

# THE YALE LAW JOURNAL

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## Condemning Worship: Religious Liberty Protections and Church Takings

**ABSTRACT.** Recent eminent-domain actions against houses of worship (“church takings”) along the Mexico-U.S. border have inspired new questions about religious liberty and land use. This Note explores how courts interpret constitutional and statutory religious liberty protections when the government seeks to condemn property owned by faith communities, revealing how courts discriminate between types of religious property. While protecting those structures in which faith communities gather for worship, courts allow condemning authorities to take other properties integral to communities’ religious missions. Courts thus transform houses of worship into paradigmatic property for the free exercise of religion.

**AUTHOR.** Yale Law School, J.D. expected 2021; Priest of the Congregation of Holy Cross. I offer my heartfelt thanks to Claire Priest, who first believed in this project, mentoring me with generous care; to members of her Property and Advanced Property seminars, who asked constructive questions and shared wise perspectives; to Akhil Reed Amar, Samuel Bray, Guido Calabresi, William Eskridge, Jr., Nicole Garnett, Richard Garnett, Michael Helfand, Anthony Kronman, John Nann, Chris Pagliarella, Mark Rienzi, Reva Siegel, Kate Stith, James Whitman, and Taisu Zhang, whose insights and instruction shaped my reflection on this topic, leaving fingerprints throughout these pages; to my friends on the *Yale Law Journal*, especially Lawrence McMahon, whose masterful editing and relentless encouragement brought this Note to life; and to my brothers in Holy Cross, who remind me in moments of trial, *Ave Crux, Spes Unica*.



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The First Amendment protects freedom of religion which has its roots in the hearts and souls of the congregation, not in inanimate bricks and mortar. Yet, religious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection.<sup>1</sup>

## INTRODUCTION: TAKING LA LOMITA CHAPEL

In October 2018, just outside Mission, Texas, the federal government initiated an eminent-domain action against La Lomita Chapel and its environs in order to construct portions of the Trump Administration's border wall. A historic place of prayer and pilgrimage, La Lomita stands as the Catholic community's "mother church" in the Rio Grande Valley, welcoming worshippers who seek "communion with God" through the 154-year-old chapel's history, serenity, and humility.<sup>2</sup> The proposed border wall would physically cut off parishioners of nearby Our Lady of Guadalupe Catholic Church—and the rest of the Roman Catholic Diocese of Brownsville—from the historic chapel.<sup>3</sup> Popular outcry over the threat to La Lomita inspired members of Congress to bar legislatively federal funding for fencing on the church property,<sup>4</sup> while the Diocese of Brownsville argued in federal court that taking La Lomita would substantially burden its free exercise of religion.<sup>5</sup> In February 2019, U.S. District Judge Crane in nearby

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1. *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1254 (Colo. 1973).
  2. Defendant Roman Catholic Diocese of Brownsville's Supplemental Brief in Opposition to Plaintiff's Motion for Immediate Possession at 3, 11, *United States v. 65,791 Acres of Land*, No. 7:18-CV-329 (S.D. Tex. Dec. 31, 2018) [hereinafter *Brownsville Brief*], <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/12/La-Lomita-brief.pdf> [<https://perma.cc/T9KL-PSK5>]. The City of Mission derives its name from La Lomita Chapel, which features prominently on the city's seal. *Id.* at 3.
  3. *See id.* at 3, 11.
  4. *See* Molly Hennessy-Fiske & Molly O'Tolle, *Bulldozers Sit Idle at Border Amid Legal Confusion over Trump's Emergency*, L.A. TIMES (Feb. 26, 2019, 4:10 PM), <https://www.latimes.com/politics/la-na-pol-border-construction-national-emergency-20190226-story.html> [<https://perma.cc/P5GL-FR7P>]. The Department of Homeland Security has since proposed building a "virtual wall" at La Lomita, utilizing Linear Ground Detection System technology instead of metal bollards. Sandra Sanchez, *'Virtual Wall' to Be Built at 3 Protected Locations in South Texas, Congressman Says*, BORDER REP. (May 27, 2020, 10:17 PM), <https://www.borderreport.com/hot-topics/the-border-wall/virtual-wall-to-be-built-at-3-protected-locations-in-south-texas-congressman-says> [<https://perma.cc/W6J7-GUDM>].
  5. *See* Molly Hennessy-Fiske, *A Cowboy Priest Battles to Protect 153-Year-Old Texas Chapel from a Border Fence*, L.A. TIMES (Jan. 30, 2019, 4:00 AM), <https://www.latimes.com/nation/la-na-texas-border-wall-church-20190130-htmstory.html> [<https://perma.cc/8XPL-CY8U>]; *see also* *Brownsville Brief*, *supra* note 2, at 2 ("[T]he proposed border wall is fundamentally inconsistent with Catholic values and, if completed, would substantially burden the free exercise

McAllen determined that diocesan officials must allow government surveyors access to the property, but his remarks concerning the significant legal challenges to taking La Lomita were revealing: “The government may be wasting its time doing this . . . [b]ut it wants to do it anyway.”<sup>6</sup>

The history of church-property litigation in the United States confirms what Judge Crane seems to know: courts rarely allow governments to take houses of worship by eminent domain.<sup>7</sup> In those rare instances when the government does seek to exercise eminent domain over a church, litigation overwhelmingly focuses not on public-use limitations or just-compensation guarantees – the two explicit constitutional constraints on federal and state eminent-domain power<sup>8</sup> – but on religious liberty, with parties disputing whether the condemnation constitutes a substantial burden on the faith community’s free exercise of religion. Almost always, courts side with the church, preventing the taking. Nonjudicial actors, therefore, simply avoid taking churches, a phenomenon that has been well documented in the literature on eminent domain and properties of “high subjective value” – value to owners not reflected in the price that the properties would achieve in a market sale.<sup>9</sup>

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of religion by restricting access to La Lomita Chapel, a sacred site to the Valley’s Catholic community.”).

6. Dave Hendricks, *Judge Says Catholic Church Must Allow Access to La Lomita Chapel Property for Border Wall Survey*, PROGRESS TIMES (Mission, Tex.) (Feb. 6, 2019), <https://www.progress-times.net/news/local-news/12404-judge-says-catholic-church-must-allow-access-to-la-lomita-chapel-property-for-border-wall-survey.html> [<https://perma.cc/H4G7-4S5H>]; see Minute Entry for Proceedings Held Before Judge Randy Crane, *65.791 Acres of Land*, No. 7:18-CV-329 (“After arguments, the Court allowed the US Government right of entry under terms set by the Catholic Diocese of Brownsville. Order forthcoming.”).
7. See *infra* Part II.
8. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). In 1897, the Takings Clause of the Fifth Amendment was held to limit state governments through incorporation into the Due Process Clause of the Fourteenth Amendment. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238-41 (1897). Most state constitutions contain similar requirements. See, e.g., CONN. CONST. art. 1, § 11 (“The property of no person shall be taken for public use, without just compensation therefor.”); IND. CONST. art. 1, § 21 (“No person’s property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.”).
9. See Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 101 (2006); Christopher Serkin & Nelson Tebbe, *RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 41 (2009); G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653, 1676-77 (2006). When the government seizes property using its eminent-domain power, it is required to pay “just compensation” to owners. The Supreme Court has defined “just compensation” as fair market value, the value that a property would achieve in a market sale. Fair market

Professors Nicole Garnett, Christopher Serkin, and Nelson Tebbe have revealed the elevated political and economic costs in church takings. Garnett's insightful treatment of expressway construction and Catholic churches in 1950s Chicago illustrates not only the influence of religious groups – there, the Archdiocese of Chicago and its over two million Catholics – over church condemnations, but also, perhaps more instructively, that condemning authorities painstakingly avoid church structures.<sup>10</sup> When mobilized around properties of high subjective value, such “cohesive, well-organized, and narrowly-focused coalitions [as] those that characterized parish-preservation efforts” in Chicago frequently motivated government actors to avoid takings altogether.<sup>11</sup> Serkin and Tebbe observe that the principal constraint on eminent domain “is, and has always been, political” – particularly when churches are involved.<sup>12</sup> As with owners of any property carrying strong emotional attachments, faith communities can resist the government's “voluntary overtures” by generating “unwanted” and

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valuation often fails to capture taken properties' subjective value. See MARGARET JANE RADIN, REINTERPRETING PROPERTY 35-71 (1993) (arguing that certain property becomes inextricably intertwined with an individual or communal owner's personhood, increasing its subjective value to the owner well beyond “fair market value”).

10. Garnett, *supra* note 9, at 103 (“[W]hile expressway construction displaced thousands of parishioners, only five Catholic churches were destroyed. Planners assiduously avoided the Archdiocese's four hundred other churches. And, when they did not, they were made to wish that they had: in several cases, the outcry . . . led planners to reroute the expressways.”).
11. *Id.* at 117. This dynamic is unsurprising. When particular properties are highly valued by an entire community, community opposition seeks to render the taking untenable. See Mathues, *supra* note 9. Faith communities labor to convince condemning authorities that the costs of taking “their church” are too high, ensuring that eminent domain remains “a tool of last resort for governments instead of the first one called upon.” Serkin & Tebbe, *supra* note 9, at 32. Threats of lengthy litigation, exorbitant compensation, and reputational harm to government actors all contribute to the narrative that “this taking” will prove particularly, even unacceptably, costly. *Id.* at 32-34; see also Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77-78 (1986) (describing the costs of eminent domain). According to Garnett's account, Chicago planners avoided taking dozens of churches along proposed expressway routes because of their “collective importance to tight-knit [parish] communities, which made them natural rallying points” for opposition. Garnett, *supra* note 9, at 117. One of those churches, Saint Stanislaus Kostka, was then “the largest parish in the United States, if not the world, with 8,000 families, totaling 40,000 people” and was widely considered “the most important national parish in the most Polish of all American cities.” *Id.* at 114. When Chicago's Department of Public Works announced that Saint Stanislaus would be demolished to make way for the Kennedy Expressway, Polish Catholics quickly mobilized to oppose the condemnation, demanding that Cardinal Stritch intervene to save their parish. Cardinal Stritch negotiated with Governor Stratton against the backdrop of this Polish Catholic opposition. *Id.* at 113-14; see also William Braden, *Expressway Churches: Kennedy, Ryan Bend to Polish-Catholic Clout*, CHI. SUN-TIMES, Apr. 11, 1993, at 38.
12. Serkin & Tebbe, *supra* note 9, at 31.

thus “potentially effective” political opposition to the government’s plan.<sup>13</sup> Throughout the Windy City and across the country, politics often inspires avoidance, keeping many church takings from ever reaching the courtroom.<sup>14</sup>

Faith communities facing condemnation harmonize their collective opposition with notes of religious liberty. When New York gubernatorial candidate Carl Paladino proposed seizing an Islamic prayer space under development as a mosque and community center — channeling widespread hostility toward the so-called “Ground Zero Mosque” in Lower Manhattan — Imam Feisal Abdul Rauf led the communal defense of Muslim religious practice at the site.<sup>15</sup> That defense inspired Governor David Patterson and Attorney General Andrew Cuomo to dismiss the threatened taking as “legally deficient,” concluding that “courts would almost certainly reject any use of [eminent-domain] power in which a case could be made that a specific house of worship was being targeted.”<sup>16</sup> Patterson’s office called the proposed condemnation “an obvious violation of the First Amendment’s religion clauses [and] a gross violation of the spirit and intent of the

13. Garnett, *supra* note 9, at 111.

14. During the wholesale demolition and redevelopment of Southwest Washington, D.C. — at issue in *Berman v. Parker*, 348 U.S. 26 (1954), the landmark Supreme Court decision interpreting the Takings Clause — one of the only buildings spared was Saint Dominic Catholic Church. Garnett, *supra* note 9, at 119 n.97. Despite condemning and demolishing its priory, school, and convent for the construction of I-395, the District of Columbia Redevelopment Land Agency ultimately avoided taking Saint Dominic Church, bending to expansive political pressure from Catholics displaced by the District’s urban renewal. Catholic political pressure against the proposed taking became so intense that an Act of Congress was passed to protect Saint Dominic Church from the Redevelopment Land Agency. See Linda Wheeler, *Broken Ground, Broken Hearts*, WASH. POST (June 21, 1999), <https://www.washingtonpost.com/archive/politics/1999/06/21/broken-ground-broken-hearts/fc12d6d4-74c6-4259-9527-b506df9c8fe3> [<https://perma.cc/4L6Z-JJKZ>]; *History of St. Dominic Church*, ST. DOMINIC CHURCH, <http://www.stdominicchurch.org/history.html> [<https://perma.cc/W5NJ-K2P8>].

15. See Anne Barnard, *For Imam in Muslim Center Furor, a Hard Balancing Act*, N.Y. TIMES (Aug. 21, 2010), <https://www.nytimes.com/2010/08/22/nyregion/22imam.html> [<https://perma.cc/7GCJ-QWSL>]; Anne Barnard, *Muslim Leaders Unite Behind Center*, N.Y. TIMES (Sept. 20, 2010), <https://www.nytimes.com/2010/09/21/nyregion/21mosque.html> [<https://perma.cc/P8BK-2ZCV>]; Nate Silver, *Polls, Reporting on “Ground Zero Mosque” May Mislead*, FIVETHIRTYEIGHT (July 31, 2010, 9:15 PM), <https://fivethirtyeight.com/features/polls-reporting-on-ground-zero-mosque> [<https://perma.cc/Z77Z-9M5L>]; Ilya Somin, *Property Rights, Eminent Domain, and the “Ground Zero Mosque,”* VOLOKH CONSPIRACY (Aug. 23, 2010, 11:02 PM), <http://volokh.com/2010/08/23/property-rights-eminent-domain-and-the-ground-zero-mosque> [<https://perma.cc/G6Q8-RZNG>].

16. Casey Seiler, *Mosque on Solid Legal Ground*, TIMES UNION (July 27, 2010, 1:00 AM), <https://www.timesunion.com/local/article/Mosque-on-solid-legal-ground-591663.php> [<https://perma.cc/AW4J-7ACY>]; see Melissa Rogers, *Assessing Decision-Making on the NYC Islamic Center: Continuing Our Tradition of Religious Liberty*, BROOKINGS INST. 2-3 (Aug. 4, 2010), [https://www.brookings.edu/wp-content/uploads/2016/06/0804\\_nyc\\_landmarks\\_rogers.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0804_nyc_landmarks_rogers.pdf) [<https://perma.cc/7MXX-YD8N>].

eminent domain provision in state law,”<sup>17</sup> while Mayor Michael Bloomberg and President Barack Obama swiftly rose to the Muslim community’s defense by invoking religious freedom.<sup>18</sup> In Orlando, Florida, the congregation of Faith Deliverance Temple persuaded city officials to relocate a new Major League Soccer stadium one block west of their family-owned church, rather than endure lengthy and costly litigation.<sup>19</sup> “[I]t’s not about the money,” pronounced the church founder’s son in response to city overtures, but “about being here and being able to worship God freely.”<sup>20</sup> And just outside of Tulsa, Oklahoma, Centennial Baptist Church enlisted the Becket Fund for Religious Liberty to threaten “immediate legal action” against the Sand Springs Development Authority, sparking what one local newspaper described as “a battle between God Almighty and the almighty dollar”<sup>21</sup>:

To put it simply, the Church property is not for sale . . . . [T]he Church’s right to engage in religious exercise on its property, free from government burden and interference, is fully protected by the First and Fourteenth Amendments of the United States Constitution, the Oklahoma Religious Freedom Act, 51 Okl. St. §§ 251 *et seq.* (“ORFA”), and the

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17. Seiler, *supra* note 16.

18. Bloomberg called upon the nation’s founding neutrality toward religion: “If somebody wants to build a religious house of worship, they should do it and we shouldn’t be in the business of picking which religions can and which religions can’t.” Rogers, *supra* note 16, at 2 (responding to Newt Gingrich’s claim that “[t]here should be no mosque near Ground Zero in New York so long as there are no churches or synagogues in Saudi Arabia”). President Obama offered simple and forceful words from the White House: “Muslims have the same right to practice their religion as everyone else in this country.” Editorial, *The Constitution and the Mosque*, N.Y. TIMES (Aug. 16, 2010), <https://www.nytimes.com/2010/08/17/opinion/17tue2.html> [<https://perma.cc/YM4F-NURN>]; see Michael Howard Saul, *Mayor Jabs at Paladino*, WALL ST. J. (July 23, 2010, 12:01 AM ET), <https://www.wsj.com/articles/SB10001424052748703467304575383682783277758> [<https://perma.cc/RTK4-5T4K>].

19. David Damron, *Orlando Drops Eminent Domain Action Against Church, Moves Soccer Stadium Farther West*, ORLANDO SENTINEL (Aug. 4, 2014, 6:17 PM), <https://www.orlandosentinel.com/news/breaking-news/os-orlando-soccer-stadium-church-eminent-domain-20140804-story.html> [<https://perma.cc/6R2L-2Y7H>].

20. Chelsea Pizzola, *Orlando Drops Attempt to Abuse Eminent Domain*, INST. FOR JUST. (Aug. 6, 2014), <https://ij.org/action-post/orlando-drops-attempt-to-abuse-eminent-domain-replace-church-with-soccer-stadium> [<https://perma.cc/2XAU-TV9B>].

21. Ralph Blumenthal, *Humble Church Is at Center of Debate on Eminent Domain*, N.Y. TIMES (Jan. 25, 2006), <https://www.nytimes.com/2006/01/25/us/humble-church-is-at-center-of-debate-on-eminent-domain.html> [<https://perma.cc/ZNE9-MMUP>].

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.* (“RLUIPA”).<sup>22</sup>

Reverend Roosevelt Gildon and his “humble church” made national headlines before Sand Springs ultimately decided to withdraw its condemnation proceedings.<sup>23</sup> Not every faith community averts condemnation for its house of worship – for instance, Father Joseph Karasiewicz and the Polish Catholic community in Detroit lost Immaculate Conception Church to the city’s infamous Poletown project with General Motors, though only after Cardinal Dearden of the Archdiocese of Detroit intervened in support of condemnation.<sup>24</sup>

Because the government often stands down, litigation challenges to condemnation proceedings against houses of worship are rare. Even so, there are noteworthy cases of eminent-domain actions brought against church-owned property, including La Lomita and many others chronicled throughout this Note. While the vast majority of challenges to condemnation do succeed, the judiciary’s approach to such challenges remains largely unexplored. This Note focuses on the legal problems that emerge after eminent-domain proceedings commence, when faith communities raise religious liberty protections to shield their properties from condemnation.

This Note contributes to the property literature on takings by exploring how courts interpret religious liberty protections to discriminate between different

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22. Letter from Derek L. Gaubatz, Dir. of Litig., Becket Fund for Religious Liberty, to Mayor Robert L. Walker & Members of the Sand Springs Dev. Auth. 1 (Mar. 28, 2006), <https://s3.amazonaws.com/becketnewsite/3-28-06-Letter-to-City.pdf> [<https://perma.cc/E3FM-66PK>].

23. Blumenthal, *supra* note 21.

24. Despite the Poletown community’s fight to save Immaculate Conception, Cardinal Dearden – who supported the Poletown project – and the Archdiocese rejected offers from General Motors to spend millions of dollars moving and refurbishing the church. Over Father Karasiewicz’s impassioned pleas, Dearden had the last word. While Father Karasiewicz and the Poletown Catholic community persuaded General Motors to move and to refurbish Immaculate Conception, Cardinal Dearden approved the church’s demolition. See JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 153-164 (1989); William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 940; Garnett, *supra* note 9, at 119. Structures of hierarchical church authority can complicate analysis of church takings, particularly when church property is corporately owned beyond the immediate faith community. See ADAM MAIDA & NICHOLAS P. CAFARDI, CHURCH PROPERTY, CHURCH FINANCES, AND CHURCH-RELATED CORPORATIONS: A CANON LAW HANDBOOK 127-37 (1983); see also MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 258-61 (4th ed. 2016) (discussing the relationship between religious structures and civil legal structures).

types of church property in eminent-domain litigation.<sup>25</sup> Where courts disagree over how to comprehend religious exercise, many find themselves granting something less than property-rule protection to elements necessary for the free exercise of religion – including many church-owned properties outside the sanctuary. Courts apply a “liability rule” to these nonsanctuary properties, allowing government condemnation in exchange for just compensation.<sup>26</sup> The property-rule/liability-rule framework proposed by Guido Calabresi and A. Douglas Melamed can help describe court-drawn distinctions between different types of church property in eminent-domain litigation.<sup>27</sup> But as this Note argues, such distinctions impose an inappropriate judicial theology on church property, one rooted in judge-made determinations of what may be considered essential to faith communities’ free exercise of religion.

When the government seeks to exercise eminent domain over a house of worship, faith communities stridently assert constitutional and statutory free-exercise protections against condemning authorities – and courts almost always side with them. As this Note will explore, judicial maneuvers to interpret the First Amendment<sup>28</sup> and its state-constitutional equivalents,<sup>29</sup> federal and state Religious Freedom Restoration Acts<sup>30</sup> (RFRAs), and the Religious Land Use

25. The literature largely avoids those rare, though not imaginary, moments when the government seeks to exercise eminent domain over a church. The condemnation of church property complements and challenges concepts in property law that continue to inspire tremendous scholarly conversation, including in the areas of subjective value, property rules, and inalienability. See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); RADIN, *supra* note 9; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Garnett, *supra* note 9; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*]; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Serkin & Tebbe, *supra* note 9. To my knowledge, this Note is the first to distinguish between types of religious property in comprehending judicial responses to eminent domain. By separating cases involving houses of worship from other cases involving property owned by faith communities, the Note highlights an implicit logic in church-takings jurisprudence. See discussion *infra* Sections I.B, IV.A.
26. See Calabresi & Melamed, *supra* note 25, at 1106–10 (explaining liability rules).
27. *Id.* That Calabresi and Melamed proposed this property-rule/liability-rule framework in an article entitled *One View of the Cathedral* – a seminal contribution to the field of law and economics – is a happy coincidence for this Note.
28. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). The Establishment Clause and the Free Exercise Clause were likewise incorporated against the states through the Fourteenth Amendment. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).
29. E.g., COLO. CONST. art. 2, § 4; IND. CONST. art. I, §§ 2–4; PA. CONST. art. I, § 3.
30. 42 U.S.C. §§ 2000bb–2000bb–4 (2018); e.g., 775 ILL. COMP. STAT. 35/1–35/99 (2019); IND. CODE § 34–13–9–9 (2017); see *infra* notes 87–93.

and Institutionalized Persons Act<sup>31</sup> (RLUIPA) in the context of eminent domain effectively create a “property rule” for the church to prevent its taking.<sup>32</sup> Rather than mandating compensation for the church – per the “liability rule” protection of Calabresi and Melamed’s classic formula – courts block the taking altogether, forcing a voluntary transaction between the government and the faith community. In such cases, there may simply be no transaction at all.

However, as this Note reveals, such interpretations lead courts to discriminate between different types of property owned by faith communities. While courts consistently protect those structures deemed necessary for religious devotion, for ritual prayer, and for worship, many church-owned parcels and buildings have been successfully condemned. Paradigmatically, courts will protect from eminent domain *the religious sanctuary itself* – that physical structure in which the faith community gathers for worship. But case law reflects that courts do allow condemning authorities to take other connected properties owned by the faith community – including parking lots<sup>33</sup> and cemeteries,<sup>34</sup> as well as camps and undeveloped parcels of land.<sup>35</sup> These properties are taken even though they, like the religious sanctuary, are often integral to the community’s religious mission. In the language of Calabresi and Melamed, courts apply a “liability rule” outside the physical space of the sanctuary itself.

When courts make decisions regarding condemnation based on their own evaluation of how properties relate to religious practice, they engage in problematic judicial line drawing. Even if courts were accurate in their assumption that property outside the brick-and-mortar sanctuary is less “essential” to religious

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31. 42 U.S.C. §§ 2000cc-2000cc-5 (2018).

32. See Calabresi & Melamed, *supra* note 25, at 1106-10 (defining property rules and liability rules).

33. See, e.g., *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth.*, 527 P.2d 804, 804-05 (Colo. 1974) (“The St. Elizabeth church building is not itself being condemned in this proceeding . . . [T]he eventual plan provides for public parking to be located directly across the street from the Church, thus resulting only in a temporary interference with the Church.”); see also *infra* Section III.A (discussing parking lots).

34. See, e.g., *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007) (“[E]ven graves in cemeteries with a religious affiliation may be relocated because of natural necessity . . . or for many other private or public reasons. We conclude there is nothing inherently religious about cemeteries or graves, and the act of relocating them thus does not on its face infringe upon a religious practice.”); see also *infra* Section III.A (discussing cemeteries).

35. See, e.g., *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 252-53 (W.D.N.Y. 2005) (noting that, according to the record, “the Town’s actions are neutral and generally applicable, and [Faith Temple] has failed to demonstrate that the proposed condemnation imposes a substantial burden on its exercise of religion” because there is no land-use regulation at play limiting or restricting the use or development of land (citations omitted)); see also *infra* Section III.A (discussing summer camps).

exercise – an assumption many faith communities would dispute as morally and theologically flawed – their resolution of eminent-domain challenges would be grounded in “judicial perception” of religious beliefs and practices, something which established free-exercise doctrine forbids.<sup>36</sup> For courts and faith communities alike, this Note will discuss how greater judicial reliance on time-tested religious liberty principles can help.

This Note involves both practical and theoretical components. Part I shows how religious liberty protections create a property rule for churches and other houses of worship that effectively functions within a “rights as trumps” paradigm, imbuing the brick and mortar of these religious structures with constitutional meaning.<sup>37</sup> Parts II and III then discuss how courts respond in practice to takings of church property. Part II examines those cases where eminent domain is exercised over the sanctuary itself, detailing how courts interpret constitutional and statutory religious liberty protections to prevent the taking. By way of illustration, Part II studies the attempted condemnation of City Chapel Evangelical Free Church in South Bend, Indiana. Part III surveys cases where eminent domain is exercised over other properties owned by faith communities that courts deem unnecessary for religious worship. Much of the scholarly literature on church takings lumps together both types of cases, perhaps because commentators have overlooked the distinction courts tend to make between these different forms of property.<sup>38</sup> Finally, Part IV draws upon personhood theory to explore why courts protect churches from condemnation, rendering them paradigmatic property for the free exercise of religion. This Note uses the term “church” broadly to refer to those physical structures where faith communities of any bona fide religion gather for worship.<sup>39</sup> Consequently, it uses the phrase “church takings” to describe exercises of eminent domain over any faith

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36. *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 714 (1981); see cases cited *infra* note 63.

37. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 191-92 (1977) (arguing that any right held by an individual limits the reasons that the government may proffer to deprive the rights-holder of whatever the right protects); Joseph Blocher, *Bans*, 129 *YALE L.J.* 308 (2019) (analyzing and critiquing legal restrictions to rights); see also Jamal Greene, *Foreword: Rights as Trumps?*, 132 *HARV. L. REV.* 28, 96-117 (2018) (describing the development of the rights-as-trumps framework in U.S. constitutional law).

38. See, e.g., Mathues, *supra* note 9; Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 *MO. L. REV.* 653, 677-82 (2004); Serkin & Tebbe, *supra* note 9; Comment, *The Lord Buildeth and the State Taketh Away – Church Condemnation and the Religion Clauses of the First Amendment*, 46 *U. COLO. L. REV.* 43 (1974).

39. This Note does not examine the process by which courts define what constitutes a bona fide religion, but it does suggest that courts uphold religious liberty protections for church property deemed specifically necessary for faith communities' ritual prayer and worship.

community's property, not merely condemnation of structures in which Christian worship takes place.

Admittedly, cases involving church takings do not overwhelm the judiciary.<sup>40</sup> In an early case involving urban renewal and the condemnation of a church, the Colorado Supreme Court posited that such “direct confrontations . . . have been avoided because legislatures and administrative bodies have generally accorded great respect to religious organizations.”<sup>41</sup> While the evidence presented here is incomplete, this Note represents an important step toward understanding how courts respond to religious and governmental actors when their property interests conflict.

## I. BRICK-AND-MORTAR RIGHTS: RELIGIOUS LIBERTY PROTECTIONS FOR CHURCHES

When Representative Henry Cuellar and fellow members of Congress voted to protect La Lomita Chapel from condemnation, their legislative efforts mapped onto the familiar pattern of avoidance in church takings. Rather than face the political consequences of local and national outcry over the historic church's threatened destruction, Cuellar and other elected officials pushed to avoid taking La Lomita entirely.<sup>42</sup> The willingness of political, environmental, and religious communities far from South Texas to mobilize their own representatives and senators against the condemnation plans was instructive.<sup>43</sup> Taking the 154-year-

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40. Since 1950, I estimate that fewer than 150 cases involving church takings have reached the courts. By way of example, the Boolean search (“*eminent domain*” OR *takings* OR *condemnation*) /80 (*relig!* OR *church!* OR *synagogue!* OR *mosque!*) in Westlaw yielded 209 results when filtered by *worship!* and date. Many of those results either represent unrelated issues (e.g., involving government condemnation or endorsement of religion) or cite distinct procedural postures within the same litigation. For perspective on why church takings are rare, see *supra* notes 10–23 and accompanying text.

41. *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1254 (Colo. 1973).

42. Lorenzo Zazueta-Castro, *Landowners Make Outcry: Congressman Faces Concerns from Wall-Fearing Residents Fighting for Property Rights*, MONITOR (Mar. 22, 2019), <https://www.themonitor.com/2019/03/22/landowners-make-outcry-congressman-faces-concerns-wall-fearing-residents-fighting-property-rights> [https://perma.cc/222J-M2CP].

43. See Dudley Althaus & Katie Zezima, *As Border Wall Construction Moves Ahead in Texas, Judge Rules Feds Can Survey Church's Land*, WASH. POST (Feb. 6, 2019, 2:39 PM EST), <https://www.washingtonpost.com/national/as-border-wall-construction-moves-ahead-in-texas-judge-rules-feds-can-survey-churchs-land/2019/02/06/5de32316-2a39-11e9-984d-9b8fba003e81> [https://perma.cc/B6RP-E8NY]; Mark Reagan, *Democrats Seek Answers on Eminent Domain Action Against Catholic Church*, BROWNSVILLE HERALD (Jan. 18, 2019, 11:27 AM), [https://www.brownsvilleherald.com/news/local/democrats-seek-answers-on-eminent-domain-action-against-catholic-church/article\\_64d23cb8-1b46-11e9-851b-d3e26871d666.html](https://www.brownsvilleherald.com/news/local/democrats-seek-answers-on-eminent-domain-action-against-catholic-church/article_64d23cb8-1b46-11e9-851b-d3e26871d666.html) [https://perma.cc/FJ8X-9HXB].

old church would cost the federal government more than “just compensation.” Even greater opposition to an already-controversial border wall would assuredly follow La Lomita’s demise. Nonetheless, officials with U.S. Customs and Border Protection sought to survey the chapel property, and the Diocese of Brownsville found itself in federal court defending the free exercise of religion at La Lomita.<sup>44</sup>

In those rare moments when faith communities must defend their churches from eminent-domain proceedings, religious liberty protections take over. Rather than contest “public use” limitations or “just compensation” guarantees, litigating parties dispute whether the government’s exercise of eminent domain constitutes a substantial burden on the faith community’s free exercise of religion. Courts typically accept faith communities’ arguments that their fundamental religious practices – their religious devotion, ritual prayer, and worship – require the space or structure in which those practices take place.<sup>45</sup> When they side with the church, courts almost always interpret constitutional and statutory religious liberty protections as a kind of property rule to prevent the taking.

#### A. Religious Worship and the Sanctuary

Faith communities rely on religious liberty jurisprudence that interprets constitutional and statutory “free exercise” relative to worship and ritual.<sup>46</sup> They benefit when courts read federal and state religious liberty protections broadly, subjecting restrictions on “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” to strict scrutiny.<sup>47</sup> But even when courts construe religious liberty protections narrowly, they tend to safeguard “key religious activities” considered fundamental to religion, “including the conducting of worship services and other religious ceremonies and rituals.”<sup>48</sup> This framework renders courts receptive to arguments defining religious exercise by the spaces and structures in which religious worship, ceremonies, and rituals take place. It also guides the judicial logic behind protecting those spaces and structures from condemnation: *taking this faith community’s home and principal*

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44. Althaus & Zezima, *supra* note 43.

45. See Letter from Derek L. Gaubatz to Robert L. Walker, *supra* note 22, at 3.

46. See discussion *infra* Section II.A (exploring constitutional and statutory religious liberty protections).

47. 42 U.S.C. § 2000cc-5(7)(A) (2018) (emphasis added). RFRA and RLUIPA provide for the “broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g) (2018).

48. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring).

*place of worship by eminent domain will substantially burden, and may even preclude, their ability to engage in fundamental religious practices, such as worship.*<sup>49</sup>

Courts tend to reason through church-takings cases along precisely these lines. In Denver, Colorado, “The First Amendment protects freedom of religion which has its roots in the hearts and souls of the congregation, not in inanimate bricks and mortar. Yet, religious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection.”<sup>50</sup> In Wayne, New Jersey,

over the past 22 years, the Mosque’s congregation has grown from fewer than 100 individuals to over 200 families. [Houses of worship] cannot function without physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.<sup>51</sup>

In South Bend, Indiana, “South Bend seeks to take property the loss of which will materially burden [City Chapel’s] rights embodied in the core values of Sections 2, 3, and 4 of Article 1 of the Indiana Constitution,” which secure all people “in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.”<sup>52</sup> In Yonkers, New York: “[We] accept as true . . . the Archdiocese’s allegations that the taking of the Seminary site would ‘substantially affect [the] work at St. Joseph’s’ and that the site is ‘essential’ to the Seminary’s mission.”<sup>53</sup> This list of examples could go on.<sup>54</sup> Courts protect the religious exercise of faith communities by protecting their houses of worship.

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49. This argument paraphrases the one made by Becket to the Sand Springs Development Authority. See Letter from Derek L. Gaubatz to Robert L. Walker, *supra* note 22, at 3.

50. *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1254 (Colo. 1973).

51. *Albanian Associated Fund v. Township of Wayne*, No. 06-cv-3217 (PGS), 2007 WL 2904194, at \*10 (D.N.J. Oct. 1, 2007) (internal quotation marks omitted) (quoting *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 312 (D. Mass. 2006)).

52. *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 445-50 (Ind. 2001). For the text of article I, sections 2, 3, and 4, see *infra* note 115.

53. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 872 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

54. See, e.g., *United States v. Rutherford Cty.*, No. 3:12-0737, 2012 WL 2930076, at \*1 (M.D. Tenn. July 18, 2012) (“Plaintiff has demonstrated that the mosque is necessary to accommodate the number of worshippers, especially during the holy season of Ramadan . . . The new building, which is ready to serve the community, eliminates the facilities problems, providing ample space for prayer, holiday celebrations, religious meetings and children’s play.”); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) (“Preventing a church from building a worship site fundamentally inhibits its ability to

Courts' emphasis on worship and ritual in religious liberty jurisprudence explains more than judicial decisions to protect church structures from condemnation. Understanding the religious activities that take place *inside* the sanctuary as fundamental to, even constitutive of, religious exercise can help make sense of courts' inconsistent extension of religious liberty protections *outside* the sanctuary. Unlike churches, other church-owned properties—some adjacent to the church, many necessary for nonritualistic religious ministry—are often taken by eminent domain. Courts rarely block these takings, deeming parking lots, camps, and cemeteries nonessential for the ritualistic exercise of religious worship. In the eyes of courts, faith communities consistently fall short of demonstrating that their particular nonsanctuary property is “inseparable from the[ir] way of life, the cornerstone of their religious observance, or *plays the central role in their religious ceremonies and practices.*”<sup>55</sup> This attenuation from religious worship, which paradigmatically occurs within the sanctuary space, leaves such properties vulnerable to condemnation.

### B. Brick-and-Mortar Rights

The contrast between takings cases involving church-owned property outside the sanctuary and those of the sanctuary itself reveals the implicit “property rule” afforded to churches by the courts.<sup>56</sup> Such property-rule protections for churches behave like “trumps,” rendering the free exercise of religion immune from constitutional interest balancing and subjecting church takings to something like “per se rules of invalidity.”<sup>57</sup> Joseph Blocher’s compelling approach to “bans” suggests functional and formalist explanations for what the courts are

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practice its religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist.”); *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 883-84 (D. Md. 1996) (“The Church in the present case asserts that Roman Catholic law, teaching and tradition require it to replace the old Monastery with facilities more appropriate to its liturgical needs. . . . This Court is not empowered to question the validity of that belief.”); *cf. Guru Nanak Sikh Soc’y of Yuba City v. Cty. of Sutter*, 326 F. Supp. 2d 1140, 1151 (E.D. Cal. 2003) (challenging the denial of an approved conditional-use permit: “The use of the land [for a Sikh *gurudwara*] does not have to be a core religious practice. Rather, [t]he term religious exercise includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” (internal quotation marks omitted)), *aff’d*, 456 F.3d 978 (9th Cir. 2006).

55. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980) (emphasis added) (citations omitted), *cert. denied*, 449 U.S. 953 (1980).
56. See Calabresi & Melamed, *supra* note 25, at 1106-10 (explaining property rules).
57. Blocher, *supra* note 37, at 311; see DWORKIN, *supra* note 37, at 191-92 (arguing that “rights” must not be subjected to interest balancing for public benefit, except to prevent catastrophe or to secure conflicting rights).

doing in church-takings cases.<sup>58</sup> Under the functional approach, “to call a law a ban is simply shorthand for concluding that it imposes an impermissibly large burden on rightsholders’ ability to effectuate their constitutionally guaranteed interests.”<sup>59</sup> By contrast, the formalist approach “define[s] bans based not on their instrumental impact, but by reference to some other metric—a more purely historical approach, for example, or a conceptual identification of what elements of a right are essential.”<sup>60</sup> When courts conclude that an eminent-domain action constitutes “a total prohibition on some aspect of the right” to religious liberty—effectively banning constitutionally protected religious worship within the condemned church structure—they follow Blocher’s functional approach.<sup>61</sup> The courts “sidestep means-end scrutiny and apply a bright-line rule of *per se* invalidity.”<sup>62</sup>

Yet courts’ proclivity to define religious exercise by the spaces or structures in which worship takes place sounds in formalism. Decisions regarding condemnation often revolve around unstated or understated assessments of religious essentiality—of how *essential* a given church-owned structure or property is to religious worship, ceremony, or ritual—even though the Supreme Court has long recognized that judges are ill-positioned to evaluate the beliefs and practices of faith communities, particularly those of minority religious traditions in the United States.<sup>63</sup>

That courts allow some church property to be taken by eminent domain reveals an implicit limitation within the “rights as trumps” paradigm. Courts grant

58. See Blocher, *supra* note 37, at 316.

59. *Id.*

60. *Id.*

61. See *id.* at 311.

62. *Id.* at 322.

63. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015) (dismissing the district court’s misguided evaluation of an Islamic prisoner’s sincere religious exercise under RLUIPA’s “substantial burden” analysis); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-88 (2012) (summarizing cases that underscore the Court’s avoidance of “quintessentially religious controversies whose resolution the First Amendment commits exclusively to [church authorities]”); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *Emp’t Div. v. Smith*, 494 U.S. 872, 886-87 (1990) (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981) (“The determination of what is a ‘religious’ belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question.”); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (“[A] determination of what is a ‘religious’ belief or practice entitled to constitutional protection may present a most delicate question.”).

something less than property-rule protection to many church-owned properties outside the sanctuary based on how they comprehend religious exercise, allowing condemnation in exchange for just compensation. When courts draw distinctions between types of church property in eminent-domain litigation, they tend to follow the classic property-rule/liability-rule model of Calabresi and Melamed.<sup>64</sup> But in doing so, they impose their own judicial theology on church property, based on judge-made determinations of religious essentiality.

This Note suggests that courts protect church property from condemnation because of its essential relationship to its owners' effectuation of their constitutionally guaranteed interests.<sup>65</sup> When courts prevent government actors from taking structures necessary for religious devotion, ritual prayer, and worship, they imbue such structures with constitutional meaning. Churches become paradigmatic property for their faith communities' free exercise of religion, protected by property rules that behave like trumps against condemnation. So long as churches remain in the possession of faith communities who continue to worship therein, they should not be taken. Courts ensure fundamental religious liberty by protecting those spaces and structures where freedom of worship, "most precious to the spirit,"<sup>66</sup> can flourish without fear of condemnation.

## II. PROTECTING WORSHIP: RELIGIOUS LIBERTY AS A PROPERTY RULE FOR CHURCHES

Religious liberty shapes the conversation surrounding nearly every church taking. In their letter to then-Secretary of Homeland Security Kirstjen Nielsen concerning the federal government's exercise of eminent domain in border-wall construction, Senators Chuck Schumer, Dick Durbin, Tom Udall, and Martin Heinrich warned that taking "sacred sites like La Lomita Chapel" required "extreme caution": "[E]minent domain should not be invoked in violation of any religious organization's First Amendment right of free exercise of religion, Fifth Amendment right to just compensation for any public taking of private property,

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64. See Calabresi & Melamed, *supra* note 25, at 1106-10.

65. In this respect, Blocher's account of "bans" could be specified with respect to constitutionally meaningful property. See Blocher, *supra* note 37, at 308. When Justice Scalia described handguns as "the quintessential self-defense weapon" in *District of Columbia v. Heller* — en route to invalidating the District's handgun ban — his decision imbued handguns with constitutional meaning, 554 U.S. 570, 629 (2008). To prohibit handguns impermissibly burdens gunowners' ability to effectuate their "core" Second Amendment interest in self-defense. *Id.* at 599, 630; see Blocher, *supra* note 37, at 316. Regulation of their use, in property terms, effects a taking.

66. *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1252 (Colo. 1973).

or the Religious Freedom Restoration Act.”<sup>67</sup> Even if condemning authorities proceed further against La Lomita, assuming the political consequences of local and national outcry over the historic church’s threatened destruction,<sup>68</sup> the actual taking would face renewed religious liberty challenges in court.<sup>69</sup> Diocesan litigation against the government has already argued that taking La Lomita would substantially burden the free exercise of religion.<sup>70</sup> The fact that individual worshippers will lose their “place of prayer, reflection, and communion with God”<sup>71</sup> without their humble church beside the Rio Grande will likely protect it from being taken.

This Part examines how religious liberty influences litigation when a governmental entity seeks to exercise eminent domain over a church. Rather than contest “public use” limitations or “just compensation” guarantees,<sup>72</sup> litigating parties dispute whether the condemnation constitutes a substantial burden on the faith community’s free exercise of religion. Church communities stridently

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67. Letter from Senators Charles E. Schumer, Richard J. Durbin, Tom Udall & Martin Heinrich, to Kirstjen Nielsen, Sec’y of Homeland Sec. (Jan. 17, 2019), <https://www.democrats.senate.gov/imo/media/doc/2019-1-17%20Letter%20to%20Secretary%20Nielsen2.pdf> [<https://perma.cc/46HX-7M8P>].
68. See Althaus & Zezima, *supra* note 43; Hennessy-Fiske, *supra* note 5; Hennessy-Fiske & O’Tolle, *supra* note 4; Zazueta-Castro, *supra* note 42; see also Matt Hadro, *U.S. Bishops Ask Catholics to Pray for Brownsville Diocese Border Wall Fight*, CATH. NEWS AGENCY (June 19, 2020, 4:27 PM MT), <https://www.catholicnewsagency.com/news/us-bishops-ask-catholics-to-pray-for-brownsville-diocese-border-wall-fight-33554> [<https://perma.cc/5NDA-G5M7>] (asking all Catholics to pray for the Diocese of Brownsville and its efforts to ensure that border-wall construction does not affect La Lomita); *Border Wall Dispute in Diocese of Brownsville*, U.S. CONF. CATH. BISHOPS (June 26, 2020), <http://www.usccb.org/issues-and-action/religious-liberty/religious-freedom-week/upload/Religious-Freedom-Week-2020-June-26-Border-wall.pdf> [<https://perma.cc/6TKT-REEX>] (providing suggestions for reflection and action to Catholics).
69. See Brownsville Brief, *supra* note 2, at 10-12 (“While cognizant that the temporary taking that is the subject of this litigation is limited to ‘surveying, testing, and other investigatory work’ . . . the Diocese cannot ignore that these tasks are preludes to and prerequisites for the Government actually constructing the proposed border wall on the [Chapel] Property.”); Reagan, *supra* note 43.
70. See Hennessy-Fiske, *supra* note 5; Brownsville Brief, *supra* note 2, at 5-6, 11.
71. Brownsville Brief, *supra* note 2, at 11.
72. U.S. CONST. amend. V; see *supra* note 8. The Supreme Court has instructed lower courts to afford condemning authorities a high degree of deference when determining whether an eminent-domain action meets the constitutional “public use” requirement. In the Court’s landmark case defining “public use,” *Kelo v. City of New London* – upholding the private-to-private transfer of land for economic-development purposes in New London, Connecticut – Justice Kennedy wrote that takings need only be “rationally related to a conceivable public purpose.” 545 U.S. 469, 490 (2005) (Kennedy, J., concurring). In another landmark decision, *United States v. 564.54 Acres of Land*, the Court held that “just compensation” for condemned property requires no more than “fair market value.” 441 U.S. 506, 514 (1979); see *infra* notes 160-167.

assert the free-exercise protections of the First Amendment<sup>73</sup> and its state-constitutional equivalents,<sup>74</sup> federal and state RFRA's,<sup>75</sup> and RLUIPA<sup>76</sup> against condemning authorities. Before considering specific cases, an exploration of these relevant constitutional and statutory religious liberty protections is instructive.

### A. Constitutional and Statutory Religious Liberty Protections

Prior to *Employment Division v. Smith*,<sup>77</sup> free-exercise claims under the First Amendment were subjected to strict scrutiny.<sup>78</sup> Following the standard established in *Sherbert v. Verner*<sup>79</sup> and *Wisconsin v. Yoder*,<sup>80</sup> laws that burdened religious exercise could only pass scrutiny if they served a compelling government interest by the least restrictive means.<sup>81</sup> Certain aspects of religion remained off limits to local, state, and federal regulation unless they involved explicit criminality—including religious beliefs, assembly, and worship.<sup>82</sup> But in *Smith*, the Supreme Court rejected its strict-scrutiny analysis, holding that “the right of free

73. U.S. CONST. amend. I; *see supra* note 28.

74. *See supra* note 29.

75. 42 U.S.C. §§ 2000bb-2000bb-4 (2018); *see supra* note 30.

76. 42 U.S.C. §§ 2000cc-2000cc-5.

77. 494 U.S. 872 (1990).

78. The Supreme Court first applied strict scrutiny under the Free Exercise Clause in *Sherbert v. Verner*, 374 U.S. 398 (1963). But ever since *Cantwell v. Connecticut*, the Court had applied heightened scrutiny to free-exercise claims. 310 U.S. 296, 303 (1940). John Witte, Jr. and Joel Nichols note that

after the First Amendment religion clauses were made binding on the states in the 1940s, most laws in America that touched religion became subject to First Amendment influence, if not scrutiny. And, at least until recently, most state courts followed Supreme Court precedents in interpreting their state constitutional clauses on religious liberty.

JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 117 (4th ed. 2016).

79. 374 U.S. at 404.

80. 406 U.S. 205, 221 (1972).

81. Each law was reviewed generally and as applied to an individual claimant. When laws failed to meet both criteria, they were struck down; and if they met both criteria generally, but failed when applied to individual claimants, they were allowed to stand with exemptions for claimants' religious exercise.

82. *See Cantwell*, 310 U.S. at 303 (“The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.”).

exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability.’”<sup>83</sup> After *Smith*, any neutral and generally applicable law can be constitutional under the First Amendment, even if the law burdens “conduct . . . ‘central’ to the individual’s religion.”<sup>84</sup> While strict scrutiny still applies to governmental actions that “target” religious conduct for distinctive treatment,<sup>85</sup> since 1990, the Free Exercise Clause has provided faith communities with “the *lowest* scrutiny and the *least* promising pathway to relief against both federal and state laws” – including those that commence church takings.<sup>86</sup>

In 1993, Congress rebuked *Smith*, passing RFRA<sup>87</sup> with support from one of the broadest political coalitions in history.<sup>88</sup> RFRA restored the strict-scrutiny standard established in *Sherbert*<sup>89</sup> and *Yoder*<sup>90</sup>: the government may not “substantially burden” individual or communal religious exercise, “even if the burden results from a rule of general applicability,” unless it demonstrates that the burden furthers a “compelling government interest” and is the “least restrictive means” of furthering that interest.<sup>91</sup> While *City of Boerne v. Flores* declared RFRA unconstitutional as applied to the states,<sup>92</sup> its protections for religious exercise still guide judicial review of federal laws. Since *Boerne*, twenty-one states have

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83. *Emp’t Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982)).

84. *Id.* at 886–87.

85. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *see id.* at 546 (holding that “a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests”); *see also* Letter from Derek L. Gaubatz to Robert L. Walker, *supra* note 22, at 6 (discussing *Lukumi* in the context of an anticipated church condemnation).

86. WITTE & NICHOLS, *supra* note 78, at 124–25.

87. 42 U.S.C. §§ 2000bb–2000bb–4 (2018).

88. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994). That coalition included sixty-six religious and civil-liberties groups. *Id.* at 210 n.9. The Senate voted 97–3 in favor of RFRA, while the House of Representatives passed it unanimously. *Id.* at 210.

89. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

90. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

91. 42 U.S.C. § 2000bb–1(a)–(b). In the federal RFRA’s “declaration of purposes,” Congress notes that *Employment Division v. Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion” and finds “the compelling interest test set forth in prior Federal court rulings [to be] a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” *Id.* § 2000bb(a)(4)–(5).

92. 521 U.S. 507, 536 (1997).

passed their own RFRA, and ten others contain RFRA-like strict-scrutiny protections in their state constitutions.<sup>93</sup>

Congress again responded to the Supreme Court in 2000, passing RLUIPA.<sup>94</sup> RLUIPA applied RFRA's strict-scrutiny protections to land use. Consolidating much of the statutory language detailed above, RLUIPA's "substantial burden" provision draws together religious exercise and property:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

- (A) is in furtherance of a compelling government interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.<sup>95</sup>

Courts have regularly interpreted RLUIPA's definition of "land use regulation," which does not include the words "eminent domain," to exclude takings from strict-scrutiny protection under the Act.<sup>96</sup> While faith communities have

93. *RFRA Info Central: Numbers*, BECKET, <https://www.becketlaw.org/research-central/rfra-info-central/numbers> [<https://perma.cc/GBV7-A2RJ>].
94. 42 U.S.C. §§ 2000cc-2000cc-5 (2018). Following the *Boerne* decision, congressional hearings investigating state and local restrictions on religious exercise unearthed statistical and anecdotal evidence revealing widespread discrimination against houses of worship in zoning decisions. See Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 510 (2005).
95. 42 U.S.C. § 2000cc(a)(1). While courts often construe "religious exercise" relative to church property in line with worship and ritual, RLUIPA offers a capacious definition: "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A) (emphasis added).
96. *Id.* § 2000cc-5(5) ("The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land) . . ."); see, e.g., *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 639-42 (7th Cir. 2007) ("Given the importance of eminent domain as a governmental power affecting land use, we think that if Congress had wanted to include eminent domain within RLUIPA, it would have said something."); *Congregation Adas Yereim v. City of New York*, 673 F. Supp. 2d 94, 106 (E.D.N.Y. 2009) ("In the absence of statutory direction, the Court declines to extend RLUIPA to include eminent domain proceedings, and thus, to reach the taking of the [Congregation's] property at issue in this case."); *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 255 (W.D.N.Y. 2005) ("By its terms . . . RLUIPA does not apply to eminent domain proceedings."). *But see* *Albanian Associated Fund v. Township of Wayne*, No. 06-cv-3217 (PGS), 2007 WL 2904194, at \*8 (D.N.J. Oct. 1, 2007) ("[T]he Court does not reach this question [of whether eminent domain proceedings against the Mosque fall within the context of RLUIPA] because . . . the RLUIPA

attempted to invoke RLUIPA in church-takings litigation, the statutory text has been read narrowly, applying only when zoning or landmarking laws restrict the “use or development of land (including a structure affixed to land)” in a manner that substantially burdens religious exercise.<sup>97</sup>

In 2012, the Supreme Court held that the government cannot regulate any “internal church decision that affects the faith and mission of the church itself.”<sup>98</sup> The First Amendment protects “the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith.”<sup>99</sup> As discussed in Part I, faith communities rely on religious liberty jurisprudence that interprets constitutional “free exercise” relative to worship and ritual when fighting to protect their churches from eminent domain.<sup>100</sup> And paradigmatically, courts preserve religious sanctuaries in which faith communities gather for worship from condemnation.

### B. City Chapel v. South Bend

Urban redevelopment efforts throughout the United States have led to conflicts between condemning authorities and faith communities endeavoring to preserve their churches.<sup>101</sup> Faith communities argue that church takings substantially burden their free exercise of religion, and courts almost always

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challenge does not go to the actual taking, but rather the implementation of the open space plan which is a land use regulation. The taking is merely a method of implementation.”); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002) (rejecting the city’s argument that eminent domain is not a “land use regulation” under RLUIPA).

97. See cases cited *supra* note 96; see also Serkin & Tebbe, *supra* note 9 (arguing that RLUIPA should not give faith communities special protection from eminent domain, given the heightened political and economic costs that condemnation of religious property imposes on local governments).
98. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).
99. *Id.* at 199 (Alito, J., concurring).
100. See *supra* notes 46–53 and accompanying text.
101. See *supra* notes 10–14 and accompanying text. Scattered cases suggest that churches stand in special relationship to police-power regulation because they “belong to a category of uses which are ‘clearly in furtherance of the public morals and general welfare.’” Comment, *supra* note 38, at 43 n.4 (quoting Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 836–37 (N.Y. 1956)); cf. Kelo v. City of New London, 545 U.S. 469 (2005) (holding that city authorities did not violate the Fifth Amendment’s “public use” requirement when their urban development plan involved private-to-private property transfer through eminent domain); Walz v. Tax Comm’n of N.Y.C., 397 U.S. 664, 666, 672–73 (1970) (upholding tax exemptions for churches, “property used solely for religious worship,” based on the state’s determination that religious groups are “beneficial and stabilizing influences in community life”).

agree.<sup>102</sup> One illustrative case, which remains largely unexplored by the scholarly literature engaging religious land use, is *City Chapel Evangelical Free Inc. v. City of South Bend*.<sup>103</sup> Affirming City Chapel's objections to condemnation by the South Bend Department of Redevelopment "based on religious liberty claims under the Indiana Constitution," the Indiana Supreme Court prevented condemning authorities from proceeding against the church.<sup>104</sup> Justice Dickson's reasoning underscores the court's particular concern for religious worship, revealing an implicit property rule protecting churches like City Chapel from eminent domain.

In 1994, an intergenerational assembly of Evangelical Christians founded City Chapel to provide urban religious ministry and communal worship in downtown South Bend.<sup>105</sup> Acquiring an abandoned paint store across the street from South Bend's federal courthouse to serve as its church, City Chapel's faith community quickly grew to include nearly one hundred members.<sup>106</sup> The pastor presided over worship services on Sunday mornings and Wednesday evenings, gathering members for prayer, service, and religious instruction.<sup>107</sup> Much of City Chapel's church – including the sanctuary, religious ministry rooms, administrative offices, and classrooms – occupied their brick building's ground floor, leaving three upper floors available for office space and parking.<sup>108</sup> The property was located within the South Bend Central Redevelopment Area, declared blighted by resolution in 1997, three years after City Chapel's founding.<sup>109</sup> South Bend

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102. See *supra* Section I.A.

103. 744 N.E.2d 443 (Ind. 2001).

104. *Id.* at 454. Following the Indiana Supreme Court's decision, South Bend Department of Redevelopment authorities offered City Chapel \$565,000 for the church building – nearly quadrupling their original offer of \$152,500. City Chapel accepted that second offer, relocating just outside the city's Central Redevelopment Area. See Jeff Parrott, *Church's Future in Doubt*, S. BEND TRIB., Mar. 17, 2008, at A1 (recounting the aftermath of *City Chapel v. South Bend*).

105. Appellant's Brief in Support of Interlocutory Appeal at 1-2, *City Chapel*, 744 N.E.2d 443 (No. 71S00-0008-CV-501). Beyond regular worship services and "Sunday school," City Chapel's "religious ministry" sought to care for the poor and the homeless in downtown South Bend. *Id.*

106. *Id.* at 2; Appellee's Brief at 3, *City Chapel*, 744 N.E.2d 443 (No. 71S00-0008-CV-501).

107. A local Seventh-Day Adventist congregation also used City Chapel's sanctuary on Saturday mornings for worship services. Appellant's Brief, *supra* note 105, at 2.

108. The former paint store was constructed with an aboveground parking garage, which City Chapel hoped would provide additional revenue for its social-service ministries when not used by community members. *Id.*

109. Appellee's Brief, *supra* note 106, at 3-4. The Central Redevelopment Area included South Bend's historic Main Street, which the city hoped to redevelop with commercial and residential-property offerings. Appellant's Brief, *supra* note 105, at 1-2.

sought to acquire the church for \$152,000.<sup>110</sup> Condemnation proceedings commenced shortly after City Chapel refused to sell.<sup>111</sup>

The *City Chapel* controversy reached Indiana’s highest court on appeal.<sup>112</sup> When the St. Joseph Circuit Court overruled its objections to the condemnation proceedings against its church, City Chapel invoked the Indiana Supreme Court’s original jurisdiction over “substantial question[s] of law of great public importance.”<sup>113</sup> The court would decide whether taking a church building under the state’s police power of eminent domain prohibitively or permissibly burdens that church’s members in their free exercise of religion.<sup>114</sup> Citing Article I of the Indiana Constitution, City Chapel claimed that the taking “involve[d] not just a property interest in the church building but infringe[d] upon the congregation’s use of the church building for the free exercise of religious worship and assembly” and that the taking “w[ould] destroy the church.”<sup>115</sup> South Bend defended its condemnation actions as “religion-neutral.”<sup>116</sup> Asserting that the Indiana Constitution’s religious liberty protections should be equated with those of the U.S. Constitution, South Bend relied on federal jurisprudence in *Employment*

110. South Bend made a Uniform Land Acquisition offer to purchase the church for \$152,000 by letter dated January 25, 1999. After negotiations failed, South Bend filed a declaration of taking against City Chapel, dated February 9, 2000. City Chapel filed objections to the taking in St. Joseph Circuit Court two weeks later. See Appellant’s Brief, *supra* note 105, at 3; Terrence Bland, *Church Site Is ‘One More Piece of the Puzzle’*, S. BEND TRIB., Aug. 4, 2001, at A4.

111. Appellant’s Brief, *supra* note 105, at 3; Bland, *supra* note 110.

112. *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 443 (Ind. 2001).

113. *Id.* at 444. The initial St. Joseph Circuit Court hearings considered two objections from City Chapel: (1) South Bend did not make a “good faith appraisal” of the church property; and (2) South Bend’s use of eminent domain to take the church property materially burdened City Chapel’s “constitutional rights of free exercise of religious worship and assembly.” Appellant’s Brief, *supra* note 105, at 3. The Indiana Supreme Court ultimately dismissed the first objection in ruling for City Chapel on its second objection. *City Chapel*, 744 N.E.2d at 454.

114. *City Chapel*, 744 N.E.2d at 447.

115. *Id.* at 445 (internal quotation marks and citations omitted). Article I of the Indiana Constitution provides, in relevant part, for the religious liberty of citizens:

Section 2. All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.

Section 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.

Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

IND. CONST. art. I, §§ 2-4. The state’s power of eminent domain is acknowledged by implication in the same article: “No person’s property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.” *Id.* § 21.

116. *City Chapel*, 744 N.E.2d at 445.

*Division v. Smith*<sup>117</sup> to contend that its “use of statutory condemnation proceedings to take City Chapel’s church is a permissible use of religious-neutral laws of general applicability, and that [the city] is not required to demonstrate a compelling government interest.”<sup>118</sup> Hearing both arguments, the Indiana Supreme Court was left to decide whether a church taking required strict scrutiny – and if so, whether that heightened burden could prevent South Bend from proceeding against City Chapel.

Ultimately, the court decided for City Chapel.<sup>119</sup> In a lengthy opinion discerning “the intent of the framers of the [Indiana] Constitution” with respect to religious liberty, Justice Dickson concluded that condemnation of the church could not proceed “because South Bend seeks to take property the loss of which City Chapel claims will materially burden its rights embodied in the core values of Sections 2, 3, and 4 of Article 1 of the Indiana Constitution.”<sup>120</sup> The state’s police power of eminent domain may not materially burden the free exercise of religion,<sup>121</sup> and religious free exercise extends beyond “the personal devotional aspect of religion”<sup>122</sup> to communal worship:

From the literal text of Sections 2 and 3, the discussions at the Constitutional Convention, and the surrounding circumstances, we conclude that the framers and ratifiers of the Indiana Constitution’s religious liberty clauses did not intend to afford only narrow protection for a person’s internal thoughts and private practices of religion and conscience. By protecting the right to worship according to the dictates of conscience and the rights freely to exercise religious opinion and to act in accord

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117. 494 U.S. 872 (1990).

118. *City Chapel*, 744 N.E.2d at 451. The court rejected South Bend’s assertion that federal First Amendment jurisprudence should govern its interpretation of state religious liberty guarantees

When Indiana’s present constitution was adopted in 1851, the framers who drafted it and the voters who ratified it did not copy or paraphrase the 1791 language of the federal First Amendment. Instead, they adopted seven separate and specific provisions, Sections 2 through 8 of Article 1, relating to religion.

*Id.* at 445-46 (footnote omitted).

119. *Id.* at 454.

120. *Id.* at 447, 450. For sections 2, 3, and 4 of article I, see *supra* note 115.

121. *City Chapel*, 744 N.E.2d at 450.

122. *Id.* at 449. South Bend contended that the Indiana Constitution’s religious liberty clauses only protected the “personal devotional aspect of religion,” as distinct from public or communal religious exercise. Appellee’s Brief, *supra* note 106, at 22. The court understood South Bend’s argument “essentially to urge that the core values of Sections 2 and 3 encompass only the ‘personal devotional aspect’ of worship,” hence Justice Dickson’s extensive treatment of the framers’ intention. *City Chapel*, 744 N.E.2d at 448.

with personal conscience, Sections 2 and 3 advance core values that restrain government interference with the practice of religious worship, both in private and in community with other persons.<sup>123</sup>

According to Justice Dickson, the phrase “in any case whatever” qualifying section 3 “demonstrates the framers’ and ratifiers’ intent to provide unrestrained protection” for religious liberty.<sup>124</sup> When coupled with a “material burden” analysis that “looks only to the magnitude of the impairment [of religious exercise],” not weighing “the social utility of the state action at issue,” such constitutional protection allowed the court to limit condemning authorities in South Bend.<sup>125</sup> The Indiana Constitution and the state’s highest court protected religious exercise at City Chapel by protecting the physical structure in which its faith community gathered for worship—an abandoned paint store that became their church—from condemnation.

### C. A Property Rule for Churches

The court’s reasoning in *City Chapel* echoes across church-takings jurisprudence. When faith communities argue that condemnation substantially burdens their free exercise of religion, courts regularly accept their argument.<sup>126</sup> The

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123. *City Chapel*, 744 N.E.2d at 450. The court defines “worship” as “*chiefly and eminently*, the act of paying divine honors to the Supreme Being; or the reverence and homage paid to him in religious exercises consisting in adoration, confession, prayer, thanksgiving, and the like. . . . To perform acts of adoration; to perform religious service.” *Id.* at 448 (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1273 (Mass., George & Charles Merriam 1856)).

124. *City Chapel*, 744 N.E.2d at 448.

125. *Id.* at 447.

126. See *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 872 (2d Cir. 1988) (“[We] . . . accept as true . . . the Archdiocese’s allegations that the taking of the Seminary site would ‘substantially affect [the] work at St. Joseph’s’ and that the site is ‘essential’ to the Seminary’s mission.”); *Albanian Associated Fund v. Township of Wayne*, No. 06-cv-3217, 2007 WL 2904194, at \*10 (D.N.J. Oct. 1, 2007) (“[O]ver the past 22 years, the Mosque’s congregation has grown from fewer than 100 individuals to over 200 families. ‘[Houses of worship] cannot function without physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.’” (quoting *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 312 (D. Mass. 2006))); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1209 (C.D. Cal. 2002); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 880, 888 (D. Md. 1996); *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth.*, 527 P.2d 804, 805 (Colo. 1974); *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1254-55 (Colo. 1973); see also Phillip E. Hassman, Annotation, *Eminent Domain: Right to Condemn Property*

Becket Fund's 2006 letter to officials in Sand Springs, Oklahoma, captures courts' prevailing logic and sentiment: "Seizing and demolishing the Church's home and principal place of worship by eminent domain would substantially burden the Church's ability to engage in fundamental religious practices, such as prayer and worship."<sup>127</sup> Because religious liberty jurisprudence involving church property interprets "religious exercise" in relation to worship and ritual, those spaces or structures in which worship takes place cannot be condemned without substantially burdening the faith communities that own them. If courts reject faith communities' arguments, they do so because—in their judgment—no necessary relationship exists between a religious practice and a specific physical space.<sup>128</sup>

Theoretically, the government should be able to exercise eminent domain over a church by demonstrating that the substantial burden of condemnation furthers a compelling government interest and is the least restrictive means of furthering that interest. Condemning authorities would thus pass the courts' strict-scrutiny standard of review against faith-community objections.<sup>129</sup> But

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*Owned or Used by Private Educational, Charitable, or Religious Organization*, 80 A.L.R. 3d 833, §7(a) (1977) ("The taking, under an eminent domain power, of property belonging to a religious organization has been considered . . . as an interference with the free exercise of religion when the property is unique or essential to the religious activities of the organization."). The case of Christian Romany Church—where procedural issues precluded evidence concerning the "substantial burden" of the church's condemnation—may be distinguished from this pattern. In *Christian Romany Church Ministries, Inc. v. Broward County*, the Florida Court of Appeals sustained "the county's relevance objection to the pastor's rebuttal," finding that the "proffered testimony did not relate to whether the taking would meet the definition of substantial burden" but "simply outlined the services the church provides at its existing location." 980 So. 2d 1164, 1168 (Fla. Dist. Ct. App. 2008). Absent that testimony, the court found that Christian Romany Church had not made arguments necessary for religious liberty protection. *Id.*

127. Letter from Derek L. Gaubatz to Robert L. Walker, *supra* note 22, at 3.

128. See *Wilson v. Block*, 708 F.2d 735, 744 (D.C. Cir. 1983) ("[P]laintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."). Native American religious practices sometimes face this problem. See *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980) ("Granting as we do that the individual [Cherokee] plaintiffs sincerely adhere to a religion which honors ancestors and draws its spiritual strength from feelings of kinship with nature, they have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (*Yoder*), the cornerstone of their religious observance (*Frank*), or plays the central role in their religious ceremonies and practices (*Woody*)."); *Badoni v. Higginson*, 455 F. Supp. 641, 646 (D. Utah 1977) ("Plaintiffs fail, however, to demonstrate in any manner a vital relationship of the [religious] practices in question with the Navajo way of life or a 'history of consistency' which would support their allegation of religious use of Rainbow Bridge . . .").

129. See *supra* notes 87–95 and accompanying text.

when it comes to church takings, courts rarely move beyond the substantial burden on religious exercise, consistently interpreting constitutional and statutory religious liberty protections to prevent condemnation.<sup>130</sup> By doing so, courts establish for churches a “property rule” in the fashion of Calabresi and Melamed, requiring cities like South Bend to acquire churches from faith communities through voluntary transactions.<sup>131</sup>

Most faith communities that object to their church’s condemnation have no interest in selling to the government, under any circumstances.<sup>132</sup> As one member of Faith Deliverance Temple in Orlando proclaimed, “It’s not about the money . . . [but] about being here and being able to worship God freely.”<sup>133</sup> Centennial Baptist Church in Sand Springs echoed that conviction: “To put it simply, the Church property is not for sale . . . .”<sup>134</sup> For faith communities like Pillar of Fire, the church itself is sacred, even *sui generis*.<sup>135</sup> In *Pillar of Fire v. Denver Urban Renewal Authority*, the Colorado Supreme Court prevented authorities from proceeding against Memorial Hall, “revered for its historical and symbolic meaning in the birth of the Pillar of Fire Church.”<sup>136</sup> Writing for a unanimous court, Justice Erickson argued that any “decision by the Renewal Authority which will destroy the first church” of Pillar of Fire could not be upheld.<sup>137</sup> Justice Erickson continued, “The First Amendment protects freedom of religion which has its roots in the hearts and souls of the congregation, not in inanimate bricks and mortar. Yet, religious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection.”<sup>138</sup> While the court considered urban renewal “a substantial state interest that can justify taking property dedicated to religious uses,” the loss of Memorial Hall would “go far beyond the incidental burden of having to move to a new

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130. See cases cited *supra* note 126.

131. See Calabresi & Melamed, *supra* note 25, at 1092 (“An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”).

132. In the end, City Chapel proved an exception, selling to the government. See Parrott, *supra* note 104.

133. Pizzola, *supra* note 20.

134. Letter from Derek L. Gaubatz to Robert L. Walker, *supra* note 22, at 1.

135. *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1254 (Colo. 1973) (“Not only is the building in question being used for religious purposes, but the building and the site are alleged to have unique religious significance for the Pillar of Fire.”).

136. *Id.* at 1252.

137. *Id.* at 1254-55.

138. *Id.* at 1254.

location.”<sup>139</sup> Freedom of worship is “most precious to the spirit” and must be guarded by the courts.<sup>140</sup> That structure where Pillar of Fire gathers for worship – along with City Chapel, St. Dominic Church, the Albanian Associated Fund Mosque, Cottonwood Christian Center, St. Joseph’s Seminary, and almost certainly La Lomita Chapel – cannot be taken.

### III. OUTSIDE THE SANCTUARY: LIABILITY RULES FOR TAKINGS INVOLVING OTHER CHURCH-OWNED PROPERTY

Of course, the faith community that worships in La Lomita Chapel disagrees with *any* part of its property being taken. Beyond the church itself, La Lomita’s “peaceful setting” along the Rio Grande gives the people of Mission, Texas, space to “feel the presence of God” and to celebrate significant moments together “as a community.”<sup>141</sup> The chapel’s plot, just below the river levee, connects Catholics in the Rio Grande Valley to their community’s historic foundation as an outpost for itinerant missionaries – the Oblates of Mary Immaculate, whose “cowboy priest” continues to serve La Lomita today.<sup>142</sup> Even if the chapel structure remained intact, its situation just inside the proposed 150-foot border-wall enforcement zone, cleared of vegetation and subjected to unremitting surveillance, would render the property desecrated.<sup>143</sup>

That the proposed border wall is “fundamentally inconsistent with Catholic values” of human dignity, solidarity, and communion further precludes the faith community’s consent to condemnation.<sup>144</sup> Bishop Daniel Flores of the Diocese of Brownsville captures this moral and theological sentiment:

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139. *Id.* at 1253-54. The court distinguished urban-renewal efforts in Denver from those considered by the Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954). *Pillar of Fire*, 509 P.2d at 1253 (“[N]o First Amendment rights were at issue in [that] case.”). While agreeing with Justice Douglas that particular decisions of renewal authorities are “properly for the legislative and administrative branches and not for the court to review,” the court argued that it cannot “avoid its responsibility to guard constitutional rights by leaving the protection of First Amendment freedoms to the other branches without a right of review.” *Id.* at 1253-54.

140. *Pillar of Fire*, 509 P.2d at 1252.

141. Brownsville Brief, *supra* note 2, at 4.

142. Jeremy Raff, *The Chapel at the Border*, ATLANTIC (Feb. 24, 2019), <https://www.theatlantic.com/politics/archive/2019/02/trumps-border-wall-threatens-loma-lomita-chapel> [<https://perma.cc/J5GD-TWTW>].

143. See Brownsville Brief, *supra* note 2, at 10-11. The diocesan brief adds that “many citizens and documented immigrants of Latino descent[] are likely to conclude that the opportunity to seek out this holy place is simply not worth the risk of being stopped, questioned, or detained by the Government.” *Id.* at 11.

144. *Id.* at 2, 6-10.

A wall reflects the view that humanity is not a community of mutual responsibilities, but instead is divided into camps of “us” and “them.” Catholic teaching recognizes that the state has the right to protect its sovereignty by reasonable means and to secure its borders, but the Diocese [of Brownsville] cannot consent to the erection of a physical symbol of division and dehumanization on its Property, especially where there are alternative means of patrolling the border. A barrier that prevents victims of government tyranny, gang violence, domestic abuse, and economic insecurity from seeking refuge in the United States cannot be reconciled with Catholic moral and doctrinal teaching.<sup>145</sup>

Not only would the Trump Administration’s exercise of eminent domain foreclose communal use of church-owned property around La Lomita, but the property’s taking for border-wall construction would itself become “a ‘counter-sign’ to the Church’s mission in the Valley.”<sup>146</sup>

This mission reaches outside the sanctuary because communities of faith gather for more than worship. Across the United States, churches like La Lomita serve the spiritual and corporal needs of believers and nonbelievers alike<sup>147</sup> — educating the young in schools, feeding the hungry in soup kitchens, welcoming the homeless in shelters, caring for the sick in clinics, burying the dead in cemeteries.<sup>148</sup> Such ministries on church-owned property flow from the same

145. *Id.* at 8.

146. *Id.* at 8–9.

147. In Roman Catholic churches like La Lomita, “ministries” are largely guided by the “Corporal Works of Mercy” (e.g., feeding the hungry, giving drink to the thirsty, sheltering the homeless, visiting the sick, burying the dead) and the “Spiritual Works of Mercy” (e.g., comforting the sorrowful, counseling the doubtful, instructing the ignorant). See *The Corporal Works of Mercy*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-corporal-works-of-mercy.cfm> [<https://perma.cc/98QS-Y6WC>]; *The Spiritual Works of Mercy*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/new-evangelization/jubilee-of-mercy/the-spiritual-works-of-mercy.cfm> [<https://perma.cc/49E5-DWDK>].

148. In the United States, Catholics run the largest network of private schools, educating over 1.8 million students in nearly 5,000 elementary schools, 1,200 secondary schools, and more than 200 institutions of higher learning. See *Catholic Education*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/about/public-affairs/backgrounders/catholic-education.cfm> [<https://perma.cc/WF69-UDZK>]; *Catholic School Data*, NAT’L CATH. EDUC. ASS’N, [https://www.ncea.org/ncea/proclaim/catholic\\_school\\_data/catholic\\_school\\_data.aspx](https://www.ncea.org/ncea/proclaim/catholic_school_data/catholic_school_data.aspx) [<https://perma.cc/3WNP-5HNM>]. Catholic health-care serves nearly ninety million patients in hundreds of hospitals, health-care centers, and specialized homes nationwide. See *Catholic Health Care, Social Services and Humanitarian Aid*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/about/public-affairs/backgrounders/health-care-social-service-humanitarian-aid.cfm> [<https://perma.cc/73KK-HN9K>]. With support from Catholic Charities

religious belief given ritual expression in worship. But faith communities often fail to convince courts that their free exercise of religion will be substantially burdened by condemnation of property beyond the physical space or structure in which private and communal worship takes place. Whether a court will extend religious liberty protection beyond the sanctuary is thus more difficult to predict. Examination of the case law reveals how church-owned properties necessary for nonritualistic ministry are often taken, even when the church itself avoids condemnation.

### A. Parking Lots, Summer Camps, and Cemeteries

Church-owned properties are unequally associated with the religious free exercise of their faith communities. Courts nearly always consider the education of young people in private, church-owned school buildings to be constitutively religious.<sup>149</sup> Care for young people in private, church-owned camps or centers, however, will less often earn courts' deference.<sup>150</sup> While a sublime sanctuary may well inspire the religious imagination more than a mundane parking lot, the distinctions drawn by courts between church structures and other church-owned property seem nebulous to faith communities facing condemnation. Before contemplating possible explanations for the courts' church-takings jurisprudence,

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USA, more than 170 Catholic social-service agencies across the country respond to the needs of individuals and families living in poverty, while Catholic Relief Services partners with local communities and church institutions around the world to address urgent humanitarian needs. *See id.*; *Our Ministry*, CATH. CHARITIES USA, <https://www.catholiccharitiesusa.org/our-ministry> [<https://perma.cc/N7Y7-4Z9M>]; *Our Work Overseas*, CATH. RELIEF SERVS., <https://www.crs.org/our-work-overseas> [<https://perma.cc/5TTQ-MADZ>].

149. Courts understand church-owned private schools to provide religious instruction, regardless of students' personal faith commitments or lack thereof. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 177, 192 (2012); *Zelman v. Simmons-Harris*, 536 U.S. 639, 647-49 (2002); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-75 (1973); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 476-80 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 607 (1971); *Tilton v. Richardson*, 403 U.S. 672, 682, 687 (1971); *Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 531-32 (1925).
150. *See, e.g.*, *United States v. 564.54 Acres of Land*, 576 F.2d 983, 989 (3d Cir. 1978), *rev'd*, 441 U.S. 506 (1979) (“[Remarks by the Government] may have influenced the jurors to find that the substitute facilities measure did not apply because they did not want the taxpayers’ funds to be used to convert campers to the Lutheran religion. There is absolutely no evidence in the record to indicate that the Synod used the camps to proselytize.”); *State Highway Dep’t v. Augusta Dist. of N. Ga. Conference of Methodist Church*, 154 S.E.2d 29, 30 (Ga. Ct. App. 1967); *Father Flanagan’s Boys’ Home v. Millard Sch. Dist.*, 242 N.W.2d 637, 640 (Neb. 1976); *State v. First Methodist Church*, 488 P.2d 835, 837 (Or. Ct. App. 1971); *Camp Ramah in the Poconos, Inc. v. Zoning Hearing Bd.*, 743 A.2d 1019 (Pa. Commw. Ct. 2000).

an exploration of representative case law is instructive. Separating cases involving church takings from cases in which eminent domain is exercised over church-owned property not deemed necessary for religious worship—both of which have been lumped together in much of the legal literature<sup>151</sup>—illuminates the distinction courts draw between types of property belonging to faith communities.<sup>152</sup>

Numerous examples involve the church parking lot. Paved with asphalt, demarcated by line-drawn spots, parking lots are convincingly devoid of religious significance beyond their use by members of the faith community attending religious activities. Historically, parking lots have not received property-rule religious liberty protection. While some faith communities complain that lost parking spaces complicate their access to the church—enough to impact attendance at worship—courts have not found their religious exercise substantially burdened.<sup>153</sup> Few condemned parking lots leave members of the faith community unable to access their church. Property upon which neither religious worship nor religious ministry take place—at the physical and spiritual periphery of the sanctuary—will thus be found to implicate the faith community’s religious exercise only tenuously.

In *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Authority*—another case involving urban renewal in Denver—the Colorado Supreme Court distinguished “a church parking lot adjacent to and serving” St. Elizabeth’s Monastery and Church from the historic church itself.<sup>154</sup> Since the “St. Elizabeth church building [was] not itself being condemned” in the proceeding, Justice Lee wrote that the court needed evidence on several factors from the Order of Friars Minor, including the issue of deprivation of

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151. See, e.g., Mathues, *supra* note 9, at 1655-57; Saxer, *supra* note 38, at 677-82; Serkin & Tebbe, *supra* note 9, at 2; Comment, *supra* note 38, at 43.

152. Courts draw distinctions based on the properties’ necessity for religious worship, despite consistent instruction from the Supreme Court *not* to evaluate the beliefs and practices of faith communities. See cases cited *supra* note 63.

153. See, e.g., Trs. of Wade Baptist Church v. Miss. State Highway Comm’n, 469 So. 2d 1241, 1244 (Miss. 1985) (allowing condemnation of land used for parking while acknowledging that “access is of value and its taking is subject to our eminent domain laws”); Saints Sahag & Mesrob Armenian Church v. Dir. of Pub. Works, 360 A.2d 534, 536-37 (R.I. 1976) (“The expert’s reference to ingress and egress and the parishioner’s desire to park within the shortest possible walking distance to the church of his choice are completely irrelevant to a proper adjudication of the property right upon which the church’s claim actually rests.”); see also St. Luke’s German Evangelical Lutheran Church v. City of Rochester, 453 N.Y.S.2d 1012, 1016 (N.Y. Sup. Ct. 1982) (“[I]t is apparent that any inconvenience of having to travel an additional four-tenths of a mile, upon paved city streets, does not here render such [church] access unsuitable.”).

154. 527 P.2d 804, 806 (Colo. 1974).

religious free exercise through the property loss.<sup>155</sup> That Denver Urban Renewal Authority’s “eventual plan provide[d] for public parking to be located directly across the street from the Church, thus resulting only in a temporary interference with the Church,” seemed to impact the court’s judgment.<sup>156</sup> Despite St. Elizabeth’s designation as a historic landmark, the court allowed the church’s parking lot to be taken.<sup>157</sup> Similar cases involving church parking lot condemnation generally circumscribe those property-rule protections afforded the churches themselves.<sup>158</sup>

Church camps are also instructive. Located along tranquil waters or rolling prairies, away from the noise and bustle of urban America, providing innumerable activities on land and water for young people to grow in their appreciation of nature, camps may well implicate the faith community’s ministerial commitment to serving young people or caring for creation. Insofar as ministry at the rustic outdoor property flows from the same religious belief given ritual expression in worship, its condemnation would seem to substantially burden the faith community in their religious exercise. Yet even when camps or farms are explicitly associated with their faith communities’ religious mission, courts are unlikely to prevent their taking.<sup>159</sup> The established, physical location with its arts

155. *Id.* at 804, 806.

156. *Id.* at 805.

157. RICHARD B. COUSER, *MINISTRY AND THE AMERICAN LEGAL SYSTEM: A GUIDE FOR CLERGY, LAY WORKERS, AND CONGREGATIONS* 129 (1993); *see also History*, ST. ELIZABETH HUNG., <http://stelizabethdenver.org/welcome> [<https://perma.cc/JF4Q-NFVU>] (describing the church’s history, including its placements on the National Register of Historic Places and the Denver Landmark Preservation Commission).

158. *See, e.g.*, *Trinity Temple Church of God in Christ, Inc. v. Orange Cty.*, 681 So. 2d 765, 766 (Fla. Dist. Ct. App. 1996) (“[Lost] ‘profits’ in the form of fewer gifts, donations, and bequests” do not preclude the taking of church parking spaces, “[b]ecause the promotion of religion, not its own livelihood, is the primary purpose of a church”); *State of Ill. Med. Ctr. Comm’n v. United Church of the Med. Ctr.*, 491 N.E.2d 1327, 1331 (Ill. App. Ct. 1986) (“[T]he fact that the income received from the rental parking was devoted to religious purposes is not sufficient to make United Church’s use of the [parking lot] a religious use.”); *Miss. State Highway Comm’n v. Antioch Baptist Church, Inc.*, 392 So. 2d 512, 514 (Miss. 1981) (allowing condemnation of land used for parking which limited access to “the old church sanctuary building” but required no “building or permanent structure” to be taken); *cf. Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at \*11 (W.D. Tex. Mar. 17, 2004) (“Here, the Church is not denied physical access by the ordinance or the application of it in the multiple denials of the SUP. The Church enjoys significant parking in its current lot, and . . . the size of the existing lot meets the City’s standards for the size of the sanctuary it must serve.”).

159. *See, e.g.*, *State Highway Dep’t v. Augusta Dist. of N. Ga. Conference of Methodist Church*, 154 S.E.2d 29, 30 (Ga. Ct. App. 1967) (allowing consequential damages for property taken from “a recreational and Christian training camp area for youth” which resulted in “one cabin being

and crafts, tents and chuckwagon, tree-covered hills, and glistening pond rarely earns judicial property-rule protection.

*United States v. 564.54 Acres of Land*,<sup>160</sup> the Supreme Court's landmark case defining "just compensation," involved camps taken from the Southeastern Pennsylvania Synod of the Lutheran Church in America. The Synod sought complete indemnification for the development of substitute facilities when the federal government condemned its three summer camps along the Delaware River in Monroe County, Pennsylvania. Anticipating the taking years before the camps' condemnation, the Synod purchased land in the Poconos to construct a replacement camp, finding no suitable replacement camps on the market.<sup>161</sup> When the Synod first appealed to the Third Circuit, Judge Gibbons framed its question in terms of religious mission:

Whether the Lutheran Synod operates camping facilities at a loss because it believes camping builds character, or because it feels a charitable obligation to afford recreational opportunities to persons who would not otherwise be able to afford them, it seems clear that the reason for operating the camps is related to the Synod's religious mission. Thus the question presented is the extent to which [they] are entitled to be indemnified . . . . A closely analogous case would be the condemnation of an ancient church building still in active use for religious purposes.<sup>162</sup>

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in close proximity to the highway," which rendered it "useless for the purpose for which it was constructed"); *Father Flanagan's Boys' Home v. Millard Sch. Dist.*, 242 N.W.2d 637, 640 (Neb. 1976) ("There is nothing unique about the 40-acre tract of farm-land owned by the plaintiff . . . . The loss of this property will not interfere substantially in any way with the operation of the plaintiff's [program for orphaned, indigent, and underprivileged boys]."); *see also* *Marianist Province of the U.S. v. City of Kirkwood*, 944 F.3d 996, 1001 (8th Cir. 2019) (finding that a Catholic high school failed to demonstrate that its religious exercise was "substantially burdened, rather than merely inconvenienced, by its inability to use its baseball field at night"); *State v. First Methodist Church of Ashland*, 488 P.2d 835, 837 (Or. Ct. App. 1971) ("Desirable as it may be for the church to operate the youth center, it had no legal duty to do so. Thus, for two reasons, (a) availability of the usual methods of demonstrating market value, and (b) lack of legal necessity, the substitution or reproduction theory is inapplicable . . . ."); *cf.* *Camp Ramah in the Poconos, Inc. v. Zoning Hearing Bd.*, 743 A.2d 1019, 1022 (Pa. Commw. Ct. 2000) (commenting, in a zoning case, that "[t]he fact that the camp would be operated by and for practitioners of a particular religion with . . . [a] synagogue and religious educational experiences does not change the recreational nature of the use of the property").

160. 441 U.S. 506 (1979).

161. *United States v. 564.54 Acres of Land*, 576 F.2d 983, 986 (3d Cir. 1978), *rev'd*, 441 U.S. 506 (1979).

162. *United States v. 564.54 Acres of Land*, 506 F.2d 796, 798-99 (3d Cir. 1974).

After remanding to determine whether the Synod could qualify for substitute-facilities compensation, which was “available to private nonprofit owners if there was no ‘ready market’ for the condemned property and if the facilities were ‘reasonably necessary to public welfare,’” the Third Circuit again reversed the district court’s denial of entitlement to substitute-facilities compensation.<sup>163</sup> The Synod’s three camps “provide[d] a benefit to the community that [would] not be as fully provided after the facility [was] taken.”<sup>164</sup> And as Judge Van Dusen added, “to hold that a private owner cannot qualify for application of the substitute facilities doctrine if he receives any type of profit, no matter how intangible or ephemeral, from his property would render the doctrine inapplicable to private owners in every instance.”<sup>165</sup>

The Supreme Court ultimately saw things differently. Regardless of the Synod’s charitable or religious mission, Justice White asserted that “nontransferable values arising from the owner’s unique need for the property are not compensable, and [such] divergence from full indemnification does not violate the Fifth Amendment.”<sup>166</sup> The church summer camps would not be afforded religious liberty protections that might have justified their complete indemnification in the Synod’s creation of replacement camps near Monroe County, Pennsylvania. Outside the sanctuary, church property necessary for nonritualistic ministry was not spared the “public’s loss upon condemnation.”<sup>167</sup>

Courts rarely afford property-rule protection to church summer camps. But faith communities dispute the notion that such properties are merely recreational in nature. Unlike parking lots, summer camps can provide opportunities for religious education, community formation, and even ritual worship.<sup>168</sup> In *Camp Ramah in the Poconos*, Judge Smith gave voice to this conviction, dissenting from her Pennsylvania court’s conclusion that a thirty-acre Jewish day camp was “not religious”: “Camp Ramah . . . would teach many of the aspects of the Jewish faith to Jewish children by incorporating them into their daily lives while campers. Prayer services will be scheduled throughout the day, and campers will adhere to a kosher diet and speak in Hebrew whenever possible.”<sup>169</sup> An alternative

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163. *564.54 Acres*, 441 U.S. at 509-10.

164. *Id.* at 510 (quoting *564.54 Acres*, 576 F.2d at 995).

165. *564.54 Acres*, 576 F.2d at 989.

166. *564.54 Acres*, 441 U.S. at 514.

167. *Id.* at 516.

168. See, e.g., *Camp Ramah in the Poconos, Inc. v. Zoning Hearing Bd.*, 743 A.2d 1019, 1025 (Pa. Commw. Ct. 2000) (Smith, J., dissenting) (“[I]t is not uncommon for religious and recreational land uses to share common characteristics.”).

169. *Id.* at 1024 (citation omitted). Camp facilities even included “an outdoor synagogue.” *Id.* at 1025.

judicial paradigm would affirm faith communities in their sincere religious belief, even if courts ultimately allow their property to be condemned, rather than deny that their property could bear religious significance.

Church cemeteries are pointedly illustrative. Despite lying outside the sanctuary, cemetery property *itself* can be sacred. Many faith communities believe that internment of the deceased in a private, church-owned cemetery bridges religious worship and religiously motivated action in the world, crossing the sanctuary threshold and imbuing the burial ground with sacredness. Condemning the cemetery would thus seem to implicate the faith community's religious exercise directly. Beyond substantially burdening any ministerial practices involved in burying the dead, community members may condemn the taking itself as sacrilegious, believing that relocation desecrates ground meant to remain reverently undisturbed. Nonetheless, even when courts acknowledge that condemnation and relocation of the church cemetery infringes upon religious exercise, they rarely prevent the taking, leaving burial grounds without the property-rule protection of those spaces and structures in which ritual worship – including religious funerals – takes place.<sup>170</sup>

The Seventh Circuit's textbook-worthy opinion in *St. John's United Church of Christ v. City of Chicago*<sup>171</sup> exemplifies most courts' reasoning. When Chicago sought to acquire property around O'Hare International Airport for building additional runways, the St. John's community refused to sell St. Johannes Cemetery, suing in state and federal court over the city's eventual condemnation of their five-acre, 160-year-old burial ground.<sup>172</sup> For St. John's, "the remains of those buried . . . must not be disturbed until Jesus Christ raises [them] on the day of Resurrection."<sup>173</sup> Condemning and relocating St. Johannes Cemetery would be a "sacrilege" offensive to the community's religious faith.<sup>174</sup> Judge Wood accepted those concerns as sincere before reminding St. John's that cemetery relocation does not necessarily "infringe upon or restrict . . . a religious practice without a secular meaning."<sup>175</sup> Sacred practice meshes with its temporal setting: "[E]ven graves in cemeteries with a religious affiliation may be relocated

170. See cases cited *infra* notes 171, 178.

171. 502 F.3d 616, 619 (7th Cir. 2007).

172. See Geoffrey Johnson, *Dead Reckoning*, CHI. MAG. (Oct. 5, 2009), <https://www.chicagomag.com/Chicago-Magazine/October-2009/OHare-Expansion-Stalled-by-St-Johannes-Cemetery> [<https://perma.cc/WB22-4SYD>]; Gerry Smith, *Who Speaks for Dead at O'Hare Cemetery?*, CHI. TRIB. (Mar. 21, 2011), <https://www.chicagotribune.com/news/ct-xpm-2011-03-21-ct-met-bensenville-cemetery-20110321-story.html> [<https://perma.cc/46KS-6UQT>].

173. *St. John's United Church of Christ*, 502 F.3d at 632.

174. *Id.*

175. *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

because of natural necessity, for public health concerns, after a hurricane or flood, or for many other private or public reasons.”<sup>176</sup> Since graves and cemeteries themselves are not “inherently religious,” their relocation “does not on its face infringe upon a religious practice.”<sup>177</sup> Similar cases involving church-cemetery condemnation echo this reasoning, limiting those property-rule protections commonly afforded to church structures themselves.<sup>178</sup>

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176. *Id.*

177. *Id.* Judge Wood also noted that the O’Hare Modernization Act (OMA)—enabling legislation passed by the Illinois General Assembly in 2003—amended the Illinois Religious Freedom Restoration Act (IRFRA) to include a qualification: “[N]othing in IRFRA ‘limit[s] the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or the graves located therein.’” *Id.* at 631-632 (citing 775 ILL. COMP. STAT. 35/30 (2013)). The district and circuit courts thus dismissed the free-exercise claims: “[A]ny property, religious or otherwise, within the area designated for O’Hare expansion is subject to the extraordinary powers conferred in the OMA.” *Id.* at 632.

178. *See* St. James African Methodist Episcopal Church v. Balt. & Ohio R.R. Co., 79 A. 35, 37 (Md. 1911) (“[T]he unoccupied part of a private [church] cemetery may be condemned for railroad or other public purposes.”); *In re* Bd. of St. Openings & Improvements, 16 N.Y.S. 894, 898 (Gen. Term 1891) (“The city authorities can . . . take the fee of the land, which is in the corporation of Trinity Church, and . . . extinguish the right of burial in such land, however acquired, and in whomsoever vested.”), *aff’d*, 31 N.E. 102, 104 (N.Y. 1892) (“There is no law which prohibits the removal of human remains from a cemetery for lawful purpose and placing them elsewhere.”); Township of O’Hara v. 4.65 Acres, 910 A.2d 166, 171 (Pa. Commw. Ct. 2006) (“[T]he legislature’s deletion of the former prohibition against condemnation of church and cemetery property when establishing parks and recreational areas supports our construction that such is not currently prohibited.”); Cty. Bd. of Comm’rs v. Holladay, 189 S.E. 885, 889 (S.C. 1937) (“A cemetery is a sacred spot, where lie buried the loved ones of the living . . . and, should [the Legislature] at any time conclude that necessity require the granting of the power to condemn such lands, it would expressly give such authority, with special provisions as to disinterment . . . .”); Defendant’s Motion to Dismiss at 34, Rio Grande Int’l Study Ctr. v. Trump, No. 1:19-cv-00720-TNM (D.D.C. May 31, 2019), 2019 WL 8016785 (including condemnation proceedings against “Jackson Ranch Church and Cemetery and Eli Jackson Cemetery in Hidalgo County, Texas”); *see also* Lyng v. Nw. Indian Cemetery Ass’n, 485 U.S. 439, 451-52 (1988) (“Even if we assume that we should accept the Ninth Circuit’s prediction, according to which the [logging and road-building projects around Chimney Rock] will ‘virtually destroy the . . . Indians’ ability to practice their religion,’ the Constitution simply does not provide a principle that could justify upholding respondents’ legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.” (citation omitted)); Thiry v. Carlson, 78 F.3d 1491, 1493 (10th Cir. 1996) (“[T]he plaintiffs can still practice their [Christian and American Indian] religion and maintain the integrity of their family despite the relocation of their daughter’s gravesite.”); *cf.* Warschauer Sick Support Soc. v. New York, 754 F. Supp. 305, 307 (E.D.N.Y. 1991) (“The statute is facially neutral. As applied, the statute may impact Jewish fraternal organizations disproportionately, but any lack of proportion does not result from a discriminatory motive. It occurs, if at all, because Jewish immigrants were the ones who primarily formed benevolent societies and purchased cemetery plots.”).

### B. Liability Rules Outside the Sanctuary

In *St. John's United Church of Christ*, Judge Wood gave language to one of the principal reasons why courts rarely extend property-rule protections to church-owned property outside the sanctuary. In the eyes of the courts, such property is not “inherently religious.”<sup>179</sup> Its relationship to fundamental religious practices is considered too attenuated. Faith communities consistently fail to demonstrate that their particular nonchurch property is “inseparable from the[ir] way of life, the cornerstone of their religious observance, or plays the central role in their religious ceremonies and practices.”<sup>180</sup> Established church-takings jurisprudence involves an interpretation of “religious exercise” relative to what happens *inside* the church, emphasizing worship and ritual as fundamental to – even constitutive of – religious exercise. For the free exercise of religion, parking lots, summer camps, and even cemeteries do not fit this mold.

Judge Wood's opinion also gives voice to an underlying tension within the jurisprudence of religious liberty and takings, one that implicates the ministerial commitments of faith communities who find their nonchurch property condemned. *St. John's* illustrates that tension between religious practices on church-owned property and analogous secular practices on property unaffiliated with religion. The City of Chicago was permitted to condemn St. Johannes Cemetery because the Seventh Circuit found that relocating cemeteries and “the graves located therein” does not “infringe upon or restrict . . . a religious practice *without a secular meaning*.”<sup>181</sup> In other words, nonreligious people also bury their dead, and they bury their dead in cemeteries that “may be relocated because of natural necessity” from time to time.<sup>182</sup> This means that St. John's cemetery need not be granted property-rule protection on the basis of religious liberty, especially if “there is nothing inherently religious about cemeteries or graves.”<sup>183</sup> Secular analogues to religious practices, on property unaffiliated with religion, implicitly challenge the claim that such religious practices are fundamental – leaving the property on which they take place vulnerable to condemnation. As a result, courts apply Calabresi and Melamed-type “liability rules” outside the sanctuary,

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179. *St. John's United Church of Christ*, 502 F.3d at 632.

180. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980) (citations omitted), *cert. denied*, 449 U.S. 953 (1980).

181. *St. John's United Church of Christ*, 502 F.3d at 632 (emphasis added) (citations omitted).

182. *Id.*

183. *Id.*

allowing cities like Chicago to acquire church-owned property from faith communities through eminent domain.<sup>184</sup>

Faith communities dispute the reasoning behind these liability rules. By taking their camp, their cemetery, or even their undeveloped parcel of land,<sup>185</sup> condemning authorities seize property that faith communities consider necessary for their religious ministry, substantially burdening their free exercise of religion.<sup>186</sup> Judge Ripple captured this religious liberty argument for protecting nonchurch property from condemnation, dissenting in *St. John's United Church of Christ* from “the portion of the panel’s opinion that rejects St. John’s claim”<sup>187</sup>:

We have held that a burden on the free exercise of religion rises to the level of a constitutional injury when the law places significant pressure on the adherent to forego its religious precepts. The effect of relocating St. Johannes on St. John’s religious observance is neither hypothetical nor speculative, but, rather, inescapable. The relocation of St. Johannes would force St. John’s to forego its religious precepts regarding the burial

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184. See Calabresi & Melamed, *supra* note 25, at 1092 (“Whenever someone may destroy [an] initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder’s complaint that he would have demanded more will not avail him once the objectively determined value is set.”); see also *id.* at 1106-10 (defining property rules and liability rules).
185. See, e.g., *Congregation Adas Yereim v. City of New York*, 673 F. Supp. 2d 94, 98 (E.D.N.Y. 2009) (allowing condemnation of property upon which Jewish organizations “sought to build a religious complex . . . including a yeshiva, that is, a religious school, and residential facilities”); *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 252 (W.D.N.Y. 2005) (“[T]he record demonstrates that the Town’s actions are neutral and generally applicable, and [Faith Temple] has failed to demonstrate that the proposed condemnation imposes a substantial burden on its exercise of religion.”); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum*, 744 N.E.2d 308, 311-12 (Ill. App. Ct. 2001) (“Contrary to the Mosque’s argument, the fact that these properties adjoin a place of worship does not change the basic character of the surroundings. The basic character of the locale is still one of ruin and urban decay. The area is blighted. The exercise of eminent-domain powers for the purpose of eliminating slums or blighted property is a proper use for a valid public purpose.”).
186. Beyond condemnation, zoning regulations through “special use permits” often work to burden the free exercise of religion, particularly on properties owned by minority religious communities. See, e.g., *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006) (involving a Sikh community); *Congregation Etz Chaim v. City of Los Angeles*, 371 F.3d 1122 (9th Cir. 2004) (involving a Hasidic community); *Spirit of Aloha Temple v. County of Maui*, 409 F. Supp. 3d 889 (D. Haw. 2019) (involving a Hindu community). For an insightful treatment of religious liberty in the zoning context, see Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 *FORDHAM URB. L.J.* 1021 (2012).
187. *St. John’s United Church of Christ*, 502 F.3d at 646 (Ripple, J., concurring in part and dissenting in part).

of its members. This burden goes further than placing pressure on St. John's to forego its religious precepts. By relocating St. Johannes Cemetery, St. John's would be "coerced by the Government's action into violating [its] religious beliefs." By forcing St. John's to "perform acts undeniably at odds with fundamental tenets of [its] religious beliefs," this coercion presents the precise "danger to the free exercise of religion that the First Amendment was designed to prevent."<sup>188</sup>

Whether graves or campsites are "inherently religious," their condemnation can—and does—impermissibly burden religious exercise outside the sanctuary. Unfortunately for faith communities like St. John's, the Southeastern Pennsylvania Lutheran Synod, and Congregation Adas Yereim, courts rarely accept that argument. Church-owned properties necessary for religious exercise beyond ritual prayer and worship—whether for burying the dead, forming community leaders, or building moral character in young people—can still be taken.

#### IV. PARADIGMATIC PROPERTY AND PERSONHOOD: WHY COURTS PROTECT CHURCHES FROM CONDEMNATION

The reasoning behind takings cases involving church-owned property outside the sanctuary underscores the implicit property-rule protection afforded churches by the courts. These property-rule protections for churches behave like "trumps," rendering the free exercise of religion immune from constitutional interest balancing and subjecting church takings to something like "per se rules of invalidity."<sup>189</sup> Courts conclude that an eminent-domain action impermissibly burdens faith communities in their constitutionally guaranteed religious liberty,

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188. *Id.* at 645 (citations omitted). Judge Ripple specifically critiqued the panel's determination that "because cemeteries and the burial, or relocation, of the dead are not inherently religious, the [OMA] amendment to the Illinois RFRA is textually neutral." *Id.* at 644. According to Judge Ripple, the panel's

analysis fails to appreciate that, when read in context, the new section 30 of the Illinois RFRA affects *only religious cemeteries* . . . . Moreover, because the Illinois RFRA's protections apply only where the government action substantially burdens an individual's free exercise of religion, the amendment affects only those religious cemeteries whose relocation would substantially burden an individual's free exercise of religion.

The effect of the amendment is to remove from the protections afforded to every other individual's religious observance, those individuals whose religious practices would be substantially burdened by the relocation of cemeteries in connection with the expansion of O'Hare.

*Id.* at 644-45 (emphasis added).

189. See Blocher, *supra* note 37, at 311.

effectively prohibiting religious worship within their condemned church structure, and block the taking.<sup>190</sup>

Yet the very distinction between those spaces or structures in which worship takes place and other church-owned property outside the sanctuary suggests that courts decide based on some other metric. Established church-takings jurisprudence describes “religious exercise” relative to what happens inside churches, emphasizing worship and ritual as essential to the free exercise of religion. Unstated and understated valuations of properties as nonessential for religious worship – as not “inherently religious” – often decide their condemnation.

That courts allow some church property to be taken by eminent domain reveals an implicit limitation within the “rights as trumps” paradigm for church takings. Courts grant something less than property-rule protection to elements necessary for the free exercise of religion – including many church-owned properties outside the sanctuary – based, in no small part, on how they comprehend the religious exercise involved. Applying “liability rule” protection to these non-sanctuary properties, from parking lots to camps to cemeteries, courts permit governments to take property from faith communities for just compensation.<sup>191</sup> But they do so by imposing an inappropriate judicial theology on church property, one rooted in judge-made determinations of what may be considered “essential” to faith communities’ free exercise of religion.

#### A. Paradigmatic Property and Personhood

When courts prevent the government from taking structures necessary for religious worship, they imbue such structures with constitutional meaning. Courts accept that prayer and worship constitute fundamental religious practice – regardless of what *else* might be considered fundamental religious practice for particular faith communities – and extend property-rule protections to those spaces and structures in which “religious exercise,” so understood, paradigmatically takes place: churches. No matter how courts evaluate other properties through which faith communities realize the nondevotional commitments of their religious belief, their interpretation of constitutional and statutory religious liberty protections preserves church buildings from condemnation. Insofar as churches bear an essential relationship to faith communities’ effectuation of their constitutionally guaranteed interest in fundamental religious practice, they become a kind of paradigmatic property for the free exercise of religion. Their taking will *always* implicate religious exercise, conceived paradigmatically by courts

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190. *See id.* at 311, 316.

191. Calabresi & Melamed, *supra* note 25, 1106-10 (explaining liability rules).

relative to what occurs inside the sanctuary. To condemn a faith community's *church* is to condemn their *worship*.

Despite its usefulness for describing court-drawn distinctions between different types of church property in eminent-domain litigation, the property-rule/liability-rule framework ultimately fails to capture *why* courts treat church property differently. Calabresi and Melamed's classic formulation, concerned with efficient market transactions and levels of entitlement protection,<sup>192</sup> struggles to explain how courts comprehend the *subjective* relationship between faith communities and their property. Intuitions about that relationship can help make sense of why church camps and cemeteries are allowed to be taken, while church sanctuaries are protected from condemnation. A different theoretical perspective, one focused more on the religious exercise of faith communities than on their property, is necessary.

Margaret Radin's classic "personhood" theory of property offers just that perspective. Perceiving that people can be constitutively bound up with "things" external to them, her account of "property for personhood" is instructive for understanding those spaces and structures where faith communities practice their religion. Radin begins with the following observation:

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house . . . .

. . . .

The opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value. One holds such an object for purely instrumental reasons. The archetype of such a good is, of course, money, which is almost always held only to buy other things. A dollar is worth no more than what one chooses to buy with it, and one dollar bill is as good as another.<sup>193</sup>

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192. See *id.* at 1090-97.

193. RADIN, *supra* note 9, at 36-37. Radin suggests that "the strength or significance of someone's relationship with an object" may be gauged by "the kind of pain that would be occasioned by its loss." *Id.* On Radin's view, property is "closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder." *Id.* Radin offers the example of a wedding ring to illustrate the

Radin refers to these theoretical opposites as “personal property” and “fungible property,” respectively.<sup>194</sup> Personal property is connected morally to the proper development and flourishing of persons.<sup>195</sup> Fungible property instead represents interchangeable units of exchange value and is not similarly connected to persons.<sup>196</sup> Both forms of property exist on “a continuum that ranges from a thing indispensable to someone’s being to a thing wholly interchangeable with money.”<sup>197</sup> The personhood perspective focuses on where property ends up, not where and how it starts out, as well as on the person with whom it ends up – on the “subjective relationship between the holder and the thing, and not on the objective arrangements surrounding production of the thing.”<sup>198</sup> The subjective relationship to human beings gives moral weight to personal property. For Radin, that added moral weight deserves property-rule protection.<sup>199</sup>

Certain personal property may rest outside the marketplace altogether.<sup>200</sup> Radin refers to such morally significant property, which is precluded from sale by law or custom, as “market-inalienable.”<sup>201</sup> Because it becomes something of “a personal attribute,” property bound up in personhood can only be gifted within the realm of social interactions.<sup>202</sup> Prohibiting the commodification of personal property through market transfer helps “exclud[e] from social life commodified versions of certain ‘goods’” – such as love, friendship, family, sexuality,

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distinction: “[I]f a wedding ring is stolen from a jeweler, insurance proceeds can reimburse the jeweler, but if a wedding ring is stolen from a loving wearer, the price of a replacement will not restore the status quo – perhaps no amount of money can do so.” *Id.*

194. *Id.*

195. *Id.* at 153. Examples of personal property might include “a wedding ring, a portrait, an heirloom, or a house.” *Id.* at 36.

196. *Id.* at 153–54. Examples of fungible property might include “the wedding ring in the hands of the jeweler, the automobile in the hands of the dealer, the land in the hands of the developer, or the apartment in the hands of the commercial landlord.” *Id.* at 37.

197. *Id.* at 53. Radin notes that many relationships between persons and property fall somewhere in the middle of this continuum. *See id.* at 53–54.

198. *Id.* at 54.

199. *Id.* at 54–55 (“The Calabres[i]-Melamed distinction between property rules and liability rules . . . merely recognizes that some entitlements are harder to extinguish than others. In order to make it take on a moral function, there would be a nice simplicity in hypothesizing that personal property should be protected by property rules and that fungible property should be protected by liability rules.”); *see supra* notes 26–27 and accompanying text.

200. Radin, *Market-Inalienability*, *supra* note 25, at 1853–54.

201. *Id.* at 1850.

202. *Id.* at 1880, 1905–06 (“A better view of personhood should understand many kinds of particulars – one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes – as integral to the self. To understand any of these as monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human.”).

and religion – while stressing “the social context for the proper expression and fostering of personhood.”<sup>203</sup> Such property challenges the rhetorical assumption of economics that all things can be reduced to market value, exchanged, or condemned.<sup>204</sup> Human organs and blood, sexual activity and fetal surrogacy, infants and children, clean air and water, and artifacts of endangered species have all involved “deeply contested issues of commodification” that have inspired judicial and statutory prohibitions at different points in history.<sup>205</sup> Their moral and legal resistance to market value guide lawmakers in circumscribing the state’s power of eminent domain.<sup>206</sup>

The concepts of personhood and inalienability elucidate why courts protect churches from condemnation, as well as why courts seem unwilling to block takings of other church-owned property outside the sanctuary. They discern an essential relationship between fundamental religious practice – religious devotion, ritual prayer, and worship – and the church structure itself. The Colorado Supreme Court in *Pillar of Fire* captured this moral connection between property and religion: “[R]eligious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection.”<sup>207</sup> When courts focus on where property ends up, not where and how it starts out, the fungibility of particular church structures dissipates. An abandoned paint store in South Bend can receive property-rule religious liberty protection because City Chapel’s faith community worships there.<sup>208</sup>

203. *Id.* at 1913.

204. Radin describes “commodification” as more than simply “buying and selling.” *Id.* at 1859. Broadly construed, it also includes “market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions.” *Id.* “Market value,” or exchange value, is defined as “either the sum of money the holder will accept in order to relinquish [property] or the sum of money the potential holder will pay in order to acquire [property].” *Id.* at 1859–60 n.44. Radin laments that the “rhetoric of commodification has led us into an unreflective use of market characterizations and comparisons for almost everything people may value, and hence into an inferior conception of personhood.” *Id.* at 1936.

205. *Id.* at 1856–57; see, e.g., National Organ Transplant Act of 1984, 42 U.S.C. § 274e(a) (2018) (banning organ sales in interstate commerce); *Andrus v. Allard*, 444 U.S. 51, 64–68 (1979) (upholding the ban on trade in artifacts with eagle feathers under the Eagle Protection Act); UNIF. PARENTAGE ACT art. 8 cmt. (UNIF. LAW COMM’N 2017) (“The fact that very few states enacted Article 8 of UPA (2002) is likely the result of . . . the controversial nature of surrogacy itself.”).

206. See RADIN, *supra* note 9, at 156 (“To the extent that we recognize personal property, we might think that some property should not be taken at all. We might think that for some things no compensation can be ‘just.’ We might find some things to be inalienable if they are closely connected with personhood, or at least inalienable involuntarily to the government.”).

207. *Pillar of Fire v. Denver Urban Renewal Auth.*, 509 P.2d 1250, 1254 (Colo. 1973).

208. See *supra* notes 106–108 and accompanying text.

When courts allow church-owned property outside the sanctuary to be taken, their judgments implicate more than the ministerial commitments of faith communities who find their camps and cemeteries condemned. They also declare the property fungible. Courts not only determine that nonchurch properties are unnecessary for worship; they conclude that such properties are not “inherently religious.”<sup>209</sup> They reference secular analogues to religious practices, on property unaffiliated with religion, to reject the notion that faith communities are losing property that is “inseparable from the[ir] way of life, the cornerstone of their religious observance, or plays the central role in their religious ceremonies and practices.”<sup>210</sup>

Ultimately, courts are making judgments about church property based on their own determinations of what counts as “essential” for faith communities’ free exercise of religion. Decisions to block takings *inside* the sanctuary while allowing takings *outside* the sanctuary – all because of *where* and *how* courts believe religious exercise paradigmatically occurs – impose an inappropriate, judge-made theology on church property. When courts extend property-rule protections to spaces and structures in which religious worship takes place, they seek not to preserve churches per se, but the freedom of religion, “most precious to the spirit,”<sup>211</sup> which sanctifies their bricks and mortar. For courts and faith communities alike, greater judicial reliance on basic, time-tested religious liberty principles can help.

### B. Renegotiating Judicial Theology

When courts make judgments about church property based on what they deem “essential” for faith communities’ free exercise of religion, they do the very thing First Amendment jurisprudence forbids: they resolve questions of eminent

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209. *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 632 (7th Cir. 2007). Interestingly, by the time *United States v. 564.54 Acres of Land* reached the Supreme Court, any discussion of the Lutheran Synod’s “religious mission” had ceased. Compare *United States v. 564.54 Acres of Land*, 576 F.2d 983 (3d Cir. 1978), with *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979). The Court reaffirmed that “nontransferable [subjective] values arising from the owner’s unique need for the property are not compensable” in deciding that just compensation for condemned property requires no more than “fair market value.” *564.54 Acres*, 441 U.S. at 514. Church-owned summer camps had become fungible property. See also *supra* Section III.B.

210. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (1980) (citations omitted), *cert. denied*, 449 U.S. 953 (1980).

211. *Pillar of Fire*, 509 P.2d at 1252.

domain based on their “judicial perception” of religious beliefs and practices.<sup>212</sup> Courts evaluate church takings based on where and how *they* believe religious exercise paradigmatically takes place. They tacitly theologize about religious essentiality, despite the fact that RFRA and RLUIPA—along with constitutional and statutory religious liberty protections in thirty-one states—place no special value on whether religious exercise is “essential” or “fundamental” in their strict-scrutiny analysis.<sup>213</sup> Indeed, even *Employment Division v. Smith* considered such theological line drawing inappropriate for courts.<sup>214</sup> Given that judicial distinctions between religious exercise inside and outside the sanctuary are likely to ring hollow for many faith communities, another approach seems necessary.<sup>215</sup>

Courts might avoid slipping into judicial theology by following an alternative line of inquiry, one that comports with most existing outcomes in church takings without engaging in theological speculation. Rather than decide whether a religious practice is “essential” or “fundamental,” courts would follow the broadly defined textual standards of RFRA and RLUIPA and instead ask probing questions about *what the sincere religious practice actually is* and *whether the government is imposing a meaningful burden on that practice*.<sup>216</sup>

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212. *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981); see cases cited *supra* note 63 (underscoring that judges are ill-positioned to evaluate the beliefs and practices of faith communities, particularly those of minority religious traditions).
213. See *supra* notes 87–98 and accompanying text.
214. See *Emp’t Div. v. Smith*, 494 U.S. 872, 886–87 (1990) (“It is no more appropriate for judges to determine the ‘centrality’ of religious beliefs before applying a ‘compelling interest’ test in the free exercise field, than it would be for them to determine the ‘importance’ of ideas before applying the ‘compelling interest’ test in the free speech field.”).
215. In Eastern and Western Christianity, the Greek word for “worship” is *leitourgia*, “a work (*ergon*) undertaken on behalf of the people (*laos*).” DAVID W. FAGERBERG, *THEOLOGIA PRIMA: WHAT IS LITURGICAL THEOLOGY?* 11 (2d ed. 2004). Its biblical usage implies both “ministry” as well as “gift or benefaction on behalf of the needy,” in keeping with Jewish and Christian scriptural commandments to care for the stranger, the orphan, and the widow. *Id.* In *leitourgia*, “a group of people become something corporately which they had not been as a mere collection of individuals—a whole greater than the sum of its parts.” *Id.* (quoting ALEXANDER SCHMEMANN, *FOR THE LIFE OF THE WORLD* 25 (1976)). *Leitourgia* involves “a function or ‘ministry’ . . . on behalf of and in the interest of the whole community.” It was never “a domestic act for one’s kith and kin, but a public act for the community in which one dwelled.” *Id.* Religious worship, so understood, moves outside the sanctuary, which is why every Roman Catholic Mass concludes with the priest instructing worshippers to “go . . .”
216. Judges can investigate religious sincerity, but only very gingerly. Following *Thomas v. Review Board*, judges are rarely supposed to examine whether an individual’s beliefs are internally consistent—“Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one”—nor should they assess sincerity based upon other people’s behavior: [I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.” 450 U.S. 707, 715–16 (1981).

Church parking lots provide an intriguing example, both practically and theoretically. In reviewing the condemnation of a parking lot that serves the church itself, a court might first observe that sincere belief in the power and importance of communal prayer motivates members of the faith community to attend worship services at their church. A court might then find that taking the church parking lot only burdens those members substantially if it significantly raises the cost of participating in worship services – by forcing members to walk great distances or to take prohibitively expensive cabs to reach the church, or by foreclosing available accommodations for disabled parishioners, or by restricting access to the church building in some other way.<sup>217</sup>

Judging the substantiality of the burden allows courts to focus on church property's necessity for sincere religious practice, including worship, but in a manner that avoids imposing courts' *own* theological reasoning – which the faith community might find alien. Courts can ask how faith communities would engage in particular religious practices if their parking lot, their summer camp, or their cemetery were taken, then inquire if those practices would be prohibitively more costly, or otherwise burdensome, under such circumstances.<sup>218</sup> If faith communities answer the second question affirmatively, courts may determine that condemnation substantially burdens their religious exercise, concluding that their property is reasonably necessary to sincere religious practice.

This alternative judicial paradigm for church takings invites courts to affirm faith communities in their sincere religious belief, rather than to deny the religious significance of their property. Two dissenting opinions from nonsanctuary condemnations exemplify this sounder method of inquiry. In *Camp Ramah*: “Camp Ramah . . . would teach many of the aspects of the Jewish faith to Jewish children by incorporating them into their daily lives while campers. Prayer services will be scheduled throughout the day, and campers will adhere to a kosher diet and speak in Hebrew whenever possible.”<sup>219</sup> In *St. John's*: “The relocation of St. Johannes would force St. John's to forego its religious precepts regarding the burial of its members . . . . [T]his coercion presents the precise danger to the free

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217. See cases cited *supra* note 153. The condemnation of St. Elizabeth's church parking lot was allowed, in no small part, because Denver's urban renewal plan “provide[d] for public parking to be located directly across the street from the Church, thus resulting only in a temporary interference with the Church.” *Order of Friars Minor of the Province of the Most Holy Name v. Denver Urban Renewal Auth.*, 527 P.2d 804, 805 (Colo. 1974).

218. *E.g.*, *Order of Friars Minor*, 527 P.2d at 805 (“The Church contends that the lot is necessary to its operation, as it would impose a great difficulty upon many parishioners to attend were parking not available. The Church is in a high-crime area, evidenced partially by the fact that it is an area slated for urban renewal. Public transit is expensive and unreliable and walking often dangerous, particularly for the elderly.”).

219. *Camp Ramah in the Poconos, Inc. v. Zoning Hearing Bd.*, 743 A.2d 1019, 1024-25 (Pa. Commw. Ct. 2000) (Smith, J., dissenting).

exercise of religion that the First Amendment was designed to prevent.”<sup>220</sup> Whether graves or campsites are “inherently religious,” their condemnation can—and does—impermissibly burden religious exercise. Radin suggests that “the strength or significance of someone’s relationship with an object” may be gauged by “the kind of pain that would be occasioned by its loss.”<sup>221</sup> The loss of property bound up with a faith community’s free exercise of religion will always constitute a substantial burden.

Of course, courts can always decide that the government’s interest in condemnation is sufficiently compelling to warrant burdening the religious exercise of faith communities.<sup>222</sup> If taking church property can be considered the least restrictive means of achieving that compelling interest—and there may be good reason to believe that it is, given the elevated political and economic costs of eminent domain<sup>223</sup>—courts may allow the taking. But they will have affirmed faith communities in their sincere religious belief, even if they ultimately permit something of their religious exercise to be condemned, acting in accord with our constitutional commitment to religious liberty.

#### CONCLUSION: PROTECTING LA LOMITA CHAPEL

Just as urban-redevelopment efforts and other exertions of governmental eminent-domain power have long implicated religious property throughout the United States, recent actions against houses of worship along the Mexico-United States border have summoned questions about religious liberty protections in land use.<sup>224</sup> This Note has described how courts almost always protect churches

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220. *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 645 (7th Cir. 2007) (Ripple, J., concurring in part and dissenting in part).

221. RADIN, *supra* note 9, at 36-37.

222. *Cf. Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451-52 (1988) (“Even if we assume that we should accept the Ninth Circuit’s prediction [that] the G-O road will ‘virtually destroy the . . . Indians’ ability to practice their religion,’ the Constitution simply . . . does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours.”).

223. *See supra* notes 9-23 and accompanying text. Threats of lengthy litigation, exorbitant compensation, and reputational harm to government actors all ensure that eminent domain remains “a tool of last resort for governments instead of the first one called upon.” Serkin & Tebbe, *supra* note 9, at 32.

224. *See, e.g.,* Nina Lakhani, ‘That’s Genocide’: Ancient Tribal Graves Threatened By Trump Border Wall, *GUARDIAN* (Dec. 16, 2019), <https://www.theguardian.com/environment/2019/dec/16/tribe-fights-to-save-ancestral-graves-in-the-path-of-trumps-border-wall> [<https://perma.cc/SG6W-TYQD>] (describing the 145-year-old Jackson Ranch Chapel—

from condemnation, interpreting constitutional and statutory religious liberty protections as a kind of property rule to prevent the taking. However, these same interpretations lead courts to discriminate between different types of religious property. While many church-owned parcels and buildings have been condemned, courts continue to protect those structures deemed necessary for religious devotion, for ritual prayer, and for worship. Case law reveals that courts sometimes allow condemning authorities to take properties integral to a faith community's religious mission – including church camps and cemeteries – while shielding with a strong property rule those physical structures where the community worships. Courts imbue such structures with constitutional meaning by their protection, transforming houses of worship into paradigmatic property for the free exercise of religion. Thus, unsurprisingly, La Lomita Chapel has not been taken.

Nevertheless, the Trump Administration continues to threaten church property around La Lomita.<sup>225</sup> Condemnation of surveyed land adjacent to the chapel will inevitably restrict, and may eventually deny, the faith community's access to religious worship at La Lomita.<sup>226</sup> Because the land bears an essential relationship to the faith community's free exercise of religion at La Lomita, property-rule protection should apply. Our first freedom should give the federal court in McAllen, Texas, pause before deciding the sacred hillock's condemnation.

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the Rio Grande Valley's first Protestant church – and Eli Jackson Cemetery in Hidalgo County, Texas); Samuel Smith, *Planned Texas Border Wall Would Cut Off Congregants from Their Church, 'Burden' Religious Practice*, CHRISTIAN POST (Feb. 9, 2020), <https://www.christianpost.com/news/planned-texas-border-wall-would-cut-off-congregants-from-their-church-burden-religious-practice.html> [<https://perma.cc/77XV-8MLQ>] (describing Templo La Hermosa Church outside Donna, Texas); Gary Nabhan et al., *Opinion, Religious Services Are 'Essential,' Just Not for Those Communities in Way of Border Wall*, AZ CENT. (June 17, 2020), <https://www.azcentral.com/story/opinion/op-ed/2020/06/17/border-wall-imperils-communities-access-sacred-sites/5339686002> [<https://perma.cc/LP4K-KMWE>]; *Native Burial Sites Blown Up for US Border Wall*, BBC NEWS (Feb. 10, 2020), <https://www.bbc.com/news/world-us-canada-51449739> [<https://perma.cc/3YH3-TGD3>] (describing places of worship for the Tohono O'odham Nation near Organ Pipe Cactus National Monument in Arizona).

225. Elizabeth Findell, *Construction of Texas Border Wall Stalls over Fights with Landowners*, WALL ST. J. (Dec. 12, 2019, 7:40 AM ET), <https://www.wsj.com/articles/construction-of-texas-border-wall-stalls-over-fights-with-landowners-11576154415> [<https://perma.cc/2HWN-T4HB>].

226. Brownsville Brief, *supra* note 2, at 3, 11.