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Institutional Free Exercise and Religious Land Use

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The Supreme Court's recent decision in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC. *declared that the First Amendment "gives special solicitude to the rights of religious organizations." This recognition of institutional free exercise rights has important implications for religious land uses. The Religious Land Use and Institutionalized Persons Act (RLUIPA) protects religious landowners from the imposition, through a land use regulation, of a substantial burden on religious exercise. Most RLUIPA claims are brought by the religious institution that owns property subject to a regulation. Nonetheless, courts and commentators evaluate these claims by applying a standard derived from cases involving individual free exercise rights. This approach has contributed to the significant lack of clarity regarding what constitutes a substantial burden, leaving property owners and local governments without a firm conception of the scope of land use protections for religious institutions.*

This Article contends that courts and commentators have failed to consider the implications of the institutional identity of the vast majority of land use claimants under RLUIPA. Both the concept of institutional free exercise and the treatment of institutions in other land use contexts shed significant light on how to clarify land use protections for religious institutions. Institutional free exercise provides a touchstone for distinguishing between the religious exercise of religious institutions and individual adherents, and for understanding the distinct ways in which these institutions experience burdens. The treatment of nonprofit institutions in comparable land use contexts, particularly hardship claims under landmark

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laws, can help shape an analysis sensitive to the distinct, non-commercial concerns of religious property owners.

The analysis proposed in this Article reframes the interpretation of RLUIPA and provides insights applicable to evaluating hardships on other civil society institutions. It also offers broader insight into the relationship between religious institutions and the State and a starting point for further scholarship on how Hosanna-Tabor *and the concept of institutional free exercise should affect institutional claims in other contexts.*

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INTRODUCTION

Institutions, rather than individuals, own most land used for religious purposes. When a religious institution—be it a church, synagogue, mosque, or temple—claims its religious exercise is substantially burdened by zoning or landmarking laws, how should courts treat this claim? In most contexts, when a property owner asserts that a land use law imposes a hardship, courts examine how the challenged law affects the property owner's use of the property. The concerns of individuals without a property interest are not the focus of the analysis. By contrast, in the context of religious land uses, courts frequently emphasize the religious exercise, and alleged burdens, of individual adherents. Courts consider such factors as the number of individuals affected[1] and the burden imposed on individuals forced to walk further to an alternate location.[2]

This approach is somewhat understandable, but deeply problematic. It prevents careful consideration of the distinct institutional interests at stake and dislodges judicial inquiry from the land use context in which these claims arise. Moreover, a careful reading of the statute that governs most religious land use cases, the Religious Land Use and Institutionalized Persons Act (RLUIPA),[3] confirms that courts should focus on the burdens experienced by the religious institution that owns the property subject to a challenged land use regulation rather than the burdens claimed by individual adherents.[4]

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1 *See* Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1209 (C.D. Cal. 2002).

2 *See infra* Part I.C (discussing the problematic focus of courts and the Department of Justice on burdens claimed by individual adherents).

3 42 U.S.C. § 2000cc (2012).

4 Parties often bring claims under both RLUIPA and the Free Exercise Clause of the First Amendment, but RLUIPA tends to govern the analysis. Courts and commentators debate whether RLUIPA's statutory provisions simply codify constitutional principles or provide broader protections. *See, e.g.*, Vision Church v. Village of Long Grove, 468 F.3d 975, 996 (7th Cir. 2006) ("Given the similarities between RLUIPA § 2(a)(1) and First Amendment jurisprudence, we collapse Vision's claims for the purpose of this analysis; this approach seems most consistent with post-RLUIPA case law."); Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 18–22 (2009) (contending that the substantial burden provision "does not simply mimic already existing constitutional rules," and discussing the statute's role as a "prophylactic instrument"); *see also* Cambodian Buddhist Soc'y of Conn. v. Planning & Zoning Comm'n, 941 A.2d 868, 885–91 (Conn. 2008) (discussing debate and citing cases). Regardless of whether

RLUIPA "expressly recognizes that only persons with a property interest in the subject property are proper parties to an action challenging the application of a zoning regulation."[5]

The statute's core provision applies strict scrutiny to land use regulations that impose a "substantial burden" on the religious exercise of a claimant with a property interest in the regulated land.[6] RLUIPA does not define what constitutes a "substantial burden" on an institution's religious exercise. In the absence of such a definition, courts typically look to the statute's legislative history, which suggests that the term should be interpreted in accordance with relevant Supreme Court jurisprudence.[7] This Free Exercise Clause jurisprudence traditionally has focused on the substantial burdens claimed by individual adherents—who bring most free exercise claims.[8]

The key cases, such as *Sherbert v. Verner*,[9] involve the claims of individuals denied government benefits when they refuse work they assert is contrary to their faith. In *Sherbert* the Court declared that the government burdens free exercise when it forces an individual "to choose between following the precepts of her religion and forfeiting

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RLUIPA's protections exceed the scope of the First Amendment, Free Exercise Clause jurisprudence clearly informs judicial analysis of RLUIPA claims. *See infra* notes 7–8 and accompanying text.

5 *Cambodian Buddhist Soc'y*, 941 A.2d at 880; *see also* Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield, 796 F. Supp. 2d 333, 338 (D. Conn. 2011) (granting defendants' motion to dismiss plaintiff rabbi's RLUIPA claim, and declaring that "RLUIPA requires a plaintiff to hold some property interest that he has attempted to use and which has been threatened by the illegal conduct of the defendants").

6 42 U.S.C. § 2000cc(a)(1) (2012); *see also infra* notes 44–47 and accompanying text (discussing who is a "claimant" under RLUIPA).

7 As Senators Hatch and Kennedy explained:

> The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

146 CONG. REC. 16,698, 16,700 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy); *see also* Int'l Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1067 (9th Cir. 2011) ("Generally, the term 'substantial burden' in RLUIPA is construed in light of federal Supreme Court and appellate jurisprudence involving the Free Exercise Clause of the First Amendment prior to the Court's decision in [*Employment Division v. Smith*, 494 U.S. 872, 878–82 (1990)].").

8 *See infra* notes 64–81 and accompanying text. Courts have found the Supreme Court's individual free exercise cases to be "instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA." Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004); *see also Vision Church*, 468 F.3d at 996–97; Guru Nanak Sikh Soc'y v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006).

9 374 U.S. 398 (1963).

benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[10] Religious institutions are unlikely to face such a choice.[11] In attempting to wrest an analytical framework from this context and apply it to institutional land use claims, courts and commentators have articulated a myriad of conflicting and often unhelpful standards.[12] This muddled jurisprudence, which can be attributed in part to the failure to distinguish between individual and institutional claims, creates substantial uncertainty (and often costs) for religious institutions and local governments.

This Article offers a way out of this confusion. A more clearly defined and consistently applied substantiality requirement holds the potential to restrict the flow of frivolous RLUIPA claims into the courts.[13] This Article seeks to clarify the substantial burden standard by proposing a new framework for evaluating RLUIPA claims. This framework derives from careful consideration of the distinct nature of institutional free exercise and of the treatment of religious and nonprofit institutions in comparable land use contexts.

This approach draws upon the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, as well as prior case law on the rights of religious institutions. In *Hosanna-Tabor* the Court unanimously held that the Free Exercise Clause protects "the freedom of religious groups to select their own [ministers]."[14] The case involved a religious school's invocation of the "ministerial exception," a controversial judicial doctrine that bars the application of employment discrimination laws to the relationship between religious institutions and their ministers.[15] This ministerial exception represents the most robust recognition of institutional free

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10 *Id.* at 404.

11 The Second Circuit recognized this in *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), but merely proposed a standard that paraphrased *Sherbert*, instead of considering the distinct character of institutional free exercise.

12 Most notoriously, the Seventh Circuit embraced irreconcilable interpretations in *Vision Church*, 468 F.3d at 997, in which the court declared that for a burden to be "substantial" under RLUIPA, it must "necessarily bear[] direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable," and *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005), in which the circuit declared that a burden imposing "delay, uncertainty, and expense" although not "insuperable" was still substantial. For further discussion on the variability of such standards, see *infra* notes 59–61 and accompanying text.

13 *See* Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) ("Unless the requirement of substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind.").

14 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 703 (2012).

15 *Id.* at 705.

exercise rights distinct from those of individual adherents.[16] In recognizing the existence of this exception, the Court expressly rejected the position that religious institutions could only invoke a right to freedom of association akin to that of secular groups. It declared that "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations."[17]

Institutional free exercise rights are an intrinsic part of our constitutional tradition and are not simply derived from the rights of individuals. Religious institutions are organic entities whose interests can be isolated from those of their adherents. The identity and continued existence of these institutions depend upon their freedom to develop and communicate their doctrine, which is at the core of their institutional religious exercise.[18] Accordingly, institutional religious actors experience substantial burdens upon their religious exercise in ways distinct from individual adherents. More fundamentally, and even in the absence of RLUIPA, *Hosanna-Tabor*'s recognition of "a religious group's right to shape its own faith and mission" has potential implications for land use law and a range of other government regulations.[19]

Applying the theory of institutional free exercise developed in this Article would lead courts to distinguish between the substantial burden claims of "existing institutions," those that have made use of a particular property for a period of time and seek to alter or expand their use, and "new institutions," by which I mean both institutions seeking a parcel of land for their first location and those seeking to obtain and use a new parcel of land. Given their bonds with a specific location and community, certain land use restrictions may impose a substantial burden on the religious exercise of existing institutions. In contrast, new institutions cannot claim the same degree of burden when denied the use of a particular parcel, so long as other suitable property is available. I propose that the challenges brought by "new institutions" should instead be evaluated through the application of RLUIPA's other provisions, which provide clearer standards for courts to apply.[20]

A theory of institutional free exercise rights does not, by itself, provide adequate guidance to courts seeking to resolve religious land use claims. To help shape a proposed framework, I turn to the treatment of institutional landowners, particularly nonprofits, in other areas of land use law. These include hardship claims by nonprofits under

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16 *See* Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 170–71 (2009). *See generally* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1 (2011).

17 *Hosanna-Tabor*, 132 S. Ct. at 697.

18 *See infra* notes 115, 163 and accompanying text.

19 *Hosanna-Tabor*, 132 S. Ct. at 706.

20 *See infra* notes 269–282 and accompanying text.

landmark laws and the expansion of nonconforming land uses. These cases focus on the charitable purposes that define an institution and shape its use of land. They confront the distinct hardships experienced by nonprofit property owners, whose uses are often neither fungible nor reducible to the same economic considerations that govern commercial land uses. Nonprofits, including religious institutions, often have particular ties to a given location or community. These ties can cause certain land use regulations to impose a substantial burden in situations that may not have the same effect on other property owners. These cases reinforce the proposition that religious land users have distinct claims rooted in their institutional free exercise and the nature of their relationship with the community.

Courts and commentators have entirely failed to grapple with the interaction between institutional free exercise and religious land use. This Article fills this void by articulating a theory of institutional free exercise with distinct relevance to land use claims. The proposed analysis yields important insights into both the relationship between religious institutions and the state and the extent to which the interests of these institutions can be distinguished from those of individual adherents.

This Article proceeds in four parts. Part I briefly recounts the legislative history of RLUIPA and the Supreme Court decisions that preceded it. I argue that a focus on institutional religious exercise and burdens properly reflects the statutory text. The problematic approach of courts and the Department of Justice, which have failed to distinguish between individual and institutional interests, has muddied the waters for substantial burden claims. Part II explores the nature of institutional free exercise and the scope of the protection it should receive. After discussing *Hosanna-Tabor* and other relevant precedent, I draw on prior scholarship to outline three theories of institutional free exercise: an intrinsic theory, a derivative theory, and a pragmatic theory. I conclude that an intrinsic theory best reflects the analysis in *Hosanna-Tabor* and provides the proper framework for understanding institutional free exercise in the context of RLUIPA. Part III discusses how land use doctrine supplies two analogous models for evaluating institutional free exercise claims under RLUIPA. These include the treatment of hardship claims by nonprofits under landmark laws and the treatment of expansions of nonconforming uses. In Part IV, I propose a unique framework for evaluating the claims of religious institutions under RLUIPA. I begin by outlining a set of considerations that should shape this analysis. I then explore the relevance of this analysis for claims brought by both existing and new institutions.

Finally, I briefly note potential implications for evaluating similar hardship claims by nonreligious civil society institutions.[21]

I. INDIVIDUALS AND INSTITUTIONS UNDER RLUIPA

This Part briefly reviews the conflict between the Supreme Court and Congress that engendered RLUIPA. I then argue that existing attempts to apply a burden analysis derived from individual free exercise cases have yielded a muddled jurisprudence.[22] Courts and the Department of Justice have exacerbated this confusion by problematically emphasizing the substantial burden claims of individuals. I chart a course out of this morass by showing that the statute's text and legislative history support restricting the substantial burden analysis to the institutions that typically control the property at issue in an RLUIPA claim.

A. *Recent Free Exercise Legislation and Jurisprudence*

RLUIPA's origins can be traced to the Supreme Court's decision in *Employment Division v. Smith*.[23] *Smith* upheld the denial of unemployment benefits to members of the Native American Church who lost their jobs when they violated state law by using peyote during a

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21 Throughout this Article, I elide questions regarding the constitutionality of RLUIPA's land use provisions, arguing instead that, assuming the statute's constitutionality, it is best interpreted through the framework of institutional free exercise. Although the Supreme Court has not ruled on the constitutionality of RLUIPA's land use provisions, in *Cutter v. Wilkinson* the Court upheld the constitutionality of the Act's institutionalized persons section. 544 U.S. 709, 720 (2005). This section prohibits the imposition of a substantial burden on the religious exercise of institutionalized individuals. *See* 42 U.S.C. § 2000cc-1 (2012). The lower federal courts appear to have reached a consensus that RLUIPA's land use provisions also pass constitutional muster. *See* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 209 (2008) (citing cases).

Hosanna-Tabor has potential relevance for future challenges to RLUIPA's constitutionality. The decision expressly distinguished *Employment Division v. Smith*, 494 U.S. 872 (1990), to which RLUIPA is a response. *See infra* notes 23–39, 166–171 and accompanying text. The Court contrasted *Hosanna-Tabor*, which involved "government interference with an internal church decision that affects the faith and mission of the church itself," with *Smith*, which involved "government regulation of only outward physical acts." *Hosanna-Tabor*, 132 S. Ct. at 706–07. Whether *Hosanna-Tabor* provides support for the constitutionality of RLUIPA depends in part on whether land use regulations are understood as affecting only outward acts, or whether emphasis is placed on the regulations' impact on an institution's "faith and mission."

22 Salkin & Lavine, *supra* note 21, at 219 ("If one argument in support of RLUIPA is the need for uniformity and clarity in the protection of the free exercise of religion, RLUIPA is failing miserably.").

23 494 U.S. 872.

religious ritual.[24] The Court refused to apply the balancing test articulated in *Sherbert v. Verner*,[25] which "would have asked whether Oregon's prohibition [on the use of peyote] substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest."[26] Instead, *Smith* declared that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[27] The Court distinguished the *Sherbert* substantial burden/compelling interest standard, which developed out of a context involving an individualized assessment of conduct.[28] According to the Court, application of "a neutral, generally applicable law to religiously motivated action" had only been barred by the First Amendment in cases that "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[29]

Members of Congress, critical of the conclusion in *Smith*, rallied around the Religious Freedom Restoration Act (RFRA), which sought, by its own terms, "to restore the compelling interest test as set forth in *Sherbert v. Verner*[30] and *Wisconsin v. Yoder*[31] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[32] RFRA prohibited the imposition of a substantial burden on a person's religious exercise, even if the burden resulted from a generally applicable law, unless the law furthers a "compelling governmental interest" through the "least restrictive means."[33] In *City of Boerne v. Flores*, the Court invalidated RFRA, insofar as it applied to the actions of states and localities, holding that those provisions exceeded

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24 City of Boerne v. Flores, 521 U.S. 507, 512–13 (1997).

25 *See* discussion *infra* Part I.C.1.

26 *City of Boerne*, 521 U.S. at 513.

27 *Smith*, 494 U.S. at 878–79.

28 *Id.* at 884.

29 *Id.* at 881 (citations omitted). This articulation of a "hybrid situation" has faced criticism. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566–67 (1993) (Souter, J., concurring) (declaring a hybrid claim distinction "untenable"); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3–4 (2000) (arguing that application of strict scrutiny in situations "where the burden to religious exercise is combined with a burden to some other constitutional right. . . . could prove to be a substantial exception to the *Smith* rule. . . . since any creative lawyer should be able to properly allege a burden (only a burden and not an actual violation needs to be shown) on another constitutional right, such as property, speech, privacy, or association, in addition to the free exercise claim." (footnote omitted)).

30 374 U.S. 398 (1963).

31 406 U.S. 205 (1972).

32 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 § 2(b)(1), 107 Stat. 1488, 1488. The final section of *Smith*, in the words of the Fourth Circuit, "openly invited the political branches to provide greater protection to religious exercise through legislative action." Madison v. Riter, 355 F.3d 310, 314–15 (4th Cir. 2003).

33 42 U.S.C. § 2000bb-1(b) (2012).

the scope of Section 5 of the Fourteenth Amendment, which empowers Congress to pass remedial laws to enforce the Amendment's due process and equal protection provisions.[34] Rather than interpreting RFRA as an acceptable piece of remedial legislation intended to enforce constitutional rights, the Court viewed it as a Congressional attempt to alter the substance of free exercise rights.[35]

Congress extended its tug of war with the Court by passing RLUIPA.[36] Seeking to avoid RFRA's fate, Congress limited RLUIPA's application to programs that receive federal financial assistance, regulations that affect commerce, and substantial burdens "imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."[37] These restrictions allowed Congress to avoid relying solely on Section 5 of the Fourteenth Amendment and represented an attempt to root the legislation in Congress's spending and commerce powers and to codify the "individualized assessment" rule in *Sherbert*.[38] In contrast with the broadly applicable RFRA, RLUIPA, as its title makes clear, applies only to laws and regulations affecting land use and institutionalized persons, that is, individuals in prisons and mental institutions.[39]

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34 City of Boerne v. Flores, 521 U.S. 507, 533–36 (1997). Section 5 of the Fourteenth Amendment grants Congress the power "to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The substantive provision of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* § 1.

35 *City of Boerne*, 521 U.S. at 532; Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1836 (2004).

36 42 U.S.C. § 2000cc. *See generally* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003) (reviewing precursors to RLUIPA and legislative history); Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 811–12 (2006) (describing Congressional effort to draft a limited statute based on largely anecdotal findings of discrimination in zoning); Salkin & Lavine, *supra* note 21 (discussing history of RLUIPA).

37 42 U.S.C. § 2000cc.

38 *See* Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 897 (7th Cir. 2005) ("*Boerne* reaffirmed *Sherbert* insofar as that case holds that a state that has a system for granting individual exemptions from a general rule must have a compelling reason to deny a religious group an exemption that is sought on the basis of hardship or, in the language of the present Act, of 'a substantial burden on . . . religious exercise.' *Sherbert* was an interpretation of the Constitution, and so the creation of a federal judicial remedy for conduct contrary to its doctrine is an uncontroversial use of section 5." (alteration in original) (citation omitted)).

39 42 U.S.C. § 1997 (providing the relevant statutory definition for "institution" under RLUIPA's "institutionalized persons" provision); Madison v. Riter, 355 F.3d 310, 315 (4th Cir.

B. *RLUIPA's Land Use Provisions and Institutional Claimants*

RLUIPA contains four separate provisions directed at protecting land use as religious exercise. In addition to the substantial burden provision, the three other provisions prohibit the imposition of a land use regulation that 1) treats a religious institution on less than equal terms with a nonreligious institution, 2) discriminates against a religious institution, or 3) either totally excludes a religious institution or unreasonably limits its ability to locate itself within a jurisdiction.[40] These three provisions are decidedly less controversial than the substantial burden provision.[41] As noted, this Article does not seek to enter the already crowded debate regarding the constitutionality of RLUIPA, particularly its validity under the Establishment Clause or as a Congressional attempt to enforce the Free Exercise Clause pursuant to Section 5 of the Fourteenth Amendment.[42] Instead, I contend that RLUIPA's land use provisions—assuming they are constitutionality valid—should be interpreted and applied through an institutional analysis that focuses on the unique characteristics and concerns of religious institutions and assemblies as actors in the land use context.

Both the plain text of RLUIPA and the statute's legislative history support restricting the substantial burden inquiry to whether a religious institution itself, rather than individual members or some group of members, faces a substantial burden. I make this claim fully cognizant that the "substantial burden" provision of RLUIPA explicitly refers to persons and assemblies, as it states:

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

2003).

40 42 U.S.C. § 2000cc.

41 Marci Hamilton, a prominent critic of the "substantial burden" provision of RLUIPA, has described the other three land use provisions as "similar to the [Fair Housing Act] or settled constitutional law." Marci A. Hamilton, *The Constitutional Limitations on Congress's Power over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional*, 2 ALB. GOV'T L. REV. 366, 407–08 (2009); *see also* Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 222 nn.87–89 (2006) (citing prior cases codified by these three provisions).

42 *See, e.g.*, Hamilton, *supra* note 41, at 369 (describing RLUIPA as "arguably . . . even more constitutionally suspect" than RFRA); Julie M. Osborn, *RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to* City of Boerne, 28 ENVIRONS ENVTL. L. & POL'Y J. 155 (2004). *But see* Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485, 511–16 (2009). For additional articles arguing for and against the constitutionality of RLUIPA, see Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 723 n.23 (2008).

> person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[43]

Although this provision speaks of persons, assemblies, and institutions, the statute's definition section indicates that the burden analysis should focus on the individual or entity whose property interest is directly affected by the regulation at issue. RLUIPA defines a "land use regulation" as "a zoning or landmarking law, or the application of such a law, *that limits or restricts a claimant's use or development of land* (including a structure affixed to land), *if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest*."[44] Hence, to bring a claim under RLUIPA, an individual or entity must have a property interest in the land impacted by the challenged regulation.[45] In addition, the definition of "religious exercise" expressly includes "the use, building, or conversion of real property for the purposes of religious exercise," further reflecting the statute's concern with the religious exercise of the "person or entity" with control over the property at issue.[46] Burdens on other persons, including members of a congregation who exercise their religion at the location at issue, but lack an independent property interest, should not be a central consideration for courts evaluating a claim.

The statute's legislative history supports this interpretation. A section of the joint statement by RLUIPA's sponsors regarding the shifting burden of persuasion under the statute states that the burden shifts to the government "[i]f a claimant proves a substantial burden on *its* religious exercise."[47] The joint statement, in outlining the need for

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43 42 U.S.C. § 2000cc.

44 *Id.* § 2000cc-5. The same section provides a straightforward definition of a "claimant," "a person raising a claim or defense under this chapter." *Id.*

45 For similar reasons, the term "assembly" should be folded into "institution." Although an "assembly" is defined as "[a] gathering of persons for religious worship; a congregation," 1 OXFORD ENGLISH DICTIONARY 504 (1970), in contrast with the definition of an "institution," "[an] establishment, organization, or association, instituted for the promotion of some object, esp. one of public or general utility, religious, charitable, educational, etc., e.g. a church," 5 OXFORD ENGLISH DICTIONARY 354 (1970), a religious organization will hold a property interest in its capacity as an institution and not as an assembly. I acknowledge that statutes should not be interpreted in a way that renders a term superfluous. *See* Corley v. United States, 556 U.S. 303, 314 (2009). However, the use of "assembly" should be understood as reflective of the inclusion of both more hierarchical religious groups, which may be prone to use the term "institution" in self-reference, and less hierarchical religious groups, which might more readily refer to themselves as an "assembly."

46 42 U.S.C. § 2000cc-5.

47 146 CONG. REC. 16,698, 16,700 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy) (emphasis added). Marci Hamilton has interpreted RLUIPA similarly:

> A claimant under RLUIPA is not one whose religious conduct is burdened by land use laws. Rather, through its definition of "claimant," it works to the benefit of only a

the legislation, emphasizes the particular interests of religious institutions, which "cannot function without a physical space adequate to their needs and consistent with their theological requirements."[48] Discussing the scope of RLUIPA's land use provision, the sponsors also declare that the statute "does not provide religious institutions with immunity from land use regulations, nor does it relieve religious institutions from applying for . . . relief provisions in land use regulations."[49]

Testimony during Congressional hearings on the Religious Liberty Protection Act (RLPA) emphasized the role of religious institutions in land use disputes. No specific hearings were held on RLUIPA, but the RLPA hearings, which focused in part on land use matters, are considered part of RLUIPA's legislative history.[50] RLPA, introduced in response to *City of Boerne*, sought to restore broad protections akin to RFRA by relying in part on the Commerce and Spending Clauses.[51] A number of individuals testifying in support of RLPA emphasized that the jurisdictional requirement that an activity affect interstate commerce would typically be satisfied by institutions—through activities such as the purchase of materials for the construction of facilities or the hiring of employees—but would be less likely to extend protection to individuals.[52] The testimony solicited in the course of

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> subset of individuals, those who own property and intend to use it for religious purposes. Thus, a member of a congregation may not bring an RLUIPA claim where local land use law is inhibiting worship. Only the property owner may do so.

Hamilton, *supra* note 41, at 434.

48 146 CONG. REC. 16,698, 16,698 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy).

49 *Id.* at 16,700.

50 *See* Hamilton, *supra* note 36, at 334 ("No hearings were held on RLUIPA per se; rather, the hearings on RLPA generally addressing land use law were supposed to stand in as hearings in support of RLUIPA."). The language of RLPA's land use protections closely mirrors those enacted under RLUIPA. *Compare* Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. § 3, *with* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a)(1) (2012). RLUIPA added the phrase "including a religious assembly or institution," while the Religious Liberty Protection Act only referred to "a person's religious exercise" in its substantial burden provision. However, the Religious Liberty Protection Act, like RLUIPA, contained three separate provisions that applied specifically to assemblies and institutions.

51 Hamilton, *supra* note 36, at 341–42; Salkin & Lavine, *supra* note 21, at 205.

52 *See, e.g.*, *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 178 (1998), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl106-274/hear-134-1998.pdf (testimony of Steven T. McFarland, Director, Center for Law and Religious Freedom) (noting that the Commerce Clause provision would cover religious schools, book stores, and charities); *id.* at 54–55 (testimony of Marc Stern, Director, Legal Department, American Jewish Congress) (discussing the impact of religious institutions on commerce); *id.* at 10 (statement of Douglas Laycock, Associate Dean for Research, University of Texas Law School) (declaring that while it is "clear" that the bill protects religious exercise of organizations, it would only "sometimes" protect individual religious exercise); *Protecting Religious Freedom After* Boerne v. Flores*:*

these hearings indicates a Congressional concern for the religious exercise of the institutions that own property subject to a challenged land use regulation.[53]

In addition, RLUIPA's separate prohibitions on discrimination and exclusion explicitly refer only to religious assemblies and institutions and do not make reference to the religious exercise of a "person." The equal terms provision prohibits land use regulations that "treat[] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[54] The nondiscrimination provision prohibits regulations that "discriminate[] against any assembly or institution on the basis of religion or religious denomination."[55] And the third provision forbids regulations that either "totally exclude[] religious assemblies from a jurisdiction" or "unreasonably limit[] religious assemblies, institutions, or structures within a jurisdiction."[56] These provisions reinforce an institutional reading of the statute's land use protections.

A brief caveat will narrow the scope of the analysis that follows. In arguing that courts should not focus their analyses on the burdens imposed on individuals who are not proper claimants, I leave to one side cases in which individuals have a property interest sufficient to bring an RLUIPA claim. These cases typically involve individuals who

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Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 84 (1997), *available at* http://www.justice.gov/jmd/ls/legislative_histories/pl106-274/hear-55-1-1997.pdf (statement of Thomas C. Berg, Associate Professor of Law, Cumberland School of Law, Samford University) (noting that, because they would not typically involve commercial activity, Commerce Clause "rationales would not likely extend to most cases of individual free exercise").

53 *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019*, *supra* note 52, at 134 (statement of W. Cole Durham, Jr., Brigham Young University Law School) ("When I was invited to appear at this Hearing, I was asked to focus in particular on religious freedom issues that arise in the area of land use. In the balance of my remarks, I will turn to this area. In my view, the problems encountered by religious organizations in the area of land use are symptomatic of a larger set of problems that religious organizations face in the modern regulatory state.").

54 42 U.S.C. § 2000cc (b)(1).

55 *Id.* § 2000cc(b)(2).

56 *Id.* § 2000cc(b)(3). The Seventh Circuit has interpreted the substantial burden provision as a "backstop" to RLUIPA's explicit discrimination provision. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005) ("[T]he 'substantial burden' provision backstops the [Act's] explicit prohibition of religious discrimination . . . . If a land-use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision."); *see also* Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (stating that denying religious organizations the "unusual privilege [to build churches anywhere] could not reasonably be thought to impose a substantial burden on them," and quoting the "backstop" language from *Sts. Constantine & Helen Greek Orthodox Church* as support). This interpretation identifies the substantial burden provision as one component of a cohesive set of land use protections for religious institutions and assemblies.

own property that they operate for a religious purpose. Examples include cases in which an individual hosts prayer meetings[57] or seeks to operate a religious retreat center[58] in her home. These cases are the exception, as most RLUIPA land use claims are brought by institutions with a property interest in the land subject to regulation.

C. *The Substantial Burden Provision and the Problematic Consideration of Individuals*

In the absence of a statutory definition, the federal circuits have articulated a range of standards for what constitutes a substantial burden on religious exercise under RLUIPA.[59] Scholarly articles have placed these standards along a spectrum from more to less onerous for a religious institution to establish a substantial burden.[60] Given the malleability of the language used by the courts, this categorization often seems futile. The inquiry into whether a land use provision substantially burdens religious exercise is necessarily fact-intensive[61] and the prophylactic justification for RLUIPA[62]—which relies on the statute's

57 Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 345 (2d Cir. 2005).

58 DiLaura v. Township of Ann Arbor, 112 F. App'x 445, 446 (6th Cir. 2004).

59 *See* Salkin & Lavine, *supra* note 21, at 226 ("If a firm understanding of 'religious exercise' has eluded the courts, the disagreement over the meaning of that term pales in comparison to the controversy among the courts in defining 'substantial burden.'").

60 *See, e.g.*, Karla L. Chaffee & Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T. L. REV. 437, 449 (2009) (discussing "sliding scale" of judicial definitions of substantial burden); Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41, 53–62 (2010) (discussing a "continuum of standards" for substantial burden); Salkin & Lavine, *supra* note 21, at 225–34 (ascribing inconsistency among interpretations of "substantial burden" to lack of a firm definition by the Supreme Court); Tyler Mark, Note, *Rocky Mountain Shootout: Free Exercise & Preserving the Open Range*, 98 GEO. L.J. 1859, 1876–80 (2010) (describing a "spectrum" of substantial burden tests).

61 Living Water Church of God v. Charter Township of Meridian, 258 Fed. App'x. 729, 734 (6th Cir. 2007) ("In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high and that determining its existence is fact intensive."); Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp. 2d 309, 319–22 (D. Mass. 2006) (noting the same as in *Living Water*).

62 This justification for RLUIPA, which Congress itself relied upon, treats the statute "as a prophylaxis, requiring close scrutiny of all land use regulations substantially burdening religious practice precisely because of the risk that intentional discrimination may otherwise go undetected." Serkin & Tebbe, *supra* note 4, at 4; *see also* Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005) (referencing the argument that non-mainstream religious institutions are particularly vulnerable to "subtle forms of discrimination" in land use contexts involving highly discretionary decisions made by nonprofessionals); *cf.* Lawrence G. Sager, Commentary, *Panel One: Free Exercise After* Smith *and* Boerne, 57 N.Y.U. ANN. SURV. AM. L. 9, 11 (2000) ("The *Sherbert* quartet of cases themselves are best understood as prompted by a prophylactic impulse—an impulse to protect unemployment insurance applicants with non-mainstream religious affiliations from discrimination in a highly discretionary administrative context.").

purported role in smoking out hidden discrimination[63]—lends itself to searching inquiries. Rather than review how courts have framed the substantial burden analysis, in this Section I reveal how both judicial opinions and the Department of the Justice have problematically emphasized the burdens on individual religious adherents, rather than institutions. This approach has contributed to the conceptual muddle of RLUIPA jurisprudence and evidences the need for the new approach I develop in subsequent Parts.

1. The Difficulty in Applying *Sherbert* to Institutions

RLUIPA does not define a "substantial burden," instead directing courts to interpret the term "by reference to Supreme Court jurisprudence."[64] Courts that follow this directive rely upon a line of cases that begins with *Sherbert v. Verner*.[65] Sherbert, a Seventh-day Adventist, was discharged from her job after her employer moved to a six-day work week that included Saturday, her Sabbath.[66] The state of South Carolina denied her unemployment compensation benefits on the grounds that she had not provided good cause for refusing to accept suitable work.[67] Sherbert challenged this determination as a violation of her right to free exercise.[68] The Court found that the benefits denial clearly imposed a burden on her free exercise—equivalent to a fine on Saturday worship—as "[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[69] Finding that the state lacked a

63 146 CONG. REC. 16,698, 16,698 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy) (discussing "covert" discrimination that often "lurks behind . . . vague and universally applicable reasons"); *see also* Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 780 (1998) (asserting that land use regulation "is administered through highly discretionary and individualized processes that leave ample room for deliberate, but hidden, discrimination."). Laycock does not, however, offer empirical support for his view of the zoning process and the unique hardships of religious institutions, relying instead upon "illustrative factual allegations" of hostility towards churches and the difficulties faced by new churches. *Id.* at 780 n.204. For a more extensive discussion of the "subjective and highly discretionary" land use decision-making process, see Ostrow, *supra* note 42, at 733–37. For a very different view of land use determinations, see Hamilton, *supra* note 41, at 372–86 ("The notion promoted at the hearings about RLUIPA that land use determinations are typically standard-less and unreviewable demonstrates a profound lack of knowledge about modern land use law.").

64 146 CONG. REC. 16,698, 16,700 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy); *see also supra* note 8 and accompanying text.

65 374 U.S. 398 (1963).

66 *Id.* at 399–400.

67 *Id.* at 400–01.

68 *Id.* at 401.

69 *Id.* at 404.

compelling interest sufficient to justify the infringement on Sherbert's rights, the Court declared that she was entitled to unemployment compensation.[70]

The Court refined the *Sherbert* analysis in *Thomas v. Review Board*. Thomas, a Jehovah's Witness, challenged a denial of unemployment benefits after he terminated his employment due to an internal transfer that required him to participate in the production of war materials, which he asserted was prohibited by his religious beliefs.[71] The Court sided with *Thomas*, holding that although the "law [did] not *compel* a violation of conscience," he had experienced coercion in that the threat of being denied unemployment benefits placed unmistakable pressure upon him to violate his religious beliefs and continue working.[72]

The imposition of a coerced choice, as outlined in *Sherbert* and *Thomas*, represents the standard analysis for a substantial burden on religious exercise.[73] Applying this analysis to RLUIPA claims can prove difficult. Religious institutions denied permission to pursue a particular land use are not confronted with a choice akin to that in *Sherbert*—between following religious beliefs and losing benefits or abandoning religious beliefs and receiving benefits. Since the "benefit" sought is the use of property for a particular religious exercise, it is meaningless to talk of obtaining this benefit on condition of abandoning the desired exercise.[74] Even if *Sherbert* and its progeny were ready-made for application in the land use context, it is not clear that they would sharply illuminate the contours of RLUIPA's substantial burden inquiry. As Michael Dorf has noted, *Sherbert* never uses the term "substantial burden" and *Yoder* simply fails to answer the question of "how

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70 *Id.* at 406–07.

71 450 U.S. 707 (1981).

72 *Id.* at 717. Between *Sherbert* and *Thomas*, the Court decided *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which held that compulsory school attendance laws could not be applied to Amish parents who, for religious reasons, refused to send their children to school beyond the eighth grade. *Yoder* declared that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability," *Id.* at 220, but did not provide further clarification regarding how a court should determine whether a substantial burden exists. In *Smith* the Court sought to distinguish *Yoder* by classifying it as an example of a hybrid case in which a "neutral, generally applicable law" implicates both the Free Exercise Clause and another constitutional protection, namely the "right of parents . . . to direct the education of their children." Emp't Div. v. Smith, 494 U.S. 872, 881 (1990).

73 Justice Brennan contended that the coercion test does not "exhaust[] the range of religious burdens recognized under the Free Exercise Clause" and argued instead, relying on *Yoder*, for an analysis that considered the impact or effect of the governmental restraint, rather than its form. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 466 (1988) (Brennan, J., dissenting).

74 An exception may exist in cases involving a conditional denial, which might present a religious institution with the opportunity to modify its behavior in order to receive approval. *See* Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007).

burdensome a law must be before the burden will be deemed substantial enough to trigger strict scrutiny."[75]

The Second Circuit has acknowledged the potential challenges in applying the *Sherbert* analysis to institutions in the land use context,[76] as has at least one other court and commentator.[77] In *Westchester Day School v. Village of Mamaroneck*, an Orthodox Jewish day school sought a special permit to expand its facilities. The court observed:

> [I]n the context of land use, a religious institution is not ordinarily faced with the same dilemma [as an individual] of choosing between religious precepts and government benefits. When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed. Accordingly, when there has been a denial of a religious institution's building application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits.[78]

The Second Circuit's attempt to distinguish the substantial burden analysis in the benefits and land use contexts is rather futile: "substantial pressure to change" seems identical to "action that directly *coerces*," even when the latter includes italics. Moreover, nearly any denial of an application for a particular land use could be said to "coerce the religious institution to change its behavior" insofar as the institution is forbidden from doing what it sought to do. And since RLUIPA explicitly applies to all religious exercise, "whether or not compelled by,

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75 Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213–14 (1996) (arguing that pre-*Smith* free exercise cases failed to provide "a satisfactory application of the substantiality threshold of RFRA"); *see also* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 934–36 (1989) (asserting that despite the "significance and difficulty of defining a constitutionally cognizable burden upon free exercise," the topic has received scant scholarly attention).

76 *Westchester Day Sch.*, 504 F.3d at 348–49.

77 In *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 704 (E.D. Mich. 2004), a case involving the denial of a student group's requested permit to demolish an historic building it contended was inadequate for its needs and to construct a new facility, the court observed that "[u]nlike the burdens found in *Yoder* and *Sherbert*, this is not a case where Canterbury House must choose between exercising its religious beliefs and forgoing significant government benefits or incurring criminal or financial penalties." *Id.* at 704; *see also* MacLeod, *supra* note 60, at 54 (noting that the substantial burden standard "does not fit comfortably into the land use regulatory landscape").

78 *Westchester Day Sch.*, 504 F.3d at 348–49. The court relied on the Eleventh Circuit's decision in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004), to support its conclusion that coercion to change behavior constitutes a substantial burden. *Westchester Day Sch.*, 504 F.3d at 349; *see also* DAVID L. CALLIES, ROBERT H. FREILICH, & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 454 (5th ed. 2008) (describing the *Midrash Sephardi* standard as the "majority rule" for substantial burdens under RLUIPA).

or central to, a system of religious belief,"[79] this focus on a change in behavior cannot be limited to behavior deemed central to the institution.[80] Perhaps recognizing the limitations of a coercion analysis, the Second Circuit's opinion quickly transitioned into a more nuanced consideration of whether the land use process was "arbitrary and capricious."[81]

2. The Problematic Focus on Individual Actors

A number of courts reviewing substantial burden claims also have focused on the burdens experienced by individual members of a religious community, who, as I explained in the prior Section, are not proper claimants under RLUIPA.[82] Courts look for facts that can easily be evaluated through the framework of *Sherbert* and its progeny, leading to such inquiries as whether longer drives for church members constitute a substantial burden.[83] This focus on individual adherents is problematic for multiple reasons. As noted above, it is inconsistent with the text of RLUIPA.[84] It distracts courts from conducting a more rigorous analysis of how a given regulation affects the use of property and burdens the religious institution itself. It also markedly contrasts with how courts deal with alleged injuries in the comparable context of corporations, where the claimed injuries of a corporation are distinguished from the claims of corporate officers or shareholders.[85]

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79 42 U.S.C. § 2000cc-5(7)(A) (2012).

80 In *Smith*, Justice Scalia reasoned that questions of a religious practice's centrality and the substantiality of a burden are identical. *See* 494 U.S. 872, 887 n.4 ("'Constitutionally significant burden' would seem to be 'centrality' under another name."). I return to this issue *infra* at note 234 and accompanying text.

81 *Westchester Day Sch.*, 504 F.3d at 351.

82 *See, e.g.*, Bikur Cholim, Inc. v. Village of Suffern, 664 F. Supp. 2d 267, 276 (S.D.N.Y. 2009) (finding prima facie elements of the substantial burden claim on the part of individual guests of a facility that would enable observant Jewish visitors to a nearby hospital to avoid traveling on the Sabbath); Calvary Temple Assembly of God v. City of Marinette, No. 06-C-1148, 2008 WL 2837774, at *9 (E.D. Wis. July 21, 2008) (finding potential inconvenience for counselors and clients of a proposed faith-based counseling center "is simply not sufficient to constitute a substantial burden"); Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp. 2d 1207, 1214 (S.D. Fla. 2005) (evaluating whether denial of a conditional use application "substantially burdened Plaintiff's members' ability to worship according to their beliefs" or "coerced Plaintiff's congregants into foregoing their religious beliefs").

83 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 111 P.3d 1123, 1130 (Or. 2005) (finding that the delay imposed by the requirement of new permit applications, resulting in crowded conditions and longer drives for church members, did not impose a substantial burden under RLUIPA).

84 *See supra* Part I.B.

85 *See* J.B. Heaton, *Deepening Insolvency*, 30 J. CORP. L. 465, 482–83 (2005) ("A noticeable but unemphasized example of corporate personhood is the law's recognition of corporate injury distinct from injury to others. The law declares the corporate person as 'a separate entity distinct from its officers, directors, or investors' and characterizes corporate injury as

Focusing on the burdens claimed by individual adherents poses the danger of providing greater protection to larger congregations, particularly if courts confuse a qualitative analysis of the substantiality of a burden with a quantitative analysis of how many individuals have been burdened. In *Cottonwood Christian Center v. Cypress Redevelopment Agency* a congregation sought to build a 4700-seat auditorium and additional buildings on an eighteen-acre parcel.[86] The court stated that whether a burden is substantial is a question of degree and resolved this question by declaring that "[t]he burden on two people is not so great as the burden on more than 4,000 Cottonwood members and their families."[87] Emphasizing the aggregate burden on individuals, rather than the burden on the institution, allows a larger congregation to establish a substantial burden more easily than a smaller one. This calculus grants larger congregations, which may have greater political power within a community, greater protection under RLUIPA, despite the fact that their size may cause more significant negative externalities.

Despite these issues, the Department of Justice (DOJ), in filings in RLUIPA cases, has erroneously emphasized the burdens experienced by individual members of a congregation. The DOJ's Statement of Interest before the District Court in *Etz Chaim v. City of Los Angeles*, a case whose appeal is pending in the Ninth Circuit, discussed the standard for a substantial burden.[88] It began by emphasizing the need for a broad

'independent and separate from the claims of shareholders, creditors, and others.'" (footnotes omitted) (quoting Leonard v. McMorris, 63 P.3d 323, 330 (Colo. 2003); and Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 348 (3d Cir. 2001))). Corporate officers and shareholders are typically prohibited from maintaining an action against a third party for an injury to the corporation, even if they experience a derivative injury. *See, e.g.*, Alternate Fuels, Inc. v. Cabanas, 538 F.3d 969, 973 (8th Cir. 2008) ("[A] corporate officer cannot maintain a personal action against a third party for harm caused to the corporation, unless the officer alleges a direct injury not derivative of the company's injury."); Gregory v. Mitchell, 459 F. Supp. 1162, 1165 (M.D. Ala. 1978) ("It is well established that neither officers nor stockholders, even controlling stockholders, can maintain an action to redress an injury to the corporation even though the value of their stock is impaired as a result of the injury.").

86 218 F. Supp. 2d 1203, 1209 (C.D. Cal. 2002).

87 *Id.* at 1227.

88 United States of America's Statement of Interest in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment at 2–3, Congregation Etz Chaim v. City of Los Angeles, No. CV 10-01587 (CAS) (Ex) (C.D. Cal. Apr. 28, 2011) [hereinafter Statement of Interest], *available at* http://www.justice.gov/crt/about/hce/documents/etzchaim_soi_4-28-11.pdf. *Etz Chaim* involved a more than decade-old dispute between a Jewish congregation, which sought to conduct religious services in a house in Los Angeles, and the City. Order Granting Plantiffs' Motion for Partial Summary Judgment and Denying Denfendant's Motion for Summary Judgment at 1, *Etz Chaim*, No. CV 10-1587 CAS (Ex) (C.D. Cal. July 11, 2011) [hereinafter *Etz Chaim* Order for Summary Judgment], *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/rff47.2-etzchaim_psj_ruling.pdf. The plaintiffs brought claims under the substantial burden, equal terms, and non-discrimination provisions of RLUIPA. The court found that, as applied, the relevant land use ordinance, which permitted similar non-religious uses, violated RLUIPA's equal terms provisions. *Id.* at 13–17. It did not

contextual analysis, which would include consideration of the history of the congregation's attempt to site its place of worship.[89] The DOJ's analysis then shifted to discuss specific burdens on individual congregants. It contended that the plaintiffs demonstrated a substantial burden through "ample evidence" that certain individual members of the congregation would be physically unable to walk to a different location in a nearby commercial zone.[90] The district court, rejecting the City's description of these claimed burdens as a mere "inconvenience," embraced the DOJ's argument, quoting approvingly the precise description of the burden provided in the Statement of Interest.[91]

The broader facts of *Etz Chaim* render it difficult to determine how much the burdens on individual adherents affected the court's ultimate determination on the substantial burden claim. As the DOJ notes, the dispute was over a decade old and a number of congregants had moved closer to the location at issue in reliance on a settlement subsequently struck down by the Ninth Circuit.[92] The district court emphasized that there were no financially feasible alternatives in the commercial zone given that, also in reliance on the settlement, the congregation spent a considerable amount of money to comply with the city's requirements and would have had to sell its existing property before buying a new property.[93] These costs rendered the congregation less able to move to an alternative location.

The DOJ's approach problematically emphasizes individual burdens without placing them in the context of their impact on the institutional claimant. Nonetheless, this approach is understandable, as *Etz Chaim* raises difficulties for the assertion that the burden on a religious institution or assembly should be considered in isolation from the burdens experienced by individual members of a congregation. In situations involving small congregations, particularly those practicing a unique religion or strain of a religion, burdens on a critical mass of individuals may place a substantial burden on the institution or assembly itself. Distinguishing individual and institutional burdens may prove difficult. However, there is no indication that the court in *Etz Chaim* considered the share of congregants who were substantially burdened and the impact their non-attendance or non-participation would have on the institution itself. As will be discussed further below,

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reach the nondiscrimination claim. *Id.* at 17. For a summary of the decision, see *Religious Freedom in Focus—Jewish Congregation Wins Right to Locate in Los Angeles Neighborhood*, U.S. DEP'T OF JUSTICE (July 2011) http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_47.html#2 (Civil Rights Division email newsletter, Volume 47).

89 Statement of Interest, *supra* note 88, at 2–3.

90 Statement of Interest, *supra* note 88, at 3.

91 *Etz Chaim* Order for Summary Judgment, *supra* note 88, at 12–13.

92 Statement of Interest, *supra* note 88, at 4.

93 *Etz Chaim* Order for Summary Judgment, *supra* note 88, at 12–13.

applying an institutional free exercise analysis to the claims of religious institutions should not render all individual interests irrelevant. Instead this approach demands that individual hardship not be central or decisive to the analysis and that the impact on individuals be evaluated in light of its effect on the institution.

The Eleventh Circuit's analysis in *Midrash Sephardi* hints towards this institutional analysis. The court considered whether a zoning ordinance, which excluded churches and synagogues from locations in a business district where private clubs and lodges were allowed, imposed a substantial burden on two Orthodox Jewish synagogues.[94] According to the congregations, the town's RD-1 district, where a religious institution would be allowed, was beyond "the required walking range for a significant number of their members, particularly elderly ones."[95] The claimants asserted that requiring their relocation to the residential district would subject them to a substantial burden in two related ways.[96] First, relocation would require individual congregants to walk further to services, and "the additional blocks would greatly burden congregants who are ill, young or very old."[97] Second, these individuals would cease to attend services, causing a significant decline in attendance, forcing the synagogues to cease operation and "thereby creating an obvious substantial burden on [the congregations'] religious exercise."[98] Distinguishing between the substantial burdens experienced by individuals and institutions and determining the extent to which the former impacts an analysis of the latter can prove difficult. The next three Parts articulate a unique framework for drawing this distinction and conducting this analysis.

II. INSTITUTIONAL FREE EXERCISE

A series of Supreme Court decisions resolving intra-church property disputes[99] provides the genesis for the doctrine of institutional

94 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1219, 1227 (11th Cir. 2004).

95 *Id.* at 1221.

96 *Id.* at 1227.

97 *Id.*

98 *Id.* The Eleventh Circuit ultimately rejected the substantial burden claims, concluding that "[w]hile walking may be burdensome and 'walking farther' may be even more so, we cannot say that walking a few extra blocks is 'substantial,' as the term is used in RLUIPA, and as suggested by the Supreme Court." *Id.* at 1228. It also relied on deposition testimony indicating that members of Orthodox Jewish congregations often move closer to a synagogue when necessary. *Id.* However, the court found that the ordinance violated the equal terms provision of RLUIPA. *Id.* at 1235.

99 *See* Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self Governance:* Hosanna-Tabor *and the First Amendment*, 13 ENGAGE, no. 1, Mar. 2012, at 104, 118, *available at* http://www.fed-soc.org/doclib/20120529_Engage13.1.pdf ("In *Hosanna-Tabor*, a unanimous Supreme Court took a discrete line of cases involving religious disputes and church property

free exercise—or as it is sometimes termed, organizational free exercise—recently applied in *Hosanna-Tabor*.[100] These decisions "radiate . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[101] Relying on these and other cases, commentators have developed theories explaining the origin, justification, and scope of institutional free exercise. In this Part, I provide a taxonomy of these theoretical approaches and explore how they can aid in distinguishing between institutional and individual religious exercise and can clarify RLUIPA's application to religious institutions.

A. Hosanna-Tabor Evangelical Lutheran Church

In *Hosanna-Tabor* the Court recognized "a 'ministerial exception,' grounded in the First Amendment, which precludes application of [employment discrimination] legislation to claims concerning the

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and enlarged on it so as to give rise to a full-throated protection of religious institutional autonomy." (footnote omitted)). In *Kedroff v. St. Nicholas Cathedral* the Supreme Court held that New York State's legislature violated the First Amendment when it instituted a law determining how the church's leadership would be chosen and transferred control of property from the Russian Orthodox Church in Moscow to an autonomous administrative body in the United States. 344 U.S. 94 (1952). The New York legislature sought to prevent selection of church leadership by the Orthodox Church in Russia, which it deemed to be under the control of the antireligious Communist government. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1853 (1998). The Court declared that a religious organization's freedom to select its clergy has "federal constitutional protection as part of the free exercise of religion against state interference." *Kedroff*, 344 U.S. at 116. Prior to *Kedroff*, in the pre-*Erie* case *Watson v. Jones*, the Court, applying federal common law, declared that civil courts must defer, in "questions of discipline, or of faith, or ecclesiastical rule, custom, or law," to the decisions of the highest church tribunals. 80 U.S. 679, 727 (1871). For a fuller discussion of the church property cases, see *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694, 704–05 (2012). *See also* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1637–49 (discussing Supreme Court decisions on intra-church property disputes and their relevance for free exercise of religious organizations); Greenawalt, *supra* (exploring "judicial approaches to control of religious property . . . and . . . explain[ing] how these problems relate to broader First Amendment principles").

100 *See* John H. Garvey, *Churches and the Free Exercise of Religion*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 567, 578 (1990) (interpreting these cases as reflective of protection of a religious entity's freedom as a group distinct from its members and which may have interests at odds with those of its members: "[i]ts freedom is not a compound of individual liberties").

101 *Kedroff*, 344 U.S. at 116. The *Kedroff* Court's rejection of the New York legislature's attempt to interfere in the Russian Orthodox Church's selection of its clergy was particularly striking given the historic context of the Cold War. Richard Garnett explores this context, and the case's broader relevance for the concept of church autonomy, in *"Things that Are Not Caesar's": The Story of* Kedroff v. St. Nicholas Cathedral, *in* FIRST AMENDMENT STORIES 171 (Richard W. Garnett & Andrew Koppelman eds., 2011).

employment relationship between a religious institution and its ministers."[102] One commentator has described the ministerial exception, which had been uniformly recognized by the Courts of Appeals,[103] as "[t]he most fully developed example of religious organizational freedom."[104] *Hosanna-Tabor* emphasized the ministerial exception's role in preventing interference by the state in "the internal governance" of a religious institution and its "control over the selection of those who will personify its beliefs."[105] The decision rejected the position that religious institutions could only invoke a right to freedom of association akin to that of secular groups, declaring that "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations."[106] The scope of this doctrine remains unclear: the lower courts have not limited the ministerial exception to ordained clergy only,[107] and the Court refused to articulate a specific test for determining whether an employee is a minister, instead considering all the circumstances of the claimant's employment.[108]

In contrast with the ministerial exception, RLUIPA does not establish a blanket restriction on the application of land use laws to

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102 *Hosanna-Tabor*, 132 S. Ct. at 705. Writing prior to *Hosanna-Tabor*, Salkin and Lavine observed that "[w]hile it is clear that the First Amendment contemplates an organizational right to free exercise, the Supreme Court has yet to define the contours of this right." Salkin & Lavine, *supra* note 21, at 218 (footnote omitted). The narrow decision in *Hosanna-Tabor* provided little additional clarification of the scope of this right.

103 *See* Petruska v. Gannon Univ., 462 F.3d 294, 303–04 (3d Cir. 2006) ("Every one of our sister circuits to consider the issue has concluded that application of Title VII to a minister-church relationship would violate—or would risk violating—the First Amendment and, accordingly, has recognized some version of the ministerial exception." (footnote omitted)).

104 Berg, *supra* note 16, at 170–71; *see generally* Lund, *supra* note 16.

105 *Hosanna-Tabor*, 132 S. Ct. at 706.

106 *Id.* Prior to *Hosanna-Tabor*, commentators debated whether the ministerial exception represents a special protection unique to religious institutions or simply relies upon the general principle of associational freedom. *See* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 288 (2008) (declaring constitutional immunity of Catholic Church, in its choice of priests, from equal employment law an example of associational freedom); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111, 1167 (2011) ("Together with related doctrines governing church property and other matters, the ministerial exemption articulates a type of special protection for religious organizations that could be called institutional, jurisdictional, or structural."). Garnett himself questioned whether equating religious institutions with voluntary associations sufficiently accounted for the freedom of religious institutions with regards to decisions regarding their ministers. Garnett, *supra*, at 288.

107 Brady, *supra* note 99, at 1652–53. As Brady notes, courts have reached varied conclusions regarding which employees should be classified as ministers.

108 *Hosanna-Tabor*, 132 S. Ct. at 707. In a concurrence, Justice Thomas asserted that the Religion Clauses demand that a civil court applying the ministerial exception must "defer to a religious organization's good-faith understanding of who qualifies as its minister." *Id.* at 710 (Thomas, J., concurring). Justice Alito, in a separate concurrence joined by Justice Kagan, contended that the term "minister" and the concept of ordination should not be given significant importance in determining if the exception applies, as many religious groups do not use the term. Courts should instead focus on the function performed by an individual. *Id.* at 711–12 (Alito, J., concurring).

religious institutions.[109] RLUIPA also does not reflect a concern for the independent governance of a religious institution, which is central to the ministerial exception.[110] Land use regulations are unlikely to implicate issues of internal governance as their enforcement does not place courts in the middle of disputes between a religious congregation and its ministers, but instead involves the religious institution's relationship with an external authority.

However, land use regulations can impact two other concerns at the core of the ministerial exception cases: institutional identity[111] and the competence of secular courts to resolve religious questions.[112] Property can play an important role in the formation of group identity.[113] Land use regulations may impinge upon institutional identity to the extent that they severely restrict an institution's ability to engage in certain uses of its property (and to form its identity through these uses) or, as is discussed further *infra*, to expand their facilities in response to growing institutional needs. The substantial burden inquiry and the determination of what constitutes religious exercise also risk

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109 RLUIPA's co-sponsors emphasized that the "substantial burden" provision "does not exempt religious uses from land use regulation; rather it requires regulators to more fully justify substantial burdens on religious exercise." 146 CONG. REC. 16,698, 16,699 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy); *see also id.* at 16,700 (stating that RLUIPA "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.").

110 *See, e.g.*, Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (holding that any government restriction on the church's choice of its leaders burdens the church's free exercise rights).

111 *See* Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1203 (2009) (declaring that the reasoning of certain courts applying ministerial exception reflects the idea that "certain internal activities of religious institutions that are vitally important for establishing and communicating the religious identity of the institution must be off limits to government rules that normally would limit the permissible grounds for employment decisions.").

112 This same concern was presented in the church property cases. *See* Jones v. Wolf, 443 U.S. 595, 602 (1979) ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. . . . [T]he Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." (citations omitted)).

113 *See* Alison Ledgerwood et al., *Group-Identity Completion and the Symbolic Value of Property*, 18 PSYCHOL. SCI. 873, 877 (2007) (finding "that group identity, like personal identity, can be conceptualized as a goal toward which group members willfully strive, and that such goal striving is reflected in the value placed on potential symbols of group identity," including property). A number of legal commentators have discussed the similar relationship between cultural property and group identity. *See, e.g.*, Kristen A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009) ("[C]ertain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples."); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 566 (1995) ("[C]ultural property embodies the physical manifestation of a group's identity . . . .").

involving courts in the resolution of religious questions. The approach proposed in subsequent Parts of this Article addresses this concern by shifting the judicial inquiry from religious questions to more secular issues that courts frequently confront in analogous land use cases.

The ministerial exception cases, as well as the intra-church property cases, also reflect judicial recognition of institutional rights and interests distinguishable from those of the individual members of a religious assembly.[114] This accords with the insight of Justice Brennan who, concurring in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, noted, "[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[115] The next Section will consider theoretical justifications for the free exercise rights of these entities, and their relevance for the interpretation of RLUIPA.

B. *Theories of Institutional Free Exercise*

A growing body of legal scholarship examines the importance of institutions in the context of the First Amendment's religion clauses and other constitutional rights.[116] Traditionally, discussions of religious

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114 *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) ("The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission.").

115 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment); *see also* Robert M. Cover, Foreword, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Garvey, *supra* note 100, at 581–83 (noting that churches, particularly hierarchical ones, are not merely "a procedural device for advancing members' interests" but instead "a kind of unified whole, different from the sum of its parts"); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) ("Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] clause.").

116 *See, e.g.*, Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 523 (2007) ("Well understood, 'separation of church and state' would seem to denote a structural arrangement involving institutions, a constitutional order in which the institutions of religion—not 'faith,' 'religion,' or 'spirituality,' but the 'church'—are distinct from, other than, and meaningfully independent of, the institutions of government."); Garvey, *supra* note 100 (discussing freedom of religion as a group right); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1764 (2007) ("Were we to conclude that a certain institution can be the basis for a relevant constitutional category, we would often, even if not necessarily, be saying that the institution is a repository for certain constitutionally important values, that the relationship between the institution and the values is probabilistic and not universal, and that protecting or fostering the institution would have the tendency to serve those values.").

freedom have focused on the rights and beliefs of individuals, giving scant attention to the role of groups and institutions.[117] This may reflect two assumptions: first, that everything the First Amendment has to say about religious institutions is contained within the Establishment Clause, which defines the relationship between religious institutions and the government; and second, that the Free Exercise Clause concerns itself solely with the rights of individuals.[118]

Rejecting these premises, this scholarship is animated by the intuition that certain rights, particularly those of expression, "depend[]on the existence and flourishing of, certain institutions—newspapers, political parties, interest groups, libraries, expressive associations, universities and so on."[119] These institutions play what Richard Garnett terms an "infrastructural" role of creating a "civil-society space" within which rights, including religious freedom, can be exercised.[120] They also exercise their own rights.

In the remainder of this Section, I categorize the case law and legal scholarship discussing institutional free exercise into three distinct theoretical approaches. The first, which I term the intrinsic theory of institutional free exercise, asserts that religious institutions have distinct identities and a historical role in political theory and Constitutional doctrine that entitle them to rights that are not simply dependent upon the rights of individuals. The second theory derives institutional free exercise rights from the rights of individuals, which institutional rights serve to further. I term this the derivative theory of institutional free exercise.[121] A third justification, which partly overlaps with the derivative theory, can also be found in the case law. This pragmatic theory rests on the belief that religious institutions contribute certain goods to society and that respecting institutional rights furthers these

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117 Garnett, *supra* note 116, at 291–92; *see also Developments in the Law—Religion and the State: VI. Government Regulation of Religious Organizations*, 100 HARV. L. REV. 1740, 1741–42 (1987) (noting that commentators analyzing free exercise clause generally focus on individual religious exercise and in particular on right of conscientious objection).

118 *See* Carl H. Esbeck, *Toward a General Theory of Church-State Relations and the First Amendment*, 4 PUB. L. FORUM 325, 330–31 (1985) ("The Free Exercise Clause functions like other provisions in the Constitution that protect individual liberties. Its purpose is to stand against governmental abuse of an individual's inalienable rights. . . . Unlike the other provisions of the first amendment which protect individual liberties, the Establishment Clause focuses on a structural concern, namely, governing the church-state relationship.").

119 Garnett, *supra* note 106, at 274.

120 *Id.* ("The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them.").

121 *See id.* at 295 (discussing predominance of the derivative approach in contemporary discussions of religious freedom); *see also* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 426 (discussing, but dismissing as unpersuasive, the "theory of derivative rights" that might allow an organization to assert a free exercise claim in employment contexts and thereby "enhance and secure the personal rights of members").

societal benefits.[122] The arguments advanced in support of the recognition of institutional free exercise reflect these theories to varying degrees and often in combination. The novel taxonomy provided in the next three Sections focuses on the relevance of these theories for land use disputes and evaluates them in light of *Hosanna-Tabor*.[123]

1. The Intrinsic Theory

In a recent paper Steven Smith articulated what I term an intrinsic theory of institutional free exercise rights, proposing that the First Amendment's religion clauses are not really about religion, but are instead about "the church."[124] Smith traces the commitment to freedom of conscience to what was initially "a campaign for freedom of the church—a campaign devoted to maintaining the church as a jurisdiction independent of the state."[125] *Hosanna-Tabor* also recounts this historic battle, presenting it as the background against which the First Amendment was adopted.[126] Similarly, Michael McConnell has

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122 Using the provision of such goods as the primary justification of certain rights or exemptions would offer a consequentialist account of those rights, which Michael Dorf has described as the view that "people have individual rights because of a judgment that some goal—such as aggregate happiness or utility—will be best served in the long run by recognizing rights as a matter of positive law." Dorf, *supra* note 75, at 1197.

123 The scholarship discussed in this Section precedes the Court's decision in *Hosanna-Tabor*.

124 Steven D. Smith, *Freedom of Religion or Freedom of the Church?* 1 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 11-061, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412.

125 *Id.* at 2. Recounting the development of this classical conception, Smith offers—as an imperfect analogy for its understanding of the relationship between the church and king—the relationship between a foreign embassy and the state in which it is located, protected therein by "a sort of diplomatic immunity from secular law." *Id.* at 26. Smith notes that the state would "define and limit the scope of this foreign sovereign immunity," but that, within the sphere established for the church, it would exist "immune from secular interference." *Id.* at 27.

126 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 702 (2012) (discussing the first clause of the Magna Carta, which declares that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired" (quoting J. HOLT, MAGNA CARTA app. IV, at 317, cl. 1 (1965)) (internal quotation marks omitted)); *see also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 368–69 (2002) (discussing how John Locke "developed the argument for liberty of conscience by refining the idea of separate spheres of authority for religious and worldly affairs" expressed by prior thinkers); Tebbe, *supra* note 106, at 1169 (noting that scholars have traced distinction between church and government "through different lines of inheritance all the way up through American constitutionalism"); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 395 (1996) ("Eighteenth century writers did not speak unequivocally of what we now call group rights, or corporate free exercise rights, but they did regularly call for 'ecclesiastical liberty,' 'the equal liberty of one sect . . . with another,' and the right 'to have the full enjoyment and free exercise of those spiritual powers . . . which, being derived only from CHRIST and His Apostles, are to be maintained, independent of every foreign, or other, jurisdiction, so far as may be consistent with the civil rights of society.'" (alterations in original) (quoting LEVI HART, LIBERTY

emphasized the importance of the First Amendment's choice of the words "free exercise of religion" rather than "rights of conscience," arguing that "'conscience' emphasizes individual judgment, while 'religion' also encompasses the corporate or institutional aspects of religious belief."[127] On this reading, religion is about a "community of believers" and the free exercise clause "suggests that the government may not interfere with the activities of religious bodies, even when the interference has no direct relation to a claim of conscience."[128] On my account, an intrinsic theory of institutional free exercise rights may acknowledge that protection of these rights will serve to protect individual rights or provide societal benefits, but will not rely upon this for justification.[129]

Contrary to the assertions of some commentators, institutional free exercise need not be deemed equivalent to or even dependent upon a strong conception of "church autonomy."[130] The Court's opinion in *Hosanna-Tabor* never uses the term autonomy, although it does appear in concurrences by Justices Thomas and Alito.[131] Claims of autonomy—which in their strongest form would categorically exclude judicial intervention[132]—rely upon both free exercise rights and the Establishment Clause principle of avoiding "excessive entanglement" between church and state.[133] Institutional free exercise is instead firmly

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DESCRIBED AND RECOMMENDED 14 (Hartford, E. Watson 1775)); ISAAC BACKUS, ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM: PAMPHLETS, 1754–1789 (William G. McLoughlin ed., 1968); and A DECLARATION OF CERTAIN FUNDAMENTAL RIGHTS AND LIBERTIES OF THE PROTESTANT EPISCOPAL CHURCH IN MARYLAND, *quoted in* 1 ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES 741 (1950).

127 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1489–90 (1990) (footnote omitted). McConnell notes that the free exercise clauses in early state constitutions "seem to allow churches and other religious institutions to define their own doctrine, membership, organization, and internal requirements without state interference." *Id.* at 1464–65; *see also* McConnell, *supra* note 29, at 16–17 ("[T]he idea of a jurisdictional separation between religious and temporal authority has roots which extend as far back as the Fifth Century, long before there was any real conception of individual conscience in matters of religion in papal teachings regarding the freedom of the church from the control of the Emperor.").

128 McConnell, *supra* note 127, at 1490.

129 *See* Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 180 (2011) ("By setting the precedent for limited government, institutional religious freedom has promoted both political and religious liberty for all, believers and nonbelievers alike.").

130 My view on this matter contrasts with that of other commentators, such as Lloyd Hitoshi Mayer, who discusses "institutional free exercise" as a "logical extension" of the church autonomy doctrine. Mayer, *supra* note 111, at 1197.

131 *See Hosanna-Tabor*, 132 S. Ct. at 694.

132 *See* Esbeck, *supra* note 99, at 115 ("[T]he religious autonomy recognized in *Hosanna-Tabor* is categorical.").

133 Berg, *supra* note 16, at 167; *see also* Mayer, *supra* note 111, at 1201 ("The Supreme Court has, however, been vague regarding whether the constitutional basis for [church autonomy] derives from the Free Exercise Clause or the Establishment Clause of the First Amendment, although its statements indicate that it relies on both clauses.").

rooted in the Free Exercise Clause alone, although the Establishment Clause may restrict its scope.[134]

At the same time, the concept of autonomy plays a crucial role in the identity formation of both groups and individuals. In the context of church-state relations, discussions of autonomy often take the form of identifying separate spheres within which religion and government operate.[135] In the words of Justice Black, "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[136] These separate spheres of religion and government, understood as an intrinsic component of our Constitutional structure, have particular salience in the land use context. By providing protections for religious land uses that might exceed those afforded other land use actors, RLUIPA serves to foster the literal space within which religious institutions can operate and flourish.[137]

2. The Derivative Theory

A derivative theory of institutional free exercise would recognize protections for religious institutions in order to enable individuals to exercise their own free exercise rights.[138] This approach is analogous to Constitutional law doctrine that protects the freedom of association on the grounds that this is necessary to provide meaningful protection of the freedom of speech.[139] Religious groups are valued as an intermediary between the individual and the state that protects personal freedoms.[140]

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134 *Hosanna-Tabor*, 132 S. Ct. at 703 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").

135 *See* Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 111 (2009) (articulating a conception of "First Amendment institutionalism" based on Abraham Kuyper's notion of "sovereign spheres" and describing the First Amendment institution as "an identifiable sovereign sphere whose fundamental role in the social order is to contribute to public discourse").

136 Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

137 *See* Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 YALE J. INT'L L. 1, 13 (2008) ("[R]eligious communities seek and require not private but 'public spheres' of their own in order to flourish and, ultimately, to survive.").

138 See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment) ("Solicitude for a church's ability [to define itself] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."); Mayer, *supra* note 111, at 1207 ("The very individual right that the Free Exercise Clause clearly protects is therefore dependent on the ability of [religious] institutions to function free from government regulation, at least with respect to those activities that are most important to perpetuating their faith.").

139 Frederick Mark Gedicks has advocated a doctrine of "religious association" on this basis. *See* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L.

Derivative approaches akin to the freedom of association fail to account for the independent interests of religious institutions[141] or the special protections accorded those institutions by RLUIPA. Moreover, the Court rejected this approach in *Hosanna-Tabor*, which declared that the freedom of association, as outlined in *Roberts v. United States Jaycees*,[142] failed to adequately account for the Constitutional right of religious organizations to select their ministers.[143] The Court's rejection of these approaches in *Hosanna-Tabor*—which relied instead on the First Amendment's "special solicitude to the rights of religious organizations"[144]—reflects its recognition of what I term an intrinsic theory of institutional free exercise.

The derivative theory partially overlaps with the third theory, which emphasizes the societal benefits that accrue from the protection of institutional free exercise. Both theories have instrumental aspects, but the derivative theory can be differentiated on the grounds that it relies on the principle that protection of individual religious freedom *demands* the recognition of institutional freedom (and that this freedom is therefore implicit in our constitutional structure).

3. The Pragmatic Theory

In contrast to the derivative theory, the pragmatic theory supports the protection of institutional freedom to the extent that this freedom serves to further other, potentially variable, social goals. The Supreme Court has recognized pragmatic interests as a valid basis for property

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REV. 925, 941 (2000) (citing NAACP v. Alabama, 357 U.S. 449, 460 (1958)); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1311–14 (1994) (proposing a form of "church autonomy" rooted in privacy principles that also protect expressive association).

140 Garvey, *supra* note 100, at 588; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring) ("Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'" (alteration in original) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984))).

141 *See supra* notes 114–115 and accompanying text.

142 468 U.S. at 617–29. The two conceptions of "freedom of association" discussed in *Roberts* both reflect derivative theories. The first protected choices regarding "certain intimate human relationships" from "undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617–18. The second "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Id.* at 618.

143 *Hosanna-Tabor*, 132 S. Ct. at 706.

144 *Id.*; *see also* Esbeck, *supra* note 99, at 114 (discussing *Hosanna-Tabor*'s rejection of the argument from freedom of association).

tax exemptions, on the grounds that certain groups are "beneficial and stabilizing influences in community life" and "should not be inhibited in their activities by property taxation or the hazard of loss of [their] propert[y] for nonpayment of taxes."[145] Justice Brennan's concurrence in *Walz v. Tax Commission* emphasized two secular purposes served by these exemptions: religious organizations make a unique contribution to diversity in society and they "contribute to the well-being of the community in a variety of nonreligious ways," providing goods that the state would otherwise have to provide (and pay for through taxation).[146] New York State courts have embraced a position consistent with the pragmatic theory in a series of decisions holding that religious and educational uses are "by their very nature, clearly in furtherance of the public morals and general welfare."[147] Under this doctrine, religious uses possess a distinct status from "mere commercial enterprises" and considerations that might govern in cases involving commercial properties—effects on property values, tax revenue, traffic hazards, and the enjoyment of neighboring property—are not sufficient to restrict a religious use.[148]

This pragmatic approach to religious institutions has a long historical lineage. Alexis de Tocqueville emphasized the role of religion

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145 Walz v. Tax Comm'n, 397 U.S. 664, 672–73 (1970). *Walz* did not recognize a constitutional right to tax exemptions, but held that the legislative grant of such exemptions does not violate the religion clauses. *Id.* at 680. A study conducted in the early 1990s found that over 2000 statutes contained religious exemptions. *See* McConnell, *supra* note 29, at 5; *see also* Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593, 612–13 ("Exemptions from federal and state taxes and reporting requirements . . . . have been influenced by several factors including the government's hesitation to identify and interfere with religious uses under the First Amendment, a concern that religious organizations should not be allowed an economic advantage when their activities compete with other secular entities, and the government's recognition that religious organizations have helped to provide public relief."). *But see* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652–53 (1981) (religious interests are not "superior to [others] having social, political, or other ideological messages to proselytize").

146 *Walz*, 397 U.S at 687 (Brennan, J., concurring). Although it acknowledged that securing these benefits might represent a valid legislative purpose, the majority in *Walz* refused to uphold the exemptions solely on the basis of the social welfare services a particular religious institution might provide. *Id.* at 674–78 (majority opinion). Instead the Court relied upon the Establishment Clause principle of avoiding entanglement and the historic attitude of religious tolerance reflected by the exemption. *Id.* at 674.

147 Westchester Reform Temple v. Brown, 239 N.E.2d 891, 894 (N.Y. 1968) (quoting Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 834 (N.Y. 1956)).

148 *Id.* In *Westchester Reform* the state's highest court concluded that a congregation's need to expand its facilities to meet growing demands could only be prohibited upon a showing that the expansion would "have a direct and immediate adverse effect upon the health, safety or welfare of the community." *Id.* at 895. The same court in *Cornell University v. Bagnardi* altered the analysis in *Westchester Reform*, acknowledging a "presumed beneficial effect" from schools and churches, but noting that this presumption could be rebutted by evidence that included "a significant impact on traffic congestion, property values, municipal services and the like." 503 N.E.2d 509, 515 (N.Y. 1986). This alteration reflected the court's concern with the increasing size and scope of educational and religious institutions. *See id.* at 514.

in fostering political expression and participation.[149] And as Thomas Berg has asserted, the Framers believed that respecting the "communal norms" of religious groups "played a crucial role in fostering virtue among the citizenry."[150] There is also some empirical support for this theory. Research by Robert Putnam and David Campbell on the civic engagement of religious individuals reveals that regular attendees of religious services are more likely to volunteer not only for religious causes, but also for secular causes.[151] They make "vastly larger" annual donations than secular Americans, even if only secular causes are considered,[152] and are twice as active in civic affairs.[153] What is most interesting about Putnam and Campbell's work is not the conclusion that there is a causative relationship between religiosity and giving, volunteering and civic engagement.[154] Rather, Putnam and Campbell examine why this is the case and conclude that "communities of faith seem more important than faith itself."[155] They find that active participation in religious social networks "is virtually the most powerful predictor of every measure of good neighborliness" they analyze[156] and conclude that, for the most part, "Tocqueville [was] right that religion contributes to American democracy."[157]

Although it might provide a secular legislative purpose sufficient to satisfy the Establishment Clause standard of *Lemon v. Kurtzman*,[158] the pragmatic theory fails to independently justify the recognition of

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149 Brady, *supra* note 99, at 1700; *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 334 (Henry Reeve trans., New York, Edward Walker 7th ed. 1847) (1835), *available at* http://archive.org/stream/democracyinamer06spengoog#page/n371/mode/2up ("Religion in America takes no direct part in the government of society, but it must be regarded as the foremost of the political institutions of that country; for if it does not impart a taste for freedom, it facilitates the use of free institutions."); Horwitz, *supra* note 135, at 103 (discussing Tocqueville's linking of "religious associations' influence in forming the moral character and political development of the nation with a vibrant conception of civil freedom and church-state separation").

150 Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 430 (1999).

151 *See* ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE 445 (2010). "In round numbers, regular churchgoers are more than twice as likely to volunteer to help the needy, compared to demographically matched Americans who rarely, if ever, attend church." *Id.* at 446.

152 *Id.* at 447–48.

153 *Id.* at 454.

154 *Id.* at 462.

155 *Id.* at 444.

156 *Id.* at 472.

157 *Id.* at 492. The one exception is an important one, as religious Americans are, according to the study, "less staunch supporters of civil liberties than secular Americans." *Id.*

158 Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that, for statute to pass muster under Establishment Clause, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." (citations omitted) (internal quotations marks omitted)).

Constitutional protections for institutional free exercise. The recognition of institutional free exercise rights should not depend upon the provision of social goods in service of the general welfare by religious institutions. By itself, the pragmatic theory is over and potentially under-inclusive, justifying equivalent rights for non-religious civic society groups that serve the general welfare and failing to justify the extension of protections to religious institutions that do not directly serve the broader community.[159] In so far as Congress sought to protect Free Exercise Clause principles through RLUIPA, the pragmatic theory does not offer the best account of these statutory protections.[160]

C. *RLUIPA Is Best Interpreted Through Application of the Intrinsic Theory*

To the extent that RLUIPA is defended as a codification of prior Supreme Court decisions applying strict scrutiny to individualized determinations, the intrinsic theory of institutional free exercise provides the most appropriate framework for analyzing substantial burden claims. Even to the extent that RLUIPA provides statutory protections that exceed Constitutional rights, what constitutes a "substantial burden" and "religious exercise" must still be determined in light of the First Amendment and relevant Supreme Court jurisprudence.[161] *Hosanna-Tabor* rejected the assertion that religious organizations could only rely upon a right to freedom of association "'implicit' in the First Amendment," instead recognizing in the First Amendment's text a "special solicitude to the rights of religious organizations."[162] An intrinsic theory of institutional free exercise, which would define the scope of protections provided to religious institutions based upon the institution's distinct religious exercise and not the interests or religious exercise of individual members, best accounts for the historical basis for this "special solicitude."

A few principles distilled from this analysis of institutional free exercise should frame the interpretation of RLUIPA's protections for religious institutions in the land use context. First, religious institutions

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159 I say "potentially" under-inclusive as this would depend on what is considered a contribution to society. Although some religious institutions may not provide beneficial social goods to the broader community, all would at least contribute to some extent to the "diversity in society" referenced by Justice Brennan. But by itself an appeal to such diversity begs the question of why diversity among religious institutions merits stronger protections for those institutions than diversity among some other class of institutions would merit.

160 The pragmatic theory would also favor a balancing test, which falls short of the specific protections in RLUIPA. *See* Westchester Reform Temple v. Brown, 239 N.E.2d 891, 894–96 (N.Y. 1968) (discussing how New York state courts have applied a balancing test).

161 *See supra* note 7.

162 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012).

have interests and concerns independent of their individual members. It is the institution's religious exercise, and the challenged land use decision's effect on this exercise, that must be considered when evaluating a substantial burden claim. Second, this institutional religious exercise includes the development and communication of religious beliefs and identity and the performance of religious ceremonies.[163] It will also, for many religious institutions, include charitable activities. Determining what constitutes institutional free exercise, without entangling courts in religious questions, will create difficulties. But similar difficulties will attend the determination of who qualifies as a "minister" under the ministerial exception, a task that courts will have to confront following *Hosanna-Tabor*.[164] Third, and relatedly, institutional free exercise reflects a vision of religious institutions as independent organic entities whose existence and identity depends upon the ability to pass their teachings on.[165] Accordingly, institutions should be granted space to flourish within their separate sphere. This may necessitate certain accommodations in response to demands for the growth and expansion of existing religious activities.

A final point is in order. Institutional free exercise potentially blurs the distinction, crucial to *Smith*, between protections for religious belief and opinion and protections for practices.[166] *Smith* declared that the government may not regulate "religious *beliefs* as such"[167] but may interfere with overt religious acts.[168] RLUIPA, through its reference to religious exercise, expressly protects the latter. However, if the central or defining religious exercise of religious institutions is, in the words of

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163 *Id.* at 711–12 (Alito, J., concurring) ("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."); *see also* Gedicks, *supra* note 139, at 941 ("[G]overnment action that threatens to change the content or character of an association's message must be narrowly tailored to protect a compelling or substantial government interest unrelated to the suppression of ideas."); Mayer, *supra* note 111, at 1207 ("[Religious] institutions are not only vehicles for the implementation of individual religious beliefs, although this is one of their important functions; they are also vehicles for the development, refinement, and communication of such beliefs, and the ramifications of those beliefs for conduct, to both current adherents and possible converts.").

164 *Cf.* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 189–90 (2003) (noting that institutional theories of organizational rights grant churches the rights necessary to pursue the ends appropriate to the sphere in which they operate, namely the advancement of "their religious beliefs and ceremonies," but observing that such theories rely upon the assumption that consensus can be reached about the proper ends of a given institution).

165 *See supra* note 115 and accompanying text.

166 Emp't Div. v. Smith, 494 U.S. 872, 877–79 (1990) (declaring that "while [government regulations] cannot interfere with mere religious belief and opinions, they may with practices" (quoting Reynolds v. United States, 98 U.S. 145, 166 (1878)).

167 *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

168 *Id.* at 878–80.

Justice Brennan, the perpetuation of an "ongoing tradition of shared beliefs,"[169] interfering with an institution's religious exercise may directly impinge upon beliefs in a way that is not true for individuals. Put another way, while an individual's beliefs may reside internally in the conscience or mind, institutions and their beliefs take form and existence in the physical world and through the interaction among individuals in the present and across time. Institutions are formed for the purpose of promoting and perpetuating these beliefs.[170] Land use regulation can impact a religious institution's ability to pursue this mission. Restrictions on an institution's ability to engage in the outward acts through which religious beliefs are developed, communicated, and transferred over time may constitute a regulation of the beliefs themselves and thereby affect institutional identity.[171]

A theory of institutional free exercise and the recognition of distinct institutional interests are not, by themselves, sufficient to resolve how courts should conduct a substantial burden analysis. What is needed next is a doctrinal framework for evaluating institutional substantial burden claims, which courts confronting such claims have largely lacked. Rather than rely on individual Free Exercise precedent, which has only muddied the waters and failed to produce a clear and consistent jurisprudence, courts should draw on the treatment of analogous institutional land-use disputes. Two particularly useful models exist: the first dealing with charitable purposes and hardship claims in the landmarks context, and the second treating the natural expansion of nonconforming uses.

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169 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341–42 (1987) (Brennan, J., concurring in the judgment); *see also supra* note 115 and accompanying text.

170 The *Oxford English Dictionary* defines an "institution" as "[a]n establishment, organization, or association, instituted for the promotion of some object." 5 OXFORD ENGLISH DICTIONARY 354 (1970).

171 *See supra* notes 112–113 and accompanying text. In *Hosanna-Tabor* the Court distinguished *Smith*, which "involved government regulation of only outward physical acts," from the case before it, which involved "an internal church decision that affects the faith and mission of the church itself." Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706–07 (2012). This distinction is not nearly as clear as the Court implies, as the firing of an employee surely entails an "outward physical act." *See generally* Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. (forthcoming 2013) (critiquing this and other elements of the opinion).

III. MODELS FOR EVALUATING INSTITUTIONAL FREE EXERCISE CLAIMS: NEW YORK'S JUDICIAL HARDSHIP TEST AND THE NATURAL EXPANSION OF NONCONFORMING USES

A series of New York State decisions regarding challenges to landmark restrictions on nonprofit institutions provides guidance for resolving RLUIPA claims by religious institutions. Although these cases deal with the specific context of hardship exceptions to a landmarks law,[172] they provide a useful framework for evaluating RLUIPA claims, particularly those brought by existing institutions challenging restrictions on their ability to expand or alter their facilities. Until now, these decisions have received no relevant attention in the case law and scholarship analyzing RLUIPA.[173]

Land use cases that involve nonprofits, rather than for-profit individuals or organizations, raise distinct considerations in part because nonprofit uses are not fungible and not easily reducible to economic calculations. These uses are frequently not the most economically valuable uses of a given site and certain nonprofits or religious institutions may have a particular interest in continuing to operate in a specific location and community, even if a less expensive alternative exists.[174] Legal restrictions that provide an owner with a reasonable return on property may nonetheless interfere substantially with the owner's particular charitable purpose.[175] While commercial entities may readily be able to obtain the same or better financial return at another property (or through a different use of the property at issue), nonprofits and religious institutions may find themselves unable to simply move their operations and continue pursuing their charitable purposes or religious exercise.[176] Accordingly, the decisions in *Trustees*

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172 These cases differ from RLUIPA in that hardship relief is available to both for-profits and nonprofits in the context of landmark designation; the only question is what test should be applied to adequately evaluate the concerns that drive the land use decisions of both types of property owners.

173 A Westlaw search for "'Snug Harbor' 'Lutheran Church in America' 'Ethical Culture' and RLUIPA" conducted on February 13, 2012 yielded twenty-one cases and journal articles, none of which discussed these decisions in relation to the substantial burden provision.

174 *See* David M. Stewart, *Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners Under New York City's Historic Preservation Law*, 21 COLUM. J.L. & SOC. PROBS. 163, 180 (1988) ("Reasonable return formulas are inappropriate for nonprofit-owned landmarks, because the concept of reasonable return is irrelevant to institutions not pursuing economic gain, and because the buildings nonprofit institutions occupy are generally not designed to produce a commercial return.").

175 *Id.* at 183 ("It is easy to imagine an application of a regulation which might seriously interfere with the carrying out of a nonprofit owner's purpose, thus requiring compensation under *Snug Harbor* and *Lutheran Church*, and still leave the property with a reasonable remaining use.").

176 *See* Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91, 110 (1992) (arguing that

of the Sailors' Snug Harbor v. Platt,[177] *Lutheran Church in America v. City of New York*,[178] and *Society for Ethical Culture v. Spatt*[179] establish a hardship relief for nonprofit entities, including religious institutions,[180] that protects not only their current uses of their property, but also the reasonable evolution and expansion of these uses. With regards to expansion, the approach developed in these cases is akin to the recognition by other courts of a right to expand a nonconforming use.[181]

A. *Protections for Charitable Purpose and Evolving Institutional Use*

New York State's judicially-created hardship exception provides relief for nonprofits subject to the New York City landmarks law when the law "seriously interfere[s] with the owner's particular charitable purpose."[182] This exception tailors the economic hardship exemption frequently found in preservation ordinances—which provides relief when an owner is denied an adequate return—to the unique situation of

while "commercial property owners may temper any negative financial consequences flowing from [landmark] designation—such as affirmative maintenance requirements—by putting their property to uses that will maximize the return on their investment," in contrast, religious institutions "are far less able to 'adapt' to landmark designation"). While commercial property owners may be able to "adaptively reuse" a landmarked property so as to maximize their return and mitigate financial consequences, religious institutions are not as able to adapt. *Id.* at 104–05. The difficulties that both religious and charitable institutions face in adapting their property stem from a similar concern with institutional purpose. Such institutions change their use of property so as to adjust to institutional needs and the evolving nature of their missions and charitable purposes. Because the highest and best use of their property typically is not their primary concern, adaptation for the purposes of mitigating financial consequences and maximizing profitability is not a natural step and may directly conflict with the use that best serves an institution's purposes.

177 288 N.Y.S.2d 314 (App. Div. 1968).

178 316 N.E.2d 305, 307 (N.Y. 1974).

179 415 N.E.2d 922 (N.Y. 1980).

180 *See* Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183, 196 (N.Y. 1986) (discussing application of the hardship standard to property used "for a charitable or religious purpose").

181 *See infra* notes 226–228 and accompanying text.

182 Stewart, *supra* note 174, at 183. New York City's landmark preservation ordinance "provides the most significant protection for [religious and charitable] institutions." Weinstein, *supra* note 176, at 104–05; *see also* Christine Faller, Economic Hardship and Historic Preservation of Non-Profits: Balancing Individual Burden with Community Benefit (May 13, 2008), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1029&context=hpps_papers (unpublished manuscript, Georgetown University Law Center) (reviewing takings standard for nonprofit organizations in different jurisdictions). For an overview of the landmark designation process in New York City, see Joachim Beno Steinberg, Note, *New York City's Landmarks Law and the Rescission Process*, 66 N.Y.U. ANN. SURV. AM. L. 951, 955–72 (2011).

nonprofits.[183] New York courts first articulated this test in *Trustees of Sailors' Snug Harbor v. Platt*.[184] According to the plaintiff in *Snug Harbor*, the landmarked buildings at issue—a series of dormitories owned by an organization with the charitable purpose of providing a home for retired sailors—had "largely outlived their usefulness" and no longer provided suitable accommodations.[185] The court considered whether the landmark regulation, by prohibiting the demolition and redevelopment of the property, resulted in a constitutionally prohibited taking.[186] The available statutory relief applied only when a nonprofit sought to sell or lease the property to a commercial enterprise.[187] The plaintiff instead wished to continue using the building to provide accommodations, pursuant to its charitable purpose. The court devised a distinct standard for granting relief to a charitable entity—allowing relief "where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose."[188] It also outlined a series of subsidiary questions that would bear upon resolving this broader question in the factual situation before it, all of which should be considered "in the light of the purposes and resources of the petitioner."[189]

Lutheran Church in America v. City of New York, the first challenge by a religious institution to the Landmarks Law, refined the judicial hardship exception. The plaintiff religious corporation occupied a residential building that had been converted into offices for its "corporate-religious purposes."[190] The building was subsequently

183 Laura S. Nelson, *Remove Not the Ancient Landmark: Legal Protections for Historic Religious Properties in an Age of Religious Freedom Legislation*, 21 CARDOZO L. REV. 721, 743–44 (1999).

184 288 N.Y.S.2d 314, 316 (App. Div. 1968). At least one New York municipality, the City of Buffalo, codified this standard. The city's code provides that the Preservation Board may allow modifications of the code's preservation standards when an applicant establishes "undue hardship." BUFFALO, N.Y., CODE § 337-23(A) (2012). One of the three bases for proving undue hardship applies specifically to nonprofits: "Prevention of purpose. The land or improvement in question, without the requested construction, alteration, removal or demolition, may not be used without physically or financially preventing or seriously interfering with the carrying out of the charitable purpose in the case of properties held for charitable, religious or nonprofit purposes." *Id.* § 337-23(B)(3). A number of other jurisdictions also have ordinances that contain relief provisions for nonprofits and religious institutions subject to landmark restrictions. *See* Weinstein, *supra* note 176, at 104–05 & nn.69–73.

185 288 N.Y.S.2d at 316. The buildings were considered among the best examples of Greek Revival architecture in the country. *Id.*

186 *Id.*

187 *Id.*; *see also* Steinberg, *supra* note 182, at 979.

188 *Snug Harbor*, 288 N.Y.S.2d at 316; *see also* Stewart, *supra* note 174, at 180 ("The courts have . . . applied three separate constitutional standards for takings claims asserted by nonprofit owners: (1) interference with the charitable functions of the landmark's owner, (2) interference with activities being carried on within the landmark structure and (3) preclusion of purposes for which the structure is reasonably adapted." (footnote omitted)).

189 *Snug Harbor*, 288 N.Y.S.2d at 316.

190 *Lutheran Church*, 316 N.E.2d 305, 307 (1974); *see also* Weinstein, *supra* note 176, at 118.

designated a landmark. Eventually, the plaintiff's need for office space increased, rendering the building inadequate.[191] The church filed suit challenging the landmark designation and brought, *inter alia*, free exercise and takings claims. In the course of a hearing, the church presented evidence regarding "the nature of its work, its space requirements, the inadequacies of the existing space, its plans to rebuild, and the impact of the designation on all of this."[192]

The court invoked the *Snug Harbor* test as its standard for determining whether a regulatory taking occurred.[193] It concluded that the landmark designation "would prevent or seriously interfere with the carrying out of the charitable purpose" because "the existing building is totally inadequate for plaintiff's legitimate needs" and as such constituted a "naked taking."[194] The court noted that an ordinance cannot be applied in a way that prohibits the existing use at the time of enactment and the plaintiff had submitted ample proof that it would need to cease the use to which the property had been put for over twenty years.[195] This conclusion relied, however, upon a broad interpretation of the prior existing use. The court's statement of facts indicated not that the landmark law prohibited continued use of the property as office space, but that the church's office space needs had expanded to such an extent as to render the building inadequate for those growing needs.[196] Hence the court found the statute created a hardship upon the church's current "legitimate needs" and prevented the church from "freely and economically using the premises," resulting in a taking.[197]

In a subsequent decision applying *Snug Harbor*, the New York Court of Appeals rejected a challenge to the landmark designation of the Meeting House of the Society of Ethical Culture.[198] The Society alleged that restrictions on the use of its property denied it due compensation and violated its free exercise. Although the Society argued that the landmarked building was no longer sufficient for its needs, the court was not convinced that demolition was the only available alternative. It also noted that there was no claim that the Society's charitable activities had been disrupted.[199] Moreover, the petitioner's primary complaint was that its landmark status prevented the Society from "putting the

191 *Lutheran Church*, 316 N.E.2d at 307.

192 *Id.* at 308.

193 *Id.* at 311.

194 *Id.* at 311–12.

195 *Id.* at 310.

196 *See id.* at 307; *see also* Weinstein, *supra* note 176, at 120 n.159 (noting that hardship relief claimed in *Lutheran Church* was based on demands of "increasing or evolving institutional use").

197 *Lutheran Church*, 316 N.E.2d at 312.

198 Soc'y for Ethical Culture v. Spatt, 415 N.E.2d 922 (N.Y. 1980).

199 *Id.* at 926.

property to its most lucrative use."[200] The court's rejection of the asserted grounds for hardship relief—which caused no disruption of "eleemosynary activities within the landmark"[201]—resembles a portion of RLUIPA's legislative history, which expressly disavowed the statute's application to burdens on commercial buildings whose proceeds are used to support religious exercise.[202]

The hardship exception outlined in *Snug Harbor* and its progeny has direct relevance for the interpretation of RLUIPA's substantial burden standard, particularly if the latter is considered through the framework of institutional free exercise. A religious institution's religious exercise should be considered functionally equivalent to a secular nonprofit's charitable purpose.[203] Both represent the relevant entity's "rasion d'être." It must be acknowledged that distinctions exist between the stakes at issue under RLUIPA and in the takings context.[204] When a violation of RLUIPA is established, the government's action is prohibited, but when a taking is found the government must simply provide compensation.[205] However, in the RLUIPA context the substantial burden determination is only the first step of the inquiry, as courts will then apply strict scrutiny and potentially uphold the challenged action. There is also an analogous precedent for associating RLUIPA's substantial burden standard with New York's judicial hardship test. As will be discussed in more detail, the Second Circuit, in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*, applied an identical test to both a free exercise and a takings claim brought by a church challenging a landmark regulation.[206]

An analysis derived from the charitable purpose/judicial hardship cases would focus the substantial burden inquiry on a property owner's

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200 *Id.*

201 *Id.*

202 146 CONG. REC. 16,698, 16,700 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy) ("[A] burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'").

203 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 712 (2012) (Alito, J., concurring) ("[The] very existence [of religious groups] is dedicated to the collective expression and propagation of shared religious ideals."); *see also* Mayer, *supra* note 111, at 1210 (describing communication of religious beliefs as "the reason for [a religious] institution's existence").

204 *Cf.* First Covenant Church v. City of Seattle, 840 P.2d 174, 190 (Wash. 1992) (Utter, J., concurring) (declaring that, when free exercise and free speech rights are also implicated, "[m]ore is at stake . . . than the investment-backed expectations at issue in the takings context").

205 First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (declaring that the Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking").

206 914 F.2d 348, 353 (2d Cir. 1990).

legitimate institutional needs in pursuing its religious exercise. These legitimate needs would reflect an institution's current demands for building space or similar resources. It would allow for the potential evolution and expansion of institutional use when a claimant can present specific evidence regarding the nature of its religious exercise, its space requirements, the inadequacies of its existing space, and the direct impact of the challenged land use regulation. This approach would allow for expansion necessary to meet an institution's current needs, but not in anticipation of projected future expansion or to simply allow a more lucrative use of its property. But since the finding of a substantial burden constitutes only the first step of the RLUIPA inquiry, not all expansions will be permitted. Even if they are responsive to legitimate institutional needs, expansions and evolving uses that too radically alter the fabric of a municipality's land use will likely run afoul of a compelling governmental interest.

B. Penn Central *and* St. Bartholomew's

One might question whether the analysis in these cases survives the Supreme Court's decision in *Penn Central Transportation Co. v. New York City*.[207] *Penn Central*, which involved a for-profit property owner's takings challenge to New York's Landmark Law, articulated a regulatory takings analysis that "requires courts to balance, among other things, '[t]he economic impact of the regulation on the claimant' and 'the character of the governmental action.'"[208] With regard to economic impact, the Court deemed particularly important "the extent to which the regulation has interfered with distinct investment-backed expectations."[209] In subsequent decisions the Court transformed this analysis into a consideration of "*reasonable* investment backed expectations."[210]

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207 438 U.S. 104 (1978). Although *Ethical Culture* was decided after *Penn Central* and cited the Supreme Court's decision, it did not explicitly consider its relevance for the *Snug Harbor* hardship exemption.

208 Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 617–18 (2004) (quoting *Penn Cent.*, 438 U.S. at 124).

209 *Penn Cent.*, 438 U.S. at 124.

210 Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (emphasis added); *see also* Christopher Serkin, *Existing Use and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1251 (2009) ("Over time, the inquiry into investment-backed expectations has changed and lost its focus on the existing use of the property."); *cf.* Consumers Union of U.S., Inc. v. State, 840 N.E.2d 68 (N.Y. 2005) ("The word 'investment' may seem awkward in discussing the expectations of a not-for-profit entity, but I think the meaning of 'investment-backed expectations' in this context is simply [claimant's] reasonable expectations as to the future use of [its] property.").

The Second Circuit considered *Penn Central* and its relevance for New York State's charitable purpose test in *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*.[211] In *St. Bartholomew's*, the church and its Community House—used for religious and social activities—were both designated landmarks.[212] The plaintiff sought a "hardship exception" to demolish the Community House, which it asserted was inadequate for its religious purposes, and build a forty-seven–story office tower.[213] It argued that the Landmarks Law "substantially burdens religion in violation of the First Amendment."[214] The court declared that the question of whether "the landmark regulation prevented the church from carrying out its religious and charitable mission" represented the proper standard for both free exercise and takings challenges to a landmark regulation.[215]

The new office building would have provided improved space for church programs, as well as income to support these activities.[216] The church argued that it was "unconstitutionally denie[d] the opportunity to exploit" its property in furtherance of its religious mission.[217] Relying on *Employment Division v. Smith*, the Second Circuit rejected these arguments. It found that the Landmarks Law represented a "facially neutral regulation of general applicability."[218]

Turning to the takings claim, the court articulated a charitable purposes application of the *Penn Central* standard. This analysis asked

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211 914 F.2d 348 (2d Cir. 1990).

212 *Id.* at 351, 353.

213 *Id.* at 351–52.

214 *Id.* at 353.

215 *Id.* at 351, 353.

216 *Id.* at 354.

217 *Id.*

218 *Id.* In light of RLUIPA's statutory protections, this no longer reflects the proper analysis and a substantial burden test should apply instead. Even if the landmark law were deemed a neutral regulation and not an individualized assessment, RLUIPA would apply through its other jurisdictional provisions. *See* 42 U.S.C. § 2000cc(b) (2012) (outlining jurisdictional bases for application of RLUIPA). In another post-*Smith* decision dealing with a challenge to a landmark ordinance's application to property used for religious purposes, the Washington State Supreme Court found that the landmark ordinance at issue was not a "generally applicable" law because it involved an individualized assessment of the property and the owner's use of the property, and because it included provisions allowing for individualized exceptions. First Covenant Church v. City of Seattle, 840 P.2d 174, 180 (Wash. 1992) (distinguishing *St. Bartholomew's* on the grounds that St. Bartholomew's accepted landmark designation without objection, the building at issue in *St. Bartholomew's* was not actual church building, and St. Bartholomew's sought to use the exception for commercial uses and generation of additional revenue, rather than for purely religious purposes). The court deemed the case a "hybrid claim" exception to *Smith*, because it implicated not only free exercise but also free speech rights. *Id.* at 181–82. However, Washington courts have adopted a distinct approach to landmark designation of religious properties, consistently prohibiting such designation based in significant part on a broad provision of the state constitution regarding freedom of conscience. *Id.* at 186–88; *see also* First United Methodist Church v. Hearing Exam'r for the Seattle Landmarks Pres. Bd., 916 P.2d 374 (Wash. 1996).

"whether the land-use regulation impairs the continued operation of the property *in its originally expected use*."[219] This interpretation narrowed the standard in *Snug Harbor* and its progeny, particularly *Lutheran Church*. The court expressly noted that the regulation might, consistent with *Penn Central*, "prevent the Church from expanding or altering its activities."[220] It equated a restriction on the church's expansion of its activities with the restriction in *Penn Central* on the ability to earn increased profits through redevelopment of Grand Central Terminal.[221] The *St. Bartholomew's* court's conclusion was also motivated by the plaintiff's failure to establish that the existing space limitations could not be remedied in another manner, for example, through an acceptable reconfiguration or renovation.[222]

St. Bartholomew's, which appeared to close the door to arguments that a restriction on a nonprofit's expansion of existing activities can constitute a hardship,[223] left the door ajar when it stated that "[s]o long as the Church can continue to use its property in the way that it has been using it—to house its charitable and religious activity—there is no unconstitutional taking."[224] Applying this statement of the standard to a case like *Lutheran Church* and a growing institution's need for additional office space, it could be argued that an expanded space is necessary for the institution to continue "hous[ing] its charitable and religious activity." Looking past *St. Bartholomew's*, the Supreme Court in *Penn Central* held that no taking had occurred, in part because the landmark restrictions imposed on Grand Central Terminal "not only permit reasonable beneficial use of the landmark site *but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties*."[225] Hence, although *Penn Central* was prevented from expanding or altering its use at the "Terminal site proper," the Court's evaluation of whether a taking had occurred also gave weight to *Penn Central*'s ability to develop other properties, using development rights from the terminal site. The *St. Bartholomew's* court ignores this additional consideration when it invokes *Penn Central* to narrow the standard in *Lutheran Church*.

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219 *St. Bartholomew's*, 914 F.2d at 356 (emphasis added).

220 *Id.*

221 *Id.* at 356–57.

222 *Id.* at 358.

223 This argument was recently made in an amicus curiae brief by the Municipal Art Society of New York in the case of St. Vincent's Hospital. *See* Brief Amici Curiae of The Municipal Art Society of New York City et al. Supporting Petitioners at 22–24, Protect the Vill. Historic Dist. v. N.Y.C. Landmarks Pres. Comm'n, No. 102744/2009 (N.Y. Sup. Ct. 2009), *available at* http://www.gvshp.org/_gvshp/preservation/st_vincents/doc/amicus-curiae-11-04-09.pdf.

224 *St. Bartholomew's*, 914 F.2d at 357.

225 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978).

C. *The Expansion of Nonconforming Uses*

A distinct area of land use law, the treatment of nonconforming uses—uses of property "in existence at the time of the enactment of a land use regulation forbidding or restricting the land use in question"[226]—provides a similar model for evaluating substantial burden claims by religious institutions. A number of courts have recognized a right to expand a nonconforming use.[227] For example, Pennsylvania courts recognize a "natural expansion doctrine," permitting expansion to accommodate business growth, so long as the expansion is not detrimental to public health, safety, and welfare.[228] Of course, by their nature nonconforming uses were in place prior to the enactment of the new ordinance limiting growth. In contrast, an expanding religious institution may have been subject to the land use regulation that it now claims imposes a substantial burden, by restricting expansion, at the time it first obtained its property. However, this distinction should be deemed irrelevant. In *Palazzolo v. Rhode Island*, the Supreme Court stated that the transfer of property after a regulation was enacted does not extinguish a takings claim and prevent subsequent owners from claiming injury.[229] A similar analysis might be applied to the RLUIPA substantial burden inquiry: a regulation may place a cognizable burden on religious exercise, even if the property owner knew about the regulation at the time it obtained the property, just as a regulation may place an unreasonable limitation on a property owner's use of land, even if the individual knew about the regulation at the time of purchase.

The principles that inform these two areas of land use law provide a framework for evaluating substantial burden claims under RLUIPA. It is, of course, impossible to anticipate every factual scenario that courts will confront or the range of considerations that will affect a substantial

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226 City of Dublin v. Finkes, 615 N.E.2d 690, 692 (Ohio Ct. App. 1992).

227 ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 201–02 (2d ed. 2000) (noting, however, that most courts strictly limit nonconforming uses). *See generally* Eunice A. Eichelberger, Annotation, *Alteration, Extension, Reconstruction, or Repair of Nonconforming Structure or Structure Devoted to Nonconforming Use as Violation of Zoning Ordinance*, 63 A.L.R. 4TH 275 (1988).

228 Township of Chartiers v. William H. Martin, Inc., 542 A.2d 985, 988 (Pa. 1988) ("[O]nce it has been determined that a nonconforming use is in existence, an overly technical assessment of that use cannot be utilized to stunt its natural development and growth."); *see also* Eichelberger, *supra* note 227, § 5 (discussing cases permitting changes to nonconforming use to accommodate natural expansion or increase in business). Eichelberger cites an Oregon case in which a church was permitted to enlarge its sanctuary, a nonconforming use, without a conditional use permit. The relevant municipal ordinance included an exception, for churches and schools, to a provision prohibiting enlargement of nonconforming uses. *See* Ne. Neighborhood Ass'n v. City of Salem, 651 P.2d 193, 194 (Or. Ct. App. 1982).

229 533 U.S. 606, 626–30 (2001).

burden determination. Nonetheless, the interpretive framework outlined in the next Part will bring greater clarity and consistency to this analysis, benefiting local governments, religious institutions, and courts.

IV. INSTITUTIONAL FREE EXERCISE AND LAND USE HARDSHIPS: TOWARD A NEW FRAMEWORK

A religious institution's communication of its tradition and beliefs is not simply a core purpose; it is also necessary for its continued existence. A key premise of the distinction between religious and secular spheres of authority is that each will, within certain bounds, permit the other to flourish without interference.[230] RLUIPA, with its emphasis on protecting the use of land as a form of religious exercise, relies on the premise that access to land and a certain freedom in the use of that land are crucial for religious institutions to pursue their purposes and form their distinct identities. In this final Part, I explore how an understanding of institutional free exercise and the treatment of religious and nonprofit institutional land uses in other contexts can inform the analysis of religious land use claims. In addition, shifting the analysis towards a careful consideration of institutional religious exercise, this approach will encourage courts to distinguish between the claims of new and existing religious institutions.

A. *Clarifying the Analytical Framework*

Institutional free exercise has important implications for the scope of the "religious exercise" considered in a substantial burden analysis. Whether a regulation imposes a substantial burden on religious exercise will be significantly affected by how religious exercise is defined. Under RLUIPA, "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[231] The substantial burden provision prohibits imposing

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230 *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *see also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."); Ruti Teitel, *A Critique of Religion as Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 760 (1993) (discussing how the "separation model," which relies on a "two spheres principle—of sharp distinctions between the private and the public, the sacred and the secular, and belief and action—has enabled minority religion to flourish in this country").

231 42 U.S.C. § 2000cc-5(7) (2012). For a discussion of specific land uses that have been deemed "religious exercise," see Salkin & Lavine, *supra* note 21, at 225 (citing cases).

"substantial burden[s] on *the religious exercise* of a person, including a religious assembly or institution."[232]

Although this statutory definition makes clear that courts should consider an imposition on any specific religious activity when evaluating a substantial burden claim, the substantiality of that burden should be evaluated in light of a more holistic conception of "religious exercise." Courts should reject attempts to sever the specific religious activity burdened by a regulation and assert a substantial burden on that single activity. Such an approach would be akin to the notion of conceptual severance within takings jurisprudence, the strategy of "delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken."[233] In contrast with this approach, when evaluating a substantial burden claim, the phrase "religious exercise" should be understood to refer to the collective multitude of distinct religious activities that comprise an institution's religious exercise and define its identity. For a burden to be substantial it must adversely affect "religious exercise" in this broader sense, rather than a specific religious activity.[234] This interpretation would treat religious exercise in the same manner as a charitable purpose under New York State's judicial hardship exception.

Understanding religious exercise in this manner still provides important protections to religious institutions, but will better focus the substantiality analysis on a regulation's impact on institutional free exercise—particularly the development and communication of religious beliefs and identity—even as it takes account of burdens imposed upon a broad range of specific religious activities. Regulations that impinge upon worship or the communication of religious doctrine would be more likely to substantially burden institutional religious exercise—for example, restrictions on expansion of a worship space or a religious school. However, consistent with RLUIPA's broad definition of "religious exercise," restrictions on other activities, such as charitable work or fellowship activities, could still be challenged; it would simply

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232 42 U.S.C. § 2000cc (emphasis added).

233 Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

234 I recognize that this approach might appear to read a centrality requirement back into RLUIPA, counter to the statute's definition of "religious exercise." However, I share the intuition of Justice Scalia, who asserted in *Smith* that questions of a religious practice's centrality and the substantiality of a burden are ultimately identical. *See* Emp't Div. v. Smith, 494 U.S. 872, 887 n.4 (1990) ("'Constitutionally significant burden' would seem to be 'centrality' under another name."). Moreover, a court's determination, in the course of a substantial burden inquiry, of whether an institutional activity constitutes an "exercise of religion" is itself akin to a determination of centrality.

be more difficult to establish that these restrictions substantially burden "the religious exercise" of the institution.

A comparable inquiry was conducted in another decision applying New York State's charitable purpose analysis. In *1025 Fifth Avenue, Inc. v. Marymount School*, a Catholic school sought to add a gymnasium, which it had never had in the past.[235] The facilities it previously used at other locations were decreasingly available and other alternatives were not feasible.[236] The school claimed that the lack of such a facility seriously interfered with its ability to carry out its charitable purpose.[237] Rather than focus on whether lack of a gym burdened some narrow activity, such as the provision of physical education, the court looked more broadly at whether the school's "charitable purpose of providing a well-rounded quality education is being undermined by the lack of a gymnasium" and whether the education of its students was hindered and found a "substantial adverse impact on the school."[238] A similar approach should be applied to a religious institution's RLUIPA claims.

Although drawing these lines will not be without difficulty, the analysis will be akin to the determination of who qualifies as a "minister" for purposes of the ministerial exception. The Court in *Hosanna-Tabor* expressed reluctance "to adopt a rigid formula for deciding when an employee qualifies as a minister."[239] Instead it recognized that these determinations require an inquiry into the individual's role in "carrying out [the institution's] mission," which necessitates some determination of that mission's scope.[240] Similarly, a rigid formula for determining what constitutes "religious exercise" and "substantial burden" is inappropriate. However, as subsequent decisions further develop the contours of who qualifies as a minister for purposes of the ministerial exception, they should inform the analogous determinations under RLUIPA, and vice versa.

Another similarity exists between the determination of whether an individual is a minister and whether a particular use of property constitutes religious exercise.[241] As is true in the ministerial exception context, courts must consider a range of factors in making this decision. RLUIPA's protections may be appropriate for facilities that are not

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235 475 N.Y.S.2d 182 (Sup. Ct. 1983).

236 *Id.* at 184.

237 *Id.*

238 *Id.* at 186–87; *see also id.* at 183 ("Marymount, according to its literature, prides itself on educating and challenging the whole child, intellectually, morally and physically.").

239 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012).

240 *Id.* at 708.

241 RLUIPA embraces a broad understanding of religious exercise, but does not specify what constitutes religious exercise. Courts must tread carefully when making such determinations. *See* Salkin & Lavine, *supra* note 21, at 221 ("[A]lthough courts [applying RLUIPA] may not inquire into the centrality or importance of religious practices, they may inquire into whether a purported 'religious exercise' is, in fact, religious in nature.").

purely religious, just as a "minister" may include someone who does not perform purely religious tasks.[242] On the one extreme, the statute's legislative history rejects substantial burden claims related to property used primarily for commercial purposes and profit generation.[243] Accordingly, the construction of an apartment complex does not constitute religious exercise.[244] Nor does the use of a religious institution's facilities for commercial enterprises necessary to provide financial support for continued operations.[245] Worship space and schools and other facilities used to communicate religious beliefs should readily fall within the scope of an institution's religious exercise. The difficult cases might involve some combination of profitable enterprise and religious or charitable activity—perhaps day care facilities or nursing homes that charge for their services. The issue in *St. Bartholomew's*, where a church wished to build a 47-story office tower for both its own activities and commercial purposes, provides another example.[246] Had the church proposed a smaller alternative, which responded to legitimate institutional needs and that provided uses more significantly linked to its religious exercise, a denial may have posed a substantial burden.

In these instances, courts must look carefully at a range of considerations, starting with the legitimate need for the facility, but also including the extent to which the given activity is motivated by the institution's desire to directly express its religious identity, rather than a desire to indirectly support other activities. Courts conduct similar inquiries in other cases involving religious institutions. For example, in determining whether an institution is a religious entity entitled to an exemption under the Civil Rights Act, the Ninth Circuit has weighed "religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious."[247] The Third Circuit has conducted a similar analysis, considering nine factors, which vary in relevance depending on the facts of a given case, drawn from other circuit courts.[248] A number of these factors, including whether an entity operates for a profit, whether its articles of

242 *See Hosanna-Tabor*, 132 S. Ct. at 708–09 (declaring that the ministerial exception is not limited to employees who perform solely religious functions).

243 146 CONG. REC. 16,698, 16,700 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy) ("[A] burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'").

244 *See* Greater Bible Way Temple v. City of Jackson, 733 N.W.2d 734 (Mich. 2007).

245 Scottish Rite Cathedral Ass'n v. City of Los Angeles, 67 Cal. Rptr. 3d 207, 216 (Ct. App. 2007).

246 *See supra* notes 211–222.

247 Spencer v. World Vision, Inc., 633 F.3d 723, 726 (9th Cir. 2011) (O'Scannlain, J., concurring).

248 LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226–27 (3d Cir. 2007).

incorporation expressly state a religious purpose, and whether the entity holds itself out to the public as secular or religious, could be tailored to the determination of whether a specific activity—such as the provision of social services—should be classified as religious exercise.[249] These particular factors could be addressed without an improper judicial determination of the religious nature of the activity, as they look instead at the religious entity's self-identification of its activity and the neutral question of whether an activity is pursued for profit.

B. *Existing Institutions*

An "existing institution" that has operated at a specific location for a significant period of time will find a regulation prohibiting it from adapting or expanding as needed to continue pursuing its religious exercise more burdensome than a "new institution" denied its desired use of a particular parcel of land. This distinction relies on the recognition that an institution's identity, which institutional free exercise serves to protect, is significantly linked to its existing location and community.[250] Property can play a crucial role in institutional and group identity formation, just as it can for individual personhood.[251] Although property will play a role in identity formation for both new and existing institutions, particular parcels of property are more fungible for new or relocating institutions. As such, the denial of a desired use at a particular property is less likely to impose a substantial burden.

This position may be controversial for, among other things, potentially providing greater protection for the land uses of established institutions than those of new institutions. However, it is driven by the same intuition that motivates land use regulations protecting existing

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249 Judge O'Scannlain's concurring opinion of the Ninth Circuit in *Spencer* discussed the Third Circuit's nine factors and declined to apply certain factors that "could be constitutionally troublesome" by entangling the court in religious questions. 633 F.3d at 730 (O'Scannlain, J., concurring). The three judges on the panel each proposed a different test. *See id.* at 741–42 (Kleinfeld, J., concurring); *id.* at 750 (Berzon, J., dissenting).

250 The link between identity and community, which has been acknowledged for individuals, has similar relevance for institutions. *See* Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1923 (2005) ("[A]s several scholars have observed, the longer a person participates in a community, the more her life and her identity will become bound up with that community and, as a consequence, the higher her costs of leaving that community will climb.").

251 *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 977–78 (1982) (discussing Hegelian personality theory and noting potential political implications for group claims to certain resources, including property). Radin's discussion reflects what I term a derivative theory, asserting that these implications for group rights stem from the conclusion that "in a given social context certain groups are likely to be constitutive of their members in the sense that the members find self-determination only within the groups." *Id.* at 978.

uses.[252] Moreover, as discussed in more detail below, the concerns raised by new religious institutions under the substantial burden provision can be adequately addressed by other parts of RLUIPA.

1. Evaluating Demands for the Expansion of an Existing Institution

For existing institutions seeking to adapt or expand their facilities, courts should focus on the institution's current legitimate needs[253] and the capacity of its existing facilities when determining whether a substantial burden exists. This analysis of legitimate needs should follow the approach in *Lutheran Church*,[254] which reviewed specific evidence regarding the nature of the institution's activities, its space requirements, and the extent to which its existing space failed to satisfy these requirements.[255] A few courts reviewing RLUIPA substantial burden claims have similarly conducted careful evaluations of institutional needs for space[256] and relied on expert testimony regarding these needs.[257]

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252 This argument is analogous to an example given by Christopher Serkin to illustrate the premise that "a regulation of an existing use is more likely to be a compensable taking than a regulation of a prospective future use." Serkin, *supra* note 210, at 1254. Serkin contends that if two otherwise identical parcels, the first with an existing building and second without one, are subject to a new regulation that requires the building be eliminated on the first and no building be constructed on the second, the owner of the first would suffer a greater reduction in value and "more significant economic impact." *Id.* (arguing that existing uses should not receive special judicial protection and that diminution in value is "wholly inadequate to support the kind of comprehensive protection [for existing uses] that property law exhibits").

253 The sponsors of RLUIPA emphasized the right of religious institutions to "build, buy, or rent" "a physical space adequate to their needs and consistent with their theological requirements." 146 CONG. REC. 16,698, 16,698 (2000) (joint statement of Sen. Orin Hatch and Sen. Edward Kennedy). As the court declared in *Mintz v. Roman Catholic Bishop*, "the religious needs of an institution can grow so large that the impinging nature of zoning laws may become much more burdensome." 424 F. Supp. 2d 309, 322 (D. Mass. 2006).

254 *See supra* notes 190–197.

255 Lutheran Church in Am. v. City of New York, 316 N.E.2d 305, 308 (N.Y. 1974).

256 The Sixth Circuit's decision in *Living Water Church of God v. Charter Township of Meridian* reflects this analysis. After noting that it would not find a substantial burden "[e]ven if Living Water's current needs are not the proper measuring stick," the court provides an analysis of those existing needs:

> Living Water has a building in which to worship. It may conduct its ministries and programs. It has permission to construct a school on its property, and it can build an additional 14,000 square-foot building without obtaining an SUP. *While Living Water has outgrown its current facility, the record does not contain the kind of facts that would permit a finding that the building which the church can construct without an additional SUP would be so inadequate as to substantially burden Living Water's religious exercise in the future.*

Living Water Church of God v. Charter Township of Meridian, 258 F. App'x 729, 739 (6th Cir. 2007) (emphasis added).

Similarly, in *Mintz v. Roman Catholic Bishop*, a Catholic parish proposed construction of a

Courts should demand proof that a religious institution's facilities fail to provide for its existing needs, rather than for projected long-term future growth. This approach reflects the "natural expansion doctrine" for nonconforming uses.[258] Denying such natural expansion when an existing religious institution is significantly restricted by its current facilities and available land uses should be found to constitute a substantial burden on the institution's religious exercise. This position is motivated by the principle, discussed in Part II, that institutional free exercise demands a sphere in which religious institutions are free to operate.[259] Land use regulations have a unique potential to stymie the development and growth of a religious institution. In certain situations, for an institution's religious exercise to flourish, and for it to continue communicating the beliefs that define its identity and ensure its continued existence, expansion may be necessary. This is however, a fairly high bar. And even if a regulation subjects an institution to such a burden, it should still be upheld, if it furthers a compelling government interest, such as public health, safety, and welfare,[260] through the least restrictive means.

2. Evaluating Available Alternatives

The consideration of available alternatives should play a central role in the determination of whether a land use statute substantially burdens an existing religious institution. This approach focuses the burden analysis on the needs and resources of the religious institution itself. Courts might evaluate whether a religious institution seeking to demolish its existing structure to facilitate expansion can alter its use of the existing facility in a way that will adequately serve its asserted needs.[261] As the court in *Snug Harbor* declared, evaluation of the

parish center, with a social hall, kitchen, and office. 424 F. Supp. 2d at 320. At the time, the rectory, which housed the parish priest, was the only source of office space, with one office in a former bedroom. Meetings were held in the living room, dining room, and kitchen, and the parish council, due to its size, met offsite. *Id.* at 311. The court found sufficient evidence in the record to conclude that denying a permit for expansion would impose a substantial burden. *Id.* at 322.

257 *See* Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 352 (2d Cir. 2007) (considering, in the context of alternatives analysis, expert reports on whether the school could reallocate space to satisfy its needs).

258 *See supra* Part III.C.

259 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 712 (2012) ("[W]e have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.").

260 *See supra* note 228 and accompanying text.

261 A federal district court decision in Michigan reflects this approach. The Canterbury House, an Episcopal religious organization serving students at the University of Michigan, sought to expand its space, which was located in a historic district. Episcopal Student Found. v.

substantiality of a burden or hardship demands careful consideration of a claimant's resources.[262] The Seventh Circuit echoed this approach in one RLUIPA decision, declaring that "substantiality is a relative term—whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question."[263]

A consideration of alternatives may take the analysis in different directions depending on a religious institution's structure. Smaller, independent institutions may have a stronger case for asserting a substantial burden when growth is restricted. In contrast, for institutions that are members of larger, hierarchical institutions, such as a single Catholic parish, courts might consider the substantiality of a burden in relation to the larger institution, in the Catholic Church example, perhaps at the diocesan level. On this analysis, an individual parish's inability to expand in response to changing need may not constitute a substantial burden if other parishes nearby offer alternatives that adequately further the broader institution's religious exercise. Another example might be taken from the facts in a decision involving a Shabbos House that provided accommodations for observant Jewish families seeking to visit patients at a hospital, but avoid travelling on the Sabbath. In *Bikur Cholim, Inc. v. Village of Suffern* the court focused inappropriately on the claimed burdens of the private individuals who used the house.[264] Had its analysis focused instead on the burdens experienced by the religious institution—Bikur Cholim, which also provided accommodations near two other hospitals—it would have examined whether, in light of these other locations, the regulation restricting the particular Shabbos House at issue substantially burdened the institution's ability to exercise its religion through the provision of these accommodations.

This inquiry is not without difficulties. As Michael Dorf has noted, the free speech "concept of an alternative means of expression has no obvious free exercise analogue."[265] For those expressing a certain message, it may not be crucial that a particular medium is used, but for

City of Ann Arbor, 341 F. Supp. 2d 691, 693–94 (E.D. Mich. 2004). The organization argued that it needed to demolish its existing facility and construct a new building to accommodate growing membership, build adequate cooking and dining facilities to serve its religious mission of providing meals to the hungry, and continue providing social activities necessary for its continued growth. *Id.* The court's opinion, which denied the requested demolition, emphasized facts that indicated other solutions lay within the religious organization's control. The student group only used one-half of its building and it had not sought permission from the Historic Commission to expand or renovate its facility, rather than demolish and rebuild it. *Id.* at 704–05 & n.6.

262 Trs. of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (App. Div. 1968).

263 World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 539 (7th Cir. 2009).

264 Bikur Cholim, Inc. v. Village of Suffern, 664 F. Supp. 2d 267, 276 (S.D.N.Y. 2009).

265 Dorf, *supra* note 75, at 1215.

those who seek to engage in a certain religious exercise—such as the use of peyote in a religious ritual—the concept of an acceptable alternative seems inappropriate.[266] However, these concerns are lessened when considering alternatives to institutional land uses, as the inquiry will focus not on alternative religious activities but instead on secular questions of alternative locations or alternative uses of a space.[267] This analysis of alternatives can still provide real protections, as courts addressing RLUIPA claims have found that while a religious institution must pursue alternatives, the burden of a search for alternatives can still be substantial even if it is not "insuperable."[268]

C. *New Institutions (and Existing Institutions Moving to a New Location)*

For religious institutions denied their desired use of a new parcel of property—whether these be entirely new institutions or existing institutions seeking to construct a facility at a new location—RLUIPA's other provisions provide protection for the legitimate concerns they currently raise via the substantial burden provision. It might be argued that shifting these claims to RLUIPA's other provisions would eliminate the statute's value as a prophylactic measure providing protection from hidden discrimination, specifically discrimination encountered by minority religious groups and those new to a specific locale. However, the cases dealing with these concerns, such as those asserting that "delay, uncertainty, and expense" constitute a substantial burden,[269]

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266 *Id.*; *see also* Gedicks, *supra* note 139, at 936–37 ("[A]lternatives do not usually exist for engaging in religious worship or otherwise satisfying religious obligations when the government incidentally burdens religious practices.").

267 *See* Gedicks, *supra* note 139, at 948 ("[A]lthough some analyses of alternatives require interpretation of religious doctrine, many do not. This is particularly the case with land use and zoning regulations.").

268 Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005). In support of this conclusion, the court noted that the plaintiff in *Sherbert* may well have been able to find another job that would not have required Saturday work if she simply kept looking after receiving her third rejection. However, the Supreme Court did not hold that the possibility that a longer search may have turned up a suitable position rendered the burden she experienced insubstantial. *Id.* at 901. Other circuits have cited this proposition approvingly. *See, e.g.*, Int'l Church of the Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1068 (9th Cir. 2011); Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007). This protection is akin to that afforded to "high-value" speech, an area in which courts have found that "the excessive expense of alternative channels of communication is a sufficient reason for invalidating time, place, or manner regulations, even when the regulation is content-neutral and serves non-trivial regulatory interests." Gedicks, *supra* note 139, at 937–38 (citing cases).

269 *See, e.g.*, *Sts. Constantine & Helen*, 396 F.3d at 900–01 (finding a substantial burden when a plaintiff seeking to build new and larger church on a recently acquired parcel of land was forced to either sell the land it had purchased and find an alternative piece of land or endure

insofar as they seek to confront unreasonable procedural delays or conditions that reveal bad faith,[270] should be analyzed under the unreasonable limitation provision[271] or equal terms provision[272] of RLUIPA.[273] These provisions still enable a searching inquiry, but provide a clearer standard for the analysis.

By itself, the denial of a new institution's desired use at a specific parcel does not constitute a substantial burden.[274] However, RLUIPA prohibits the total exclusion of religious assemblies from a jurisdiction, or regulations that "unreasonably limit[]" them within a jurisdiction. The legislative history discussing the unreasonable limitation provision calls for a searching inquiry, stating that "[w]hat is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations."[275] Accordingly, the evaluation of whether a limitation is unreasonable should consider not only the physical availability of property, but also whether alternative locations are financially feasible for the religious institution. This provision has particular salience for new institutions and the claims they currently raise as substantial burdens. Consider *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, in which the court found a substantial burden existed "based on two considerations: (1) that the

"unreasonable delay" to satisfy the Planning Commission with regard to a contingency "for which the Church has already provided complete satisfaction").

270 *Id.* at 901 (referencing a "whiff of bad faith arising from the Planning Commission's rejection of a solution that would have eliminated the City's only legitimate concern"); *see also Westchester Day Sch.*, 504 F.3d at 350 (declaring that a substantial burden might be found "where land use restrictions are imposed on the religious institution arbitrarily, capriciously, or unlawfully" as such application "may reflect bias or discrimination against religion").

271 42 U.S.C. § 2000cc(b)(3)(B) (2012) ("No government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.").

272 *Id.* § 2000cc(b)(1) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.").

273 *Cf.* Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After* Boerne, 68 GEO. WASH. L. REV. 861, 921 (2000) (arguing that the unreasonable limitation and equal terms provisions of RLUIPA "directly respond to the most significant threats to religious land uses—discrimination against non-mainstream faiths and effective exclusion of religious uses from a jurisdiction").

274 *See* Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) ("When there is plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community, the fact that they are not permitted to build everywhere does not create a substantial burden."); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004) ("[W]hile the PUD ordinance may have rendered College unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that College was precluded from using other sites within the city."); Wesleyan Methodist Church v. Village of Canisteo, 792 F. Supp. 2d 667, 673 (W.D.N.Y. 2011) ("[A] finding of 'substantial burden' is less likely when the plaintiff has other alternatives available to it, such as where it can readily build its church somewhere else.").

275 146 CONG. REC. 19,123, 19,123 (2000) (statement of Rep. Charles Canady).

County's broad reasons given for its tandem denials could easily apply to all future applications by Guru Nanak; and (2) that Guru Nanak readily agreed to every mitigation measure suggested by the Planning Division, but the County, without explanation, found such cooperation insufficient."[276] These factors, which significantly reduced the prospects of the religious institution being able to construct a temple, also provide a basis for finding that the county violated the unreasonable limitation provision.

The equal terms provision can be used to confront concerns regarding restrictive ordinances that "foreclose or limit new religious groups from moving into a municipality."[277] This provision provides a mechanism for courts to "ferret out laws that are facially neutral but discriminate in fact" through application of an equal protection analysis.[278] Courts have held that this provision also bars "utterly groundless" denials of permit applications that impose "delay, uncertainty, and expense."[279] As commentators have noted, the equal terms provision calls for an analysis focused on "secular questions of land use regulation."[280]

Both of these provisions provide firmer guidelines for courts in evaluating religious land use claims and avoid turning the substantial burden provision into a vehicle for an open-ended and standardless inquiry. A more difficult case is presented when all land use applications in a given jurisdiction are subject to a lengthy delay and there is no indication that a new religious institution has been subjected to

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276 Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978, 989–90 (9th Cir. 2006) (finding underlying rationales for denials of two conditional use permit applications—avoiding on the one hand noise and traffic concerns in dense districts and, on the other hand, leapfrog development into agricultural areas—combined to significantly reduce prospects of the religious institution constructing a temple and amounted to a substantial burden upon its religious exercise).

277 H.R. REP. NO. 106-219, at 19 (1999) (quoting *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019*, *supra* note 52, at 200 (statement of Bruce D. Shoulson, Attorney, Lowenstein Sandler, P.C.).

278 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1239 (11th Cir. 2004). The court in *Midrash Sephardi* declared that RLUIPA's "equal terms provision codifies the *Smith-Lukumi* line of precedent" and enables "courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability." *Id.* at 1232.

279 In *Petra Presbyterian* the Seventh Circuit acknowledged that its prior decision, in *Sts. Constantine & Helen*, which found a substantial burden when an "utterly groundless" denial of a permit "create[d] an inference of religious discrimination" "could equally have been decided under the 'less than equal terms' provision of RLUIPA." *Petra Presbyterian*, 489 F.3d at 851. A claim was not brought under the equal terms provision in *Sts. Constantine & Helen*. *See* Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900–01 (7th Cir. 2005).

280 Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1924 (2011).

discriminatory treatment.[281] Given its universal application, such a regulation would not raise an equal terms issue. Nonetheless, the universality of a burden does not necessarily render it reasonable. An undue delay in these cases could still be found to "unreasonably limit[]" a religious institution's ability to locate in a jurisdiction.[282]

This approach to RLUIPA reads the statute holistically, as a unified set of protections for religious institutions. On this reading, new institutions would still be able to raise RLUIPA claims. However, rather than invoke the substantial burden provision, they should rely upon the statute's other provisions to challenge the decision-making process through which a land use regulation was implemented or the denial of the use of a particular parcel. These other provisions provide a better mechanism for addressing these claims.

D. *Beyond Religious Institutions*

In rejecting a derivative theory as the basis for understanding institutional free exercise, I have limited the relevance of my inquiry for other "civil society" institutions.[283] The institutional rights of these organizations to freedom of association properly derive from the rights of their individual members. Accordingly, further reflection is needed on the potential protections the freedom of association might provide to these institutions in the land use context. These protections would likely be less than those granted to religious institutions, given the Constitution's "special solicitude to the rights of religious organizations."[284] They should instead be shaped by an analysis that emphasizes some form of derivative theory and that recognizes protections for these institutions to the extent necessary to enable the exercise of individual rights.[285]

CONCLUSION

The unanimous decision in *Hosanna-Tabor* laid the groundwork for renewed exploration of the distinct rights of religious institutions.

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281 An example might be the lengthy delays imposed by a temporary moratoria on development, which were unsuccessfully challenged as a taking in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

282 42 U.S.C. § 2000cc(b)(3) (2012).

283 *See* McConnell, *supra* note 29, at 22 (rejecting the position that "constitutional protection is given to churches because they are institutions of 'civil society'"); *see also supra* note 106 and accompanying text.

284 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 697 (2012).

285 *See supra* Part II.B.2 (discussing the derivative theory).

These rights are an intrinsic part of our Constitutional order and possess relevance for a range of legal questions. RLUIPA, a statute that already provides special protections for religious institutions, offers an ideal context for beginning to consider the broader application of *Hosanna-Tabor*.

Institutions do not experience substantial burdens on their religious exercise in the same manner as individual adherents. The evaluation of substantial burden claims under RLUIPA should apply the principles that shape institutional free exercise rights and focus on the burdens experienced by religious institutions, rather than individuals. Because existing institutions that are rooted in a community and established at a particular location will more readily be burdened by restrictions on their ability to alter their use in response to pressing needs, they should be treated differently than institutions seeking to obtain and use a new piece of property. This Article provides a framework for examining these issues, based on the treatment of institutional hardship claims in other land use contexts. This approach will help shape the course of future scholarship examining challenges by religious institutions, as well as other civil society institutions, to government regulations.