

State RFRAs and Land Use Regulation

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INTRODUCTION

Land use regulation is among the most difficult issues facing religious liberty legislation — religiously, politically, legally, and factually. Core First Amendment rights are subject to a body of regulation that is highly intrusive and highly discretionary. The relevant legal concepts are not well suited to the problem, and their content is highly disputed. The relevant facts are poorly understood. This Article will briefly review the conceptual difficulties (religious, political, and legal), and then report at somewhat greater length the factual record assembled in recent congressional hearings.

I. THE CONCEPTUAL DIFFICULTIES

A. *Religious and Political Difficulties*

The religious and political difficulties are closely related; they arise from a fundamental clash between the religious and political views of what it means to build a church.

The right to assemble for worship is at the very core of religious

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liberty. In every major religious tradition — Christian, Jewish, Muslim, Buddhist, Hindu, whatever — communities of believers assemble together, at least for shared rituals and usually for other activities as well. Churches cannot function without a physical space; creation of a church building is a core First Amendment right.

Of course the right to assemble for worship cannot be absolute. A growing church in too small a place can impose substantial costs on its neighbors, especially if it lacks parking or other facilities and, thus, spills over into surrounding properties. But the recognition of some limits does not change the essential point: assembly for worship and other religious activities, and the creation of spaces in which such assembly may occur, is at the very core of religious liberty.

In some communities, this core religious need is met without substantial difficulty. Where land use regulation in general is not unduly burdensome, or where regulators are sensitive to the special needs of religious organizations, churches can create worship space without substantial difficulty. This Article will document widespread obstacles to worship, but it is important to emphasize at the outset that those obstacles are not universal. Legitimate land use regulation can exclude churches from inappropriate locations and protect neighbors from serious inconvenience without unduly constricting the range of available locations or disproportionately increasing the costs of renting, buying, or building a church. Where regulation proceeds in this way, lawsuits by churches should be rare, and successful lawsuits rarer still.

In many communities, the experience is very different, and the location of a new church can be difficult or impossible. The conceptual difficulty is not in the straightforward religious view of the church building as essential to First Amendment rights; that view is virtually unarguable within its premises. The difficulty is in the radically different view of the matter taken by some land use regulators and especially by neighborhood associations and other grass roots constituencies that demand strong land use regulation. These constituencies start from the premise that the community should have a strong voice — many of them clearly believe the community should have a veto — in the development of every parcel of land, and that any claims of liberty from the land owner involve only property rights, which are entitled to little protection.

Worship inside the church may be a First Amendment right, but building the church in the first place is a mere property right, subject to pervasive regulation.

Far from being an especially protected land use, churches in this view are an especially dangerous land use. They are an unusual use, posing special problems and requiring especially intense regulation. No doubt most land use regulators think they will use their power fairly and reasonably, but they see themselves as empowered to decide what may be built and how existing buildings may be used. What from a religious perspective is a core First Amendment right is, and from the land use perspective should be, largely at the mercy of land use regulators.

This clash of perspectives means that land use regulators and their supporters are a principal part of the reason why religious liberty legislation is needed, and also a principal obstacle to its enactment. Land use interests lobbied hard against the Texas Religious Freedom Restoration Act ("RFRA"),¹ and lobbied the governors of Illinois and California to veto religious liberty legislation in those states,² successfully in the case of California.³

¹ See *Texas Religious Freedom and Restoration Act: Hearing on SB 138 Before the Senate Comm. on State Affairs*, 76th Legis., 1st Reg. Sess. (Feb. 25, 1999) [hereinafter *Texas Senate Hearing*] (testimony of Maxine Aaronson, Texas Neighborhoods Together; Maggie Armstrong, Austin Neighborhoods Council; Chris Bowers, National Alliance of Preservation Comm'ns; Lowell Denton (attorney for the City of Boerne); Pamela Hatcher, Haggard Park Homeowner's Ass'n.; Patrick Heath, City of Boerne; Jane Jenkins, National Trust for Historic Preservation; Patti E. Leonard, Austin homeowner; Virginia McAlester, Preservation Dallas; Anita N. Martinez, Guadalupe Social Center; Joe N. Medrano, Guadalupe Social Center; Russ Pate, Guadalupe Social Center; Shirley Spellerberg, City of Corinth; Ronnie Villareal, Guadalupe Social Center); *Texas Religious Freedom Restoration Act: Hearing on HB 601 Before the House Comm. on State Affairs*, 76th Legis., 1st Reg. Sess. (Mar. 15, 1999) [hereinafter *Texas House Hearing*] (Maxine Aaronson, Texas Neighborhoods Together; Christopher Bowers, National Alliance of Preservation Commissions; Lowell Denton, City of Boerne; Habib Erkin, City of San Antonio; Patrick Heath, City of Boerne; Catherine Horsey, Preservation Dallas; Virginia McAlester, Preservation Dallas; Laura Miller, Dallas City Council; Russ Pate, Guadalupe Social Center; Marcel Quimby, National Trust for Historic Preservation; Shirley Spellerberg, City of Corinth). Committee hearings in the Texas legislature are recorded on audiotape and are available from Committee staff; these tapes are also available in the Tarlton Law Library at The University of Texas at Austin. Witness lists are available at <<http://www.capitol.state.tx.us/tlo/76R/witmtg/1999/C570/05612301.HTM>> (*Texas Senate Hearing*); <<http://www.capitol.state.tx.us/tlo/76R/witmtg/1999/C450/07413301.HTM>> (*Texas House Hearing*). The enacted Texas RFRA will be codified in Tex. Civ. Prac. & Remedies Code §§ 110.001-110.012.

² Interviews with staff to Rep. Joe Baca, sponsor of the California legislation, and with Steffan Johnson, a lawyer at Mayer, Brown, & Platt in Chicago, who was actively involved in the enactment of the Illinois legislation.

³ See Governor's Veto Message for Assembly Bill No. 1617 (Sept. 28, 1998), 1997-98 Reg. Sess., 8 ASSEMBLY J. 9647, 9647 (Cal. 1998) (also available at <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1601-1650/ab_1617_vt_19980928.html>) (returning Assembly

An astute Texas legislator told me early on that if the neighborhood associations came to believe that a Texas RFRA would let churches build in their neighborhoods — and especially if they came to believe that “it means they can’t keep black churches out of white neighborhoods” — the bill would be dead.⁴ This prediction, offered as a matter-of-fact assessment of how the world works, necessarily imputes to the neighborhood associations the view that existing land use rules gave them the power to stop any church they chose to oppose.

I have no doubt that the neighborhood associations want that power, but only some of them have it. At the hearings on Texas RFRA, land use witnesses told one tale after another of church buildings that had been built over their opposition⁵ — all under existing land use regulation and without a lawsuit invoking statutory or constitutional protections for religious liberty. Implicitly but unambiguously, these witnesses wanted more intense restrictions on the building of churches. Land use regulators in many Texas communities were not preventing the construction of churches as aggressively as their most outspoken constituents wanted.

These constituents brought a remarkable intensity and sense of entitlement to their desire to prevent the construction of churches. One witness was in tears as she described the construction of a synagogue and Jewish community center on a forty-acre tract near her home.⁶ She apparently believed that she was entitled in perpetuity to the free enjoyment of that undeveloped forty acres. Another activist ended a conversation about the relevant legal standard cursing at one of the governor’s policy aides on the floor of the Senate.⁷

I can only infer the reasons for such intense opposition to a right to create worship space. The reasons surely must vary with circumstance. It is necessary to explain not only why large free-standing churches are not wanted in suburban, residential

Bill No. 1617 without his signature).

⁴ For obvious reasons, I cannot identify this legislator.

⁵ See *Texas Senate Hearing*, *supra* note 1 (testimony of Pamela Hatcher, Haggard Park Owner’s Association; Virginia McAllister, Preservation Dallas).

⁶ See *id.* (testimony of Patti E. Leonard).

⁷ This confrontation took place on February 25, 1999 between Maxine Aaronson of Texas Neighborhoods Together and Don Willett of the Office of the Governor, during the hearing before the Senate Committee on State Affairs, which was meeting in the Senate Chamber.

neighborhoods, but also why they are not wanted in commercial districts, and why it is so difficult in some cities even to locate a church in an existing building.

In the case of residential neighborhoods, much of the opposition to churches presumably flows from opposition to development of any kind. Many of the people opposed to new churches are also opposed to other new developments. But more than that is going on. Churches appear to be more vulnerable than other projects of similar size to NIMBY opposition — the classic demand to build it somewhere else, but Not In My Back Yard. A new grocery store or a new theater may have large numbers of potential customers in the neighborhood, people who will find it convenient to have a service close at hand. These neighbors offer some counterweight to the typically more active residents who want nothing built close by. But any one church may have only a few potential members in the immediate neighborhood. On any given day the grocery store or theater may attract the same size crowd as the church, but it will be a different crowd on different days and at different hours, so that its base of regular customers is much larger than any one day's attendance. The church will attract basically the same crowd every week, and that is its whole base of potential supporters. Only 40% of the population reports regular church attendance,⁸ and the real number may be smaller.⁹ These worshipers are divided among many denominations, so that most new churches can expect to serve only a tiny slice of the population. For most new churches, only a few of the members will come from the immediate neighborhood, and the rest will come from a wider radius.¹⁰

The large majority of the neighboring population confidently expects never to attend the proposed new church. At best they have no stake in seeing the church built. But some of those people are hostile to new development, and some of them fear that even a little church might grow, becoming a big church and a big

⁸ See ANDREW M. GREELEY, *RELIGIOUS CHANGE IN AMERICA* 43 (1989) (citing Gallup Poll data from 1939 to 1984); C. Kirk Haddaway et al., *What the Polls Don't Show: A Closer Look at U.S. Church Attendance*, 58 AM. SOC. REV. 741, 741-42 (1993) (collecting polling data from multiple sources and more recent years).

⁹ See Haddaway et al., *supra* note 8, at 743-48 (estimating 20% to 25% based on actually counting people in churches).

¹⁰ See Marc D. Stern, *Zoning for Churches: Guidelines, But No Magic Formula*, 7 RESPONSIVE COMMUNITY No. 3, at 69, 70 (1997) ("religious institutions serve populations that are less and less centered in the geographic communities in which they are located").

problem to the neighborhood.

Worse, some are hostile to religion and to churches, either in general or in certain manifestations. Some Americans are hostile to all religion. They believe it is irrational, superstitious, and harmful.¹¹ This is the view of a small minority, but in my experience, this view is overrepresented in elite positions. What is much more widespread is suspicion of, or hostility to, religious intensity. People who are religious themselves are often hostile to unfamiliar faiths, to high intensity faiths, and to the conservative and evangelical churches associated with the "Religious Right." Thus in 1993, 45% of Americans admitted to "mostly unfavorable" or "very unfavorable" opinions of "religious fundamentalists," and 86% admitted to mostly or very unfavorable opinions of "members of religious cults or sects."¹² In 1989, 30% of Americans said they would not like to have "religious fundamentalists" as neighbors, and 62% said they would not like to have "members of minority religious sects or cults" as neighbors.¹³ A desire not to have members of a minority sect as neighbors is closely related to a desire not to have the minority sect's church as a neighbor.

In older communities, this resistance to churches has very uneven impact. The large denominations that historically served most of the church-going population, and that are more likely to have political clout, are mostly grandfathered in. They have often built fine churches on desirable corners, in an era before land use regulation or when approval was much easier to get. Legislators, judges, and regulators are apt to think of these familiar churches and assume that there is no problem with church land use regulation, even if new churches are effectively excluded from the community. These excluded churches are typically small and unfamiliar, with few members, no visibility, and little political clout, or they are rapidly growing evangelical churches that may have political clout but may also draw political opposition to the religious right.

The older cases, and land use witnesses at legislative hearings, talk mostly about churches in residential neighborhoods, and those conflicts still occur. But the principal battle has shifted to commercial properties, especially in older communities. A right to

¹¹ See, e.g., Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453 (1996).

¹² GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1993, at 75-76, 78 (1994).

¹³ GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1989, at 63, 67 (1990).

locate a church in built-up residential neighborhoods is illusory for all but the tiniest congregations. Unless your congregation can meet in a single house, the only way to build a church in a residential area is to buy several adjacent lots and tear down the houses.¹⁴ But several adjacent lots never come on the market at the same time, and if they did, any church pursuing this strategy would likely provoke an angry reaction from the neighborhood. It is only in commercial zones that significant tracts of land are bought and sold with any frequency.¹⁵ This makes sense of the common zoning code provisions that permit churches only in residential neighborhoods.¹⁶ To exclude new churches from commercial zones goes far to exclude them from the city, while allowing them to locate as of right in residential neighborhoods goes far to fool uninformed judges into believing that a complaining church has ample opportunity to locate.¹⁷

Thus, increasing numbers of the recent cases involve opposition to churches in commercial zones, or even industrial zones.¹⁸ In these zones, it is highly implausible to believe that neighbors will be disturbed or inconvenienced. It is hard to identify reasons for

¹⁴ See *Religious Liberty Protection Act of 1998, Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (forthcoming) [hereinafter *July 1998 House Hearing*] (statement of Bruce D. Shoulson, attorney, <<http://www.house.gov/judiciary/222494.htm>> [hereinafter *Shoulson Statement*]); conversation with John Mauck in Washington, D.C., on June 16, 1998 [hereinafter *Mauck Conversation*]. Mr. Mauck is a zoning attorney who specializes in the representation of churches.

¹⁵ See *Mauck Conversation*, *supra* note 14.

¹⁶ For example, a survey of zoning codes in 29 Chicago suburbs found that 10 permitted churches to locate as of right only in residential neighborhoods. See *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *June 1998 House Hearing*] (forthcoming); *Compilation of Zoning Provisions Affecting Churches in 29 Suburbs of Northern Cook County* by John W. Mauck [as] of 7-10-98 Based Upon 1995 Published Standards, attached to statement of John Mauck, partner, Mauck, Bellande, Baker & O'Connell, <<http://www.house.gov/judiciary/mauck.pdf>> [hereinafter *Zoning Code Survey*].

¹⁷ See *Cornerstone Bible Church v. City of Hastings*, 740 F. Supp. 654, 663 (D. Minn. 1990) (holding that zoning ordinance left open "ample alternative channels of communication," because church could locate in residential zones constituting 45% of the city's area), *rev'd in part, on other grounds*, 948 F.2d 464 (8th Cir. 1991); *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53, 59 (Ill. App. 1999) (upholding exclusion of churches from commercial zones, in part because residential zones constituting 60% of city were open to churches), *appeal allowed*, 184 Ill. 2d 554 (June 2, 1999).

¹⁸ See, e.g., cases cited *supra* note 17; *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878 (N.D. Ill. 1996). Mayor Shirley Spellerberg of Corinth, Texas, worked vigorously against the Texas RFRA, because she was engaged in a dispute with a Metropolitan Community Church located in the city's industrial zone. See *Texas Senate Hearing*, *supra* note 1 (testimony of Shirley Spellerberg).

opposition that do not either derive from actual hostility to some or all churches, or, however derived, are so universal in scope that they translate into de facto hostility to all churches. The most tangible reason for local officials may be that they do not want property taken off the tax rolls.¹⁹ Some observers may think that this is a legitimate or neutral reason — it is based on money, and not on any views about theology. But its practical effect is continuous opposition to any new places of worship, with local officials offering real or imagined or wholly phony land use concerns as a subterfuge to fight the state legislature's policy of tax exemption. Whatever the motives, the resulting pattern of behavior is clear. We have widespread political and governmental opposition to the exercise of a core First Amendment right.

This opposition is contagious because of a serious collective action problem, especially in suburban areas with small and adjoining local jurisdictions. If one such jurisdiction restricts or excludes churches, new churches may be displaced to neighboring jurisdictions, increasing the risk of activating there the political forces that oppose the location of churches. These neighboring jurisdictions must either accept a disproportionate share of area churches or else exclude churches as aggressively as the first jurisdiction. Each additional jurisdiction that excludes churches puts more pressure on its neighbors to follow suit. Only vigorous and evenhanded enforcement of statewide legislation can protect churches against this dysfunctional feature of local land use regulation.

Motives are somewhat different in the landmarking cases, and the regulatory burden is in one sense the opposite of the zoning burden: it is hard to open new churches and hard to modify or close old churches. But the end result is substantially the same — intrusive regulation that is indifferent to the religious function to which the property is dedicated.²⁰ One study found that churches

¹⁹ See *June 1998 House Hearing*, *supra* note 16 (statement of John Mauck 2-3, 5, <<http://www.house.gov/judiciary/mauck.pdf>> [hereinafter *Mauck Statement*]) (describing case of Cornerstone Community Church in Chicago Heights, Illinois, where city preferred that long-abandoned department store remain vacant rather than be occupied by church, because as long as building sat empty, there remained some chance that it might be occupied by commercial user that would generate tax revenue).

²⁰ See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (failing to reach merits of landmarking dispute); *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) (upholding landmarking of church); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879 (D.Md. 1996) (striking down landmarking of auxiliary building under Free Exercise Clause); *Munns v. Martin*, 930 P.2d 318 (Wash. 1997) (striking down landmarking of church

are forty-two times more likely to be landmarked than any other kind of property.²¹ Some churches are landmarked to prevent more intensive redevelopment, some on the apparent theory that any distinctive structure should be landmarked, some out of genuine affection for the building. But the affection is only for the building, not for the church as a community of believers that needs a working facility adapted to its needs. One irony of the landmarking cases is that the long-established mainstream churches are the most frequent victims. They are the ones with older central city churches that have grown obsolete, too expensive to maintain, and too large or too small for congregations that have greatly changed over time.

B. Legal Difficulties

Legal guarantees of religious liberty are designed in part to resolve conflicts between religious and political conceptions of the exercise of religion. But the two competing conceptions are embedded in the relevant zoning law, substantial obstacles to litigation give churches less protection than formal doctrine might suggest, and there are formidable conceptual difficulties in the relevant law of religious liberty.

The relevant law is hard to summarize; the law in action does not match the law on the books. The majority rule in state courts is said to be that churches are favored uses that cannot be excluded from residential zones.²² The minority rule is said to be that churches may be excluded from residential areas but not from the entire city.²³ The battle lines have now shifted to commercial zones, but the bulk of the cases over the decades have dealt with

under state constitution); *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (striking down landmarking of church under state constitution); *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990) (striking down landmarking of church interior under state constitution); *The Need for Federal Protection of Religious Freedom and Boerne v. Flores*, I, *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) (forthcoming) [hereinafter *February 1998 House Hearing*] (statement of Richard Robb, First Presbyterian Church of Ypsilanti, Michigan, <<http://www.house.gov/judiciary/22383.htm>>) (describing landmarking of building on lot purchased for church expansion).

²¹ See N.J. L'Heureux, Jr., *Ministry v. Mortar: A Landmark Conflict*, in *GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS* 2, at 164, 168 (Dean M. Kelley ed., 1986).

²² See 2 EDWARD H. ZIEGLER, JR., *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 20.04[b], at 20-36 (1999).

²³ See *id.* § 20.04[c], at 20-40.

residential zones, so that is the context in which majority and minority rules have been formulated. Churches have won a majority of reported church zoning cases,²⁴ although their success rate has declined over time.²⁵ Constitutional challenges in the federal courts have had very little success.²⁶

The actual experience of many churches is more in line with the hostile federal cases than with the more encouraging summaries of state zoning doctrine. Churches that have struggled to find any place to meet would be grateful even for the benefits of the minority rule that they cannot be excluded from the city. Commentators writing from the land use perspective share my sense that the climate has changed and that churches now face less sympathetic regulation.²⁷ The press has also reported on growing hostility to the location of churches.²⁸

There are several reasons why the actual situation in many jurisdictions appears to be much less favorable than doctrinal summaries would suggest. Many local zoning authorities do not share the favorable view of churches held (at least in the past) by some appellate judges. Any protection for churches is exceptional in a body of zoning law that generally vests broad discretion in

²⁴ See *The Need for Federal Protection of Religious Freedom and Boerne v. Flores*, II: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (forthcoming) [hereinafter *March 1998 House Hearing*] (statement of Von Keetch, Partner, Kirton & McConkie, <<http://www.house.gov/judiciary/222358.htm>>, Appendix, Table 4 [hereinafter *Keetch Statement*]) (reporting study of reported cases).

²⁵ See *id.* Table 4 shows an overall win rate of 63%. The Appendix also lists the individual cases, with dates and whether the church was successful. I calculate from that list that churches won 67% of the cases before 1980 (71 out of 106), and 57% of the cases since 1979 (48 out of 83).

²⁶ See *Christian Gospel Church v. San Francisco*, 896 F.2d 1221 (9th Cir. 1990) (upholding exclusion of church from residential zone); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988) (upholding exclusion of church from agricultural zone); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) (upholding prohibition on prayer services in rabbi's residence); *Lakewood, Ohio, Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (upholding exclusion of church from half-acre lot, zoned residential, fronting on six-lane thoroughfare).

²⁷ See ZIEGLER, *supra* note 22, § 20.04[c], at 20-43 (asserting that older law assumed small neighborhood churches, and that modern churches, with more activities and wider commuting distances, "present a different picture"); Christopher Duerksen, *Regulating Religious Properties in the 1990s: Divine Guidance from the Supreme Court*, 14 ZONING AND PLANNING LAW REPORT 169, 170 (1991) ("With the proliferation of religious denominations in the United States, many with nontraditional forms of worship in nontraditional locations, churches are increasingly running up against 'unsympathetic' land use regulations in a variety of circumstances.").

²⁸ See Karen De Witt, *Cold Shoulder to Churches that Practice Preachings*, N.Y. TIMES, Mar. 27, 1994, at A1; R. Gustav Niebuhr, *Here Is the Church; As for the People, They're Picketing It*, WALL ST. J., Nov. 20, 1991, at A1.

local zoning officials. In places where it might actually be feasible to locate a church, regulators can condition use of property for religious purposes on a special use permit, and they can deny the permit. Some cases say that a special use permit must be granted if all the conditions are met,²⁹ but others treat the permit as a "privilege,"³⁰ or "by definition and in essential character discretionary and not a matter of right."³¹ And even if the permit must be granted if all the conditions are met, the local authorities get to write the conditions. Judicial review is generally deferential, confined to "illegality, arbitrariness, or abuse of discretion."³²

This is the general body of zoning law even in those jurisdictions in which courts attempt to give special protection to churches. Land use constituencies assume the power to say no to churches, because they generally have the power to say no to any development that requires a permit. And whatever the appellate cases may say, there is an enormous force of inertia on the side of the board that denies a special use permit to a church. Litigation is expensive and uncertain at best, and in addition to the costs of litigation, the church has to commit to a lease or a mortgage to hold the property while it litigates.³³ Without an interest in the property, it has no standing.³⁴ And the churches most exposed to zoning problems are young and often have little capital.

Even within the law of religious liberty, the relevant legal concepts are ill-fitting and ill-defined. The traditional legal concepts of substantial burden and compelling interest have so far not worked well in this context. The property rights perspective is too easily read into the substantial burden requirement; courts and commentators are inclined to say that a burden on your property rights is not necessarily a burden on your religious rights.³⁵

²⁹ See 6 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, § 44.02[2][e], at 44-46 to 44-47 (1991).

³⁰ *Id.* § 44.01[1], at 44-2.

³¹ *Id.* § 44.02[2][c], at 44-39.

³² *Id.* § 44.02[2][e], at 44-43.

³³ See *June 1998 House Hearing*, *supra* note 16 (oral testimony of John Mauck [hereinafter *Mauck Oral Testimony*]) ("judicial remedies are often not available. The churches don't have the money, or the municipalities can wait them out because a church has a choice of buying a building that it can't use or having to carry that expense and pay the mortgage every month, if you can get a mortgage, on a building that it can't use, or walking away.")

³⁴ See *Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir. 1990) (holding that church lacked standing to challenge zoning restrictions that excluded churches, because it had no lease on specific property, despite church's claim that no landlord would lease to it pending zoning litigation).

³⁵ See, e.g., *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 823 (10th Cir.

The compelling interest test seems ill-suited to zoning cases for at least two reasons. Part of the problem is that it does not fit political or judicial intuitions; many zoning interests are not plausibly characterized as compelling, yet a large constituency feels strongly about them. Some courts simply announce in broad and conclusory fashion that zoning serves compelling interests.³⁶

More fundamentally, even with respect to zoning interests that can be compelling, making sense of the test requires that questions be reformulated from the details of zoning formulae to the practicalities of individual properties and neighborhoods. For example, I would concede that a community has a compelling interest in not permitting a church (or any other place of assembly) to regularly take over all the street parking in a neighborhood, making it difficult or impossible for people to have guests or to park in front of their own homes. In the case of a church that provides wholly inadequate parking for its membership, the compelling interest test is easy to apply.

But what of a church that has enough land for eighty spaces, where the city's parking formula requires one hundred? Does the city have a compelling interest in one hundred spaces instead of eighty? In the abstract, that is a nonsense question, and thinking about such nonsense questions inspires doubts about whether the compelling interest test could ever be workable. The city's real interest is not in a parking-space formula, but in ensuring that the spillover from the church parking lot does not deprive neighbors of reasonable opportunity to park in their own neighborhood. That is a much more concrete question, and it is in general answerable, although it may sometimes present close questions of

1998) ("Church has not been denied a right to exercise a religious preference. Rather, the church has been denied a building permit, and may not construct its house of worship where it please. . . ."); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 307 (6th Cir. 1983) (stating that building place of worship "has no religious or ritualistic significance," and is a "purely secular act of building," "at most . . . tangentially related" to freedom to worship); *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 880 (N.D. Ill. 1996) ("The impact is not upon the content of religious practices but only upon where that religion may be practiced. Having a church facility is important to the Church, but specific location is not."); *Keetch Statement*, *supra* note 24 (quoting *Corporation of the Presiding Bishop v. Board of Comm'rs*, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998) (city's intent "was not directed to restricting the right of an individual to practice their religion, the intent was to regulate the use of the City's land").

³⁶ See *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53 (Ill. Ct. App. 1998) ("The city has a cognizable compelling interest to enforce its zoning laws."), *appeal allowed*, 184 Ill. 2d 554 (June 2, 1999).

degree. To consider that question requires the court to look past the city's formulation of the question and to consider the real interests at stake. But that requires the court to depart from its deferential stance, and to recognize that it is considering a religious liberty case and not just a land use case.

Existing First Amendment law has another key concept, general applicability. A law that burdens religious exercise — however substantially and however core the religious practice — requires no special justification under the Federal Free Exercise Clause if it is a neutral and generally applicable law.³⁷ Religious claimants, and some lower courts, understand the Supreme Court to have meant what it said. A law is generally applicable if it applies to everyone, or at least to everyone similarly situated. A law with exceptions is not generally applicable;³⁸ a law that applies to some properties and not others is not generally applicable; a law that permits “individualized governmental assessment of the reasons for the relevant conduct” is not generally applicable.³⁹ Land use regulation is among the most individualized and least generally applicable bodies of law in our legal system. The whole point of requiring a special use permit is to provide for “individualized governmental assessment” of the proposed use. In a survey of Presbyterian congregations, 32% of the congregations that had needed a land use permit reported that “no clear rules permitted or forbade what we wanted to do, and everything was decided based on the specifics of this particular case (e.g., variance, waiver, special use permit, conditional use permit, amendment to the zoning ordinance, etc.).”⁴⁰ Another 15% reported that “even

³⁷ See *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that neutral and generally applicable criminal prohibitions on worship service raise no issue under the Free Exercise Clause).

³⁸ See *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999) (requiring religious exception to no-beard rule where defendant provided medical exception); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (requiring religious exception to landmarking ordinance where ordinance included three secular exceptions); *Rader v. Johnston*, 924 F. Supp. 1540, 1551-56 (D. Neb. 1996) (requiring religious exception to rule requiring freshman to live in dorm where university permitted written and unwritten secular exceptions); *Horen v. Commonwealth*, 479 S.E.2d 553, 557 (Va. App. 1997) (requiring religious exception to law forbidding possession of parts of wild birds where law contained several secular exceptions).

³⁹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

⁴⁰ *Religious Liberty Protection Act of 1998: Hearing on S.2148 Before the Sen. Comm. on the Judiciary*, 105th Cong. (forthcoming) (statement of Prof. Douglas Laycock, Univ. of Texas, 14-16 & Appendix, Question 9) [hereinafter *Presbyterian Survey*] (reporting data from survey of Presbyterian congregations).

though a clear rule seemed to permit or forbid what we wanted to do, the land use authority's principal decision involved granting exceptions to the rule based on the specifics of this particular case."⁴¹ So in 47% of the cases, there was no generally applicable rule and the key decisions were individualized. I believe that if we had a more detailed report, we would find that the larger and more important the land use decision, the less likely there is to be a clear rule. The lack of generally applicable rules removes these cases from the general rule of *Employment Division v. Smith*, as some courts have held.⁴²

Even when there is a rule, the rule can be changed. There are repeated cases in Chicago in which churches applied for a special use permit and the City Council responded by rezoning the individual property to exclude churches entirely.⁴³

But not everyone agrees that the individualized nature of land use regulation takes it outside the *Smith* rule. Indeed, the meaning of the general-applicability requirement remains essentially contested. Governments, and some lower courts, have taken the view that "generally applicable" is an odd paraphrase that actually means "enacted without a constitutionally forbidden motive." In this view, any law not motivated by hostility to religion in general, or to a particular faith, is a generally applicable law — even if it enacts special rules for churches,⁴⁴ deliberately excludes all new churches,⁴⁵ picks and chooses among religious practices,⁴⁶ or is

⁴¹ *Id.*

⁴² See *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1344-45 n.31 (Haw. 1998) ("[T]he City's variance law clearly creates a 'system of individualized exceptions' from the general zoning law."); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 181 (Wash. 1992) (holding that landmark ordinances "invite individualized assessments of the subject property and the owner's use of such property, and contain mechanisms for individualized exceptions"); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (holding that landmark ordinance "has in place a system of individual exemptions"); Sarah J. Galen Rous, *Why Free Exercise Jurisprudence in Relation to Zoning Restrictions Remains Unsettled After Boerne v. Flores*, 52 SMU L. Rev. 305, 326 (1996) ("the individualized exemptions exception threatens to vitiate *Smith* in the zoning context").

⁴³ See *Ira Iglesia de la Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997) (holding that responsible aldermen were protected by absolute legislative immunity).

⁴⁴ See *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 468 & n.2, 472 (8th Cir. 1991) ("City allows churches . . . in residential areas but not in the central business district," but there "is no evidence that the City has an anti-religious purpose," so "the ordinance is properly viewed as a neutral law of general applicability.").

⁴⁵ See *Keetch Statement*, *supra* note 24 (describing Corporation of the Presiding Bishop v. Board of Comm'rs, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998)). The court found that there was "no property in the City" on which the church could build, and that this was the city's intention, but that "there was no evidence of discriminatory intent directed at the church." *Id.* "The intent was to regulate the use of the City's land." *Id.*

applied through individualized assessments that select churches with gross disproportion.⁴⁷ Courts sometimes conclude that the zoning code is a generally applicable law because it applies to secular properties, ignoring its many selective provisions, its provisions for exceptions, and its individualized assessments of land parcels and development projects.⁴⁸

The lack of consensus about these legal concepts partly results from, and partly facilitates, political and judicial resistance to religious liberty guarantees. To find that zoning laws impose no substantial burden, or that the zoning system as a whole serves compelling interests or is generally applicable, is to make a potentially difficult case go away without ever dealing with the real issues: Has the city in fact made it substantially more difficult for this church to create a place of worship or carry on its mission, and are there sufficiently strong governmental interests to justify that burden?

II. THE FACTUAL RECORD

Difficulties in legal conceptions are also related to inaccurate factual assumptions; inability to see land use regulation as a religious liberty issue is shaped by lack of information about how the process actually works. If one believes that churches are generally viewed favorably in this country, or at least without hostility, and if one assumes that land use regulation is generally administered in a fair and reasonable way, and that churches are treated no differently from any other proposed land use, then one may easily assume — especially from the perspective of *Employment Division v. Smith*⁴⁹ — that nothing of special interest is going on in church land use cases. The burden of land use regulation is neutral and generally applicable on this view, and for the church it

⁴⁶ See *Sasnett v. Sullivan*, No. 94-C-52-C., at 21 (W.D. Wis. Jan. 28, 1999) (holding that prison rule that permits some religious articles and forbids others of comparable significance is neutral and generally applicable because “it affects a wide range of diverse religions”).

⁴⁷ See *Rector of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 354-55 (2d Cir. 1990) (holding landmark ordinance neutral and generally applicable, despite disproportionate application to religious buildings, vague standards, and decisions influenced by interests not included in announced standards).

⁴⁸ See *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1558 (M.D. Fla. 1995) (“[T]he City code is neutral and of general applicability.”).

⁴⁹ 494 U.S. 872 (1990) (holding that Free Exercise Clause offers little protection from “neutral and generally applicable laws”).

is a simple matter of choosing a more appropriate location. This seemed to be the Supreme Court's assumption in *City of Boerne v. Flores*,⁵⁰ a land use case that was presented as an abstract legal question with no factual record to inform the Court's assumptions.⁵¹ Litigating one case at a time may not change these impressions, because land use litigation focuses on the single parcel and resists comparative judgments or even evidence about other parcels.

Land use regulation of churches is not always benign. Congressional hearings over the last two years have established a substantial record of widespread use of land use regulation to prevent the location of churches, sometimes in discriminatory ways, sometimes with arbitrary methods. The emphasis in congressional hearings was on evidence that land use regulation was both burdensome and not generally applicable. Witnesses emphasized the lack of general applicability because Congress was inquiring whether it could address the problem under its power to enforce the Fourteenth Amendment.⁵² But the question of general applicability is legally irrelevant to state RFRAs. State legislatures have power to act on their own discretion, and if land use regulation is a substantial burden on the right to worship, state legislatures would have ample reason to act. The evidence of individualized assessments and discretionary regulation is at most a political argument for why state regulation is needed; it is not an argument for legal authority to act.

The House Subcommittee on the Constitution gathered much testimony about church land use regulation. Some of this testimony is statistical — surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal. Some of it is sworn statements by individuals or representatives of organizations with wide experience in the field who said that the anecdotes are representative — that similar problems recur frequently. This evidence is cumulative and mutually reinforcing; it is greater than the sum of its parts. It demonstrates that land use regulation is a substantial burden on religious liberty.

A study conducted at Brigham Young University shows that small

⁵⁰ 521 U.S. 507 (1997).

⁵¹ For the facts of *Boerne*, see Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 781-90 (1998).

⁵² See *Boerne*, 521 U.S. at 507 (holding that Congress must accept Court's interpretation of constitutional right that Congress means to enforce).

religious groups, including Jews, small Christian denominations, and nondenominational churches, are vastly overrepresented in reported church zoning cases.⁵³ Religious groups accounting for only 9% of the population account for 50% of the reported litigation involving location of churches, and 34% of the reported litigation involving accessory uses at existing churches.⁵⁴ These small groups plus unaffiliated and nondenominational churches account for 69% of the reported location cases and 51% of the reported accessory use cases.⁵⁵ Jews account for only 2% of the population, but 20% of the reported location cases and 17% of the reported accessory use cases.⁵⁶

These small faiths are forced to litigate far more often, which means they have less ability to resolve their land use problems politically. Land use authorities are less sympathetic to their needs and react less favorably to their claims. Yet once they get to court, these small faiths win their cases at about the same rate as larger churches.⁵⁷ It is not that small churches bring weak cases, but that small churches are more likely to be unlawfully denied land use permits.

The overrepresentation of small faiths is greater in location cases, where the issue is whether there can be a church on a particular site, than in accessory use cases, where the issue is whether one of the church's activities is permitted in an existing church. The explanation for this difference is that land use authorities often have a narrow idea of what a church is and does. Churches that confine their activities to the zoning board's understanding of a basic worship service are treated differently from churches that do anything more than that. This difference in

⁵³ See Keetch Statement, *supra* note 24; see also June 1998 House Hearing, *supra* note 16 (statement of Prof. W. Cole Durham, Brigham Young Univ., <<http://www.house.gov/judiciary/durham.htm>>) (summarizing study); Religious Liberty Protection Act of 1999, Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (1999) (forthcoming) [hereinafter 1999 House Hearing] (statement of Von Keetch, <<http://www.house.gov/judiciary/keet0512.htm>>) (again reporting study). This study originated in Rebecca Beynon, *Regulation of Church Land Use and Discrimination Against Minority Faiths* (unpublished seminar paper prepared for Prof. Cynthia Estlund at The University of Texas School of Law, on file with author). Ms. Beynon, now an associate at Kellogg, Huber, Hansen, Todd & Evans in Washington, D.C., did not have time to prepare the study for publication. Scholars at Brigham Young undertook to replicate the study, and in the course of replication, considerably expanded its scope.

⁵⁴ See Keetch Statement, *supra* note 24 (text and Table 2).

⁵⁵ See *id.*

⁵⁶ See *id.* at Table 2.

⁵⁷ See *id.* at Table 3.

treatment can be understood as discrimination based on the scope of the religious mission, or simply as a governmental restriction on the scope of religious missions. Accessory use cases bring more mainstream churches into court, but even there, the small faiths are significantly overrepresented.

In considering the significance of discrimination against small faiths, keep in mind that there is no majority religion in the United States, and that adherents of different faiths are distributed quite unevenly across the nation. Every faith is a small faith somewhere and may be the subject of discrimination somewhere. Faiths that are small nationally are just small in more places.

A second piece of survey evidence was provided by the Presbyterian Church (U.S.A.), the largest Presbyterian body in the United States. Late in 1997, it surveyed its congregations about land use issues.⁵⁸ This survey uncovers the unreported cases of a mainline denomination, and it greatly informs our understanding of the Brigham Young study of reported cases.

The Presbyterians surveyed their 11,328 congregations and received 9603 responses.⁵⁹ Twenty-three percent of those responding, or 2194 congregations, had needed a land use permit since January 1, 1992.⁶⁰ All further percentages are percentages of these 2194 congregations that needed a land use permit.

The Presbyterians are a well-connected, mainline denomination if anybody is. Even so, 10% of their congregations reported significant conflict with government or neighbors over the land use permit, and 8% reported that government imposed conditions that increased the cost of the project by more than 10%.⁶¹ Some congregations may have reported both significant conflict and a cost increase of more than 10%; at least 15%, and perhaps as many as 18%, reported one or the other.

These data mean that between 325 and 400 Presbyterian congregations, or sixty to eighty per year over the last five years, experienced significant difficulty in getting a land use permit. In

⁵⁸ See *Presbyterian Survey*, *supra* note 40; see also *July 1998 House Hearing*, *supra* note 14 (statement of Rev. Eleanora Giddings Ivory, Director, Washington Office of Presbyterian Church (U.S.A.), <<http://www.house.gov/judiciary/222495.htm>>) (describing individual cases from study). The tables and data printouts were introduced into the record only in the Senate; Senate hearings are not available on the Internet. Pending publication of the Senate hearing record, these data are on file with author.

⁵⁹ See *Presbyterian Survey*, *supra* note 40, Appendix.

⁶⁰ See *id.* at Question 6.

⁶¹ See *id.* at Question 8.

twenty-eight of these cases, or more than five per year, the permit was refused or the project was abandoned because the church expected the permit to be refused.⁶² Yet the Brigham Young study reveals only five reported cases involving Presbyterian churches.⁶³ We know that reported cases are the tip of the iceberg; this comparison gives some sense of how enormous is the iceberg and how tiny is the reported tip.

Another window on the volume of unreported cases comes from zoning attorney John Mauck, who estimates that 30% of the cases in the Chicago Board of Zoning Appeals involve churches.⁶⁴ Of course churches are no where near 30% of the land uses in the city, or even of the nonresidential land uses in the city. In Mr. Mauck's experience, churches are so overrepresented because they are more likely than secular uses to be subject to the requirement of a special use permit, and because authorities are less likely to grant the permit when it is required.⁶⁵

One percent of responding Presbyterian congregations reported that "a clear rule that applied only to churches forbade what we wanted to do."⁶⁶ These rules would seem to be in clear prima facie violation of the Free Exercise Clause as interpreted in *Employment Division v. Smith*. Ten percent reported that "a clear rule that applied only to churches permitted what we wanted to do."⁶⁷ This tends to confirm what no one disputes — that some communities accommodate the needs of churches. The problems described in this Article are widespread but not universal.

There is also evidence of discrimination in the zoning codes themselves. John Mauck described a survey of twenty-nine zoning codes from suburban Chicago. In twelve of these codes, there was no place where a church could locate as of right without a special use permit.⁶⁸ In ten more, churches could locate as of right only in residential neighborhoods,⁶⁹ which is generally impractical.⁷⁰ An even more effective tactic, visible only on the ground and not on

⁶² See *id.* at Question 7.

⁶³ See *Keetch Statement*, *supra* note 24, Appendix.

⁶⁴ See *Mauck Conversation*, *supra* note 14. This estimate is based on regular review of the Board's posted docket sheet. Unfortunately, it is not based on an actual count of cases listed on the docket sheet.

⁶⁵ See *id.*

⁶⁶ *Presbyterian Survey*, *supra* note 40, Appendix, Question 9.

⁶⁷ See *id.*

⁶⁸ See *Zoning Code Survey*, *supra* note 16.

⁶⁹ See *id.*

⁷⁰ See *supra* text accompanying notes 14-15.

the face of the codes, is to authorize churches to locate as of right in all those places, and only those places, where an existing church is already located.⁷¹ The code shows multiple sites for churches, but in fact all new churches are totally excluded.

Counting only the total exclusions and the confinement to residential zones, twenty-two of these twenty-nine suburbs effectively excluded churches except on special use permit, which means that zoning authorities hold a discretionary power to say yes or no. These individualized decisions are made under standards that are often vague, discretionary, or subjective. "The zoning board did not have to give a specific reason. They can say it is not in the general welfare, or they can say that you are taking property off the tax rolls."⁷² Forest Hills, Tennessee denied a permit to the Mormons on the ground that a temple would not be "in the best interests of and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the City,"⁷³ the judge concluded that the real reason for excluding all new churches was "essentially aesthetic, to maintain a 'suburban estate character' of the City."⁷⁴ Churches can be excluded from residential zones because they generate too much traffic,⁷⁵ and

⁷¹ See *Keetch Statement*, *supra* note 24 (describing Corporation of the Presiding Bishop v. Board of Comm'rs, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998), in which four existing churches and one school were zoned ER — Educational and Religious Zone); 1999 House Hearing, *supra* note 53 (statement of Douglas Laycock, <<http://www.house.gov/judiciary/lay0512.htm>>) (describing Morning Star Christian Church v. City of Rolling Hills Estates, Cal. (pending in the Superior Court of the County of Los Angeles), in which city created "Institutional Zone" that included only existing churches, and barred churches even on special use permit from all other zones); *Mauck Conversation*, *supra* note 14 (describing similar zoning of existing churches in Northwood, Illinois).

⁷² *Mauck Oral Testimony*, *supra* note 33.

⁷³ *Keetch Statement*, *supra* note 24 (describing Corporation of the Presiding Bishop v. Board of Comm'rs, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998)).

⁷⁴ *Id.*

⁷⁵ See *Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (zoning "protects the zones' inhabitants from problems of traffic, noise and litter"); *State v. Cameron*, 445 A.2d 75, 80 (N.J. Super. Ct. Law Div. 1982) (collecting cases on traffic problems associated with churches), *rev'd on other grounds*, 498 A.2d 1217 (N.J. 1985). Permits denied for flimsy traffic reasons are sometimes granted on judicial review, especially in states where churches are a protected use, and sometimes even where they are not. See *Kali Bari Temple v. Board of Adjustment*, 638 A.2d 839 (N.J. Super. Ct. App. Div. 1994) (ordering permit for occasional Hindu worship services, in home of clergyman (situated on 7.24 acres!), finding little traffic impact); *Grace Community Church v. Planning & Zoning Comm'n*, 615 A.2d 1092, 1103-04 (Conn. Super. Ct. 1992) (collecting cases); *Lucas Valley Homeowners Ass'n, Inc., v. County of Marin*, 233 Cal. App. 3d 130, 154-55, 284 Cal. Rptr. 427, 441-42 (Ct. App. 1991) (approving permit for synagogue, finding that traffic impact would not be great enough to justify withholding permit).

from commercial zones because they don't generate enough traffic.⁷⁶ Every use of land adds traffic, so the real question is how much traffic is too much.⁷⁷ Except at the extremes, that question is as subjective as "aesthetics" or "the general welfare."

Typical proposed projects do not pose cases at the extremes. Every land use imposes some cost on its neighbors, so there is always *some* reason to say no. But of course, authorities do not always say no; most urban land is eventually developed. So there is a very wide range of proposed projects that impose some costs but not more than the city is willing to accept if it welcomes the use. And in this very broad range, subjective judgments about questions of degree can be consciously or unconsciously distorted by other factors, including how the neighbors or the authorities feel about the proposed use and the proposed occupant. In the free speech context, we would call this standardless licensing, and it would be unconstitutional.⁷⁸

Now recall the widespread public hostility to "fundamentalists" and "minority sects."⁷⁹ Churches and believers often encounter such attitudes among persons in elite positions, and it is reasonable to infer that hostility shared by 45% or more of the public is well represented among government officials with discretionary powers. Land use regulators must respond to these attitudes whether or not

⁷⁶ See *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 467 (8th Cir. 1991) (quoting city council resolution justifying exclusion of churches on ground that "no business or retail contribution or activity is generated"); *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 881 (N.D. Ill. 1996) (distinguishing church from permitted uses "which will encourage shopper traffic in the area during shopping hours"); *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53, 59 (Ill. App. 1999) ("The city submitted evidence that its zoning plan [excluding churches from commercial zones] was designed to invigorate the commercial corridor to regenerate declining revenues and create a strong tax base."), *appeal allowed*, 184 Ill. 2d 554 (June 2, 1999).

⁷⁷ See *Family Christian Fellowship v. Winnebago County*, 503 N.E.2d 367, 372 (Ill. App. 1986) ("While traffic is a factor in zoning cases, ordinarily it is not accorded much weight because traffic is a problem in most areas and is constantly getting worse.").

⁷⁸ See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." (citations omitted)); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (refusing to presume good faith in administration of vague standards for permits affecting First Amendment rights); *Griffin v. City of Lovell*, 303 U.S. 444, 452 (1938) (stating that completely discretionary permit requirement "would restore the system of license and censorship in its baldest form"); see also Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U.J. URB. & CONTEMP. L. 1, 63-76 (1998) (arguing that exclusion of churches is prior restraint).

⁷⁹ See *supra* notes 12-13 and accompanying text.

they share them; land use regulation is intensely local and responsive to the views of community activists. The hostile attitudes are real, not theoretical, and individualized processes under vague standards give such attitudes ample opportunity for expression. If the neighbors or the authorities are not comfortable with a church, or with a particular church, these attitudes inevitably affect such discretionary judgments as the general welfare, the character of the neighborhood, aesthetics, and traffic. Each of these labels can readily be used to disguise a decision made for quite different reasons. And each is almost impossible to prove or disprove.

The zoning code survey also showed that places of secular assembly are often not subject to the same rules. The details vary, but uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.⁸⁰ Every one of the twenty-nine zoning codes surveyed treated at least one of these uses more favorably than churches; one treated twelve of these uses more favorably; the average was better treatment for about 5.5 such uses.⁸¹ Many business uses are also generally permitted as of right without special use permits.⁸²

All these data are mutually reinforcing. Religious biases are widespread in the population. Individualized decision making and discretionary standards provide ample opportunity for any biases to operate. Legislation is necessarily political and discretionary, so any biases that may exist can also operate when the city enacts its zoning code.

We see evidence of discrimination in the places that leave a published record. On the face of the zoning codes, churches are often treated worse than secular meeting places. In the reported cases, small and unfamiliar churches are forced to litigate far more often than large, mainstream churches. These differences are not random. These patterns appear because views about churches

⁸⁰ See *Zoning Code Survey*, *supra* note 16.

⁸¹ Calculated from *id.*

⁸² See *Mauck Oral Testimony*, *supra* note 33.

distort discretionary decisions under vague and subjective standards. Consciously or unconsciously, land use authorities discriminate against religion and among religions.

Finally, we see that there are many times more unreported church land use conflicts than reported cases. We have no systematic way to study this vast number of unreported conflicts. But the same attitudes, rules, and procedures are at work in the reported and unreported cases. The same individualized processes and discretionary standards apply. The same biases are present in the population. If these factors lead to discrimination against churches and among churches in the visible parts of the process — in the zoning codes and the reported cases — it is reasonable to infer that they also lead to discrimination against churches and among churches in the invisible part of the process, in the vast number of unreported, discretionary decisions on individual permit applications. If 15 to 18% of Presbyterian churches are having significant trouble with land use permits, then surely the figure is much higher for Jehovah's Witnesses, Pentecostals, Jews, and other groups more likely to be subject to prejudice.

The evidence based on anecdote and experience supports this inference. John Mauck described twenty-one cases of zoning permits denied for apparently illegitimate or discriminatory reasons.⁸³ Most of these did not even involve new construction. Rather, the cities refused to permit church use of existing buildings — often buildings that had been used as secular places of assembly. Family Christian Center in Rockford, Illinois was not allowed to use a former school building as a church;⁸⁴ this decision was ultimately set aside as arbitrary and capricious.⁸⁵ Living Word Outreach Full Gospel Church and Ministries in Chicago Heights, Illinois was not allowed to use a Masonic Temple as a church.⁸⁶ Gethsemane Baptist in Northlake, Illinois was not allowed to use a VFW hall as a church.⁸⁷ Faith Cathedral Church in Chicago was not

⁸³ See *Mauck Statement*, *supra* note 19, at 1-5.

⁸⁴ See *id.* at 1.

⁸⁵ See *Family Christian Fellowship v. County of Winnebago*, 503 N.E.2d 367 (Ill. App. 1986) (finding effects on traffic insignificant, drainage problems fixable, and residential use impractical).

⁸⁶ See *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 707 N.E.2d 53 (Ill. App. 1999), *appeal allowed*, 184 Ill. 2d 554 (June 2, 1999); *Mauck Statement*, *supra* note 19, at 2 (describing case). In this case, the trial judge had held that denial of the special use permit was arbitrary and capricious.

⁸⁷ See *Mauck Statement*, *supra* note 19, at 4.

allowed to use a funeral parlor, which had a chapel and plentiful parking.⁸⁸ Vinyard Church in Chicago was not allowed to use a former theater as a church.⁸⁹ Evanston Vinyard Church in Evanston, Illinois was not allowed to use an office building with an auditorium for a church.⁹⁰ Cornerstone Community Church in Chicago Heights was not allowed to use a former department store as a church.⁹¹ A flower shop, a former branch bank, and a theater were each rezoned as single-parcel manufacturing zones to prevent their being used as a church.⁹² Mr. Mauck spends nearly all his time handling such cases in the Chicago area, and he gets calls about such cases from all over the country.⁹³

Marc Stern described five more examples.⁹⁴ A Long Island beach community excluded a synagogue because it would bring traffic on Friday nights, but an astute judge noted that it would bring no more traffic than the large secular parties that were already common in the community on Friday nights.⁹⁵ Unfortunately, many judges are not so astute. Stern described an Ohio case where Jewish leaders wholly satisfied the land use officials, but their project was disapproved in a referendum.⁹⁶ He described a case in Clifton, New Jersey, in which an abandoned building sat empty for years, but when a church tried to move in, officials suddenly decided they wanted an art theater at the site.⁹⁷

In Forest Hills, Tennessee, four large churches sat on or near the intersection of two major arterial roads — one Methodist, one Presbyterian, and two Churches of Christ.⁹⁸ One of these churches closed, and the Mormons bought the property.⁹⁹ Yet the city refused permission to locate a Mormon temple on the site, citing its desire to have no more churches in the community, and a state trial judge upheld that exclusion.¹⁰⁰

⁸⁸ See *id.*

⁸⁹ See *id.* at 5.

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.* at 2-3, 5.

⁹³ See *Mauck Conversation*, *supra* note 14.

⁹⁴ See *March 1998 House Hearing*, *supra* note 24 (statement of Marc D. Stern, American Jewish Congress [hereinafter *Stern Statement*]).

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *Keetch Statement*, *supra* note 24.

⁹⁹ See *id.*

¹⁰⁰ See *id.* (citing *Corporation of the Presiding Bishop v. Board of Comm'rs*, No. 95-1135 (Chancery Ct. Davidson County, Tenn. Jan. 27, 1998)).

Rabbi Chaim Rubin described how the City of Los Angeles refused to let fifty elderly Jews meet for prayer in a house in the Hancock Park neighborhood, an area of some six square miles, because Hancock Park had no place of worship and the City did not want to create a precedent for one.¹⁰¹ That is, the City's express reason for excluding a place of worship was that it wanted to exclude places of worship! Yet the City permitted other places of assembly in Hancock Park, including schools, recreational uses, and embassy parties. Whittier Law School was just down the street from Rabbi Rubin's shul.¹⁰² Eighty-four thousand cars passed the building every day,¹⁰³ and hundreds of law students came and went to both the day school and the night school. But we are supposed to believe that fifty Jews arriving on foot once a week would irrevocably change the neighborhood.

These conflicts over Jews meeting for prayer are common.¹⁰⁴ Orthodox Jews must live within walking distance of a synagogue or shul, because they cannot use motorized vehicles on the Sabbath.¹⁰⁵ Thus, a community that excludes synagogues and shuls effectively excludes Orthodox Jews from living in the community at all. Attorney Bruce Shoulson testified to a pattern of such exclusion in northern New Jersey, where he has handled more than thirty such cases.¹⁰⁶ Land use authorities sometimes refuse permits for Orthodox synagogues because they do not have as many parking spaces as the city requires for the number of seats.¹⁰⁷ This is pretextual, because on the Sabbath, when the seats are occupied, the people cannot arrive by car. Cheltenham Township, Pennsylvania, carried this to the lengths of insisting on the required parking spaces, refusing to count leased spaces off-site, and then, when the synagogue offered to construct the parking

¹⁰¹ See *February 1998 House Hearing*, *supra* note 20 (statement of Rabbi Chaim Baruch Rubin, Congregation Etz Chaim, Los Angeles, California, <<http://www.house.gov/judiciary/22382.htm>>).

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* (citing information from national conference of Agudath Israel); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995) (finding violation of Fair Housing Act by village incorporated for purpose of excluding Orthodox Jews); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983) (upholding exclusion of prayer services from rabbi's residence); *Orthodox Minyan v. Cheltenham Township Zoning Hearing Board*, 552 A.2d 772 (Pa. Commw. Ct. 1989) (reversing denial of special use permit for conversion of residence to Orthodox synagogue).

¹⁰⁵ See *Shoulson Statement*, *supra* note 14; *Stern Statement*, *supra* note 94.

¹⁰⁶ See *Shoulson Statement*, *supra* note 14.

¹⁰⁷ See *id.*; *Stern Statement*, *supra* note 94.

spaces and let them sit empty, denying the permit on the ground that cars for that much parking would aggravate traffic problems.¹⁰⁸

Sometimes, religious hostility is openly expressed in the zoning process. Most chillingly, Shoulson described a hearing in which "an objector turned to the people in the audience wearing skull caps and said 'Hitler should have killed more of you.'"¹⁰⁹ In another New Jersey community, the board invited testimony on the effect that substantial Orthodox Jewish populations had had on other communities.¹¹⁰ Anti-Semitic views were openly expressed in the campaign for the Ohio referendum voting down the Jewish proposal that had received land use approval.¹¹¹ Residents created the Village of Airmont, New York, for the openly stated purpose of using the zoning power to exclude Orthodox Jews.¹¹²

In the *Family Christian Center* case, a neighbor said, outside the hearing process, "Let's keep these God damned Pentecostals out of here."¹¹³ The judge in that case said from the bench that "We don't want twelve-story prayer towers in Rockford," apparently because there was a twelve-story prayer tower at Oral Roberts University in Oklahoma, and the Illinois church in the case had a loose affiliation with the University, although that was not in the record and the judge had to have learned it outside of court.¹¹⁴ The church had not applied to build anything, let alone a twelve-story tower; it wanted to use an existing school for worship purposes.¹¹⁵

Churches often have an ethnic as well as a religious identity, and permits are denied in whole or in part for reasons of racial discrimination. John Mauck testified to a case in which the mayor told the city manager to deny the permit because "We don't want Spics in this town."¹¹⁶ The city manager who disclosed this statement was fired.¹¹⁷ In the *Faith Cathedral* case, in which the city refused permission to use a funeral chapel as a church, the funeral

¹⁰⁸ See *Orthodox Minyan v. Cheltenham Township Zoning Hearing Bd.*, 552 A.2d 772, 773 (Pa. Commw. Ct. 1989) (reversing denial of permit).

¹⁰⁹ *Shoulson Statement*, *supra* note 14.

¹¹⁰ See *id.*

¹¹¹ See *Stern Statement*, *supra* note 94.

¹¹² See *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 418-19, 431 (2d Cir. 1995) (quoting statements such as "the only reason we formed this village is to keep those Jews from Williamsburg out of here").

¹¹³ *Mauck Statement*, *supra* note 19, at 1.

¹¹⁴ *Id.*

¹¹⁵ See *id.*

¹¹⁶ *Mauck Oral Testimony*, *supra* note 33.

¹¹⁷ See *id.*

chapel was one-hundred feet west of Western Avenue, and thus on the white side of the main racial boundary in south Chicago.¹¹⁸ Amazing Grace Church, another black church that located in the same neighborhood, was met first with racial slurs and thrown eggs, and then with charges of zoning violations.¹¹⁹ In the *Living Word Outreach* case, in which the city refused permission to use a Masonic temple as a church, the Masons had been white and the church members were black.¹²⁰ Mauck also had reason to suspect racial motivations in several other cases involving black and Korean churches.¹²¹

Wayne, New Jersey denied a permit to a black church, after one official opposed the permit on the ground that the city would soon look like Patterson, a predominantly African-American city nearby.¹²² Clifton, New Jersey denied permits for a black mosque four times, offering parking concerns as the reason, then approved a white church nearby that raised the very same parking issues.¹²³ In the other Clifton case, in which officials suddenly decided they wanted an art theater, the church that sought to move in had a multi-racial congregation.¹²⁴

Discrimination is difficult to prove in any individual case.¹²⁵ Supreme Court precedent is skeptical of attempts to prove bad motive, even when Supreme Court doctrine requires the attempt.¹²⁶ Sometimes the Court says that "otherwise valid" laws — including laws that are valid because they further a "legitimate purpose" unrelated to suppression of a constitutional right — are valid even if enacted with actual motive to violate that constitutional right.¹²⁷

¹¹⁸ See *id.*

¹¹⁹ See Mauck Statement, *supra* note 19, at 4.

¹²⁰ See *id.* at 2.

¹²¹ See *id.* at 2, 3, 5 (describing *Ira Iglesia de la Biblia Abierta*, *Christ Center*, *Pipe Stream Morning Star Retreat*, and *Korean Central Covenant Church*); Mauck Oral Testimony, *supra* note 33 (providing further details about *Christ Center*).

¹²² See Stern Statement, *supra* note 94. Mr. Stern identified the city in each these cases in a conversation on June 22, 1999.

¹²³ See *id.*

¹²⁴ See Conversation with Marc Stern, June 22, 1999.

¹²⁵ See Keetch Statement, *supra* note 24; Stern Statement, *supra* note 94; Mauck Statement, *supra* note 19.

¹²⁶ See *Village of Arlington Heights v. Metropolitan Community Dev. Corp.*, 429 U.S. 252, 268 n.17 (1977) (holding that proof of equal protection violation requires proof of actual governmental motive, but noting that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of the other branches of government").

¹²⁷ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (holding that zoning ordinance confining adult theaters to less than five percent of city, in which no land

Even if some unsophisticated citizen or commissioner blurts out an unambiguously bigoted motive, courts are often reluctant to attribute the collective decision to that motive.¹²⁸ Trial judges are reluctant to find that local officials acted for improper motives, and often fail to do so find even in egregious cases in which appellate courts find clear error.¹²⁹

Even the bare fact of unequal treatment, without regard to motive, can be difficult to litigate in land use cases, and the same judicial deference sometimes appears even in easy cases.¹³⁰ No two pieces of land are identical, and in the context of deference to local authority, different zoning outcomes can be attributed to minor differences in legitimate zoning factors instead of the

was for sale or lease, furthered purpose unrelated to suppression of communication, and refusing to inquire into city's actual motive); *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971) (refusing to inquire into reasons why Jackson, Mississippi, closed its public swimming pools in wake of order to desegregate them); *United States v. O'Brien*, 391 U.S. 367, 383-86 (1967) (holding that law against burning draft cards furthered purpose unrelated to suppression of communication, and refusing to inquire into actual congressional purpose).

¹²⁸ See *Scott-Harris v. City of Fall River*, 134 F.3d 427, 436-38 (1st Cir. 1997) (collecting conflicting cases), *rev'd in part, on other grounds, sub nom.* *Bogan v. Scott-Harris*, 118 S. Ct. 966 (1998); *cf.* *United States v. O'Brien*, 391 U.S. 367, 385-86 (1967) (after holding motive irrelevant, considering motive in dictum and refusing to infer congressional motive from express statements of only Senator and only two Representatives to speak to issue, or from more subtle statements in committee reports). Compare *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 269 (1977) (noting that opponents of low income housing who spoke at public hearings "might have been motivated by opposition to minority groups," but affirming district court's refusal to infer that officials shared that motive), with *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 419 (2d Cir. 1995) (inferring official motive to exclude Orthodox Jews, in part from public statements to that effect by members of private organization that led campaign to create new village and that supplied new village's public officials); compare *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540-42 (1993) (Kennedy, J., joined by Stevens, J.) (relying on clear statements of hostility to plaintiff church by citizens, public employees, and members of city council), with *id.* at 558-59 (Scalia, J., joined by Rehnquist, C.J.) (refusing to join that part of Kennedy's opinion, on ground that motive is irrelevant).

¹²⁹ See *Hunter v. Underwood*, 471 U.S. 222, 224-31 (1985) (unanimously finding that openly stated motive to disenfranchise blacks accounted for voting eligibility rules in Alabama Constitution of 1901, affirming court of appeals, which had reversed district court, which had refused to find racial motive); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 417-24, 429-31 (2d Cir. 1995) (finding egregious evidence of motive to exclude Orthodox Jews, and reinstating jury verdict that district judge had set aside).

¹³⁰ See *Church of the Lukumi*, 508 U.S. at 520 (unanimously concluding that ordinances burdening religion were neither neutral nor generally applicable, and "fall well below the minimum standard necessary to protect First Amendment rights," although district judge and court of appeals had unanimously upheld ordinances and no circuit judge requested vote on rehearing en banc); *id.* at 558 (Scalia, J., concurring) ("I agree with most of the invalidating factors set forth in part II of the Court's opinion."); *id.* at 559 (Souter, J., concurring) (ordinances were "aimed at suppressing religious belief or practice"); *id.* at 577 (Blackmun, J., concurring) (ordinances were "explicitly directed at petitioners' religious practice").

obvious but illegitimate difference in race or religion. Subjective criteria aggravate this problem, enabling officials to describe almost any zoning result in terms of a reason that is neutral and legitimate on its face.

In a pending Michigan case, the township denied a permit to a black church, despite the contrary recommendation of the township's independent land-use consultant, and even though the township had approved five white churches that had drawn similar objections from neighbors.¹³¹ The township's stated reason for refusing the black church was that its proposed use was not "harmonious and in accordance with the objectives and regulations of the ordinance."¹³² The court held that this was a legitimate nondiscriminatory reason, and that the church lost unless it hired "an expert to compare *in detail* the sites of the five churches that were granted a conditional use permit with the subject property and the proposed use."¹³³ The township carried its burden with a vague slogan; the church was required to offer a detailed expert study. The township opposed the decision to allow the church time to hire such an expert.¹³⁴ The trial judge seemed to think he was going to great lengths to be fair.¹³⁵

CONCLUSION

Land use regulation has become the most widespread obstacle to the free exercise of religion. Part of the problem is discrimination against churches and among churches; part of the problem is highly intrusive and burdensome regulation, imposed for modest public purposes and without regard to the effect on constitutional rights. Part of the problem is persistent failure of land use authorities in many jurisdictions to recognize that they are even dealing with a constitutional right.

State RFRA's cannot magically solve these problems, but if sensibly interpreted, state RFRA's will help. State RFRA's will eliminate the need to prove discrimination, whether in terms of bad motive or unequal treatment or lack of general applicability.

¹³¹ See *Fountain Church of God v. Charter Township*, 40 F. Supp. 2d 899, 901 (E.D. Mich. 1999).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See *id.*

¹³⁵ See *id.* at 901-02 ("Although the Court is cognizant of effort expended, rectitude of decision commands the highest priority in this Court.").

If the church shows a substantial burden on its exercise of religion, government must show that that burden serves a compelling interest by the least restrictive means. Churches will still be well advised to show the difficulties of locating elsewhere; courts must be educated not to assume that denial of a special use permit at one site is usually no burden because the church can readily move to another. The cases in which relocation is readily available tend not to be litigated. State RFRAs will do little good unless courts come to understand that.

Similarly, the compelling interest test must be taken seriously. Courts and litigants must focus on real and serious burdens to neighboring properties, and not assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or incremental reduction of traffic (in residential zones), is compelling.

The prospect of fee awards should change the incentives for litigation, deterring zoning boards from arbitrarily denying permits and counting on the expense of litigation to make judicial review unlikely. Judges must reverse the denial of land use permits often enough to give land use authorities reason to grant such permits except when there is strong reason to deny them.

To get serious enforcement of state RFRAs in the land use context requires that courts, churches, and their lawyers understand the magnitude and the religious significance of the land use burden on churches. It would be even better if land use authorities came to understand the constitutional significance of the burden they have imposed on churches. These changes require education, and sophisticated litigation. State RFRAs can simplify that litigation, and send a political signal, but enacting the statute is only the beginning.