CHANGING DEMOGRAPHICS AND THE FUTURE OF RELIGIOUS EXERCISE

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Post-Enlightenment Western religion, and legal frameworks responding to it, place special emphasis on individuality and personal conscience. But as the racial and ethnic makeup of the nation evolves, an increasing portion of the nation's population follows religious traditions that emphasize communal practices. Thus, as demographics change, the appearance of religious exercise will change too. Recent scholarly critique, which questions robust protections for religious free exercise, should consider how certain protections may be particularly valuable for minority, but growing, religious perspectives. Specifically, protections for institutional free exercise and religious land use, with the proper limitations, should be seriously considered as desirable safeguards of minority rights. Such approaches to religious liberty law would respect the communal and embodied nature of religious life which looks to expand in years to come.

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Introduction

Most of the Framers of the United States Constitution came from a Western Protestant background.[1] Those whose background was not explicitly Protestant still were steeped in Enlightenment thought.[2] As a result, safeguards for religious freedom enshrined in the Constitution and early American legal thought were built on individualist assumptions.[3] Those assumptions only strengthened in the following centuries, as the Supreme Court eventually applied all individual free exercise protections against not only the federal government, but state and local governments as well.[4] On top of that, Congress and state legislatures have gone above and beyond modern constitutional requirements to constrain themselves.[5] Today, individual religious liberty is at a high point. If an individual can show a particular law contradicts her religion-informed conscience, she will have a good chance at avoiding the requirements of the law.[6] Moreover, in recent decades the Supreme Court has supported a broader conception of religious freedom than one that focuses only on individual consciences.[7] It has upheld a form of institutional free exercise, which allows organizations certain privileges because of religious status or conviction.[8]

Seeing this robust array of religious liberty protections, many commentators understandably have argued that it is time to back up.

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[1] David L. Holmes, *The Founding Fathers, Deism, and Christianity*, ENCYCLOPAEDIA BRITANNICA (Dec. 21, 2006), https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214.

[2] *Id.*

[3] *See* Hanz Gutierrez, *Protestantism and Contemporary Individualism – Dialoguing with Zygmunt Bauman (1925–2017)*, SPECTRUM (June 8, 2017), https://spectrummagazine.org/article/2017/06/08/protestantism-and-contemporary-individualism%25E2%2580%2594dialoguing-zygmunt-bauman-1925-2017 (describing the relationship between Protestantism and Individualism).

[4] *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

[5] *See, e.g.*, The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4; 71 PA. CONS. STAT. §§ 2401–08 (2021); VA. CODE ANN. § 57-2.02 (2021); N.M. STAT. ANN. §§ 28-22-1 to -5 (2021).

[6] *See Emp. Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990) (applying rational basis review to neutral, generally applicable laws that only incidentally burden religious exercise); *but see* 42 U.S.C. § 2000bb-1(a) (mandating that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," and evaluating such laws under a strict scrutiny standard). Notably, this statute was passed in response to *Smith*'s more relaxed approach. *Id.*

[7] *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012) (recognizing the religious freedom of a religious entity).

[8] *See, e.g.*, *id.* at 181.

In their view, the new overly broad freedom tramples other interests that are at least as important, like those secured by antidiscrimination laws.[9] Common targets include institutional religious freedom and property-focused protections like those found in the Religious Land Use and Institutionalized Persons Act (RLUIPA).[10] To critics, these protections go too far (and might even be ontologically incoherent), securing broad rights for organizations or corporations when the legal protections for individuals that make up those entities already do enough work on their own.[11]

This essay argues that any critique of institutional free exercise or religious land use protections should consider how those protections may benefit minority faiths and ethnic groups.

Broad protections for the religious exercise of individuals largely (though of course not solely) benefit adherents of white, Western denominations and faiths.[12] As demographics change, though, people of faith in the United States are increasingly non-white and from faith traditions that developed outside the context of the Enlightenment.[13] That matters because although Enlightenment-shaped faiths emphasize personal conscience and individual religious exercise, other faiths or denominations by comparison emphasize communal and embodied practices—group events and activities centered at particular places or on physical things.[14] As the religious demographics of the United States change in this way, we should ensure that members of minority faith groups appreciate as much legal protection as that which members of individualist traditions have long enjoyed. Certain safeguards for religious institutionalism and land use may be important tools for ensuring that protection.

Part II of this essay briefly describes the religious philosophy that has long been dominant in the United States—one that

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[9] *See, e.g.*, Leslie C. Griffin, *A Word of Warning from a Woman: Arbitrary, Categorical, and Hidden Religious Exemptions Threaten LGBT Rights*, 7 ALA. CIV. RIGHTS & CIV. LIBERTIES L. REV. 97 (2015) (arguing that broad religious exemptions threaten minorities and harm civil rights).

[10] John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693 (2013); Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013).

[11] *Id.*

[12] Currently, those identifying as white Christians make up around 46% of the population. *Religious Landscape Study*, PEW RSCH. CTR. (2014), https://www.pewforum.org/religious-landscape-study/#religions.

[13] *America's Changing Religious Landscape*, PEW RSCH. CTR. (May 12, 2015), https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[14] Kenneth I. Pargament, William Silverman, Steven Johnson, Ruben Echemendia & Susan Snyder, *The Psychosocial Climate of Religious Congregations*, 11 AM. J. CMTY. PSYCH. 351, 368 (1983), https://link.springer.com/content/pdf/10.1007/BF00894054.pdf.

emphasizes individual outworking of personal conscience. Part III describes the changing religious demographics of this country and how this trend will likely result in a greater prominence of minority faiths that emphasize communal and embodied practices. Part IV will explore how legal protections for institutional free exercise and religious land use perhaps could accommodate those demographic shifts. Part V suggests reasonable limitations on religious freedom protections so that the protections will not be used offensively by powerful groups to effectively veto laws that benefit the public.

I. The Classic American Religious Philosophy

At and after the American founding, the "two spheres" conception of church-state relations dominated.[15] Under this perspective, some parts of life are under the authority of government, and other parts are under the authority of God or the church.[16] Specifically, internal convictions and beliefs, and many matters of conscience, are for God's or the church's governance, while much public behavior is the state's business.[17] In fact, early proposals for what became the Free Exercise Clause specifically included statements regarding the liberty of conscience.[18] Though that language did not make it into the final draft, the principle continued on in American law.

The two spheres philosophy of church-state relations had theological roots in some strands of European Christianity. The seeds were planted during the Papal Revolution. Resisting the influence of aggressive European kings, Catholic popes asserted authority over all matters of church practice.[19] The Protestant Reformation grasped that authority of the church and seated it with each individual person.[20] One of Protestantism's foundational principles was that each person has the right to choose their faith for themselves and no outside force can control an individual's conscience.[21] Individual volition was central.

That individualistic outlook on faith remained at center stage during the First and Second Great Awakenings in the United States.

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[15] JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 62–63 (4th ed. 2016).

[16] *Id.* at 31–33.

[17] *Id.* at 32–33.

[18] MICHAEL W. MCCONNELL, THOMAS C. BERG, & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 52 (4th ed. 2016).

[19] *Id.* at 13.

[20] *Id.* at 15–17.

[21] *Id.* at 17–18.

Both revivals brought a renewed passion for personal piety.[22] Emotional spiritual experiences were critical, and preachers emphasized the need for personal conversion decisions.[23] Although participants in revival events came from a variety of backgrounds, the teaching was distinctly Western and individualistic.[24]

Today, although American religious life is not so uniformly Christian, the dominant religious philosophy is similar. Among Christians, the need for personal conversion or personal relationship with God or Jesus is placed front and center.[25] Especially in Protestant circles, a person is often deemed "saved" based on an individual prayer or other sincere personal spiritual experience.[26] Beyond the question of salvation, Christians are encouraged to individually "share their faith" and individually act consistently with their moral convictions in private and public.[27] All in all, the truly Christian life is, to many, marked by individual decisions that signify a particular form of piety. And, under the most common modern conception in popular Christian culture (and somewhat contrary to early Christian thought), the "end" to which the Christian life is headed involves the soul escaping this world into a spiritual "heaven."[28] If the end game is the travel of the individual soul, the preparation is distinctly personal, aimed towards preparing that person's soul to make the trip.[29]

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[22] *Great Awakening*, ENCYCLOPAEDIA BRITANNICA (last updated July 16, 2021), https://www.britannica.com/event/Great-Awakening; *Second Great Awakening*, ENCYCLOPAEDIA BRITANNICA (May 8, 2019), https://www.britannica.com/topic/Second-Great-Awakening.

[23] *Id.*

[24] *Id.*

[25] *See, e.g.*, Southern Baptist Convention, *Baptist Faith and Message 2000*, § IV, https://bfm.sbc.net/bfm2000/#iv-salvation (last visited Jan. 8, 2021); Karen Edmisten, *Personal Relationship with Christ?*, SIMPLY CATH., https://www.simplycatholic.com/a-personal-relationship-with-christ/ (last visited July 25, 2021).

[26] *See, e.g.*, *What Must I Do to Be Saved?*, THE CHRISTIAN WORLDVIEW, https://www.thechristianworldview.org/about-us-2/what-must-do-to-be-saved/ (last visited July 25, 2021); *Salvation Prayer*, KENNETH HAGIN MINISTRIES, https://www.rhema.org/index.php?option=com_content&view=article&id=223&Itemid=20 (last visited July 25, 2021).

[27] Mary Fairchild, *How to Share Your Faith*, LEARN RELIGIONS (Feb. 19, 2019), https://www.learnreligions.com/how-to-share-your-faith-701257.

[28] *See* N.T. WRIGHT, SURPRISED BY HOPE (2008) (describing how early Christian thought supported an idea of the "end" that is different from the modern concept of "heaven"). Albert Brumley's "I'll Fly Away," or Brad Paisley's "When I Get Where I'm Going" are some of the countless examples of songs speaking of escaping to Heaven as the ultimate destination after death.

[29] Despite its popularity among lay people, this conception of the "end" is resisted by many Christian scholars. N.T. Wright, for example, has emphasized the Christian

Even among people in the United States who claim no particular religion, "faith" is usually individualistic. Pop culture is saturated with messages like "find yourself," "be true to yourself," and "follow your dreams," and many people place various forms of self-actualization at the pinnacle of personal priority.[30] Because of this, and because of the dominant Western view of Christianity described above, Harold Bloom of Yale famously argued that the dominant religious faith in America is *Gnosticism*—a belief system that places private personal experience and connection with the divine at the center of spiritual life and human flourishing.[31] The Supreme Court implicitly endorsed a similar philosophy of religion while interpreting a statute in *United States v. Seeger*.[32] And with "non-religious" convictions following the same conscience-centered, individualized form as religious convictions, it is no surprise that commentators have questioned whether "religion" is worthy of special legal protection.[33] Perhaps, instead, all matters of sincere moral conviction should be treated the same under the law.

An emphasis on hyper-individualistic faith is reflected in the United States' approach to religious liberty law. Our rights of belief and conscience are strongly protected.[34] Indeed, earlier Supreme Court precedent held that the belief-action distinction was key to determining how government could regulate religious exercise.[35] Outward acts could be limited but personal belief could not be subjected to compulsion. Eventually this distinction faded,[36] only to yield to greater individual freedom. Perhaps the culmination of personal religious freedom came when the Supreme Court held that courts may not question the reasonableness of a person's religious convictions; as long as that person has a sincere individual conviction

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Bible's insistence that the end destination for those who are "saved" is bodily resurrection into a renewed and perfected world every bit as physical as the current one. *See, e.g.*, *id.*

[30] *See, e.g.*, *A Guide to Finding Yourself*, PSYCHALIVE, https://www.psychalive.org/finding-yourself/ (last visited July 25, 2021).

[31] Henry F. May, *Democratic Gnosticism: The American Religion?*, 21 REVS. IN AM. HIST. 185, 185 (1993).

[32] 380 U.S. 163, 165–66 (1965) ("We believe that, under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.").

[33] Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012); BRIAN LEITER, WHY TOLERATE RELIGION? (2013).

[34] *See, e.g.*, *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981).

[35] *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

[36] *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963).

motivated by "religious" belief, the law may protect her.[37] Majority religion in the United States has been individualistic, and so historic legal protections have been too.

II. The Effect of Changing Religious Demographics

Many have said that the United States is now becoming less religious.[38] It would be more accurate to say that a smaller portion of the white population identifies with a particular religion.[39] Other racial and ethnic groups are holding relatively steady on measures of religiosity.[40] And because those groups are growing relative to white people of European descent,[41] the result is that an increasing percentage of religious people are not Caucasian.

Statistically, non-white religious adherents approach their faith somewhat differently than white people of faith.[42] The easiest way to describe this difference is that Latin-, African-, and Asian-American faith practices are on average more communal and place-based than the European-American individualized practices described in Part II. Compared to white Americans, non-white Americans, especially those identifying as Black or Latino, are more likely to regularly attend religious services.[43] They are also more likely than white Americans to identify religion as an important part of their lives, and more likely to frequently attend a prayer group or religious study group.[44] Although Americans identifying with an Asian heritage are statistically less religious than other groups, Asian-Americans who *are* religious are more committed to attending religious services and engaging in other religious activities than religious white Americans.[45]

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[37] *Thomas*, 450 U.S. at 713–14.

[38] Henry Olsen, *America is Becoming Less Religious. That Won't Demolish Conservatism.*, WASH. POST (Apr. 2, 2021), *https*://www.washingtonpost.com/opinions/2021/04/02/america-is-becoming-more-secular-that-doesnt-mean-conservatives-are-doomed/.

[39] Daniel Cox & Robert P. Jones, *America's Changing Religious Identity*, PUB. RELIGION RES. INST. (Sept. 6, 2017), https://www.prri.org/research/american-religious-landscape-christian-religiously-unaffiliated/.

[40] *Id.*

[41] Dudley L. Poston, Jr., *3 Ways that the U.S. Population Will Change Over the Next Decade*, PBS (Jan. 2, 2020), https://www.pbs.org/newshour/nation/3-ways-that-the-u-s-population-will-change-over-the-next-decade.

[42] Pargament, Silverman, Johnson, Echemendia & Snyder, *supra* note 14, at 368.

[43] *Religious Landscape Study: Racial and Ethnic Composition*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study/racial-and-ethnic-composition/.

[44] *Id.*

[45] *Id.*

So, all in all, non-white religious Americans are more likely to engage in religious practices that involve communal gatherings or meetings in particular geographic locations. Compared to their white counterparts, it appears more important for non-white religious Americans to gather with others, and to use physical property for religious activities.[46] Because the United States is becoming less white (and because the diminishing religiosity of the nation is primarily present among white people but not others), the future of religious exercise is communal and spatial. Although non-white religious Americans do emphasize individual faith practices just like their white counterparts, the special value placed on services and group gatherings means a legal landscape that only accommodates personal conscience would be deficient.

III. Respecting Future Religious Exercise

Of course, religious freedom law in the United States does protect more than individual rights of conscience. Constitutional law specifically protects certain rights of religious institutions, notably through the ministerial exception,[47] and statutory law protects the right to use land for religious purposes.[48] Many commentators question these protections, claiming they go too far to privilege religious people over others or some religious people over other religious people.[49] But we should consider how these protections secure rights necessary to racial and ethnic minorities' religious exercise.

Because non-white religious adherents place greater emphasis on religious services and group gatherings, the law must reasonably protect their rights to gather and conduct rites. First, freedom for religious institutions is vital.[50] Although individuals may come together to meet, pray, or study on their own initiative, many deep religious activities are organized or performed by institutions—churches, synagogues, mosques, and other entities. Indeed,

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[46] *Id.*

[47] The ministerial exception bars the application of employment anti-discrimination laws to religious groups when selecting their own ministers. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 180 (2012).

[48] *See* RLUIPA, 42 U.S.C. §§ 2000cc–2000cc-5.

[49] *See, e.g.*, Zachary Bray, *RLUIPA and the Limits of Religious Institutionalism*, 2016 UTAH L. REV. 41 (2016).

[50] Supreme Court case law supports "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Ch. in N. Am.*, 344 U.S. 94, 116 (1952).

institutional approval is definitionally essential to some significant religious conduct. In Catholicism and some other Christian traditions, for example, the sacrament of the Eucharist is effected by the actions of a priest before congregants partake in the bread and wine.[51] Likewise, in some traditions theology or sacred texts can only be taught, and the liturgy of confession and forgiveness can only be performed, by individuals given that right by the church itself.[52]

Even at a less formal level, religious institutions play a central role in non-white traditions. For example, the Black Protestant Church has long served as the center of the community as a source of not only religious instruction and ritual worship, but of community fabric and "family."[53] It has played a crucial role in helping congregants navigate all areas of life, from social care to social activism to personal spiritual formation.[54]

Next, because of the forms of religious practice that look to grow as demographics change, legal protections for religious land use are important too. Like with the religious institution, the property on which a church building, synagogue, or mosque sits is indispensable to much core religious exercise. Communal worship, social care, and group learning often require a place—a specific location where people can congregate and participate in group activity.[55] Relatedly, Catholicism, which more Latino and fewer Caucasian Americans are practicing,[56] urges congregants to attend the church designated in their geographic area.[57] Connectedness to local community, and physical practices like baptism, the Eucharist, and confession, are central to the faith.[58] Outside of popular monotheistic traditions, Native American faiths often place special spiritual significance on

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[51] *The Liturgical Celebration of the Eucharist, Catechism of the Catholic Church*, THE VATICAN, https://www.vatican.va/archive/ENG0015/__P40.HTM.

[52] *See, e.g.*, Elder C. Scott Grow, *Why and What Do I Need to Confess to My Bishop?*, THE CHURCH OF JESUS CHRIST OF THE LATTER-DAY SAINTS, https://www.churchofjesuschrist.org/study/new-era/2013/10/why-and-what-do-i-need-to-confess-to-my-bishop?lang=eng (last visited July 28, 2021).

[53] Marilyn Mellowes, *The Black Church*, PBS, https://www.pbs.org/wgbh/americanexperience/features/godinamerica-black-church/.

[54] *Id.*

[55] *The Place of Worship*, LIGONIER MINISTRIES, https://www.ligonier.org/learn/devotionals/place-worship/ (last visited July 28, 2021).

[56] PEW RSCH. CTR., *supra* note 13.

[57] Fr. Michael P. Enright, *Worship Local*, U.S. CATH. (Dec. 11, 2015), https://uscatholic.org/articles/201512/worship-local/.

[58] *Id.*

particular geographic locations.[59] So, though religious white Americans may be comparatively more content with individual, isolated displays of piety alone, the communal nature of much non-Western religious practice seeks rootedness to a place and social, bodily expression of beliefs and values.

In fact, a recent empirical study showed that RLUIPA has been particularly effective at protecting the rights of minority religious groups, consistent with its intended purpose.[60] For example, Jewish, Muslim, and Orthodox Christian entities have brought about 21% of the RLUIPA claims in state courts, and about 25% of RLUIPA claims in federal courts;[61] both percentages far exceed the percentage of the U.S. religious population those groups comprise.[62] And the success rate of those minority faith claims is as good as the success rate of claims brought by Christian majority entities.[63] Part of the reason RLUIPA especially benefits minority faiths may be because the statute constrains religious bias and hostility against such faiths by government decisionmakers.[64] Both bias against minority faith groups and the special emphasis those groups may place on using land probably contribute to the fact that such groups particularly benefit from RLUIPA.

Because religious institutions and physical presence on particular land can serve such an important function for people of faith, especially those who are not Caucasian or from majority religious groups, our law should accord those things proper respect. To make religious freedom equitable moving forward, we must seek to respect the expressions of these particular religious traditions as much as we accommodate the freedom of conscience which is so valued in many Caucasian religious circles. Institutional free exercise and religious land use protections fit the bill for this challenge. Both secure freedom for the entities that foster communal and embodied religious activities in ways individuals acting unilaterally driven by their own consciences perhaps could not.[65] If a religious institution is the only (or the best) means by which sacraments can be administered, congregants can be instructed, and the needy can be cared for, then the institution should be allowed freedom to do those

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[59] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449–50 (1988).

[60] Lucien D. Dhooge, *RLUIPA at 20: A Quantitative Study of Its Impact on Land Use and Religious Minorities*, 46 J. LEGIS. 207, 209 (2019).

[61] *Id.* at 212, 215.

[62] *Id.* at 209–10 n. 14.

[63] *Id.* at 233–34.

[64] *Id.* at 238–40.

[65] *Id.* at 207–08.

things (and other things it considers necessary) consistent with the relevant religious dictates. And if those activities and other gatherings can only happen in geographic space, then the institution should have some freedom to use land for those purposes as well. Any proposed restriction on these protections should consider the oversized impact such limits could have on minority religious adherents.[66]

IV. Necessary Limits

Critics are right that institutional free exercise and religious land use can present challenges for the public interest. Indeed, I have questioned RLUIPA's propriety on the ground that it hampers a core function of local governments.[67] And I share the concern that institutional and land use protections may be leveraged as a sword instead of a shield by large, majority-white congregations where such protections may not be as necessary.[68] This subsection proposes some limitations on protections for institutional religious land use to address some of these concerns.

One of the biggest concerns presented by robust protections for institutional free exercise and religious land use is that "mega-churches" will weaponize their rights and bully local governments contrary to the public interest.[69] Large churches that host massive gatherings on a weekly basis create wear on roads and generate noise and traffic.[70] They are often accompanied by large parking lots and thus may present environmental hazards.[71] Local governments (and, by extension, the people they represent) may prefer to limit the size or frequency of gatherings, especially in residential areas. But RLUIPA constrains a local government's traditional right to limit undesirable land uses if the limitation would substantially burden the church's religious exercise (or if the limitation would not have been placed on a similar non-religious entity).[72]

My recommendation to protect the public interest from aggressive, harmful land use by large organizations is to lean in to the substantial burden and compelling interest analyses set forth under RLUIPA.[73] First, courts should seriously consider whether a local

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[66] *See, e.g.*, Bray, *supra* note 49; Schragger & Schwartzman, *supra* note 10.

[67] Brian M. Miller, *Religion and Local Power*, 72 MERCER L. REV. (forthcoming 2021) (manuscript at 32) (on file with author).

[68] *See, e.g.*, Bray, *supra* note 49, at 60–61.

[69] *See, e.g.*, *id.*

[70] *Id.* at 65.

[71] *Id.* at 64–65.

[72] 42 U.S.C. § 2000cc(a)(1).

[73] *See id.*

government's land use limitation in fact substantially burdens religious exercise. The leaders of massive churches are disproportionately white[74] and, despite their congregations' numbers, may not emphasize the importance of physical presence. They often focus more on the sermon portion of the service[75] (which can likely be witnessed remotely online) and, to the extent they encourage community interaction, do so through smaller group meetings in members' homes.[76] When a court must determine whether a land use restriction substantially burdens a claimant's religious exercise, it should consider how important the land use actually is to the claimant. Certainly, limitations on larger gatherings could burden any religious institution. But for institutions that emphasize personal spiritual experiences and acts based on individual convictions—more so than communal practices and physical exercises at religious services—a limitation on larger gatherings may not be as "substantial" of a burden.[77] Not every burden on religious exercise must trigger the compelling interest requirement.[78]

Similarly, a local government could more easily demonstrate a compelling interest in limiting certain activities of massive religious institutions than it could for those of smaller entities. A late-night gathering of 5,000 people in one location could present more dangers to the public interest (for example, because of excessive night traffic and more polluting vehicles on the road) than would a gathering at a smaller church of 100 people happening at the same time. I do not mean to say that larger church gatherings are never good for the public; they often are. But reasonable limitations built into RLUIPA's compelling interest test are necessary safeguards for local governments, and courts should respect them.

Another objection to institutional religious exercise arises because of cases like *Burwell v. Hobby Lobby*,[79] in which the Supreme Court interpreted the protections of the Religious Freedom Restoration Act (RFRA) to apply to a closely-held for-profit

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[74] Daniel Silliman, *The Majority of American Megachurches are now Multiracial*, CHRISTIANITY TODAY (Dec. 21, 2020), https://www.christianitytoday.com/ct/2021/january-february/multiracial-church-megachurches-race-relations.html.

[75] Jeff Robinson, *The Case for Sermon-Centric Sundays*, THE GOSPEL COAL. (Oct. 3, 2019), https://www.thegospelcoalition.org/article/case-sermon-centric-sundays/.

[76] *See, e.g.*, *Small Groups*, SADDLEBACK CHURCH, https://saddleback.com/connect/smallgroups.

[77] *See Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 94–97 (1st Cir. 2013) (describing various formulations of the substantial burden inquiry).

[78] *Id.* at 96.

[79] 573 U.S. 682 (2014).

corporation.[80] One potential objection to this conception of religious freedom is that it allows individuals, who already appreciate broad protection under RFRA, to obtain another level of protection, maintaining an exemption from generally applicable laws even when the laws apply only to the non-natural entity—the corporation. Institutional free exercise, so conceived, seizes the state's benefits of corporate form and still retains a personalized veto for potentially numerous federal laws. It is one thing to allow individual people the right to an exemption from laws that burden their religious exercise, but perhaps it is a more serious thing to allow the same protections to corporations with thousands of employees and massive assets. The public interest gets pushed to the side more quickly when such an entity gains a blanket exemption from laws its leadership finds contrary to their beliefs.

I respect that concern and would offer some limitations here too. Setting aside the statutory interpretation issue presented in *Hobby Lobby*, I would suggest that institutional free exercise perhaps be limited to true religious institutions. That appears to be the present reach of the ministerial exception anyway. Thus, a church, synagogue, mosque, or other religious institution should be entitled to special protection as a non-natural "person," but a for-profit corporation perhaps should not. Of course, it is a tough line drawing problem to decide what sorts of entities count as "religious" and which do not.[81] But at a minimum I think the institution should have some sort of confirmable religious identity separate from the personal views of its members.

Relatedly, *Hobby Lobby* and other cases invite the objection that "religion" per se should not be given special treatment.[82] For example, Hobby Lobby was entitled to an exemption from a contraceptive law because Hobby Lobby's owners had a conviction, based on their religious beliefs, that abortifacient contraceptives were immoral.[83] But what about a company whose owners follow no specific religious tradition but believe based on the scientific evidence that abortifacient contraceptives terminate innocent human life? Presumably, such a corporation would not be entitled to an exemption under RFRA, or the Free Exercise Clause if that provision were in play. From a purely theoretical standpoint, this disparate

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[80] *Id.* at 690–91.

[81] *See, e.g.*, Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 SO. CAL. L. REV. 539, 539 (2015).

[82] *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021).

[83] *Hobby Lobby*, 573 U.S. at 691.

treatment is hard to justify, and institutional religious protections might only exacerbate the problem.

But I believe institutional free exercise and religious land use, if conceived of properly, can actually be part of the solution. When commentators rightly point out that *all* people act on the basis of conscience and deeply held beliefs,[84] they reasonably question religion's special treatment under the Constitution and statutes. Perhaps, then, it is *institutional and not individual* religious exercise that should be treated as special compared to general claims of conscience.[85] Although all people may act based on their convictions, religious or not, religious *institutions* may be unique in their historical role as centers for community and group practices, special forms of land use, and spiritual formation.[86]

From a practical standpoint, the limitations on broad free exercise I urge may require courts to be more skeptical of individual claimants who assert a burden on their religious exercise.[87] Courts perhaps should give less weight to individual claims when the individual cannot point to an institution with which they are affiliated, or when any affiliated institution would not place much value on the particular issue relevant to the individual's objection. In such cases, the claim more likely flows from individual conscience than from any form of institutional or religious affiliation which might make it unique from other types of conscience claims. In a way, the Court may have constrained itself from such an approach when it limited its inquiry in religion cases to the issue of the sincerity of the claimant's beliefs.[88] But because courts still must determine that a claimant's *religious* exercise is substantially burdened (which in theory is different from asking whether their conscience is burdened), it appears that courts have room within existing doctrine to look on isolated claims by *individuals* under RFRA, RLUIPA, or other provisions with some degree of skepticism.

To summarize, even as I advocate for protections for institutional free exercise and religious land use, courts have multiple tools at their disposal to protect the public interest from "aggressive" claims of massive organizations or isolated individuals. The substantial burden and compelling interest inquiries under RLUIPA (and even RFRA) can guide courts to be more receptive to the claims

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[84] *See* Schragger & Schwartzman, *supra* note 10, at 919–20.

[85] *See, e.g.*, Schwartzman, *supra* note 33, at 1392.

[86] *See* Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007).

[87] I might particularly urge this approach for religion claims brought against local governments. *See* Miller, *supra* note 67.

[88] *See, e.g.*, *Seeger v. United States*, 380 U.S. 163, 165–66 (1965).

of smaller institutions and less beholden to the wishes of large entities that create greater externalities. Privileging institutional religious exercise, instead of personal claims of conscience brought in the name of religious freedom, can serve to respect religion for its truly unique elements. Overall, these safeguards alongside institutional free exercise and religious land use could help ensure that non-white or minority religious traditions are given respect without giving unfair advantage to some white religious institutions that already hold a privileged status.

Conclusion

White Americans are becoming less religious. But the same is not true for Black, Latin, and Asian Americans, and those groups are growing as a proportion of the United States populace. One consequence of these shifts in demography and religiosity is that the future of religious practice is more communal and embodied—tied to group gatherings and geographic places. So, while individual claims of conscience historically have stood at the forefront of American religious freedom cases, institutional and land use-based claims may expand in prominence moving forward. Scholars have offered various insightful critiques against such claims, but before committing to rolling back institutional free exercise and religious land use protections, we should grapple with their value to racial and ethnic minorities. Indeed, charges that religion should not receive special treatment may make more sense for individualized claims of conscience than for institutional or communal claims. Perhaps religion, especially that of racial and ethnic minorities, is special because of its institutional and communal characteristics. If so, our laws should reflect that reality.