



5-1-2006

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Recommended Citation

G. D. Mathues, *Shadow of a Bulldozer: Rluipa and Eminent Domain after Kelo*, 81 Notre Dame L. Rev. 1653 (2006).
Available at: <http://scholarship.law.nd.edu/ndlr/vol81/iss4/10>

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SHADOW OF A BULLDOZER?: RLUIPA AND EMINENT DOMAIN AFTER *KELO*

G. David Mathues*

INTRODUCTION

According to the Gospel of Matthew, the local tax collectors once asked Peter whether or not Jesus paid the temple tax.¹ Peter answered in the affirmative—without talking to Jesus. Later that day, Jesus suggested that He should not have to pay. But He then instructed Peter to go fishing, take the coin from the mouth of the first fish he caught, and use it to pay both of their taxes, so that they would “not offend” the tax authorities.²

Modern church³ leaders may find the story proverbial. Although churches are exempt from property taxes, church leaders’ relationships with land use authorities would be more amicable if the churches paid. But since the coin-filled fish is a rare species, there has been no shortage of “offense” between churches and governments seeking tax revenues. This Note considers the clash between the two in light of the Supreme Court’s recent decision in *Kelo v. City of New London*.⁴

Kelo held that governments may seize unblighted, private property through eminent domain and then give the property to another private party without violating the Public Use Clause of the Fifth

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1 *Matthew* 17:24–27.

2 *Matthew* 17:27.

3 As used throughout this Note, the word “church” is synonymous with the term “religious assembly” and should not be construed to signify any specific faith, sect, or denomination. The building may be a church, cathedral, synagogue, temple, or mosque. The sign out front does not matter so long as the congregation is gathering there to worship.

4 125 S. Ct. 2655 (2005).

Amendment if the transfer furthers economic development.⁵ The case forged odd alliances⁶ and set off “a firestorm of criticism crossing partisan lines.”⁷ Church leaders claimed that the ruling threatened them in a special way because in the rush for tax revenues,⁸ governments seeking increased revenue from economic development could, and would, target tax-exempt religious land users first.⁹ One religious liberty representative predicted that “[c]ity governments will be emboldened to some extent by the Court’s decision, and may begin to target church properties.”¹⁰ An attorney for the Becket Fund for Religious Liberty warned ominously that “this decision will inevitably draw the bulldozers toward religious institutions first.”¹¹

5 *Id.* at 2668.

6 Amicus briefs on behalf of the homeowners were submitted by the NAACP, the AARP, the Libertarian Party, and the Becket Fund for Religious Liberty—unlikely, although not unprecedented, allies, because while the former two tend to favor government intervention, the latter two tend to oppose it. *See* Brief for NAACP, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Ass’n, Inc., & the Southern Christian Leadership Conference as Amici Curiae Supporting Petitioners, *Kelo*, 125 S. Ct. 2655 (No. 04-108), 2004 WL 2811057; Brief for the Tidewater Libertarian Party as Amicus Curiae Supporting Petitioners, *Kelo*, 125 S. Ct. 2655 (No. 04-108), 2004 WL 2803190; Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners, *Kelo*, 125 S. Ct. 2655 (No. 04-108), 2004 WL 278141 [hereinafter Brief for the Becket Fund for Religious Liberty]. After the ruling, a congressional response was cosponsored by the political odd couple of Representatives Tom DeLay (R-TX) and Maxine Waters (D-CA). Joi Preciphs, *Eminent-Domain Ruling Knits Rivals*, WALL ST. J., July 8, 2005, at 4A.

7 James W. Ely, Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 64. Even Justice Stevens, the opinion’s author, later said that his views on the condemnation’s constitutionality were “entirely divorced” from his view on its wisdom. Linda Greenhouse, *Judge Weighs Duty v. Desire (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1.

8 *See* Paul J. Weinberg, *The First Church of Costco: Land Grab for Tax Revenue or Preferential Treatment of Churches*, 26 Zoning & Plan. L. Rep. (West) 1, 3 (Mar. 2003) (quoting University of Southern California Law Professor George Lefcoe, who believes that in many land use decisions, including those involving religious entities, “[t]he whole problem is that cities are in a mad race for revenues”).

9 *See, e.g.*, David D. Kirkpatrick, *Ruling on Property Seizures Rallies Christian Groups*, N.Y. TIMES, July 11, 2005, at A13; Jane Lampman, *Property Rights: Not a Given for Churches*, CHRISTIAN SCI. MONITOR, Feb. 16, 2005, at 15 (describing apprehension by religious organizations following oral argument in *Kelo*); Mark Stricherz, *Court Decision Worries Churches*, CHRISTIANITY TODAY, Sept. 30, 2005, at 30.

10 Stricherz, *supra* note 9, at 30 (quoting Richard Hammar, Editor, *Church Law & Tax Report*).

11 Kirkpatrick, *supra* note 9. The Becket Fund frequently represents churches in land use conflicts and filed an amicus brief in *Kelo*. Brief for the Becket Fund for Religious Liberty, *supra* note 6.

A world where the government could seize church property merely by asserting some nebulous economic benefit is troublesome. Is this prospect realistic? Churches can seek refuge from condemnation under unique constitutional and statutory provisions, so at first glance it seems odd that churches would be uniquely vulnerable to the bulldozers. Furthermore, given the prominence of faith in American life, targeting churches might not be politically feasible, even if it is legal.¹² For these reasons, Columbia Law School Professor Thomas Merrill believes that a fear of cities targeting church buildings is “‘paranoid.’”¹³

Merrill may be right. Before *Kelo*, one city tried to take a church’s land but failed. In *Cottonwood Christian Center v. Cypress Redevelopment Corp.*,¹⁴ an expanding church, needing a facility which would accommodate all its members, spent five years assembling a plot of land large enough for its needs.¹⁵ When the church applied for a permit, the city said no, and then told the church it was imposing a moratorium on building permits in the area.¹⁶ Yet during this supposed moratorium, the city peddled the church’s land to commercial clients.¹⁷ Once Costco expressed interest in the property, the city pressured the church to sell. The church refused.¹⁸ The city then moved to condemn the church’s property in order to give the land to Costco, justifying its decision by the economic benefits Costco would create.¹⁹

12 While it might be politically impossible to target some churches, other churches have been targeted by openly prejudiced land use authorities. See H.R. REP. NO. 106-219, at 18–24 (1999) (Conf. Rep.) (providing extended catalogue of antireligious discrimination by land use authorities). Nor was the discrimination limited to the authorities themselves. In one hearing a witness pleaded to a zoning board, “Let’s keep these God-damned Pentecostals out of here”; in another an objector snarled “Hitler should have killed more of you” at Jews seeking permission to open a synagogue. *Id.*; see also Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 755, 760 (1999) (describing land use regulation as “among the most difficult issues facing religious liberty” and exposing its pernicious and disproportionate impact on minority faiths).

13 Kirkpatrick, *supra* note 9.

14 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

15 *Id.* at 1212–14.

16 *Id.* at 1213; Deborah Baxtrom, *Render unto Caesar*, LIBERTY MAG., Jan.–Feb. 2003, at 19, 19.

17 *Cottonwood*, 218 F. Supp. 2d at 1213–14.

18 *Id.* at 1214.

19 *Id.* at 1215, 1227–29.

A lengthy legal and public relations battle followed.²⁰ The church leaders questioned the city's interest in tax revenue from land that had lain vacant for almost a decade especially since the city was enjoying a twenty-five percent budget surplus and further questioned the city's good faith in shopping the land to Costco during the supposed building moratorium.²¹ City Councilmember Anna Piercy defended the city, answering that the city did not object to the church, so long as it did not "'tak[e] our prime development land.'"²²

The church answered that the land belonged to the church, not to the city, and that under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)²³ the city could not take the land and give it to Costco just because Costco would pay more taxes. The court agreed with the church. It granted the church's motion for a preliminary injunction and then denied the City's motion to dismiss.²⁴ The case settled soon afterwards.²⁵

Cottonwood is the only reported case where a government tried to condemn religious property in the name of economic development. The result should ease church leaders' fears. But some concern might remain because *Cottonwood* was only a single district court case, and it was decided before *Kelo*. Therefore, *Cottonwood's* continuing significance might be open to question.

Furthermore, church leaders might wonder how frequently other cities have tried to condemn religious property for economic reasons. The Becket Fund's amicus brief in *Kelo* cited ten such incidents since 2000 alone.²⁶ Following *Kelo*, Sand Springs, Oklahoma, attempted to condemn the Centennial Baptist Church as part of the town's redevelopment program.²⁷ The church resisted and caught the attention of

20 For a longer discussion of the facts of the case, see generally STEVEN GREENHUT, ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN 160-77 (2004); Kevin M. Powers, *The Sword and the Shield: RLUIPA and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB. INT. L.J. 145, 184-86 (2004); Baxtrom, *supra* note 16.

21 See Baxtrom, *supra* note 16, at 19.

22 Maggie Gallagher, *Evicting the Lord*, N.Y. POST, Aug. 14, 2002, at 25 (emphasis added).

23 42 U.S.C. § 2000cc to 2000cc-5 (2000).

24 *Cottonwood*, 218 F. Supp. 2d at 1232.

25 Powers, *supra* note 20, at 185. The church gave up its land to Costco, but received a nearby and equally suitable plot instead.

26 Brief for the Becket Fund for Religious Liberty, *supra* note 6, at 8 n.20.

27 Ralph Blumenthal, *Humble Church Is at Center of Debate on Eminent Domain*, N.Y. TIMES, Jan. 25, 2006, at A11.

both the *New York Times*²⁸ and the *National Review*.²⁹ The controversy, which a local paper has dubbed “‘a battle between God Almighty and the almighty dollar,’”³⁰ could, if unsettled, play out over several years in a manner similar to *Cottonwood*.

The Becket Fund’s brief and the Sand Springs incident demonstrate that church leaders are not paranoid to fear that governments may *try* to take church land for economic development; this Note asks whether, in light of RLUIPA and *Kelo*, they are paranoid to fear that the governments will *succeed*.

Because RLUIPA requires that the government show a compelling interest before it enacts a “land use regulation” which substantially burdens religious exercise,³¹ this Note asks specifically if *Kelo* made economic development a compelling government interest. Part I lays the foundation for this question by examining the background and substance of both RLUIPA and the Supreme Court’s eminent domain decisions. Part II asks whether RLUIPA is applicable to eminent domain proceedings and answers that RLUIPA does apply. Part III asks whether economic development was a compelling interest sufficient to overcome RLUIPA in any context, including eminent domain, before *Kelo* and concludes that economic development was never compelling. Part IV asks if *Kelo* changes the existing law and concludes that *Kelo* changes nothing. Therefore, this Note concludes that RLUIPA prevents any government from taking a church’s land through eminent domain for the purpose of economic development. Because of RLUIPA, church leaders should reduce their concerns about *Kelo*.

I. BACKGROUND AND SUBSTANCE OF RLUIPA AND THE SUPREME COURT’S EMINENT DOMAIN JURISPRUDENCE

A. *Background to RLUIPA*

On July 13, 2000, Senators Orin Hatch (R-UT) and Edward Kennedy (D-MA) introduced RLUIPA.³² President Clinton signed it into law on September 22, 2000.³³ RLUIPA was the latest in a series of bills

28 *Id.*

29 Heather Wilhelm, *Unholy Land Grab*, NAT’L REV. ONLINE, Jan. 17, 2006, <http://www.nationalreview.com/comment/wilhelm200601170926.asp>.

30 Blumenthal, *supra* note 27.

31 42 U.S.C. § 2000cc(a)(1) (2000).

32 146 CONG. REC. 14283, 14283–86 (2000) (statement of Sen. Hatch).

33 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.”).

designed to limit *Employment Division v. Smith*.³⁴ In *Smith*, the Supreme Court rejected the proposition, derived from *Sherbert v. Verner*³⁵ and *Wisconsin v. Yoder*,³⁶ that laws burdening free exercise must pass strict scrutiny, meaning that they had to serve a compelling government interest and follow the least restrictive means of serving that interest.³⁷ *Smith* drew criticism from many quarters³⁸ and led to the enactment of the Religious Freedom Restoration Act in 1993 (RFRA).³⁹ RFRA sought to escape *Smith* by statutorily restoring *Sherbert*.⁴⁰

Unimpressed by Congress's attempt to overturn its ruling,⁴¹ the Court struck down RFRA as unconstitutional in *City of Boerne v. Flores*.⁴² The Court held that RFRA unconstitutionally exceeded Congress's powers under Section 5 of the Fourteenth Amendment because RFRA failed to demonstrate a "congruence and proportionality" between the constitutional violations Congress sought to prevent and the means Congress used to prevent them.⁴³ In short, the Court thought RFRA was too broad and lacked evidential support.

Congress then considered several bills which sought to legislatively strengthen the Free Exercise Clause and yet comply with

34 494 U.S. 872 (1990).

35 374 U.S. 398 (1963).

36 406 U.S. 205 (1972).

37 *Smith*, 494 U.S. at 885 ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to such challenges.").

38 For information on the public outcries over *Smith*, see LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA 187-88 (2002); PETER K. ROLFS, THE RELIGION GUARANTEES 157-59 (2005). Rolf and Fisher also provide a short but thorough history on the Supreme Court's Free Exercise decisions. For specific criticism of *Smith*, see generally Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

39 FISHER, *supra* note 38, at 188-91.

40 ROLFS, *supra* note 38, at 158.

41 The text of RFRA specifically criticized *Smith* and stated RFRA's goal of reversing its holding. Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also* Neal Devins, *How Not To Challenge the Court*, 39 WM. & MARY L. REV. 645, 652-54 (1998).

42 521 U.S. 507. However, *Boerne* did not invalidate RFRA as applied to the federal government. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1225 (2006), the Court relied on RFRA to hold that the government had not demonstrated a compelling interest in preventing the defendant church's sacramental use of a hallucinogenic tea.

43 *Boerne*, 521 U.S. at 520. Congress had asserted that Section 5 of the Fourteenth Amendment gave it the authority to pass RFRA. *Id.* at 516-17.

Boerne.⁴⁴ Congress settled on RLUIPA, which relied on Congress's powers under the Commerce and Spending Clauses rather than on Section 5,⁴⁵ and applied only to claims by religious land users and institutionalized persons.⁴⁶

RLUIPA's premise is simple. It states:

No 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 the imposition of the burden . . . is in furtherance of a compelling governmental interest; and, . . . is the least restrictive means of furthering that compelling governmental interest.⁴⁷

This prohibition applies if the substantial burden impacts interstate commerce, includes federal funds, or is imposed under a system of "individualized assessments."⁴⁸ The law is not a blank check exempting religious land users from all land use regulation,⁴⁹ but it does give religious institutions significant legal protection.⁵⁰

B. *Background to the Supreme Court's Takings Case Law*

The Takings Clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation."⁵¹ The Supreme Court's eminent domain jurisprudence revolves around the definition of "public use": any exercise of eminent domain that meets the definition is constitutionally permitted if the government pays "just compensation." Any use of the power that does not is prohibited no matter how much the government pays.

44 See FISHER, *supra* note 38, at 200–01.

45 See 42 U.S.C. § 2000cc(a)(2) (2000); FISHER, *supra* note 38, at 200.

46 FISHER, *supra* note 38, at 201.

47 42 U.S.C. § 2000cc(a)(1).

48 *Id.* § 2000cc(a)(2).

49 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, 946 n.109 (2001).

50 Litigants on both sides recognize RLUIPA's power. Compare James L. Dam, *Churches Use New Federal Statute To Win Zoning Cases*, LAW. WKLY. USA, Aug. 20, 2001, available at <http://www.lawyersweeklyusa.com/alert/usa/zoning.htm> (last visited April 18, 2006) ("We have seen our BB gun replaced by an atomic bomb . . .") (quoting Brad Daucus, President, Pacific Justice Inst.), with Stuart Lieberman, *Does RLUIPA Mean That Houses of Worship Get Anything They Want?*, REALTY TIMES, Dec. 13, 2003, http://realtymtimes.com/rtcpages/20031211_rluiipa.htm (saying that RLUIPA makes "planning and zoning boards cringe").

51 U.S. CONST. amend. V.

Since the Supreme Court began applying the Fifth Amendment to the states at the turn of the century, it has interpreted the words “public use” to mean “public purpose,” not “use by the public.”⁵² Public purpose, in turn, is a broad concept reflecting “deference to legislative judgments”⁵³ in determining what kinds of projects benefit the public.⁵⁴ In the fifty years prior to *Kelo*, the Supreme Court decided only two eminent domain cases. Those cases are considered to have encapsulated the modern law of eminent domain.⁵⁵

In *Berman v. Parker*,⁵⁶ the plaintiffs challenged the condemnation of their property under the District of Columbia’s redevelopment plan. Congress determined that large sections of the District were blighted and authorized the District of Columbia Land Agency to assemble large tracts of land, by eminent domain if necessary, for urban redevelopment.⁵⁷ The plaintiffs argued that because their department store was not blighted, taking their land would not serve the public purpose of eliminating blight. They also contended that because a private developer would likely end up with their property, the taking was for a private use and therefore unconstitutional.⁵⁸

The Court rejected their arguments, holding instead that Congress’s power under the Public Use Clause was essentially its police power to serve the public welfare and that the concept of public welfare was “broad and inclusive.”⁵⁹ Justice Douglas wrote that the Court would not second guess Congress’s judgment as to which projects served the public interest, would not decide how to implement those projects,⁶⁰ and would not strike down a project just because land

52 *Kelo v. City of New London*, 125 S. Ct. 2655, 2662–63 (2005).

53 *Id.* at 2663.

54 This definition of “public use” appeared in the Court’s earliest eminent domain cases. *Id.* In early cases, the Court upheld the taking of water rights in order to construct a dam, *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916), a mining company’s use of an aerial bucket to transport ore over neighboring property, *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906), and a statute which allowed one land owner to widen a ditch on a neighbor’s land in order to improve irrigation on his land, *Clark v. Nash*, 198 U.S. 361 (1905). In *Strickley*, Justice Holmes stressed the inadequacy of the “use by the public” test and emphatically rejected it. 200 U.S. at 531.

55 John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court’s 2005 Takings Trilogy*, [2005] 35 *Envtl. L. Rep.* (Envtl. Law Inst.) 10,577, 10,584.

56 348 U.S. 26 (1954).

57 *Id.* at 28–29.

58 *Id.* at 31.

59 *Id.* at 33.

60 *Id.* at 35–36 (“[T]he amount and character of the land to be taken for the project and the need for a particular tract . . . rests in the discretion of the legislative branch.”).

might end up in private hands.⁶¹ Most importantly, the Court held that “[o]nce the object is within the authority of Congress, then the right to realize it through the exercise of eminent domain is clear.”⁶² Under this deferential standard, the Court upheld the condemnation.⁶³

In *Hawaii v. Midkiff*,⁶⁴ the Court upheld a Hawaii statute which used the eminent domain power to force lessors to sell their land to lessees.⁶⁵ An oligopoly dominated land ownership in Hawaii, and the Hawaii legislature sought to break up the land oligarchs’ estates.⁶⁶ Because earlier efforts failed, the legislature created a system whereby residents who met certain qualifications could purchase the land that they had been leasing.⁶⁷

The lessors sued, claiming that because the law essentially transferred property from one private owner to another, it did not serve a public purpose. The Court rejected the claim, again equating the eminent domain power with the police power and holding that when the use of eminent domain is “rationally related to a conceivable public purpose,” the condemnation is not prohibited by the Public Use Clause.⁶⁸ Just as in *Berman*, the Court granted the legislature two levels of deference. By referring to a “conceivable” public purpose, it granted the legislature deference in deciding *why* to use eminent domain,⁶⁹ by only requiring that the use of eminent domain be “rationally related” to that public purpose, it granted the legislature deference in *how* it used eminent domain.⁷⁰

Because of that deferential standard, the Court had “no trouble” holding that the statute did not violate the Public Use Clause.⁷¹ It found “regulating oligopoly” to be within the state’s police power and

61 *Id.* at 33–34.

62 *Id.* at 33.

63 *Id.* at 36.

64 467 U.S. 229 (1984).

65 *Id.* at 231–32.

66 *Id.* at 232–33.

67 *Id.* If the lessee wanted to buy, he or she asked for an administrative hearing. If the lessee could show that transferring the lessee’s lot would further the statute’s goals, the Hawaii Housing Authority (HHA) would acquire the resident’s lot from the landlord by negotiation or condemnation and then sell the lot to the former tenant. *Id.* at 233–34.

68 *Id.* at 241.

69 *Id.*; see also *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“[E]minent domain is only a means to an end.”).

70 *Midkiff*, 467 U.S. at 241; see also *Berman*, 348 U.S. at 35–36 (“[T]he amount and character of the land to be taken . . . rests in the discretion of the legislative branch.”).

71 *Midkiff*, 467 U.S. at 241.

the Hawaii plan was a rational use of that power.⁷² As in *Berman*, the fact that the land would end up in private hands did not matter.⁷³

Midkiff reigned as the authoritative statement on eminent domain from the Supreme Court for twenty years, and its grant of deference to legislative determinations allowed governments to wield immense power through eminent domain.⁷⁴ All reported federal appellate decisions between 1954 and 1986 in which the definition of “public use” was contested upheld the challenged use of eminent domain,⁷⁵ as did thirteen out of the fourteen reported appellate decisions on point between 1986 and 2003.⁷⁶ Thus, any conflict between eminent domain and RLUIPA pits one of the government’s broadest powers against one of the most effective statutes for limiting governmental powers.

II. DOES RLUIPA APPLY TO EMINENT DOMAIN ACTIONS?

Before asking whether *Kelo* permits a government to condemn religious property for economic development, a threshold question arises: does RLUIPA apply to eminent domain proceedings? The statute refers only to zoning and historic preservation laws; it does not mention eminent domain. If RLUIPA does not apply, then the economic development question is moot because RLUIPA cannot protect churches from any eminent domain proceedings.

A. *Eminent Domain Proceedings and RLUIPA Jurisdiction*

A church seeking to block a condemnation by using RLUIPA must first establish RLUIPA jurisdiction. RLUIPA jurisdiction can be obtained three ways: federal funds, interstate commerce, and a system of “individual assessments.”⁷⁷ The church should be able to establish the latter two in almost all cases.⁷⁸

⁷² *Id.* at 242.

⁷³ *Id.* at 243–44.

⁷⁴ See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSES OF EMINENT DOMAIN (2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf (cataloging eminent domain projects and showing the breadth of the eminent domain power).

⁷⁵ Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 95–96 (1986).

⁷⁶ Corey J. Wilk, *The Struggle over the Public Use Clause: Survey of Holdings and Trends*, 39 REAL PROP. PROB. & TR. J. 251, 257–60 (2004).

⁷⁷ 42 U.S.C. § 2000cc(a)(2) (2000).

⁷⁸ It is questionable whether the church would want to prove the first element, because federal funds flowing to the church would likely create an Establishment

RLUIPA applies if the substantial burden imposed upon the religious land user, or the removal of that burden, would affect interstate commerce.⁷⁹ Church condemnation affects interstate commerce because church construction affects interstate commerce.⁸⁰ When a church's property is condemned, the church will almost certainly have to build a new building; this construction will affect interstate commerce and trigger RLUIPA jurisdiction. *Cottonwood* used this logic to apply RLUIPA to eminent domain.⁸¹ *Cottonwood's* conclusion appears sound, especially given the aggregation principle in *Wickard v Filburn*,⁸² because even if a single church construction does not affect interstate commerce, church constructions as a whole do.⁸³

Jurisdiction also exists through the Commerce Clause even if the congregation purchases a new church rather than constructing one. A government will not leave the vacated church intact; it will tear down the church and construct some other building. That destruction, construction, and the following increase in commerce will always create RLUIPA jurisdiction. Economic development is, *by definition*, an increase in commerce. A city in this situation faces an ironic dilemma: it can accept RLUIPA jurisdiction, or it can make the absurd and self-defeating argument that its economic development program will not affect interstate commerce.

Clause problem. Shelly Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 667 (2004).

79 42 U.S.C. § 2000cc(a)(2)(B). The Commerce Clause applies to churches, charities, and nonprofit organizations because even though those organizations do not engage in traditional commercial activities, they are "major participants in interstate markets." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 586 (1997).

80 *Storzer & Picarello*, *supra* note 49, at 953.

81 *Cottonwood Christian Ctr. v. Cypress Redevelopment Corp.*, 218 F. Supp. 2d 1203, 1221 (C.D. Cal. 2002).

82 317 U.S. 111 (1942).

83 *Storzer & Picarello*, *supra* note 49, at 953. Recently in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), the Supreme Court reiterated its commitment to the Commerce Clause's aggregation principle expressed in *Wickard*. *Id.* at 2206–07. The Court stated that neither *United States v. Lopez*, 514 U.S. 549 (1995), nor *United States v. Morrison*, 529 U.S. 598 (2000), blocked Congress's ability to regulate homegrown marijuana under the Commerce Clause. *Raich*, 125 S. Ct. at 2210. If homegrown marijuana, even if it is never sold, can be regulated under the Commerce Clause, it is difficult to see how the construction of a church would be outside the Clause. *But see* Lara A. Berwanger, Note, *White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2389–401 (2004) (arguing, before *Raich*, that RLUIPA is unconstitutional because it exceeds the Congress's Commerce Clause power).

Eminent domain proceedings also fall under RLUIPA jurisdiction because eminent domain involves “formal or informal procedures which permit the government to make individualized assessments of the proposed uses of the property involved.”⁸⁴ Eminent domain proceedings, by their nature, are not generally applicable laws because the proceedings single out specific properties for condemnation.⁸⁵ In *Cottonwood*, the court found the city’s determination that the church was “blighted,” its condemnation decision, and its determination that Costco was more consistent with its redevelopment plan all to be individual assessments.⁸⁶ *Cottonwood*’s analysis is sound: eminent domain proceedings create RLUIPA jurisdiction because they involve individualized assessments.

B. Eminent Domain Proceedings and RLUIPA’s Definition of “Land Use Regulations”

This jurisdictional analysis does not mean that the church automatically gets RLUIPA’s protection; the statute refers to “land use regulations,” so the church must prove that a condemnation qualifies as a land use regulation. RLUIPA defines “land use regulation” as a “zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land.”⁸⁷ The “application of such a law” phrase is critical, because most condemnations, especially those done for economic development, are executed pursuant to a zoning system.⁸⁸

Past cases show the link between condemnations and zoning. In *Berman*, the plaintiffs’ property was condemned under a plan “specifying the boundaries and allocat[ing] the use of the land for various purposes,”⁸⁹ or, in other words, a zoning plan. Similarly, the condem-

84 42 U.S.C. § 2000cc(a)(1)(C).

85 See Laycock, *supra* note 38, at 48–49 (explaining how land use regulations are not neutral and generally applicable laws); Saxer, *supra* note 78, at 679. 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. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The “individualized assessments” element was probably written to create jurisdiction in land use cases. See Saxer, *supra* note 78, at 667–68.

86 *Cottonwood*, 218 F. Supp. 2d at 1222–23. The court analyzed the “individualized assessments” issue under *Smith* rather than under RLUIPA, but the difference is immaterial.

87 42 U.S.C. § 2000cc-5(5) (emphasis added).

88 See Saxer, *supra* note 78, at 670. Indeed, without the zoning system, it is difficult to see how the economic development plan could work.

89 *Berman v. Parker*, 348 U.S. 26, 30 (1954).

nation in *Cottonwood* was based on a zoning plan developed by the city to further economic development. The court found that the condemnation was an application of a zoning law and therefore RLUIPA applied.⁹⁰

These cases suggest that the church will satisfy the “land use regulation” requirement by showing that the condemnation is done in furtherance of a zoning law. Ironically, because *Kelo* treated the city’s use of a detailed zoning and development plan as a fact favorable to the city,⁹¹ *Kelo* may increase the likelihood that future condemnations for economic development are done under such a plan and thus increase the likelihood that those condemnations will fall within RLUIPA’s protection.⁹² But even where the condemnation is not directly pursuant to a zoning law, two arguments support finding the condemnation a “land use regulation” for RLUIPA purposes.

Professor Shelly Ross Saxer believes that RLUIPA’s legislative history suggests that its drafters intended the statute to cover eminent domain.⁹³ Her argument draws support from evidence which suggests that the same kinds of congressional concerns which prompted the adoption of RLUIPA apply in the eminent domain context.⁹⁴ While valid, Saxer’s argument is not conclusive given the limits of legislative history. A second, stronger argument for finding eminent domain proceedings to be “land use regulations” comes from the federal

90 *Cottonwood*, 218 F. Supp. 2d at 1222 n.9 (“The Redevelopment Agency’s authority to exercise eminent domain . . . is based on a zoning system developed by the City (the LART Plan). It would unquestionably ‘limit [] or restrict[]’ Cottonwood’s ‘use or development of land.’” (alterations in original)).

91 *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005); see also *id.* at 2670 (Kennedy, J., concurring).

92 Echeverria, *supra* note 55, at 10,586.

93 Saxer, *supra* note 78, at 668–69. She points out that when Congress changed the language of the bill from “a law or decision by the government which limits or restricts a private person’s use or development of land” to the final text, it acted not to restrict the kind of land use decisions RLUIPA covered but to assuage other civil rights concerns. *Id.* The first draft would have covered eminent domain. The change was made for reasons far removed from eliminating coverage of eminent domain. Therefore, she suggests, there is no reason to believe that Congress did not intend RLUIPA to apply to eminent domain. *Id.* The final definition of “land use regulation” under RLUIPA reads, in relevant part, “a zoning or landmarking law, or the application of such a law that limits or restricts a claimant’s use or development of land.” 42 U.S.C. § 2000cc-5(5) (2000).

94 Compare 146 CONG. REC. 16698, 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) (discussing the importance of ensuring that religious assemblies have a place of worship in order to preserve the free exercise of religion), with *Cottonwood*, 218 F. Supp. 2d at 1226 (stating in context of attempted condemnation of church property that “[i]f Cottonwood could not build a church, it could not exist”).

courts' broad construction of the phrase "land use regulations." RLUIPA itself mandates that its terms be construed in favor of religious exercise to the "maximum extent" permitted by the statute and the Constitution,⁹⁵ so a court should find a condemnation to be a land use regulation unless the statute mandates otherwise. Federal courts have followed this command of broad construction. One case extended the definition of "land use regulation" to include state, as well as local regulation.⁹⁶ It rejected the state's argument that the state regulations merely "classified" land while only local authorities "zoned" land.⁹⁷ In another case, the court found nonaction to constitute an act pursuant to a zoning ordinance.⁹⁸

Courts refusing to find a "land use regulation" have not relied on hair-splitting statutory parsing but have instead rejected only genuinely specious claims.⁹⁹ The Northern District of Illinois declined to apply RLUIPA to the condemnation of a church cemetery which stood in the way of planned expansions to the O'Hare Airport because it found no connection between zoning and the planned condemnation.¹⁰⁰ However, even while rejecting the plaintiffs' request to apply RLUIPA to all condemnations as an attempt to "rewrite" RLUIPA, the court pointed out that if the city condemned land and then rezoned the land, RLUIPA would likely come into play.¹⁰¹ The decision struck the proper balance. By following the statutory language and requiring a connection between condemnation and zoning, the court prevented churches from pushing RLUIPA's interpretation too far. But it still left churches with substantial protection because a church is far more likely to face condemnation from a

95 42 U.S.C. § 2000cc-3(g). *But see* *Babbit v. Sweet Valley Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 727–28 (1995) (Scalia, J., dissenting) (dismissing broad construction clauses as "empty flourish[es]" that only indicate that "this statute means what it means all the way").

96 *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1070 (D. Haw. 2002).

97 *Id.*

98 *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 990 (N.D. Ill. 2003).

99 *See, e.g., Second Baptist Church of Leechberg v. Gilpin Twp.*, 118 F. App'x 615, 617 (3d Cir. 2004) (rejecting claim that mandatory sewer tap-in ordinance was the application of a zoning law); *see also Prater v. City of Burnside*, 289 F.3d 417, 434 (6th Cir. 2002) (holding that a city's decision to develop its own land was not the application of a zoning or landmarking law but was rather an exercise of its rights as a landowner); Saxer, *supra* note 78, at 669 (observing that courts have interpreted the definition of land use regulation "broadly").

100 *St. John's United Church of Christ v. City of Chi.*, 401 F. Supp. 2d 887, 889–900 (N.D. Ill. 2005).

101 *Id.* at 900 n.8.

zoning-based redevelopment plan than from an airport expansion plan.¹⁰²

However, a New York court recently rejected the reasoning of *Cottonwood* and *St. John's* and became the only authority arguing that RLUIPA does not apply to eminent domain when it permitted the town to condemn property a church intended for a new building and turn it into a park.¹⁰³ The court focused on RLUIPA's legislative history to conclude that Congress did not mean to include eminent domain in its definition of "zoning law"¹⁰⁴ and further reasoned that, since eminent domain is a familiar concept, it could "not assume that Congress simply overlooked it when drafting RLUIPA."¹⁰⁵

To the extent that the legislative history alone does not, and should not, prove that RLUIPA applied to condemnation, the court was correct. However, the court failed to apply RLUIPA's provision that a land use regulation could also be the *application* of a zoning law.¹⁰⁶ The city marked the church's land for a park as part of the city's Comprehensive Plan, but the court viewed the connection to zoning regulations as "too attenuated" to qualify as the application of a zoning law.¹⁰⁷ The court justified its conclusion by "the plain language of the statute,"¹⁰⁸ but the statute referred to the "application" of a zoning law.¹⁰⁹ As the *Cottonwood* court recognized,¹¹⁰ when the town's decision is based on the town's overall land use plan, a plan which involves zoning regulations, the town has applied its zoning laws to condemn the church. This connection is real, not attenuated. Furthermore, the "plain language" on which the court relied applies

102 Consider the contrasting facts of *Cottonwood* and *St. John's*. Moving a cemetery because it is the only way to expand one of the world's most overcrowded airports is one thing. But seizing land that had lain vacant for years until the congregation announced plans to build a church in the name of tax revenues, especially when the city already had a budget surplus and could have put the Costco elsewhere, makes a far more sympathetic case for the church. It is difficult to believe that the judges in both cases did not consider the facts as much as the law in deciding whether to apply RLUIPA.

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

104 *Id.* at 255–56.

105 *Id.* at 255. *But see supra* notes 93–94 and accompanying text (presenting argument that RLUIPA's legislative history favors applying RLUIPA to eminent domain).

106 *See supra* notes 87–88 and accompanying text.

107 *Faith Temple Church*, 405 F. Supp. 2d at 256.

108 *Id.*

109 42 U.S.C. § 2000cc-5(5) (2000).

110 *See supra* note 90 and accompanying text.

to all applications of zoning laws; it contains no exceptions for applications which a court considers "too attenuated."

Notwithstanding the New York court's opinion, condemnations will fall within RLUIPA's definition of a land use regulation because they will be executed as part of a broader zoning plan. Given *Kelo*, this is especially true for condemnations motivated by economic development.¹¹¹ No reason exists why eminent domain should be uniquely excluded from RLUIPA's orbit. Without a reason to exclude eminent domain from RLUIPA's definition of "land use regulation," the statute's legislative history, self-contained canon of broad construction, and federal case law indicate that condemnations of church property should be governed by RLUIPA.

*C. Eminent Domain Proceedings and RLUIPA's Requirement of a
Substantial Burden on the Free Exercise of the Church's
Religious Beliefs*

Once a church obtains RLUIPA jurisdiction and proves that eminent domain qualifies as a "land use regulation," the church must still show that the condemnation substantially burdens its religious exercise before strict scrutiny applies. Common sense suggests that seizing a congregation's church substantially burdens the free exercise of its faith. But because common sense and the law, like reason and love, often keep "very little company together nowadays,"¹¹² this Note will go through a more extended analysis before arriving at the same conclusion.

1. Can Religious Land Use Qualify as Religious Exercise under RLUIPA?

Federal courts developed the "substantial burden on religious exercise" test when performing strict scrutiny review in the decades between *Sherbert*¹¹³ and *Smith*.¹¹⁴ The Supreme Court's only case between a religious claimant and the eminent domain power shows the test's weakness. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,¹¹⁵ the Court permitted the government to build a highway through sacred Native American land despite claims by Native Americans that noise and pollution from the highway would destroy their

111 See *supra* note 92 and accompanying text.

112 WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT'S DREAM* act 3, sc. 1.

113 *Sherbert v. Verner*, 374 U.S. 398 (1963).

114 *Employment Div. v. Smith*, 494 U.S. 872, 883-84 (1990) (discussing development of *Sherbert* test).

115 485 U.S. 439 (1988).

ability to worship on the land.¹¹⁶ Rejecting the plaintiff's claims, the Court held that the First Amendment cannot give the worshippers "a veto over public programs that do not prohibit the free exercise of religion."¹¹⁷ Since the highway did not outlaw the practice of the Native Americans' faith, the Court found no substantial burden.¹¹⁸

Taken at face value, *Lyng* implies that condemnation cannot be a substantial burden because there is no logical difference between making land unavailable for worship by building a highway next door and making land unavailable for worship by giving the land to Costco.¹¹⁹ But *Lyng* should be understood with three qualifiers. First, *Lyng* was decided before RLUIPA was passed, so *Lyng* cannot end the analysis. Second, *Lyng* might not have been about free exercise at all, but about federal sovereignty. The government owned the land in question and could do as it chose with its own land.¹²⁰ Third, *Lyng* stresses that while the Constitution did constrain the federal government, the government was free to accommodate the Native American's religious practices and build elsewhere.¹²¹

Lyng may not fully represent the current law, but it offers one example of how the pre-*Smith* strict scrutiny test resulted in powerful rhetoric about the importance of free exercise but few victories for religious plaintiffs.¹²² Federal courts never settled on a definition of

116 *Id.* at 441–42.

117 *Id.* at 452.

118 *Id.* at 453 (“[A] law prohibiting [the Native Americans from visiting the sacred land] would raise a different set of constitutional questions.”). The dissent accused the majority of ignoring reality by failing to distinguish between prohibiting worship and preventing it. *Id.* at 458–59, 467 (Brennan, J., dissenting) (calling majority’s decision “astonishing” and refusing to accept its “premise that the form of the government’s restraint on religious practice, rather than its effect, controls our constitutional analysis”).

119 The condemnation in *Lyng* exacted an even greater burden. The church could search for a substitute building; the Native Americans considered the sacred land irreplaceable.

120 *Lyng*, 485 U.S. at 453 (majority opinion) (“Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.”).

121 *Id.* at 454. The reference to accommodation foreshadows RLUIPA. By enacting RLUIPA, Congress has taken the Court at its word and chosen to accommodate specific religious practices. For a favorable discussion of accommodation, see generally Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

122 See, e.g., McConnell, *supra* note 38, at 1110; Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1495 (1999) (arguing that *Sherbert* was not a regime of strict scrutiny, but one of multiple tests granting different levels of deference).

substantial burden,¹²³ and some courts created an artificially narrow definition of “religious exercise.”¹²⁴ *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*¹²⁵ represents a typical *Pre-Smith* case where a court frustrated a religious claim by adopting a narrow test. *Lakewood* determined that freedom of worship was merely “tangentially related” to having a place in which to worship and that any financial costs to the congregation were only “incidental.”¹²⁶ Therefore, the court held that the plaintiffs, who were accusing the city of exclusionary zoning, could not show either religious exercise or a substantial burden because the city was not forcing congregation members to change their religious beliefs.¹²⁷

Lakewood ignored the well known centrality of a church to a religious assembly.¹²⁸ Moreover, the right to assemble “lies at the very core of religious liberty”; without the right to worship together, many faiths would not, and could not, exist.¹²⁹ By dictating where churches may exist and what they may look like, land use authorities dictate what kinds of churches—if any—exist.¹³⁰

123 See *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1151–52 (E.D. Cal. 2003) (collecting cases); *Cottonwood Christian Ctr. v. Cypress Redevelopment Corp.*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) (collecting cases).

124 These courts determined that construction or occupation of a place of worship was not central or fundamental to the exercise of religion and therefore not protected by the Free Exercise Clause. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225–26 (11th Cir. 2004) (collecting cases). This test immunized land use authorities from free exercise claims no matter how much of a burden their regulations imposed on congregations and persisted despite Supreme Court precedent that courts must not inquire into the “centrality of particular beliefs or practices to a faith.” *Hernandez v. Comm’r.*, 490 U.S. 680, 699 (1989).

125 699 F.2d 303 (6th Cir. 1983).

126 *Id.* at 307.

127 *Id.* at 307–08.

128 Often the building itself reflects the assembly’s beliefs. *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 182 (Wash. 1992) (“The relationship between theological doctrine and architectural design is well recognized.”); see also *Storzer & Picarello*, *supra* note 49, at 941 (observing that increasing diversity of religious beliefs has led to an increasing variety of church locations and structures).

129 *Laycock*, *supra* note 12, at 755–56.

130 *Storzer & Picarello*, *supra* note 49, at 941–42. The *Lakewood* court also overlooked that it was the Jehovah’s Witnesses, the subjects of intense persecution throughout American history, Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 22 (2004), who had been hurt by the land use regulation rather than some well established and wealthier denomination. See also 146 CONG. REC. 16698, 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) (noting that new churches, black churches, and synagogues are most likely to face discrimination); *Laycock*, *supra* note 12, at 770–74 (observing that Jews and

The *Lakewood* court's insistence that financial burdens are only "incidental" was equally naïve: it wrongly equated *prohibiting* religious worship with *preventing* it.¹³¹ Under the court's logic, the government could bankrupt a church by imposing a crushing tax on sacramental elements and yet still claim not to have inhibited the church's right to free exercise. Governments need to regulate, and regulations impose costs, but the government should not be permitted to accomplish through the back door what it cannot accomplish through the front door. The power to tax is, after all, the power to destroy.¹³²

While RLUIPA in some ways codified Supreme Court precedent,¹³³ its text also responded to decisions like *Lakewood*.¹³⁴ It defined religious exercise, for purposes of the statute, as the "use, building, or conversion of real property" for religious purposes.¹³⁵ *Midrash Sephardi, Inc. v. Town of Surfside*¹³⁶ discussed the new definition and determined that the correct question under RLUIPA was

small, less popular denominations are much more likely to face discriminatory land use regulation). Perhaps the city was motivated by some remaining animus against the Jehovah's Witnesses and perhaps it was not, but the court should have examined the issue. This failure to even investigate the possibility of discrimination against a minority religious group which had frequently been targeted for discrimination ignores the court's purpose of protecting "discrete and insular minorities." *Carolene Prods. v. United States*, 304 U.S. 144, 153 n.4 (1938).

131 Justice Brennan's dissent in *Lyng* accused the majority of the same error. See *supra* note 118.

132 *M'Culloch v. Maryland*, 17 U.S. 316, 327 (1819). Given the persuasive power of money, any government regulation that makes free exercise prohibitively expensive might persuade someone to modify her religious beliefs—some people would view significant financial loss as much more coercive than a night in jail. One could answer that such fickle believers do not deserve protection, but the First Amendment does not protect only the most devoted saints. See also *Murphy v. Zoning Comm'n of New Milford*, 148 F. Supp. 2d 173, 189 (D. Conn. 2001) ("Foregoing or modifying the practice of one's religion because of governmental interference or fear of punishment by the government is precisely the type of 'substantial burden' Congress intended to trigger the RLUIPA's protections; indeed, it is the concern which impelled the adoption of the First Amendment.").

133 Saxer, *supra* note 78, at 671 n.135.

134 See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004) (holding that RLUIPA provides a definition of religious exercise and "obviates" the need for *Lakewood's* analysis of whether land use constituted religious exercise); *Congregation of Kol Ami v. Abington Twp.*, No. Civ.A. 01-1919, 2004 WL 1837037, at *8 (E.D. Pa. Aug. 17, 2004) ("[RLUIPA] undermines the holdings of cases like *Lakewood*."); see also *Storzer & Picarello*, *supra* note 49, at 956 (describing *Lakewood* as "astonishing" and "clearly demonstrat[ing] the need for guiding and reinforcing legislation").

135 42 U.S.C. § 2000cc-5(7)(A) (2000).

136 366 F.3d 1214.

whether the regulation imposed a substantial burden “on the congregations’ use of real property for the purpose of religious exercise.”¹³⁷ The definition provided a single, consistent definition of religious exercise and also foreclosed the *Lakewood* court’s flawed practice of deciding for itself what constitutes religious exercise for a particular faith and how central that exercise is to that specific faith. *Midrash* and the statutory text show that land use regulations can burden religious exercise in fact and that, despite past court cases, religious land use qualifies as religious exercise, at least for RLUIPA purposes.¹³⁸

2. Can Condemnation Qualify as a Substantial Burden on Religious Exercise Under RLUIPA?

In applying the substantial burden test in the context of religious land use, courts have articulated tests which favor finding a substantial burden in an eminent domain case.¹³⁹ While these tests slightly dif-

137 *Id.* at 1226. The *Midrash* court saw the new definition as evidence that Congress recognized two facts: the importance of houses of worship to religious congregations and the burden that land use regulations can impose on religious exercise. *Id.* *Midrash* casts significant doubt on the continuing vitality of *Lakewood*. See *supra* note 134.

138 One federal district court agreed that Congress created a new definition of religious exercise but found the definition an unconstitutional attempt to change the Supreme Court’s constitutional interpretation of “substantial burden.” *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1099, 1102 (C.D. Cal. 2003). The court was right to notice the difference but wrong on the constitutional argument. Defining land use as religious exercise does not change the meaning of “substantial burden” but rather requires the courts to follow Congress’s direction and “apply the established guideposts of ‘substantial burden’ analysis in a new context.” *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003); see also *Storzer & Picarello*, *supra* note 49, at 979 (arguing that RLUIPA does not redefine the substance of constitutional law). The constitutionality of RLUIPA has been extensively debated elsewhere and will not be discussed further in this Note.

139 See, e.g., *Adkins v. Kaspar*, 393 F.3d 559, 560–70 (5th Cir. 2004) (holding that substantial burden under RLUIPA “pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs,” and “a government action or regulation is significant when it . . . influences the adherent to act in a way that violates his religious beliefs”); *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (holding that substantial burden under RLUIPA “must ‘significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person’s] individual [religious] beliefs; must meaningfully curtail a [person’s] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person’s] religion’” (alterations in original)); *Midrash*, 366 F.3d at 1227 (stating that substantial burden under RLUIPA is “significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly”); *San Jose Christian Coll. v. City of Morgan Hill*,

fer, they all recognize that land use regulation can pressure religious worshipers to act against their religious conviction to assemble.¹⁴⁰ Under any of these tests, a church's free exercise is substantially burdened when a church's land is condemned.

By seizing the church, the city prevents the congregation from assembling. The congregation must then attend services elsewhere or expend substantial time and effort to build a new worship center. If the members look elsewhere, they may not be able to attend the same church together or may not find a church which reflects their religious beliefs. If forced to build, the members will have to put their worship on hold throughout the process—assuming that they are able to build at all.¹⁴¹ In either case, the church members will be at least significantly discouraged, if not completely prevented, from assembling together.

Rev. Roosevelt Gildon's dilemma shows that the closer a church's ties are to its surrounding community, the greater the burden on its members if the church's land is taken. Rev. Gildon pastors a small church in a poor Sand Springs, Oklahoma, area once settled by survivors of the infamous Tulsa Race Riots.¹⁴² The town wants to replace his church with a Home Depot as part of a lucrative redevelopment program, but Rev. Gildon replies that his church is not dilapidated and his congregation's situation makes moving impossible.¹⁴³ Rev. Gildon explains that many members of his congregation walk to church because they do not own cars¹⁴⁴ and that the city's offer of

360 F.3d 1024, 1034 (9th Cir. 2004) (holding that "substantial burden" for RLUIPA purposes imposes "a significantly great restriction or onus upon such exercise").

140 One circuit has adopted a test much less favorable to religious claimants. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752 (7th Cir. 2003). Over the vehement dissent of Judge Posner, the court declared that "in the context of RLUIPA's broad definition of religious exercise, . . . a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Id.* at 761. But Posner, at least, is not inclined to interpret the *C.L.U.B.* court's "effectively impracticable" standard too literally. See *Saints Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (Posner, J.) (finding a substantial burden in "delay, uncertainty, and expense"); see also *Midrash*, 366 F.3d at 1227 (rejecting the *C.L.U.B.* decision as rendering part of RLUIPA "meaningless"); *Sikh Soc'y*, 326 F. Supp. 2d at 1153 (declining to adopt *C.L.U.B.*'s "extremely high" substantial burden threshold).

141 In *Cottonwood*, the judge suggested that the city would have thwarted any building program the church undertook. *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1232 n.17 (C.D. Cal. 2002).

142 Blumenthal, *supra* note 27.

143 Wilhelm, *supra* note 29.

144 *Id.*

compensation was not enough for him to obtain a new building.¹⁴⁵ Frustrated, Rev. Gildon says that the city does not think his work is as important as “‘raking in money for the politicians to spend,’” but wonders “[i]f we leave, who is going to minister to the black community in Sand Springs?”¹⁴⁶

The circuits have slightly different tests for “substantial burden,” but the variations should not impact the results. For example, one circuit requires a great “onus” on religious exercise,¹⁴⁷ while another looks for pressure to significantly modify religious behavior.¹⁴⁸ But a congregation like Rev. Gildon’s can meet either test because the prospective condemnation imposes a great, if not insurmountable, obstacle to religious land use and by doing so significantly pressures the congregation to stop assembling for worship. Congress intended RLUIPA to deal with these very situations, where government activity forces an adherent to abandon the practice of her faith.¹⁴⁹

The *Cottonwood* court found that the church needed to meet together in order to effectively practice its faith and that it had spent five years and millions of dollars obtaining enough land to accommodate its congregation.¹⁵⁰ The city substantially burdened the religious exercise of the four thousand members when it condemned the property. As the court concluded, “Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist.”¹⁵¹

The church could have continued to hold multiple services in a cramped building and begun its search anew, but this possibility does not change the substantial burden analysis. The Supreme Court held in the foundational free exercise case of *Sherbert v. Verner*¹⁵² that someone whose religious convictions against working on the Sabbath caused her to lose her job could receive unemployment benefits, *even if* a longer search might have turned up a suitable job.¹⁵³ The search for new property will almost certainly take longer, impact more peo-

145 Blumenthal, *supra* note 27.

146 Wilhelm, *supra* note 29.

147 See case cited *supra* note 139 (discussing the Ninth Circuit’s test).

148 See case cited *supra* note 139 (discussing the Fifth Circuit’s test).

149 *Murphy v. Zoning Comm’n of New Milford*, 148 F. Supp. 2d 173, 189 (D. Conn. 2001).

150 *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227 (C.D. Cal. 2002).

151 *Id.* at 1226.

152 374 U.S. 398 (1963).

153 Sherbert wanted a job that did not require Sabbath work. She had only unsuccessfully applied for three other jobs when she filed for unemployment benefits. *Id.* at 402 n.2. Even so, the Court held that South Carolina may not constitutionally apply

ple, and include more uncertainty than the search for a job that does not require Sabbath work.¹⁵⁴ Therefore, if the denial of unemployment benefits to one person is a substantial burden, destruction of a church should be a substantial burden on the congregation.

A court confronted in the future with a claim against a city condemning a church for economic development should follow *Cottonwood's* lead and apply RLUIPA. Eminent domain proceedings trigger RLUIPA jurisdiction. Condemnations are "land use regulations" for RLUIPA purposes. Condemning a church's land imposes a substantial burden on religious land use, which is religious exercise under RLUIPA.

III. ECONOMIC DEVELOPMENT AND THE COMPELLING INTEREST TEST BEFORE *KELO*

Even if RLUIPA applies, the land use regulation may stand if it passes strict scrutiny by serving a compelling state interest and following the least restrictive means. To determine whether economic development is a compelling state interest, this Note will examine four sources: the compelling interest test in the broader free exercise context, state supreme court decisions on the conflict between churches and municipal coffers, RLUIPA's legislative history, and federal district courts which have discussed the government's interest in economic development.

A. *Federal Free Exercise Jurisprudence*

While RLUIPA defines religious exercise, RLUIPA does not define compelling interest but codifies the Supreme Court's definitions in the *Sherbert/Smith/Lukumi* line of decisions.¹⁵⁵ In *Sherbert*, the Court declared that compelling state interests were only those needed to prevent "the gravest abuses, endangering paramount [state] interest[s]."¹⁵⁶ Whenever the test was applied, the government rarely passed.¹⁵⁷ But because the test was rarely applied in free exercise

the eligibility provisions so as to constrain a worker to abandon her religious convictions respecting the day of rest. *Id.* at 410.

154 See *Saints Constantine and Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (Posner, J.) (comparing job search in *Sherbert* to church's search for suitable land, and finding failure to exhaust all possible avenues in both cases did not preclude finding substantial burden).

155 *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1091 (C.D. Cal. 2003).

156 *Sherbert*, 374 U.S. at 406.

157 *Elsinore*, 291 F. Supp. 2d at 1091-93 (citing cases).

cases,¹⁵⁸ strict scrutiny in the free exercise context was dubbed a “Potemkin doctrine.”¹⁵⁹

But after the Supreme Court rejected the application of strict scrutiny to neutral and generally applicable laws in *Smith*, the test gained strength. Three years later, the Court held that a law that was neither neutral nor generally applicable would face strict scrutiny that is “not ‘water[ed] down’ but ‘really means what it says’”¹⁶⁰ and would be upheld only if it advanced “interests of the highest order” and was “narrowly tailored in pursuit of those interests.”¹⁶¹ *Lukumi*’s version of the compelling interest test controls in land use cases because land use regulations—especially eminent domain proceedings—are not neutral and generally applicable laws.¹⁶² In the land use context, a compelling government interest is one that is needed to prevent a “clear and present, grave and immediate” danger to public health, peace, and welfare.¹⁶³ Two cases applying *Lukumi* in the land use context illustrate this principle.

In *Keeler v. Mayor of Cumberland*,¹⁶⁴ the court found that a historic preservation ordinance was not generally applicable because it only impacted some properties and because even impacted property owners could apply for and receive individual exemptions.¹⁶⁵ The city justified its ordinance by its interests in property values, aesthetic values, and preserving the city’s heritage; the court rejected all these interests

158 *Employment Div. v. Smith*, 494 U.S. 872, 883 (1990) (“We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied . . .”).

159 *McConnell*, *supra* note 38, at 1110.

160 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (quoting *Smith*, 494 U.S. at 888).

161 *Id.* The Court does not say why it was strengthening the test when dealing with nonneutral and nongenerally applicable laws. Two possible explanations are that the greater possibility of a nonneutral law being enacted for a discriminatory purpose warrants increased scrutiny and that, since the Court would not have to apply the test to so many laws, it could afford to strengthen the test without significantly interfering with the other branches of government.

162 *See supra* notes 84–86 and accompanying text; *see also* *Storzer & Picarello*, *supra* note 49, at 949–52 (arguing that land use regulations are not neutral and generally applicable laws).

163 *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1993); *see also* *Storzer & Picarello*, *supra* note 49, at 963 (citing *First Covenant Church* for compelling interest standard in land use context, and offering fire safety and occupancy requirements as “obvious examples of compelling interests”).

164 940 F. Supp. 879 (D. Md. 1996).

165 *Id.* at 886.

as not compelling.¹⁶⁶ In *Alpine Christian Fellowship v. City Commissioners of Pitkin County*,¹⁶⁷ the City Commissioners refused to grant a Christian school an operating permit. Finding that the permit denial was an “individualized question,” the court held that *Lukumi*, rather than *Smith*, applied, and therefore state interests which would “justify zoning codes in general [were] not applicable.”¹⁶⁸ The court rejected the city’s interest in limiting noise and traffic as not compelling.¹⁶⁹

An underdeveloped economy may pose problems, but it is not a “clear and present, grave and immediate” danger to public health, peace, and welfare.¹⁷⁰ If public health is not compelling, and it was not in *Lukumi*, economic development should not be compelling because that would place a higher value on citizens’ economic welfare than on their physical welfare. *Keeler* specifically found that property values, which are part of overall economic development, did not rise to the level of a compelling interest.¹⁷¹ Thus, federal free exercise cases suggest that economic development in general and tax revenue in particular are not compelling interests.

B. State Supreme Courts

In 1953 the Diocese of Rochester determined that its aging facility inadequately served its growing congregation and began the search for new property.¹⁷² After acquiring the only suitable property in the area for a new parish, it applied for the needed special use permit. The town board denied the permit and claimed that several “compelling” interests justified the denial.¹⁷³ The New York Court of Appeals rejected the town’s interests in keeping churches out of built-up areas, traffic hazards, and maintaining property values as not compelling.¹⁷⁴

The town also claimed a compelling interest in tax revenue and complained that, because the church would be exempt from property

166 *Id.*; see also Powers, *supra* note 20, 179–80 (listing traffic, aesthetics, and property values as legitimate but not compelling interests).

167 870 F. Supp. 991 (D. Colo. 1994).

168 *Id.* at 994.

169 *Id.* at 994–95.

170 *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1993).

171 940 F. Supp. at 886.

172 *Diocese of Rochester v. Planning Bd. of Brighton*, 136 N.E.2d 827, 829 (N.Y. 1956).

173 *Id.* at 830–31.

174 *Id.* at 835–36. The court’s rejection of the interest in property values echoes the *Keeler* court’s rejection of the same interest. See *supra* notes 164–66 and accompanying text.

taxes, granting the church an exemption would cost the town revenue.¹⁷⁵ The court rejected the argument and refused to allow the town to deny the permit merely because the town would make more money without the church. *Diocese of Rochester* held that since a higher authority, the State of New York, had already declared that churches were tax-exempt because they benefited the public welfare, the town could not claim that excluding the church would serve the public welfare by increasing revenue.¹⁷⁶ The court then repeated its holding for emphasis: "No municipality can justly refuse a permit to build a church only because the property will no longer be subject to taxation."¹⁷⁷ If a municipality cannot deny a congregation the right to build a church because of a potential loss of tax revenue from the property, it follows that a municipality cannot condemn church property in order to obtain economic benefits from the property which it had never before received.

When denying a special use permit to a congregation of Jehovah's Witnesses, the City of Chicago framed its interest as "the detrimental effect of a church in a solid business block" rather than as a naked interest in tax receipts.¹⁷⁸ This recasting failed: the Illinois Supreme Court held that even if the church diminished the value of the adjacent stores (and thus the amount of tax revenue the stores would generate), the permit denial was still arbitrary, capricious, unrelated to the public welfare, and therefore invalid.¹⁷⁹ Because the city's reasoning could have supported denying permits to all churches, the

175 *Diocese of Rochester*, 136 N.E.2d at 830-31. The clash was similar to *Cottonwood*, as it pitted a growing church seeking a new facility against municipal authorities seeking tax revenue. See *supra* notes 14-22 and accompanying text.

176 *Diocese of Rochester*, 136 N.E.2d at 836.

177 *Id.* Twenty years later, in *Jewish Reconstructionist Synagogue of North Shore, Inc. v. Village of Roslyn Harbor*, 342 N.E.2d 534 (N.Y. 1975) (plurality opinion), the New York Court of Appeals was asked to reconsider *Diocese of Rochester* in light of an allegedly more modern view that churches should be subjected to the same zoning restrictions as other entities, *id.* at 538. Writing for the plurality, Judge Fuchsberg's opinion reaffirmed *Diocese of Rochester* and, although the facts dealt with a fencing ordinance, specifically said that tax revenue was not a compelling interest. *Id.* He also held that, while the Town's interests in public welfare were valid, they were outweighed by the interests of free exercise and the "public benefit and welfare which is itself an attribute of religious worship in a community." *Id.*; see also Storzer & Picarello, *supra* note 49, at 935 n.36 (collecting more recent sources on value of churches to a community).

178 *Columbus Park Congregation of Jehovah's Witness, Inc. v. Bd. of Appeals of Chi.*, 182 N.E.2d 722, 726 (Ill. 1962). One wonders if the city framed its interest in this manner because its lawyers had read *Diocese of Rochester*.

179 *Id.* The rejection of "diminution in value" interest demonstrates that a government will not be able to recast its motivation for condemning religious property from

city's reasoning was inconsistent with the constitutional guarantees of free exercise and therefore unacceptable.¹⁸⁰

In *Jacobi v. Zoning Board of Adjustment of Lower Moreland Township*,¹⁸¹ the Board granted the Archdiocese of Philadelphia a special exception in order to operate a church, convent, and parochial school. When local property owners sued, arguing that the exception was contrary to the "health, safety and general welfare of the inhabitants of the Township," the Pennsylvania Supreme Court admitted that the religious complex might increase the need for township services without increasing the township's coffers.¹⁸² But the court found any loss harmless to the general welfare because the legislature had already determined that religious institutions promoted the general welfare when it granted them tax-exempt status.¹⁸³

Because these cases have not been limited, overruled, or even substantially criticized in later judicial opinions,¹⁸⁴ the best way to attack their holdings is to dismiss them as outdated. However, the attack fails because the courts' reasoning rests on a timeless legal principle: the allocation of power between superior and inferior levels of government. The cases argue that, when a state determines that exempting religious entities from property taxes is in the public's best interest, the city, as a creature of the state, has no right to usurp the state's authority and declare that the public's interest would be better served if the land generated property taxes. Every state exempts

tax revenue to some broader economic interest and thereby defeat the compelling interest test.

180 *Id.*

181 196 A.2d 742 (Pa. 1964).

182 *Id.* at 744.

183 *Id.* at 745.

184 On April 19, 2006, I ran these three cases—*Jacobi*, *Diocese of Rochester*, and *Columbus Park* through KeyCite on Westlaw's online database. When I checked *Jacobi*, I found 45 positive citing references in other cases and no negative references. When I checked *Diocese of Rochester*, I found 88 positive citing references and only two negative references, one which distinguished the case and one which said that while it was accepted in many jurisdictions, it was not the law of Pennsylvania. When I checked *Columbus Park*, I found 28 positive references and four negative references. One negative reference was listed as calling *Columbus Park* into doubt and thus represented the most serious criticism of any of these three cases. However, the critical case was *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 749 N.E.2d 916 (Ill. 2001). For a discussion of why *Living Word*, rather than *Columbus Park*, should be considered wrongly decided, see *infra* notes 219–27. While this short search is far from definitive because it does not examine academic literature for possible criticism, the search at least suggests that these three older state cases are still good law.

churches from property tax and has done so for centuries.¹⁸⁵ This exemption reflects a policy judgment that churches benefit a community in tangible and intangible ways and therefore *belong* in communities.¹⁸⁶ Attempts to exclude them are short-sighted. Even Justice Brennan, generally considered a supporter of a strong Establishment Clause jurisprudence, has recognized, and approved, this policy judgment.¹⁸⁷ Perhaps the municipality does not like the state legislature's policy and wants to set aside a three-hundred-year-old and universally approved practice for its own short-term financial enrichment. If so, the municipality should have the courage and integrity to make the challenge openly, in the legislature, and not clandestinely, through land use regulations.¹⁸⁸

C. *The Legislative History Surrounding RLUIPA*

Before passing RLUIPA, Congress held extensive hearings that catalogued the practices of land use authorities toward churches¹⁸⁹ and used evidence from these hearings as justification for passing RLUIPA.¹⁹⁰ The House report on RLUIPA presented evidence of land use authorities acting for many reasons Congress considered illegitimate and included evidence of municipalities wielding zoning law against churches for the sole purpose of keeping as much land as possible on the tax rolls.¹⁹¹ If municipal decisions against churches based on tax and economic interests partially motivated Congress to pass RLUIPA, those interests should not be sufficient to overcome RLUIPA's protection. Courts have cited this record as evidence that

185 *Waltz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678 (1970); *id.* at 681 (Brennan, J., concurring).

186 *Storzer & Picarello*, *supra* note 49, at 934–36.

187 *Waltz*, 397 U.S. at 687–89 (Brennan, J., concurring).

188 *See supra* notes 175–77, 183 and accompanying text (discussing why the legislature's policy judgment should trump a city's claim); *see also* Laycock, *supra* note 12, at 762. Laycock argues that the primary reason land use authorities thwart religious land use is because “they do not want property taken off the tax rolls” and accuses them of wrongfully “using land concerns as a subterfuge to fight the state legislature's policy of tax exemption.” *Id.* Another professor agrees that in making land use decision, “cities are in a mad race for revenues.” Weinberg, *supra* note 8, at 3.

189 H.R. REP. NO. 106-219, at 5–12, 18–24 (1999) (compiling testimony); *Storzer & Picarello*, *supra* note 49, at 984 (stating that Congress held nine hearings over three years on the subject).

190 146 CONG. REC. 16698, 16698–99 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

191 H.R. REP. NO. 106-219, at 19.

Congress did not intend economic development to be a compelling interest.¹⁹²

A contrary conclusion assumes that Congress passed a self-defeating statute where the exception swallows the rule. A hypothetical environmental statute illustrates this point as well. Suppose Congress, concerned that mining companies were putting profits before environmental responsibility in refusing to fill open pit mines, passed a law requiring mining companies to fill in exhausted mines unless the company obtained a special permit not to fill in the mine. Congress instructs the EPA to grant permits only in “extraordinary circumstances.” From this record, one would not expect a mining company to receive a permit if its only argument to the EPA was “filling in the mine will cut our profits.” Likewise, given RLUIPA’s record, a government should not be allowed to condemn religious land if its only argument is “this condemnation will lead to increased tax revenue.” In both RLUIPA and the hypothetical environmental statute, Congress has openly disapproved of an entity putting too much weight on monetary concerns when making a decision. In both cases, Congress has responded with a law raising the bar the entity must clear before it can to do what it wanted, whether that was condemning church property or leaving an open pit mine open. In neither case should the entity be able to clear that bar by relying on the very motivation Congress wanted to eliminate—financial gain.

D. Federal District Courts

1. Two District Courts Have Found That Economic Development Is Not a Compelling Interest

The *Cottonwood* court justified its conclusion that revenue was not a compelling interest on two grounds. First, following the reasoning of the previously discussed state courts, it determined that revenue could not be compelling because if it were, then the city could exclude all religious entities from its borders.¹⁹³ Second, the court determined that in the land use context, a compelling interest is one where government activity is needed “to ‘protect public health or safety.’”¹⁹⁴ Because an increase in tax revenue alone did not improve

192 *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1093 (C.D. Cal. 2003).

193 *Cottonwood Christian Ctr. v. Cypress Redevelopment Corp.*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002); see also *supra* notes 175–77, 183 and accompanying text.

194 *Id.* (quoting *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1993)).

the public health and safety, the court found the interest in revenue not compelling.

Revenue generation does not protect public health and safety in the same way the town's fire code or the zoning of chemical plants might. Even if revenue from the church's property were needed to protect public health and safety under some extreme circumstances,¹⁹⁵ the *Cottonwood* court determined that the city did not need revenue from the Cottonwood property in order to protect public health and safety. The city had not received revenue from the property as it had lain vacant for the previous twelve years, but public health and safety had not been compromised. More importantly, at the same time the city was explaining the importance of its interest in possible revenue from Cottonwood's property, the city's mayor was running for reelection boasting that the city enjoyed a twenty-five percent budget surplus.¹⁹⁶

This discrepancy between the city's assertions inside the courtroom and its actions outside the courtroom drove the court's skepticism about the city's asserted interest in revenue.¹⁹⁷ The court also concluded that, even if revenue was a compelling interest, the city was "using a sledgehammer to kill an ant."¹⁹⁸ RLUIPA's strict scrutiny also requires that the government use the least restrictive means when pursuing its compelling interest. Under the least restrictive means requirement, the city had to justify why it condemned *the particular property that Cottonwood owned* in order to further this interest.¹⁹⁹ The city

195 A city with *no* money could not enforce its fire code, pay its police, or pay its zoning commissioner to keep chemical plants out of certain parts of the city. Since the compelling interest test is "a standard that responds to facts and context," *Elsinore*, 291 F. Supp. 2d at 1092, one could conceive of a situation where revenue might be a compelling interest. A city such as New Orleans following Hurricane Katrina might have an argument that revenue from the church's land is needed immediately to protect public health and safety. However, if the city were receiving substantial outside assistance, either in manpower or finances, the need would no longer be immediate, and the interest no longer compelling.

196 *Cottonwood*, 218 F. Supp. 2d at 1228. The Mayor also bragged that she had not even passed a utility tax to achieve this surplus, *id.*, a fact that might have helped her campaign but did not help the city's case.

197 Perhaps the city was indeed motivated by revenue; if so, it lost for the right reason. But some of the surrounding evidence and the tone of the court's opinion suggest that the judge suspected a deeper motivation. See *id.* at 1228, 1232 n.17 (calling the interest in revenue "suspect," and suggesting that the "reluctant" city might oppose any attempt by the church to assemble property); see also Gallagher, *supra* note 22 (calling the judge's opinion in the case "unprecedented" and "a stinging rebuke" to the city).

198 *Cottonwood*, 218 F. Supp. 2d at 1229.

199 *Id.*

failed this prong of the test because it made no showing that it could not have increased revenue other ways, such as by developing around the church or by condemning other property.²⁰⁰ In future cases, a church should not focus its argument so much on whether economic development is a compelling interest that the church overlooks RLUIPA's important least restrictive means requirement; but, a further discussion of that second prong is outside the scope of this Note.²⁰¹

Elsinore Christian Center, although decided in the zoning context, reaches the same conclusion as *Cottonwood*. Like *Cottonwood*, *Elsinore* found that if tax revenue constituted a compelling interest, cities could always exclude churches and RLUIPA would be meaningless.²⁰² *Elsinore* also looked to RLUIPA's legislative history and concluded that "property tax revenue is a potentially pretextual basis for decision-making that appears to have been a specific target of RLUIPA."²⁰³ On these grounds, the court refused to find that revenue was a compelling interest.²⁰⁴

2. Two Cases Could Be Taken To Support Finding Economic Development To Be a Compelling Interest

Any city looking to defend its condemnation of religious land will likely turn to *International Church of the Foursquare Gospel v. City of Chicago Heights*²⁰⁵ and *City of Chicago Heights v. Living Word Outreach Full*

200 *Id.*

201 In short, if the government could promote economic development without condemning the religious property, but condemns the property anyway, the government will fail strict scrutiny. In *Cottonwood*, the city could have developed different property. In larger development cases such as *Kelo*, the city could make the development smaller or build the development around the existing church.

The prospective condemnation of Rev. Gildon's Centennial Baptist Church, *see supra* text accompanying notes 142–49, presents a good example because, even though "the church could easily live side-by-side with new stores, houses, or businesses," the city remains intent on condemning the church. Wilhelm, *supra* note 29. A city's insistence on condemning a church where there appears to be enough room for development without taking the church may rile religious liberty advocates. *See id.* But church advocates might end up thanking the city for its apparent stubbornness, because the city's refusal to consider developing around the church might translate into a failure to use the least restrictive means and thus into a powerful legal argument for the church.

202 *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1093 (C.D. Cal. 2003).

203 *Id.*

204 *Id.*

205 955 F. Supp. 878 (N.D. Ill. 1996).

*Gospel Church & Ministries, Inc.*²⁰⁶ Both cases were decided before RLUIPA, and Congress criticized *Living Word* when it drafted RLUIPA.²⁰⁷ These events alone would cast doubt on the cases' relevance, even if they had been well reasoned. They were not. Nevertheless, they must be examined because they represent the strongest legal support for finding economic development a compelling government interest.²⁰⁸

The cases arose from the same facts.²⁰⁹ Chicago Heights adopted a zoning plan to promote commercial development.²¹⁰ The church, having been burned out of its location in 1993, found a piece of property available for a good price.²¹¹ When the church applied for the needed permit, the city denied the permit as inconsistent with its zoning and commercial redevelopment plan.²¹² The church sued, first in federal court under RFRA and later in state court. The cases will be addressed in that order.

The federal court first said that denying the permit did not substantially burden the church's free exercise²¹³—a dubious conclusion in light of RLUIPA.²¹⁴ Perhaps because it found no substantial burden, the court devoted only two paragraphs to the compelling interest

206 707 N.E.2d 53 (Ill. App. Ct. 1999), *rev'd on other grounds*, 749 N.E.2d 916 (Ill. 2001).

207 H.R. REP. NO. 106-219, at 19–22 & nn.72 & 98 (1999); *see also* Congregation of Kol Ami v. Abington Twp., No. Civ.A. 01-1919, 2004 WL 1837037, at *8 (E.D. Pa. Aug. 17, 2004) (stating that RLUIPA “undermines” cases like *International Church*).

208 An unreported federal appellate case held that promoting commercial development was an interest sufficient to pass a rational basis standard for free exercise burdens under *Smith*. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 F. App'x 70, 75 (3d Cir. 2004). This holding is unremarkable because a significant difference exists between an interest which will satisfy *Smith's* rational basis review and a compelling interest which will satisfy RLUIPA. The court gave no indication that it sought to bridge that gap. Similarly, an Illinois court permitted the condemnation of a mosque's property as part of a redevelopment plan. *Sw. Ill. Dev. Auth. v. Al-Muhajirum*, 744 N.E.2d 308 (Ill. App. Ct. 2001). However, the mosque's properties were undisputedly blighted and were condemned for that reason (the court even mentioned that it saw pictures of the property). *Id.* at 311. The court did not hold that economic development justified condemning religious property; it only rejected the mosque's novel argument that since the properties were religious, they could not be have been blighted. *Id.*

209 *Int'l Church*, 955 F. Supp. at 879 (contested property located on Lincoln Highway); *Living Word*, 707 N.E.2d at 55 (same).

210 *Int'l Church*, 955 F. Supp. at 879.

211 *Id.*

212 *Id.*

213 *Id.* at 880.

214 *See supra* Part II.C.

analysis.²¹⁵ The court then said that the city's actions satisfied strict scrutiny, but it neither specifically identified the compelling interest nor explained why the city's denial of the permit was the least restrictive means of accomplishing that interest.²¹⁶ The court did say that the city "must create an economic underpinning," so one can assume that phrase was the court's formulation of the compelling interest, but the court cited *no* authority that "creating an economic underpinning" is a compelling interest—or even a substantial interest.²¹⁷ The opinion also failed to discuss any past cases which found a compelling governmental interest or explain why "creating an economic underpinning" was similar to any previously accepted compelling interests.²¹⁸ *International Church* asserted an ambiguous compelling interest without analysis or authority. This omission undermines the case's persuasive value.

The church then turned to the state courts. The Illinois Court of Appeals held that the zoning restrictions furthered two compelling interests: creation of a stronger tax base and enforcement of zoning laws.²¹⁹ The latter interest demonstrates bootstrapping at its worst: if the government has a compelling interest in enforcing its zoning laws, whatever laws it enacts will automatically pass strict scrutiny simply because the government has a compelling interest in enforcing the law. This logic eviscerates the compelling interest test and cannot be accepted.

For its more sophisticated, but still erroneous, conclusion that "maintaining a sound tax system" is a compelling interest, *Living Word* cited *Hernandez v. Commissioner*.²²⁰ In *Hernandez*, Scientologists claimed that by refusing to consider payments for doctrinal training courses tax-deductible, the IRS violated the Scientologists' free exer-

215 *Int'l Church*, 955 F. Supp. at 881.

216 *Id.* Indeed, the court never examines any possible alternative ways for the city to accomplish its (vague) goal.

217 *Id.*

218 In a further demonstration of dubious reasoning, the court responded to the church's claim that it was being excluded because it is exempt from property taxes by saying that the church is not being excluded for that reason but because the church is noncommercial. *Id.* This conclusion partially missed the point: the reason the church is exempt from property taxes is *because* the property is being used for religious and noncommercial purposes. See 35 ILL. COMP. STAT. ANN. 200/15-40 (West 1996) (amended 2001) (requiring exclusive use for religious purposes and absence of profit motive for property tax exemption).

219 *City of Chi. Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.* 707 N.E.2d 53, 59 (Ill. App. Ct. 1999), *rev'd on other grounds*, 749 N.E.2d 916 (Ill. 2001).

220 *Id.* (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699–700 (1989)).

cise rights. The Supreme Court responded that, even if the denial constituted a substantial burden, it was justified by the government's compelling interest in a "sound tax system."²²¹ The *Living Word* court took *Hernandez* to mean that the government has a compelling interest in increasing the amount of revenue as a whole.²²²

But this conclusion overlooks the context of the Supreme Court's statement: the entire phrase defines the interest as "'maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'"²²³ The Supreme Court was concerned not with lost government revenue but with the specter of an income tax system full of confusing exceptions where one's ability to claim the exception depended on one's religious beliefs. In the same paragraph, the Supreme Court stressed that a tax "must be uniformly applicable to all, except as Congress specifically provides explicitly otherwise."²²⁴ The Supreme Court focused on uniformity, order, and congressional authority; it did not worry about the size of the federal treasury. *Hernandez* did not hold that governments have a compelling interest in getting more money, so the *Living Word* court was unjustified in reading *Hernandez* as saying it did.

If *Hernandez* is relevant, it favors a church fighting an economically motivated condemnation because it stresses Congress's role in providing tax exemptions.²²⁵ Congress provided an exemption when it passed RLUIPA with legislative history suggesting that economic concerns did not justify hindering religious land use.²²⁶ More importantly, each of the fifty states provided exemptions when they declared religious land users free from property taxes. The city has no right to use land regulation as a pretext to thwart the property tax exemption.²²⁷

Before *Kelo*, the Supreme Court had never addressed whether economic development was a compelling interest, but the tone of free exercise case law suggests that it has never been considered a compelling interest. Three state supreme courts reached the same conclusion. RLUIPA's legislative history indicates that its drafters would have agreed. Two district courts ruled that economic development

221 *Hernandez*, 490 U.S. at 699.

222 *Living Word*, 707 N.E.2d at 59.

223 *Hernandez*, 490 U.S. at 699–700 (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

224 *Id.* at 700.

225 *Id.* Congress's ability to provide that exemption again raises the issue of accommodation, which is mentioned *supra* note 121.

226 *See supra* Part III.C.

227 *See supra* notes 181–88 and accompanying text.

was not compelling. The only cases reaching the opposite conclusion either ignored or misunderstood precedent. Therefore, the best understanding is that before *Kelo*, economic development was not a compelling interest.

IV. ECONOMIC DEVELOPMENT AND THE COMPELLING INTEREST TEST AFTER *KELO*

We have seen that RLUIPA applies to condemnation proceedings and that economic development was not a compelling interest before *Kelo*. The only remaining question is whether the sound and fury surrounding *Kelo* signifies any legal change. The various opinions in the case and the surrounding academic commentary show that it does not.

As even a casual reader of the headlines now knows, the City of New London attempted to reverse its economic decline by planning a massive waterfront redevelopment project.²²⁸ The city convinced Pfizer to build a \$300 million research facility to anchor the project.²²⁹ But since the city planned the project on land it did not own, the city had to obtain the land to complete the project. Most area property owners willingly sold, but a few turned down the city's offer. Susette Kelo, who did not want to leave her waterfront view, and Wilhelmina Dery, an eighty-seven-year-old woman who still lived in the same house in which she was born, refused to leave.²³⁰

When persuasion failed, the city turned to force; the day before Thanksgiving in 2000, it nailed a condemnation notice to Kelo's door.²³¹ Kelo and her neighbors then sued to stop the condemnation, arguing that it was outside the Fifth Amendment's Public Use Clause because unblighted property was being taken solely for economic development and being given to another private party. A bitterly divided Connecticut Supreme Court ruled 4-3 for the city.²³² The court relied on state and federal precedent for its conclusion that "public use" meant "public purpose" and that a public purpose was a broad term which included economic development.²³³

228 *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005).

229 *Id.* at 2659.

230 *Id.* at 2660. For a detailed analysis of the facts of *Kelo*, see Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837 (2005).

231 Steven E. Buckingham, Comment, *The Kelo Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1289 (2005).

232 *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655.

233 *Kelo*, 125 S. Ct. at 2660 (saying that the Connecticut Supreme Court relied on *Berman* and *Midkiff* in reaching its decision).

Had the case been decided a decade ago, it may not have made the news; it simply applied *Berman* and *Midkiff* in an unremarkable way.²³⁴ But *Kelo* was decided amidst a revived public debate over eminent domain and a shifting judicial landscape. From the *Berman* decision in 1954 to *99 Cents Only Stores v. Lancaster Redevelopment Agency*²³⁵ in 2002, not a single federal case rejected an eminent domain proceeding as not being for a public use.²³⁶ Then within two years, three federal courts blocked a condemnation as outside the Public Use Clause, which was an “amazing” judicial development “considering the preceding drought.”²³⁷ Several state courts departed from the deferential federal standard and limited eminent domain powers under their state constitutions.²³⁸ Most notably, the Michigan Supreme Court reversed its notorious *Poletown* decision.²³⁹

The court of public opinion also shifted against the broader definition of public use. Abuses of eminent domain which enriched private parties were broadly publicized and created a public backlash.²⁴⁰

234 See *id.*; Echeverria, *supra* note 55, at 10,584 (“Given the lack of any genuine issue about the appropriate legal standard . . . persuading the Court to grant certiorari in *Kelo* was quite an accomplishment.”).

235 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

236 Wilk, *supra* note 76, at 270.

237 *Id.* at 271. Besides *99 Cents Only Stores*, the other two federal cases were *Cottonwood*, which has been discussed throughout this Note, and *Daniels v. Area Plan Commission of Alan County*, 306 F.3d 445 (7th Cir. 2002). Wilk, *supra* note 76, at 271.

238 Wilk, *supra* note 76, at 267–70 (mentioning the courts in New Jersey, Massachusetts, Illinois, and Michigan).

239 *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *Poletown*, the Michigan Supreme Court approved a plan condemning a large tract of land and transferring it to General Motors for a new assembly plant. *Poletown*, 304 N.W.2d at 457. The case led to an expansion of eminent domain at a state level and came to symbolize expansive eminent domain powers. Timothy Sandefur, *A Gleeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651, 651, 655 (2005).

240 See, e.g., BERLINER, *supra* note 74 (cataloging eminent domain abuses); GREENHUT, *supra* note 20 (devoting entire book to exposing eminent domain abuses); Patricia E. Salkin & Lora A. Lucero, *Community Redevelopment, Public Use, and Eminent Domain*, 37 URB. LAW. 201, 218–223 (2005) (discussing the public outcry over a redevelopment plan in Lakewood, Ohio, which resulted in the plan being defeated and its authors voted out of office); *60 Minutes: Eminent Domain Being Abused?*, CBS NEWS, July 4, 2004, <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml> (warning audience about eminent domain abuses). Most of the outrage arises from the belief that the Public Use Clause is being used to benefit private corporations. See Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 (reporting that, before and after *Kelo*, the public sees eminent domain as a way the rich get richer at the expense of everyone else).

When the Supreme Court granted certiorari in *Kelo*, some commentators noticed a parallel between the recently overruled *Poletown* taking, which benefited GM, and the *Kelo* taking, which benefited Pfizer and hoped that *Kelo*, like *Poletown*, would be overruled.²⁴¹

On June 23, 2005, the Court handed down a 5-4 decision in favor of the city. Justice Stevens affirmed the Connecticut Supreme Court's conclusion that economic development was a valid public purpose consistent with the Public Use Clause.²⁴² So long as the condemnation served a rational public purpose, the fact that another private party ended up owning the land was not relevant. The case immediately made the headlines and earned withering editorial scorn.²⁴³ One paper called the decision "not only one of the most unpopular decisions in recent memory, but one of the worst as well."²⁴⁴ The commentators typically framed the case as an expansion of eminent domain power. They described private property protection as "immensely diminished"²⁴⁵ or "crippled"²⁴⁶ by a decision which was more suited to a communist government²⁴⁷ and would lead to "dark days"²⁴⁸ in the future for homeowners. These attacks reveal a view that *Kelo* made new law. A prediction of "dark days ahead" presupposes that sunnier days existed before. The perception that the Court had somehow gone too far drove cries for legislative remedies.²⁴⁹

241 See, e.g., James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845, 854 (stating that *Hathcock* may be a turning point in eminent domain law); Roy Whitehead, Jr. & Lu Harden, *Government Theft: The Taking of Private Property To Benefit the Favored Few*, 15 GEO. MASON U. CIV. RTS. L.J. 81 (2004) (discussing *Kelo*, *Poletown*, *Hathcock*, and other eminent domain cases, and expressing hope that the Supreme Court would use *Kelo* to contain eminent domain).

242 *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

243 See Michael M. Berger, *What Has the Supreme Court Done to—or for—Land Use?*, in LAND USE INSTITUTE PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 64, 73 (ALI-ABA Course of Study, Aug. 25-27, 2005), available at WL SL005 ALI-ABA 63. The article cites nine editorials from papers nationwide, including the *Boston Globe*, *Cincinnati Inquirer*, *Houston Chronicle*, and *Chicago Tribune*, published the week of the decision, and adds that "the outpouring of invective has continued unabated ever since." *Id.* The article points out that the usually liberal papers attacked the decision. *Id.*

244 John Ehinger, *The Court Errs Badly*, HUNTSVILLE TIMES, June 25, 2005, at B4.

245 Editorial, *Kennedy's Vast Domain*, WALL. ST. J., June 24, 2005, at A12.

246 Editorial, *Court Cripples Property Rights*, CINCINNATI ENQUIRER, June 24, 2005, at 8B.

247 Editorial, *Stealing Home*, HOUSTON CHRON., June 25, 2005, at B8.

248 Editorial, *Dark Days Ahead for Property Owners*, ROCKY MTN. NEWS (Denver, Colo.), June 24, 2004, at 48A.

249 See Preciphs, *supra* note 6, for the congressional response. At the state level, bills or constitutional amendments proposing limits on the power of eminent domain

Even if the commentators are right that *Kelo* was an unwise and unpopular decision, they are mistaken in viewing it as a new and radical decision. A careful look at the majority opinion reveals that the idea that *Kelo* granted the government some new power is a product of rhetoric, not of reality. Throughout the opinion, Justice Stevens relies heavily on precedent. He never invokes the policy arguments or flexible interpretative techniques that normally characterize the Court's more groundbreaking opinions.²⁵⁰

Justice Stevens cites *Berman* and *Midkiff* twenty-three times throughout his opinion.²⁵¹ Such reliance on prior cases in the same field is not the mark of a watershed case. He emphasized that "[w]ithout exception," past cases had construed the Public Use Clause broadly.²⁵² When asking whether economic development is a public use, he does not discuss policy or argue that cities needed broad eminent domain powers to implement creative strategies for combating societal challenges.²⁵³ Rather, Stevens simply determines that "[p]romoting economic development is a traditional and long accepted function of government" and supports his statement with citations to *Berman*, *Midkiff*, and earlier eminent domain cases.²⁵⁴ Stevens characterizes *Kelo* as indistinguishable from past cases and accuses the plaintiffs of trying to avoid the weight of precedent.²⁵⁵ The majority's claim of following precedent is not conclusive, as past decisions have

have been introduced in thirty state legislatures, and in three states governors have temporarily halted condemnations. Coleman, *supra* note 240. However, it is important to keep in mind that the difference between a bill being introduced and such a bill actually becoming law. It is too early to determine what the permanent impact of *Kelo* on state eminent domain law will be, although even before *Kelo* some states were limiting the power. See *supra* note 238 and accompanying text.

250 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (relying on "evolving standards of decency" to find juvenile death penalty unconstitutional under the Eighth Amendment) (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)); *Lawrence v. Texas*, 539 U.S. 558, 579 (2002) (citing international sources, and arguing that "later generations" may be able to recognize the oppressive nature of certain longstanding laws).

251 *Kelo v. City of New London*, 125 S. Ct. 2655, 2658–69 (2005).

252 *Id.* at 2663.

253 For a commentator who made this argument, see Thomas W. Merrill, *The Goods, the Bads, and the Ugly*, LEGAL AFF., Jan.–Feb., 2005, at 18.

254 *Kelo*, 125 S. Ct. at 2665 (stating there was "no principled way of distinguishing" between *Kelo* and past cases).

255 *Id.* at 2666 ("Again, our cases foreclose this objection."); *id.* at 2667 (suggesting that petitioners' alternative rule was "an even greater departure from . . . precedent").

purported to be following precedent when they were ignoring it,²⁵⁶ but *Kelo's* use of precedent at least suggests that it is not the watershed case its populist critics allege.

The professional commentary supports the same conclusion. Before the case was handed down, commentators disagreed over who should win but agreed that a win for *Kelo* would shift the law. For property-rights supporters, *Kelo* offered a chance for the Court to reconsider its prior holdings in *Berman* and *Midkiff*.²⁵⁷ The key word is *reconsider*: the property rights supporters wanted the court to *change the law*.

Supporters of New London also framed their argument in terms of maintaining the status quo. Professor Thomas Merrill pointed to *Hathcock's* reasoning as a way the Supreme Court could narrow eminent domain power but stated that such reasoning would only be employed if the Court wanted to "avoid the conclusion" toward which its prior cases pointed.²⁵⁸ Another commentator was concerned that the Court would "overreact" to well known stories of eminent domain abuse and limit the needed powers which government currently en-

256 Justice Scalia's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), may be the most infamous example. See, e.g., McConnell, *supra* note 38, at 1120, 1125 (arguing that *Smith's* use of precedent borders on "shocking" and consists of "overruled and minority positions").

257 See Alan T. Ackerman, *The Changing Landscape and Recognition of the Public Use Limitation: Is Hathcock a Precursor to Kelo?*, 2004 MICH. ST. L. REV. 1041, 1052 (describing the *Kelo* homeowners' brief as asking the Court to "modify existing law" or "restrict prior interpretations"); Ely, *supra* note 241, at 854 (suggesting that the grant of certiorari in *Kelo* might signal willingness to curb use of eminent domain for economic development); Mary Massaron Ross, *Does County of Wayne v. Hathcock Signal a Revival of the Public Use Limit to the Taking of Private Property?*, 37 URB. LAW. 243, 267 (2005) (writing that in *Kelo* the Supreme Court can continue its direction or "shift course," and predicting an "earthquake" if the property owners win); Whitehead & Harden, *supra* note 241, at 82 (arguing that the eminent domain power has been abused throughout the country, and hoping the Supreme Court uses *Kelo* to curb that power); Buckingham, *supra* note 231, at 1309 (hoping the Supreme Court will put an outer limit on what is currently a "near plenary" power, and stating that, if the city wins, "the doctrine of eminent domain will be left largely unchanged"); Michael J. Coughlin, Comment, *Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule*, 54 CATH. U. L. REV. 1001, 1003-04 (2005) (discussing cases, and hoping the Supreme Court will reject the *Berman/Midkiff* regime and follow *Hathcock* instead).

258 Merrill, *supra* note 253, at 17; see also Salkin & Lucero, *supra* note 240, at 241 (asking the court to "[c]ontinue" its rational basis review in eminent domain cases and leave new restrictions to the states); Gallagher, *supra* note 230, at 1842, 1865-71 (admitting that the Supreme Court "has not yet considered whether economic development justifies the use of eminent domain," but arguing that economic development was within the public purpose test).

joyed.²⁵⁹ If governments already enjoyed power to act as New London had acted, a court decision affirming those actions as legal cannot be a shift in the law.

After the case was decided, the commentators remained divided as to whether the Court had reached a wise conclusion, but they remained almost unanimous that it had not reached a new one. Shelly Ross Saxer wrote that “*Kelo* did not change the law, but it should have.”²⁶⁰ To legal historian and property textbook author James W. Ely, Jr., the decision merely “administered last rites” to an already decrepit restriction on eminent domain.²⁶¹ Other than the Institute for Justice,²⁶² very few voices dissented from the view that *Kelo* did not widen the power of eminent domain.²⁶³ Since the Court only applied the existing test to uphold a condemnation similar to those already upheld, *Kelo* might be described as the most misreported,²⁶⁴ as well as the most unpopular, case in recent memory.

259 Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 822 n.160 (“Let us hope that the Court is careful enough to avoid this pitfall.”).

260 Shelly Ross Saxer, *Thoughts on Kelo v. City of New London*, in LAND USE INSTITUTE PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION, *supra* note 243, at 79, 81, available at WL SL005 ALI-ABA 79. Saxer has specifically written on RLUIPA and eminent domain, *see* Saxer, *supra* note 78, but she did not address how *Kelo* might change her previous analysis.

261 Ely, *supra* note 7, at 61. Ely was nevertheless unhappy with the decision, because of its “flawed reasoning” and because it “represented a lost opportunity” to limit eminent domain power. *Id.*

262 INST. FOR JUSTICE, *Kelo v. City Of New London: What It Means and the Need for Real Eminent Domain Reform* (2005), available at http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf. The IFJ argues that even if *Kelo* did not change the legal test for eminent domain, it broadened the law by applying the test to more extreme facts. *Id.* at 3. The IFJ’s argument misses the point that condemnations similar to those in *Kelo* have been repeatedly upheld by courts in the past. Perhaps the IFJ’s position was colored by its representation of the homeowners in the case.

263 *See supra* note 260 and accompanying text; *see also* David B. Cosgrove, *The U.S. Supreme Court Authorizes Taking of Private Property for Economic Development: New London, But Old Rules?*, ORANGE COUNTY LAW., Sep. 2005, at 42, 44 (discussing “perception” that *Kelo* changes the law); David C. Wilkes & John D. Cavallaro, *This Land Is Your Land?*, N.Y. ST. BAR J., Oct. 2005, at 10, 12 (arguing that the view that *Kelo* gives the government greater eminent domain power is “misguided”). *But see* Richard A. Epstein, *Kelo: An American Original*, 8 GREEN BAG 2d 355, 355–57 (2005) (distinguishing past eminent domain cases and arguing that *Kelo* did expand the eminent domain power). It should be noted that since the case was decided so recently, the scholarly commentary on it remains somewhat sparse.

264 Erwin Chemerinsky, *The End of an Era*, 8 GREEN BAG 2d 345, 350 (2005). Professor Chemerinsky argues that the “media[’s] present[ation of] this case as a dramatic change in the law” was erroneous and calls the case the most misreported of the 2005 term. *Id.*

Indeed, a plausible argument exists that *Kelo* narrowed the scope of eminent domain law. The Court issued unanimous decisions in *Berman* and *Midkiff*; *Kelo* came down 5-4. A single replacement on the court could lead to a different result.²⁶⁵ Furthermore, while five justices signed the main opinion, Justice Kennedy wrote a concurring opinion stating that, while he upheld New London's condemnations under the deferential standard of *Berman* and *Midkiff*, he would apply a stricter standard of review in circumstances where the takings showed "impermissible favoritism" to private parties.²⁶⁶ Kennedy did not elaborate on what those circumstances would be or what his test would look like (the dissent sharply criticized him for this omission²⁶⁷), but his concurrence and role as the critical fifth vote suggest that a city would not want to push its eminent domain power too far beyond the facts of *Kelo* for fear of losing Kennedy's vote.²⁶⁸ Both Kennedy and Stevens stressed that the takings occurred in the context of a comprehensive redevelopment plan.²⁶⁹ Both stressed the overall depressed economy of New London.²⁷⁰ This factual focus may cast doubt on whether the Court would approve a condemnation for economic development where the city lacked (or ignored) a larger economic development plan or executed the condemnation in a less depressed area.²⁷¹ The Court even hinted that the "just compensation" paid might not be constitutionally just in all cases but said that issue could not be addressed further because it was not before the

265 The U.S. Senate is aware of this fact, as Supreme Court nominee John Roberts was questioned by the Judiciary Committee on his view of *Kelo*. See *On Eminent Domain, Supreme Court Workload, End of Life and Consistency*, N.Y. TIMES, Sept. 5, 2005, at A28.

266 *Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring).

267 *Id.* at 2675 (O'Connor, J., dissenting).

268 The kind of one-to-one forced exchange of property in *Cottonwood*, where the church's property is taken to be given to Costco, might be sufficient to trigger Kennedy's stricter test, but one cannot be sure.

269 *Id.* at 2665 (majority opinion); *id.* at 2670 (Kennedy, J., concurring).

270 *Id.* at 2658 (majority opinion); *id.* at 2669 (Kennedy, J., concurring). Contrast the depressed economy of New London with the City of Cypress's notorious twenty-five percent surplus. See *supra* note 196 and accompanying text.

271 See Echeverria, *supra* note 55, at 10,586 (saying that "most important new limitation" in *Kelo* is that courts will only grant significant deference to condemnations when there is a "comprehensive plan"). But see *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting) (arguing that, while the majority "takes great comfort" in the facts of *Kelo*, the facts have no legal significance).

Court.²⁷² In doing so, the majority expressed a measure of sympathy with the victims of eminent domain that previous cases lacked.²⁷³

One need not accept the argument that *Kelo* narrowed the meaning of “public use.” *Berman* and *Midkiff* involved a large plan, so the focus on the plan may be nothing new. The reference to compensation may be a rhetorical scrap. But the existence of an argument that *Kelo* narrowed the Public Use Clause weakens the claim that *Kelo* expanded the Clause.

But it is the *Kelo* dissenters who provide the strongest proof that *Kelo* did not change the law. The dissenters claimed that the decision “significantly expand[ed] the meaning of ‘public use,’”²⁷⁴ but the rest of the dissent belies that claim. Justice O’Connor, who authored the principle dissent (Justice Thomas also filed his own dissent), also wrote *Midkiff* and thus found herself trying to work around a case she had written. O’Connor argued that *Kelo* departed from precedent because past cases found a public purpose only when the government was acting to combat some harm, while in *Kelo* it was trying to promote the good of economic development.²⁷⁵ The majority needed only a footnote to refute her argument: it observed that there was nothing harmful with the particular property condemned in *Berman* and nothing inherently harmful about the land condemned in the turn-of-the-century mining cases.²⁷⁶

The majority did not add, although it could have, that *Kelo* could be framed as a case where the government was combating the harm of economic depression. Just as Mr. Berman’s particular store was not blighted, but the neighborhood was, Ms. Kelo’s home may not have been harmful, but the depressed economy harmed the entire area. Even if Justice O’Connor’s distinction between government actions which attack harms and actions which promote goods was valid with

272 *Kelo*, 125 S. Ct at 2668 n.21 (majority opinion).

273 Justice Stevens’ hint that compensation may not always be just is a far cry from Justice Douglas’s sneer that “[i]f those who govern the District of Columbia decide the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.” *Berman v. Parker*, 348 U.S. 26, 33 (1954).

274 *Kelo*, 125 S. Ct. at 2675 (O’Connor, J., dissenting).

275 *Id.* O’Connor’s analysis, and especially her view that eminent domain can be used to remove harmful property use but not to promote a beneficial use, substantially resembles the Michigan Supreme Court’s opinion in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The resemblance is probably not coincidental. See Merrill, *supra* note 253, for an explanation, given before oral argument in *Kelo*, of how the Supreme Court could follow *Hathcock* if it wished to rule for the homeowners without directly overruling *Berman* and *Midkiff*.

276 *Kelo*, 125 S. Ct. at 2666 n.16 (majority opinion).

respect to eminent domain, it has been criticized elsewhere as a vague, easily manipulated judicial standard.²⁷⁷

To her credit, Justice O'Connor admits that her dissent cannot be squared with the language in *Berman* and *Midkiff* that equates the eminent domain power with the sovereign's police power.²⁷⁸ She dismisses this language as "errant" and "unnecessary to the specific holdings"²⁷⁹ of those prior cases; she must, as that language if taken literally compels *Kelo's* result. Yet the language she dismisses from *Midkiff* as "errant" came from her own pen. O'Connor may well have second thoughts about the wisdom of her decision in *Midkiff*; that is not remarkable, as Supreme Court Justices have changed their minds before.²⁸⁰ More remarkable is her claim that, essentially, she did not mean what she wrote literally when she wrote it. Still, O'Connor's candid admission that a different outcome in *Kelo* would have required dismissing language from past cases refutes any claim that *Kelo* significantly expanded the scope of the Public Use Clause.²⁸¹

Kelo did not open the door to a Brave New World of unlimited eminent domain powers. At worst, it alerted the public to the breadth of an existing power. At best, it affirmed settled precedent. The majority opinion, academic commentary, and, most of all, the dissent, prove that *Kelo* did not change the law of eminent domain. *Kelo* merely held that economic development satisfied the Court's deferential test for condemnation under the Public Use Clause. RLUIPA requires that the government satisfy the compelling interest test before it condemns religious land, and *Kelo* never even hinted that economic development would pass this much more demanding standard.

277 See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024 (1992) ("[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder.").

278 *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting).

279 *Id.*

280 Justice Byron White, who voted with the majority in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and harshly criticized the decision twenty years later, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766-74 (1985) (White, J., concurring), is one of the most notable examples.

281 Justice Thomas's dissent takes an even more restrictive view of the Public Use Clause and openly advocates reversing *Berman* and *Midkiff* as inconsistent with the original meaning of the Clause. *Kelo*, 125 S. Ct. at 2667 (Thomas, J., dissenting). While his solitary dissent represents the view of a minority within a minority, his view that the standard adopted by *Berman* is "boundlessly broad" and should be reconsidered offers even more evidence that *Kelo* is no more than an application of existing law. *Id.* at 2682.

CONCLUSION

This Note asked whether church leaders' fears of being targeted for economically motivated condemnation following *Kelo* were reasonable. In light of history, those concerns are not irrational. Governments have attempted to use eminent domain to transfer tax-exempt church property to an owner who will pay more taxes. However, this Note's analysis suggests that the leaders' fears are exaggerated. *Kelo* may motivate a few governments to try and seize religious land in an effort to fatten their wallets, but *Kelo* should not help those governments succeed.

RLUIPA requires that a government land use regulation which substantially burdens a person's or a congregation's free exercise of their religion must serve a compelling governmental interest and follow the least restrictive means. RLUIPA's definition of land use regulation includes eminent domain actions. Condemnation substantially burdens free exercise. Before *Kelo*, economic development was not a compelling governmental interest. Therefore, before *Kelo*, churches were protected from condemnation for economic development by RLUIPA. Notwithstanding the protests of the dissenters and the popular firestorm, *Kelo* wrought no change in the law of eminent domain.

Economic development was a permitted, but not a compelling, interest before *Kelo*. It remains a permitted, but not compelling, interest after *Kelo*. Therefore, RLUIPA should still protect churches and other religious land users in *Kelo*'s wake from condemnations motivated by economic development or tax revenue. Church leaders need not cringe at the sound of bulldozers; because of RLUIPA, they and their congregations are far from defenseless.