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RLUIPA AND THE LIMITS OF RELIGIOUS INSTITUTIONALISM

Zachary Bray*

Abstract

What special protections, if any, should religious organizations receive from local land use controls? The Religious Land Use and Institutionalized Persons Act (“RLUIPA”)—a deeply flawed statute—has been a magnet for controversy since its passage in 2000. Yet until recently, RLUIPA has played little role in debates about “religious institutionalism,” a set of ideas that suggest religious institutions play a distinctive role in developing the framework for religious liberty and that they deserve comparably distinctive deference and protection. This is starting to change: RLUIPA’s magnetic affinity for controversy has begun to connect conflicts over religious land use with larger debates about religious institutionalism. But as this Article will show, there are many good reasons to reject an institutional interpretation of RLUIPA. An institutional interpretation of the statute is inconsistent with RLUIPA’s stated purpose, and will create two tiers of religious claimants, thereby providing unnecessary advantages to existing religious institutions while denying those advantages to new religious institutions. Moreover, reading and applying RLUIPA through the lens of religious institutionalism threatens to exacerbate existing problems that surround what is already a very difficult statute. In short, an institutional interpretation of RLUIPA would not fix the statute’s many flaws; rather, it would make a bad statute much worse.

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I. INTRODUCTION

There are two constants regarding the legal treatment of religious belief and exercise in America, at least in recent years: first, it is almost perpetually unsettled; and second, pretty much everyone claims to hate the current state of the doctrine.¹ The Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”)² is a particularly loathed target. Many commentators wish it had never been passed,³ and even those who appreciate the statute’s purpose or potential think it is a terrible

¹ See, e.g., Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 154 (2014) (“American religious liberty is in a state of flux and uncertainty. . . . The [Supreme] Court is routinely criticized for the incoherence of its Religion Clause jurisprudence.”); see also JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, at xx–xxi (2d ed. 2005) (noting that the recent judicial record “on religious rights and liberties has become vilified for its lack of consistent and coherent principles”).

² 42 U.S.C. §§ 2000cc to 2000cc-5 (2012).

³ See, e.g., MARCI A. HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 115–150 (2d ed. 2014) (arguing that RLUIPA is unconstitutional, should not have been passed, and should now be repealed or dramatically narrowed).

mess.⁴ RLUIPA's many critics are right to point out its flaws: the statute's substantive provisions have created a rash of circuit splits, while exacerbating incentives for conflict in an area that previously saw relatively little federal litigation.⁵ Nevertheless, in an odd and stubborn way the statute has not only survived but thrived. Indeed, as this Article will show, new arguments promise (or, perhaps more accurately, threaten) to give RLUIPA additional support, a wider scope, and an even greater impact than it presently enjoys.

By design, RLUIPA covers a wide and diverse range of potential disputes about religious exercise, which range from the religious exercise of individuals "residing in or confined to an institution,"⁶ to disputes that involve religious land use,⁷ the latter of which are the focus of this Article. In the land use context, RLUIPA provides religious landowners with special protections from land use regulations;⁸ an array of potential legal claims to make if governments violate these special protections; and a powerful set of tools, in addition to litigation, to employ in negotiations with local governments. RLUIPA's wide range means that the statute has played a role in almost every significant legal controversy and academic debate

⁴ See, e.g., John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693, 1697, 1700, 1708 (2013) (arguing for an institutional approach to RLUIPA, but repeatedly referring to the "muddled jurisprudence" and the "myriad of conflicting and often unhelpful standards" that courts have applied to RLUIPA claims in the land use context).

⁵ See *infra* notes 22, 107–108, 121–146, 164–204 and accompanying text.

⁶ 42 U.S.C. § 2000cc-1(a); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (holding that a prison grooming policy substantially burdened an individual's exercise of religion and violated RLUIPA).

⁷ See 42 U.S.C. § 2000cc(a) (providing that "[n]o government shall impose or implement a land use regulation" that violates the statute's "[s]ubstantial burden," "[e]qual terms," "[n]ondiscrimination," and "[e]xclusions and limits" prongs).

⁸ RLUIPA defines a "land use regulation" in broad and general terms, including any "zoning or landmarki]ng law, or the application of such a law, that limits or restricts a claimant's use or development of land . . . if the claimant has an ownership . . . or other property interest" in the land at issue. 42 U.S.C. § 2000cc-5(5). Land use law, "the area of law that [probably] most affects the quality of life in the United States," is an evolving field that is rapidly "converging" with environmental law. DANIEL P. SELMI, JAMES A. KUSHNER, & EDWARD H. ZIEGLER, *LAND USE REGULATION: CASES AND MATERIALS* 3 (4th ed. 2012). Land use controls require courts and local governments to interact with "the dynamic process of deciding how land is utilized," and the conditions that may be imposed on new development, while also "grappling with the intersection between First Amendment rights, such as freedom of religion, and the ability of local governments to regulate the use of churches." *Id.*

about religious exercise since its passage in 2000⁹—including the present debate about the importance of and proper roles for religious institutions.¹⁰

Much recent work addressing law and religious exercise now revolves around this latter debate—the debate over “religious institutionalism,” a collection of related theories that have resonated with recent developments in recent high-profile litigation such as *Burwell v. Hobby Lobby Stores, Inc.*¹¹ The theories grouped together here and elsewhere under the umbrella of religious institutionalism may take many forms, discussed at greater length below. For now, the following may serve as a working definition: theories of religious institutionalism revolve around the central claim that religious institutions, independent from the individual people that make up religious institutions, are actors with key roles to play in determining the nature and limits of protection for religious exercise.¹²

Other versions of religious institutionalism maintain that the problems associated with the legal treatment of religious exercise stem from a fundamental misconception. Under these “stronger” institutional theories, religious institutions should enjoy deference not because they help to safeguard individual religious liberties, but rather because religious institutions, in their own right, ought to be the primary foci for religious protection. Stated simply, what this Article refers to as “strong” religious institutionalism claims that protection for religious exercise ought to be about protection for “churches”¹³ first and foremost.¹⁴

When put into practice, theories of religious institutionalism can pack a powerful punch. Their impact can be seen in recent high-profile litigation,¹⁵ including the Supreme Court’s recent decision regarding the employment

⁹ See, e.g., Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 3 (2009) (discussing the relationship between RLUIPA and condemnation of religious property after the Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005)).

¹⁰ See *infra* Part IV.

¹¹ 134 S. Ct. 2751 (2014).

¹² See, e.g., Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049, 1051–53 (2013) (arguing that courts should give “robust but not unlimited deference” to the “self-regulatory capacity” of religious institutions, which play a crucial role in building and safeguarding the “infrastructure” of religious freedom).

¹³ Following convention, and for the sake of brevity, this Article will occasionally use the term “church” to refer both to all types of religious entities as well as all types of physical structures used as places of worship, regardless of the beliefs involved.

¹⁴ See, e.g., Steven D. Smith, *Freedom of Religion or Freedom of the Church?*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 249, 249 (Austin Sarat ed., 2012) (“The embarrassments of modern religion clause jurisprudence are no secret. . . . [T]he most serious embarrassments can be traced back to a common misconception: We have supposed that the First Amendment’s religion clauses are about *religion*. They are not. They are about *the church*.”). In referring to this as a “strong” form of religious institutionalism, this Article follows the descriptive and critical analysis adopted by Richard Schragger and Micah Schwartzman in *Against Religious Institutionalism*, 99 VA. L. REV. 917, 929–31 (2013).

¹⁵ See *infra* Part II.B.

relationship between religious institutions and their ministers,¹⁶ as well as its opinion in *Hobby Lobby*.¹⁷ As a result, arguments drawing on religious institutionalism have begun to seep into numerous new areas—including the current debate about RLUIPA and religious land use.¹⁸ These arguments in favor of an institutional approach to RLUIPA have emerged at roughly the same time that other scholars have begun to recognize the true magnitude of the stakes in this context: courts' increasing willingness to accord special solicitude to religious institutions has, among other problems, threatened to subvert many legitimate aims of local government in the land use context.¹⁹

This is all troubling. Yet, as this Article will show, it actually understates the problem. When religious institutionalism is combined with an expansive view of RLUIPA, what emerges is far worse than the sum of the already ungainly parts.

This Article aims to arrest the trend toward expansive interpretations of RLUIPA generally, and institutional approaches to the statute more specifically. Along the way, this Article will demonstrate that the ideas and arguments associated with religious institutionalism are a poor fit for resolving disputes about religious land use—and a particularly poor fit for disputes involving RLUIPA. An institutional approach to religious land use will tend to give large existing religious institutions even more leverage than they already enjoy, while imposing significant disadvantages on local governments, new and smaller religious organizations, and the communities that must balance religious land use against other concerns. Such an approach threatens to treat religious minorities as second-class citizens when compared with members of established religious organizations, who will enjoy further and unnecessary advantages that undermine sensible local land use controls. This approach should, therefore, be rejected.

Part II of this Article provides a brief introduction to the core ideas behind religious institutionalism, focusing on prominent debates in significant recent cases such as *Hobby Lobby* and *Hosanna-Tabor Evangelical Church & School v. EEOC*,²⁰ and the ways in which these recent decisions might lead future courts and litigants to adopt an increasingly institutional interpretation of RLUIPA. For example, Part II will show how religious claimants might use *Hobby Lobby* to expand both the *kinds of organizations* that can make RLUIPA claims as well as the *kinds of activity*

¹⁶ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

¹⁷ 134 S. Ct. 2751 (2014).

¹⁸ See, e.g., Infranca, *supra* note 4, at 1695 (arguing that in religious land use cases, “courts should focus on the burdens experienced by the religious institution that owns the property . . . rather than the burdens claimed by individual adherents,” and developing and applying a theory of institutional free exercise for the land use context).

¹⁹ See, e.g., Kellen Zale, *God's Green Earth? The Environmental Impacts of Religious Land Use*, 64 ME. L. REV. 207, 210 (2011) (arguing that “by allowing religious entities to use their property in ways that no other land users can, [RLUIPA] threatens to undermine local environmental protection efforts nationwide.”).

²⁰ 132 S. Ct. 694 (2012).

that RLUIPA plaintiffs might claim is covered by the statute.²¹ Part II will also show how the rise of religious institutionalism has occurred amid a decades-long period of change in American religious practice and American religious land use, which have created the conditions for institutional arguments about religious land use to flourish.

Next, Part III of this Article sets out a targeted roadmap of RLUIPA's substantive components and legislative history, insofar as each is relevant to institutional arguments regarding religious land use. Part III also explores fundamental and longstanding problems in the way that RLUIPA is practically applied, such as the ambiguity and inconsistency that surround its key substantive provisions, as well as the incredible leverage its attorneys' fee component provides to religious claimants.

Part IV of the Article begins with a critical and detailed examination of one recent expressly institutional approach to RLUIPA. The idea behind section IV.A is to answer a basic question: what does a deliberately institutional approach to RLUIPA look like? The remainder of Part IV builds on the preceding section and Parts, demonstrating how current practice already and increasingly approximates many of the negative aspects of a deliberately institutional approach to RLUIPA. In particular, Part IV shows how an increasingly institutional approach will make an already bad statute worse in two ways. Then, Part IV will show how an institutional approach to RLUIPA will exacerbate many of the problems RLUIPA already causes, focusing on the interaction between RLUIPA's substantive ambiguity and its fee provisions introduced in Part III, and the likely effects of *Hobby Lobby* and *Hosanna-Tabor* in the context of religious land use. In addition, Part IV will show how an institutional approach to RLUIPA will subvert part of the stated justification for passing the statute in the first place.

This Article is not intended as a defense, partial or otherwise, of RLUIPA's constitutionality or practical desirability. Indeed, all of the arguments advanced here are intended to be compatible with the conclusion that RLUIPA is, was, and was always likely to be unconstitutional and a practically bad idea to boot.²² Beyond these constitutional issues, this Article focuses more on where RLUIPA appears to be headed, and the practical problems that this statute has caused and will continue to cause. The Article argues that the practical application of religious institutionalism to disputes about religious land use will likely make the bad parts of a bad statute even worse, and concludes with the hope that courts will reject the coming institutional turn in religious land use described and criticized below.

II. RELIGIOUS INSTITUTIONALISM AND THE TRANSFORMATION OF AMERICAN RELIGIOUS LAND USE

Before examining how an institutional interpretation might make RLUIPA even worse, this Article first addresses a more basic question: what is religious

²¹ These claims will be introduced in Part II and explored at length in Part IV.

²² *E.g.*, HAMILTON, *supra* note 3, at 148.

institutionalism? The ideas behind recent theories of religious institutionalism are old,²³ but in recent years they have reached a high tide, at least to date, in both American legal theory and practice. The present prominence of institutional ideas in debates about religious exercise rests upon previous debates about the importance of First Amendment institutions in protecting free expression.²⁴ Such arguments about the importance of First Amendment expressive institutions emphasize the importance of public and private organizations, policies, and actors that make up “the infrastructure” of free expression: these are the institutions that protect free expression even as they provide stages for it.²⁵

Put another way, these broader First Amendment institutional arguments seek to minimize the alleged historical focus on the scope and content of various acts, such as “speech,” in First Amendment doctrine.²⁶ In place of such traditional approaches, institutional accounts of the broader First Amendment argue for a more context-dependent approach, which treats certain institutions—such as universities, the institutional press, and the like—as foci for especially important expressive functions, and therefore deserving of special autonomy and protection.²⁷ More recent work about the virtues of an institutional approach to the Religion Clauses has drawn on this broader trend in First Amendment scholarship.²⁸

What then is *religious* institutionalism? Its proponents advance a number of related ideas: first, a claim that organized religious groups are important vehicles for the protection of everyone’s religious rights; second, a suggestion that such organizations properly hold religious rights that supervene upon or perhaps transcend the rights of their individual members; and third, a cautionary note about the potentially corrosive influence of government on such institutions.²⁹ Particularly

²³ See, e.g., Horwitz, *supra* note 12, at 1049 (“These ideas return to prominence every scholarly generation or so, and are criticized in similar terms each time.” (citation omitted)).

²⁴ E.g., Schragger & Schwartzman, *supra* note 14, at 922–23.

²⁵ Jack M. Balkin, Address at the Second Access to Knowledge Conference at Yale University, *Two Ideas for Access to Knowledge: The Infrastructure of Free Expression and Margins of Appreciation* (Apr. 27, 2007) (transcript available at <http://balkin.blogspot.com/2007/04/two-ideas-for-access-to-knowledge.html>) [perma.cc/8QTL-5TWW]; see also Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 273–74 (2008) (citing Balkin and connecting institutionalism about the Religion Clauses with broader institutional trends in First Amendment scholarship).

²⁶ See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1258–59 (2005) (criticizing approaches to the First Amendment that “locate the important lines of protection along the dimension of speech (or expression, or communication)”).

²⁷ *Id.* at 1270–75.

²⁸ E.g., Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 530–32 (2007).

²⁹ See, e.g., Horwitz, *supra* note 12, at 1049–51 (outlining the historic pedigree of arguments that “emphasize[] the importance of churches and other non-state institutions” and the malignant tendencies of the state toward those institutions); see also Garnett, *supra* note 25, at 294–95 (2008) (suggesting that “the values and goods [of] the First Amendment’s

strong versions of religious institutionalism argue that it is a widespread but tragic mistake to assume that the protections set forth by the Religion Clauses of the First Amendment are about individuals' religion or religious beliefs in the first place.

According to such strong versions of religious institutionalism, the protections for religious liberty ought to be about religious organizations first and foremost.³⁰ In contrast, milder versions of religious institutionalism argue only that the religious beliefs and practices of individuals are dependent upon religious institutions, which in turn do and should occupy "a distinctive place in our constitutional order," as they provide the necessary framework within which individuals' religious freedom can thrive.³¹ Such versions of religious institutionalism are "weaker" because, although they argue that religious institutions deserve special consideration, they ground these claims on the relationship between religious institutions and the religious rights of individuals, rather than an argument that the former should take priority over the latter.³²

The remainder of this Part of the Article will proceed in two sections. Section II.A will briefly review the theory, varieties, and structure of religious institutionalism. Section II.B will examine how institutional theories have gained prominence in recent debates about religious rights and exercise, including litigation over the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* and the contraceptive mandate at issue in *Hobby Lobby*. These theoretical and legal changes present only half the story: section II.C will show how these theoretical and legal changes have emerged at a time of dramatic change in American religious practice and religious land use.

Religion Clauses . . . are well served by a civil-society landscape that is thick with churches . . . and by legal rules that acknowledge and capture their importance.”).

³⁰ See, e.g., Smith, *supra* note 14, at 249–50 (arguing that it is “a debilitating category mistake” to think that the Constitution recognizes or protects something distinctive called “religion,” and that properly interpreted the Constitution does and ought to protect religious organizations).

³¹ E.g., Richard W. Garnett, “*The Freedom of the Church*”: (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33, 41 (2013) (quoting Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 92 (2002)).

³² See, e.g., Schragger & Schwartzman, *supra* note 14, at 984 (noting that “[t]here are weaker and stronger forms of [religious institutionalism], but all appear to coalesce around the view that religious institutions should be treated specially by the state”). For an example of a form of what this Article calls “weak” religious institutionalism, in contrast to “strong” religious institutionalism, see *infra* note 214.

A. *The Structure and Varieties of Religious Institutionalism*

Defining the term “institution” is the first step in understanding what religious institutionalism is and how it is meant to apply to cases involving religious land use and other religious practices and beliefs. Drawing on very broad trends in other disciplines, we can define an institution, in the most general terms, as sets of rules and norms, and organizations built on those rules and norms, which help to order human relationships and define the choices that people make.³³ Such a definition includes both specific kinds of entities like churches, as well as sets of practices such as marriage.³⁴ When someone talks about institutions that are important to the First Amendment, they may or may not be referring to religious institutions in particular. In other words, there are all sorts of institutions that may be particularly significant to aspects of the First Amendment, such as newspapers or universities that may not be particularly religious in nature.³⁵

As used in academic discussions about *religious* institutionalism, however, the term “institution” tends to refer more to organizations—churches, for example—rather than sets of practices like marriage, or even more abstract sets of rules and norms that some might refer to as institutions.³⁶ Of course, such an approach still leaves room for special treatment to be extended to all sorts of organizations—not just churches, but also religiously oriented schools, charities, and perhaps at least some businesses.³⁷ Surprisingly, the effort to define what counts as a *religious* institution, as well as related questions about the limits of paradigmatically

³³ E.g., Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994); see also Victor Nee, *Sources of the New Institutionalism*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 8 (Mary C. Brinton & Victor Nee eds., 1998) (“Institutions, defined as webs of interrelated rules and norms that govern social relationships, comprise the formal and informal social constraints that shape the choice-set of actors.”).

³⁴ See Nee, *supra* note 33, at 8.

³⁵ See PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 11 (2013).

³⁶ E.g., *id.* at 11; cf. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 842 (2008) (distinguishing between organizations, such as specific universities, and institutions, such as academia, and noting that “[i]nstitutions set the rules” whereas “[o]rganizations follow and—crucially for the First Amendment analysis here—apply them”).

³⁷ Many scholars who might defend some or all of the ideas and claims that this Article lumps together under the broad heading of “religious institutionalism” might also argue that not all types of organizations deserve the same kinds of protection. E.g., James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1617–20 (arguing for a limited theory of institutional or collective conscience, while suggesting a conceptual distinction between organizations such as for-profit corporations on the one hand and “constitutive communities” such as churches on the other).

religiously institutions' particularly religious activities, remains under-theorized in the recent legal academic literature.³⁸

In the broader context of First Amendment institutional theories more generally, some argue that practical applications of First Amendment protections should move away from application of First Amendment values and toward a more straightforward question: Was the conduct at issue attributable to a First Amendment institution?³⁹ If so, then it deserves heightened protection.⁴⁰

Put another way, most First Amendment institutionalists would concede that it is only when a First Amendment institution has acted in a way that is “distinctively” part of its nature, or in a way that is unique to its particular institutional nature, that it deserves special protection.⁴¹ Thus, under an institutional approach to the First Amendment, a university may deserve protection when it acts in ways that are relevant to its academic mission, but not for every decision or action that it might take.⁴² A similar line of reasoning often appears in most examples of religious institutionalism more specifically. This means that religious institutionalists tend to take places of worship as the paradigmatic practical example of meaningfully religious institutions, with other examples derivative upon churches as the core example.⁴³

If religious institutionalism depends on distinctively religious institutions, which act in ways that are recognizably religious by third parties, then religious land use cases may present particularly difficult definitional issues for institutional theories.⁴⁴ In part, this is because the religious nature of a locally controversial

³⁸ Zoë Robinson, *What Is a “Religious Institution”?*, 55 B.C. L. REV. 181, 185 (2014) (“[I]t is surprising that there has yet to be any serious attempt to define a ‘religious institution’ for First Amendment purposes.”); see also Nelson, *supra* note 37, at 1567 (arguing that “[t]he root” of courts’ problems with institutional free exercise claims raised by for-profit corporations “is not conflicting doctrine” but rather “that courts do not have a workable theory to guide their analysis”).

³⁹ See Schauer, *supra* note 26, at 1274–75.

⁴⁰ See *id.*

⁴¹ HORWITZ, *supra* note 35, at 115; see also Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279, 296 (2013) (arguing that “we should draw jurisdictional lines not at churches only, but also at religious functions within other institutions[,]” which “should include the *distinctively religious* features of religious schools, social services, and hospitals”) (emphasis added).

⁴² HORWITZ, *supra* note 35, at 115–16.

⁴³ See, e.g., *id.* at 175 (discussing “arguments about the infrastructural or institutional role of churches and other religious organizations within society”); see also Garnett, *supra* note 25, at 295 (asking “[h]ow, exactly, do churches (and the like) shore up (and not just find shelter within) the freedom of religion?”). Religiously affiliated educational organizations are often given as a second example of the sort of distinctively religious institutions that often deserve protection under different versions of religious institutionalism. See *id.* at 286–89.

⁴⁴ These definitional issues may be particularly acute for religious institutionalism in the land use context, but it is important to note that similar issues present themselves for other types of First Amendment institutionalism as well. For an extended discussion of how

specific land use, or a proposed land use, is not always intuitively obvious to all observers. Of course, not all religious land uses pose difficult definitional issues. For example, a building owned and used by a religious denomination as a place of worship involves a religious organization doing quintessentially religious stuff in a physical space built for religious purposes. And thus “churches,” as defined above,⁴⁵ are taken by many religious institutionalists as the paradigmatic example of their theory.⁴⁶

On the other hand, a gymnasium owned and operated by a religious denomination is a less intuitively obvious example: it may be difficult, at least for people outside the religious denomination, to connect such a land use with anything that is particularly religious in nature, or deserving of special protection. Any serious institutional approach must develop some criteria or method for such tricky or borderline cases; after all, whether an institution’s action is distinctively religious or recognizably religious by third parties is a key component of such theories.⁴⁷ Furthermore, in the religious land use context, the difficulty of such unavoidable and fundamental questions—What counts as a religious institution? Is this particular religious institution acting in distinctively religious ways?—can be compounded in any given case because the land uses at issue are often mixed. For example, a religious organization may seek to develop land for a church, and a school that includes religious instruction as part of its curriculum, and a gymnasium, and perhaps other uses as well.⁴⁸

If it is hard to define exactly what a religious institution is, and if the boundaries of defining religious institutions remain under-theorized, then what is religious institutionalism supposed to be about? This Article refers to “strong” and “weak” versions of religious institutionalism, but critics and advocates alike tend to recognize that most versions of an institutional approach to the Religion Clauses and statutes such as RLUIPA and RFRA tend to involve two main claims.⁴⁹ First, most

such issues play out in the context of the university example discussed immediately above, see HORWITZ, *supra* note 35, at 116–21 (arguing that a sort of “institutional due process” ought to apply to such definitional questions). I do not intend to suggest here that the mere existence of difficult definitional questions for institutional approaches to the Religion Clauses and statutes such as RLUIPA necessarily present reasons to reject such approaches.

⁴⁵ See *supra* note 13 and accompanying text.

⁴⁶ See *supra* note 43 and accompanying text.

⁴⁷ See *supra* notes 29–32 and accompanying text.

⁴⁸ *E.g.*, *Rocky Mountain Christian Church v. Bd. of Cty. Comm’rs (Rocky Mountain II)*, 613 F.3d 1229, 1234 (10th Cir. 2010) (involving an “application for a 28,000 square foot gymnasium, a 6,500 square foot chapel, expanding the school building by 57,500 square feet, . . . and an expansion of the main worship building’s seating capacity by 150 seats” (citation omitted)). For a thoughtful and extended analysis of *Rocky Mountain II*, see Zale, *supra* note 19, at 222–25, 231–37.

⁴⁹ See, *e.g.*, Schragger & Schwartzman, *supra* note 14, at 922 (“What we are calling religious institutionalism is really a set of arguments that coalesce around the conclusion that churches are constitutionally unique and that they should have significant autonomy to regulate their own affairs.”).

versions of religious institutionalism involve claims about the fundamental importance of religious organizations and the rights that they do and ought to hold, as more than mere aggregations of their members' religious rights.⁵⁰ Similarly, most examples of religious institutionalism involve related arguments about the importance of the right of religious organizations to govern their own affairs relatively free from government interference.⁵¹

In addition to the similarities in their central claims, different types of religious institutionalism may also be subject to the same types of problems, with these problems growing increasingly significant as the institutional claims get "stronger," as defined above. More specifically, critics have suggested that granting freestanding rights to religious institutions that are not derived from their individual members is antidemocratic and antithetical to the American tradition.⁵² In addition, critics have argued that institutional theories lack meaningful boundaries, which means that the claims that religious institutions might make are "potentially unlimited," even as it is difficult to distinguish exactly where the boundaries between distinctively religious institutions and less protected but similar civic institutions might lie.⁵³

These general problems afflict an institutional approach to RLUIPA, and will be discussed in greater detail in Parts III and IV. But, before turning to RLUIPA itself, it is necessary to first examine two situations in which religious institutionalism has been most prominent in recent years: namely, debates over the ministerial exception and the contraceptive mandate.

B. *Religious Institutionalism in the Courts*

Perhaps the most useful way to describe religious institutionalism is to examine the practical ways in which these ideas have emerged in recent years in recent high-profile litigation.⁵⁴ In particular, institutional ideas have fallen on relatively fertile ground in recent litigation regarding the ministerial exception for the employment relationship between a religious institution and its ministers,⁵⁵ as well as the applicability of the Department of Health and Human Services' contraceptive mandate.⁵⁶ Both of these examples will be briefly examined in turn.

The ministerial exception is the idea, long percolating in lower federal courts, that at least some religious organizations ought to be protected against otherwise

⁵⁰ *E.g.*, Horwitz, *supra* note 12, at 1052–55.

⁵¹ *E.g.*, Garnett, *supra* note 31, at 40–41.

⁵² Schragger & Schwartzman, *supra* note 14, at 932–56.

⁵³ *Id.*

⁵⁴ *See id.* at 918 ("An institution-centered concept of religious free exercise has . . . emerged" in both *Hosanna-Tabor* and the "ongoing controversy over the Obama administration's efforts to require large employers . . . to provide their employees with insurance that would cover contraception.").

⁵⁵ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706–07 (2012).

⁵⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014).

valid employment discrimination litigation, so long as the potential plaintiff and (ex-)employee fulfilled some “ministerial” role within the organization.⁵⁷ The doctrine is meant to apply to a religious organization’s selection of clergy—in other words, to its representatives “who will perform particular spiritual functions.”⁵⁸ It applies even when the underlying civil rights statutes creating the relevant employee causes of action do not provide an exception for religious organizations.⁵⁹ Prior to the Supreme Court’s decision in *Hosanna-Tabor*, discussed below, when federal courts adopted the exception they tended to justify it on the grounds that religious organizations ought to be free from entanglement with and interference from the government in issues of administration that involve central questions of religious belief.⁶⁰

Critics of the ministerial exception have offered a number of arguments against its continued existence. Some have argued that the definition of “minister” has been so expansively interpreted that any reasonable justification for the doctrine based on something distinctive about religious belief or practice has been effectively eroded.⁶¹ Others have claimed that the doctrine is likely to promote rather than to reduce entanglement between religious organizations and the state,⁶² that courts are not particularly competent to craft wide-ranging exemptions to otherwise valid neutral and generally applicable statutes,⁶³ and that the ministerial exception has been disproportionately applied to deny otherwise available relief to particularly vulnerable minorities.⁶⁴

On the other hand, prior to the Supreme Court’s decision in *Hosanna-Tabor*, many defenders of the ministerial exception pointed out that it was hard to understand how the exception could be justified without a shift toward an institutional interpretation of the Religion Clauses.⁶⁵ Accordingly, *Hosanna-Tabor*

⁵⁷ See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–05 (3d Cir. 2006) (recognizing a ministerial exception to a Title VII claim).

⁵⁸ *Id.* at 303–04.

⁵⁹ Lupu & Tuttle, *supra* note 31, at 41–43.

⁶⁰ See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 10 (2011) (“The ministerial exception arises from the conflict between employment laws and constitutional principles of church autonomy.”).

⁶¹ See, e.g., Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 ME. L. REV. 23, 53–56 (2010).

⁶² Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2006–28 (2007).

⁶³ See *id.* at 1194–96.

⁶⁴ Leslie C. Griffin & Ronald Turner, *Abolish the Ministerial Exception*, ACSBLOG (Apr. 12, 2011), <http://www.acslaw.org/acsblog/abolish-the-ministerial-exception> [<http://perma.cc/K72U-D5YX>].

⁶⁵ Steven D. Smith, *The Establishment Clause and the “Problem of the Church,”* in CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY 20–21 (Gerard V. Bradley ed., 2012); see also Garnett, *supra* note 28, at 521 (asking why, under non-institutional theories of the Religion Clauses, “[i]f it would be illegal for Wal-Mart to fire a store-manager because of her gender . . . should a religiously affiliated university be permitted to fire a chaplain because of hers?”).

provided a double opportunity for religious institutionalists and advocates for the ministerial exception.⁶⁶ Most immediately, of course, in *Hosanna-Tabor* the Supreme Court recognized the ministerial exception for the first time. But more important for the purposes of this Article is the reasoning the Court employed to reach this result, which is shot through with an institutional conception of the Religion Clauses.

This is easiest to see in the opinion's conclusion that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations."⁶⁷ But this passage is far from an isolated example: the opinion also repeatedly recognizes the relevant church's own "freedom under the Religion Clauses,"⁶⁸ as well as the more general "interest of religious groups" in their own right, rather than as aggregations of their rights-holding members, to "choos[e] who will preach their beliefs, teach their faith, and carry out their mission."⁶⁹ As a result, *Hosanna-Tabor* has been identified as a landmark by religious institutionalists because it expressly advances the notion, key to institutional theories, that religious organizations are and ought to be protected as the proper holders of claims and rights that are independent from their individual members, and because it also plays a key role in the expressly institutional interpretation of RLUIPA critically examined in Part IV of this Article.⁷⁰

The second arena in which ideas drawn from religious institutionalism have gained prominence in recent years involves the struggle over whether for-profit corporations deserve special protection or exemption from otherwise applicable laws based on their alleged religious beliefs. Arguments about whether businesses (among other organizations) should have religious free exercise rights may once have seemed fanciful.⁷¹ However, in the last half-decade this issue has received even

⁶⁶ See Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175–77 (2011) (arguing that the ministerial exception is "at the core of our tradition of institutional religious freedom").

⁶⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

⁶⁸ *Id.* at 709; see also *id.* at 710 (concluding that the relevant "church" itself, rather than its members, "must be free to choose those who will guide it on its way").

⁶⁹ *Id.* at 710.

⁷⁰ See Robinson, *supra* note 38, at 182 ("With this statement, the Court in *Hosanna-Tabor* fundamentally changed the framework of the First Amendment Religion Clauses. Prior to *Hosanna-Tabor*, all litigants could pursue one or both of two claims [under the Free Exercise Clause or Establishment Clause]."). According to Robinson, *Hosanna-Tabor* has created "an additional doctrinal path for litigants to follow[.]" which, "[u]nlike the generally applicable Religion Clauses . . . is exclusive and applicable only to 'religious institutions.'" *Id.*; see also Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405, 419 (2013) ("*Hosanna-Tabor* is the clearest endorsement of a doctrine of religious group rights in recent memory. It repeatedly characterizes the congregation as an independent constitutional rights-holder without any suggestion that those rights derive from its members.").

⁷¹ Nelson, *supra* note 37, at 1566; see also Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 279 (2015) (noting that prior to *Hobby Lobby*, "[f]or-

more attention than the ministerial exception, thanks to the widespread and high-profile litigation over the “contraception mandate” associated with the Affordable Care Act (“ACA”),⁷² in which dozens of organizations have argued that their religious rights are violated by a requirement that they offer employee health plans that cover contraceptives.⁷³

The most prominent example of these challenges, which also best demonstrates the influence of the institutional theories in this debate, is the Supreme Court’s decision in *Burwell v. Hobby Lobby*. The regulations issued by the Department of Health and Human Services to define the essential coverage large employers were required to provide under the ACA included contraceptives approved by the Food and Drug Administration.⁷⁴ Regulatory exemptions were made to this “contraceptive mandate,” but they did not cover for-profit businesses such as the plaintiffs in *Hobby Lobby*, which argued that the mandate violated the religious principles of both the business owners and the corporate plaintiffs themselves.⁷⁵ More specifically, the *Hobby Lobby* plaintiffs argued that the contraceptive mandate violated rights

profit corporations had never before sought conscientious objector status and the Supreme Court had never before evaluated corporate religious liberty”).

⁷² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.). The ACA requires employers with at least fifty employees to provide their employees “essential coverage” in health insurance plans, and penalizes employers who fail to comply. 26 U.S.C. §§ 4980H(a), (c)(2), 4980D(a)–(b) (2012). Subsequent regulations issued by the Department of Health and Human Services (“HHS”) defined essential coverage to include “contraceptive methods, sterilization procedures, and patient education and counseling” approved by the Food and Drug Administration. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012) (codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

⁷³ *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014). The Supreme Court consolidated a pair of cases in *Hobby Lobby* that involved similar claims. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.), *cert. granted*, 134 S. Ct. 678 (2013) (mem.), *aff’d sub nom. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377 (3d Cir.), *cert. granted*, 134 S. Ct. 678 (2013) (mem.), *rev’d sub nom. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). For a summary of cases challenging the implementation of the ACA, see *HHS Mandate Information Central*, THE BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> [<http://perma.cc/V92A-87GH>] (last updated Nov. 2, 2015).

⁷⁴ See *supra* note 72 and accompanying text.

⁷⁵ The plaintiffs, closely held and family-owned corporations running chains of arts-and-crafts stores (*Hobby Lobby*), Christian bookstores (*Mardel*), and cabinet doors and components stores (*Conestoga Wood Specialties*) argued that the mandate violated both the religious beliefs of the individual plaintiff owners and the corporate plaintiffs. Brief for Respondents at 7–16, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354); Brief for Petitioners at 3–5, 12–15, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-356).

protected by RFRA that should properly be held by the corporate plaintiffs themselves, and not only by their various individual plaintiff owners.⁷⁶

Hobby Lobby thus presented a superficially straightforward question: are for-profit corporations—at least closely held corporations like the plaintiffs in *Hobby Lobby*—appropriate vessels to hold and exercise protected religious liberties in their own right?⁷⁷ Commentators swiftly drew a connection between the central question posed by *Hobby Lobby*, the central issues raised in *Hosanna-Tabor*, and the increasing prominence of religious institutionalist arguments more generally.⁷⁸ The connections are easy to see because *Hobby Lobby* directly implicates the controversial issues at the heart of recent debates about religious institutionalism: what counts as a *religious* institution, and do such institutions deserve special protections and exemptions in their own right?

Ruling in favor of the corporate plaintiffs, the Supreme Court in *Hobby Lobby* concluded that closely held for-profit corporations are entitled to claim some of the rights protected by RFRA.⁷⁹ Lauded by some, furiously criticized by others, *Hobby Lobby* sparked intense, widespread, and ongoing debate.⁸⁰ Our interest here, however, is not with the general controversy over *Hobby Lobby*, but its impact on religious land use disputes generally and an institutional approach toward RLUIPA more specifically.

Hobby Lobby's recognition of institutional rights is hugely expansive, in at least two ways that are especially important in the land use context. First, all manner of for-profit entities that are not publicly traded might count as “closely held,” and therefore might be proper objects for special protection under RLUIPA as well as RFRA. For example, if a closely held chain of religious bookstores like Mardel is an appropriate plaintiff in its own right under RFRA in a suit against HHS regarding its employee insurance plans, then in the land use context similar sorts of businesses might well be proper plaintiffs in their own right under RLUIPA in suits against

⁷⁶ Brief for Respondents, *supra* note 75, at 16–17; Brief for the Petitioners, *supra* note 75, at 18–19.

⁷⁷ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2767; *see also* Horwitz, *supra* note 1, at 163 (“As it happened, the question the Court decided in *Hobby Lobby* was . . . prosaic: Are some corporations ‘persons’ entitled to raise statutory claims under RFRA? The answer was yes.”).

⁷⁸ *See, e.g.*, Berg, *supra* note 41, at 297 (drawing parallels between challenges to the contraceptive mandate and the criteria for the “freedom of the church” approach advanced by John Courtney Murray and others); Schragger & Schwartzman, *supra* note 14, at 974, 983–84 (noting that the controversy over health care mandates has proved to be one of “the standard doctrinal areas in which religious institutionalism seems most significantly implicated”); Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2179–80 (2012) (connecting *Hobby Lobby* and *Hosanna-Tabor* as manifestations of an alleged attack on religious organizations generally and the Catholic church specifically).

⁷⁹ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759.

⁸⁰ *See* Horwitz, *supra* note 1, at 154–55.

local governments.⁸¹ This issue was the subject of an amicus brief filed by various local government and related advocacy groups in *Hobby Lobby*,⁸² and it was specifically addressed by Justice Ginsburg in her dissent.⁸³ The concern is straightforward: if religious bookstores and hobby shops and cabinet makers are entitled to protection under RLUIPA as they are entitled to protection under RFRA after *Hobby Lobby*, then local governments might as well get out of the business of regulating land use altogether, because the number of entities that could claim to be protected under RLUIPA would dramatically increase.⁸⁴

Second, and perhaps more importantly, *Hobby Lobby* might substantially expand what kinds of *activity*, and not just what kinds of *institutions*, qualify for protection under statutes like RFRA and RLUIPA.⁸⁵ As discussed in detail elsewhere in this Article, in recent years religious organizations have raised claims under RLUIPA related to all sorts of land uses, ranging from houses of worship to hotels, movie theaters, outdoor musical concerts, and sporting contests.⁸⁶ *Hobby Lobby* threatens to exacerbate this trend: if a for-profit business like Conestoga or Hobby Lobby is entitled to protection in its own right under RFRA even when engaging in commercial activities, then in the land use context a religious organization might successfully argue that it should be entitled to exemption from local land use controls under RLUIPA when engaged in similarly kinds of activity, even if third parties might not regard such activity as distinctively religious.

This problem is related to but not necessarily dependent upon the concern that Justice Ginsburg raised in her *Hobby Lobby* dissent. In other words, even if courts heed Justice Ginsburg's note of caution and find a limiting principle, which could restrict *Hobby Lobby* to a more limited set of potential claimants under RLUIPA, it is likely that the kinds of plaintiffs who already file RLUIPA claims will be able to

⁸¹ See Stephen R. Miller, *Hobby Lobby's "Passing Strange" Interpretation of RLUIPA: An Unlikely, but Potentially Dramatic, Impact on Land Use Law?*, LAND USE PROF BLOG (July 1, 2014), http://lawprofessors.typepad.com/land_use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chillin.html [<http://perma.cc/7NSA-NLQZ>].

⁸² Brief of the Nat'l League of Cities et al. as Amici Curiae in Support of the Government at 1, *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356).

⁸³ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2794 n.12 (Ginsburg, J., dissenting).

⁸⁴ *Id.* (arguing that an analogous reading of RLUIPA, which would "permit commercial enterprises to challenge zoning and other land-use regulations . . . would 'dramatically expand the statute's reach' and deeply intrude on local prerogatives, contrary to Congress's intent" (quoting Brief of the Nat'l League of Cities et al., *supra* note 82, at 26)).

⁸⁵ Cf. Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY (George Washington Univ. Law School Legal Studies, Research Paper No. 2014-56, forthcoming 2015) (manuscript at 6), <http://ssrn.com/abstract=2535991> [<http://perma.cc/9KDS-WPVA>] ("Going forward, the questions after *Hobby Lobby* will be far less about which entities have rights of religious exercise, and far more about precisely what rights of religious exercise corporate identities may legitimately assert.").

⁸⁶ See *infra* notes 97–103 and accompanying text.

expand the types of land use activity protected by RLUIPA beyond even today's extremely generous limits. Here is how this change will occur: RLUIPA plaintiffs will argue, based on the reasoning of *Hobby Lobby*, that religious exercise, already broadly defined under RLUIPA and RFRA, involves more than celebrations of religious belief, and even more than actions primarily motivated by the dictates of conscience or faith, but rather any "acts that are engaged in for religious reasons," period.⁸⁷ They will also argue that the standard for what counts as a substantial burden on religious exercise should be dramatically expanded, relying both on *Hobby Lobby* and *Holt v. Hobbs*,⁸⁸ a still more recent opinion resolving a RLUIPA prisoner suit, in which the Court articulated a relatively expansive interpretation of both the religious exercise and the substantial burden terms for prisoner suits based on its reasoning in *Hobby Lobby*.⁸⁹

We do not need to wait for examples. Although *Hobby Lobby* is barely a year old, RLUIPA claimants, represented by the most sophisticated counsel, are already advancing these kinds of arguments,⁹⁰ and at least one federal appellate court has already concluded that *Hobby Lobby* and *Holt* should require the relevant circuit to revise and expand its approach to substantial burden challenges in RLUIPA land use disputes.⁹¹ These and other practical effects of *Hobby Lobby*, *Hosanna-Tabor*, and an institutional approach to religious land use more generally will be discussed in greater length at in Part IV below.

⁸⁷ *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2770 (citation omitted) (internal quotation marks omitted).

⁸⁸ 135 S. Ct. 853 (2015).

⁸⁹ *Id.* at 862 (citing *Hobby Lobby* and concluding that because RLUIPA protects religious exercise based on "sincer[e]" religious beliefs, a prisoner plaintiff "easily satisfied [his] obligation" to show that a prison grooming policy requiring him to shave his beard "substantially burden[ed] his religious exercise").

⁹⁰ *See, e.g.*, Brief for Petitioner-Appellant at 28, *Harbor Missionary Church Corp. v. City of San Buenaventura*, No. 14-56137 (9th Cir. Aug. 11, 2014); Plaintiffs' Memorandum of Law in Support of their F.R. Civ. P. 60(b)(6) and/or 54(b) Motion for Relief from Grant to Defendants of Summary Judgment on Count III of Plaintiffs' Amended Complaint, *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673 (7th Cir. 2013), *abrogated by* *Schlemm v. Wall*, 784 F.3d 362 (7th Cir. 2015) (No. 10-CV-118).

⁹¹ *See Schlemm*, 784 F.3d at 364 (noting that the Seventh Circuit's previous approach to RLUIPA land use disputes, which "effectively limit[ed] [RLUIPA] to those beliefs or practices that are 'central' to religious beliefs[,] . . . did not survive *Hobby Lobby* and *Holt*").

C. Background Changes in American Religious Exercise

A brief examination of broad changes in American religious life helps to show that an increasingly institutional interpretation of RLUIPA is problematic in part because it is both fueled by and increasingly out of step with many Americans' religious practice. In recent years, the number of Americans who are "religiously unaffiliated"—who answer religious survey questions by stating that they either have no religion, no particular religion, or no preference for or affiliation with a religious organization, whatever their individual beliefs might be—has been growing.⁹² Many of these individuals may possess beliefs and engage in practices that most outside observers would recognize as "religious."⁹³ But for purposes of this Article, what is most relevant is that the religiously unaffiliated tend to disclaim any affiliation with the kinds of institutions that religious institutionalism suggests should get distinctive protection.

While the recent growth in people who describe themselves as religiously unaffiliated is due, in some part, to changes in underlying belief, it is also due in large part to the fact that individual American religious identity is more closely mirroring individual levels of involvement or participation in religious organizations. In other words, Americans today who do not participate in the activities of institutions with which they were previously affiliated "are more willing than in the past to drop their religious attachments altogether."⁹⁴ Interestingly, while the ranks of the religiously unaffiliated have been growing in recent years, certain kinds of religious institutions have been growing in size, number, and in their related land uses. Prior to the late twentieth century, religious exercise at most religious institutions occurred during weekly services, and for some, during weekday education at religious schools.⁹⁵

However, in recent decades the size of religious institutions and the scope of activities they offer have both greatly increased.⁹⁶ As a result, today many religious institutions provide increasing amounts of entertainment, social, and commercial services in addition to religious services and education.⁹⁷ So, for example, in recent years and across many different local communities, churches have owned and operated credit unions, hotels, music studios, residential developments, senior care

⁹² PEW RESEARCH CTR., "NONES" ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 13–15 (Oct. 9, 2012), <http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf> [<http://perma.cc/DRA4-23KW>].

⁹³ *Id.* at 7 (pointing out that most of the "religiously unaffiliated," often imprecisely referred to as "nones" in the popular press and some academic work, indicate that they personally "believe in God, and most describe themselves as religious, spiritual or both").

⁹⁴ *Id.* at 11.

⁹⁵ See Zale, *supra* note 19, at 211.

⁹⁶ See *id.* at 211–12 (noting that churches began offering "activities ranging from soup kitchens to singles' meetings to summer camps" in the 1980s, and that, "[i]n 1970, there were ten megachurches," while there are more than 1,200 today).

⁹⁷ HAMILTON, *supra* note 3, at 123–24.

centers, shopping centers, sports arenas, theaters, and all sorts of commercial enterprises running from aviation subsidiaries through limousine services to restaurants.⁹⁸

In particular, the rise in the number of “megachurches,” which can be defined as religious organizations with congregations that draw 2,000 or more in total weekly attendance,⁹⁹ has been particularly dramatic. These colossi are at least ten times the size of an average church and over twenty times larger than a church of median size,¹⁰⁰ and the scope of their land use activity may be many times larger still—in fact, many of them may have multiple physical sites.¹⁰¹ Megachurches are increasing in number, in size, in the number of services that they offer, and thus in their land use footprint. To get a rough idea of their significance, if they were taken as a whole, they would be the nation’s third-largest denomination.¹⁰²

The picture of contemporary American religious life, therefore, is one in which increasing numbers of individuals divorce themselves from institutional affiliation while certain extremely large and expanding religious institutions adopt an ever-widening and intensifying range of activities, including extensive and novel kinds of land use. And this, in turn, has led to an increase in the number of disputes regarding religious land use, as religious institutions’ use of real property increasingly conflicts with local land use regulations and inflicts externalities on their neighbors.¹⁰³ In the face of these changes, one might wish for courts to adopt a middle ground.

In other words, courts might resolve conflicts over religious land use by attempting to accommodate new forms of religious land use where possible, and where they reflect sincere individual beliefs, while also recognizing that the individual neighbors of such institutions, for whom relevant land use regulations were at least ostensibly designed, are increasingly likely to be religiously unaffiliated themselves. Such an approach would fit well with textbook conceptions of land use regulation as a three-way interaction between local governments,

⁹⁸ 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, 223–25 (2008) (gathering examples); see also HAMILTON, *supra* note 3, at 124 (same).

⁹⁹ See WARREN BIRD & SCOTT THUMMA, HARTFORD INST. FOR RELIGION RESEARCH, A NEW DECADE OF MEGACHURCHES: 2011 PROFILE OF LARGE ATTENDANCE CHURCHES IN THE UNITED STATES 4 (2011), <http://hrr.hartsem.edu/megachurch/New-Decade-of-Megachurches-2011Profile.pdf> [<http://perma.cc/KF35-5DVD>].

¹⁰⁰ See NATIONAL CONGREGATIONS STUDY, 2015 RELIGIOUS CONGREGATIONS IN 21ST CENTURY AMERICA 39 (2015) (noting that in 2012 the mean number of regular participants at surveyed institutions was 183 and the median was 70).

¹⁰¹ BIRD & THUMMA, *supra* note 99, at 5.

¹⁰² *Id.*

¹⁰³ Alan C. Weinstein, *The Effect of RLUIPA’s Land Use Provisions on Local Governments*, 39 FORDHAM URB. L.J. 1221, 1224–25 (2012).

affected landowners and land developers, *and* their neighbors.¹⁰⁴ But the array of novel and powerful tools RLUIPA provides religious landowners to litigate against and negotiate with local governments has, in practice, dramatically diminished the role of neighboring landowners in disputes about religious land use, while dramatically shifting the balance of power between religious landowners and local governments.¹⁰⁵ This shift in power has coincided with a period of growth in the number, size, and land use activities of megachurches, which has put unprecedented pressure on both neighboring landowners and local governments in the land use context.¹⁰⁶ RLUIPA has always made finding a middle ground for religious land use disputes hard to reach, but background changes in contemporary religious practice and individual identification are also shrinking the middle ground on which Americans might meet.

III. RLUIPA AND ITS DISCONTENTS

RLUIPA's critics are legion, as noted elsewhere in this Article,¹⁰⁷ and even those who defend aspects of the statute and its present or potential future

¹⁰⁴ ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 73–74 (3d. ed. 2005); *see also* HAMILTON, *supra* note 3, at 116 (pointing out that “land use law is usually a matter of negotiating, and that reasonable parties typically sit on either side of the table”).

¹⁰⁵ HAMILTON, *supra* note 3, at 117–18 (arguing that legal constraints prior to RLUIPA's passage required religious landowners “to take into account the views of the surrounding homeowners and families on the impact of their propos[ed] land use,]” but that after RLUIPA, “[t]he balance of power in residential neighborhoods [has] shift[ed] to the religious landowners . . . [and] homeowners have become second-class citizens to their religious neighbors”).

¹⁰⁶ *See infra* notes 242–245 and accompanying text; *see also* Jennifer S. Evans-Cowley & Kenneth Pearlman, *Six Flags over Jesus: RLUIPA, Megachurches, and Zoning*, 21 *TUL. ENVTL. L.J.* 203, 208 (2008) (noting that conflict over land use disputes arising out of megachurch activities are increasing).

¹⁰⁷ *See supra* notes 3, 19 and accompanying text; *infra* Part IV.B; *see also* Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 *SEATTLE U. L. REV.* 805, 806 (2006) (arguing that RLUIPA's “overly broad” statutory language has made churches effectively “immune from local zoning laws”); Adam J. MacLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA*, 40 *REAL EST. L.J.* 115, 116 (2011) (defending one potential interpretation of RLUIPA, but noting that for many critics the statute has become a “bogeyman” and a “poltergeist” that “takes various, terrifying forms in law journal articles, . . . among land use planners, and in popular media”); Lawrence G. Sager, *Panel One Commentary*, 57 *N.Y.U. ANN. SURV. AM. L.* 9, 14, 16 (2000) (concluding that “RLUIPA is a bad law, . . . which is likely to produce bad results however it fares in the courts” because it “is a remarkable privileging of the land use interests of churches over all but the most weighty of land use concerns”); Salkin & Lavine, *supra* note 98, at 219 (arguing that RLUIPA is “failing miserably” in providing “uniformity and clarity in the protection of the

interpretation are usually quick to point out RLUIPA's many flaws.¹⁰⁸ There is relatively more disagreement about *how bad* RLUIPA really is in practice: some commentators have pointed out that the amount of actual litigation under RLUIPA is roughly equivalent to other similar kinds of land use that raise First Amendment issues, and while religious plaintiffs generally do relatively well in RLUIPA suits, they do not win every time or even most of the time.¹⁰⁹ Still, other commentators have suggested that RLUIPA's many critics have overstated the problems with both the statute itself and its practical application,¹¹⁰ or even that the statute should be reinforced against its many critics.¹¹¹

The long-running debates about RLUIPA can be boiled down to two areas of conflict. The most fundamental criticism of RLUIPA is the claim that it is unconstitutional.¹¹² While the Supreme Court has ruled that RLUIPA's institutionalized persons provisions are constitutional,¹¹³ it has not directly addressed the constitutionality of RLUIPA's land use provisions. Despite their merits, this Article will not spend much time reviewing arguments that RLUIPA may be unconstitutional for the following reasons. First, arguments that RLUIPA's land use provisions are unconstitutional have been well made for many years, leaving little to be improved upon.¹¹⁴ Moreover, while such arguments might prevail at some point in the future, that prospect seems increasingly remote, especially given

free exercise of religion," and that the statute's drafters were "far from thorough in their attention to detail").

¹⁰⁸ See Infranca, *supra* note 4, at 1697, 1700, 1708 (defending an institutional approach to RLUIPA while repeatedly pointing out the statute's present flaws); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 723–24 (2008) (arguing that RLUIPA has some value, despite its flaws, because it identifies a fundamental flaw in land use regulation). *But see* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1025 (2012) (concluding that "twelve years of precedent show that RLUIPA was and is needed" to address the "hostility and discrimination" that churches face).

¹⁰⁹ Weinstein, *supra* note 103, at 1239–41.

¹¹⁰ See, e.g., MacLeod, *supra* note 107, at 137–47; see also Bram Alden, Comment, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1782 (2010) (arguing that critics of the statute have only focused "on instances in which religious entities have used RLUIPA to circumvent . . . local zoning boards," while ignoring "evidence that highlights the statute's ineffectiveness" in decided cases).

¹¹¹ See, e.g., Laycock & Goodrich, *supra* note 108, at 1048–70 (discussing numerous instances where a court's flawed reasoning has been the basis for ruling against RLUIPA actions).

¹¹² See generally 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, 371 (2009) (discussing the "bedrock principles of land use law" in order "to place RLUIPA analysis on a more constitutionally sound base").

¹¹³ *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

¹¹⁴ See, e.g., Hamilton, *supra* note 112, at 368–70.

the Supreme Court's recent institutional turn in cases like *Hobby Lobby*. Finally, even if RLUIPA were ruled unconstitutional by the Supreme Court, many states have effectively replicated its protections,¹¹⁵ by passing state statutes that mimic the language of the Religious Freedom Restoration Act of 1993 ("RFRA")¹¹⁶ These state RFRA's may not add much to the analysis of many RLUIPA claims today,¹¹⁷ but even if RLUIPA were struck down, in many jurisdictions these state RFRA's might take its place, like the many heads of a hydra, perpetuating the problems RLUIPA has and might yet help to create.¹¹⁸ If we are stuck with RLUIPA for the foreseeable future, then what remains is to figure out how to make its practical application a bit better—or, at least, how to prevent its practical application from getting much worse.

Accordingly, the problems with RLUIPA's practical application will be discussed at much greater length in this Article than the debate about RLUIPA's constitutionality briefly noted immediately above. At the most general level, RLUIPA's exemptions for a wide range of religious land uses make it more difficult to achieve workable and local solutions to land use problems that are, after all, inherently local in nature.¹¹⁹ More specifically, the most immediate set of problems that RLUIPA creates are related to the sheer impact that certain large-scale religious uses may have on local communities and on systems of local land use regulation, which are effectively exempted under the statute.

The remainder of this Part of the Article provides a brief introduction to the statutory structure that fuels these ongoing debates. As will be seen below, RLUIPA is a deeply murky statute, with substantive provisions that lack clear limiting principles. In other words, RLUIPA's existing problems are exactly the sorts of problems that an institutional approach will likely exacerbate.¹²⁰ Section III.A discusses RLUIPA's practical impact on local land use controls, focusing on the potential negative environmental impacts posed by unregulated land development under the statute, as well as the ripple effects that religious land use might have on a community when it is exempted from local land use controls. Section III.B below

¹¹⁵ See, e.g., Don Byrd, *State RFRA Bill Tracker*, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY (Mar. 4, 2015), <http://bjconline.org/state-rfra-tracker-2015/> [<http://perma.cc/GS3W-RXJS>].

¹¹⁶ 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹¹⁷ See, e.g., *Irshad Learning Ctr. v. County of DuPage*, 937 F. Supp. 2d 910, 949 (N.D. Ill. 2013) (noting that Illinois's "RFRA has an essentially identical provision to RLUIPA's substantial burden provision[,] thus negating the need for a separate analysis).

¹¹⁸ HAMILTON, *supra* note 3, at 148–50. Of course, it is possible that a hypothetical future determination that RLUIPA's land use provisions are unconstitutional might also invalidate many or all of the state RFRA's. But for the reasons given above, this nested hypothetical will not be considered at greater length here.

¹¹⁹ See, e.g., Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1848 (2004) ("RLUIPA prevents the local negotiation of the religious-secular relationship, closing off the option for local communities to deal with religious conflict collectively and where it is likely taking place.").

¹²⁰ See *infra* Part IV.

will briefly describe the legislative history of RLUIPA and its stated purpose. Section III.C will discuss RLUIPA's substantial burden provision, the meaning of the statutory term "religious exercise," and the ways that courts interpret this language. In addition, section III.D will briefly summarize RLUIPA's other substantive provisions and the ways that they are interpreted by courts.

A. *The Impact of RLUIPA and Religious Land Use*

As one scholar has pointed out, a 200,000-square-foot megachurch is likely to create the same kinds of externalities as a 200,000-square-foot Wal-Mart.¹²¹ Thanks to RLUIPA, however, the religious development may be effectively immune from local land use controls—including, but not necessarily limited to regulations imposed to control externalities arising from large-scale development in environmentally sensitive areas.¹²² The comparison of large-scale contemporary religious development to large-scale contemporary commercial development is an apt one because increasingly the two forms of land use mirror one another.¹²³ In many instances, the increasing similarity between many forms of religious and commercial land use today is no accident.¹²⁴ Rather, the convergence of religious and nonreligious land development is often the product of careful design and deliberate imitation, as the leaders of religious organizations and the architects and real estate professionals they employ deliberately seek to replicate the large-scale commercial, educational, and residential institutions that have increasingly shaped American life in recent decades.¹²⁵

¹²¹ See *Zale*, *supra* note 19, at 210.

¹²² *Id.* at 223–25 (discussing *Rocky Mountain II*, 613 F.3d 1229 (10th Cir. 2010)).

¹²³ See Stephen Ellingson, *New Research on Megachurches: Non-denominationalism and Sectarianism*, in *THE NEW BLACKWELL COMPANION TO THE SOCIOLOGY OF RELIGION* 247, 262 (Bryan S. Turner ed., 2010).

¹²⁴ *Id.* at 255–56 (gathering sources and noting that the success of many religious organizations today is "because they make religion take place in a familiar institutional form," like "the shopping mall or movie theater").

¹²⁵ See ANNE C. LOVELAND & OTIS B. WHEELER, *FROM MEETINGHOUSE TO MEGACHURCH: A MATERIAL AND CULTURAL HISTORY* 116–26 (2003). Loveland and Wheeler gathered the opinions of "church growth experts" who explained that in order "to attract" modern churchgoers, religious organizations must replicate the forms and patterns of the "large institutions" that dominate contemporary life, such as "high schools with thousands of students, universities with tens of thousands, companies with large payrolls[,] . . . urban apartment buildings," and shopping malls. *Id.* at 117. As one religious minister and "church growth expert" has put it, "[w]hat we want" is for the typical member to "say, 'I was just at corporate headquarters for IBM in Atlanta Wednesday, and now I come to church here and it's basically the same.'" *Id.* at 123.

Of course, not all recent religious land use takes this form. I refer here to extremely broad and general trends and the increasing similarity over a period of decades in the scope, intensity, and environmental impact of large-scale land development, whether religious or not. Although the general trends are unmistakable, exceptions abound.

Yet even as American religious land use increasingly mirrors other forms of large-scale and intensive land use, RLUIPA's special protections have made American religious land use increasingly exempt from scrutiny and control by local governments. The combination of these trends presents obvious problems. For example, whether the purpose they serve is commercial, residential, or religious in nature, large parking lots lead to increased mobile source air pollution, stormwater runoff, and erosion; large and multiple-use buildings require increased water, sewage, and trash disposal capacity; and large multi-acre complexes sited at or beyond the outskirts of the suburbs may exceed traffic capacity in the short term and exacerbate sprawl and impinge upon planned greenbelts in the medium to long-term.¹²⁶ In sum, therefore, the environmental implications for religious land use are often at least as significant as those for structures or developments of equivalent size that are put to nonreligious purposes.¹²⁷

Moreover, as this section has discussed and as Part IV will explore at greater length, the size, scope, and intensity of much religious land use has been steadily increasing in recent decades. But even as the environmental impact of religious land development has steadily grown in recent years, to the point where it now approximates or exceeds the environmental impact of large-scale commercial land development in many instances, RLUIPA has steadily eroded local governments' ability to monitor and regulate religious land use. Whatever RLUIPA's merits may be—and this Article will argue that they are few, far between, and outweighed by RLUIPA's many negative effects—the combination of these background trends is deeply problematic.

Although the problems that RLUIPA creates for local environmental and natural resource regulations are significant, the problems caused by RLUIPA-exempted religious land development are not limited to environmental issues alone. Nor are the problems RLUIPA causes necessarily limited to the impacts that religious land use can have on its immediate neighbors. Rather, the large-scale religious land use that RLUIPA frees from local regulation may have “ripple effects” that can wash over neighboring landowners in unpredictable ways.¹²⁸

For example, the development of land by a religious landowner may dramatically change the character of a residential neighborhood, or dampen foot traffic during business hours in a pedestrian-friendly zone downtown, or preclude certain kinds of commercial development that a community might wish to encourage in certain areas.¹²⁹ Moreover, the costs of religious land use are not always limited to a single neighborhood. As with any other kind of significant, intensive, or large-scale land use, in some situations contemporary religious land development may impose particularly wide-ranging externalities or dramatically change the character

¹²⁶ Jonathan D. Weiss & Randy Lowell, *Supersizing Religion: Megachurches, Sprawl, and Smart Growth*, 21 ST. LOUIS U. PUB. L. REV. 313, 318–26 (2002).

¹²⁷ *See id.* at 319.

¹²⁸ Elizabeth Reilly, *Empathy and Pragmatism in the Choice of Constitutional Norms for Religious Land Use Disputes*, 2 ALB. GOV'T L. REV. 555, 558 (2009).

¹²⁹ *Id.*

of a community far beyond the land use's neighbors.¹³⁰ The fact that religious land use increasingly causes the same kinds of externalities as other forms of land use is not, in itself, necessarily a problem. But such wide-ranging externalities may be particularly difficult to resolve when they arise from religious land use because RLUIPA frequently inhibits or entirely prevents neighbors and local governments from working toward the types of solutions that might be applied to analogous situations involving nonreligious land use.

In addition to concerns about the size and impact of protected religious land uses, some critics of RLUIPA have raised concerns about the *kinds* of religious land use that may be exempted by the statute. More specifically, some of RLUIPA's many critics are concerned that certain "auxiliary uses" that do not appear to be particularly religious in nature will be exempted by a broad reading of the statute from otherwise controlling land use regulations.¹³¹ Today, common auxiliary uses of land by religious organizations include relatively familiar religious land uses such as schools, but also community centers, health care facilities, homeless shelters and halfway houses, food pantries, food preparation and dining areas, TV and radio broadcasting facilities, credit unions and banks, and various forms of housing.¹³² So, for example, courts have considered RLUIPA claims related to proposed or actual land uses that include commercial real estate development, night clubs, GED placement and training centers, day care facilities, fraternal lodges, residential rehabilitation facilities, and commercial wedding businesses.¹³³ Moreover, courts have applied RLUIPA to protect proposed or actual land uses that include homeless shelters, hospitals, retreat facilities with overnight lodging, crisis centers for

¹³⁰ For a very recent example of this kind of development, with costs that stretch beyond the environmental or natural resources context, see Dan Geringer, *Mayfair's Devon Theater Seeks Rebirth As a Church*, PHILA. INQUIRER (June 22, 2015), http://articles.philly.com/2015-06-22/news/63675507_1_food-bank-devon-theater-church [<http://perma.cc/ARR2-9LJR>] ("Everybody wanted to see the arts come back to Mayfair . . . Having [the theater] turned into a church was a great disappointment to a lot [of] people." (internal quotation marks omitted)).

¹³¹ See, e.g., 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, 219–20 (2006).

¹³² DANIEL DALTON, RELIGIOUS LAND USE LITIGATION SINCE 2000, at 25 (2014) http://www.rc.com/upload/2014_ABA_Webinar_Presentation_RLUIPA_v7.pdf [<http://perma.cc/ZL6X-KDF8>] (panel presentation at the 2014 American Bar Association midyear meeting).

¹³³ E.g., *World Outreach Conference Ctr. v. City of Chicago*, 787 F.3d 839, 841 (7th Cir. 2015) (residential building); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 648 (10th Cir. 2006) (day care facility); *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1217 (9th Cir. 2003) (commercial wedding business); *Cal.-Nev. Annual Conference of the Methodist Church v. City & County of San Francisco*, 74 F. Supp. 3d 1144, 1148 (N.D. Cal. 2014) (residential building); *Men of Destiny Ministries, Inc. v. Osceola County*, No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321, at *1 (M.D. Fla. Nov. 6, 2006) (residential rehabilitation program); *Scottish Rite Cathedral Ass'n v. City of Los Angeles*, 67 Cal. Rptr. 3d 207, 211 (Ct. App. 2007) (entertainment rental venue).

addiction or domestic disputes, and, in one recent case, a 5,000-square-foot residence for a religious minister that includes an indoor swimming pool.¹³⁴

None of these land uses may be problematic, at least in certain locations. Indeed, many may be worthy projects, at least in the right spot. But they all impose costs upon their neighbors, and RLUIPA causes many of these costs to be considered and regulated in a less searching way, if at all, when they are arising out of religious land use.¹³⁵

Each of these individual examples of the special treatment religious land use enjoys under RLUIPA may have only local significance. However, in the aggregate these kinds of exceptions have altered the nature of local land use controls, and not for the better—they make it much harder for local governments to manage the externalities that land use inevitably produces.¹³⁶ Yet these examples, taken from RLUIPA cases that made it to court, are only the beginning of the practical problem RLUIPA poses for local governments, because the most practically significant aspect of the statute may be the discretion it affords courts to award prevailing religious claimants their attorneys' fees.¹³⁷

Thus, the threat of recovering their attorneys' fees connected with RLUIPA litigation gives religious claimants substantial leverage when disputes arise.¹³⁸ This leverage may be disproportionate to the substantive merits of the claim under the statute because both fee awards and the related cost of settlements to resolve RLUIPA cases can be significant, frequently rising into six or seven figures—sums that far outstrip many local governments' ability to pay or even realistically contemplate.¹³⁹ Thus, the prospect of having to make such a payment, combined

¹³⁴ *E.g.*, *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 189 (2d Cir. 2014) (5,000 square foot residence with indoor swimming pool), *cert. denied*, 135 S. Ct. 1853 (2015); *DiLaura v. Township of Ann Arbor*, 112 Fed. App'x 445, 446 (6th Cir. 2004) (*per curiam*) (religious retreat facility); *Sisters of St. Francis Health Servs., Inc. v. Morgan County*, 397 F. Supp. 2d 1032, 1035 (S.D. Ind. 2005) (hospital); *Missionaries of Charity, Bros. v. City of Los Angeles*, No. CV 01-08115-SVW (C.D. Cal. July 11, 2003) (homeless ministry).

¹³⁵ *See* Schragger, *supra* note 119, at 1846 (“It is difficult to find a normatively persuasive difference between, for example, a church and a nonprofit secular organization, both of which want to operate a homeless shelter . . . yet RLUIPA mandates treating the two claimants differently.”).

¹³⁶ For a discussion of how local governments, neighboring landowners, and developers manage the externalities that arise from land use and development, see ELLICKSON & BEEN, *supra* note 104, at 31–45.

¹³⁷ *See* 42 U.S.C. § 1988(b) (2012).

¹³⁸ *See id.* (“In any action . . . to enforce a provision of . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs . . .”).

¹³⁹ The current record settlement for a RLUIPA suit, about \$7.75 million, comes from a dispute resolved in December 2014. *See* Patricia Salkin, *N.J. Township Settles RLUIPA Lawsuit for Almost \$8M*, LAW OF THE LAND, (Dec. 10, 2014), *available at* <https://lawoftheland.wordpress.com/2014/12/10/nj-township-settles-rluipla-lawsuit-for-almost-8m/> [<http://perma.cc/LX48-URBB>]. While this settlement from the Township of

with the murky nature of the statute's substantive provisions, frequently creates substantial pressure on local governments to compromise or settle even relatively weak RLUIPA claims.¹⁴⁰ Indeed, even some attorneys who represent religious organizations in land use disputes note that the combination of RLUIPA's fees provision and the unpredictability attached to the statute's substantive provisions provide strong, often irresistible incentives for local governments to capitulate that bear little relation to the substantive merits of the landowner's claim.¹⁴¹

Moreover, the edge that RLUIPA's fee awards provision gives to religious claimants is exacerbated by such claimants' potential access to assistance from expert outside assistance provided by nonprofits that focus on religious legal disputes.¹⁴² As a result, local governments frequently settle RLUIPA disputes on terms favorable to religious plaintiffs, and when they settle, local governments frequently cite RLUIPA's fees provisions as the determinative factor.¹⁴³ When local governments are compelled to settle RLUIPA disputes based on the prospect of a fee award, their representatives often acknowledge the fact in stark and honest terms—especially if the local government and the community are relatively small, and facing claimant's counsel from larger legal markets or expert nongovernmental organizations. As the attorney for a local government in one recent settlement put it:

Bridgewater dispute appears to be the current record settlement, it is not the first multi-million dollar settlement or award needed to cover a religious organization's legal fees in a RLUIPA dispute. *See id.*

¹⁴⁰ See Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 447 (“[D]ue in large part to the threat of an attorney[] fees award to successful plaintiffs . . . an atmosphere [exists] wherein many counties, cities, and towns feel significant pressure to compromise or accede to the demands of potential plaintiffs who can assert religious reasons for the use . . . of their property.”).

¹⁴¹ *E.g.*, Daniel P. Dalton, *The Religious Land Use and Institutionalized Persons Act—Recent Decisions and Developments*, 45 URB. LAW. 741, 762–64 (2013).

¹⁴² *E.g.*, Weinstein, *supra* note 103, at 1238.

¹⁴³ Settlement examples abound in local news coverage as well as academic studies, and more examples will be discussed at greater length in Part IV. One brief example involves a June 2015 settlement of an April 2015 lawsuit filed by a religious organization, Liberty Baptist Church, in Crawford County, Kansas. Specifically, in March 2015, the Crawford County Commission denied Liberty Baptist's conditional-use permit application because of safety concerns, neighbors' concerns about “activity on church grounds outside of its use” for worship, and concerns that the proposed use failed to meet the “general character” of the neighborhood. Andrew Nash, *Liberty Baptist Settles with County*, MORNING SUN (June 16, 2015, 4:58 PM), <http://www.morningsun.net/article/20150616/NEWS/150619862> [<http://perma.cc/2W5L-EG4N>]. Represented by outside counsel from Chicago who specialize in RLUIPA suits, Liberty Baptist immediately sued and Crawford County almost as immediately capitulated: the church agreed to plant some shrubs while the county agreed to pay at least some of the church's costs and fees. *Id.* Like the representatives of many other local governments in RLUIPA disputes, Crawford County's attorney attributed the decision to settle entirely to the layered threat, described immediately above in this Article, that RLUIPA's fee provisions impose on local governments. *Id.*

This settlement was done due to the risk involved with litigation. We were concerned about other cases along the same line that had been litigated in other states. Some had won significant attorney's fees. One was in excess of \$1 million . . . It boiled down to the decision of: 'Is it worth the risk to take it to trial?' Especially in light of the fact attorney's fees could be substantial.¹⁴⁴

The role that fee awards play when religious land use disputes do arise, as well as their deterrent effect on local government regulation even before disputes arise, will also be discussed at greater length in Part IV below.¹⁴⁵ For now, it is enough to note that local government officials and lawyers on both sides of religious land use disputes believe that the prospect of RLUIPA fee awards compels local governments to settle disputes that should not be settled and deters them from regulating religious land use as they otherwise would and should.¹⁴⁶ Again, each individual compromise may have only local significance; however, in the aggregate the compelling threat and deterrent effect of RLUIPA's fees provisions make it much harder for local governments to manage the externalities that religious land use, like every other kind of land use, inevitably produces.

B. RLUIPA's Purpose and History

RLUIPA owes its existence to the failure of RFRA—which the Supreme Court has called RLUIPA's "sister" statute.¹⁴⁷ If RFRA and RLUIPA are sisters, RFRA is the eldest, and she has probably been something of a disappointment to her parents. Passed in 1993, RFRA "was designed to provide very broad protection for religious liberty," giving religious claimants far more protection than the Supreme Court had previously held was constitutionally required.¹⁴⁸ Indeed, RFRA was itself a reaction to the Supreme Court's *Employment Division, Department of Human Resources of Oregon v. Smith*,¹⁴⁹ which some perceived as narrowing the scope of religious liberty, including but not limited to disputes involving religious land use.¹⁵⁰

In response to *Smith*, Congress passed RFRA to prohibit government at all levels from "substantially burden[ing] a person's exercise of religion" unless it can be shown that the burden both furthers a compelling government interest and is the

¹⁴⁴ *Id.* (quoting Crawford County Counselor Jim Emerson).

¹⁴⁵ See *infra* notes 244–248, 259, 266–272 and accompanying text.

¹⁴⁶ Salkin & Lavine, *supra* note 98, at 251–52 (reporting that local government officials "rubber stamp" religious organizations' planned land uses, while refusing to give such proposals "the scrutiny they deserve because of the potential legal bills" (citation omitted) (internal quotation marks omitted)).

¹⁴⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014).

¹⁴⁸ *Id.* at 2767.

¹⁴⁹ 494 U.S. 872 (1990).

¹⁵⁰ DANIEL P. DALTON, LITIGATING RELIGIOUS LAND USE CASES 3–6 (2014).

least restrictive means to further that interest.¹⁵¹ RLUIPA's own substantial burden section obviously mirrors this provision in RFRA.¹⁵² In 1997, the Supreme Court held that RFRA was unconstitutional as applied to the states in *City of Boerne v. Flores*, finding that Congress had failed to show a significant history of religious discrimination by state governments against religious organizations, and concluding "[w]hen the exercise of religion has been burdened in an incidental way . . . it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."¹⁵³

Almost immediately after *City of Boerne*, Congress began attempting to resurrect RFRA's substantial burden provision for state restrictions on religious liberty. Congress's first attempts to revive RFRA came in 1998 and 1999, when legislation known as the Religious Liberty Protection Acts ("RLPA") were introduced.¹⁵⁴ Although neither version of RLPA was enacted, the bills paved the way for RLUIPA's passage in 2000.¹⁵⁵ RLUIPA succeeded where RLPA failed in part because it was the product of an unusual alliance between religious organizations seeking greater land use privileges and prisoners-rights advocates seeking greater accommodation for religious exercise for persons in institutions.¹⁵⁶ RLUIPA was also expressly designed to survive the challenges that proved fatal to RFRA: first, RLUIPA was given a narrower focus (land use regulation and people in institutions); and second, Congress justified RLUIPA in terms of its Commerce

¹⁵¹ 42 U.S.C. § 2000bb-1(a)–(b) (2012), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁵² *See infra* Part III.C.

¹⁵³ *City of Boerne*, 521 U.S. at 533–35. Of course, RFRA remains good law as applied to the federal government. *See Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2759.

¹⁵⁴ Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998); Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

¹⁵⁵ The congressional hearings held to consider the RLPA, and specifically its land use provision, are tremendously significant for RLUIPA because the testimony and evidence presented at the RLPA hearings are the main source for RLUIPA's purpose and legislative history—RLUIPA itself was passed very quickly and with very few congressional hearings. *See* U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 3 (2010), http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa_report_092210.pdf [<http://perma.cc/F23H-J7Y8>] (citing the "three years" of hearings prior to RLUIPA's passage in which Congress examined discrimination in land use decisions). For more on RLUIPA's background, the relationship between RLUIPA, RLPA, and RFRA, 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, 332–53 (2003) (tracing the legislative history of RFRA, RLPA, and RLUIPA), and Salkin & Lavine, *supra* note 98, at 196, 203–08 (suggesting that "[u]nderstanding Congressional motivation for the enactment of RFRA [and] its constitutional deficiencies" explains "Congressional development and enactment of RLUIPA").

¹⁵⁶ *See* Hamilton, *supra* note 155, at 333–34 (describing the collaboration between religious organizations, the ACLU, and the Department of Justice to draft RLUIPA).

and Spending Clause authority, in addition to the Fourteenth Amendment authority found inadequate with respect to the states in *City of Boerne*.¹⁵⁷

During Congress's deliberations over RLUIPA, the evidence provided was extremely one-sided in favor of the legislation: RLUIPA essentially drew upon the hearings conducted in support of RLPA, and RLUIPA's opponents never really had a chance to present their case against the bill before Congress.¹⁵⁸ RLUIPA is often described, and rightly so, as a bipartisan bill¹⁵⁹—but similarly, the opposition to the bill prior to its passage was also bipartisan, though even the existence of such opposition was substantially excluded from the floor debates and the legislative history.¹⁶⁰ The stated purpose that emerged from this unusual process was a concern about discrimination by local governments against religious persons and organizations,¹⁶¹ although many scholars have questioned how much discrimination against religious persons and organizations actually existed or continues to exist in land use regulation.¹⁶² In particular, RLUIPA was based on a special concern for “[s]maller and less mainstream denominations,” which, according to the one-sided and unusually composed record, are both particularly vulnerable to and particularly likely to face “discriminatory regulation” from local governments, especially if their members also belong to a racial minority that has faced a history of discrimination.¹⁶³

C. *Religious Exercise and Substantial Burdens Under RLUIPA*

Two of RLUIPA's specific components are worth particular attention at the outset of this focused review of the statute: first, the statute's use and definition of

¹⁵⁷ See Salkin & Lavine, *supra* note 98, at 208–09 (noting that “Congress had taken the Supreme Court's hints” with respect to RLUIPA).

¹⁵⁸ See *id.* at 206–08.

¹⁵⁹ See Presidential Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 WEEKLY COMP. PRES. DOC. 2168, 2168–69 (Sept. 22, 2000) (suggesting that RLUIPA “demonstrates that people of all political bents and faiths can work together for a common purpose that benefits all Americans”).

¹⁶⁰ See HAMILTON, *supra* note 3, at 131–32 (pointing out that both Senator Patrick Moynihan and former Mayor of New York City Rudolph Giuliani asked to testify about their concerns with the bill, but were not permitted to do so, and that Giuliani's letter in opposition was excluded from the record).

¹⁶¹ H.R. REP. NO. 106-219, at 18–24 (1999); 146 CONG. REC. 16,698–705 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹⁶² See, e.g., Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 860 (2007) (finding, after detailed empirical study, that religious institutions in New Haven, Connecticut, “face little discernable [sic] discrimination from municipal land use regulations”). See generally Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335, 341 (2000) (concluding, based on national survey data, that prior to RLUIPA's passage “[t]he nearly universal experience of American congregations seeking government authorization to do something they want to do is one of facilitation rather than roadblock”).

¹⁶³ H.R. REP. NO. 106-219, at 24.

the term *religious exercise* itself,¹⁶⁴ and second, the provision of the statute that prohibits local governments from imposing a *substantial burden* on religious exercise.¹⁶⁵ Aside from the provisions creating the possibility for attorneys' fee awards for religious claimants, the religious exercise and substantial burden components of RLUIPA are the most important parts of the statute. The breadth of both terms and their relationship to each other makes resolving inquiries into the relevant religious exercise and whether it has been substantially burdened the critical inquiry in many disputes resolved by the statute.¹⁶⁶

Section 2(a) of RLUIPA receives the lion's share of attention paid to the statute from academics, courts, and litigants.¹⁶⁷ It provides that no local or state government:

shall impose or implement a land use regulation in a manner that imposes a *substantial burden* on the *religious exercise* of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.¹⁶⁸

The place to begin unraveling section 2(a) is with its use of the term "religious exercise," defined by the statute as "any exercise of religion," including "[t]he use, building, or conversion of real property" if the property is "use[d] or intend[ed] to [b]e use[d]" for religious exercise by its owner.¹⁶⁹ RLUIPA's drafters created a new, broader definition for the legal term "religious exercise": prior to the statute's passage, the term had not really been used by courts or litigants in religious land use disputes.¹⁷⁰

The statute's drafters intended that the term religious exercise should be interpreted as broadly as possible¹⁷¹—indeed, the statute expressly does not limit

¹⁶⁴ 42 U.S.C. §§ 2000cc(a)(1), 2000cc-5(7) (2012).

¹⁶⁵ *Id.* § 2000cc(a)(1).

¹⁶⁶ See Macleod, *supra* note 107, at 134–37; see also Dwight H. Merriam, *How Local Government Can Nip RLUIPA Claims in the Bud*, in *RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS* 113, 113–14 (Michael S. Giaimo & Lora A. Lucero eds., 2009) (noting that understanding "substantial burden" and "religious exercise" are critical for local governments).

¹⁶⁷ *E.g.*, Roger Severino & Eric Rassbach, *The Religious Land Use and Institutionalized Persons Act of 2000*, in *GUIDE TO REPRESENTING RELIGIOUS ORGANIZATIONS* 301, 302 (Lisa A. Runquist et al. eds., 2009).

¹⁶⁸ 42 U.S.C. § 2000cc(a)(1) (emphasis added).

¹⁶⁹ *Id.* § 2000cc-5(7).

¹⁷⁰ See Galvan, *supra* note 131, at 208–09, 220–23.

¹⁷¹ See 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").

inquiry to practices “compelled by” or “central to” the religious beliefs at issue.¹⁷² It is, for example, broader than analogous provisions in the tax code, which extend favorable treatment to religious organizations only if the relevant conduct is “substantially related” to the organization’s religious, charitable, or educational purpose.¹⁷³ More importantly, RLUIPA’s term “religious exercise” is also intended to include and protect more kinds of religious land use than were previously recognized: RLUIPA expressly amended the definition of the “exercise of religion” provided by RFRA “in an obvious effort to effect a complete separation from First Amendment case law” and its predecessor statutes.¹⁷⁴ The intention behind this deliberate rupture with previous First Amendment case law was to make “the exercise of religion” a term that would be as broad as possible, explicitly untethering “the exercise of religion” from any inquiry into that exercise’s relative importance to a system of religious belief.¹⁷⁵

Accordingly, the expansive nature of “religious exercise” under RLUIPA means that defining the outer limits of “a substantial burden on the religious exercise of a person”¹⁷⁶ has proved to be the most important and the most complicated component of the statute.¹⁷⁷ As Judge Posner recently noted, “[i]t’s hard to imagine a vaguer criterion for a violation of religious rights.”¹⁷⁸ The murky nature of any inquiry into religious exercise and substantial burden under the general and expansive language of the statute has been exacerbated by the mare’s nest of opinions that have tried, and spectacularly failed, to sort out consistent interpretations of these terms in RLUIPA cases.¹⁷⁹ Nevertheless, a few general points of consensus have emerged.

In general, courts will not find a substantial burden based on purely procedural requirements that ultimately allow the relevant religious exercise to proceed, or when other sites are available for the religious exercise at issue.¹⁸⁰ On the other hand, local governments are likely to run afoul of the substantial burden prong of RLUIPA when they entirely reject compromise, or avenues of potential compromise, with

¹⁷² *Id.* § 2000cc-5(7)(A).

¹⁷³ 26 U.S.C. §§ 501(a)–(c), 513(a) (2012).

¹⁷⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62 (2014).

¹⁷⁵ *See id.* (“In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the ‘exercise of religion’ to include ‘any exercise of religion, whether or not compelled by, or central to, a system of religious belief.’” (quoting 42 U.S.C. § 2000cc-5(7)(A) (2012))).

¹⁷⁶ 42 U.S.C. § 2000cc(a)(1).

¹⁷⁷ *See DALTON*, *supra* note 150, at 7–8, 57–86.

¹⁷⁸ *World Outreach Conference Ctr. v. City of Chicago*, 787 F.3d 839, 843 (7th Cir. 2015).

¹⁷⁹ *See DALTON*, *supra* note 150, at 58 (noting that “courts have been more inclined to outline what *could* be a substantial burden under RLUIPA as opposed to stating a plain definition”).

¹⁸⁰ *See DALTON*, *supra* note 132, at 26–33.

religious groups.¹⁸¹ Similarly, local governments are highly likely to run into RLUIPA-related problems if the record reflects any measure of animus against either the faith in question or the individual believers impacted by the relevant land use controls.¹⁸²

But beyond situations that involve intransigence or outright hostility, what counts as a substantial burden under RLUIPA varies considerably across—and sometimes within—the circuits.¹⁸³ So, for example, the Seventh Circuit has recently held that religious exercise must be “effectively impracticable” under a local land use regulation in order to be substantially burdened under RLUIPA;¹⁸⁴ however, the Seventh Circuit has also held that a substantial burden may be found when there is merely “delay, uncertainty, and expense.”¹⁸⁵ In contrast, the Eleventh Circuit has deliberately rejected the Seventh Circuit’s approach(es), focusing instead on individual believers for whom substantial burdens are “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”¹⁸⁶ Meanwhile, courts in the Ninth Circuit have rejected all of the above approaches, holding instead that religious exercise must be burdened to a “significantly great extent”—something less than rendering religious exercise effectively impracticable, but something more than mere delay, uncertainty, and expense.¹⁸⁷ These are only examples: cataloguing the range of recent approaches to substantial burden and religious exercise would take many more pages.¹⁸⁸

This uncertainty means that courts often reach wildly inconsistent results in RLUIPA cases involving similarly situated religious claimants and local governments. So, for example, some courts have held that land use regulations that effectively restrict the time of religious services and the size of the congregation that can meet may not be a substantial burden,¹⁸⁹ while others have held that a lack of

¹⁸¹ See Severino & Rassbach, *supra* note 167, at 305 (“The circuits agree that a substantial burden is more likely to be found in cases in which a municipality refuses to make any accommodation for the religious applicant or if a court detects a hint of bad faith.”).

¹⁸² *Id.*

¹⁸³ See DALTON, *supra* note 150, at 8.

¹⁸⁴ *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673, 680–81 (7th Cir. 2013), *abrogated by* *Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015) (concluding that *Eagle Cove*’s approach does not survive the Supreme Court’s recent decisions in *Hobby Lobby* and *Holt*).

¹⁸⁵ *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005).

¹⁸⁶ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

¹⁸⁷ *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)).

¹⁸⁸ See, e.g., *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 95 (1st Cir. 2013) (reviewing the approaches used to find a substantial burden under RLUIPA as listed above as well as approaches from other circuits).

¹⁸⁹ E.g., *Church of Our Savior v. City of Jacksonville Beach*, 69 F. Supp. 3d 1299, 1313–14 (M.D. Fla. 2014).

meeting space in auxiliary buildings besides those used for religious services may be a substantial burden.¹⁹⁰ Similarly, although some courts have held that land use controls that entirely prevent construction of a church of any size on rural land impose a substantial burden,¹⁹¹ other courts require religious organizations in such a situation to also show that they “could not reasonably locate and acquire an alternative site for its proposed combined uses.”¹⁹²

As a result, it is hard for local governments and their counsel to predict what might or might not be a substantial burden of religious exercise under RLUIPA. This unpredictability only exacerbates the problematic incentives created by RLUIPA’s attorneys’ fees provision. Local governments must contend with the procedural risk of RLUIPA’s fees provisions and the uncertainty surrounding the substantial terms provision, both of which deter local governments from implementing useful land use regulation in the first place or compel local governments to settle individual disputes where enforcement of existing regulations is badly needed.

*D. Equal Terms, Nondiscrimination, Unreasonable Limits,
and Total Exclusion Under RLUIPA*

In addition to its prohibition on substantially burdening religious exercise, RLUIPA also prohibits local governments from “impos[ing] or implement[ing] a land use regulation in a manner that” treats religious organizations “on less than equal terms” with nonreligious organizations,¹⁹³ or discriminates against any religious organization,¹⁹⁴ or totally excludes religious organizations from a jurisdiction,¹⁹⁵ or places unreasonable limits on religious organizations within a jurisdiction.¹⁹⁶ Unlike section 2(a) of the statute, these sections essentially mirror previous constitutional precedent or provisions of other statutes such as the Fair Housing Act, and as a result, they have attracted far less attention from RLUIPA’s many critics.¹⁹⁷ For similar reasons, these provisions have also attracted less attention from litigants and from courts than the substantial burden provision discussed above.¹⁹⁸

¹⁹⁰ *E.g.*, *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 311–12, 321–22 (D. Mass. 2006).

¹⁹¹ *E.g.*, *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 558 (4th Cir. 2013).

¹⁹² *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 774–75 (Or. Ct. App. 2007).

¹⁹³ 42 U.S.C. § 2000cc(b)(1) (2012).

¹⁹⁴ *Id.* § 2000cc(b)(2).

¹⁹⁵ *Id.* § 2000cc(b)(3)(A).

¹⁹⁶ *Id.* § 2000cc(b)(3)(B).

¹⁹⁷ *E.g.*, *Hamilton*, *supra* note 112, at 409–11.

¹⁹⁸ *E.g.*, *Muslim Cmty. Ass’n of Ann Arbor & Vicinity v. Pittsfield Charter Twp.*, 947 F. Supp. 2d 752, 765 (E.D. Mich. 2013) (“There are few published cases discussing RLUIPA’s nondiscrimination provision”); *see also DALTON*, *supra* note 150, at 87 (“Equal terms claims have been far less frequent in the relatively short life span of RLUIPA”

Of these remaining substantive provisions of RLUIPA, by far the most significant is the “equal terms” section of the statute,¹⁹⁹ which has begun to be more frequently litigated in recent years.²⁰⁰ The chief problem with the equal terms provision is that the statutory text contains literally no limiting principle. Accordingly, most courts have read in the limiting term “similarly situated” into the statutory text of 42 U.S.C. § 2000cc(b)(1),²⁰¹ because without it, then “if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members . . . to locate in the same neighborhood regardless of the [differential] impact” such a religious land use might have compared with the secular permitted land use.²⁰² Most, but not all have followed this reasoning: the Eleventh Circuit reads the statutory term literally, effectively giving religious land users a blanket waiver from local land use controls, because under the literal language of the statute a zoning ordinance “that permits *any* ‘assembly’ . . . to locate in a district must permit a church to locate there as well even if the only secular assemblies permitted are hospital operating theaters, bus terminals, air raid shelters,” and other assemblies that are dissimilar to religious organizations.²⁰³ Moreover, even among those courts that do effectively read the words “similarly situated” into the statute, there is great variety about how the statutory provision should be interpreted.²⁰⁴

Again, the uncertainty and unpredictability that attaches to RLUIPA’s equal terms provision only exacerbates the problematic incentives created by RLUIPA’s attorneys’ fees provision, which may deter local governments from implementing useful land use regulation in the first place or compel local governments to settle individual disputes where enforcement of existing regulations is badly needed. These practical problems, along with the practical problems discussed at the end of Part II, will be discussed at greater length in Part IV, which will explain how an institutional approach to RLUIPA will exacerbate these and other problems already caused by the statute. But before we turn to these problems, it is necessary first to discuss what religious institutionalism is, and then to critically examine what an institutional approach to RLUIPA would look like.

than substantial burden claims.); Severino & Rassbach, *supra* note 167, at 308–09 (noting that “few circuits have ruled on the meaning of RLUIPA’s Equal Terms” or nondiscrimination provisions, and have devoted even less attention to RLUIPA’s total exclusion and unreasonableness sections).

¹⁹⁹ 42 U.S.C. § 2000cc(b)(1).

²⁰⁰ Dalton, *supra* note 141, at 742.

²⁰¹ In other words, courts effectively read 42 U.S.C. § 2000cc(b)(1) as prohibiting land use controls that treat religious organizations “on less than equal terms *with similarly situated*” nonreligious organizations. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3d Cir. 2007) (emphasis added).

²⁰² *Id.* at 268.

²⁰³ River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 369 (7th Cir. 2010) (en banc) (criticizing, *inter alia*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F. 3d 1214, 1230–32 (11th Cir. 2004) (per curiam)).

²⁰⁴ *Id.* at 368–74.

IV. FROM BAD TO WORSE: THE PROBLEMS WITH AN INSTITUTIONAL APPROACH TO RLUIPA

Part II of this Article discussed the recent rise of religious institutionalism in the courts and the academic debate, and explained how recent Supreme Court opinions that voice institutional ideas might impact religious land use disputes. Part III of this Article examined the history and substance of RLUIPA, which provides the framework under which many religious land use disputes are resolved. Part III also explored the ways in which RLUIPA makes disputes about religious land use so problematic. Part IV of the Article explores the ways in which an institutional approach would make this bad statute increasingly worse.

More specifically, section IV.A begins with a critical examination of arguments in favor of an institutional approach to religious land use. Section IV.B then shows how an institutional approach to RLUIPA will likely exacerbate the many problems that the statute already creates. To be clear, the problems this Article identifies with an institutional approach to religious land use are largely prospective. Although section IV.C will show the ways in which—thanks to *Hosanna-Tabor* and *Hobby Lobby*—a practically institutional approach to RLUIPA is beginning to emerge, the problems posed by an institutional approach to religious land use are largely still just over the horizon.²⁰⁵ Section IV.D and the Conclusion of this Article show how an institutional approach to RLUIPA promises to do more than simply exacerbate the existing problems that the statute already causes. In addition to exacerbating the problems that already exist under the statute, an institutional approach to religious land use will undermine the statute’s stated solicitude for the members of new or minority religious groups.

A. *What Does an Expressly Institutional Approach to RLUIPA Look Like?*

This section of the Article provides a critical examination of recent work that advocates for an expressly institutional interpretation of RLUIPA and draws on the Court’s opinion in *Hosanna-Tabor*. Of course, as discussed in Part III, RLUIPA’s text expressly includes religious assemblies and institutions in the definition of “persons” covered by its land use provisions.²⁰⁶ An institutional approach to RLUIPA, therefore, is not directed at securing religious institutions a right to sue, but rather with shifting the focus of the inquiry in religious land use cases to the burdens and protections that religious institutions ought to bear in their own right. More specifically, an expressly institutional interpretation of RLUIPA seeks to provide a relatively greater emphasis on the religious exercise of religious

²⁰⁵ Again, the central claim of this Article is that RLUIPA threatens to make a bad statute even worse.

²⁰⁶ 42 U.S.C. § 2000cc(a)(1) (2012).

institutions themselves, not just as appropriate plaintiffs but as irreducible rights holders.²⁰⁷

Similarly, such an approach will tend to minimize the significance of individual religious beliefs, practices, and the burdens that land use regulations might impose upon them. Such an approach may be usefully contrasted with, for example, the Supreme Court's approach to similar issues in *City of Boerne*,²⁰⁸ which focused first and foremost on the burdens allegedly suffered by the individual citizens who make up religious institutions. As discussed in Part II, in contrast to an institutional approach, on a noninstitutional view of religious liberty, the individuals who make up religious institutions are and ought to be the primary rights holders in issues of religious liberty.²⁰⁹

Arguments in favor of an institutional approach to RLUIPA naturally begin with the following straightforward and surely correct observation: organized religious groups, rather than individual believers, typically own the land that is implicated in such disputes with local governments.²¹⁰ Exceptions exist, of course. For example, one recent published RLUIPA decision involved an application for a private family chapel on rural ranchland.²¹¹ But by and large it is true that most RLUIPA decisions, and indeed most disputes involving religious land use, involve property that is owned by a religious organization on behalf of its individual members, and most claims are brought by those same organizations.

Beyond this descriptive point, like every other institutional approach to religious issues, an institutional interpretation of RLUIPA rests on the following two premises. First, the rights that religious institutions hold and ought to hold are not entirely reducible to the rights held by their individual members. And second, these institutional rights can and in some situations ought to be distinguished from the rights of individual believers.²¹²

The expressly institutional approach to RLUIPA examined and criticized in this section of the Article rests on what Part II referred to as a "strong" version of religious institutionalism.²¹³ Put another way, an institutional approach to RLUIPA

²⁰⁷ See Infranca, *supra* note 4, at 1695 (suggesting that the emphasis placed by many courts on "the religious exercise, and alleged burdens, of individual adherents" in RLUIPA cases is "deeply problematic," and arguing instead that "courts should focus on the burdens experienced by the religious institution that owns the property . . . rather than the burdens claimed by individual adherents").

²⁰⁸ See *supra* note 153 and accompanying text.

²⁰⁹ Schragger & Schwartzman, *supra* note 14, at 984–85. *But cf.* Infranca, *supra* note 4, at 1750 ("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.").

²¹⁰ Infranca, *supra* note 4, at 1695.

²¹¹ *Anselmo v. County of Shasta*, 873 F. Supp. 2d 1247, 1251 (E.D. Cal. 2012).

²¹² See Infranca, *supra* note 4, at 1698 ("Institutional free exercise rights are an intrinsic part of our constitutional tradition and are not simply derived from the rights of individuals.").

²¹³ See *supra* notes 29–30 and accompanying text.

proceeds from a belief that religious institutions should enjoy religious protection in their own right, even if the protection invoked, or the alleged interference with religious exercise, does not directly implicate an individual's belief or religious practice.²¹⁴ Similarly, the chief harms that an institutional approach to RLUIPA is supposed to solve are in many ways also tied to this "strong" conception of religious institutionalism.²¹⁵

To see how the relationship between RLUIPA and a strong version of religious institutionalism is supposed to work, it is necessary to briefly review some old ideas sometimes called "sphere sovereignty," which are very important to this and other strong versions of religious institutionalism. The basic notion is this: religious institutions should operate within a separate "sphere" of their own, left free from many government controls that might apply to similarly situated but nonreligious entities.²¹⁶ By this point, the resonance between these old notions of sphere sovereignty and contemporary strong versions of religious institutionalism should be clear: both pick out religious institutions as things that are distinctively valuable in their own right, which—at least in certain matters—should accordingly be free from government interference.

²¹⁴ See Infranca, *supra* note 4, at 1721 ("[A]n 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."). Infranca cites *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), for support of what he calls an "intrinsic theory of institutional free exercise rights," as distinguished from what he calls "derivative" and "pragmatic" theories of religious institutionalism. Infranca, *supra* note 4, at 1720–26. Infranca's "intrinsic" theory of institutional rights has much in common with variants of what this Article and others refer to as "strong" religious institutionalism and will be treated as such, whereas what Infranca calls "derivative" and "pragmatic" theories of religious institutionalism resembles what this Article refers to as "weak" religious institutionalism. See *supra* notes 29–32 and accompanying text. Indeed, Infranca suggests that weak institutionalism might not be able to support an institutional approach to RLUIPA because it would be both "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." Infranca, *supra* note 4, at 1726. I agree that a weak institutional approach to RLUIPA is a bad idea, but I think that strong institutional approaches to RLUIPA are likely to be even more problematic. As such, I think institutional approaches to RLUIPA will be relatively less problematic as claims for special deference and protection for religious institutions independent from individual members grow "weaker." See *infra* Part IV.

²¹⁵ Infranca, *supra* note 4, at 1721.

²¹⁶ See, e.g., Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 79 (2009) (suggesting that churches are "sovereign spheres" with an "authority [that] is ultimately coequal to that of the state"). In elaborating these ideas, Horwitz draws on a notion of "sphere sovereignty" originally provided by the theologian Abraham Kuyper, whose works have been important to many other scholars writing in this area. *Id.*

Accordingly, the institutional approach to religious land use examined and criticized here builds on notions of sphere sovereignty and suggests that an institutional interpretation of RLUIPA is needed to create the necessary space, free from government control, in which religious institutions can operate.²¹⁷ Absent such protection, religious organizations, which own most of the land used for religious purposes in this country, often confront fundamental problems of identity and self-definition when they confront land use regulations. Sometimes these problems arise because certain land uses may be particularly important to a given institution's religious identity. For example, a house of worship is the sort of land use that may be central to an institution's identity and the religious beliefs and practice of its members.²¹⁸ But these problems can also arise, according to the account examined here, in all sorts of other situations as well, if a religious organization's ability to expand as it sees fit, at least within its appropriately independent "sphere," is restricted by land use controls.²¹⁹

Thus, according to the account examined and criticized here, the potential problems of institutional identity and sovereignty that religious organizations face when they confront state and local land use regulations approximate equivalent problems that religious organizations face in the context of the ministerial exception. According to the institutional approach, this similarity helps justify making use of something like the organizational or institutional free exercise contemplated in *Hosanna-Tabor* in the context of religious land use.²²⁰ Recall that in *Hosanna-Tabor*, the Court held that the Religion Clauses "give[] special solicitude to the rights of religious organizations," which should be guaranteed certain freedoms in their own right, such as the right to select their own ministers.²²¹ This special solicitude and these special rights need not stop with the ministerial exception, according to the account examined and criticized here, but rather should be extended to the land use context and the interpretation of RLUIPA.²²²

What, then, would an explicitly institutional approach to RLUIPA look like in practice? Practically speaking, such an explicitly institutional approach will focus almost entirely on the substantial burden component of the statute, which, after all, is the statute's most significant single substantive component. More specifically, an explicitly institutional approach to RLUIPA would expand what counts as a

²¹⁷ See Infranca, *supra* note 4, at 1722 ("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.").

²¹⁸ See *id.* at 1717 ("Property can play an important role in the formation of group identity.").

²¹⁹ *Id.* at 1714–22, 1726–28.

²²⁰ *Id.* at 1720–22.

²²¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

²²² See *supra* note 70 and accompanying text.

substantial burden under the statute, but only for *some* religious organizations, as Part IV will discuss in greater detail.²²³

As a first step, the institutional approach to RLUIPA examined here essentially excludes any consideration of an individual's religious exercise, or the burdens placed upon it, unless that individual owns the property at issue and is therefore herself an appropriate claimant under RLUIPA.²²⁴ Instead, under an institutional approach, a court reviewing a conflict over religious land use should focus on the religious exercise of the organization that owns the land, and the ways in which the challenged land use regulation impacts that institution's religious exercise. To determine what an institution's religious exercise is, and how it might be burdened, the expressly institutional account examined and criticized here draws an analogy with exceptions to historic preservation laws for charitable organizations in New York. More specifically, under an institutional interpretation of RLUIPA the analysis of a religious institution's religious exercise should proceed much like the analysis of a secular nonprofit's charitable purpose.²²⁵

What is wrong with this approach to RLUIPA? To begin, this interpretation of RLUIPA's substantial purpose and religious exercise terms will be incredibly broad—far broader, in practice, than the analogous inquiry into charitable purposes under New York state law—thanks to the already expansive definitions of “substantial purpose” and “religious exercise” under RLUIPA. In the wake of *Hobby Lobby* and *Hosanna-Tabor*, the imperial sweep of these terms will grow wider still.

What gives this institutional interpretation of substantial purpose and religious exercise such breadth is both its irreducibility and its separation from the beliefs and related burdens on individual believers. This interpretation of “religious exercise” is meant to capture “the collective multitude” of activities that a religious organization might engage in, rather than any one more or less religious specific activity.²²⁶ Such an interpretation resists bright lines and easy categorization, but an analogy and an

²²³ While this Article criticizes an institutional approach of RLUIPA, I greatly admire Infranca's account, including but not limited to his transparency regarding the different treatment for “new” as opposed to “existing” religious institutions that such an approach must entail. Of course, I think that treating religious institutions in such different ways is deeply problematic, as I explain in Part IV.C. Put another way, I take Infranca's account to be essentially the best and most thoughtful case that could be made for an institutional approach to RLUIPA, while concluding that the problems with an institutional approach, identified in this Article, are so significant that any such approach should be rejected.

²²⁴ See Infranca, *supra* note 4, at 1706–07, 1726–27 (arguing that courts should not focus their analyses on the burdens imposed on individuals, but that instead “[i]t is the institution's religious exercise, and the challenged land use decision's effect on this exercise, that must be considered”).

²²⁵ See *id.* at 1698–99 (noting that, in other areas of land use law, “[n]onprofits, 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”).

²²⁶ *Id.* at 1739.

example can help show what is intended, and show how broad and how generous (to religious institutions) this approach to religious land use will be.

The critical analogy is tied to the analysis of the ministerial exception discussed in *Hosanna-Tabor*. Under an institutional approach to RLUIPA, attempts to define the religious exercise of an organization or institution, and the substantiality of any related burdens on the institution, should resist a “rigid formula” and depend in large part on the religious institution’s own representations—in much the same way that questions about who qualifies as a minister after *Hosanna-Tabor* must resist a “rigid formula” and rely on the institution’s own representations.²²⁷

While this approach eschews bright-line rules in favor of examples drawn from both the land use context and ministerial exception cases, one key point is absolutely clear. Existing religious institutions, with long-standing ties to a specific parcel of land, should have greater access to substantial burden claims under this approach than “new institutions,” defined as those religious institutions that may be seeking to use a particular piece of property for the first time.²²⁸ In fact, under this approach, “new” religious institutions should be barred from asserting substantial burden claims under RLUIPA altogether.²²⁹ Both of these points will be discussed in greater detail below.²³⁰

In addition to the analogy with *Hosanna-Tabor*’s approach to the ministerial exception, we will better understand the institutional approach to RLUIPA if we briefly examine a relevant example, upon which the institutional account examined and criticized here also expressly relies. The example involves a case predating RLUIPA and decided under the charitable-purpose model developed by New York courts.²³¹ In the relevant case, *1025 Fifth Avenue, Inc. v. Marymount School*,²³² a religious school wanted to build a new gymnasium on the roof of its existing facility.²³³ The gymnasium was new in the sense that the school had never previously had a gymnasium; in other words, it was not merely a renovation of an existing facility. But the school itself was not new, and therefore the case is a good template

²²⁷ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–08 (2012).

²²⁸ *See* Infranca, *supra* note 4, at 1698 (“Applying the theory of institutional free exercise [to RLUIPA] 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.”).

²²⁹ *See id.* (“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.”).

²³⁰ *See infra* Part IV.D.

²³¹ *See supra* note 225 and accompanying text.

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

²³³ *Id.* at 183–84. This case was cited and discussed by Infranca, *supra* note 4, at 1740–41.

for how an institutional approach to RLUIPA would work in religious land use disputes that involve an “existing” religious institution.²³⁴

According to an expressly institutional approach to RLUIPA, the appropriate inquiry in such cases is not whether the specific activity at issue—for example, a religious school’s new gymnasium—is central or essential to the school’s religious exercise. Rather, informed by *Hosanna-Tabor*, the appropriate inquiry ought to be a holistic one into whether the proposed land use fits in with something analogous to the general “charitable purpose” of a nonprofit.²³⁵ But in cases that involve RLUIPA, courts tend to eschew any close examination of the sincerity or the centrality of the religious beliefs at issue,²³⁶ because “religious exercise” is defined as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²³⁷ In other words, both the plain language of the statute and its practical application by most courts create a giant hole at the center of the holistic inquiry called for by an institutional approach to religious land use disputes.

Stepping back from RLUIPA itself for just a moment, courts’ general aversion to inquiring into the sincerity or centrality of religious beliefs or purposes often becomes particularly pronounced when courts adopt an institutional approach.²³⁸ This makes RLUIPA’s resolution of land use disputes, and especially an increasingly institutional interpretation of RLUIPA, very unlike cases decided under the charitable purpose model discussed above. In charitable purpose cases, substantial and detailed evidence may be provided as to whether the proposed land

²³⁴ This case highlights an issue with the distinction between “existing” and “new” religious institutions, which is discussed further in Part IV.D, namely, that a new expansion by an existing institution may be just as disruptive, problematic, or damaging to the purpose of the relevant land use regulation as a new use by a new institution, but the two actors may be treated very differently. The school in question was housed in buildings originally designed as townhouses, and the new gym was to be built on top of the townhouses’ roof. *1025 Fifth Avenue*, 475 N.Y.S.2d at 183–184. However, the impact on the neighborhood would have been no different if the townhouses had been bought by a “new” religious institution and immediately converted to a school with a rooftop gym. *Cf., e.g., id.* (noting that the “[n]eighboring property owners . . . have charged that construction of the rooftop gymnasium, even as modified, would obstruct views from their apartments and lessen property values”).

²³⁵ See *Infranca*, *supra* note 4, at 1740 (citing *1025 Fifth Avenue, Inc.*, 475 N.Y.S.2d 182, and *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), and concluding that “[a] similar approach should be applied to a religious institution’s RLUIPA claims.”).

²³⁶ See Patricia E. Salkin, *Seeing the Light Through RLUIPA’s Haze*, in *RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS*, *supra* note 166, at 167, 169–70.

²³⁷ 42 U.S.C. § 2000cc-5(7)(A) (2012).

²³⁸ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778–79 (gathering precedent and holding that “it is not for us to say that . . . religious beliefs are mistaken or insubstantial”).

use relates to the institution's relevant charitable purpose.²³⁹ However, in religious land use disputes decided under RLUIPA, unlike cases decided under the charitable purpose model, inquiries into the centrality or substantiality of the relevant religious exercise tend to be off-limits²⁴⁰—and again, this trend is likely to become more pronounced in the wake of *Hobby Lobby* and *Hosanna-Tabor*.

This means that it is and will remain virtually impossible to provide any practically limiting principles or limiting criteria for an institutional approach to RLUIPA. If inquiries into the centrality or substantiality of religious exercise are effectively off-limits, then over time the scope of actions that will tend to qualify for protection under the statute will expand, especially as courts become ever more reluctant to police this boundary under an increasingly institutional approach to the statute in the wake of *Hosanna-Tabor* and *Hobby Lobby*. The practical consequences of this expansion will be discussed at greater length in sections IV.B and IV.C below, which will also show how RLUIPA's practical application already increasingly approximates the expressly institutional approach critically examined here.

B. The Practical Problems Caused by RLUIPA's Increasingly Institutional Tendencies

Several scholars have criticized the combination of the trends discussed above. Indeed, many recent critical accounts of RLUIPA predate recent cases such as *Hosanna-Tabor* and *Hobby Lobby*, as well as much of the recent institutional turn in scholarship regarding religious belief and exercise. Nevertheless, several of these critics focus on the ways in which courts applying RLUIPA often single out religious institutions for special and problematic treatment simply because they are *religious* institutions.²⁴¹

So, for example, some scholars have pointed out the ways in which megachurches and other expanding religious institutions have secured or defended novel and expansive forms of land use, despite the presence of environmental land use regulations that otherwise ought to apply, based on little more than the institutions' allegedly distinctive religious nature.²⁴² In other words, thanks to RLUIPA a religious claimant can push forward plans for development that include over one hundred thousand new square feet of construction, comprising a

²³⁹ See, e.g., *1025 Fifth Avenue*, 475 N.Y.S.2d at 184 (noting the “considerable detail” of “the evidence introduced . . . in support of [the] contention that lack of the gymnasium ‘seriously interfered with the carrying out of the charitable purpose’”) (internal citations omitted).

²⁴⁰ See *supra* notes 171–191, 235–236 and accompanying text.

²⁴¹ See, e.g., Galvan, *supra* note 131, at 232 (“Rather than evaluate the application of a land use regulation using post-RLUIPA free exercise framework, land use authorities are beginning to use only one criterion: whether an entity is a religious institution.”).

²⁴² Zale, *supra* note 19, at 210 (focusing on the detrimental impact of large and novel religious land use on local environmental controls, and arguing that “RLUIPA’s message to churches is that they can expand without regard to the detrimental impact of their development”).

gymnasium, a gallery, a multipurpose building, and five hundred parking spaces (in addition to a school and facilities for religious worship), on land designated as an agricultural buffer zone where nonreligious claimants would be barred from similarly intensive development.²⁴³ In addition, several critics have identified the “tremendous leverage” that RLUIPA’s fee-shifting provisions, combined with the murkiness attached to its substantive components, provide to religious claimants in negotiations with local governments.²⁴⁴ As attorneys who have been involved *on both sides* of religious land use disputes recognize, RLUIPA allows religious claimants to “bully” or “strong arm” local governments, to a degree “that would be tolerated from no other land user,” thanks to the one-sided practical application of the statute’s fees provision and the murky nature of the statute’s key substantive provisions.²⁴⁵

As a result, while bargaining in RLUIPA’s shadow, religious claimants can negotiate on such favorable terms with local governments that they become a “law unto themselves,” even regarding auxiliary uses like food courts, bookstores, and broadcasting facilities.²⁴⁶ Furthermore, religious institutions’ enhanced bargaining power vis-à-vis local governments under RLUIPA may not be limited to compellent threats in settlement negotiations; rather, as several scholars have pointed out, the specter of RLUIPA’s fees provisions may deter local governments from imposing land use regulation in the first place.²⁴⁷ In other words, the enhanced influence outside of court that RLUIPA gives religious institutions is not just a significant weapon to compel local governments to settle disputes when they arise: the threat of RLUIPA litigation may also chill local governments’ willingness to impose desirable land use controls in the first place.²⁴⁸

²⁴³ *Id.* at 208–10 (citing *Rocky Mountain Christian Church v. Bd. of Cty. Comm’rs (Rocky Mountain I)*, 612 F. Supp. 2d 1163 (D. Colo. 2009), and *Rocky Mountain II*, 613 F.3d 1229 (10th Cir. 2010)); *see also* Jeffrey Wolf, *Jurors Deliberate Niwot Church’s Zoning Lawsuit*, 9NEWS.COM (Nov. 18, 2008, 2:13 PM), <http://archive.9news.com/news/article/104151/0/Jurors-deliberate-Niwot-churchs-zoning-lawsuit> [<http://perma.cc/LS3D-QTTU>] (discussing the proposed land use at issue in the *Rocky Mountain I* and *II* disputes in more detail).

²⁴⁴ *E.g.*, Goldfien, *supra* note 140, at 450–51.

²⁴⁵ *See, e.g.*, Reilly, *supra* note 128, at 558–60 (describing how she “did not appreciate the feeling that [RLUIPA] acted like a ‘bully’ on” behalf of her church in a dispute with her local government); *see also infra* notes 262–273 and accompanying text (gathering accounts about the corrosive practical effects of RLUIPA’s fee provisions from attorneys on both sides of religious land use disputes).

²⁴⁶ Galvan, *supra* note 131, at 228–30; Goldfien, *supra* note 140, at 450–51.

²⁴⁷ *See, e.g.*, Salkin & Lavine, *supra* note 98, at 254–55. For a discussion of the nature of compellent threats as distinguished from deterrent threats, and how both may be used in negotiations over regulatory matters, *see* Zachary Bray, *The Hidden Rise of ‘Efficient’ (De)Listing*, 73 MD. L. REV. 389, 451 (2014).

²⁴⁸ *See, e.g.*, Christopher Crosby, *Residents Object to Church’s Proposal for Recovery Home*, OXFORD HILLS, June 11, 2015 (quoting participants in a local planning board meeting regarding a proposed addiction recovery program and group home to be operated by a religious organization).

In a similar vein, some scholars have highlighted the costs that expanding religious land use imposes on religious institutions' neighbors, and the reluctance of many institutions to account for concerns related to those costs given RLUIPA's protections.²⁴⁹ Still, other critics of the statute's land use provisions have described the chasm between the statute's stated purpose—to address and prevent discrimination against particularly vulnerable religious believers—and the special protections that it practically affords to all religious organizations, whether or not they are vulnerable to or have faced discrimination.²⁵⁰ Regardless of the particular focus of their criticism, a common thread runs through most past critical examinations of RLUIPA: namely, the way in which the statute, as it is often applied, picks out religious institutions that own land for distinctively favorable treatment because of what they are rather than what they are doing or why they are doing it.²⁵¹

In other words, if these past critical accounts of RLUIPA are correct, then the recent past and present practical application of RLUIPA already, in many ways, approximates an institutional approach to RLUIPA *avant la lettre*, albeit in negative ways.²⁵² Contrary to the expressly institutional interpretation of RLUIPA examined earlier in section A, these previous critical accounts suggest that some courts already pay plenty of attention to religious institutions as rights holders deserving of distinctive protection in their own right under RLUIPA. In fact, if RLUIPA's critics are correct, then religious institutions already get too much deference and protection under the statute simply because they are religious institutions.²⁵³ Prior critics of RLUIPA have not explicitly criticized the institutional aspects of the statute's practical application, but then most of their critical accounts predate the recent institutional turn in scholarship about religious belief and exercise. Of course, as noted above, some defenders of RLUIPA reject this critical picture of RLUIPA—

²⁴⁹ *E.g.*, HAMILTON, *supra* note 3, at 131–39.

²⁵⁰ *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 272 (2007) (concluding that RLUIPA “provides a presumptive exemption to every religious landowner, no matter how powerful or privileged . . . [and] no matter how fairly the burden is shared with other landowners”).

²⁵¹ *See, e.g.*, Sager, *supra* note 107, at 15 (“RLUIPA is not fairly characterized as a means of protecting churches against discrimination; it is a bald and rather extreme privileging of churches for which no justification is available.”); *see also* HAMILTON, *supra* note 3, at 148 (arguing that RLUIPA “gives neighboring landowners different rights simply on the basis of religious status,” which divides everyone into two classes, the “‘religious’ and . . . everyone else.”); Zale, *supra* note 19, at 236 (arguing that some courts’ “overly-expansive interpretations of RLUIPA” threaten to rewrite the statute into “‘a free pass’ elevating religious land use above everything else”).

²⁵² Religious land use is not the only area in which institutional ideas have exerted a creeping and gradual practical influence. *See, e.g.*, Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1185 (2014) (suggesting that lower courts may have been “inadvertently and imprecisely stumbling toward *Hosanna-Tabor*” even before *Hosanna-Tabor* itself).

²⁵³ Hamilton, *supra* note 112, at 423 (arguing that “RLUIPA reflects a new combination of factors . . . [designed] to obtain the best possible advantage for the religious land use applicant”).

they argue that religious institutions receive an appropriate amount of deference and protection under the statute, and some even argue that religious institutions receive too little protection under the statute as currently applied.²⁵⁴

As a result, the debate about RLUIPA's practical effect has stagnated, leaving both sides to chew over the same evidence while reaching different conclusions. In part this stagnation is a function of the evidence relied upon by both sides. It is true that religious institutions lose RLUIPA suits that are decided on substantive grounds in federal court more often than they win.²⁵⁵ On the other hand, RLUIPA plaintiffs still win around half the time,²⁵⁶ and they tend to win more often and with bigger victories than plaintiffs with similar sorts of religious land use claims brought prior to RLUIPA's enactment.²⁵⁷ Similarly, although the rate of litigation in federal court regarding RLUIPA is not dramatically higher than for other kinds of land use disputes involving rights associated with the First Amendment, such as signs or adult uses, the rate of litigation for religious land use disputes has been higher since RLUIPA than it was before the statute was enacted.²⁵⁸ In short, data about the outcomes of RLUIPA suits in the courts has failed to resolve the long-standing, though relatively one-sided, debate about the statute's merits. This should not be surprising: due to selection effects and other related variables, litigation success rates often reveal relatively little reliable and interesting information.

Ultimately, RLUIPA's many critics have always based their arguments on the statute's impact on local governments outside the courtroom as much as the rate and outcome of RLUIPA challenges that are resolved by courts. In particular, the primary criticism of RLUIPA is based on the idea that the statute's substantive ambiguity, combined with its attorneys' fee provisions, deter local governments from regulating religious institutions and railroad governments into unfavorable settlements when disputes do arise.²⁵⁹ In response, RLUIPA's defenders often argue that this criticism of the statute is based largely on anecdotes—there are, for example, “no comprehensive studies of the incidence of out-of-court settlements that are unduly favorable to religious landowners.”²⁶⁰

RLUIPA's defenders have a point here. The primary evidence relied upon by most critics of the statute is somewhat anecdotal—although many of the myriad firsthand accounts about RLUIPA's decisive out-of-court impact on local

²⁵⁴ See *supra* note 108 and accompanying text.

²⁵⁵ See Alan Weinstein, *RLUIPA Challenges: An Ounce of Prevention Is Worth a Pound of Cure*, in *RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS*, *supra* note 166, at 131, 138–39.

²⁵⁶ See Zale, *supra* note 19, at 222 n.100 (noting that “churches prevailed in 11 of 26 cases” decided on the merits in federal appellate courts prior to February 2011).

²⁵⁷ Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2188 (2007).

²⁵⁸ *Id.* at 2188–96.

²⁵⁹ See HAMILTON, *supra* note 3, at 126.

²⁶⁰ Macleod, *supra* note 107, at 127–28.

governments are, at the very least, highly suggestive.²⁶¹ But while comprehensive survey data about RLUIPA's out-of-court impact may be lacking, there is another valuable and underexamined source of information that sheds light on RLUIPA's substantial and negative impact on local governments outside of court.

To see how religious institutions have become, in essence, a “law unto themselves” under RLUIPA with respect to local governments and land use regulations,²⁶² one need only look at what the lawyers who represent both sides in religious land use disputes say about the statute. For example, with respect to the most critical questions related to most religious land use disputes under RLUIPA—the crucial and intertwined issues related to the statute's definition of religious exercise and its substantial burden provision²⁶³—lawyers who represent local governments are forced to provide much more qualified advice than on other topics.²⁶⁴ Put another way, when advising their clients at the outset of a RLUIPA dispute, lawyers for local governments typically find it more difficult to give definite pronouncements either on the resolution of specific issues or the overall likelihood of success.²⁶⁵

When this indeterminacy is combined with RLUIPA's attorneys' fee provision, it is easy to see how religious institutions, under RLUIPA, have become a law unto themselves with respect to local governments and land use regulation.²⁶⁶ Local governments have much to lose in a religious land use dispute. As a result, their counsel, if acting appropriately, must advise local governments to consider the prospect of high fee awards early in a RLUIPA dispute—a time when, due to the statute's particularly ambiguous and inconsistent substantive provisions, it also

²⁶¹ See, e.g., Chris McKenna, *Religion vs. Zoning*, TIMES HERALD-REC. (Dec. 17, 2010, 12:33 PM), <http://www.recordonline.com/article/20050918/News/309189997> [<http://perma.cc/58TJ-65QZ>] (reporting the approval of a school, synagogue, and wedding hall project in suburban New York following a RLUIPA dispute, and quoting the town's planning board chairman as stating, “[w]hen you are dealing with religion, religion trumps all zoning”).

²⁶² See *supra* note 246 and accompanying text.

²⁶³ See *supra* notes 164–192 and accompanying text.

²⁶⁴ See, e.g., Merriam, *supra* note 166, at 114 (noting that “no one will feel truly comfortable answering” questions about substantial exercise or religious exercise “because neither Congress nor the courts have defined the boundaries of either religious exercise or substantial burden”).

²⁶⁵ See *id.* (“Lawyers are often asked: ‘What’s the chance we will win?’ When it comes to RLUIPA claims, the response is almost certain to contain more ‘ifs’ per line than most opinions.”).

²⁶⁶ See Evan J. Seeman, *RLUIPA Defense Tactics: How to Avoid & Defend Against RLUIPA Claims*, ZONING & PLAN. L. REP., Dec. 2014, at 1, 1 (recognizing that “[w]hat municipalities may fear most of all . . . is the potential financial impact of an RLUIPA loss” potentially reaching “millions[] of dollars,” which can lead local governments “to cave to the demands of religious institutions”); see also Merriam, *supra* note 166, at 114 (asserting that the challenge of providing early advice to local governments about RLUIPA is compounded by the high stakes related to attorneys’ fees, even if the matter is resolved before trial).

makes sense for local governments and their counsel to assume that religious plaintiffs will succeed on many of the relevant substantive points.²⁶⁷

These accounts from practitioners who represent local governments in RLUIPA disputes are particularly persuasive evidence regarding the larger academic debate about the statute's impact because they are often echoed by lawyers who have represented religious institutions in RLUIPA disputes.²⁶⁸ In other words, lawyers who represent religious institutions echo the claims made by this Article, RLUIPA's many critics, and the lawyers who represent local governments about the relationship between RLUIPA's expansive and murky substantive provisions and its attorneys' fee provisions.²⁶⁹

So, for example, attorneys who represent religious institutions note that RLUIPA is "a big stick" that should be wielded with some care because it can be so threatening that it might lead the rest of the community to think that a particular religious institution does "not care about local land use considerations."²⁷⁰ Similarly, scholars who have been involved in RLUIPA disputes on behalf of their own religious institutions have described the statute as a "trump card" or a "bludgeon," while lamenting the larger structural effects of a statute "that enables (or requires) religious entities to engage in" extremely aggressive negotiating tactics that would not be tolerated from other land use actors.²⁷¹ These perspectives from lawyers who have worked for religious institutions also offer particularly strong support for the thesis advanced in this Article, because they tend to show how religious institutions in their own right, rather than the beliefs and burdens of institutions' individual members, increasingly take center stage in contemporary RLUIPA practice.

The key point to see here is the strength of the incentives to compromise and settle exerted by RLUIPA on local governments, a strength borne out by the accounts from lawyers who represent both local governments *and* religious institutions in such disputes.²⁷² Due to both the ambiguity of substantive RLUIPA

²⁶⁷ Seeman, *supra* note 266, at 1–2, 9–10.

²⁶⁸ See, e.g., Roman P. Storzer, *The Perspective of the Religious Land Use Applicant*, in *RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS*, *supra* note 166, at 43, 47 (noting widespread "inconsistencies in reported decisions" related to RLUIPA, while pointing out that "many settlements have been reached" in large part because "the risk of a RLUIPA lawsuit might induce municipal officials" to "permit[] the religious exercise to exist").

²⁶⁹ See, e.g., Dalton, *supra* note 141, at 762 (noting that the combination of large settlements and substantive "uncertainty therefore provides a strong incentive [for local governments] to settle in many instances, rather than risk a loss and possibly a costly jury verdict at trial").

²⁷⁰ Wendie L. Kellington, *RLUIPA Practice Pointers—Representing the Religious Claimant*, SN005 ALI-ABA 1141, 1148 (2007).

²⁷¹ See Reilly, *supra* note 128, 557–60 (describing her own experience and gathering other examples).

²⁷² See Seeman, *supra* note 266, at 10 (arguing that it is a misconception for municipalities to think that they must always submit to religious applicants "simply because RLUIPA exists," but pointing out that the first issue local governments should resolve is

doctrine and the effects of the statute's fee provision, the evidence provided by practitioners on both sides of RLUIPA disputes suggests that religious institutional plaintiffs are often able to secure the kind of distinctive treatment that approximates an institutional approach to religious land use. This evidence also suggests that past critics of the statute have a point: the degree of deference and protection that religious institutions often receive is problematic, imposing the costs of religious developments on neighbors and causing local governments to create unwarranted exceptions to legitimate regulatory goals.²⁷³

In sum, therefore, RLUIPA tilts the balance in negotiation and conflict over land use regulation toward religious institutions: an approach that, albeit in negative ways, already approximates the institutional approach critically examined in Part III above. This does not mean that religious institutions win every time in court, nor that local governments are driven to capitulate outside of court in every situation.²⁷⁴ But RLUIPA's substantive uncertainty, the statute's fee provisions, and the stakes of the conflict for local government defendants do provide religious institutions with distinctive deference and protection from local land use regulation. Moreover, this deference and protection is neither based upon nor entirely reducible to concerns or regard for the institution's individual members, but rather focused on the institutional plaintiffs in their own right.²⁷⁵

C. *Hosanna-Tabor and Hobby Lobby Will Exacerbate the Practical Problems RLUIPA Causes*

Unfortunately for local governments, there is every reason to believe that RLUIPA will continue to be applied in this manner, and that the Supreme Court's opinions in *Hosanna-Tabor* and *Hobby Lobby* will reinforce and expand these effects. The connection may be easiest to see with *Hosanna-Tabor*; after all, the institutional approach to religious land use discussed in Part III expressly relies on a concept of institutional free exercise like the one elaborated in *Hosanna-Tabor* in defense of the ministerial exception.²⁷⁶ Under this approach, courts should recognize that "a religious group's right to shape its own faith and mission" is distinct and

"whether they wish[,] . . . if possible, [to] negotiate a mutually satisfactory compromise with the religious group, because legal fees in these cases can mount quickly").

²⁷³ See *supra* notes 241–253 and accompanying text.

²⁷⁴ E.g., *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673, 683 (7th Cir. 2013) (affirming summary judgment for the Town of Woodboro), *abrogated by* *Schlemm v. Wall*, 784 F.3d 362 (7th Cir. 2015).

²⁷⁵ Compare *supra* notes 207–212 and accompanying text (stating that an institutional interpretation of RLUIPA must rest on similar premises), with *supra* notes 238–240 and accompanying text (showing how religious institutions receive special deference and protection under RLUIPA that is often divorced from the views and beliefs of and burdens on their individual members).

²⁷⁶ *Infranca*, *supra* note 4, at 1697–98; see *supra* notes 207, 212–214 and accompanying text.

independent from the rights of its individual members, in both religious land use disputes and in disputes about certain kinds of religious employment.²⁷⁷

What will an increasingly institutional approach to RLUIPA, based on *Hosanna-Tabor*, look like in practice? The answer must begin with the evolution of the ministerial exception since that decision. Since the Court issued its opinion in *Hosanna-Tabor*, many religious organizations have expanded their working definitions of individuals who count as religious ministers. For example, since *Hosanna-Tabor* many religious schools have required all of their administrators, staff, and teachers of all subjects—regardless of whether they are even members of the relevant religious organization—to refrain from either saying or doing anything at any time that might contradict the relevant church’s doctrine.²⁷⁸

This, of course, is entirely predictable. After all, one problem identified by critics of religious institutionalism is the tendency of such theories to expand without limits, in contrast to other First Amendment institutions.²⁷⁹ Put another way, the sphere of religious institutions’ potential sovereignty has fewer inherent limits than other sorts of institutions like newspapers or universities, which makes it much harder to find a common and limited set of principles to cabin the distinctive deference and protection that institutional theories seek to reserve for religious institutions.²⁸⁰ And just as the ministerial exception, at least for the time being, appears to be growing without readily discernible limits in the wake of the organizational free exercise claims advanced in *Hosanna-Tabor*, it is reasonable to expect that the same principles, incorporated into the land use context, will cause

²⁷⁷ *Infranca*, *supra* note 4, at 1698 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012)).

²⁷⁸ See, e.g., *Archbishop Sparks Row with School Rules on Homosexuality and Abortion*, *GUARDIAN* (Feb. 6, 2015, 2:33 PM), <http://www.theguardian.com/world/2015/feb/06/archbishop-san-francisco-homosexuality-abortion>, <http://perma.cc/6SGL-GVMM>] (detailing a Catholic archdiocese’s plan to require “all administrators, faculty and staff, including non-Catholics,” to “refrain from saying or doing anything publicly that contradicts church doctrine” by “identify[ing] all school employees as ministers of the church”); Leslie C. Griffin, *Push Back Against Illegal Morals Contracts*, *HAMILTON & GRIFFIN ON RTS.* (May 13, 2014), <http://hamilton-griffin.com/push-back-against-illegal-morals-contracts/> [<http://perma.cc/5842-G8BJ>] (providing examples of expansive interpretations of the ministerial exception after *Hosanna-Tabor* from around the nation); Joshua J. McElwee, *Contracts that Define Teachers as Ministers Raise Labor Questions*, *NAT’L CATH. REP.* (Apr. 28, 2014), <http://ncronline.org/news/faith-parish/contracts-defining-teachers-ministers-raise-labor-questions> <http://perma.cc/XR5R-7CWX>] (discussing the impact of the ministerial exception on teacher contracts at Catholic schools).

²⁷⁹ See Schragger & Schwartzman, *supra* note 14, at 932–56 (discussing the “potentially unlimited” and “totalizing” nature of religious institutions’ claims, and contrasting those with more limited claims of other First Amendment institutions).

²⁸⁰ See *id.* at 946 (suggesting that “there is no centrally defined core institutional mission” of religious institutions “on which to build a limited account of institutional autonomy”); cf. *supra* notes 216–219 and accompanying text (discussing the role of theories of sphere sovereignty in religious institutionalism generally and institutional approaches to religious land use specifically).

further distension of RLUIPA's already expansive definition of "religious exercise" in the land use context. If all teachers in a religious school may be deemed religious ministers, regardless of what they teach or what their own beliefs might be,²⁸¹ then similarly every kind of land use activity that school engages in might be deemed religious exercise under RLUIPA, at least according to an institutional theory.

The potential effects of *Hobby Lobby* on religious land use, and the ways in which that decision might lead to an increasingly institutional interpretation of RLUIPA, are a bit harder to explain, although the ultimate impact may be even more significant. *Hobby Lobby* has the potential to influence religious land use disputes in an institutional direction in at least two ways. First, as noted by amici and Justice Ginsburg's dissent, *Hobby Lobby* might lead to a dramatic expansion in the types of organizations that could claim protection under RLUIPA.²⁸² If closely held commercial corporations count as "persons" under RFRA, then they might equally well count as "persons" under RLUIPA,²⁸³ and lawyers who represent both local governments and religious organizations are already advising their clients of this possibility.²⁸⁴

Second, and beyond this potential expansion of potential RLUIPA plaintiffs, *Hobby Lobby* might alter the related inquiries into "religious exercise" and "substantial burden" under the statute, shifting both even closer to an institutional approach.²⁸⁵ To see how, it is probably easiest to turn first to an extremely recent

²⁸¹ See *supra* note 278 and accompanying text.

²⁸² See *supra* notes 81–84 and accompanying text.

²⁸³ Lisa Soronen, *Birth Control Mandate Case Also a Land Use Case?*, ICMA (July 15, 2014, 2:19 PM), http://icma.org/en/icma/knowledge_network/blogs/blogpost/2591/Birth_Control_Mandate_Case_also_a_Land_Use_Case [<http://perma.cc/ZP8N-W5YT>]. The relevant portion of RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless there is a "compelling governmental interest" and the burden is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b) (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997). Similarly, the relevant portion of RLUIPA, discussed and excerpted in Part III.C, provides that the government shall not "impose[] a substantial burden on the religious exercise of a person, including an assembly or institution," without a compelling governmental interest and using the least restrictive means to achieve that interest. 42 U.S.C. § 2000cc(a)(1) (2012).

²⁸⁴ See Seeman, *supra* note 266, at 10 (suggesting that after *Hobby Lobby* "municipalities may now wish to proceed as though [RLUIPA] does apply" when privately held corporations assert that their activity is protected by the statute); Daniel P. Dalton, *RLUIPA, Land Use and the Hobby Lobby Decision*, DALTON & TOMICH (Aug. 13, 2014), http://www.daltontomich.com/blog/rliupa_land_use_and_the_hobby_lobby_decision [<http://perma.cc/RML4-N8QP>] (suggesting that a "close reading of Justice Alito's discussion on RLUIPA and RFRA can logically be taken as leaving the door open to RLUIPA claims by for-profit companies as long as the 'exercise of religion' is sincere").

²⁸⁵ See *supra* note 179 and accompanying text; see also Jeffrey Toobin, *On Hobby Lobby, Ginsburg Was Right*, NEW YORKER (Sept. 30, 2014), <http://www.newyorker.com/news/daily-comment/hobby-lobbys-troubling-aftermath> [<http://perma.cc/7792-LA5V>] (gathering examples and suggesting that Ginsburg's *Hobby*

RLUIPA case that postdates *Hobby Lobby*, albeit one involving a prisoner's religious exercise rather than religious land use. In *Holt v. Hobbs*, the Court drew upon *Hobby Lobby*, and the common history of RFRA and RLUIPA, to underscore the statutes' "expansive protection for religious liberty" and "capacious[]" definition of religious exercise.²⁸⁶ In addition, in *Holt* the Court applied the same analysis for a substantial burden under RLUIPA that it applied to substantial burdens under RFRA in *Hobby Lobby*.²⁸⁷

In the land use context, similar trends are likely to further discourage local governments, which in turn will increasingly enable religious organizations to effectively become a "law unto themselves" with respect to local land use controls.²⁸⁸ Although *Hobby Lobby* is less than a year old, courts already rely on it in RLUIPA cases to justify their decisions to avoid any inquiry into whether the land use activity is religious in nature. In other words, if the claimant is a religious institution, and if its relevant activity involves land, then courts have begun to simply conclude that RLUIPA should apply without any further analysis, relying upon *Hobby Lobby*.²⁸⁹

In addition, sophisticated counsel for religious organizations in RLUIPA cases are beginning to invoke *Hobby Lobby* for the same sorts of purposes: to establish the extremely generous limits of religious exercise under the statute; to show how courts must accept, without further inquiry, a religious institution's claim that its activity constitutes religious exercise; and finally, to demonstrate how this nearly unlimited conception of religious exercise should contribute to an equally expansive interpretation of substantial burdens under the statute.²⁹⁰ In sum, courts and counsel for religious plaintiffs are already using *Hobby Lobby* to advance increasingly institutional interpretations of RLUIPA.

Lobby dissent was both correct and prescient, as "the decision is opening the door for the religiously observant to claim privileges that are not available to anyone else").

²⁸⁶ *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015).

²⁸⁷ *Id.* at 863–64.

²⁸⁸ See *supra* note 246 and accompanying text.

²⁸⁹ *E.g.*, *Church of Our Savior v. City of Jacksonville Beach*, 69 F. Supp. 3d 1299, 1313–15 (M.D. Fla. 2014). In *Church of Our Savior*, the court cited *Hobby Lobby* and quoted an unpublished 2006 case for the proposition that "[u]nder RLUIPA, the court does not delve into 'whether the religious exercise implicated by zoning decisions was integral to a believer's faith.'" *Id.* at 1313 (quoting *Men of Destiny Ministries, Inc. v. Osceola County*, No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321, at *4 (M.D. Fla. Nov. 6, 2006)) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014)). If this reasoning sounds familiar, it should. For a discussion of how *Hobby Lobby* might well influence litigants and courts to adopt just such an institutional approach to RLUIPA, see *supra* notes 73–91 and accompanying text.

²⁹⁰ *E.g.*, Brief for Petitioner-Appellant, *supra* note 90, at 2–3, 7–8, 28, 31–33, 40, 53. For a thoughtful analysis of the potential significance and the arguments at issue in *Harbor Missionary Church Corp.*, see, for example, Evan Seeman, Karla Chaffee, & Dwight Merriam, *Ninth Circuit to Consider Effect of Hobby Lobby in Land Use Context*, ROBINSON & COLE (Feb. 25, 2015), <http://www.rluipa-defense.com/2015/02/ninth-circuit-to-consider-effect-of-hobby-lobby-in-land-use-context/> [<http://perma.cc/4JSA-FZGG>].

As practically applied, therefore, some recent interpretations of RLUIPA already approximate an institutional approach to religious land use. Even without an institutional gloss on the statute, under RLUIPA, religious institutions already receive substantial deference and protection in the courts, which are not reducible to the beliefs, practice, or the burdens imposed upon their individual members. Outside of court, the practical effects of this institutional turn are even easier to discern: practitioners on both sides of religious land use disputes note the ways that religious organizations are able to obtain the level of deference and protection advocated by institutionalists thanks to the leverage that RLUIPA's substantive ambiguity and attorneys' fees provisions provides. Unfortunately, the many problems associated with this one-sided approach to religious land use are likely to increase as the institutional chords sounded by *Hosanna-Tabor* and *Hobby Lobby* are incorporated into RLUIPA doctrine in the coming years.

D. An Institutional Interpretation of RLUIPA Will Distort the Religious Marketplace and Relatively Disadvantage Newer and Minority Religious Groups

Thus far, this Article has pointed out the ways in which an increasingly institutional approach to RLUIPA will exacerbate problems that already exist with the statute. In this final section, this Article will show how an increasingly institutional approach to RLUIPA will lead to new problems, inverting the statute's structure for the most vulnerable religious groups and subverting its stated purpose. An increasingly institutional approach to RLUIPA will make the bad parts of a bad statute worse, but it will also create entirely new problems for "new" religious groups, as that term is defined immediately below.

These new problems stem from the following fundamental issue: an institutional approach to religious land use will inevitably wind up treating different kinds of religious institutions facing otherwise similar land use regulations in different ways. This is because such an approach focuses first and foremost on the religious institution at issue, the nature of its religious exercise, and the burdens upon it, rather than considering these issues as supervenient on the more fundamental beliefs, religious exercise, and related burdens of the individual members. If religious institutions are the sorts of things that hold rights as a basic and fundamental attribute of what they are,²⁹¹ and if religious institutions in the land use context suffer burdens, in their own right, to their religious exercise as they develop bonds with a particular location,²⁹² then institutions that have been in place for a

²⁹¹ See, e.g., Schragger & Schwartzman, *supra* note 14, at 919–20 (noting that a common theme of institutional theories "is the view that religious groups do not owe their distinction to the rights and interests of their members[,] but that "[t]heir sovereignty is basic and irreducible, not a function of anything more . . . fundamental").

²⁹² See Infranca, *supra* note 4, at 1698 ("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.").

longer time will inevitably suffer greater burdens than relatively newer institutions facing similar land use restrictions.²⁹³ By definition, newer institutions are not tied to a particular piece of land: so as long as in theory there is other land available to them in a particular jurisdiction, then they cannot be institutionally burdened by land use restrictions in the same way as an existing institution, even if their members might be relatively more burdened by delays or denials of development than an existing institution's members.²⁹⁴

Whether an institution is new or old may not matter much if we care, first and foremost, about the burdens on religious exercise that individual members of religious institutions suffer. Consider two individuals: one a member of a new religious institution without a fixed place for worship, and the other a member of an existing institution, the members of which have been worshipping in the same church for generations. Both religious institutions seek to construct buildings of comparable size on comparable lots that they own.

The development envisioned by both institutions will thus impose similar sorts of externalities on the surrounding community. The only difference is that the new institution wants to construct its first house of worship, and the existing institution wants to expand its current facilities. Imagine now that both projects are blocked by some local land use restriction. Given facts like these, one might well conclude that the relevant land use restrictions impose greater burdens on the member of the relatively new religious institution, which lacks entirely a fixed place for worship, than on the member of the existing institution, the members of which have been happily worshipping in the same place for a long time.

On the other hand, if we care about religious institutions as deserving of special protection in their own right, then the land use contemplated by an existing institution (and its members) will probably receive more protection than an otherwise similar land use contemplated by a new institution (and its members). To many who find the notion of religious institutionalism initially appealing this result may seem counterintuitive. Thus it is important to make clear how this kind of result is an inevitable result—indeed, the designed result—of an institutional approach to religious land use.

As noted above, under an institutional approach to religious land use, religious institutions should get deference and protection in their own right, based in part on the bonds that they have developed with a particular piece of property.²⁹⁵ New institutions, in contrast, lack such bonds, so they can always simply locate somewhere else—assuming, of course, that other space to develop for religious purposes exists, at least in theory, in the relevant jurisdiction. Accordingly, existing institutions will always have greater access to substantial burden claims under RLUIPA than new institutions, at least as long as we focus on institutions rather than individuals as the relevant primary rights holders in such cases.

²⁹³ *See id.* (“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.”).

²⁹⁴ *Id.*

²⁹⁵ *See id.*

To its great credit, the expressly institutional approach to RLUIPA examined critically in Part III confronts this issue head-on. By “new” religious institutions, the expressly institutional account examined above refers both to institutions seeking their first physical location as well as institutions that have existed for some time but wish to move to a new place.²⁹⁶ In contrast, more established or “existing” religious institutions are simply those that have been in a particular place for some time, and which have run into conflict with land use regulations as they seek to alter or expand their footprint.²⁹⁷

Under this approach, substantial burden claims under RLUIPA²⁹⁸ should be reserved for existing institutions, because the core premises of an institutional approach suggest that their distinctive identity, and thus their free exercise, will be most burdened by limiting land use regulation.²⁹⁹ New institutions would not be completely bereft of claims and remedies under this interpretation of RLUIPA, but equally they would not have access to substantial burden claims. Instead, an increasingly institutional interpretation of the statute would limit new institutions to claims based on RLUIPA’s other substantive provisions.³⁰⁰ In other words, under an institutional approach to the statute, new religious institutions would be barred from making substantial burden claims, and would have access only to the statute’s equal terms, nondiscrimination, total exclusion, and unreasonable limitation provisions.³⁰¹

As discussed above, the substantial burden component of the statute is probably the most significant substantive component of the statute, and it certainly represents the statute’s greatest substantive departure from the pre-statutory treatment of religious institutions in the land use context.³⁰² According to the expressly institutional account examined in section IV.A, removing substantial burden claims from new institutions would have the salutary effect of eliminating frivolous claims that might be filed by such new institutions, which could otherwise rely on increasingly expansive institutional interpretations of that section of the statute to file claims with little merit.³⁰³ Again, under an institutional approach these claims will lack merit compared with similar claims made by existing institutions because new institutions have, by definition, not had the time to build the roots to a particular location that existing institutions, seeking to expand on their current site, possess. Similarly, new institutions will be relatively disfavored compared with existing counterparts because local governments usually can point to alternative sites for

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ 42 U.S.C. § 2000cc(a) (2012).

²⁹⁹ See Infranca, *supra* note 4, at 1742 (“An ‘existing institution’ that has operated at a specific location for a significant period of time will find a regulation . . . more burdensome” than a similarly situated new institution.)

³⁰⁰ See *id.* at 1698 (“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.”).

³⁰¹ 42 U.S.C. §§ 2000cc(b) (2012).

³⁰² See *supra* notes 164–192 and accompanying text.

³⁰³ Infranca, *supra* note 4, at 1697–98.

development that are, at least in theory, potentially suitable for a new institution without much additional burden, whereas a move, for an existing institution, will be far more burdensome.

On its face, this might seem like a good idea: we should worry about potentially frivolous claims under an expanded and institutional interpretation of RLUIPA. After all, as discussed above, one of the problems with increasingly institutional interpretations of the statute is the absence of any meaningful limiting principle for religious institutions' claims under such an approach. But denying "new" institutions access to the most significant substantive components of the statute is very strong medicine indeed, and an odd way to proceed, given the stated purposes of the statute and the recent growth of many large and existing religious institutions.

Such an approach would effectively create two different classes of institutional protection in religious land use disputes: extensive and distinctive protection under the full range of the statute for existing institutions, and a default back to pre-statutory levels of protection for new institutions. Moreover, compared with the intent voiced by and attributed to RLUIPA's drafters, the institutional approach represents a dramatic shift in the statute's structure and practical application. This is because the new institutions that would be disadvantaged by such a shift are *exactly* those institutions that Congress found are most vulnerable to whatever discrimination against religious institutions may emerge in land use regulation.³⁰⁴

To be clear, the additional problem with the institutional approach analyzed here is not that all new religious institutions do or will face high levels of discrimination from local governments in the land use context without RLUIPA's protection. Nor is the claim that new institutions will be disadvantaged compared to their secular counterparts: even an institutional approach to RLUIPA surely leaves new religious institutions better off than secular parties with comparable land use development projects. Rather, the problem identified here is that a statute designed in part to address potential discrimination against members of religious minorities will wind up doing relatively little for such believers.

On the other hand, an institutional approach to RLUIPA *will* greatly advantage the kinds of existing institutions and religious believers that have done well in recent years, even before RLUIPA's passage. An institutional approach will also tend to advantage the kinds of religious land use that generate the most significant and wide-ranging externalities that cause problems for local governments in the land use context.³⁰⁵ If we think about American religious life as a marketplace between competitors—a fraught but frequently used trope³⁰⁶—then the problem that an

³⁰⁴ See U.S. DEP'T OF JUSTICE, *supra* note 155, at 3.

³⁰⁵ See *supra* Part III.A.

³⁰⁶ References to America's religious "market" or "marketplace," marked by competition between different groups of believers or non-believers, is common and long-standing in both the popular press and academic debate. Compare Cathy Lynn Grossman, *Christians Drop, 'Nones' Soar in New Religion Portrait*, USA TODAY (May 12, 2015, 6:53 PM), <http://www.usatoday.com/story/news/nation/2015/05/12/christians-drop-nones-soar-in-new-religion-portrait/27159533/> [<http://perma.cc/9HNV-S62D>] (noting that "[a]theists

institutional approach to RLUIPA creates becomes clearer. An institutional approach to religious land use will tip the scales that operate in the religious marketplace even further in the direction of established institutions, and away from newer competitors that often tend to be made up of members from other minority groups. This threatens to leave new religious institutions worse off, even if they are relatively advantaged under RLUIPA compared with similar secular land users, because they will be relatively disadvantaged in the religious marketplace compared with their existing institutional competitors.

To see how denying new institutions access to substantial burden claims would undermine the statute's ostensible solicitude for the members of new and minority religious groups, we need an example. More specifically, we need to find a recent RLUIPA dispute in which a "new" religious institution succeeded on its substantial burden claim while simultaneously raising unsuccessful claims under the statute's other substantive provisions. Such an example would be particularly persuasive in picking out this additional flaw with an institutional approach if the individual members of the "new" institution also belonged to groups who have faced a history of racial or ethnic discrimination. After all, RLUIPA was designed, at least in part, to protect exactly the kinds of religious believers we are looking for in such an example: members of smaller or at least less-mainstream religious organizations, who—at least according to the findings relied upon by Congress—may be particularly vulnerable to local governments in the land use context if they also belong to racial or ethnic minorities that have confronted a history of discrimination.³⁰⁷

Two recent RLUIPA cases, *Bethel World Outreach Ministries v. Montgomery County Council*³⁰⁸ and *Irshad Learning Center v. County of DuPage*,³⁰⁹ provide the examples we seek. Both Bethel World Outreach Ministries ("Bethel") and the Irshad Learning Center ("ILC"), the plaintiffs in these suits, would be classified as new

and agnostics have nearly doubled their share of the religious marketplace" in recent years), with Luis Lugo, *A Land of Immigrants, a Shifting Religious Marketplace*, REFLECTIONS (2008), <http://reflections.yale.edu/article/who-my-neighbor-facing-immigration/land-immigrants-shifting-religious-marketplace> [<http://perma.cc/U67R-P58R>] (noting the growth in America of people who identify as Catholic or unaffiliated).

For an introduction to the literature on the parallels between U.S. religious institutions and market systems, see, for example, Laurence R. Iannaccone, *Religious Markets and the Economics of Religion*, 39 SOC. COMPASS 123, 123 (1992) (noting that "[w]e hear much talk these days of 'religious markets' and 'religious economies[.]'" which some are "tempted to dismiss as . . . misguided and possibly even pernicious" because "[t]he logic of economics and even its language are powerful tools for the social-scientific study of religion"); R. Stephen Warner, *Work in Progress Toward a New Paradigm for the Sociological Study of Religion in the United States*, 98 AM. J. SOC. 1044, 1044 (1993) (reviewing the then-recent literature and arguing "that a new paradigm is emerging . . . the crux of which is that organized religion thrives in the United States in an open market system").

³⁰⁷ See *supra* notes 161–163 and accompanying text.

³⁰⁸ 706 F.3d 548 (4th Cir. 2013).

³⁰⁹ 937 F. Supp. 2d 910 (N.D. Ill. 2013).

institutions under an institutional approach to RLUIPA. Neither institution was very “old” when conflict broke out over their proposed land uses. More importantly, both institutions sought to obtain and use “new” parcels of land, which lie at the center of each institution’s conflict with some of their neighbors and the relevant local bodies of government.³¹⁰ In addition, both groups are extremely sympathetic plaintiffs as well. While many previous scholars have pointed out good reasons to be skeptical about the overall levels of discrimination that most religious claimants face in the land use arena,³¹¹ such skepticism probably is misplaced in these two cases: both Bethel and Irshad reached the right outcome, albeit for the wrong reasons.³¹²

Both Bethel and ILC raised a battery of claims under state and federal constitutional law, in addition to their substantial burden RLUIPA claims. Moreover, both Bethel and ILC were successful in their suits. Both won motions for summary judgment, and then settled for substantial six- and seven-figure sums with the local governments before the respective courts could impose fee awards.³¹³ In addition, and perhaps most importantly for their value as examples here, the victories won by both institutions were dependent on the success of the substantial burden claims under RLUIPA that they advanced. More specifically, Bethel lost on every

³¹⁰ Cf. Infranca, *supra* note 4, at 1698 (defining new and existing institutions and explaining why, under an institutional approach, “new institutions cannot claim the same degree of burden” as their existing counterparts).

³¹¹ See *supra* note 162 and accompanying text.

³¹² In concluding that Bethel and Irshad reached the right result for the wrong reasons, I am claiming that in a world without RLUIPA, Bethel and ILC should have been granted relief based on their First Amendment claims. Indeed, I think ILC’s free exercise claims grounded in both the U.S. and Illinois Constitutions should have been relatively straightforward, given the troubling discrimination that the members of this religious organization faced. See *infra* notes 318–323 and accompanying text. In a world with RLUIPA, however, the constitutional claims advanced by Bethel and ILC were given relatively short shrift, as the courts at issue focused upon and granted relief under RLUIPA’s substantial burden prong, which tends to dominate such suits for all the reasons given in Part III. Under an institutional approach to RLUIPA, which encourages courts to eschew constitutional claims in favor of the statute’s analysis, new institutions such as Bethel and ILC might not have received the relief that they deserved—or, at the very least, it would have been more difficult for them to prove that they deserved the relief at issue under the statute’s substantial burden prong compared with an existing institution with similar development plans.

³¹³ Bill Turque, *Montgomery County Will Pay \$1.25 Million to End Lengthy Dispute over Church on Rural Land*, WASH. POST (Sept. 16, 2013), https://www.washingtonpost.com/local/md-politics/montgomery-county-will-pay-125-million-to-end-lengthy-dispute-over-church-on-rural-land/2013/09/16/4f0d05d0-1ee3-11e3-8459-657e0c72fec8_story.html [<https://perma.cc/7H5X-8CJL>]; *Community Update: Settlement Reached for Irshad Learning Center*, CAIR CHICAGO (June 27, 2013), available at <http://www.cairchicago.org/2013/06/27/community-update-settlement-reached-for-irshad-learning-center/> [<http://perma.cc/V7E7-D9QD>].

other point besides its RLUIPA substantial burden,³¹⁴ and while ILC succeeded on its state RFRA and constitutional free exercise claims, the *Irshad* court's cursory treatment of these issues essentially recapitulated its analysis of the religious claimant's successful RLUIPA substantial burden claim.³¹⁵

Finally, many of the individual members of Bethel and ILC were also members of minorities that have tended to face discrimination beyond their religious beliefs. Bethel's members were predominantly immigrant families from Africa,³¹⁶ seeking to build a church in a rural part of a Maryland county.³¹⁷ Most of the members of ILC were of Iranian origin or descent,³¹⁸ and the reaction from their new neighbors, if not from the local board of zoning appeals, typified the "anti-Muslim sentiment . . . coupled with [absurd] claims about the threats to the United States" that some have observed emerging in American life in recent years.³¹⁹ During ILC's

³¹⁴ *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 554–55 (4th Cir. 2013).

³¹⁵ *Irshad Learning Ctr. v. County of DuPage*, 937 F. Supp. 2d 910, 949–50 (N.D. Ill. 2013) (noting that RFRA and RLUIPA's substantial burden provisions are identical and need not be discussed separately, and resolving the free exercise claims using the same substantial burden analysis used with the main RLUIPA claim). Such an approach is quite common in RLUIPA opinions, which is understandable, given that RLUIPA's freedoms extend far beyond constitutional guarantees of religious free exercise.

³¹⁶ Roman P. Storzer & Blair Lazarus Storzer, *Christian Parking, Hindu Parking: Applying Established Civil Rights Principles to RLUIPA's Nondiscrimination Provision*, 16 RICH. J.L. & PUB. INT. 295, 330 (2013).

³¹⁷ *Bethel World Outreach Ministries*, 706 F.3d at 552.

³¹⁸ *Irshad Learning Ctr.*, 937 F. Supp. 2d at 914.

³¹⁹ Noah Feldman, *Islamic Constitutionalism in Context: A Typology and a Warning*, 7 U. ST. THOMAS L.J. 436, 437 (2010).

Despite the claims made in RLUIPA's legislative history and by some recent scholars, there is little evidence of widespread animus against religious organizations by local governments in recent years, at least in the land use context. *See supra* note 162 and accompanying text. Indeed, as discussed elsewhere in this Article and in other recent scholarship, there is much evidence to the contrary suggesting that many local governments tolerate and even encourage religious organizations and religious land use. *See, e.g.*, Michael Wesp et al., *Anti-Religion Group Takes Issue with Hawkins Sign*, MYEASTTEX (June 9, 2015, 11:53 AM), <http://www.myeasttex.com/news/local-news/anit-religion-group-takes-issue-with-hawkins-sign> [<http://perma.cc/P2RM-LRA8>] (describing a sign constructed and maintained by the Hawkins City Council, which reads "Jesus Welcomes You to Hawkins"). *See generally* Clowney, *supra* note 162, at 860 (casting doubts on the suggestion that churches have been victimized by local zoning boards).

However, as accounts like Feldman's and cases such as ILC demonstrate, the treatment of Muslim religious organizations by local governments may represent a significant and troubling exception to this trend of tolerance and accommodation, one that may stretch far beyond the land use context. *See, e.g.*, John Cominsky, *Chairman: Only Christian Prayers Welcome at Lincoln County Meetings*, WBTVCOM (May 8, 2015, 4:38 PM) <http://www.wbtv.com/story/29018874/chairman-only-christian-prayers-welcome-at-lincoln-county-meetings> [<http://perma.cc/HGR2-5FKF>] (quoting Carrol Mitchem, Chairman of the Lincoln County Board of Commissioners, who said that he will only permit Christian prayers

application for a conditional use, concerns were raised in both ILC's hearings and the local media about the organization and its members' alleged ties to various charities connected with the Iranian government and terrorist organizations,³²⁰ using language that local officials later agreed was inappropriate, "over the top," and ultimately irrelevant to ILC's application.³²¹ Although the court in *Irshad* ruled out any discriminatory intent on the part of the board of zoning appeals,³²² the reaction of at least some of ILC's neighbors to its application means that this dispute, at least, arguably stands as an example of one of the rare cases of religious discrimination that may still emerge in religious land use disputes.³²³

Thus, both *Bethel* and *Irshad* provide exactly the sort of examples necessary to show how an institutional approach to RLUIPA undermines the statute's stated purpose, in addition to exacerbating all of the problems of the statute discussed elsewhere in this Article. Whatever one's views about RLUIPA's overall merits—or one's views about the specific merits of the outcomes in *Bethel* and *Irshad*—the plaintiffs in these cases are among the most sympathetic RLUIPA plaintiffs imaginable, in part because they most nearly embody the kinds of embattled plaintiffs that the statute was designed to protect. Put another way, if the outcome in any RLUIPA suit in which the claimant wins is defensible, then it is in cases and for plaintiffs like those in *Bethel* and *Irshad*. Yet these are exactly the kinds of potential plaintiffs that would be disadvantaged under an institutional approach to religious land use compared with their existing counterparts, which can draw on their history with and connections to the property at issue in order to support a substantial burden claim under RLUIPA. Indeed, for *Bethel* and ILC, an institutional approach to

before local public meetings because he doesn't "need no Arab or Muslim or whoever telling [him] what to do or us here in the county what to do about praying," and that he "ain't gonna have no new religion or pray to Allah or nothing like that"). The existence of such poisonous discrimination, however, provides yet another reason to reject rather than adopt an institutional approach to religious land use disputes: as discussed at length above, because many Muslim religious organizations tend to be "new" religious organizations, they will tend to be systematically disadvantaged relative to their non-Muslim counterparts rather than specially protected under an institutional approach to RLUIPA.

³²⁰ *Irshad Learning Ctr.*, 937 F. Supp. 2d at 914, 928–30.

³²¹ *Id.* at 930.

³²² *Id.* at 939–40.

³²³ See *supra* note 162 and accompanying text; cf. *Zale*, *supra* note 19, at 227 (arguing that "RLUIPA's efficacy in allowing churches to obtain redress for the rare cases of religious discrimination must be balanced against the myriad of [negative] unintended consequences that RLUIPA in its present form creates"). As *Zale* and others point out, rare instances of discrimination against religious organizations in the land use context do not necessarily justify the many problems RLUIPA causes. *Zale*, *supra* note 19, at 227–28. Instead, such problems might be resolved by courts relying on the Religion Clauses as guarantees of nondiscrimination for individuals facing discrimination, rather than as an appendage to RLUIPA and a tool for restructuring land use disputes involving relatively powerful organizations. *Id.*; see also HAMILTON, *supra* note 3, at 136–38 (showing the use of the Religion Clauses in a court's decision regarding appropriate books for children in school).

RLUIPA, which would have limited or foreclosed their ability to make substantial burden claims, might well have changed the outcome of their cases.

Bethel and ILC are, of course, only examples chosen to illustrate a larger point about the problematic nature of an institutional approach to RLUIPA. Beyond these examples, new institutions with more marginal cases than Bethel and ILC will be far *more* disadvantaged than existing institutions pursuing comparable land use development with comparably marginal cases. The worthiness of such claims is largely irrelevant for this argument: my claim here is only that under an institutional approach to RLUIPA it will be more expensive for new institutions to negotiate with local governments and develop land in ways comparable to their existing competitors in the religious marketplace. Indeed, in some cases, new institutions will likely be unable to develop land in ways that are otherwise comparable to their existing competitors.

Thus an institutional approach to RLUIPA will provide disproportionate relative benefit to existing institutions in one of the most visible spheres of the religious marketplace: namely, their physical presence in their communities. Individuals affiliated with new religious institutions will be relatively worse off under an institutional approach to RLUIPA than under the statute as it has been conventionally understood. In other words, such an approach to the statute will inevitably disadvantage the very people whom the statute was ostensibly meant to protect, while rewarding only those people and institutions who need it least. In sum, an institutional approach to RLUIPA will do more than merely exacerbate the existing problems that plague this bad statute: it will make the problems of religious land use worse in new ways that subvert some of the very justifications advanced for the statute's existence in the first place.

V. CONCLUSION

Institutional theories about religious rights are flourishing at the moment: the notion that religious institutions are and ought to be primary rights holders, deserving of special deference and protection in their own right, has found receptive audiences in Supreme Court majorities and contemporary academic debate. Unsurprisingly, arguments for an institutional approach to religious land use generally and to RLUIPA specifically have also begun to appear in recent years. These arguments should be resisted and rejected.

RLUIPA is already a bad statute: enacted to safeguard religious liberty for members of new, small, and minority religious groups, it has instead extended sweeping exemptions and unnecessary leverage to powerful religious organizations regardless of whether they have faced or are facing discrimination. As a result, many religious organizations have been able to dictate the terms of their land use to local governments, impairing local governments' ability to plan for and control externalities arising out of a wide range of land uses not previously considered particularly religious. Fixing this problem must be left to future work: at present, it is enough to try to ensure that RLUIPA does not get even worse in practice than it already is.

An increasingly institutional approach to RLUIPA will make this bad statute even worse: it will give religious organizations even more distinctive deference and protection in their own right than they already enjoy, and it will further erode already crumbling limits on what counts as a substantial burden on religious exercise in land use disputes. Such an approach will, therefore, exacerbate all of the practical problems that RLUIPA presently causes for local governments and for the neighbors of religious institutions that impose significant externalities on their communities in the absence of effective land use controls. Existing institutions will win more exemptions covering a wider range of activity than they presently enjoy, and local governments will be even further deterred from attempting to control expansive religious land uses. In addition, an increasingly institutional approach to RLUIPA will also undermine the statute's core purpose. Under an institutional approach, the members of new and minority religious organizations whose rights RLUIPA was designed to protect will become second-class claimants compared with members of existing and well-established religious organizations, who least need but most enjoy the statute's ever-expanding protections.

It may be difficult to arrest these tendencies, given the influence of the broader institutional turn in this and other areas of religious rights. Nevertheless, courts and litigants should try to resist the institutional turn in land use disputes, by focusing on the burdens and religious activity of the individual members of organizational plaintiffs in RLUIPA. Doing so will not fix all of the practical problems that RLUIPA already causes, but it will keep a bad statute from getting substantially worse.