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Eminent Domain Actions Targeting First Amendment Land Uses

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EMINENT DOMAIN ACTIONS TARGETING FIRST AMENDMENT LAND USES

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I. INTRODUCTION

When the legislature uses the police power to serve the public interest, the extent of this power is constitutionally limited, but the legislature's declaration of what constitutes the public interest justifying the regulation is deemed "well-nigh conclusive."[1] Therefore, unless the government's use of eminent domain is determined to be unconstitutional, the government can condemn property under a broad definition of acting for the public benefit, so long as it pays just compensation. Since "the power of eminent domain is merely the means to the end,"[2] its exercise is subject to the same constitutional limitations imposed on other government land use regulations and the judiciary has a narrow role in "determining whether that power is being exercised for a public purpose."[3] This Article advocates that courts should distinguish between the government exercising eminent domain and the government using typical land use regulation and should impose stricter constitutional limitations on the eminent domain power.[4]

Because our current "concept of the public welfare is broad and inclusive,"[5] the potential for government abuse of its eminent domain power is great.[6] Under this broad definition, the government may satisfy Fifth

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1. Berman v. Parker, 348 U.S. 26, 32 (1954).

2. *Id.* at 33.

3. *Id.* at 32.

4. *But see* Forty-Second St. Co. v. Koch, 613 F. Supp. 1416, 1422 (S.D.N.Y. 1985) ("There is no reason to treat eminent domain any differently from any other basic governmental power; government may no more effect an unconstitutional purpose through eminent domain than through zoning, injunctions, criminal prosecution, or any other method.").

5. *Berman*, 348 U.S. at 33.

6. *See* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 47 (1992) (arguing that "the constitutional defenses of property and speech rest on the sense that government is a necessary evil . . . [and] its officials . . . are self-interested persons with imperfect knowledge subject to a universal presumption of distrust").

Amendment concerns by paying just compensation for property taken involuntarily from its owners.[7] The government's attempt to eliminate an undesirable, but constitutionally protected, use from its community through condemnation must be carefully scrutinized to ensure that there is not an impermissible motive behind the action. Thus, eminent domain actions targeting land uses protected by the First Amendment should be subject to a heightened scrutiny, greater than the deferential standard given to typical land use regulations.

This Article explores constitutional and statutory limitations on land use regulations where First Amendment rights are implicated.[8] In particular, it will focus on how courts have dealt with eminent domain actions targeting adult business and religious land uses.[9] Although these two types of uses are strange bedfellows, they are the land uses that typically involve First Amendment rights and that tend to generate emotional responses from the community leading to content-based regulation.[10] Issues to be examined in this Article include: eminent domain actions against adult uses protected under the First Amendment; eminent domain actions against religious land uses protected under state and federal constitutions, state Religious Freedom Restoration Act (RFRA) statutes, and the Religious Land Use and Institutionalized Persons Act (RLUIPA);[11] government motivations for targeting protected land uses; and special valuation considerations for just compensation determinations.

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7. U.S. CONST. amend. V.

8. Although this Article does not discuss Equal Protection challenges to eminent domain actions, there is a recent federal court decision regarding a city's denial of a church's application for a permit to hold worship meetings. The court in that case determined that strict scrutiny should be applied to the city's classification between cultural uses and religious uses and found that, even under a rational basis review, the city "failed to offer a rational explanation for treating [the church] differently from similarly situated institutions such as cultural and membership organizations." Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 979 (N.D. Ill. 2003).

9. *See* Father Flanagan's Boys' Home v. Millard Sch. Dist., 242 N.W.2d 637, 640 (Neb. 1976) ("As a general rule property used for religious purposes or for private school purposes is subject to condemnation for public use.") (citing 26 AM. JUR. 2D *Eminent Domain* § 78 (1975); 29A C.J.S. *Eminent Domain* § 65 (1975)).

10. Signs and other types of commercial speech, such as news racks, also involve First Amendment rights; however the purpose of regulation in these instances is generally based purely on aesthetics and not at an effort to suppress the content. *See generally* Robert A. Sedler, *The First Amendment and Land Use: An Overview, in* PROTECTING FREE SPEECH AND EXPRESSION: THE FIRST AMENDMENT AND LAND USE LAW 1 (Daniel R. Mandelker & Rebecca L. Rubin eds., 2001).

11. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2000).

II. EMINENT DOMAIN ACTIONS IMPACTING FIRST AMENDMENT FREE SPEECH RIGHTS

Government land use regulations that impact protected speech are subject to either intermediate scrutiny as a time, place, or manner regulation or to strict scrutiny, if the regulation is content-based. Challenged land use regulations typically affect either adult business uses or commercial signage.[12] An intermediate scrutiny test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*[13] applies to the constitutionality of commercial billboard regulation and other commercial signs,[14] while adult business regulations are subject to intermediate scrutiny under the "secondary effects" theory developed by the United States Supreme Court in *Young v. American Mini Theatres, Inc.*,[15] and *City of Renton v. Playtime Theatres, Inc.*[16] The secondary effects theory treats land use regulations specifically restricting adult uses as content-neutral time, place, and matter regulations that are subject to intermediate review. They are considered content-neutral because the government purports to address the adverse secondary effects of these uses, such as prostitution and assault, and *not* to suppress the protected speech itself.[17]

The secondary effects theory subjects regulations that target adult businesses based on content to a lower level of judicial scrutiny than strict scrutiny which would otherwise be applied to such content-based speech distinctions. Thus, when the government restricts protected speech based on its content by regulating property rights, the level of scrutiny accorded to First Amendment rights is lowered.[18] However, this secondary effects doctrine may be in jeopardy following Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*[19] Although Justice Kennedy supports

12. DANIEL R. MANDELKER, LAND USE LAW § 2.50, at 2-59 (5th ed. 2003).

13. 447 U.S. 557, 564 (1980).

14. *See* MANDELKER, *supra* note 12, § 2.50, at 2-59 ("Under this test, if the speech is protected, the Court will uphold a land use regulation against free speech objections if (1) the governmental interest is substantial; (2) the regulation directly advances that governmental interest; and (3) the regulation is not more extensive than necessary to serve that interest.").

15. 427 U.S. 50 (1976).

16. 475 U.S. 41 (1986).

17. *See* MANDELKER, *supra* note 12, §§ 5.58-5.63. *But see* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (noting that the secondary effects theory is "something of a fiction").

18. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 702, 705 (1986) (noting that First Amendment scrutiny will be applied to "a statute regulating conduct which has the incidental effect of burdening the expression of a particular political opinion" but that "neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities").

19. 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

applying an intermediate level of scrutiny to some adult use regulations, his view that the secondary effects doctrine is a fiction that should be discarded is one approach to resolving the conflict between the police power and First Amendment rights.[20]

In *Alameda Books*, Justice Kennedy agreed that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny."[21] However, he also "viewed the regulation of adult entertainment businesses to be content-related, because the businesses to be regulated are identified by the content of their speech."[22] Judge Canby, dissenting in *Center for Fair Public Policy v. Maricopa County*,[23] noted, as did the majority, that Justice Kennedy's opinion is the focal point of the *Alameda Books* decision since "there was no majority opinion and Justice Kennedy's concurring opinion was the one that supported the Court's judgment on the narrowest grounds."[24] According to Justice Kennedy's opinion in *Alameda Books*, "[a] city may not assert that it will reduce secondary effects by reducing speech in the same proportion."[25] Thus, Judge Canby in *Center for Fair Public Policy*, dissented from the majority opinion, which upheld restrictions on the hours of operation of sexually-oriented businesses using a secondary effects argument to justify intermediate scrutiny under *Renton*.[26] Judge Canby concluded that the majority's holding was inconsistent with the *Alameda Books* decision and that Arizona's regulation of adult businesses' closing hours should have been invalidated as an attempt to "'attack secondary effects indirectly by attacking speech'"[27] since "speech is simply stopped during the hours of forced closure."[28]

Another approach to resolving the conflict between the police power and protected speech, besides abandoning the secondary effects doctrine, is to increase the level of scrutiny applied to government actions impacting all private property rights. Professor Richard Epstein suggests that heightened scrutiny for property rights, whether or not the use involves free speech, is

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20. *Id.* (Kennedy, J., concurring).

21. *Id.* (Kennedy, J., concurring).

22. Ctr. For Fair Pub. Policy v. Maricopa County, 336 F.3d 1153, 1171 (9th Cir. 2003) (Canby, J., dissenting) (citing *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring)).

23. 336 F.3d 1153 (9th Cir. 2003).

24. *Id.* at 1171 (Canby, J., dissenting).

25. *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring).

26. *Ctr. For Fair Public Policy*, 336 F.3d at 1166-70 (applying three-part test from City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986)).

27. *Id.* at 1172 (Canby, J., dissenting) (quoting *Alameda Books*, 535 U.S. at 449 (Kennedy, J. concurring)).

28. *Id.* at 1173 (Canby, J., dissenting).

justified because distrust of the government is a common rationale for both speech and takings law.[29]

Epstein explains that the just compensation component of takings jurisprudence serves as a check on legislative abuse because it ensures that there is a net social gain by requiring compensation, and it avoids judicial oversight of legislative action by "secur[ing] justice to the individual, [while] combat[ing] the untrustworthiness of government officials."[30] However, Epstein appears to presume that First Amendment uses will be protected against abuse, even if the government is prepared to offer compensation. Using an eminent domain example, Professor Epstein observes that the government is "flatly forbidden" under the First Amendment from taking possession of the New York Times printing presses even if it pays just compensation.[31] This high level of protection guards against "the real risk that the government will condemn newspapers simply to suppress criticism."[32] However, adult uses, which also involve protected First Amendment speech, have not fared as well against eminent domain actions as Epstein's example might indicate, most likely because of the secondary effects doctrine.[33]

Similar to the way in which just compensation is supposed to combat legislative abuse under takings jurisprudence, Professor Epstein argues that the First Amendment controls legislative abuse by using judicial review of legislative action to protect against the risk that bad legislators "will stifle criticism, rig debate, and disseminate falsehoods to achieve their ends."[34]

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29. Epstein, *supra* note 6, at 50.

30. *Id.* at 52.

31. *Id.* at 64 (stating that "[i]f the government needs a printing press, it knows where to buy it; so too with raw land"); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 137 (1985) ("Thus is it an open and shut issue that the First Amendment effectively prevents the United States from nationalizing the *New York Times*, even if it is prepared to operate it as a government newspaper.").

32. Epstein, *supra* note 6, at 64; *see also* Time Warner Entm't Co. v. FCC, 105 F.3d 723, 728 (D.C. Cir. 1997) ("We would see rather serious First Amendment problems if the government used its power of eminent domain to become the only lawful supplier of newsprint and then sold the newsprint only to licensed persons, issuing the licenses only to persons that promised to use the newsprint for papers satisfying government-defined rules of content.").

33. *See, e.g.*, *In re* G. & A. Books, Inc., 770 F.2d 288, 291 (2d Cir. 1985) (holding that condemnation of buildings housing adult businesses "did not constitute an illegal prior restraint and that the Project plan did not classify speech on the basis of content, or burden it with overly restrictive regulations"); Forty-Second St. Co. v. Koch, 613 F. Supp. 1416, 1424 (S.D.N.Y. 1985) (concluding that condemnation of adult theaters is constitutional under First Amendment tests); *In re* Condemnation by Urban Redevelopment Auth., 823 A.2d 1086, 1096 (Pa. Commw. Ct. 2003) (concluding that condemnation of adult theater is constitutional under the intermediate scrutiny test of United States v. O'Brien, 391 U.S. 367 (1968)).

34. Epstein, *supra* note 6, at 54.

Epstein laments the lack of protection for private property rights and economic liberties and warns against proposals to "reduce the protection of freedom of speech to the paltry level now afforded economic liberties."[35] Instead, he proposes that the level of protection for property rights be increased to the level of free speech protection, which would provide a better legal response to cases involving adult entertainment, where police power invoked to protect social mores collides with free speech.[36]

Epstein's approach reconciles property rights and First Amendment protection by imposing a heavy burden on the government to be content-neutral in its regulatory approach in both situations.[37] While Epstein's suggestion to apply heightened scrutiny to all property rights might guard against improper governmental motivation, it is not likely to be followed in the near future. It is much more likely that the secondary effects doctrine will ultimately be discarded, and properly so, and that any attempt to regulate protected uses or condemn property for the purpose of suppressing speech will be subject to strict scrutiny.

Nevertheless, under current First Amendment and eminent domain jurisprudence, local communities wishing to shut down undesirable adult businesses can use redevelopment funds to condemn a "blighted" area and turn the condemned property over to a development company to revitalize the neighborhood free of such undesirable uses. For example, in *In re G. & A. Books, Inc.*,[38] New York, as part of a rehabilitation project for Times Square, proposed to condemn private buildings in which adult retail stores were operating.[39] The property owners alleged that the eminent domain action was an illegal prior restraint and that it violated the First and Fourteenth Amendments.[40] Finding that the project was "not aimed at suppression of speech but at eliminating community blight," the court determined that it was content-neutral with only an incidental effect on speech.[41] The court upheld the action because it satisfied the four-part test from *United States v. O'Brien*,[42] as applied in *Young v. American Mini Theatres*,[43] which requires that:

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35. *Id.* at 55 (discussing Owen Fiss's proposal which "sadly underestimates the capacity for legislative abuse that lies in both these areas").

36. *Id.* at 77; *see also* EPSTEIN, *supra* note 31, at 137 (agreeing that the First Amendment has a dominant place, but arguing that "[i]t is still possible to show that the takings clause should be more resistant to encroachment by the police power of the state").

37. Epstein, *supra* note 6, at 81 (noting that the current standard for property rights allows the government "to select certain businesses or firms for regulation" and that this power is "easily abused by the political system").

38. 770 F.2d 288 (2d Cir. 1985).

39. *Id.* at 290.

40. *Id.* at 290-91.

41. *Id.* at 296.

42. 391 U.S. 367, 378-80 (1968).

43. 427 U.S. 50, 79-81 (1976).

> (1) the action is within the constitutional power of the government; (2) the action furthers important or substantial government interests; (3) the interests furthered are unrelated to the suppression of free speech; and (4) the restriction on First Amendment freedoms is no greater than is essential to the furtherance of the government interests.[44]

Although there was evidence "that the suppression of sex-related businesses may have been at least *a* motivating factor in designing the Project,"[45] the court found that this subjective motivation to suppress speech did not make the action unconstitutional since "important governmental interests unrelated to suppression of speech exist[ed], independent of any desire to suppress speech."[46]

Another portion of the rehabilitation project for Times Square was similarly challenged in *Forty-Second Street Co. v. Koch*[47] where the city's plan called for the condemnation of adult movie theaters for conversion to live theater and other uses.[48] Relying on the *G. & A. Books* decision, the court upheld the eminent domain action against claims by the property owners that their theaters were "being singled out for condemnation because defendants object to the content of the movies they exhibit, which include low-budget martial arts and horror movies along with some mainstream Hollywood fare and sexually explicit films."[49] Although the court refused to give broad deference to the government's land use regulations in view of the constitutional allegations,[50] it determined that the condemnation was not a prior restraint and that it satisfied the four-part *O'Brien* test as stated in *G. & A. Books.*[51] The *Forty-Second Street* court similarly concluded that "the condemnation serves important governmental interests unrelated to the suppression of speech."[52]

Relying on both the *G. & A. Books* and *Forty-Second Street* decisions, a Pennsylvania court in *In re Condemnation by Urban Redevelopment Authority*[53] recently refused to apply strict scrutiny to a challenged eminent domain action against an adult theater building because it determined that the action

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44. *G. & A. Books, Inc.*, 770 F.2d at 296.
45. *Id.* at 297.
46. *Id.*
47. 613 F. Supp. 1416 (S.D.N.Y. 1985).
48. *Id.* at 1419-20.
49. *Id.* at 1420.
50. *Id.* at 1422.
51. *Id.* at 1424 (concluding "for reasons substantially similar to those advanced in *G. & A. Books*, that the instant condemnation passes constitutional muster under both First Amendment tests").
52. *Id.* at 1428.
53. 823 A.2d 1086 (Pa. Commw. Ct. 2003).

was not content-based.[54] Instead, the court applied the intermediate scrutiny test of *O'Brien,* since the redevelopment agency "articulated several bases for acquiring the theater unrelated to content of speech,"[55] and found that the action passed constitutional muster.[56] As in some of the other cases, the condemnee pointed to statements made by city officials during the planning process, which indicated that the adult theater added to the negative image of the targeted redevelopment area.[57] However, these hostile comments were not sufficient to justify applying strict scrutiny to a project addressing other primary public purposes.[58]

Although these three decisions indicate a willingness to give heightened scrutiny, i.e. the intermediate scrutiny test from *O'Brien*, this level of scrutiny is not a sufficient protection against government abuse of its eminent domain power. While land use restrictions on adult entertainment have been subject to intermediate scrutiny, these businesses have been targeted based on content. The United States Supreme Court has justified applying a content-neutral level of scrutiny to such restrictions by explaining that the government actions are not aimed at content, but instead target the negative secondary effects of these adult uses, such as crime.[59] However, Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*,[60] may signal the demise of the secondary effects doctrine since "[t]hese ordinances are content based, and we should call them so."[61]

Eminent domain will likely be subject to intermediate scrutiny as a time, place, or manner regulation if the court determines that it is the blight resulting from such undesirable uses that the condemnation is targeting, rather than the undesirable use itself. But at what point does the government's abuse of its eminent domain power require strict scrutiny to prevent it from suppressing protected adult entertainment expression? In each of the three cases discussed above, there was evidence of the government's desire to suppress the undesirable, but protected, expression. And, in each case, the court found other legitimate public purposes, such as eliminating blight, which justified the discriminatory eminent domain actions.[62] This approach does not give

54. *Id.* at 1095.
55. *Id.* at 1095-96.
56. *Id.* at 1096.
57. *Id.* at 1095.
58. *Id.*
59. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277 (2000); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).
60. 535 U.S. 425 (2002).
61. *Id.* at 448 (Kennedy, J., concurring).
62. Part IV will explore the discriminatory motive issue in more depth, *see infra* notes 225-74 and accompanying text.

proper protection against the risk of government abuse.[63] If the government would not be allowed to condemn a printing press to suppress political criticism,[64] how can it be allowed to suppress protected adult entertainment expression by shutting down these businesses using eminent domain? Unless the Court determines that different levels of protection should be accorded to different types of protected speech, it will be difficult to draw the line between which condemnations will be allowed to suppress content and which ones will be forbidden as a suppression of speech based on content.

In addition to alleging that Free Exercise rights have been violated, some religious institutions have challenged local government regulation as Free Speech violations, but most such challenges have been unsuccessful.[65] However, RLUIPA contains a special provision, Section (b)(3), which states that "[n]o 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."[66] Legislative history indicates that this provision "enforces the Free Speech Clause as interpreted in *Schad v. Borough of Mount Ephraim*, which held that a municipality cannot entirely exclude a category of first amendment activity."[67]

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63. *See, e.g.*, Patrick S. Davies et al., Comment, *Constitutional Law – G. & A. Books, Inc. v. Stern: Relevance of Improper Motive to First Amendment Incidental Infringement Claims*, 61 NOTRE DAME L. REV. 272, 282 (1986) (noting that although the *G. & A. Books* case was correctly decided because of the great government interest in the rehabilitation project, "[t]he court's refusal to address the government's mixed motivation . . . sets precedent which results in inadequately protecting first amendment rights in future condemnation cases").

64. *See supra* notes 30-32 and accompanying text (discussing Epstein's *New York Times* example).

65. Petra Presbyterian Church v. Village of Northbrook, No. 03 C 1936, 2003 WL 22048089, at *9 (N.D. Ill. Aug. 29, 2003) (noting that "it is not reasonably likely that Petra's free speech challenge will succeed" since there is no evidence that zoning code's purpose was to restrict religious speech); Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1204-05 (D. Wyo. 2002) (finding no evidence to conclude that church's free speech or association rights were violated by a content-neutral zoning regulation impacting the church's operation of a church school); C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 915 (N.D. Ill. 2001), *aff'd*, 342 F.3d 752 (7th Cir. 2003) (observing that "the operation of a house of worship does not equate with 'religious speech,' any more than the operation of a shoe store equates with commercial speech"). *But see* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 982-84 (N.D. Ill. 2003) (applying an intermediate level of scrutiny under the secondary effects doctrine to a zoning ordinance prohibiting churches, but not cultural uses, and concluding that the church's free speech and assembly rights were violated).

66. 42 U.S.C. § 2000cc(b)(3) (2000).

67. 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) (citing Schad v. Borough of Mount Ephraim, 425 U.S. 61 (1981)).

The court in *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*[68] addressed an RLUIPA challenge by the church against the city's zoning ordinance forbidding worship services by religious institutions in the district, but noted that there was some confusion over "whether Section (b) is to be read as a subset of the general prohibition in Section (a) against substantially burdening religious exercise, or if it is an independent provision."[69] Relying on legislative history and the United States' brief in support of RLUIPA's constitutionality, the court concluded that Section (b) should be construed as a subset of Section (a), and that Vineyard did not prove a substantial burden on religion.[70] Thus, whenever a municipality attempts to exclude or limit a religious institution by using an eminent domain action to acquire property owned by the institution, the action can be challenged under this RLUIPA provision as interference with Free Speech as long as the challenger proves that religious exercise has been substantially burdened.

Professor Epstein's proposal to increase judicial scrutiny over all government restrictions on property to the level given First Amendment rights is one way to deal with potential government abuse of power. However, at a minimum, eminent domain actions that target First Amendment uses and are accompanied by evidence of improper government motives should be subject to strict scrutiny rather than the intermediate scrutiny currently used under the secondary effects doctrine. Additionally, if RLUIPA survives constitutional challenge, it will provide a strict scrutiny review standard under Section 2(b)(3) for any eminent domain action used to exclude or unreasonably limit religious assemblies in a particular jurisdiction, provided the action substantially burdens free exercise.

III. FREE EXERCISE & ESTABLISHMENT CHALLENGES TO EMINENT DOMAIN ACTIONS

The First Amendment protects religious rights through the free exercise clause and the establishment clause. The tension between these clauses is a source of difficulty for government regulation since "[g]overnment actions to facilitate free exercise might be challenged as impermissible establishments, and government efforts to refrain from establishing religion might be objected

68. 250 F. Supp. 2d 961 (N.D. Ill. 2003).

69. *Id.* at 992; *see also* San Jose Christian Coll. v. City of Morgan Hill, No. C091-20857, 2001 WL 1862224, at *6 (N.D. Cal. Nov 14, 2001) (noting that there was no unreasonable limitation under § 2000cc(b)(3) because "the PUD zoning laws on their face permit all uses, and hence there can be no facial attack on the PUD zoning as discriminating against religious institutions or assemblies").

70. *Vineyard*, 250 F. Supp. 2d at 992-93 (finding that ordinance did not violate RLUIPA and therefore RLUIPA's constitutionality need not be addressed).

to as denying the free exercise of religion."[71] The Supreme Court has had trouble identifying whether a particular restriction constitutes a "law respecting an establishment of religion"[72] because of "the provision's inherent tension and potential for self-contradiction: on the one hand, it prevents the establishment of religion and, on the other, ensures the free exercise of religion."[73] Although this tension may appear in some of the cases discussed, this Article will analyze eminent domain actions involving religious uses by treating these clauses separately, as much as possible.

A. Free Exercise Challenges

The free exercise clause limits government regulation of religious beliefs, but some practices may be subject to restriction, such as when religious exercise violates criminal law.[74] The standard of review for evaluating government restrictions on religious exercise has varied over the years. Between 1960 and 1990, the United States Supreme Court followed a strict scrutiny standard, which required that the government have a compelling state interest to support any law substantially burdening free exercise.[75] However, in 1990, the Court's decision in *Employment Division v. Smith*[76] established a new standard of review for free exercise claims under which "neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion."[77]

Subsequently, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)[78] "to negate the *Smith* test and require strict scrutiny for free exercise clause claims."[79] The Court held RFRA to be unconstitutional four years later in *City of Boerne v. Flores,*[80]as an invalid exercise of Congressional power,[81] but the Act was soon amended by Congress to apply to states as the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[82] Congress enacted RLUIPA to require that strict scrutiny be

71. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.1, at 1140 (2d ed. 2002).

72. U.S. CONST. amend. I.

73. Laurie Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U. L. REV. 767, 797 (1984).

74. CHEMERINSKY, *supra* note 71, § 12.3.2.1, at 1203.

75. *Id.* § 12.3.2.2, at 1206 (discussing Sherbert v. Verner, 374 U.S. 398 (1963)).

76. 494 U.S. 872 (1990).

77. CHEMERINSKY, *supra* note 71, § 12.3.2.3, at 1213.

78. 42 U.S.C. § 2000bb (2000).

79. CHEMERINSKY, *supra* note 71, § 12.3.2.4, at 1216.

80. 521 U.S. 507 (1997).

81. *Id.* at 536.

82. 42 U.S.C. § 2000cc (2000); *see also* Prater v. City of Burnside, 289 F.3d 417, 433 (6th Cir. 2002) (construing "[c]hurch's RLUIPA claim as an extension of its RFRA claim" because RLUIPA amended RFRA).

applied to state and local land use regulations burdening free exercise and to institutionalized persons' claims of religious freedom infringements.[83] Because review standards may vary under state and federal law due to the presence or absence of a state RFRA statute, the application of RFRA to federal actions, and differing judicial opinions as to the constitutionality of RLUIPA, eminent domain actions impacting free exercise will be analyzed under RLUIPA, state constitutional and statutory law, and the *Smith* standard.[84]

1. Eminent Domain Actions Under RLUIPA

RLUIPA requires that strict scrutiny be applied when a land use restriction is challenged as unconstitutionally violating free exercise. It specifically prohibits

> any government agency from imposing or implementing: a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[85]

Because RLUIPA is a relatively new statute, the case law involving land use is limited[86] and there is only one published opinion involving an eminent

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83. 42 U.S.C. § 2000cc(a)(1).

84. This Article will not address potential claims under the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2000). For more information about Native American religious freedom, see John Celichowski, *A Rough and Narrow Path: Preserving Native American Religious Liberty in the* Smith *Era*, 25 AM. INDIAN L. REV. 1 (2000-2001).

85. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1220 (C.D. Cal. 2002) (citing 42 U.S.C. § 2000cc(a)(1)).

86. *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, No. 03-13858, 2004 WL 842527 (11th Cir. Apr. 21, 2004) (holding that a city's action excluding religious assemblies from the business district violated RLUIPA's "equal terms" provision and that RLUIPA is a constitutional exercise of power under Section 5 of the 14th Amendment and does not violate the Establishment Clause or 10th Amendment); Murphy v. Zoning Comm'n, 289 F. Supp. 2d 87, 126 (D. Conn. 2003) (holding that RLUIPA is constitutional and rejecting Enforcement and Establishment Clause challenges); Westchester Day Sch. v. Village of Mamaroneck, 280 F. Supp. 2d 230, 235-39 (S.D.N.Y. 2003) (holding that RLUIPA is constitutional and rejecting Enforcement, Commerce, and Establishment Clause, and Tenth Amendment challenges); Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1089-91 (C.D. Cal. 2003) (holding that "substantial burden" provision of land use section exceeded the powers of Congress under the Enforcement Clause and was, therefore, unconstitu-

domain action.[87] The land use cases decided under RLUIPA thus far have generally followed the same analytical approach used for RFRA before its invalidation as applied to state and local regulation. Although it is likely that RLUIPA will be similarly challenged as unconstitutional, this Article assumes its constitutionality and will not address the issue of whether it will withstand constitutional scrutiny. It is notable, however, that during its enactment, the U.S. Department of Justice strongly supported the Act as constitutional under Supreme Court precedent.[88] Several federal courts have either presumed the Act to be constitutional or have specifically upheld its constitutionality as applied to land use cases,[89] and this topic has been the subject of much commentary since RLUIPA was enacted.[90] However, at least one re-

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tional); *Cottonwood*, 218 F. Supp. 2d at 1221 n.7 (noting that RLUIPA likely "avoided the flaws of its predecessor RFRA" and is constitutionally within Congress's authority); Freedom Baptist Church v. Township of Middleton, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (holding that RLUIPA was constitutional and rejecting challenges to the Enforcement Clause, Commerce Clause, and Establishment Clause).

87. *See Cottonwood*, 218 F. Supp. 2d at 1209 (granting preliminary injunction in eminent domain action against a religious use).

88. 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000).

89. Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1192 (D. Wyo. 2002) (presuming the Act to be constitutional); *Freedom Baptist Church*, 204 F. Supp. 2d at 874 (concluding "that the RLUIPA's land use provisions are constitutional on their face as applied to states and municipalities"); *Cottonwood*, 218 F. Supp. 2d at 1221 n.7 (observing that "RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority"). See also the RLUIPA cases involving prisoners' rights such as Charles v. Verhagen, No. 02-3572, 2003 WL 22455960 (7th Cir. Oct. 30, 2003) (upholding RLUIPA under Commerce Clause, 10th Amendment, Establishment Clause, and Spending Clause); Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) (RLUIPA does not violate Establishment Clause); Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003) (RLUIPA portion that applies to institutional persons violates the Establishment Clause); Mayweathers v. Newland, 314 F.3d 1062, 1066 (9th Cir. 2002) (upholding RLUIPA as a constitutional exercise of Congress's spending power), *cert. denied*, 124 S. Ct. 66 (2003).

90. For some articles addressing the RLUIPA's constitutionality, see Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003); Shawn Jensvold, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1 (2001); Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903 (2001); Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 WHITTIER L. REV. 493 (2002); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001); Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitu-*

cent decision has held that the RLUIPA provisions addressing land use regulation are unconstitutional as outside congressional authority.[91] In *Elsinore Christian Center v. City of Lake Elsinore*,[92] the court concluded that Congress exceeded its power under Section 5 of the Fourteenth Amendment by broadly redefining what the Supreme Court had decided constitutes religious exercise.[93] Additionally, the *Elsinore* court concluded that "[b]ecause Section 2(a) of RLUIPA regulates the way States regulate private parties, Congress's Commerce Clause authority is an inappropriate basis upon which to predicate its enactment."[94]

In the only published case involving an eminent domain action and RLUIPA,[95] the court in *Cottonwood Christian Center v. Cypress Redevelopment Agency*[96] applied a strict scrutiny standard of review and preliminarily enjoined the City of Cypress from pursuing an eminent domain action against property owned by the church.[97] The Cottonwood Christian Center (Cottonwood) owned 18 acres of property in Cypress, California on which it wanted to construct a large church facility.[98] The City of Cypress (Cypress) wanted the property to be used instead for a discount retail center such as Costco, which would bring in additional tax revenue not available from a religious

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tional, 23 U. HAW. L. REV. 479 (2001); Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002); Kris Banvard, Comment, *Exercise in Frustration? A New Attempt by Congress to Restore Strict Scrutiny to Governmental Burdens on Religious Practice*, 31 CAP. U. L. REV. 279 (2003); Joshua R. Geller, Note, *The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of the Fourteenth Amendment*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 561 (2002-2003); Heather Guidry, Comment, *If at First You Don't Succeed . . .: Can the Commerce and Spending Clauses Support Congress's Latest Attempt at Religious Freedom Legislation?*, 32 CUMB. L. REV. 419 (2001-2002); Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress' New Twist on "Speak Softly and Carry a Big Stick,"* 34 URB. LAW. 829 (2002); Evan M. Shapiro, Comment, *The Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause*, 76 WASH. L. REV. 1255 (2001); Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001).

91. *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1102 (holding that 42 U.S.C. § 2000cc(a)(2)(C) is unconstitutional).

92. 291 F. Supp. 2d 1083 (C.D. Cal. 2003).

93. *Id.* at 1101-02.

94. *Id.* at 1104.

95. *Cf.* Prater v. City of Burnside, 289 F.3d 417, 425 (6th Cir. 2002) (discussing eminent domain in relation to a Takings Clause challenge).

96. 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

97. *Id.* at 1232.

98. *Id.* at 1209.

nonprofit use.[99] Cottonwood challenged several actions taken by Cypress as violating both the California and U.S. Constitutions, among other claims.[100] The court analyzed these claims first under RLUIPA and then under the *Smith* standard.[101]

a. RLUIPA Jurisdiction

Claimants challenging state or local regulations as unconstitutional violations of free exercise must establish a basis for jurisdiction before asserting an RLUIPA claim.[102] By its terms, RLUIPA applies only in a case where:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[103]

The first two ways to establish jurisdiction as described in subsections (A) and (B) are not as likely to be used in a land use regulation challenge as the third approach. First, it is unlikely that a claimant asserting that the government has substantially burdened its religious exercise will be able to show that the program or activity receives federal financial assistance since such assistance would likely generate an Establishment Clause issue.[104] Second, although Commerce Clause jurisdiction may be asserted because "[c]hurch activities have a significant impact on interstate commerce,"[105] the third basis

99. *Id.* at 1225. Cottonwood and Cypress eventually settled the litigation when Cottonwood agreed to sell its land to Cypress in exchange for a profitable price and the right to buy and build on a nearby golf course. However, this agreed upon building site threatens to generate traffic concerns for the adjacent municipality of Los Alamitos, which has filed a lawsuit against Cypress. David Haldane, *Orange County; Traffic Fears Threaten Cottonwood Agreement*, L.A. TIMES, June 16, 2004, at B3.

100. *Cottonwood*, 218 F. Supp. 2d at 1215.

101. *Id.* at 1219-25.

102. Prater v. City of Burnside, 289 F.3d 417, 433 (6th Cir. 2002).

103. *Id.* (quoting 42 U.S.C. § 2000cc(a)(2)(A)-(C) (2000)).

104. CHEMERINSKY, *supra* note 71, § 12.2.6, at 1182-1200.

105. *Cottonwood*, 218 F. Supp. 2d at 1221-22 (citing United States v. Grassie, 237 F.3d 1199, 1210 n.7 (10th Cir. 2001)); *see also* DiLaura v. Ann Arbor Charter Town-

for RLUIPA jurisdiction appears to have been specifically intended to apply to land use regulations.

If subsection (C) is invoked to establish RLUIPA jurisdiction, the government action must be a "land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments."[106] RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land."[107] In the *Cottonwood Christian Center* case, Cypress unsuccessfully argued that the eminent domain action was not a land use regulation within the purview of RLUIPA.[108] The court determined that condemnation proceedings fall within the definition of "land use regulation" and, in any event, the redevelopment agency's authority to condemn property to combat blight was based on a zoning system developed by Cypress.[109] The court's conclusory determination that an eminent domain action is a "land use regulation" as defined under RLUIPA seems reasonable. However, this particular issue is worth closer examination as it may impact the validity of future eminent domain actions taken against religious uses.

As mentioned above, RLUIPA's definition of land use regulation means:

> a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.[110]

An earlier version of the bill passed by the House, but not the Senate, defined land use regulation as "a law or decision by a government that limits or restricts a private person's uses or development of land."[111]

One could argue that an eminent domain action is *not* a zoning or landmarking law, but rather a government *decision* not covered by the definition contained in the final version of the bill. However, when the final version was narrowed in scope to address concerns about the potential for civil rights

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ship, No. 00-1846, 2002 WL 273774, at *8 (6th Cir. Feb. 25, 2002) (finding RLUIPA jurisdiction under 42 U.S.C. § 2000cc(a)(2)(B) "because the DiLauras wish to run a retreat house; guests could certainly travel in interstate commerce to attend their retreat and sleep at the house").

106. 42 U.S.C. § 2000cc(a)(2)(C).

107. 42 U.S.C. § 2000cc-5(5).

108. *Cottonwood*, 218 F. Supp. 2d at 1222 n.9.

109. *Id.*

110. 42 U.S.C. § 2000cc-5(5).

111. 145 CONG. REC. H5580-02, H5597 (daily ed. July 15, 1999) (statement of Rep. Nadler).

violations against gays, lesbians, and others in housing and employment decisions, there is no indication that Congress changed the definition language in order to restrict the type of land use decision subject to RLUIPA.[112] Thus, this parsing of language to exclude eminent domain actions from the reach of RLUIPA's land use regulation definition would probably be unsuccessful.

As an example of how broadly courts have interpreted what constitutes a land use regulation, the court in *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*,[113] determined that a city's refusal to amend a zoning ordinance to allow religious institutions, in addition to other permitted and special uses such as cultural facilities, implicated land use regulation and "was an act pursuant to the zoning law" giving the court jurisdiction under RLUIPA Section 2000cc(a)(2)(C).[114] The court in *Hale O Kaula Church v. Maui Planning Commission*[115] also defined land use regulation broadly to include a state land use classification system even though zoning and land use regulation is typically a local government function.[116]

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." For example, the court in *Cottonwood* determined that "[t]he Redevelopment Agency's authority to exercise eminent domain to contravene blight, as set forth in the Resolution of Necessity, is based on a zoning system developed by the City."[117] However, in *Prater v. City of Burnside*[118] the Sixth Circuit held that RLUIPA was not applicable because the city's decision whether to develop or close a roadway owned by the city was not a zoning or landmarking law restricting a religious organization's property, even though the decision impacted the development of church-owned property.[119]

In *Prater*, the City of Burnside (City) owned a roadway located between two lots belonging to the Main Street Baptist Church (Church).[120] The City developed this roadway through the Church's property to allow access to the Burnside Cemetery, operated by the Burnside Masonic Lodge.[121] The City rejected the Church's suggestion to close the roadway and develop an alterna-

112. *See* 146 CONG. REC. S7774, S7778 (daily ed. July 27, 2000) (statement of Sen. Reid) ("[T]he legislation stalled in the Senate when legitimate concerns were raised that RLPA, as drafted, would supersede certain civil rights, particularly in areas relating to employment and housing.").

113. 250 F. Supp. 2d 961 (N.D. Ill. 2003).

114. *Id.* at 990.

115. 229 F. Supp. 2d 1056 (D. Haw. 2002).

116. *Id.* at 1070.

117. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002).

118. 289 F.3d 417 (6th Cir. 2002).

119. *Id.* at 434.

120. *Id.* at 422.

121. *Id.*

tive access route[122] and instead extended the road, which precluded the Church from expanding its facilities on its bisected lots.[123] The Church challenged the City's decision to extend the road as an RLUIPA violation because it "substantially burdened its religious exercise."[124] However, the court found that because the City owned the roadway at issue, it had a right to choose to develop it.[125] Thus, the court found that the city's decision to develop was "not based upon any zoning or landmarking law restricting the development or use of the Church's own private property."[126]

As the *Cottonwood* decision indicates, any eminent domain action can likely be traced to a local government's comprehensive plan or zoning system and can thus be considered the government's application of a zoning law or landmarking law, subject to RLUIPA. Additionally, express statutory language requires that the Act be construed "in favor of a broad protection of religious exercise."[127] Such a broad construction would certainly encompass government eminent domain actions within the definition of a "land use regulation" that substantially burdens religious exercise. However, other land use actions, such as the roadway extension decision in *Prater*, which do not directly apply to private property but only adversely impact its development, will not be subject to RLUIPA scrutiny.

b. RLUIPA Requirements

(i) Substantial Burden on Religious Exercise

Once a claimant establishes that a challenge to government regulation is within RLUIPA's jurisdiction, the claimant must show that the action substantially burdens religious exercise.[128] The *Cottonwood* court used a Ninth Circuit definition of "substantial burden" from *Bryant v. Gomez*[129] where the court stated that a substantial burden on a person's religious freedom is placed on him or her when the government's action "prevent[s] him or her from engaging in conduct or having a religious experience which the faith mandates."[130] Under this definition, the court found that the Church met its burden of proving that the City's "zoning and eminent domain actions sub-

122. *Id.* at 423.
123. *Id.* at 422.
124. *Id.* at 433.
125. *Id.* at 434.
126. *Id.*
127. 42 U.S.C. § 2000cc-3(g) (2000).
128. *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) ("Before strict scrutiny can be applied, Cottonwood must prove that Cypress's zoning and eminent domain actions substantially burden its exercise of religion.") (citing 42 U.S.C. § 2000cc-2(b)).
129. 46 F.3d 948 (9th Cir. 1995).
130. *Id.* at 949.

stantially burden its exercise of religion."[131] The court stated that "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion"[132] and found that the Cottonwood Church not only had a fundamental need to have a church, it had a "religious need to have a large and multi-faceted church."[133] Thus, the City's actions, which prevented the development of the Church's property for a major Church worship facility, substantially burdened free exercise.[134] This broad interpretation of what constitutes a substantial burden certainly opens the door for more suits challenging government land use regulation of religious structures and their location.

RLUIPA's legislative history indicates that the term "substantial burden" should be interpreted according to United States Supreme Court precedent.[135] While the *Cottonwood* court used a broad definition of "substantial burden" from the Ninth Circuit to prevent local government from restricting development of church land, the court in *Elsinore Christian Center v. City of Lake Elsinore*[136] used RLUIPA's broad definition of "religious exercise" to invalidate RLUIPA as an unconstitutional exercise of legislative power.[137] The *Elsinore* court observed that because RLUIPA redefined "religious exercise" specifically to include the use of land, a local government's denial of the owner's right to use the property is a "substantial burden" on that use.[138] Thus, both the *Elsinore* court and the *Cottonwood* court determined that under RLUIPA a restriction on a church's right to use its property is a substantial burden on religious exercise. However, the *Elsinore* court concluded that because "RLUIPA establishes an entirely new and different standard than that employed in prior Free Exercise Clause jurisprudence" by "equating land use with 'religious exercise'"[139] the RLUIPA provision at issue was unconstitutional.[140]

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131. *Cottonwood*, 218 F. Supp. 2d at 1226 (citing 42 U.S.C. § 2000cc-2(b)).

132. *Id.*

133. *Id.* at 1227.

134. *Id.* *But see* N. Pac. Union Conference Ass'n of the Seventh-Day Adventists v. Clark County, 74 P.3d 140, 147 (Wash. Ct. App. 2003) (RLUIPA requires that plaintiff show a substantial burden on religious exercise by demonstrating "that the County's conduct interferes with a central belief of the Church's religious doctrine," which was not met by prohibiting the church from building in agriculturally zoned land).

135. 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) (joint statement by Sen. Hatch & Sen. Kennedy) (stating that "[t]he Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise").

136. 291 F. Supp. 2d 1083 (C.D. Cal. 2003).

137. *Id.* at 1101-02.

138. *Id.* at 1091.

139. *Id.*

140. *Id.* at 1102.

The court in *Grace United Methodist Church v. City of Cheyenne*,[141] similarly noted the legislative intent to "apply the same 'substantial burden' test that was applied under RFRA."[142] Although the court recognized that RLUIPA defines religious activity to include land use regulation,[143] it required the church to establish that the city's land use regulations substantially burdened the exercise of religion by showing that the regulations "have the tendency to coerce individuals into acting contrary to their religious beliefs."[144] Since few, if any, land use regulations would meet this standard, the *Grace* court's decision "virtually reads the statute out of existence."[145]

As observed by the *Elsinore* court, "[b]ecause zoning regulations and decisions rarely bear upon central tenets of religious belief, those regulations and decisions have not generally been held under [prior] standards to impose a substantial burden on religious exercise. . . . [so] [c]learly, RLUIPA was intended to and does upset this test."[146] Thus, while federal courts interpreting RLUIPA have accepted that the substantial burden test has been changed, some, such as the *Elsinore* and *Grace* courts, have balked at applying this broader RLUIPA standard to land use actions.[147] However, others, such as the *Cottonwood* court and the court in *Murphy v. Zoning Commission of New*

141. 235 F. Supp. 2d 1186 (D. Wyo. 2002).

142. *Id.* at 1194.

143. *Id.* at 1195-96 ("the 'use, building, or conversion of real property for the purpose of religious exercise' is considered to be in itself a 'religious exercise'") (quoting 42 U.S.C. § 2000cc-5(7)(B) (2000)).

144. *Id.* at 1197.

145. Posting of Patrick A. Randolph, Jr., to dirt@umkc.edu (May 28, 2003), *available at* http://dirt.umkc.edu/MayDD2003/052803.htm (noting that most land use regulations "would simply make the practice of the belief more expensive because the belief would have to be carried out at another more expensive location").

146. Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1090-91 (C.D. Cal. 2003).

147. *See also* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 990-91 (N.D. Ill. 2003) (finding no violation of RLUIPA since "Congress did not intend to change traditional Supreme Court jurisprudence on the definition of substantial burden" and the church did not demonstrate that its free exercise was substantially burdened when it was prohibited from conducting religious services on its property); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1071 (D. Haw. 2002) (highlighting RLUIPA's legislative history, stating that religious institutions are not exempt from land use regulations, and concluding that "[c]ompliance with the law itself does not present a substantial burden on practice of religion" by citation to the *Employment Div. v. Smith* decision); San Jose Christian Coll. v. City of Morgan Hill, No. C01-20857, 2002 WL 971779, at *2 (N.D. Cal. Mar. 5, 2002) (noting that religious institutions are not exempt from land use regulation under RLUIPA and denial of college's re-zoning application does not impose a substantial burden); C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 917 (N.D. Ill. 2001), *aff'd*, 342 F.3d 752 (7th Cir. 2003) (holding RLUIPA inapplicable since the city amended its ordinance to remove any potential for substantial burden).

Milford,[148] have held that restrictive land use regulations that do not necessarily burden "the exercise of religious beliefs compelled by or central to a particular faith"[149] nevertheless constitute a substantial burden.[150]

Although *Cottonwood* is the only case thus far dealing with a challenge to the eminent domain power under RLUIPA, the court did not distinguish between eminent domain actions as a substantial burden on religious exercise and other types of land use regulations burdening religious exercise. As discussed above, the *Cottonwood* court determined that "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion" and thus the city's attempt to condemn church property to use for retail sales substantially burdened religious exercise.[151] However, the *Cottonwood* court did not discuss the applicability of 42 U.S.C.A. § 2000cc-3(e) which states:

> A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, *or by any other means that eliminates the substantial burden.*[152]

Under this RLUIPA provision, the government could defend its use of eminent domain by paying just compensation to *eliminate the substantial burden.*[153] Thus, if state or local government pays just compensation when it condemns property, it can defend against an RLUIPA challenge by arguing that any potential substantial burden on religious exercise has been eliminated

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148. 148 F. Supp. 2d 173 (D. Conn. 2001).

149. *Id.* at 188.

150. *See* DiLaura v. Ann Arbor Charter Township, No. 00-1846, 2002 WL 273774, at *7 (6th Cir. Feb. 25, 2002) (noting that religious exercise includes land use not necessarily central to religious belief and "gatherings of individuals for the purposes of prayer (the activity at issue) is a use of land constituting a religious exercise that is substantially burdened, under RLUIPA, by a zoning ordinance that prevents such gatherings"); *Murphy*, 148 F. Supp. 2d at 188-89 (observing that under RLUIPA Congress requires that "substantial burden" be more broadly applied so that "requiring plaintiffs to ensure that the number of attendees of a meeting never exceeded twenty-five would place a substantial burden on the exercise of plaintiffs' religion"); *supra* notes 128-34 and accompanying text.

151. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002).

152. 42 U.S.C. § 2000cc-3(e) (2000) (emphasis added).

153. *See* C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 917 (N.D. Ill. 2001), *aff'd*, 342 F.3d 752 (7th Cir. 2003) (discussing how a city can remove potential substantial burdens under this RLUIPA provision by amending its regulations or changing its policies).

by the just compensation payment. This is one reason why condemnation actions should receive a higher level of scrutiny than typical land use regulations—because the opportunity for government abuse, by paying just compensation to force the sale of citizen's free speech or free exercise rights, is so great.

(ii) Compelling State Interest and Least Restrictive Means

When government land use regulation substantially burdens religious exercise, the court must apply strict scrutiny to determine whether the government has a compelling state interest in taking such action and whether the action is the least restrictive means of achieving the asserted interest.[154] In *Cottonwood*, the court determined that the City's interests in generating revenue and eliminating blight were not sufficiently compelling to justify the resulting burden on religious exercise created by the City's use of its eminent domain power.[155] The evidence presented in the case did not support the blight finding since the Church's project would also have eliminated blight, and the City's need for revenue was not compelling since it had a budget surplus.[156] In addition, the court noted that the City could not justify excluding religious institutions merely because they are tax-exempt.[157] Even if the City had been able to demonstrate a compelling state interest, it did not show that the least restrictive means were used to further that interest.[158] Allowing the Church to build its facility would have eliminated the blight without burdening free exercise and the court noted that there were other ways of generating revenue other than by denying the Church an opportunity to build its tax-free facility.[159]

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154. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) ("[A] law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.") (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

155. *Cottonwood*, 218 F. Supp. 2d at 1228; *see also* Maggie Gallagher, *Evicting the Lord?*, N.Y. POST, Aug. 14, 2002, at 25 ("Quite shamelessly this spring, city officials announced plans to condemn the Cottonwood Christian Center's land because they preferred the taxes Costco would generate to the souls the Cottonwood might save.").

156. *Cottonwood*, 218 F. Supp. 2d at 1228.

157. *Id.* at 1228; *see also* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083,1093 (C.D. Cal. 2003) (finding that the city's interest in generating tax revenue is not a compelling governmental interest because if it were treated as such "the most significant provision of RLUIPA would be largely moot, as a decision to deny a religious assembly use of land would almost always be justifiable on that basis").

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

159. *Id.*; *see also* Gallagher, *supra* note 155, at 25 ("An attractive worship complex (in an area zoned for churches) with day-care center, meeting rooms, youth gym,

RLUIPA decisions not involving eminent domain are also instructive as to how courts will determine whether the state or local government has a compelling interest in condemning property sufficient to justify the substantial burden on religious exercise resulting from such action. RLUIPA legislative history indicates that the compelling state interest test "was and is intended to codify the traditional compelling interest test" used by the courts prior to the *Employment Division v. Smith*[160] decision.[161] Applying this somewhat ambiguous standard,[162] the court in *Elsinore* found that the city's proffered compelling interests in "'curbing urban blight, preserving the sole food market in an underprivileged low-income area, [and] preserving jobs in the same area'"[163] were assumed to be compelling since "concerns regarding the vitality of city life are of paramount importance in land use planning."[164] Nevertheless, the *Elsinore* court found that by denying the church's conditional use permit to operate a church on its property in order to keep the church's tenant, a food store, at the current location, the city did not use the least restrictive means of achieving these compelling interests.[165] Instead, the evidence indicated that "as between two users with services that City officials concede could both advance the same general interests, the City chose the alternative *most* burdensome on Plaintiffs' 'religious exercise' under RLUIPA."[166]

Similarly, in *Murphy v. Zoning Commission*,[167] the court agreed that "local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations."[168] However, the court also determined that the town had not shown

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coffee shop and bookstore is not exactly a slum. Surely Cypress city officials do not need a federal judge to tell them churches are not a blight upon the land?").

160. 494 U.S. 872 (1990).

161. *Elsinore Christian Ctr.*, 291 F. Supp. 2d at 1091 (quoting 146 CONG. REC. E1563, E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Charles T. Canady, sponsor of the RLUIPA)).

162. *See id.* at 1092 (noting that it is not clear whether or not the compelling interest standard is a strict one since "Senators Hatch and Kennedy included in the legislative history an ambiguous invocation that 'the compelling interest test is a standard that responds to facts and context'") (quoting 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000)).

163. *Id.* at 1093 (quoting Defendant's Opposing Brief at 15, Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) (No. CV-01-04842 SVW (RCX))).

164. *Id.* at 1094 (citing Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 190 (D. Conn. 2001).

165. *Id.* at 1094-96.

166. *Id.* at 1096.

167. 148 F. Supp. 2d 173 (D. Conn. 2001).

168. *Id.* at 190.

that it used the least restrictive means of protecting the community.[169] Instead of limiting the number of participants at a prayer group meeting in the plaintiff's home to address traffic concerns, the town could have addressed the increased traffic concern by investigating less intrusive means to reduce the impact on neighbors living in the small cul-de-sac.[170]

Mitigating the "substantial burden" by paying just compensation may free the government from strict scrutiny review under RLUIPA when it uses condemnation to suppress religious exercise.[171] But if such mitigation does not relieve it from strict scrutiny, the "compelling interest" test will likely be applied to eminent domain actions in the same manner as it is applied to other land use actions under RLUIPA. On the other hand, the "least restrictive means" determination that follows the compelling interest test may require local governments to avoid using the severe process of condemnation to achieve compelling state interests. Cities seeking to use eminent domain against religious use property will need to examine other less restrictive land use alternatives to avoid a potential RLUIPA violation.

2. State Constitutional and Statutory Challenges

In addition to challenging land use regulations under the federal Free Exercise clause and under RLUIPA for state and local actions, landowners can assert claims under state constitutions and state RFRA statutes.[172] Prior to the *Smith* decision and the resulting RFRA and RLUIPA legislative enactments, state courts used a balancing test to determine constitutional validity in challenges to eminent domain actions.[173] In *Pillar of Fire v. Denver Urban*

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169. *Id.*

170. *Id.* at 190-91.

171. *See supra* notes 152-53 and accompanying text discussing applicability of 42 U.S.C. § 2000cc-3(e) to eminent domain actions.

172. RFRA is constitutionally valid when applied to federal actions. *See* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1176 (10th Cir. 2003) (noting that while the Supreme Court held RFRA unconstitutional as applied to states, it is still binding on the federal government).

173. *See, e.g.*, Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 868-69 (2d Cir. 1988) (affirming the district court's balancing of the competing interests of church and state and noting that "[w]hile the condemnation of church property for public use is not unheard of, we are aware of no federal court case in which a religious organization has challenged the taking of real property on free exercise grounds") (citations omitted) (citing Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250 (1973)); *see also* Gideon Kanner, *Developments in the Right-To-Take Law*, SG059 A.L.I.-A.B.A. 11, 59 n.66 (2002) (noting that the rule followed by the courts in City Chapel v. City of South Bend, 744 N.E.2d 443 (Ind. Ct. App. 2001) and Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250 (Colo. 1973) "is that the courts must balance the condemnees' First Amendment right to freedom of worship against the government's decision to exercise the power of eminent domain").

Renewal Authority,[174] the Colorado Supreme Court employed a review standard which required that "the state must show a substantial interest without a reasonable alternate means of accomplishment" if the state uses its eminent domain power to condemn the worship building considered to be the religious denomination's birthplace.[175] The court concluded that "urban renewal is a substantial state interest that can justify taking property dedicated to religious uses,"[176] but remanded the case because it was unable to weigh the competing interests without a hearing to allow the church to defend its birthplace and to challenge the state "to justify a use of its power of eminent domain."[177]

Eminent domain actions which burden free exercise may also be challenged under state constitutional law. The Indiana Supreme Court in *City Chapel Evangelical Free Inc. v. City of South Bend*[178] addressed a church's challenge against the city's condemnation of its worship place under both state and federal constitutions.[179] The church's claim that the eminent domain proceedings violated its free exercise of religious worship and assembly was first addressed pursuant to the Indiana Constitution.[180] Although the city argued that its "condemnation action [was] religion-neutral" and that "no balancing test and thus no hearing [was] required,"[181] the court refused to use federal jurisprudence to interpret the Indiana Constitution's religious protection provisions.[182] The court also rejected the city's contention that the "only constitutional inhibition on the taking of private property for public use is the requirement of just compensation."[183] Instead, the court remanded the church's claims for consideration at a hearing to determine whether the condemnation action constituted a material burden upon the church's core values.[184] Because the Indiana "'material burden' analysis looks only to the magnitude of the impairment and does not take into account the social utility

174. 509 P.2d 1250 (Colo. 1973).

175. *Id.* at 1253.

176. *Id.*

177. *Id.* (applying a balancing test to consider the parties' rights); *see also* Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth., 527 P.2d 804, 805 (Colo. 1974) (noting that "the court has a duty to weigh and balance the competing interests, public and religious" when deciding whether or not the condemnation of a church parking lot violates free exercise).

178. 744 N.E.2d 443 (Ind. 2001).

179. *Id.* at 444; *see also supra* notes 74-171 and accompanying text discussing federal constitutional claims.

180. *City Chapel*, 744 N.E.2d at 445-51.

181. *Id.* at 445.

182. *Id.* at 446.

183. *Id.* at 450 (observing that the state may not "ignore other provisions of the constitution when acting pursuant to its powers of eminent domain").

184. *Id.* at 451.

of the state action at issue,"[185] it does not appear that this particular state uses a balancing standard.

State statutes also offer protection for religious exercise.[186] In *Vineyard*, the church challenged the city's land use actions under the Illinois Religious Freedom Restoration Act (IRFRA), arguing that the city substantially burdened its religious exercise by failing to amend an ordinance to allow churches in the area and by denying Vineyard's special use applications.[187] Applying the strict scrutiny standard required by IRFRA, the court found that although Vineyard must incur "significant expense" by having to rent space to hold worship services and that it would be inconvenienced by not being able to use its own property for worship services, such burdens were not substantial enough to require the city to show a compelling interest.[188]

3. Religious Exercise Challenges Under the *Smith* Standard

In the absence of RLUIPA jurisdiction, or if a federal Free Exercise claim is asserted, the judicial review standard from *Employment Division v. Smith*[189] applies to any land use decision of general applicability.[190] The *Smith* decision "had the effect of narrowing the number of cases in which courts will strictly scrutinize government actions. After *Smith*, courts are to use strict scrutiny only if a litigant's exercise of religion is burdened by a law which is not neutral or generally applicable."[191] Because eminent domain actions will likely require an individualized determination, they are not generally applicable zoning laws and will be subject to strict scrutiny under *Smith*.[192]

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185. *Id.* at 447.

186. *See, e.g.*, Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 136 (Mass. 2001) (finding that a state statute which "precludes the adoption of zoning ordinances or bylaws restricting the use of land for religious (and other exempt) purposes" applies to a Mormon church and its steeple).

187. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 993 (N.D. Ill. 2003); *see also* C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 916 (N.D. Ill. 2001) (declining to exercise supplemental jurisdiction over state claim asserted under the Illinois Religious Freedom Restoration Act because federal claims were dismissed prior to trial), *aff'd*, 342 F.3d 752 (7th Cir. 2003).

188. *Vineyard*, 250 F. Supp. 2d at 993-94.

189. 494 U.S. 872 (1990).

190. *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (discussing RLUIPA and *Smith* standards as applied to land use regulations).

191. *Vineyard*, 250 F. Supp. 2d at 985.

192. *Cottonwood*, 218 F. Supp. 2d at 1222 ("Although *Smith* determined that there was no violation of the Establishment Clause when a government seeks to enforce a law of general applicability, it left undisturbed the application of a strict scrutiny test

In *Cottonwood*, the court determined that the local government's actions on Cottonwood's conditional use permit application and its exercise of eminent domain were quasi-judicial decisions requiring specific factual findings, and thus were "individualized assessments" not subject to the *Smith* deferential standard.[193] The *Cottonwood* court noted that government officials might discriminate against religious uses and stressed that "[j]udicial [r]eview must be in place to protect against this type of abuse any time a government agency is making individual assessments that might infringe on a fundamental right."[194] Although *Cottonwood* appears to be the only published case involving an eminent domain action and a free exercise challenge treated as a *Smith* exception, eminent domain actions will likely be subject to strict scrutiny as individualized assessments, excepted from the *Smith* deferential standard that is otherwise applied to neutral laws of general applicability.[195]

Eminent domain actions otherwise subject to the *Smith* deferential standard may also require strict scrutiny if they are so-called "hybrid rights" claims, which result when there is another constitutional right asserted in addition to a Free Exercise claim.[196] The hybrid-rights theory developed from Justice Scalia's dicta in *Smith*, where he "noted that the only cases in which the Court had struck down neutral and generally applicable laws involved free exercise claims in conjunction with some other constitutional

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to situations where there are "'individualized governmental assessment[s].'") (quoting *Smith*, 494 U.S. at 884) (alteration in original).

193. *Id.* at 1222-23 (finding that "[d]efendants' land-use decisions here are not generally applicable laws").

194. *Id.* at 1224.

195. *See* Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) (state law provisions for exemptions from permitted uses "are a system of 'individualized exemptions' to which strict scrutiny applies" under *Smith*); *but see* Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1200 (D. Wyo. 2002) (noting that "[s]everal federal courts have held that land use regulations, i.e. zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances") (citing Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999); First Assembly of God of Naples, Fla., Inc. v. Collier County, 20 F.3d 419, 423 (11th Cir. 1994); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991); Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990); C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903, 914-15 (N.D. Ill. 2001), *aff'd*, 342 F.3d 752 (7th Cir. 2003)).

196. *See Vineyard*, 250 F. Supp. 2d at 985; *see also* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 490 (1991) ("When house of worship design is recognized as religious speech, the 'hybrid' requirement of *Smith* is satisfied, and a compelling state interest in design restriction must justify the resulting burden on religion.").

claim."[197] However, it is unclear whether the landowner challenging the action must demonstrate that the government has substantially burdened religious exercise before strict scrutiny will be applied to the condemnation.[198]

In *Vineyard*, the court observed that "[c]ourts have approached the application of 'hybrid rights' claims differently"[199] and it discussed the differing decisions from the Sixth, Ninth, and Tenth Circuits.[200] According to the *Vineyard* court, the Sixth Circuit initially refused to apply the hybrid-rights theory at all,[201] but it subsequently adopted a view requiring the plaintiff to show a Free Exercise violation before the court could apply strict scrutiny.[202] The *Vineyard* court instead decided to "follow the logic of the Ninth and Tenth Circuits, which require that in order for strict scrutiny to apply, a plaintiff must make a showing of a colorable infringement of one of the other constitutional rights involved in the hybrid claim."[203]

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197. *Vineyard*, 250 F. Supp. 2d at 988 (citing Employment Div. v. Smith, 494 U.S. 872, 881 (1990)).

198. *See id.* at 985 ("Under either a direct burden or a 'hybrid rights' analysis, *Smith* and subsequent caselaw establishes that before a court is even to analyze whether the law is neutral and/or generally applicable, there must be a burden on religious exercise."); *see also* Petra Presbyterian Church v. Vill. of Northbrook, No. 03 C 1936, 2003 WL 22048089, at *9 (N.D. Ill. Aug. 29, 2003) ("Before considering whether a law is neutral and/or generally applicable, however, a court must determine whether the law substantially burdens religious exercise."). *But see Vineyard*, 250 F. Supp. 2d at 989 ("Notwithstanding the absence of a colorable free exercise claim, the court nevertheless proceeded to analyze whether strict scrutiny should apply to the case under the hybrid rights approach.") (citing Am. Family Ass'n v. City and County of San Francisco, 277 F.3d 1114, 1123-25 (9th Cir. 2002)).

199. *Vineyard*, 250 F. Supp. 2d at 988.

200. *Id.* at 988-89.

201. *Id.* at 988 (citing Kissinger v. Bd. of Trustees of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993)).

202. *Id.* at 988-89 ("declin[ing] to apply the compelling interest test under a hybrid rights theory not because such a theory is untenable but because the plaintiff failed to establish a free exercise violation") (citing Prater v. City of Burnside, Ky., 289 F.3d 417, 430 (6th Cir. 2002)); *but see* Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1202 n.6 (D. Wyo. 2002) ("The Sixth Circuit has rejected the assertion that a hybrid-rights claim is subject to strict scrutiny.") (citing *Prater*, 289 F.3d at 430).

203. *Vineyard*, 250 F. Supp. 2d at 989 (finding that "Vineyard has demonstrated that its free speech and equal protection rights have been violated, and therefore the case is arguably analogous to those cited in *Smith* as involving hybrid rights"); *see also Grace United Methodist Church*, 235 F. Supp. 2d at 1203 (church did not allege "a colorable claim of a violation of its First Amendment rights to free speech or association or its Fourteenth Amendment rights to due process or equal protection" so it did not fall within the hybrid-rights exception); Ventura County Christian High Sch. v. City of San Buenaventura, 233 F. Supp. 2d 1241, 1251 (C.D. Cal. 2002) (concluding that strict scrutiny should not be applied to claim that school district violated free exercise rights by denying religious school the right to erect modular classrooms since

It appears as though only three published cases have addressed a *Smith* hybrid-rights claim involving an eminent domain action.[204] In *Thiry v. Carlson*,[205] the Tenth Circuit examined the claim of parents who argued that if "a parcel of their property containing the grave of their stillborn daughter is taken for public highway purposes, necessitating the relocation of the gravesite," their rights under RFRA, the First Amendment Free Exercise Clause, and the Fourteenth Amendment would be violated.[206] Although the plaintiffs attempted "to fall within the 'hybrid' exception recognized by Smith for cases that involve 'the Free Exercise Clause in conjunction with other constitutional protections,'"[207] the court concluded that their

> First and Fourteenth Amendment rights [would] not be violated because the taking is part of a neutrally applied project, not directed at the plaintiffs' religion, the effects are incidental, and the plaintiffs can still practice their religion and maintain the integrity of their family despite the relocation of their daughter's gravesite.[208]

Thus, it appears that plaintiffs must show a substantial burden on religious exercise before the court will apply strict scrutiny under the hybrid-rights theory.

A city's use of eminent domain to condemn a church building used for the church's ministry was challenged as a First Amendment violation under the federal constitution in *City Chapel Evangelical Free Inc. v. City of South Bend*.[209] The church asserted both a Free Exercise claim and a Freedom of Association claim and argued that the trial court should have applied strict scrutiny under the hybrid claim exception to *Smith*.[210] Although the Indiana Supreme Court held that the trial court did not err when it denied the church a hearing on its federal First Amendment claims, a portion of Justice Dickson's opinion not joined by a majority of the Justices concluded that the trial court did err on this issue. Justice Dickson stated:

> [i]n the event of a hearing, however, to qualify for the this [sic] hybrid claim exception, City Chapel would have to demonstrate at the hearing that South Bend's taking of its church building would both

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the school did not make a "colorable claim" that equal protection or freedom of association rights were violated by a neutrally-enforced zoning ordinance).

204. *See* Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002); Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996); City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001).

205. 78 F.3d 1491 (10th Cir. 1996).

206. *Id.* at 1493.

207. *Id.* at 1496 (quoting Employment Div. v. Smith, 494 U.S. 872, 881 (1990)).

208. *Id.* at 1493.

209. 744 N.E.2d 443 (Ind. 2001).

210. *Id.* at 451-52.

(1) significantly affect or burden its members' right to expressive association, and (2) substantially burden a religious practice.[211]

Again, it is likely that an Indiana court would require a plaintiff to show a substantial burden on religious exercise to qualify for the hybrid-rights strict scrutiny standard.

Finally, in *Prater v. City of Burnside,*[212] the Sixth Circuit rejected a church's claims that the city violated its hybrid rights under the Free Exercise, Free Speech, Freedom of Assembly, and the Takings Clause by choosing to develop rather than close a road extension running between two lots owned by the church.[213] The court concluded that the church's hybrid-rights theory failed because the church did not show religious discrimination violating the Free Exercise Clause, nor did it show any violation of the Takings Clause, or the Free Speech or the Freedom of Assembly Clauses.[214] In fact, the Sixth Circuit appears to have entirely "rejected the 'assertion that the Supreme Court established in *Employment Division v. Smith* that laws challenged by hybrid rights claims are subject to strict scrutiny.'"[215]

Thus, with such little case law on this issue, it is difficult to determine whether the hybrid-rights theory will apply to eminent domain actions involving claims of constitutional violations in addition to a claim that religious exercise has been violated. However, once a court determines that an eminent domain action is subject to strict scrutiny as an exception to the *Smith* deferential standard—either as an individualized assessment or as a hybrid-rights claim—the state will be required to show that any regulation or action that substantially burdens free exercise is justified by a compelling state interest that cannot be achieved by less restrictive means.[216] This scrutiny will

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211. *Id.* at 454 (citations omitted).

212. 289 F.3d 417 (6th Cir. 2002).

213. *Id.* at 430.

214. *Id.*

215. *Id.* (quoting Watchtower Bible & Tract Soc'y of New York., Inc. v. Vill. of Stratton, 240 F.3d 553, 561 (6th Cir. 2001), *rev'd,* 536 U.S. 150 (2002)). *But see* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 988 (N.D. Ill. 2003) (noting that "the Sixth Circuit declined to apply the compelling interest test under a hybrid rights theory not because such a theory is untenable but because the plaintiff failed to establish a free exercise violation") (citing *Prater,* 289 F.3d at 430).

216. *See Vineyard,* 250 F. Supp. 2d at 987 (dismissing free exercise claims because church did not show it had suffered a substantial burden by not being allowed to conduct worship services on its property); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) ("Maui County may not deny a special use permit to Plaintiffs to operate a church if doing so imposes a 'substantial burden' on Plaintiffs' free exercise of religion, unless the County demonstrates a compelling interest and denying the permit would be the least restrictive means of reaching that goal.").

be handled the same way it is handled under RLUIPA's strict scrutiny standard discussed above.[217]

B. Establishment Clause Challenges

Sometimes a government's attempt to avoid a Free Exercise Clause challenge will actually violate the Establishment Clause because too much deference or assistance is given to a religious institution.[218] The court in *Grace United Methodist Church v. City of Cheyenne*[219] concluded that the city's denial of the church's variance application to operate a childcare center did not violate the church's Free Exercise rights.[220] However, the court noted that if the city had granted the special variance "solely on the basis of [the church's] 'religious beliefs' concerning the religious education of children," such an action might "run afoul of the Establishment clause."[221]

RLUIPA's legislative history also reflects this concern in the Joint Statement of Senator Hatch and Senator Kennedy, which states:

> The Act's protection for religious liberty does not violate the Establishment Clause. It is triggered only by a substantial burden on, a discrimination against, a total exclusion of, or an unreasonable limitation on the free exercise of religion. Regulatory exemptions

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217. *See supra* notes 154-71 and accompanying text.

218. *See, e.g.*, *Hale O Kaula Church*, 229 F. Supp. 2d at 1071 n.11 (noting that the state zoning law did not mention churches, but "if it specifically *permitted* any and all religious institutions and structures, we might be here discussing the establishment clause and not the free exercise clause") (emphasis added); Urban Renewal Agency v. Gospel Mission Church and Sch., 603 P.2d 209, 214 (Kan. Ct. App. 1979) (noting that if the only reason for applying a special just compensation measurement "is that it is a religious organization, the proscription against assisting the establishment of religion will be breached") (citing United States v. 564.54 Acres of Land, 576 F.2d 983, 999 (3d Cir. 1978), *rev'd*, 441 U.S. 506 (1979) (observing that "[a]ttempts to supervise the use of the condemnation award will run afoul of the First Amendment's entanglement proscription")); *In re* Condemnation by the Minneapolis Cmty. Dev. Agency, 439 N.W.2d 708, 714 (Minn. 1989) (holding that condemnation in favor of a private developer, which contracted to rent space to the YMCA (an organization with religious roots), "neither advances religion nor fosters excessive government entanglement with religion and, therefore, does not violate the establishment clause").

219. 235 F. Supp. 2d 1186 (D. Wyo. 2002).

220. *Id.* at 1201.

221. *Id.* at 1202 (citing Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 702 n.7 (10th Cir. 1998)).

> are constitutional if they lift such government imposed burdens on religious exercise.[222]

Although RLUIPA has been challenged as unconstitutionally violating the Establishment Clause, the court in *Freedom Baptist Church v. Township of Middletown*[223] rejected such a claim, deciding instead to analyze "RLUIPA against the Free Exercise and Fourteenth Amendment § 5 standards that eight justices considered in *City of Boerne*" to address the RFRA constitutional challenge.[224]

While government actions may be challenged as Establishment Clause violations when special dispensation or exemptions are given to religious institutions to avoid Free Exercise Clause violations, it is unlikely that such challenges will be successful under either the First Amendment or RLUIPA. So long as the government acts in a nondiscriminatory manner to avoid burdening religious exercise, typical land use regulations and actions should be constitutionally valid.

IV. FIRST AMENDMENT VIOLATIONS BASED ON DISCRIMINATORY MOTIVES

When the government acts to suppress or discriminate against protected speech because of its content, it must show a compelling state interest that cannot be achieved by any less restrictive means.[225] In most land use regulation cases, however, local government will assert that any restriction on free speech rights is not aimed at the content of the speech, but is instead neutrally applied against all landowners in order to promote the health, safety, and welfare of its citizens. As discussed above in Part II, eminent domain actions targeting adult uses are justified as content-neutral means of combating adverse secondary effects such as crime, and are subject to an intermediate scrutiny standard under the *O'Brien* test.[226] This intermediate scrutiny does not address concerns about controlling the government's abuse of its eminent domain power when it targets protected speech it wishes to restrict or eliminate.[227] The government may suppress any speech it wishes so long as the speech is attached to a land use that generates some adverse effects.

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222. 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

223. 204 F. Supp. 2d 857 (E.D. Pa. 2002).

224. *Id.* at 865 & n.9 (noting that RFRA passed the *Lemon* Establishment Clause test in an Eighth Circuit case) (citing City of Boerne v. Flores, 521 U.S. 507 (1997) and *In re* Young, 141 F.3d 854, 861-63 (8th Cir. 1998)).

225. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

226. *See supra* notes 12-58 and accompanying text.

227. *See supra* notes 29-37 and accompanying text (discussing Professor Epstein's concerns about the level of protection given to property rights).

Similarly, eminent domain actions may target religious uses with the intent to discriminate, but if the court views them as generally applicable land use regulations under the *Smith* standard, they may only be subject to rational basis review. Under RLUIPA, however, such condemnations will likely be subject to a strict scrutiny standard, which would resolve any issues of discriminatory motives because the government would need to show a compelling state interest that could not be achieved by any less restrictive means.[228] Sections A and B of this Part examine decisions where eminent domain actions implicating First Amendment rights have been challenged with evidence of discriminatory governmental motive.[229] This Part concludes by suggesting a judicial approach for resolving these challenges.

A. Addressing Improper Government Motives for Condemning Adult Uses

Eminent domain actions targeting adult uses are typically part of a redevelopment project where the municipality or government agency claims that the condemned area is blighted and needs to be turned over to a private developer for remedial development. However, in many of these cases there is evidence that the action is motivated by a desire to eliminate the protected use. In *In re G. & A. Books, Inc. v. Stern*,[230] the Second Circuit reviewed a challenge to an adult bookstore condemnation and observed that

> [a]lthough the district court found a substantial basis for the [redevelopment] Project independent of any desire to suppress speech, it also concluded that "the government defendants have an official policy of hostility towards adult uses," and that the Project would have some impact on the dissemination of sexually explicit materials.[231]

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228. Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1194 (D. Wyo. 2002).

229. This Article does not address substantive due process claims or Fifth Amendment claims based on allegations of improper governmental motives. *See, e.g.*, United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 402 (3d Cir. 2003) (concluding that land use decisions violate substantive due process only if they shock the conscience of the court, not merely because the government official acts with an improper motive); Aaron v. Target Corp., 269 F. Supp. 2d 1162, 1178 (E.D. Mo. 2003) (granting TRO to stop eminent domain action allegedly used to combat blight, but where evidence suggested that government improperly used its condemnation power to acquire private property for a private, not public interest), *rev'd*, 357 F.3d 768 (8th Cir. 2004).

230. 770 F.2d 288 (2d Cir. 1985).

231. *Id.* at 294.

Finding that the "Project is not aimed at suppression of speech but at eliminating community blight, crime and decay and at restoring the area to commercial and cultural vitality,"[232] the court upheld the condemnation as a content-neutral action which satisfied the intermediate scrutiny four part *O'Brien* test as applied in *Young v. American Mini Theatres*.[233]

Although suppression of protected speech may be a motivating factor in the government's condemnation action, the action is constitutional so long as "important governmental interests unrelated to suppression of speech exist."[234] Thus, in *Forty-Second Street Co. v. Koch*,[235] the court applied an intermediate scrutiny *O'Brien* test to find that the city's condemnation of eight theaters, which showed "primarily low-budget martial arts and horror films and some sexually explicit films to a largely low-income and minority audience,"[236] did not violate the First Amendment.[237] Following the *G. & A. Books* decision, the court focused "on the overall goals and methods of the Project" to upgrade the Times Square area and concluded that "mere hostility to speech which will be incidentally burdened by a Project that has other primary purposes is insufficient" to invalidate the city's condemnation action.[238]

Private property right defenders argue that government restrictions on property rights should be subjected to a higher level of scrutiny to protect

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232. *Id.* at 296.

233. *Id.* (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 79-80 (1976)).

234. *Id.* at 297 ("'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'") (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)); *see also* Progress Dev. Corp. v. Mitchell, 286 F.2d 222, 229 (7th Cir. 1961) (holding that plaintiffs did not establish a conspiracy to use official action condemning land in order to stop construction of an integrated housing project even though many of the individual defendants made statements "which were characterized as extreme and provocative"); *In re* Condemnation By Urban Redevelopment Auth., 823 A.2d 1086, 1095 (Pa. Cmmw. Ct. 2003) (finding that "[a]lthough there is evidence that some participants in the planning process believed that the adult theater added to the negative image," the condemnation action is subject to intermediate scrutiny since the government "had articulated several bases for acquiring the theater unrelated to content of speech").

235. 613 F. Supp. 1416 (S.D.N.Y. 1985).

236. *Id.* at 1418.

237. *Id.* at 1424.

238. *Id.* at 1424-25 (observing that there is "no evidence of a desire on the part of the government defendants to silence plaintiffs because of the message of their films or even to reduce public access to these films, except as an incident of changing the overall socio-economic makeup of the immediate Times Square area"); *see also* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003) (existence of illicit motives of an individual alderman does not demonstrate city endorsement of such motives in absence of evidence that policy-making body approved the illicit motivation).

against government abuse.[239] This argument is particularly forceful when the government uses its eminent domain power to deprive property owners of their rights and there is evidence of an improper or discriminatory government motive. One law review article proposes that "in addressing improper motivation in eminent domain actions which infringe on protected speech, courts should apply the test employed by the United States Supreme Court in *Mt. Healthy School District v. Doyle*."[240]

The *Mt. Healthy* Court employed a burden shifting analysis. If a plaintiff can show that suppression of speech was a motivating factor in the government's action, the burden shifts to the defendant to show that "it would have reached the same decision absent the illegitimate motive."[241] The *Mt. Healthy* decision involved an employer's failure to rehire an untenured teacher, allegedly because he exercised his Free Speech rights.[242] The Supreme Court required that the employee show his constitutionally protected conduct was a motivating factor in the decision not to rehire, and then shifted the burden to the employer to show "by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."[243] Although *Mt. Healthy* was an employment case rather than a land use case, such a standard would give additional protection to private property owners with constitutionally protected First Amendment uses.

Eminent domain abuses would be better controlled by either using a strict scrutiny standard as proposed by Professor Epstein or by requiring that when there is evidence of an improper motive, the government show that it would have made the same condemnation decision in the absence of the protected conduct, such as the property being used for an adult business. As concerns increase about the government's abuse of its eminent domain power, courts should be particularly wary when these abuses target not only economic interests, but First Amendment rights which deserve the highest protection against government interference.

B. Addressing Improper Government Motives for Condemning Religious Uses

Government actions overtly discriminating against religious uses are unconstitutional under the First Amendment.[244] Government land use actions

239. *See* Epstein discussion *supra* notes 29-37 and accompanying text.

240. Davies et al., *supra* note 63, at 272 (citing Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977)).

241. *Id.* at 285.

242. *Mt. Healthy Sch. Dist.*, 429 U.S. at 282.

243. *Id.* at 287.

244. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

that incidentally impact religious uses may also be challenged as Free Exercise violations under the federal constitution, but will be subject to the deferential *Smith* standard unless they are based upon an individualized assessment or a hybrid-rights claim.[245] Motivation is particularly troublesome when individual decisions are made about specific land uses; the potential for government abuse justifies applying a strict scrutiny level of review.

For example, in *Civil Liberties for Urban Believers ("CLUB") v. City of Chicago*,[246] a church interested in purchasing a building in a commercial district was denied a special use permit since most of the neighbors wanted "a taxpaying entity in the neighborhood rather than a church."[247] Determining that RLUIPA requires that "a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise,"[248] the Seventh Circuit in the *CLUB* case held that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[249] Thus, the court found that the approval processes and the scarcity of land in the districts allowing religious uses were conditions which did "not amount to a substantial burden on religious exercise" since the plaintiff churches were able to locate within Chicago's city limits, even though they had to spend extra time and money to obtain their locations.[250]

Judge Posner, dissenting in the *CLUB* judgment, concluded that Chicago's zoning ordinance violated the equal protection clause by discriminating "in favor of well-established sects."[251] Judge Posner advocated applying a heightened scrutiny, like that used in *City of Cleburne v. Cleburne Living Center, Inc.*,[252] for mentally retarded homes, to land regulation involving religious uses.[253] While the mentally retarded are shunned and religious people are not, Posner noted, "religion arouses strong emotions, sectarian rivalry is intense and often bitter, and the mixing of religion and government is explosive."[254] Judge Posner expressed concern that "[w]hen government singles out churches for special regulation" there is a risk of discrimination, not necessarily by atheists against religion, but discrimination "against particular sects," which requires heightened scrutiny.[255] Thus, even without the protec-

245. *See supra* notes 189-203 and accompanying text.
246. 342 F.3d 752 (7th Cir. 2003).
247. *Id.* at 756.
248. *Id.* at 760.
249. *Id.* at 761.
250. *Id.*
251. *Id.* at 770 (Posner, J., dissenting).
252. 473 U.S. 432 (1985).
253. *C.L.U.B.*, 342 F.3d at 770 (Posner, J., dissenting).
254. *Id.* (Posner, J., dissenting).
255. *Id.* (Posner, J., dissenting).

tion offered under the Free Exercise clause or RLUIPA, regulation of religious land uses should require heightened scrutiny under an equal protection claim because of the potential for religious discrimination.

The court in *Cottonwood Christian Center v. Cypress Redevelopment Agency*[256] similarly recognized this potential for religious discrimination in land use regulation.[257] The court stressed that even if the government action appears neutral on its face, the Free Exercise "Clause forbids subtle departures from neutrality, and covert suppression of particular religious beliefs. . . . [to] protect[] against governmental hostility which is masked, as well as overt."[258] Finding that "there is significant circumstantial evidence of a discriminatory intent" in the city's condemnation of the church's property, the *Cottonwood* court granted an injunction against the action so that the city's motives could be decided at trial.[259]

When the land use action is a facially neutral zoning ordinance "and there is no evidence offered of any animus against religion involved in either the passage or interpretation of the law," it does not violate the First Amendment.[260] However, neutral zoning ordinances, which were not enacted with the objective to infringe on religious exercise, may nonetheless be subject to strict scrutiny where there is a special use permit system requiring individualized decision-making by government officials.[261] An eminent domain action is like a special use permitting system in that it is a quasi-judicial rather than a legislative decision.[262] Therefore, eminent domain actions should be subject to strict scrutiny under *Smith* to protect against government abuse because individual assessments have the potential to discriminate against religious freedom.[263]

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256. 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

257. *Id.* at 1223.

258. *Id.* at 1225 (noting that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality").

259. *Id.*

260. DiLaura v. Ann Arbor Charter Township, No. 00-1846, 2002 WL 273774, at *6 (6th Cir. Feb. 25, 2002).

261. *See* Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) (noting that although the state zoning laws are neutral and there is no evidence of an intent to discriminate against religious practices, special use permits would be subject to strict scrutiny under *Smith* because they are a system of "individualized exemptions").

262. *Cottonwood*, 218 F. Supp. 2d at 1223.

263. *Id.* at 1224 ("where a government agency allows secular exceptions, the denial of religious exceptions must meet strict scrutiny"). *But see* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1098 (C.D. Cal. 2003) (concluding that land use permitting is not analogous to deciding "whether to *exempt* a proposed user from an applicable law, but rather whether the general law *applies* to the facts before it" and is, therefore, a quasi-judicial determination not subject to strict scrutiny).

In *Prater v. City of Burnside*,[264] a church challenged as a violation of its religious exercise the city's refusal to abandon a dedicated public roadway to allow the church to expand its facilities.[265] When the court determined that the city's action did not "burden the Church's rights under the Free Exercise Clause," the church argued instead that the city "intentionally sought to burden the Church's religious activities" by developing rather than closing a road located between two land parcels owned by the church and thus precluding expansion of church facilities.[266] Finding no evidence of religious discrimination, the court concluded that "the Church cannot show that the City's decision implicated its rights under the Free Exercise Clause."[267] Thus, it appears that individualized land use decisions such as an eminent domain action will be subject to a searching inquiry by the court; but unless a landowner can show either a substantial burden on its religious exercise or some evidence of religious discrimination, the action will not be subject to strict scrutiny.

RLUIPA's legislative history reveals a pervasive background of religious discrimination in land use decision-making.[268] Evidence gathered for the hearing on this legislation showed that "[c]hurches 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."[269] Observing that sometimes explicitly discriminatory statements are made by local government officials and neighbors, the Joint Statement by Senators Hatch and Kennedy declared that "[m]ore often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"[270] Because "[t]his discrimination against religious uses is a nationwide problem,"[271] RLUIPA established a strict scrutiny review for land use regulations substantially burdening religious exercise.

In *Cottonwood*, the church obtained an injunction against an eminent domain action based on a potential Free Exercise Clause violation because the church was able to show evidence of discriminatory intent.[272] However, under its RLUIPA claim, the church was only required to show that the city's eminent domain action substantially burdened its religious exercise in order

264. 289 F.3d 417 (6th Cir. 2002).

265. *Id.* at 427-28.

266. *Id.* at 428.

267. *Id.* at 430.

268. *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

269. *Id.* at S7774.

270. *Id.*

271. *Id.* at S7775.

272. *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1225; *see also* text accompanying notes 256-62.

to obtain a strict scrutiny standard of review.[273] Concluding that the city's action substantially burdened the church, the court required the city to show a compelling state interest accomplished by the least restrictive means.[274]

Therefore, under the federal Free Exercise Clause, strict scrutiny will not be applied to a land use action unless there is evidence of intent to discriminate or if the action is an individualized assessment or hybrid-rights claim under *Smith* and the action has substantially burdened the landowner's religious exercise. A claim under RLUIPA is similar to the *Smith* exceptions in that it does not require a showing of religious animus in order for strict scrutiny to be applied, so long as the landowner shows a substantial burden on religious exercise.

V. JUST COMPENSATION FOR FIRST AMENDMENT PROPERTY CONDEMNATIONS

Once the government may constitutionally use its eminent domain power to acquire property utilized for a First Amendment purpose, the remaining issue is valuation for just compensation purposes. Since property used for adult businesses will generally be indistinguishable from other commercial use property, valuation should not be a problem for property used for protected free speech. However, churches and other religious institutions may have special considerations in evaluating a just compensation award if the property is unique but otherwise unmarketable, and if there is no evidence of what another church or religious institution would pay for the property.[275] Such a special purpose property may need to be valued based on its intrinsic value to the landowner in order to assure that just compensation is provided.[276] Factors such as the "the cost of cure, replacement cost minus depreciation, capitalized cost of inconvenience, or any other manner which would be a fair method" should also be considered in addition to the value to the owner.[277]

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273. *Cottonwood*, 218 F. Supp. 2d at 1226.

274. *Id.* at 1227-29.

275. 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 12C.01[1] (rev. 3d ed. 2001); *see also* City of Baltimore v. Concord Baptist Church, Inc., 262 A.2d 755, 760 (Md. 1970) ("Church property, like the property of a school or nonprofit hospital, is devoted to a service use, and income is either non-existent, or provides no reliable basis for appraisal. Moreover, service properties are seldom bought and sold in the willing seller-willing buyer context . . . .").

276. 4 NICHOLS ON EMINENT DOMAIN, *supra* note 275, § 12C.01[1].

277. *Id.*; *see also Concord Baptist Church*, 262 A.2d at 761 (valuing church property by determining "the cost of reproducing or replacing the improvements, adjusted for physical and functional depreciation, to which shall be added the fair market value of the land").

"Where the market value of condemned property is not ascertainable, or where the application of the market value standard would be manifestly unjust, courts have applied the doctrine of substitute facilities."[278] This doctrine requires that the court determine the "reasonable cost of a 'substantially equivalent substitute facility.'"[279] However, in *United States v. 564.54 Acres of Land*,[280] the United States Supreme Court held that unless the circumstances justify a departure from the normal rules of using fair market value for deciding just compensation, the Fifth Amendment does not require the use of replacement cost just because the condemnee is a nonprofit organization using its property for a community service.[281] The Court in *564.54 Acres of Land* found that although just compensation "does not necessarily compensate for all values an owner may derive from his property,"[282] the summer camp property at issue did have "a readily discernible market value" that could be used to determine compensation under the fair-market-value standard.[283]

The "substitute facilities" standard of valuation was applied to church property in *City of Baltimore v. Concord Baptist Church, Inc.*,[284] where the court upheld the application of a Maryland statute requiring just compensation damages for churches to "be the reasonable cost as of the valuation date, of erecting a new structure of substantially the same size and of comparable character and quality of construction as the acquired structure at some other suitable and comparable location."[285] More recently, in *City Chapel Evangelical Free Inc. v. City of South Bend*,[286] a dissenting Indiana Supreme Court Justice observed that the City was risking

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278. 4 NICHOLS ON EMINENT DOMAIN, *supra* note 275, § 12C.01[3][d] (citing Brown v. United States, 263 U.S. 78 (1923)); *see also* United States v. Commodities Trading Corp., 339 U.S. 121 (1950).

279. 4 NICHOLS ON EMINENT DOMAIN, *supra* note 275, at § 12C.01[3][d] (citing State v. Township of South Hackensack, 322 A.2d 818 (N.J. 1974)).

280. 441 U.S. 506 (1979).

281. *Id.* at 516-17.

282. *Id.* at 511.

283. *Id.* at 514.

284. 262 A.2d 755 (Md. 1970); *see also* Redevelopment Agency v. First Christian Church, 189 Cal. Rptr. 749, 759 (Cal. Ct. App. 1983) (upholding jury instruction in a church condemnation trial "that the replacement/reproduction method of valuation 'may be considered in all cases and has particular applicability to special use properties, as to which there is limited market data available in the form of comparable sales'"); Wilmington Housing Auth. v. Greater St. John Baptist Church, 291 A.2d 282, 283 (Del. 1972) (applying a Delaware statute allowing a religious condemnee to present evidence of the reasonable costs of erecting a new structure at a comparable location in a just compensation valuation).

285. *Concord Baptist Church*, 262 A.2d at 757 (quoting MD. CODE ANN., REAL PROP. § 5(d) (1967)).

286. 744 N.E.2d 443 (Ind. 2001).

> that City Chapel can establish that it requires more than the fair market value of the property to permit City Chapel to replace the condemned facility in a location and manner that are necessary to its religious mission . . . [since] the City may have to pay more to achieve "just compensation" than it would if it were condemning a secular site.[287]

Although some churches may properly be valued as special purpose property, not all condemnations of religious uses will be specially treated. In *City of New York v. 2641 Concourse Co.*,[288] the court observed that "specialty status will not be automatically accorded to [church and school] property; rather, property must meet four criteria in order to qualify."[289] These four criteria are: 1) the property must be unique and built for the special purpose; 2) it must be used for the special purpose for which it was designed; 3) there must be no market for the property and no sales of comparable property; and 4) the current use must be "economically feasible and reasonably expected to be replaced."[290]

Since not all religious uses will be located on special purpose property, special valuation using the substitute facilities or replacement doctrine will depend on whether certain criteria, such as those listed above, are met.[291] For example, in *Urban Renewal Agency v. Gospel Mission Church & School*,[292] the court held that the substitute facilities valuation method could only be applied to a public entity, not a private nonprofit church, since "there is no requirement beyond good intentions" that the church "continue to serve its congregation and community in the same manner as before the taking."[293] Such a holding effectively precludes churches in this jurisdiction from claiming the right to replacement valuation. Additionally, the *Urban Renewal* court noted that "if the only reason for applying the substitute facilities method to this private condemnee is that it is a religious organization, the proscription against assisting the establishment of religion will be

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287. *Id.* at 458 (Boehm, J., dissenting). In this opinion, the dissenting justices actually formed the majority of the court to conclude that the church was not entitled to a hearing on its federal First Amendment claim, but the majority opinion did permit a hearing on the church's state constitutional claims against a condemnation action. *Id.* at 454.

288. 680 N.Y.S.2d 533 (N.Y. App. Div. 1998).

289. *Id.* at 535.

290. *Id.* at 535-36 (citing *In re* Lido Boulevard, 349 N.Y.S.2d 422 (N.Y. App. Div. 1973), *aff'd*, 353 N.E.2d 849 (N.Y. 1976)).

291. *See, e.g.*, State v. First Methodist Church of Ashland, 488 P.2d 835, 837 (Or. Ct. App. 1971) ("Inability to demonstrate lack of market value is not present here, so replacement facility valuation was inappropriate.").

292. 603 P.2d 209 (Kan. Ct. App. 1979).

293. *Id.* at 213.

breached."[294] Thus, special valuation methods for churches may run afoul of the Establishment Clause if the departure from the fair market value rule is based on the fact that the use is religious rather than on the particularities of the property itself.

VI. CONCLUSION

The government's eminent domain power can weaken the protection due undesirable land uses under the First Amendment. City officials can stifle protected speech and religious freedom under the auspices of promoting the general welfare of its citizens. Constitutionally protected property uses may be condemned with little judicial review so long as just compensation is paid and procedural protections of notice and hearing are provided. Although typical adult entertainment land use regulations implicating free speech rights receive intermediate judicial scrutiny under the secondary effects doctrine developed in *Young v. American Mini Theatres, Inc.*[295] and *City of Renton v. Playtime Theatres, Inc.*, [296] this level of scrutiny is inadequate to protect against government abuse of power and illicit government motivations for suppressing speech.[297]

Eminent domain actions that target free expression uses, such as adult entertainment businesses, and that are accompanied by evidence of improper government motivation should be subject to strict scrutiny as content-based restrictions on free speech. RLUIPA's free speech provisions will also provide a strict scrutiny review standard under Section 2(b)(3) for any eminent domain action used to exclude or unreasonably limit religious assemblies in a particular jurisdiction, provided the action substantially burdens free exercise.

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

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294. *Id.* at 214 ("'Where church-owned property is involved, constitutional obstacles present themselves no matter which narrow path we choose to follow. Attempts to supervise the use of the condemnation award will run afoul of the First Amendment's entanglement proscription. Thus, there is no way to insure [sic] than an award premised on use for substitute facilities will not be pocketed. Yet, in addition to offending our sense of fairness, any system of compensation which results in a windfall to the property owner may well violate the constitutional command that the government not aid religion.'") (quoting United States v. 564.54 Acres of Land, 576 F.2d 983, 999 (3d Cir. 1978) (Stern, J., concurring), *rev'd*, 441 U.S. 506 (1979)).

295. 427 U.S. 50 (1976).

296. 475 U.S. 41 (1986).

297. It is always possible that, based on Justice Kennedy's concurring decision in *Alameda Books*, the secondary effects doctrine will not survive as a way to lower the scrutiny given to content-based regulation of protected adult entertainment speech. *See supra* notes 18-28 and accompanying text.

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. Therefore, before the government condemns property used for religious exercise, it must show that there is a compelling state interest which justifies the condemnation, and that there are no less restrictive means of achieving the compelling interest. While it is possible for the government to argue that strict scrutiny does not apply since it is eliminating the substantial burden under RLUIPA § 2000cc-3(e) by paying just compensation, such a defense should not be allowed since it would permit suppression of constitutionally protected speech by forcing a sale of property.

Free exercise challenges to eminent domain actions under state statutes and state constitutional provisions should require strict scrutiny as well, assuming the statutes are modeled after either the federal RFRA or RLUIPA provisions and that the state constitutional standards follow the federal constitutional scheme. Federal constitutional challenges to condemnations under the *Smith* standard should be accorded strict scrutiny if they substantially burden religious exercise. Because an eminent domain action is an individualized assessment requiring specific factual findings, it should be treated as an exception to the *Smith* deferential standard. Therefore, under either state or federal statute or constitution, eminent domain actions substantially burdening religious freedom by prohibiting the landowner from using the property should be subject to strict scrutiny. Condemnations will need to be justified by a compelling governmental interest and there must be no less restrictive means of achieving such an interest. If such a condemnation is constitutionally valid, special factors may be considered in the valuation for just compensation purposes to recognize that such properties, particularly religious worship spaces, may be unique and difficult to value.

Even if the Supreme Court retains the secondary effects doctrine and provides only intermediate scrutiny to eminent domain actions impacting protected adult entertainment businesses, any evidence of illicit government motivation to suppress speech should raise the scrutiny to a level of strict judicial review. Similarly, eminent domain actions substantially burdening religious exercise should be subject to strict scrutiny whenever the challenger presents evidence of a government motive to discriminate against religion. If RLUIPA does not pass constitutional scrutiny and if the *Smith* deferential standard is deemed appropriate for eminent domain actions impacting religious exercise, heightened scrutiny should nevertheless be applied whenever there is evidence that the government has acted for an improper motive and has abused its police power to achieve a discriminatory purpose.