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# The Political Economy of Religious Property Rights

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**Abstract** Religious liberty is generally thought to apply to rights of conscience. However, acting upon one's beliefs also involves numerous other civil liberties including the right to assemble, as well as the right to own and use real estate. I assert that the successful operation and growth of religious movements requires well-specified and protected private property rights. However, in recent decades, one of the major threats to religious freedom has been an attack on the property rights of religious denominations, particularly smaller and less organized ones. In addition to common Not in my backyard complaints, I assert two additional reasons for this phenomenon: (1) the tax-exempt status of religious groups dis-incentivizes politicians from giving out building permits to congregations; and (2) the growth of private and homeschooling incentivizes politicians concerned with protecting public school funding from granting land use permits that could facilitate alternative educational facilities.

**Keywords:** religious property rights; religious liberty; tax-exempt status; religion and politics; primary/secondary education

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This paper is a revision of an earlier "guiding paper" that appeared at TheARDAcom See Gill (2010). Details of this case (in legal jargon) can be found at <http://landuselaw.wustl.edu/cottonwood.htm> (accessed July 1, 2015). A more readable account is located at <http://www.becketfund.org/cottonwoodchristian> (accessed July 1, 2015).

## 1. INTRODUCTION

Cottonwood Church began as many congregations have with inauspicious roots in a Bible study group back in 1983. Over time it developed an increased following which necessitated a larger meeting space. As its parishioner base grew, and multiple services were being held on Saturday evenings and Sundays (placing a huge and inefficient workload on the pastorate), a decision was made to purchase land that could accommodate a large 4,700-seat auditorium, children's ministry, and other facilities to serve its "megachurch" constituency. In late 1999, Cottonwood finished securing a set of parcels from various landholders in Cypress (California) suitable for such a facility, and applied for a conditional use permit that the city's Community Development Planner agreed was a legitimate land use. Before construction could begin, however, the city council altered its land use plan with a focus on using the area for commercial retail outlets. The council then asserted its eminent domain power to expropriate Cottonwood's legally purchased real estate with the intent of selling the land to a "big box retailer."<sup>1</sup> Cottonwood sued under the Religious Land Use and Institutionalized Person's Act (RLUIPA) arguing that this represented a discriminatory violation of its religious freedom. Although the case was settled out of court when another nearby plot of land was made available, Cottonwood still had to pay a significant cost in terms of time and resources devoted to fighting the city's decision, not to mention the loss of potential membership during the delay.

Around the same time, and further up the Pacific coast, the executive of King County, Washington, issued a moratorium on church construction in unincorporated portions of the county, arguing that this was needed to preserve the rural aspect of the area outside of the major metropolitan areas of Seattle and Bellevue.<sup>2</sup> The ostensible rationale for 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 with single-family homes or apartment buildings. 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? "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 US

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<sup>1</sup> Details of this case (in legal jargon) can be found at <http://landuselaw.wustl.edu/cottonwood.htm> (accessed July 1, 2015). A more readable account is located at <http://www.becketfund.org/cottonwoodchristian> (accessed July 1, 2015).

<sup>2</sup> For a discussion of the debate, see. <http://community.seattletimes.nwsources.com/archive/?date=20010302&slug=mor-mon02m> (Accessed July 1, 2015).

tender) would fall from heaven?<sup>3</sup> This policy created a major political firestorm, lit in good part by the Seattle Archdiocese of the Catholic Church, which was planning several new parishes near growing rural communities. Facing an outcry by Catholics and other denominations, the county executive backed away from an outright ban on construction but attempted to limit the size of church facilities to less than 20,000 square feet. Continued uproar by religious lobbyists forced the county to back away from this policy too, but not without a significant delay in time when churches could have been built.

Buying land and constructing a facility are not the only land use problems facing congregations. Once buildings are built, regulations dictating the use of property also impact how they fulfill their spiritual mission. Consider Timberlake Church in Redmond, Washington. 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, prior to the declared King County moratorium mentioned above. The congregation routinely attracts 1,000–1,500 worshippers every Sunday and hosts a number of religious meetings (or “small groups”) throughout the remainder 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 single-family home in the region. To put it mildly, spaghetti dinners are a challenge. Nor can the church build a gymnasium to host recreational activities, a limitation on religious people who like to play basketball with other churchy folks and a way of engaging members in ways not strictly related to sermonizing. Secular events such as birthday and anniversary parties are also prohibited by their land use permit.<sup>4</sup>

Such cases appear to have become increasingly commonplace over the past two decades, and involve not only new construction but limitations on the use of preexisting structures (cf. Gill, 2010). These restrictions are not limited to Christianity, but affect other major faith traditions as well. For example, when the rabbi of Kol Ami, a Jewish congregation in Pennsylvania, attempted to purchase a building from The Sisters of the Holy Family of Nazareth to house their religious services, “the

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3 The author of this article lived in King County at the time and can attest that despite the desire to “keep the county rural,” there were several high-density residential neighborhoods being built on and near unincorporated land. It was this residential expansion that was incentivizing religious congregations to build new facilities, not the other way around.

4 Interview with Pastor Gary Gonzalez, 5 December, 2006. As full disclosure, this was the congregation that the author was attending at that time and this project was, in part, prompted by the oddities of the conditional use permit. While handing out donuts one morning, I asked why we didn’t have a bigger kitchen, to which I was informed that it was in the conditional use permit. This, in turn, got me to ask what a conditional use permit was and why one was needed. Since that time, the church has dealt with space issues by purchasing joint campuses in the local area, yet it still lacks a large kitchen and gymnasium.

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.<sup>5</sup> 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 it 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.<sup>6</sup> A compromise for a scaled-down expansion was eventually agreed upon.<sup>7</sup> Private groups such as The Beckett Fund and Alliance Defending Freedom have sprouted up to defend religious groups from violations of their property rights, usually relying upon the RLUIPA<sup>8</sup> that was passed by Congress in 2000 to deal with such violations.<sup>9</sup>

This essay seeks to answer two essential questions related to the aforementioned cases. First, to what extent are restrictions on property ownership and land use an

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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](http://www.marinij.com/fastsearchresults/ci_4683409). Accessed 28 January 2010.

8 The RLUIPA legislation represents a symptomatic response to a perceived increase in violations of religious liberty dating back to the landmark Supreme Court case *Employment Division of Oregon v Smith* (Leonczyk, 2009; Meier, 2007). That case dealt specifically with whether two individuals relieved of their jobs at a drug rehabilitation center for using peyote, a controlled hallucinogenic, could receive unemployment benefits as their ingestion of the drug in question was related ostensibly to a native American religious ceremony. While not related to land use specifically, Congress responded to this case and growing concern over a shift in the judicial climate away from general deference to rights of religious expression by passing the Religious Freedom Restoration Act (RFRA) three years later. The broad basis of this legislative act ran afoul of Section 5 of the US Constitution's 14th Amendment that placed the actions of the federal government in conflict with state rights. Congress responded with a more narrow set of protections aimed specifically at local zoning restrictions on religious property (the land use provision of RLUIPA) and the rights of prisoners and other individuals held coercively by the state (e.g. in mental hospitals). While issues of whether inmates may grow beards in accordance with various religious tenets have arisen over the years, the main action with RLUIPA has been on the dimension of protecting private religious property from local governments attempting to restrict its use. While a casual observer of this legislation may assume that RLUIPA settled disputes over religious property use once and for all, the continual stream of court cases referring to RLUIPA indicates that a tension between government and private religious interests still exists. It is our intent to investigate the political and economic logic underlying this tension.

9 A full empirical accounting of the supposed trend is methodologically difficult to determine. Like increases in any medical condition (e.g. autism) that are observed following a new definition or measurement of the ailment, the apparent increase in court cases may be the result of organizations seeking to litigate such cases. Additionally, there is reason to suspect that many violations of religious property rights go unreported and this may have a skewing effect on the data (see below). Nonetheless, the need for the US Congress to enact legislation (RLUIPA) dealing specifically with property rights violations of religious congregations indicates that some individuals were attempting to deal with a preexisting problem that was affecting a wider circle of individuals. Our initial compilation of such cases for an ongoing project indicates that these violations are occurring to all faith traditions in roughly the same proportion to their size in the general population. In other words, there is no initial reason to suspect they are motivated by anti-Jewish or anti-Muslim bias.

infringement upon religious liberty? Second, what are the underlying political and economic incentives for such violations? As for the former, I argue that religious goods are most efficiently supplied within a social (or communal) framework and that communal worship necessitates a regularized and accessible meeting place. Raising the costs of assembling for worship can have a deleterious effect on the optimal level of religiosity supplied in spiritual marketplace that is relatively free of such building restrictions. Likewise, specific regulations on the use of religious property limit the entrepreneurial opportunities of clergy to serve their constituents. While an outside secular observer might think midnight basketball programs are an odd way to bring people closer to God, pastors who are trying to build or maintain membership may have better local knowledge of how to engage parishioners. Both outright bans on construction and limits on use make it more difficult for religious adherents to fully express and live out their religious beliefs. As for the second question, part of the reason for the increasing number of violations of religious property rights may simply lie in Not in my backyard (NIMBY)-ism. However, from a public choice perspective, I argue that the tax-exempt status of religious organizations reduces the incentive of politicians to allocate land to churches relative to alternative residential and commercial uses that generate more tax revenue. Additionally, given that religious facilities sometimes serve as space for private educational activities (e.g. private schools and/or homeschooling co-ops), restrictions on religious property rights help to insulate public educational bureaucracies from competition. I conclude with some initial thoughts about the taxation of religious property.

## 2. GATHERING TOGETHER: 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 infringement on religious freedom. For many, 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 or nativity scenes on the lawn of city hall center on whether government authority is being used to favor a certain belief (implicitly telling people what the content of their beliefs should be). The establishment clause of the US Constitution's First 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 theology 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

more than what an individual can *believe*; it also relates to how people *act upon and celebrate* those beliefs, which can take upon a public characteristic. 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 the 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 may be fashionable to denounce institutionalized religion and claim virtue in practicing one’s beliefs in a private setting outside of the view of others, the reality is that religion (particularly monotheistic religion) necessitates communal and public worship (Stark, 2001, pp. 175–185). 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 likely to lose 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 centerpiece for such activity. Religions existing mostly in the realm of personalized worship—e.g. New Age faiths, various Eastern religions—tend to remain small or only attain weak adherence among their members.

Economically, there are several reasons why successful religions need congregation. First, religious organizations produce what economists call credence goods (Ekelund, Hébert, Tollison, Anderson, & Davidson, 1996, pp. 26–27). 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 accident. In the meantime, I must look for quality signals from the insurance company that their promise to compensate me fully will be credible. Clergy have a comparative advantage in the creation and dissemination of philosophical answers related to the nature of the supernatural and/or about other intangible things such as the meaning of life and what occurs beyond death.<sup>10</sup> These answers (or theologies) are credence goods par excellent. Since many 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

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<sup>10</sup> After asserting that “theologies” are credence goods, I am often criticized for characterizing such spiritual ideas as mere commodities. I offer no value judgment about the worthiness of theological ideas, but I do note that there is an exchange that does take place between a cleric, who specializes in providing/teaching religious ideas, and congregants, who “consume” these ideas and provide resources (tithing) in exchange for those ideas. While menu pricing is not often used for the exchange of religious ideas, and the consumer is free to pay in accordance with what they feel the value of those ideas are, there is nonetheless a market exchange that takes place here. Hopefully, this is clear to readers of the *Forum on Social Economics*. The pricing of religious goods is a fascinating topic unto itself.

credibility of their theology a number of ways, including celebrating martyrs who have paid a high price for their faith, taking vows of poverty to show that signal their organization is not simply a money making scheme, or by building temples of grandeur or holy shrines that show God's grace is smiling upon them.<sup>11</sup> 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 experienced in communities which direct us on how to evaluate them" (Sherkat, 1997, p. 68). A religious group that boasts a large and/or growing constituency is far more credible than a small and/or shrinking one, *ceteris paribus*. Having a physical space to accommodate a large group is important to the credibility of a spiritual organization.

This leads to the second reason why communal religious celebration is important—worship is a club good wherein "team production" of various aspects of that good (e.g. singing hymns, providing public testimony) enhances the overall quality of the good (Iannaccone, 1992). When more people gather and participate, the enjoyment of religious activity increases and the per-member costs of such participation tend to decrease while simultaneously leading to a higher value experience. The best way to achieve such economies of scale and enhance the club features of a religion is to have a regularized meeting time and place (cf. Chwe, 2003). Such an assertion is so obvious as to be banal, yet it is of crucial importance; without a regular meeting place, members are likely to drift away, the quality of the religious product will diminish, and the credibility of the organization will falter. Regularity of participation is also enhanced by the meeting space being publicly identifiable and easily accessed. Knowing where the church is in town makes it easier to recruit new members; a steeple represents a means of advertising presence just as much as a set of golden arches indicate that hamburgers are nearby. Other aspects such as convenient parking, uncongested traffic flows, and plenty of seating affect whether individuals will attend.<sup>12</sup> The conditional use permit for Timberlake Church

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11 There are numerous ways religions signal credibility, a topic worthy of its own study and filled with interesting insights. The construction of extravagant temples may be seen as superfluous and hypocritical for clergy who claim to care for the poor. However, in attempting to accumulate members and financial donations, a signal that the religious group is financially healthy can be important. Just as Wells Fargo built expensive buildings in the Old West as a "bond" to signal they would be around for a long time in a community and that it was safe to store your money there, grand basilicas with expensive artwork help communicate that a confession is successful in the eyes of God and you can trust your soul with them.

12 In a podcast interview with Thom Rainer, the issue of adequate seating and parking was brought up as an essential feature of church health. People who cannot park within a reasonable distance of a church are less likely to come on any given Sunday. Likewise, congregants who come later and cannot find a seat are apt to turn around, head instead to Denny's, and not return the following week. See <http://www.researchonreligion.org/church-organization/thom-s-rainer-on-baptist-conventions-church-health>. Having multiple services on a Saturday evening or Sunday also creates congestion as people are coming and going; congregants have to be ushered out quickly following the first service so that the second service can begin in a timely manner. This is hardly a way to establish a welcoming environment as friendly fellowship requires people linger and talk with one another after the services.



(mentioned above) included a restriction on the signage and a requirement that the building be hidden from roadside view by trees, both of which downplayed its social presence in the community. 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.<sup>13</sup> As Olson (2008) 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 and the amount of money tithed during services. Any governmental restriction on the size of a church parking lot, restrictions on road use, signage, or the size of the sanctuary church can easily affect regular attendance and the financial viability of a congregation.

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 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 (cf. Inazu, 2014). 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?

### 3. THE POLITICAL ECONOMY OF RELIGIOUS PROPERTY RIGHTS VIOLATIONS

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 self-interests in a democracy, a situation that has been endemic throughout US history (and every world historical civilization). The other two reasons—involving government concerns over tax revenue and public school enrollment—are relatively new (and growing) phenomena. I will address each of these explanations separately acknowledging that any given case will involve a mix of any or all three elements.

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<sup>13</sup> To indicate that sandwich boards are not simply trivial matters of property rights, the Supreme Court Case of *Reed v Town of Gilbert* had the size of church signs as its central point of dispute. The justices ruled in favor of Reed (a pastor) in a 9-0 decision. See <http://www.scotusblog.com/case-files/cases/reed-v-town-of-gilbert-arizona>.

### 3.1. Not in My Backyard: Residential Resistance to Church Construction

We live in a world of diverse 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, congregations rarely settle in the middle of nowhere. As populations grow and expand, religious groups arise or locate to meet the spiritual needs of those populations. This means constructing a building amidst preexisting populations, often close to residential homes. For some citizens trying to flee the hustle and bustle of urban environments, having a 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 construction projects such as schools, hospitals, gas stations, or a neighbor's tool shed. Once 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. "Not in my backyard!" (NIMBY) is a common rallying cry of property owners.

Recognizing such problems, local governments create zoning regulations that alleviate any uncertainty about future land use projects (Fischel, 1987). A person buying in an area zoned for residential use can rest assured that a supermarket will not be built next to them any time soon. 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 canceled out with the congestion and noise of weekday business simply being replaced on Sunday with church congestion and noise.<sup>14</sup> Churches locating in business parks, and converting unused warehouses into worship centers, has been a recent response to avoiding such conflicts and finding relatively cheaper property. Nonetheless, the persistent problem of NIMBY-ism remains one that will continue to vex religious groups seeking to build, as it affects any other type of establishment. For our immediate concerns, this explanation is rather uninteresting.

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<sup>14</sup> This assertion naturally rests on the notion we are dealing predominately with Christian organizations and that Sunday morning is the time when traffic will be the greatest. This assertion can be modified for faiths that meet on different days of the week, namely Judaism and Islam. However, it should be noted that Jewish and Muslim congregations will tend to locate in Jewish and Muslim neighborhoods, respectively, to serve the nearby constituents who are most likely Jewish or Muslim. A synagogue that is planted in the midst of a neighborhood populated almost entirely by Christians would likely cause some hassle on Saturday mornings, but it is unlikely that a synagogue would be built there.

### 3.2. The Grasping Hand: Churches and Local Government Tax Revenue

Once categorized as 501-(c)-(3) organization, religious groups qualify for a number of favorable tax exemptions on property, services, and assets not available to other entities. It should not be assumed, though, that such organizations are entirely tax exempt. 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, congregations are nonetheless liable for taxes on activities such as the sale of goods in religious bookstores, property that is not specifically used for worship or administrative 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 used explicitly for religious use.<sup>15</sup> 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 single-family housing units, condominiums, restaurants, or factories. That religious organizations pay less taxes per comparable space and usage than other entities provides governmental actors an incentive to discriminate against religious property when faced with competing uses.

Public choice theory rests upon the assumption that policy-makers are self-interested actors that implement policy with their own specific goals in mind (Buchanan & Tullock, 1962; Mayhew, 1974). Elected politicians are assumed to be vote maximizers, but once election is assured increasing control over public budgets also takes high priority. The larger the budget under one's political control, the more power the politician has in directing resources toward favored constituents and/or to win over potential voters to secure incumbency. Niskanen (1971) noted the budget-maximizing incentive of non-elected government officials (i.e. bureaucrats), as well. Bureaucrats secure their positions with larger public budgets that are, in turn, fed by tax revenue. Given this, politicians and bureaucrats have an incentive to allocate scarce land (via zoning laws and building permits) to uses that generate more tax revenue, *ceteris paribus*. In counties or municipalities facing budget shortfalls or population growth that increases competing demands for scarce real estate, governmental actors have an incentive to allocate land to those uses that generate the highest tax revenue. Obviously there will have to be a balance of allocation across residential and commercial uses, but in this situation houses of worship will tend to be at a disadvantage relative to houses of pancakes as they take up valuable space but yield little in the way of increased government revenue.

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<sup>15</sup> See RCW 458.16.190 available at <http://apps.leg.wa.gov/WAC/default.aspx?cite=458-16-190>.

The case of *Cottonwood v Cypress* (2002) mentioned above represents this situation well. Owners of vacant or underutilized parcels of land in Cypress willingly sold to Cottonwood Church in a free exchange indicating that the land was being allocated to a higher use. While the land could have been sold to a private retailer, the prior owners of that land chose (for whatever reason) to sell to the religious group, perhaps because no retailer was interested in that location at the time. However, the city managers intervened before Cottonwood could begin construction, re-zoning the land and declaring eminent domain so as to divert the parcels to a retailer that would generate higher tax revenue. This case bears strong resemblance to the Supreme Court case of *Kelo v New London* (2005), wherein the “little pink house” of Susette Kelo was taken by the city of New London in order to be sold to the pharmaceutical retailer Pfizer with the argument being that the additional tax revenue generated was a legitimate “public use” under the “takings clause” of the US Constitution’s Fifth Amendment (Benedict, 2009).<sup>16</sup> New London won the case with the precedent being that “increased tax revenue” now constitutes a “public use.” *Cottonwood v Cypress* had all the makings of being a similar legal test of the definition of “public use” contained in the Fifth Amendment. The Kelo decision now serves as legal cover for local governments that want to bias land use decisions away from religious institutions that provide lower tax revenue than other uses.

The use of eminent domain to expropriate a congregation’s already existing property is likely to prove politically dangerous. Remember that elected politicians are vote maximizers and will likely avoid controversies that stir voter anger. Religious groups historically have been masters of collective action (Djupe & Gilbert, 2009; Gill, 1998) and any direct attempt to take the land will encounter stiff resistance from an already mobilized group. That churches are often seen in favorable light by citizens makes such outright expropriation akin to kicking a puppy, something that no candidate for public office wants to be seen doing. As such, the political logic dictates that it is easier to deny permits for future construction of religious buildings than to expropriate what already exists. The church construction moratorium in King County, Washington fits well into this logic. While ostensibly aimed at preserving the rural landscape, the moratorium also had the effect of preserving the land for commercial and residential development in the future. As it is difficult for a present generation of politicians to bind the decisions of a future generation (which may include themselves in later election cycles), leaving land untouched for the time being certainly allows it to be used for high revenue-generating uses in the future as businesses and developers become more interested in the land. Nowhere was this logic made more explicit than in Stafford, Texas in 2006 wherein the city council publicly declared the number of tax-exempt churches within the city limits was

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<sup>16</sup> As stated in the Fifth Amendment, “nor shall private property be taken for *public use*, without just compensation” (emphasis added).

busting the budget and no more permits would be given for religious construction projects.<sup>17</sup> The decision to ban church construction in Medina, MN a month after Woodbridge Church applied for a building permit in 2012,<sup>18</sup> and for the city of Wayne, NJ to reallocated land purchased by the Albanian Associated Fund Mosque for “open space”<sup>19</sup> can be explained in this manner as well.

Rezoning land in a manner that is biased against church construction not only has the effect of limiting church growth across the board, but it also affects the qualitative nature of the spiritual landscape. The King County moratorium (and subsequent size restrictions) on church construction was eventually defeated through the mobilizing efforts of the Catholic Archdiocese of Seattle and with assistance from the Latter Day Saints who are a densely networked denomination with significant legal resources. However, smaller denominations and independent churches without informational networks and funds to hire property rights attorneys are likely to be at a disadvantage. Seminaries rarely train clergy in municipal land use regulations, preferring instead to focus on hermeneutics or doxology. Without the administrative resources a larger denomination that can afford to fight such cases, these smaller churches can easily be prevented from ever gaining a physical presence in a community and, as a result, growing larger. In essence, the tax-exempt status of religious organizations tilts the religious marketplace against small upstart sects and in favor of established denominations that have the resources to play the rent-seeking game created by the political use of the tax code. Empirically, determining the extent that this logic plays out is difficult as it creates Bastiat’s famous “seen and unseen” dilemma. The churches that are never built because of property restrictions fade quietly into history and go unobserved by social scientists.

### 3.3. Thinking about the Children! Private Schools and Homeschoolers as a Motivation

While some (perhaps many) churches eventually do get built, the actual use of such property may be regulated in such ways that limit some entrepreneurial ways of engaging parishioners, which in turn affects the likelihood and intensity of how people become engaged in their faith. This brings us to the final reason why local government officials have a motivation to implement property restrictions on churches. Religious institutions often compete with local governments for provision of public goods, most notably education. As education goes beyond merely

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

18 See *Woodridge Church v. City of Medina*, Case No. 11-275 (MJD/FLN). <https://docs.justia.com/cases/federal/district-courts/minnesota/mndce/0:2011cv00275/118417/31/>. Accessed July 25, 2015. This court case also includes limitations on the size of church buildings smaller than what the Woodbridge Church requested.

19 See <http://www.becketfund.org/albanian-associated-fund-v-township-of-wayne-nj/>.

teaching reading, writing, and arithmetic, and also includes the inculcation of values, many religious families have a strong preference for having their children attend private religious schools or homeschool co-ops, both of which can be housed in preexisting church property. Indeed, to the extent that most religious activity within a church occurs on one specific day (e.g. Sundays for Christians or Saturday for Jews), there are significant deadweight costs to that property during the remainder of the week. Holding Bible studies or other “small groups” on a weekday evening may help absorb some of this loss, but religious buildings are primed for taking on the role of educating children during weekdays. Churches often have the space to host kindergarten and primary education classes, or offer rooms for homeschooling co-ops to meet on a regular basis.

In many states, funding for public school districts 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 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 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 significantly, 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 usually come loaded for bear when confronting the politician who tells them it will be their school that must go. 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 toward the politician who makes the tough choice, but the teacher unions may possibly 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 elected officials charged with keeping schools open—will prefer to limit the amount of private school enrollment. One way of limiting private school enrollment is to restrict private school construction, with the understanding that there will be some political support (usually among wealthy citizens) for private schooling and that any outright ban would be politically infeasible. Barring outright bans on private school construction, property regulations can be used to limit the size of buildings, thereby using space restrictions to create a ceiling on enrollments.<sup>20</sup>

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 cost more to the direct consumer. The higher private costs act to limit the number of students who might otherwise leave the public system. However, there is a cheaper alternative to private schools that has been gaining popularity over the past two decades: homeschooling (Murphy, 2014). Whereas 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 decades. Concurrent with the increased popularity of homeschooling has been the creation of homeschool 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.<sup>21</sup> 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 homeschool population is driven by concerns over religious education, one of the most popular places to host such co-ops is churches. Moreover, church space often sits

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<sup>20</sup> Only so many kids can fit in a classroom, and capacity regulations usually determine this. Limiting physical space limits enrollments, which in turn creates a potential scarcity leading to tuition prices to be bid upward, creating yet another limitation on enrollments.

<sup>21</sup> Homeschooling advocates have discovered that there are certain economies of scale to be captured via co-operation, particularly in the upper grades. While most parents can handle math and science education up to the fifth or sixth grade, it becomes advantageous to pool resources and hire an outside instructor to teach groups of middle or high school students the more advanced aspects of physics, geometry, and biology. Co-ops will often hire a local aerospace engineer or medical doctor to teach some of these subjects, and you are more likely to get a quality instructor by paying more, which means creating a large pool of contributions. Bringing together twenty, thirty, or even seventy students requires substantial space, and churches that usually have nothing else going on during the days of the week are ideal spots for this to happen. The author was asked a few times to serve as a substitute teacher to a homeschooling co-op that was meeting in a local megachurch. When I arrived my first time I was expecting to see a handful or two of students, but instead was met by several hundred students ranging from grades 5–12, moving between multiple classes on various subjects when a bell was rung. The students even had a lunch hour served by the church's cafeteria and a volleyball session in the attached gym. Needless to say, this was not the Timberlake Church mentioned at the beginning of the article.



underutilized during the weekdays, thus hosting homeschool co-ops are a great way to mitigate deadweight loss.

For school district employees or board members worried about losing students to this movement, a potential method of dealing with such a problem is to create regulations making it difficult for homeschool co-ops to gather in a location or to place other burdensome requirements on the process of homeschooling. Specific regulations aimed at limiting room sizes in churches or how such property can be used is another method. Consider the effect of limiting the size of a church's kitchen on the ability to serve homeschoolers lunch, or prohibiting a congregation from constructing a gymnasium on how this would hinder homeschoolers from fulfilling a mandated physical education requirement. Although these policies may seem trivial, minor regulations often have an important marginal effect in encouraging or discouraging all types of behavior and organization. Vieux (2014) has demonstrated that homeschooling regulations are politically contentious and attributes variations in regulations across states to a "culture war" hypothesis wherein states with a higher percentage of evangelical Christians have fewer regulations on homeschooling. This finding is not inconsistent with a political economy approach to religious property restrictions. In regions where politicians face lower political costs for restricting homeschooling activities, there is an increased likelihood of using church property restrictions to limit entry into the homeschooling market, ergo protecting public school enrollment. Given the micro-regulatory nature of many of these restrictions, the empirical case for such theoretical logic may be difficult to prove, but warrants further research.

#### 4. 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 US Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) designed to prevent local government officials from using property regulations in ways that inhibited the free exercise right of religious groups.<sup>22</sup> As noted earlier, RLUIPA was actually a Supreme Court decision—*City of Boerne v Flores*—that invalidated a previous Congressional law known as the RFRA.<sup>23</sup> That constitutional battle directly involved the property rights of a church. In *Boerne v Flores*,<sup>24</sup> the Catholic Archdiocese of San Antonio, Texas sought and was

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<sup>22</sup> See Powers (2003).

<sup>23</sup> 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.

<sup>24</sup> See *City of Boerne v Flores* 521 US 507 (1997).



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 RFRA to claim that the inability to build more adequate space for their parishioners violated free exercise rights. Unfortunately for Archbishop Flores, the US Supreme Court decided that RFRA was unconstitutional based upon a violation of Congress's ability to 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 RLUIPA, which has yet to face a constitutional challenge (as of this writing).

RLUIPA, then, acts as a federal protection for churches against the regulatory violation of church property rights. Groups such as The Beckett Fund, Alliance Defending Freedom, and The Rutherford Institute have used RLUIPA 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 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. This gives local regulators the ability to "bully" members of the pulpit.<sup>25</sup> 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. Such

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<sup>25</sup> I am grateful to Pastor Steve Hammond for this insight during an interview conducted on 10 November 2009 in Enumclaw, WA. Hammond noted that when confronted with seemingly obscure regulatory challenges to the property rights of churches, regulators would often respond with a "so sue us" attitude. Few people outside of the legal profession relish the prospects of litigation and merely the threat of a contracted legal battle may be enough to force compliance to an overly restrictive application of a regulatory code. See Gill (2010).

delays can have deleterious effects on the church's membership and attendance in ways that are difficult to quantify, another instance of Bastiat's "seen and unseen" problem. Moreover, the monetary and time costs of lengthy court cases tend to be concentrated for churches, whereas they are dispersed for regulatory agencies that rely on a broad taxpayer base to cover their legal expenses.<sup>26</sup> And long delays only provide an additional justification for budget requests to keep the regulatory agency well-funded into the future.

The situation of asymmetric information and resources favoring government regulators may well have an impact on the composition of the religious marketplace, favoring more established churches over "upstart sects," and dampening religious innovation and entrepreneurship. Religious organizations that do have easy recourse to financial and legal resources are in a better position to defend against property restrictions placed on them by local governments. The failure of King County 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 small, independent congregations, the legislation may have been approved and no new churches would have been built in rural King County over the past decade. Other large and long-established denominations (e.g. Presbyterians, United Methodists) also have the communication networks, legal knowledge, and institutional resources to deal with such regulatory threats. The result is to skew the dynamics of the religious marketplace to these older, mainline denominations. Ironically, these larger mainline denominations are the ones that have been witnessing slower growth and declining membership over the past few decades (Iannaccone, 1994), and are the least in need of new land for church construction.<sup>27</sup> Members who are defecting from such congregations have been moving toward theologically stricter small churches,

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<sup>26</sup> A more cynical assessment would note that provoking more legal disputes with churches helps to justify hiring and funding more government-paid lawyers who specialize in these cases.

<sup>27</sup> Smaller, non-denominational churches have been the more dynamic segment of the religious market in recent decades. Given the resource disadvantage of these independent churches relative to the older and larger mainline denominations, one might expect religious property restrictions to depress this market segment. Nonetheless, these small churches continue to grow and would seem to argue against the deleterious effects that property restrictions have on these churches. So are such churches really being harmed? Methodologically, it is hard, if not impossible to determine if growth in this area has been slowed relative to the counterfactual of such restrictions not being present. Nonetheless, Moll (2015) has observed that church construction has overall been down over the past decade, but congregations are finding innovative ways to gather, including through the use of storefront properties, a tactic that does favor small, independent churches. Second, it should be noted that so long as the growth of small churches outstrips the rate at which local governments can impose property restrictions—and these restrictions are by no means prevalent in every community in the US—we should still be able to observe a positive rate of growth by such congregations. Government is notoriously reactive to new social trends and so long as the faithful retain an entrepreneurial spirit, they will be able to find ways to work around government action, even if those work-arounds are a sub-optimal solution to actually owning one's property.

but if these small churches are unable to get a foothold in the community due to property restrictions, it may well be that many people are simply dropping out of the religious market altogether. The much-discussed increase in “religious nones”<sup>28</sup> may not simply be the result of changing religious tastes among the population, but an artifact of regulations that impose higher costs on the spiritual organizations that may best be able to cater to these religious “dropouts.” Secularization, in other words, is not merely a cultural phenomenon, but may also be the result of government policy (Gill & Lundsgaarde, 2004; Stark & Iannaccone, 1994).

From a public choice perspective, the legal resources available to larger denominations would seem to suggest rent-seeking opportunities for these organizations by lobbying for various zoning regulations that would keep newer denominations out of the religious marketplace. The United States is no stranger to such political opportunism. The so-called Blaine Amendments to various state constitutions in the nineteenth century, promoted by Protestant politicians and activist groups, attempted to limit the Catholic Church’s ability to provide education by limiting government funding for parochial schools, a common practice at the time (Duncan, 2003). While not a property limitation per se, these amendments did affect the cost Catholics had to bear in providing educational facilities for their students at the time when Protestants were given “free” access to public schools. It further indicates the willingness of dominant confessions to use the coercive force of the state to gain leverage over spiritual competitors. Similar efforts against other religious minorities such as the Latter Day Saints and Jehovah’s Witnesses can also be noted. If this was true in American history, why should we not expect it now. Two reasons can be advanced. First, as compared to an overwhelmingly dominant Protestant America in the nineteenth and early mid-twentieth century where a few denominations did hold majority status in particular regions, the contemporary landscape is much more diversified and there are few areas where a single denomination holds majority sway. Religious pluralism has long been accepted as the new spiritual reality in the US since at least the 1950s. Second, and relatedly, is that the dimension of current restrictions on religious property rights is coming from a secular government for secular (or non-religious) reasons as laid out above. In essence, all churches face a similar threat and restrictions imposed on smaller denominations may be visited upon larger denominations at some point in the future. That many attempts to restrict religious property rights have been blanket laws that affect both Catholics and independent churches provides strong incentives for an ecumenical defense against such action, as was seen in the case of the King County moratorium where Catholics worked side by side with Mormons and Pentecostals.

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28 See “Nones on the Rise” from the Pew Forum. <http://www.pewforum.org/2012/10/09/nones-on-the-rise/> accessed 25 July 2010.

## 5. CONCLUSION: SHOULD CHURCHES BE TAXED?

One of the key arguments of this essay is that the tax-exempt status of religious organizations incentivizes politicians and bureaucrats to discriminate against houses of worship when it comes to zoning and land use regulations. The obvious solution to such discrimination would be to tax churches on an equal par with comparable residential and commercial property.<sup>29</sup> If churches were taxed on the same schedule as a grocery store or an apartment complex, there would be less of a political incentive to deny building permits for such use. While seemingly obvious, there are several reasons to expect that this would not entirely eliminate the disincentive to favor other land uses over religious property. First, while it may be possible to equalize the property tax revenue between religious and commercial establishments, local governments receive revenue from other sources including sales and income taxes. Churches simply do not sell as much stuff and junk as a grocery store or clothing boutique, nor do they often employ a comparable number of individuals per square foot of the property. Religious groups often rely upon volunteer labor and the staff that do get paid are often compensated at a relatively low wage (given that churches fund themselves primarily through voluntary contributions). In the case of Cottonwood, even if that congregation paid full-time janitors and receptionists at their facility, they still could not compete with the additional tax revenue generated by the sales and employment at a big box retailer. Churches may face more favorable conditions when competing against residential land uses (e.g. single-family homes or apartment complexes), though there too the value of religious property is not as likely to grow as fast as those residential uses if there is an expanding population. This, in turn, affects property value assessments and property tax revenue; churches remain at a competitive disadvantage for land use particularly in areas with expanding population. Religious congregations are simply not worth as much to revenue-maximizing politicians and bureaucrats in fiduciary terms.

While it may be possible to level the playing field between religious property and alternative land uses a bit if churches were to be taxed, religious groups would remain at a competitive disadvantage because they provide community activities that directly challenge government-provided services. As noted above, the use of church property for private schools or homeschooling co-ops directly rivals public sector education. Additionally, services such as marriage and life counseling, assistance to the poor, and alcohol/drug rehabilitation are commonly provided by religious institutions. Whereas politicians would likely be attracted to such private activities in their communities, and the pro-social behaviors that religions often promote (Stark, 2013), public bureaucracies that perform similar roles find churches

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<sup>29</sup> This suggestion comes up in many public forums where the current author presents these ideas. Indeed, it was also proposed to me by Russ Roberts on my appearance on EconTalk in January 2014. See [http://www.econtalk.org/archives/2014/01/anthony\\_gill\\_on.html](http://www.econtalk.org/archives/2014/01/anthony_gill_on.html) accessed July 25, 2015.

to be a competitor in this realm. If the private religious sector is providing comparable services to the community, and at no cost to taxpayers, it becomes difficult to justify an expanded budget and mission. Some private businesses may also be concerned about the competing activities of religious groups and lobby for property restrictions on churches.<sup>30</sup> Imposing property taxes on religious organizations does not mitigate this incentive for local officials to restrict the construction and use of religious property.

All told, religious institutions provide valuable goods and services to local communities, from theological answers to life and death that many individuals desire to clothing drives and childcare. However, the expanding role of government creates an increasing need for tax revenue that cuts into the religious freedom of such organizations by way of being less valuable to government officials in terms of property taxes. Add to this the competing role that churches play in the delivery of community services and it is possible to see a growing tension between government and the religious sector, one that favors the former over the latter.<sup>31</sup> The lesson for political economists to draw from this discussion is the notion that the growth of the state impacts individual and group freedoms in many areas and ways that one might not expect. For individuals who are concerned with the preservation of religious liberty, it is best for them to understand how the growth of government has an indirect impact on their ability to congregate and proselytize. Likewise, for those fighting battles to preserve private property rights against the encroachment of governmental power, allies for that struggle can be found sometimes in the most unlikely places.

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<sup>30</sup> For example, Timberlake Church (mentioned above) had wanted a government permit to provide no-cost, or low-cost, automobile repair to unemployed and poor individuals in the community but were denied such permission. Interview with Pastor Gary Gonzalez, 5 December 2006.

<sup>31</sup> There have been some innovations in the realm of government–religious partnerships, including governmental assistance for religious charities (Hein, 2014) and collaborations between public schools and homeschoolers wherein the latter can use some of the facilities of the former in exchange for those students being counted toward the per pupil funding of the district.

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