

## RLUIPA AS A POSSIBLE SHIELD FROM THE GOVERNMENT TAKING OF RELIGIOUS PROPERTY

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### I. INTRODUCTION

Two hundred thirty years ago, one commentator writing on burial rites observed that “there is perhaps nothing else so distinctive of the condition and character of a people as the method in which they treat their dead.”<sup>1</sup> Today, this prudent revelation is being put to the test. The preservation of cemeteries and other sacred burial sites is often at odds with government ideals—namely the condemnation of said land for public use under the Takings Clause of the Fifth Amendment.<sup>2</sup> Despite their unique purpose in the community, cemeteries and other land used by religious institutions are just as susceptible to the government’s eminent domain power as are all other forms of land. With the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA, or “the Act”) comes the hope of a statutory shield against condemnation proceedings that affect religious burial sites and other religious uses of property.<sup>3</sup> As recent case law suggests, however, cemetery protection from a government’s power of eminent domain under RLUIPA is tenuous and problematic.<sup>4</sup>

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<sup>1</sup> WILLIAM TEGG, *THE LAST ACT: BEING THE FUNERAL RITES OF NATIONS AND INDIVIDUALS* 9 (William Tegg ed., 1876).

<sup>2</sup> U.S. CONST. amend. V.

<sup>3</sup> Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to -5 (2000). This comment focuses on the land use provisions of the Act, not those pertaining to institutionalized persons.

<sup>4</sup> Compare *St. John’s United Church v. City of Chicago*, 401 F. Supp. 2d 887, 899 (N.D. Ill. 2005), *aff’d*, 2007 U.S. App. LEXIS 21914 (7th Cir. Sept. 13, 2007) (declining to apply RLUIPA to municipal eminent domain actions), and *Temple Faith Church v. Town of Brighton*, 405 F. Supp. 2d 250, 254–55 (W.D.N.Y. 2005) (same), with *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d

Congress enacted RLUIPA to give additional protection to private land used primarily for religious exercise, with the hopes of preventing government actions that impose a substantial burden on the free exercise of religion.<sup>5</sup> However, the Act was narrowly tailored to govern only government actions that constitute “land use regulation[s].”<sup>6</sup> Whether an eminent domain proceeding is a land use regulation under RLUIPA is the central question in the debate. An affirmative answer to that question could be the decisive factor guaranteeing additional protection for religious institutions and their chosen land uses. Conversely, if an eminent domain proceeding is not considered a land use regulation within the scope of RLUIPA, then religious institutions and cemetery preservationists will have little success using RLUIPA as a defense against the condemnation of their sacred land. This Comment contends that eminent domain proceedings are not per se land use regulations within the scope of RLUIPA, but that an eminent domain proceeding might fall under RLUIPA’s umbrella if undertaken as part of a plan to ultimately execute a land use regulation.

Part II traces the history of the Act and the current district court debate over RLUIPA’s application to condemnation proceedings. Part III analyzes whether an eminent domain proceeding is a land use regulation within the scope of RLUIPA and evaluates the arguments on each side of that debate. Part IV explores the consequences of declaring that eminent domain is not a recognized land use regulation protected under RLUIPA. Finally, Part V considers the future of the Act’s relationship with eminent domain and the current push to amending the Act to include eminent domain as a per se land use regulation.

## II. RLUIPA AND *ST. JOHN’S UNITED CHURCH OF CHRIST*

A look at the controversial history of RLUIPA will provide the foundation for the current federal court debate over its application to condemnation proceedings, as well as a useful backdrop for exploring the issue. The leading case in this debate is *St. John’s United*

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1203, 1218 (C.D. Cal. 2002) (applying RLUIPA to municipal eminent domain action in grant of preliminary injunction).

<sup>5</sup> 42 U.S.C. § 2000cc(a)(1). See generally 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statements of Sens. Hatch, Kennedy, and Reid).

<sup>6</sup> § 2000cc(a)(1). See also 146 CONG. REC. S7779 (daily ed. July 27, 2000) (referring to RLUIPA as “a narrowly-tailored religious freedom protection measure”).

*Church of Christ v. City of Chicago*<sup>7</sup>—decided in the Northern District of Illinois in the wake of *Cottonwood Christian Center v. Cypress Development Agency*.<sup>8</sup> With Supreme Court jurisprudence nonexistent and district court analysis scarce, the discussion is just beginning.

A. *Religious Land Use and Institutionalized Persons Act*

RLUIPA is the product of a ten-year tug-of-war between the Supreme Court of the United States and Congress regarding the appropriate standard of review for government actions—specifically land use regulations—that affect religious actors.<sup>9</sup> The debate began with the Supreme Court’s decision in *Employment Division v. Smith*<sup>10</sup> that religious actors are not automatically exempt from compliance with “neutral, generally applicable regulatory law[s].”<sup>11</sup> The *Smith* Court proclaimed that it would no longer apply the *Sherbert v. Verner* balancing test,<sup>12</sup> which was used since 1963 and allowed the government to substantially burden religious exercise if such actions were “justified by a compelling governmental interest.”<sup>13</sup>

In direct response to the Supreme Court’s ruling in *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).<sup>14</sup> The purpose of RFRA was to reinstate the *Sherbert* compelling interest test in place of the neutrality test prescribed in *Smith*.<sup>15</sup> The risk inherent in the regulation of religious land uses was that by “controlling where churches may locate, governments control the kind of mission they may pursue, and so risk forcing churches to conform to the community’s vision of the ‘proper’ church.”<sup>16</sup> While the legislature’s concerns were well substantiated,<sup>17</sup> the Supreme Court

<sup>7</sup> 401 F. Supp. 2d 887.

<sup>8</sup> 218 F. Supp. 2d 1203.

<sup>9</sup> *St. John’s*, 401 F. Supp. 2d at 897.

<sup>10</sup> 494 U.S. 872 (1990).

<sup>11</sup> *Id.* at 880–81.

<sup>12</sup> 374 U.S. 398, 403 (1963).

<sup>13</sup> *Smith*, 494 U.S. at 883.

<sup>14</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to -5 (2000). In RFRA, Congress found that the *Smith* decision had “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”—a clear indication that the legislation was intended as a direct response to *Smith*. *Id.* § 2000bb(a)(4); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (“Congress enacted RFRA in direct response to . . . *Smith* . . .”).

<sup>15</sup> § 2000bb(b)(1).

<sup>16</sup> 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, 941 (2001).

<sup>17</sup> *See* Angela C. Carmella & Eugene Gressman, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 67 (1996) (“Seldom has Congress been inspired to

reacted in opposition to Congress. Five years later, the Supreme Court ruled in *City of Boerne v. Flores*<sup>18</sup> that RFRA was unconstitutional because it exceeded Congress's Enforcement Clause power under the Fourteenth Amendment.<sup>19</sup> Writing for the majority, Justice Kennedy reasoned that the Act's widespread coverage of all federal, state, and local government actions—regardless of the level of religious bigotry motivating such actions—in conjunction with RFRA's compelling interest test resulted in “RFRA's impact [being] disproportionate to the constitutional harms it was designed to prevent.”<sup>20</sup> This disproportionality between the goals of the statute and the means used to reach those goals indicated that RFRA was not enacted as a remedial or preventative measure,<sup>21</sup> but as a “substantive change in constitutional protections.”<sup>22</sup> Such action by Congress challenged vital separation of powers principles. Never before had Congress enacted a statute imposing on the judiciary an obligation to discount a Supreme Court decision interpreting a constitutional provision and replacing it instead with what Congress deemed a “better interpretive approach.”<sup>23</sup> Dating back to *Marbury v. Madison*, it has been “emphatically the province and duty of the judicial department to say what the law is.”<sup>24</sup> As a consequence, Congress lacked the power to enact RFRA—legislation that invaded the judiciary's jurisdiction and role in the United States government.<sup>25</sup> Thus, the Supreme Court struck down RFRA in 1997.<sup>26</sup>

After the failure of RFRA, Congress decided to forgo the *Smith* neutrality approach, and responded by enacting RLUIPA.<sup>27</sup> Aware of its powers to enact legislation “to enforce and protect some specified

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express such quick indignation and displeasure with a constitutional decision of the Supreme Court or been so eager to overturn the substance of such a decision.”).

<sup>18</sup> 521 U.S. 507.

<sup>19</sup> *Id.* at 536; see also Storzer & Picarello, *supra* note 16, at 942.

<sup>20</sup> *City of Boerne*, 521 U.S. at 536.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Carmella & Gressman, *supra* note 17.

<sup>24</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>25</sup> *City of Boerne*, 521 U.S. at 536.

<sup>26</sup> *Id.* Justice Stevens, concurring, argued that the Act provided religious institutions with a weapon against the government that was not available to non-religious institutions and therefore was in violation of the Establishment Clause. *Id.* at 537 (Stevens, J., concurring); see also Storzer & Picarello, *supra* note 16, at 942.

<sup>27</sup> Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to -5 (2000).

aspects of religious exercise,”<sup>28</sup> Congress deliberately created RLUIPA to be more narrow than RFRA. RLUIPA applies only to governmental burdens that are imposed by or in the implementation of a *land use regulation*,<sup>29</sup> which the statute defines 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), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.<sup>30</sup>

RLUIPA mandates that:

[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—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.<sup>31</sup>

RLUIPA was significantly more circumscribed than RFRA. Congress determined that there was a specific need for legislation protecting land used for religious purposes.<sup>32</sup> Members of Congress maintained that a religious group’s right to buy, rent, or build on land is an “indispensable adjunct” of the First Amendment right to gather for religious exercise and worship.<sup>33</sup> RLUIPA was enacted following “three years of hearings . . . that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation.”<sup>34</sup> The legislative hearing record accumulated considerable evidence of widespread violations of the right to assem-

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<sup>28</sup> Carmella & Gressman, *supra* note 17, at 141; 146 CONG. REC. S7774, S7777 (daily ed. July 27, 2000) (statement of Sen. Kennedy).

<sup>29</sup> *St. John’s United Church of Christ v. City of Chicago*, 401 F. Supp. 2d 887, 897 (N.D. Ill. 2005).

<sup>30</sup> 42 U.S.C. § 2000cc-5(5). Professor Carmella refers to land use regulations as including: historic preservation, zoning and planning, environmental protection, urban renewal, and nondiscrimination in housing. Angela C. Carmella, *Land Use Regulation of Churches*, in RELIGIOUS ORGANIZATIONS IN THE UNITED STATES: A STUDY OF IDENTITY, LIBERTY, AND THE LAW 565, 565 (James A. Serritella ed., 2006).

<sup>31</sup> *Id.* § 2000cc(a)(1)(A)–(B).

<sup>32</sup> *See infra* Part II.C.

<sup>33</sup> 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

<sup>34</sup> *Id.*

ble for worship.<sup>35</sup> Religious institutions “are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.”<sup>36</sup> To combat this problem and support Congress’s objectives, RLUIPA specifies that it is to be “construed in favor of a broad protection of religious exercise.”<sup>37</sup>

Professor Angela Carmella posits that the extent to which a government will accommodate religious land use depends on “whether equality or liberty is considered the paramount value in contemporary constitutional interpretation.”<sup>38</sup> A high value on equality would protect religious institutions from discriminatory treatment, but place religious organizations on the same terms as their secular counterparts.<sup>39</sup> Conversely, a high value on liberty would treat religious organizations more preferably than their secular counterparts due to the unique place religious institutions hold in society.<sup>40</sup> Professor Carmella argues that RLUIPA incorporates both rationales through a complementary approach: “[t]he law embraces a liberty rationale when it sets out to protect religious land use from burdensome zoning and historic preservation regulation that lack compelling justification. It adopts an equality rationale when it sets a protective floor, preventing government discrimination towards and exclusion of religious land use.”<sup>41</sup> RLUIPA, devised in this fashion, signals a new commitment to the elimination of burdens that inhibit religious freedom.<sup>42</sup>

If faced with a constitutional challenge to RLUIPA, it appears highly likely that the Supreme Court will find RLUIPA to be a constitutionally valid exercise of congressional power.<sup>43</sup> Relying upon its authority under the Fourteenth Amendment, the Commerce Clause, and the Spending Clause, Congress “made the law extremely specific

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-3(g) (2000).

<sup>38</sup> Carmella, *supra* note 30, at 565 (footnote omitted).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 565–66.

<sup>41</sup> *Id.* at 566.

<sup>42</sup> *See id.* at 571.

<sup>43</sup> *See Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 315–16 (D. Mass. 2006) (observing that “nearly every court which has considered the issue” has found RLUIPA’s constraints on land use regulations constitutional).

to ensure the law was narrowly tailored”<sup>44</sup> so that it would pass constitutional muster and not be invalidated by the Supreme Court as its predecessor—RFRA—was earlier in the decade.<sup>45</sup> RLUIPA was specifically designed to be narrower than RFRA, although it offers similar protection for religious institutions from unwarranted governmental intrusions.<sup>46</sup> Unlike RFRA, RLUIPA “codified existing free exercise, Establishment Clause, and equal protection rights . . . [and] did not attempt any substantive change in constitutional protection.”<sup>47</sup> Accordingly, nearly every court to address RLUIPA has found it constitutional.<sup>48</sup> In August 2006, the United States Court of Appeals for the Ninth Circuit affirmed the constitutionality of RLUIPA in *Elsinore Christian Center. v. City of Lake Elsinore*.<sup>49</sup> The Ninth Circuit reversed the district court decision, which was possibly the only decision ever to find the Act’s land use provisions unconstitutional.<sup>50</sup>

*B. St. John’s United Church of Christ v. City of Chicago*<sup>51</sup>

Even if RLUIPA is constitutional, however, the question of whether its reach extends to exercises of eminent domain remains ambiguous. In one of the first cases to consider the question, the United States District Court for the Northern District of Illinois held in *St. John’s United Church of Christ v. City of Chicago* that the city’s emi-

<sup>44</sup> Kevin M. Powers, Note, *The Sword and the Shield: RLUIPA and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB. INT. L.J. 145, 155 (2004).

<sup>45</sup> *Id.* at 155–56.

<sup>46</sup> *Id.*

<sup>47</sup> DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION 366 (2d ed. 2004).

<sup>48</sup> *Mintz*, 424 F. Supp. 2d at 315–16 (collecting cases discussing the constitutionality of RLUIPA’s land use provisions); *see* *Guru Nanak Sikh Soc’y v. County of Sutter*, 456 F.3d 978, 995 (9th Cir. 2006) (holding that RLUIPA was “constitutionally enacted . . . pursuant to [Congress’s] enforcement power within Section Five of the Fourteenth Amendment”); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (noting that the Ninth Circuit had previously held RLUIPA to be a “constitutional exercise of Congress’s spending power”); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1237–43 (11th Cir. 2004) (holding that RLUIPA is a “proper exercise of Congress’s . . . powers”); *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002) (holding RLUIPA’s land use provisions constitutional as applied to states and municipalities); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (opining in dicta that RLUIPA “avoided the flaws of its predecessor RFRA, and [is] within Congress’s constitutional authority”).

<sup>49</sup> *Elsinore Christian Ctr. v. City of Lake Elsinore*, 197 F. App’x 718, 719 (9th Cir. 2006).

<sup>50</sup> *See Mintz*, 424 F. Supp. 2d at 316. This Comment specifically addresses the Act’s land use provisions and not the provisions pertaining to institutionalized persons.

<sup>51</sup> 401 F. Supp. 2d 887 (N.D. Ill. 2005).

ment domain proceedings were outside of the umbrella of RLUIPA protection.<sup>52</sup> When the City of Chicago exercised its power of eminent domain in an effort to acquire land for the expansion of O'Hare International Airport, land used by St. Johannes Cemetery and Rest Haven Cemetery was included in the acquisition.<sup>53</sup> Holding that the City of Chicago's authority to acquire land pursuant to its power of eminent domain did not constitute a land use regulation under RLUIPA, the court concluded that the plaintiffs<sup>54</sup> had no basis for a claim under the federal statute and thus dismissed the RLUIPA claim.<sup>55</sup> In concluding that RLUIPA did not apply to the eminent domain proceedings alleged in this case, the court reasoned that the Act applies only to governmental actions that "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person."<sup>56</sup> The court did not find any statutory support for the proposition that a taking of land pursuant to a government's power of eminent domain directly constituted a land use regulation under RLUIPA, and therefore, statutory protection of the land used by the religious institution was not warranted.<sup>57</sup>

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<sup>52</sup> *Id.* at 900.

<sup>53</sup> *Id.* at 890–91. While the acquisition was pending, the City also passed the O'Hare Modernization Act (OMA) to ward off opposition to the acquisition. *Id.* at 891. As amended by the OMA, the Illinois Religious Freedom Restoration Act stated that "[n]othing in this act limits the authority of the City of Chicago to exercise its powers . . . for the purposes of relocation of cemeteries or the graves located therein." *Id.* at 891 (internal citations omitted). The OMA was unmistakably intended to silence religious objections to the taking. *See id.*

<sup>54</sup> The Village, the Church, and the Cemeteries were named as plaintiffs. *Id.* at 891.

<sup>55</sup> *Id.* at 901. The remaining constitutional claims against the City of Chicago, the FAA, and the State of Illinois alleging violations of the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment eventually failed as well. *Id.* In regard to the Free Exercise claim, the law treats all land in the path of expansion the same and the city does not specifically discriminate against religion in its acquisition of land. *Id.* at 898. Thus, the court need only apply a rational basis test. *Id.* Chicago's actions "are rationally related to the legitimate government objective of expanding and improving O'Hare," thus the Free Exercise claim fails. *Id.* In regard to the Equal Protection claim, "where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only a rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts." *Id.* (quoting *Wirzburger v. Galvin*, 412 F.3d 271, 282–83 (1st Cir. 2005)). Therefore, this claim fails as well. *See id.* at 898–901.

<sup>56</sup> *Id.* at 887; Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000).

<sup>57</sup> *St. John's*, 401 F. Supp. 2d at 887.



While the majority conclusion in *St. John's* gives credence to the argument that eminent domain is not a land use regulation under RLUIPA, the primary case cited by the plaintiffs in *St. John's*—and most often proffered by those who contend that RLUIPA *does* apply to eminent domain proceedings—is *Cottonwood Christian Center v. Cypress Redevelopment Agency*.<sup>58</sup> In that case, the Cottonwood Christian Center was denied the necessary permit for the expansion of its church facilities.<sup>59</sup> Subsequent to the denial of the permit, the city made plans to take the Cottonwood property by its power of eminent domain and turn it over to a private developer.<sup>60</sup> In an action brought by the Church against the City of Cypress and the Cypress Redevelopment Agency under RLUIPA, the United States District Court for the Central District of California granted the plaintiffs a preliminary injunction halting the eminent domain actions.<sup>61</sup> The *Cottonwood* court rejected the defendants' claim that RLUIPA does not apply to the government's condemnation action because it is not a land use regulation, as set forth under the Act, and instead applied RLUIPA's strict scrutiny analysis to review the city's actions.<sup>62</sup>

In *St. John's*, the court distinguished the reasoning of the *Cottonwood* court and rejected the plaintiffs' dependence on the *Cottonwood* case.<sup>63</sup> While the “[p]laintiffs contend[ed] that *Cottonwood* stands for the proposition that all exercises of eminent domain authority are subject to RLUIPA . . . [the c]ourt [wa]s not willing to take such an expansive view, nor [did] it believe that *Cottonwood* stands for such a sweeping proposition.”<sup>64</sup> The *St. John's* court asserted that *Cottonwood* could only be read to suggest that RLUIPA applies to “specific eminent domain actions where the condemnation proceeding is intertwined with other actions by the city involving zoning regulations.”<sup>65</sup>

In addition to finding the reasoning of the *Cottonwood* court unpersuasive, the *St. John's* court aptly noted that there is an attenuated

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<sup>58</sup> *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

<sup>59</sup> *Id.* at 1214; *cf. St. John's*, 401 F. Supp. 2d at 900 (carefully noting the difference in the governmental use of power exercised directly against the property in *Cottonwood* (a permit denial of the facility expansion) as compared to the governmental use of power in *St. John's* (eminent domain proceeding directly against the religious property)).

<sup>60</sup> *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1214–15.

<sup>61</sup> *Id.* at 1209.

<sup>62</sup> *Id.* at 1221–22.

<sup>63</sup> *St. John's*, 401 F. Supp. 2d at 899–900.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 900.

relationship between eminent domain and zoning.<sup>66</sup> The court rejected the plaintiffs' argument that the City's actions "can be linked to zoning regulations because the City's proposed actions 'impose severe restrictions on St. John's use or development of St. Johannes[ ]' . . . [and] are attempts to regulate the land and so are an act of zoning."<sup>67</sup> The court emphasized that the acquisition was not a restriction on the use of the land and to call it so would not only be a major understatement, but an incorrect classification of the government's eminent domain powers.<sup>68</sup> Although land use regulations limit an owner's use of property and condemnations are the ultimate limitation on an owner's use of property, the court clarified that this similarity does not mean that a taking automatically constitutes a land use regulation under RLUIPA.<sup>69</sup> In reaching its holding, the court declared that it was "no[t] persuaded that it should construe the concept of zoning so broadly that any acquisition of land by the City pursuant to eminent domain proceedings is an act of zoning."<sup>70</sup> The court highlighted the fact that a material distinction exists between land use regulations and condemnation proceedings, and that Congress's purposeful exclusion of eminent domain from its definition of a land use regulation under the Act is of great consequence in this ongoing debate.<sup>71</sup>

This issue is hotly contested in the lower courts and has yet to reach the Supreme Court of the United States. An evaluation of the legislative history of RLUIPA, however, provides some guidance as to the congressional purpose behind the Act and the intended scope of the Act.

### C. *RLUIPA's Legislative History Examined*

While parties on both sides of the debate use legislative history to bolster their position, the legislative evidence more strongly supports the argument that a taking is not intended to be included under the Act. In the City of Chicago's trial brief, the City alleged that Congress's definition of a land use regulation was specifically narrow

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<sup>66</sup> *Id.* at n.7.

<sup>67</sup> *Id.* at 900.

<sup>68</sup> *Id.*

<sup>69</sup> *St. John's*, 401 F. Supp. 2d at 900.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

and deliberate.<sup>72</sup> Considering the constitutionally sensitive time at which Congress enacted RLUIPA, many argue that the limited definition of land use regulation was purposeful “as RLUIPA’s drafters sought to ‘avoid the . . . fate’ of judicial invalidation that befell RFRA.”<sup>73</sup> A quick reference to the *Smith*, RFRA, *Boerne*, and RLUIPA progression provides support for the necessity of having such a strictly focused construction of the statute.<sup>74</sup> Indeed, Senator Reid drew attention to the relevance of this progression in the Congressional Record.<sup>75</sup>

“The legislative history [of RLUIPA] indicates that Congress was concerned about local governments’ use of their zoning authority to discriminate against religious groups by making it difficult or impossible for them to build places of worship or other facilities.”<sup>76</sup> Verifying RLUIPA’s purpose, Representative Charles Canady of Florida asserted that the Act “will protect the free exercise of religion from unnecessary government interference.”<sup>77</sup> Senator Edward Kennedy of Massachusetts and Senator Michael Dewine of Ohio, who were skeptical about the passage of the RLUIPA bill and expressed several concerns about RLUIPA, did not refer at all to eminent domain proceedings and their relevance under the Act.<sup>78</sup> The Senators’ failure to mention eminent domain is evidence that it was unlikely within the desired legislative scope and direction of the bill.<sup>79</sup> Likewise, the leg-

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<sup>72</sup> Brief for Defendant at 33, *St. John’s United Church v. City of Chicago*, 401 F. Supp. 2d 887 (N.D. Ill. 2005) (No. 05-4418) (on file with author) [hereinafter *City of Chicago’s Brief*].

<sup>73</sup> *Id.*

<sup>74</sup> See *supra* Part II.A.

<sup>75</sup> 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Reid).

<sup>76</sup> *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 255 (W.D.N.Y. 2005). See, e.g., 146 CONG. REC. E1564 (daily ed. Sept. 21, 2000) (statement of Rep. Hyde) (regarding “zoning conflicts between churches and cities”); see also 146 CONG. REC. E1564 (daily ed. Sept. 21, 2000) (statement of Rep. Hyde) (pointing out that in the ten years prior to the Act’s enactment “zoning conflicts between churches and cities [had] become a leading church-state issue”); 146 CONG. REC. E1234–35 (daily ed. July 13, 2000) (statement of Rep. Canady) (noting instances where a municipality “intentionally changed a zone to exclude a church,” but containing no reference to eminent domain).

<sup>77</sup> 146 CONG. REC. E1563 (daily ed. Sept. 21, 2000) (statement of Rep. Canady).

<sup>78</sup> 146 CONG. REC. S10992 (daily ed. Oct. 25, 2000) (comments of Sen. Dewine and Sen. Kennedy).

<sup>79</sup> 146 CONG. REC. S10992 (daily ed. Oct. 25, 2000) (comments of Sen. Dewine and Sen. Kennedy) (“I was concerned that the bill would have unintentionally impeded the ability of states and localities to protect the health and safety of children in a variety of ways . . . . I am relieved that the . . . version has a much more limited scope.”); 146 CONG. REC. S6688–89 (daily ed. July 13, 2000) (comments of Sen. Ken-

islative history illustrates that the members of Congress sought to narrow the scope of RLUIPA so that it avoided “possible conflict with other civil rights protections, and those concerns were addressed. But among all these expressions of concern that served to narrow the Act, *not a soul* complained the RLUIPA would overreach by covering eminent domain laws as one type of ‘zoning law.’”<sup>80</sup> Moreover, it is well settled that it is not the court’s proper function to add language to a statute in an effort to stretch its applicability.<sup>81</sup>

Tracing the history of RLUIPA and the recent district court cases evaluating the Act’s application to eminent domain proceedings is helpful, but not determinative, in analyzing whether an eminent domain proceeding is a land use regulation within the purview of RLUIPA. The Supreme Court has not yet considered the question. Until that time, the resolution to the debate will be left open-ended and a religious institution’s protections under RLUIPA from eminent domain will be unpredictable. Most notably, the *St. John’s* court alluded to what seems to be the most promising basis for applying RLUIPA to the review of eminent domain proceedings—a taking that occurs amidst the imposition of a land use regulation.<sup>82</sup>

### III. TAKINGS AND LAND USE REGULATIONS UNDER RLUIPA

This Part considers the arguments by proponents of each side of the debate. As noted above, RLUIPA defines the term “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.”<sup>83</sup> This Comment explores three possible resolutions to the

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ned) (noting that authors of the RLUIPA bill “were mindful of not undermining existing laws intended to protect other important civil rights and civil liberties”).

<sup>80</sup> Brief for Plaintiff, *St. John’s United Church v. City of Chicago*, No. 03-C3726 (N.D. Ill. 2005) at 24 [hereinafter *St. John’s Brief*]; see 146 CONG. REC. H7190–91 (daily ed. July 27, 2000) (comments of Rep. Nadler, Sen. Reid, Sen. Kennedy, and Sen. Dewine); 146 CONG. REC. H7190 (daily ed. July 27, 2000) (comments of Rep. Nadler) (“I am aware of no opposition from any religious or civil rights or civil liberties group . . .”).

<sup>81</sup> *Faith Temple Church*, 405 F. Supp. 2d at 255.

<sup>82</sup> *St. John’s United Church v. City of Chicago*, 401 F. Supp. 2d 887, 899–901 (N.D. Ill. 2005), *aff’d*, 2007 U.S. App. LEXIS 21914 (7th Cir. Sept. 13, 2007).

<sup>83</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-5(5) (2000).

The term “land use regulation” means 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), if the claimant has an ownership, leasehold, easement, servitude, or other

question of whether the exercise of eminent domain is a land use regulation: (1) a taking is never a land use regulation under RLUIPA; (2) a taking is always a land use regulation under RLUIPA; or (3) a taking is within the scope of RLUIPA if it is employed in the implementation of a land use regulation. Courts are just beginning to explore the question and are split as to the correct answer.

A. *A Taking is Never a Land Use Regulation Under RLUIPA*

A number of sources lend support to the proposition that a taking is not a per se land use regulation under RLUIPA—among others, district court decisions, universal notions of state sovereign power, and the acknowledged differentiating characteristics between eminent domain actions and land use regulations. While each theory differs slightly in substance, the significant weight of the obtainable evidence tips in favor of not applying RLUIPA to every eminent domain proceeding that concerns sacred land.

1. District Court Analysis

Examined first in *St. John's*<sup>84</sup> and again in *Faith Temple Church v. Town of Brighton*,<sup>85</sup> the question of whether eminent domain proceedings are per se land use regulations under RLUIPA has received judicial attention. Following *St. John's*, the district court in *Faith Temple* also rejected the proposition that an eminent domain proceeding is per se a land use regulation.<sup>86</sup> Central to the *Faith Temple* court's reasoning was the nature of authority underlying a zoning law as opposed to an eminent domain proceeding.<sup>87</sup> "[T]owns are authorized by statute to enact zoning laws 'to regulate and restrict' a property owner's private use of land, while in contrast, local and state governments have the power to take land for the public use."<sup>88</sup> Acknowledging that these are two distinct concepts of authority, albeit both involving land, the *Faith Temple* court aptly noted a key distinction between eminent domain actions and land use regulations—the government uses its power over the land in very different ways.<sup>89</sup>

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property interest in the regulated land or a contract or option to acquire such an interest.

*Id.*

<sup>84</sup> *St. John's*, 401 F. Supp. 2d 887.

<sup>85</sup> 405 F. Supp. 2d 250 (W.D.N.Y. 2005).

<sup>86</sup> *Id.* at 256–57.

<sup>87</sup> See *id.* at 253–56.

<sup>88</sup> *Id.* at 254.

<sup>89</sup> *Id.*

Further considering the differences between zoning and eminent domain, the *Faith Temple* court considered it suspect that Congress would interpret RLUIPA's explicit statutory reference to zoning as a type of land use regulation automatically to include eminent domain actions as well.<sup>90</sup> Congress proactively chose to limit the scope and application of the Act.<sup>91</sup> Thus, because "[e]minent domain is hardly an arcane or little-known concept . . . the [c]ourt will not assume that Congress simply overlooked it when drafting RLUIPA."<sup>92</sup> The *Faith Temple* court asserted that a relationship to land use is not enough to bring it within the purview of RLUIPA.<sup>93</sup> It is not enough to regard zoning and condemnation proceedings as synonymous merely because they both have the potential to affect the land and to restrict the uses to which the land may be put.<sup>94</sup> Congress could have included both eminent domain and zoning within the coverage the Act, but it did not choose to do so and it is not the proper function of the court to "judicially amend RLUIPA to 'correct' Congress's omission."<sup>95</sup>

Scrutiny of the district court analysis identifies another facet of the debate. Those who are in support of RLUIPA's application to condemnation proceedings contend that § 2000cc-3(g) of RLUIPA provides evidence of congressional intent for broader Act application and protection.<sup>96</sup> The provision reads: "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."<sup>97</sup> The *St. John's* plaintiffs argued that the City defendants applied the wrong rule of construction when interpreting § 2000cc-3(g).<sup>98</sup> The plaintiffs contended that because RLUIPA is federal civil rights legislation, the provision should have been applied broadly so that it could best effectuate the purpose of the Act.<sup>99</sup> Although the *St. John's* court disagreed with the plaintiffs' contention, it was aware of RLUIPA's admonition that the Act was to be construed broadly in

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<sup>90</sup> *Id.* at 254–55.

<sup>91</sup> *Faith Temple Church*, 405 F. Supp. 2d at 254–55.

<sup>92</sup> *Id.* at 255.

<sup>93</sup> *Id.* at 257–58.

<sup>94</sup> *Id.* at 258.

<sup>95</sup> *Id.*

<sup>96</sup> See *St. John's* Brief, *supra* note 80, at 23–24.

<sup>97</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-3(g) (2000).

<sup>98</sup> *St. John's* Brief, *supra* note 80, at 24.

<sup>99</sup> *Id.*

favor of protecting religious exercise. For that reason, the court stated that its holding “should not be taken to mean that all condemnation proceedings necessarily are outside the scope of RLUIPA.”<sup>100</sup> The court, in qualifying its statement in regard to the language of § 2000cc-3(g), declared that the obligation to broadly protect religious exercise can only inflate to the extent permitted by the Act’s terms because “[s]uch language does not itself alter Congress’s express delineation of the statute’s reach.”<sup>101</sup> The court asserted that to read the clause otherwise would violate basic rules of statutory construction,<sup>102</sup> for it is an accepted principle that a “definition which declares what a term ‘means’ . . . excludes any meaning that is not stated.”<sup>103</sup> Furthermore, the *St. John’s* plaintiffs’ contention that “all condemnation proceedings are land use regulations dealing with zoning . . . is not an attempt to construe the statute broadly but rather is an attempt to rewrite it.”<sup>104</sup> Thus, for fear of other courts misconstruing its holding, the *St. John’s* court clearly delineated the limits of its ruling.

## 2. Eminent Domain Versus Land Use Regulations

The differences between an eminent domain action and a land use regulation as used under RLUIPA are numerous.<sup>105</sup> The chief difference between a land use regulation and an eminent domain proceeding is how the land is restricted. A land use regulation involves the government restricting how private parties may use the land, while an eminent domain proceeding involves a compelled transfer of private land to the public for the public benefit and use.<sup>106</sup> The “core of eminent domain power has nothing to do with the regulation of the use of property by others, but instead provides property

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<sup>100</sup> *St. John’s United Church v. City of Chicago*, 401 F. Supp. 2d 887, 900 (N.D. Ill. 2005), *aff’d*, 2007 U.S. App. LEXIS 21914 (7th Cir. Sept. 13, 2007) (“[A]n act to acquire land (through eminent domain) and then to rezone it and transfer it might very well fall with[in] the reach of RLUIPA.”).

<sup>101</sup> *City of Chicago’s* Brief, *supra* note 72, at 39 n.11.

<sup>102</sup> *See* *Reves v. Ernst & Young*, 507 U.S. 170, 183–84 (1993); *Callanan v. United States*, 364 U.S. 587, 596 (1961) (“[A] construction clause does not invite the court to apply the statute to new purposes that were never intended by Congress. Such a clause, ‘as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one.’”).

<sup>103</sup> *Colautti v. Franklin*, 439 U.S. 379, 393 (1979) (quoting 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.07 (4th ed. Supp. 1978) (internal quotations omitted)).

<sup>104</sup> *St. John’s*, 401 F. Supp. 2d at 900.

<sup>105</sup> *City of Chicago’s* Brief, *supra* note 72, at 34–37.

<sup>106</sup> *Id.* at 34.

for the government's own use."<sup>107</sup> In *Georgia v. City of Chattanooga*, the Supreme Court, declared that the taking of property enables the "proper performance of governmental functions."<sup>108</sup> Historically, eminent domain has been distinguished from "other forms of governmental action that deprive persons of property values . . . by the fact that . . . the government puts the property taken to a specific, publicly mandated use."<sup>109</sup> Landmarking and zoning regulations do not change the ownership of the land in a way that allows the government to have complete control. While such government actions may adjust how the land is used, they do not mandate that land be used only for the government's chosen purpose and only by whom the government chooses; this differing degree of ownership is a vital distinction.<sup>110</sup>

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<sup>107</sup> *Id.* at 35.

<sup>108</sup> 264 U.S. 472, 480 (1924).

<sup>109</sup> See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1183 (1995).

<sup>110</sup> See City of Chicago's Brief, *supra* note 72, at 34–35. When tracing the history and development of the government's zoning power in contrast to the government's eminent domain power, another difference between the two becomes apparent. Zoning is a generally modern invention, while eminent domain is a concept that predates the United States Constitution and has always been recognized as an "inherent right to the sovereign." *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 254 n.3 (W.D.N.Y. 2005); see also *E. Thirteenth St. Cmty. Ass'n v. N.Y. State Urban Dev. Corp.*, 641 N.E.2d 1368 (N.Y. 1994).

Another dissimilarity between zoning laws and eminent domain proceedings is the general purpose for which the two governmental actions are authorized. "[Z]oning statutes seek to protect 'the welfare of the entire community' by making a balanced and effective use of the available land and providing for the public need for varying types of uses and structures." *E. Thirteenth St. Cmty. Ass'n*, 641 N.E.2d at 1371 (citations omitted). While zoning laws will be found invalid if they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," eminent domain proceedings do not have to be for the public health, safety, etc. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The eminent domain public use requirement is much broader than that allowed for zoning measures. The "primary concern of land use regulations is not economics, but the promotion of public health and safety and aesthetics," while the concept and pertinence of economics is a budding aspect of eminent domain actions. Julie M. Osborn, Note, *RLUIPA's Land Use Provision: Congress' Unconstitutional Response to City of Boerne*, 28 ENVIRONS ENVTL. L. & POL'Y J. 155, 174 (2004). The Supreme Court decision in *Kelo* further verifies this distinction between zoning measures and eminent domain actions. *Kelo v. City of New London*, 545 U.S. 469 (2005). In warning about the incorrect fusing of the two categories of government's power over land—zoning and eminent domain—the dissent in *Kelo* added that "whether the State can take property using the power of eminent domain is . . . distinct from the question whether it can regulate property pursuant to the police power." *Id.* at 519 (Thomas, J., dissenting).



A further incongruity between eminent domain actions and land use regulations pertains to the nature of the inquiry involved in each action—individualized assessment versus non-individualized assessment. It is theorized that the Takings Clause is “designed to bar [the government] from forcing some people alone to bear the public burdens, which, in all fairness and justice, should be borne by the public as a whole.”<sup>111</sup> Thus, condemnation proceedings individually assess each parcel of land subject to the government’s eminent domain power to ensure the constitutional requirements are satisfied and that the power of eminent domain is exercised non-discriminately. To the contrary, zoning and landmarking laws are the types of government laws that characteristically do not involve individualized assessments.<sup>112</sup> Zoning measures generally apply to every property within a specific zoning area without a comprehensive assessment of each parcel of land.<sup>113</sup> Zoning laws embody the policy judgments of local and state officials about what the best uses of private property are in a particular area. Zoning ordinances “provide control over land use within a neighborhood and are part of a comprehensive plan for community development.”<sup>114</sup> Notwithstanding the principle of non-individualized assessment that traditionally applied to zoning enactments, RLUIPA now requires the government to evaluate each property with a religious affiliation individually and apart from other types of land prior to the enactment of a zoning plan.<sup>115</sup> RLUIPA provides

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<sup>111</sup> Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>112</sup> See City of Chicago’s Brief, *supra* note 72, at 36. *But see supra* Part IV.C.

<sup>113</sup> See City of Boerne v. Flores, 521 U.S. 507, 514 (1997); *cf. SELMI & KUSHNER, supra* note 47, at 45 (“All of the flexibility devices have the common characteristic of focusing on the individual impacts from a particular development or use, rather than on the needs of the jurisdiction as a whole.”); Angela C. Carmella, *Zoning of Religious Uses*, in RELIGION AND AMERICAN LAW 574, 574 (Paul Finkelman ed., 2000). Carmella argues:

This assumption of general applicability is incorrect. Built into zoning laws are numerous mechanisms for exceptions and special consideration. Variances, hardship exemptions, and special permits are among the many discretionary mechanisms present in land use ordinances; these are necessary to provide flexibility in an area subject to constant pressures for change. Under *Smith*, it seems that statutory regimes which contain exemption mechanisms (with government making “individualized assessments” in discretionary fashion) may continue to enjoy the highest level of judicial review, the compelling interest test.

The analysis is thus not as simple as Justice Kennedy . . . suggests.

Carmella, *Zoning of Religious Uses*, at 574.

<sup>114</sup> See 83 AM. JUR. 2d *Zoning and Planning* § 3 (2006).

<sup>115</sup> See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2000).

religious institutions protection from discriminatory zoning measures in a manner similar to the constitutionally mandated protections and individualized assessments of the Takings Clause.

The dissimilarity between the level of community involvement necessary and ordinarily implicated in the execution of each power is notable. In eminent domain proceedings, there is greater public involvement and far greater scrutiny by the public and various public officials.<sup>116</sup> These checks and balances are needed to prevent abuse of this constitutional right.<sup>117</sup> On the other hand, zoning and landmarking laws do not have constitutionally established checks and balances set in place. Although religious institutions often receive a safeguard from zoning measures due to their non-conforming use status,<sup>118</sup> many situations exist where that status does not protect the religious institution from government intrusion. Therefore, a federal statute such as RLUIPA is disputably necessary to prevent abuse of religious actors.<sup>119</sup> Furthermore, zoning and landmarking laws are relatively easy for towns to enact, while condemnation proceedings are costly and come at a literal price to the government—the fair market value of the property.<sup>120</sup> Arguably, zoning and landmarking regulations also have more oppressive implications for property owners, in that property values are often lowered without compensation by the government. While governments in eminent domain proceedings are subject to the constitutionally mandated payment of just compensation, the government is able simply to “take” land through zoning regulations without compensating the property owner.<sup>121</sup>

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<sup>116</sup> City of Chicago’s Brief, *supra* note 72, at 41.

<sup>117</sup> *Id.*

<sup>118</sup> SELMI & KUSHNER, *supra* note 47, at 67–70. The idea behind a non-conforming use is to let a property owner’s land use continue under the new zoning plan—even though such use would not be permitted under the plan—because the use existed prior to the zoning measure’s enactment and it would be unfair to deprive the property owner of his or her expected use of such property. *Id.* Ideally, any expansion of the non-conforming property or of the property’s non-conforming use will be restricted and eventually removed. *Id.*

<sup>119</sup> City of Chicago’s Brief, *supra* note 72, at 41.

<sup>120</sup> See *United States v. 6.45 Acres of Land*, 409 F.3d 139, 145 (3rd Cir. 2005); *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 256 (W.D.N.Y. 2005).

<sup>121</sup> City of Chicago’s Brief, *supra* note 72, at 41. An interesting debate in this area involves Justice Holmes’s holding in *Pennsylvania Coal Co. v. Mahon*, that land use regulations that go “too far” can actually constitute a taking. 260 U.S. 393, 415–16 (1922); see SELMI & KUSHNER, *supra* note 47, at 315–16. *But see* SELMI & KUSHNER, *supra* note 47, at 317 (“[A] number of scholars have suggested that, based on the historical record, a ‘taking’ meant an actual expropriation of property. The effects of land use

### 3. State Sovereign Power Considered

Notions of state sovereign power buttress the preceding arguments and set the foundation for a supplemental line of reasoning in favor of finding eminent domain outside the boundaries of RLUIPA protection. While this argument is not grounded on finding an eminent domain proceeding to be outside the RLUIPA definition of a land use regulation, it nonetheless provides some insight as to why eminent domain actions would not have been included under the Act in the first place, regardless of whether an eminent domain proceeding could ever be deemed a land use regulation.<sup>122</sup>

Eminent domain power is one traditionally reserved to the states—“it is intimately involved with sovereign prerogative.”<sup>123</sup> Thus, cognate of state eminent domain power, it is possible that Congress purposefully did not extend RLUIPA to eminent domain actions so as to not interfere with the state’s power to take religious or non-religious lands for the public benefit. And, “[a]bsent an unmistakably clear expression of intent to alter the usual constitutional balance between the states and the federal government, [the courts] will interpret a statute to preserve rather than destroy the States’ substantial sovereign powers.”<sup>124</sup>

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regulation thus would not result in takings . . . an excessive land use regulation is simply an invalid regulation.”).

<sup>122</sup> Cf. Storzer & Picarello, *supra* note 16, at 1000. The view that RLUIPA infringes on a state’s right to exercise its power of eminent domain is not widespread. Storzer and Picarello dispel the notion that RLUIPA cannot supersede this state power:

RLUIPA aims to assure that all courts (federal and state alike) purporting to apply federal constitutional protections do not ignore their continuing vitality. To claim that this codification of existing federal limits on local discretionary power represents some novel infringement on States’ rights is to mischaracterize not only the statute and the constitutional jurisprudence it enforces, but also the history of the States’ concern for local abuses of religious freedom.

*Id.* They suggest that RLUIPA’s purpose is not to inhibit a state’s right to exercise its powers, but to assist the states in their protection of the religious freedoms they apparently deem so important. From this line of reasoning, it can be inferred that not all eminent domain proceedings are to be automatically approved simply because the power to exercise a taking is one traditionally held by the state itself. Thus, while the state sovereignty argument has potential, it is not necessarily the strongest line of attack against RLUIPA’s application to condemnation proceedings.

<sup>123</sup> *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959); *see Searl v. Sch. Dist. No. 2 in Lake County*, 133 U.S. 553, 562 (1890) (stating that the eminent domain right “is the offspring of political necessity, and is inseparable from sovereignty”).

<sup>124</sup> *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998) (internal quotations omitted).

The *St. John's* plaintiffs alluded to the states' sovereign power argument in their trial brief.<sup>125</sup> They contended that the city defendants incorrectly applied the principles of *Gregory v. Ashcroft*.<sup>126</sup> Only state functions that "go to the heart of the representative government"<sup>127</sup> are protected by the *Ashcroft* decision.<sup>128</sup> The plaintiffs asserted that such a limiting phrase would hardly include the taking of a cemetery for the expansion of an interstate transportation system that was subsidized largely by federal government and had a tremendous effect on interstate commerce.<sup>129</sup> Despite the plaintiffs' argument cutting against the state sovereign power theory, the court, by not explicitly addressing whether eminent domain actions fall under the type of *Ashcroft* governmental functions that are protected from federal statutory interference, left open the possibility that eminent domain actions are out of the reach of federal statutory schemes such as RLUIPA due to the power of the sovereign state.

A number of authorities lend support to the proposition that a taking is not a *per se* land use regulation under RLUIPA. The significant weight of the obtainable information, as will be clear by the end of this Comment, obviously tips in favor of not applying RLUIPA to eminent domain proceedings.<sup>130</sup> Nevertheless, as the debate is just commencing, the arguments in favor of this position are still malleable, and this faction's strengths and weaknesses will inevitably be tested as the debate roars on.<sup>131</sup>

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<sup>125</sup> St. John's Brief, *supra* note 80, at 24.

<sup>126</sup> 501 U.S. 452 (1991) (affirming the authority of state citizens to determine the qualifications of important government officials, a state function protected by the Tenth Amendment); St. John's Brief, *supra* note 80, at 24.

<sup>127</sup> St. John's Brief, *supra* note 80, at 24. The plaintiffs in *St. John's* argue that the City's rule of construction "would have the Court interpret federal statutes to avoid any interference with state governmental functions which, Defendants claim, includes eminent domain power. Yet nowhere is such a rule announced in *Gregory v. Ashcroft*, on which the City relies." *Id.* (citation omitted).

<sup>128</sup> *Gregory*, 501 U.S. at 461.

<sup>129</sup> St. John's Brief, *supra* note 80, at 25.

<sup>130</sup> A pro-government effect of a taking *not* being considered a land use regulation is that once the city acquires title to the land via eminent domain there will no longer be a RLUIPA claim. Once the city acquires title, the RLUIPA claim self-destructs. See 42 U.S.C. §§ 2000cc-5(5).

<sup>131</sup> Carmella, *supra* note 30, at 579.

Private covenants [and defeasible estates] are used not only to exclude religious uses in these indirect ways but also to perpetuate religious uses . . . [They] often function just like zoning restrictions. . . . [B]ecause they do not invoke state action, these private agreements are not subject to constitutional scrutiny in the way that zoning is.

*B. A Taking Is Always a Land Use Regulation Under RLUIPA*

The proposition that a taking is considered a land use regulation under the RLUIPA is not well supported by many authorities. Those in favor of RLUIPA's application to eminent domain proceedings desire a RLUIPA strict scrutiny analysis to be applied to condemnation proceedings that burden religious exercise. Thus, if eminent domain is encompassed within the protection of the Act, the government will have to meet a higher standard of review to take land used by religious institutions.

The primary authority in support of this view is the decision by the United States District Court for the Central District of California in *Cottonwood Christian Center v. Cypress Development Agency*.<sup>132</sup> Without much discussion, the court assumed that an eminent domain proceeding was within the bounds of a RLUIPA land use regulation simply because the government action restricted the Christian Center's use of land—an assumption that blurred the important distinction between the various ways in which land can be restricted by government interference.<sup>133</sup> Although the court's analysis was possibly founded on an improper interpretation of the statute,<sup>134</sup> the court nevertheless found that the condemnation proceeding at issue was within the scope of RLUIPA, and thus the taking was invalid under the Act.<sup>135</sup>

In addition, the *Cottonwood* court maintained that Congress, by its passage of RLUIPA, “conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitu-

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*Id.* Although eminent domain proceedings are outside the power of the individual land owner, an interesting question is the extent to which religious institutions can protect themselves from government actions by private land covenants. Perhaps, the way legally to effectuate [the desire to not have a church built next door] is by private mutual covenants between property owners imposing appropriate servitudes on the land. We must not “employ the new device of zoning to make exclusive districts much more exclusive.” [I]t is [not] a proper function of government to interfere in the name of the public to exclude churches from residential districts for the purpose of securing to adjacent landowners the benefits of exclusive residential restrictions.

O'Brien v. Chicago, 105 N.E.2d 917, 921 (Ill. App. Ct. 1952) (quoting Ohio v. Joseph, 39 N.E.2d 515, 524 (1942)) (citation omitted).

<sup>132</sup> 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

<sup>133</sup> *Id.* at 1222. Note the distinction between the use restrictions of a permit denial and the use restrictions of a condemnation proceeding.

<sup>134</sup> See *St. John's United Church v. City of Chicago*, 401 F. Supp. 2d 887, 900 (N.D. Ill. 2005), *aff'd*, 2007 U.S. App. LEXIS 21914 (7th Cir. Sept. 13, 2007).

<sup>135</sup> *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1222.

tion.”<sup>136</sup> From this concept it can be inferred that the court also found protection in the Constitution for preventing this taking, although such protections were not clearly set forth in the opinion. Conceivably, because the land was being transferred from private ownership to a use that was debatably not a constitutionally protected public use—a private retail corporation—the condemnation proceeding ran contrary to the public’s interest.<sup>137</sup> Thus, it is possible that the taking could have been prohibited on those grounds.<sup>138</sup> Needless to say, the *Cottonwood* court’s line of reasoning has been sharply questioned and would likely not hold up if dissected by an appellate court today.

Professor Shelley Ross Saxer supports a second justification<sup>139</sup> for RLUIPA’s application to eminent domain proceedings.<sup>140</sup> Saxer contends that even though an eminent domain action is not specifically within the classification of a zoning or landmarking law as defined under RLUIPA, excluding eminent domain proceedings from the Act’s reach would be inappropriate considering the context in which the definition of land use regulation was formulated.<sup>141</sup> She argues that the bill narrowly described a land use regulation in order “to address concerns about the potential for civil rights violations . . . [but] there is no indication that Congress changed the definition language in order to restrict the type of land use decision subject to RLUIPA.”<sup>142</sup> Accordingly, she argues it would be a mistake to parse

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<sup>136</sup> *Id.* at 1230–31.

<sup>137</sup> *Id.* at 1231.

<sup>138</sup> *Id.*

<sup>139</sup> The particular class of people who *benefit* from a taking can possibly form the basis for a third argument in favor of applying RLUIPA to eminent domain proceedings. Generally, a condemnation action benefits the majority of the public, while a land use regulation—for example, a zoning or landmarking law—is to the detriment of a minority group of landowners. Arguably, a smaller number of interests are at stake with a land use regulation, because it is not designed to benefit the majority of the public, whereas eminent domain proceedings are specifically undertaken for the advantage of the public majority. Since land use regulations only affect a minority of individual property owners, it seems fair to give a religious institution affected by a land use regulation some additional protection. It seems more viable to award the minority interest holders some leniency, especially when they are asking for the leniency in order to protect a value that ultimately serves the majority—namely First Amendment religious freedom of expression.

<sup>140</sup> Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653 (2004).

<sup>141</sup> *Id.* at 668–69.

<sup>142</sup> *Id.*

the language in a way that would exclude eminent domain proceedings from the reach of the Act's land use regulation definition.<sup>143</sup>

Support for the proposition that eminent domain proceedings should be considered land use regulations under RLUIPA is scarce.<sup>144</sup> Nonetheless, it is important to concentrate on the most potentially successful arguments on this side of the debate. Being that Supreme Court jurisprudence is non-existent, and fundamental scholarship is outdated, unfounded, or inapplicable, this pro-side of the debate is not yet *condemned*.

C. *A Taking Is Within RLUIPA if Carried Out in the Implementation of a Land Use Regulation*

An intermediate approach to the question of RLUIPA's application to eminent domain proceedings may be the most effective argument for religious institutions to make. Perhaps by limiting RLUIPA's applicability to situations where eminent domain is used as part of a plan that effectuates a land use regulation, a middle ground can be achieved so that governments and religious institutions alike would be pleased. Focusing on the Act's language and a common-sense construction of it, it seems that an acceptable way to resolve the current predicament would be to allow eminent domain proceedings to fall within RLUIPA's purview only when they occur as part of a plan that ultimately implements a land use regulation.

Allowing RLUIPA to apply to eminent domain actions in these certain instances would offer religious institutions the protection that Congress deemed them worthy of receiving when it first enacted RLUIPA.<sup>145</sup> Religious institutions often qualify as non-conforming uses and are temporarily exempt from local zoning plans.<sup>146</sup> Because non-conforming use status by itself offers religious institutions a protection from potentially devastating zoning measures, the non-conforming use status practically makes RLUIPA inapplicable and unnecessary. A government may, however, attempt to use its eminent domain power over the non-conforming use property in a way that

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<sup>143</sup> *Id.* at 669.

<sup>144</sup> Adverse possession against cemeteries is not permitted, absent evidence of complete and actual abandonment of the burial ground site. See Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 Ky. L.J. 487, 496 (2005). Arguably, this rule evidences a general governmental intent to protect religious sites, and would therefore compliment the notion that an eminent domain action is a land use regulation under RLUIPA. See *id.* 496–98.

<sup>145</sup> See *supra* Part II.C.

<sup>146</sup> See SELMI & KUSHNER, *supra* note 47, at 68–70.

would circumvent the religious institution's non-conforming use status. This would, in effect, turn restricted non-conforming use property into unrestricted property that could then fit freely into a zoning plan. Moreover, without special protection, religious property that is not classified as a non-conforming use would still be subject to the government's eminent domain power.<sup>147</sup> In an effort to reach its land use goals, the government may opt to condemn the religious property in order to gain control of it, instead of using zoning measures that are subject to strict RLUIPA scrutiny. In a situation like this—when the taking is actually being done for the ultimate implementation of a land use regulation—RLUIPA should apply to protect the religious institution from the taking.

The intent to include eminent domain proceedings within RLUIPA's reach in this particular way is evidenced by the particular choice of language in § 2000cc(a).<sup>148</sup> Arguably, by selecting the word "implement" Congress expected that the "*means* the government uses to 'implement' a land use regulation may [also] substantially burden religious exercise."<sup>149</sup> Thus, although the *means* used by the government may not qualify as a per se land use regulation, if the *end* is a land use regulation then the means used by the government to put that land use regulation into action may actually be covered under RLUIPA.<sup>150</sup> Applying similar reasoning to the question of whether or not an eminent domain proceeding is a land use regulation under the Act, it could effectively be argued that when eminent domain is used as a precursor to a zoning measure—for example, the implementation of a zoning development plan—then it is a means used to reach the end and is therefore covered under RLUIPA.

The above rationale helps resolve some of the discrepancies surrounding the debate because "[v]ery often a land use regulation by itself may not substantially burden religious exercise, but the means

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<sup>147</sup> Arguably, RLUIPA standards afford greater protection to religious institutions than the constitutional requirements of a taking. While eminent domain proceedings are subject to the public use and compensation requirements, RLUIPA standards are more stringent, requiring a compelling governmental interest and the least restrictive means of furthering that compelling interest. See Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a)(1)(A)–(B) (2000).

<sup>148</sup> § 2000cc(a).

<sup>149</sup> Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Plaintiff-Appellant at 5, *Faith Temple Church v. Town of Brighton*, No. 06-0354-cv (W.D.N.Y. 2005) (emphasis added), available at <http://www.becketfund.org/files/Idec2.pdf> [hereinafter Becket Fund *Faith Temple* Brief].

<sup>150</sup> See *id.* at 5.



used to implement that regulation do burden religious exercise.”<sup>151</sup> The *St. John’s* plaintiffs apply this justification broadly when they maintain that the city’s authorization to change the use of land from religious cemetery to airport property was an act of zoning because the ordinance at issue constituted an “attempt by a government to regulate the use of a piece of property.”<sup>152</sup> While the plaintiffs take this line of reasoning a step beyond where most courts will likely be prepared to go, the justification behind the rationale is sound.

The way a court frames the issue can affect the RLUIPA analysis in regard to eminent domain proceedings. The Becket Fund for Religious Liberty, in its amicus brief in support of Faith Temple Church, insists that the *Faith Temple*<sup>153</sup> court erred when it failed to ask whether the city’s use of eminent domain “implement[ed] a land use regulation,” as RLUIPA’s language instructs, and instead asked “whether eminent domain proceedings were themselves a land use regulation within the meaning of RLUIPA.”<sup>154</sup> Claiming that this type of analysis by the courts will not protect religious institutions “from the means used to implement land use regulations unless those means are themselves land use regulations,” the Becket Fund argued for a more strategic application of the RLUIPA implementation language.<sup>155</sup> The Becket Fund contended that interpreting RLUIPA in this stingy way in effect reads the word “implements” out of the Act’s text and thus violates common principles of statutory construction.<sup>156</sup> This type of analysis in fact narrows the Act, rather than “construing it in favor of broad protection of religious exercise” as § 2000cc-3(g) of RLUIPA requires.<sup>157</sup> Proponents of RLUIPA’s application to eminent domain proceedings argue that the “Court should not sheath RLUIPA’s sword in a context where religious institutions are most vulnerable.”<sup>158</sup> By focusing on the means used to execute a land use regulation, courts will be more responsive to the role that the government’s eminent domain power plays in land use regulation schemes and ultimately more likely to award religious institutions their deserved protection under RLUIPA.

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<sup>151</sup> *Id.*

<sup>152</sup> Second Amended Complaint for St. John’s United Church, *St. John’s United Church v. City of Chicago*, 401 F. Supp. 2d 887, No. 03-C-3726 (N.D. Ill. 2005) (on file with author).

<sup>153</sup> 405 F. Supp. 2d 250 (W.D.N.Y. 2005).

<sup>154</sup> Becket Fund *Faith Temple* Brief, *supra* note 149, at 7.

<sup>155</sup> *Id.* at 8.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 8.

<sup>158</sup> *Id.* at 15.

Limiting RLUIPA's applicability to situations where eminent domain is used in the implementation of a land use regulation is an intermediate scheme that has been endorsed by some courts.<sup>159</sup> This approach poses a great danger to the government's power of eminent domain, yet it poses an even greater promise to religious institutions for protection from such power. As the discussion continues over whether a land use regulation under the statute encompasses condemnation proceedings, the debate may instead switch gears and focus on how far the courts are willing to take the "in implementation of a land use regulation" language as a means of bringing eminent domain within RLUIPA's reach.

#### IV. CONSEQUENCES OF EMINENT DOMAIN PROCEEDINGS BEING CONSIDERED OUTSIDE THE SCOPE OF RLUIPA

The implications of RLUIPA's application to eminent domain actions will be widespread. However, the ramifications of eminent domain *not* being considered a land use regulation under RLUIPA are especially extensive considering the particular vulnerability of religious institutions. The consequences of such a ruling fuel the fire of the debate. Religious institutions hold a significant place in the history and culture of this country. Proponents of RLUIPA's application to eminent domain proceedings argue that holding land use regulations outside the scope of RLUIPA will encourage local governments to "declare open season on the taking of religious property of all kinds."<sup>160</sup> These proponents postulate that, when viewed in conjunction with the tax-free status of religious institutions, the Supreme Court's recent decision in *Kelo v. City of New London*<sup>161</sup> will have tremendous implications on the government's tendency to take land from religious institutions. On the other hand, some scholars argue that religious institutions have political influence over local governments, which will prevent such dramatic consequences from occurring because this political influence actually encourages governments to actively avoid condemning religious property.<sup>162</sup>

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<sup>159</sup> See *St. John's United Church v. City of Chicago*, 401 F. Supp. 2d 887, 900 (N.D. Ill. 2005), *aff'd*, 2007 U.S. App. LEXIS 21914 (7th Cir. Sept. 13, 2007).

<sup>160</sup> Becket Fund *Faith Temple* Brief, *supra* note 149, at 4.

<sup>161</sup> 545 U.S. 469, 518 (2005).

<sup>162</sup> See *infra* Part IV.C.

A. *The Significance of Religious Expression*

Private property is used by religious institutions in a variety of ways.<sup>163</sup> “Property provides a physical reality through which the church manifests its religious structure.”<sup>164</sup> Churches serve as the meeting place for most religions and as the foundation of religious practice.<sup>165</sup> As a result of the uniqueness of religious property use, religious institutions will be particularly devastated by the power of eminent domain.<sup>166</sup> Regulations that prevent a church from existing will inhibit the free and unhampered exercise of religion.<sup>167</sup> Moreover, religious expression and a religious institution’s duty to the public are inevitably burdened when cemeteries, soup kitchens, schools, and other socially advantageous functions that religious institutions provide are condemned.<sup>168</sup>

When the government seeks, through exercise of eminent domain, to dictate where a religious institution may or may not exist, it inevitably treads on that religious institution’s autonomy and expression . . . . Conforming religious institutions to the government’s vision of the “proper place” for such institutions, in effect, imposes the government’s vision of their “proper role.”<sup>169</sup>

A look back on our history at the great many wars that were fought in the name of religion can provide some insight as to the depth of the value we are seeking to protect, namely the freedom to express and practice religion.<sup>170</sup> RLUIPA’s application to eminent

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<sup>163</sup> Carmella, *supra* note 30, at 566.

[A] 1994 Report on the Survey of Religious Organizations at the National Level, conducted by the Northwestern University Survey Laboratory and DePaul Law School’s Center for Church/State Studies, shows that nearly all churches hold religious gatherings at least once a week; additionally, two-thirds of religious organizations engage in social service or welfare activities; more than eighty percent are involved in education; nearly sixty percent provide recreation or social activities; eighty-five percent are involved in communications; one-third have retreat centers; and forty percent have cemeteries.

*Id.*

<sup>164</sup> *See id.* at 565.

<sup>165</sup> Becket Fund *Faith Temple* Brief, *supra* note 149, at 10.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Brief Amicus Curiae of The Becket Fund for Religious Liberty in Support of Petitioners at \*5, *Kelo v. City of New London*, U.S. S. Ct. Briefs LEXIS 801 (2004) (No. 04-108) [hereinafter Becket Fund *Kelo* Brief].

<sup>170</sup> ReligiousTolerance.Org, Basic Information on Religious Tolerance & Conflict, [http://www.religioustolerance.org/re1\\_toll.htm](http://www.religioustolerance.org/re1_toll.htm) (last visited Feb. 22, 2007).

domain proceedings will become just one more battle won or lost in the ongoing struggle for religious freedom.

*B. The Kelo Effect*

If eminent domain actions are outside the umbrella of RLUIPA protection, the *Kelo* decision could inevitably increase the propensity with which local governments legally exercise their eminent domain powers.<sup>171</sup> Because of the Supreme Court's skillful pronouncement that economic development and revenue generation are valid public purposes under the Takings Clause,<sup>172</sup> it is argued that municipalities now have an unprecedented power to condemn private property for purely economic reasons under their constitutional power of eminent domain.<sup>173</sup> Nevertheless, the governmental reaction to *Kelo* may not be as drastic as envisioned. Many states have imposed stricter limits than federal law as to what constitutes a public use, the primary goal behind these narrowed parameters being to make eminent domain unavailable for redevelopment projects.<sup>174</sup>

Nevertheless, *Kelo*'s broadening of public use to include economic takings could presumably lead to an increased number of condemnation proceedings against religious institutions for economic development purposes.<sup>175</sup> Religious institutions are almost universally non-profit and tax-exempt,<sup>176</sup> and as a consequence they normally do not generate much revenue for their local governments.<sup>177</sup> To the disadvantage of religious institutions, the class of private properties eligible for an economic taking "in the name of generating additional tax revenue is more limited . . . [Eligibility] is dependent on the nature of the present use of the property, the identity of the owner, or both."<sup>178</sup> Consequently, by the nature of the private property use religious institutions enjoy, such institutions and the land they use for religious purposes—for example, cemetery land—fit perfectly within the category of private property available

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<sup>171</sup> See Becket Fund *Kelo* Brief, *supra* note 169, at \*2.

<sup>172</sup> *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

<sup>173</sup> Becket Fund *Kelo* Brief, *supra* note 169, at \*3.

<sup>174</sup> John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 789 (2006).

<sup>175</sup> Becket Fund *Kelo* Brief, *supra* note 169, at \*2.

<sup>176</sup> *Id.*

<sup>177</sup> See *id.* at \*18 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 689 (1970)).

<sup>178</sup> *Id.* at \*16 n.21.

for economic development and revenue generation.<sup>179</sup> According to the *Kelo* ruling, it now seems that revenue-hungry governments are free to use their power of eminent domain “to implement land use plans that call for achieving economic development by replacing tax-exempt religious uses with tax revenue generating commercial uses.”<sup>180</sup> Under a system that favors “for-profit tax-generating businesses” over “non-profit, tax-exempt property owners,”<sup>181</sup> religious institutions will become easy targets for a government’s exercise of its eminent domain power.<sup>182</sup> And, more and more, religious institutions will be found in the middle of redevelopment plans, for it is often too tempting for a city to pass up an opportunity to generate more tax revenue by transferring religious property to private developers.<sup>183</sup>

The incentives underlying the *Kelo* decision trigger the question of whether economic development is more important than property rights—a question the *Kelo* majority implicitly answered in the affirmative. Conceivably, economic development is a public use more worthy of protection than church rights.<sup>184</sup> A key aspect of the continuing debate is which use serves the best public purpose—tax generation and revenue boosting, or tax-exempt religious institutions?<sup>185</sup> Reaching a result where religious institutions are valued less than tax generation is ironic “because religious institutions are generally exempted from taxes *precisely because* they are deemed to be ‘beneficial and stabilizing influences in community life.’”<sup>186</sup> The United States

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<sup>179</sup> *Id.* at \*7 (quoting *Walz*, 397 U.S. at 673).

<sup>180</sup> Becket Fund *Faith Temple* Brief, *supra* note 149, at 9–12 (listing examples of municipalities targeting religious institutions for eminent domain proceedings—primarily to “implement land use plans that they claim will generate tax revenue and economic development”).

<sup>181</sup> Becket Fund *Kelo* Brief, *supra* note 169, at \*7.

<sup>182</sup> *Id.* at \*8. Perhaps, even if eminent domain does not fall within the statute, the taking might still be unjustified if the public benefit of the church/cemetery outweighs the public use the city is seeking to create through its power of eminent domain.

<sup>183</sup> Becket Fund *Faith Temple* Brief, *supra* note 149, at 9.

<sup>184</sup> Jerry Falwell, *Eminent Domain Knocking on Church’s Door*, THE CONSERVATIVE VOICE, (Jan. 21, 2006), <http://www.theconservativevoice.com/article/11703.html> (last visited Feb. 22, 2007).

<sup>185</sup> In theory, if the public use is great enough that a taking is deemed appropriate in the first place, then should the taking not be appropriate regardless of what needs to be taken? Along a similar line of reasoning, then even if eminent domain does not fall within the bounds of RLUIPA, could the taking still be unjustified if the public benefit of the church or cemetery is found to outweigh the public use the city is seeking to create through its power of eminent domain?

<sup>186</sup> Becket Fund *Kelo* Brief, *supra* note 169, at \*7 (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 673 (1970)) (emphasis added).

has a long tradition in which religious institutions provide necessary public goods to the community and serve the people through soup kitchens, food drives, spiritual guidance, and the like.<sup>187</sup> Accordingly, the “government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities.”<sup>188</sup> Social science tells us that churches and other religious institutions do in fact promote the general public interest and the common welfare.<sup>189</sup> While affirming the constitutionality of tax exemptions for religious entities, the Supreme Court recognized that certain entities “exist in a harmonious relationship to the community at large, and . . . foster its moral or mental improvement, [and thus they] should not be inhibited in their activities by . . . the hazard of loss of those properties for nonpayment of taxes.”<sup>190</sup> Nevertheless, the property rights of religious institutions remain at risk due to the *Kelo* decision and the absence of a federal statutory scheme—like RLUIPA—designed to protect religious institutions and their land counterparts from the government’s selective power of eminent domain.<sup>191</sup>

### C. *Politics as a Sword for Religious Institutions*

Interestingly, some respected scholars argue that governments actually avoid using their power of eminent domain over religious institutions, since governments reasonably prefer the course of action that will generate the least amount of public outcry and resistance.<sup>192</sup> Nicole Stelle Garnett predicts that governments are “most likely to avoid high subjective value property owned by the politically connected.”<sup>193</sup> Professor Garnett ascertains that takers have strong incentives to simply avoid the exercise of eminent domain over land holding high subjective value, namely land belonging to religious institu-

<sup>187</sup> See Storzer & Picarello, *supra* note 16, at 930.

<sup>188</sup> *Waltz*, 397 U.S. at 689.

<sup>189</sup> *Bd. of Zoning Appeals v. Schulte*, 172 N.E.2d 39, 43 (Ind. 1961).

<sup>190</sup> *Waltz*, 397 U.S. at 672 (citations omitted).

<sup>191</sup> Cf. Jeff Johnson, *Eminent Domain: Churches Targeted by the Bulldozers*, CNSNEWS.COM, July 15, 2005, <http://www.cnsnews.com/ViewNation.asp?Page=/Nation/archive//200507//NAT20050715a.html>. Johnson argues that the *Kelo* decision is not as devastating to the property rights of religious institutions because of the strength of the First Amendment constitutional protections, as well as other federal and state laws. *Id.*

<sup>192</sup> Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 103, 116 (2006). Planners for a roadway in Chicago “assiduously” avoided the taking and ultimate demolition of over 400 churches. *Id.* at 103.

<sup>193</sup> *Id.* at 117.

tions.<sup>194</sup> Since development plans often are flexible, governments are inclined to use this flexibility in a manner that “minimize[s] subjective losses,” and they often achieve this by utilizing alternate parcels of land—frequently, parcels of land belong to non-religiously affiliated owners.<sup>195</sup>

Inevitably, politics have a strong influence over a government’s decision to exercise its eminent domain power over religious property.<sup>196</sup> Garnett maintains that governments often opt not to take religious property for fear of the political fallout resulting from bad publicity and the inevitable holdout situation.<sup>197</sup> Increasingly, religious institutions are able to considerably influence local politics and land use decision-making in their communities.<sup>198</sup> Some commentators even suggest that the political process effectively polices the government’s exercise of its eminent domain power.<sup>199</sup> Strikingly, “[a] similar assumption is reflected in the Supreme Court’s deferential public use review: the court assumes that the political process is better equipped than the judiciary to determine when an exercise of eminent domain will serve the public interest.”<sup>200</sup> Concerns for potential Establishment Clause violations underlie the ever-present tension between the numerous societal benefits that religious institutions offer and the tremendous political influence such organizations have in the community.<sup>201</sup> Even without RLUIPA, many local governments grant religious institutions land use exemptions and cater to the organizations’ interests in growth and development plans.<sup>202</sup>

In addition, it has been asserted that the political power of some religious institutions can influence the government’s exercise of eminent domain.<sup>203</sup> Thus, while religious institutions are usually the most vulnerable targets for eminent domain actions, they are not always at the losing end of the proceedings. A government will often take private land by its power of eminent domain and subsequently transfer

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<sup>194</sup> *Id.* at 111.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 117.

<sup>197</sup> See Garnett, *supra* note 192, at 104.

<sup>198</sup> Nicholas William Haddad, *Public Use or Private Benefit? The Post-Kelo Intersection of Religious Land Use and the Public Use Doctrine*, 75 *FORDHAM L. REV.* 1105, 1131 (2006) (discussing influence of Camden Churches Organized for People, a nonprofit group, over Camden’s redevelopment during the fiscal crisis of 2001).

<sup>199</sup> See Garnett, *supra* note 192, at 115.

<sup>200</sup> *Id.*

<sup>201</sup> See Haddad, *supra* note 198, at 1132.

<sup>202</sup> *Id.* at 1133.

<sup>203</sup> See Garnett, *supra* note 192.

that land to religious organizations.<sup>204</sup> Moreover, “[p]owerful . . . religious institutions . . . can use eminent domain to dominate land use decision making in areas populated by the politically vulnerable.”<sup>205</sup> Given this possibility, citizens in the aforementioned areas may actually be in favor of applying RLUIPA to eminent domain actions. Heightened judicial scrutiny of condemnation proceedings—namely by the application of RLUIPA—may be an effective means to “ensure that public benefits indeed flow from a challenged condemnation, thus reducing the potential for religious interests to dominate land use decision making while still permitting the public to continue to benefit from the services offered by such interests.”<sup>206</sup> Thus, even though religious institutions are often the most vulnerable targets of eminent domain actions, there may be some situations where the citizens—not the religious institutions—would most benefit from RLUIPA’s application to condemnation proceedings.

*D. Heightened Level of Scrutiny Regardless*

Ultimately, advocates of RLUIPA’s application to eminent domain proceedings desire such a result for the sole purpose of subjecting governments to a strict scrutiny analysis when they attempt to condemn religious property. Generally, they are advocating for a higher level of scrutiny to be applied to eminent domain proceedings that burden religious institutions. In determining the constitutionality of condemnation proceedings under the Free Exercise Clause, it is held that government actions, such as eminent domain proceedings, that openly discriminate against religious uses are unconstitutional.<sup>207</sup> On the other hand, eminent domain actions that incidentally affect religious uses will only face a strict scrutiny analysis if they are individualized assessments.<sup>208</sup> It is asserted by some that since eminent domain actions almost always require individualized determinations, they are not “generally applicable laws”<sup>209</sup> and will therefore be subject to strict scrutiny review regardless of RLUIPA’s application.<sup>210</sup> If the government actions do not involve individualized assessments, then they are generally applicable laws and will only be subject to a

<sup>204</sup> Haddad, *supra* note 198, at 1108.

<sup>205</sup> *Id.* at 1141–42.

<sup>206</sup> *See id.* at 1142.

<sup>207</sup> *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

<sup>208</sup> *See id.*

<sup>209</sup> *See id.* at 886.

<sup>210</sup> *See Saxer, supra* note 140, at 678–80.



rational basis test. These laws of general applicability will easily pass rational basis review and will continue to burden religious practice.<sup>211</sup> Coincidentally, most land use regulations that burden religious exercise do not fall under *Smith*'s "neutral laws of general applicability" category either, and accordingly are subject to strict scrutiny review.<sup>212</sup> Because of the First Amendment, land use regulations that burden religious exercise are usually subject to the heightened level of review that RLUIPA seeks to provide anyway, and eminent domain proceedings—because of the constitutionally mandated individualized nature of the assessment—are also indirectly subject to a RLUIPA-like level of review. Consequently, this begs the question of the actual necessity of RLUIPA in the face of First Amendment protections.

*E. State Evasion of RLUIPA*

It is worth noting that a government may evade the preemptive force of RLUIPA by changing or eliminating the practice or policy that leads to the substantial burden on the religious institution.<sup>213</sup> Moreover, the local government can argue that any burden on the exercise of religion imposed through the exploitation of their eminent domain power will be eliminated by the just compensation payment.<sup>214</sup> Nevertheless, this type of argument might fail because there are likely burdens that may not be undone or outweighed by a monetary figure. It is contended that "one reason why condemnation actions should receive a higher level of scrutiny than typical land use regulations . . . [is] the opportunity for government abuse, by paying just compensation to force the sale of citizen's free speech or free exercise rights, is so great."<sup>215</sup> It cannot be forgotten that a high constitutional standard still must be met for an eminent domain proceeding to be valid, regardless of whether or not such actions are subject to additional scrutiny under RLUIPA.

The decision to not apply RLUIPA to eminent domain is fraught with negative implications for the religious community. The power of religious institutions is slight compared to the power of the government, and such a power differential will be especially detrimental in the eminent domain context because of religion's irreplaceable benefit to society. RLUIPA was enacted to ward off possible attacks against religious institutions for their choice of land use, yet the failure to

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<sup>211</sup> See *Smith*, 494 U.S. at 882–85.

<sup>212</sup> See Storzer & Picarello, *supra* note 16, at 949.

<sup>213</sup> See Saxer, *supra* note 140, at 673.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 674.

protect religious institutions from the government's power of eminent domain, that freedom of choice can be more easily taken away.

#### V. WHERE IS THE RLUIPA/EMINENT DOMAIN RELATIONSHIP GOING?

Inevitably, the debate over RLUIPA's application to eminent domain proceedings will continue until the Supreme Court rules definitively on the subject. In the meantime, some politicians suggest that amending RLUIPA to explicitly include eminent domain within the definition of land use regulation would be beneficial.<sup>216</sup> It is questionable whether a proposed amendment to the Act would even pass constitutional muster. The proposed amendment would dramatically alter the rational review standard set forth in *Kelo* for assessing exercises of eminent domain power under the Takings Clause as it would replace the rational review standard with RLUIPA strict scrutiny review.<sup>217</sup> The Court has already rejected a congressional attempt to change the standard of review for Takings Clause controversies, finding that "it [could not] unilaterally determine the constitutional standard under the Takings Clause, without transgressing the separation of powers: That standard is for the Supreme Court to set."<sup>218</sup> Such an amendment also likely violates the Establishment Clause because it would give religious institutions extraordinary protection against takings but not provide other landowners with the same benefit.<sup>219</sup>

Additionally, some politicians have suggested that Congress hold legislative hearings to determine the appropriate direction in which to focus this discussion and to brainstorm about possible solutions to the existing dilemma. It is argued that constituents might want to inform members of Congress about the actual influence and impact of RLUIPA, namely "the fact that it has created an aristocracy of landowners—those that are religious—which has disserved many private property owners."<sup>220</sup> Considering the judicial split over RLUIPA's application to eminent domain proceedings and the slowly budding commentary on the issue, it seems that the controversial

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<sup>216</sup> Senator Edward Kennedy has proposed an amendment to RLUIPA. See Eminent Domain Watch, *Churches and Eminent Domain: A Move in Congress to Once Again Make Churches Privileged Landowners*, <http://www.iconworldwide.com/emdo/churches-and-eminent-domain-move-in.htm>.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

RLUIPA/ eminent domain relationship will not terminate anytime soon. Because it is unknown where the relationship is heading, as for now, the future of the relationship remains open-ended and waiting for the taking.

## VI. CONCLUSION

The government is on a slippery slope when it begins doling out privileges based on religious affiliations. Allowing religion to trump every land use claim would be tyrannical. An unofficial backyard burial site could end up blocking the construction of a major freeway.<sup>221</sup> As Justice Sandra Day O'Connor articulated in a 1988 opinion, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."<sup>222</sup> Arguing the unfairness of a church receiving special protection from the government's taking of its land simply because the gravesites present are believed to be sacred, while a mom-and-pop pizza restaurant would not be accorded a similar level of protection even though the government's action would incontestably destroy the restaurant's business, Eric Zorn contends that "[w]hen the harms people merely believe in have greater standing than the harms people can actually prove, government has lost its neutrality in matters of faith, and genuine religious freedom again sails out the window."<sup>223</sup>

The debate is just beginning over RLUIPA's application to eminent domain actions. Proposing that eminent domain proceedings are not per se land use regulations within the scope of RLUIPA, but could likely be found to be in the implementation of a land use regulation under RLUIPA, this Comment recommends a middle approach to the issue that seems most equitable to both religious institutions and the government. This Comment suggests that allowing takings to fit within RLUIPA's scope only if they are found to be in the implementation of a land use regulation is a sophisticated solution to the problem currently facing state governments and religious institutions. If such a position is accepted, the danger to the livelihood of religious institutions and the security of their sacred burial sites will not be as acute and the government's power to exercise their condemnation right will not be incorrectly usurped.

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<sup>221</sup> Change of Subject—The Chicago Tribune, *Cemetery Fight at O'Hare, continued*, [http://blogs.chicagotribune.com/news\\_columnists\\_ezorn/2006/04/cemetery\\_fight\\_.html](http://blogs.chicagotribune.com/news_columnists_ezorn/2006/04/cemetery_fight_.html) (posted by Eric Zorn Apr. 6, 2006) [hereinafter *Cemetery Fight*].

<sup>222</sup> *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

<sup>223</sup> *Cemetery Fight*, supra note 221.