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## DON'T TOUCH MY JUNK – AT THE AIRPORT OR AT THE ZONING OFFICE

by [John C. Shepard](#) 12/18/2010



Until recently, “Don’t touch my junk” was only a rallying cry for people who liked to accumulate broken down cars in their yards, in defiance of local nuisance ordinances. The [internet meme](#) radiating from San Diego International Airport puts an entirely new spin on the phrase.

Americans have a strong tradition of equality, enshrined in the Equal Protection clause of the 14th Amendment to the United States Constitution: “no state shall ... deny to any person within its jurisdiction the equal protection of the laws”.

Next to the implied right to privacy—the right to be left alone—we value the fact that the law holds each of us as equals, whether we’re old or young, rich or poor, white, black, brown or purple. We’re Americans, darn it, and we should all be treated the same.

However, we balance the blind scales of justice with countervailing impulses of forgiveness and righteousness, charity and perseverance. The vaunted Puritan work ethic makes sense—you work hard, you should enjoy the fruits of your labor. On the other hand, our better nature implores us to give a helping hand up, to right wrongs and to make the world a better place. Sometimes we don’t treat people the same because they worked harder or because they need a little extra help. We balance our values, and that’s OK.

In the wake of 9/11, we have balanced many rights against the greater good of protecting our national security. This week’s dust-up with the TSA’s enhanced security systems is illustrative of that balancing act. Americans will put up with a lot when there is a genuine consensus that the end result benefits the greater good, but eventually government will overreach. Even on—or especially on—issues of grave national concern, we risk going a bridge too far.

Each day I work with communities and the people who live in them to build better places to live. Like an entrepreneur puts together a business plan evaluating assets and liabilities, revenues and expenses, communities put together comprehensive land use plans to chart their shared course forward. Those plans are implemented through local ordinances and policies, such as zoning regulations or economic development programs.

The 2005 US Supreme Court case of [Kelo v. City of New London](#) (545 US 469) was a case of a bridge too far for local government policy. As you may recall, the city put together a redevelopment plan that promised over 3,000 new jobs and over \$1 million a year in new tax revenue. The price to be paid was the Fort Trumbull neighborhood, which was slated to be acquired by eminent domain, demolished and rebuilt by private developers. In this case the Court upheld the existing balance between property rights and community development, ruling that the city’s acquisition of private property for economic development is a permissible “public use” under the takings clause of the Fifth Amendment, applied by the Due Process Clause of the 14th Amendment.

This was a pyrrhic victory at best, as across the nation people rebelled at the notion, not just of takings—the property owners were due just compensation—but of imposing so great a cost on an individual for the dubious betterment of so many. If they could do this to Susette Kelo in New London, Connecticut, they could take any of our homes if a big enough carrot comes to town. As

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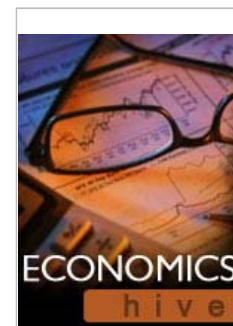
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Ilya Shapiro at Cato Institute [noted this summer](#), in the five years since the Supreme Court decision nine state high courts have limited eminent domain, and almost all state legislatures across the country have passed some type of property rights reform. The consensus comes undone when we reach too far.

Now I am a planner, by training and craft. I don't believe, as some say, that ["central planning is superior to free-market competition."](#) Comprehensive planning is a statement of a community's shared goals and visions for the future. As the Cheshire Cat told Alice, "If you don't know where you are going, any road will get you there." The federal government sinks billions of dollars into roads, rail and air networks, so it makes sense to do some transportation planning. Local governments sink untold millions into water, sewer, and road infrastructure, so it makes some sense to spend those scarce funds prudently. That said, there is no sense in robbing Peter to pay Paul. Peter needs to pay for Peter's problems and Paul needs to pay for Paul's.

The same questions arise countless times in local government. We write a rule to fix a problem and then the rule creates another problem. For example, local zoning regulations often require special conditional use permits for places of worship. Traditionally churches, synagogues and mosques have been sited in residential neighborhoods, limiting the traffic increase to once-a-week worship services. As a practical matter it wasn't much of a problem. More recently, many of these buildings have added day care and other week-day services more typical of commercial land uses. So should they be treated the same as commercial uses that attract traffic and impact residential livability? Or following the First Amendment should freedom of religion exempt places of worship from local land use requirements?

Congress stepped in to this zoning question with the [Religious Land Use and Institutionalized Persons Act](#) (RLUIPA) in 2000, prohibiting any "substantial burden" on religious exercise unless a "compelling government interest" can be demonstrated. Religious expression is a constitutionally protected freedom, yet there may be compelling public interest in balancing that expression. In the case of airport security, we all recognize the public interest in security, yet part of the current public outcry stems from the perception that the government may not be consistent in how they treat people based on their religious practices.

We are still struggling to interpret RLUIPA in cities and counties across the country as well as in our courts. Boulder County, Colorado, recently appealed to the US Supreme Court a decision holding that the county had not treated a proposed church campus expansion similarly to a non-religious use on equal terms. The County's long-standing commitment to "curbing urban sprawl, maintaining open space to preserve the county's rural character, and sustaining agriculture", as expressed in the Comprehensive Plan and implemented in the Land Use Code, was insufficient to balance the protected religious expression. However that case turns out one thing is clear: we have to treat everyone the same, be they a Christian cathedral, a Buddhist temple or a non-denominational retreat center.

Whether it's the political correctness of security pat-downs or land use regulations, we inevitably get in trouble when we forget the great American traditions of equality, charity and justice. All men are created equal, at the airport or at the zoning office.

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