

DE-FANGING RLUIPA: RELIGION AND THE POLITICS OF  
EMINENT DOMAIN

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ABSTRACT

Should religious landowners enjoy special protection from eminent domain? A recent federal statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), compels courts to apply strict scrutiny to zoning and landmarking regulations that substantially burden religiously owned property. That provision has been controversial in itself, but today a new cutting-edge issue is emerging: whether the Act's extraordinary protection should extend to condemnation as well. The matter has taken on added significance in the wake of *Kelo*, where the Supreme Court reaffirmed its expansive view of the eminent domain power. In this Article, we argue that RLUIPA should not give religious assemblies any extraordinary ability to resist condemnation. We offer two principal reasons for this proposal. First, the political economy surrounding condemnation is markedly different from that of zoning, so that broadening the law's protections beyond zoning to cover outright takings would be unnecessary and ineffective. Second, the costs of presumptively exempting congregations from condemnation are likely to be far higher than the costs of applying strict scrutiny to zoning. In conclusion, we identify an important implication of our argument for the law's core zoning provision – namely, our proposal invites local governments to circumvent RLUIPA by simply condemning religious property that they find difficult to zone because of the Act. On the one hand, this gives local governments a needed safety valve while, on the other hand, requiring them to pay just compensation to religious groups. Our proposal therefore suggests a powerful compromise.

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# DE-FANGING RLUIPA: RELIGION AND THE POLITICS OF EMINENT DOMAIN

*Christopher Serkin\* and Nelson Tebbe\*\**

## I. INTRODUCTION

Should religious landowners enjoy special protection against eminent domain? That provocative question – implicating core judgments about the relationship between faith and property rights – is driving the latest fight over the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>1</sup> Enacted by Congress in 2000, RLUIPA requires courts to presumptively exempt religious assemblies from zoning and landmarking laws that substantially burden religious exercise.<sup>2</sup> It provides a powerful legal tool to congregations that wish to, say, build a parking lot or expand their buildings in defiance of municipal restrictions. But does it also confer the power to resist condemnation? If so, then churches, mosques, and synagogues would receive a virtual trump card that would threaten the development of municipal infrastructure, economic redevelopment, and even general regulatory power. If not, RLUIPA’s core zoning provisions would be de-fanged because localities that found themselves unable to zone could simply condemn church property. In this Article, we argue for the latter. In so doing, we reconceptualize RLUIPA as a prophylaxis against intentional discrimination, we offer a political economy account of how such discrimination works in zoning as compared to condemnation, and we propose that the availability of condemnation is an important counterweight to RLUIPA’s otherwise expansive protection. RLUIPA should not be extended to outright takings despite – or indeed because – allowing unfettered condemnation would effectively remove some of the bite from the Act’s core zoning provisions.

As the latest installment in an ongoing battle over First Amendment protection, RLUIPA has rightfully drawn widespread

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<sup>1</sup> 42 U.S.C. §§ 2000cc *et seq.*

<sup>2</sup> 42 U.S.C. §§ 2000cc-2000cc-5 (2000); *id.* at § 2000cc(a)(1) (restricting government “land use regulation[s]”); *id.* at § 2000cc-5(5) (defining “land use regulation” as “a zoning or landmarking law”).

attention, some of which has been supportive and some of which has been highly critical.<sup>3</sup> After *Kelo v. City of New London*,<sup>4</sup> where the Supreme Court controversially reaffirmed its expansive view of the government's power of eminent domain, legislatures, courts, and commentators have wrestled publically and with increasing acrimony over the dangers and appropriate uses of condemnation. Individually, RLUIPA and condemnation are at the leading edge of current but seemingly unrelated legal controversies. A number of recent litigations have forced these issues together, however, calling on courts to decide whether RLUIPA serves to prohibit condemnation of religious property, and raising complex questions about religious discrimination and the limits of government authority. So far, courts have come to inconsistent conclusions.<sup>5</sup>

This Article argues that RLUIPA should not be read or amended to extend to eminent domain. We offer two principal reasons for that conclusion. First, the political economy surrounding condemnation is markedly different from that of zoning and landmarking, so that expanding the law's protections to outright takings would be unnecessary and ineffective. Second, the costs of presumptively exempting religious uses from condemnation are likely to be considerably higher than the costs of RLUIPA's zoning protections.

Consider first the political economy dynamics. The best available justification for the Act's core zoning provision depends on a series of claims about the potential for religious discrimination in land use governance. Religious groups have been especially susceptible to discrimination in this country, according to this account.<sup>6</sup> Public

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<sup>3</sup> See Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results From the National Congregations Study*, 42 J. CHURCH & ST. 335, 341 (2000) (documenting the frequency with which U.S. congregations have applied for land use permits or licenses and concluding that "this form of interaction between church and state is indeed an important point at which religious activity can be facilitated or hampered by government practices").

<sup>4</sup> 454 U.S. 469 (2005). *Kelo* sparked strong protest against the exercise of eminent domain generally. Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20.

<sup>5</sup> See *St. John's United Church of Christ v. Chicago*, 502 F.3d 616, 641 (7th Cir. 2007); *Albanian Associated Fund v. Township of Wayne*, 2007 WL 2904194, at \*8 (D.N.J. 2007); *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D.N.Y. 2005); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

We do not engage arguments of statutory interpretation, preferring simply to show that a number of different textual readings are colorable and then to argue for one of them based on normative and theoretical considerations.

<sup>6</sup> Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, in LAW &

discrimination based on religion is of course presumptively unconstitutional.<sup>7</sup> However, religious discrimination can be hard for judicial institutions to detect. Government actors can easily offer neutral rationales for discriminatory conduct—justifications that, if subject only to rational basis review, may well withstand judicial scrutiny. Against this backdrop, RLUIPA functions as a prophylaxis, requiring strict scrutiny of all land use regulations substantially burdening religious practice precisely because of the risk that intentional discrimination may otherwise go undetected.<sup>8</sup> Congress itself offered this justification when it passed the statute.<sup>9</sup>

There may be some plausible reason to be concerned about discrimination by local zoning authorities. Discriminating through zoning is cheap for local government decision-makers because zoning rarely triggers a compensation requirement and so does not affect the budget. This is especially important in small local governments that tend to be both relatively majoritarian and sensitive to costs.<sup>10</sup> Where these conditions hold, officials who want to discriminate – for whatever reason – are likely to be drawn to zoning because it will allow them to effectively exclude religious groups at no expense.

By these lights, discrimination in zoning may be hard to uncover for certain structural reasons as well. Local zoning authorities are often governed by vague standards and have tremendous discretion.<sup>11</sup> Furthermore, they frequently provide only cursory written findings supporting their decisions, if any at all.<sup>12</sup> It is, of course, an open and

RELIGION 200, 201 (Stephen M. Feldman ed., 2000) (“What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value.”).

<sup>7</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993); *see also* MARCI A. HAMILTON, *GOD VS. THE GAVEL* 92 (2005) (“[I]f a zoning board or city intended to rid the community of a religious group . . . the purpose would violate the Establishment Clause . . . . It would also violate the Free Exercise Clause.”).

<sup>8</sup> *See infra* Part II.A.

<sup>9</sup> *See* HAMILTON, *supra*, (citing legislative history).

<sup>10</sup> *See* Christopher Serkin, *Big Differences for Small Governments: Levels of Government and the Takings Clause*, 82 N.Y.U. L. REV. 1624 (2006) [hereinafter Serkin, *Big Differences*] (arguing that small local governments tend to be sensitive to costs because they are dominated by local homeowners who must pay for the costs through property taxes).

<sup>11</sup> Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 774 (1999).

<sup>12</sup> The extent to which zoning decisions require written findings of fact remains a subject of controversy, although reforms since the 1950s have increased the formality of quasi-judicial zoning decisions. David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J.

contested empirical question whether such discrimination is actually commonplace. It may well not be sufficiently widespread to justify RLUIPA's broad protections.<sup>13</sup> Nevertheless, the strongest story that can be told in support of RLUIPA is that a prophylactic rule is needed because discrimination is so hard to exhume in the zoning context.

Condemnation simply does not present the same opportunity for unchecked discrimination. That is so in part because the constitutional necessity of just compensation means that condemnation will always present government decision-makers with some financial costs to consider.<sup>14</sup> Discrimination is therefore literally more expensive. That does not necessarily mean that discrimination will comprise a smaller proportion of outright takings, as compared to zoning actions, but it does suggest a lower absolute level of anti-religious targeting in condemnation. Bias is also likely to be more politically costly. Condemnation presents a poorer climate for discrimination because eminent domain has considerable political valence, as *Kelo* demonstrated.<sup>15</sup> Its exercise is relatively rare, compared with zoning, and tends to be highly visible.<sup>16</sup> Because of those high costs—both economic and political—condemnation is usually the option of last resort for local

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OF ENVT'L L. 279, 301-04 (2004). Many state statutes now require written findings, and most commentators agree that written findings are not only good practice but should be required. 101A C.J.S. Zoning & Land Planning § 328 (reviewing state statutes and judicial interpretations of writing requirement). Still, the relative informality of zoning decisions, and particular the variance process, remains an ongoing concern for courts and commentators alike. See *Brevard County v. Snyder*, 627 So.2d 429 (1993) (holding written findings not required); see also Thomas G. Pelham, *Quasi-Judicial Rezoning: A Commentary on the Snyder Decision and the Consistency Requirement*, 9 J. LAND USE & ENVT'L L. 243, 287-88 (1994) (criticizing *Snyder*). Zoning decisions are still sometimes made without written findings, either in violation of state statutes or because the state statute does not explicitly require such findings.

<sup>13</sup> See *infra* note 80 (reviewing the weak empirical evidence of discrimination).

<sup>14</sup> This claim need not rely on a stylized vision of governments as rational economic actors, a view that has appropriately come under increasing attack. See Serkin, *Big Differences*, *supra* note 10, at 1667 (describing criticisms of traditional economic account of government decision-making). So long as economic costs are translated into political costs in any way – whatever the mechanism and no matter how much – compensation will create some political pressure.

<sup>15</sup> Salzman & Mansnerus, *supra* note 4, at A20.

<sup>16</sup> By one anti-condemnation group's measure, the total number of condemnation or threatened condemnation actions in the country from 1998-2002 was 10,000. See <http://castlecoalition.org/pdf/publications/floodgates-report-low.pdf>. According to the group, the number has tripled since 2005. See *id.* Even if those numbers are accurate, they are tiny compared to the figures for zoning, which pervades every major metropolitan area except Houston. See Bill Schadewald, *The Only Major U.S. City Without Zoning*, HOUSTON BUS. J., April 7, 2006 (describing April Fool's joke of announcing Houston's first zoning ordinance).

governments.<sup>17</sup> Therefore, a prophylactic measure is far less attractive in the context of eminent domain because it would stymie less discrimination on the basis of religion. Put differently, it would deliver fewer benefits.

Our second rationale considers the costs of applying RLUIPA to condemnation. If RLUIPA were free, some might argue for extending its protection to condemnation despite its questionable benefits, on the theory that more protection against bias is always better. Undoubtedly, the kinds of political pressures that arise when the government condemns property will not necessarily prevent condemnation, even when untoward. Condemnees do not always win these political fights, and therefore a prophylactic approach might seem appropriate for condemnation, too. However, not only is the risk of discrimination lower for condemnation than zoning, but the costs of RLUIPA's prophylactic protections are much higher. Property rights and regulatory power are, in this context, locked in a zero-sum game: increasing religious groups' ability to resist condemnation comes at the expense of legitimate government action.

Admittedly, providing special protection against zoning is potentially quite costly. Religious assemblies may well be able to erect buildings that violate a local government's bulk limits. They may increase traffic, decrease parking, and draw a steady influx of outsiders into a community.<sup>18</sup> While many religious land uses may bring positive value to a community, some will not, depending on the particular use and on the particular community. Limiting a local government's zoning authority can reduce its capacity to address harms when they occur.

Yet as high as these costs are, the drawbacks of limiting governments' condemnation power are potentially even more serious. If officials cannot assemble religious property, they may have to choose suboptimal locations for core municipal facilities, like schools, hospitals, and parks.<sup>19</sup> They may even have to divert roads, railroads, and other infrastructure. Public-private partnerships to develop depressed or blighted areas may also become difficult if not impossible (although some will find that to be a happy result). Indeed, it is not farfetched to

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<sup>17</sup> WILLIAM FISCHER, *REGULATORY TAKINGS* 69 (1995); Thomas Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61 (1986); Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 *COLUM. L. REV.* 1412, 1441 (2006); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 *MICH. L. REV.* 101, 129 (2006) (“[A] number of state and federal laws make formal condemnation proceedings a disfavored last resort.”).

<sup>18</sup> See HAMILTON, *supra* note 7, at 99-104 (describing costs).

<sup>19</sup> See *infra* text accompanying notes 150-154 (citing examples).

imagine a religious group becoming complicit in stopping a large-scale development project by acquiring some property in the target footprint.<sup>20</sup> More generally, nothing prevents a religious group from using RLUIPA to extract holdout value from the government at the expense of local taxpayers. As costs of land assembly and acquisition go up – and the benefits go down – chances increase that certain public projects will not happen at all. In sum, applying RLUIPA to condemnation would have far-reaching consequences indeed – consequences that are unnecessary and unjustifiable given the decreased benefits of using prophylactic rule for condemnation, with its markedly different political economy.

Our argument has an interesting and important implication for the core zoning provisions of RLUIPA. Namely, it invites local governments that find RLUIPA's zoning restrictions burdensome to simply condemn the property instead. We would actually invite this kind of strategic behavior in the belief that political checks on the exercise of eminent domain will be sufficient to thwart much discrimination – and that the cost of imposing a prophylactic rule to prevent any remaining bias would be unacceptably high. Our proposal therefore offers a kind of compromise in the battle over RLUIPA's zoning protections. On the one hand, local governments have a safety valve that may relieve some of the most serious pressure on RLUIPA. On the other hand, those who believe congregations require special protection in this area can exact compensation from governments that wish to use condemnation to implement zoning policy. While religious groups do not continue to enjoy property rule protection against much zoning under our proposal, they do retain something like liability rule protection. That change shifts some power back into the hands of local governments and may actually facilitate compromise.

Part I of this Article lays out the possible approaches and describes an emerging consensus among courts that RLUIPA should apply to condemnation that is part of a broader land use policy. Part II first offers a plausible justification for RLUIPA's core zoning provisions, namely that they provide needed prophylaxis against discrimination in local land use decision-making. It then distinguishes the political economy of zoning from that of eminent domain, and it argues that the greater economic cost and political salience of condemnation weakens even the best available justifications for the law when it comes to outright takings. Part II closes by considering some of the costs of applying RLUIPA to condemnation, costs that go even beyond the

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<sup>20</sup> Cf. *Faith Temple*, 405 F. Supp. 2d at 251-52 (recounting an instance where a church bought property after the town had announced condemnation plans).

significant restrictions that the statute places on local zoning power. Finally, Part III points out that under our proposal religious landowners would enjoy only something resembling liability rule protection against much zoning, despite the fact that RLUIPA purports to provide property rule protection. Because municipalities can always condemn property, subject only to ordinary constitutional limitations, they may accomplish many legitimate land-use objectives, so long as they are willing to pay just compensation and bear the procedural costs.

### I. AN EMERGING CONSENSUS

RLUIPA provides that “[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that . . . [its action] is in furtherance of a compelling governmental interest.”<sup>21</sup> The statute further defines a land use regulation as “a zoning or landmarking law, or the application of such a law, that limits or restricts the claimant’s use or development of land.”<sup>22</sup> Few courts or commentators have yet paid much attention to the question of whether that language ought to restrict local governments’ condemnation power.

Early pronouncements seem to have distributed themselves among three positions, each of which relies on plausible readings of the statute. The only point on which these competing interpretations agree is that the statute itself is ambiguous regarding its applicability to eminent domain. One straightforward interpretation is that RLUIPA always applies to condemnation (the maximalist position). At least one court and one prominent expert have endorsed this approach.<sup>23</sup> Moreover, Senator Kennedy has introduced a bill that would amend RLUIPA to explicitly extend its scope so that it unambiguously would cover eminent domain.<sup>24</sup>

Another reading, which would apply RLUIPA only to certain instances of eminent domain, has begun to attract an early consensus among courts and commentators. Adherents of this intermediate view

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<sup>21</sup> 42 U.S.C. § 2000cc(a).

<sup>22</sup> 42 U.S.C. § 2000cc-5(5).

<sup>23</sup> *Cottonwood*, 218 F. Supp. 2d at 1222 n.9; see also Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 670 (2004); see also Note, 2008 B.Y.U. L. REV. 1213, 1234-42 (arguing based on Congressional intent that RLUIPA should apply to eminent domain).

<sup>24</sup> Marci Hamilton, *Churches and Eminent Domain: A Move in Congress to Once Again Make Churches Privileged Landowners* (posted Aug. 10, 2006), at [writ.news.findlaw.com/hamilton/20060810.html](http://writ.news.findlaw.com/hamilton/20060810.html).

argue that, at the very least, a presumption of illegality ought to attach when the condemnation is sufficiently intertwined with zoning or landmarking activity, the Act's primary targets. On this reading, for instance, courts should carefully scrutinize a local government's exercise of its power of eminent domain when it seems as if officials are attempting to condemn a parcel of land owned by a religious entity precisely in order to evade RLUIPA's zoning provisions, which otherwise would make it difficult or impossible for them to regulate.<sup>25</sup> A few early commentators have agreed that the statute should apply in such instances and several courts have adopted a similar intermediate approach, at least in dicta.<sup>26</sup> This solution seems sensible and consequently it has attracted its share of advocates.

In this Article, however, we argue that this emerging consensus is mistaken. Instead, we contend that RLUIPA's presumption of illegality should not attach to local governments' exercise of eminent domain (the minimalist position). In this Part, we describe these three positions more fully and we then identify a convergence around the intermediate view that RLUIPA does or should pertain to exercises of eminent domain that are sufficiently commingled with zoning or landmarking. In the remainder of the Article, we argue against the nascent consensus in favor of a minimalist position, namely that the Act's presumption of illegality should never be triggered by a local government's exercise of its power of eminent domain.

#### A. *Maximalism*

Of those who have argued that RLUIPA does or should always apply to condemnation, perhaps the most important is Senator Kennedy, who has proposed clarifying that the Act's provisions extend to instances

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<sup>25</sup> For instance, a mosque in New Jersey recently submitted a site plan application in order to build a larger house of worship for its growing congregation on a piece of undeveloped property that it had purchased. *Albanian Associated Fund*, 2007 WL 2904194, at \*2. Subsequently, the local government initiated condemnation proceedings, claiming it required the property for its open space program. *Id.* at \*3. That prompted the federal Department of Justice to file a brief arguing that the township had deployed its power of eminent domain, in effect, to defeat the zoning permit. Brief of the United States as Amicus Curiae in Opposition to Defendants' Motion for Summary Judgment at 28-30, *Albanian Associated Fund v. Wayne*, 2007 WL 2904194 (D.N.J. 2007) (No. 2:06-cv-3217). DOJ therefore argued that RLUIPA should be available at least where the government attempts to condemn a property in order to effectively defeat a zoning permit.

<sup>26</sup> See *infra* Part I.C (citing cases and scholarly articles).

of eminent domain.<sup>27</sup> An original sponsor of RLUIPA, Senator Kennedy may well have the political stature on this issue to write a maximalist reading of RLUIPA into law. A bill would take the form of an amendment to the definitional section of the existing law, so that exercises of eminent domain would qualify as “land use regulations” that trigger the Act’s presumption of illegality.<sup>28</sup>

There is some support for this view in the case law already. In fact, the first court to take a position on the question indicated that RLUIPA does apply to condemnation actions, even in its present form.<sup>29</sup> The dispute concerned the Cottonwood Christian Center, a non-denominational church with over 5,000 members. Continuous growth pushed the group to purchase a plot of land in Cypress, California for the purpose of building a large campus that would include not only a house of worship, but also a variety of auditoriums, classrooms, day care centers, and the like. Cypress denied the church a conditional use permit (CUP), which would have been required under local zoning laws before the church could erect its new campus.

Interesting for our purposes is what happened next: the town filed an action to condemn the property. It said that condemnation was necessary because the church’s plot happened to fall within a larger blighted area, for which the town had formulated a redevelopment plan anchored around a Costco retail store.<sup>30</sup> Cottonwood sued, alleging a violation of RLUIPA, among other illegalities, and a federal court applied strict scrutiny under the Act. While the court’s first justification for applying heightened scrutiny was that the denial of a CUP permit plainly triggered RLUIPA’s core zoning provision,<sup>31</sup> the district judge also indicated (in dicta) that even if only the condemnation action had been at issue, the Act’s definition of “land use regulation” should be read to include Cypress’s exercise of eminent domain as part of its larger

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<sup>27</sup> Hamilton, *Churches and Eminent Domain*, *supra* note 24.

<sup>28</sup> *Id.* With regard to interpretation of the existing statute, Senator Kennedy’s proposal could cut either way, of course. It could either signal that the current language does not sufficiently cover eminent domain, or it could serve as evidence that Congress originally meant RLUIPA to apply to condemnation, and now is simply seeking to clarify that intent. Again, we do not engage arguments of legislative intent here. Rather, we observe that any of the three available readings are plausible readings of the Act’s current language and we argue for minimalism as the most attractive of these as a normative and theoretical matter.

<sup>29</sup> *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

<sup>30</sup> *Id.* at 1211 (describing the LART plan).

<sup>31</sup> *Id.* at 1222.

redevelopment plan for the area.<sup>32</sup> Under a broad reading of that position, many instances of eminent domain would trigger the law's requirement that the government justify its actions by showing a compelling interest and narrow tailoring, because condemnation actions are often undertaken in relation to larger zoning schemes.<sup>33</sup>

At least one scholar has taken this position as well. In the first full-length article on the question, Professor Shelley Ross Saxer argues that courts should closely scrutinize eminent domain actions against churches and other religious entities, with the aim of uncovering any impermissible governmental motive.<sup>34</sup> In fact, Professor Saxer believes that exercises of eminent domain should trigger *greater* judicial suspicion than other forms of land use regulation because the required payment of just compensation may be sufficient to defeat a religious entity's claim that it has been substantially burdened—a threshold showing required in order to activate RLUIPA's main strict scrutiny provision.<sup>35</sup> She also believes that the maximalist reading best fits RLUIPA's text and legislative history.<sup>36</sup>

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<sup>32</sup> *Id.* at 1222 n.9. The court's textual argument led off by observing that RLUIPA defines "land use regulation" to mean a zoning or landmarking law "that limits or restricts the claimant's use or development of land" 42 U.S.C. § 2000cc-5(5). It then reasoned that the city's condemnation action was based on a zoning system that "would unquestionably 'limit[] or restrict[]' Cottonwood's 'use or development of land.'" *Id.* (alterations original).

<sup>33</sup> *Cottonwood's* dicta has been read in that broad manner by other courts, as well as by observers. *See, e.g.*, *St. John's United Church of Christ v. Chicago*, 502 F.3d 616, 641 (7th Cir. 2007) (characterizing the *Cottonwood* dicta as indicating "that eminent domain is always and inevitably a land use regulation under RLUIPA"); *see also* Saxer, *supra* note 23, at 670 ("As the *Cottonwood* decision indicates, any eminent domain action can likely be traced to a local government's comprehensive plan or zoning system and thus be considered the government's application of a zoning law or a landmarking law, subject to RLUIPA.").

One other court may have subscribed to a reading of *Cottonwood* that is nearly as broad. A judge in the District of New Jersey applied RLUIPA to an outright taking because the condemnation was "merely a method of implementation" of an open space plan, which was "unquestionably" a land use regulation. *Albanian Associated Fund*, 2007 WL 2904194, at \*8.

<sup>34</sup> Saxer, *supra* note 23, at 694-95 ("Whenever the government uses eminent domain to restrict religious freedom, such condemnations should be subject to strict scrutiny review if they substantially burden religious exercise. Under RLUIPA, religious exercise is defined to include the use of land; thus, whenever the government uses eminent domain to deny the landowner a right to use the property, such an action constitutes a substantial burden on that use and is subject to strict scrutiny."). A student note took a similar position. G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653, 1657 (2006).

<sup>35</sup> *Id.* at 673-74, 695.

<sup>36</sup> *Id.* at 668-70.

Despite these early endorsements, the tide has begun to turn against the maximalist position. More common today is the intermediate view that RLUIPA's presumption should be triggered only when the government's initiation of an eminent domain action against a religious entity is sufficiently closely tied to its core zoning and landmarking activities. Before examining that position, however, we briefly review the scarce support that minimalism so far has generated.

### B. Minimalism

Perhaps the least commonly-held view today is that RLUIPA never applies to condemnation—precisely the proposal that we advance in this Article. The few courts and commentators that have endorsed minimalism have offered reasons that differ from our political-economy rationale.

Most prominently, the Seventh Circuit arguably took this position in a case concerning a planned expansion of O'Hare airport in Chicago.<sup>37</sup> As part of that plan, the city announced that it would condemn a wide swath of properties, including the St. Johannes cemetery owned by St. John's United Church of Christ. Under the plan, the cemetery was to be relocated and compensation paid to the church. St. John's resisted and filed a federal action, arguing *inter alia* that the condemnation plan violated RLUIPA, but the Seventh Circuit ultimately rejected that argument.<sup>38</sup> The court noted that “zoning and eminent domain are two distinct concepts that involve land in very different ways”<sup>39</sup> and concluded that “if Congress had wanted to include eminent domain within RLUIPA, it would have said something.”<sup>40</sup>

Among commentators, minimalism is even more uncommon. Perhaps it would be defended by Professor Marci Hamilton, who has suggested in a blog post that extending RLUIPA's presumption of illegality to eminent domain actions that sweep in sacred property would be unnecessary and indeed harmful.<sup>41</sup> According to her, there is scant

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<sup>37</sup> St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007).

<sup>38</sup> The panel was divided, but not on the RLUIPA issue. Judge Ripple dissented on a different question, namely whether the state RFRA had permissibly been amended to exempt the O'Hare project. *See id.* at 642-43.

<sup>39</sup> *Id.* at 640.

<sup>40</sup> *Id.* at 641; *cf. also* Prater v. City of Burnside, 289 F.3d 417, 433 (2002) (narrowly construing “land use regulation” in holding RLUIPA did not apply to road development).

<sup>41</sup> Hamilton, *supra* note 24, at 2; see also HAMILTON, *supra* note 7, at 78-110 (cataloguing the injurious effects of RLUIPA on land use regulation).

evidence that special protection is needed against religious discrimination in condemnation. To the contrary, Professor Hamilton believes that the Act's core zoning provisions are already causing significant harm and should not lightly be extended.<sup>42</sup> Aside from Professor Hamilton's post, the only other support for the minimalist position comes from a student note, which contends that special protection against condemnation is unnecessary because eminent domain actions do not involve the sort of individualized, case-by-case review of particular parcels of land that is most likely to allow for anti-religious discrimination.<sup>43</sup>

While we agree with these authors that RLUIPA ought not to apply to condemnation, their rationales differ significantly from our political economy story. Professor Hamilton's post seems to be predicated on an empirical and normative claim that the Act's central zoning and landmarking provisions have impaired the public good, on balance.<sup>44</sup> She suggests that any extension of the Act to eminent domain will operate in similarly deleterious ways. In this Article, by contrast, we take no position on the desirability of the Act's core applications to zoning and landmarking, which we assume for the sake of argument are justifiable. We argue more narrowly that, even if RLUIPA is basically defensible, significant differences between zoning and eminent domain counsel against an expansion of the law to cover the latter. With regard to the student note, we are not convinced that outright takings invariably involve government in considerations that are not individualized in the sense that they are targeted to specific parcels of land. Our review of the cases and of anecdotal reports suggests, to the contrary, that forced sales are indeed frequently directed toward specific religious holdings.<sup>45</sup>

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<sup>42</sup> Hamilton, *supra* note 24, at 2.

<sup>43</sup> Cristina Finetti, Note, *Limiting the Scope of the Religious Land Use and Institutionalized Persons Act: Why RLUIPA Should Not Be Amended to Regulate Eminent Domain Actions Against Religious Property*, 38 SETON HALL L. REV. 667, 669, 691-92 (2008).

<sup>44</sup> See Hamilton, *supra* note 24, at 3 ("Before either House of Congress thinks about amending RLUIPA [to extend its provisions to condemnation], its members might want to hear from their constituents about the actual, on-the-ground impact of RLUIPA[’s core provisions] on residential neighborhoods . . . . There are many, many neighborhoods in every state that are currently being negatively affected by RLUIPA, and their residents are mad as hell.”).

<sup>45</sup> See Saxer, *supra* note 23, at 679 (“eminent domain actions will likely require an individualized determination”). Cf. Mathues, *supra* note 34, at 1664 (arguing less precisely that “[e]minent domain proceedings, by their nature, are not generally applicable laws because the proceedings single out specific properties for condemnation.”).

For example, the Township of Wayne in New Jersey, acting pursuant to a

Perhaps because of these weaknesses in currently-available defenses of the view that RLUIPA should never apply to condemnation—weaknesses that we hope to rectify here—the third, intermediate position is becoming more prevalent.

### C. An Intermediate Approach

Several recent decisions seem to be converging around a middle solution, one that neither insists that RLUIPA should always require heightened scrutiny of all eminent domain actions that substantially burden religious entities, nor holds that it should never apply to condemnation, but instead contends that it sometimes should.

Adherents of this view think that the Act's presumption of illegality should apply in at least one of two related situations. First, courts should pay careful attention when a local government resorts to condemnation in order to circumvent the difficulties of zoning or landmarking religious property. Governments may want to work an end-run around zoning procedures because a church can effectively resist regulation under ordinary zoning law—for instance, by seeking non-conforming use status or a special use permit, for which churches qualify.<sup>46</sup> Or they may resort to eminent domain because the religious

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referendum that set aside funds to acquire and preserve open space, formed a committee to investigate candidate properties. According to the mayor, the “Committee pursued properties on an individualized, property-by-property basis.” *Albanian Associated Fund*, 2007 WL 2904194, at \*2. (Not incidentally, one councilman indicated that a Muslim group's application to build a mosque on a piece of undeveloped land was one of the reasons that the open space referendum was placed on the ballot in the first place. *Id.*)

The parcel of land at issue in *Faith Temple* also appears to have been considered singly, because it was contiguous with a park that the town wished to expand. If it was considered alongside other contiguous properties, that fact was not reported in the court's decision. *Faith Temple*, 405 F. Supp. 2d at 251-52. Here too, the exercise of eminent domain proceeded in a particularized fashion.

Similarly, Broward County focused on a particular piece of church property that it felt was optimal for the expansion of a substance abuse facility. The church's property was the only private land necessary to complete the project, which otherwise relied on adjacent plots already owned by the government. *Christian Romany Church Ministries*, 980 So.2d at 1165-66. Although the case concerned a state-law cognate of RLUIPA, rather than RLUIPA itself, its facts nevertheless demonstrate that the local exercise of eminent domain power often works in an individualized way.

<sup>46</sup> One national study found that of the many congregations that applied for a land use permit or license in the past year, only one percent reported having been denied. Chaves & Tsistos, *supra* note 4, at \*4. Ninety-two percent reported that the permit or license had been granted, and five percent said that the process was ongoing. *Id.*

landowner has invoked RLUIPA's core provisions themselves against threatened regulation.<sup>47</sup> Either way, on this view, the Act should apply to condemnation actions that are initiated so as to work an end run around legal barriers to zoning religious property.<sup>48</sup>

Second, the protections of the Act ought to come into play, for adherents of this view, whenever condemnation is sufficiently intertwined with a zoning or landmarking scheme. One way of reading the *Cottonwood* decision is to say that the town's decision to condemn the congregation's property and pave the way for Costco was an integral part of its plan to redevelop the larger area surrounding the church's plot. Recently, a few courts have chosen to read *Cottonwood* to stand for this narrower proposition, rather than for the maximalist view that the Act should always apply to condemnation of religious land. They have then distinguished the case, concluding that, at least under the particular

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Those findings are consistent with results from a national study of Presbyterian congregations. *Id.* ("This result—a 1 percent denial rate—is identical to that obtained in a survey of Presbyterian congregations that is, to our knowledge, the only other survey of this kind."); Research Services, Presbyterian Church (U.S.A.), *Congregational Statistics for 1997, Information Collected from Congregations via the Supplement to the Session Annual Statistical Report*, at 3 (1997), available at <http://www.pcusa.org/research/congrestats/sasr97.htm#toc3> (reporting that of 2,312 congregations that sought some sort of land use permit or license in the period between 1992 and 1997, only 30 congregations, or 1%, reported that the permit was refused or that they abandoned the project in anticipation of a denial); *cf.* Laycock, *supra* note 17, at 772-73 (describing the 1997 Presbyterian study and noting that of the 2,194 churches that applied for permits over a five-year period, only twenty-eight reported denials or expected denials).

A smaller study, confined to the City of New Haven, Connecticut, found that land use permissions were granted to religious groups at rates that were high, as an absolute matter, and comparable to those encountered by non-religious applicants. Stephen Clowney, Note, *An Empirical Look at Churches in the Zoning Process*, 116 *YALE L.J.* 859, 863 (2007) (reporting that seventy-six percent of churches' applications for exemptions from land use regulations were granted, as compared to 80% for secular applicants).

<sup>47</sup> Allison Scaduto, Note, *RLUIPA as a Possible Shield From the Government Taking of Religious Property*, 38 *SETON HALL L. REV.* 823, 845-46 (2008).

<sup>48</sup> The textual hook for this reading is contained in the definitions section of the statute. There Congress specified that "land use regulation" means not only "a zoning or landmarking law" but also "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). Supporters of the intermediate approach argue that a local government's effort to circumvent the Act's zoning provisions should count as an "application of" a zoning law that restricts the use of land, even though the government is acting through its power of eminent domain. *See* Saxer, *supra* note 23, at 669 ("Even if an eminent domain action is not considered to be a zoning or landmarking law, it would likely be treated as 'the application of such a law.'").

circumstances before them, the locality's exercise of eminent domain was not similarly intertwined with a larger zoning plan.<sup>49</sup>

One court, however, concluded that RLUIPA did in fact apply to the town's exercise of eminent domain after it deployed a variation of this intermediate approach. A Muslim group bought an undeveloped parcel of land in Wayne, New Jersey with the intent of building a new mosque for its growing congregation.<sup>50</sup> The group submitted a Land Development Application, which it revised several times over a period of years in response to requests from the town's zoning board. Subsequently, while the application was pending, the town formulated an open space plan that called for purchasing and preserving undeveloped land, including the Muslim group's site. After an initial purchase offer was rejected, the town announced a plan to initiate condemnation proceedings and, in response, the group filed suit.<sup>51</sup> The district court reasoned that the condemnation proceeding was initiated as part of the open space plan, which unquestionably was a "land use regulation" within the meaning of the Act.<sup>52</sup> Eminent domain was simply one means by which the town was implementing its greater regulatory plan. Not incidentally, the court also found that sufficient facts had been alleged to show that the planned mosque had been targeted by the town in violation of RLUIPA's equal treatment provisions.<sup>53</sup>

This intermediate approach has some intuitive appeal. At first blush, it would seem odd to allow local governments to avoid the Act by

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<sup>49</sup> See *City and County of Honolulu v. Sherman*, 129 P.2d 542, 563-64 (Hawai'i 2006) (reading *Cottonwood* narrowly and distinguishing its facts from those before the court); *St. John's United Church of Christ v. City of Chicago*, 401 F. Supp. 2d 887, 899-900 (N.D. Ill. 2005) (noting that *Cottonwood* "can be read to suggest that RLUIPA is applicable to the specific eminent domain actions where the condemnation proceeding is intertwined with other actions by the city involving zoning regulations" and holding that in the case before it there is no allegation that Chicago's exercise of eminent domain stems from zoning regulations or a landmarking law); *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D.N.Y. 2005) (holding that, under the facts, the link between condemnation and zoning is "too attenuated to constitute the application of a zoning law" such that RLUIOPA would be triggered).

To the extent that *Cottonwood* stands for the broader proposition that RLUIPA should virtually always apply to condemnation actions, either on its own terms or because those actions are practically almost always initiated pursuant to some zoning plan, courts have expressed disagreement. *St. John's*, 401 F. Supp. 2d at 900 n.7; *Faith Temple*, 405 F. Supp. 2d at 256-57.

<sup>50</sup> *Albanian Associated Fund v. Township of Wayne*, 2007 WL 2904194, at \*1 (D.N.J. 2007).

<sup>51</sup> *Id.* at \*4.

<sup>52</sup> *Id.* at \*9.

<sup>53</sup> *Id.* at \*11, \*13 ("In the Court's view, it cannot be said, as a matter of law, that the Mosque was not being singled out for discriminatory treatment.").

simply condemning property that RLUIPA would make difficult to zone. However, the emerging consensus around this third position insufficiently appreciates the political economy dynamics that surround a local government's exercise of eminent domain. Those dynamics suggest that the best available rationales for RLUIPA's zoning provisions do not pertain in the same way to condemnation. In the next Part, we briefly set out those rationales so that we then can demonstrate why the Act ought not to apply to outright takings at all.

## II. THE POLITICAL ECONOMY OF RLUIPA

In this Part we first reconstruct a plausible defense for RLUIPA's core provision concerning zoning and landmarking. Briefly, we contend that the Act is best conceptualized as a prophylactic instrument designed to guard against anti-religious discrimination that would be difficult to detect in local zoning and landmarking decisions. (As a reminder, we identify this rationale for the sake of argument, without endorsing RLUIPA as a wise or measured response to any threat of discrimination.) Next, in Section B, we explain why differences between the political economies of zoning and condemnation mean that even the best-available justifications for the Act's zoning provisions apply more weakly to outright takings. In Section C, we then look at the other side of the balance sheet—not the justifications for the statute but its costs for local governments—and we conclude that the costs of presumptively exempting religious actors from eminent domain actions are likely to be far higher than the costs exacted by the Act's existing zoning measures.

### A. Zoning and Prophylaxis

Our argument in this Section is that RLUIPA can be defended most persuasively as a prophylactic measure that works to combat covert discrimination on the basis of religion in zoning and landmarking regulation. Not only is this the best available justification for the statute as a conceptual matter, but it was also the principal rationale offered by the law's sponsors in Congress.<sup>54</sup>

1. *RLUIPA's best defense.* – Recall that RLUIPA prohibits all land use regulations that impose a substantial burden on religious exercise, unless the government can show a compelling interest and narrow tailoring.<sup>55</sup> Although the Act also contains sections requiring

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<sup>54</sup> See *infra* text accompanying notes 68-71.

<sup>55</sup> 42 U.S.C. § 2000cc(a)(1) (2000).

equal treatment of religious entities,<sup>56</sup> prohibiting discrimination on the basis of religion,<sup>57</sup> and prohibiting governments from completely excluding religious groups from a jurisdiction,<sup>58</sup> we focus here on its central provision, which again extends a presumption of illegality to land use regulations that impose a substantial burden on religious property.<sup>59</sup> That provision, which does not simply mimic already-existing constitutional rules, is the most interesting for the purposes of our argument and has drawn greatest attention in the literature.<sup>60</sup>

Current constitutional law does not provide strict scrutiny protection against incidental burdens on free exercise, of course. A presumption of unconstitutionality will not be triggered unless the government has purposefully differentiated on the basis of religion.<sup>61</sup> RLUIPA's substantial burden provision extends far greater protection as a statutory matter in the limited contexts of prisons and land use, requiring a presumption of illegality whenever the government's actions have the incidental effect of thwarting religious observance, not merely when they single out free exercise for unfavorable treatment.<sup>62</sup>

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<sup>56</sup> 42 U.S.C. § 2000cc(b)(1) (“No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”).

<sup>57</sup> 42 U.S.C. § 2000cc(b)(2) (“No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”).

<sup>58</sup> 42 U.S.C. § 2000cc(b)(3) (“No government shall impose or implement a land use regulation that— (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”).

<sup>59</sup> 42 U.S.C. § 2000cc(a)(1).

<sup>60</sup> The substantial burden section has also been the focus of debate in the literature. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* 268-70 (2007) (focusing on this provision).

<sup>61</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990). There are a few exceptions to this rule—for individualized assessments, violations of hybrid rights, and so forth. The Act's peripheral provisions mirror these exceptions. We leave them to one side here. For an account of the cases leading up to RLUIPA, and the current state of the constitutional rules, see Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 *HASTINGS L. REV.* 699, 705-11, 725-27 (2005).

<sup>62</sup> We describe RLUIPA's relationship to the Free Exercise Clause for the sake of clarity only. Importantly, our assessment of RLUIPA here is independent of its relationship to any constitutional protection under the First Amendment. We do not take a position on whether existing understandings of the Free Exercise and Establishment Clauses are defensible and we do not tie our identification of RLUIPA's justifications to longstanding arguments surrounding those provisions. Nor do we therefore consider whether RLUIPA falls within Congress's enforcement power under Section 5 of the Fourteenth Amendment. Rather, we assess arguments for RLUIPA's desirability as a freestanding matter. To be sure, we start with the uncontroverted

It is possible to defend the Act as a prophylactic instrument. As we understand the term, a prophylactic rule prohibits more government activity than the law otherwise would in a first-best world of perfect detection and enforcement.<sup>63</sup> Under perfect conditions, legal rules would be administered in such a way that they prohibit or punish all activity that is in fact illegal and only that activity. But because actually-existing legal institutions are imperfect, that sort of precision is often not achievable. In our second-best world, institutional limitations create risks of error in case-by-case adjudication so that judges often operate under conditions of considerable uncertainty. Most frequently, the specific difficulty is that courts lack the fact-finding capacity to accurately detect when a legal violation has actually occurred, particularly where the scrutinized government official is acting under subjective standards that allow a great deal of discretion and require little reliable reporting.<sup>64</sup> Pragmatic difficulties like these may lead to the construction of legal rules that predictably err on the side of prohibiting or punishing too much activity.<sup>65</sup> Such prophylactic mechanisms can be justified when the cost of erring on the side of prohibiting too much government activity—the cost of overprotection—is lower than the cost of erring on the side of barring too little—the cost of underprotection.

RLUIPA's substantial burden provision can be seen as just that sort of prophylactic device. If the concern is anti-religious discrimination in land use regulation, there may be good reason to worry

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proposition that governmental discrimination on the basis of religion ought to be prohibited. Although this is a basic constitutional principle, we invoke it as a separate norm. In sum, then, our articulation of a defense of RLUIPA as a prophylactic rule is independent of constitutional arguments.

<sup>63</sup> Prophylactic rules are rare but significant in the law. Though we are addressing statutory rules rather than judge-made ones, we draw our basic insights from the literature on judge-made prophylactic rules—most famously, the *Miranda* rule. See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 207-09 (1988); Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 9 (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

<sup>64</sup> See Caminker, *supra* note 64, at 8-9; Strauss, *supra* note 64, at 209; see also Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 168 (1989) ("Both courts and commentators have recognized that discretion is an inevitable and necessary part of zoning decisionmaking.").

<sup>65</sup> Our definition of prophylactic rules puts to one side the debate over whether there is a meaningful difference between the actual meaning of the Constitution and the doctrine that courts fashion to enforce its provisions. See Berman, *supra* note 64, at 14-15 (describing that conceptual debate). The outcome of that disagreement has little bearing on the fairly clear difference here between the constitutional rule against religious discrimination and RLUIPA's broad rule against substantial burdens on religious observance.

that courts lack the capacity to accurately detect violations on a case-by-case basis. Too often, the theory goes, zoning and landmarking authorities are able to obscure discrimination against religious groups by giving ostensibly neutral reasons for land use determinations that are in fact illicit.<sup>66</sup> Zoning and landmarking determinations are so frequent, so often handed down with insufficient reasoning or without any reasoning at all, and so commonly governed by standards that leave ample room for subjectivity, that courts have a difficult time policing them for anti-religious activity.<sup>67</sup>

Congress relied on precisely that sort of argument when it passed RLUIPA. The law's sponsors, Senators Hatch and Kennedy, collected evidence that they said showed widespread discrimination against religious entities in land use regulation.<sup>68</sup> Where it occurs, they said, such discrimination is frequently unarticulated, hidden behind purportedly neutral justifications such as concerns about traffic or aesthetics.<sup>69</sup> The sponsors explicitly recognized the difficulty of

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<sup>66</sup> Courts and commentators have long recognized that zoning generally presents a likely opportunity for discrimination. *See Cordes, supra* note 65, at 168 (citing sources); *see also* *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7<sup>th</sup> Cir. 2007) (justifying RLUIPA's "substantial burden" test as evidence of intentional discrimination); *Saints Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 900 (7<sup>th</sup> Cir. 2005) (finding RLUIPA "backstops the explicit prohibition of religious discrimination . . . much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.").

<sup>67</sup> *See, e.g., Laycock, supra* note 17, at 776-77 (detailing evidence of discrimination and noting that "[t]hese patterns [of discrimination] appear because views about churches distort discretionary decisions under vague and subjective standards. Consciously or unconsciously, land use authorities discriminate against religion and among religions.").

There does seem to be evidence that land use decisions concerning religious congregations are often based on the specifics of the individual case. Research Services, *Presbyterian Church (U.S.A)*, *supra* note 47, at 4 (reporting that of the thousands of congregations that sought land use permits over a five-year period, 32% said that "no clear rules permitted or forbade what we wanted to do, and everything was decided based on the specifics of this particular case" and 16% more reported that "even though a clear rule seemed to permit or forbid what we wanted to do, the land use authority's principal decision involved granting exceptions to the rule based on the specifics of this particular case.").

<sup>68</sup> *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774-01, 7774 (daily ed. July 17, 2000) ("Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.").

<sup>69</sup> *Id.* ("Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of

fashioning a rule that would accurately target local governments that engaged in discriminatory land use regulation.<sup>70</sup> That is, Congress perceived a need for a prophylactic rule that would be designed to address the institutional concern that courts would not effectively unearth anti-religious discrimination. So it crafted a broad substantial burden provision, knowing that the law might sweep in local land use activity that was not in fact discriminatory.<sup>71</sup>

Leading commentators on both sides—supporters and detractors alike—have identified something like our prophylactic justification as the best defense of RLUIPA’s central provision. Professor Douglas Laycock, who testified repeatedly before Congress in favor of the Act and its precursors, has argued that zoning decisions often involve individualized determinations that are arrived at under discretionary or subjective standards and that provide fertile ground for anti-religious discrimination.<sup>72</sup> “Consciously or unconsciously, land use authorities discriminate against religion and among religions,” he wrote in an article that was later relied on by the Act’s sponsors and that overlaps with much of his congressional testimony.<sup>73</sup> The difficulty he identified is that purposive discrimination and unequal treatment are extraordinarily

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black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”); *id.* at 7775 (“Where it occurs, [discrimination against religious land uses] is often covert.”).

<sup>70</sup> *Id.* at 7775 (“It is impossible to make separate findings about every jurisdiction, or to legislate in a way that reaches only those jurisdictions that are guilty.”).

<sup>71</sup> We take no position on the constitutional question of whether Congress had authority to pass RLUIPA’s substantial burden provision under Section 5 of the Fourteenth Amendment. In fact, Congress has not straightforwardly relied on that authority - instead, it grounded the substantial burden provision on other enumerated powers, namely those granted in the Commerce and Spending Clauses. *See id.* at 7775 (“The General Rules in §2(a)(1), requiring that substantial burdens on religious exercise be justified by a compelling interest, applies only to cases within the spending power or the commerce power, or to cases where government has authority to make individualized assessments of the proposed uses to which the property will be put.”). Rather, we are assessing available justifications for the Act’s central provision more generally, putting to one side questions concerning its constitutionality.

<sup>72</sup> Laycock, *supra* note 17, at 774-76 (“The hostile attitudes [of land use regulators toward religion] are real, not theoretical, and individualized processes under vague standards give such attitudes ample opportunity for expression.”).

<sup>73</sup> *Id.* at 777 (cited in Joint Statement of Senators Hatch and Kennedy, *supra* note 69, at 7775). Compare Laycock, *supra* note 17, with *House Subcommittee on the Constitution, Hearing on H.R. 4019, The Religious Liberty Protection Act of 1998*, 105<sup>th</sup> Cong. (July 14, 1998) (testimony of Douglas Laycock), available at [http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_of.htm).

difficult to prove in land use cases, because bias against religious land uses can always be attributed to inevitable differences between factual scenarios. Government action consequently can easily be justified by reference to neutral reasons.<sup>74</sup>

RLUIPA's substantial burden provision addresses this problem by eliminating the need to prove discrimination.<sup>75</sup> Once a congregation has shown that its religious exercise has been substantially burdened by a land use regulation, the burden shifts to the government and the group may prevail if the court is not convinced, without ever having to prove that its religious exercise was thwarted because of discrimination. In testimony before Congress, Professor Laycock even described a precursor to RLUIPA as a "prophylactic rule[] for land use regulation."<sup>76</sup> A prophylactic rule is needed, according to his reasoning, because "discrimination [against religious land uses is] extremely difficult to prove in any individual case."<sup>77</sup>

Opponents of RLUIPA likewise have identified prophylaxis against covert discrimination as the statute's most persuasive rationale. Christopher Eisgruber and Larry Sager, for instance, agree that RLUIPA's sponsors in the Senate relied chiefly on the idea that the law

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<sup>74</sup> Laycock, *supra* note 17, at 781-83. Of course, this reasoning applies to all forms of discriminatory zoning. Nevertheless, Congress chose to confine its concern in RLUIPA to religious discrimination.

<sup>75</sup> *Id.* at 783-84 (discussing state RFRAs in terms that are equally applicable to a federal statute). Again, this article is similar to testimony that Laycock presented to Congress. *See infra* note 92.

<sup>76</sup> *House Subcommittee on the Constitution, Hearing on H.R. 1691, The Religious Liberty Protection Act of 1999*, 105<sup>th</sup> Cong. (May 12, 1999) (testimony of Douglas Laycock), available at [http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju59929.000/hju59929_of.htm). Professor Laycock also testified that "in cases where religious exercise is burdened . . . , many of the laws affected will be unconstitutional," a statement that implicitly recognized that the law would be overprotective.

Professor Laycock was speaking about § 3(b) of The Religious Liberty Protection Act of 1999, a prototype for what would become RLUIPA's substantial burden provision. It provided:

(1) LIMITATION ON LAND USE REGULATION– (A) Where, in applying or implementing any land use regulation or exemption, or system of land use regulations or exemptions, a government has the authority to make individualized assessments of the proposed uses to which real property would be put, the government may not impose a substantial burden on a person's religious exercise, unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

H.R. 106-1691, 106th Cong., available at <http://thomas.loc.gov/cgi-bin/query/D?c106:5:/temp/~c106tQ5IK5::>

<sup>77</sup> Laycock, *supra* note 17 (testifying before the House Subcommittee on the Constitution).

was necessary to remedy discrimination that would be hard to prove in court and might well go unaddressed absent legislative action.<sup>78</sup> Professors Eisgruber and Sager even acknowledge that if religious entities did in fact face widespread, undetected discrimination in land use, the Act would be justifiable for precisely the reasons that Congress gave—because under those conditions the likelihood of overenforcement created by the Act would be necessary to counteract the even greater risk of underenforcement that would otherwise exist.<sup>79</sup> What bothers Professors Eisgruber and Sager is that the law is much too far-reaching, even considering the institutional limitations that may result in predictable adjudicative error. Chiefly, they come to that conclusion because they think that the empirical evidence of bias against religious land uses is fairly weak.<sup>80</sup> Given that reliable studies have shown little or

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<sup>78</sup> See EISGRUBER & SAGER, *supra* note 61, at 269.

<sup>79</sup> *Id.*; see also *id.* at 252-57 (describing congressional remedies for underenforcement generally); Lawrence G. Sager, *Panel One Commentary*, 57 N.Y.U. ANN. SURV. AM. L. 9, 14 (2000) (noting that supporters “defend RLUIPA as a prophylaxis against discrimination by municipalities against disfavored churches” and granting that that argument “represents a distinct conceptual advance.”).

<sup>80</sup> EISGRUBER & SAGER, *supra* note 61, at 270-72; see also HAMILTON, *supra* note 7, at 87 (“The problem with the discrimination claims was that there are virtually no cases to support [religious entities’] argument that Congress needed to intervene to help these landowners.”).

For non-anecdotal empirical evidence, Congress relied primarily on a study conducted by a law professor at Brigham Young University, in conjunction with lawyers at a firm in Chicago. See H.R. Rep. 106-219, at \*18 & n.70 (citing Laycock, *supra* note 17, as providing an accurate summary of the evidence); Laycock, *supra* note 17, at 770-71 (summarizing the evidence considered by Congress, including principally the BYU study); Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999) (reporting results of the BYU study). However, that study has been criticized persuasively for relying exclusively on reported judicial decisions. See EISGRUBER & SAGER, *supra* note 61, at 271; Clowney, *supra* note 47, at 865 & n.29 (citing criticisms of the BYU study).

Apparently, the only other piece of non-anecdotal evidence that Congress might have relied on was an internal study conducted by one mainline denomination, the Presbyterian Church (U.S.A.). See Laycock, *supra* note 17, at 772 (indicating that the Presbyterian study was before Congress). That study found that only one percent of congregations that sought land use permits or licenses reported that their requests were denied or were expected to be denied. Research Services, Presbyterian Church (U.S.A.), *supra* note 47, at \*3. Professor Laycock points out that about twenty-eight congregations confronted actual or expected denials, Laycock, *supra* note 17, at 772-73, but that number is relatively insignificant compared to the thousands of applications submitted by churches over the five-year period covered by the study. Cf. Research Services, Presbyterian Church (U.S.A.), *supra* note 47, at \*3 (putting the number at 30).

Discrimination is notoriously difficult to uncover, but reports based on more comprehensive data sets have found little evidence of widespread land-use

no disproportionate constraint on land use by American congregations, RLUIPA's substantial burden rule, which creates a presumption of illegality around a spectrum of land use regulations in many different factual settings, sweeps far too broadly for the taste of these critics.

Setting aside that critique of RLUIPA, powerful as it is, our objective here is simply to point out that there is surprising agreement around the claim that the Act can most convincingly be justified as a prophylaxis against difficult-to-detect discrimination on the basis of religion in land use regulation.

2. *A broader defense.* – Some might defend RLUIPA on broader grounds, namely that religious entities ought to enjoy strict scrutiny protection not because they might otherwise be vulnerable to undetected discrimination, but because they ought to enjoy a presumptive exemption from land use regulations that substantially interfere with observance, even if those rules are neutral and generally applicable. On this view, in other words, religious actors have a liberty right to engage in religiously-mandated land uses free of all but the most necessary government interference, here in the form of essential zoning and landmarking restrictions. For proponents of this justification, the statute's substantial burden provision is not a prophylactic rule; instead, it provides exactly the right level of protection against local government regulations that have the incidental effect of burdening religious activity.

Proponents of this broader understanding see RLUIPA as part of Congress's ongoing effort to combat the Court's decision in *Employment Division v. Smith*, which they feel wrongly weakened protection of religious liberty by removing meaningful judicial review of laws and policies that incidentally burden religious observance, leaving in place heightened scrutiny for only a few narrow categories of cases. For them, RLUIPA, like its predecessor RFRA, seeks to reverse the legal effect of that decision by restoring the pre-*Smith* level of protection, if only as a statutory matter and if only in the limited contexts of land use and

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discrimination, either against religious groups generally or among such groups. See Chaves & Tsitsos, *supra* note 4, at 341 (reporting on a representative national sample and concluding that “[t]he nearly universal experience of American congregations seeking government authorization to do something they want to do is one of facilitation rather than roadblock.”); Clowney, *supra* note 47, at 860 (reporting on a study of records of zoning exemption applications in one city and concluding that “New Haven religious institutions, both large and small, face little discernable discrimination from municipal land use regulations.”). Reportedly the Chaves and Tsitsos study was available to Congress, but was ignored. EISGRUBER & SAGER, *supra* note 61, at 271; Marci A Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 352 (2003).

institutionalized persons.<sup>81</sup> Put differently, people who view RLUIPA this way think it is properly designed to protect religious exercise against laws and policies that merely have the incidental effect of burdening sacred practices.

Admittedly, the legislative history indicates that RLUIPA was sometimes conceptualized in this way.<sup>82</sup> And Eisgruber and Sager have said that they have trouble believing that RLUIPA's sweeping substantial burden provision was in fact designed to combat discrimination.<sup>83</sup> Unmistakably, they are suggesting that the law was actually crafted to give religious entities strong presumptive protection against burdensome land use regulation. Leading academic proponents of RLUIPA have also indicated, on occasion, that the law deserves support simply because it eases governmental restrictions on the ability of churches to pursue their callings through land use.<sup>84</sup>

To the extent that this broader rationale has figured into support for the Act, we do not find it persuasive. There is little reason to think

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<sup>81</sup> Congress designed RFRA specifically to combat *Smith* and to restore the level of religious freedom protection that religious actors had enjoyed prior to that case. In RFRA's preamble, Congress found that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb (2000). It therefore described the purposes of the law as "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," cases that had governed free exercise claims prior to *Smith*, "and to guarantee [that test's] application in all cases where free exercise of religion is substantially burdened, and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.*

<sup>82</sup> See, e.g., 146 Cong. Rec. 6678, 6688 (2000) (statement of Senator Hatch) ("Under current law, an assembly whose religious practice is burdened by an otherwise 'generally applicable' and 'neutral' law can obtain relief only by carrying the heavy burden of proving that there is an unconstitutional motivation behind a law, and thus, that it is not truly neutral or generally applicable. Such a standard places a seemingly insurmountable barrier between the religious assemblies of our country and their right to worship freely.").

<sup>83</sup> EISGRUBER & SAGER, *supra* note 61, at 272; see also Sager, *supra* note 80, at 15 ("RLUIPA is best understood as aimed not at the protection of churches against discrimination but rather at a very different target. The proponents of RFRA have been relentless in their effort to gain back some of the ground lost when the Supreme Court invalidated that measure. Land use offered a domain where the reinstatement of RFRA was politically acceptable.").

<sup>84</sup> Professor Laycock, for instance, has suggested that the law can be justified not only as a prophylaxis against discrimination, but also as a shield against burdensome regulation. Laycock, *supra* note 17, at 783 ("Part of the problem is discrimination against churches and among churches; part of the problem [faced by churches in the land use context] is highly intrusive and burdensome regulation, imposed for modest public purposes and without regard to the effect on constitutional rights").

that all religious landowners—no matter how wealthy or politically influential—deserve such a strong presumption in favor of an exemption from every conceivable zoning and landmarking regulation.<sup>85</sup> While religious liberty certainly is often exercised through land use by churches, mosques, and synagogues, interference with that sort of sacred use should nevertheless be subject to some lower level of judicial scrutiny, absent discrimination or an unacceptably high risk of discrimination that otherwise may go undetected.<sup>86</sup>

Our opposition draws on the experience of the Court during the nearly thirty years before *Smith*, when the Court ostensibly was applying a strict scrutiny standard to all laws and policies that burdened observance—and not merely as a way of preemptively guarding against discrimination, but instead in order to ensure that religious groups could observe their convictions despite all but the most pressing general laws. Over time, it became clear that in fact the Justices were turning away free exercise claims far more frequently and easily than one would have expected under that rigorous standard.<sup>87</sup> Even some defenders of strong protection for religious liberty came to realize that many of these cases were rightly decided and, consequently, that a presumption of unconstitutionality might not be appropriate for every law that happened to impinge on the rituals or beliefs of one or another faith community.<sup>88</sup>

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<sup>85</sup> In fact, there is reason to be concerned about the extent of some religious groups' influence over local land use decisions, at least in certain situations. See Garnett, *supra* note 24 (describing role of Catholic churches in siting highways in Detroit so as to preserve Parish boundaries).

<sup>86</sup> One of us has argued for an understanding of the Free Exercise Clause that includes protection for religious liberty, independent of any concern for discrimination. See Tebbe, *supra* note 62, at 703-04. However, that proposal strongly opposes protecting free exercise with the sort of strict scrutiny rule set out in RLUIPA – precisely because of the difficulties that strict scrutiny presents across a breathtaking range of contexts, including land use. See *id.* at 730-32.

<sup>87</sup> *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990) (noting that the Court's results had not conformed to what one would have expected under strict scrutiny even where it had “purported to apply the *Sherbert* test”); *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment) (arguing that the strict scrutiny standard does not explain the Court's holdings particularly well and citing cases); see also Tebbe, *supra* note 62, at 730-31; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1127-28 (1990); Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 201 (2004) (discussing the era before *Smith* and noting that “many commentators thought the compelling interest test was relaxed in some of the cases that the government won”).

<sup>88</sup> See, e.g., Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 182-85, 222-23 (1995)

Sacred practices ran up against such a sweeping range of government activities that exempting them from nearly all such laws would not match common conceptions of the proper scope of religious freedom. In other words, the strict scrutiny apparatus seems not to fit the most attractive understandings of the Free Exercise Clause.<sup>89</sup> Prominent supporters of religious exemptions such as Professor (now Judge) Michael McConnell therefore began to distance themselves from the strict scrutiny regime, even while they took the Court to task for shedding all meaningful review of incidental burdens on free exercise in *Smith*.<sup>90</sup>

With respect to the particular context of land use regulation, it is likewise difficult to believe that a standard requiring maximal judicial skepticism would generate results that would line up with an appealing account of what religious observers actually ought to be able to do without government interference. The contexts and circumstances in which religious landowners face obstacles are just too complex and wide-ranging to warrant a blanket presumption against all government regulation.<sup>91</sup> If RLUIPA's deployment of constitutional law's most powerful standard is to be defended, it cannot be on the ground that religious observers deserve a broad right to practice their faiths free of all laws that burden those practices only incidentally.

Whether for the reasons we have just given or others, few seem to have signed onto this broader rationale for RLUIPA. Consequently, it has played no more than a bit role in the public debate, even among the statute's defenders.<sup>92</sup> By far the more prominent and convincing

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(arguing for a construction of RFRA that mimics the Court's weaker application of the strict scrutiny test before *Smith* was decided).

<sup>89</sup> Principally, strict scrutiny seemed unnecessary to protect either religious liberty or government neutrality toward religion. A detailed discussion of these concepts lies beyond the scope of this Article but can be found in Tebbe, *supra* note 62, at 705-11, 725-27.

<sup>90</sup> McConnell, *supra* note 88, at 1127 ("Even the Justices committed to the doctrine of free exercise exemptions [from neutral laws] have in fact applied a far more relaxed standard [than strict scrutiny] to these cases, and they were correct to do so. The 'compelling interest' standard is a misnomer.").

<sup>91</sup> We leave to one side here the more general question of whether the constitutional guarantee of free exercise ever ought to include protection of liberty or autonomy, independent of concern about discrimination; our point here is simply that any such conception cannot justify the application of strict scrutiny.

<sup>92</sup> Douglas Laycock, for instance, has referred to the broader rationale only in passing, focusing instead on the need for protection against anti-religious bias. Compare, e.g., Laycock, *supra* note 17, at 774-77 (setting out in some detail the case that hostility toward minority sects is widespread among government officials who exercise discretionary authority over land use, and that those officials will often

argument for the statute has instead been the narrower one that we have identified, namely that heightened scrutiny is necessary to preempt discrimination by local land use authorities that otherwise might go undetected and unaddressed.<sup>93</sup>

One feature of RLUIPA's prophylactic approach should be reiterated, namely its implicit reliance on a certain conception of institutional competence. According to this understanding, courts are inept at uncovering discrimination that may be perpetrated in individualized governmental determinations guided only by broad standards that leave ample leeway for official subjectivity and discretion. That institutional disability is particularly regrettable because it is precisely in such situations that judicial oversight is most needed. Where decisionmaking is subjective and accountability is weak, the government's own procedures provide scant opportunity for religious minorities to protect themselves through the political process itself. Zoning and landmarking determinations therefore present just the sort of opportunity for covert bias that calls for judicial oversight, and yet their particular characteristics make them particularly difficult for courts to monitor.<sup>94</sup> A prophylactic rule allows religious groups that are at risk of

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disguise that hostility by giving neutral justifications for their decisions, justifications will be difficult to disprove in litigation), *and id.* at 781-83 (same); *with id.* at 783 (noting in passing that "part of the problem," in addition to undetectable discrimination, is "highly intrusive and burdensome regulation, imposed for modest public purposes and without regard to the effect on constitutional rights.").

<sup>93</sup> It is possible to imagine a justification for RLUIPA that falls between the narrow prophylactic rationale we have identified and the broad concern for religious autonomy. What if officials decided to condemn a religious property not out of subjective animus toward the affected group but instead because they realized, in an objective way, that a certain degree of discrimination against that identity group was priced into the broader real estate market? Policymakers might not harbor any antipathy at all toward the congregation. Rather, they might simply seek to increase property values in the jurisdiction by eliminating the group, just as they might attract home buyers by condemning a blighted building or forcing the sale of a polluting business. Conceivably some lawmakers supported RLUIPA in order to protect religious assemblies from just this sort of land use regulation. And that sort of justification could apply with equal force to eminent domain, thereby justifying the Act's extension beyond zoning and landmarking. Yet our sense is that to the degree that this practice can be considered discriminatory, the heightened political salience of condemnation will do much to prevent its worst instances.

<sup>94</sup> This kind of concern about local zoning decisions, and particularly variances, has a long pedigree. For a review of criticisms of variance procedures, see Owens, *supra* note 18, at 297-99. Colorfully, one commentator for the 1950s called variance procedures, "frequently a cross between a Jacobin assize and a New England witch trial." Richard F. Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 522 n.48 (1959).

being disfavored in such determinations to obtain relief without having to prove actual discrimination in a forum whose institutional characteristics make that sort of showing difficult, even where unequal treatment has actually occurred.

That institutional competence story plays differently if we adjust our assumptions about the visibility of governmental decisionmaking. In the next section, we explore how it unfolds not with respect to zoning, RLUIPA's central concern, but instead in the context of condemnation, with its markedly different political economy.

### *B. The Political Economy of Condemnation*

The political economy of condemnation is importantly different and simply does not provide the same opportunity for abuse. At the most superficial level, condemnation is less likely to be a source of discrimination against religious groups because it is far less common than zoning and other regulatory land use controls.<sup>95</sup> More profoundly, too, the expense, political salience, and visibility of condemnation will reduce the need for prophylaxis against religious discrimination in ways that are different from the politics of zoning.

Government condemnation power is very broad.<sup>96</sup> The federal constitutional limits are twofold and include, first, that the condemnation be for public use and, second, that compensation be paid.<sup>97</sup> Courts, including state courts, have traditionally deferred to public use determinations.<sup>98</sup> Faced with few judicial limits, the principal constraint

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<sup>95</sup> According to the Pacific Legal Foundation, which tracks government use of eminent domain, the total number of condemnations, in all states, in a five-year period was approximately 10,000. See <http://castlecoalition.org/pdf/publications/floodgates-report-low.pdf>. Although this number may seem high, it is actually surprisingly small, especially when compared with the local exercise of zoning power which is ubiquitous nationwide. Of course, these statistics say nothing about the relative percentages of zoning and condemnation actions that may be motivated by discrimination.

<sup>96</sup> This has changed somewhat in recent years, with many states enacting statutes in response to the Supreme Court's ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005). See Donald E. Sanders & Patricia Pattison, *The Aftermath of Kelo*, 34 REAL EST. L.J. 157, 164-70 (2005) (describing backlash in response to *Kelo*).

<sup>97</sup> *Kelo v. City of New London*, 545 U.S. 469, 495-96 (O'Connor, J., dissenting) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003)).

<sup>98</sup> *Kelo*, 545 U.S. at 480, 482-83 (describing traditional deference to legislative determinations of public use). *But see* *Hathcock v. Wayne*, 684 N.W.2d 765 (Mich. 2004) (reversing *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), and establishing more searching public use review); Merrill, *supra* note 24, at 93-109 (collecting cases in which state courts fund no public use).

on eminent domain is, and has always been, political.<sup>99</sup> As it turns out, this is no thin bulwark. Politics is a potent defense against abusive eminent domain.

First, and probably most importantly, the fact of compensation changes the opportunity for religious discrimination simply by making it more expensive than zoning, which is usually free.<sup>100</sup> To the extent governments are motivated by fiscal constraints – and some undoubtedly are<sup>101</sup> – the cost of compensation will deter local officials from pursuing discriminatory policies through eminent domain.<sup>102</sup> Importantly, just compensation imposes more than a trivial expense, usually valued by property’s fair market value, and sometimes by even more.<sup>103</sup>

Added to the compensation itself, the process required to condemn property is sufficiently expensive that it is generally a tool of last resort for governments instead of the first one called upon.<sup>104</sup>

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<sup>99</sup> See, e.g., FISCHEL, REGULATORY TAKINGS, *supra* note 24, at 73-75; Garnett, *supra* note 24 at 115-119 (discussing Chicago’s condemnation of property implicating Catholic parishes).

<sup>100</sup> One court has adopted this reasoning in excluding condemnation from RLUIPA. See *Faith Temple*, 405 F. Supp. 2d at 255-56 (“[W]hile zoning laws are relatively ‘painless’ for municipalities to enact, property taken by condemnation literally comes at a price: the fair market value of the property, which must be paid out of the public fisc. . . . [B]oth the built-in disincentive of having to pay fair market value, as well as the hurdle of having to demonstrate a legitimate public use, mean that town officials harboring some discriminatory animus against a religious group would not generally be expected to use eminent domain as a tool to prevent the group from erecting a church within the town.”).

<sup>101</sup> One of us has argued that small local governments are particularly responsive to on-budget items. See Serkin, *Big Differences*, *supra* note 16, at 1680-85.

<sup>102</sup> See Robert Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 392 (“Local officials who desire reelection will normally refuse to pay to stop development if they can stop it without expending tax revenues”); cf. FISCHEL, REGULATORY TAKINGS, *supra* note 24, at 74 (“Having to pay compensation and enduring the transaction costs that eminent domain entails are sufficient to deter legislatures from using eminent domain to accomplish unprincipled redistributions of wealth. To put it cynically, there are so many cheaper ways to accomplish unprincipled redistribution that there is little reason for judges to worry about this particular issue.”); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999) (“The obligation to pay compensation can constrain government inclinations to exploit politically vulnerable groups and individuals”).

<sup>103</sup> For a discussion of valuation issues surrounding religious property, see *infra* text accompanying notes 185-188.

<sup>104</sup> See Merrill, *supra* note 24, at 77-78 (describing costs of eminent domain); *id.* at 80 (noting that casual observation suggests that “the government views eminent domain as a cumbersome and expensive process to be avoided if at all possible”); see also FISCHEL, REGULATORY TAKINGS, *supra* note 24, at 74; Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of*

Professor Merrill has referred to this as the “‘due process’ costs of eminent domain,” and it includes “drafting and filing the complaint, serving process, securing a formal appraisal, the possibility of a trial and appeal, and so forth.”<sup>105</sup> State statutes may require localities to reimburse condemnees for attorneys’ fees and expert witness costs in some situations.<sup>106</sup> Administrative expenses like these, when combined with the burden of compensation itself, deter condemnation generally, and make discrimination through condemnation expensive and therefore less likely.<sup>107</sup>

Some indirect evidence of compensation’s deterrent effect can be found in the current debate over the Takings Clause. Both sides of that controversy share a deeply held view that forcing governments to pay to regulate will decrease the amount of government regulation, perhaps dramatically.<sup>108</sup> This intuition has been borne out in Oregon, where voters adopted Measure 37, essentially a statutory super-Takings Clause requiring governments to compensate for land use regulations having any negative impact on property values.<sup>109</sup> The stark but predictable result has been that local governments there have almost always chosen not to enforce their land use regulations instead of paying compensation.<sup>110</sup> Although the mechanism for translating fiscal costs into government inaction is not always clear and may vary by jurisdiction, it is hard to dispute the general effect of a compensation

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*Eminent Domain*, 2004 Mich. STATE L. REV. 929, 934 (2004) (“Eminent domain is an expensive way to acquire property.”).

Also, governments may end up settling out of court for more than the fair market value of the property because some state laws will penalize governments for failed negotiations by making them pay the condemnees’ attorneys fees if the amount of the final judgment exceeds the government’s final offer during settlement negotiations. Garnett, *supra* note 24, at 129-30.

<sup>105</sup> Merrill, *supra* note 24, at 77.

<sup>106</sup> Garnett, *supra* note 24, at 129-30.

<sup>107</sup> FISCHER, REGULATORY TAKINGS, *supra* note 24, at 96. For a useful summary of the procedural requirements for condemnation in all fifty states, see PATRICK J. ROHAN, CONDEMNATION PROCEDURES AND TECHNIQUES 13-G2A (2008).

<sup>108</sup> See Serkin, *Big Differences*, *supra* note 16, at 1633 (identifying shared assumption that “the more the government has to pay for its actions, the less willing it will be to act.”); see also FISCHER, REGULATORY TAKINGS, *supra* note 24, at 96-97 (citing studies showing that administrative costs, including relocation assistance, had a deterrent effect on condemnation).

<sup>109</sup> Or. Rev. Stat. § 197.352 (2006)). For a discussion of Measure 37, see Sara C. Galvan, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587, 587-88 (2005).

<sup>110</sup> Keith Aoki, *All The King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again?*, 21 J. L. & POL'Y 397, 436 (2005).

requirement: It tends to restrain government action, for better or worse.<sup>111</sup> That may not necessarily mean that discrimination will comprise a lower proportion of land use regulation that takes the form of condemnation rather than zoning, but it will predictably mean that condemnation involves less discriminatory governmental action overall – an absolute difference that matters when considering whether the costs of underprotection justify a prophylactic measure such as RLUIPA’s substantial burden provision.

At least as important as the financial costs of condemnation are its political costs. Generally, the political liabilities associated with eminent domain will be greater than those associated with regulatory land use controls because of condemnation’s heightened political salience. Especially after *Kelo*, but traditionally as well, government exercise of its power of eminent domain is prone to raise public hackles. According to longstanding tradition, outright takings present a political issue of constitutional magnitude, something that is only recently true of land use regulations.<sup>112</sup>

More generally, the politics of condemnation implicate different pressures and concerns than the politics of zoning. Of course, the actual political economy of any particular eminent domain proceeding is likely to be highly context-dependent. It may matter, for example, whether the government is a small town, characterized by majoritarian politics and particularly sensitive to financial costs, or whether it is a larger

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<sup>111</sup> See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) (noting that governments are generally responsive to political costs, not fiscal ones, and that while there is an association between the two, the mechanism that translates the latter into the former is complex and variable).

<sup>112</sup> Although this history is increasingly disputed, good evidence shows that the Takings Clause was drafted to be predominantly if not exclusively concerned with outright expropriations by the government. See William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792-97 (1995). But see Nicole Garnett, *No Takings Without Touchings* (unpublished manuscript, on file with authors). It is indisputably true that the law of regulatory takings is of very recent vintage. See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings Muddle*, 90 MINN. L. REV. 826, 838-51 (2006) (arguing that the Supreme Court’s decision in *Penn Central Transp. Auth. v. New York*, was the first time the Supreme Court incorporated the Takings Clause against the states). Of course, land use regulations as we know them now are also a relatively recent invention, dating back only to the 1920s and the promulgation of the Standard Zoning Enabling Act. See, Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent With an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y, 295, 297 (2000).

government, more susceptible to special interest group pressure.<sup>113</sup> If the former, the fact of compensation alone may be enough to prevent any small subset of the community – say immediate neighbors of some religious use – from lobbying successfully for discriminatory condemnation. The costs, borne by all local property owners through increased property taxes, will simply be too high.<sup>114</sup> Homeowners will be especially motivated to scrutinize carefully the proposed outlays and they will be unwilling to fund condemnations for discriminatory purposes that they do not value.

This story is admittedly different if the discrimination is more widespread, as when an entire community objects to the presence of some disfavored religious minority. Imagine, for example, in today's political climate, a small town banding together to try to force a Mosque and its religious community to leave.<sup>115</sup> A majority of taxpayers in such a community may be perfectly willing to shoulder the increased tax burden caused by discriminatory condemnation. A majority of members of the community may be willing, in short, to pay to discriminate if their hostility to the religion or the religious group causes a greater decrease in their collective utility than the costs of condemnation.<sup>116</sup>

In this situation, compensation will force local taxpayers to internalize the costs of their discrimination, but this may be small comfort to the religious group whose property is nevertheless condemned.<sup>117</sup> It is important to remember, though, that the story does not end there. Whether RLUIPA applies to condemnation or not, the First Amendment still prevents *de jure* discrimination on the basis of religion.<sup>118</sup> While it may be easy enough for small scale property disputes between a religious group and its neighbors to be cloaked in

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<sup>113</sup> See Serkin, *Big Differences*, *supra* note 16, at 1661-65 (comparing large and small local governments).

<sup>114</sup> *Id.* at 1652-55 (discussing role of property taxes to fund local services).

<sup>115</sup> *Albanian Associated Fund v. Township of Wayne*, No.06-CV-3217(PGS), 2007 WL 2904194, (D.N.J. 2007) (denying summary judgment where local government condemned property to be developed as Mosque).

<sup>116</sup> Nor does everyone have to share discriminatory animus for this dynamic to exist. If the religious group is disfavored enough, its presence in a community may well depress market values generally. People voting only their wallets may nevertheless vote to discriminate. See, e.g., Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 451-52 (2006); see also Serkin, *Big Differences*, *supra* note 16, at 1658 (questioning impact of discrimination on property values).

<sup>117</sup> Professor Ellickson has argued that property rule protection combined with damages is appropriate as a remedy for discrimination against "racial and ideological minorities." Ellickson, *supra* note 103, at 417-18.

<sup>118</sup> *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

religion neutral terms, the kind of community-wide discrimination to a religious group described here – the kind of widespread bigotry necessary for a majority of the community to be willing to pay to condemn the property – is likely to be easier for courts to detect.

All of this becomes somewhat more complex in larger local governments where the political process is more susceptible to special interest group pressure, what some people describe as minoritarianism as opposed to the majoritarianism characterizing many small local governments.<sup>119</sup> Instead of motivated homeowners monitoring government actors for regulatory excess, larger municipalities sometimes include relatively disengaged taxpayers and highly motivated special interest groups.<sup>120</sup> There, if neighbors and opponents of a religious group solicit the government to condemn the group's property, the impact on property taxes may be vanishingly small for individual taxpayers and voters throughout the municipality.<sup>121</sup> The immediate political cost of having to compensate for condemnation is correspondingly smaller, too, opening the door to discrimination.<sup>122</sup>

How a religious group will fare in the rough-and-tumble of interest group politics is highly dependent on local context. Larger municipalities are often staffed by professionals and contain layers of bureaucracy help to insulate those with condemnation authority from the political pressure of a religious group's neighbors.<sup>123</sup> Where that is not true, over-protection of religious land uses may be a bigger problem than

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<sup>119</sup> See NEIL KOMESAR, *LAW'S LIMITS* 7 (2001) (describing minoritarianism); Serkin, *Big Differences*, *supra* note 16, at 1638 & n.53 (same).

<sup>120</sup> See KOMESAR, *supra* note 122, at 61; Serkin, *Big Differences*, *supra* note 16, at 1661-62 (describing larger local governments).

<sup>121</sup> The sensitivity of budget outlays is spread over all tax payers, allowing motivated special interest groups, in effect, to externalize the costs of their agendas to taxpayers more generally. See Serkin, *Big Differences*, *supra* note 16, at 1668 ("The greater the number of taxpayers, the smaller the per-tax payer stake in any government action). In this context, it amounts to spreading the costs of discrimination to taxpayers who themselves may not have any discriminatory motivation, but who may nevertheless be relatively indifferent if the cost is sufficiently low.

<sup>122</sup> Of course this will be less true if the affected faith is observed by a large portion of the community. If the group is politically powerful enough, it may be able to protect itself against condemnation in both small and large government settings. See Garnett, *supra* note 24, at 115-16. Here we are considering the most difficult case for our argument, where the affected group is a religious minority with relatively little political power.

<sup>123</sup> New York City, *sue generis* in many ways, offers an extreme example. In New York, all condemnations are subject to the Uniform Land Use Review Procedure, (ULURP), which imposes substantial procedural requirements, including layers of approval at the community and city level. See ULURP § 2-01(k). For an overview of the ULURP process, see <http://www.nyc.gov/html/dcp/html/luproc/ulpro>.

under-protection. In one of the most insightful treatments of condemnation of religious property, Professor Garnett examined the politics around the siting of expressways in Chicago in the 1950's.<sup>124</sup> In her account, various Catholics and Catholic groups exercised considerable influence over the location of the expressways, an influence they used to preserve Catholic parishes and, apparently, to reinforce racial segregation.<sup>125</sup>

When a larger government does wish, for whatever reason, to discriminate against a religious group, condemnation is too politically fraught to be a likely tool. There is simply no such thing as routine condemnation. Even where a government is condemning property for some core public use, like building a new road, it still requires an affirmative exercise of government power to forcibly acquire property in an inherently non-consensual transaction.<sup>126</sup> By contrast, the kinds of zoning actions that are most likely to implicate religious discrimination involve denials of variances, denials of rezoning requests, or denials of conditional use permits or other permits.<sup>127</sup> Religious groups in these settings can be cast as supplicants to local governments, seeking some preferential treatment over and above what the *status quo* appears to permit.<sup>128</sup> Whether this is true, whether a local government routinely grants similar variances to secular organizations, discriminating against a religious group by denying what can at least be characterized as a preference presumably comes at lower political cost than discriminating

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<sup>124</sup> See Garnett, *supra* note 24, at 110-19.

<sup>125</sup> *Id.* at 112-13.

<sup>126</sup> As Professor Merrill explains: "First, and most important, legislatures must authorize the exercise of eminent domain. It is thus necessary to persuade a legislature to grant the power of eminent domain, or, if a general grant of the power already exists, to persuade officials to exercise it." Merrill, *supra* note 24, at 77 (internal citations omitted); see also, e.g., *Goldman v. Moore*, 220 N.E.2d 466, 468 (Ill. 1966)..

<sup>127</sup> See, e.g., *St. John's Roman Catholic Church Corp. v. Town of Darien*, 184 A.2d 42 (Conn. 1962) (variance application); *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734 (Mich. 2007) (rezoning request); *League of Residential Neighborhood Advocates v. Los Angeles*, 498 F.3d 452 (9<sup>th</sup> Cir.) (conditional use permit); see also Cordes, *supra* note 65, at 164-66 (reviewing mechanisms for seeking relief from zoning restrictions). Not coincidentally, these contexts overlap with RLUIPA's jurisdictional trigger, which applies to "individualized land use determinations," instead of to the provisions of the generally applicable zoning ordinance. 42 U.S.C. § 2000cc(a)(2)(C) (2000).

<sup>128</sup> This vision of religious groups is borrowed from Professor Fischel's description of special interest groups generally as supplicants to homeowner majorities. WILLIAM FISCHEL, *THE HOMEVOTER HYPOTHESIS* 92 (2001). Here, religious groups are not necessarily dependent on local homeowners, but still must seek some affirmatively favorable treatment from government.

through a proactive government measure, like condemnation.<sup>129</sup> Although more form than substance, the discriminatory impact of denying a benefit can appear to be less odious than the impact of imposing an affirmative harm, even if the results are the same.

Furthermore, examination of any exercise of eminent domain is usually quite vigorous. Although procedures vary state-by-state, condemnation commonly involves, first, a requirement of good-faith negotiations followed by public hearings, a complaint filed against the property owner in court, and a subsequent trial or judicial hearing.<sup>130</sup> The burden is on the government in such a proceeding to demonstrate the necessity of the condemnation, its public purpose, and ultimately the amount of compensation.<sup>131</sup> In preparation, property owners not only have access to the usual tools of discovery but may also make open records requests, giving access to a trove of information about the government's decision-making process.<sup>132</sup> These information-forcing mechanisms do not prevent abusive eminent domain practices, but they increase condemnation's visibility and the transparency of the condemnation process.

Because of its relative rarity and higher visibility, condemnation has more political salience than a local government's exercise of its generic zoning power.<sup>133</sup> As Professor Fischel trenchantly explains, there is a "popular revulsion" at the questionable use of condemnation that can become a "*cause célèbre*" spilling beyond the boundary of the local government.<sup>134</sup> The public outcry following the Supreme Court's

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<sup>129</sup> For one application of the effect of framing on political saliency, consider Colorado's effort to amend its constitution to prohibit extending favorable treatment to gays and lesbians. *See Romer v. Evans*, 517 U.S. 620 (1996) (striking down amendment). This amendment, while rightly characterized as discriminatory, *id.* at 635, was nevertheless shrewdly constructed to minimize political opposition.

<sup>130</sup> *See* New Jersey Eminent Domain of 1971, N.J.S.A. 20:3-8, 12, 13; New York Eminent Domain Procedure Law, NY EDPL §§ 201, 207; *see also* American Bar Association, Illinois Mortgage Foreclosure and Eminent Domain Procedure, <http://www.abanet.org/rppt/cmtes/standing-committees/community/IllinoisMortgageForeclosure.pdf>; California Eminent Domain Law Group, *The Eminent Domain Handbook*, <http://www.eminentdomainlaw.net/propertyguide.html>.

<sup>131</sup> *See* Simon H. Bloom, *et al. Condemnation 101: Fundamentals of Condemnation Law and Land Valuation*, SM102 ALI-ABA 89 (2007).

<sup>132</sup> *See id.*

<sup>133</sup> Professor Garnett cites one study finding that only 20% of government acquisitions of property involved eminent domain proceedings. *See* Garnett, *supra* note 24, at 104 n.15 (citing Fed. Highway Admin., U.S. Dep't of Transp., Evaluation of State Condemnation Proceedings, <http://www.fhwa.dot.gov/realestate/cndmst.htm>); *see also* <http://castlecoalition.org/pdf/publications/floodgates-report-low.pdf>.

<sup>134</sup> FISCHEL, REGULATORY TAKINGS, *supra* note 24, at 74.

decision in *Kelo v. City of New London* is a particularly stark example, but nevertheless just one example, of the political opposition to eminent domain.<sup>135</sup>

Even if political and economic barriers to eminent domain do not prevent a particular instance of discriminatory condemnation, the judicial review process we described above, with its information-forcing mechanisms, is more likely to effectively uncover bias than is judicial review of zoning.<sup>136</sup> This is true in the context of large municipalities as well as with regard to smaller towns. On the other hand, of course, religious discrimination may well find its way in the door and go undetected under traditional constitutional review. There is, undeniably, a history of abusive and even discriminatory condemnation in this country, particularly in the urban redevelopment programs – sometimes called “slum clearance” – from the 1950s and ‘60s, although those were followed by statutory reforms cracking down on the most abusive uses of eminent domain.<sup>137</sup> This much, however, is clear: the politics and economics of condemnation make religious discrimination less likely here than in the context of zoning and other regulatory land use controls.<sup>138</sup>

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<sup>135</sup> 454 U.S. 469 (2005). There are innumerable examples of condemnation creating local political opposition, only some of which reach the national stage. Two leading examples from opposite coasts include current efforts to condemn property in Brooklyn to create, *inter alia*, a new stadium for the Nets basketball team, *see, e.g.*, See Nicholas Confessore, *Blight, like Beauty, Can Be in the Eye of the Beholder*, N.Y. TIMES, July 25, 2006, at B1, and the condemnation of Chávez Ravine for the Los Angeles Dodgers in the 1960s., *see* RY COODER, CHÁVEZ RAVINE (Nonesuch Records 2005).

<sup>136</sup> *See supra* text accompanying notes 132-34.

<sup>137</sup> *See* Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 34-35 (2003) (describing discriminatory slum clearance during the 1950s in Chicago). The principal statutory reform responding to the problems of urban renewal came from the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, 42 U.S.C. §§ 4601-4655 (1971). *See* Marc Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L. Q. 1, (2007) (“The Uniform Act responded to the public outcry after the government used eminent domain in the 1940s to 1960s to remove urban blight.”); Garnett, *supra* note 17, at 121-24 (describing federal and state relocation acts). Many of these particular statutes may not directly protect religious property because most apply specifically to compensation for residences and businesses. *See id.* Nevertheless, they demonstrate the increased political attention paid to eminent domain practices of the past.

<sup>138</sup> The history of discriminatory zoning is even more problematic. Early zoning ordinances zoned explicitly based on race. *See* *In re Lee Sing*, 43 F. Supp. 359 (N.D. Cal. 1890) (striking down San Francisco’s “Bingham Ordinance,” which required people of Chinese ancestry to live in designated areas); *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating a Louisville, Kentucky segregation ordinance). Ongoing

It is important to observe, too, that the harm from discriminatory condemnation is arguably smaller than from discriminatory zoning. Both may have the effect of excluding a religious group from a community, but at least in the latter, the group receives compensation. It may not be compensation that serves to make the group truly whole; it may exclude entire categories of real harms.<sup>139</sup> Nevertheless, it provides more than discriminatory zoning, the exclusionary effect of which comes with no remedy at all.<sup>140</sup>

### C. *The Costs of Limiting Condemnation*

A prophylactic rule is, by its nature, overbroad. It reflects an implicit judgment that the costs of over-protection are lower than the costs of under-protection.<sup>141</sup> As the previous section argued, the costs of under-protection against religious discrimination are lower for condemnation than for zoning actions like variance and other permit denials. This is half the equation. The other half is important, too, as the costs of thwarting condemnation are higher, in general, than the costs of limiting governments' zoning power. A prophylactic rule hampering condemnation is therefore both less valuable and more costly than zoning prophylaxis, strongly militating against extending RLUIPA to eminent domain.

1. *The comparative costs of zoning and condemnation.* – The costs of limiting local government zoning authority over religious property are admittedly quite high. Most profoundly, religious land uses can implicate many of the core justifications for zoning authority: separating incompatible uses and preserving property values.<sup>142</sup> Religious land uses, whether for a place of worship or a secondary use, can generate traffic

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discrimination in zoning is a widely discussed phenomenon. *See generally* J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761 (discussing various types of discrimination in zoning).

<sup>139</sup> For discussion of the damages routinely excluded from compensation awards, see Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957 (2004); Serkin, *The Meaning of Value*, *supra* note 104; James Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859 (2004).

<sup>140</sup> Saxer relies on a similar insight to argue for extending RLUIPA to eminent domain. In her view, the existence of compensation means courts will be less willing to find that condemnation has impermissibly burdened a religious group. Saxer, *supra* note 23, at 673-74, 695. We agree, but reach exactly the opposite conclusion.

<sup>141</sup> *See supra* text accompanying note 64 (discussing prophylactic rules).

<sup>142</sup> Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 254 (2000) (“The primary purposes of zoning are to provide for orderly development and to protect property values and human health by segregating incompatible land uses . . .”).

and noise.<sup>143</sup> They can bring outsiders into a neighborhood on a regular and ongoing basis. Even without religious discrimination, the presence of unfamiliar outsiders can increase distrust and decrease comfort levels within a community. Moreover, the introduction of any non-residential use into a residential community can be a harbinger of more profound change, threatening to begin a transformation into more of a mixed-use community.<sup>144</sup> All of this will predictably reduce nearby property values and the subjective use values that people have in their property.<sup>145</sup>

This is not just a problem for individual property owners, either. It is also potentially a problem for a local government and for a community more generally. Local governments are, by-and-large, engaged in fierce competition with each other to be good places to live and do business.<sup>146</sup> Both the cause and the effect of this inter-local competition is to enhance property values.<sup>147</sup> High property values signal that a community is a desirable place to live, that it is providing a desirable mix of public services and property taxes. Good schools, low crime, and smart land use planning are all capitalized into property values, as are the property taxes used to fund these services.<sup>148</sup> When the mix is right, this generates demand for local housing, serving to maintain strong property values. This translates into a powerful political force since homeowners are highly motivated to ensure that property values remain high.<sup>149</sup> When exempting some religious land uses from local zoning has the effect of decreasing local property values – or even has the potential to decrease local property values – this is likely to impact a local government’s competition with neighboring towns, and may well have significant

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<sup>143</sup> HAMILTON, *supra* note 7, at 78-81.

<sup>144</sup> *Id.* at 79. The costs are clearest in the context of residential neighborhoods, but exist, too, in mixed-use and commercial neighborhoods. There, the presence of religious uses may again increase traffic and consume scarce parking resources, to the detriment of local businesses. Moreover, some religious uses, whether a place of worship or a school, may be more sensitive to some of the noise and congestion created in mixed-use neighborhoods potentially leading to conflicts with neighbors. See *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 852 (7<sup>th</sup> Cir. 2007) (considering consequences of allowing church in industrial zone).

<sup>145</sup> *E.g.* HAMILTON, *supra* note 7, at 79-81 (arguing that churches can change character of neighborhood and reduce property values).

<sup>146</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956); FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 67, at 59-60; Serkin, *Local Property Law*, *supra* note , at 899 n. 71 (citing sources).

<sup>147</sup> Serkin, *Big Differences*, *supra* note 16, at 1655.

<sup>148</sup> FISCHER, THE HOMEVOTER HYPOTHESIS, *supra* note 67, at 51-52.

<sup>149</sup> For most homeowners, the house is their single largest investment, and anything adversely affecting its value is of substantial concern. Serkin, *Big Differences*, *supra* note 16, at 1648.

political costs for local politicians, regardless of their responsibility. These are high costs, indeed.

The costs of presumptively exempting religious land uses from condemnation that substantially burdens religion are even higher, however. Allowing religious groups to resist condemnation threatens to force governments to change the location of roads, parks, and other municipal infrastructure to avoid religious property. This is not idle speculation. Religious groups have already invoked RLUIPA, although not always successfully, in order to prevent the expansion of a park,<sup>150</sup> an extension of O'Hare airport,<sup>151</sup> the development of unused land into a Costco,<sup>152</sup> and an addition to a substance abuse facility.<sup>153</sup> In a case presently pending in the Eastern District of New York, a religious congregation has invoked RLUIPA to stop development of a municipal garage in Brooklyn.<sup>154</sup> Notably, had RLUIPA existed in the 1970s, it might have provided religious groups with a *de facto* veto over Detroit's controversial condemnation of a neighborhood to allow expansion of a General Motors plant in *Poletown Neighborhood Council v. Detroit*.<sup>155</sup> While the allocation of responsibility to define "public use" is complex and contested, no one has seriously argued that churches should be given a potential veto over such large-scale redevelopment .

Two caveats are in order before we go further. First, we do not claim that every instance in which a zoning action is thwarted will be less costly than every instance in which a condemnation is prevented, but only that on balance a widespread restriction on condemnation will reduce overall welfare more dramatically than an analogous restriction on zoning and landmarking. It is possible to imagine a case in which failing to zone is costlier than not being able to condemn, but the fact remains that on the whole hobbling a government's condemnation power

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<sup>150</sup> Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250 (W.D.N.Y. 2005).

<sup>151</sup> St. John's United Church of Christ v. Chicago, 502 F.3d 616, 641 (7th Cir. 2007).

<sup>152</sup> Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1214 (C.D. Cal. 2002).

<sup>153</sup> Christian Romany Church Ministries v. Broward County, 980 So.2d 1164 (D.Ct. App. Fla. 2008) (applying the Florida Religious Freedom Restoration Act). In another current example in the Eastern District of New York, a religious group has recently invoked RLUIPA to prevent condemnation of its property for development of a municipal parking facility. See [case caption].

<sup>154</sup> See Congregation Adas Yereim v. New York, 07 CV 01457 (E.D.N.Y.).

<sup>155</sup> 304 N.W.2d 455 (Mich. 1981). See William Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 940 (identifying to substantial Catholic Churches condemning for the project).

with respect to religious assemblies will be costlier than restricting its zoning authority.

Second, we recognize that RLUIPA will by no means defeat every governmental attempt to condemn property. For RLUIPA's strict scrutiny to apply, a condemnation must impose a substantial burden on religious exercise. This threshold requirement has at least some teeth.<sup>156</sup> The Ninth Circuit, for example, has rejected an RLUIPA claim based on denial of a rezoning request because the City's regulations did not "render religious exercise effectively impracticable."<sup>157</sup> Under this standard, no substantial burden exists so long as a religious group has a reasonable opportunity to pursue its religious activity elsewhere in the municipality. The Seventh Circuit, on the other hand, adopted a far broader interpretation of the statute in *Saints Constantine and Helen Greek Orthodox Church v. City of New Berlin*, finding a substantial burden where there is "delay, uncertainty, and expense."<sup>158</sup> The religious group in that case was not required to show that its religious activities also could not have occurred elsewhere in the municipality; being denied use of its own property was burden enough.<sup>159</sup> Still other courts have articulated different standards.<sup>160</sup> Coupled with this uncertainty, we recognize, too, that imposing a strict scrutiny regime will not actually defeat every governmental attempt to condemn, because some takings will satisfy that standard.

Nevertheless, these same limits apply to RLUIPA's core zoning provisions: the regulation must impose a substantial burden, and the resulting strict scrutiny may not be fatal in fact. We argue only that whatever legal standard applies, RLUIPA's costs will tend to be higher in the context of condemnation than in zoning. And, at least at the

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<sup>156</sup> For a summary of recent case law, see Shelby D. Green, *Zoning In and Out Churches: Limits on Municipal Zoning Powers By the Religious Land Use and Institutionalized Persons Act*, 37 Real Est. L. J. 163, text accompanying notes 50-92 (2008).

<sup>157</sup> *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1035 (9<sup>th</sup> Cir. 2004).

<sup>158</sup> 396 F.3d 895, 901 (7<sup>th</sup> Cir. 2005).

<sup>159</sup> *Id.* ("That the burden would not be insuperable would not make it insubstantial."); see also *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp. 2d 1203, 1226-27 (2002) (finding substantial burden where church was prevented from developing its property and it would be difficult to find a sufficiently large alternative site in the area).

<sup>160</sup> See *Washington v. Klem*, 497 F.3d 272, (3d Cir. 2007) (finding substantial burden in prisoner context where "follower is forced to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion . . ."); followed by *Albanian Assoc. Fund v. Wayne*, 2007 WL 2904194 (D.N.J. 2007) (applying *Klem* standard in land use context).

margins, a significant number of governmental exercises will actually be stopped. Some of these would doubtless have been net-positive public projects. All we need to show, and all we mean to argue, is that imposing a presumption of illegality when it comes to religious property will hamstring the exercise of eminent domain to some extent, and that doing so is likely to entail costs that tend to be even more significant than as applied to zoning.

2. *Holdouts*. – In reality, the effect of allowing religious groups to resist condemnation is somewhat complex. The traditional justification for eminent domain is to prevent holdouts.<sup>161</sup> In the absence of condemnation, each individual property owner could hold out for some share of the surplus being created by the government project. The extent to which holdouts are a problem depends on a variety of factors. In a competitive market, where the government has its choice of property to acquire, holdouts pose little threat.<sup>162</sup> But in thin markets, where the government needs a particular property, the owner can seek to extract some or all of the surplus being created by the government.<sup>163</sup> Even this situation, though, should not threaten the viability of the project. If the property truly is more valuable to the government than to the property owner, the ability to hold out will have distributional consequences – the government will pay more – but the parties should be able to negotiate a sale.

This all changes as soon as multiple owners have the ability to hold out. Now, each property owner may seek to extract some of the surplus of the government project, and the demands may well exceed the value of the project to the government.<sup>164</sup> If there are enough individual owners, they will have trouble coordinating their negotiations with the government and even agreements that would benefit everyone may not be struck.<sup>165</sup> Now, instead of altering the purchase price of the property, the ability to hold out means the government project may not happen at all. Condemnation is frequently justified as preventing this obviously

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<sup>161</sup> *E.g.* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 3.6-7 (3rd ed. 1986).

<sup>162</sup> Merrill, *supra* note 24, at 77-78 (contrasting “thick” and “thin” markets).

<sup>163</sup> *Id.* at 65 (“[E]minent domain’s purpose is to overcome barriers to voluntary exchange created when a seller of resources is in position to extract economic rents from a buyer.”).

<sup>164</sup> For examples of this phenomenon, see MICHAEL HELLER, *THE GRIDLOCK ECONOMY* (2008).

<sup>165</sup> *E.g.* MANCUR OLSON: *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53-57 (1965). It is partly for this reason that Professors Heller and Hills proposed a mechanism for coordinating negotiations with the government. See Michael Heller & Roderick Hills, *LADs and the Art of Land Assembly*, *Harv. L. Rev.* (2008).

inefficient situation.<sup>166</sup>

Importantly, though, protecting religious groups from condemnation does not appear to raise this latter, more significant concern. The chances are small of any condemnation including so many different religious groups that they are unable to coordinate their negotiations with the government. Moreover, it is useful to distinguish between good faith and strategic holdout value. A religious group may refuse to sell either because the property is genuinely worth more to the group than the government is offering, or strategically to extract more money from the government. The former, again, is not problematic for the efficient allocation of property. If property is worth more to the religious group than the government is willing to pay, the government should not condemn it.

The problem, fundamentally, is distinguishing between good faith and strategic holdouts. If owners could be limited to demanding in compensation only what the property is genuinely worth to them, there would be no need, or at least less need, for eminent domain.<sup>167</sup> Against this backdrop, people may have an intuition that religious groups are less likely than other private actors to engage in strategic bargaining with the government. This, however, seems overly optimistic.

It may well be that some religious groups' public mindedness will lead them to engage in more forthright dealing with the government, but this is not necessarily true. Many religious groups are sophisticated economic actors with their own very private agendas. Professor Garnett's account of the Catholic Church in Chicago depicts a fairly sophisticated political actor, accustomed to bargaining with

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<sup>166</sup> E.g. Richard A. Epstein, *Holdouts, Externalities, and the Single Owners: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 572 (1993); Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 21 (2006); Krier & Serkin, *Public Ruses*, *supra* note 141, at 870. There are, of course, other more normative justifications, too. For example, a number of people have argued that individual property owners should not be entitled to any of the surplus created by public projects because this amounts to an unjustified transfer of wealth from the public to an individual private owner who has done nothing to create the value of the project.

<sup>167</sup> A number of scholarly proposals seek to create this scenario. Heller & Hills, *supra* note 165 (proposing "land assembly districts"); Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982). Even so, there may still be some need for eminent domain if property owners should not necessarily be entitled to be made truly whole. See Katrina Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 251 (2007) (suggesting that just compensation need not compensate for condemnees "subjective perception of their losses").

government.<sup>168</sup> Though the church there seemed motivated only by a desire to protect its local communities, it is not farfetched to think that some religious groups may acquire property precisely for its strategic holdout value. *Faith Temple*, in fact, provides an example in which a church acquired its property after the town had issued a comprehensive plan that recommended acquiring the land, through condemnation if necessary.<sup>169</sup> It is easy enough to imagine some religious groups using their ability to resist condemnation to stop controversial public-private development partnerships. Responding either to the influence of its congregants, or even to its own sense of social justice, a religious group may well seek to acquire property within the footprint of some development in order to prevent it from going forward. Without the power to condemn, one well-situated parcel of religious property could stop an entire development. In fact, it need not even be a parcel; simply an easement or any other interest in real property could serve this protective function, so long as its elimination would work a substantial burden on religious exercise. In other words, even a solitary church or synagogue could stop worthwhile projects from going forward, should RLUIPA extend presumptive protection against eminent domain.

3. *Inverse condemnation.* – Eliminating the government’s ability to condemn religious property has another potential effect, too, one so far overlooked in the RLUIPA literature. It threatens to transform the remedy for inverse condemnation actions from routine damages for reductions in property value to injunctions prohibiting the government from acting at all. Not only is this a potentially significant change in the limits of government regulation, in some situations its results are unintelligible.

Inverse condemnation is a state law action that allows a property owner to recover just compensation for a taking of her property. It is a state law mechanism for alleging a regulatory taking where the government has not affirmatively exercised its power of eminent domain and involves a claim that the government has effectively taken property without compensation.<sup>170</sup> In fact, federal ripeness doctrines require property owners to pursue inverse condemnation or its equivalent in state

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<sup>168</sup> Garnett, *supra* note 24. This sophistication around property is presumably not limited to the Catholic Church, or even to traditional, mainstream religions. Cf. Richard Wellborn, *Church of Scientology Buys More Harlem Property*, THE NEW YORK OBSERVER, Aug. 6, 2007 (describing \$10 million purchase of property in Harlem).

<sup>169</sup> *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D.N.Y. 2005). Afterward, when the town announced its decision to condemn, the church claimed to be surprised. 405 F.Supp.2d at 251-52.

<sup>170</sup> See e.g. 27 Am. Jur. 2d EMINENT DOMAIN § 742 (2008) (defining inverse condemnation).

court before bringing a federal constitutional claim.<sup>171</sup>

Any facts giving rise to a regulatory takings claim can be the basis for an inverse condemnation action. Importantly for RLUIPA analysis, though, is the category of takings claims involving cases of physical invasion by the government, such as airplane overflights, flooding from rivers, or even groundwater contamination.<sup>172</sup> Notice, these are all regulations that do not otherwise appear to fall within RLUIPA's definition of zoning or landmarking regulations but that may nevertheless impose a substantial burden on religious exercise. The constitutionally mandated remedy in these cases is just compensation for a taking of the property, and the owner can bring that claim under inverse condemnation.<sup>173</sup>

What, then, would it mean if government did not have the power to condemn religious property under RLUIPA? Now, instead of an action for damages, inverse condemnation should come with property rule protection.<sup>174</sup> If landing patterns take planes low over a church, the government may have to reroute them. If a municipal power company's dam floods upstream religious lands, the government may have to close the dam. It is unclear what this would even mean for inverse condemnation actions filed after property damage has already occurred. This is not idle conjecture. The Supreme Court's decision mandating the availability of damages awards for regulatory takings came from the flooding of property owned by the First Lutheran Evangelical Church.<sup>175</sup>

Maybe these "invasion" situations would survive RLUIPA's strict scrutiny, but this requires something of a tortured interpretation of the statute. Raised as a claim before the property damage occurred, the Army Corps of Engineers may well be unable to demonstrate that the location of a new dam, for example, is necessary for a compelling government purpose. When flooding occurs and a religious group brings a claim after that fact, what could transform the same underlying conduct so that it now survives strict scrutiny? There is no good answer to this

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<sup>171</sup> Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

<sup>172</sup> Albahary v. Bristol, 826 A.2d 802 (Conn. 2005) (groundwater); McCarran International Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006) (overflights); Keller v. Wilson, 2007 WL 614023 (Tex. App. Ct.) (flooding).

<sup>173</sup> First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) (requiring availability of compensation for regulatory takings).

<sup>174</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (defining property and liability rules).

<sup>175</sup> First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987).

question. Restricting governments' condemnation power over a category of property not only limits outright condemnation but affects much broader regulatory powers, too.

Applying RLUIPA to condemnation would have far-reaching consequences, allowing religious groups to engage in rent-seeking from the government to extract holdout value and some of the surplus created from government actions. It is easy to imagine in many instances that the ability of religious groups to resist condemnation would prevent some government projects from happening at all. While the costs of RLUIPA in limiting local governments' zoning power are already very high, the costs in the context of condemnation are higher still. Comparing zoning and condemnation, there is both much less need for RLUIPA to apply to condemnation, and the costs are higher. RLUIPA should therefore not apply to condemnation.

### III. RLUIPA AS LIABILITY RULE

Concluding that RLUIPA does not apply to condemnation suggests a new way of conceptualizing RLUIPA's protection for religious land uses. So long as local governments retain condemnation as a backstop, RLUIPA does not prevent local governments from zoning religious property so much as it mandates compensation. To put this in terms of Calabresi and Malamed's famous formula, it transforms what appears to be property rule protection for religious groups into a kind of liability rule protection.<sup>176</sup> This, in turn, puts some power back in local governments' hands, recasting zoning immunity into mere resistance.<sup>177</sup>

Surprisingly, this may represent an appealing compromise between the positions of RLUIPA advocates and opponents.<sup>178</sup> Those who argue that religious uses ought to be exempt from all land use regulation will at

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<sup>176</sup> Calabresi & Malamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).; Merrill, *supra* note 24, at 74 (“[E]minent domain provides a mechanism that allows government to convert property rules into liability rules.”).

<sup>177</sup> Professor Ellickson has provided one of the most thoroughgoing discussions of the benefits of liability rule protection for land use regulations. See Ellickson, *supra* note 103, at 410-22.

<sup>178</sup> We do not view this implication of our proposal to be a first-best solution that would necessarily be desirable in an ideal world. Rather, we argue more narrowly that given the durable reality of RLUIPA's rules concerning zoning and landmarking – provisions that are not likely to be repealed under current political conditions – transforming RLUIPA's core zoning provisions from something resembling a property rule into a safeguard that more closely approximates a liability rule blunts some of the most serious criticism of the existing statute while continuing to offer congregations significant protection that would not be available in a world without RLUIPA.

least be able to extract payment when the government acts against sacred landowners, even though officials are rarely required to provide compensation for land-use regulations that apply to other groups. And those who believe that religious entities should be subject to the same land use regulations as other groups will take comfort from the thought that governments retain their power over local land use, subject to payment of compensation. Neither group is likely to be pleased by this solution, but that may be to its credit. This much is at least clear: Inviting the use of condemnation to avoid application of RLUIPA's zoning provisions changes the stakes of land use disputes with religious groups and restores some balance to the interaction between such groups and local governments.<sup>179</sup>

RLUIPA's proponents will undoubtedly worry that allowing condemnation of religious property invites an end-run around RLUIPA's core protection. Allowing the government to zone, so long as it pays, seems to fly in the face of the RLUIPA's prophylactic character.<sup>180</sup> Yet it is important to understand that under our proposal RLUIPA would not exactly protect religious groups with liability rule protection—it would do quite a bit more. To see this, think again of Oregon's Measure 37. That law requires governments in Oregon to pay whenever their land use regulations reduce property values.<sup>181</sup> It truly protects property owners from zoning with a liability rule, requiring compensation for any decrease in market value. Our RLUIPA proposal is different. In order to subject religious property to land use controls, local governments would have to affirmatively condemn the property and pay its full value. It would still prevent local governments from zoning religious groups—unless they can survive strict scrutiny review—but it would allow what amounts to an escape valve. Exercising that option would entail all of the political and economic costs that accompany condemnation.

Even so, RLUIPA proponents may view this as scant protection. If the government can condemn the property, it can then always re-convey

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<sup>179</sup> Ellickson, however, has argued that liability rule protection is inappropriate protection against religious discrimination. *See* Ellickson, *supra* note 103, at 417-18. RLUIPA changes the dynamic that concerns him, however, in which local governments can discriminate with impunity. Here, the liability rule protection we propose is modifying a substantially different background rule, that local governments cannot regulate religious property at all.

<sup>180</sup> This, in fact, is at the heart of the emerging consensus identified in Part I that RLUIPA applies to condemnation only when undertaken to avoid application of RLUIPA's core zoning provisions. *See supra* Part I.

<sup>181</sup> OR. REV. STAT. ANN. § 197.305(1) (West 2007). This is subject to important limitations, the most important of which is that transfers in ownership eliminated claims under Measure 37. *Id.* at 3.

it to secular owners, recapturing the property's fair market value but now subjecting it to land use controls. In other words, the effect to local governments may be to force them to pay only the diminution in value resulting from the zoning, which may be a small price, indeed.<sup>182</sup> Proponents may worry governments will do this all the time.

There are three responses to this concern. First, requiring compensation only for diminution in value is still robust protection, as the response to Oregon's Measure 37 reveals. Forced to pay to zone, most governments simply do not zone.<sup>183</sup> Second, condemnation as a process is more costly than zoning, as discussed above.<sup>184</sup> The administrative costs around condemnation are high, and local governments will not be able to recapture their costs simply by re-conveying condemned property at fair market value.

Finally, local governments may have to pay more than fair market value to acquire religious property.<sup>185</sup> Although compensation is usually pegged to the property's fair market value, churches and places of worship often constitute special use properties that can be subject to their own compensation rules.<sup>186</sup> For such property, the government must often pay an amount adequate to allow the owner to re-create the special use in a different location.<sup>187</sup> In effect, displaced owners of special use property can receive its replacement value, rather than just fair market value.<sup>188</sup> Assuming the government will not be able to capture this

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<sup>182</sup> Notice that the government could not re-convey the property to a religious group or it would find itself in the same bind, unable to enforce land use regulations against the owner of the property because of RLUIPA's zoning provisions.

<sup>183</sup> See Caroline McClaren, *Oregon at a Crossroads: Where Do We Go from Here?*, 36 ENVTL. L. 53, 58 (2006).

<sup>184</sup> See *supra* Part II.B.

<sup>185</sup> See *supra* note 106.

<sup>186</sup> See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 N.W. UNIV. L. REV. 677, 724-25 (2004) (discussing replacement value); *Congregation of Sons of Israel v. State*, 387 N.Y.S.2d 738 (App. Div. 1976) (awarding replacement value for synagogue); see also Saxer, *supra* note 23, at 692-94 (discussing when "substitute facilities" doctrine applies to religious property).

<sup>187</sup> 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12C.01(3)(d) (rev. 3d ed. 2001) (citing *State v. Township of South Hackensack*, 322 A.2d 818 (N.J. 1974)), cited in Saxer, *supra*, at 692 n.79.

<sup>188</sup> *Id.*, at 122-23. In one case study, Professor Garnett found that property owners who negotiated with the government received, on average, 157% of the appraised value of their property in total compensation. *Id.* at 134. A significant proportion of total compensation came in the form of relocation assistance, including compensation for the difference between the condemned property and replacement property. Her study may well not be applicable to religious property, but it does illustrate in a detailed way the mechanisms by which various realities—legal, political, and economic—can drive up the total costs of condemnation.

higher value if it turns around and re-sells the property to a secular buyer, the difference between the property's replacement value to the religious group, and fair market value in a consensual transaction with a secular buyer, is an additional loss to the government that makes condemnation a costly escape valve.

Given all of these costs, RLUIPA opponents may argue that condemnation is no real option at all and does not genuinely minimize the force of RLUIPA's application to zoning. We are inclined to agree. The practical difficulty of condemnation means that most religious land use will still be immune from zoning. Nevertheless, the opportunity to condemn religious property does have some practical consequences that at least diminish the costs of RLUIPA's prophylactic application to zoning.

Most importantly, having condemnation theoretically available may be all it takes to alter the bargaining dynamic between local governments and religious groups. Religious groups can, after all, voluntarily agree to abide by any land use restrictions. In fact, the zoning and planning process is often characterized by ongoing dealing between local governments and property owners to arrive at a regulatory regime that is acceptable to both.<sup>189</sup> Under RLUIPA's zoning provisions, religious groups have little incentive to grant any concessions to local zoning authorities. But with the threat of condemnation in the background, they may at least be brought to the bargaining table.<sup>190</sup>

Negotiations are still heavily skewed to favor the religious group largely because local governments lack flexible threats. Their fallback is condemnation, a kind of land use nuclear option that cannot be exercised, or even threatened, very often with any kind of credibility. This threat of condemnation seemingly raises the stakes of the dispute, and may not be a bargaining strategy conducive to amicable agreements. Nevertheless, RLUIPA is itself something of a nuclear option for religious groups, and one that they have been able to invoke to date with relatively little risk. Putting condemnation on the table may result in

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<sup>189</sup> Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 81 (1994) ("Rather than conceiving of zoning as consisting of legislative-type rules, we should understand zoning as establishing mere presumptions or baseline rules that precipitate and provide a convenient substantive starting point for negotiations between developers and representatives of neighborhood interests."); see also Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983);

<sup>190</sup> In negotiation terms, the opportunity for condemnation changes the best alternative to a negotiated settlement, increasing the value of settlement to the religious group. See ROBERT FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 100 (1991).

religious groups agreeing to more zoning and land use restrictions than they otherwise would. In this land use arms race, the parties may well blink and reach a negotiated compromise.

Conceptualizing condemnation as a backstop or safety valve for local governments when religious groups resist zoning is directly at odds with the emerging consensus over RLUIPA's applicability to eminent domain.<sup>191</sup> As described above, a number of courts and commentators have reasoned that RLUIPA does not apply to eminent domain unless a local government is using condemnation to circumvent RLUIPA's restrictions on zoning religious property.<sup>192</sup> We, however, are inviting local governments to use (or to threaten to use) condemnation in precisely these situations, at least when the stakes for the local government are sufficiently high. This is not an invitation to reintroduce religious discrimination through the back door. Carrying through on the threat will put local governments through the crucible of eminent domain, and we expect it to happen very rarely – so rarely, in fact, that it may be little protection for local governments at all. Still, understanding the relationship between the political economy of eminent domain and the use of liability rule protection to overcome religious zoning holdouts demonstrates that RLUIPA's costs may not be quite as high as many people fear.

#### CONCLUSION

RLUIPA provides religious groups with sweeping protection from local zoning authority. Whether it also applies to eminent domain remains unsettled, with courts and commentators seeking sensible results in difficult cases. Most of these efforts have largely ignored what, in our view, is the most important difference between zoning and condemnation: their relative political and economic costs, and the different opportunities they present for discriminating against religious groups.

While we take no position here on the proportionality of RLUIPA's provisions to the problem of religious discrimination in the zoning context, RLUIPA's best justification is as a prophylactic rule preventing discrimination that would otherwise be hard to detect. Because condemnation provides far less opportunity for hidden discrimination, and because the costs of limiting governments' condemnation power over religiously-owned property are so high,

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<sup>191</sup> See *supra* Part I.

<sup>192</sup> See *id.*

RLUIPA should not apply to condemnation. This interpretation of RLUIPA also provides local governments with an escape hatch to avoid the most severe applications of RLUIPA's zoning provisions. More importantly, too, the background threat of condemnation may restore some power to local governments in negotiating sensible land use policies with religious groups.