner restriction if it fails to leave ample alternatives for exercise of the regulated
of a total ban, but stated that at least in the absence of a showing that alternatives were available elsewhere the ban must fail.142

These zoning decisions demonstrate the applicability of time, place, and manner jurisprudence to first amendment zoning restrictions. As in other contexts, the Court will more readily tolerate zoning regulations which only minimally restrain first amendment exercise than those which significantly suppress it. Yet, even restrictions that do not significantly suppress speech must meet a heightened standard of review.143 In particular, the Court has focused on the existence of identifiable secondary effects as justifying the zoning of first amendment activity.144 Further, the decisions affirm that zoning restrictions on first amendment activity must be a "narrowly tailored" means of serving the state's interest, suggesting primarily that restrictions that unnecessarily include categories or types of first amendment activities that do not generate the targeted effects might be overbroad.145 The next section of the article will discuss the application of these zoning and time, place, and manner precedents to zoning restrictions on churches.

III. LOCATIONAL RESTRICTIONS ON CHURCHES

First amendment precedent, involving both time, place, and manner restrictions on religious conduct and zoning restrictions on first amendment activity, establishes that a locational restriction on religious worship, though not a Sherbert-type free exercise clause right, in which case the restriction is subjected to a standard of review approaching strict scrutiny.

142. Id. at 75-76.


144. This is consistent with the Court's frequent focus on "compatibility" in assessing the strength of asserted state interests supporting time, place, and manner restrictions. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (footnote omitted) ("The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable. . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.") Accord Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1981). Indeed, the Court in Schad expressly applied this compatibility analysis to the zoning restriction. 452 U.S. at 74-75.

145. See Schad, 452 U.S. at 74 (to the extent that some live entertainment might raise distinctive problems justifying the challenged restrictions, the Borough has failed to show that a "more selective approach" would not address those problems); Young, 427 U.S. at 82 (Powell, J., concurring) (suggesting that the ordinance would be unconstitutional if it included within its reach "types of theaters that had not been shown to contribute to the deterioration of surrounding areas"); Playtime Theaters, 106 S. Ct. at 931 (stating that the ordinance was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects'".})
violation, must nevertheless meet four requirements to be constitutional. It must serve a substantial state interest, be narrowly drawn, leave open adequate means of exercise, and be content-neutral. This section will discuss these requirements as they apply to zoning restrictions on churches, first examining the requirements of substantiality of interest and precision of regulation. It will then discuss the requirement of available alternatives. It will end by examining concerns of content-neutrality in the context of special-use permits in which discrimination problems are most likely to occur.

A. Significance of Interest and Precision of Means

There is little doubt that, in the abstract, municipalities have a sufficiently substantial interest in preserving quiet neighborhoods to justify locational restrictions on churches within residential districts. Although not speaking in a first amendment context, in Village of Belle Terre v. Boraas the Court emphasized that the state has a substantial interest in preserving the tranquility of residential neighborhoods. The Court has recently emphasized in several first amendment contexts that both traffic safety and aesthetics are substantial enough concerns to justify the restriction of protected activities. Indeed, the Court has consistently emphasized the importance of the goals achieved by land use planning. To the extent that churches are a significantly more intense use of land than those normally found in residential neighborhoods, municipalities have a substantial interest in regulating this use.

The general recognition that the state has a substantial interest in regulating church location, however, does not establish that the interest is substantial in all instances. Schad demonstrates that substantiality of interest must be assessed, not in the abstract, but relative to surrounding permitted uses. Where the secondary effects from churches are not more intense in terms of traffic, noise, and parking than permitted uses, the regulation is arguably underinclusive and, therefore, invalid. Thus, although municipalities

146. See supra note 124.
147. 416 U.S. 1 (1974); see supra text accompanying notes 26-28.
149. See, e.g., Young, 427 U.S. at 71 ("the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect").
150. See Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 73-75 (1981). This emphasis on assessing the substantiality of the state's interest relative to surrounding uses is also seen in a number of time, place, and manner decisions in which the Court has focused on a "compatibility" standard in assessing state interests. See supra note 144.
have a substantial interest in excluding churches from low density residential zones, attempts to exclude them from commercial or business zones are invalid.\textsuperscript{151} Additionally, excluding churches from residential districts, while permitting other intensive land uses, such as schools, libraries, and museums, is arguably underinclusive and invalid as well.\textsuperscript{152}

More problematic to an analysis of church zonings is whether the state's interest can be furthered by a more narrow means than a blanket exclusion of churches from residential neighborhoods. To avoid unnecessary intrusions on the first amendment, time, place, and manner analysis has consistently required some precision in achieving the state's interest.\textsuperscript{153} This requirement was affirmed in Young, Schad, and Playtime Theaters as a constitutionally necessary element for valid zoning restrictions on first amendment activity.\textsuperscript{154} Thus, to the extent that the state's interest in zoning churches can be furthered by a means less restrictive than a blanket exclusion they must fall.

A zoning ordinance that restricts any first amendment activity, such as religious worship, might be overbroad and invalid in two ways. First, as suggested in Schad, an ordinance that unnecessarily includes within its reach first amendment uses that do not generate the effects giving rise to the state's interest in regulation is overbroad and invalid.\textsuperscript{155} Second, an ordinance can also be overbroad if adequate alternative remedies exist that control the actual secondary effects themselves without prohibiting the first amendment source.\textsuperscript{156} In the church zoning context such a remedy would be

\begin{itemize}
\item \textsuperscript{154} See City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925, 928 (1986); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68-71 (1981); Young v. American Mini Theaters, Inc., 427 U.S. 50, 63 n.18 (1976) (plurality opinion) (zoning restriction must be "necessary to further significant governmental interests"); \textit{id}. at 79-80 (Powell, J., concurring) (restriction on first amendment must be "no greater than is essential to the furtherance" of the state's interest).
\item \textsuperscript{155} See 452 U.S. at 74-75; see also Young, 427 U.S. at 82 (Powell, J., concurring) ("The case would present a different situation had Detroit brought within the ordinance types of theaters that had not been shown to contribute to the deterioration of surrounding areas.").
\item \textsuperscript{156} See, e.g., Schneider v. Town of Irvington, 308 U.S. 147, 160-61 (1939) (state's in-
an effective control on the traffic, noise, and parking problems that did not directly prohibit the religious worship, which gives rise to these concerns.

As discussed earlier, zoning ordinances typically restrict church location in two ways: through a special-use permit process regulating location within residential districts or by completely excluding churches from residential districts. The special-use process appears to be a narrowly drawn means of serving the state's interest since it involves a case-by-case decision whether the state's interest justifies regulating a particular church. By requiring an individual assessment of a church's potential incompatibility with its surroundings, this approach is designed to avoid restrictions on churches that do not pose a threat to residential neighborhoods and, thus, avoids the first type of overbreadth mentioned above. Further, the process also allows alternative land controls, such as off-street parking requirements, traffic controls, and noise regulations, as a means of controlling the effects of the church and, thus, addresses the second type of overbreadth. Although restricting location by special-use permits poses potential content-neutrality problems, the particularized nature of the restriction makes it a narrowly tailored means of regulation for first amendment purposes.

More problematic under a least restrictive means analysis is the validity of a blanket exclusion of churches from residential areas. Such an approach to furthering the state's interest of preserving residential neighborhoods arguably is overbroad for both reasons above: it fails to assess whether a particular church in fact poses a threat to a residential neighborhood, and it fails to pursue less restrictive alternative controls, such as parking requirements, traffic controls, and noise regulations. The overbreadth of blanket exclusions might seem particularly acute because of the existence of the widely used special-use alternative described above. The willingness of many municipalities to use special-use permits suggests that the state's interest in preserving residential areas can be served by this less restrictive alternative.

Whether blanket exclusions are unnecessarily broad and, thus, invalid depends on the exact definition of the least restrictive means requirement in the context of time, place, and manner restrictions. In strict scrutiny review, the least restrictive means requirement usually necessitates an assessment of whether the marginally greater effec-

157. For arguments which in essence state that blanket exclusions of churches from residential neighborhoods are not a narrowly drawn means of regulation, see Comment, supra note 14.
tiveness of the challenged regulation, as compared to the alternatives, justifies the greater burden on the first amendment. Such a balancing of marginal harms and benefits permits some sacrifice in the protection of the state's interest if a corresponding furtherance of first amendment values is accomplished. Similarly, state regulation of traditional fora or media of expression, such as parks and streets, requires a restriction more narrow than a complete ban. This constitutional requirement resembles the balancing of marginal harms and benefits in that it requires some accommodation of expressive rights despite the resulting inconvenience to the state.

Where the challenged restriction does not greatly suppress speech or access to traditional fora, however, the Court has not appeared to

158. See M. NIMMER, FREEDOM OF SPEECH § 2.06[A][4] n.20 (1985). Although the Court has not clearly articulated such a marginal balancing of interests, commentators frequently interpret the Court's analysis as suggesting such an approach. See, e.g., id.; L. TRIBE, supra note 112; Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482 (1975).

159. For example, once a free exercise infringement is established in free exercise analysis the state must show that it has a compelling interest in not granting an exemption to the religious claimant. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 215-18 (1972). This, in effect, amounts to a balancing of the marginal utility of the state's interest in regulating the religious exercise against the burden to religion.

160. The Court strongly suggested in some of its early decisions that although the state can regulate use of traditional fora, such as streets and parks it could not altogether ban first amendment exercise from such places. See, e.g., Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939); Schneider v. Town of Irvington, 308 U.S. 147 (1939). This was recently affirmed in Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983), in which the Court in dictum again stated that the state may not prohibit all first amendment activity from traditional fora. See generally Kalven, supra note 96. The Court has clearly recognized, however, that the state can regulate the use of such fora through less intrusive means such as parade permits. See, e.g., Cox v. New Hampshire, 312 U.S. 569, 574-76 (1941).

161. Requiring accommodation of some first amendment activity in such fora will likely result in some inconvenience or cost to the state. For example, allowing use of the streets for parades or other demonstrations, to some extent, will interfere with the state's interest in orderly traffic. Allowing the distribution of leaflets similarly will result in some inconvenience. See Schneider v. Town of Irvington, 308 U.S. 147 (1939). The special status of these fora and media, however, require that some accommodation be made by more narrowly drawn regulations.

The need for such accommodation apparently derives from both the traditional and important role that such places play in first amendment exercise. Early in its public forum jurisprudence the Court noted that the streets and parks had long been held in trust for expressive activities, suggesting a type of first amendment easement. See, e.g., Committee for Indus. Org., 307 U.S. at 515-16. The Court and commentators have also emphasized the important role that such fora and media play in the exercise of first amendment rights, especially for the poor, as a reason for requiring some accommodation of expressive activities. See Saia v. New York, 334 U.S. 558, 561 (1948); Martin v. Struthers, 319 U.S. 141, 146-47 (1943); L. TRIBE, supra note 112, § 12-20. This suggests that where a particular fora plays a unique and significant role in first amendment exercise some accommodation of exercise is required.
balance the marginal utilities of alternative regulations, but instead has looked to whether the state's interest could be pursued as effectively by other means.\textsuperscript{162} In particular, the Court has been willing to find restrictions "narrowly drawn" if the alternatives would not as effectively serve the state interest \textsuperscript{163} or if the restricted activity cannot be separated from its objectionable effects.\textsuperscript{164} Further, the Court has been willing to tolerate a complete ban on expression in particular fora\textsuperscript{165} or by particular media\textsuperscript{166} if the restriction is not gratuitous and adequate alternatives exist. In such situations, the "narrowly tailored" requirement appears to require only that the restriction is not truly broader than necessary to effectuate the state's purpose and that it does not necessarily include within its reach conduct not giving rise to the state's interest.

This analysis suggests that, despite the existence of a special-use alternative, a blanket exclusion of churches from residential neighborhoods would not be an overly broad manner of regulation, at least where ample alternatives exist for churches to locate. Although churches vary in their potentially intrusive effect on residential neighborhoods, even smaller, less active churches are a more intrusive land use than normally exists in a residential district and, thus, are potentially incompatible. The regulation of churches by the special-use permit process assumes that there is some threshold level of adverse effects below which a church is a compatible, and even desirable, land use in residential districts. Yet, a municipality might find that even minor effects from a church are objectionable, especially where there is a potential for the secondary land use effects to increase as the church grows.

Moreover, regulations aimed at the adverse effects themselves arguably are only partially effective. Although parking problems can be adequately and less intrusively eliminated by off-street parking requirements implemented in a special-use permit process, noise and traffic problems can only be partially alleviated by secondary regulations. Both are inevitable consequences of a more intensive use of

\textsuperscript{162} See M. \textsc{nimmer}, \textit{supra} note 158, \S 2.06[4].

\textsuperscript{163} See, \textit{e.g.}, Clark v. Community for Creative Nonviolence, 468 U.S. 288, 299 (1984) (upholding ban on sleeping in park, through recognized as an expressive activity, because less restrictive alternatives such as reducing "size, duration, or frequency of demonstrations" would cause some damage to the park and not meet the level of protection deemed necessary by the park service).

\textsuperscript{164} See, \textit{e.g.}, City Council v. Taxpayers for Vincent, 466 U.S. 789, 808-10 (1984) (upholding prohibition on posting signs on utility poles, since the state's interest in curtailing visual clutter cannot be separated from the expressive activity, but is an inevitable byproduct).

\textsuperscript{165} See, \textit{e.g.}, Heffron v. \textsc{international soc'y for krishna consciousness, inc.}, 452 U.S. 640 (1981).

land, which results when a church is located in a residential district. Thus, the imposition of additional traffic controls and the enforcement of noise restrictions would only partially further the state's interest of preserving residential neighborhoods.

Such an analysis is consistent with the Court's apparent focus on categorical imprecision under the "narrowly tailored" means requirement in its first amendment zoning decisions. None of these decisions suggest the need for an individualized assessment of a regulated use's actual impact. Justice Stevens' plurality opinion in Young v. American Mini Theatres, Inc., though stating that the restriction must be "necessary," summarily accepted the categorical restriction on adult uses.6 Both Justice Powell's concurrence in Young169 and the majority opinion in Schad170 only alluded to imprecision in the types of use regulated when discussing the "narrowly tailored" requirement. This analysis of the "narrowly tailored" requirement was again used in Playtime Theaters, in which the Court found the regulation "narrowly tailored" because it did not include "categories" not generating the secondary effects to be avoided.171 The Court, therefore, appears willing to tolerate the individualized imprecision which inevitably occurs in zoning, assuming the restriction does not significantly suppress first amendment rights.

In principle, therefore, both the categorical exclusion of churches from residential neighborhoods and the more narrowly drawn special-use permit process are permissible means of regulating churches. As has been generally true in time, place, and manner jurisprudence, the most important constitutional safeguards are the assurance of adequate alternative areas for exercise of the right to worship and the assurance of content-neutrality in ordinances regulating the location of churches. The next two sections will discuss these requirements, with the second section focusing on the special-use process.

B. The Need for Ample Alternatives

The Supreme Court has frequently noted that an otherwise valid time, place, and manner restriction on "speech" may be invalid if

167. See id. at 808-10 (suggesting that to the extent the objectionable byproducts can be separately regulated, a less restrictive means exists, but where the byproducts are inherent in the first amendment activity itself, limiting the activity is not overly broad).
169. Id. at 79-80 (Powell, J., concurring).
the remaining avenues of communication are inadequate.\textsuperscript{172} This has usually been an issue where the state restricts access to a particular forum for communication or prohibits a particular medium of expression. When analyzing the adequacy of the remaining alternatives, the Court has focused on both the traditional first amendment role played by the particular forum or medium and the necessity for effective communication.\textsuperscript{173} In this regard, the Court has shown special solicitude for forms of expression that have been viewed as traditionally necessary for adequate expression in our society, such as access to parks and streets and the use of leafletting.\textsuperscript{174} At the same time, however, the first amendment clearly does not guarantee the right to the best or least expensive means of exercise available. As long as the particular forum is not deemed essential for reaching a particular audience, the Court has been willing to tolerate less effective alternatives.\textsuperscript{175}

When the state regulates first amendment activity on private property through zoning ordinances, however, the analysis is distinctively different. In such situations there is usually no readily available substitute in the form of other media or public fora.\textsuperscript{176} The requirement that there be adequate alternatives, therefore, requires that there be an ample supply of available land on which the activity is allowed, or the restriction arguably becomes vulnerable to constitutional attack. This requirement was highlighted in \textit{Young} where the plurality and concurring opinions both stressed that their willingness to uphold the challenged regulation of adult theaters was in large part because the ordinance did not completely suppress the regulated speech.\textsuperscript{177} This requirement was stressed again in \textit{Schad} where a major consideration in striking down the ordinance was that it effectively banned a form of first amendment expression.\textsuperscript{178}

Despite its importance, however, evaluating the adequacy of alternative sites is admittedly difficult because of the dual public and


\textsuperscript{173} See generally L. Tribe, supra note 112.

\textsuperscript{174} See Martin v. Struthers, 319 U.S. 141, 146 (1943) ("Door-to-door distribution of circulars is essential to the poorly financed causes of little people."); L. Tribe, supra note 112, \S 12-20.

\textsuperscript{175} See Taxpayers for Vincent, 466 U.S. at 812.

\textsuperscript{176} The regulation of billboards on private property is an exception, since the communicative purpose served by billboards can often be served by other media. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

\textsuperscript{177} Young v. American Mini Theatres, Inc., 427 U.S. 50, 62 (1976) (plurality opinion); \textit{id.} at 78-79 (Powell, J., concurring).

market roles involved in determining the availability of land resources for a particular use. A zoning regulation that permits a particular land use is a minimum requirement without which the land use cannot occur. Beyond that, however, land might not be "available" if it is already developed or, if available, it might not be suitable for religious use. Despite obvious difficulties, therefore, an accurate assessment of the adequacy of alternatives should not only examine public controls but also private market realities. In fact, lower courts subsequent to Young have scrutinized particularly restrictive adult use ordinances to ensure that there are adequate alternative sites, focusing not only on the amount of land actually zoned, but on its suitability and market availability.  

The Supreme Court's recent decision in City of Renton v. Playtime Theaters, Inc. suggests that these concerns are best balanced by a "reasonable opportunity" standard of review. In that decision, the Court upheld an adult use ordinance that restricted adult use to about five percent of the city, relying on a district court finding that there was still "ample, accessible real estate" in all stages of development. Although the Court's decision clearly available for a particular first amendment exercise, the Court stated that municipalities must provide a "reasonable opportunity" for first amendment uses to meet. Such an approach suggests that, while first amendment activities must tolerate some increased cost and inconvenience, which inevitably result from zoning restrictions, municipalities cannot force them to accept clearly unsuitable alternatives or to endure unreasonable expense or hardship. A proper assessment of "reasonable opportunity" must, of course, turn on the specific circumstances of the zoning ordinance in question, and consider both the needs of the regulated activity and the actual impact of the restriction. When this standard is applied to religious exercise, however, two concerns are of particular importance. The first is the actual market availability of land within

179. Illustrative of this type of scrutiny is Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982), in which the Fifth Circuit struck down a zoning restriction on adult uses which limited such uses to ten to fifteen percent of the city. The court found that the only land actually available for adult uses was in industrial areas, far from commercial outlets, and with poor access roads. Id. at 1214. A similar result was reached in Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981), in which a federal district court scrutinized the actual suitability of 81 possible sites for adult uses and found the vast majority inadequate, either because of present development or unsuitability for commercial uses.
181. Id. at 932.
182. Id.
183. Id.; see also supra note 90.
districts that allow churches. Although churches need not be guaranteed land at bargain prices, \textsuperscript{184} neither should they be forced to pay unrealistic sums to buy out and convert existing uses. "Availability," therefore, should require either sufficient quantities of undeveloped land to accommodate anticipated church needs\textsuperscript{185} or existing structures clearly suitable for church purposes.

Second, an adequacy analysis should also inquire into the suitability of the land available for churches. Certainly residential land cannot be considered essential to church worship and in most instances provision of nonresidential sites will be adequate. Yet, consideration should be given to whether, looking to both surrounding property uses and the size of parcels, available property is conducive to religious worship and assembly. Thus, locating churches in heavy industrial zones\textsuperscript{186} or placing them on extremely small parcels that would limit the scope of activity that could be pursued should be considered inadequate.\textsuperscript{187} Moreover, in larger cities, districts where churches are allowed should be reasonably accessible to residential neighborhoods.

As a practical matter, such inquiries will in most instances establish the adequacy of alternative sites for churches. As opposed to adult uses, municipalities will usually tolerate churches in a substantial portion of a city, even when they exclude them from residential neighborhoods. When an assessment of adequacy establishes that a "reasonable opportunity" does not exist, courts should more closely scrutinize the restriction as applied to the particular parcel and require some municipal accommodation of the asserted religious exercise. This should include a particularized assessment of the state's

\textsuperscript{184} 106 S. Ct. at 932.
\textsuperscript{186} Cf. Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (5th Cir. 1982) (land zoned for adult uses in industrial district unsuitable).
\textsuperscript{187} Similarly, alternatives such as meeting in adherents' homes or renting building space, suggested by the Sixth Circuit in Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir.), cert. denied, 464 U.S. 815 (1983), should be rejected as unsuitable for the purposes of most churches. As will be discussed in section IV, churches today typically engage in diverse activities as integral parts of their ministries. See infra text accompanying notes 201-62. Although churches must tolerate some increased cost and inconvenience as a result of zoning, they should not be required to restrict greatly the ability to engage in various activities. To require that congregations meet in homes or facilities designed for significantly different uses would have such an effect. At the same time, however, meeting in private homes subject to secondary controls should be considered a minimum requirement for congregations unable to afford facilities elsewhere. See infra text accompanying notes 266-305.
interest and the use of secondary controls as a less intrusive means of regulating the church.\footnote{188}

\section*{C. Special-Use Permits and Content-Neutrality}

Certainly the most important concern that emerges from Supreme Court review of time, place, and manner restrictions on first amendment conduct is the requirement of content-neutrality.\footnote{189} In the zoning context, this concern can arise in several ways, such as ordinances which expressly restrict or exempt conduct based on its content.\footnote{190} Content-neutrality concerns are most likely to arise with regard to the special-use permit process because of the inevitable subjectivity involved in reviewing permit requests. When first amendment rights are affected by such a process, as in the case of churches, special...
constitutional concerns arise, most notably the need for nondiscretionary standards and an understanding of the permissible basis for denying a permit.

As discussed earlier, the special-use permit process provides for an individualized assessment of a church's compatibility with a particular district and allows for application of special conditions on the use. For these reasons, the special-use permit has become a particularly popular method of regulating church location in residential districts. Although many jurisdictions prohibit a complete ban on churches, all jurisdictions acknowledge, at least in theory, the legitimacy of regulating churches through special-use provisions.

In practice, however, the standard of judicial scrutiny used when reviewing permit denials varies considerably. Some states review permit denials to churches with no greater scrutiny than that applied to other special-uses such as gas stations or hospitals. Most states, however, consistent with their view on the validity of exclusions, require a clear showing that the church would be incompatible with neighboring property.

Although the flexibility offered by the special-use process makes it an attractive device for regulating churches, it is, in effect, a licensing of first amendment activity and raises questions associated with content-neutrality. The Supreme Court has frequently examined licensing schemes that were a part of a time, place, and manner regulation of a protected activity; indeed, much of the Court's early case law regarding access to public fora involved licensing schemes. Although the Court has recognized that licensing schemes may be used to regulate first amendment conduct, the Court has consistently held that such schemes must be nondiscretionary and provide appropriate standards for issuing permits. Further, fac-

192. See supra note 52.
197. See, e.g., Niemotko v. Maryland, 340 U.S. 268 (1951); Cantwell v. Connecticut, 310
ially valid licensing schemes must be applied in a nondiscriminatory manner, and permits must be issued where the preexisting criteria are met.\textsuperscript{198}

These concerns and precedent demonstrate the need for substantial judicial control and supervision when the special-use process is applied to churches. Although churches generally might not invoke the same municipal hostility as adult theaters, minority religions are often viewed as threatening the community well-being and are potentially subject to discrimination. Yet, as Professor Reynolds notes, special-use provisions for churches are frequently vague and general, similar to provisions governing non-first amendment uses.\textsuperscript{199} When first amendment uses are involved, references to the “general welfare” fail to provide substantial guidance to issuing authorities and reviewing courts. Even absent proof of actual discrimination, courts should void regulations that fail to list specific criteria for reviewing special-use permits to avoid the potential for content discrimination.\textsuperscript{200}

When permit issuance standards are provided, some subjectivity is inevitable. Although specific factors for consideration, such as traffic, noise, and parking, must be articulated, it is difficult to require precise levels of objectionable conduct. Attempting to delineate such precise standards would make ordinances unwieldy and unworkable, and courts have not required such precision. It would be sufficient to require that ordinances articulate general factors which would form an acceptable basis for exclusion of churches from a particular interest.

Because precision of regulation is impossible in an ordinance itself, it is also important for courts to undertake meaningful review of permit denials in two regards.\textsuperscript{201} First, courts should closely scrutinize permit denials to ensure that municipalities substantiate traffic, noise, parking, and other concerns that form the basis of their decisions. This obviously means not only that reasons for a denial must be limited to the criteria stated in the ordinance, but also that the municipality must be able to substantiate concerns under the

\textsuperscript{199} See Reynolds, supra note 43, at 786-88.
\textsuperscript{200} In an analogous zoning situation, courts have struck down special-use requirements for adult theaters that had only vague and general criteria because of the potential for unbridled discretion over an activity protected by the first amendment. See, e.g., City of Imperial Beach v. Palm Ave. Books, Inc., 115 Cal. App. 3d 134, 171 Cal. Rptr. 197 (1981); see also Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497, 505 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981).
specific facts of the application rather than just by reference to general state interests.\textsuperscript{202} Second, courts should also compare permit decisions to previous determinations under the ordinance to ensure that the standards are being applied in an evenhanded way.\textsuperscript{203}

In sum, the first amendment tolerates locational restrictions on churches subject to several important safeguards. Any locational restriction, and in particular any complete ban on churches in certain districts, must not only advance significant state interests, but also leave ample alternative sites. When location is regulated by special-use permits, specific standards must be stated in the zoning ordinance, and permit decisions must be scrutinized to ensure that the state can substantiate its purported interest and that the ordinance is applied fairly. This article will next examine the scope of the activities a church can pursue on its property.

IV. ACCESSORY USES AND THE CHURCH SCHOOL

A. In General

Distinct from the issue of where churches may locate is the issue of what activities they may conduct on property zoned for "church" use. As previously noted, churches today are rapidly expanding their activities and ministries, particularly in the areas of education and social services.\textsuperscript{204} Not surprisingly, churches frequently choose to pursue these activities on their premises rather than seek facilities elsewhere. As a result, the traditional church building, previously used only for weekly worship, has become the center of diverse activities throughout the week. Of particular significance is the growing number of churches that use their facilities for private, religious schools. This changing use pattern is increasingly being resisted by residential communities, which, while often willing to tolerate more

\begin{itemize}
  \item \textsuperscript{201} For a thorough discussion of current deficiencies in the use of special-use permits as applied to churches and recommended changes, including suggestions for meaningful judicial review, see Reynolds, supra note 43, at 784-809.
  \item \textsuperscript{202} As previously noted, most courts do in fact closely scrutinize permit denials and require that zoning boards substantiate their conclusions by specific facts rather than just abstract state interests. See supra note 53 and accompanying text.
  \item \textsuperscript{203} See Lubavitch Chabad House, Inc. v. City of Evanston, 112 Ill. App. 3d 223, 445 N.E.2d 343 (1982), cert. denied, 464 U.S. 992 (1983) (holding that denial of special-use permit violated first amendment where church had met permit requirements and evidence showed that many other churches had been granted permits in the same district). See generally Reynolds, supra note 43, at 807-09.
  \item \textsuperscript{204} Buzzard, America Today, Shaking Foundations, FREEDOM AND FAITH: THE IMPACT OF LAW ON RELIGIOUS LIBERTY 11, 17-18 (1982); Esbeck, supra note 11, at 367-68.
\end{itemize}
Several distinct inquiries are involved in regulating the scope of activities a church may conduct on its property. The key inquiry, however, requires determination of what activities are encompassed within a "church" zoning designation; that is, what bundle of uses make up a "church" for zoning purposes. This, of course, is initially a matter of statutory interpretation regarding what uses are contemplated by the ordinance. Beyond that, however, constitutional issues arise regarding the degree to which the first amendment requires accommodation of various activities on church property.

The generally recognized primary use of church property is that of religious worship and assembly. Incidents which make up this primary use are clearly permissible. Zoning law recognizes, however, that a primary use designation for property also encompasses various secondary uses, commonly referred to as "accessory uses." Accessory uses are activities which, while distinct from the primary or principal use of property, are generally allowed because of their close relationship with the primary use. Although ordinances vary in the specificity with which they define permissible accessory uses, they typically require that an "accessory use" be subordinate as well as related to the primary use, and most significantly, that it be "customarily incidental" to the primary use. As such, these "accessory use" standards serve as a shorthand method both for discerning legislative intent regarding the intended scope of permissible activities and for assessing an activity's potential compatibility with surrounding land.

Courts have taken two general approaches in addressing the accessory use question with regard to churches. Many courts have applied the "customarily incidental" standard used in other contexts. Although as a threshold inquiry these courts require that the use be a religious one and related to the primary church use, the primary question is whether, from a land use perspective, the activity is one normally associated with churches. When applying this standard, courts have generally shown sensitivity to churches by broadly characterizing the use in question to bring it within a more general and acceptable category, and at times have shown sensitivity

205. See, e.g., Churches v. Zoning Boards, The Wash. Post, Nov. 18, 1985, at 34-35 (nat'l weekly ed.) (reporting of a Fairfax County, Va., conflict between churches and local residents over the right of churches to use their facilities for religious schools and shelters for the homeless).
206. See 2 R. Anderson, supra note 41, § 16.11.
207. 2 A. Rathkopf, supra note 7, § 23.01.
208. Id. § 23.01[1].
209. See, e.g., East Side Baptist Church of Denver, Inc. v. Klein, 175 Colo. 168, 171, 487
to the practices of particular sects. Nevertheless, if properly applied, the "customarily incidental" standard allows prohibitions on secondary uses which, although clearly religious in nature, are not customarily associated with churches.

A second identifiable approach to the accessory use question is to allow, as a permissible accessory use, activities that have a religious purpose or are integral to the church's mission. Although these courts at times couch their analysis in "customarily incidental" language, they, in essence, only seek to determine whether the challenged activity is arguably integral to the church's mission, and decline to limit activities to those "customarily" associated with churches. This approach is occasionally based on language found in the ordinance involved, but more frequently appears to be implicitly based on the first amendment concern that government not


210. See, e.g., Schulte, 241 Ind. at 346, 172 N.E.2d at 42; New Testament Baptist Church, 118 N.H. at 58-59, 382 A.2d at 379-80. Any particular use can be characterized at various levels of specificity or generality, thus allowing courts to manipulate the standard to reach desired results. If a use is characterized at a high level of generality it is more easily viewed as customary, since a common element can be found with activities normally associated with churches. Conversely, if a use is characterized with great specificity, it is less likely to be viewed as customary since the greater specificity makes the use more unique. For example, a drug treatment program conducted on church premises can be characterized with substantial specificity and thus viewed as not customary, since such programs are usually not associated with churches. On the other hand, it could more generally be characterized as a social service activity which are somewhat more customary with churches.


213. See Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 315-18, 319 N.Y.S.2d 937, 943-45 (1971) (ordinance allowing "religious uses" as permissible accessory uses interpreted to include drug treatment center).
unnecessarily interfere with religious exercise. As might be expected, the range of potential accessory uses under this approach is virtually unlimited, since churches can sincerely pursue a variety of activities as part of their religious mission. Indeed, courts that follow this approach have appropriately shown significant deference to churches when defining what is religious. As a result, courts have permitted such diverse activities as a softball field, a coffee house, and a drug treatment center.

These two approaches reflect the problems inherent in regulating accessory church uses. Both sound land use planning and first amendment concerns require that churches be allowed to pursue some activities on their property beyond religious worship. A church’s own facility must be recognized as a unique and particularly significant site for many of the activities a church might pursue and for which some accommodation should be made. Further, since it can be anticipated that churches will engage in activities beyond worship, municipalities should be obligated to some extent to consider this fact in their initial zoning designations to avoid unnecessary burdens on religion by requiring bifurcation of ministries. As a practical matter, municipalities apparently recognize these concerns and always allow churches to engage in some accessory activities on their property.

214. Although most courts have not articulated a strong first amendment rationale in applying a “religious use” approach, courts have frequently emphasized that churches should be free to perform their perceived mission, see, e.g., Synod of Chesapeake, Inc. v. City of Newark, 254 A.2d 611 (Del. Ch. 1969), suggesting a right to be free from state interference.

215. These courts have generally defined the term “religious use” as uses conducted with a religious purpose. See Slevin, 66 Misc. 2d at 315-16, 319 N.Y.S.2d at 943. In applying this standard, courts have recognized that churches must largely be responsible for determining how to foster growth and fellowship and to best effectuate their various religious obligations. Although courts require that churches articulate a religious purpose for a particular activity such as a coffee house or drug treatment center, they have readily accepted the sincerity and plausibility of the religious motivation behind such undertakings. Such deference to churches is clearly warranted, since core religious concerns such as growth, strengthening fellowship between members, and meeting societal needs can be accomplished in a variety of ways. For this reason courts are quick to acknowledge the religious motivation and purpose behind such activities. See, e.g., Diocese of Rochester v. Planning Bd., 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956).


219. See supra notes 160-61 and accompanying text, discussing the need to accommodate first amendment expression when regulating constitutionally significant fora. Such an accommodation analysis would also seem appropriate when examining the right of churches to use their facilities for secondary activities because of the important role such facilities play in the life of the church.
At the same time, however, the preservation of residential neighborhood quality requires some limitation on the activities a church can pursue. Further, to allow churches virtually unlimited use of their property makes it particularly difficult for a municipality to assess a church's impact on surrounding land when enacting a comprehensive zoning ordinance. This, in turn, might encourage municipalities to zone to the lowest common denominator, thereby excluding many religious land uses that a municipality might deem compatible with residential neighborhoods because of potentially unique and disruptive activities. Not only would this possibly interfere with a municipality's interest in properly allocating land uses, but might also result in greater locational restrictions on churches than desirable from either a land use or first amendment perspective.

The "customarily incidental" standard might be viewed as a reasonable attempt to balance these two conflicting concerns, since it requires municipalities to anticipate and allow some secondary activities, and, yet, does not expose them to unforeseen uses that disrupt surrounding neighborhoods. Although commentators have argued that the "customarily incidental" standard poses establishment clause problems because it requires the state to interpret religious doctrine, this is not necessarily true. Courts and municipalities should be prohibited from deciding accessory use questions based on their perceptions of whether an activity is part of a particular religion's beliefs. The determination of what is customary, however, can properly be made from a land use perspective rather

220. See Reynolds, supra note 43, at 814; Note, Land Use Regulation, supra note 14, at 1572.

221. The Supreme Court has frequently noted that the state is not competent to make substantive assessments of religious matters. This was recently articulated in Thomas v. Review Bd., 450 U.S. 707 (1981), where the Court stated:

The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Id. at 714. Later, the Court stated that "[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." Id. at 716; see also Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

The Court has expressed a similar sentiment in a line of cases involving intrafaith property disputes. Although courts have little choice but to accept jurisdiction in such matters, the Supreme Court has firmly stated that they must avoid questions "made to turn on the resolution . . . of controversies over religious doctrine and practice." Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).
than a theological perspective; that is, by focusing on land use experience as a reference point for the determination of whether the activity is "customary." Thus, restricting or prohibiting an activity because it is not a "customary" church activity does not require a determination of whether the use is religious in nature, but instead merely requires that from a land use perspective the state determines that the "use" is not customarily associated with churches.

The "customarily incidental" standard is flawed for other reasons, however. First, the problems inherent in the test in other contexts are accentuated with regard to churches. Setting a suitable reference point from which to judge what is "customary" is particularly problematic when the test is applied to churches because of their diverse characteristics. Although courts at times avoid this problem by characterizing the challenged activity very generally, this, in effect, amounts to the more lenient "religious use" test. The standard is also potentially unresponsive to a religion's evolving understanding of its religious mission in today's society.

Even more problematic, however, is the discrimination inherent in the "customarily incidental" approach. By its very nature, the standard is skewed towards traditional religious practices and dogma because it uses normalcy as a reference point. The Supreme Court has been particularly sensitive to legislative classifications which, in effect, prefer one religion over another without a legitimate basis for distinction. Although zoning regulations might have a different effect on first amendment uses where distinct secondary effects exist, the "customarily incidental" standard is not precisely drawn to that end. Therefore, to the extent that the standard is a shorthand means of assessing compatibility in other contexts, it lacks the precision necessary to constitutionally regulate first amendment activity.

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223. The "customarily incidental" standard requires a reference point from which to judge whether a particular use is "customary." Problems arise in setting an appropriate time-frame and geographic area by which to judge a particular use. Further problems arise in setting some degree of use by which a use becomes "customary." See generally Note, supra note 222.

224. It has often been pointed out that if taken literally, the "customarily incidental" standard would prohibit evolving uses of property. See, e.g., id. at 554.

225. See, e.g., Larson v. Valente, 456 U.S. 228 (1982) (Minnesota's charitable solicitations act, which exempted from registration and reporting requirements only those religious organizations that received more than half their contributions from members or affiliated organizations, held to violate establishment clause because it discriminated between religions and created a denominational preference).

Resolution of accessory use issues, therefore, is better addressed by focusing on the actual problems posed by a particular activity rather than categorically prohibiting uses because they are not "normal." Such an approach would recognize a church’s right to engage in activities related to its religious purpose or mission as long as the activity does not substantially interfere with surrounding uses. The focus of inquiry should be on the impact a particular secondary use has on its surroundings. Although not a perfect solution, this approach strikes a better balance between the planning needs of a community and the religious activities of its churches.

Such a compatibility analysis would be premised on a showing that the activity in question is part of the church’s religious mission and, thus, related to the land’s primary use. Since courts, for the most part, are precluded from evaluating religious doctrine, in practice this would be a sincerity test. Assuming that the use is religious, the burden would shift to the municipality to show that the activity is clearly incompatible in its neighborhood context. Although this is similar to the determination made under time, place, and manner regulations, it differs because it involves an individualized, rather than a categorical, assessment. Further, the mere fact that an analogous primary use would be prohibited under applicable zoning regulations should not suffice to establish incompatibility; rather, an actual showing based on specific concerns should be required.

This approach is admittedly quite deferential to churches because it presumes a right to engage in any activity related to a church’s religious mission and then requires the municipality to establish that the activity is incompatible with surrounding property. Striking the balance in this way, however, is justified for several reasons. First, this approach avoids the extreme deference of the “religious use” test on the one hand and the more intrusive and discriminatory “customarily incidental” standard on the other. Second, giving churches substantial freedom to pursue activities on their property is a reasonable offset to municipal ability to locate churches. Finally, the degree of interference with religious exercise is intuitively greater when not only where a church can locate is limited, but what it can do there is limited as well. Although in theory such regulations are still only time, place, and manner restrictions, if the use is permitted

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227. Although warning against judicial entanglement in evaluating religious doctrine, the Supreme Court has frequently noted that free exercise claims are subject to a sincerity test to avoid fraudulent claims. This is at best a truncated inquiry, however, since the focus is not on the correctness of a belief, but on whether the claimant really believes it. See THomas v. Review Bd., 450 U.S. 707, 716 (1981).
elsewhere, dispersing the various activities of churches throughout a municipality will obviously substantially burden religious exercise.228

The analysis proposed above can be demonstrated by its application to an issue of current significance, whether churches can use their facilities to provide shelter for the homeless.229 There is little question that such a use is sincere religious conduct for many religions, because ministering to the poor and extending hospitality are frequently dictated by the religion.230 Thus, the "religious use" approach taken by some courts would clearly allow it. Conversely, despite its religious nature, such an activity cannot be viewed as a normal or traditional use of church facilities, at least from a land use perspective, and, therefore, could be prohibited under the "customarily incidental" standard. The approach outlined above, however, would allow the municipality to restrict the use only upon a showing of clear incompatibility with its surrounding neighborhood.

Such a showing, of course, would depend upon surrounding land uses. If the church is located in a high density residential or commercial district, providing shelter for the homeless would be compatible and, thus, permissible. Even in a low density residential district the municipality would have to show how such a use would substantially interfere with surrounding properties. Increased noise and traffic, as well as the possible intrusion upon surrounding neighborhoods, would be legitimate concerns in this regard. Further, the municipality could impose reasonable secondary controls upon the activity, such as noise limitations and building code restrictions.231 As in the case of special-use permits, however, unsubstantiated assertions of state interest should not be considered adequate to interfere with the church's mission.

The foregoing analysis is appropriate for most accessory use questions. The most common and significant accessory use issue today concerns the use of churches for private, religious schools. Because of the frequency with which the issue arises and the impor-

228. Although as discussed in section III the "narrowly tailored" means requirement is usually not applied with rigor in time, place, and manner analysis, the Court has appeared to require some accommodation when the restriction burdens first amendment exercise, such as where it restricts a traditional place or means of expression. See, e.g., United States v. Grace, 461 U.S. 171 (1983).

229. See The Wash. Post, supra note 205, at 34-35 (Fairfax County, Virginia, conflict between churches and zoning board over, inter alia, attempts by churches to house the homeless in their buildings); see also St. John's Evangelical Lutheran Church v. Hoboken, 195 N.J. Super. 414, 479 A.2d 935 (1983).

230. See, e.g., Deuteronomy 15:7 ("If there is among you a poor man, . . . , you shall not harden your heart or shut your hand against your poor brother, but you shall open your hand to him, and lend him sufficient for his need, whatever it may be.").

tant interests involved, the next subsection will address church schools.

B. Zoning the Church School

The most frequent and controversial accessory use issue arising today is whether churches may operate private religious schools or day care centers on their premises. That the issue arises with increasing frequency is partly attributable to a growing dissatisfaction among certain religious groups with public education and to the general proliferation of day care centers. Private religious schools, once the almost exclusive realm of Catholicism, are now employed by a growing number of conservative Protestant groups. For obvious reasons, these groups see advantages in using existing church facilities rather than building or renting alternative sites.

Although the regulation of church schools is similar to other accessory use issues because it concerns whether a church can use its facility for a secondary activity, in several respects church school regulation differs. First, unlike most accessory uses, private schools are usually a separately designated primary use in zoning ordinances. This separate treatment not only provides clear legislative intent regarding locational restrictions on schools, but also provides a reference point by which the distinct and often more intense effects of schools can be evaluated.

Second, case law regarding accessory church schools has arisen in more diverse ways than have other accessory use cases. Although some cases have involved clear questions of whether a church could operate a school as an accessory use, less intrusive forms of regulation have been involved more often, such as the requirement of a separate special use permit for schools or separate building code

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232. See cases cited supra note 16.
233. The number of fundamentalist Christian schools has risen dramatically in the last decade. There are currently about 20,000 such schools with over 1,000,000 students. The majority of these schools are located in churches. See Solorzano, supra note 15, at 46.
235. See, e.g., Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 610 P.2d 273 (1980), appeal dismissed, 450 U.S. 902 (1981) (suggesting that explicit treatment of schools as separate primary use indicated that they were not intended to be accessory uses).
requirements. These latter restrictions did not prohibit accessory church schools per se, but instead attempted to apply separate and more intensive land use regulations to schools than were already applicable to the church.

For these reasons, judicial review of zoning restrictions on church schools has differed from and been more deferential than review of other accessory uses. The common identification of schools as a separate primary use has led courts to dispense with inquiries into whether the use is "customary" and instead to focus on first amendment issues raised by the restrictions. In this regard, courts have viewed schools as encompassing land use concerns different from churches and have held that separate restrictions are permissible as long as some provision is made for church schools elsewhere. In some cases, courts have noted that the challenged restrictions did not prohibit an accessory church school, but only regulated its manner of use. In other instances, courts have held or suggested that broader bans are permissible if provisions are made elsewhere for schools, indicating there is little need to accommodate schools on church premises themselves.


240. See, e.g., Damascus Community Church, 45 Or. App. at 1068-69, 610 P.2d at 276 (ordinance manifested clear intent to make the granting of and criteria for conditional use permits for churches and for religious schools different, by having different regulations for each). But see City of Concord v. New Testament Baptist Church, 118 N.H. 56, 382 A.2d 377 (1978) (interpreting a zoning ordinance which permitted as accessory uses those uses usually connected with a church to include parochial schools).

241. See cases cited supra note 239.

242. See, e.g., Congregation Beth Yitzchok, 593 F. Supp. at 664; Antrim Faith Baptist Church, 75 Pa. Commw. at 65, 460 A.2d at 1229-30.

Despite this general acceptance of zoning restrictions on accessory church schools, some precedent exists for treating church schools as accessory uses. New York decisions have held that, because of the integral role played by religious education in the life of a church, municipalities cannot prohibit such uses. More recently in City of Concord v. New Testament Baptist Church, the Connecticut Supreme Court held that under an ordinance allowing "facilities usually connected with a church," a church school must be permitted. The court stressed both the integral role that the school played in the claimant's religion and the historical role that education had played in New England churches and concluded that churches were a permissible accessory use under the ordinance. The Washington Supreme Court reached a similar result in City of Sumner v. First Baptist Church, where it held that if the "practical effect" of meeting either separate building code or zoning requirements was to add prohibitive costs to, and, thus, force closure of, a school, there was an infringement of free exercise of religion.

A careful reading of the various decisions suggests that analysis of accessory church school issues should be approached on two different levels. The first and most basic question is whether the integral
role that education plays in the life of many churches prohibits municipalities from applying distinct land use controls to schools housed in churches. As noted, most accessory church school cases have in fact involved regulations which did not necessarily prohibit the school, but instead attempted to apply additional land use or building standards to the proposed schools. Churches have consistently challenged even these secondary controls, on the ground that religious schools qualify as a church use and, therefore, are already encompassed within the regulations applicable to churches generally. Thus, churches have argued that a school’s integral relationship to their mission eliminates the need for additional controls.

Such a perspective fails to distinguish properly between the theological relevance and the land use relevance of an activity. Although religious schools certainly are integral to many religions and deserve constitutional protection, zoning controls are based on the land use characteristics of an activity. As previously discussed, courts have necessarily focused on the distinct secondary land use effects of first amendment uses to justify their regulation. This focus also applies to accessory uses, where a municipality should be able to assess separately the compatibility of proposed uses with surrounding property. Thus, the integral religious nature of an activity should not limit a municipality’s right to regulate distinct land use concerns that might exist.

This analysis is particularly relevant to accessory church schools, which potentially have land use effects and building needs quite


250. Indeed, this assertion has never been challenged even in those cases upholding municipal regulations. See, e.g., Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 1070-71, 610 P.2d 273, 275 (1980), appeal dismissed, 450 U.S. 902 (1981).

251. There is little doubt that proper education of its young is an integral and central aspect of many religions. The Supreme Court has long recognized that the state must allow religious groups opportunities for alternative education. In Pierce v. Society of Sisters, 268 U.S. at 247 (“If the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.”).
distinct from churches generally. In many instances, a school is a more intense land use than a church because of the greater frequency of use. Moreover, the younger constituency of schools poses potentially distinct health and safety concerns. To allow a separate assessment of these concerns neither prohibits the activity nor questions its religious importance; rather, it simply recognizes that valid land use distinctions exist that justify a separate assessment of building and locational standards.

The second and more difficult accessory church school issue is whether some accommodation of a church's desire to use their facilities for schools should be required, rather than allowing municipalities to exclude them per se. As suggested in the previous section, the necessity of allowing churches to engage in some accessory uses is best achieved by an individualized compatibility standard rather than by an outright prohibition of a particular use. This standard requires accommodation to the extent that a particular use is compatible with its surroundings, but allows the prohibition of uses that are actually disruptive and the application of secondary controls. Arguably, however, the traditional treatment of schools as a separate primary use provides sufficient land use experience from which to recognize that schools are a more intensive land use than churches are and, thus, do not require a particularized assessment.

Although such an approach is perhaps administratively attractive, it should be rejected as unnecessarily burdensome on religious exercise for several reasons. First, the fact that schools are generally recognized as a distinct and more intensive land use than churches does not mean they are necessarily incompatible with a particular church's neighborhood. In certain situations, the nature of the school and its actual location will indicate that the school can be accommodated without ill-effects. Accommodation in such circumstances is particularly important because of the admittedly integral

254. See supra text accompanying notes 225-31.
255. Another potential reason for regulating accessory church schools is based on the state's own admittedly strong interest in education. Allowing churches to use their facilities for schools, however, does not in itself affect the state's educational interest, but only its land use interest. The state's very high interest in education can obviously be addressed in ways that do not bear upon the location of church schools. Specifically, the state's educational interest concerns what children are learning, not where they are learning it. This can be addressed by regulations such as curriculum requirements and teacher certification. Thus, when examining zoning issues concerning church schools, the state's interest is not education but the external land use effects of the school, an important but certainly not as significant an interest as education.
role that education plays in a church. Indeed, Supreme Court precedent recognizes the right to provide such education and argues in favor of making some accommodation.256

Second, sensitivity to the needs of smaller congregations suggests that the use of their own facilities should be considered as a rational alternative to securing other facilities. Although the first amendment does not guarantee that rights be exercised by the least expensive means, the Court has shown sensitivity to protecting particularly appropriate fora for the exercise of rights.257 The expense and inconvenience of providing alternative facilities for a church school will certainly deter some churches from pursuing this integral aspect of their religion. The recognition that churches have a right to use their facilities for schools, subject to appropriate building code requirements and assessment of the use's compatibility with surrounding property, is an appropriate accommodation of the needs of churches without exposing municipalities to disruptive uses.258

Requiring an individual assessment of the propriety of church schools obviously does not mean that they are beyond regulation. It simply means that the municipality has the burden of showing that the school would be incompatible with surrounding property uses, with the focus on such factors as actual intensity of use.259 Further, even when the church school is allowed to operate, the municipality should be able to require compliance with separate building codes to ensure the safety of the students.260 The nature of the use and the

256. See supra note 251.
257. See supra notes 160-61.
258. Accommodating the needs of churches, and in particular smaller congregations, in this manner should not mean that a church's free exercise rights are violated if compliance costs are prohibitive, as suggested in City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 639 P.2d 1358 (1982). Premising a free exercise violation on the financial ability of a particular church to comply with land use controls is problematic in several regards. First, the mere financial costs of complying with government regulations has not normally been sufficient to establish a free exercise violation; rather, the claimant must be penalized for exercising a religious belief. See supra notes 88-90 and accompanying text. Second, and more important, determining when costs become prohibitive would entangle the state in assessing a church’s choices in how it spends its money. Thus, although financial concerns should be relevant in addressing the issue of church schools, they are better addressed by a general recognition that churches can use their facilities subject to reasonable land use requirements than by an individualized assessment of whether costs are prohibitive in any particular case.
259. Prohibiting private religious schools in churches while permitting public schools in a district arguably violates content-neutrality concerns in that both uses generate similar external effects. Courts have split with regard to the issue. See Roman Catholic Welfare Corp. v. City of Piedmont, 45 Cal. 2d 325, 289 P.2d 438 (1955) (holding such an ordinance invalid); Catholic Bishop v. Kingery, 371 Ill. 257, 20 N.E.2d 583 (1939) (holding ordinance invalid); State ex. rel. Wisconsin Lutheran High School Conference v. Sinar, 267 Wis. 91, 65 N.W.2d 43 (1954), appeal dismissed, 349 U.S. 913 (1955) (holding ordinance valid).
constituency of the users of schools is substantially different from that of churches and justifies separate regulations. Moreover, as in the case of special-use permits, municipalities should be able to require reasonable land use modifications, such as parking requirements or minor landscaping, to mitigate the external effects of the use on its surroundings.261

The approach outlined above, which recognizes a church's right to use its facilities for private schools subject to assessment of compatibility and secondary controls, is not necessarily inconsistent with decisions allowing municipalities to restrict church schools. Although some of these cases have involved blanket prohibitions on church schools in particular districts,262 more frequently the challenged regulation did not per se prohibit church schools but subjected the school to separate building code provisions,263 landscaping modifications,264 or a special-use permit process.265 As such, the regulations potentially recognized the right of the church to use its facilities for a school, subject to these secondary controls. This strikes a reasonable balance between the needs of both the church and the community.


The Supreme Court's summary disposition of the appeal in Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 610 P.2d 273 (1980), appeal dismissed, 450 U.S. 902 (1981), admittedly poses a potential problem in that it represents Supreme Court precedent to the narrow issues involved. The issue involved in Damascus, however, was whether a church school could be made subject to a separate special-use permit requirement distinct from that applicable to the church itself. To the extent that it did not involve an outright ban but rather an individualized assessment of the propriety of a school in the church, it is compatible with the analysis presented in the text.
V. Restrictions on Religious Activities in the Home

Most religious zoning cases have involved locational restrictions on conventional church buildings and the regulation of accessory uses. Issues concerning the application of zoning restrictions to religious activities in private homes, however, have emerged in the last several years. Two recent cases have construed zoning ordinances that excluded churches from a residential district as prohibiting worship services in a private home. Further, although there have been no reported cases on point, municipalities have attempted to interpret such ordinances as prohibiting less formal home religious assembly such as Bible studies or prayer meetings. This section will explore the permissible scope of zoning ordinances regulating home religious assembly.

Case law involving zoning restrictions on religious activities in private homes has been limited to challenges of worship services held in private homes. In Grosz v. City of Miami Beach266, the Eleventh Circuit held that a city could constitutionally prohibit an Orthodox rabbi from holding regular worship services in his garage. In Grosz, the plaintiff's religion required that he conduct religious services twice daily in a congregation of at least ten adult males. Shortly after moving into his residence, which was in a zone prohibiting churches, Grosz remodeled his garage and began holding worship services there twice daily. Most services involved ten to twenty people and caused no substantial disturbance to the neighborhood. Well-attended services reached as high as fifty people, however, and disturbed neighbors as a result of people seeking directions to the home, and chanting and singing during the services.267 Because of neighbors’ complaints, the City of Miami Beach gave Grosz a “notice of violation,” that threatened prosecution if the activity continued.268 The Eleventh Circuit interpreted the zoning ordinance as prohibiting the conduct in question, and directed itself only to the free exercise issues raised by Grosz.269 In finding no first amendment violation, the court applied a balancing test, and held that the city’s interest in preserving the quality of residential neighborhoods by controlling traffic and noise outweighed what it viewed as an incidental burden on religion.270 The court emphasized that the zoning

266. 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984).
267. Id. at 731-32.
268. Id. The City of Miami Beach said that it “would not prosecute plaintiffs for praying in their home, with ten friends, neighbors, and relatives,” thus suggesting that it was the level of the activity that the city considered prohibited and to which the court directed its attention. Id. at 732.
269. Id. at 733.
270. Id. at 740-41.
ordinance allowed religious institutions to locate in one-half of the city, and, therefore, the religious practices could be conducted elsewhere. Thus, it viewed the restriction as a reasonable time, place, and manner regulation of a church’s location, and in fact made no mention of the fact that the activity occurred on the Grosz’ residential property.

In State v. Cameron, a case similar to Grosz, a New Jersey Court of Appeals ruled that the defendant, an Episcopalian minister, violated a zoning ordinance by holding worship services in his home. The defendant and his congregation of fifteen to twenty people worshipped weekly in his home, which was located in an area zoned exclusively for single family residences. The congregation had previously rented a room in a school for Sunday services, but had been forced to move when the rent was raised. The city ordered Cameron to cease holding services after a neighbor complained that he could hear the sermon and singing in his home and that parked cars hindered traffic on the street.

As in Grosz, the court of appeals in Cameron interpreted the ordinance’s prohibition of churches as applying to organized worship services in private homes. Similarly, the court said that the state’s interest in regulating the noise, traffic, and congestion caused by churches outweighed the incidental burden on the defendant’s first amendment rights. The court applied a time, place, and manner analysis, and found that the regulation furthered an important government interest in a narrowly tailored means.

On appeal, the New Jersey Supreme Court reversed the court of appeals, holding that the ordinance was vague in defining “church.” The court noted that the ordinance contained no definition of church and that the term was susceptible to a number of interpretations. Although the court stated that in some situations the ordinance could be applied without raising questions of vagueness, such as with regard to buildings specifically built for religious worship, the court held that it was not clear from the ordinance what type of conduct turned a single family residence into a church. Therefore, as applied to the

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271. Id. at 740.
272. 189 N.J. Super. 404, 460 A.2d 191 (1983), rev’d, 100 N.J. 586, 498 A.2d 1217 (1985). The court of appeals majority opinion in Cameron adopted the holding and reasoning of the municipal court opinion found at 184 N.J. Super. 66, 445 A.2d 75 (1982), adding only a paragraph of its own regarding whether the activity met the definition of a church. Thus, references to the court of appeals decision in fact are to the municipal court decision which it adopted.
273. 184 N.J. Super. at 69-70, 445 A.2d at 76-78.
274. 189 N.J. Super. at 405, 460 A.2d at 192.
defendant in Cameron, the ordinance was unconstitutionally vague. The decision left open, however, the possibility of a more precisely drawn ordinance that could constitutionally prohibit religious assembly in a private residence.

The New Jersey Supreme Court’s decision in Cameron demonstrates sensitivity to the inevitable problem of distinguishing between permissible and impermissible religious assembly in private homes. Indeed, there have been a number of incidents in recent years in which municipalities have attempted to prohibit more informal religious gatherings in private homes, such as Bible studies or prayer groups. One religious organization has reported over one hundred such incidents in the last several years. The challenged activities have ranged from meetings of small groups of two or three for a catechism class to large group meetings for Bible teaching, prayer, and singing. Municipalities’ rationales for the attempted prohibitions have been that such activities, in effect, constitute churches and, therefore, are either prohibited from the particular zone or subject to special-use requirements. Although these incidents have yet to generate case law, the frequent use of private homes for various forms of religious assembly suggests that the problem will not go away.

The issue of how and whether home religious assembly can be regulated fundamentally concerns a municipality’s ability to regulate the use of private, residential property. As with other primary uses, municipalities attempt to control the external effects of residential land use in two general ways. The first is to limit, through accessory use provisions, the nature of the activities that can occur on the property. Ordinances and courts typically allow for accessory uses on residential property, usually requiring that the use be related to the

277. Id. at 594-99, 498 A.2d at 1223-25.
278. The majority decision in the New Jersey Supreme Court’s disposition of Cameron relied on vagueness grounds to invalidate the statute, suggesting that a more precisely drawn statute might have been constitutional. The court also hinted, however, that perhaps the proper way to address such problems was enforcement of the existing, more narrowly drawn statutes aimed at noise, parking, and similar problems. Id. at 600, 498 A.2d at 1224-25. The court was ambiguous as to whether municipal attempts to define more precisely the prohibited conduct would suffice if they categorically prohibited a particular type of religious assembly in a home.
279. The Center for Law and Religious Freedom reports that over 100 such incidents have occurred over the last several years in this country. See Center for Law and Religious Freedom, supra note 18, at 3. Five such occurrences are reviewed in detail in Comment, supra note 18.
280. See Comment, supra note 18.
281. In the vast majority of cases the municipalities involved apparently changed their position and allowed the informal religious gathering to continue. See Center for Law and Religious Freedom, supra note 18, at 3; Comment, supra note 18, at 786-87 nn.1-3.
principal use and be "customarily incidental" to it.\textsuperscript{282} This form of regulation involves a categorical prohibition of certain activities regardless of whether there is a showing of actual incompatibility with the surrounding neighborhood. Such an approach is generally supported by the expectations of the parties and generalizations that can be presumed about activities not "customarily" found with residential uses.\textsuperscript{283}

A second means of controlling the external effects of residential property is through secondary regulations aimed at the effects themselves as opposed to a particular use. Regulations can be set to limit noise levels, restrict parking along streets, and regulate traffic flow in residential neighborhoods. These secondary regulations recognize that even permissible land uses generate external effects that must be controlled to ensure maximum enjoyment of the land. Moreover, a municipality may enjoin any activity, whether categorically prohibited or not, if it is a genuine nuisance.\textsuperscript{284}

Viewed from a broader perspective, therefore, the issue of whether zoning ordinances can be applied to prohibit home religious assembly is not whether the activity can be regulated, but what form of regulation is constitutionally permissible. As previously discussed, the first amendment status of an activity does not immunize it from reasonable regulation. At a minimum, first amendment conduct in a private home is subject to the secondary controls mentioned above. Whether the state should also be able to categorically prohibit such activities as impermissible accessory uses should be examined more closely.

The rationale for allowing municipalities to categorically prohibit churches as a primary land use is that reasonable generalizations can be made about their basic incompatibility with residential zones. Because zoning restrictions are designed to regulate land uses and not structures, a similar rationale for prohibition might exist even if the church use is only a secondary and not a primary use of the land. Thus, as interpreted by both the Eleventh Circuit in \textit{Grosz} and the lower courts in \textit{Cameron}, an activity prohibited as a primary use should per se be considered outside the scope of permissible accessory uses, since the state's interest in land use regulation is the same in both instances.\textsuperscript{285} Thus, to the extent that a religious service can

\textsuperscript{282} See A. Rathkoff, \textit{supra} note 7, § 23.01; see also Note, \textit{supra} note 222.
\textsuperscript{283} See \textit{supra} text accompanying notes 207-08.
\textsuperscript{285} This analysis was implicit in the Eleventh Circuit's opinion in \textit{Grosz}, since it treated
be reasonably viewed as a "church" use within the terms of the zoning ordinance, arguably, it can be prohibited even as a secondary use in a private home.

Although this approach makes sense in other land use contexts, it is problematic as an approach to regulating home religious assembly for two reasons. First, although, as noted by the New Jersey Supreme Court in *Cameron*, the term "church" has a core meaning that involves a use primarily for purposes of religious assembly and worship, it is more difficult to find determinative factors that turn home assembly into a "church." Further, the generalizations regarding intensity of use that support restrictions on churches as a primary use are less compelling when the assembly is located in a private residence and secondary to the primary residential use. In such situations, the number of participants are fewer and the frequency of use for religious purposes is far less. Thus, the incompatibility concerns that typically accompany churches that are a primary land use in a residential neighborhood are diminished.

Second, and more importantly, even if the religious assembly, when viewed as a primary use, might be prohibited, a sufficient first amendment justification for the activity might exist because of its relationship to the primary residential use of the property. Foremost in such an analysis are content-neutrality concerns that arise when religious activity in a person's home is singled out for categorical prohibition. Zoning ordinances clearly permit, as accessory uses, various social activities, such as dinners, political discussions, or parties, that involve nonresidents in a person's home. To discriminate against informal religious activities because of their content clearly violates the content-neutrality requirements that are at the heart of first amendment jurisprudence. Even if the challenged activity is a regular religious meeting, such as a weekly Bible study, it is indistinguishable from any other regular form of entertainment that homeowners engage in and which generates traffic and noise. For this reason, the earlier mentioned attempts at prohibiting informal home religious assembly, such as Bible studies and prayer meetings, clearly run afoul of the first amendment.

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2 The case as merely involving a location restriction on churches. The lower courts in *Cameron* more directly addressed the issue, however, and held that the meeting of religious adherents on a permanent basis constituted a "church."


287. Such practices are so common place and well-accepted in our society that there is no case law regarding municipal attempts to prohibit such activities. In addressing other concerns, however, courts have occasionally alluded to the right to use residences for social purposes. See, e.g., Borough of Chatham v. Donaldson, 69 N.J. Super. 277, 282, 174 A.2d 213, 216 (1961) (residential use includes "use for private religious, educational, cultural, and recreational advantages of family") (emphasis omitted).
Similar content-neutrality arguments can be made even with regard to the more formal, regular worship services involved in *Cameron* and *Grosz*. For Rabbi Grosz to have up to fifty people in his home for worship is no different than neighbors having fifty people in their home for a party. A possible distinction, of course, is the scope of the activity, either in terms of size or regularity. To have people in your home on a regular basis, or to occasionally have large numbers there, is a normal residential use, but to do both is uncommon and might be viewed as unsuitable for that locale. Such concerns, however, should permit regulation of the scope of the activity but should not necessarily permit a categorical prohibition. As will be discussed below, content-neutral limitations might be put on such activities pursuant to the equal protection clause.

In addition to equal protection concerns, a "minimum access" right to use one's home for various forms of religious assembly arguably exists because the home is a unique and constitutionally significant setting for the exercise of first amendment rights. This was alluded to in *Stanley v. Georgia*, where the Supreme Court held that a person could not be convicted for possessing obscene material in the privacy of his home, even though such material was not protected elsewhere. In reaching this result, the Court was primarily concerned with a right of autonomy inherent in the first amendment to form ideas and thoughts free from state interference. Implicit in this reasoning was a recognition that the home is an especially significant place in which to exercise such a right.

Certainly the finding of a violation of such a first amendment right must be limited to the facts of *Stanley*, in which the activity was confined within the four walls of the home and did not involve nonresidents. Neither privacy nor first amendment concerns immunize first amendment exercise from regulation just because it occurs in the home. Yet, the suggestion in *Stanley* that a personal residence is a particularly unique and significant setting for first amendment

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288. Such an analysis is analogous to "minimum access" theories regarding public fora, which argue that, aside from "equal access" concerns, the state must provide some minimum access to traditional public fora such as parks and streets. See infra notes 297-300 and accompanying text.


290. *Id.* at 559.

291. *Id.* at 566. The Court emphasized that by attempting to control the contents of a person's library, as the ordinance attempted to do, the state was trying to control the person's mind. It was this significant state intrusion into a person's right to form his or her own ideas and beliefs that the Court found particularly repulsive in *Stanley*. *Id.* at 565-66.

Such a view can be supported by recognizing the unique setting that a private residence provides for associational exercise. The Supreme Court has frequently recognized that associations with others to solidify and advance personal beliefs are essential to the exercise of first amendment rights. The self-realization values inherent in the free speech and free exercise clauses, to a large extent, are dependent on interactions with others in a conducive atmosphere. Such associational exercise is intuitively freest and fullest in an adherent's own home. This is particularly important for religious worship and assembly, which frequently must find expression in an intimate community.

Besides its conduciveness to first amendment exercise, the use of private residences for first amendment assembly arguably is

293. On one other occasion the Court has suggested that there is some constitutional significance to exercise of first amendment rights on one's residential property. In Spence v. Washington, 418 U.S. 405 (1974), the Court, in reversing on first amendment grounds a conviction for improper display of a flag, noted among other considerations that the flag was displayed from the defendant's own apartment. Id. at 409. Although noting that it was a significant factor that the flag was displayed on Spence's own property, the Court did not elaborate on its significance. Id.

294. The Supreme Court's decision in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) should not be read as precluding recognition of the home as a constitutionally significant setting for the exercise of associational rights. Although the Court in Belle Terre held that a zoning ordinance which prohibited more than two unrelated adults from living in the same household did not violate associational or privacy rights, the decision can be distinguished in several important regards. First, the conduct involved in Belle Terre did not involve any first amendment exercise which was of critical concern to the Court in Stanley in recognizing a constitutional significance to the home. Second, the Court in Belle Terre emphasized in the context of not finding the implication of a fundamental right that the ordinance did not prohibit the claimants from associating with others in their home. Id. at 8-9. Although not too much should be made of this statement, since its significance was left totally undeveloped, it suggests that the Court in Belle Terre considered attempts to regulate the right to associate with others in one's own home to be of a different magnitude than regulating living arrangements. As such, the Court's deferential attitude toward a municipality's right to regulate household living arrangements should not be interpreted as necessarily allowing as extensive a right to order how a homeowner might associate with others in his home.

295. See, e.g., NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). Although the Court has not recognized the right to association as an independent constitutional right, it has given it considerable significance where it is used to further separately protected goals, such as that of free speech.

296. Extensive commentary has been devoted to exploring the values inherent in and furthered by the free speech clause. Although the vital role free speech plays in sustaining a politically free society is perhaps most often cited, commentators frequently emphasize the self-realization value furthered by free speech. Indeed, some commentators argue that it is the only adequate basis on which to support the clause. See, e.g., M. Redish, Freedom of Expression 9-39 (1984).
necessary to insure adequate fora for the associational exercise of rights. Although financial burdens per se have not been grounds for finding a violation of first amendment rights, in formulating its time, place, and manner jurisprudence the Court has been sensitive to ostensibly neutral restrictions that fall more heavily on the poor.

This has been most apparent in public forum cases, in which the Court has guarded particular fora or media of expression that have been traditionally necessary for the exercise of first amendment rights. Thus, the Court has recognized the need to make public parks and streets available for some communicative conduct. Similarly, the Court has been particularly sensitive to bans on leafletting because of the role it plays as an inexpensive form of communication.

Arguably, a private residence plays an analogous role as a guarded fora for the associational aspects of first amendment exercise. The home is at least as basic and fundamental a forum for first amendment association as the parks and streets are to communication. A group's inability to afford special accommodations, either because of size or financial circumstance, should not preclude it from making use of a member's home for corporate activities. This is particularly true for corporate religious assembly where there is often a need for smaller or newer congregations to meet in homes. Indeed, in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood* the Sixth Circuit, in discussing alternatives for the congregation, suggested that it was free to worship in members' homes if financially precluded from securing property elsewhere. Although this should not be considered an adequate alternative for congregations that desire a specialized structure, it should be considered a minimum alternative for groups unable to meet elsewhere.

Recognizing the constitutional significance of the home for the exercise of first amendment rights does not preclude reasonable regulation of such activities. It suggests, however, that a categorical prohibition should be rejected in favor of the use of neutral criteria designed to regulate the secondary effects of the activity. Such an approach recognizes a minimum right to one's own home for religious

297. See *supra* note 90.
298. See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); *L. Tribe, supra* note 112.
299. See *supra* notes 159-61 and accompanying text.
300. See *supra* note 299.
assembly even of a formal, regular, and organized nature. The external land use effects of the activity can be controlled, however, by secondary regulations that govern noise, parking, and traffic. Such a regulatory approach strikes a proper balance between the first amendment rights of homeowners and the need to preserve residential neighborhoods.

In addition to such secondary controls, two other potential limitations on religious activities in private homes exist. First, of course, is that the primary use of the property must remain residential; once religious assembly becomes the property's primary use it would be subject to the regulations governing churches. This is so because the right to some minimum use of the property for religious assembly derives from its relation to the property's primary status as residential and its concomitant constitutional significance. This justification would be lost were the property's residential status to become secondary.

A second additional control is that home religious activities can be enjoined as a nuisance if they substantially interfere with surrounding property. Such a determination would require a finding both that the level of activity is unsuitable for the neighborhood and that it substantially interferes with the neighbors' enjoyment of their property. This necessitates inquiry into the normal level of activity for that particular neighborhood. If it is customary to have large parties on a regular basis, certainly large worship services with regularity must be tolerated. Only if the level of activity were truly unusual in such settings and, thus, unsuitable for the particular locale, should the activity be enjoined.

Further, home religious assembly should be enjoined only if it substantially interferes with the enjoyment of the surrounding land. The Supreme Court's emphasis on the necessity of a "substantial" state interest to support restrictions on first amendment rights clearly suggests that society must tolerate some inconvenience resulting from first amendment exercise. Although this standard might not be binding in private nuisance actions, in nuisance actions courts typically regard the social value of the interfering use as an important factor in determining whether a nuisance exists. First amendment jurisprudence, therefore, can be looked at as a recognition of the

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303. Nuisance law requires an unreasonable interference with the use and enjoyment of the land of another. Unreasonableness is usually determined by a balancing test involving a number of factors, a primary one being the suitability of the particular use to its locale. See \textit{Restatement (Second) of Torts} §§ 826-828 (1979).

304. The \textit{Restatement (Second) of Torts} provides that an intentional nuisance is established if the gravity of the harm outweighs the utility of the actor's conduct. \textit{Id.} § 826. Among the factors considered in assessing the utility of the actor's conduct is the social value attached to his conduct. \textit{Id.} § 828.
high value society places on expressive and religious conduct, which should be factored into the nuisance balancing process.

Thus, in balancing the interests involved to determine whether a nuisance exists, mere inconvenience to neighbors should not be enough to overcome the first amendment interest. This means that some level of activity beyond that normally occurring in a residential neighborhood must be allowed. In Grosz, for example, even though the meeting of fifty or sixty people on a regular basis might be enjoined if incompatible with the neighborhood, the regular meeting of fifteen to twenty people, subject to appropriate noise, parking, and traffic regulations, should not be considered a nuisance.\(^{305}\) Similarly, the limited worship examined in Cameron, which involved about fifteen to twenty people, should be viewed as constitutionally protected.

In sum, courts should recognize a right to use private residences for home religious assembly. Both equal protection and first amendment concerns suggest that such activity should not be subject to categorical prohibition, but instead should be regulated through secondary controls such as noise and parking regulations, and if necessary, through nuisance actions. This is particularly true for informal gatherings, such as small Bible studies or prayer meetings, which are indistinguishable in terms of the effects generated from numerous social and recreational uses of homes that are clearly permitted. Even more formal religious activities, such as regular worship, should not be categorically prohibited, but should instead be regulated by the less restrictive means test described above. Such an approach best strikes a balance between the first amendment rights of homeowners and the property rights of neighbors.

VI. CONCLUSION

The intensification of religious land uses in recent years, coupled with growing municipal concerns of preserving residential areas, has led to increased conflict between churches and their surrounding communities. This has involved not only traditional issues regarding locational restrictions on churches, but also with increasing frequency the issues of what activities churches can pursue and even the issue of what rights homeowners have to use their property for religious assembly and worship. This article has argued that, although churches can be made subject to zoning and other land use controls,

\(^{305}\) This in fact corresponds to the Eleventh Circuit's decision in Grosz, where the court stated that it would not necessarily enjoin a more limited level of activity in Rabbi Grosz's home. Grosz v. City of Miami Beach, 721 F.2d 729, 732 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984).
first amendment concerns require an intermediate standard of review to assess the validity of such restrictions. This is in contrast to more traditional analysis, which is unnecessarily deferential to churches on the one hand, and recent suggestions by some courts that only a "mere rationality" standard should be applied, which is too strict on the other hand.

In particular, the first amendment permits locational restrictions on churches, both in terms of special-use permits and blanket exclusions from residential neighborhoods, if they are applied in a content-neutral manner and leave ample alternative sites for religious exercise. When accessory uses are regulated, however, greater deference should be given churches, both because of neutrality concerns and the need to make reasonable accommodation of churches. This, in essence, changes the focus of analysis from a categorical to an individual assessment of a particular use's compatibility with surrounding property. A similar analysis is applicable to home religious assembly, where both equal protection and first amendment concerns require that such activities are not categorically prohibited but instead are regulated by secondary controls.