

Septics, Sewers and Secularization: How Government Regulation Flushes Religiosity Down the Drain

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ABSTRACT

In recent decades, religious organizations have witnessed increasing restrictions on their property rights. Various regulations have been imposed by local governments that restrict the ability of churches to build and/or expand meeting facilities. Many of these laws and ordinances have increased the general cost of “doing religious business.” Such burdens represent a significant assault on religious liberty as enumerated by the free exercise clause in the U.S. Constitution’s First Amendment. While the U.S. Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000 to deal with this issue, many local governments continue aggressively to limit the property rights of churches. This paper presents a number of causal factors explaining this trend, highlighting the important role that tax revenue and public school enrollment plays in determining the nature and extent of property regulations. I also highlight how asymmetries in power, resources and information favoring local governments over independent congregations enable violations of religious property rights to persist despite federal regulations guaranteeing churches from such abuses.

Once upon a time, in the not too distant past, there was a growing congregation located just outside of the city limits of Issaquah, Washington — a town east of Seattle, seat of the King County government that has jurisdiction over unincorporated (rural) property. As with many rural buildings, the Eastridge Christian Assembly was connected to a septic system for purposes of waste water disposal. Local building codes require the size of the building in use to match a specified size for the septic tanks. But Eastridge was growing by leaps and bounds, attracting residents from the expanding suburban population. Sunday services were filled to capacity. Eastridge needed to expand its sanctuary to accommodate the growing demand.¹ Expanding the current septic system on the congregation's property was not economically feasible. Fortunately, or so Eastridge's leaders thought, a sewer pipe ran through an easement on their land connecting a nearby public school bus barn to Issaquah's waste treatment system. Connecting to the sewer system would alleviate a set of size restrictions on the church's building and allow them to expand. But repeated requests to connect to the sewer system were denied by county land regulators. The legal and bureaucratic hassles became so overwhelming for this independent congregation that they eventually moved to another parcel of land several miles away at a cost substantially higher than what it would have been if they had simply been given permission to connect to the sewer.

Timberlake Church sits a few miles north of Eastridge, but shares many of the same regulatory frustrations. Founded in 1989 as the Timberlake Christian Fellowship by a small handful of families, this congregation grew rapidly and through generous donations was able to construct a 48,500 square foot facility that opened in 2001.² The congregation routinely attracts 1,000 — 1,500 worshippers every Sunday and hosts a number of religious events throughout the rest of the week. Despite these impressive attendance figures and its enormous building, Timberlake's conditional use permit forbids it from having an "institutional-sized" kitchen capable of storing and preparing food for a large number of people on a regular basis. The kitchen it does maintain is no larger than one for a typical family home in the region. To put it mildly, spaghetti dinners are a challenge. Nor can the church build a gymnasium. Secular events such as birthday and anniversary parties are also prohibited by their land use permit.

¹ Interestingly, after hearing one of my lecture's that detailed the plight of this church, a student in one of my religion and politics classes at the University of Washington recounted how she used to attend Eastridge and never understood why the youth group she attended had to be bused to a separate facility every Sunday.

² See <http://www.timberlakeonline.org/our-history/>. Accessed 10 December 2009.

Both Eastridge and Timberlake experienced their property frustrations at a time when the King County (WA) government was increasing regulatory requirements on the construction of churches in rural areas. In 2001, the county executive declared a moratorium on all church construction on unincorporated land, touching off a firestorm of protest led primarily by the Catholic Archdiocese of Seattle, but which also included a myriad of religious groups in the region. The ostensible rationale of the moratorium was to limit suburban sprawl, with the idea being that if you built a large church in the middle of an uninhabited landscape, people would rapidly settle the area.

The convoluted logic of this reasoning is astounding. How many churches would undertake an expensive capital project based only on the hope that residential housing would quickly spring up around their church and people would fill the pews and coffers? “If you build it they will come” is a good strategy for a fantasy baseball field, but not for a church with a multi-million dollar facility to finance.

Moreover, what bank would lend money for such a project based merely on the hope that the church would find members in a desolate wilderness or that manna (hopefully in the form of legal U.S. tender) would fall from heaven? A desolate wilderness might be a good place for church planting if you bring your congregation with you, but otherwise coyotes do not make good congregants. The King County Council quickly backed away from this proposal, but attempted to limit any new church construction to 20,000 square feet or less. This proposal was also defeated.

Washington State is not the only area where such property battles involving religious groups are common. In California, the Cypress city council invoked the power of eminent domain to confiscate a parcel of land that the Cottonwood Christian Center was preparing for construction.³ Purchase of the land was redirected to a “big box” retail outlet. After some legal wrangling, Cypress and Cottonwood settled out of court and the congregation was assisted in acquiring a plot of land a few miles away from their original site.

As documented by The Beckett Fund for Religious Liberty, the list of local governments using regulatory power to restrict the property rights of religious groups goes on and on.⁴ When the Jewish congregation Kol Ami attempted to purchase a building from the Sisters of the Holy Family of Nazareth to house

³ This occurred prior to the US Supreme Court’s landmark *Kelo v New London* 545 U. S. 469 (2005) decision that allowed local governments to claim “tax revenue” as a public good for purposes of eminent domain seizures. See Benedict (2009).

⁴ Visit www.rluipa.org for The Beckett Fund’s documentation of cases involving legal action.

their religious services, “the Abington Township Zoning Hearing Board refused to allow the congregation to use the facility for religious purposes, denying permission to continue ‘the prior nonconforming religious use of the sisters’ property,’ despite the fact that it had granted such permission just five years earlier to a different religious group based on the same set of facts.”⁵ Meanwhile in 2006, in Tiburon, California, another Jewish congregation — Kol Shofar — fought for the right to repair and expand its facility, a middle school that sat abandoned for more than a decade until they purchased in 1984. Seeking to expand the main sanctuary and add space for new classrooms, the city council blocked those requests on the protests of surrounding neighbors.⁶ A compromise for a scaled-down expansion was eventually agreed upon.⁷

Churches and synagogues are not the only entities affected. Religious educational facilities are also often the target of local government machinations. In Alameda, California, Redwood Christian School was denied a conditional use permit to construct a school for kindergarten children through grade 12 three years after purchasing land for \$3 million with the expectation that they would be able to undertake the project. It took nearly eight years of legal wrangling to reach a settlement in that case,⁸ wherein a generation of students bounced around between temporary locations.⁹

There are uncountable similar cases that never get reported in the news or make their way to litigation. In my various informal conversations with pastors from different congregations, I have been surprised to find how many of them have at least one story of the hassles of dealing with local land use boards. The general sense that I get from these discussions is that the problem is ubiquitous and is growing. As will be noted below, however, the majority of these cases do not come to light as most congregations feel they are the only one affected and it is not a topic that receives heavy attention in the media.

When the topic of religious liberty comes up in the news, the issues discussed usually involve prayer in public schools, nativity scenes on public property, or whether Mother Teresa should appear on a U.S. postage stamp. Rarely do matters of property capture the media’s attention. But as the cases above indicate, these matters

⁵ See <http://www.rluipa.org/index.php/case/44.html>. Accessed 10 December 2009.

⁶ See <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/10/23/BAG1HLU55N1.DTL&hw=kol+shofar&sn=001&sc=1000>. Accessed 15 January 2010.

⁷ See http://www.marinij.com/fastsearchresults/ci_4683409. Accessed 28 January 2010.

⁸ See <http://www.rluipa.org/index.php/case/70.html>. Accessed 28 January 2010.

⁹ See <http://www.rluipa.org/index.php/article/636.html>. Accessed 38 January 2010.

are no less important and may even represent a more invidious attack on basic religious liberties than whether “under God” should appear in the Pledge of Allegiance.

The passage by Congress in 2000 of the Religious Land Use and Institutionalized Persons Act legislation aimed at giving religious groups protection against violations of their property rights, indicates the salience of the issue. Despite this law, though, assaults on church property by local governments continue and often in blatant disregard for the legislation. The question is why? This paper seeks to provide an answer to that query by examining the underlying incentives of local politicians and the framework for action they operate under when dealing with religious organizations. I will argue that the need for tax revenue, combined with pressure to keep public school enrollments high, contribute to an environment wherein politicians find it in their short-term interest to restrict the growth of religious organizations.

Additionally, the asymmetry in regulatory knowledge and legal resources favors local government and makes it easier for politicians to undertake restrictions that may run counter to state and national law, especially when dealing with independent congregations that are not attached to national organizations that can serve as watchdogs. To bolster these claims, I will provide cursory anecdotal evidence as this paper represents the first part of a larger project to study this issue empirically.

The Importance of Religious Property

Before examining the reasons why local governments have increasingly violated the private property rights on religious groups, it is first necessary to understand why such violations represent a serious — perhaps *the most* serious — infringement on religious freedom. For many folks, the connection is not readily apparent; so long as the government doesn’t dictate *what* a person *believes*, there seems to be no problem in terms of religious freedom. This viewpoint speaks directly to *freedom of conscience*. Cases involving prayer in public school and nativity scenes in courthouses center on whether government authority is being used to favor a certain belief (implicitly telling people what the content of their beliefs should be).¹⁰ The establishment clause of the First

¹⁰ The normative argument that allowing a child time to pray in school or to mention Jesus as an influential figure in their life represents a positive endorsement by government of religion has always baffled me. If people making such complaints are so weak-willed as to have their belief system changed or offended by observing a teenager bow their head during homeroom, one must certainly wonder about their overall intellectual and emotional fortitude. Rather than such complaints being a defensive reaction to the onslaught of religious zealots,

Amendment dictates that the government should not establish a religion, which has been broadly interpreted to mean that the government should not promote a particular religious denomination or religion more generally as a favored entity. People should be allowed to believe as they choose and government should not encourage them one way or the other.

But religious liberty involves not only *what* one can *believe*, but *how* one goes about *celebrating those beliefs*. This brings the free exercise clause to the table. As stated in the First Amendment, “Congress should make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* ...” (emphasis added). It is this free exercise clause that speaks directly to the issue of religious property rights.

The ability to congregate is essential to the success and growth of any religion. While it is often fashionable to denounce institutionalized religion and to say that one practices his or her own beliefs in private, the reality is that religion (particularly monotheistic religion) necessitates communal worship. Theologically, this was recognized in the *New Testament*. “Let us not give up meeting together, as some are in the habit of doing; but let us encourage one another ...” (*Hebrews 10:25*). Here the author of that letter was fully cognizant that people who practice their faith in isolation are wont to lose that faith.

The three major Abrahamic faith traditions — Judaism, Christianity, and Islam — all have developed traditions of regularized community worship. Even Islam, which encourages Muslims to pray individually several times a day, still sees the necessity of communal worship and buildings (mosques) are the centerpieces for such activity. Religions existing mostly in the realm of personalized worship — e.g., New Age spiritualities, various Eastern religions — tend to remain small or only attain weak adherence among their members.

Sociologically speaking, there is a good reason why successful religions need congregation. Religions supply people with what economists call credence goods.¹¹ These are goods wherein the quality of the product cannot be verified until some point in the future. Insurance represents an example of this. When I purchase a policy to insure me against an auto accident, I don’t know how good that policy will be until I get into an

they more than likely represent radical secularists taking the offense against religious believers in an effort to cleanse society of any form of spiritual belief or practice. Ironically, the more such forces go on offense, the more they rally religious forces to play defense and become more involved in the political arena. In other words, by trying to eliminate religion from politics, radical secularists invariably guarantee more religion in politics.

¹¹ Ekelund, et al. (1996, 26-27).

accident. In the meantime, I must look for quality signals from the insurance company that their promise to compensate me fully will be credible.

The primary good that religions provide are philosophical answers about the nature of the supernatural and about other intangible things such as the meaning of life and what occurs beyond death. Since many or most of these answers cannot be judged easily in this life, potential adherents to a theology will need reassurances that what they are being asked to believe is credible. Clergy can send signals about the credibility of their theology a number of ways, including celebrating martyrs who have paid a high price for their faith,¹² taking vows of poverty to show that they are willing to make sacrifices and that their religion is not merely a money making scheme, or by building temples of grandeur or maintaining holy shrines that show God's grace is smiling upon them. Religious groups also try to build trust by doing good deeds (e.g., feeding the homeless, providing medical clinics) among populations they seek to missionize. Of course, doing good deeds may also be a requirement or an altruistic expression of one's faith and it should not be taken that such actions are simply instrumental means of recruitment. Nonetheless, the residual impact of vows of poverty or charity work is to enhance the credibility of the theological message.

Another important means of enhancing credibility is to have a show of numerical strength. "Religious goods are not simply 'experience' goods which must be consumed in order to be evaluated; rather, these goods must be experience in communities which direct us on how to evaluate them."¹³ In economic terms, the credibility of religious explanations are enhanced by economies of scale. Your doubts are ameliorated by seeing others believing the same as you.¹⁴ The best way to achieve such economies of scale is to have a regularized meeting time and place. Such an assertion is so obvious as to be banal, yet it is of crucial importance.

The Redwood Christian School and Jewish congregation Kol Ami mentioned above certainly understand this. Their experiences as transient religious groups undoubtedly affected their ability to attract and retain members, and became a key point in their legal cases. Moses may have been able to hold together a ragtag

¹² Stark (1996, 163-90).

¹³ Sherkat (1997, 68).

¹⁴ See Chwe (2003) for an excellent economic discussion of ritualized behavior as a means of communicating common knowledge and reducing uncertainty. Surprisingly, and despite the title of his superb book, his research does not directly address religious behavior even though the applicability of his findings to the study of religion are immediately apparent.

group of Jews on their journey across the desert, but it was not an easy task. A permanent meeting place to call one's own provides the key ingredients for stability and growth, all other things being equal.¹⁵

Moreover, a church's location should be publicly identifiable and easily accessed. Knowing where the church is in town makes it easier to recruit new members; the steeple represents a means of advertising presence just as much as a set of golden arches indicate that hamburgers are nearby. The conditional use permit for Timberlake Church (mentioned above) also included a restriction on the signage that the congregation could have and its visibility from the road. The permit required a small sign and for the building to be hidden from roadside view by trees. Attempts to use "sandwich boards" at nearby intersections to indicate where the church was also raised the hackles of local residents and county officials who saw such unobtrusive signs (used by bagel shops) as being a public nuisance. A central location with good parking is also critical; if people have to make a Herculean effort to get to church on Sunday, the chance that they will show up declines.

As Paul Olson has shown, even minor changes in the cost of getting to church — be it a snowstorm or a major football game the night before — can have a significant impact on church attendance.¹⁶ A governmental restriction on the size of a church parking lot or restrictions on road use surrounding the church can easily affect regular attendance.¹⁷ And beyond just having an identifiable building, the size of the meeting space is critical. While a church would love to have "standing room only" every Sunday, that situation will undoubtedly encourage the least committed members to stay home as it is too difficult to find a place to sit. Packed sanctuaries are the desired goal, but so is the ability to expand to pack in a few more congregants every week.

The final reason why church property rights are of crucial importance for the preservation of religious freedom is legal. The First Amendment of the US Constitution contains not only the non-establishment and free

¹⁵ There are many variables that affect a denomination's ability to grow. No studies to my knowledge have looked at the issue of having a permanent and visible location, as most of the easy cases to study are the ones that remain in one place. Nonetheless, permanence of location and regularity of meeting times seem to be a basic precondition for congregational growth. My own personal experience attests to this. My desire to attend a local "cowboy church" in western Washington was frustrated by the congregation's inability to obtain an ongoing rental agreement at one location. The church rarely remained in one place for more than six months and it became difficult to track. This, of course, may be one of the appealing attributes of a "cowboy church;" cowboys are known to wander, so why shouldn't one expect their churches to do the same!

¹⁶ Olson (2008).

¹⁷ The Beckett Fund's RLUIPA website — www.rluipa.org — contains a rather humorous picture of a "no parking" sign near a church. The no parking restrictions are only enforced on Sunday morning. Likewise, the recent well-publicized conflict between a Bible study group and San Diego county revolved around an issue of parking. See <http://www.10news.com/news/19562217/detail.html>, accessed 9 February 2010. See also Lawlor (2006).

exercise clauses, but it also makes note of “the right of the people peaceably to assemble.” It is no accident that the right to gather together is included in the same amendment as religious freedom. The Founding Fathers knew that freedom of conscience was part and parcel of the ability of citizens to exercise their collective voice. Anything getting in the way of the ability to assemble is both an affront to personal (and corporate) property rights and the right to practice one’s own beliefs in a manner that is befitting to a free society. This then raises the central question of this paper. Why, given the important spiritual, sociological and legal reasons to allow churches basic property rights, would local governments seek to restrict such rights?

Explaining Governmental Restrictions on Religious Property

There are three primary reasons why local governments have been engaged in restricting the private property rights of religious organizations. The first involves the basic problem of trying to reconcile divergent interests in a democracy, a situation that has been endemic throughout U.S. history. The other two reasons — involving government concerns over tax revenue and public school enrollment — are relatively new (and growing) phenomenon. I will address each of these explanations separately acknowledging that any given case will involve a mix of any or all three elements. Given that this is a working paper, the explanations provided below represent preliminary hypotheses.

Not In My Backyard: Residential Resistance and Secular Pushback

We live in a world of divergent preferences. It is near impossible for one person’s actions not to create some dissatisfaction among other individuals. The construction of a church is no exception. As noted above, churches are rarely built in the middle of nowhere. As populations grow and expand, churches follow to meet the spiritual needs of those populations. This invariably means constructing a building amongst pre-existing buildings, usually near residential homes. For citizens trying to flee the hustle and bustle of urban environments, having a large grocery store or church built adjacent to their neighborhood raises the specter of the traffic congestion and noise that they were initially trying to escape. Invariably, someone will complain about the possibility of church construction and seek governmental redress for any perceived inconvenience that might result.

This is true not only for churches, but for any large construction projects as well such as schools, hospitals or gas stations. One a homeowner finds an ideal place of land on which to settle down, they tend to have a strong preference for keeping the surrounding environment the way it was when they initially purchased their plot. Recognizing such problems, nearly all local governments have created zoning regulations that alleviate any uncertainty about future land use projects. A person buying in an area zoned for residential use can rest assured that a Piggly Wiggly will not be built next to them in the next year.

Knowing the zoning boundaries helps people make informed choices and changes to those boundaries naturally will upset individuals as it could have drastic effects upon their property values and/or quality of life. This leads us to expect that there will be a higher propensity for conflict over religious property rights in residential areas than in business districts. After all, most businesses — particularly non-retail businesses — tend to be closed on Sunday so concerns over traffic congestion and noise tend to be cancelled out with the congestion and noise of weekday business simply being replaced on Sunday with church congestion and noise.

Even with clear zoning regulations in place, churches that are constructed within legal boundaries still raise the ire of some local residents. Of course, there may be a group of citizens more than anxious to have a church built in their neighborhood as they represent the untapped demand for religious services that were probably going unmet due to a lack of a congregation. However, there are also likely to be individuals who are not particularly spiritual and fear the growing influence of “the religious” in their community.

The increasing aggressiveness of various secular groups such as the Freedom from Religion Foundation and Americans United for Separation of Church and State represent a willingness among the secular community to prevent the growth of religious influence in society. Given that such groups typically draw their membership from those on the left side of the political spectrum, we would expect to find local governments in areas where Democrats have held political sway for substantial periods of time to be more likely to engage in restrictions on religious property rights.

The above discussion can be formalized into the following hypotheses:

H1) Restrictions on church property rights will be more likely to occur in residential areas than in business areas, *ceteris paribus*.

H2) Localities that tend to vote Democratic will have governments that are more likely to place property restrictions on religious organizations, *ceteris paribus*.

While the *ceteris paribus* clause in both these hypotheses is meant to help isolate each causal factor from others, we could easily combine these two hypotheses and predict that areas with rapid residential growth with liberal voting patterns will tend to be the most likely places property restrictions will be placed on religious groups. The above examples from King County, Washington fit this pattern well. That region has experienced rapid suburbanization in the past two decades and has consistently elected left-leaning candidates to the county government and state legislature. Given that Washington is also known to be one of the least church states in the country,¹⁸ the attempt by religious groups to gain a foothold in this area is likely to cause conflict with some of the more secular elements of the population.

The Grasping Hand: Churches and Local Government Tax Revenue

Everyone knows that churches are tax-exempt. For many people, this provides the *raison d'être* why churches should stay out of politics. Unfortunately, not everyone knows that churches actually do pay taxes. In reality, churches are only tax-exempt on certain portions of their income or assets, such as charitable contributions and buildings used specifically for religious purposes. Depending upon local or state laws, churches are nonetheless liable for taxes on activities such as the sale of goods in church bookstores, property that is not specifically used for religious purposes or on the amount of land that exceeds certain size limits.

For example, churches in Washington State are only granted tax exemption on property up to five acres.¹⁹ Numerous other taxes such as licensing fees on church vans, taxes on employees (e.g., social security taxes) and fees assessed for use of various public services may also be applied depending on local laws. Nonetheless, despite the fact that churches actually do pay taxes, they certainly generate much less tax revenue than entities using up comparable real estate such as residential neighborhoods, condominiums, restaurants, or factories.

¹⁸ Froese and Bader (2009).

¹⁹ Interview with Pastor Joe Fuiten, Cedar Park Church. Fall 2008. (Need to find exact date.)

That religious organizations pay less taxes per comparable space and usage than other entities provides governments with a natural reason to restrict church property. Within political science, it is a common assumption that political leaders are first and foremost interested in political survival (re-election) and then are interested in maximizing government revenue.²⁰ Pursuing the latter interest (tax revenue) often enhances the latter in that it allows them to provide certain public goods (e.g., police and fire services) and patronage to loyal or latent supporters.²¹ Using tax revenue to build a playground in a neighborhood is a visible representation that a politician is “doing something” and should be re-elected to office. Faced with a situation of permitting a church or strip mall with a ten-acre plot of land, the decision is an easy one for government officials — choose the one that generates a higher stream of revenue.

While this might suggest politicians will always favor the higher revenue-generating activity, if there are enough people clamoring for a church to be built, a politician can earn greater political favor and loyalty by appealing that community. And that government official will likely want to show up at the ground-breaking and ribbon-cutting ceremonies for that church. If and when governments face severe budget constraints that dictate cutting crucial services such as fire fighting and police, there will be greater pressure to favor the strip mall over the Baptist congregation. Additionally, when land within a local community (county or municipality) becomes increasingly scarce due to population growth or environmental land-use restrictions, politicians will tend to favor land use that generates more tax revenue as compared to setting it aside for religious purposes that yield less revenue.

The previous discussion thus leads to the generation of a series of related hypotheses:

H3) Government officials will tend to favor land use that generates higher tax revenue. As such, local governments will be more likely to discriminate against religious land use when faced with alternative choices, *ceteris paribus*.

²⁰ See Mayhew (1974), Olson (1993), and Geddes (1994).

²¹ Of course, the desire for political survival may at times be in tension with maximizing tax revenue. Politicians that attempt to extract too much from their citizenry may find themselves the subject of a tax revolt and being thrown out of office. Just ask King Louis XIV of France who lost his head over it. The rise of the “tea party” movement in the US may be another such example of how political survival and maximizing tax revenue are competing goals.

H3a) Local governments with chronic budget shortfalls will be more likely to deny land use permits to churches than those without such budgetary problems, *ceteris paribus*.

H3b) In areas where real estate is becoming a scarce commodity, government officials will favor activities that generate higher tax revenue and hence will be less likely to grant religious groups right to property.

H3c) If there is a sizeable voting constituency that demands construction of church property, politicians facing competitive elections will yield to those demands. As a corollary, this means that politicians will tend to favor construction of churches that will generate high attendance as compared to those with a smaller membership, *ceteris paribus*.

Some of the cases discussed above illustrate the plausibility of these hypotheses. The case wherein the City of Cypress used its eminent domain power to expropriate the property of the Cottonwood Christian Fellowship so as to give the land to a major retailer clearly indicates a desire to maximize revenue. King County's moratorium on church construction in rural areas in 2000 is another example, especially considering that the same county council that was denying building permits to churches was at the same time granting construction companies the right to create new residential neighborhoods. In 2006, the city council of Stafford, Texas publicly declared the number of tax-exempt churches within the city limits was busting the budget and no more permits would be given for religious construction projects.²²

Think about the Children! Private Schools and Homeschoolers as a Motivation

The final reason why local government officials have a motivation to implement greater property restrictions on churches deals with the issue of funding for public schools. In many states and sub-state localities, funding for public schools is allocated on a per pupil basis. The more students enrolled, the more funding a school or school district receives. It should be noted that this funding tends to be "lumpy;" if classes (especially

²² See <http://abcnews.go.com/WNT/story?id=2513924>. Accessed 9 February 2010.

at the elementary level) are regulated to a certain size (e.g., 25 students per class), increasing students above that threshold means another teacher will have to be hired.

Additional students up to the next threshold mark provide additional revenue without the requirement of hiring another employee. Of course, this works in reverse. Should a particular school see a drop of, say, 25 students, a teacher will need to be laid off. Moreover, the number and location of public schools is determined by the number of pupils enrolled and where they are located. Should the population of students in a district begin decreasing, there may be a need to close an entire school.

Since the general decline in the student population is likely to be distributed randomly across the district's geography (i.e., not concentrated around one particular school), there will be a difficult political choice regarding what school to close, with the remaining student population of the shuttered school needing to be bused to a new location. Parents near the closed school are not going to be pleased with such a decision. And there also exists the possibility that the property that the closed school is located on will not be sold leaving the district with a non-performing asset.

Without a doubt, mothballing a school creates a huge political headache for any elected leader and threatens the odds of re-election. Not only will parents at the closed school harbor ill feelings towards the politician who makes the tough choice, but the teacher unions may possibly to withdraw campaign support for him as well.

When it comes to the politics of public schools, religious organizations quickly fall into the crosshairs. The biggest target, not surprisingly, are private religious schools. While some of these schools are entities not affiliated with any single church or denomination, many tend to be affiliated with a particular denomination or congregation. An increase in the number of students enrolled in private schools naturally creates downward pressure on the enrollment for public schools, raising the possibility that teachers will have to be laid off or entire schools closed.

Teacher unions and school administrators — not to mention government officials charged with keeping schools open — will prefer to limit the amount of private school enrollment. One way of doing this is to prohibit private school construction outright. Barring that, property regulations can be used to limit the size of private school buildings, thereby creating a space cap on private enrollments.

Private religious schools have existed for a long time. And while the per pupil costs of these schools may be lower than comparable spending per child in the public schools, taxpayer subsidization of public schools means that private schools will cost more. The higher private costs act to limit the number of students peeled away from the public system. There is a cheaper alternative to private schools, however, that has been gaining increasing popularity in the past two decades: homeschooling. While the stereotypical image of homeschooling may be the stay-at-home mom teaching her three kids math at the kitchen table, homeschooling has become a major industry in recent years. Concurrent with the increased popularity of homeschooling has come the creation of home school co-operatives; families will often pool their financial resources to rent a building and pay a nominal fee to teachers who meet with students several times a week.

Many of these co-operatives closely resemble regular schools, with dozens if not hundreds of students moving between classes as if it were a public high school.²³ Students often have lunch periods, gym classes and study halls during the time they are at these co-ops. Given that a large segment of the home school population is driven by concerns over religious education, one of the most popular places to host such co-ops is churches.

For school district employees or board members worried about losing students to this movement, the most effective way to deal with the problem is to create regulations making it difficult for homeschoolers to easily gather or to place other burdensome requirements on the process of homeschooling. A recent proposal in California to license home school teachers (i.e., mom and dad) is merely one example of this. Specific regulations aimed at limiting room sizes in churches or how such property can be used is another method.

This discussion points us to the following hypothesis.

H4) In areas with declining public school populations, due to an increase in home schooling or private school enrollment, local government officials more frequently will use their regulatory power to affect the size and use of church (or religiously-based) property.

²³ I actually had the opportunity to serve as a substitute teacher for one of these co-ops. Expecting to be talking to a small handful of students, I was amazed to walk into a local mega-church where the co-op was hosted and find that two classes I taught had at least 30 students each. During the lunch break, I ate with over 100 students, some with brown bag lunches and others eating food prepared in a cafeteria. I was surprised to learn that this lunch period served only half the students. Had it not been for the fact that I was told that I would be teaching homeschoolers, I would have assumed this was a regular public or private K-12 school.

Thinking back to the cases above, one can immediately understand why the Redwood Christian School in California faced year after year of bureaucratic red tape preventing them from building on the land that they had rightfully purchased. And in the case of the Timberlake Church, restrictions on the size of the kitchen and the outright prohibition on the construction of a gymnasium were clearly designed to prevent the property from either hosting a home school co-op and/or eventually creating their own private school. Without a big kitchen, you can't feed many kids. And state requirements dictating physical education for homeschoolers meant that without a gymnasium, the church was much less desirable as a location for a co-op. Furthermore, the restrictions on hosting non-religious events including birthday or anniversary parties could broadly be applied to homeschooling activities.

Bullies Against the Pulpit

The increasing use of local laws and regulations to inhibit the creation or expansion of different religious denominations has not gone unnoticed in national policy circles. In 2000, the U.S. Congress passed the Religious Land Use and Institutionalized Persons Act designed to prevent local government officials from using property regulations in ways that inhibited the free exercise right of religious groups.²⁴

The legislation was actually a Supreme Court decision — *City of Boerne v Flores* — that invalidated a previous Congressional law known as the Religious Freedom Restoration Act.²⁵ That constitutional battle directly involved the property rights of a church. In *Boerne v Flores*,²⁶ the Catholic Archdiocese of San Antonio, Texas sought and was denied permission to expand one of its parish buildings in the town of Boerne. The city council there denied the Archdiocese the right to build based on the reasoning that the church was a historic landmark and needed to be preserved.

The Archdiocese relied upon the Religious Freedom Restoration Act to claim that the inability to build more adequate space for their parishioners violated free exercise rights. Unfortunately for Archbishop Flores, the U.S. Supreme Court decided that the law was unconstitutional based upon a violation of Congress's ability to

²⁴ See Powers (2003).

²⁵ There is a fairly long and convoluted history involving First Amendment cases that in turn provided the motivation for the passage of the RFRA. I do not consider this the proper place to review this legal history, as it has been done elsewhere. See Hall (2006) for an excellent summary and interpretation of these cases.

²⁶ See *City of Boerne v Flores* 521 U.S. 507 (1997).

enforce legislation. Congress immediately acted to rewrite the law in a manner more consistent with the Fourteenth Amendment of the US Constitution. The result was the Religious Land Use and Institutionalized Persons Act, which has yet to face a constitutional challenge (as of this writing).

The newer law acts as a federal protection for churches against the regulatory violation of church property rights. Groups such as the Beckett Fund, Alliance Defense Fund and the Rutherford Institute have used the law to defend religious groups against property rights abuses by local governments. While RLUIPA has been applied to defend the rights of religious organizations in several instances, churches and other religious groups often find themselves at a significant disadvantage when it comes to protecting their property rights and many instances of governmental abuse have gone unnoticed. This is largely due to the problem of asymmetric information; local government officials have much greater knowledge about (frequently byzantine) property regulations than religious staff.

This is not surprising. It is the job of local politicians and bureaucratic regulators to know the laws and regulations that they apply on a daily basis. Clergy, parish boards and others are typically not experts in land use policy. As Steve Hammond, a former Baptist pastor turned property rights crusader, mentioned to me, this gives local regulators the ability to “bully” members of the pulpit.²⁷ Without detailed knowledge of arcane property laws, church leaders are at the mercy of local politicians who want to use such laws to hinder the expansion of churches for the reasons mentioned above.

Moreover, churches are often disadvantaged by their scarce financial and legal resources relative to local governments. It is not uncommon for local regulatory agencies to impose a controversial regulatory decision on a small group and place the legal burden of bringing the decision to judicial hearing on that group. Defending against what might be considered an unjust decision requires legal expertise and lawyers don’t come cheap. Even if the church is fortunate enough to have a property attorney on their board of elders or could convince a law firm to take on their case pro bono, there is still a significant time cost incurred by such action.

Court cases involving property disputes can take years to wriggle their way through court. As in the cases of the Eastridge Christian Assembly and Cottonwood Christian Fellowship noted above, such a delay can have deleterious effects on the church’s membership and attendance. Fortunately for both Eastridge and

²⁷ Interview with Steve Hammond (10 November 2009), Enumclaw, WA. See also Gill (2010).

Cottonwood, other locations were available. Many churches may not be so lucky. Religious organizations that do have easy recourse to financial and legal resources are in a better position to defend against such tactics placed on them by local governments.

The failure of King County (WA) to implement its church growth moratorium in 2000 (see above) was largely the result of the Catholic Archdiocese of Seattle being able to rely upon its vast network of legal contacts and pool of financial resources to pressure the county council into rescinding their decision. Had the county decision only impacted a few independent congregations, the legislation may have been approved and no new churches would have been built in rural King County over the past decade.

Taking into account the discussion above, we can now advance our fifth and final hypothesis.

H5) Local politicians and regulators are more likely to impose property restrictions on independent and smaller churches, than on larger mainline churches that have access to greater legal resources and networks of knowledge.

It is not only the Catholic Church with its vast network of contacts with significant expertise and financial resources that will likely be exempt from the actions of regulators.²⁸ Mega-churches, which often are associated with large bookstores and other taxable activities, may also get differential regulatory treatment relative to smaller, independent congregations. Since almost all mega-churches began small at some point in their history, however, it would be an interesting project to trace the historical stories of their legal wrangling with local zoning boards.

This hypothesis presents us with a difficult methodological problem, one that might make the empirical investigation of this general topic more difficult. Given that politicians and regulators are more likely to target smaller, less organized and poorer congregations, instances where religious property rights have been violated

²⁸ This includes access to media resources that can be a potent tool against regulatory abuse. Few politicians want to be labeled in the media as anti-religious, although this may not be as big of a concern in regions where church attendance tends to be low and ones constituency is significantly secular. Such an observation suggests yet another hypothesis regarding where such regulatory violations are likely to occur. The King County (WA) cases noted above occurred in an area with a significant urban population that has relatively low rates of church attendance. It is fairly easy for county council members with constituents located primarily in the secular city of Seattle to impose restrictions on rural churchgoers and not suffer any electoral consequences for such action. Indeed, their constituents might even reward them for stamping out the ill effects of “rural religion!”

will be much more difficult to observe. Cases of such violations that make the news or are picked up by groups defending religious civil liberties are easy to spot, but for every such case there conceivably are dozens or hundreds more such instances that go unreported and, as such, escape the eye of the researcher who is attempting to build a database to investigate the question more rigorously.

This raises the possibility of an empirical bias that understates the actual saliency of the dependent variable — in other words, we are likely to be underestimating the degree to which religious property rights are violated in the US.²⁹ The research design that best addresses the question on the first cut may well be one of a more qualitative nature that relies upon historical process tracing and analytic narratives.

Conclusion

The above discussion lays out a theoretical framework for investigating what potentially may be a growing threat to religious liberty. The number of cases involving the violation of religious property rights has been growing over the years. Fortunately, groups defending churches against such violations have been helpful in building a record of when and where these cases exist.³⁰ As noted above, however, several methodological problems still exist with investigating this phenomenon, most notably the likelihood that we are underestimating the extent of the problem. Nonetheless, it is a problem that social scientists should not ignore.

Scholars have been rightfully interested in explaining the reasons for the variation in church growth and attendance. Secularization theorists have emphasized a general loss of spiritual belief among the potential churchgoing population as a reason for the perceived decline in religious practice throughout society, most notably in Europe. Yet even among populations with low church attendance, surveys indicate that belief in God

²⁹ There is an additional problem that I plan to address in the wider work. The *Kelo v New London* 545 U. S. 469 (2005) decision, which provided a very amorphous interpretation of the takings clause of the Fifth Amendment and allowed “increased tax revenue” to be a valid “public good” for the application of eminent domain seizures, is likely to come in conflict with RLUIPA. Since churches pay less taxes than a retail commercial or industrial entity, local governments can easily refer to the *Kelo* case when denying a church its due property rights and avoid the appearance of bias against a religious organization. This line of reasoning is consistent with hypothesis 3, but again it will be difficult to identify such cases in a methodologically rigorous way. When one looks at a newly-built grocery store, it will be difficult to know if that land was denied use to a church. See Mathues (2006), Baker (2008) and Leonczyk (2009).

³⁰ Rachel Tweet, an undergraduate research assistant of mine, has dutifully gathered information from The Beckett Fund’s RLUIPA website to build an initial dataset with information about each of these cases. I am still in the process of evaluating the usefulness of this data and hope to make greater use of it in the book-length project.

and other personal measures of spirituality remain high.³¹ As such, it is important to look for the causes of church growth (or lack thereof) in other places.

The importance of religious freedom and government regulation has been highlighted by several authors.³² This paper joins that line of inquiry, bringing to bear a set of specific hypotheses that show the relationship between the interests of local politicians (and bureaucrats), the importance of property, and the ability of churches to meet the demands of their parishioners. In doing so, the hope is to build a research agenda that directs our attention to the important fact that religious freedom is not something that is self-contained, but rather connects to all of our civil liberties. After all, without the right of property, man is not truly free — religiously or otherwise.

³¹ See Davie (1994), Stark and Iannaccone (1994), and Stark (2008).

³² See Chaves and Cann (1992), Stark and Iannaccone (1994), Gill (1999), and Gill (2007).

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