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Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good

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RESPONSIBLE FREEDOM UNDER THE RELIGION CLAUSES: EXEMPTIONS, LEGAL PLURALISM, AND THE COMMON GOOD*

Angela C. Carmella**

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I. INTRODUCTION

A person, institution or activity might benefit from an exemption from an otherwise applicable law. This exemption phenomenon is common throughout state and federal law. Consider, for example, that some types of housing are

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exempt from certain restrictions of the Fair Housing Act,\(^1\) and some businesses are exempt from the requirements of the Family and Medical Leave Act.\(^2\)

Whether the product of political compromise or of constitutional interpretation, exemptions provide freedom from the reach of a given law.

This Article focuses on exemptions that benefit churches\(^3\)—whether crafted by legislatures, courts, or agencies. These exemptions might benefit religious institutions alone, or might benefit a broader category of institutions, like non-profits, of which churches are a part. Some examples are familiar. Churches are exempt from some applications of federal and state anti-discrimination laws in the employment area. Sometimes churches are exempt from certain regulations of their social service activities. And of course they are tax exempt institutions, along with other non-profits. These and many other religious exemptions give churches freedom from particular kinds of governmental oversight, requirements or restrictions.

In October of 2006, the *New York Times* ran a four-part front-page series on the widespread existence of religious exemptions for churches.\(^4\) The series read like an exposé of abuse, focusing on aggrieved employees with no recourse to courts, the dangers of unlicensed social services, and tax breaks for non-traditional property uses that raise the tax burden on the rest of us. It provided a disturbing litany of privilege and social irresponsibility. The articles echoed the voices of some commentators that have suggested that exemptions invite conduct that harms the common good.\(^5\) But if this is so, why do courts and legislatures continue to create them? Over two thousand religious exemptions exist in state or federal law,\(^6\) with many exemptions created in the last fifteen years alone.\(^7\) Do exemptions exist primarily because of the political power

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1. See, e.g., 42 U.S.C. § 3603(b) (2000) (exempting certain individual landlords) and § 3607(b) (exempting housing for older persons).
3. Throughout this article, the term “church” will be used generically to refer to any religious institution, including worshipping communities as well as church-affiliated institutions for education and social services. More precise language will be used when necessary.
6. James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445 (1992). This number reflects legislative exemptions, and is for both churches and individuals. This number does not reflect exemptions granted by agencies or the many judicial exemptions required by courts over the years.
churches wield—as the Times series suggests? Or can a principled case be made for religious exemptions from otherwise general laws?

Commentators cite a variety of justifications for judicial and legislative religious exemptions, all of which are rooted in the vigorous protection of religious freedom under the Constitution. First, there are the textual and historical justifications. The First Amendment protects the free exercise of religion; exemptions give expression to that value. And as a historical matter, exemptions from oath taking and military conscription appeared as early as colonial times. In fact, James Madison supported an explicit conscience exemption from military service in the text of the Bill of Rights. Second, there is a related "quid pro quo" justification: because exemptions express a free exercise value, they balance those special restraints on religion required by the Establishment Clause. A third justification is that exemptions prevent violence and persecution (particularly as regards to minority faiths). Yet another justification is theological in nature: religious exercise is "intrinsically good," to be protected as a natural right. Further, based on the Madisonian argument that duties to God are prior to civil duties, exemptions are necessary to avoid the severe personal distress that can emerge from conflicting demands of law and faith.

This list omits two related justifications—at least with respect to churches—that are consistent with and yet more plausible than the ones mentioned. I contend that some—maybe many—exemptions make sense because churches: 1) function responsibly in the "space" created by the exemption by filling that space with their own ethical-legal norms and 2) promote the com-

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9 Gedicks, supra note 8, at 558-62.


11 Id. at 1500.

12 See Abner S. Greene, The Political Balance of the Religion Clauses, 102 Yale L.J. 1611, 1643-44 (1993); McConnell, Garvey & Berger, supra note 8, at 236.

13 Gedicks, supra note 8, at 563-65.

14 Id. at 566-68. See generally Garvey, What Are Freedoms For?, supra note 8.

15 See generally McConnell, Origins, supra note 10.

16 For the idea that exemptions provide space for alternative normative systems to function, see Perry Dane, Exemptions for Religion Contained in Regulatory Statutes, in 1 Encyclopedia of American Civil Liberties 559-62 (Paul Finkelman ed., 2006); Perry Dane, 'Omalous' Autonomy, 2004 BYU L. Rev. 1715; Perry Dane, Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities, 90 Yale L.J. 350 (1980) (employing a conflicts of law analogy).
mon good (or at least do not thwart it) by the conduct the exemption allows. By generating their own religious norms of ethics and law, churches are considered capable of operating responsibly under conditions of freedom. Indeed, because they are communities of moral meaning that have generated norms for social and political (as well as religious) life, churches have played a significant role in defining the common good. Not surprisingly, then, the state often expects that churches will support temporal needs and civic values. But because such expectations lead to demands for social accountability—which can in turn threaten religious freedom—many commentators who defend exemptions do not want to consider their social impacts. This Article attempts to do just that. It will explore the extent to which internal ethical-legal systems (what I call “legal pluralism”) are tolerated, and the extent to which minimal expectations of responsible religious exercise are attached to exemptions. In short, I argue that exemptions are designed not for the exclusive protection of religious freedom, but for the protection of both religious freedom and the socio-political community that provides the conditions for the meaningful exercise of that freedom.

I propose to apply the common good argument—that churches, functioning according to their own ethical-legal systems, are sometimes (maybe often) capable of advancing the common good—to all exemption questions, whether judicial or legislative, and whether arising under the Free Exercise Clause, the Establishment Clause, or religion-protective statutes like the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The connection between exemptions and the common good is scattered throughout the jurisprudence, but needs to be explicitly drawn out and unified into one inquiry. The unified inquiry will vary not by clause or statute but by type of exemption. The three main categories of exemptions—those that protect institutional autonomy, those that lift financial burdens, and those that promote the provision of social services—call for different nuances in the balance between freedom and social accountability. This project is especially important now that the United States Supreme Court has

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17 See Henry B. Hansmann, The Role of Nonprofit Enterprise, 89 YALE L.J. 835 (1980). Charitable organizations are governed by “social norms that reinforce the legal restraints on profiteering” and “ethical constraints that may be far more important than legal sanctions in causing the managers of nonprofits to adhere to their fiduciary responsibilities. . . . The importance of such ethical constraints may also explain why so many nonprofit institutions—including, for example, schools, hospitals, nursing homes, foster homes, and even housing project sponsors—are affiliated with religious groups. For such an association may help to keep the norms intact and at the same time assure potential patrons that in fact they are intact.” Id. at 875-76 (emphasis in original).

18 See McConnell, Origins, supra note 10, at 1455-66, for a discussion of early state constitutions, many of which provided for religious freedom to the extent it did not excuse licentiousness or threaten the peace or safety of society.

19 U.S. CONST. amend. I (providing in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).


suggested in two recent decisions the need to articulate the underlying connection between religious exemptions and their broader social and governmental impacts.\textsuperscript{22}

While this Article's main focus is on constitutional and statutory interpretation, the inspiration for the common good argument is the concept of "responsible freedom" set forth in the Second Vatican Council's Declaration on Religious Freedom.\textsuperscript{23} That document grounds religious freedom in the dignity of the human person. It provides that "the right to religious freedom is exercised in human society, hence its exercise is subject to certain regulatory norms. . . . [Individuals and groups] are bound by the moral law to have respect for both the rights of others and for their own duties toward others and for the common welfare of all."\textsuperscript{24} At the same time, the Declaration asserts a strong presumption in favor of freedom "as far as possible, and curtailed only when and in so far as necessary."\textsuperscript{25} Therefore, using the rough guidance of these signposts, together with other social, political and constitutional principles, the common good argument is an attempt to work out a methodology for "responsible" religious freedom in the exemption context.

I use the concept of the common good intentionally, rather than the "state's interest" or "general welfare," because it transcends these concepts and more accurately captures the rich sense of the socio-political community.\textsuperscript{26} It refers to

\begin{quote}
[T]he totality of goods that create the conditions in which persons flourish. In its fullest sense, the common good describes social conditions designed to enable the 'total human development' of the person, such as human rights for individuals, social health and development of the community, and a just, stable, and secure order.\textsuperscript{27}
\end{quote}

It emerges from a broad consensus, achieved through deliberation and prudential argument, "that is not necessarily the same as majoritarian determina-

\textsuperscript{24} Id. at 685-86.
\textsuperscript{25} Id. at 687.
\textsuperscript{27} Angela C. Carmella, A Catholic View of Law and Justice, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 255, 266 (Michael W. McConnell, Robert F. Cochran, Jr. and Angela Carmella, eds., 2001) [hereinafter Carmella, A Catholic View]. The common good is "a set of social conditions which facilitate the realization of personal goods by individuals." DAVID HOLLENBACH, CLAIMS IN CONFLICT 64 (1979).
tion," and it may be, on some matters, of necessity plural rather than universal. Thus, I claim that churches, along with other institutions in society, are capable of providing some of those social goods that help create the conditions for human flourishing, and should enjoy exemptions that enable them to do so. Difficulties in application arise, of course, where the very definition of human flourishing is contested. Yet a focus on the common good requires us to ask "‘what is good for the person?’ and not, ‘what is good for the state and its institutions?’"

The role of exemptions in promoting the common good rests on a larger vision of a vibrant, pluralistic civil society and the limited, yet activist role of the state within it. This vision, drawn from contemporary political theory and Catholic social thought, as well as the expectations of American constitutional law, recognizes that all social institutions have responsibility for promoting the common good, and that one of the state’s main roles is to coordinate non-state actors in this task. The state’s other main (and related) role is to ensure the public order—which is a piece of the larger common good—through laws that enforce human rights, civic peace, and public morality. Exemptions may be fully consistent with the state’s public order function and the larger common good, particularly when they allow institutions in civil society to engage in socially responsible, stabilizing and beneficial activities.

The reader may be uncomfortable with an approach that involves the "judgment" of religion, and in fact, some have argued eloquently that our system is set up precisely to prevent the state from making such evaluations. Of course the state is barred from certain kinds of judgments about religion. It can-

28 Duncan, supra note 26, at 87-88.

The common good is inextricably bound to the good of individual persons, as [Jacques] Maritain explains in his classic work, Man and the State: . . . [that] each concrete person, not only in a privileged class but throughout the whole body politic, may truly reach that measure of independence which is proper to civilized life and which is ensured alike by the economic guarantees of work and property, political rights, civic virtues, and the cultivation of the mind.

Id.


31 See generally GARVEY, WHAT ARE FREEDOMS FOR?, supra note 8. Michael Stokes Paulsen notes that we protect religion broadly because "we do not trust political majorities, and we certainly do not trust government agents, to distinguish Truth from Rubbish and because it is exceedingly difficult (and dangerous) to try to draft a religious freedom rule that successfully draws such a line." God Is Great, Garvey is Good: Making Sense of Religious Freedom, 72 NOTRE DAME L. REV. 1597, 1606 (1997) (book review).
not declare an official religion, or say that a belief is true or false, or give preferences based on a particular religion.\textsuperscript{32} But in the context of exemptions, a judgment regarding the social impact of an exemption is inevitable where a court or legislature is trying to determine whether the goals of a law or the needs of society will be undermined if the law is not uniformly applied.\textsuperscript{33} Courts and legislatures are always evaluating, even if implicitly and indirectly, the compatibility of exemptions with the common good and the congruence of alternative ethical-legal systems with broader societal norms. The only way to avoid such judgments would be to allow absolute religious freedom or to impose only the state’s legal norms, neither of which is possible in our constitutional system. By making the evaluation comprehensive and explicit, we are better able to constrain the state’s decision making.

In light of the complexities posed by the phenomenon of religious exemptions, this Article will continue as follows. Part II gathers the sources of the common good argument, which are currently scattered throughout the religion jurisprudence. Part III develops the common good argument in the context of the Religion Clauses, RFRA and RLUIPA, and then applies it to the three basic categories of religious exemptions. Part IV describes two political and sociological concepts that have been developed in Catholic social thought—subsidiarity and the public order—which might help to avoid the extremes of legal pluralism and legal authoritarianism.

\section*{II. Locating the Sources of the Common Good Argument}

The distinction between civil society and the state is fundamental to contemporary political theory.\textsuperscript{34} The state owes citizens a commitment to inclusive and overarching norms.\textsuperscript{35} But civil society is marked by “plural and particularist identities,”\textsuperscript{36} which are expressed in diverse non-political institutions: families, schools, churches, neighborhood groups, ethnic/cultural/linguistic groups, civic and voluntary associations of all kinds, labor unions, work-related and professional associations, businesses, and large corporations.\textsuperscript{37} Many of

\begin{footnotesize}

\textsuperscript{33} Even Professor Paulsen concedes that “exemptions for religious believers are constitutionally required, except in the most compelling circumstances out of the strictest necessity.” Paulsen, supra note 31, at 1620 (emphasis added). A court would have to decide what constitutes those circumstances.


\textsuperscript{35} Id. at 3.

\textsuperscript{36} Id.

\textsuperscript{37} Id. at 16-17. See also Jean Bethke Eshtain, \textit{Catholic Social Thought, the City, and Liberal America}, in \textit{CATHOLICISM, LIBERALISM, AND COMMUNITARIANISM: THE CATHOLIC INTELLECTUAL TRADITION AND THE MORAL FOUNDATIONS OF DEMOCRACY} 97 (Kenneth L. Grasso et al. eds., 1995).
\end{footnotesize}
these institutions of civil society are also considered “mediating” institutions, those “seedbeds of virtue” and “schools of citizenship” that mediate between and among individuals, the state, and the market. Madison considered the pluralism and particularity of civil society a source of its peace and stability. For him, the vast multiplicity of social “factions” would serve as checks and balances on each other so that none would gain power over the others. Thus, contemporary political theory posits the central political concept of the founders: that the common good of civil society is generally promoted under conditions of freedom, not restraint.

The state plays a critical role in coordinating the institutions of civil society toward the common good, but this coordination, through law, must be done in ways that respect the boundary between them. Several important constitutional doctrines ensure that the state does not destroy the plural and particular identities of social institutions. Under doctrines like expressive association, some institutions are free to determine their members and leaders, and are not forced to adopt the state’s norms as their own. Doctrines under the religion clauses protect the fundamental independence of civil society and the state, as well as church and state. Associational freedoms generally involve freedom of self-governance and the freedom to operate under alternative legal systems. In these and other ways, the state disables itself not only in relation to individuals, but also in relation to the mediating institutions in which those individuals are nurtured, and respects the legal pluralism of alternative normative systems. It is important to recall that where the state has refused to disable itself in these ways, civil society is destroyed. Indeed, the major task of the last decade in the former Soviet Republics and countries of Eastern Europe has been the building of civil society. As an essential feature of democracy, civil society is always considered the “bulwark” against state power.


39 McConnell, Origins, supra note 10, at 1515; see also McConnell, Equal Citizens, supra note 30, at 90 (comparing Rousseau and Madison).

40 See The Federalist Nos. 10, 51 (James Madison).


[N]orm generating aspects of corporation law, contract, and free exercise of religion are all instances of associational liberty protected by the Constitution. Freedom of association implies a degree of norm-generating autonomy on the part of the association. It is not a liberty to be but a liberty and capacity to create and interpret law—minimally, to interpret the terms of the association's own being.

Id.
Political theory recognizes not only a fundamental distinction between civil society and the state, but their complementarity as well.\textsuperscript{43} The institutions of civil society and the state are “permeable” to the influences of each other.\textsuperscript{44} Even the definition of the common good, toward which the state coordinates the efforts of non-state actors, is not set exclusively by the state, but is instead “achieved by the processes of deliberative democracy.”\textsuperscript{45}

[C]ivil society needs the state for those public goods the state alone can provide or guarantee: the coordination of order, a structure of civility and peace among pluralist visions of the good, the regulation of welfare and justice, the forging of a ‘common civic faith and purpose’ that cross-cuts any one particularist tradition . . . . In turn . . . civil society offers a zone of freedom, spontaneity, creativity, a grass-roots anchoring of ‘belonging.’ It remains the primary locale for the anchoring of virtue.\textsuperscript{46}

Thus, when political theorists posit the state as the realm of “inclusive, overarching norms” and the civil society as the realm of the “particular and plural,” we must be careful not to assume that the realms are necessarily antagonistic. There can be, and often is, significant overlap and congruence, even partnership. Indeed, civil society is the very source of norms that might be made universal through law. While mediating institutions of civil society serve as a bulwark against the state, at the same time they impart values critical to good citizenship and self-government and inspire democratic participation. Their extensive charitable activities relieve the state of many burdens. Moreover, complex interrelationships between and among governmental, non-profit and for-profit institutions make it possible for them to collaborate on social welfare programs.\textsuperscript{47} With specific reference to churches, political theorists “reflect not only on tensions between obligations of citizenship and demands of faith but also on ways in which religion complements and supports democratic citizenship, or compensates for acknowledged limitations of democratic government and civic identity.”\textsuperscript{48}

\textsuperscript{43} Rosenblum & Post, Introduction, supra note 34, at 16-23.
\textsuperscript{44} Id. at 6.
\textsuperscript{45} Coleman, supra note 30, at 238.
\textsuperscript{46} Id. at 244.
\textsuperscript{47} Rosenblum and Post, Introduction, supra note 34, at 16-17.
\textsuperscript{48} Nancy L. Rosenblum, Introduction in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 4 (Nancy L. Rosenblum ed., 2000). Paulsen states that “[w]e do not protect religious liberty for secular society’s sake . . . . That secular society may benefit incidentally from [religious exercise] is all well and good, but the point is to protect free exercise, not (except by some happy convenience) to produce the secondary benefits to society.” Paulsen, supra note 31, at 1600. Mediating institutions typically operate accord-
In the following discussion, I use three Supreme Court opinions to illuminate both the boundary and complementarity between civil society and the state.\(^49\) They reveal the ways in which the state evaluates the congruence between religious conduct and the common good. The Court recognizes a modest legal pluralism and the significance of exemptions to the flourishing of institutions within civil society. But other decisions and doctrinal developments show how courts limit the "particular and plural" to make churches accountable when their conduct threatens (or is thought to threaten) the common good.\(^50\)

A. Church Autonomy: Watson v. Jones\(^51\)

Exemptions from otherwise general laws raise a question in stark terms: in the absence of the law of the state, what exists to direct or restrain the behavior of the church? The religion decisions referred to as the "church autonomy" cases provide us with the beginnings of the answer to this question: the church's ethical-legal system.\(^52\) Even if a comprehensive alternative "legal" system does not exist, which is often the case, an ethical system (derived from theological principles) typically exists to direct and restrain behavior.\(^53\) In fact, the existence of a well defined ethical-legal system has become part of the standard way in which courts define religion,\(^54\) and is even a component of the Internal Revenue Code's definition of a "church."\(^55\) Some legal theorists have argued for generous exemptions for charitable activities of churches because internal ethical restraints make churches good fiduciaries of the donations given to them.\(^56\) Some exemptions are crafted specifically with a church's internal governance in mind.\(^57\)
The church autonomy cases provide a rather dramatic illustration of legal pluralism, albeit in the narrow field of ecclesiastical decisions. Flowing from the fundamental independence of church from state, civil courts are not considered competent to adjudicate religious questions, and so defer to religious tribunals on matters of religious law. Consequently, on a host of issues involving internal decisions, the church autonomy doctrine allows multiple, non-state legal systems to function. While I do not argue that exemptions provide analogous “zones” of church autonomy, several aspects of the autonomy doctrine are significant for understanding the connection between exemptions and the common good. The church autonomy cases show us that the state expects churches to have their own legal systems, and those systems are expected to be connected to their creedal and ethical teachings. Additionally, the cases view decision making within these ethical-legal systems as essential to the process of self-constitution and self-definition of churches. And finally, the legal pluralism that creates many “particular and plural” identities is assumed to foster stability in the aggregate.

The Madisonian concept of a multiplicity of sects and factions, as understood in the nineteenth century, accepted a modest degree of legal pluralism for non-state actors. *Watson v. Jones*, decided in 1871, is the first Supreme Court decision to declare legal pluralism in the church-state area. After the American Civil War, the national body of the Presbyterian Church (which had opposed slavery) decided that pro-slavery southerners could not be part of the church unless they repented of their sins. A schism between a pro-slavery faction and anti-slavery faction at a local church raised the question: who owns
the church building? The appropriate tribunals within the national Presbyterian Church found ownership in the anti-slavery faction. The Court held that in cases of hierarchical churches like this one, church decisions adjudicating "questions of discipline, or of faith, or ecclesiastical rule, custom, or law" were final and binding on civil courts.

That churches have their own laws was considered completely natural. The Court, pointing to the example of several large Protestant churches, noted that each "has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs ..." The Court clearly expected the operation of those separate legal systems to promote the stability of society. Indeed, a church that failed to promote such stability risked being viewed as illegitimate: consider that, nearly contemporaneous with Watson, the Court refused to acknowledge in any way the Mormon Church's claims regarding property ownership, church governance, and autonomous ecclesiastical courts because of the repugnance of polygamy and the grave social harm it was thought to pose.

The question of the connection between autonomous decision making and the common good continued to be a complex one throughout the twentieth century. During most of that time, the deference to ecclesiastical decisions was circumscribed by the expectation that such decisions would be free of "fraud, collusion, and arbitrariness." But in 1976, when a state court reinstated a defrocked bishop on the ground that the church arbitrarily had violated its own laws, the Court rejected this level of accountability as too great an intrusion. The Court found that the state court had unconstitutionally substituted its own interpretation of church law, displacing the proper church tribunal's interpretation. In the opinion, Justice Brennan allowed for church law to depart from

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62 Id. at 692.
64 The legal pluralism of Watson, 80 U.S. at 679, is closely tied to the role of such autonomy in the self-constitution of churches. The Court made clear that Americans have "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government ..." Watson, 80 U.S. at 728-29.
65 Id. at 729.
66 See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890), in which the Court held that Congress had the right to abrogate the corporate existence of the Mormon church and confiscate its property. See also Edwin B. Firmage, Religion and the Law: The Mormon Experience in the Nineteenth Century, 12 CARDOZO L. REV. 765 (1991).
67 See, e.g., Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1, 16 (1929).
69 Id. at 720.
the expectations of the state and society, eschewing even any requirement of rationality.\(^7\)

To Justice Rehnquist, however, this seemed to be the kind of legal pluralism that our system could not bear. Convinced that the civil courts could expect rational decision making from church courts, he worried, in dissent, that under the deference principle, civil courts permitted “arbitrary lawlessness.”\(^7\) This may explain why three years later the Court gave its blessing to an alternative method of adjudicating religious disputes that allowed more aggressive civil court intervention: the “neutral principles” approach.\(^7\) Under this approach, courts may adjudicate church matters and even overturn a church’s internal decision as long as the court can do so without engaging religious principles.\(^7\) At the same time the Court urges churches to use civil legal forms to give accurate expression to their internal norms, it seems to be trying to ensure some kind of minimal rationality with this more intrusive approach.

Despite the introduction of this “neutral principles” methodology, the deference principle continues to govern most significantly in the area of church employment decisions and has been embodied in the exemption doctrine known as the “ministerial exception.”\(^7\) Under this exception, courts will not intrude on hiring, firing, and promotion decisions regarding personnel whose jobs involve core religious roles.\(^7\) Courts admit a total lack of competence under the Constitution to review these internal church decisions.\(^7\) This results in a judge-made exception to civil rights legislation, and in fact does provide a “zone” of autonomy. Sometimes there is an internal process available for the employee to seek redress, but this does not appear to be the justification of the exception. Church autonomy principles have also influenced the broad interpretation of the federal statutory exemption that allows churches to discriminate in favor of their own religions in employment, even with respect to “secular” positions that appear to be disconnected from religious mission.\(^7\) For both the ministerial exception and the broad statutory exemption allowing the exclusive hiring and retention of

\(^7\) “[E]cclesiastical decisions . . . are to be accepted as matters of faith, whether or not rational . . . Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.” Id. at 714-15.

\(^7\) See id. at 727 (Rehnquist, J., dissenting).

\(^7\) See Jones v. Wolf, 443 U.S. 595, 602 (1979).

\(^7\) Id. at 603 (“The method relies exclusively on objective, well established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.”). Id.

\(^7\) See, e.g., Rayburn v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (applying exception to claims brought under Title VII of the Civil Rights Act of 1964); see also McClure v Salvation Army, 460 F.2d 553 (5th Cir. 1972).

\(^7\) See, e.g., Rayburn, 772 F.2d at 1171.

\(^7\) See, e.g., id. at 1170.

\(^7\) See infra notes 162-68 and accompanying text.
co-religionists, the fundamental right of the church to define and constitute itself—especially when it decides who is in charge of religious functions—is protected, even at great cost to individual employees (or potential employees). 78

While the law tolerates virtually complete autonomy in decision making regarding clergy and other church employees, the courts have grown increasingly uncomfortable with applying autonomy principles beyond these situations. In the past, the autonomy principle protected churches from litigation that would require searching inquiries into internal management practices, even though no ecclesiastical decisions of an internal religious dispute were involved. That use of autonomy seems to be diminishing, especially as more courts allow clergy abuse victims to sue churches under the neutral principles approach. 79 Further, courts faced with unprecedented questions of legal pluralism appear less tolerant. For instance, some bankruptcy courts handling diocesan bankruptcies refuse to recognize property ownership, as defined in Catholic canon law, in connection with sex abuse tort claims. 80

B. Establishment Clause: Walz v. Tax Commissioner 81

Some legislative exemptions are designed specifically for religious institutions. More commonly, churches benefit from legislative exemptions aimed at a broader category of institutions, such as charitable or non-profit institutions. Tax exemptions for the non-profit sector, an example of this second category, quite explicitly preserve the distinction between civil society and the state and embody the presumption that charities, including churches, promote the common good. A mechanism of accountability—revocation—is built into the tax system. 82 For other areas of law, doctrinal developments often function to limit exemptions when they threaten the common good.

Religious and educational activities were historically included in the common law’s definition of “charity,” because, like charity, they “redounded to

78 Churches are “free to: ‘select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.’” Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (quoting Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 COLUM. L. REV. 1373, 1389 (1981)).


80 See, e.g., In re Roman Catholic Archbishop of Portland in Or., 335 B.R. 842 (Bankr. D. Or. 2005) (refusing to defer to canon law).


82 See, e.g., I.R.C. § 504 (2006) (providing for revocation of tax exempt status for political lobbying); see also Walz, 397 U.S. at 673 (discussing revocation of tax exempt status).
the benefit of an indefinite public. In fact, even today most American churches are considered to be "public charities." Some might quarrel with this designation because not all religious purposes are dedicated to the public's benefit. But the record is clear that churches engage in numerous social welfare endeavors, such as education, health care, and serving the poor, among other things, which often supplement the work of both other charitable institutions and the state. While recent debates in Congress and the courts have focused on the prudence and constitutionality of governmental funding for churches in these social efforts, no one disputes the considerable extent to which churches are generally involved in "charitable" works. Thus, the current understanding is that churches, as charities, confer a public benefit, create social stability, and relieve government of specific burdens. This rationale recognizes that though many mediating institutions are formally considered to make up the "private non-profit sector," in actuality they are non-state actors with public purposes and public impacts.

The public benefit presumption provides the major historical and contemporary justification for tax exemptions and serves as the backdrop for the Court's decision in Walz v. Tax Commissioner, an Establishment Clause challenge to a tax exemption for church property. While tax exemptions for church property have existed for hundreds of years, the current rationale for such exemptions dates to the late nineteenth century when there was widespread agreement that churches "serve to the advantage of both society in general and the state in particular. They dispense 'social benefits' and discharge 'state burdens.'" Despite the persistence of this rationale, the Walz Court found the tax exemption to be justified not by public benefits, but by an appropriate "benevolent neutrality" of the state toward the church, by the institutional separation of church and state, and by history. Yet the Court was well aware that the exemption reflected the state's finding that all these groups "exist in a harmonious

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83 John Witte Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties 192-93 (2000) (quoting Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (Mass. 1867). Charity came to be defined as "any activity that redounded to 'the benefit of an indefinite number of persons, either by bringing their hearts or minds under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, by erecting or maintaining public buildings, or by otherwise lessening the burdens of government.'"

84 See, e.g., Wells, supra note 38, at 1203.

85 This requirement is not strictly administered. Witte, supra note 83, at 208-10.


87 397 U.S. 664 (1970). New York law made the exemption available to a broad range of charitable, educational and other nonprofit institutions.

88 Witte, supra note 83, at 202.

89 Id. at 187.
relationship to the community at large" and "foster its 'moral or mental improvement.'" The Court noted that it was constitutional for a legislature to classify and exempt non-profits—including churches—that it found "useful, desirable, and in the public interest." Because churches, along with other non-profit institutions, have "beneficial and stabilizing influences in community life," the Court admitted it makes sense to ensure they are not "inhibited in their activities," by taxation itself or by the means of enforcement by tax authorities. Thus, while the public benefit concept is not the basis for the decision, the concept is central to the decision's rationale: the state could extend benevolent neutrality to churches and strive for separation from churches only because churches could be trusted to promote the common good. The exemption was not unconstitutional "sponsorship" of religion, but rather a way to enable the state to coordinate non-profit mediating institutions, including churches, as they play their unique roles in civil society.

In addition to its consideration of the general public benefits of tax exemptions, the Court described the specific societal benefits of increased religious freedom and religious diversity. Justice Burger wrote that churches had not abused tax exemptions by using them to concentrate money or consolidate power, noting instead that the system had "operated affirmatively to help guarantee the free exercise of all forms of religious belief." Justice Brennan's concurrence emphasized that, in addition to contributing "to the well-being of the community in a variety of nonreligious ways," churches "uniquely contribute to the pluralism of American society by their religious activities." While such a focus on the society-state relationship might appear to dilute, or even substitute for the analysis of the church-state relationship, the Walz Court understood the tax exemption's function in both relationships. As institutions within civil society, churches are like other mediating institutions, and the exemption allows them greater freedom to mediate between the state, the market and the individual. It thus helps to preserve the independence of civil society from the state. But, as a constitutional matter, churches are never solely institutions of civil society.

90 walz, 397 u.s. at 672.
91 id. at 673.
92 id.
93 id. at 672.
94 id. at 678 (emphasis added).
95 id. at 687 (brennan, j., concurring).
96 id. at 689. for an excellent treatment of the approaches of burger and brennan, see c.m.a. mc cauliff, constitutional jurisprudence of history and natural law: complementary or rival modes of discourse? 24 cal. w.l. rev. 287, 321-25 (1988).
97 see evelyn brody, of sovereignty and subsidy: conceptualizing the charity tax exemption, 23 j. corp. l. 585, 629 (1998) (proposing that a "sovereignty" view of the charitable sector underlies the tax exemption, a perspective that "allows us to see how government simultaneously defers to and restricts charitable activity," by keeping government out of the business of charities and also keeping charities from petitioning the government for assistance).
society. When it comes to churches as churches, the exemption preserves the independence of the church from the state. In fact, Walz produced what would later become the famous “entanglement” prong of the Lemon test (also penned by Justice Burger): taxation of churches posed a far greater risk of state entanglement in the life of churches than did the exemption.

Inasmuch as the justification for tax exemptions rests on the notion that churches contribute to the common good, if a church behaves in ways incompatible with the common good, the exemption can be revoked. Indeed, “[a] corollary to the public benefit principle is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy.” Citing this traditional rule, the Internal Revenue Service revoked the exemption of a religiously affiliated college that had racially discriminatory policies. In Bob Jones University v. United States, the Court upheld the IRS’s action because the school violated the strong federal commitment to racial equality in education. The Court further justified the action because a school, and not a church (i.e., a worshipping community), was affected.

Bob Jones raised concerns among legal pluralists, political theorists and constitutional scholars that the state, in pursuit of its overarching norms, had used law for heavy handed “moral education” and might begin to pursue an aggressive agenda to evaluate the normative teachings of churches. The IRS had in fact attempted to prompt internal change at the school, and had been partially successful when the school, in response to the first threat of revocation, changed its policies from exclusion of non-whites to admission of non-whites, but with a prohibition against interracial dating. The decision can be justified as an example of the very traditional formulation for a tax exemption, one in effect since at least 1602: that social benefit, not harm, is expected.

Some minimal

98 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (providing that state action violates the Establishment Clause if it lacks a secular purpose, has the primary effect of advancing or inhibiting religion, or results in excessive entanglement between church and state).

99 See Walz, 397 U.S. at 674-75. This same concern motivated Justice Burger to refuse to uphold the exemption on the grounds that churches provide specific services or good works to members and the larger community. Burger was concerned that such a “test” for the exemption could give rise to conflicts between church and state. I suspect his concern was to avoid having the state distinguish among different religious groups as to which ones provide sufficient benefit to merit the exemption (and avoid the entanglement he feared).


101 461 U.S. 574.

102 See id. at 604 n.29.


104 See ARIENS & DESTRO, supra note 55, at 719 (stating that under the Statute of Charitable Uses, 1602, judges decided a use was charitable if it provided a public benefit and was otherwise consistent with public policy).
congruence between fundamental overarching norms and the norms of plural and particular groups is properly expected, especially since, as the Court found, the exemptions “encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.” In essence, an implied trust is attached to every tax exemption—with obligations owing to the public. There are constitutional limits to the operation of this trust when it comes to the teachings of worship communities, but the social fiduciary concept expresses the basic expectation, attached to these exemptions, of a modicum of accountability.

The requirement of social accountability is also reflected in major doctrinal revisions restricting the creation of exemptions in several contexts outside the tax area, such as charitable immunity and zoning protections. The presumption of public benefit that sustained these doctrines has waned over the decades, in large part due to the growing incongruence of that presumption with human experience and legal developments. Charitable immunity from employee negligence awards was originally intended to benefit charities (including churches) and the wider society by protecting “trust funds, . . . [and] encourag[ing] . . . altruistic activity through private philanthropy, and . . . reliev[ing] . . . the government from the need to provide beneficent services.” But over time, charitable immunity became incompatible with developments in tort and insurance law. Courts began to conclude that to require liability insurance neither threatened the survival of charities nor affected the “high service in the community” that they perform. Similarly, zoning protections in some states provided churches with a presumption of public benefit in the land use context, on the basis that religious land uses “are, in themselves, clearly in furtherance of the public morals and general welfare.” But this presumption of inherently beneficial land use has given way, in many places, to more explicit judicial assessments of the negative impacts caused by religious land use on surrounding properties.

C. Free Exercise Clause: Wisconsin v. Yoder

We have seen that the church autonomy doctrine and the exemptions it inspires can provide churches’ separate ethical-legal systems substantial room to

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105 Bob Jones Univ., 461 U.S. at 588.
107 See, e.g., Georgetown Coll. v. Hughes, 130 F.2d 810 (D.C. Cir. 1942) (discussing historical development of charitable immunity in tort law).
108 Id. at 827-28 (discussing the impact of tort liability on charities).
operate. We have also seen that the state, through legislative exemptions and judicial review of those exemptions, can make substantive judgments about the social good the exemption promotes. Now we turn to judicially created exemptions, carved out of general legislation where compatible with the common good.

Judicial creation of religious exemptions is not a modern phenomenon. In 1813, in *People v. Philips*, a New York court allowed a priest to remain silent, and not testify as to the identity of a thief, where he learned of that identity through the thief’s confession. The New York Constitution protected religious freedom “provided that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.” The court examined the social and ethical role of the sacrament of penance and found that an exemption—here, a priest-penitent evidentiary privilege—could be reconciled with the common good.

The *Philips* court, far from focusing on the dangers associated with allowing priests to withhold testimony in violation of a legal duty, focused instead on the social advantages of penance: the thief confessed and was reconciled to his God and his church and community, thereby making it less likely that he would steal again; and, in this case, the stolen goods were returned to the victims. With respect to the state’s system of criminal justice, some of the same goals—those that are cognizable by the state—of “reconciliation” to the community and return of the goods were accomplished, but by different means. An exemption from the general requirement of testifying was recognized, but rather than lead to lawlessness, or threaten peace or safety, it allowed an alternative ethical-legal system to benefit and stabilize the immediate community and wider society.

More than a century and a half after *Philips*, the Supreme Court exhibited a similar recognition of an alternative ethical-legal system and the congruence of exemptions with the common good in *Wisconsin v. Yoder*. The Court’s opinion also points out the role of exemptions in sustaining the boundary between civil society and the state, by enabling families and churches to flourish in freedom and diversity. In *Yoder*, Amish parents claimed that send-
ing their children to school after the age of fourteen severely burdened their ability to transmit their faith and way of life to their children and to sustain their community. But unlike Walz, the Yoder court did not simply respect a legislative finding of social benefit; rather, it found actual benefit on the evidentiary record.\textsuperscript{118} Exempting the children from those last two years of required education involved no “harm to the physical or mental health of the child or to the public safety, peace, order, or welfare.”\textsuperscript{119} Beyond this minimal consistency with the common good, the exemption was found to promote the common good, albeit in an alternative (Amish) manner.

The Amish community has been a highly successful social unit within our society, even if apart from the conventional ‘mainstream.’ Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemptions . . . from the obligation to pay social security taxes . . . . The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life . . . and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade . . . .\textsuperscript{120}

The Court applied a strict scrutiny standard of review to the Wisconsin law. That standard provides that if religious claimants demonstrate that a law burdens their religious belief or practice, the government must justify the burden with a compelling interest that cannot be advanced by a less restrictive alternative. The Amish, while seeking freedom from “the hydraulic insistence on conformity to majoritarian standards,”\textsuperscript{121} were not asking for an exemption to allow them to be lazy and uneducated. The Amish had their own method of work and their own system of education, and allowing this system to flourish through exemption allowed the state’s goals of education to be realized—albeit in a different way, for this particular community. In assessing the government’s claim that its legal requirements served a compelling interest, the Court made clear that the government’s interest must be one “not otherwise served.”\textsuperscript{122} The Court

\textsuperscript{118} Id. at 218.
\textsuperscript{119} Id. at 230.
\textsuperscript{120} Id. at 222, 225 (emphasis added).
\textsuperscript{121} Id. at 217.
\textsuperscript{122} Id. at 215 (emphasis added).
recognized that the state’s interest in education could be properly served in this
way, by this community, according to its norms—yet outside the system estab-
lished by the state.

Like the Walz decision, Yoder provides us with a view of exemptions
that enable religious groups to promote the common good. Here we find an
exemption in harmony with the state’s interest and society’s needs. The Amish
may not share all the values of the larger culture, but their values do not threaten
to undermine the larger culture. They promote “informal learning-through-
doing; a life of ‘goodness,’ rather than a life of intellect; wisdom, rather than
technical knowledge; community welfare, rather than competition . . . ”123 The
Amish way of life encompasses virtues that are highly prized by many of those
mediating institutions that help nurture the person and cultivate the citizen.
Thus, Yoder, like Walz, reflects an appreciation of the role of exemptions in
sustaining the distinction between civil society and the state, and of the benefi-
cial and stabilizing tendencies of mediating institutions like families, churches
and charities, thereby expressing the quintessential Madisonian paradox that
stability and social health can be achieved through freedom, not law. And like
Walz, Yoder also implicitly celebrates the legal pluralism the exemption en-
abled.

To be sure, doctrinal developments have made exemptions harder to es-
tablish and sustain. The church autonomy area has seen calls for greater ac-
countability and the rise of the “neutral principles” approach has made it easier
to impose overarching norms upon churches.124 Courts are also less likely than
before to entertain presumptions of public benefit from church activities.125 But
few were prepared for the sweeping imposition of a system of near-total ac-
countability that occurred in 1990. The Court, in Employment Division v.
Smith,126 did not overrule Yoder, but virtually eliminated the possibility of
judge-made exemptions from otherwise general laws.127 The Smith Court re-
jected a claim for an exemption from drug laws for Native American sacramen-
tal use of peyote by holding that the compelling interest test is not applicable to
most neutral, general laws.128 To justify the rejection of the strict scrutiny stan-
dard of review, Justice Scalia wrote, “[a]ny society adopting such a system [of
exempting religious objectors when the law fails to serve a compelling interest]
would be courting anarchy, but that danger increases in direct proportion to the
society’s diversity of religious beliefs, and its determination to coerce or sup-
press none of them.”129 A regime of judicial exemptions is a “system in which

123 Id. at 211.
124 See supra notes 72-73 and accompanying text.
125 See Reynolds, supra note 110.
127 Id. at 881.
128 Id. at 879-80.
129 Id. at 888.
each conscience is a law unto itself." For the Smith Court, legislatures, not courts, are the appropriate bodies for determining the wisdom of exemptions.

In response to Smith, Congress saw fit to return the task of exemption creation to the judiciary, in certain contexts, by passing the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). These federal statutes (and some state counterparts) restore the Yoder approach in some categories of cases. But if a legislature decides not to include exemptions for churches, and no statutory recourse exists under RFRA or RLUIPA, churches are virtually without constitutional protection when neutral, general laws burden their religious practices. After Smith, the temptation for states to impose their overarching norms on the institutions of civil society—especially churches—is a strong one indeed.

III. DEVELOPING A UNIFIED "COMMON GOOD" APPROACH UNDER BOTH RELIGION CLAUSES

Judicial interpretation and application of the Religion Clauses and religion-protective statutes fulfills an important social role in regulating the relationship between the legal pluralism of churches in civil society and the overarching norms of the state as those norms are expressed in generally applicable laws and doctrines. But courts and legislatures should not assume that an antagonistic relationship exists between the norms of churches and the norms of the state. As is evident in Watson, Walz and Yoder, churches, in their plural and particularistic ways, might very well advance some of those overarching norms when their own internal ethical-legal systems are allowed to guide their behavior. Recognizing this possibility requires the state to recognize its own limitations, vis-à-vis both churches and civil society, and to acknowledge that exemptions, properly evaluated and tailored, enable responsible freedom, rather than lawlessness or abuse.

The concept of the common good mediates this comparison between competing norms. Because of the focus on the "compelling interest test" in free exercise discourse, we tend to equate the state's interest with the general welfare. Yet, "the common good" is a broader category that gives due consideration to the role of the institutions of civil society and focuses on social conditions as they affect human development. Thus, "the common good" cannot be identified with the good of the state, or of any one institution, or even the

130 Id. at 890.
131 Id.
132 See 42 U.S.C. §§ 2000bb to 2000bb-4 (2000). RFRA applies only to federal law after it was held unconstitutional as applied to the states, see City of Boerne v. Flores, 521 U.S. 507 (1997). Twelve states have passed "mini-RFRAs." For a complete listing, see McCONNELL, GARVEY & BERG, supra note 8, at 161.
"greatest good of the greatest number," for these concepts ignore "how this overall sum [of welfare] is distributed among the members of the society." The common good refers to "the securing of a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development." The common good has been described as consisting "chiefly in the protection of the rights, and in the performance of the duties of the human person." But the common good also calls for a just, peaceful and stable society comprised of strong mediating institutions. All institutions work together to provide the political, economic and social conditions that enable the full flourishing of the human person.

The common good is not a fixed concept. While its unchanging objective always focuses on the flourishing of the human person in society, the definition of the common good is "concretize[d] in historical, time-bound goals" and is "constantly revis[ed] and reconceiv[ed] in accordance with the particular needs of the time." And it is reached only through deliberation. Thus, the specific goals of legislation, or a particular interest of society can give expression to an aspect of the common good, insofar as it addresses the creation or reform of specific political, economic and social conditions. The lawmaking activity of the state, framed in terms of the "state's interest" or "society's general welfare," is capable of promoting the common good. Exemptions give a particular kind of expression to the role of mediating institutions, and invite consideration of the ways in which the conduct of the exempt institution will affect social conditions.

Issues involving exemptions arise under two different clauses of the First Amendment. Those granted by a legislature might be challenged as violations of the Establishment Clause, as was done in Walz. And where the legisla-

134 JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154 (1980).
136 FINNIS, supra note 134, at 154.
137 Declaration, supra note 23, at 683-84.
138 The common good "embraces the sum of those conditions of social life by which individuals, families and groups can achieve their own fulfillment in a relatively thorough and ready way." Pastoral Constitution on the Church in the Modern World, in THE DOCUMENTS OF VATICAN II 199, 284 (Walter M. Abbott, S.J. ed., 1966).
141 See supra note 28 and accompanying text.
ture has not granted an exemption, a religious claimant might ask a court to create an exemption as a mandate of the Free Exercise Clause, as was done in *Yoder*. While this second alternative was severely narrowed after the 1990 *Smith* decision, Congress responded to *Smith* with RFRA and RLUIPA, which provided causes of action to challenge federal laws, laws governing state prisons, and laws that affect religious land uses. These statutory provisions will be discussed in connection with the free exercise jurisprudence.

In this section, I describe two separate exemption jurisprudences (one under each clause) and locate in each the connection between exemptions and the common good. Since that connection already exists in each body of precedent, I propose to unify the separate analyses so that one approach applies across the board. Further, I suggest that this inquiry should apply differently to the three main categories of exemptions: those that enable churches to constitute themselves, those that provide relief from financial obligations, and those that facilitate church participation in a great variety of human services. These categories make possible a more nuanced understanding of society's proper expectations of churches. Under these categories social accountability is lowest when exemptions enable churches to constitute themselves and is highest when churches receive financial benefits and serve those outside of their membership bodies. In the section to follow, I will further refine the analysis by taking into account situations in which normative standards remain contested.

This proposal is not intended to expand the role for courts and legislatures in evaluating the conduct of churches. As we see from a brief overview of *Watson*, *Walz* and *Yoder*, courts and legislatures already evaluate—sometimes explicitly, more often implicitly and indirectly—the relationship between exemptions and the common good. The proposal simply offers guidance and constraints for an evaluative process that already occurs.

A. Exemptions: Two, Now Three, Distinct Bodies of Law

*Yoder*'s extraordinary judicial sensitivity to the common good argument showed that the Free Exercise Clause, and the "compelling interest test" that enabled exemptions under that clause, were capable of capturing the church-society connection. The *Yoder* Court found that an exemption that removed a burden on religious practice was compatible with the state's goals. But post-*Yoder* applications of this test obscured the connection between exemptions and the common good because the Court over-emphasized the test as a "weighing" of opposing interests. When the "weight" of the burden to religious practice was measured against the "weight" of the state's interest, an exemption (to alleviate the burden on religious practice) would be granted only if the state's interest was not sufficiently "heavy." Given the significance attached to most laws, simply by virtue of a legislature's decision to address a given issue, it was very
difficult for a religious claim to "outweigh" the state's interest.\footnote{See the cases discussed in Employment Division v. Smith, 494 U.S. at 879-86. Justice Scalia concluded from these cases that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." \textit{Id.} at 878-79.} Such a focus on balancing the interests obscured the more appropriate question: whether a religious exemption might be compatible with, or indeed might even promote, a state interest of a most compelling nature.\footnote{Justice Scalia likened the balancing test to comparing the length of a line to the weight of a rock. \textit{Bendix Autolite Corp. v. Midwesco Enters.}, 486 U.S. 888, 897 (Scalia, J., concurring).}

The compelling interest test came to be understood as setting forth rights in opposition to the state's interest, which included a "weighing" of antagonistic claims, so that exemptions from law unavoidably undermined the state's goals.\footnote{\textit{Yoder} characterized the compelling interest test as a weighing, but did not allow the metaphor to obscure the connection between the exemption and the state's interest in education.} With increased litigation from individuals with \textit{sui generis} religious beliefs,\footnote{See, e.g., \textit{Bowen v. Roy}, 476 U.S. 693, 695-97 (1986).} courts began to assume that religious claims in general necessarily conflicted with those of the larger society, and that religious conduct tended to be antisocial and destabilizing.\footnote{See cases cited in \textit{Smith}, 494 U.S. at 888-89 (what Justice O'Connor refers to as the "parade of horribles" in her concurring opinion.) \textit{Id.} at 902.} By the 1980s, we find the Court emphasizing the irrational and incomprehensible aspects of religion for individuals and for churches.\footnote{See, e.g., \textit{Thomas v. Review Bd.}, 450 U.S. 707, 714 (1981) (finding that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"); \textit{see also} \textit{Serb. E. Orthodox Diocese v. Milivojevich}, 426 U.S. 696 (1976).}

At the same time, the protection of the common good of society came to be identified exclusively with the state's role. By the time of the \textit{Smith} decision, the Court associated the exemption mechanism of the compelling interest test with lawlessness, not stability or promotion of the common good. Rather than repair the test by retrieving the underlying connection between exemptions and the common good, the \textit{Smith} Court simply jettisoned it. The dissent, however, perceived that connection, and found it significant.

The dissenters in \textit{Smith} retrieved \textit{Yoder}'s common good argument, and found that the peyote exemption and the state's anti-drug goals were compatible.\footnote{\textit{Smith}, 494 U.S. at 908-16 (Blackmun, J., dissenting) (citing Wisconsin v. \textit{Yoder}, 406 U.S. 205 (1972)).} Beyond the argument that the exemption would not thwart the federal war on drugs because there was no trafficking in peyote, they justified the exemption on the grounds that it actually promoted important state goals. Looking carefully at the reasons why more than half of the states had granted peyote exemptions for Native Americans, they found that the sacramental use of peyote
promoted community stability and family life, and reduced drug and alcohol abuse.\textsuperscript{149}

After Smith, and no doubt in reaction to it, we see some glimpses of the common good argument. Some state courts employed their state constitutions to retain the compelling interest test, and some of those admitted the connection between the exemption and the state’s goals.\textsuperscript{150} In fact, some courts noted that the state’s goals were promoted more effectively by the church’s conduct than by compliance with the state’s laws.\textsuperscript{151} Similarly, some interpretations of RFRA and RLUIPA make the common good connection.\textsuperscript{152} These courts have steered away from the notion of “weighing” oppositional interests and have seen a harmony of compatible interests when the state’s goal is promoted in the religious actor’s own way.

In fact, RFRA, which directly references Yoder as an interpretive guide, and RLUIPA seem to offer the best vehicle for retrieving any sense of a connection between exemptions and the common good. Chief Justice Roberts’s recent opinion interpreting RFRA, Gonzales v. O Centro Espirita Beneficente Uniao

\textsuperscript{149} Smith, 494 U.S. at 907, 914-15 (Blackmun, J., dissenting).


\textsuperscript{151} See, e.g., State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (silver reflecting tape on slow-moving Amish vehicles promoted safety goals even more effectively than the state’s orange-triangle requirement).

\textsuperscript{152} See, e.g., Cheema v. Thompson, 67 F.3d 883, 886 (9th Cir. 1995) (Sikh children’s offer to sew ceremonial knife into sheath satisfied school’s no-knife policy); Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (D. Cal. 2003) (church building plans would curb urban blight, so town did not have to deny conditional use permit); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1228 (D. Cal. 2002) (church building plans would curb urban blight, so town did not have to take the property by eminent domain); Campos v. Coughlin 854 F. Supp. 194, 209 (S.D.N.Y. 1994) (prisoner’s offer to wear religious beads under clothing satisfied the prison’s concern that beads could be used in gang identification); W. Presbyterian Church v. Bd. of Zoning Adjustment, 849 F. Supp. 77, 78-79 (D.D.C. 1994) (church soup kitchen could operate so long as it did not create negative impacts on surrounding neighborhood).
Do Vegetal (UDV) spoke in terms of explicit compatibility between the religious exemption and the promotion of the greater social good. In UDV, a small sect claimed that its use of an illegal drug for sacramental purposes was protected under RFRA. The federal government claimed that uniform enforcement of the drug laws was necessary, and that the current absence of any legislative exemption was sufficient proof. Rather than describe the process as a "weighing" of antagonistic interests, Chief Justice Roberts remarked that the Free Exercise Clause interpretation RFRA was intended to replicate "scrutinized the asserted harm [to state interests] of granting specific exemptions to particular religious claimants." Specifically describing the Yoder decision, he emphasized several times how the Court carefully examined not only the government's interests, but also "the impediment to those objectives that would flow from recognizing the claimed Amish exemption." In that case, he said, Wisconsin had to demonstrate "with more particularity how its admittedly strong interest... would be adversely affected by granting an exemption to the Amish." In UDV the Court emphasized that because "context matters," the state must demonstrate a causal connection between the exemption and social harm. The case rejected the automatic assumption that religious exemptions stand in opposition to the common good, instead placing the onus on the state to specify harms that would warrant the denial of the exemption. Because the underlying values of Yoder continue to be vibrant, the UDV decision helps to lay the groundwork for a retrieval of Yoder's sensitivity to the common good argument, and contains the seeds for rectifying the inadequacies of the Smith approach.

While free exercise and statutory claims ask courts to grant an exemption, the Establishment Clause is invoked when a religious exemption has already been legislatively granted and is being challenged as an unwarranted "benefit" to religion. For the most part, however, legislative exemptions are not considered "benefits" under the usual establishment tests because they are

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153 546 U.S. 418 (2006). I have argued elsewhere that RFRA was unconstitutional because the articulation of a standard of review under the Free Exercise Clause is a judicial task. See Eugene Gressman and Angela C. Carmella, The RFRA Revision of the Free Exercise Clause, 57 OHIO ST. L.J. 65 (1996). The article argued for a judicial return to the compelling interest test in free exercise interpretation. In the present article, I do not advocate a simple return to that test. I do, however, appreciate that the statutory interpretations of the compelling interest test in RFRA and RLUIPA, as was the case in Yoder, are capable of showing compatibility between exemptions and law.

154 UDV, 546 U.S. at 431.

155 Id. (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

156 Id.

157 Id. (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

158 The Court pointed out that the text of the federal drug law at issue "contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety.'" Id. at 432-33.

159 I refer here to the "Lemon" and "endorsement" tests. The Lemon test requires a secular legislative purpose, a primary effect that does not advance or inhibit religion, and no excessive
understood to promote not religion, but religious freedom. Indeed, because the Smith Court deemed legislatures superior to courts for crafting religious exemptions, legislative exemptions are now practically the “only available vehicle for honoring Free Exercise values” under the First Amendment. This does not mean, of course, that all exemptions are acceptable; some might “devolve into ‘an unlawful fostering of religion.’” Therefore, the Court has developed, over time, several factors for distinguishing between permissible exemptions that promote free exercise and impermissible ones that provide “unjustifiable awards of assistance.”

Given the primacy of free exercise values, then, it is not surprising that religious exemptions in legislation must be shown to lift state-created burdens on religious exercise. This is illustrated vividly in Corp. of Presiding Bishop v. Amos, a case rooted in autonomy doctrine. The federal employment discrimination statute in question allowed churches to discriminate in favor of their own members, regardless of the religious or secular nature of the employment. A janitor was fired by his church employer because he was no longer a member in good standing. He challenged that provision of the law as a violation of the Establishment Clause on the grounds that his job was secular, and that churches should be subject to anti-discrimination laws with respect to secular jobs. Justice White justified this exemption wholly on religious freedom grounds, and in doing so, extricated it from the snares of Lemon’s purpose and effect prongs. He wrote that the exemption fulfills a proper secular purpose because it “alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”

He further found that the exemption did not unconstitutionally advance religion “simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden ‘effects’ under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence.” Though Justice O’Connor criticized this distinction, it is fully consistent with the no-church-state entanglement. Lemon v. Kurtzman, 403 U.S. 602 (1971). The “endorsement test” prohibits the state from endorsing or disapproving of religion in a way that makes religion relevant to one’s standing in the political community. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring).

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161 Id. at 133-134.
163 Id. at 348 (O’Connor, J., concurring).
164 Id. at 327 (majority opinion).
165 Id. at 335.
166 Id. at 337 (O’Connor, J., concurring).
167 Id. at 347. Justice O’Connor thought it would be helpful to admit that an exemption advances religion, but then to decide which ones are constitutional accommodations and which ones are “unjustifiable awards of assistance.” Id. at 348.
tion that exemptions give churches freedom to develop their plural and particular identities in civil society. Justice Brennan’s concurrence made even more explicit the fundamental autonomy concerns expressed in the exemption, noting that a church “defines itself” when it “[d]etermin[es] that certain activities are in furtherance of [its] religious mission, and that only those committed to that mission should conduct them . . . .”

In addition to an exemption’s connection to the promotion of free exercise, several other factors are significant in determining the permissibility of exemptions under the Establishment Clause: the burdens an exemption might impose on non-beneficiaries; the possibility of sectarian discrimination arising from the exemption; and the possibility that an exemption will override other important interests. In the recent decision of Cutter v. Wilkinson, Justice Ginsburg applied this multi-factored approach to exemptions under the Establishment Clause, and, like Chief Justice Roberts in UDV, suggested an explicit connection between exemptions and the common good. In Cutter, prison administrators challenged the portion of RLUIPA applicable to prisoners as a facial violation of the Establishment Clause. What is different here is that the challenge is not to a specific exemption, like a tax exemption, but instead to a statute providing a process by which a religious claimant might gain an exemption. The Court thus takes the opportunity to see the free exercise values embedded in RLUIPA, and further, to see the connections between exemptions and their social impact.

In upholding the statute, Justice Ginsburg draws from prior establishment precedent concerning exemptions and other types of accommodations to distill a comprehensive inquiry regarding social impact. Concluding that “[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way,” she sets out the need to assess broader impacts. Courts specifically “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . .” Further, the exemption must not violate basic denominational neutrality. And finally, “[a]n accom-

168 Id. at 342 (Brennan, J., concurring).
171 Cutter, 544 U.S. at 722.
172 Id. at 720. See also Tex. Monthly, 489 U.S. at 24 (tax burdens flowed to non-beneficiaries); Thornton, 472 U.S. at 710 (Sabbath observers were protected “over all other interests . . .”).
173 Cutter, 544 U.S. at 723-24. The requirement that RLUIPA be “administered neutrally among different faiths” does not mean that all religions must receive the exemption, but that all religions that suffer the same burdens must receive the exemption. Id. at 720. As Professor Conkle explains, “[T]he government can grant one exemption but not another that is arguably similar as long as there is a distinction that is reasonable in terms of the relative strength of the government’s secular interests and the relative harm to those interests that a religious exemption would cause.” CONKLE, supra note 160, at 140.
modation must be measured so that it does not override other significant interests."174 While the government’s interest in this portion of RLUIPA is often cast in terms of prison administration, the Court makes clear that it is more accurately understood as the larger “social” interest in “discipline, order, safety and security” within the prison society.175 Thus, the impacts on increasingly broad social categories are relevant: the beneficiaries, the non-beneficiaries, other religious groups, and the wider society with any significant interest in the outcome.

Most Establishment Clause exemption cases involve religion-only exemptions. For broad exemptions that benefit churches as part of a larger group of non-state institutions, the establishment concerns are considerably lessened. In fact, when an establishment is found in the context of a religion-only exemption, an appropriate remedy is to broaden the exemption to include non-religious counterparts.176 Broadly applicable exemptions, like the tax exemption in Walz, are consistent with the many different understandings of establishment clause neutrality.177 They are also fully consistent with promoting the independence and pluralism of civil society.

Thus, the current Establishment Clause jurisprudence encourages legislatures to craft broad exemptions that include churches as beneficiaries. And when legislatures craft religion-only exemptions, those exemptions must promote free exercise. Further, it appears that even religious exemptions that could be said to lift burdens might still be violations of the Establishment Clause, if they place disproportionate burdens on those who do not benefit, allow sectarian discrimination, or thwart other overriding societal interests.178 Here the exemptions become unjustifiable awards of assistance, impermissible benefits to the church rather than a “vehicle for honoring free exercise values.”179 It remains to be seen whether Cutter’s contextual analysis will have the effect of redirecting lower courts’ interpretations of exemptions generally, or whether it will be more limited in scope.

B. Unifying the Distinct Bodies of Law

UDV and Cutter contain the seeds for regenerating and uniting the common good argument in both the free exercise and establishment contexts.

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174 Cutter, 544 U.S. at 722.
175 Id.
177 Neutrality has many different meanings. It can refer to: “evenhanded” aid given without reference to religion, benevolent neutrality (as in no sponsorship and no interference), strict neutrality as between religion and nonreligion, or the neutral effect of an accommodation that does not make a religious choice more attractive.
178 Cutter, 544 U.S. at 722.
179 Conkle, supra note 160, at 133-34.
But why is that important? Why should we care whether exemptions are given similar treatment under both clauses and under the religion-protective statutes? A unified inquiry is appropriate for institutional reasons and for substantive reasons.

A unified approach to exemptions calls on courts and legislatures to be involved in exemptions under both clauses. The *Smith* Court found courts incompetent to assess the compatibility of exemptions and the common good, as it involves what many consider to be "political" balancing. But this institutional preference creates a distortion in the assessment that legislatures make. Right now, there is virtually no way to seek a judicial exemption from a neutral law of general applicability unless RFRA or RLUIPA (or a state counterpart) applies. On the other hand, a legislative exemption is always subject to challenge under the Establishment Clause. The net effect is an imbalance: courts have the power to strike exemptions, but not to mandate them. This discourages legislative deliberation concerning exemptions and encourages legislatures to assert governmental norms against churches, thereby ignoring the very task of political balancing the *Smith* Court charged them with. Contrary to the impression left by the *New York Times* series noted at the start of this article, legislatures do say "no" to churches that seek exemptions. In a system that recognizes the possible compatibility of exemptions and the common good, courts need to be able to invalidate exemptions that cause social disruption and to mandate exemptions that produce religious freedom, social stability and public benefit. Legislatu

Moving from the institutional reasons for a unified common good argument under both clauses, we turn to the substantive rationale. Why is it necessary, as a matter of religious freedom and nonestablishment, to look to the impact of a church exemption on the common good? Certainly one could argue that this takes the focus off the purposes of the Religion Clauses—primarily promoting voluntary religious choice—and threatens to give the state *carte blanche* to limit freedom whenever it claims that religious exercise is inconsistent with its goals or society's needs. This would dilute the protection for incumbent freedoms. Americans tend to consider rights to be most robust when unpopular groups with antisocial conduct are protected from state intervention,
without regard to social impact.\textsuperscript{182} We boldly proclaim that "it's none of the state's business."

But when it comes to exemptions, it is the state's business because exemptions remove religious conduct from the reach of laws properly within the state's jurisdiction. When government legislates, adjudicates, or regulates within its scope of competence, it must evaluate the social consequences of any exemption under consideration. Now, that does not mean that religious exemptions only protect "safe" conduct. Many exemptions protect what could be considered antisocial, disturbing, destabilizing, even harmful conduct. But, if we look closely at these exemptions, we see they are usually justified because either so few people are in a position to take advantage of them, or the impacts are so well contained that there is little or no harm.\textsuperscript{183} In these cases, a narrow religious freedom and limited legal pluralism can still be consistent with the common good, and even radically divergent values can contribute to the deliberative process that defines the common good.

The case for church exemptions that have more than a minor or well contained impact requires a more developed common good argument. Assuming the legislation is valid, an exemption for a class of activity otherwise covered by legislation (protecting either a group of institutions in civil society or churches alone) can be justified only if it does not thwart the common good. Some commentators focus on the structural aspects of the common good, arguing that freedom for the institutions of civil society is an intrinsic good.\textsuperscript{184} But in the exemption context, it is simply not enough to consider the increase in diversity and pluralism that exemptions enable, for this argument excuses too much. Under such an argument, any exemption would be presumed to be a social benefit, and we know that is simply not true. Obviously, an exemption from criminal law to allow religiously motivated murder would never be tolerated. Thus, a simple appeal to the contribution of exemptions to pluralism and boundary maintenance between civil society and the state is insufficient.

There is no way to avoid substantive judgments about the social impacts, positive and negative, of churches. A richer and more accurate view of the common good goes beyond structural "boundary maintenance" and includes this substantive evaluation. In the context of exemptions, courts and legislatures

\textsuperscript{182} See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940).

\textsuperscript{183} See, e.g., Alicia Novak, Comment, The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges, 7 U. PA. J. CONST. L. 1101 (2005). Congress responded to Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (which held that the Free Exercise Clause was not violated by a military prohibition on yarmulkes) by exempting religious headgear like yarmulkes from the military prohibition, in part because so few men would make use of the exemption that it would not seriously compromise the necessary esprit de corps. Similarly, the peyote exemption from drug laws for Native Americans passed by Congress in 1994 was justified in large part because there is no trafficking of peyote. 42 U.S.C. § 1996(a) (1994).

have always made such evaluations, and will continue to do so. In the church autonomy cases, drawing the line between appropriate autonomy and appropriate regulation tacitly involves such an assessment. The burden-compelling interest test invites such an assessment, even though it was rarely framed in those terms. Even the Smith decision created a sweeping presumption that religious exemptions thwart the common good (unless legislatures determine otherwise). Finally, the Establishment Clause goal of preventing unwarranted religious privilege invites such an assessment as well, because an exemption that benefits a church at the extreme expense of society is precisely the measure of "favoritism." Why not make sure the assessment is done explicitly, with safeguards in place?

I propose the following standard, and then demonstrate how it might be applied in three categories of exemption below. This approach would inform both the Free Exercise and Establishment Clause analyses, as well as the RFRA and RLUIPA interpretations, and apply whether a church was requesting a court to order an exemption from a general law or whether a party was challenging an exemption as an establishment. It should also inform the inquiry of a legislature faced with exemption requests. First, we make sure the exemption removes a burden to religious exercise. Second, we determine the ethical-legal systems that function in place of the state's law. Third, we ask the nature of the exemption's impact on a) the state's law, b) any specific relevant societal interests, and c) the common good. These are different things, but we need to assess them individually and in relationship to each other. The common good is "the totality of goods that create the conditions in which persons flourish," so a given piece of legislation might advance one aspect of the common good, while an exemption advances another; a law might promote the interests of one slice of society (the rich, let's say), while an exemption might advance the interests of another (the poor—or vice versa). And finally, we consider the conduct of the state and other institutions of civil society—for instance, whether other non-state actors can be depended upon to promote the goals of the law—to make sure we have a complete picture of the exemption's impact.

C. Applying a Unified Standard to Distinct Categories of Exemptions

Exemptions, whether judicial or legislative, can be divided into three general categories. First are those exemptions that enable churches to define...
and constitute themselves. Like the ministerial exception, and the employment discrimination exemption as interpreted by the Amos Court, these exemptions echo the church autonomy cases going all the way back to Watson v. Jones. Next are those exemptions that give churches freedom from financial obligations. Like the tax exemptions of Walz, these exemptions echo the early understanding that churches, like all charities, are social fiduciaries and are expected to provide public benefit. Finally, certain exemptions give churches freedom from state regulation, particularly in the delivery of a numerous health, welfare, educational and social services. Like the exemption in Yoder, these exemptions allow churches to carry out important roles in society according to their own understanding and governed by their own internal standards. In contrast to the alternative educational system considered in Yoder, however, such services are usually provided broadly to beneficiaries outside the church, which heightens demands for social accountability. Of course all three of these categories often overlap, but they provide rough lines to help guide us.

1. Exemptions for Self-Definition and Self-Constitution

Exemptions that allow groups to define and constitute themselves protect a fundamental principle of freedom for many mediating institutions within civil society. This is the "particular and plural" of the civil society, in which numerous diverse groups are free to define their memberships and missions. For churches specifically, these exemptions further a limited autonomy on ecclesiastical matters and the independence of church and state. These exemptions also signify the acceptance of a modest legal pluralism: the alternative normative systems that govern decisions about membership, employment, and the like enable the functioning of non-state legal systems. Those affected are considered to have impliedly consented to be bound by church rules and governance. Thus, decisions and doctrines about employment—hiring, firing, moral standards, and the like—are generally immune from state intervention.

The state’s primary concern with this category of exemption is in ensuring that some normative standards function in place of its law. The substantive compatibility between the church’s norms and the state’s norms are far less relevant precisely because these autonomy-based exemptions are intended to allow for normative diversity and pluralism in civil society. These exemptions ensure the boundary between church and state, as well as between civil society and the state; they also allow for diverse voices to participate in deliberations over the common good, particularly as churches offer prophetic witness on a host of controversial social issues. The independence also protects the role of

188 Rosenblum & Post, Introduction, supra note 304, at 3-4.
189 State labor laws often apply, however, to religious institutions. See Brady, supra note 184, at 1658-62.
churches as mediating institutions.  

Decisionmakers considering exemptions in this category focus more closely on the structural, as opposed to the substantive, common good. The ministerial exception, for instance, protects churches even when they make arbitrary and deceptive employment decisions because the critical goal is to disable the state from deciding who runs a church.

But not all autonomy-based exemptions serve the boundary function without regard to substantive effects. Autonomy is also the basis for exemptions that protect sacramental practices and other core religious practices, such as the Native American peyote exemption and exemptions from abuse and neglect statutes for Christian Scientist parents who use spiritual healing when their children are sick. Such practices are just as central to self-definition and self-constitution as are decisions regarding employment. These exemptions, and the alternative normative systems that govern in the space created by them, are scrutinized from a substantive perspective. Peyote use has been recognized as having stabilizing tendencies in those communities that partake of it. And exemptions for spiritual healing have been justified by an entire system of alternative healing, complete with “nurse practitioners” certified by the Christian Science Church. Several states, however, have held parents criminally culpable for the deaths of their children, and a handful of states have repealed the exemptions in light of these deaths. Critics have called for the repeal of these exemptions in each state, especially since they are no longer required as a condition of federal funds.

Even in the employment area, a doctrinal shift toward greater social accountability (and a narrowing of autonomy) may be taking place. There is a circuit split on the issue whether the ministerial exception should be replaced by

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190 See, e.g., Mark Tushnet, *Defending a Rule of Institutional Autonomy on “No-Harm” Grounds*, 2004 BYU L. REV. 1375, 1377 (noting that virtues emerging from theological and ethical conviction are more authentic and have more authority over members than if those same virtues were enforced by civil law).

191 See generally Rayburn v. Gen. Conf. of Seventh Day Adventists, 772 F.2d 1164 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).


194 See, e.g., Walker v. Superior Ct., 763 P.2d 852 (Cal. 1988); Hermanson v. State, 570 So.2d 322 (Fla. 1990). For civil liability, see Lundman v. McKown, 530 N.W.2d 807 (Minn. App. 1995).


196 See HAMILTON, supra note 5, at 31 n.81.
a RFRA analysis when federal law would otherwise be applicable. Were this to happen, churches would not enjoy an automatic exemption but would have to prove in each case that applying a given law would actually burden its religious belief or practice and that the law did not represent a compelling interest. Using RFRA would allow courts to delve into the connection between the exemption and the substantive impact on the common good, something the ministerial exception now precludes.

2. Exemptions That Relieve Financial Burdens

The second category of exemptions involves those that relieve churches of financial burdens. These exemptions make it possible or easier for churches to advance their ministries and missions because their donations are not diverted to other, state mandated expenses. Thus, like the autonomy-based exemptions, these exemptions allow for self-constitution and self-definition and promote pluralism. When they benefit the larger charitable sector, exemptions from financial burdens serve a significant boundary maintenance function. But unlike the autonomy-based exemptions, there is a greater concern with the substantive compatibility between the church’s norms and the society’s norms. Tax exemptions and the charitable immunity doctrine—two traditional mechanisms for lifting financial burdens—always expected a broad public benefit from churches, charities and schools in exchange for the lifting of those burdens. This suggests that some scrutiny is appropriate as to social impact in this category of exemptions.

This exemption category goes well beyond income and property taxation. Churches are exempt from federal laws governing pension benefits and retirement income, and unemployment compensation, to name a few. Further, the exemptions in this category do not necessarily relate directly to financial obligations. Some simply make ministries and missions less expensive for

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197 Compare Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) (RFRA applies to minister’s age discrimination suit against church), with Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036 (7th Cir. 2006) (ministerial exception bars music director’s age discrimination suit against church).

198 See Brody, supra note 97 at 586.

199 The IRS has been very careful to respect rather than judge normative differences of worshipping communities; but it does exercise a clear normative judgments when it decides in the first instance which churches are eligible for tax exemptions and when it threatens revocation for violation of the political electioneering restrictions. In these ways the state decides which institutions are socially beneficial, and further confines those institutions to the social as opposed to political realm. For a critique, see Edward McGlynn Gaffney, Jr. On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics, 40 DePaul L. Rev. 1 (1990).


201 See, e.g., 26 U.S.C. § 3309(b) (2000); see also Henriques, Religion-Based Tax Breaks: Housing to Paychecks to Books, supra note 4.
churches, like exemptions from certain building and zoning requirements that involve high compliance costs. Even exemptions from licensing requirements for particular kinds of social service activities might be based entirely upon the removal of economic burdens.

Exemptions from financial burdens usually pass muster under the Establishment Clause (because they are connected to the promotion of free exercise), but have rarely been judicially created under a free exercise mandate. Sometimes courts note that fiscal burdens can severely impair religious exercise, but it is more common for courts not to find a constitutional violation when a law simply makes an activity more expensive. Part of this is attributable to the fact that courts do not want to encourage a landslide of church requests for exemptions from all kinds of laws that unintentionally raise expenses. But it is also attributable to the sense that financial burdens are simply of a different ilk, more attenuated in their connection to religious exercise.

Thus, exemptions from financial burdens will usually be legislative, enacted with the intent to encourage churches (and often other charities) to engage in socially beneficial activity. Here a minimal social accountability is particularly appropriate. Unlike autonomy-based exemptions, which allow for self-constitution and self-definition and to which we often give great deference, exemptions that lift financial burdens have their origin in fundamental social expectations. It might be going too far to say that minimal “trust” obligations are attached to these exemptions, as it is inappropriate to apply to churches concepts of trust duties that we apply to non-religious charitable institutions. Indeed, certain forms of accountability to the state breach the most fundamental church-state independence. Yet it seems necessary to consider the impacts of exemptions where church employee pensions have been lost, or where church employees who are laid off cannot obtain unemployment compensation. Likewise, in cases in which churches enjoy a zoning exemption to alleviate fiscal burdens, it seems necessary to ask whether the exemption enables them to benefit their members and community or whether it primarily permits them to use their property without regard to their neighbors.

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204 For examples of direct attorney general oversight that raises constitutional concerns, see ARIENS & DESTRO, supra note 55, at 565-79.

3. Exemptions for the Provision of Social Services

A third category of exemptions makes it easier for churches to provide social services. Most fundamentally, these exemptions relieve burdens on churches so they can relieve burdens on government. But there is more. "By injecting a diversity of values and beliefs into the provision of social welfare, religious organizations also strengthen pluralism and in addition offset the danger of a monopoly by government bureaucracy . . . [E]xperience in helping those in need can make religious groups independent, knowledgeable and credible participants in discussions about public policies."207

Many exemptions that relate to the provision of some socially valuable service thus implicate autonomy concerns of self-definition and self-constitution; they may involve the mitigation of financial burdens as well. So we are dealing with a hybrid of sorts in this category. For instance, many exemptions from land use regulation, judicial or legislative, attempt to do all three: where a church seeks to expand social programs on its existing site, a zoning exemption allows for the advancement of church ministries to serve people in need; allows for the continued expression of the church’s faith commitment; and relieves some financial burdens by allowing the church to use property it already owns.

Exemptions in this area warrant a much more substantive evaluation of both the internal ethical-legal norms that will function in place of the state’s law and of the social impacts of the exemption. As we recall from Yoder, we know that the freedom given the Amish was not the freedom to be education-free. It was freedom to use their own educational system. The Amish provide other good examples. Self-employed Amish workers are exempt from having to pay social security taxes because the Amish communities take care of their elderly members. The exemption permits the operation of an alternative system of care, which allows the Amish to be faithful to their beliefs. The Amish are even freed from street safety requirements in some places because their alternative safety measures for their slow-moving buggies have been found to be more effective than those required by the state.210

206 See, e.g., Ehlers-Renzi v. Connelly Sch. of the Holy Child, 224 F.3d 283 (4th Cir. 2000) (zoning law exempted religious schools located on church property from needing permits for expansion); Cohen v. Des Plaines, 8 F.3d 484 (7th Cir. 1993) (zoning law exempted religious day care centers from the normally required special use permit).
209 Id.
210 State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (silver reflecting tape on slow-moving Amish vehicles promoted safety goals even more effectively than the state’s orange-triangle requirement).
The proliferation of Amish examples is attributable to the fact that they are governed by a comprehensive alternative normative system. But a church does not need to be an enclave community in order to claim an alternative normative system on a given matter. There may simply be areas in which belief and practice differ from that of the wider society, and exemptions are needed to permit those differences. Conscience exemptions for Catholic health care institutions allow them to provide health care while following the Church's moral teachings on abortion and sterilization. Food inspection exemptions that allow for ritual animal slaughter under kosher and halal rules allow the Jewish and Muslim communities to market products and be faithful to their religious dictates.

When churches serve the public, the need for accountability is heightened. The normative system that will govern in place of the state's law becomes relevant to the potential beneficiaries of that service. Take the example of church-run day care facilities that serve families from both inside and outside the church. In ten or twelve states, church day care centers are exempt from some or all licensing requirements. If churches are subject to a separate accreditation system to ensure safety and health, sometimes more rigorous than the state's, such an exemption is easily justified. Or if churches have a clear plan that substantially complies with state safety and health regulations, even if not in specific conformity with every legal requirement (such as with respect to the number of toys per child), an exemption can be reasonable. But when the exemption simply allows churches to provide services with no alternative plan in place—other than the "quality control" of the pastor and congregation—an exemption is much harder to justify.

Holding churches to state requirements in the delivery of social services—like the example of day care licensing—involves rather mundane issues of compliance with public health and safety requirements. Churches that might balk at this rarely complain that the state is imposing particular moral norms (which would implicate autonomy concerns); instead, their complaint usually concerns the economic burden of compliance. Yet courts and legislatures have begun to show less concern even for the claims of moral burden resulting from imposition of the state's norms. The highest courts of both California and New York have decided that in order to promote the state's interest in gender equity and women's health, Catholic Charities must provide contraception coverage to its employees (in opposition to church teaching) if it provides prescription drug

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212 Ryan, supra note 6, at 1446 n.217.
coverage as part of its health insurance package. Further, in Massachusetts, where same-sex marriage has been instituted, adoption service providers must consider same sex couples just as they would other prospective parents. When Catholic Charities refused under orders from the bishops, the exemption they sought at the state legislature was dead on arrival. Apparently the prospect of losing adoption services as well as the service provider carried no political weight. With no judicial recourse available under Smith, Catholic Charities had no choice but to end its provision of adoption services. Such questions of regulatory exemption are difficult because they involve both the provision of services to the public and the preservation of institutional autonomy. In the former, a high degree of compatibility with state norms is expected, but in the latter case, very little. Further, they raise questions about the very definition of the common good.

IV. UNITING THE EXEMPTION JURISPRUDENCE WITH HELP FROM CATHOLIC SOCIAL THOUGHT

Inasmuch as it involves explicit evaluation of religious norms as they intersect with and support or thwart the norms of the state and society, using the common good argument as a benchmark for decisions about exemptions is undoubtedly vulnerable to the extremes of legal pluralism and legal authoritarianism. On their own, courts and legislatures might give unlimited deference to churches (and in the process abdicate the state’s role in protecting human rights, civic peace and public morals) or might severely undervalue religious associational and expressive freedoms in the interest of uniform enforcement of the state’s norms. Is there a principled way to constrain the range of possibilities, so that the common good argument can avoid both extremes? Two concepts from Catholic social thought, both closely related to the concept of the common good, are instructive: the public order function of the state and the principle of subsidiarity. Much like our constitutional design, these concepts work to-

217 Though “Catholic,” subsidiarity has been understood as a quintessential American phenomenon, allowing “individuals the fullest possible opportunity to reflect, choose, and act for themselves, and to take responsibility for the outcomes. The principle is in the best sense democratic . . . .” Thomas C. Kohler, Civic Virtue at Work: Unions as Seedbeds of Civic Virtue, in SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY, supra note 38 at 131, 155-56. Similarly, public order provides “an understanding of limited, constitutional government [and] provides us with a crucial framework for exploring the
gether to value freedom over order: as much religious freedom as is possible, and only as much restriction as is socially necessary. They provide specific limiting principles on society and the state that are intended to protect the dignity of the person and the common good.

Although it rejects the individualism of political liberalism, Catholic social thought always begins with the person, who is “the subject, the foundation, and the end of social life.”218 It posits an inherently social person, one who is “intelligent, reasonable, [] responsible . . . and situated,”219 formed by and through interaction with the institutions of civil society “with the ultimate goal of encouraging and empowering the individual exercise of responsibility.”220 Because the human person is an active agent of his or her own destiny, and lives in social “interdependence and relationship,” all persons and all institutions—social, political and economic—are called to contribute to the common good at all levels.221

The public order function of the state, though defined by particular tasks, is closely tied to promotion of the common good. Public order is, in short, that part of the common good the state is empowered to coerce by law.222 Public order involves, first, “the effective protection of the rights of all citizens and the peaceful settlement of conflicts of rights; [second], the adequate protection of that just public peace which is to be found where people live together in good order and true justice; and [third], the proper guardianship of public morality.”223 This function is broad indeed, and casts the state as an active force in ensuring the common good is promoted, through its laws and through its own governmental activities, but also (and especially) by coordinating the multiplicity of the institutions of civil society. Significantly, the state does not wholly define or control the common good, but “safeguards and promotes it.”224 The definition is left primarily to the institutions of civil society and the processes of deliberative democracy.225

relationship between human dignity, freedom, morality, and the proper function and limits of law in the contemporary American constitutional order.” Thus, it “deserves the attention of constitutional lawyers because of what it can teach us about the nature of constitutional government: government whose legitimate scope and power is limited by the demand for responsible freedom that is rooted in human dignity.” Gregory Kalsheur, Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom, 16 So. Cal. Interdisc. L.J. 1, 6-7 (2006).

218 POPE JOHN XXIII, PACEM IN TERRIS para. 26.
219 Kohler, supra note 217, at 155.
222 Carmella, A Catholic View, supra note 27, at 266-67.
223 Kalsheur, supra note 217, at 20.
224 Duncan, supra note 26, at 80.
225 See Coleman, supra note 30.
The principle of subsidiarity helps to define the contours of the state’s public order function. It is the principle that “a community of higher order [e.g., federal] should not interfere in the internal life of a community of lower order [e.g., local], depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.”226 A preference for lower over higher, and for non-state over state, inheres in the principle. Subsidiarity offers a normative vision of the human person situated within and empowered by multiple, vibrant mediating institutions that protect the individual from the state and market. Thus, any intervention or assistance from the state or from larger institutions must not absorb or usurp the functions of institutions of civil society, particularly of mediating institutions.227 In short, subsidiarity’s goal is “fostering the vitality of mediating structures in the service of human dignity and the common good.”228

Subsidiarity recognizes that devolution is justified only to the extent local groups can accomplish their goals.229 Its preference for lower over higher, non-state over state, “can always be overturned in light of experience . . . . The operation of the principle presupposes the coordinating and rectifying functions of the state.”230 In fact, together with the state’s public order function, the principle of subsidiarity not only justifies but often demands state action. “[T]he state and other large institutions have the duty to undertake those functions that neither individuals nor smaller associations can perform. From this perspective, social institutions exist to supply help (subsidium) to individuals in assuming self-responsibility. The subsidiary function of the community thus rests not in displacing but in establishing the conditions for authentic self-determination.”231

When problems exceed the capacity of local mediating institutions, the “help” that is often called for is governmental intervention in the form of money or other resources to make local groups more effective.232 Familiar (and contro-

226 CENTESIMUS ANNUS, supra note 221 para. 48.
227 POPE PIUS XI, ENCYCLICAL QUADREGESIMO ANNO para. 79, 80 (1931).
228 Duncan, supra note 26, at 74.
229 A reader familiar with contemporary political debates over the appropriate division of labor between the power of the states and federal government will have already noticed how the principle of subsidiarity can be co-opted by those favoring extreme devolution to the states and a severely limited federal government, and by those who believe that private institutions rather than government at any level should shoulder most of the burden of curing society’s ills. But Vischer argues that “the strictly conservative portrayal of subsidiarity misconstrues the nature of the Catholic social theory from which the principle arises . . . [and] also overlooks the affirmative government functions essential to subsidiarity’s faithful implementation.” Robert K. Vischer, Subsidiarity as a Principle of Governance: Beyond Devolution, 35 IND. L. REV. 103 (2001).
231 Kohler, supra note 217, at 155.
232 For an excellent discussion, see Susan J. Stabile, Subsidiarity and the Use of Faith-Based Organizations in the Fight against Poverty, 2 J. CATH. SOC. THOUGHT 313 (2005) (describing
versial) examples of such state/non-state collaboration include school vouchers and “faith and community based initiatives.” But it would be wrong to put exclusive emphasis on such a view of subsidiarity and public order. Subsidiarity and public order sometimes call, even more forcefully, for exemption from otherwise general laws to give mediating institutions “their own proper freedom.”

The state is affirmatively obligated to protect the integrity of lower level communities, helping them to achieve what they cannot achieve on their own, and redressing wrongs committed against them that they cannot redress themselves. On the other hand, the state also has an obligation to refrain from intervention where the lower level community can handle a matter on its own, or where the intervention will cause undue disruption to the relationships between the members of the lower order community.

“Handling the matter on its own” points to the independent capacity of mediating institutions to promote the common good, to play a beneficial and stabilizing role, to allow the functioning of independent non-state ethical-legal systems. Exemptions, in this view, are not mere favors or privileges, but part of the state’s mechanism for discharging its duty to ensure freedom, coordinate diverse actors toward the common good, and set conditions for the deliberation necessary for defining the common good.

Therefore, subsidiarity and public order together have a structural impact, “emphasiz[ing] that the common good is to be pursued in a particular way, one that has much in common with traditional notions of limited government.” This gives the mediating institutions of civil society wide latitude to define and pursue the common good while the state’s “subsidiary role” in promoting the common good involves the coordination of their efforts. It “re-frames our image of the modern state, envisioning it as a resource for localized empowerment and coordination, rather than an arbiter and provider of the social good.”

How do the principles of subsidiarity and public order assist in our analysis regarding exemptions? How do they help us determine when it is ap-

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233 See, e.g., LUPU & TUTTLE, LEGAL DEVELOPMENTS, supra note 86.
235 CENTESIMUS ANNUS, supra note 221, para 86.
236 Kalsheur, supra note 217, at 24.
237 Vischer, Subversion, supra note 139, at 288.
propriate to permit an alternative ethical-legal system to govern, or when it is appropriate to impose the state’s overarching norms? First, because these principles focus primary attention on the civil society, a broad degree of normative diversity is presumptively acceptable. Diversity and pluralism are features of the conditions that provide for the flourishing of the human person. In fact, the definition of common good is not so much one common good as a multiplicity of common goods, many of which crisscross in a broadly stabilizing way. Identifying those aspects of the common good that are universal—for which multiple conceptions are not acceptable—is part of the deliberative political and social process.

Second, the public order function—especially as it is described in the Declaration on Religious Freedom—entails a presumption in favor of freedom “as far as possible, and curtailed only when and in so far as necessary.”238 Obviously, state restrictions become “necessary” when churches commit abuses on the pretext of religious freedom, or directly interfere with the state’s ability to perform its rightful functions to guarantee human rights, civic peace, or public morality.239 But by ordering freedom over restraint, “public order” suggests that the state must look for the “least restrictive alternative” when curtailing religious freedom.240 Additionally, there are prudential limits on law, in cases where law will not be effective or might actually cause harms in other areas.241

Third, even given all these constraints on the state, the principles of subsidiarity and public order provide a fundamental role for law in ensuring social accountability. While these principles support limited government, they also support an activist and moral government. When the institutions of civil society cannot alone provide the proper conditions for the promotion of the common good, the state must become involved. And in fact, governmental intervention beyond coordination of non-state actors has been necessary in many areas, such as the economy, education, health care, the environment, housing, and opposition to discrimination. “Because the state’s purpose is tied to the promotion, protection, and coordination of the common good, its role is essentially a moral one . . . .”242 Obviously the dialogue within the civil society on the substantive meaning of the common good is a critical one. But through law the state is a participant, not a mere umpire.

And yet a moral role for government is not necessarily the same as a state that forces moral congruence on the institutions of civil society. Political theorists recognize two positions. The model of congruence, which would require normative conformity among various social groups, acknowledges the role of the state as moral educator, and views law as a tool that “defines and educates

238 Declaration, supra note 23, at 687.
239 Id. at 686.
240 Carmella, Protection, supra note 79, at 1050-51.
241 Id. at 1050.
242 Carmella, A Catholic View, supra note 27, at 269.
its citizens.” 243 In a heavy handed way the state reaches into civil society and “invites state institutions to colonize social life in the name of progressive public ideals.” 244 An alternative model allows for more normative diversity and posits that “public life can be sustained by a modus vivendi among competitive groups, or by an ‘overlapping consensus’. . . ” 245 The question of exemptions from general laws will increasingly implicate profound issues of the moral life of the community. “To the extent that civil society flourishes and evidences agreement about significant public values, greater degrees of congruence can be tolerated. But to the extent that civil society is less open and more segmented, with deep social divisions based on class or status, modus vivendi may be all that is attainable.” 246

V. CONCLUSION

As the Declaration on Religious Freedom teaches, and as the exemption jurisprudence confirms, the right to religious freedom is exercised “in human society.” 247 The common good argument, as developed in this article, has been an attempt to think through the implications of responsible freedom. When we see abuses, we are tempted to assume that exemptions inevitably undermine law and social norms. But this would be a mistake. Churches are able to contribute directly to the social conditions that permit the full flourishing of the human person, and exemptions that enable these contributions promote the common good. Multiple ethical-legal systems operating in place of the state’s law promote religious freedom and diversity, and maintain the necessary boundary between civil society and the state. Such legal pluralism allows the common good to be fostered structurally, by protecting what is distinctive. But this legal pluralism may also promote widely shared norms and goals. When this happens, the common good is fostered substantively, by protecting what is shared.

Social accountability is thus achieved sometimes by exemption, and sometimes by legal regulation or restraint. The state coordinates mediating institutions, including churches, toward the common good, often by way of exemption. But when exemptions threaten the common good—specifically by violating human rights, civic peace or public morality, or by leaving social tasks inadequately done—the state properly asserts its law as the exclusive law. The common good argument, as set out in this article, recognizes that the entire enterprise of exemption jurisprudence must involve normative judgments if religious freedom is to be exercised responsibly, “in human society.”

244 Id.
245 Id. at 14.
246 Id. at 14-15.
247 Declaration, supra note 23, at 685.