

In Defense of Religious Neighborhood Associations

Robert H. Nelson

Consider the following scenario: A group of Baptists belong to a local church. To be a member of the church, it is necessary to affirm a belief in some key tenets of the Baptist religion. The federal government, however, views this requirement as barring others from membership by engaging in discrimination on the basis of religion. It brings suit to require the church to drop its religious requirements.

Of course, this would never stand up in an American court. The church would argue successfully that the government was interfering with its constitutionally-protected free exercise of religion. Let us now add, however, one further element. Assume that the members of the Baptist church find that the practice of their religion is much enhanced by living together in a common neighborhood. The members of this “neighborhood church” would be able to share their faith in daily personal interactions. Attending Sunday services would be a matter of a few minutes’ walk, rather than a half-hour car drive. Organizing church barbecues, choir practice, and other affairs would be simplified. In light of these many considerations, the local church decides to form a Baptist private community association with the ownership of units in the association limited to practicing Baptists. The members engage a developer who agrees to construct a church building as part of a new Baptist neighborhood plan, to restrict unit owners to fellow Baptists, and to turn the neighborhood governance over to a private community association—following standard industry practice, after at least 75 percent of the units have been sold.

Unlike the previous scenario, at present *this* action would probably not enjoy constitutional protection. Indeed, it would very likely be illegal under current federal law. The Fair Housing Act prohibits any discrimination based on “race, color, national origin, religion, sex, handicap or familial status” (the law contains some exceptions for religion but they appear—there have been few tests to date in court—to be quite limited). That is to say, religion in most cases currently is a prohibited category in matters of housing. It might even be illegal to create a Baptist commu-

nity association that merely “encouraged,” rather than required, membership in the church. Federal law is enforced, in short, not only against overt legal discrimination but also against informal “steering” practices.

I argue, however, that the current provisions of the Fair Housing Act—at least as they apply to discrimination based on religion—are themselves unconstitutional. Any federal action to prevent the establishment of a Baptist community association would be legally equivalent to prohibiting the creation of a church itself. The same constitutional rules with respect to separation of church and state should apply.

Community Associations in America

This issue is not of minor significance. As I argue in my recent book, *Private Neighborhoods and the Transformation of Local Government*, the rise of private community associations has had a large impact on American society, an impact sure to increase in future. In 1970, around 1 percent of Americans lived in a community association. Today, this figure has risen to 18 percent, equal to about 55 million people. From 1980 to 2000, fully half of the new housing units built in the

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United States were subject to the governance of a homeowners association, a condominium, or a cooperative—the three legal forms that comprise the category of “private community association.” More than 1.25 million Americans now serve on the boards of directors of their community associations.

Although religious identity has not been a main feature in the formation of community associations, one finds new trends precisely in this direction. One such association, the Martha Franks Baptist Retirement Center, is found in South Carolina. A resident there

declared that “one can become more faithful here in church attendance because they make it so convenient.” She added that “I feel like I need the support of Christian people” in her residential community. The Reverend Jerry Falwell is building a new community association for fellow church members in southwest Virginia. According to one report, “Mr. Falwell thinks often about what will remain when he’s gone.” This “conservative pastor [hopes that] his most visible legacy [will be] twinkling below: a master -planned community where members of his flock can live from ‘birth to antiquity’” near Lynchburg, Virginia.

Eric Jacobsen, associate pastor at the First Presbyterian Church in Missoula, Montana, declares that a successful community also “requires grace.” Most neighborhoods experience internal tensions, but the presence of a shared religious commitment may go far to defuse disagreements among residents. As Jacobsen explains, “we also need forgiveness from our neighbors whom we will invariably offend in the

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course of living in close proximity to one another. And, as it is nearly impossible to offer grace until we have experienced grace, therefore, the theological promise that God provides grace freely is foundational to many communities.” The building of a healthy social environment may require “some more visiting among neighbors” and this will be encouraged in those neighborhoods where “the church and the Christians in that community have a distinct and vital role to play.”

Joining together in a community of fellow believers thus may not only serve religious purposes but also confer such practical benefits as a more harmonious overall working of the community. At present, many ordinary communities experience significant problems in this regard: tempers sometimes flare; fierce disputes break out among the unit owners; lone individuals may be treated badly by the neighborhood majority. In one acrimonious dispute within a California association, board members were “screaming and others walking out of the room. . . . After the meeting, a board member began legal proceedings against the past president for slander.”

One observer of community associations finds that some boards have acted like a new suburban “Gestapo.” In Nevada, such problems spurred state Senator Mike Schneider to seek greater state oversight of community associations, and he declared that

“we’ve seen some guys who turn into little Nazis when they get onto a board” of directors. In Florida, the director of the Fair Housing Center of the Greater Palm Beaches said in 2003 that his organization had received thousands of calls by “homeowners being run through the ringer by unscrupulous heads of associations.” Too often, moreover, it is “those residents yearning to exercise control over their neighbors who run for positions” of authority. If they were fellow members of the same church or other religious group, these governance problems might well be less severe.

One sees not only the creation of religious associations of fellow believers, but also the organization of private community associations in order to bring together people who share a number of common interests and values. The Fair Housing Act prohibits discrimination against children in housing but provides an exception for communities of senior citizens. In such communities, at least one of the owners of a unit must be at least 55 or older. The *New York Times* reported in 2001 that, as the baby boomer generation neared retirement age, private community associations of senior citizens with many high-end luxuries (full time “resorts” for retirement living, as some observers took to calling them) were spreading rapidly across New Jersey, the fastest growing segment of the housing market. One New Jersey developer commented that “people are just clamoring for this product,” and even with nine age-restricted communities under construction in New Jersey, “we just can’t build them fast enough.”

Retirement communities increasingly are designed for people with more in common than just their age range. The *New York Times* reported in 2004 that “retirement communities are springing up that let you grow old in the company of people with similar backgrounds or mutual passions that go far deeper than a shared interest in golf.” They range from “communities for gay men and lesbians to centers shaped for

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members of specific ethnic groups. Retired military officers have formed communities around the country.” The *Washington Post* similarly found that developers were “building an archipelago of gay retirement communities across the Sun Belt,” with demand out-running supply, yielding high profits for developers who then clamored to build more.

Reporting in the *Chicago Tribune*, Mary Umberger notes that “I’ve come across residential enclaves that

appeal specifically to golfers, airplane owners, horse lovers and even to Latvians." An association she had found near Las Vegas, however, set a "new standard," including plans for "more than a dozen shooting ranges," designed for a special group of unit owners, a private community of "gun lovers." Even when these communities do not literally impose legal limits on membership, they advertise and promote themselves—and particularly their interests—to the public.

Legal Arguments

If it is at present acceptable for a wide variety of private communities to require an agreed-upon social and physical environment among unit owners, it would seem that members of religious groups likewise should have the same right to establish their own

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social and physical environments. In at least one case, as noted above, Congress already has officially blessed social discrimination—when it is based on age and involves senior citizens.

To date, the issue of the religious rights of community associations has not been tested in the courts. However, the related issue of discrimination against religion *has* been addressed by the US Supreme Court, and its rulings may well prove to have implications for community associations. Public schools typically make their facilities available to private student groups for after-school activities, but the Milford Central School in New York State refused to allow religious groups to use public school facilities in its after-school programs. In 2001, the Supreme Court declared that, although the meetings of the Good News Club had elements of a religious service, "the Club [also] teaches morals and character development to children. . . . No one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a non-secular way." The Court therefore found that the after-school "exclusion of the Good News Club's activities" from the Milford school facility "constitutes unconstitutional viewpoint discrimination," based on religion. Indeed, rather than neutrality with respect to religion, the school actually conveyed an implicit message of "hostility toward the religious viewpoint if the Club were excluded from the public forum," while other nonreligious groups were permitted.

Admittedly, the Supreme Court was less protective of religion in an earlier 1994 case that involved the school district of Kiryas Joel in Orange County, New York. The residents of Kiryas Joel, a small incorporated village, members of the Satmar Hasidic sect of Judaism, provided most education on their own in private schools but found it necessary to turn to the public system to meet expensive requirements for the special education of handicapped children. However, the Hasidic children found it awkward to mix with other children, who regarded Hasidic dress and behavior as "different." In 1989, therefore, the New York State legislature authorized a separate public school district effectively limited to the Hasidic students of Kiryas Joel.

One could have expected little constitutional disagreement if the common characteristic of children in this school district had featured almost any element *other* than religion. Because many suspected that the ruling hinged on a religious issue, however, debate was heated, fractious, and widely noted, with opponents of the ruling arguing that the action of the New York legislature infringed on the separation of church and state. The US Supreme Court also suspected that religion had been a factor because the actual trend in recent decades in New York State had been towards consolidation of school districts. The Supreme Court acknowledged that "we do not deny that the Constitution allows the State to accommodate religious needs by alleviating special concerns," as the Kiryas Joel children obviously had. In the end, nevertheless, the Court declared that New York's action was "substantially equivalent to defining a political subdivision and hence the qualification for franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions'." The Court, in sum, disallowed the creation of a separate public school district limited to a religious group.

Shifting Opinion

A decade or two earlier, this decision would probably have provoked little dissent within the American legal community. However, it now came at a time when many prominent intellectuals increasingly lamented the decline of community in American life. The social revolutions of the 1960s and 1970s had promoted individual rights but perhaps also at the cost of community rights and values. One found new concern for the defense of small communities as a main source of values, especially for children. The nation itself might be too large and diverse a group of people to play this critical role. It might be necessary to provide new legal—and even constitutional—support for the many smaller communities that had long been found in American society.

Thus, only a few months after the Supreme Court announced its *Kiryas Joel* decision, a prominent legal theorist, Harvard law professor Martha Minow, announced that “I think the case of *Kiryas Joel* was wrongly decided.” She uncharacteristically agreed with the Court’s conservative dissenters, Justices Rehnquist, Scalia and Thomas, sharing their view that the Court majority had been “overly suspicious of or even opposed to religion.” There was “nothing in the record [to suggest that] the State would refrain from accommodating another religious group that asked for” similar treatment—or a non-religious group for that matter. New York State had made a reasonable pragmatic

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accommodation to the special needs of the Hasidic handicapped students of *Kiryas Joel*. Indeed, seven years later, perhaps reflecting a continuing shift within American elite opinion, the *Good News* case described above reflected a new Supreme Court view based on arguments similar to those that Minow had made.

Although the village of *Kiryas Joel* was public, for many practical purposes the village functioned in the manner of a private community association. One wonders whether, were it actually a private community association, *Kiryas Joel* would be allowed to limit ownership of units to only Hasidic Jews. This restriction would seem to violate the Fair Housing Act but, as suggested above, the Act itself may be unconstitutional in its application to religiously-based communities.

A related issue is addressed by political scientist Nancy Rosenblum, the current chairperson of Harvard’s government department. Declaring that “the meaning and value of associations” of all kinds “is as extensive as human flourishing, self-development, and self-affirmation,” she contends that the power to exclude others who do not share the common values of the group is essential to the vitality of most small associations. Rosenblum asks specifically whether a private community association “formed by Orthodox Jews” should be permitted by the law to enforce restrictions “that males must wear yarmulkes in common areas [of the private community] on holy days.” According to Rosenblum’s reading in 1998 of the scholarly literature, “the consensus of commentators is that courts should enforce this covenant,” so long as it really represented “the unanimous wishes of the original members.” If very few non-Jews would want to join such an association, the result for practical

purposes would be a private community limited to Orthodox Jews—a result agreeable to Rosenblum.

Of course, if discrimination to create a private community of Orthodox Jews is legally permissible, one must also consider the possibility of creating a “Christian community” that excluded Jews. This is a disturbing prospect, given the horrors of anti-semitism throughout the centuries. Yet, the right to form a Baptist, Mormon, Presbyterian or other well-defined religious private community might be constitutionally protected, even though a “Christian” community would be legally impermissible. Since the category “Christian” simply encompasses too large a percentage of the American population, the creation of a “Christian” community association would not be based on any distinctive set of shared community values and interests. As a practical matter, such a community association would discriminate specifically against the small minorities of Jews, Muslims and other non-Christian groups; and thus it can be made illegal without violating the basic constitutional protections for religion.

Enhancing Civil Society

The philosopher John Dewey many years ago concluded that the large size of many institutions in modern life contributed to the grave ethical problems he observed in his day. As he wrote in 1939, “individuals can find the security and protection that are prerequisites for freedom only in association with others”—that is to say, a healthy “individuality demands [close] association to develop and sustain it.” Strong bonds of association were more likely to be found in local interactions—at the scale of living and working of say a neighborhood—than in the functioning of modern behemoths such as the nation-state or the multinational business corporation. Dewey offered the warn-

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ing, “evils which are uncritically and indiscriminately laid at the door of industrialism and [mass] democracy might, with greater intelligence, be referred to the dislocation and unsettlement of local communities.” Echoing themes found as long ago as Jefferson and Tocqueville, he declared that “democracy must begin at home and its home is the neighborly community.”

Such concerns were not alleviated by the events of the later decades of the twentieth century. In the 1960s,

Private Neighborhoods and the Transformation of Local Government

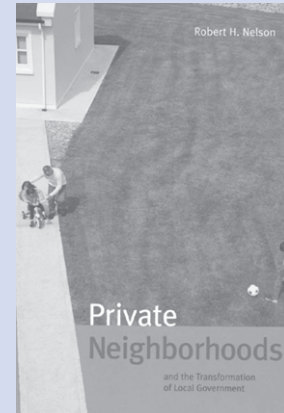
Robert H. Nelson

"Rarely does so ambitious an intellectual project succeed so dramatically or engage the reader so thoroughly. Nelson shows that the private neighborhood is an institution with the potential to transform governance, and even society, from the bottom up. Even readers who do not share his provocative views will find this work a treasure trove of ideas. This is a lasting contribution that will frame the debate about private neighborhoods for years to come."

—Evan McKenzie, University of Illinois at Chicago, author of *Privatopia: Homeowner Associations and the Rise of Residential Private Government*

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a new individualism took hold in American life that often threatened older family and other communal associations. Divorce rates soared, and in other areas as well—abortion, gay rights, drug use, euthanasia—advocates of individual choice won a new freedom from old social conventions. It was part of a new libertarian trend in American society that derived as much impetus from the “left” as from the “right” side of the political spectrum. It all went together—from the 1960s onwards we see a decline in confidence in governmental capacities, a decline in social trust, a greater focus on individual self-expression, and a new resistance to the collective authority of churches, colleges, and other groups.

By the late 1970s and 1980s, many began seeing the institutions that generate and defend American values as embattled and in crisis. As a corrective, social theorists Peter Berger and Richard Neuhaus in 1977 argued for a new emphasis in American society on “mediating structures;” they included “the neighborhood” as a key form of local association “in the reordering of our national life.” In the 1990s, Harvard political scientist Robert Putnam and others similarly warned of the loss

of social capital in American life. Such commentators looked increasingly to smaller organizations outside of government—to “civil society”—for solutions. The Urban Institute reported in 1997 that “what is needed are strong partnerships across existing neighborhood institutions and between institutions and residents. Residents then take the lead role in designing and implementing strategies for community improvement.”

Many of the older forms of private association in American life such as labor unions, the American Legion, the Masons, and others have been in decline for many years. One type of local association, however, has been exploding in numbers and participation—the private community association. This new form of neighborhood association holds the promise of adding a valuable new player in American civil society.

The most important form of association for many Americans is based on their shared religious faith. If a group of people share a religion, and they want to practice this religion by living together in a private community, their ability to do so—and to exclude those who do not share their religious beliefs—should

be constitutionally protected. It is not only a matter of protecting the basic constitutional freedom of religious association. Religious neighborhood associations also further a pragmatic social policy at a time when many informed observers fear that the value-sustaining institutions of American society are in trouble. The religious neighborhood association should be protected as a core American expression of the freedom of religious association, and it should be embraced as a much-needed contribution to the social good.

Robert H. Nelson
Professor
School of Public Policy
University of Maryland
nelsonr@umd.edu

Sources: Robert H. Nelson, *Private Neighborhoods and the Transformation of Local Government* (Washington, DC: Urban Institute Press, 2005); Hilary Appelman, "All Y our Neighbors Are Just Like You," *New York Times* (April 13, 2004); Chris Kahn, "Falwell Has Hopes of Christian Hamlet," *Washington Times* (June 16, 2002), p. A9; Eric O. Jacobsen, "Receiving Community: The Church and the Future of the New Urbanist Movement," *Markets and Morality*, vol. 6 (Spring 2003); Carol J. Silverman and Stephen E. Barton, "Managing Interdependence: The Effects of Neighboring Style on Neighborhood Organization," in *Common Interest Communities: Private Governments and the Public Interest*, edited by Barton and Silverman (Berkeley, CA: Institute of

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