LIMITING THE SCOPE OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: WHY RLUIPA SHOULD NOT BE AMENDED TO REGULATE EMINENT DOMAIN ACTIONS AGAINST RELIGIOUS PROPERTY

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I. INTRODUCTION

Government entities from time to time exercise the power of eminent domain to acquire property, including property owned by religious institutions, in order to redevelop a downtrodden neighborhood or further some other legitimate public purpose. For example, Broward County, Florida, planned to construct a drug and alcohol detoxification center on a parcel of land in Fort Lauderdale, the site of the Christian Romany Church.[1] The Church pastor leased the church property, but exercised an option to buy the property for $1.27 million after he learned about the County's plans.[2] The Broward County Circuit Court granted the County permission to force a $1.6 million sale of the property through the exercise of its eminent domain power, because the planned development of a drug and alcohol recovery center constituted a public use.[3] The Broward County situation shows that churches and other religious property are not beyond the government's power to take land for the public use.

At times, religious institutions faced with condemnation challenge the action on grounds of discrimination and burdens on the

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[1] Brittany Wallman, *Church Faces Forced Closing; Judge Has Approved Eminent Domain Purchase So Broward Can Build Detoxification Center on Site*, SUN SENTINEL (Ft. Lauderdale, Fla.), July 28, 2007, at 1B.

[2] *Id.*

[3] *Id.* Counsel for the Christian Romany Church plans to appeal the decision. *Id.*

free exercise[4] of religion.[5] The institutions believe they are unfairly targeted with condemnation due to their non-profit status or simply out of animosity toward certain religious beliefs.[6] For example, a Muslim group in Paterson, New Jersey, has been trying to build a mosque on a tract of land in nearby Wayne.[7] For years, Wayne has stalled the group's plans by claiming that the township needs to preserve the land as a natural space.[8] The township subsequently passed a resolution to acquire the tract by eminent domain.[9] The Muslim group claims it is being treated unfairly and has sued Wayne.[10]

The Religious Land Use and Institutionalized Persons Act[11] (RLUIPA) was passed in 2000 in response to what Congress felt was an unwelcome change in free exercise law.[12] RLUIPA, which applies only to land use and prison contexts, polices the imposition of substantial burdens on religious exercise by requiring such burdens to further a compelling state interest and be narrowly tailored to achieve that interest[13]—this is the "strict scrutiny" test. Although RLUIPA's land use provision expressly applies only to zoning and landmarking laws that substantially burden religious exercise,[14] many religious institutions facing condemnation use RLUIPA to challenge the attempted taking.[15] In fact, Senator Edward Kennedy began ef-

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[4] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

[5] *See infra* Part III.A.

[6] *See infra* Part III.A.

[7] John Chadwick, *Muslim Group: Bias Stalling Mosque Plans*, THE HERALD NEWS (Passaic County, N.J.), July 19, 2006, at B4.

[8] *Id.*

[9] *Id.*

[10] *Id.* On November 1, 2006, Judge Peter G. Sheridan of the United States District Court for the District of New Jersey temporarily enjoined Wayne from condemning the property based on suspicion of the town's motives, and also enjoined the Muslim group from beginning construction on the mosque at this site. Peter J. Sampson, *Judge Stalls Mosque Dispute: Sets Trial on Town's Plan to Seize Tract*, THE HERALD NEWS (Passaic County, N.J.), Nov. 2, 2006, at B1. Judge Sheridan subsequently denied each side's motion for summary judgment, leaving claims of intentional discrimination and substantial burden on religious exercise for the fact-finder. Albanian Associated Fund v. Twp. of Wayne, No. 06-cv-3217, 2007 U.S. Dist. LEXIS 73176, at *24–42 (D.N.J. Oct. 1, 2007).

[11] Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to -5 (2000)).

[12] *See* 146 CONG. REC. S7774, 7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[13] 42 U.S.C. § 2000cc(a)(1).

[14] *Id.* §§ 2000cc(a), 2000cc-5(5).

[15] *E.g.*, Chadwick, *supra* note 7, at B4. The Muslim group alleges that Wayne violated RLUIPA, among other claims. *Id.*; *see also infra* Part III.A.

forts to amend RLUIPA to explicitly include eminent domain within the scope of the statute.[16]

This Comment will argue that RLUIPA does not cover eminent domain actions and should not be amended to subject eminent domain actions against religious property to strict scrutiny review. Part II traces the changes in free exercise law which led to the passage of RLUIPA. Part III explains why the current version of RLUIPA does not cover eminent domain, through an examination of recent case law, the legislative history, and the fundamental conceptual distinctions between eminent domain and zoning and landmarking laws. Part IV explains that RLUIPA should not be amended to cover eminent domain because eminent domain is a generally applicable law ordinarily subject to rational basis review, and that religious institutions seeking to challenge a condemnation have alternative legal recourse under the Free Exercise Clause of the First Amendment[17] and the Equal Protection Clause of the Fourteenth Amendment.[18] This section also demonstrates that the application of RLUIPA to eminent domain actions against religious property may severely limit the government's power to condemn, resulting in a disproportionate impact on private homes and businesses. Ultimately, this Comment will argue that RLUIPA cannot be expanded to the point that it erodes the vital government power of eminent domain.

II. BACKGROUND

Employment Division v. Smith[19] served as the catalyst for a series of congressional efforts to heighten the protection of religious practice under the Free Exercise Clause of the First Amendment.[20] In *Smith*, two members of the Native American Church were terminated from their employment and denied unemployment compensation for ingesting peyote as part of a Church sacrament.[21] Oregon law prohibits the possession of controlled substances, including peyote.[22] The issue

[16] E-mail from Jim Walsh, Staffer for Sen. Edward Kennedy, Senate Committee on the Judiciary, to author (Sept. 29, 2006, 18:38:07 EST) (on file with author).

[17] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

[18] U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[19] 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2000)).

[20] *See infra* notes 31–46 and accompanying text.

[21] 494 U.S. at 874.

[22] *Id.*

was whether the Oregon drug law burdened the Native American Church members' religious practice in violation of the Free Exercise Clause.[23] The Supreme Court of the United States held that a burden on religion that is "merely the incidental effect of a generally applicable and otherwise valid provision" does not offend the Free Exercise Clause, and upheld the Oregon law.[24] To explain this rule, Justice Scalia, writing for the majority, set forth an example of a generally applicable law—taxation.[25] Justice Scalia articulated that taxation will impose an incidental burden on those who consider taxation to be sinful; however, it is not the objective of the tax law to burden religions.[26] To grant an individual an exemption from taxation would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[27]

In a concurring opinion, Justice O'Connor stated that the Court's holding was a dramatic shift from prior First Amendment jurisprudence.[28] Previously, the Court applied strict scrutiny review, which required "the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."[29] Justice O'Connor stressed that laws indirectly burdening religious activity were just as dangerous as laws aimed directly at religious activity and argued to preserve strict scrutiny review.[30]

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[23] *Id.* at 874–78.

[24] *Id.* at 878, 890.

[25] *Id.* at 878.

[26] *Id.*

[27] *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1879)).

[28] *Id.* at 891 (O'Connor, J., concurring).

[29] *Id.* at 894 (citations omitted). The strict scrutiny standard was applied to free exercise challenges in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Wisconsin's compulsory school attendance law, which required students to attend school until age sixteen, impermissibly burdened the Amish community's religious practice of requiring its members to leave school at age fourteen or fifteen), and *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that the South Carolina Employment Security Commission's denial of unemployment compensation to a Seventh Day Adventist because of her refusal to work on the Sabbath out of the fear of false unemployment claims was not a compelling reason to justify the substantial burden on religious practice). It is arguable that "*Smith* simply changed the doctrine of the free exercise clause to reflect the actual pattern of decisions. . . . [T]he Court had rejected all free exercise clause claims since 1960 except for the employment benefit cases and *Yoder*." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1213 (2d ed. 2002).

[30] *Smith*, 494 U.S. at 897–901.

In response to *Smith*, Congress passed the Religious Freedom Restoration Act[31] (RFRA) to reinstate strict scrutiny review of substantial burdens on religious conduct.[32] Under RFRA, "[g]overnment shall not burden a person's exercise of religion even if the burden results from a rule of general applicability," unless such burden passes strict scrutiny review.[33] RFRA applied to both federal and state law.[34] However, RFRA was short-lived; in *City of Boerne v. Flores*,[35] the Supreme Court found RFRA unconstitutional because it exceeded the scope of Congress's power under the Enforcement Clause[36] of the Fourteenth Amendment.[37] Under the Enforcement Clause, Congress can only exercise remedial powers congruent and proportional to the alleged problem sought to be corrected.[38] The Court determined that RFRA was not remedial legislation, but a substantive change in constitutional law.[39] The Act's "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[40] Thus, RFRA was invalid because it permitted a tremendous imposition on the states' ability to enforce general laws to promote citizens' health and welfare.[41] As the law stands today, RFRA is only valid insofar as it applies to actions of the federal government.[42]

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[31] Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to -4 (2000)).

[32] H.R. REP. NO. 106-219, at 4 (1999).

[33] RFRA, Pub. L. No. 103-141, § 3(a), (b), 107 Stat. 1488, 1488–89 (1993).

[34] *Id.* § 6(a), 107 Stat. at 1489.

[35] 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to -5 (2000)).

[36] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce this article by appropriate legislation.").

[37] *City of Boerne*, 521 U.S. at 536.

[38] *Id.* at 519–20.

[39] *Id.* at 532.

[40] *Id.*

[41] *Id.* at 534.

[42] *See* Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 958, 960 (10th Cir. 2001). Thus, the current version of RFRA supersedes the holding in *Employment Division v. Smith*, but only insofar as the substantial burdens at issue result from actions by the federal government. *See* CHEMERINSKY, *supra* note 29, at 1217. For example, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the respondent church required its members to drink hoasca tea as a communion ritual. *Id.* at 425. This tea contained a hallucinogenic substance regulated under the Controlled Substances Act, a federal law of general applicability. *Id.* The Supreme Court found that the government could not prohibit the church's use of the sacramental tea because it failed to put forth a compelling interest in support of the prohibition. *Id.* at 439. It is also important to note that several states have enacted their own religious protection statutes—mini-RFRAs that re-

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act[43] (RLUIPA). Under RLUIPA:

> [n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
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> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.[44]

RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land."[45] RLUIPA defines "government" as "(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law."[46] The scope of RLUIPA extends to situations where

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
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> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[47]

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store strict scrutiny review to government-imposed burdens on religious exercise. Thomas C. Berg, *On the Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States*, 19 EMORY INT'L L. REV. 1277, 1288 (2005). For example, the Illinois legislature passed its own Religious Freedom Restoration Act because the *Boerne* decision only invalidated the *federal* RFRA as far as it applied to the states. St. John's United Church of Christ v. City of Chicago, No. 05-4418, 2007 U.S. App. LEXIS 21914, at *42 (7th Cir. Sept. 13, 2007). A discussion of state-originating religious freedom legislation is beyond the scope of this Comment.

[43] 42 U.S.C. §§ 2000cc to -5 (2000).

[44] *Id.* § 2000cc(a)(1)(A)–(B).

[45] *Id.* § 2000cc-5(5).

[46] *Id.* § 2000cc-5(4)(A)(i)–(iii).

[47] *Id.* § 2000cc(a)(2)(A)–(C).

Thus, RLUIPA provides three constitutional bases for its power: the Spending Clause,[48] the Commerce Clause,[49] and the Enforcement Clause of the Fourteenth Amendment.[50]

RLUIPA was designed to fill in the gaps left by *Flores*'s invalidation of RFRA.[51] It applies to state actions only,[52] and it comports with Congress's powers under the Enforcement Clause because it targets two very specific areas—land use and institutional conditions.[53] Congress heard extensive testimony regarding the burdens on religious liberty, and the evidence indicated that free exercise rights are most frequently burdened in the land use and institutional contexts.[54] Thus, RLUIPA was developed with a narrow focus to achieve a congruent and proportional response to a serious problem.[55] However, courts and commentators continue to debate the constitutionality of RLUIPA.[56] For example, the Supreme Court upheld the Act's provision regarding institutionalized persons against a challenge that it violated the Establishment Clause[57] of the First Amendment, but it has not yet addressed the constitutionality of the land use provisions

[48] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . .").

[49] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with Indian tribes . . . .").

[50] U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[51] *See* Corey Mertes, Note, *God's Little Acre: Religious Land Use and the Separation of Church and State*, 74 UMKC L. REV. 221, 223–25 (2005); Mark Spykerman, Note, *When God and Costco Battle for a City's Soul: Can the Religious Land Use and Institutionalized Persons Act Fairly Adjudicate Both Sides in Land Use Disputes?*, 18 WASH. U. J.L. & POL'Y 291, 298–303 (2005).

[52] 42 U.S.C. § 2000cc-5(4)(A)(i)–(iii) (2000).

[53] 146 CONG. REC. S7774, 7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). RLUIPA also requires strict scrutiny review of a government action that imposes a "substantial burden on the religious exercise of a person residing in or confined to an institution." 42 U.S.C. § 2000cc-1(a)(1)–(2). This Comment will not discuss the application of RLUIPA to prisoners or other institutionalized persons.

[54] 146 CONG. REC. S7774, 7774–75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[55] *See id.*

[56] *See* Ariel Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 514–17 (2005); Mertes, *supra* note 51, at 234–36; Spykerman, *supra* note 51, at 303–05.

[57] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

as such.[58] Despite its questionable constitutionality, as it stands today, RLUIPA supersedes the *Smith* rule that generally applicable laws that burden religious exercise do not offend the First Amendment, but only insofar as a state or its subdivisions impose a substantial burden on religious exercise within the specific contexts of zoning and landmarking situations and prison issues.[59]

The Supreme Court decision in *Kelo v. City of New London*[60] clarified the government's power of eminent domain. Pursuant to the Fifth Amendment of the United States Constitution,[61] the government is authorized to take private land for public use, as long as it pays just compensation to the owner of the private property.[62] In *Kelo*, the Court interpreted "public use" as "public purpose," rather than the narrower "use by the public" definition.[63] The Court accommodated the definition to the realities of public uses of formerly private land—private property was no longer condemned solely to construct railroads and highways, but also to establish facilities and residences for indirect public use and overall public benefit.[64] The Court determined that the broad scope of "public purpose" encom-

[58] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005). In *Cutter*, prisoners housed by the Ohio Department of Rehabilitation and Correction claimed prison officials impeded their practice of non-mainstream religions. *Id.* at 712. The prison officials responded that RLUIPA impermissibly advances religion because it encourages prisoners to adopt religious beliefs in order to receive more benefits. *Id.* at 714, 721 n.10. The Court held that the institutionalized persons provision does not offend the Establishment Clause because it accommodates religious beliefs without favoring one belief over another or overriding legitimate concerns for prison order and safety. *Id.* at 720–23. However, the Court explicitly noted that it did not address the constitutional validity of the RLUIPA provision regarding land use regulation. *Id.* at 716 n.3.

[59] CHEMERINSKY, *supra* note 29, at 1217.

[60] 545 U.S. 469 (2005).

[61] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[62] *Id.* The public use and just compensation requirements that accompany the power of eminent domain are binding on the states by incorporation of the Fifth Amendment through the Due Process Clause of the Fourteenth Amendment. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 n.7 (1984) (citing Chicago, B. & Q. R.R. Co. v. City of Chicago, 166 U.S. 226 (1897)).

[63] 545 U.S. at 479–80.

[64] *See id.* at 479–80 & nn. 7–8. The Court suggested that condemnation to promote economic development was not a new concept. *See id.* at 480–84 ("There is . . . no principled way of distinguishing economic development from other public purposes that we have recognized."). To dispel the notion that *Kelo* actually broke new ground by permitting condemnation for economic development, Thomas Merrill highlights Justice Stevens's references to takings to facilitate farming and mining, and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), where trade secrets were taken to promote competition in the pesticide market. Thomas W. Merrill, *Six Myths About* Kelo, 20 A.B.A. PROB. & PROP. 19, 20 (2006).

passed condemnation for general economic development, thus enabling the City of New London to condemn an economically depressed area and develop an industrial park to revitalize the local economy.[65] Although not explicitly stated, Justice Stevens essentially applied rational basis scrutiny to the city's eminent domain proceedings, evidenced by the statement, that "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[66] By finding economic development consistent with public use, the Court continued the trend of granting deference to legislatures to exercise the eminent domain power.[67]

The Becket Fund, a public interest law firm specializing in free exercise claims, filed an amicus curiae brief on behalf of the petitioners in *Kelo*.[68] Although the City of New London did not condemn any religious property, the Becket Fund attorneys expressed concern that the expansion of eminent domain power would permit municipalities to target religious property due to their tax-exempt status.[69] The

[65] *See Kelo*, 545 U.S. at 472, 484–85.

[66] *Id.* at 483. In his concurrence, Justice Kennedy stressed that although there is a presumption that the government has taken the property for a legitimate purpose, accusations of favoritism toward private developers must be reviewed carefully. *Id.* at 492 (Kennedy, J., concurring). He also did not discount the application of a higher scrutiny to "a more narrowly drawn category of takings." *Id.* at 493. Thomas Merrill suggests that the majority actually invokes a higher scrutiny than rational basis review, evidenced by Justice Stevens's statement that condemnation actions should be reviewed carefully to watch for the "mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Merrill, *supra* note 64, at 20–21 (citing *Kelo*, 545 U.S. at 478). In any event, the Court certainly does not invoke strict scrutiny, and *Kelo* is neither the first nor last case involving the application of a low level of scrutiny to review eminent domain actions. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–43 (1984); Berman v. Parker, 348 U.S. 26, 32 (1954); City of Guymon v. Cal Farley's Boys Ranch, No. CIV-04-457-BA, 2005 U.S. Dist. LEXIS 38506, at *10–12 (W.D. Okla. Dec. 30, 2005).

[67] *See Kelo*, U.S. 545 at 483. Of course, the deference applied to legislatures to effectuate a taking for economic development was strongly challenged by the dissent in *Kelo*. Justice O'Connor, joined by Justices Scalia and Thomas and Chief Justice Rehnquist, argued that although judicial review of a legislature's decision to condemn property is narrow, taking for economic development is unconstitutional because it significantly differs from the permissible types of condemnation established over time (transfer of private property to public ownership, transfer of private property to be used by the public, and condemnation to eradicate a pre-condemnation use of property that was harmful to society). *Id.* at 497–501 (O'Connor, J., dissenting).

[68] Brief of Amicus Curiae The Becket Fund for Religious Liberty in Support of Petitioners at 1, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 U.S. S. Ct. Briefs LEXIS 801 [hereinafter Becket Fund Brief].

[69] *Id.* at 6–7.

Becket Fund stated that "a judgment . . . that potential economic development and tax revenue growth concerns justify property transfers from one private owner to another . . . would place religious institutions at special risk of eminent domain actions."[70] The Becket Fund offered several examples of religious property faced with the threat of condemnation.[71] For instance, the City of New Rochelle, New York, chose to condemn two churches to build an IKEA store.[72]

The *Smith* decision removed neutral laws of general applicability from the purview of strict scrutiny review.[73] This change in free exercise jurisprudence compelled Congress to pass reform measures, culminating in RLUIPA, which reinstates strict scrutiny review of state government burdens on religious activity in the land use and institutional contexts.[74] Similarly, the *Kelo* Court's interpretation of public use sparked a nationwide debate over the proper use of eminent domain, prompting state legislatures to pass restrictions on the takings power.[75] The Becket Fund amicus brief sheds light on the possible effects of *Kelo* on religious property, raising the question, should religious property receive heightened protection against eminent domain actions? The intersection of two major legal issues—religious liberty and eminent domain—is the focus of this Comment.

III. IN ITS CURRENT FORM, RLUIPA DOES NOT COVER EMINENT DOMAIN

Three recent cases—*Faith Temple Church v. Town of Brighton*,[76] *St. John's United Church of Christ v. City of Chicago*,[77] and *City & County of Honolulu v. Sherman*[78]—have held that the plain language of RLUIPA, defining a land use regulation as a zoning or landmarking law, does

[70] *Id.* at 6.

[71] *Id.* at 6–11.

[72] *Id.* at 11 n.20.

[73] *See supra* notes 19–27 and accompanying text.

[74] *See supra* notes 31–46 and accompanying text.

[75] Since the *Kelo* decision was handed down, thirty-four states have passed legislation designed to reform eminent domain proceedings. INST. FOR JUSTICE CASTLE COALITION, LEGISLATIVE ACTION SINCE *KELO* 1–2 (2006). For example, Florida recently passed amendments to its eminent domain law, FLA. STAT. ANN. §§ 73.013–73.014 (LexisNexis 2007), which requires municipalities to wait ten years prior to transferring from one party to another land acquired via eminent domain (to essentially eliminate the incentive for private development) and forbids municipalities to use eminent domain to combat blight. CASTLE COALITION, *supra*, at 4.

[76] 405 F. Supp. 2d 250 (W.D.N.Y. 2005).

[77] 401 F. Supp. 2d 887 (N.D. Ill. 2005), *aff'd*, No. 05-4418, 2007 U.S. App. LEXIS 21914 (7th Cir. Sept. 13, 2007).

[78] 129 P.3d 542 (Haw. 2006).

not encompass eminent domain.[79] In terms of legislative intent, *Faith Temple Church* also suggested that Congress did not intend RLUIPA to regulate the government's power of eminent domain.[80] The legislative history confirms that Congress intended to police burdens on religious property from zoning and landmarking laws only.[81] Additional evidence to support this conclusion comes from the very nature of eminent domain itself and theories to support government use of the takings power.[82] Only one case, *Cottonwood Christian Center v. Cypress Redevelopment Agency*,[83] applied RLUIPA to an eminent domain action, but this ruling was consistently rejected in the most recent cases on point.[84]

A. Recent Case Law

1. *Cottonwood Christian Center v. Cypress Redevelopment Agency*

Cottonwood Christian Center v. Cypress Redevelopment Agency involved the first use of RLUIPA to challenge condemnation of religious property.[85] In an effort to expand, the Cottonwood Christian Center acquired several parcels of land in a section of Cypress, California, designated as blighted.[86] When the city received a bid from Costco to build a store on land within the blighted area owned by Cottonwood, it initiated a condemnation action against Cottonwood.[87] The church claimed that this exercise of eminent domain violated RLUIPA.[88] The court determined that the controversy centered on the application of a land use regulation involving an individualized assessment,[89] so it applied strict scrutiny review to the condemnation action.[90] In a note, the court rejected the city's contention that RLUIPA does not

[79] *St. John's*, 401 F. Supp. 2d at 899–900; *Faith Temple Church*, 405 F. Supp. 2d at 254–55; *Sherman*, 129 P.3d at 560–63.

[80] *See Faith Temple Church*, 405 F. Supp. 2d at 254–56; *infra* notes 104–07 and accompanying text.

[81] *See infra* Part III.B.

[82] *See infra* Part III.C.

[83] 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

[84] *Faith Temple Church*, 405 F. Supp. 2d. at 256–57; *St. John's*, 401 F. Supp. 2d. at 899–900; *Sherman*, 129 P.3d. at 563–64.

[85] Shelly Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 666 (2004).

[86] *Cottonwood*, 218 F. Supp. 2d at 1209–13.

[87] *Id.* at 1214–15.

[88] *Id.* at 1218.

[89] *Id.* at 1222.

[90] *Id.*

apply to eminent domain.[91] The court stated that condemnation proceedings were covered under RLUIPA's definition of land use regulation because the "Redevelopment Agency's authority to exercise eminent domain to contravene blight . . . is based on a zoning system developed by the City [and] would unquestionably 'limit[] or restrict[]' Cottonwood's 'use or development of land.'"[92] The court ultimately held that Cypress's condemnation action imposed a substantial burden on Cottonwood, which failed strict scrutiny review.[93]

2. *Faith Temple Church v. Town of Brighton*

Several recent cases have rejected the *Cottonwood* court's application of RLUIPA to eminent domain actions. In *Faith Temple Church v. Town of Brighton*, the District Court for the Western District of New York stated explicitly that RLUIPA does not cover eminent domain.[94] Faith Temple Church purchased a parcel of land in the Town of Brighton to construct a new church facility.[95] The town initiated a condemnation proceeding against Faith Temple Church under New York's eminent domain authority in order to acquire this land for development as a town park.[96] The Church sought to enjoin the town from using its power of eminent domain to acquire the property and claimed that the condemnation violated RLUIPA.[97]

The court addressed the town's response that RLUIPA does not cover eminent domain by first examining the language of the statute.[98] The court pointed out that there is no explicit mention of eminent domain anywhere in the statute.[99] The court explained that RLUIPA applies to government imposition of a land use regulation, defined as a "'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant

[91] *Id.* at 1222 n.9.

[92] *Cottonwnood*, 218 F. Supp. 2d at 1222 n.9 (quoting 42 U.S.C. § 2000cc-5(5) (2000)).

[93] *Id.* at 1226–29.

[94] Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 255 (W.D.N.Y. 2005). The parties settled just days before oral arguments were set to be heard in Faith Temple's appeal to the United States Court of Appeals for the Second Circuit. Marketta Gregory, *Brighton Land Case Settled*, ROCHESTER DEMOCRAT AND CHRONICLE (Rochester, N.Y.), Nov. 10, 2006, at 1B.

[95] *Faith Temple Church*, 405 F. Supp. 2d at 251.

[96] *Id.* at 251–52.

[97] *Id.* at 252.

[98] *Id.* at 254.

[99] *Id.* at 255 ("Conspicuously absent is any mention of eminent domain. Eminent domain is hardly an arcane or little-known concept, and the Court will not assume that Congress simply overlooked it when drafting RLUIPA.").

has an interest."[100] The court stated that eminent domain clearly is not a landmarking law, which is defined under New York law as "regulat[ion] and restrict[ion of] certain areas as national historic landmarks, special historic sites, places and buildings for the purpose of conservation, protection, enhancement and perpetuation of these places of natural heritage."[101] Then, the court determined that eminent domain cannot be classified as a zoning law due to fundamental differences between the two types of government powers.[102] Under New York law, towns can enact zoning laws to "regulate and restrict" certain aspects of property, while eminent domain involves the power to "take."[103]

Even though the court determined that the language of RLUIPA on its face does not cover eminent domain, the court still conducted an examination of Congress's development of RLUIPA to resolve any possible ambiguity.[104] The court noted that the legislative history indicates that Congress was concerned with the application of zoning laws to religious property, but the history "appears to contain no references to eminent domain," which suggests "eminent domain abuse was not perceived to be a cause for concern in drafting RLUIPA."[105] The court suggested that Congress likely had good reason to prevent RLUIPA from extending to eminent domain actions, given the inherent differences between eminent domain and zoning: eminent domain takes land for public use and provides just compensation, whereas zoning restricts the use of private land and offers no compensation.[106] Thus, the court posited that there is an inherent disincentive to using eminent domain to acquire church property, especially from sheer bias, because the government must compensate the private owner and demonstrate a clearly public use for the land in question.[107]

The court addressed the Church's contention that the condemnation proceeding is meant to carry out the town's Comprehensive Plan, which can be likened to a zoning system because it sought to

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[100] *Id.* at 254 (quoting Prater v. City of Burnside, 289 F.3d 417, 434 (6th 2002) (citing 42 U.S.C. § 2000cc-5(5) (2000))).

[101] *Faith Temple Church*, 405 F. Supp. 2d at 254 (quoting N.Y. VILLAGE LAW § 7-700 (Consol. 2007)).

[102] *Id.*

[103] *Id.* (quoting N.Y. CONST. art. IX, § 1(e); N.Y. TOWN LAW § 261 (Consol. 2007)).

[104] *Id.* at 255.

[105] *Id.*

[106] *Id.* at 255–56.

[107] *Faith Temple Church*, 405 F. Supp. 2d at 255–56.

expand the town's park.[108] The Church was trying to apply the *Cottonwood* court's rationale that whenever eminent domain is based upon a zoning system, the condemnation falls within the scope of RLUIPA.[109] However, the court rejected *Cottonwood* and found the connection between the eminent domain action and the town's zoning laws to be too attenuated to reach the language of RLUIPA.[110]

3. *St. John's United Church of Christ v. City of Chicago*

Similarly, the District Court for the Northern District of Illinois held that an eminent domain action, unconnected to the application of a zoning or landmarking law, falls outside the scope of RLUIPA.[111] In *St. John's United Church of Christ v. City of Chicago*, the city planned to expand O'Hare International Airport by constructing runways over existing cemeteries and other neighboring property.[112] St. John's Church, the owner of the cemetery, claimed that the city violated RLUIPA because relocating the cemetery would impose a substantial burden on the plaintiff's religious exercise.[113]

The court refused to treat the *Cottonwood* decision as establishing that all eminent domain actions are subject to RLUIPA.[114] Plaintiffs failed to demonstrate that the city's use of eminent domain was pursuant to or part of a zoning regulation or landmarking law, but instead argued that the city's use of eminent domain was analogous to zoning because condemnation placed severe restrictions on the Church's use or development of the cemetery.[115] The court explained that to classify a taking of property as a restriction is

[108] *Id.* at 256.

[109] *Id.*

[110] *Id.* at 256–58. The *Cottonwood* court's treatment of the eminent domain proceeding as an application of the City's Redevelopment Plan does not "suggest that *any* exercise of eminent domain that relates in some way to a zoning plan falls within the scope of RLUIPA." *Id.* at 256–57 (emphasis added).

[111] St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 899–901 (N.D. Ill. 2005).

[112] *Id.* at 890.

[113] *Id.* at 891–92.

[114] *Id.* at 899–900 & n.7 ("This Court does not find the Cottonwood court's reasoning persuasive as it relates to such an attenuated relationship between eminent domain and zoning."). Thus, eminent domain alone does not fit the definition of land use regulation used in RLUIPA. *Id.* The court did not find that all eminent domain actions are beyond RLUIPA coverage, but requires some legitimate connection between a zoning or landmarking law and the condemnation. *Id.* at 900 & n. 8 ("For example, an act to acquire land (through eminent domain) and then to rezone it and transfer it might very well fall within the reach of RLUIPA.").

[115] *Id.* at 900.

> an incorrect classification of the actions at issue in this case. . . . Land use regulations limit the use of property. Condemnation is, in one sense, the ultimate limitation on the use of property. It does not follow, however, that condemnation is a land use regulation as this term is used in the statute. Congress could have included "takings" within the reach of RLUIPA but did not.[116]

Ultimately, the court allowed the airport expansion project to proceed.[117]

Subsequently, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's ruling that the planned condemnation of the cemetery did not constitute a "land use regulation" under RLUIPA.[118] The court rejected St. John's argument that the authorization to condemn the cemetery is actually an application of zoning law, because it changes the use of the land from a religious burial ground to airport property.[119] The court explained that Chicago's plan could not be characterized as zoning because it did not "dictate to these plaintiffs what they are permitted to do with the plot of land[;] rather, the City seeks to assume full ownership of the land, after paying St. John's full compensation."[120] The court stressed that eminent domain and zoning deal with land in very different ways; thus the planned condemnation was not regulated by RLUIPA.[121] In addition to its conclusion that eminent domain is not equivalent to zoning, the Seventh Circuit also concluded that eminent domain itself is not captured by the term "land use regulation" under RLUIPA.[122] As in *Faith Temple Church*, the court refused to rely on the *Cottonwood* dicta that eminent domain is always a land use regulation.[123] The court reasoned that if Congress intended to include eminent domain as a land use regulation, it would have said so explicitly.[124]

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[116] *Id.*

[117] *St. John's*, 401 F. Supp. 2d at 906.

[118] St. John's United Church of Christ v. City of Chicago, No. 05-4418, 2007 U.S. App. LEXIS 21914, at *67–68 (7th Cir. Sept. 13, 2007).

[119] *Id.* at *69.

[120] *Id.*

[121] *Id.* at *69–70 (citing Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005)).

[122] *Id.* at *72–74.

[123] *Id.*

[124] *St. John's*, 2007 U.S. App. LEXIS 21914, at *73 ("[B]efore federal law . . . starts interfering with the fundamental state power of eminent domain, it is likely that we would need a clear statement from Congress.").

4. *City & County of Honolulu v. Sherman*

In *City & County of Honolulu v. Sherman*, the Supreme Court of Hawaii also determined that RLUIPA does not apply to all eminent domain actions.[125] The Revised Ordinances of Honolulu (ROH) Chapter 38[126] allowed the City and County of Honolulu to file eminent domain actions to acquire the land underneath condominiums from the fee owners to convey fee ownership to the lessees of the individual condominium units.[127] The First United Methodist Church was a fee owner of a condominium targeted by the government for condemnation.[128] The church challenged the action under RLUIPA.[129]

As in both *Faith Temple Church* and *St. John's*, the court explained that RLUIPA applied to a "land use regulation," clearly defined as a "zoning or landmarking law."[130] The court then set out the common legal definitions of both zoning and landmarking, and determined that a "'zoning or landmarking law' as defined by RLUIPA must pertain either (1) to the division of a city into districts and the regulation of the land usage within those districts or (2) to a monument, marker, or building having historical significance."[131] The court determined that ROH Chapter 38, which allows the government to acquire condominium property via eminent domain to carry out a lease-to-fee conversion, does not fit within either definition.[132]

B. Legislative History

As noted in *Faith Temple Church*, the legislative history behind RLUIPA suggests that Congress was unconcerned with condemnation of religious property.[133] An in-depth examination of the legislative history, including a complete review of the congressional hearings

[125] *See* 129 P.3d 542, 564 (Haw. 2006) .

[126] HONOLULU, HAW., REV. ORDINANCES ch. 38 (1991) (repealed by REV. ORDINANCE 05-001 (2005)). The court indicated that the repeal of the ordinance did not affect the underlying eminent domain issue. *Sherman*, 129 P.3d at 545 n.1.

[127] *Sherman*, 129 P.3d at 545 & n.1.

[128] *Id.* at 546.

[129] *Id.*

[130] *Id.* at 560.

[131] *Id.* at 561.

[132] *Id.*

[133] Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 255 (W.D.N.Y. 2005). The District Court for the Western District of New York did not offer a detailed discussion of the legislative history of RLUIPA but did explain that Congress was likely unconcerned with eminent domain because congressional commentary centered on zoning. *See id.* This Comment will present a thorough analysis of the legislative history to bolster the court's argument.

regarding the law and its precursor bills, strengthens the conclusion that Congress did not intend RLUIPA to cover eminent domain actions.

First, it is helpful to contrast the language of precursor bills to the language ultimately codified in RLUIPA. The House and Senate each introduced three bills, respectively, to address religious liberty issues post-*City of Boerne*.[134] The Religious Liberty Protection Act of 1999[135] (RLPA 1999), H.R. 1691, the House's second attempt at drafting religious liberty protection legislation, defined "land use regulation" as "a law or decision by a government that limits or restricts a private person's uses or development of land, or of structures affixed to land."[136] In RLUIPA, a "land use regulation" is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)."[137] House Bill 1691 did not include the limitation to a "zoning or landmarking law," which suggests that RLUIPA was significantly narrowed to include only two specific types of restrictive practices.[138]

Next, discussion of each precursor bill during introduction and floor debate sheds light on congressional intent. For example, the *Congressional Record* indicates that when RLUIPA, in its final draft version as Senate Bill 2869, was presented to the Senate for approval, the bill's land use provision was discussed solely in reference to zoning laws.[139] For example, in a joint statement, Senators Hatch and Kennedy stressed that RLUIPA was necessary because "[c]hurches . . . are

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[134] The House bills include H.R. 4862, 106th Cong. (2nd Sess. 2000); H.R. 1691, 106th Cong. (1st Sess. 1999); H.R. 4019, 105th Cong. (2nd Sess. 1998). The Senate bills include S. 2869, 106th Cong. (2nd Sess. 2000); S. 2081, 106th Cong. (2nd Sess. 2000); S. 2148, 105th Cong. (2nd Sess. 1998).

[135] Religious Liberty Protection Act 1999, H.R. 1691, 106th Cong. (1st Sess. 1999) (as reported by H. Comm. on the Judiciary, July 1, 1999).

[136] *Id.* § 8(3). Senate Bill 2081, the Senate's second attempt, included the same definition of land use regulation, with minor grammatical variations. S. 2081, 106th Cong. (2nd Sess. 2000). Interestingly, the first attempts by both the House and Senate did not include any definition of land use regulation. S. 2148, 105th Cong. (2nd Sess. 1998); H.R. 4019, 105th Cong. (2nd Sess. 1998).

[137] 42 U.S.C. § 2000cc-5(5) (2000). This narrower definition of land use regulation first appeared in H.R. 4862 and S. 2869, both introduced in July 2000.

[138] *See* H.R. 1691; *see also* 146 CONG. REC. E 1563, 1563–64 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). Rep. Canady provided a summary of each provision of RLUIPA on the day prior to the bill being signed into law by President Clinton. *Id.* Canady described the definition of land use regulation as "only zoning and landmarking laws." *Id.* at 1564. He also stated generally that RLUIPA was "patterned after" H.R. 1691, "an, earlier, *more expansive* bill." *Id.* at 1563 (emphasis added).

[139] *See* 146 CONG. REC. S7774, 7774–79 (daily ed. July 27, 2000).

frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation."[140] The senators went on to explain this claim by offering only examples of zoning codes.[141] As a more specific example of the types of conduct RLUIPA sought to regulate, Senator Reid stated that the Church of Jesus Christ of Latter Day Saints "maintain[ed] serious reservations about non-uniform zoning regulations throughout the country, which, though religiously-neutral on their face, have the effect of overly-restricting the size and location, among other things, of churches and temples."[142] This statement suggests that a major religious organization was primarily concerned with size and use restrictions—zoning regulations.[143] Notably, the words "eminent domain" or "condemnation" were *never* mentioned during the presentation of the bill.[144] Similarly, eminent domain is never mentioned in the House Committee Report regarding H.R. 1691, and discussion is focused on zoning.[145]

Both the *Congressional Record* regarding RLUIPA and the Committee Report regarding RLPA 1999 rely upon hearings before the House of Representatives in reaction to *City of Boerne v. Flores*,[146] which provide evidence of potentially discriminatory application of land use regulations to religious institutions.[147] The testimony provides evidence of *zoning practices* challenged as unfairly burdensome.[148] For example, land use attorney John Mauck presented the results of a survey of twenty-nine zoning codes in the Chicago area.[149] Twelve of these zoning codes did not allow a church to locate as of right without a special-use permit.[150] In ten codes, churches could locate only

[140] *Id.* at 7774 (joint statement of Sen. Hatch and Sen. Kennedy).

[141] *Id.* at 7774–75 ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.").

[142] *Id.* at 7778.

[143] *See id.*

[144] *See id.* at 7774–79.

[145] *See* H.R. REP. NO. 106-219, at 1–42 (1999).

[146] 521 U.S. 507 (1997).

[147] *See* 146 CONG. REC. S7774, 7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy); H.R. REP. NO. 106-219, at 18–24.

[148] *See, e.g.*, *Religious Liberty Protection Act: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 100–01 (June 16, 1998) (statement of John Mauck, Att'y), *microformed on* CIS No. 00:H521-10 (Cong. Info. Serv.).

[149] *Id.*

[150] *Id.*

in residential neighborhoods, which is generally impractical.[151] This study involved zoning codes, particularly location restrictions, but did not investigate eminent domain actions.[152]

Similarly, Von G. Keetch, Counsel to the Church of Jesus Christ of Latter Day Saints, described a potentially problematic regulation of religious property by the City of Forest Hills, Tennessee, in its Comprehensive Plan, which limited new development within the city to single-family homes.[153] This plan set up educational and religious zones, but limited that designation to already existing schools and churches in the city, which essentially blocked the Church of Latter Day Saints from building a new church in Forest Hills.[154] Keetch also relied upon a study conducted by faculty at Brigham Young University, which surveyed 196 cases that were categorized by the type of zoning issue involved.[155] Keetch introduced the study as follows:

> Essentially, the zoning issues fall into two broad categories: cases that involve zoning on property to permit a church building to be erected on a particular site ("location cases"), and cases that determine whether an accessory use (such as a homeless shelter or soup kitchen) may be allowed at the site of an existing church ("accessory use cases").[156]

This study was directed toward zoning ordinances and their application to religious property.[157]

After reviewing every available hearing, the author of this Comment could locate only *two* references to eminent domain in the testimony before Congress.[158] Land use attorney Bruce Shoulson, testify-

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[151] *Id.*

[152] *Id.*

[153] *Religious Liberty Protection Act of 1999: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 106th Cong. 26–28 (May 12, 1999) (statement of Von G. Keetch, Counsel, Church of Jesus Christ of Latter Day Saints), *microformed on* CIS No. 00:H521-100 (Cong. Info. Serv.).

[154] *Id.* at 27.

[155] *Id.* at 22–23, 31–43.

[156] *Id.* at 31.

[157] *See id.* at 31–43.

[158] *See Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 201 (July 14, 1998) (statement of Bruce D. Shoulson, Att'y, Lowenstein Sandler, PC), *microformed on* CIS No. 00:H521-10 (Cong. Info. Serv.) [hereinafter Shoulson testimony]; *Protecting Religious Freedom After* Boerne v. Flores *(Part III): Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 19 (Mar. 26, 1998) (statement of Mark E. Chopko, Gen. Counsel, U.S. Catholic Conference), *microformed on* CIS No. 99:H521-34 (Cong. Info. Serv.) [hereinafter Chopko testimony]. The extensive testimony spans nine hearings before Congress. For a complete list of the hearings and respective testimony, see the Appendix to this Comment.

ing before the House Judiciary Committee on the Constitution, presented evidence of how zoning ordinances burdened Orthodox Jews in Northern New Jersey.[159] He related one example where eminent domain was eventually utilized by the municipality to take land away from a religious institution:

> [O]ne community, in an effort to head off a zoning battle over the conversion to an ultra-Orthodox synagogue and relating Yeshiva program of buildings which had previously been used by a house of worship, instituted eminent domain proceedings with respect to the subject property on the suddenly conveniently discovered grounds that specific property was needed for a new municipal complex.[160]

Although the battle ultimately ended in condemnation, it was the culmination of a long *zoning* dispute. In his discussion of substantial burdens on religious property, Mark E. Chopko, General Counsel of the United States Catholic Conference, mentioned anecdotally that "some of our dioceses report conflicts over the loss of land by eminent domain for such things as creation of bicycle paths or parking lots."[161] Chopko did not relate any specific instances of litigation involving religious property and eminent domain.[162] This brief mention of eminent domain was located amidst discussion of landmarking and limitations on hours of operation and congregation size.[163]

Furthermore, following each session of testimony, the witnesses were questioned as a group by the presiding congressmen.[164] There was no questioning following Shoulson's testimony,[165] and Chopko was not asked to elaborate on his mention of eminent domain; it did not trigger a reaction by the legislators.[166] It would be unsound to conclude that "zoning and landmarking law" covers eminent domain based on two brief mentions of eminent domain in extensive testimony clearly focused on zoning.

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[159] Shoulson testimony, *supra* note 158, at 201.

[160] *Id.*

[161] Chopko testimony, *supra* note 158, at 19.

[162] *Id.*

[163] *Id.* at 18–19.

[164] *See, e.g.*, *Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 234–42 (July 14, 1998), *microformed on* CIS No. 00:H521-10 (Cong. Info. Serv.).

[165] *See id.*

[166] *Protecting Religious Freedom After* Boerne v. Flores *(Part III): Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 84–94 (Mar. 26, 1998), *microformed on* CIS No. 99:H521-34 (Cong. Info. Serv.).

C. Fundamental Differences Between the Bases of Power of Eminent Domain and Zoning and Landmarking Laws

Faith Temple Church, *St. John's*, and *Sherman* all held that RLUIPA does not cover all eminent domain actions because the statute clearly defines "land use regulation" as a "zoning or landmarking law."[167] The courts in these cases noted the fundamental differences between eminent domain and zoning or landmarking laws just by comparing the common definitions of the terms: eminent domain is a taking of land, whereas zoning and landmarking are restrictions of land use.[168] While the common definitions of these terms aptly mark the distinction, there are other theories that demonstrate that eminent domain and zoning and landmarking laws are fundamentally different government actions.

Unlike zoning, eminent domain is not part of the state's police power.[169] Eminent domain and the police power are different:

> [L]aws enacted in the proper exercise of police power, which are reasonably necessary for the preservation of the public health, safety, and morals, even though they result in the impairment of the full use of property by the owner thereof, do not ordinarily constitute a "taking of private property" within the meaning of the constitutional provisions of federal and state governments.[170]

In his dissent in *Kelo v. City of New London*, Justice Thomas noted that eminent domain is not founded in the state's police power: "The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. . . . To construe the Public Use Clause to overlap with the States' police power conflates these two categories."[171] In the landmark case *Village of Euclid v.*

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[167] Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005); St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 899 (N.D. Ill. 2005); City & County of Honolulu v. Sherman, 129 P.3d 542, 561 (Haw. 2006).

[168] *Faith Temple Church*, 405 F. Supp. 2d at 254–55; *St. John's*, 401 F. Supp. 2d at 899–900; *Sherman*, 129 P.3d at 561.

[169] *See* William A. McClain, *Modern Concepts of Police Power and Eminent Domain*, INSTITUTE ON EMINENT DOMAIN 9, 187 (Southwestern Legal Foundation, 1969). The police power "describe[s] the right of government to regulate the conduct of people in the interest of the public health, safety, and welfare." *Id.* at 166; *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112 (1985) ("The sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud.").

[170] McClain, *supra* note 169, at 187.

[171] 545 U.S. 469, 519–20 (2005) (Thomas, J., dissenting) (citation omitted).

Ambler Realty Co.,[172] the Supreme Court stated that the zoning ordinance at issue, which created use districts to separate industrial from residential and other commercial uses, was asserted under the police power.[173] Zoning, in general, was a constitutional practice, as long as the ordinance was not "arbitrary and unreasonable, [that is] having no substantial relation to the public health, safety, morals, or general welfare."[174] When an individual purchases a parcel of land, he knows that he must use the land in such a way that it does not interfere with the rights of others, and such use is rightly policed by the state, without compensation.[175] However, the private property owner does not as readily expect the taking of his property for public use, so the government must compensate for the taking.[176] Thus, eminent domain (an independent government power) and zoning (a state police power) are fundamentally different government actions.

Another distinction between eminent domain and zoning is provided by cases in which the eminent domain power overrides a limitation set by zoning law. Several courts have exempted government entities from compliance with zoning regulations if the entity uses its power of eminent domain to acquire lands for government projects.[177] For example, in *City of Washington v. Warren County*,[178] the city wanted to make improvements to its airport, but an amendment to the zoning ordinance prohibited any expansion because the airport property was located in a flood plain.[179] The Supreme Court of Missouri determined that the city could pursue its plan, immune from the zoning ordinance.[180] The court applied the "power of eminent domain" test: "[I]f a power has its source in the constitution, although delegated by statute, then it prevails over and cannot be limited by another government entity's power, such as zoning, that is

[172] 272 U.S. 365 (1926).

[173] *Id.* at 387.

[174] *Id.* at 395.

[175] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (holding that a coal company, which was forbidden by state law to mine coal in such a way that would cause subsidence, was entitled to just compensation for the taking of its property) ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."); *see also Kelo*, 545 U.S. at 519 (Thomas, J., dissenting).

[176] *See Pa. Coal Co.*, 260 U.S. at 415 ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *see also Kelo*, 545 U.S. at 519 (Thomas, J., dissenting).

[177] *See* Elaine Marie Tomko-DeLuca, Annotation, *Applicability of Zoning Regulations to Governmental Projects or Activities*, 53 A.L.R. 5th 1 (1997, updated Dec. 2005).

[178] 899 S.W.2d 863 (Mo. 1995).

[179] *Id.* at 864.

[180] *Id.* at 867.

delegated solely by statute and without any specific constitutional authority."[181] While the power of eminent domain was set forth in the Missouri Constitution, the city's zoning authority was established only by statute.[182] In *Seward County Board of Commissioners v. City of Seward*,[183] the Supreme Court of Nebraska also upheld the city's creation of an airport on condemned property, despite a contrary zoning ordinance, by applying the power of eminent domain test.[184] Interestingly, the court noted that "[i]t has frequently been stated that the power of eminent domain is inherently superior to the exercise of the zoning power."[185] Whether based on the theory that eminent domain is inherently superior to zoning or that it trumps zoning power under certain circumstances, the notion that government projects facilitated by acquisition of land via condemnation need not always be subject to zoning regulations adds strength to the distinction between the two government powers. If eminent domain can supersede zoning regulations, clearly the powers are not one and the same.

Recent case law, legislative history, and theories behind the power of eminent domain all support the conclusion that eminent domain does not fall within the scope of RLUIPA's application. Commentators reaching the opposite conclusion have difficulty challenging this direct evidence. Shelley Ross Saxer, Associate Dean of Academics and Professor at Pepperdine University School of Law, and prominent scholar in the land use context, concludes that RLUIPA covers eminent domain by suggesting that some courts have broadly interpreted the term "land use regulation."[186] She cites *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*,[187] which held that the city's refusal to amend a zoning ordinance was an act taken pursuant to a zoning law, creating jurisdiction under RLUIPA.[188] She also cites *Hale O Kaula Church v. Maui Planning Commission*,[189] which treated a state land use classification system as a zon-

[181] *Id.* at 866 (citing City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31, 42 (Mo. Ct. App. 1979)). Some jurisdictions apply a "balancing of the interests" test where the zoning power is constitutionally authorized. *Id.* (citing St. Louis v. City of Bridgeton, 705 S.W.2d 524, 529 (Mo. App. Ct. 1985)). The test requires analysis of the public interests implicated in the particular land use dispute. *City of Bridgeton*, 705 S.W.2d at 529.

[182] *City of Washington*, 899 S.W.2d at 867.

[183] 242 N.W.2d 849 (Neb. 1976).

[184] *Id.* at 850–55.

[185] *Id.* at 854.

[186] Saxer, *supra* note 85, at 668–70.

[187] 250 F. Supp. 2d 961 (N.D. Ill. 2003).

[188] Saxer, *supra* note 85, at 669 (citing *Vineyard*, 250 F. Supp. at 990).

[189] 229 F. Supp. 2d 1056 (D. Haw. 2002).

ing law.[190] However, these cases do not even hint that "land use regulation" can be interpreted so broadly as to include eminent domain, a fundamentally different type of government power.[191] Saxer then argues that *Cottonwood* held that eminent domain is not a zoning law, but an application of a zoning law, which is within the scope of RLUIPA.[192] She believes that any eminent domain action can be traced to a zoning system; thus, eminent domain is an application of the zoning law.[193]

However, recent case law has questioned *Cottonwood*'s treatment of eminent domain as an application of zoning.[194] Another commentator concedes that the legislative history of RLUIPA does not suggest any concern over eminent domain.[195] He finds fault with the decision in *Faith Temple Church* that a connection between zoning regulations and eminent domain is too attenuated to bear any weight.[196] But this decision has not been overruled or questioned in the courts. At the very least, the possible, though highly attenuated, connection between eminent domain and zoning should be analyzed further by the courts of appeals or the Supreme Court of the United States before RLUIPA is interpreted to cover eminent domain.

Faith Temple Church, *St. John's*, and *Sherman* have not been reversed. In fact, the district court ruling in *St. John's* that RLUIPA does not cover eminent domain has been affirmed by the Seventh Circuit. The legislative history shows that eminent domain was not the focus for reform; in fact, it was only mentioned twice throughout the entire course of congressional discussion regarding proposed religious liberty legislation. The rules of statutory construction require a statute to be interpreted with regard to its common meaning, altered only if such a common meaning would be contradictory to congressional intent.[197] Interpreting RLUIPA to cover eminent domain is unsupported by the language of the statute, congressional intent, and the

[190] Saxer, *supra* note 85, at 669 (citing *Hale O Kaula*, 229 F. Supp. 2d at 1070).

[191] *See id.*

[192] *Id.* at 670.

[193] *Id.*

[194] *See supra* notes 108–10, 114–16, 123 and accompanying text.

[195] G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After* Kelo, 81 NOTRE DAME L. REV. 1653, 1665, 1667 (2006).

[196] *Id.* at 1667.

[197] INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987) ("Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.").

basic distinctions between eminent domain and zoning and landmarking laws.

IV. RLUIPA SHOULD NOT BE AMENDED TO COVER EMINENT DOMAIN

Senator Edward Kennedy, one of the architects of RLUIPA, is considering an amendment to RLUIPA to include eminent domain actions within the statute's purview.[198] Senator Kennedy circulated a "Dear Colleague" letter and draft bill to fellow senators, proposing that eminent domain be included within the definition of land use regulation.[199] The amendment would subject proposed condemnations of religious property to strict scrutiny review.[200]

For the reasons discussed throughout this Part, Congress should reject Senator Kennedy's proposed amendment to RLUIPA, or any similar efforts to include eminent domain within the statute's coverage. Under current free exercise jurisprudence, a neutral, generally applicable state or local law outside of the land use or prison contexts, such as a prohibition on possession of controlled substances, that incidentally burdens religious exercise is only subject to rational basis scrutiny;[201] a law requiring an individualized assessment, such as an ordinance directly regulating religious animal sacrifice, is subject to strict scrutiny.[202] RLUIPA classifies all applications of zoning and landmarking laws as individualized assessments because religious discrimination frequently underlies the particularized examination and evaluation of religious property.[203]

RLUIPA's definition of "individualized assessment" may capture zoning and landmarking laws, but does not encompass eminent domain. Eminent domain cannot be characterized as an individualized assessment because it does not involve the same scrutiny of individual parcels of land, and thus would not be subject to strict scrutiny review.[204] However, RLUIPA also applies strict scrutiny review to a land

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[198] E-mail from Jim Walsh, Staffer for Sen. Edward Kennedy, Senate Committee on the Judiciary, to author (Sept. 29, 2006, 18:38:07 EST) (on file with author).

[199] Marci Hamilton, *Churches and Eminent Domain: A Move in Congress to Once Again Make Churches Privileged Landowners*, Aug. 10, 2006, http://writ.news.findlaw.com/hamilton/20060810.html.

[200] *Id.*

[201] Employment Div. v. Smith, 494 U.S. 872, 874–78 (1990).

[202] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–43 (1993).

[203] 146 CONG. REC. S7774, 7774–75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[204] *See infra* Part IV.A.2.

use law or government action that imposes a substantial burden on religion, and in turn, affects interstate commerce.[205] If the language of RLUIPA were amended to include eminent domain as a land use regulation, this Commerce Clause provision could be construed to encompass all eminent domain actions against religious property, despite being a generally applied government power.[206] This automatic application of strict scrutiny to eminent domain is contrary to precedent and would unnecessarily limit an important government power.[207]

Not only does Senator Kennedy's proposed amendment conflict with current law, but it also would provide an extraneous remedy, because those eminent domain actions that are truly discriminatory can be challenged under a regular free exercise claim or an equal protection claim.[208] Furthermore, Senator Kennedy's proposal is unwise because it could extend the unnecessary protection against condemnations to auxiliary uses of religious property.[209]

A. Eminent Domain Is a Generally Applicable Law, Thus It Cannot Be Subject to Strict Scrutiny

1. The Distinction Between Generally Applicable Laws and Individualized Assessments

As discussed in Part II, making the distinction between a law requiring individualized assessment and a neutral, generally applicable law is vital to a free exercise claim because it will determine the level of scrutiny a court must apply to the challenged law or government action.[210] The Supreme Court set forth this vital distinction in *Employment Division v. Smith*[211] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[212] These cases established the rule that a generally applicable law is subject only to rational basis review.[213] A generally ap-

[205] *See infra* Part IV.A.2.
[206] *See infra* Part IV.A.2.
[207] *See infra* Part IV.
[208] *See infra* Part IV.B.
[209] *See infra* Part IV.C.
[210] *See supra* Part II.
[211] Employment Div. v. Smith, 494 U.S. 872 (1990).
[212] 508 U.S. 520 (1993).
[213] *See Smith*, 494 U.S. at 882–90. The Court noted that strict scrutiny review was applied to instances where the "State has in place a system of individual exemptions," but these instances were unemployment compensation and welfare benefits cases, where delivery of benefits required an evaluation of the individual's religious motivation for refusing or quitting work. *Id.* at 883–85 (citing Bowen v. Roy, 476 U.S. 693,

plicable law applies across the board; it does not target religious activity *because* of its religious nature.[214] It may capture some religious activity, but this is incidental to the primary goal of the law.[215] On the other hand, an individualized assessment involves an evaluation of the religious purpose or basis for the conduct and can result in different treatment *because of the religious purpose or basis.*[216] An individualized assessment requires strict scrutiny review because it involves a direct analysis and/or regulation of religious activity, which runs a greater risk of offending the right to free exercise of religion.[217]

The facts of *Smith* and *Lukumi* illustrate the difference between a neutral, generally applicable law and an individualized assessment. In *Smith*, the Oregon law prohibiting use of peyote was a generally applicable law.[218] However, in *Lukumi*, the challenged law was found to be an individualized assessment.[219] In *Lukumi*, a Santeria church announced its plan to open a place of worship in Hialeah, Florida.[220] The Santeria faith conducts religious ceremonies that involve the sacrifice of animals.[221] The City of Hialeah passed a resolution that prohibited the sacrifice of animals, defined as the unnecessary killing of

708 (1986)). In *Smith*, Justice Scalia suggested that the application of a generally applicable law to religious activity could be subject to strict scrutiny review by asserting a hybrid rights theory. *Id.* at 881–82. When a claimant brings a challenge under the Free Exercise Clause "in conjunction with other constitutional protections, such as freedom of speech and of the press," the court must apply strict scrutiny review to the government action or statute. *Id.* at 881. The Court offered *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as an example of a hybrid rights situation. *Smith*, 494 U.S. at 881. In *Yoder*, an Amish claimant asserted parental rights in addition to a free exercise claim in challenging compulsory school attendance laws. *Yoder*, 406 U.S. at 207, 213–14. A hybrid rights claim was not at issue in *Smith*. *Smith*, 494 U.S. at 882. However, the courts of appeals are split as to whether or not the hybrid rights theory is valid. A few circuits apply strict scrutiny when free exercise claims are brought in conjunction with other constitutional concerns. *See, e.g.*, Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 534 n.7 (1st Cir. 1995); Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1996); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699–700 (10th Cir. 1998). Other circuits have refused to recognize the theory. *See, e.g.*, Knight v. Conn. Dept. of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) ("the language [in *Smith*] relating to hybrid claims is dicta and not binding on this court"); Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993). Thus an attempt to invoke strict scrutiny review of an eminent domain proceeding against religious property by utilizing the hybrid rights theory (property interests in conjunction with a free exercise claim) would rest on shaky ground.

[214] *Lukumi*, 508 U.S. at 531–33, 542–43; *Smith*, 494 U.S. at 878–79.

[215] *Lukumi*, 508 U.S. at 531–32; *Smith*, 494 U.S. at 878.

[216] *Lukumi*, 508 U.S. at 533, 542–43; *Smith*, 494 U.S. at 877–78.

[217] *Lukumi*, 508 U.S. at 542–43, 547.

[218] *See supra* notes 21–24 and accompanying text.

[219] *Lukumi*, 508 U.S. at 534–40.

[220] *Id.* at 525–26.

[221] *Id.* at 524–25.

an animal for ritual purposes and not primarily for consumption.[222] Although the city claimed that the resolution was designed to promote public health and prevent cruelty to animals, many other types of non-religious slaughter were permitted.[223] Since the city passed the ordinance against animal slaughtering with the *purpose* of suppressing the religious practice of the Santeria church, the ordinance was not a neutral, generally applicable law.[224] Thus, the Court determined that the ordinance involved an individualized assessment:

> Further, because [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the relevant conduct. . . . Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.[225]

RLUIPA applies when a substantial burden results from the imposition of a land use regulation "under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved."[226] Under RLUIPA, "individualized assessment" means the use of discretion by zoning officials to apply zoning regulations to some real property or grant deviations from the set regulations.[227] Thus, the Act's heightened scrutiny will come into play whenever a religious institution presents a property issue that is subject to the locality's particularized review, even absent a showing that the government intended to discriminate against the religious landowner.[228] An individualized assessment under RLUIPA, such as a decision whether to grant a special use permit to a church, may not be motivated necessarily by religious bias.[229] For example, a

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[222] *Id.* at 526–28.

[223] *Id.* at 543–44.

[224] *Id.* at 540–42.

[225] *Lukumi*, 508 U.S. at 537–38 (internal quotation omitted).

[226] 42 U.S.C. § 2000cc(a)(2)(C) (2000) (emphasis added). Congress included the narrow requirement that the burden result from an individualized assessment in order to legislate within the scope of its power under the Enforcement Clause. H.R. REP. NO. 106-219, at 17 (1999); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 949 (2001).

[227] *See* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1222–23 (2002); Storzer & Picarello, *supra* note 226, at 949–52.

[228] Storzer & Picarello, *supra* note 226, at 949–51; Graff, *supra* note 56, at 515.

[229] Graff, *supra* note 56, at 515.

zoning official's decision to deny a church a zoning variance to expand its facilities may simply result from a zoning scheme designed to maintain the consistency of uses in a neighborhood.[230] However, the legislative history of RLUIPA suggests that zoning and landmarking decisions adverse to religious property often result from underlying, though not overt, discrimination, especially in the context of special use permits and variances.[231] It suggests that zoning and landmarking decisions based on discrimination occur frequently enough that all individualized assessments of property require closer scrutiny.[232]

Therefore, under RLUIPA, the application of a zoning or landmarking law to a particular piece of religious property constitutes an individualized assessment. Since this particularized consideration of religious property often results in discriminatory treatment because of the religious nature of the land use, the *Smith* rule for generally applicable laws does not apply, and the assessment is subject to strict scrutiny review. While RLUIPA may properly classify the application of zoning and land use laws as individualized assessments, deserving of heightened protection, it cannot similarly classify eminent domain.

2. Eminent Domain Does Not Involve the Same Individualized Assessment Techniques as Zoning

Eminent domain is not an individualized assessment, but rather an action taken pursuant to generally applicable law. A condemnation action does not require the same consideration of the characteristics of an individual parcel of land involved in the application of zoning laws. Thus, eminent domain is not the type of action targeted by RLUIPA's "individualized assessment" language.

The government's power to condemn is a sovereign right, limited by the Takings Clause of the Fifth Amendment[233] and the states' respective constitutional provisions.[234] A governmental entity takes private property for a public use and pays just compensation to the former owner.[235] Typically, the entity conceives of a particular use and selects a location for construction.[236] The government can exercise its power of eminent domain to take virtually any type of prop-

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[230] *See id.*

[231] 146 CONG. REC. S7774, 7774–75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[232] *Id.*

[233] U.S. CONST. amend. V.

[234] *See* 1 NICHOLS ON EMINENT DOMAIN § 1.14[2] (Matthew Bender, 3d ed., 2006).

[235] *See id.*

[236] *See, e.g.*, St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 890–91 (N.D. Ill. 2005).

erty in that location, so long as the public use requirement is satisfied.[237] For example, in *St. John's*,[238] the City of Chicago needed to expand O'Hare International Airport—a public use—and selected a parcel of adjoining land to construct additional runways.[239] A cemetery stood in the way.[240] There was no evidence that the city would have abandoned its construction plans if a private home or business was located in the target area, or that the city selected the parcel with the specific goal of eliminating religious property.[241] Certainly, in selecting a location for the public use, the government entity exercising its eminent domain power observes the private property standing in its way.[242] However, this is typically in furtherance of a general review of the overall location and the need for the new use to be constructed on that particular site.[243]

In contrast, traditional zoning serves to regulate property to maintain conformity with a general scheme.[244] Local government creates a comprehensive plan, which sets out the standard for development and empowers the entity to establish regulations and restrictions on aspects of property, such as the size of structures, and to divide the area into use districts.[245] The entity also reviews property-holders' requests for variances to the general scheme.[246] Essentially, zoning sets up a master plan to ensure the co-existence of different land uses and to maintain at least some degree of conformity of appearance.[247] Once this plan is established, it is necessary to ensure

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[237] *See* McClain, *supra* note 169, at 186.

[238] 401 F. Supp. 2d 887.

[239] *Id.* at 889–91.

[240] *Id.* at 890.

[241] *Id.* at 898.

[242] *See, e.g.,* Kelo v. City of New London, 545 U.S. 469, 473–75 (2005); *St. John's*, 401 F. Supp. 2d at 889–91.

[243] *See, e.g.,* 1A NICHOLS ON EMINENT DOMAIN, *supra* note 234, § 3.03[2][b] (citing Unif. Eminent Domain Code § 310(a) (1974)); THOMAS F. GESSELBRACHT ET AL., ILLINOIS ZONING, EMINENT DOMAIN AND LAND USE MANUAL § 9-3(c)(1)–(3) (1998 & LexisNexis online Supp. 2005); Edward D. McKirdy et al., *New Jersey Condemnation Practice*, 2003 N.J. Inst. for Continuing Legal Educ. § 1.4.5.

[244] *See* DANIEL R. MANDELKER, THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE 57 (1971) (citing A STANDARD STATE ZONING ENABLING ACT § 3 (rev. ed. 1926)). The Standard State Zoning Enabling Act was adopted by all fifty states and still remains in effect in many states. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 971 (5th ed. 2002). It serves as the basis for modern zoning ordinances. *See id.* at 971–72.

[245] DUKEMINIER & KRIER, *supra* note 244, at 971–72.

[246] MANDELKER, *supra* note 244, at 66–67.

[247] *See* DUKEMINIER & KRIER, *supra* note 244, at 971–72 (citing A STATE STANDARD ZONING ENABLING ACT § 3).

adherence to the master plan by individual property-holders.[248] Obviously, this can only be accomplished by carefully reviewing problematic use and proposed development of individual parcels of land.[249]

In its application of the zoning laws, the government evaluates how the land is used or will be used by the *current* property owner—what RLUIPA deems an individualized assessment.[250] This consideration of the current property owner's present use or planned change in use is not the government's primary consideration when it initiates an action to take land via eminent domain.[251] The government is concerned with physical location and its suitability for the *post-condemnation* use of the property.[252]

Also, the different bases of power for eminent domain and zoning, respectively, show that eminent domain does not involve the type of individual review involved in zoning. Pursuant to the power of eminent domain,

> property . . . is taken from the owner and applied to public use because the use or enjoyment of such property . . . is beneficial to the public. In the exercise of the police power [as in zoning] the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment of such property is injurious to the public welfare.[253]

Eminent domain does not involve the scrutiny of individual parcels of land to protect against encroachments on the rights of others because it is not an exercise of the state's police power. Rather, eminent domain serves to take property that stands in the way of a planned project.

To further emphasize why eminent domain should not be considered an individualized assessment subject to strict scrutiny, eminent domain in general is reviewed under rational basis scrutiny.[254] As explained in Part II in the discussion of *Kelo v. City of New London*, legislatures are accorded deference to determine what constitutes a public use.[255] Nothing in the relevant case law suggests that a legisla-

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[248] *See id.* at 984–85 (citing A STATE STANDARD ZONING ENABLING ACT § 7).

[249] *See id.*

[250] *See id.* at 971–72; *see also* 1 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1.7 (Edward H. Zeigler, Jr., ed., Thomson West 2005) (1956); *supra* note 227 and accompanying text.

[251] *See supra* note 243.

[252] *See supra* note 243.

[253] 1 NICHOLS ON EMINENT DOMAIN, *supra* note 234, § 1.42[2].

[254] *See supra* notes 65–67 and accompanying text.

[255] *See supra* notes 60–67 and accompanying text.

ture is further limited in selecting the type of private property to be condemned to effectuate the public use.[256] There is certainly no qualification within this case law that legislatures must tip-toe around religious property.[257] Therefore, equating eminent domain with the type of individualized assessment envisaged under RLUIPA exposes eminent domain to the highest scrutiny, which is clearly inconsistent with precedent.[258]

In addition to a land use regulation involving an individualized assessment, RLUIPA also applies when the government-imposed substantial burden affects a program that receives federal funding or affects interstate commerce, even when this burden results from a law of general applicability.[259] The reason is that, in addition to the Enforcement Clause, the statute also has its basis in the Spending Clause[260] and the Commerce Clause[261] of the United States Constitution.[262] Under the Commerce Clause provision, an effect on interstate commerce is shown when the "burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of reli-

[256] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

[257] *See, e.g.*, *Kelo*, 545 U.S. 469; *Midkiff*, 467 U.S. 229; *Berman*, 348 U.S. 26.

[258] *See, e.g.*, *Kelo*, 545 U.S. 469; *Midkiff*, 467 U.S. 229; *Berman*, 348 U.S. 26. Exactions are subject to more stringent review than rational basis scrutiny. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 937 (2003). An exaction is valid if two tests are met: (1) the condition is substantially related to the government's objective, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835–37 (1987); and (2) the nature and scope of the condition are roughly proportional to the impact of the proposed development, Dolan v. City of Tigard, 512 U.S. 374, 388 (1994). Commentators have suggested that a similar test should be applied to eminent domain actions instead of rational basis review. Garnett, *supra*, at 937. This higher scrutiny would require the government to "demonstrate that a given exercise of eminent domain was 'reasonably necessary' to advance, or 'related in nature and extent' to, the public purpose for which the condemnation power was invoked." Garnett, *supra*, at 964; *see also* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). It is also important to note that regulatory takings are reviewed under different tests than eminent domain. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[259] 42 U.S.C. § 2000cc(a)(2)(A)–(B) (2000).

[260] U.S. CONST., art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . .").

[261] U.S. CONST., art. I, § 8, cl. 3 ("The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with Indian tribes . . . .").

[262] 146 CONG. REC. S7774, 7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). This Comment will not review the Spending Clause provision because it is less applicable to the land use provisions of RLUIPA. *See* H.R. REP. NO. 106-219, at 14–15 (1999).

gious goods."[263] This provision appears to capture the application of zoning regulations that effectively prevent a church from expanding its facilities or putting purchased property to religious use.[264] It has also been suggested that the Commerce Clause provision captures eminent domain actions not only because the government will redevelop the existing property, but because the church will also purchase or construct a new church building, which generates commerce.[265]

This Commerce Clause hook is effectively a catch-all provision because it applies to all substantial burdens resulting from the imposition of land use regulations that affect interstate commerce, even burdens resulting from generally applicable laws.[266] As previously discussed, eminent domain is not a land use regulation as defined under RLUIPA, so the Commerce Clause hook does not apply under the current language of RLUIPA. However, if RLUIPA was amended to include eminent domain within the definition of land use regulation, the Commerce Clause hook would encompass eminent domain because eminent domain always involves redevelopment and construction—activities that affect interstate commerce.[267] In effect, this would create a strangle-hold on the government's use of its eminent domain power to acquire religious property. As previously mentioned, eminent domain is subject to rational basis scrutiny.[268] The legislature is accorded deference to determine whether the land is being taken for the public use.[269] The automatic application of strict scrutiny review to every eminent domain action against religious

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[263] 146 CONG. REC. S7774, 7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[264] *See Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 58 (June 16, 1998) (statement of Marc D. Stern, Dir., Legal Dept., American Jewish Cong.), *microformed on* CIS No. 00:H521-10 (Cong. Info. Serv.).

> The *Almanac* also reports that religious congregations had current operating expenditures of 41 billion dollars. Some of the difference is no doubt savings or reserves, but much of the rest is no doubt spent on capital improvements—new buildings and upgrading old ones, a fact which makes *RLPA*'s zoning provisions quite important. To the extent that localities interfere with the ability of religious institutions to build, they reduce the amount of commerce in construction—much of which involves the interstate movement of goods (stained glass, furnishings) and services.

Id. (citing VIRGINIA ANN HODGKINSON, NOT-FOR-PROFIT ALMANAC 1996–1997: DIMENSIONS OF THE INDEPENDENT SECTOR 175 (1996)).

[265] Mathues, *supra* note 195, at 1663.

[266] *See* 42 U.S.C. § 2000cc(a)(2)(B) (2000).

[267] *See* Mathues, *supra* note 195, at 1663.

[268] *See supra* notes 65–67 and accompanying text.

[269] *See supra* notes 65–67 and accompanying text.

property is contrary to precedent and would severely limit an inherent governmental power.[270]

Therefore, Senator Kennedy's proposed amendment to include eminent domain within RLUIPA directly conflicts with the language and the purpose of the statute. Eminent domain is an action taken pursuant to generally applicable law. Eminent domain is not an individualized assessment, because the government does not apply the same level of scrutiny of a parcel of land that is involved in zoning or landmarking. The legislative history reveals that Congress was particularly concerned with zoning issues such as special use permits and variances, which provide a greater opportunity for religious discrimination than does the condemnation of whole tracts of land for the public use. Applying strict scrutiny review to eminent domain actions, whether authorized by the "individualized assessment" basis or the Commerce Clause catch-all provision, is inconsistent with current takings jurisprudence.

B. Religious Institutions Do Not Need RLUIPA to Pursue Challenges to Allegedly Discriminatory Eminent Domain Actions

If RLUIPA is not amended to include eminent domain, religious institutions suspecting that their properties are being unfairly targeted would still have legal recourse. They could bring claims under the Free Exercise Clause of the First Amendment[271] and the Equal Protection Clause of the Fourteenth Amendment,[272] which provide sufficient protection against condemnation actions based on religious animus.

1. Free Exercise Claim

A religious institution whose property is targeted by eminent domain can claim that the condemnation restricted its religious practice.[273] Under prevailing free exercise law, a generally applicable state

[270] *See* McClain, *supra* note 169, at 183–84 ("The power of eminent domain does not depend for its existence on a specific grant in the constitution; it is inherent in sovereignty and exists in a sovereign government without recognition thereof in the constitution."); *see also Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 40, 42 (June 16, 1998) (statement of Marci A. Hamilton, Professor, Law, Benjamin N. Cardozo School of Law, Yeshiva Univ.), *microformed on* CIS No. 00:H521-10 (Cong. Info. Serv.) (arguing that the Religious Liberty Protection Act of 1998, H.R. 4019, another precursor to RLUIPA, would federalize local land use law, one of the last remaining strongholds of local government).

[271] *See infra* Part IV.B.1.

[272] *See infra* Part IV.B.2.

[273] U.S. CONST. amend. I, cl. 1; *see supra* Part III.A.

or local law (outside the land use or institutional contexts set forth under RLUIPA) that produces an incidental burden on religious practice is only subject to rational basis review, while a non-neutral law is subject to strict scrutiny.[274] A non-neutral law is one that specifically targets the religious practice or property because it is religious in nature.[275] While eminent domain is a generally applicable law, inevitably some eminent domain actions will seek to condemn religious property *because* it is religious.[276] A condemnation based on discriminatory motive will be subject to strict scrutiny and will be halted by the courts if the condemnation fails to satisfy the state's compelling interest, or is not narrowly tailored to meet that compelling interest.[277]

If amended to include eminent domain, RLUIPA would subject all eminent domain actions that impose a substantial burden on religious practice to strict scrutiny review under RLUIPA's Commerce Clause provision.[278] As previously discussed, automatic strict scrutiny review is unwarranted in light of current free exercise jurisprudence, eminent domain jurisprudence, and the very nature of eminent domain.[279] A garden-variety free exercise claim is ample protection against a truly discriminatory exercise of eminent domain power and is consistent with the law.

2. Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[280] The Equal Protection Clause protects against purely discriminatory or unjustified distinctions between people and preserves fundamental rights.[281]

A party can challenge the government's use of eminent domain against its private property as contrary to the Equal Protection Clause

[274] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546–47 (1993); Employment Div. v. Smith, 494 U.S. 872, 882–90 (1990).

[275] *See supra* notes 216–25 and accompanying text.

[276] *See supra* Part IV.A.1.

[277] *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. . . . A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."); *see also supra* Part IV.A.1.

[278] *See supra* notes 263–67 and accompanying text.

[279] *See supra* Part IV.A.

[280] U.S. CONST. amend. XIV, § 1.

[281] CHEMERINSKY, *supra* note 29, at 642.

on the ground that the government condemned the property in a discriminatory manner.[282] In *Kessler Institute for Rehabilitation, Inc. v. Mayor & Council of Essex Fells*,[283] Kessler, which runs a rehabilitation facility for the disabled, purchased a tract of land in Essex Fells, New Jersey, for an additional health care and nurse training facility.[284] Kessler approached the Borough Planning Board seeking an amendment to the zoning ordinance, which zoned this tract for educational use.[285] It had previously been owned by the Northeastern Bible College.[286] When Kessler's request was met with public disfavor, the Planning Board decided to condemn the property in order to preserve it as an open space.[287] Kessler challenged the condemnation as a violation of the Equal Protection Clause for discrimination against disabled persons.[288]

The *Kessler* case demonstrates that a party can pursue an equal protection claim for a discriminatory application of eminent domain power.[289] Thus, it follows that a religious institution which perceives its property is being unfairly targeted for condemnation may challenge the action as a violation of the Equal Protection Clause. Religious institutions that have brought RLUIPA claims have also brought equal protection claims.[290] For example, in *St. John's*,[291] the plaintiff religious institution argued that the city discriminated against it be-

[282] *See* Kessler Inst. for Rehab., Inc. v. Mayor & Council of Essex Fells, 876 F. Supp. 641 (D.N.J. 1995).

[283] *Id.*

[284] *Id.* at 647–48.

[285] *Id.* at 648.

[286] *Id.*

[287] *Id.* at 649.

[288] *Kessler*, 876 F. Supp. at 648. At this stage of the proceeding, the court denied defendant's motion to dismiss plaintiffs' discrimination claims under the state and federal constitutions. *Id.* at 665. Kessler also filed a motion to dismiss the borough's condemnation proceeding in state court. Borough of Essex Fells v. Kessler Inst. for Rehab., 673 A.2d 856, 858 (N.J. Super. Ct. Law Div. 1995). The court dismissed the Borough's condemnation complaint on the ground that it was filed in bad faith—the asserted public interest in using the land for a park was mere pretext for opposing Kessler's presence in the community. *Id.* at 861, 863. Despite its successes, Kessler ultimately decided to sell the property to the borough for use as a recreational space. *See* Rachelle Garbarine, *For Abandoned Campuses, Recycled Lives*, N.Y. TIMES, Sept. 8, 1996, § 9, at 1.

[289] *Kessler*, 876 F. Supp. at 662–63.

[290] *See* St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 891–92 (N.D. Ill. 2005); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1218 (C.D. Cal. 2002).

[291] 401 F. Supp. 2d 887; *see supra* Part III.

cause the O'Hare Modernization Act (OMA),[292] which authorized the city to exercise its powers to expand the airport, exempted its cemetery from state religious freedom protections.[293] The plaintiff claimed that all other religious institutions in the state were fully protected; thus, St. John's cemetery was singled out for discriminatory treatment.[294] The court determined that the language of the OMA did not single out the St. John's property, but applied to all properties within the planned development site.[295] The Seventh Circuit affirmed the district court's ruling as to St. John's equal protection claim, emphasizing that there was no evidence that the OMA specifically targeted religious property, especially given the fact that other religious cemeteries were left untouched by the condemnation plan.[296]

The intensity of review afforded a government action challenged as an equal protection violation will vary depending on the type of claim at issue.[297] Generally, government classifications will be valid if rationally related to a legitimate state interest, that is, if the classifications satisfy rational basis scrutiny.[298] Heightened scrutiny is applied only to classifications against suspect classes, such as race, national origin, and gender, and classifications that invade fundamental rights.[299] Freedom of religion is considered a fundamental right.[300]

As is often the case, a religious group will challenge an eminent domain action against its property using an equal protection violation claim based on the same ground as a free exercise or RLUIPA claim—the condemnation interfered with the group's fundamental right to religious exercise.[301] If the free exercise claim is unsuccess-

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[292] O'Hare Modernization Act, 620 ILL. COMP. STAT. ANN. 65-15 (West 1993 & Supp. 2006).

[293] *St. John's*, 401 F. Supp. 2d at 891, 901. The OMA amended the Illinois Religious Freedom Restoration Act to prevent the heightened protections afforded religious groups from interfering with Chicago's authority to relocate cemeteries standing in the way of the proposed runway expansion project. *Id.* at 891.

[294] *Id.* at 901.

[295] *Id.*

[296] St. John's United Church of Christ v. City of Chicago, No. 05-4418, 2007 U.S. App. LEXIS 21914, at *48–50 (7th Cir. Sept. 13, 2007).

[297] CHEMERINSKY, *supra* note 29, at 645.

[298] *See id.* at 645–46.

[299] *See id.* at 645, 649.

[300] *Id.* at 762. Other fundamental rights include family-rearing, procreation, sexual activity, health care decision-making, travel, voting, access to the courts, and certain criminal procedure protections. *Id.*

[301] *See* Wirzburger v. Galvin, 412 F.3d 271, 282 n.5 (1st Cir. 2005). In *Wirzburger*, plaintiffs challenged a Massachusetts constitutional provision prohibiting public financial support for private schools, including religiously affiliated schools. *Id.* at 274. However, plaintiffs were prohibited from amending this constitutional provision by

ful—that is, there is no free exercise problem because the government's use of eminent domain was a neutral action, imposing only an incidental burden—the related equal protection claim will be reviewed under rational basis scrutiny.[302] So, even though the government's interference with the fundamental right to religious exercise is ordinarily accorded strict scrutiny review, the interference need only satisfy rational basis scrutiny when it is the product of a generally applicable law—when it poses no free exercise violation. Thus, when a court finds a challenged condemnation to be a neutral government action under *Smith* and *Lukumi*, the condemnation lacks the discriminatory motivation that would ordinarily subject it to strict scrutiny under the equal protection analysis.

In *St. John's*, the equal protection claim was reviewed under rational basis scrutiny because the plaintiff's free exercise claim failed—the condemnation action was neutral and generally applicable.[303] The Seventh Circuit decision clarified this reasoning: "St. John's first tries to repackage its free exercise argument in equal protection language, by claiming that the [OMA restriction on Illinois religious freedom protections] unduly burdens its fundamental right freely to exercise its religion. We have already rejected the underlying point, however."[304] The court determined that there was no equal protection violation for the same reason that there was no free exercise violation—Chicago did not target St. John's property because it was religious property.[305] It affirmed the lower court's determination that Chicago's plan to condemn the cemetery was rationally related to its interest in expanding the airport.[306]

public initiative because their argument was directed toward religious schools. *Id.* at 274–75. Plaintiffs challenged this prohibition as a violation of the Free Exercise Clause on the ground that the state substantially burdens religious exercise when it creates a political process, but excludes some people from accessing that process. *Id.* at 280. Plaintiffs also argued that the provision restricted their fundamental right to free exercise, and thus violated the Equal Protection Clause. *Id.* at 282.

[302] *See id.* at 282–83 & n.5 (citing Locke v. Davey, 540 U.S. 712, 721 n.3 (2004) ("Because we hold . . . that the program is not a violation of the Free Exercise Clause . . . we apply rational-basis scrutiny to his equal protection claims."). In *Wirzburger*, plaintiffs' free exercise claim failed because the constitutional provision prohibited anyone, not just a religious group, from seeking an amendment initiative. *Id.* at 280. Thus, the court applied rational basis scrutiny to plaintiffs' related equal protection claim. *Id.* at 282–83.

[303] St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 901 (N.D. Ill. 2005) (citing *Wirzburger*, 412 F.3d at 282–83).

[304] St. John's United Church of Christ v. City of Chicago, No. 05-4418, 2007 U.S. App. LEXIS 21914, at *62 (7th Cir. Sept. 13, 2007).

[305] *Id.* at *63–65.

[306] *Id.* at *66.

Rational basis review in the equal protection context was demonstrated in *City of Cleburne v. Cleburne Living Center, Inc.*[307] In *Cleburne*, the city required a special use permit for construction of a group home for mentally retarded individuals in a zone where other buildings, such as dormitories, apartments, and hospitals, did not require a permit.[308] The city's proffered reasons for the special use permit were irrational; for example, the city feared that students in a nearby junior high school would harass the occupants and that the property would be located in a 500-year flood plain.[309] The Supreme Court determined that the special use permit requirement discriminated against the disabled because "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[310] Therefore, Cleburne's classification of disabled persons failed rational basis scrutiny because it was not rationally related to achieving a legitimate government interest.[311]

In *Kessler*, the federal district court found that the plaintiffs made out a claim that the condemnation proceeding by Essex Fells was as irrational as the Cleburne zoning requirement.[312] The Bible college had placed the property at issue on the market for almost two years prior to Kessler's purchase.[313] Essex Fells purchased a small portion of the tract for use as a soccer field but never acquired the remainder.[314] Thus, the only reason to condemn the entire tract (after a two year lull) was the difference between uses—the Bible college versus a facility for disabled persons.[315] The court concluded that negative attitudes toward the disabled, without any justifiable reason for the condemnation, cannot serve as a rational basis for the borough's exercise of eminent domain over the Kessler property.[316]

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[307] 473 U.S. 432 (1985).

[308] *Id.* at 435, 436 & n.3, 437.

[309] *Id.* at 448–50.

[310] *Id.* at 446. The Court also emphasized the holding in *United States Department of Agriculture v. Moreno*, when it said "a bare . . . desire to harm a politically unpopular group" is not a legitimate state interest on which to base a classification between groups of persons. *Id.* at 446–47 (quoting U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[311] *Id.* at 448, 450.

[312] *See* Kessler Inst. for Rehab., Inc. v. Mayor & Council of Essex Fells, 876 F. Supp. 641, 663 (D.N.J. 1995).

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] *Id.*

The application of rational basis scrutiny to an equal protection claim is sufficient protection of religious institutions' property interests. Rational basis scrutiny allows the government to pursue eminent domain actions that serve a legitimate public purpose, but still allows a court to halt a condemnation that targets religious property because of its religious nature. As mentioned above, in *St. John's*, the condemnation of the cemetery to expand the airport withstood rational basis scrutiny because it was the most effective way to create additional runway space;[317] the city did not target the religious property to eliminate it from Chicago.[318] In contrast, a government exercise of its eminent domain power in an effort to rid the community of the presence of a particular religious group is clearly discriminatory and cannot be considered a rational means of furthering a legitimate state interest.[319]

Although an equal protection claim based on the same argument as an unsuccessful free exercise claim receives rational basis scrutiny, "[o]ther types of equal protection claims may have independent force, and must be considered accordingly."[320] There may be situations where a religious group can challenge a condemnation as a violation of the Equal Protection Clause on a theory unrelated to a free exercise argument.[321] A religious group may be able to bring an equal protection claim based on its status as a suspect class.[322] While religious affiliation alone is not suspect, if a religious group can demonstrate that the government treated it differently than another religious group, it may become a suspect class.[323] For example, a Muslim group may challenge an eminent domain action against its religious property by arguing that a Catholic church, similarly situated near the planned site of the public use, was not selected for condemnation. This type of claim will likely be accorded strict scrutiny review. *Discrimination among religions*, especially coupled with indicia of

[317] St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 901 (N.D. Ill. 2005).

[318] *Id.* at 898; *see also* St. John's United Church of Christ v. City of Chicago, No. 05-4418, 2007 U.S. App. LEXIS 21914, at *65–66 (7th Cir. Sept. 13, 2007) ("Anyone or anything standing in the way of the O'Hare project faces the prospect of the City's exercise of its eminent domain power. We have no doubt that the legislature was unmoved by St. John's religious affiliation.").

[319] *See supra* note 310 and accompanying text.

[320] Wirzburger v. Galvin, 412 F.3d 271, 282 n. 5 (1st Cir. 2005).

[321] *Id.* at 282–83 & n.5.

[322] *Id.* (citing Johnson v. Robinson, 415 U.S. 361, 375 n.14 (1974) (considering plaintiff's claim that conscientious objectors are a suspect class)).

[323] *St. John's*, 2007 U.S. App. LEXIS 21914, at *62–63.

racial or national origin bias, suggests that one type of religion is targeted for unfavorable treatment.

Thus, an equal protection claim (the condemnation interfered with the fundamental right to religious exercise) will only receive rational basis scrutiny if the related free exercise claim (the condemnation substantially burdened religious exercise) proves unsuccessful—if the burden or interference with religious exercise results from a neutral, generally applicable law or government action. Rational basis scrutiny, as demonstrated in *Cleburne*, *Kessler*, and *St. John's*, is a sufficient standard of review because it will protect legitimate government actions from overzealous judicial review, but still detect government actions directed toward religious groups because of their religious nature. Parties that can demonstrate suspect class status from evidence of discrimination among religions will deservedly receive heightened protection through strict scrutiny review.

Ultimately, eminent domain actions that are truly discriminatory against religious institutions will be weeded out under traditional free exercise and equal protection challenges. There is no need to encompass eminent domain within the scope of RLUIPA because there is ample alternative legal recourse.

C. Potential Negative Effects of Amending RLUIPA to Cover Eminent Domain

Slippery slope, parade of horribles, snowball effect—whatever you choose to call it—the application of RLUIPA to condemnation of religious property could extend to grossly unreasonable proportions. As religious institutions place the "religious property" label on facilities that function much like private businesses, the government will be substantially limited in its ability to take land for public use.

Many religious institutions offer services in addition to worship, such as homeless shelters and youth groups.[324] However, there is a current trend for many religious groups to put their properties to non-traditional "auxiliary uses"[325] and to grow into "megachurches."[326]

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[324] *See* 146 CONG. REC. S7774, 7777 (daily ed. July 27, 2000) (written statement of Wade Henderson, Executive Dir., Leadership Conference on Civil Rights); *see Religious Liberty Protection Act: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary,* 105th Cong. 202, 204–05 (July 14, 1998) (statement of Rev. Elenora Giddings Ivory, Dir., D.C. Office, Presbyterian Church (USA)), *microformed on* CIS No. 00:H521-10 (Cong. Info. Serv.).

[325] Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 207 (2006).

Churches have offered a wide variety of non-religious services, including restaurants, shopping centers, hospitals, and many other businesses.[327] If these non-traditional services constitute religious exercise, they would be covered by RLUIPA, because RLUIPA simply applies to the imposition of a substantial burden on the "religious exercise of a person, including a religious assembly or institution."[328] "Religious exercise" is defined under RLUIPA as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and includes the "use, building, or conversion of real property for the purpose of religious exercise."[329] The language of RLUIPA does not limit religious activity to worship within a church setting.[330] Although the legislative history suggests the auxiliary uses previously mentioned should not be extended the same protection as traditional uses, Congress failed to make this distinction explicit within the language of the statute.[331]

It follows that if RLUIPA were amended to include eminent domain, religious institutions faced with a condemnation action targeting their properties put to auxiliary uses would be able to challenge the condemnation as a violation of their right to free exercise. Hypothetically, if a church utilized adjacent property to operate a religious book store for its congregation, and the municipality sought to condemn the store property for conversion into a public road, the church could argue that the condemnation would substantially burden its ability to practice religion, which involves reading religious texts conveniently or exclusively available from this church store. This extension of the highest protection to auxiliary uses is excessive and would clearly infringe upon the government's ability to take private property for public use. Several courts that have addressed the application of RLUIPA to auxiliary uses have refused to extend heightened protection this far.[332] However, these cases involved the

[326] Stephen A. Haller, Comment, *On Sacred Ground: Exploring Congress's Attempts to Rein in Discriminatory State Zoning Practices*, 33 SW. U. L. REV. 285, 301 (2004) (citation omitted).

[327] Galvan, *supra* note 325, at 207–08. ("The nation's second largest church (with 30,000 congregants) has even begun developing both a 1200-home neighborhood and a 280-unit gated retirement community.").

[328] 42 U.S.C. § 2000cc(a)(1) (2000); *see* Galvan, *supra* note 325, at 208–09.

[329] § 2000cc-5(7)(A)–(B).

[330] *Id.*

[331] Galvan, *supra* note 325, at 223–24 (citing 146 CONG. REC. S7774, 7774, 7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy)).

[332] *Id.* at 228–30 (citing Westchester Day Sch. v. Village of Mamaroneck, 386 F.3d 183, 185–190 (2d Cir. 2004); Cathedral Church of the Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 380, 380–81, 390–91 (E.D.N.Y. 2005); Castle Hills First

application of zoning ordinances to religious property.[333] Given the hostile climate to eminent domain post-*Kelo*, it is not far-fetched to anticipate a court prohibiting a condemnation action against an auxiliary use.

If RLUIPA were amended to clearly include eminent domain, the unnecessarily heightened protection could extend even further than religious institutions' auxiliary uses. In its amicus brief in support of the homeowners in *Kelo*, the Becket Fund expressed concern that the expansion of the public use requirement to encompass economic development would allow municipalities to condemn religious property more frequently than other types of property, because religious institutions are tax exempt.[334] The Becket Fund also expressed the same concern for "other charitable organizations" that do not generate tax revenue.[335] It cited several examples of organizations faced with condemnation for replacement with stores and other businesses: a Moose Lodge, an American Legion hall, a homeless shelter, and a Goodwill thrift store.[336] The application of RLUIPA to eminent domain, coupled with the Becket Fund's expression of concern for the vulnerability of non-religious charitable organizations, may encourage state legislatures to devise similar heightened protections for non-revenue or low-revenue generating establishments. This would severely diminish the government's ability to exercise its vital takings power. It would also leave private homes and businesses to face the brunt of condemnation proceedings as government entities try their best to manipulate public use plans away from religious and other charitable organizations.[337] Worse yet, it could totally discourage government entities from pursuing necessary public use projects that involve condemnation of such organizations because they would want to avoid expensive and lengthy litigation.[338] The inclu-

Baptist Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004 WL 546792, at *11–13 (W.D. Tex. Mar. 17, 2004)).

[333] Galvan, *supra* note 325, at 228–30.

[334] Becket Fund Brief, *supra* note 68, at 11.

[335] *Id.*

[336] *Id.*

[337] In fact, such discrepancy may raise challenges under the Establishment Clause and create public resentment for religious groups whom they perceive to be receiving favorable treatment. *See* Graff, *supra* note 56, at 521–22; Hamilton, *supra* note 199.

[338] *See* Galvan, *supra* note 325, at 231 ("[L]ocal governments worry about the time, expense, and social cost of litigating against a well-funded or well-respected religious institution. . . . [L]ocal governments have shown a tendency to acquiesce to the threat of a RLUIPA-based challenge rather than take on the religious institution that issued it."). Although Galvan's discussion of municipalities' acquiescence in the face

sion of eminent domain under RLUIPA would be unnecessarily expansive, tying the government's hands and ultimately delaying or preventing legitimate public projects.

V. CONCLUSION

In its current form, RLUIPA does not apply to eminent domain. An amendment proposed by Senator Kennedy would include eminent domain within the definition of "land use regulation." However, this is an unnecessary and potentially detrimental enlargement of an already constitutionally questionable, yet powerful, law. Eminent domain is not the type of government action that Congress intended to police under RLUIPA; it does not involve the same individualized scrutiny of property as is involved in zoning and landmarking laws. It is a more generally applicable, neutral power that is adequately policed under current law without RLUIPA. If an application of eminent domain discriminates against a religious institution, it will be prevented under existing free exercise and equal protection law. If amended, RLUIPA would hold every eminent domain action that imposed a burden on a church, synagogue, mosque, or temple under a microscope. When does eminent domain not impose a burden on a property-holder? By subjecting condemnations of religious property to the highest scrutiny, RLUIPA would limit deference to the government's decision to invoke the power of eminent domain, an outcome contrary to precedent. Given the increasing size of churches and their auxiliary uses, along with the rallying cry for other charitable organizations to oppose takings, the government may adopt a hands-off approach to religious property rather than deal with costly and troublesome litigation, with the resulting delay or outright abandonment of beneficial public use projects.

It is undeniable that religious institutions play an important role in community life. It is also unfortunate that many religious institutions will experience harmful discriminatory treatment by government officials applying eminent domain to essentially remove unpopular religious believers from the neighborhood or limit their activities. Both the free exercise right and the takings power are contained in the Bill of Rights. While religious liberty is one of the most vital rights for all Americans—indeed the cornerstone of any truly free society—it cannot be used to weaken the government's power to take private property for the public use. RLUIPA cannot erode the

of RLUIPA claims focuses on zoning issues, the same result can be hypothesized in the condemnation context.

eminent domain power in order to serve the interests of the few while harming the interests of the public at large. Current free exercise, equal protection, and takings jurisprudence is sufficient to balance the needs of religious institutions with the interests of the government.

APPENDIX

Protecting Religious Freedom After Boerne v. Flores*: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 3–89 (July 14, 1997) (statements of Charles W. Colson, President, Prison Fellowship Ministries; Thomas S. Oliver, Special Counsel, Religious and Civil Liberties, Nat'l Council of the Churches of Christ in the U.S.A.; Marc D. Stern, Legal Dir., American Jewish Cong.; Mark E. Chopko, Gen. Counsel, U.S. Catholic Conference; Douglas Laycock, Assoc. Dean, Research, School of Law, Univ. of Tex.; Jeffrey Sutton, Solicitor, Ohio; Thomas C. Berg, Assoc. Professor, Law, Cumberland Law School, Samford Univ.), *microformed on* CIS No. 98:H521-24 (Cong. Info. Serv.).

Protecting Religious Freedom After Boerne v. Flores *(Part II): Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 3–66 (Feb. 26, 1998) (statements of Zari Wigfall; Rev. Richard Hamlin, Pastor, Evangelical Reformed Church; Rev. Patrick Wilson, III, Minister, Trinity Baptist Church of Richmond, Va., also representing Cong. of Black Churches, Richmond Affiliate; Rev. John W. Wimberly, Jr., Pastor, Western Presbyterian Church; Evelyn M. Smith, landlord; Jacob Mesiti; Suzanne Brown, mother of school children; Rabbi Chaim Rubin, Spiritual Leader, Congregation Etz Chaim; Richard Robb; Rev. E. Richard Steel, Pastor, Cedar Bayou Baptist Church; Rev. Donald W. Brooks, Dir. Prison Ministry, Catholic Dioceses of Okla.), *microformed on* CIS No. 99:H521-21 (Cong. Info. Serv.).

Protecting Religious Freedom After Boerne v. Flores *(Part III): Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary*, 105th Cong. 3–94 (Mar. 26, 1998) (statements of Marc D. Stern, Legal Dir., American Jewish Cong.; Mark E. Chopko, Gen. Counsel, U.S. Catholic Conference; Imad A. Ahmad, American Muslim Council; Steven T. McFarland, Dir., Ctr. for Law and Religious Freedom, Christian Legal Soc'y; Isaac M. Jaroslawicz, Dir., Legal Affairs, Aleph Inst.; Barry A. Fisher, Att'y; Von G. Keetch, Counsel, Church of Jesus Christ of Latter Day Saints), *microformed on* CIS No. 99:H521-34 (Cong. Info. Serv.).

Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary, 105th Cong. 6–242 (June 16, July 14, 1998) (statements of Douglas Laycock, Prof., Constitutional Law, Univ. of Tex., Austin; Thomas C. Berg, Prof., Cumberland Law School, Samford Univ.; Christopher L. Eisgruber, Prof., Law, New York Univ. School of Law; Marci A. Hamilton, Prof., Law, Benjamin N. Cardozo School of Law, Yeshiva Univ.; Gene C. Schaerr, Att'y; Marc D. Stern, Dir. Legal Dept., American Jewish Cong.; John W. Mauck, Att'y; W. Cole Durham, Jr.,

Prof., Law School, Brigham Young Univ.; Patrick Nolan, President, Justice Fellowship; William Dodson, Dir., Pub. Policy, Southern Baptist Convention; Michael P. Farris, President, Home School Legal Def. Ass'n; Colby M. May, Senior Counsel, Office of Govt. Affairs, American Ctr. for Law and Justice; Steven T. McFarland, Dir., Ctr. for Law and Religious Freedom, Christian Legal Society; Bruce D. Shoulson, Att'y; Rev. Elenora G. Ivory, Dir., D.C. Office, Presbyterian Church USA; Steven K. Green, Legal Dir., Americans United for Separation of Church and State; Jamin B. Raskin, Prof., Law, Washington Coll. of Law, American Univ.; Douglas Laycock), *microformed on* CIS No. 00:H521-10 (Cong. Info. Serv.).

Religious Liberty Protection Act of 1998: Hearings Before the S. Comm. on the Judiciary, 105th Cong. 112–274 (June 23, 1998) (statements of Dallin H. Oaks, Member, Church of Jesus Christ of Latter Day Saints; Richard D. Land, President, Ethics and Religious Liberty Comm'n, Southern Baptist Convention; Rabbi David Zwiebel, Dir., Govt. Affairs, Agudath Israel of America; Elliot M. Mincberg, Vice President, People for the American Way; Douglas Laycock, Prof., Univ. of Tex., Austin; Marci A. Hamilton, Prof., Benjamin N. Cardozo Sch. of Law, Yeshiva Univ.; Christopher L. Eisgruber, Prof., Law, New York Univ. Sch. of Law; Michael W. McConnell, Prof., Constitutional Law, Univ. of Utah), *microformed on* CIS No. 99:S521-54 (Cong. Info. Serv.).

Religious Liberty Protection Act of 1999: Hearings Before the H. Comm. on the Judiciary, 106th Cong. 6–164 (May 12, 1999) (statements of Richard D. Land, President, Ethics and Religious Liberty Comm., Southern Baptist Convention; Lawrence G. Sager, Prof., Law, New York Univ. School of Law; Von G. Keetch, Counsel, Church of Jesus Christ of Latter-Day Saints; Brent J. Walker, Gen. Counsel, Baptist Joint Comm. on Pub. Affairs; Clarence E. Hodges, Vice President, Seventh-Day Adventist Church of N. America; Christopher E. Anders, Legislative Counsel, ACLU; Rabbi David Saperstein, Dir. and Counsel, Religious Action Ctr. of Reform Judaism; Chai Feldblum, Dir., Fed. Legislation Clinic, Georgetown Univ. Law Ctr.; Douglas Laycock, Assoc. Dean, Research, Univ. of Tex. Law Sch.; Oliver S. Thomas, Special Counsel, Religious and Civil Liberties, Nat'l Council of the Churches of Christ in the U.S.A.; Rev. C.J. Malloy, Jr., Pastor, First Baptist Church of Georgetown, D.C.; Bradley Jacob, Provost, Patrick Henry College, on behalf of Michael P. Farris, Home School Legal Defense Ass'n; Marci Hamilton, Prof., Benjamin N. Cardozo Sch. of Law, Yeshiva Univ.; Steven McFarland, Ctr. for Law and Religious Freedom, Christian Legal Soc'y), *microformed on* CIS No. 00:H521-100 (Cong. Info. Serv.).

Religious Liberty: Hearings Before the S. Comm. on the Judiciary, 106th Cong. 4–63 (June 23, 1999) (statements of Steven T. McFarland, Dir., Ctr. for Law and Religious Freedom, Christian Legal Soc'y; Nathan J. Diament, Dir., Institute for Pub. Affairs, Union of Orthodox Jewish Congregations; Manuel A. Miranda, President, Cardinal Newman Soc'y for Catholic Higher Education; Eliot M. Mincberg, Vice President and Legal Dir., People for the American Way; Michael P. Farris, President, Home School Legal Defense Ass'n; Christopher E. Anders, Legislative Counsel, ACLU; Scott Hochburg, State Representative, Tex.); 72–172 (Sept. 9, 1999) (testimony of Douglas

Laycock, Prof., Univ. of Tex. Law Sch.; Chai R. Feldblum, Professor, Law, Georgetown Univ. Law Ctr.; Jay S. Bybee, Professor, Law, William S. Boyd School of Law, Univ. of Nev., Las Vegas; Gene C. Schaerr, Att'y), *microformed on* CIS No. 01:S52102 (Cong. Info. Serv.).

Related Hearings

Congress' Constitutional Role in Protecting Religious Liberty: Hearings Before the S. Comm. on the Judiciary, 105th Cong. 1–88, (Oct. 1, 1997) (statements of Erwin Chemerinsky, Sydney M. Irmas Professor of Law and Political Science, Univ. of Southern California, Los Angeles, Cal.; Daniel O. Conkle, Professor of Law and Nelson Poynter Senior Scholar, Ind. Univ., Bloomington, Ind.; Douglas Laycock, Alice McKean Young Regents Chair in Law, Univ. of Tex., Austin; Michael Stokes Paulsen, Assoc. Professor of Law, Univ. of Minn., Minneapolis, Minn.), *microformed on* CIS No. 98:S521-24 (Cong. Info. Serv.).

Congress, the Court, and the Constitution: Hearings Before the Subcomm. on the Constitution, H. Comm. on the Judiciary, 105th Cong. 1–149 (Jan. 29, 1998) (statements of Hon. Tom Campbell, Rep. from Cal.; Robert L. Clinton, Assoc. Professor of Political Science, Southern Ill. Univ.; David P. Currie, Edward H. Levi Distinguished Service Professor, Univ. of Chicago School of Law; Neal Devins, Goodrich Professor of Law, College of William and Mary; Louis Fisher, Senior Specialist in Separation of Powers, Cong. Research Service; Matthew J. Franck, Chairman and Assoc. Professor of Political Science, Radford Univ.; Hon. Barney Frank, Rep. from Mass.; Hon. John N. Hostettler, Rep. from Ind.; Neil Kinkopf, Visiting Assistant Professor of Law, Case Western Reserve Univ. Law School; Hon. Ron Lewis, Rep. from Ky.; Nadine Strossen, President, ACLU) *microformed on* CIS No. 99:H521-66 (Cong. Info. Serv.)