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Institutional Religious Exemptions: A Balancing Approach

I. INTRODUCTION

"Whether and when to exempt religious practices from regulation is the most fundamental religious liberty issue in the United States today."[1] The debate concerning exemptions for religious individuals from neutral, generally applicable laws is longstanding,[2] and the debate over exemptions for church-affiliated organizations and other religious institutions ("institutional exemptions") has gained increased media and legal attention in the past few years. Controversy has escalated with the Supreme Court's formal recognition of a "ministerial exemption" to federal antidiscrimination laws[3] and with a limited religious exemption to the Department of Health and Human Services ("HHS") contraceptive mandate.[4] Proponents of institutional exemptions argue that exemptions are necessary to protect religious freedom and autonomy; without them, the government unjustifiably intrudes into the sphere of religion by regulating private behavior in ways that jeopardize free exercise rights.[5] By protecting religious institutions' right to self-governance, proponents argue, institutional exemptions protect religious freedom for individuals.[6] Professor Mary Ann Glendon, for example, opines that the HHS mandate "is a grave

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1. Douglas Laycock, *The Religious Exemption Debate*, 11 RUTGERS J.L. & RELIGION 139, 145 (2009).

2. *See, e.g.*, Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1514–15 (1979).

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

4. The mandate, finalized and rendered effective in August 2013, requires employers who offer health plans to "provide contraceptive coverage" but exempts "religious employers" from this requirement. 45 C.F.R. 147.130.

5. *See, e.g.*, Eileen P. Kelly & Thomas E. Kelly, *A Retrospective on Public Policy Threats to Religious Liberty in the Workplace*, 17 CATH. SOC. SCI. REV. 241, 241–42 (2012) (arguing that Catholic institutions have been increasingly under attack by generally applicable secular law and public policy that contravenes Catholic morality).

6. *See, e.g.*, Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009).

violation of religious freedom" because it does not contain an adequate religious exemption.[7]

Critics of institutional exemptions, on the other hand, contend that broad exemptions may unjustifiably authorize religious organizations to violate civil rights laws.[8] Because religious groups may sometimes "exert, on the individual, oppressive and coercive power," exemptions may undermine individuals' rights by sanctioning the institutions' use of coercive power.[9] Some have argued that institutional exemptions amount to undue preferential treatment of religious organizations, which undermines the efficacy of law.[10] Professor Frederick Mark Gedicks, for example, argues that an overly broad exemption to the HHS mandate could subvert important Constitutional values such as access to contraceptives.[11] Many believe that the ministerial exemption,[12] sanctioned in *Hosanna-Tabor*, licenses church-affiliated institutions to engage in harmful, discriminatory practices.[13]

7. *See, e.g.*, John Garvey et al., *Unacceptable*, THE BECKET FUND FOR RELIGIOUS LIBERTY (Apr. 11, 2012), http://www.becketfund.org/wp-content/uploads/2012/04/Unacceptable-4-11.pdf (arguing that the so-called religious exemption to the HHS mandate "is an insult to the intelligence of Catholics, Protestants, Eastern Orthodox Christians, Jews, Muslims, and other people of faith and conscience to imagine that they will accept an assault on their religious liberty if only it is covered up by a cheap accounting trick").

8. *See, e.g.*, Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405 (2013).

9. Laura S. Underkuffler, *Thoughts on Smith and Religious-Group Autonomy*, 2004 BYU L. REV. 1773, 1783.

10. *See, e.g.*, Michael Stokes Paulsen, *The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1172 (2012).

11. *See, e.g.*, Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, AM. CONST. SOC'Y FOR L. & POL'Y (Oct. 18, 2012), http://www.acslaw.org/sites/default/files/Gedicks_-_With_Religious_Liberty_for_All_1.pdf ("That religious liberty is a fundamental constitutional value is not in doubt. Access to contraceptives is also a fundamental constitutional liberty.").

12. "The ministerial exemption is a nonstatutory, constitutionally compelled exception to the application of employment-discrimination and civil rights statutes to religious institutions and their 'ministerial' employees. The ministerial exemption . . . generally bars inquiry into a religious institution's underlying motivation for a contested employment decision." Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483, 486 (Mich. Ct. App. 2008).

13. Gedicks, *supra* note 8, at 405–06.

Similar debates in the United States concerning religious exemptions have thrived for more than two centuries,[14] and the heart of the controversy is as old as civil society itself. The debate is rooted in the question of how the secular state can permit religious groups and individuals to "[r]ender . . . unto Caesar the things which be Caesar's, and unto God the things which be God's"[15] when there is disagreement as to which things are Caesar's. This issue arises when separationism fails[16]—when the jurisdictional spheres of the church and state are not distinct but rather overlap in conflicting ways.[17] Exemptions have generally offered a solution to the age-old dilemma of how religious freedom and civil law can coexist in an ordered society when secular law clashes with what religious believers consider a higher moral law.[18]

Institutional exemptions are unique, however, in their approach to this dilemma. They draw boundaries between the church and state domains, carving out areas that are categorically "off limits" for the state regardless of their substantive content. Communal standards are at issue rather than personal beliefs. Whereas individual exemptions depend on proof of a person's sincerely held religious belief in a specific substantive issue,[19] institutional exemptions are granted more broadly in order to protect a religious group's right to self-governance.[20] As Professor Perry Dane has observed, the right to

14. *See, e.g.*, People v. Philips (N.Y. Ct. Gen. Sess. June 14, 1813), *reported in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA (New York 1813 and photo. reprint 1974) (asking when a priest qualifies for a religious exemption).

15. *Luke* 20:25 (King James).

16. "Equal Liberty" is an exemption paradigm that thoroughly explores the failure of separationism. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 4, 51–77 (2007).

17. Professor Perry Dane has described this phenomenon in depth. Perry Dane, *The Varieties of Religious Autonomy*, *in* CHURCH AUTONOMY: A COMPARATIVE SURVEY 117 (Gerhard Robbers ed., 2001), *available at* http://ssrn.com/abstract=2307670.

18. As Professor Dane puts it, "[t]he most pregnant and emblematic problems in the encounter of religion and the state, however, are, it seems to me, essentially jurisdictional. They are about the nature of the boundaries between the realms of religion and secular law and government, and the nature and degree of deference that each should expect of the other." *Id.* at 120.

19. Sincerity of belief has long been the test for conscientious objector qualification. *See, e.g.*, Welsh, II v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

20. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012); Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).

an institutional exemption does not depend on an individual "asserting a specific conflict between a secular legal norm and a sincerely held religious belief. To the contrary, the right to autonomy, correctly understood, attaches to a religious institution regardless of its motives and beliefs."[21] Institutional exemptions thus fence the government out of whole fields of religious group activity. For example, the ministerial exemption, recognized in *Hosanna-Tabor*, shields many church-affiliated institutions from anti-discrimination laws regardless of the group's religious stance on discrimination.[22]

Of course, the main difficulty in fencing out the government is knowing where to place the stakes. U.S. law forbids the state from imposing its own definitive boundaries on the religious sphere.[23] Yet lines must be drawn. If too narrow a perimeter is drawn, the state risks encroaching upon religious autonomy.[24] That is, a church may lose its vital freedom of self-governance when the state determines which activities are religious. Conversely, if the state defers too broadly to a group's definition of religion, the religious group might become a law unto itself. The secular government may find itself without authority to regulate religious institutions, even when the institutional activities at issue are non-religious or undermine the public interest.

Hence the dilemma: institutional exemptions may safeguard religious group autonomy, thereby serving as a vehicle for individual free exercise,[25] but they may also enable institutions to evade

21. Perry Dane, *"Omalous" Autonomy*, 2004 BYU L. REV. 1715, 1734 [hereinafter Dane, *"Omalous"*]. Professor Dane's distinction between "exemption rights" and "autonomy rights" is analogous to my distinction between "individual exemptions" and "institutional exemptions." *Id.*

22. The plurality's closing remarks in *Hosanna-Tabor* are simply, "[t]he church must be free to choose those who will guide it on its way," implying that what is protected by the ministerial exemption is religious group self-governance rather than sincerely held religious belief in discrimination. *Hosanna-Tabor*, 132 S. Ct. at 710.

23. *See, e.g.*, Watson v. Jones, 80 U.S. 679 (1871); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Torcaso v. Watkins, 367 U.S. 488 (1961).

24. *See, e.g.*, W. Cole Durham, Jr., *The Right to Autonomy in Religious Affairs: A Comparative View*, *in* CHURCH AUTONOMY: A COMPARATIVE SURVEY 722–24 (Gerhard Robbers ed., 2001), *available at* http://www.strasbourgconsortium.org/content/blurb/files/Chapter%2033.%20Durham.pdf (arguing that religious autonomy is fundamental to free exercise).

25. *See, e.g.*, Barbara Bradley Hagerty, *Has Obama Waged a War on Religion?*, NPR

important public policy such as antidiscrimination laws, regardless of whether free exercise is served.[26] It is not then surprising that institutional exemptions have gained attention in modern society, as governments and churches alike have expanded their reach into new social domains.[27] Much legal scholarship is devoted to drawing jurisdictional boundaries in healthcare, employment, civil rights, and First Amendment law.[28] It is also not surprising that paradigms of institutional exemptions are fairly ad hoc. Exemption literature tends to focus on either broad constitutional concerns, overlooking the distinction between institutional and individual exemptions,[29] or on narrow institutional exemptions in a specific field.[30]

This Comment expands religious group autonomy theory into a paradigm for institutional exemptions that accounts for the civil rights of individuals. It articulates a rough balancing test for weighing the benefits of exemptions to institutions—namely, the protection of religious group autonomy—against the costs to individuals—particularly the diminution of personal autonomy and other Fourteenth Amendment rights. This balancing test provides a

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(Jan. 8, 2012, 6:10 AM), http://www.npr.org/2012/01/08/144835720/has-obama-waged-a-war-on-religion (explaining the view that due to state regulation, "Americans' religious liberties are under attack").

26. *See, e.g.*, Stanley Fish, Op-Ed., *Is Religion Above the Law?*, N.Y. TIMES (Oct. 17, 2011, 9:00 PM), *available at* http://opinionator.blogs.nytimes.com/2011/10/17/is-religion-above-the-law (arguing that the ministerial exemption is unjustifiable).

27. As Professor Ira Lupu has noted, "[i]n contemporary America, the combination of wide-ranging religious pluralism, extending far beyond Protestant Christianity, and the far-reaching expansion of government has created many more occasions for conflict between religious practice and government policy." Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLIUPA*, 32 CARDOZO L. REV. 1907, 1914 (2011).

28. *See, e.g.*, Kelly Catherine Chapman, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783 (2012); Georgia L. Holmes & Penny Herickhoff, *The First Amendment and The Ministerial Exemption: Federal Statutory Mandates*, 28 J. APPLIED BUS. RES. 989 (2012); Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause?: The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633 (2012); David E. Bernstein, Commentary, *The 1964 Civil Rights Act is Under Attack Today—from Within*, CATO INSTITUTE (Feb. 4, 2004), *available at* http://www.cato.org/publications/commentary/1964-civil-rights-act-is-under-attack-today-within.

29. *See* EISGRUBER & SAGER, *supra* note 16.

30. *See id.*

principled method for conceptualizing institutional exemptions and determining when they might be justified.[31]

Part II describes the most fundamental benefits of institutional exemptions, while Part III describes the costs. Part IV identifies objective criteria for measuring the benefits and costs of institutional exemptions in varying contexts. Part V attempts to sketch how these objective criteria might apply in specific situations where the justifiability of institutional exemptions has been questioned.

II. BENEFITS OF INSTITUTIONAL EXEMPTIONS

A. Institutional Exemptions Protect Religious Group Autonomy

Institutional exemptions are conceptually buttressed by group autonomy theory.[32] "Group autonomy" in this context refers to a religious group's right to self-governance.[33] It is the freedom of a church or other religious institution to set its own agenda and administer its own affairs.[34] It posits that religious liberty for groups fosters religious liberty for individuals, and thus implies that institutional exemptions are beneficial to individuals and society at large.[35] A broad approach to autonomy would prohibit almost any

31. "Procedural fairness" is a common law notion that individuals should be protected against arbitrary decisions and actions against them by groups. *See, e.g.*, Palm Med. Grp., Inc. v. State Comp. Ins. Fund, 74 Cal. Rptr. 3d 266, 274 (2008). I use the term loosely to describe the evenhanded and logical constituency that both government and private groups owe individuals when dealing with them.

32. In the words of Professor Perry Dane, "[w]e might even see institutional autonomy as the conceptual kernel around which a defense of exemptions might be built." Dane, *"Omalous," supra* note 21, at 1736.

33. *See, e.g.*, *id.* at 1730–40; Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633, 1635 (advocating that individual free exercise flourishes when religious groups are free to manage their internal affairs with minimal state oversight); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837 (2009); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008) [hereinafter Garnett, *Do Churches Matter?*]; 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) (suggesting that religious groups, as "First Amendment institutions," may deserve special protection from otherwise valid and generally applicable laws); Horwitz, *supra* note 6, at 81 (arguing that churches deserve nearly absolute freedom from government regulation); Laycock, *supra* note 1, at 145.

34. *See, e.g.*, Brady, *supra* note 33.

35. *See id.*

state interference with church affairs, regardless of its nature.[36] A more moderate approach would permit the government to regulate some religious activity if there is a compelling state interest.[37] Some have also argued that the government should have power to apply neutral principles of law in regulating procedural but not substantive matters involving religious groups activity.[38]

Regardless of the particular approach, group autonomy theory fundamentally recognizes the unique nature of religious institutions and their relation to religious individuals. Group autonomy theory is born of the fact that a church *qua* church is not constitutionally entitled to First Amendment protection but is an indispensible component of free exercise.[39] Although group autonomy theory fails to provide a complete answer to the institutional exemption dilemma, it has dealt with difficult institutional problems in a way that prevailing exemption paradigms have not.[40] Specifically, it provides two main justifications for institutional exemptions: (1)

36. Professor Horowitz, for example, argues that the state has limited jurisdictional power to intervene in church affairs and that churches can be trusted to self-regulate. He proffers a "sphere sovereignty" theory, which severely constrains government power over religious affairs to instances of abuse against church members. *See* Horwitz, *supra* note 6.

37. *See, e.g.*, Sanford Levinson, *Identifying the Compelling State Interest: On "Due Process of Lawmaking" and the Professional Responsibility of the Public Lawyer*, 45 HASTINGS L.J. 1035 (1994).

38. Professor Evans explains that a "procedural fairness" approach to religious exemptions empowers courts to regulate religious activity only when it is procedurally unfair to an individual. CAROLYN EVANS, RELIGIOUS FREEDOM IN AUSTRALIA: LEGAL PROTECTION OF FREEDOM OF RELIGION OR BELIEF (2011). This protects religious autonomy while protecting individuals against arbitrary abuse of power by churches. The European Court of Human Rights utilized this approach when it affirmed the LDS Church's decision to fire its public affairs director for having an extra-marital affair. The court did not adjudicate the merits of firing the employee, rather it determined simply that the church had dealt fairly with employees by giving them notice of religious employment standards. *See* Obst v. Germany, 425/03 Eur. Ct. H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3272505-3650095.

39. *See, e.g.*, Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PT. 192 (2008), http://yalelawjournal.org/the-yale-law-journal-pocket-part/civil-rights/three-questions-about-hybrid-rights-and-religious-groups/ (noting widespread agreement that group rights are constitutionally suspect).

40. Some predominant exemption theories, for example Equal Liberty, implicitly presume that religious institutions and groups stand on equal Constitutional footing. Equal Liberty's inability to account for the difference between institutional and individual religious freedom is manifest by its superficial and limited explanation of why the Boy Scouts of America are entitled freedom of association. *See* EISGRUBER & SAGER, supra note 16. Group autonomy advocates, on the other hand, do not generally conflate issues of group and individual religious rights.

religious autonomy is a vehicle for free exercise, and (2) religious autonomy fosters healthy pluralism in democratic society.[41]

1. Religious autonomy is a vehicle for free exercise

Institutional exemptions may be necessary to protect free exercise rights because personal religious freedom is often exercised via group activity.[42] People worship in groups. Religious individuals have deep and complex relationships with religious groups.[43] Individuals find strength in numbers and band together to form religious institutions that enable them to collectively advance "the kingdom of God."[44] Moreover, religious institutions, such as churches and schools, transmit religious beliefs to individuals. Such institutions help develop doctrine, create traditions, preserve beliefs, and advance ideas. In other words, "[t]he freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them."[45] As Professor Cole Durham has explained:

> [I]ndividual freedom of religion would be impoverished if the autonomy of religious organizations were left unprotected. Religious communities protect the seedbeds of religious thought and belief. They provide the environment within which religious ideas and experience can be formed, crystallized, developed, transmitted, and preserved. Individual belief would lack its richness, its connectedness, and much of its character-building and meaning-giving power if it were cut off from the extended life of religious communities.[46]

41. *See, e.g.*, Horowitz, *supra* note 6.

42. *See, e.g.*, DURHAM, W. COLE, & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES (2010) (explaining the popular view that religious group autonomy is crucial to the protection of free exercise rights because individuals utilize groups to exercise religious belief).

43. *Id.*

44. Brady, *supra* note 33, at 1705. Professor Laycock has also made this argument, noting that "[t]here can be no coherent understanding of religious liberty without the right to actually practice your religion. When the state says, 'You can believe whatever you want but you can never act on it,' that is not religious liberty, and it is certainly not the free *exercise* of religion. 'Exercise,' now and in the Founders' time, means actions and conduct." Laycock, *supra* note 1, at 149.

45. Garnett, *Do Churches Matter?*, *supra* note 33, at 291–93.

46. Durham, *supra* note 24; s*ee also* Brady, *supra* note 33, at 1677 ("Full freedom of belief is not possible without a corresponding right of religious groups to teach, develop, and practice their doctrines and ideas.").

Laws that limit institutional autonomy—including general and neutral laws without religious exemptions—may end up limiting personal religious freedom. Unless churches are ensured an adequate legal right "to be left alone,"[47] secular antidiscrimination ordinances and other laws will be able to coerce religious institutions into giving up traditional beliefs and conforming to contemporary social norms.[48] When the state pigeonholes religious groups into secular organizational structures, religious institutions lose power to preserve traditional religious orders.[49] Ecclesiastic leaders and other members of the group are forced "to behave according to . . . the standards that attach to those [secular] labels."[50] Individuals within the church may become unable to continue time-honored worship practices. For example, courts resolving sexual abuse claims against the Catholic Church might jeopardize traditional Catholic clericalism by pigeonholing ecclesiastical leaders into tort categories.[51] Few people disagree that the church should face legal repercussions for its clergy's sexual misconduct, but attempts to describe the relationship between bishop and priest in terms of respondeat superior may jeopardize the freedom of bishops and priests to define their own relationships. A more generalized legal rubric of duties specially adapted to the church's clerical order may better preserve autonomy and safeguard free exercise.[52]

2. Religious autonomy advances democratic goals

Institutional exemptions may also be socially desirable, according to some proponents, because democratic society flourishes when state regulation of religion is minimized.[53] Religious institutions advance the goals of a democratic society by contributing diverse viewpoints to the democratic experience. Religious groups are "training grounds for the exercise of democratic skills and

47. *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1372, 1376 (1981).

48. *See, e.g.*, Horwitz, *supra* note 6, at 119 (arguing that without a ministerial exemption, for example, secular antidiscrimination ordinances in employment law would penalize religions for not conforming to secular norms).

49. *Id.*; Brady, *supra* note 33.

50. Dane, "*Omalous*" *supra* note 21, at 1715.

51. *Id.*; *see also* Horwitz, *supra* note 6.

52. *See* Horwitz, *supra* note 6.

53. Brady, *supra* note 33; *see* Garnett, *Do Churches Matter?*, *supra* note 33.

responsibilities, they are schools for democracy."[54] The American political process is thus enriched as religious individuals band together in groups to develop their beliefs and contribute to the democratic process.

Churches also provide a sociocultural counterpoint to secularism, thereby "protecting alternate visions of social and political life" in a pluralist society.[55] Like other First Amendment institutions, religious groups provide infrastructural support for First Amendment freedom.[56] By giving religious individuals a collective voice, religious groups protect individuals against the state's oppressive power and make free exercise possible. Thus, "religious institutions—healthy, independent, free, diverse institutions—are themselves among the necessary conditions *for* religious freedom."[57]

III. COSTS OF INSTITUTIONAL EXEMPTIONS

"'Autonomy' is only the label we attach to one side of a necessarily two-sided encounter between normative worlds."[58] Group autonomy theory merely highlights the benefits of institutional exemptions, namely the protection of religious group freedom and the systemic advancement of free exercise.[59] These benefits must be weighed against their costs, namely the social costs of letting groups disregard the rules. Although institutional exemptions may advance free exercise in some instances, they can, in other instances, subvert the individual's civil rights—especially in matters where individuals are vulnerable to oppression by groups. In healthcare, employment, and civil rights law especially, exemptions from important safeguards against the mistreatment of individuals are likely to impose direct burdens on individuals.[60] The autonomy

54. Brady, *supra* note 33, at 1700–01.

55. *Id.* at 1667.

56. *See* Garnett, *Do Churches Matter?*, *supra* note 33.

57. Richard W. Garnett, *Religious Freedom and (and in) Institutions* (Notre Dame Legal Studies Paper No. 12-57), *in* CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY 71 (Gerard V. Bradley ed., 2012), *available at* http://ssrn.com/abstract=2027639.

58. Dane, *supra* note 17, at 147.

59. Professor Underkuffler has also observed the "tendency, by those who advocate religious-group autonomy, to focus on the needs of the target group and its members" without considering the needs of complainants. Underkuffler, *supra* note 9, at 1784.

60. Professors Lupu and Tuttle have argued that a fair balancing of rights in the exemption dilemma context will consider who bears the cost of the exemption, that is whether

justifications for exemptions are weakened in these cases, when groups inhibit individuals' rights to due process and equal protection. Exemptions also insulate religious institutions from liability for misconduct, religiously motivated or not.[61] Exemptions can immunize groups from antidiscrimination laws, education standards, workplace safety rules, commercial dealings provisions, and anticorruption laws, which are all designed to protect individuals from abuses of power by groups.[62]

A. Group Autonomy Can Hamper Individual Rights

Institutional exemptions often sacrifice individual rights to religious autonomy.[63] In resolving perceived conflicts between secular and religious norms, exemptions can undermine the state's ability to resolve conflicts between religious institutions and individuals. Exemptions can give religious groups freedom to trample judicially recognized Fourteenth Amendment rights, including the right to self-determination in healthcare matters[64] and to equal protection in employment law.[65] The root of this phenomenon is what Professor Gedicks has called "the recurring paradox of groups."[66] The paradox is this: "[W]hile groups buffer their members from oppressive government action, they also buffer them from liberating government action."[67] That is, religious groups

society at large can absorb the cost of exemption or whether it is concentrated on a smaller set of individuals. Lupu & Tuttle, *supra* note 27.

61. *See, e.g.*, Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47 (arguing that too much religious autonomy can negatively shield religious groups from liberal influences).

62. Professor Underkuffler argues that if religious groups and institutions are granted unbridled autonomy, they can disregard an endless list of socially necessary laws. Underkuffler, *supra* note 9, at 1784–85.

63. Although not really a paradigm for institutions exemptions *per se*, Professor Underkuffler's criticism of religious autonomy is fundamental to exemption theory. *See id*.

64. The Supreme Court has long upheld the constitutional principle that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891); *see also* Cruzan by Cruzan v. Dir., Missouri Dept. of Health, 497 U.S. 261, 269 (1990).

65. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

66. Gedicks, *supra* note 61, at 47.

67. Gedicks, *supra* note 8, at 418 ("When government intervention in group matters would enhance individual autonomy, as in the enforcement of antidiscrimination laws, group rights that block such intervention subvert individual autonomy.").

can be vehicles for free exercise as well as shelters for intolerance.[68] When group and individual interests are at odds, institutional exemptions may simultaneously subvert personal autonomy and protect group autonomy.

At least one poignant example of how this paradox can play out involves "conscience clauses" exempting church-affiliated healthcare providers from providing emergency contraceptive and abortion services.[69] While the clauses have obvious church autonomy justifications, the following narrative demonstrates how even seemingly justifiable institutional exemptions in healthcare law might subvert patient autonomy:

> [Kathleen] Prieskorn was three months pregnant and working as a waitress when she felt a twinge, felt a trickle down her leg and realized she was miscarrying again.
>
> She rushed to her doctor's office, where [she] learned [her] amniotic sac had torn, . . . But the nearest hospital had recently merged with a Catholic hospital—and because [her] doctor could still detect a fetal heartbeat, he wasn't allowed to give [her] a uterine evacuation that would help [her] complete [the] miscarriage.
>
> To get treatment, Prieskorn, who has no car, had to instead travel 80 miles to the nearest hospital that would perform the procedure—expensive to do in an ambulance, because she had no health insurance. Her doctor handed her $400 of his own cash and she bundled into the back of a cab.[70]

68. *See id.*

69. A majority of states of have enacted statutes expressly immunizing healthcare providers from civil liability for withholding, on religious grounds, certain types of medical attention from patients. *E.g.*, ARK. CODE ANN. § 20-16-601(a) (2005); DEL. CODE ANN. tit. 24, § 1791 (2011); FLA. STAT. ANN. § 390.0111(8) (West 2013); GA. CODE ANN. § 16-12-142 (West 2013); HAW. REV. STAT. ANN. § 453-16 (West 2013); KAN. STAT. ANN. § 65-443 (West 2002); KY. REV. STAT. ANN. § 311.800 (LexisNexis 2011); LA. REV. STAT. ANN. § 40:1299.31 (West 2008); MD. CODE ANN., HEALTH–GEN. § 20-214 (LexisNexis 2009); MINN. STAT. § 145.42(1) (2011); MO. ANN. STAT. § 197.032(1) (West 2004); MONT. CODE ANN. §50-20-111 (2013); N.J. STAT. ANN. § 2A:65A-3 (West 2010); N.Y. CIV. RIGHTS LAW § 79-i(2) (McKinney 2009); OKLA. STAT. ANN. tit. 63, § 1-741 (West 2010); S.D. CODIFIED LAWS § 34-23A-12 (2011); UTAH CODE ANN. § 76-7-306(1) (West 2004); WIS. STAT. ANN. § 253.09 (West 2010); WYO. STAT. ANN. § 35-6-106 (2013).

70. Molly M. Ginty, *Treatment Denied*, MS. MAGAZINE BLOG (May 9, 2011), http://msmagazine.com/blog/2011/05/09/treatment-denied/ (internal quotation marks omitted).

Kathleen not only incurred unnecessary physical risks due to a delay in care,[71] but also incurred substantial medical costs when institutional standards overshadowed her right as a patient to self-determination. Troublingly, this is not an isolated example of religious group practices swallowing up patient autonomy in healthcare law.[72] The National Women's Law Center ("NWLC") has observed that many women have had similar experiences with life-threatening pregnancies at church-affiliated hospitals.[73] In a comprehensive study of how Catholic and non-Catholic hospitals treat ectopic pregnancies and dangerous miscarriages, the NWLC and Ibis Reproductive Health found that many religious healthcare institutions routinely fail to meet the governmentally prescribed standard of care.[74] Both common law and the Federal Emergency Medical Treatment and Labor Act require healthcare providers to offer prompt emergency care for patients, such as hemorrhaging women, who face "material deterioration of their condition" if care

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71. 7 AM. JUR. PROOF OF FACTS 2D *Physician's Failure to Diagnose a Pregnancy* § 2 (2013) (describing the potentially disastrous consequences of medical negligence when a woman is miscarrying).

72. *See* Stephane P. Fabus, *Religious Refusal: Endangering Pregnant women and Professional Standards*, 13 MARQ. ELDER'S ADVISOR 219 (2012), *available at* http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1008&context=elders; Tricia K. Fujikawa Lee, *Emergency Contraception in Religious Hospitals: The Struggle Between Religious Freedom and Personal Autonomy*, 24 U. HAW. L. REV. 65 (2004); Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703 (1999).

73. The National Women's Law Center initiated a study that was conducted by Ibis Reproductive Health, a clinical and social science research organization. Ibis selected a sampling of geographically diverse Catholic, non-Catholic and recently merged hospitals. Researchers conducted in-depth phone interviews with doctors, asking about their knowledge of hospital policies and practices regarding the treatment of ectopic pregnancies and miscarriages, as well as their perceptions of how these policies affected their treatment decisions and the quality of patient care. NAT'L WOMEN'S L. CENT., BELOW THE RADAR: RELIGIOUS REFUSALS TO TREAT PREGNANCY COMPLICATIONS PUT WOMEN IN DANGER (2012) [hereinafter NWLC REPORT].

74. The report explains that many doctors interpret the church's *Directives* to prohibit medically induced abortion of life-threatening pregnancies. Thus, they feel religiously obligated and entitled to withhold emergency medical care. *Id.* at 2–4; *see also* ANGEL M. FOSTER ET AL., ASSESSING HOSPITAL POLICIES & PRACTICES REGARDING ECTOPIC PREGNANCY & MISCARRIAGE MANAGEMENT: RESULTS OF A NATIONAL QUALITATIVE STUDY (Ibis Reprod. Health, 2009), *available at* http://www.ibisreproductivehealth.org/news/documents/Summaryofqualitativestudy.pdf.

is delayed.[75] Yet many Catholic hospitals feel that the church-issued *Ethical and Religious Directives for Catholic Health Care Services* entitle them to withhold prompt emergency care from women who face tubal rupture or other serious complications.[76] Whether or not conscience clauses or other institutional exemptions are actually involved, religious institutions often feel morally entitled to violate secular law in order to serve a higher law. Patients, in turn, often lack recourse because they do not know the legal standard of care and do not know to challenge their providers' judgment.[77]

Clearly, therefore, religious groups can harm individuals. But it is also true that many non-religious groups treat individuals badly, and subversion of individual rights may merely be an inherent risk of institutional groupthink.[78] Religious groups in this regard may be viewed no differently than any other group. A church-owned hospital's negligent treatment of dangerous pregnancies may be attributed to America's healthcare system problems generally. One might consider the religious school in *Hosanna-Tabor* as "neither a church fighting to defend the integrity of its doctrine nor a school whose leaders gave vent to a legally prohibited prejudice, but a group of ordinary people dealing with the messiness of real life."[79] A conflict between a religious employer and an employee concerning discrimination in the workplace may be chalked up as just another Title VII feud. A religious commercial vendor's indelicate habit of refusing service to customers with certain sexual proclivities may be considered foreseeable backlash against state attempts to regulate free enterprise.

75. 42 U.S.C. § 1395 (2006); *see also* George v. Travelers Ins. Co. (E.D. La.) 215 F. Supp. 340, *aff'd*, 328 F.2d 430 (5th Cir. 1964); 7 AM. JUR. PROOF OF FACTS 2D *Physician's Failure to Diagnose a Pregnancy* § 2 (2013).

76. "For example, a Catholic hospital refused to provide the uterine evacuation necessary to stabilize a patient having a miscarriage, saying that it would only give her blood transfusions as long as there was still a fetal heartbeat. A doctor at a non-sectarian hospital finally agreed to accept the transfer of the patient, despite the doctor's concern that the patient was unstable." NWLC REPORT, *supra* note 73, at 2.

77. NWLC REPORT, *supra* note 73, at 2 (explaining that women are often unable to bring claims against their doctors).

78. Social psychologists often refer to "groupthink" as the set of problems "that can arise when people with particular worldviews retreat into the safe haven offered by the company of those with whom they always agree." RESEARCH IN THE SOCIAL SCIENTIFIC STUDY OF RELIGION VOL. 23, ix (Ralph L. Piedmont & Andrew Village eds., 2012).

79. Gedicks, *supra* note 8, at 415.

In other words, individuals may be harmed equally by secular and religious groups alike. Sometimes the very nature of groups, rather than a group's religious affiliation, accounts for the mistreatment of individuals by both secular and religious institutions. The difference, however, is the religious group's ability to rely on its religious status to evade the consequences of the law. Whereas courts are allowed to scrupulously analyze the mistakes of tortfeasors in ordinary discrimination or malpractice situations, institutional exemptions preclude judicial inquiry into the wrongdoing of religious groups in certain areas of law.[80] Because institutional exemptions necessarily delineate whole fields of litigation that are off limits for courts, they enable religious groups to evade liability for wrongdoing by simply raising a religious group autonomy defense.

This evasion is problematic for at least two reasons. First, it implies that exemptions may actually perpetuate systemic mistreatment of individuals by religious groups. Classic tort theory implies that unless religious institutions are held liable for their wrongdoings, they will lack incentive to comply with contemporary social and medical standards.[81] Second, such non-compliance is unjustifiable in situations where the wrongdoing stems from religious social norms or mere groupthink rather than actual religious conviction.[82] The purpose of institutional exemptions is to advance free exercise through the vehicle of group rights. Yet this purpose is not served when an institution's actions are not

80. For example, courts have broadly declined to adjudicate wrongful termination suits filed against religious employers. *See, e.g.*, Cannata v. Catholic Diocese of Austin, 700 F.3d 169, 177 (5th Cir. 2012); Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006); Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich. Ct. App. 1988).

81. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (describing tort law as a tool for promoting efficient behavior).

82. The distinction between groupthink and actual religious conviction is nuanced but reveals how "the answers to the question 'when and why is religion good or bad for the individual' vary across context." Alana Conner Snibbe & Hazel Rose Markus, *The Psychology of Religion and the Religion of Psychology*, 12 PSYCHOLOGICAL INQUIRY 3, 229 (2002). Groupthink is "likely to occur when a group: (a) collectively evaluates and rationalizes the decisions it makes, (b) promotes uniformity of ideas, (c) assumes a censorship role toward outside views, and (d) exclusively selects information that supports their perspectives." Kari O'Grady & Richard York, *Theism and Non-Theism in Psychological Science: Towards Scholarly Dialogue*, *in* RESEARCH IN THE SOCIAL SCIENTIFIC STUDY OF RELIGION VOL. 23, 286 (Ralph L. Piedmont & Andrew Village eds., 2012) (internal citations omitted). Religious conviction, on the other hand, involves introspective formulation of personal views coupled with group dialogue. *See id.*

attributable to sincerely held religious belief.[83] Nor is free exercise necessarily advanced when a religious group fails to respect the personal beliefs of its individual constituents.[84] For example, a Catholic hospital may theologically disagree with its Catholic employee's belief that God permits abortion when the mother's life is jeopardized.[85] The employee's freedom to exercise this religious belief, by aborting a life-threatening pregnancy, is limited if the hospital enjoys an absolute right to limit the employee's otherwise legally appropriate actions.

IV. THE BALANCING TEST

Once the true costs and benefits of institutional exemptions are identified, the more difficult question is how to objectively measure them. Exemptions cover so much legal ground that ad hoc cost-benefit analyses may seem preferable to a universal balancing test.[86] The balancing act is particularly difficult because each side of the scale holds penumbral rights. On the benefits side of the scale, group rights stand on tenuous Constitutional grounds.[87] The right to religious group autonomy is merely implied by a hodgepodge of Supreme Court cases.[88] Nor, on the costs side, does the text of the Constitution expressly guarantee an individual's right to patient autonomy or freedom from discrimination.[89] Therefore, the weight afforded to each side of the scale can be difficult to determine. The

83. In *Hosanna-Tabor*, for example, the church lacked any sincerely held theological justification for firing an employee with a medical condition. Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Emp't Opportunity Comm., 132 U.S. 694 (2012).

84. Professor Underkuffler has further developed this point. *See* Underkuffler, *supra* note 9.

85. Sister Margaret McBride, devout Catholic and hospital administrator at a Catholic hospital, allowed hospital personnel to abort a pregnancy in 2009 when a woman came into the emergency room in critical condition. She was severely reprimanded and excommunicated from the church. *See* Barbara Bradley Hagerty, *Nun Excommunicated for Allowing Abortion*, NPR (May 19, 2010), http://www.npr.org/templates/story/story.php?storyId=126985072.

86. EVANS, *supra* note 38; Brady, *supra* note 33.

87. "American constitutional rights doctrine is relentlessly individualistic. . . . To the limited extent that constitutional doctrine protects group rights, it does so only because such protection promotes *individual* liberty. Second-order group rights exist only to protect first-order individual rights." *Id.* at 193 (emphasis in original).

88. Gedicks, *supra* note 39.

89. Many textualists especially have challenged Fourteenth Amendment–derived rights as constitutionally suspect. *See, e.g.*, Joan R. Bullock, *Abortion Rights in America*, 1994 BYU L. REV. 63.

actual costs and benefits of exemptions can also vary widely in different contexts. Nevertheless, some objective indicators of personal costs and group benefits can be considered in order to achieve procedurally fair results.

A. Measuring Group Autonomy Benefits

Again, the core justification for institutional exemptions is that they advance free exercise by protecting religious group autonomy. On the benefits side of the scale then, lawmakers should measure the degree to which an exemption actually serves free exercise through its protection of group autonomy. Lawmakers are constitutionally prohibited from arbitrarily defining what substantively constitutes "important" religious activity "deserving" of exemption[90]—the reason being that a religious institution may legitimately consider "even the most mundane and routine" aspects of its affairs religiously significant.[91] There is, however, no constitutional prohibition on objectively observing institutional behavior from the outside. The state may look at a group's actions to determine whether that group has positioned itself in society as a self-contained vehicle for free exercise. The government may observe from the sidelines whether a group chooses to involve itself in public affairs or chooses instead to interact with only an exclusive set of religious group members. The state may observe objective indicia of self-containment in order to distinguish highly public religious institutions from more private ones.

That is, by evaluating the *religious exclusivity* of various religiously affiliated institutions, the state can objectively distinguish entities that highly value religious autonomy from entities willing to subject themselves to more scrutiny from outsiders. To measure religious exclusivity, the state can observe (a) the religious group's

90. U.S. CONST. amend. I; *see, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971); McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948); Everson v. Bd. of Educ., 330 U.S. 1, 8–11, 15–16 (1947).

91. Professor Brady has conducted further constitutional analysis to make this point and concluded that "the only effective and workable protection for the ability of religious groups to preserve, transmit, and develop their beliefs free from government interference is a broad right of church autonomy that extends to all aspects of church affairs." Brady, *supra* note 33, at 1698.

Table 1. RELIGIOUS EXCLUSIVITY OF VARIOUS CHURCH-AFFILIATED INSTITUTIONS

INCLUSIVE	SEMI-EXCLUSIVE		EXCLUSIVE
Hospital **School**	**Adoption agency**	**Charity primarily benefitting church members**	**Church** **Social club (e.g. Boy Scouts)**
Relies upon state aid	**Accepts some state aid**	**Accepts no state aid**	**Accepts no state aid**
Highly public–openly serves everyone regardless of religion	**Semi-private - Offers services to everyone but may favor religious individuals**	**Semi-public – offers services primarily to church members but sometimes to outsiders**	**Highly private – group activities primarily involve religious group members only**

acceptance of state aid,[92] and (b) whether the institution chooses to provide services to the community at large instead of some smaller religious subset. Table 1 helps describe the notion that different types of religious institutions have different degrees of religious exclusivity. A religious institution may fit anywhere on the spectrum below, depending on how it chooses to interact with its community and the state.

Underlying this spectrum of *religious exclusivity* is the "crucial distinction between public and private realms."[93] Public institutions provide socially important goods and services, including commercial goods and services, directly to both religious and non-religious individuals.[94] They are very inclusive, opening doors to the general

92. This formula leaves open the question of whether tax exemptions are considered state aid and how that might affect determinations of how much an institution is benefiting from the government, but that is beyond the scope of this Comment. For now, the focus is when the institution is affirmatively getting something from the state.

93. Professor Lupu has argued that "the crucial distinction between public and private realms" helps discern procedurally fair religious exemptions from unfair ones. The distinction "reflects widely shared and legally embodied beliefs about the exercise of authority by individuals, intermediate associations, and state institutions." Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J. L. & SOC. POL'Y 274, 280–82 (2010).

94. The recognition of "public institutions" in American jurisprudence dates back to the Early National Era. M'Culloch v. Maryland, 17 U.S. 316 (1819) (recognizing the right of the federal government to create a national bank in order to fulfill public purposes); *see also* Van Reed v. People's Nat'l Bank of Lebanon, 198 U.S. 554, 557 (1905) (recognizing private banks as quasi-public institutions). While U.S. courts have formulated various tests for

public and often accepting state aid to finance their services.[95] The more a religious group chooses to behave like a completely public institution, the more it enmeshes itself with the secular world and relinquishes some actual power to set its own agenda. It forgoes life on an island in order to interact with outsiders. It invites the public into its sphere.[96] Private institutions generally do not serve the public at large but rather serve the interests of a selective, exclusive set of individuals. A truly private institution is self-sustaining, thriving without government aid or interaction with outsiders. The more a religious group behaves like a private institution, by choosing to keep out of the public sphere, the more it secludes itself from the secular world and maintains actual power of self-governance.[97] Conversely, the more a religious group acts as a public institution, the more it should be subjected to society's general laws. As a positive matter, many religious institutions are semi-public or semi-private.

By objectively evaluating a group's *religious exclusivity*, lawmakers may describe positive differences between various types of religious institutions without substantively limiting the definition of "religion." As they recognize and identify the objective factors that distinguish a church *qua* church from a church-owned megamall, lawmakers become capable of employing a procedurally fair balancing test. Professor Laycock has explained:

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identifying public institutions, see, for example, Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). I use "public institution" in a broad sense, as a reference to an entity that provides goods or services to all members of society at large. Thus there are varying degrees of publicness, and I adopt the understanding expressed by Mark Chopko: "Borrowing from a sociological notion of public institutions, there are certain organizing or mediating structures—government, religious organizations, private charities, the military, and similar organizations—that have socializing roles, internal governance and ritual, and other factors that set them apart from the rest of society. These so-called 'public institutions' all serve one or another important purpose for society. The importance of these institutions is that they interact with one another to create an equilibrium among socializing agents." Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 661–62 (1992) (internal citations omitted).

95. Chopko, *supra* note 94.

96. In other words, "[t]he distinction between public and private focuses on the scope of invitation and the character of the use." Lupu & Tuttle, *supra* note 93, at 283.

97. Groups and individuals forgo some actual power upon becoming involved in society because society itself is a larger group that exerts domineering power over its constituents. It is not simply the presence of general and neutral law that causes people and groups to conform. Rather, the existential human condition requires groups and individuals to follow certain norms in order to fit into society.

> The text of the Constitution applies to all forms of religious practice, central or peripheral. Still, the argument against oppression is strongest with respect to the most important religious practices, and weaker with respect to marginal practices that believers might be willing to give up. But the importance of religious practices varies from person to person, and is difficult for courts to assess.[98]

That is, the difference between a church and a church-owned commercial megamall seems intuitively obvious but difficult to describe without simply declaring that a megamall is less "religious" than a church. The *religious exclusivity* approach helps ameliorate this difficulty by respecting both church autonomy and its limits. It leaves room for groups to control the degree of autonomy to which they are entitled.

If, for example, a church-affiliated adoption agency feels threatened by antidiscrimination laws and desires total autonomy to discriminate against homosexual couples, it can always stop accepting state funding and hold itself out as an exclusive religious group that serves church members only.[99] An objective focus on *religious exclusivity* also helps lawmakers and scholars identify areas where religious externalities will likely arise. The more non-religious individuals are served by or work for an institution, the more likely non-members will incur direct and unique burdens. In other words the more inclusive and public the institution, the less entitled it is to an exemption because it has deliberately relinquished some actual (not just legal) power of self-governance. The group is behaving less like a vehicle for individual free exercise and more like a charity group.

B. Measuring Group Autonomy Costs

The most direct cost of institutional exemptions is their toll on individual free exercise and due process rights. Individual rights to

98. Laycock, *supra* note 1, at 151.

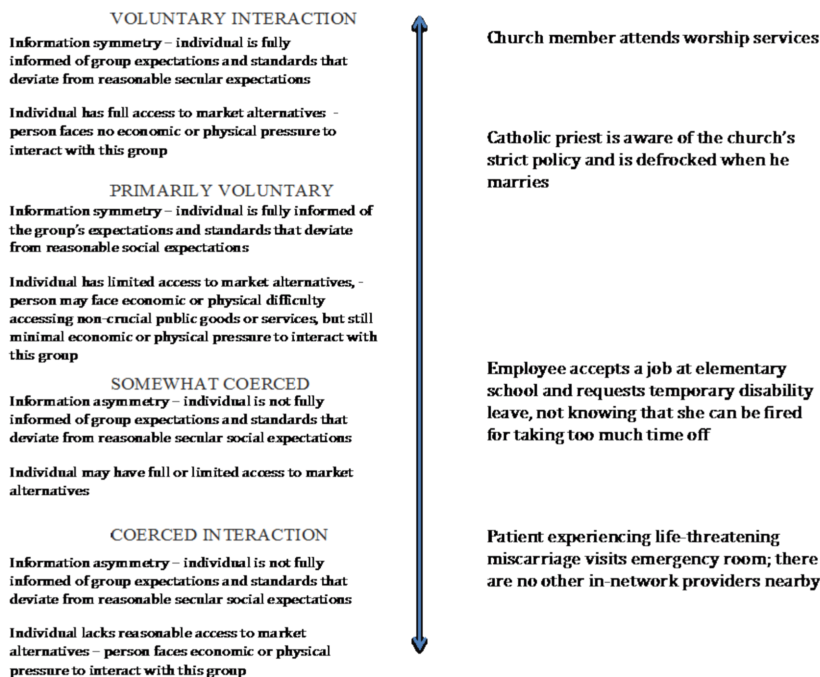
99. A religious exemption for such an agency still may not be justified, as discussed below, if non-religious individuals have no market alternatives for adoption. I also recognize the theoretical risk here that public institutions will flee the market, leaving a gap in the public services sector. But the governing principle in my paradigm is that churches must make themselves autonomous if they want the benefits of autonomy. They cannot have their cake and eat it too. If a group refuses to recognize restrictive state power in certain realms of group activity, the group should not be allowed to cherry pick the fruits of liberating state power either. Professor Lupu has recognized this principle. Lupu & Tuttle, *supra* note 27.

personal autonomy, equal access, and equal opportunity are all threatened by group dominance. On the costs side of the scale, then, lawmakers must evaluate the degree to which an exemption jeopardizes personal autonomy; because risks to personal autonomy and other individual rights can be mitigated by voluntary, knowing consent,[100] lawmakers must consider the *voluntariness* of an individual's interaction with the religious group. If an individual has total control over his or her involvement with a religious group, the potential cost of oppression is minimized because the individual is empowered to leave the group. State regulation may be unnecessary, and exemptions may be granted more liberally, when interactions between the individual and group are knowing and consensual. Key indicators of *voluntariness*, or an individual's control and consent, are (a) information symmetry[101] and (b) access to alternative institutions in the market. The more an individual is coerced into dealing with a group, the more state regulation may be necessary. Interactions with groups can thus be described along a spectrum of *voluntariness* as described in Table 2.

100. *See, e.g.*, Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

101. Economists frequently refer to "information asymmetry," or "imperfect information," as a phenomenon wherein "the managers of the firm know more about the firm than the market." Nathalie Dierkens, *Information Asymmetry and Equity Issues*, 26 J. FIN. & QUANTITATIVE ANALYSIS. 181, 182 (1991). Qualitative economic research has long indicated that information asymmetry makes individual participants in a market "worse off" than they would be in a market without information symmetry. Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q. J. ECON. 629, 638 (1976).

Table 2. INDIVIUALS' CONTROL OVER INTERACTIONS WITH RELIGIOUS GROUPS



Level of interaction	Example
VOLUNTARY INTERACTION **Information symmetry – individual is fully informed of group expectations and standards that deviate from reasonable secular expectations** **Individual has full access to market alternatives – person faces no economic or physical pressure to interact with this group**	**Church member attends worship services** **Catholic priest is aware of the church's strict policy and is defrocked when he marries**
PRIMARILY VOLUNTARY **Information symmetry – individual is fully informed of the group's expectations and standards that deviate from reasonable social expectations** **Individual has limited access to market alternatives, - person may face economic or physical difficulty accessing non-crucial public goods or services, but still minimal economic or physical pressure to interact with this group**	
SOMEWHAT COERCED **Information asymmetry – individual is not fully informed of group expectations and standards that deviate from reasonable secular social expectations** **Individual may have full or limited access to market alternatives**	**Employee accepts a job at elementary school and requests temporary disability leave, not knowing that she can be fired for taking too much time off**
COERCED INTERACTION **Information asymmetry – individual is not fully informed of group expectations and standards that deviate from reasonable secular social expectations** **Individual lacks reasonable access to market alternatives – person faces economic or physical pressure to interact with this group**	**Patient experiencing life-threatening miscarriage visits emergency room; there are no other in-network providers nearby**

Lawmakers must ask whether individuals know about the religious institution's practices and can willfully choose that institution over others. Individuals are less likely to be coerced by group power, and costs of institutional exemptions are more likely to be minimized, when groups are forthcoming about institutional norms and standards.[102] When a church terminates an employee for moral misconduct such as adultery, for example, the employee might have a strong claim that her equal protection rights were violated if the church's action was arbitrary and not forewarned. The employee's claim will be weaker if she was fully informed of and consented to the employer's specific policy regarding adultery upon being hired. The nature of the employee's position in the company and ability to seek alternate employment is also an important consideration. Individual autonomy is likely to be diminished when

102. Professor Lupu recognizes this in the context of religious exemptions from antidiscrimination ordinances protecting gay families. Lupu & Tuttle, *supra* note 93.

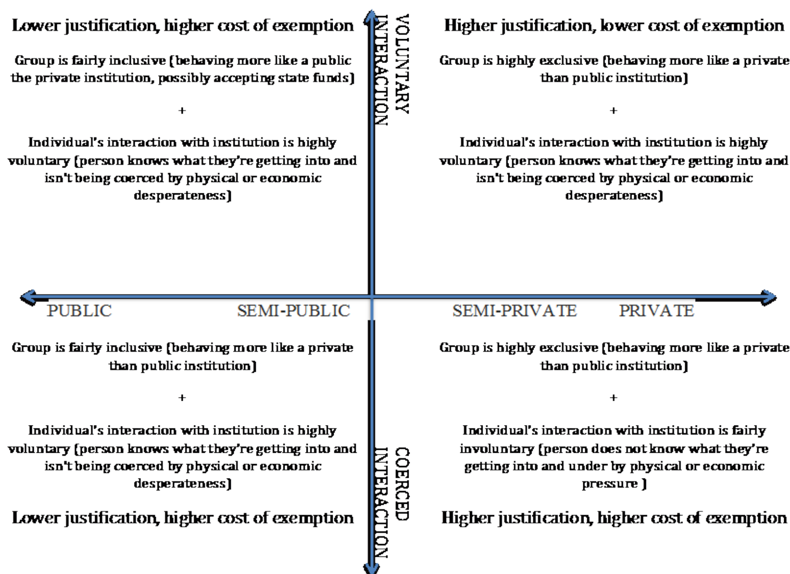
market alternatives are limited. The cost of exemptions will be high, and the individual's interaction with the group involuntary, when an individual is physically or economically compelled to seek public services from one particular religious group. A pregnant woman's interactions with a church-owned hospital, for example, may be fairly involuntary—and the cost of healthcare exemptions high—when she is hemorrhaging and financially or geographically unable to engage another emergency healthcare provider.

V. INTERACTING VARIABLES

A brief analysis of some specific institutional exemptions may illustrate how the above-described costs and benefits come together in a balancing test. Table 3 visually describes how group autonomy considerations overlay personal autonomy considerations.

Cases where the costs of exemptions are high and the benefits low, or vice versa, seem fairly straightforward to resolve. Assuming

Table 3. BALANCING EXCLUSIVITY AND VOLUNTARINESS



one can determine both group exclusivity and how voluntary an individuals' encounter with that group is,[103] public policy will favor exemptions when benefits outweigh costs. An example of the former scenario is where churches seek exemption from state law requiring general recognition of same-sex marriage. A statutory exemption in Connecticut, for example, provides "[n]o church or qualified church-controlled organization . . . shall be required to participate in a ceremony solemnizing a marriage in violation of the religious beliefs of that church or qualified church-controlled organization."[104] Setting aside the question of what constitutes a qualified church-controlled organization under Connecticut law, the exemption targets the church *qua* church. Religious autonomy justifications for the exemption are high because a church is a highly exclusive sort of religious group. Personal autonomy costs of the exemption are probably low because the individuals affected by the exemption can find other groups to solemnize their marriage and are probably well aware that some churches may choose not to solemnize same-sex marriages.

Hobby Lobby Stores, Inc. v. Sebelius provides a counterexample where a privately held corporation sought religious exemption from a health insurance provision mandate.[105] The costs of the exemption outweigh the benefits. Hobby Lobby alleged that unless it was exempted from the HHS contraceptive mandate it would "be required, contrary to the [store owners'] religious beliefs, to provide insurance coverage for certain drugs and devices that the applicants believe can cause abortions."[106] Religious group autonomy justifications for the exemption are weak because the exemption benefits a very inclusive commercial institution that opens its doors to the public. The institution itself serves customers in more than five hundred commercial retail stores nationwide,[107] and it has not held itself out as a members-only group. Costs of the exemption are high because individuals have limited control over their relationships with employers. Individuals are, in a sense, coerced into interacting

103. *See supra* Part II.

104. An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 7(a)–(b), *available at* http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm.

105. 133 S. Ct. 641, 642 (2012).

106. *Id.* at 642.

107. *Id.* at 642.

with their employer—especially in matters of healthcare benefits—because they have limited alternative means of obtaining health insurance. Moreover, the court record did not indicate that Hobby Lobby employees were expressly informed of the institution's religious objections to underwriting certain employee insurance policies;[108] employees thus cannot have consented to the idea that by working for a Christian boss they might be denied possible HHS-mandated healthcare benefits.[109] The cost-benefits balancing test thus disfavors a religious exemption for Hobby Lobby and other commercial businesses from the HHS contraceptive mandate.

Somewhat more difficult to parse are scenarios involving equally high or equally low costs and benefits of exemptions. In these cases, determinations of exclusivity and voluntariness may seem somewhat less objective. Nevertheless, the balancing test may still prove useful in difficult employment and healthcare cases.

A. The Employment Cases

Consider the scenario in *Hosanna-Tabor*. A teacher at a church-owned school was fired for "insubordination and disruptive behavior," uncannily at the same time she was diagnosed with narcolepsy and had taken disability leave. Hosanna-Tabor Evangelical Lutheran Church owned and operated a K–8 Lutheran school that routinely hired "lay" teachers to teach secular subjects and hired "called" teachers to teach religious subjects and perform other pastoral functions.[110] As in the Hobby Lobby case, the toll of an exemption on personal autonomy seems high because the affected employee is vulnerable to her employer's actions. The affected individual here lacks control over her relationship with the group because she is somewhat economically powerless to simply find a replacement employer in the market. Indeed, the very fact that she

108. *Id.* at 642. In fact, Hobby Lobby's sudden desire to withhold certain healthcare benefits might have appeared arbitrary to employees. The company never denied that it "has no moral objection to the use of preventive contraceptives and will continue its longstanding practice of covering these preventive contraceptives for its employees," but began objecting to mandatory coverage of other contraceptives after the HHS mandate was passed. *See Case Synopsis of Hobby Lobby v. Sebelius*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hobbylobby.

109. *See Case Synopsis of Hobby Lobby v. Sebelius*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hobbylobby.

110. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881 (E.D. Mich. 2008).

brought suit and fought for her job indicates that she lacks control. The employee also lacks the protection of forewarning. The religious group failed to give employees advance notice of any intent, power, or authority to disregard ADA provisions that employees ordinarily and reasonably expect employers in society to follow.[111]

Although the Court held the employer's actions permissible under a judicially enacted "ministerial exception,"[112] the balancing test implies that the costs of the employer's actions outweigh the benefits in this scenario. The employee has a fairly low degree of voluntariness or control over her relationship with the school. The costs of a ministerial exemption are high. At the same time, the benefits of a ministerial exemption are high. Church-owned schools can be very exclusive and private. It is not clear whether the Hosanna-Tabor school served a broad group of students in the community or received public aid, and more information is necessary in a close call like this to make an evaluation about public policy. The church did at least hire some non-religious individuals and thereby decreased its exclusivity somewhat. It also held itself out to the public as a group that is, in at least some ways, a secular institution.[113] Barring more information, the balancing test thus implies that *Hosanna-Tabor* Court probably should not have excused the employer's conduct under a religious exemption.

Conversely, exemptions to employment laws may sometimes be fair when church employees are fired for violating the church's code of moral conduct in their personal lives.[114] Consider the Mormon Public Affairs official who was fired for having an extramarital affair.[115] The group involved here is a church itself, an extremely private and autonomous religious institution, so justifications for an exemption are high. The individual is vulnerable to some coercion and unable to control his relationship with his employer because of the hierarchical nature of employer-employee relationships. Yet the

111. *See* EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 782 (6th Cir. 2010) (explaining that the school's personnel manual actually implied that teachers would enjoy ordinary ADA protections).

112. The ministerial exception "bar[s] certain employment against religious institutions" and is "rooted in the First Amendment's guarantees of religious freedom." Hosanna-Tabor, 133 S. Ct. at 644.

113. *Id.*

114. Obst v. Germany, 425/03 Eur. Ct. H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3272505-3650095.

115. *Id.* at 2.

employee was fully informed before the incident that he could lose his job over moral infractions.[116] The individual thus had a fair degree of control over his relationship with the church, so church-group considerations edge out individual ones. Because church exclusivity is at its highest possible level while there is complete information symmetry on the individual's side of the scale, the proposed balancing test indicates that the church should win the fight for an exemption.

B. The Healthcare Cases

Healthcare scenarios also reveal the merits of the balancing test. Kathleen Prieskorn had a miscarriage and rushed to the nearest hospital, which happened to be a Catholic hospital.[117] The doctor at the hospital determined that Kathleen urgently needed a uterine evacuation, but hospital policy prohibited the evacuation because a fetal heartbeat was still present. The next closest hospital was 80 miles away. The Catholic Church has a strong policy against abortion of any kind.[118] Should the hospital be exempt from ordinary medical standards requiring it to perform the evacuation? Again, more details about the specific hospital's practices may be needed to fairly weigh autonomy considerations. The church may alter hypothetical outcomes in exemption cases by changing how it holds itself out to the public, and this is one strength of the exclusion approach to institutions.[119] Yet barring additional information, it seems that a Catholic hospital that houses the only emergency department in an eighty mile radius is highly likely to be a public

116. *Id.* ("[Obst] held various positions within the Mormon church . . . given his long career with the Church, Mr. Obst must have been aware of the severity of his misconduct.").

117. Ginty, *supra* note 70.

118. United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, UCCSB (Nov. 17, 2009) http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf.

119. Under the balancing advocated in Parts II and III, *supra*, church hospitals are more likely to enjoy the benefits of religious exemptions if they are more exclusive or private and less public. This is ironic in one sense, since the whole reason why many churches operate hospitals is that delineate medicine is one field of particular religious significance; the church's determination of religious priorities does not really match up with the exclusivity determination advocated here. And if they are not granted exemptions when their beliefs are at odds with secular society, they may simply leave the market altogether. Yet in another sense, society's hefty interest in guaranteeing safe healthcare to patients who rely on it may rival the church group's interest in abstaining from what it considers immoral behavior.

institution. Given the reasonable assumption that the hospital accepts public aid and serves a broad base of both religious and non-religious customers,[120] justifications for an exemption are minimal.[121] The costs of the exemption are great. The individual has very little control over her interactions with the group but is coerced by a physical emergency to seek help from it. The fact that the individual has very limited market alternatives exacerbates the element of coercion in this interaction. The balancing test thus disfavors an exemption here.

Suppose in another case that a woman sues a church-owned insurance company for failing to pay for her elective abortion.[122] The insurance company provides health insurance to employees of organizations affiliated with the Church of Jesus Christ of Latter-day Saints.[123] The insurance company is a nonprofit organization distinct from the church, but funded by the church. Given the church's exclusive behavior and the fact that it participates very little in the public sphere, justifications for an exemption are high. The costs of an exemption are more difficult to determine. Inquiry into how much control a woman has or how "voluntary" abortion is tends to be highly controversial.[124] This example thus highlights one of the major shortcomings of balancing approaches in general: they necessarily require some arbitrary and subjective discretion. It also illustrates that some dynamics between groups and individuals simply

120. Past studies by MergerWatch have indicated that "[r]eligiously-sponsored hospitals serve and employ people from a wide variety of faiths and—as this study has demonstrated—rely heavily on public funding." *No Strings Attached: Public Funding of Religiously Sponsored Hospitals in the United States*, THE MERGERWATCH PROJECT HIGHLIGHTS (2002), *available at* http://www.mergerwatch.org/storage/pdf-files/bp_no_strings.pdf.

121. Again, this seems ironic because abortion is a deeply religious issue and abortion laws are peppered with religious exemptions. However the mere fact that institutional exemptions have little justification in instances where a religious healthcare group is a community's sole provider does not mean that they are never justified. The hospital can physically relocate to a different location or take greater care to not to situate itself as the only healthcare provider in a remote area unless it is willing to provide *all* services required by patients. Moreover, individual exemptions may help protect religious liberty for doctors and other individuals within Catholic institutions.

122. Katherine A. White analyzes several such cases. Katherine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703 (1999).

123. *See id.* at 1741 (describing Deseret Mutual Benefits Association as such an insurance company).

124. Daniel K. Williams, *No Happy Medium: The Role of Americans' Ambivalent View of Fetal Rights in Political Conflict over Abortion Legalization*, 25 J. POL'Y HIST. 42 (2013).

cannot be captured by a catch-all theory of exemptions. Yet attempts to measure institutional exclusivity and individual control may at least help clarify some of the dynamics at play. Here, the individual can probably find alternative abortion providers in the market and pay them out-of-pocket if her insurance company denies coverage. Also, she was probably well aware upon entering a relationship with the religious employer and church-owned insurance organization that abortion services would not be covered. Costs of an exemption are probably low. The exemption is probably fair from a costs-benefits standpoint.

VI. CONCLUSION

Legal controversy surrounding institutional religious exemptions, exceptions for church-affiliated organizations from neutral and generally applicable laws, is thriving. Supporters have argued that institutional exemptions are crucial to safeguarding free exercise rights for religious individuals. Critics have decried institutional exemptions' shielding of religious organizations from important civil rights safeguards. There is no one-size-fits-all solution to the controversy; supporters and critics alike have found, at times, ample justification for their respective positions. On one hand, institutional exemptions can protect religious freedom by providing a vehicle for free exercise and by advancing democratic goals of pluralism. On the other, they threaten to subvert personal autonomy by insulating church-affiliated institutions from laws designed to protect individuals from abuses of group power.

One solution is a balancing test that weighs the benefits of institutional exemptions, namely group autonomy, against the costs, subversion of personal autonomy. Courts must evaluate *religious exclusivity*, the degree to which an organization accepts state aid and/or holds itself out as publicly accessibly, in order to objectively measure an exemption's potential free exercise benefits. They must also consider *voluntariness*, or the degree to which an individual interacting with a religious institution has access to information and/or to market alternatives, in order to measure potential costs.

Costs and benefits of institutional exemptions are difficult to measure and will vary widely in different contexts. And all balancing tests are vulnerable to some abuse by judges. Yet objective considerations of religious exclusivity and voluntariness can help courts achieve more procedurally fair results. The balancing test

outlined in this Comment helps resolve a core element of the exemption dilemma. It articulates the conceptual framework by which institutional exemptions should be analyzed. It introduces a new way to measure the desirability of institutional exemptions generally without substantively defining religion or deferring too broadly to religious group power.

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