

11-1-2008

## RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection

Matthew Baker

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>

 Part of the [Land Use Law Commons](#), [Property Law and Real Estate Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

Matthew Baker, *RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection*, 2008 BYU L. Rev. 1213 (2008).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2008/iss4/4>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

## RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection

### I. INTRODUCTION

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)<sup>1</sup> passed through Congress “by unanimous consent”<sup>2</sup> and was signed into law by President Clinton on September 22, 2000.<sup>3</sup> RLUIPA, described generally as “a bill designed to protect the free exercise of religion from unnecessary governmental interference,”<sup>4</sup> represents the most recent in a series of congressional responses to the Supreme Court’s restrictive rendering of the Free Exercise Clause in *Employment Division v. Smith*, in which the Court held that neutral, generally applicable laws need only satisfy rational basis analysis, even though they may place burdens on free exercise rights.<sup>5</sup> Eager to reinstate a strict scrutiny standard in free exercise jurisprudence, Congress first attempted to countermand the *Smith* ruling with passage of the Religious Freedom Restoration Act of 1993 (RFRA).<sup>6</sup> However, in *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional and inapplicable to the states because it exceeded Congress’s remedial powers under Section 5 of the Fourteenth Amendment.<sup>7</sup> After failing to pass a replacement for RFRA called the

---

1. 42 U.S.C. § 2000cc (2000).

2. 146 CONG. REC. E1563 (2000) (statement of Rep. Charles T. Canady).

3. See Statement on the Signing of the Religious Land Use and Institutionalized Persons Act of 2000, 2 PUB. PAPERS 1905, 1906 (Sept. 22, 2000) (“This Act recognizes the importance the free exercise of religion plays in our democratic society.”).

4. 146 CONG. REC. H7190 (2000) (statement of Rep. Charles T. Canady).

5. 494 U.S. 872, 885 (1990), *superseded by statute*, 42 U.S.C. § 2000bb, *as recognized in* Francis v. Mineta, 505 F.3d 266 (3d Cir. 2007). Although the statute superseded the *Smith* holding for a time, the Supreme Court struck down 42 U.S.C. § 2000bb as unconstitutional in *City of Boerne*. See *infra* note 7 and accompanying text.

6. 42 U.S.C. § 2000bb (2000), *amended by* Religious Land Use and Institutionalized Persons Act § 7, 42 U.S.C. § 2000cc-4 (2000).

7. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), *superseded by statute*, 42 U.S.C. 2000cc, *as recognized in* Spratt v. Wall, No. 04-112, 2005 U.S. Dist. LEXIS 33266 (D.R.I. Nov. 21, 2005); 146 CONG. REC. E1563 (2000) (statement of Rep. Charles T. Canady) (describing how the Supreme Court’s decision in *City of Boerne* resulted in the elimination of any and all RFRA application to the states so that it remained “applicable only to the federal

Religious Liberty Protection Act (RLPA) in 1998<sup>8</sup> and 1999,<sup>9</sup> Congress decided to narrow its focus in RLUIPA to two key areas: land use regulation and state institutions.<sup>10</sup>

Academics have already produced a significant body of scholarship and criticism on RLUIPA,<sup>11</sup> focusing broadly on the debate surrounding RLUIPA's constitutionality,<sup>12</sup> discussion of its legislative merits,<sup>13</sup> and evaluation of its effectiveness.<sup>14</sup> By contrast, legal scholars have directed far less attention to unanswered questions suggested by the vagueness of the law's scope and many of its provisions. For example, while RLUIPA imprecisely defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land,"<sup>15</sup> it also calls for broad statutory construction.<sup>16</sup> Under

---

government"); *see also* *Kikumura v. Hurley*, 242 F.3d 950, 959–60 (10th Cir. 2001) (concluding that RFRA remains applicable to the federal government).

8. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998).

9. Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

10. 146 CONG. REC. S7774 (2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy); *see generally* 42 U.S.C. § 2000cc (2000).

11. For an extensive but incomplete list, see Becket Fund for Religious Liberty, RLUIPA Scholarship, <http://www.rluipa.com/index.php/topic/21.htm> (last visited Oct. 7, 2008) (listing law review articles).

12. *See, e.g.*, Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny*, 70 FORDHAM L. REV. 2361 (2002); Ariel Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485 (2005). RLUIPA's constitutionality was upheld by the first court addressing the issue. *See* *Freedom Baptist Church of Del. County v. Twp. of Middletown*, 204 F. Supp. 2d 857, 863 (E.D. Pa. 2002). The only court to strike down RLUIPA on constitutionality grounds was overturned on appeal. *See* *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1104 (C.D. Cal. 2003) ("[RLUIPA] was enacted without the ambit of congressional authority, and is therefore unconstitutional."), *rev'd*, 456 F.3d 978 (9th Cir. 2006). This Comment will only address the issue of constitutionality as it is relevant to the application of RLUIPA in eminent domain proceedings.

13. *See, e.g.*, Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003); Stephen A. Haller, Comment, *On Sacred Ground: Exploring Congress's Attempts to Rein in Discriminatory State Zoning Practices*, 33 SW. U. L. REV. 285 (2004).

14. *See, e.g.*, Note, *Religious Land Use in the Federal Courts under RLUIPA*, 120 HARV. L. REV. 2178, 2179 (2007); Sara Smolik, Note, *The Utility and Efficacy of the RLUIPA: Was It a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723, 723 (2004).

15. 42 U.S.C. § 2000cc-8(5) (2000).

16. *Id.* § 2000cc-5(g) ("This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.")

RLUIPA's regime, courts hearing arguments in the context of religious land use thus face the daunting challenge of determining the boundaries of RLUIPA's application and force, with little clear guidance from the statute's terms. Perhaps Congress intended the vague language as a means of securing the broadest possible protection for religious exercise without running afoul of its constitutional limitations. Whatever the case, RLUIPA leaves to the courts the task of tracing the appropriate lines.

One of the most interesting border disputes to arise from this vagueness problem is whether the statute's definition of "land use regulation" should be construed broadly enough to include eminent domain proceedings.<sup>17</sup> In the first case to hear the issue, *Cottonwood Christian Center v. City of Cypress*,<sup>18</sup> a federal district court held that the city's denial of a conditional use permit and invocation of eminent domain against the church were subject to strict scrutiny under RLUIPA.<sup>19</sup> The court noted that, "[e]ven if the Court were only considering the condemnation proceedings, they would fall under RLUIPA's definition of 'land use regulation' . . . [because the City's] authority to exercise eminent domain . . . is based on a zoning system developed by the City."<sup>20</sup> Apparently classifying the eminent domain proceedings as "the application of such a [zoning] law,"<sup>21</sup> the *Cottonwood* court adhered to RLUIPA's broad construction clause and marked the first boundary line accordingly.

---

17. At the commencement of this writing, only two commentators had addressed, in cursory fashion, the issues involved in extending RLUIPA's protection to the eminent domain context. See Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 662 (2004) (concluding that RLUIPA "provide[s] a strict scrutiny review standard . . . for any eminent domain action used to exclude or unreasonably limit religious assemblies"); G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653, 1696 (2006) (concluding without significant analysis that "RLUIPA's definition of land use regulation includes eminent domain actions"). Since then, three commentators have more squarely addressed the issue. See Cristina Finetti, Comment, *Limiting the Scope of the Religious Land Use and Institutionalized Persons Act: Why RLUIPA Should Not Be Amended to Regulate Eminent Domain Actions Against Religious Property*, 38 SETON HALL L. REV. 667 (2008); Daniel N. Lerman, Note, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057 (2008); Alison Scaduto, Comment, *RLUIPA as a Possible Shield from the Government Taking of Religious Property*, 38 SETON HALL L. REV. 823 (2008).

18. 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

19. *Id.* at 1220–22.

20. *Id.* at 1222 n.9.

21. *Id.* (quoting 42 U.S.C. § 2000cc-8(5) (2000)).

Subsequent courts have not been so eager to follow that congressional mandate. For example, in *St. John's United Church of Christ v. City of Chicago*,<sup>22</sup> the court took a much narrower view of RLUIPA's land use definition and the *Cottonwood* court's analysis:

This Court is not willing to take such an expansive view, nor does it believe that *Cottonwood* stands for such a sweeping proposition. While this Court may not agree with the passing reference to eminent domain in *Cottonwood*, that case can be read to suggest that RLUIPA is applicable to the specific eminent domain actions where the condemnation proceeding is intertwined with other actions by the city involving zoning regulations.<sup>23</sup>

Another district court went further, holding without reservation that RLUIPA does not apply to eminent domain proceedings.<sup>24</sup> It concluded that zoning laws and eminent domain were "two distinct [legal] concepts,"<sup>25</sup> pointed to the absence of eminent domain in the statutory language,<sup>26</sup> and criticized the *Cottonwood* court's reasoning as "not 'persuasive as it relates to such an attenuated relationship between eminent domain and zoning.'"<sup>27</sup>

With the battle lines clearly drawn, this Comment will probe the boundaries of RLUIPA to determine whether eminent domain is properly subject to its mandate. In spite of strong opinions to the contrary, this Comment will argue that application of RLUIPA to eminent domain proceedings is appropriate and reasonable given the close causal nexus between zoning laws and eminent domain, the broad construction of RLUIPA, and the substance of its congressional record. This is especially true in cases like *Cottonwood*, where the city appeared to initiate eminent domain proceedings specifically to prevent the church from locating and developing on the property.<sup>28</sup> Even a limited application of RLUIPA better serves

---

22. 401 F. Supp. 2d 887 (N.D. Ill. 2005), *aff'd*, 502 F.3d 616 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2431 (2008).

23. *Id.* at 900.

24. *See* Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 257 (W.D.N.Y. 2005) ("[T]he Town's employment of eminent domain to obtain the land is simply too far removed from any zoning regulations to fall within the purview of RLUIPA.").

25. *Id.* at 254.

26. *Id.* at 255.

27. *Id.* at 257 (citation omitted).

28. *Cottonwood Christian Ctr. v. City of Cypress*, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002) ("Although the City contends that Cottonwood is disturbing its long-planned

the purposes of the statute and free exercise jurisprudence than a complete denial of protection. In short, the *Cottonwood* court traced the correct boundary.

Part II of this Comment will first summarize the facts and analyze the reasoning of the few court cases addressing the application of RLUIPA to eminent domain proceedings in an effort to evaluate the strength of each court's treatment of the issue within the particular facts of the case. Next, Part III will examine the relationship between zoning regulations and eminent domain and argue that, in spite of their differences, the application of RLUIPA to eminent domain proceedings is reasonable and justified—and *not* legally untenable as some courts have held.<sup>29</sup> Part IV will then investigate RLUIPA's enactment and the degree to which the statutory language and congressional record allow for an extension of protection to eminent domain even in the absence of specific language to that effect. Ultimately, Congress intended RLUIPA to provide broad protection for religious land uses constrained by land use regulation throughout the country. Despite the generally negative treatment of the *Cottonwood* court's analysis by subsequent courts faced with this issue, the court of first impression has been the most faithful to the spirit and meaning of RLUIPA.

## II. RLUIPA AS APPLIED TO EMINENT DOMAIN IN THE COURTS

With RLUIPA, religious land use litigation most often involves zoning disputes.<sup>30</sup> Zoning laws and regulations impact the “use, building, or conversion of real property for the purpose of religious exercise”<sup>31</sup> far more frequently than eminent domain proceedings, which are rare by comparison. In fact, since RLUIPA's passage in 2000, only five cases have dealt directly with eminent domain proceedings, beginning with *Cottonwood*. These cases seem to reveal considerable conflict and tension in the construction of RLUIPA and conception of zoning laws and eminent domain. However, it is unclear whether this tension arises primarily from critical

---

development efforts, it was only after *Cottonwood* purchased that land that the City moved aggressively to find other uses for the property.”).

29. See, e.g., *Faith Temple Church*, 405 F. Supp. 2d at 254–58.

30. See Becket Fund for Religious Liberty, Cases, <http://www.rluipa.com/index.php/case/> (last visited Oct. 7, 2008) (providing a comprehensive, but not complete, listing of RLUIPA cases).

31. 42 U.S.C. § 2000cc-8(7)(B) (2000).

disagreements between courts, or if the divergent outcomes are better explained with reference to the particular facts of each case. Ultimately, if this trend continues, the Supreme Court will have to determine RLUIPA's scope.

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

In *Cottonwood*, the fast-growing Cottonwood Christian Church was no longer able to accommodate its large congregation. To solve the problem, the church spent five years finding a more suitable location, eventually acquiring adjacent plots of land in a blighted redevelopment zone. In total, the church amassed eighteen acres of property, which it hoped to develop into a large church facility.<sup>32</sup> While churches were permitted on the property acquired by Cottonwood, city officials informed the church that the development may not be "consistent with the goals and objectives of the Redevelopment Plan."<sup>33</sup> In accordance with zoning regulations, Cottonwood submitted an application for a conditional use permit. However, city officials were making plans to build a Town Center on the property, and denied the church's application. Shortly thereafter, the City Council adopted a moratorium on discretionary land use permits for the property, effectively preventing Cottonwood from moving forward.<sup>34</sup>

After the city determined that its Town Center plan was not feasible, it decided to pursue a scaled-down, eighteen-acre retail project to be located on Cottonwood's property. The project involved a Costco warehouse store. The city sent letters to the church to determine whether Cottonwood had interest in the project, but Cottonwood responded that it still wanted to build a church.<sup>35</sup> As a result, the city offered to purchase the Cottonwood property.<sup>36</sup> When Cottonwood refused, the city initiated eminent domain proceedings to acquire the land.<sup>37</sup> Cottonwood then brought suit in federal court, claiming violations of its rights and seeking an injunction.<sup>38</sup> It argued, in part, that the city's actions,

---

32. *Cottonwood*, 218 F. Supp. 2d at 1211-14.

33. *Id.* at 1213.

34. *Id.* at 1213-14.

35. *Id.* at 1214.

36. *Id.*

37. *Id.* at 1214-15.

38. *Id.* at 1215.

including the eminent domain proceedings, should be subject to strict scrutiny as required by RLUIPA.<sup>39</sup>

The district court held that, under RLUIPA, strict scrutiny should be applied for two reasons.<sup>40</sup> First, Cottonwood's proposed development project would substantially affect interstate commerce.<sup>41</sup> Second, the city's refusal to grant a conditional use permit "involves a 'land use regulation . . . under which a government makes . . . individualized assessments.'"<sup>42</sup> The city had argued that only the eminent domain proceedings should be at issue, and that "the exercise of eminent domain is not a 'land use regulation' under RLUIPA."<sup>43</sup> But the court had already concluded that the permit denial and eminent domain proceedings were inextricably linked by the facts of the case.<sup>44</sup> Moreover, the court stated that, even excluding the permit denial, RLUIPA applies because eminent domain proceedings fall under the statutory definition of "land use regulation."<sup>45</sup> Finally, in a related free-exercise analysis, the court further determined that, along with its actions in denying the conditional use permit, the city's condemnation efforts "are individualized assessments," thus fulfilling RLUIPA's jurisdictional requirement.<sup>46</sup>

In this case of first impression, the court took a broad view of RLUIPA's definitions and jurisdictional provisions. Based on the close connection between the city's zoning laws and redevelopment plans, and its eminent domain proceedings against the Cottonwood property, the court treated eminent domain as a logical application of the city's zoning practices, thus broadly interpreting the statutory definition of "land use regulation."<sup>47</sup> The court also firmly established RLUIPA jurisdiction over eminent domain, based on

---

39. *Id.* at 1219–20.

40. *Id.* at 1221.

41. *Id.* at 1221–22.

42. *Id.* at 1222 (quoting 42 U.S.C. § 2000cc(a)(2)(C) (2000)).

43. *Id.* at 1222 n.9.

44. *See id.* at 1219 ("If the [c]ity has wrongfully failed to grant Cottonwood a CUP for its church construction, then Defendants' attempt to condemn land that had zoning entitlements becomes a more difficult endeavor.").

45. *Id.* at 1222 n.9.

46. *Id.* at 1223.

47. *See id.* at 1222 n.9.

both the Commerce Clause and Section 5 of the Fourteenth Amendment.<sup>48</sup>

*B. Courts Responding to Cottonwood*

Subsequent courts have largely disagreed with *Cottonwood's* broad view of RLUIPA's boundaries in the eminent domain context.

*I. Faith Temple Church v. Town of Brighton*<sup>49</sup>

In *Faith Temple*, the court signaled a distinct break from the *Cottonwood* analysis. *Faith Temple* involved a religious congregation that had outgrown its former location and that sought a larger property on which to build a church complex.<sup>50</sup> Eventually the church purchased a sixty-six-acre parcel immediately east of a park owned by the town.<sup>51</sup> The town, which claimed to be "surprised by Faith Temple's action," had previously sought to acquire the parcel to permit expansion of the park, but failed to agree on a suitable price with the former owner.<sup>52</sup> A few months after purchase of the land by Faith Temple, the town began eminent domain proceedings to acquire the land.<sup>53</sup> The church brought suit alleging violation of RLUIPA, among other claims,<sup>54</sup> relying in part on the *Cottonwood* court's analysis.<sup>55</sup>

However, the *Faith Temple* court adopted a much narrower view of RLUIPA than did the *Cottonwood* court. In clear contrast to *Cottonwood*, the court held that the eminent domain proceedings at issue in the case "do not amount to a 'zoning law' or 'the application of such a law.'"<sup>56</sup> The court based its conclusion on the status of zoning laws and eminent domain as "two distinct concepts" in New York state law,<sup>57</sup> and on the absence of eminent domain in

---

48. *See id.* at 1221–22. The *Cottonwood* court refers to Section 5 of the Fourteenth Amendment as the Enforcement Clause. *See id.* at 1221.

49. 405 F. Supp. 2d 250 (W.D.N.Y. 2005).

50. *Id.* at 251.

51. *Id.*

52. *Id.*

53. *Id.* at 251–52.

54. *Id.* at 252.

55. *Id.* at 256.

56. *Id.* at 254.

57. *Id.*

the statutory definition.<sup>58</sup> In response to Faith Temple's argument that Congress "would have wanted RLUIPA to apply" to the particular facts of the case, the court curtly observed: "The statute says what it says. Congress made no mention of eminent domain, and it is not the Court's proper function to add language to the statute in order to stretch its applicability to suit the aspirations of a particular litigant."<sup>59</sup> In addition, the court concluded that "the connection between the eminent domain proceedings and any of the town's zoning laws is too attenuated to constitute the application of a zoning law."<sup>60</sup> It firmly rejected as unpersuasive the *Cottonwood* court's suggestion "that any exercise of eminent domain that relates in some way to a zoning plan falls within the scope of RLUIPA."<sup>61</sup>

## 2. *St. John's United Church of Christ v. City of Chicago*<sup>62</sup>

In *St. John's*, the courts again decided to exclude eminent domain proceedings from the scope of RLUIPA. *St. John's* involved efforts by the City of Chicago to acquire parcels of land adjacent to O'Hare airport, including land owned by a cemetery affiliated with St. John's Church, in order to facilitate expansion.<sup>63</sup> Initially, the city was enjoined from proceeding because it failed to follow the required administrative procedure by obtaining approval from the state Department of Transportation.<sup>64</sup> In response to the injunction, the city requested that the Illinois General Assembly pass the O'Hare Modernization Act (OMA), which effectively stripped the Illinois Religious Freedom Restoration Act of any power to prevent the relocation of cemeteries or graves as part of the modernization plan.<sup>65</sup> As the city moved forward with its plans to acquire the land through eminent domain, it "carefully considered the concerns of

---

58. *Id.* at 254–55. The court further stated that, while the statute's clear meaning rendered unnecessary consideration of legislative intent, analysis of RLUIPA's legislative intent also failed to support the church's position. *Id.* at 255.

59. *Id.* at 255.

60. *Id.* at 256.

61. *Id.* at 256–57.

62. The *St. John's* case was heard by both a federal district court, *see* 401 F. Supp. 2d 887 (N.D. Ill. 2005), and the Seventh Circuit on appeal, *see* 502 F.3d 616 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2431 (2008).

63. *St. John's*, 502 F.3d at 620–621.

64. *St. John's*, 401 F. Supp. 2d at 890–91.

65. *Id.* at 891.

the religious entities in an exhaustive review.”<sup>66</sup> Unsatisfied, however, St. John’s Church filed numerous claims against Chicago, its mayor, and the State of Illinois, including alleged violations of RLUIPA and the Constitution’s Free Exercise and Due Process Clauses.<sup>67</sup>

At trial, the district court held that “RLUIPA does not apply” to the city’s eminent domain proceedings against the St. John’s cemetery.<sup>68</sup> It distinguished the facts of the case from *Cottonwood*, stating that “[n]othing in the [case] leads to the inference that the City’s authority to acquire the land stems from any zoning regulations or landmarking law.”<sup>69</sup> Commenting further, the court declined to take *Cottonwood*’s “expansive view” of RLUIPA’s provisions.<sup>70</sup> Instead, the court underscored the absence of any reference to “takings” in the statute and its own perception of the differences between zoning laws and eminent domain, concluding “that the [c]ity does not act pursuant to a zoning or landmarking law.”<sup>71</sup> At the same time, the court noted that “this should not be taken to mean that all condemnation proceedings necessarily are outside the scope of RLUIPA,” leaving the question open for further review.<sup>72</sup>

On appeal, the Seventh Circuit agreed with the district court that RLUIPA did not apply to the eminent domain proceedings at issue in the case.<sup>73</sup> The court extended the discussion contained in previous cases, including *Faith Temple* and the *St. John’s* district court ruling, that approached zoning laws and eminent domain as distinct concepts: “As Illinois courts have long recognized, the ‘police power [zoning] and eminent domain are distinct powers of government.’”<sup>74</sup> Dismissing the *Cottonwood* statements as “brief dicta,” the Seventh Circuit concluded that

---

66. *St. John’s*, 502 F.3d at 635.

67. *St. John’s*, 401 F. Supp. 2d at 891–92.

68. *Id.* at 899.

69. *Id.*

70. *Id.* at 900.

71. *Id.*

72. *Id.*

73. *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 641–642 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2431 (2008).

74. *Id.* at 640 (quoting *Sanitary Dist. of Chi. v. Chi. & Alton R.R. Co.*, 108 N.E. 312, 314 (Ill. 1915)) (alteration in original).

[g]iven the importance of eminent domain as a governmental power affecting land use, we think that if Congress had wanted to include eminent domain within RLUIPA, it would have said something. . . . Congress did not mention eminent domain in so many words in RLUIPA's definition of a land use regulation, which is enough for us to consider it excluded.<sup>75</sup>

The court, in ruling that RLUIPA intentionally excluded eminent domain, viewed RLUIPA's boundaries even more narrowly than the district court, which found that RLUIPA is not necessarily inapplicable to all condemnation cases.<sup>76</sup>

### 3. City of Honolulu v. Sherman<sup>77</sup>

In *City of Honolulu*, Hawaii's Supreme Court roughly followed the reasoning of the *Faith Temple* and *St. John's* courts. The case involved eminent domain proceedings executed on a condominium complex owned by the First United Methodist Church.<sup>78</sup> At issue was a city ordinance that authorized the city to acquire through eminent domain "the fee simple interest in land situated underneath condominium developments from the fee owners of the land in order to convey fee simple title to the owner-occupants of the condominium units."<sup>79</sup> In response to the condemnation proceedings, First United filed suit for violations of its federal and state constitutional rights and invoked RLUIPA as a defense to the condemnation and conversion action.<sup>80</sup> At trial, the court ruled that "RLUIPA is inapplicable as a defense to conversion."<sup>81</sup>

In the first state appellate court case to address RLUIPA's application to eminent domain, Hawaii's Supreme Court affirmed the lower court's ruling.<sup>82</sup> The Court began by discussing the statutory definition of "land use regulation" and the nature of zoning and landmarking laws. It concluded that to correctly apply RLUIPA the city's action "must pertain either (1) to the division of a city into districts and the regulation of the land usage within those

---

75. *Id.* at 641.

76. *Id.*

77. *City of Honolulu v. Sherman*, 129 P.3d 542 (Haw. 2006).

78. *Id.* at 546.

79. *Id.* at 545.

80. *Id.* at 546.

81. *Id.*

82. *Id.* at 547.

districts or (2) to a monument, marker, or building having historical significance.”<sup>83</sup> The Court then marshaled support for its view from previous decisions in *St. John’s* and *Faith Temple*, which denied the applicability of RLUIPA to eminent domain proceedings.<sup>84</sup> Moreover, it directly addressed First United’s argument that the *Cottonwood* decision stood for the proposition that all exercises of eminent domain are subject to RLUIPA:

The fact that the *Cottonwood* court denominated the authority of the Cypress, California Redevelopment Agency to exercise its power of eminent domain as being “based on a zoning system” has no bearing on the present matter. The [Cypress] Redevelopment Agency’s authority apparently emanated from “the Resolution of Necessity” and a zoning system developed by that city, which by no means signifies that *all* exercises of eminent domain are grounded in a zoning system.<sup>85</sup>

Because the city ordinance at issue operated independent of any zoning system or regulation, the eminent domain proceedings could not have been construed as a zoning law subject to RLUIPA.<sup>86</sup> However, the court failed to specifically consider whether the proceedings in question could be the application of a zoning law.

#### 4. Albanian Associated Fund v. Township of Wayne<sup>87</sup>

The district court of New Jersey decided the most recent eminent domain RLUIPA case, in which Albanian Associated, a growing Muslim congregation, acquired an eleven-acre tract of land on which it hoped “to provide a place of public worship and prayer in accordance with the traditions of the Islamic religion.”<sup>88</sup> The property, which had always been undeveloped, was located in a land use zone that categorized a church building as a conditional use requiring city approval and that the city maintained was “defined by ordinance as ‘environmentally sensitive.’”<sup>89</sup> The city claimed that prior to Albanian Associated’s acquisition of the land it had

---

83. *Id.* at 561.

84. *Id.* at 561–62.

85. *Id.* at 564.

86. *Id.*

87. *Albanian Associated Fund v. Twp. of Wayne*, No. 06-CV-3217, 2007 WL 2904194 (D.N.J. Oct. 1, 2007).

88. *Id.* at \*1.

89. *Id.*

announced a proposal to preserve open spaces in the city.<sup>90</sup> While Albanian Associated's land development application remained pending, and "nearly two and a half years after the open space proposal was first introduced," residents approved the Open Space Referendum, "which would put aside a portion of resident tax dollars to purchase and preserve open spaces."<sup>91</sup> One councilman offered testimony suggesting that "the plaintiff's application to build its Mosque" was a principal reason behind the Referendum. The city then formed an Open Space Committee, which determined that the plaintiff's property would be subject to the initiative. However, the record showed no indication that the township ever notified Albanian Associated of its decision.<sup>92</sup>

After several meetings were held to discuss the plaintiff's property, the Council decided to move forward with plans to acquire the land.<sup>93</sup> In spite of the suspicious circumstances, several Council members testified in deposition "that the decision to acquire the property was not motivated by an improper purpose."<sup>94</sup> The township offered the plaintiff monetary compensation and suggested alternative locations for the mosque.<sup>95</sup> The plaintiff found that the alternative sites suggested were not available for acquisition and rejected the offer, at which point the township initiated condemnation proceedings. In response, the plaintiff brought suit for violations of RLUIPA and moved for a preliminary injunction against the township. During the hearing on that motion, "it was made apparent that despite approximately 102 properties identified for the Open Space and Recreation Plan, only the plaintiff's property was being pursued through condemnation."<sup>96</sup> The court granted a preliminary injunction until a final disposition could be determined.<sup>97</sup>

After a full hearing of the case, the court concluded that RLUIPA was applicable.<sup>98</sup> It discussed at length the decisions in *St.*

---

90. *Id.*

91. *Id.* at \*2.

92. *Id.*

93. *Id.* at \*3.

94. *Id.*

95. *Id.* at \*4.

96. *Id.*

97. *Id.*

98. *Id.* at \*8.

*John's* and *Faith Temple*, but only briefly mentioned *Cottonwood*,<sup>99</sup> which might be read as agreement with the former courts on the issue of eminent domain. However, it attempted to avoid the eminent domain question by holding that “the RLUIPA challenge does not go to the actual taking, but rather the implementation of the open space plan which is a land use regulation.”<sup>100</sup> At the same time, the court recognized the taking as “a method of implementation,”<sup>101</sup> suggesting, perhaps unwittingly, that eminent domain could be classified as the application of a zoning or landmarking law under RLUIPA. The overall lack of careful analysis by the court undermines the authority of its conclusion that eminent domain falls outside of RLUIPA’s scope.

### *C. Synthesizing and Reconciling the Case Law*

A review of the relevant case law leaves unsettled the issue of whether RLUIPA applies to eminent domain. In spite of the nearly categorical pronouncements in *St. John's* and *Faith Temple* against the application of RLUIPA to eminent domain, those decisions focused criticism on the notion that all eminent domain proceedings fall within RLUIPA’s purview. But those cases do not stand for the proposition that RLUIPA should never apply. In fact, the *St. John's* court specifically qualifies its ruling, saying that its holding “should not be taken to mean that all condemnation proceedings necessarily are outside the scope of RLUIPA.”<sup>102</sup>

Moreover, the facts of each case distinguish the divergent holdings. While *Faith Temple*, *St. John's*, and *City of Honolulu* all argued against application of RLUIPA,<sup>103</sup> the eminent domain proceedings in those cases did not involve the close connection to zoning laws and apparent discriminatory intent at issue in *Cottonwood* and *Albanian Associated Fund*, where the facts strongly favored treatment of eminent domain as an application of zoning or landmarking laws.<sup>104</sup> In fact, *St. John's* involved airport expansion, not zoning-based redevelopment, and the city clearly made every

---

99. *Id.* at \*8–9.

100. *Id.* at \*8.

101. *Id.*

102. *St. John's United Church of Christ v. City of Chi.*, 401 F. Supp. 2d 887, 900 (N.D. Ill. 2005), *aff'd*, 502 F.3d 616 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2431 (2008).

103. *See supra* notes 49–86 and accompanying text.

104. *See supra* notes 32–48, 87–101 and accompanying text.

1213]

*RLUIPA and Eminent Domain*

effort to accommodate the concerns of the religious groups affected while achieving the necessary ends of the project.<sup>105</sup> However, in *Cottonwood* and *Albanian Associated Fund*, the municipal defendants appeared to be engaged in a bad faith attempt to prevent the religious land use desired by the plaintiffs. When efforts to deny the churches through ordinary zoning laws failed, the cities applied eminent domain as a means to further their discriminatory purposes. Thus, in spite of its distinct character, eminent domain represented an application of zoning or landmarking laws sufficient to invoke RLUIPA's protections. If courts were to universally hold that eminent domain proceedings fell beyond RLUIPA's proper scope, cities and municipal groups could simply exercise this power in a manner seemingly independent of their own zoning regulations and, in effect, frustrate the goals and purposes of RLUIPA. At the least, RLUIPA application seems appropriate in situations involving zoning-based redevelopment decisions subject to a high degree of discretion.

### III. THE RELATIONSHIP BETWEEN ZONING LAWS AND EMINENT DOMAIN

Parts III and IV will address the principal justifications given in *St. John's* and *Faith Temple* for denying application of RLUIPA to eminent domain—namely, the separate and distinct nature of zoning laws and eminent domain, and the absence of eminent domain in the statutory language and congressional record.<sup>106</sup> Part III concerns the former, and Part IV the latter.

At issue here is RLUIPA's definition of "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>107</sup> In order for RLUIPA to apply, eminent domain proceedings must fall under this definition. *St. John's* and *Faith Temple* would deny application, relying on the basic characterization of zoning laws and eminent domain as "two distinct concepts' that involve land 'in very different ways.'"<sup>108</sup> Authority to enact zoning laws comes from the

---

105. See *supra* notes 62–76 and accompanying text.

106. See, e.g., *supra* notes 71–75 and accompanying text.

107. 42 U.S.C. § 2000cc-5(5) (2001).

108. *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 640 (7th Cir. 2007) (quoting *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005)), *cert. denied*, 128 S. Ct. 2431 (2008).

police power, while authority to take property through eminent domain comes from the sovereignty of the state. These courts would argue that because the police power and eminent domain power derive from separate sources, RLUIPA's definition of "land use regulation" includes the former, but excludes the latter.<sup>109</sup>

This analysis of RLUIPA is insufficient for two reasons. First, it fails to take into account the degree to which eminent domain proceedings arise out of zoning laws and, as such, represent an application of those laws. Second, it ignores the ways in which the Supreme Court's own takings jurisprudence has connected these two concepts. This Part will describe the legal character of zoning laws and eminent domain proceedings, and then demonstrate the causal nexus that links the two within the scope of RLUIPA.

#### *A. Police Power: Zoning Authority and Regulations*

The police power, as embodied in zoning laws and regulations, rests on the concept that private property owners are entitled to reasonable enjoyment of their property, "provided they [do] not interfere with their neighbors' reasonable enjoyment of their properties and subject to reasonable regulations for the public good."<sup>110</sup> As the Supreme Court has said, the term generally "connotes the time-tested conceptional limit of public encroachment upon private interests."<sup>111</sup> More specifically, "the police power is the power of the sovereign to legislate in behalf of the public health, morals or safety by general regulations."<sup>112</sup>

In the context of land use regulation, the police power enables states to enact zoning laws that, among other things,

regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.<sup>113</sup>

---

109. *See id.*

110. JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 1.42 (3d ed. 1950).

111. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

112. SACKMAN ET AL., *supra* note 110, § 1.42.

113. *Faith Temple Church*, 405 F. Supp. 2d at 254 (quoting N.Y. TOWN L. § 261). The Standard State Zoning Enabling Act (SZEA), announced in 1922 by the United States

This includes the creation of residential, commercial, or industrial districts and, by extension, any development or redevelopment plan initiated by the city or municipal group in order to promote the public welfare.<sup>114</sup> While local governments do not have independent police power authority, the states delegate zoning authority to them so that land use regulations are responsive to local issues and needs.<sup>115</sup>

### *B. Eminent Domain Power*

The power of eminent domain, by contrast, derives from “the sovereignty of the state,” rather than any ownership or property rights.<sup>116</sup> Eminent domain has been traced all the way back to the jurist Hugo Grotius, who described the power in 1625.<sup>117</sup> Simply put, “[e]minent domain is the power of the sovereign to take property for public use without the owner’s consent.”<sup>118</sup> Although it “does not require recognition by constitutional provision,”<sup>119</sup> the power of eminent domain—along with its public use and just compensation requirements—is countenanced by the Fifth Amendment.<sup>120</sup> Most state constitutions also include eminent

---

Department of Commerce, also reflects the main goals and concerns of zoning laws. It stated that zoning laws should be enacted “to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; [and] to facilitate the provision of transportation, water, sewerage, schools, parks, and other public requirements.” Advisory Comm. on Zoning, U.S. Dep’t of Commerce, A Standard Zoning Enabling Act § 3 (rev. ed. 1926), *available at* <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

114. Such zoning laws “are a relatively modern invention,” beginning around the turn of the twentieth century. *Faith Temple Church*, 405 F. Supp. 2d at 254 n.3 (citing *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926)).

115. *See, e.g.*, *Flower Hill Bldg. Corp. v. Flower Hill*, 100 N.Y.S.2d 903, 907–08 (Sup. Ct. 1950) (explaining how zoning laws protect communities through local zoning ordinances aimed at preventing disruptive zoning changes that would upset the local way of life, property values, and most desirable uses of land).

116. SACKMAN ET AL., *supra* note 110, § 1.13[4] (citing *Shoemaker v. United States*, 147 U.S. 282, 296 (1893)).

117. *See Welch v. Tenn. Valley Auth.*, 108 F.2d 95, 98 (6th Cir. 1939) (“The phrase ‘eminent domain’ appears to have originated with Grotius who carefully described its nature, and the power is universal and as old as political society. The American Constitution did not change its scope or nature, but simply embodied it in the fundamental law.”); SACKMAN ET AL., *supra* note 110, § 1.12[1].

118. SACKMAN ET AL., *supra* note 110, § 1.11.

119. *Id.* § 1.3.

120. U.S. CONST. amend. V.

domain provisions, which do not grant the power but act as positive limitations.<sup>121</sup> Historically, governments have properly invoked eminent domain to acquire private property for building highways and railroads;<sup>122</sup> to redevelop a blighted neighborhood;<sup>123</sup> to eliminate the “social and economic evils of a land oligopoly”;<sup>124</sup> to eliminate “a significant barrier to entry” into an important commercial market so as to enhance competition;<sup>125</sup> and to reinvigorate a distressed local economy.<sup>126</sup>

### *C. Causal Nexus: Police Power and Eminent Domain*

Based on the forgoing analysis, what generally “distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent its use thereof in a manner that is detrimental to the public interest.”<sup>127</sup> However, because the nature of the two powers and their respective sources of authority differ, this distinction alone cannot provide a definitive answer to the question of RLUIPA’s applicability. Instead, we must seriously consider whether eminent domain proceedings constitute an application of zoning laws, as the *Cottonwood* court held, and to what degree the concepts have been conflated in takings jurisprudence.

#### *1. Application of zoning or landmarking laws*

For some scholars, common sense demands that eminent domain be treated as an application of zoning or landmarking laws for the purposes of RLUIPA analysis.<sup>128</sup> After all, “any eminent domain action can likely be traced to a local government’s comprehensive plan or zoning system and can thus be considered the government’s application of a zoning law or landmarking law, subject to

---

121. SACKMAN ET AL., *supra* note 110, § 1.3.

122. *See, e.g.*, *Dohany v. Rogers*, 281 U.S. 362, 366 (1930); *West River Bridge Co. v. Dix*, 47 U.S. 507, 512 (1848).

123. *See, e.g.*, *Berman v. Parker*, 348 U.S. 26, 33 (1954).

124. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42 (1984).

125. *Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986, 1015 (1984).

126. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

127. SACKMAN ET AL., *supra* note 110, § 1.42 (emphasis in original).

128. *See, e.g.*, *Saxer*, *supra* note 17, at 670; *Mathues*, *supra* note 17, at 1664–68.

RLUIPA.”<sup>129</sup> Thus, the most “critical” aspect of RLUIPA’s applicability to eminent domain proceedings is the statute’s “application” clause, which broadens the scope of RLUIPA to cover “most condemnations . . . executed pursuant to a zoning system.”<sup>130</sup> In application, however, a majority of courts addressing this issue have failed to recognize RLUIPA’s “application” clause as sufficient to cover eminent domain proceedings.<sup>131</sup>

The courts’ failure to find RLUIPA’s “application” clause as sufficient grounds for application to eminent domain proceedings results primarily from a lack of careful analysis of the clause itself. For example, the *St. John’s* and *Faith Temple* courts never examined the precise relationship between the zoning laws and condemnation proceedings. Instead, the courts quickly concluded that “the connection between the eminent domain proceedings and any . . . zoning laws is too attenuated to constitute the application of a zoning law.”<sup>132</sup> In a subsequent case, the *City of Honolulu* court simply adopted the logic of *St. John’s* and *Faith Temple*—which rejected *Cottonwood’s* conclusions—without any discussion of whether the conversion action constituted an application of the city’s zoning laws.<sup>133</sup> In *Albanian Associated Fund*, the court described the eminent domain proceedings in relation to the zoning laws at issue as a “method of implementation,” but strangely failed to discuss the significance of this characterization in light of RLUIPA’s application clause.<sup>134</sup>

By contrast, “even while rejecting the plaintiffs’ request to apply RLUIPA to all condemnations,” the federal district court in *St. John’s* at least recognized the close relationship that can develop between zoning and eminent domain, and “pointed out that if the city condemned land and then rezoned the land, RLUIPA would likely come into play.”<sup>135</sup> Whether courts carefully analyze the issue or not, the fact remains that when a governmental body initiates eminent domain proceedings to acquire land in furtherance of its

---

129. Saxer, *supra* note 17, at 670.

130. Mathues, *supra* note 17, at 1664.

131. *See supra* Part II.

132. *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 256 (W.D.N.Y. 2005).

133. *See supra* notes 77–86 and accompanying text.

134. *See supra* note 101 and accompanying text.

135. Mathues, *supra* note 17, at 1666.

land use goals and zoning system, it has effectively applied the zoning laws to the property. Stated plainly, “[t]his connection is real, not attenuated,”<sup>136</sup> and courts would be wise to examine the facts of each case to determine the degree of connection.

## 2. *Takings jurisprudence and the coterminous relationship*

Courts denying application of RLUIPA to eminent domain also fail to recognize the ways in which the Supreme Court’s takings jurisprudence has linked the two concepts together.<sup>137</sup> Despite the distinction drawn between police power regulations and eminent domain power takings,

[f]rom one point of view there is a considerable resemblance between the police power and the power of eminent domain in that each power recognizes the superior right of the community against the selfishness of the individuals, the one preventing the use by an individual of his own property in his own way as against the general comfort and protection of the public, and the other depriving him of the right to obstruct the public necessity and convenience by obstinately refusing to part with his property when it is needed for the public use.<sup>138</sup>

The Supreme Court has explicitly recognized this connection in its takings jurisprudence. As early as 1954 in *Berman v. Parker*, the Court asserted that the eminent domain public use requirement is met by a valid exercise of the police power, as determined by the legislative body; in other words, eminent domain can be an appropriate means of “executing the project” dictated by police power concerns.<sup>139</sup> Therefore, the notion that eminent domain can represent the application of zoning laws based on the police power appears to be consistent with established Supreme Court doctrine.

In *Hawaii Housing Authority v. Midkiff*, the Court further clarified the relationship between police power and eminent domain, observing that “[t]he ‘public use’ requirement is thus *coterminous* with the scope of a sovereign’s police powers.”<sup>140</sup> It then

---

136. *Id.* at 1667.

137. I am indebted to Professor John Fee for helping me develop this approach to the relationship between zoning laws and eminent domain.

138. SACKMAN ET AL., *supra* note 110, § 1.42.

139. *See Berman v. Parker*, 348 U.S. 26, 32–33 (1954).

140. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (emphasis added).

acknowledged the narrow judicial role in reviewing legislative judgments, where “the eminent domain power is equated with the police power.”<sup>141</sup> As with some of the RLUIPA cases described above, this connection between the exercise of police power and eminent domain is real, not attenuated.<sup>142</sup>

In addition, a more recent and more controversial case, *Kelo v. City of New London*,<sup>143</sup> clearly demonstrates how the relationship between the exercise of the police power and eminent domain works in practice. In *Kelo*, a local government, with the goal of furthering economic development in a distressed area, attempted to seize private property through eminent domain for the benefit of another private party.<sup>144</sup> The Court held that the takings were constitutional, showing great deference to the city’s judgments concerning the problem of economic distress and the proposed solution:

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.<sup>145</sup>

In other words, the exercise of eminent domain in this case represents a valid application of government police power, in the form of land use plans and zoning systems, to address a serious problem.

Given the vagueness of several RLUIPA terms, courts should analyze their meaning with reference to the ways in which those terms are defined by the Supreme Court in analogous or similar contexts.<sup>146</sup> The coterminous relationship between zoning laws and

---

141. *Id.*

142. *See supra* text accompanying note 136.

143. 545 U.S. 469 (2005).

144. *Id.* at 473–75.

145. *Id.* at 483–84.

146. Courts and legislative bodies frequently employ this kind of analogical or comparative analysis to determine the meaning of unclear terms. In fact, RLUIPA’s own congressional record demonstrates this approach:

eminent domain established in the takings cases shows that condemnation proceedings can, and often do, represent an application of zoning laws.

#### IV. CONGRESSIONAL INTENT: WHAT THE RECORD SHOWS

As described above, courts rejecting the application of RLUIPA to eminent domain have also based this conclusion on the apparent lack of specific references to eminent domain in the statutory language and congressional record.<sup>147</sup> While this is an attractive assertion, and courts should not “add language to the statute in order to stretch its applicability,”<sup>148</sup> it should not be considered dispositive of the issue when the statute’s provisions and the congressional record imply a broader reading. Taken in totality, there is at least an equally reasonable argument that Congress did in fact intend for RLUIPA to apply in cases of eminent domain.

##### *A. RLUIPA’s Statutory Language and Construction*

Answering the question of whether Congress intended RLUIPA to cover eminent domain within its borders requires more than a literal reading of the statutory terms. From the start, we must concede that the terms “eminent domain,” “condemnation,” and “takings” are never mentioned by name in any of RLUIPA’s provisions. For some courts this is sufficient on its own, without delving into deeper analysis of the statute’s history and congressional record, to support the denial of RLUIPA protection.<sup>149</sup> At the same time, however, the statute employs conspicuously broad terms, suggesting a more inclusive—and less literal—intent. Most significantly, Section 3 specifically mandates a broad construction of

---

The Act does not include a definition of the term ‘substantial burden’ because it is not the intent of this Act to create a new standard for the definition of ‘substantial burden’ on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.

146 CONG. REC. S7776 (2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

147. See, e.g., *supra* notes 58–59, 71, 75 and accompanying text.

148. *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 259, 255 (W.D.N.Y. 2005).

149. See, e.g., *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 641 (7th Cir. 2007) (“Congress did not mention eminent domain in so many words in RLUIPA’s definition of a land use regulation, which is enough for us to consider it excluded.”), *cert. denied*, 128 S. Ct. 2431 (2008).

RLUIPA's provisions: "This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."<sup>150</sup> By itself, this clause seems to preclude the strictly literal reading imposed on the statute by some courts.<sup>151</sup>

And yet, even without the clause, the open language of RLUIPA recommends a broader approach to its application. For example, "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>152</sup> This definition is expansive and, on its face, appears to cover all religions and forms of religious action. Moreover, in contrast to the more limited scope of its predecessors—such as RFRA, which was based entirely on remedial powers derived from Section 5 of the Fourteenth Amendment—RLUIPA applies in three separate instances: (1) where the burden involves a federally funded program; (2) where the burden, or removal of the burden, affects interstate commerce; or (3) where the burden comes from the application of land use regulations that allow the government to make "individualized assessments of the proposed uses for the property involved."<sup>153</sup> While these alternative bases for jurisdiction were no doubt included partly to insulate RLUIPA from the constitutional challenges that ultimately doomed RFRA,<sup>154</sup> their inclusion also clearly expresses a desire for broad applicability to religious land use cases.

The call for broad construction of RLUIPA's provisions further supports the arguments for application to eminent domain described in Part III. Given the real connection between zoning laws and eminent domain proceedings, a broad construction of the statute should comfortably allow for the classification of eminent domain as an application of zoning or landmarking laws. Courts that impose a strict construction on the statute's terms to exclude eminent domain have, in fact, violated the statute's broad construction clause. Those

---

150. 42 U.S.C. § 2000cc-3 (2000).

151. *See supra* note 147 and accompanying text.

152. 42 U.S.C. § 2000cc-5(7)(A) (2000).

153. *Id.* §§ 2000cc-(a)(2)(A)-(C) (2000).

154. *See* 146 CONG. REC. S7775 (2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) ("The hearings also intensely examined Congress's constitutional authority to enact this bill in light of recent developments in Supreme Court federalism doctrine.").

courts that are faithful to the command have, as one scholar observes, produced broad results not literally required by the statute on its face.<sup>155</sup> This includes the extension of “land use regulation” to cover both state and local regulations,<sup>156</sup> and a determination that “nonaction [could] constitute an act pursuant to a zoning ordinance.”<sup>157</sup> Extending the boundaries of RLUIPA to include eminent domain proceedings as an application of zoning or landmarking laws best effectuates RLUIPA’s broad intentions.

Finally, with few exceptions, eminent domain proceedings clearly require government to make “individualized assessments of the proposed uses for the property involved.”<sup>158</sup> Generally treated as the codification of free exercise doctrines laid down by the recent Supreme Court decisions in *Smith* and *Lukumi Babalu Aye v. City of Hialeah*,<sup>159</sup> RLUIPA’s jurisdictional hook thus brings eminent domain proceedings within the statute’s reach. The *Cottonwood* court describes how this applied to the particular facts of its case, stating that

the Redevelopment Agency’s Resolution of Necessity and Defendants’ efforts to condemn the land are individualized assessments. By condemning the Cottonwood Property, the Redevelopment Agency had to come to the decision that the Cottonwood Property was blighted, that the Walker/Katella Retail

---

155. See Mathues, *supra* note 17, at 1666.

156. See *Hale O Kaula Church v. Maui Planning Comm’n*, 229 F. Supp. 2d 1056, 1070 (D. Haw. 2002) (rejecting Maui County’s argument that state regulations merely “classified” land while only local authorities “zoned” land).

157. Mathues, *supra* note 17, at 1666 (citing *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 990 (N.D. Ill. 2003)).

158. 42 U.S.C. § 2000cc-(a)(2)(C); see also Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (arguing that land use regulations, including eminent domain proceedings, are not neutral and generally applicable laws).

159. See 146 CONG. REC. S7775–76 (2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) (citing those Supreme Court cases in discussion of the compelling interest standard invoked when “government makes such individualized assessments”); Mathues, *supra* note 17, at 1664 n.85 (“The ‘individualized assessments’ phrase follows the *Smith* Court’s distinction between laws which are ‘neutral and generally applicable’ and therefore subject only to rational basis review, and laws which are not neutral and generally applicable and still subject to strict scrutiny.”). But see Graff, *supra* note 12, at 514 (“RLUIPA represents a substantial departure from the individualized assessment doctrine as defined by the Supreme Court in *Smith* . . .”).

Project was consistent with the Specific Plan and the LART plan, and that condemning the land was the only solution.<sup>160</sup>

As the *Cottonwood* case illustrates, eminent domain proceedings rely on several individualized assessments of both the zoning laws the government applies and the proposed uses for the property by the owner. Considered broadly, RLUIPA's individualized assessments prong expresses congressional intent that the statute apply to land use regulations where individualized assessments are necessary—and this includes eminent domain proceedings.

### *B. The Congressional Record*

In addition to RLUIPA's broad statutory language, the congressional record reveals more support for application of its protections to eminent domain proceedings against religious groups. Although the record contains no direct references to eminent domain, clear indications of the broad context of the bill and the overwhelming focus on religious discrimination in land use regulation suggests a more sweeping scope than has been applied by some courts.

RLUIPA's congressional record is replete with references to its predecessor bills, including RFRA and RLPA, which were much broader in scope. In his joint statement with Senator Edward M. Kennedy, Senator Orrin G. Hatch remarked that “[i]t is no secret that I would have preferred a broader bill [like RLPA] than the one before us today.”<sup>161</sup> In fact, RLPA defined “land use regulation” as “a law or decision by a government that limits or restricts a private person's uses or development of land,”<sup>162</sup> which would have definitively included eminent domain proceedings. Later in the record, a statement by Senator Harry Reid explained the reason for the statute's narrowing:

[T]he legislation stalled in the Senate when legitimate concerns were raised that RLPA, as drafted, would supersede certain civil

---

160. *Cottonwood Christian Ctr. v. City of Cypress*, 218 F. Supp. 2d 1203, 1223 (C.D. Cal. 2002). It should be noted that the *Cottonwood* court applied the individualized assessment doctrine under *Smith* rather than RLUIPA. However, since the standard in RLUIPA simply reflects the *Smith* Court's decision, the difference is immaterial.

161. 146 CONG. REC. S7774 (2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

162. 145 CONG. REC. H5597 (1999) (statement of Rep. Nadler).

rights, particularly in areas relating to employment and housing. These concerns were most troubling to the gay and lesbian community. . . . [A]s I was considering the merits of [RLPA], these concerns weighted heavily upon my mind. . . . I am proud to have had the opportunity to work with Senators Hatch and Kennedy to accomplish the worthwhile endeavor of protecting legitimate civil rights while at the same time protecting the free exercise of religion involving land use decisions.<sup>163</sup>

It was out of concern for certain civil rights, not for eminent domain power, that Congress decided to pass a more limited bill. As Professor Saxer observes, “there is *no* indication that Congress changed the definition language in order to restrict the type of land use decision subject to RLUIPA.”<sup>164</sup> Thus, although RLUIPA’s definition of “land use regulation” seems narrower, this was intended to protect civil rights that might otherwise be jeopardized, not to exclude eminent domain or any other kind of land use decision from the statute’s scope. Indeed, Senator Edward Kennedy, one of RLUIPA’s co-sponsors, has proposed an amendment to RLUIPA to include eminent domain in order to “restore [RLUIPA’s] original intent and give religious assemblies and institutions specific protection against eminent domain abuse.”<sup>165</sup>

In addition, the record’s consistent focus on the widespread pattern of religious discrimination in the land use context, and the resulting calls for legislative action further demonstrate congressional desire for broad application of RLUIPA protections.<sup>166</sup> According to Congress,

---

163. 146 CONG. REC. S7778 (2000).

164. Saxer, *supra* note 17, at 668 (emphasis added).

165. Lerman, *supra* note 17, at 2078 (quoting Letter from Sen. Coburn and Sen. Kennedy (June 30, 2006) (on file with the author)). While post-enactment statements are generally disfavored as proof of intention, it is worth noting that RLUIPA and its predecessors, RFRA and RLPA, were all enacted to restore religious protections removed by Supreme Court decisions. It is conceivable, then, that Senator Kennedy’s statement reflected a similar desire to restore protection against eminent domain removed by a majority of courts hearing RLUIPA cases in the eminent domain context.

166. Because the record of religious discrimination covers only the zoning and landmarking contexts, some might say that using it to justify application of RLUIPA to eminent domain requires an unreasonable stretch of logic. However, as shown by the *Cottonwood* and *Albanian Associated Fund* cases, local government bodies are starting to turn to eminent domain as a way to prevent religious land use that they do not want in their community. Moreover, the *Kelo* Court’s upholding of an eminent domain action for the purpose of economic development, even though the property was being transferred from one private party to another and the public benefit was unclear, raises the possibility that eminent

[t]he hearing record compiled massive evidence that this right [to assemble for religious purposes] is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.<sup>167</sup>

In support of this broad pronouncement, the record includes numerous anecdotal references to religious land use discrimination across the country.<sup>168</sup> John Mauck, a Chicago attorney specializing in land use cases, estimated that thirty percent of the cases in Chicago's Zoning Appeals Board involve religious plaintiffs.<sup>169</sup>

Beyond the anecdotal evidence, Congress relied on two significant statistical studies to substantiate the claim of widespread discrimination and the need for a legislative solution. First, Brigham Young University (BYU) conducted a study in which 196 cases involving both zoning board decisions and free exercise challenges were analyzed.<sup>170</sup> One scholar summarized the study's conclusions as follows:

[S]mall religious groups, including Jews, small Christian denominations, and nondenominational churches, are vastly overrepresented in reported church zoning cases. Religious groups accounting for only 9% of the population account for 50% of the reported litigation involving location of churches, and 34% of the reported litigation involving accessory uses at existing churches.<sup>171</sup>

---

domain might prove an easier hurdle to clear—especially if courts exclude eminent domain from RLUIPA's protections.

167. 146 CONG. REC. S7774 (2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

168. *See generally* 146 CONG. REC. E1564 (2000) (statement of Rep. Henry J. Hyde).

169. Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 773 (1999) (citing conversation with Mauck in Washington, D.C., on June 16, 1998).

170. *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 131–32, 141–46 (1998) (discussing the BYU study).

171. Laycock, *supra* note 169, at 770–71 (discussing the BYU study data).

A second survey focused on one of the larger, more prominent churches in the country—the Presbyterian Church—yielded a similar conclusion.<sup>172</sup> According to the study, 10% of congregations reported “significant conflict” over land use permits, while another 8% reported that conditions imposed by the government “increased the cost of the project by more than 10%.”<sup>173</sup> As a result of the anecdotal and statistical evidence, Congress concluded that “discrimination against religious [land] uses is a nationwide problem” that requires immediate attention.<sup>174</sup>

More recently, the evidence and conclusions reported in the congressional record have come under more focused scrutiny. Critics of RLUIPA have challenged the claim of widespread discrimination against religious land use that provided impetus for RLUIPA’s enactment.<sup>175</sup> However, most of the criticism strikes at the fringes, and not at the heart, of the claims made during the congressional hearings. For example, Stephen Clowney’s empirical study, which he asserts “calls into question the wisdom of . . . federal involvement in local land use decisions,” was entirely limited to zoning processes in New Haven, Connecticut.<sup>176</sup> Needless to say, the results from a study conducted in one city are hardly conclusive. Others have directed specific attacks at the methodology and conclusions of the BYU study.<sup>177</sup> Furthermore, detractors also point out that the

---

172. *Religious Liberty Protection Act of 1998: Hearing on S.2148 Before the S. Comm. on the Judiciary*, 105th Cong. 14–16 & Appendix, Question 9 (statement of Prof. Douglas Laycock, University of Texas) (reporting data from survey of Presbyterian congregations).

173. Laycock, *supra* note 169, at 772 (discussing Presbyterian study).

174. 146 CONG. REC. S7775 (2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

175. See, e.g., Hamilton, *supra* note 13, at 346 (“The sheer size of the land use universe makes the record of unconstitutional conduct cited in the RLPA hearings not ‘massive,’ but rather minute.”); Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 863 (2007) (“[T]his Comment questions the prevailing belief that zoning ‘has become the most widespread obstacle to the free exercise of religion.’” (quoting Laycock, *supra* note 169, at 783)); Graff, *supra* note 12, at 503 (“Congress has failed to provide convincing evidence of pervasive religious discrimination in the application of land use regulations.”).

176. Clowney, *supra* note 175, at 859–60 (“[T]his Comment . . . scrutinize[s] the records of New Haven, Connecticut, to determine whether religious institutions are treated fairly in the zoning appeals process.”).

177. See Adams, *supra* note 12, at 2397–400 (arguing that the study relied too heavily on outdated statistics and was limited to zoning decisions appealed to the courts); Graff, *supra* note 12, at 501–02 (“Durham departed from his own methodology by including Judaism as a minority religion, as Jews constitute 2.2 percent of the population and exceed Durham’s threshold standard of 1.5 percent.”). It is difficult to see how the classification of Jews makes

congressional hearings failed to include “the most scientific study of land use data and churches” at that time.<sup>178</sup> The National Congregations Study, a survey of 1236 congregations in a “representative national sample,” found that only one percent of churches reported denial of a permit or license.<sup>179</sup> But it is difficult to say how much weight to give the study because it only included information on roughly half of one percent of congregations across the country. The authors of the study even included several disclaimers concerning the strength of the results in determining the extent of religious discrimination.<sup>180</sup> Despite some contrary studies, the congressional record indicates through anecdotal and statistical evidence a high level of religious discrimination.

It should be remembered that, after the compilation of the evidence in the congressional record, RLUIPA passed both houses of Congress unanimously.<sup>181</sup> With its expansive view of the need to protect religious liberty demonstrated by the focus on evidence of discrimination, the congressional record provides further support for the application of eminent domain under RLUIPA. But for the civil rights challenges to its predecessor, there would be no need to make this argument at all.<sup>182</sup>

## V. CONCLUSION

In the end, courts will continue to determine whether RLUIPA protects religious groups from discriminatory eminent domain proceedings. Unfortunately, most of the courts that have heard the issue have concluded that eminent domain falls outside the boundaries of RLUIPA. These decisions have ignored the broad statutory mandate, instead focusing on staid, traditional conceptions of zoning laws and eminent domain that do not reflect the current legal landscape or the vision of the Congress that enacted RLUIPA.

---

any difference to the overall purpose of the study to show the prevalence of religious discrimination. Whether or not Jews are a minority religion, they were disproportionately involved in land use litigation.

178. Hamilton, *supra* note 13, at 351.

179. Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335, 341 (2000).

180. *Id.* at 341–42.

181. *See supra* note 2 and accompanying text.

182. *See supra* notes 161–164 and accompanying text.

Eminent domain proceedings almost always involve the application of zoning laws and regulations. This relationship is clear from the RLUIPA cases described above, from the Supreme Court's own takings jurisprudence, and from the intent of Congress demonstrated in the broad statutory language and congressional record. The *Cottonwood* court got the question first, and got it right. With any luck going forward, courts will glean from its analysis what should have been evident all along: RLUIPA favors expansion.

*Matthew Baker*