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## The Costs of Conscience

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# The Costs of Conscience

*Micah Schwartzman,<sup>I</sup> Nelson Tebbe,<sup>II</sup> and Richard Schragger<sup>III</sup>*

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## INTRODUCTION

Rights have costs. Sometimes those costs are borne by the government. This happens most obviously when the government has to spend money to protect the exercise of a right or to punish violators of it.<sup>2</sup> But sometimes exercising a right entails costs that fall on individuals who do not benefit directly from the right in question. And when this happens—when a right imposes costs not on the government or on the public more generally, but on particular *third parties*—it is especially important to ask about the limits of the right and about the extent to which third parties can be asked to bear the costs of its exercise.

In the context of rights to religious liberty and freedom of conscience, questions about costs to third parties have been the subject of controversy in recent years. In prior work, we have argued that when the government accommodates religious believers, it may not impose undue hardship on identifiable third parties.<sup>3</sup> This is sometimes called the *third-party harm* doctrine. Our argument has been that this doctrine is both normatively justified and grounded in constitutional sources, namely, in the Religion Clauses of the First Amendment. Indeed, it should be no surprise that political morality and constitutional law point in the

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<sup>2</sup> See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COSTS OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

<sup>3</sup> See NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 49-70* (2017); Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *When Do Religious Accommodations Burden Others?* in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 328-46 (Susanna Mancini & Michel Rosenfeld eds., 2018) [hereinafter *When Do*]; Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *How Much May Religious Accommodations Burden Others?* in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 215-39 (Holly Fernandez Lynch et al. eds., 2017) [hereinafter *How Much*]; Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BLOGSPOT: BALKINIZATION (Nov. 27, 2013), <https://balkin.blogspot.com/2013/11/the-establishment-clause-and.html>; Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?* BLOGSPOT: BALKINIZATION (Dec. 4, 2013), <https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html>; Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BLOGSPOT: BALKINIZATION (Dec. 6, 2013), [https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause\\_9.html](https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html) [hereinafter *Reconciling Amos*]; Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Reply to McConnell on Hobby Lobby and the Establishment Clause*, BLOGSPOT: BALKINIZATION (March 30, 2014), <https://balkin.blogspot.com/2014/03/reply-to-mcconnell-on-hobby-lobby-and.html>; Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Holt v. Hobbes and Third Party Harms*, BLOGSPOT: BALKINIZATION (Jan. 22, 2015), <https://balkin.blogspot.com/2015/01/holt-v-hobbes-and-third-party-harms.html> [hereinafter *Holt*].

Our work builds on Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014) [hereinafter *RFRA Exemptions*]; see also Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 323 (Micah Schwartzman et al. eds., 2016) [hereinafter *Of Burdens*].

same direction. The idea that rights are limited when they impose undue burdens on third parties is both morally intuitive and a familiar part of our constitutional tradition.

Nevertheless, critics of the third-party harm doctrine have raised a variety of objections. They have argued that the doctrine lacks normative foundations,<sup>4</sup> that it is not grounded in constitutional sources,<sup>5</sup> that it assumes an incorrect baseline for determining when third parties are harmed,<sup>6</sup> and that it cannot be applied without eliminating all, or nearly all, religious accommodations.<sup>7</sup> Although these four objections have received the most attention so far, critics have also argued that the third-party harm doctrine does not apply when the government provides legal exemptions not only for religion but also for secular claims of conscience.<sup>8</sup> More specifically, when the government recognizes both religious and secular grounds for conscientious objection, it does not treat religion distinctively and so it does not trigger constitutional scrutiny under the Establishment Clause. Finally, some have objected that religious freedom is like other fundamental rights that impose harms on others.<sup>9</sup> Consider, for example, the freedom of speech, the right to keep and

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<sup>4</sup> See, e.g., Kathleen Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717 (2018); Christopher Lund, *Religious Exemptions, Third-Party Harms, and the False Analogy to Church Taxes*, 106 KY. L.J. 679 (2018); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. (forthcoming 2019) (on file with authors).

<sup>5</sup> See, e.g., Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 59 J. CHURCH & ST. 357 (2016); Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 FED. SOC. REV. 50 (2016) [hereinafter *Religious Exemptions*]; Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103 (2015); Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105 (2016); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 45 (2014).

<sup>6</sup> See, e.g., Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, VOLOKH CONSPIRACY (Dec. 4, 2013, 5:11 PM) <http://volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/>; Kevin C. Walsh, *A Baseline Problem for the "Burden on Employees" Argument against RFRA-Based Exemptions from the Contraceptives Mandate*, MIRROR OF JUSTICE (Jan. 17, 2014), <http://mirrorofjustice.blogspot.com/2014/01/a-baseline-problem-for-the-burden-on-employees-argument-against-rfra-based-exemptions-from-the-contr.html>; Marc O. DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, MIRROR OF JUSTICE (Dec. 5, 2013), <http://mirrorofjustice.blogspot.com/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html>.

<sup>7</sup> See, e.g., Marc O. DeGirolami, *Holt v. Hobbs and the Third-Party-Harm Establishment Clause Theory*, MIRROR OF JUSTICE (Oct. 27, 2014), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2014/10/where-has-the-establishment-clause-third-party-harm-argument-gone.html>; Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1383-84 (2016).

<sup>8</sup> See, e.g., Hillel Y. Levin, *Why Some Religious Accommodations for Mandatory Vaccinations Violate the Establishment Clause*, 68 HASTINGS L.J. 1193 (2017).

<sup>9</sup> See, e.g., Esbeck, *supra* note 5, at 358 n.7; Lund, *supra* note 7, at 1384-85; Eugene Volokh, *Prof. Michael McConnell (Stanford) on the Hobby Lobby Arguments*, WASH. POST: VOLOKH

bear arms, or the right against unreasonable search and seizure. The exercise of all of these rights imposes costs on third parties, but those costs are not taken as reasons to limit the substantive content of the attendant rights. According to this objection, the fact that religious freedom entails costs for third parties gives courts no more reason to restrict the government's ability to provide religious accommodations.

In this symposium contribution, we respond to these objections and argue that none of them is persuasive. The last two objections—that the third-party harm doctrine does not apply to general conscience-based exemptions and that all rights have costs—are noteworthy, however, because they raise fundamental questions about the nature of constitutional rights and about the limits of freedom of conscience. Although such objections do not require us to abandon or diminish the third-party harm doctrine, responding to them provides an opportunity to develop the doctrine in ways that illuminate religious freedom, liberty of conscience, and other rights that impose costs on others.

## I. NORMATIVE FOUNDATIONS

A preliminary objection to the third-party harm doctrine is that it lacks normative foundations. Elsewhere, we have defended the principle of avoiding harm to others by drawing an analogy to taxpayer criticisms of compelled support for religion. In his contribution to this symposium, Christopher Lund questions this analogy, asking whether it can provide support for the third-party harm doctrine.<sup>10</sup> We respond by reviewing the analogy and explaining why we believe it holds.

During the founding era, taxpayers who were forced to support churches argued that government had violated a fundamental liberty.<sup>11</sup> James Madison opposed Virginia's bill to support churches through taxation on the ground that it would violate the freedom of conscience.<sup>12</sup> Being compelled to pay even "three pence" to support an establishment is intolerable, he argued in his successful campaign to defeat the bill.<sup>13</sup> And when Thomas Jefferson famously remarked that protecting

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CONSPIRACY (March 27, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/?utm\\_term=.15b9795ea542](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/?utm_term=.15b9795ea542) (providing commentary from Professor Michael McConnell).

<sup>10</sup> Lund, *supra* note 4, at 740–43.

<sup>11</sup> See *id.* at 52; see also Gedicks & Van Tassell, *supra* note 3, at 362–63; Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 330–31 (2011).

<sup>12</sup> See James Madison, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS 30 (Jack N. Rakove ed., 1999).

<sup>13</sup> *Id.* at 31 ("Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?").

religious freedom “neither picks my pocket nor breaks my leg,” he implicitly called into question situations where accommodating believers *did* affect his basic interests as a citizen.<sup>14</sup> Today, similarly, members of the polity have an argument that their First Amendment interests have been implicated when their funds are directed by the government to causes they oppose as a matter of conscience.<sup>15</sup> That is true even though they have no similar cause for complaint when their dollars are used to pursue policies they oppose as a matter of political preference.

In addition to concerns about liberty of conscience, early taxation to support churches drew objections based on the value of political equality. The government taxed citizens to fund religious education by churches, and that violated a basic commitment to equal status among all members of the polity. As Madison put it, taxation to support certain churches “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”<sup>16</sup> Accommodations that shift government burdens from some believers to others implicate a similar interest in equal standing.

The church-tax analogy thus indicates two main justifications for the third-party harm doctrine. First, there is the imperative of protecting citizens from government coercion that implicates a fundamental liberty. Citizens who bear costs so that others may observe their faith can rightfully complain that their liberty of conscience has been implicated. And second, the analogy draws attention to values of equal citizenship. When particular individuals are asked to bear the costs of others’ conscientious objections, they have a further complaint, which is that they are being disfavored by the government.

Now, in his contribution to this volume, Christopher Lund argues that the third-party harm doctrine cannot be supported by an analogy to the founding-era prohibition on taxation to support churches.<sup>17</sup> He reasons that our interpretation of the analogy proves too much, because it requires opposing even “three pence” of harm, whereas many accommodations of religion are widely accepted even though they impose costs on taxpayers. For example, providing kosher meals to observant inmates reduces the public fisc, but nobody believes that it is unconstitutional for that reason. He reconciles this example by arguing that the church tax precedent stands for the proposition that taxpayers may not be forced to support policies that

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<sup>14</sup> Thomas Jefferson, *Notes on the State of Virginia*, in THOMAS JEFFERSON: WRITINGS 285 (Merrill D. Peterson, ed., 1984). See also *Mitchell v. Helms*, 530 U.S. 793, 870 (2000) (Souter, J., dissenting) (“[C]ompelling an individual to support religion violates the fundamental principle of freedom of conscience. Madison’s and Jefferson’s now familiar words establish clearly that liberty of personal conviction requires freedom from coercion to support religion, and this means that the government can compel no aid to fund it.”).

<sup>15</sup> That is not to say that citizens’ interests cannot be overcome by countervailing government objectives. See Schwartzman, *supra* note 11, at 346–57.

<sup>16</sup> Madison, *supra* note 12, at 33. He also had in mind the fact that the Virginia bill exempted certain denominations from the tax, but not others.

<sup>17</sup> Lund, *supra* note 4, at 740. See Storslee, *supra* note 4 (manuscript at 17) (containing a similar critique of our use of the church tax analogy); see also *id.* (manuscript at 19 n.79) (citing this article).

*advance religion*, but they may be forced to support policies that *lift burdens on religious freedom*. Lund concludes that our analogy does not support the doctrine of avoiding harm to others. After all, we are concerned with accommodations of religious freedom and not with affirmative support for churches.

While we agree that Lund's interpretation of the church-tax analogy is important, we nevertheless believe that the example is better interpreted to support the principle against harm to others. Affirmative support for churches is always constitutionally problematic, whether or not it causes specific third-party harms. But first, the line between lifting burdens and providing affirmative support is often unclear, and part of the work of legal doctrine is to determine when the former shades into the latter. And second, even when the state is clearly lifting burdens, it cannot impose the costs of that lifting on a specific person or group. There is a meaningful difference between taxing the public to support a religious exemption and burdening a group of citizens in order to accommodate the religious beliefs of another group.<sup>18</sup> To see it more clearly, consider three hypothetical examples:

- (1) Government taxes the public to fund a church's core mission.
- (2) Government taxes the public to provide kosher meals to Jewish inmates.
- (3) Government taxes nonreligious inmates to provide kosher meals to Jewish inmates.

Lund wants to insist that there is a difference between (1), which is similar to the Virginia assessment controversy, and (2), the kosher inmate example. We agree. Lund is right to say that (2) is normatively unproblematic because government is protecting religious freedom rather than benefitting religion.<sup>19</sup> Imposing costs on the public in order to accommodate the religious liberty of minorities does not usually raise moral difficulties.<sup>20</sup> But that does not mean that the tax in (3) is normatively permissible. Nor do we agree with Lund that our intuitions about the church-tax in (1) are irrelevant to our view about the tax imposed on nonreligious inmates in (3). Let us explain why.

When the public as a whole is taxed to accommodate the beliefs or practices of a minority, as in example (2), conscience is less clearly implicated. Taxpayers have no reason to complain if the government uses their funds to lift burdens on a

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<sup>18</sup> This is a distinction that others have drawn as well. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2524 (2015).

<sup>19</sup> Sometimes it may be difficult to tell the difference, because distinguishing between government benefits and government lifting of burdens can raise baseline problems, as we discuss below in Part III. But regardless, Lund is right to say that the difference matters.

Storslee misses the distinction between (1) and (2) when he argues: "Yet if the problem with cost-shifting accommodations is that they function *like* religious taxes, it is difficult to see why using actual tax money to pay for accommodations is any less objectionable." Storslee, *supra* note 4 (manuscript at 29). It is not, for the reasons we give in the text.

<sup>20</sup> The Court upheld such a religious accommodation against an Establishment Clause challenge in *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2004), and there the Court was dealing precisely with exemptions for religious inmates. We discuss *Cutter* in Part II *infra*.

religious minority, provided the government is not advancing religion but protecting religious freedom, which is a secular good. Equality is not abridged insofar as the social meaning of that exemption is government concern for religious liberty, rather than government favoritism. The play between the joints of free exercise and nonestablishment permits a certain degree of accommodation.

When the government burdens a subset of the population, however, difficulties do arise. And those difficulties make example (2) different from (3). Start with liberty of conscience. When costs are imposed on everyone, citizens have no reason to complain because the government is not coercing them in a way that implicates their rights of conscience, as we argued above. But when those costs fall on a discrete group of citizens, they can rightly complain that they are being coerced as a matter of conscience.<sup>21</sup> Now consider equality interests, which are directly implicated. Citizens who are selectively burdened can complain that the government is preferring one group over another on account of their conscientious or religious beliefs. When one group is “taxed” so that another group may be accommodated in their observance, citizens are stratified on the basis of belief. Our conclusion is that fundamental interests are implicated when one group of citizens is asked to bear a burden so that another’s religious or conscientious objection may be accommodated, as in example (3), even though those interests are not implicated when the public as a whole bears the cost, as in example (2).<sup>22</sup>

Moreover, example (1) supports our conclusion about (3). The Virginia assessment controversy can be understood to mean that liberty and equality with respect to matters of conscience are fundamental, and that they can be offended when citizens must bear the costs of others’ conscientious claims. Our interpretation of the church tax example works differently from Lund’s—we infer liberty and equality principles from the example, and then we apply them to discrete third-party harms—but it works just as well. And it better matches Madison’s arguments in opposition to Virginia’s proposed tax to support churches, which continue to resonate as grounds for rejecting compelled support for others’ religious practices.

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<sup>21</sup> Interestingly, under the Free Speech Clause of the First Amendment, compelled support doctrine observes a similar distinction. When the government taxes the general population to fund its speech, taxpayers can have no objection. That is the holding of *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005). But when the government uses an excise tax to require particular people to pay for the speech of other people, courts have found that the taxpayers’ free speech interests may be implicated. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (striking down compelled support for union’s speech and quoting Jefferson’s Bill For Establishing Religious Freedom); *id.* at 2495 (Kagan, J., dissenting) (comparing the arrangement to “levying a tax to support collective bargaining”); see also *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997) (industry advertising); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) (student organizations); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (state bar associations); Schwartzman, *supra* note 11, at 359-71 (discussing freedom of conscience under compelled support doctrine and the Establishment Clause).

<sup>22</sup> That is why the *Cutter* court also said that accommodating religious inmates would be unconstitutional if the costs fell on secular inmates or other nonbeneficiaries. 544 U.S. at 720.



## II. LEGAL DOCTRINE

After concerns about its normative foundations, the most fundamental objection to the third-party harm doctrine is that the doctrine is not supported by constitutional sources under the Religion Clauses of the First Amendment. This objection faces an uphill battle because the Supreme Court has explicitly and repeatedly recognized that the Establishment Clause limits statutory religious accommodations that impose burdens on third parties. In *Estate of Thornton v. Caldor*,<sup>23</sup> the Supreme Court invalidated a state law that gave employees an absolute right not to work on the Sabbath day of their choice. The Court held that because the law applied “no matter what burden or inconvenience this [absolute right] imposes on the employer or fellow workers,”<sup>24</sup> the law violated a “fundamental principle of the Religion Clauses.”<sup>25</sup> In expressing that principle, the Court quoted Judge Learned Hand, who had written that “[t]he First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform to his own religious necessities.”<sup>26</sup>

The Supreme Court subsequently affirmed its *Caldor* decision. In *Cutter v. Wilkinson*,<sup>27</sup> the Court rejected a facial challenge under the Establishment Clause to the Religious Land Use and Institutionalized Persons Act (RLUIPA). That law requires the government to show that any substantial burden on inmates’ religious exercise is necessary to achieve a compelling interest.<sup>28</sup> Relying explicitly on *Caldor*, a unanimous Court held that RLUIPA was permissible because it required courts to “take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.”<sup>29</sup> And because the accommodations contemplated under RLUIPA would not impair the “significant interests” of third parties, such as prison officials and other prisoners, the Court determined that the statute did not conflict with the Establishment Clause.<sup>30</sup>

The Supreme Court’s recent decisions involving religious accommodations are consistent with the concern for third-party harms expressed in *Caldor* and *Cutter*. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court granted a religious exemption to the contraception mandate that the Obama administration had created under authority given by the Patient Protection and Affordable Care Act.<sup>31</sup> The Court made clear its expectation that the exemption would impose no burdens on third parties, such as female employees who were otherwise entitled to seamless coverage

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<sup>23</sup> 472 U.S. 703 (1985).

<sup>24</sup> *Id.* at 708–09.

<sup>25</sup> *Id.* at 710.

<sup>26</sup> *Id.* (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

<sup>27</sup> 544 U.S. 709 (2005).

<sup>28</sup> 42 U.S.C. §2000cc (2006).

<sup>29</sup> 544 U.S. at 720.

<sup>30</sup> *Id.* at 722.

<sup>31</sup> 134 S. Ct. 2751 (2014).

of contraception without cost sharing under their existing health insurance policies.<sup>32</sup> Writing for the Court, Justice Alito stated that “[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby . . . would be precisely zero.”<sup>33</sup> Similarly, in *Holt v. Hobbs*, the Court granted a religious exemption from a prison grooming policy, holding that state prison officials had failed to show that the requested accommodation posed any safety or security risks.<sup>34</sup> In a brief concurring opinion, Justice Ginsburg sharpened the point by noting that “accommodating petitioner’s religious belief would not detrimentally affect others who do not share the petitioner’s belief.”<sup>35</sup>

In response to this line of precedent, running from *Caldor* through *Hobby Lobby* and *Holt v. Hobbs*, some critics of the third-party harm doctrine are attracted to what might be called a *libertarian* view of the Supreme Court’s cases limiting religious accommodations. According to this view, the Establishment Clause does not limit religious accommodations on the basis of third party harms. The reason is that the government never establishes a religion when it acts to “leave religion alone.”<sup>36</sup> The government can only violate the Establishment Clause, including the third-party harm doctrine, when it actively promotes religion. We call this view libertarian because it imagines a world without government intervention, and it assumes that returning religious citizens to that state can never count as an establishment. The upshot of this view is that most cases involving religious accommodations will be insulated from review under the Establishment Clause. Whenever the government lifts a burden it has created, any concerns about effects on third parties will be matters of legislative discretion, rather than triggers for judicial scrutiny.

The libertarian view rests on two main arguments. The first is that the third-party harm doctrine does not apply to religious accommodations but only to

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<sup>32</sup> *Id.* at 2760. The *Hobby Lobby* majority addressed the issue of third-party harms in dicta, which we discuss below (in Part III). It should be noted that the Court nevertheless affirmed a central holding of *Cutter* and *Caldor*, by recognizing that “[i]t is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’” *Id.* at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. at 720).

<sup>33</sup> It turned out that Justice Alito’s claim was mistaken. After the Court’s decision in *Hobby Lobby*, the government had to create new regulations to extend coverage to the employees of closely held, for-profit corporations. Beginning at least with the Court’s decision, but likely starting even earlier in the litigation, and continuing until those regulations went into effect, thousands of employees who worked for Hobby Lobby (and other companies involved in the litigation) were denied statutory benefits. See TEBBE, *supra* note 3, at 51; Tebbe et al., *Holt*, *supra* note 3.

<sup>34</sup> 135 S. Ct. 853 (2015).

<sup>35</sup> *Id.* at 867 (Ginsburg, J., concurring).

<sup>36</sup> Esbeck, *supra* note 5, at 359; see also Volokh, *supra* note 6 (“[*Caldor*] doesn’t apply in situations where . . . the government is *lifting a legal obligation* from private parties—even when this lifting of the legal obligation means that other private parties will be worse off than if the legal obligation remained in place.”) (emphasis in the original).

“naked religious preferences.”<sup>37</sup> The distinction between accommodations and religious preferences is roughly this: the government accommodates when it lifts burdens that the government itself has created, and it creates a preference when it provides an advantage for religious believers that does not involve lifting a government-imposed burden.<sup>38</sup> For example, applying this distinction to *Caldor*, Professor Esbeck argues that the state law granting employees an absolute right not to work on their Sabbath day was a religious preference and not a religious accommodation.<sup>39</sup> And that is because the state provided employees with a benefit that employers in the private market did not otherwise afford them. That benefit did not result from lifting a regulatory burden that the government had imposed. This was not the state “leaving religion alone,” but rather the government intervening in the private employer-employee relationship to give employees a decisive advantage in exercising their religion.<sup>40</sup>

The second argument for the libertarian view is that that the Supreme Court has clearly sanctioned third-party harms in cases involving religious accommodations. The two main examples are *Corporation of the Presiding Bishop v. Amos*<sup>41</sup> and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.<sup>42</sup> In *Amos*, the Court rejected an Establishment Clause challenge to Section 702 of Title VII,<sup>43</sup> which provides an exemption allowing religious organizations to discriminate with respect to religion in hiring and firing employees whose work is connected with their activities.<sup>44</sup> Similarly, in *Hosanna-Tabor*, the Court held that houses of worship are protected by a constitutionally-grounded “ministerial exception,” which insulates them from anti-discrimination law when making employment decisions involving clergy and other ministerial employees.<sup>45</sup> In both *Amos* and *Hosanna-Tabor*, the Court recognized religious exemptions that imposed clear harms on employees, who lost their jobs as a result of the accommodations in question. In light of these outcomes, those attracted to the libertarian view argue that the third-party harm doctrine cannot be reconciled with

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<sup>37</sup> Esbeck, *supra* note 5, at 363-69; *see also* DeGirolami, *supra* note 5 (“*Thornton* . . . seem[s] to suggest that the burden imposed on secular interests must be state-imposed.”); *cf.* Berg, *Religious Exemptions*, *supra* note 5, at 59 (“The strongest case for government to remove a burden on religion is when government itself has created the burden . . . . In *Caldor* . . . the statute was simply reordering interests among private employers . . .”).

<sup>38</sup> Lund makes a similar distinction between advantaging religion and lifting a burden on it, but only to differentiate our example (1) from example (2). *See supra* text accompanying notes 18-20. The libertarian argument here is that a similar distinction also defeats third-party harm objections to example (3), involving harms that fall on a discrete group. According to this argument, such harms can never be objectionable when the government is merely lifting a burden that the government itself has imposed.

<sup>39</sup> Esbeck, *supra* note 5, at 363-64.

<sup>40</sup> *Id.* at 364.

<sup>41</sup> 483 U.S. 327 (1987).

<sup>42</sup> 565 U.S. 171 (2012).

<sup>43</sup> 42 U.S.C. § 2000e-1(a).

<sup>44</sup> 483 U.S. at 336.

<sup>45</sup> 565 U.S. at 181.

cases like *Amos* and *Hosanna-Tabor*. They claim that the doctrine must therefore be limited in application to cases like *Caldor*, which involve religious preferences, and not cases involving religious accommodations in which the government lifts burdens that it has imposed.<sup>46</sup>

The problem with the libertarian view, at least as a matter of legal doctrine, is that the Supreme Court has rejected it. Remember that the central claim of the libertarian view is that the third-party harm doctrine applies, if at all, only to religious preferences and not to religious accommodations that “leave religion alone” by lifting government-imposed burdens. But this claim is directly contradicted by *Cutter v. Wilkinson*, in which a unanimous Court held that the Establishment Clause limits religious accommodations that do not account for the interests of third parties.<sup>47</sup>

In *Cutter*, the Court began its analysis of RLUIPA by finding the statute “compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise.”<sup>48</sup> That is, the Court described RLUIPA as a classic religious accommodation, one that leaves religion

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<sup>46</sup> In *Amos*, the majority attempted to distinguish *Caldor* by relying on a similar distinction between the government imposing a religious preference as opposed to lifting regulations that allow private actors to burden others. Writing for the Court, Justice White reasoned that in *Caldor*, the state “had given the force of law to the employee’s designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees.” 483 U.S. at 337 n.15. By contrast, in *Amos*, the employee’s “freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.” *Id.*

In our view, Justice O’Connor offered the proper response to this distinction in her *Amos* concurrence:

Almost any government benefit to religion could be recharacterized as simply “allowing” a religion to better advance itself . . . . It is for this same reason that there is little significance to the Court’s observation that it was the Church rather than the Government that penalized [the employee’s] refusal to adhere to Church doctrine. The Church had the power to put [its employee] to a choice of qualifying [religiously] . . . or losing his job because *the Government* had lifted from religious organizations the general regulatory burden imposed by § 702.

*Id.* at 347 (O’Connor, J., concurring in the judgment) (emphasis in the original). Furthermore, as demonstrated above, see text accompanying notes 47-52, a unanimous Court in *Cutter* relied on Justice O’Connor’s reasoning—and declined to follow the *Amos* majority—when it applied *Caldor* under circumstances in which the government had lifted a regulatory burden. 544 U.S. at 720. For further argument on this point, see Schwartzman et al., *Reconciling Amos*, *supra* note 3 (“Not only is the *Amos* majority’s attempt to distinguish *Caldor* conceptually unsound, the Court has declined to follow it.”); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 62 (2014) (“When exempted religious organizations religiously discriminate against employees after having been freed by the government to do so, it makes utterly no sense to conclude that the government had no hand in depriving those employees of their rights against religious discrimination. This is no doubt why the *Amos* majority’s ‘distinction’ of *Caldor* appears nowhere in *Cutter v. Wilkinson* . . . .”); Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 3, at 368 n.119.

<sup>47</sup> 544 U.S. at 720.

<sup>48</sup> *Id.*

alone by lifting a burden imposed by the government. To emphasize this point, the Court cited to Justice O'Connor's concurring opinion in *Amos* for the proposition that "removal of government-imposed burdens on religious exercise is more likely to be perceived 'as an accommodation of the exercise of religion rather than as a Government endorsement of religion.'"<sup>49</sup>

After making and then reiterating the point that RLUIPA is an accommodation that alleviates a government-imposed burden, the Court then declared that RLUIPA "on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."<sup>50</sup> And for this proposition, the Court cited *Caldor*, which makes sense if that case stands for the principle that the Establishment Clause forbids religious accommodations that impose significant burdens on third parties.

The libertarian view cannot account for these holdings in *Cutter*. If *Caldor* is a case about religious preferences, not religious accommodations, then the *Cutter* Court should not have cited it in reviewing the constitutionality of RLUIPA under the Establishment Clause. And yet, the Court clearly relied on *Caldor* in holding that RLUIPA was facially constitutional under the Establishment Clause because the statute requires courts to account for the interests of third parties in evaluating claims for religious exemptions. Thus, whatever the normative merits of the libertarian view,<sup>51</sup> it is simply not an accurate statement of existing doctrine, which holds that religious accommodations, including those that lift government burdens, cannot "override other significant interests"<sup>52</sup> of third parties without violating the Establishment Clause.

So a central problem with the libertarian view is that, according to a unanimous Supreme Court, the third-party harm doctrine applies to religious accommodations. But this seems to leave a puzzle. What about *Amos* and *Hosanna-Tabor*? These cases look like a problem for the third-party harm doctrine because they recognize religious accommodations in which third parties, in fact, suffer significant harms. The libertarian view resolves this apparent contradiction by claiming that the third-party harm doctrine does not apply to religious accommodations. But as we have seen, this is a doctrinal mistake. Indeed, as noted above, in describing RLUIPA as lifting government-imposed burdens, the Court cited to *Amos* and then, in the very next sentence, relied on *Caldor* for its holding with respect to third-party nonbeneficiaries.<sup>53</sup>

As we have argued previously,<sup>54</sup> there is a better way to explain the Court's approach to Establishment Clause limits on religious accommodations, one that

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<sup>49</sup> *Id.* (quoting *Amos*, 483 U.S. at 349 (O'Connor, J., concurring in the judgment)).

<sup>50</sup> *Id.*

<sup>51</sup> And we deny these in Part III *infra*.

<sup>52</sup> 544 U.S. at 722.

<sup>53</sup> *Id.* at 720.

<sup>54</sup> Schwartzman et al., *Reconciling Amos*, *supra* note 3.

can reconcile cases like *Caldor* and *Cutter* with cases like *Amos* and *Hosanna-Tabor*. What the libertarian view fails to see is that *Amos* and *Hosanna-Tabor* do not represent ordinary religious accommodations. Both cases are about the extent to which religious organizations can control membership and leadership decisions. The Court has recognized that religious organizations have powerful free exercise and associational interests that generate a range of statutory and constitutional protections against liability under antidiscrimination laws.<sup>55</sup> Moreover, the harms that the Court permits in these cases are closely connected to the right to exclude, which is a core feature of the institutional autonomy that the Court has ascribed to religious and other expressive associations.<sup>56</sup>

In drawing attention to this institutional aspect of *Amos* and *Hosanna-Tabor*, we are not endorsing the Court's approach to defining the rights of religious organizations in the context of anti-discrimination law.<sup>57</sup> We are merely observing that cases like *Amos* and *Hosanna-Tabor* allow third party harms in a narrow range of circumstances, namely, where religious organizations make internal membership and employment decisions. Indeed, these are the only cases in which the Court has ever granted religious exemptions while acknowledging significant harms to others. *Amos* and *Hosanna-Tabor* define a limited category of exemptions designed to protect the institutional autonomy of churches. When described in this way, however, they no longer present a doctrinal challenge for the third-party harm doctrine. Instead they stand for narrowly prescribed, institutional exceptions from the general rule against third-party harms adopted by unanimous courts in *Caldor* and *Cutter*.

Other things equal, we should prefer legal interpretations that reconcile cases and show how they might cohere with one another.<sup>58</sup> The doctrinal account that we are advancing here is superior to the libertarian view in this respect because it provides a better fit with the cases. It can explain the force of *Amos* and *Hosanna-Tabor*, while showing that *Caldor* and *Cutter* nevertheless apply to ordinary religious accommodations. Thus, unlike the libertarian view, our interpretation can

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<sup>55</sup> See *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."). For an argument that tries to dismiss the associational interests at work in *Amos* and *Hosanna-Tabor*, see Storslee, *supra* note 4 (manuscript 25-27).

<sup>56</sup> See TEBBE, *supra* note 3, at 80-97; Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, in RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 3, at 77 (defending a limited right of "close associations" to discriminate in membership and leadership decisions); Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839, 841 (2005) (offering "a philosophical argument for a robust right to freedom of social and expressive association (including the freedom to exclude unwanted members)").

<sup>57</sup> Indeed, far from it. See TEBBE, *supra* note 3, at 88-97; Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 974-81 (2013).

<sup>58</sup> TEBBE, *supra* note 3, at 25-36 (discussing coherence in moral and legal reasoning).

give full scope to all of these decisions without effectively abandoning a fundamental principle of the Religion Clauses, namely, that third parties should not be compelled to pay significant costs to support other citizens' religious practices.

### III. BASELINES

A related objection to the third-party harm doctrine focuses on what counts as a harm for purposes of limiting religious exemptions. Some critics have argued that when the government grants an exemption that results in the loss of a benefit that the government itself provides, there is simply no harm to third-parties.<sup>59</sup> This argument assumes that religious accommodations precede any assessment of third-party harms.<sup>60</sup> The basic idea is that a law that imposes substantial burdens on religious believers is, to that extent, impermissible, unless narrowly tailored to achieve a compelling governmental interest. And if the law is impermissible as applied to religious believers, then any benefits the law provides to third parties are wrongful gains. Those third parties were never entitled to such benefits in the first place, so they cannot complain when the government takes them away.

To see the implications of this baselines objection, consider, for example, the litigation over the federal contraception mandate in *Hobby Lobby*. Under regulations enacted pursuant to the Affordable Care Act, Hobby Lobby's employees were entitled to insurance coverage without cost-sharing for all forms of female contraception approved by the FDA.<sup>61</sup> But according to the baselines objection, they were not, in fact, entitled to this benefit. That is because, under the Religious Freedom Restoration Act (RFRA),<sup>62</sup> the contraception mandate was impermissibly applied to religious employers, who had no obligation to provide their employees with coverage for contraception. And since their employees were

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<sup>59</sup> See sources cited *supra* note 6.

<sup>60</sup> Although they are ideologically aligned, the doctrinal objection discussed in Part II is not the same as the baselines objection we address in this Part. The doctrinal objection advanced by the libertarian view is that the government never violates the Establishment Clause when it lifts a burden that it has imposed on religious believers. By contrast, the baselines objection is that the government never harms an individual when it takes away a benefit it has provided. To see the difference between these objections, consider a religious exemption from a prohibition on murder. According to the doctrinal objection, this exemption does not violate the Establishment Clause because it lifts a burden (i.e., the threat of criminal sanction) imposed on someone who murders because of their religious commitments. Set aside for the moment the absurdity of this conclusion. The important point here is the contrast with the baselines objection, which does not apply to this religious exemption. In allowing religious believers to commit murder, the government does not take away a positive or regulatory benefit it has provided. Instead, proponents of the baselines objection would say that the government allows a harm to a pre-existing private right, which might indeed show a violation of the Establishment Clause. In short, the doctrinal objection focuses on whether the government is lifting regulations, whereas the baselines objection focuses on whether the government provides the entitlement in question.

<sup>61</sup> See *Hobby Lobby*, 134 S. Ct. at 2762–63 (describing contraceptive mandate under the ACA).

<sup>62</sup> 42 U.S.C. §§ 2000bb et seq.

not entitled to such coverage in the first place, those employees suffered no harm when their employers received a religious exemption from the mandate.<sup>63</sup>

We reject this baseline objection on both doctrinal and normative grounds. As a doctrinal matter, courts have never evaluated claims for religious exemptions against a baseline that assumes religious actors have a presumptive right to avoid paying for government-mandated statutory benefits to third parties. The most important example here is *United States v. Lee*, in which the Court refused a claim for a religious exemption under the Free Exercise Clause of the First Amendment.<sup>64</sup> In *Lee*, an Amish farmer objected on religious grounds to paying social security taxes. Congress had granted an exemption for members of the Amish community who were self-employed, but that exemption did not extend to Amish who employed others, even within their own religious community. Lee argued that the Free Exercise Clause required extending the existing exemption to include him, so that he would not have to pay Social Security taxes for his employees.<sup>65</sup>

Notice that according to the baseline objection, granting Lee's request would not impose any harm on his employees. The government would merely extinguish a benefit that it had provided. It would return employees to the status quo prior to the existence of retirement benefits under the social security system. And if harms were measured from that baseline, then Lee's religious exemption would not deny his employees any benefits to which they were entitled.

As with the libertarian view discussed above, the doctrinal problem with this reasoning is that the Supreme Court's decision in *Lee* repudiates it. Although the Court applied a compelling interest analysis in evaluating Lee's claim,<sup>66</sup> it rejected his demand for a religious exemption precisely because that exemption threatened to undermine the system of federal retirement benefits owed to employees. The Court declared that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes

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<sup>63</sup> Professor Esbeck has made a version of this argument. Esbeck, *supra* note 5, at 370 ("The baseline for measuring the relevant burdens and benefits on employers for purposes of the Establishment Clause is just before the effective date of the ACA. Because RFRA saw to it that religious employers were never religiously burdened by the ACA, there was no employer 'benefit' that could be said to advance religion in violation of the Establishment Clause."); *see also* Walsh, *supra* note 6 ("[I]f RFRA requires an exemption to the contraceptives coverage mandate, then the supposed baseline entitlement is illegal."); Brief of Amici Curiae Constitutional Law Scholars in Support of Petitioners, 2016 WL 183794, Zubik v. Burwell, at 5 (2016) ("[T]his Court's jurisprudence requires understanding RFRA as preserving the rights of religious claimants and third parties as they were before the Affordable Care Act burdened religion."); Brief of Constitutional Law Scholars et al., 2014 WL 356639, Burwell v. Hobby Lobby Stores, Inc., at 3-4 (2014) ("[The ACA] effectively incorporates RFRA's balancing test into its own provisions . . . . [P]laintiffs' employees simply have no right to plaintiff-provided coverage under the ACA regulations, and employees would not be burdened by plaintiffs' religious exercise.").

<sup>64</sup> 455 U.S. 252 (1982).

<sup>65</sup> *Id.* at 260-61.

<sup>66</sup> *Id.* at 258.



which are binding on others in that activity.”<sup>67</sup> Why not? Because, as the Court continued, “[g]ranting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.”<sup>68</sup> And the employer only imposes his faith on employees if those employees have some entitlement to benefits that the employer may not deny them. In *Lee*, the Court assumed a baseline in which third parties can be harmed by denying them statutory benefits.<sup>69</sup>

We recognize that *Hobby Lobby* included dicta suggesting support for a baseline objection to statutory benefits. Writing for a narrow majority, Justice Alito addressed concerns about third party harms in footnote 37 of his opinion. While conceding that, under *Cutter*, courts must take into account such harms, he objected that “[b]y framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.”<sup>70</sup>

As we have argued elsewhere, however, Justice Alito’s dicta leaves open the question of how to determine whether third parties have been harmed by a religious exemption.<sup>71</sup> If statutory benefits are not part of the baseline for measuring harm, then there must be some other basis for deciding which entitlements count. But Justice Alito provided no guidance on this point, nor is it obvious how he might have done so, at least not in a manner consistent with the Court’s prior free exercise jurisprudence, which accepts regulatory baselines.

One possibility, which some scholars have recommended,<sup>72</sup> is to collapse the third-party harm doctrine into a compelling interest test. Third parties would be able to object to an accommodation only if they suffered harms that the government would have a compelling interest in preventing. But there are at least three problems with this approach. First, in specifying what counts as a compelling interest, the Court must refer to a background set of entitlements. Without a baseline for determining what rights and benefits individuals are owed, courts

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<sup>67</sup> *Id.* at 261.

<sup>68</sup> *Id.*

<sup>69</sup> We could make the same point using other cases. *See, e.g.,* *Tony & Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290 (1985) (rejecting religious exemption from minimum wage and other provisions under the Fair Labor Standards Act); *Newman v. Piggie Park Enterprise, Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting religious exemption from prohibition on race discrimination in public accommodations under Civil Rights Act of 1964).

<sup>70</sup> 134 S. Ct. at 2781 n.37.

<sup>71</sup> *See* Tebbe et al., *When Do*, *supra* note 3, at 340-45.

<sup>72</sup> *See, e.g.,* DeGirolami, *supra* note 5 (“Accommodations must pass the government compelling interest threshold. If they do, they seem very much not to be violations of the Establishment Clause rule laid out in [*Caldor*].”); Brief of Amici Curiae Constitutional Law Scholars, *supra* note 63, at 3 (“There is no support in constitutional doctrine or theory for an Establishment Clause limit on religious exemptions that do not conflict with a government interest that is less than compelling.”); Brief of Constitutional Law Scholars et al., *supra* note 63, at 10 (“The balancing tests incorporated into statutes like RFRA already provide courts ample opportunity to ensure that any given religious accommodation will not overly burden a third party.”).

cannot evaluate the government's claim that it has a compelling interest in protecting the rights or interests of third parties. Thus, to claim that third parties can only raise claims when their interests are otherwise compelling does not avoid the need to select an appropriate baseline.

Second, requiring third party harms to be independently compelling is too stringent and also inconsistent with precedent.<sup>73</sup> Consider, for example, the facts of *Caldor*, in which employers complained that the state had burdened them by giving employees an absolute right not to work on the Sabbath day of their choosing. It seems improbable that the state had a compelling interest to prevent speculative economic injuries or to protect what the Court described as the "convenience or interests"<sup>74</sup> of private employers. The employers' interests were not protected because they were independently compelling. They prevailed because the government was prohibited by the Establishment Clause from shifting significant costs from religious employees to their employers.

A third reason to avoid conflating the third-party harm doctrine with a compelling governmental interest test is that the government will not always be the party objecting to a religious exemption. In *Caldor*, the Establishment Clause challenge was brought by private employers. And they did not need to allege that their interests were compelling for government purposes, only that they were significantly burdened as a result of the government's religious accommodation. For another example, consider recent litigation over interim rules adopted by the Trump administration to provide exemptions from the federal contraception mandate for employers who object on religious or moral grounds to paying for contraception.<sup>75</sup> Even if the administration argued that providing seamless and cost-free coverage of contraception does not serve a compelling governmental interest, employees would nevertheless have a claim that the exemption significantly burdens them by failing to account for their interests and by depriving them of a statutory benefit to which they would otherwise be entitled. The interest of those burdened by a religious accommodation need not coincide with the government's interests, whether or not compelling, in order to warrant protection under the Establishment Clause. After all, the Establishment Clause protects the religious freedom of private individuals, not only state actors.

Up to this point, our argument against the baselines objection has focused mainly on doctrinal points. But there are also powerful normative reasons to reject any account that refuses to take seriously the deprivations of statutory rights and benefits that may follow from granting religious exemptions.<sup>76</sup> One would have to

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<sup>73</sup> This paragraph draws on material from Tebbe et al., *When Do*, *supra* note 3, at 23.

<sup>74</sup> 472 U.S. at 709.

<sup>75</sup> See, e.g., *California v. Health & Human Servs.*, 281 F. Supp. 3d 86 (N.D. Cal. 2017); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017).

<sup>76</sup> See Gedicks & Van Tassel, *Of Burdens*, *supra* note 5, at 332–33 (arguing that the adoption of a "negative-liberty or libertarian baseline" would threaten to undermine a wide range of employment laws); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1457, 1513–18 (2015)

be deeply in the grip of libertarian theory to think that an employee who is denied social security benefits is not harmed by that denial. Or that a female employee who is denied contraceptive coverage is not thereby disadvantaged compared to employees who receive that coverage. Or that a gay person who is denied services in a public accommodation is not thereby harmed or demeaned by that refusal. It is, of course, possible to recognize these harms and to argue that religious liberty is sufficiently important to outweigh them.<sup>77</sup> We think such a view is mistaken,<sup>78</sup> but at least it does not ignore, or dismiss by conceptual sleight-of-hand, the very real costs that may follow from granting religious exemptions.

#### IV. NO ACCOMMODATIONS?

A pervasive concern among critics is that the third-party harm doctrine will eliminate all, or nearly all, religious accommodations.<sup>79</sup> In responding to this objection, it is important to draw some distinctions between different types of accommodations. Two factors are especially salient: first, whether an accommodation imposes significant costs on others, and, second, whether those costs are imposed on particular individuals or on the public generally. These factors allow us to distinguish three main categories of accommodations: (i) those that do not impose significant costs on others; (ii) those that impose significant costs on the public generally, and (iii) those that impose significant costs on particular individuals. Accommodations in the last of these categories are the most controversial, and we address some examples below. But accommodations in the first two categories are common, relatively uncontroversial, and too often overlooked in debates about third-party harms.

Any response to the objection that the third-party harm doctrine will eliminate accommodations should begin by pointing out what should be obvious, which is that many accommodations are harmless, in the sense that they, quite literally, do not harm other people. For example, in *Goldman v. Weinberger*,<sup>80</sup> an Orthodox Jew sought an exemption from Air Force uniform regulations so that he could wear

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(discussing the danger that adoption of a market baseline poses to employment and antidiscrimination laws); Tebbe et al., *When Do*, *supra* note 3, at 336 (arguing that “there is no natural baseline for measuring benefits and burdens” and that “meaningful comparisons can only be made by considering the substantive commitments at play in a particular dispute”).

<sup>77</sup> See Berg, *Religious Exemptions*, *supra* note 5, at 52; Lund, *supra* note 7, at 1383-84.

<sup>78</sup> See Tebbe et al., *How Much*, *supra* note 3, at 219-33 (defending an “undue hardship” standard for determining how much religious exemptions may burden third parties).

<sup>79</sup> See, e.g., Esbeck, *supra* note 5, at 375 (“If the mere loss of [a] benefit is enough to categorically defeat a religious exemption, few religious exemptions will survive.”); Lund, *supra* note 7, at 1383 (noting that “many long-established exemptions impose real harm on others, or at least seem to do so” and expressing concern that such exemptions would be impermissible under our theory); DeGirolami, *supra* note 7 (arguing that “[v]irtually all accommodations impose harms or burdens of some kinds on others” and would therefore be invalid under third-party harm doctrine).

<sup>80</sup> 475 U.S. 503 (1986).

a yarmulke. Although the Supreme Court deferred to the military and refused to grant an exemption under the Free Exercise Clause,<sup>81</sup> Congress responded by passing legislation to permit members of the armed forces to wear religious apparel unless doing so “would interfere with the performance of the member’s military duties.”<sup>82</sup> Similarly, in *Holt v. Hobbs*, the Supreme Court granted an RLUIPA exemption to allow a Muslim prisoner to wear a half-inch beard.<sup>83</sup> In that case, the Court rejected the state’s claims that an exemption from prison grooming policies would create safety or security concerns. And as noted above, Justice Ginsburg wrote separately to underscore that this accommodation was consistent with the Court’s admonition in *Cutter* that courts take account of burdens on nonbeneficiaries and that “an accommodation must be measured so that it does not override other significant interests.”<sup>84</sup>

Neither of the accommodations at issue in *Goldman* or *Holt*—nor those in many other similar cases<sup>85</sup>—should be controversial. And that is largely because neither imposes any significant cost on third parties.<sup>86</sup> Both cases involved innocuous ritual practices that officials objected to by invoking claims of deference and requirements of uniformity. But those claims were so weak that it is difficult not to impute a sense of hostility toward religious minorities.<sup>87</sup> Religious accommodations like these promote inclusiveness and equality without burdening third parties.

A second category of cases involves accommodations that impose costs on the general public, but not on particular or identifiable third parties. We have already mentioned the provision of kosher and halal meals for Jewish and Muslim prisoners.<sup>88</sup> Other cases involve religious accommodations granted to employees who lost their jobs and were denied unemployment compensation benefits after

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<sup>81</sup> *Id.* at 507–08.

<sup>82</sup> 10 U.S.C. § 774. See Dwight Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 MIL. L. REV. 125 (1988).

<sup>83</sup> 135 S. Ct. 853 (2015).

<sup>84</sup> In her *Holt* concurrence, *id.* at 867, Ginsburg cited to her dissent in *Hobby Lobby*, 134 S. Ct. at 2790 n.8, which in turn relied on *Cutter*, 544 U.S. at 720. The quote is from *Cutter*.

<sup>85</sup> See James Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053 (2009) (surveying hundreds of RLUIPA prison accommodation cases).

<sup>86</sup> Another set of cases in which courts have granted exemptions that do not harm others, or that impose de minimis harms, involve Title VII’s prohibition on religious discrimination, which requires that employers provide their employees with reasonable accommodations. We have analyzed Title VII accommodation cases under the third-party harm doctrine and argued that courts have generally achieved workable and relatively uncontroversial decisions in that context. Tebbe et al., *How Much*, *supra* note 3, at 219–28.

<sup>87</sup> See also *Fraternal Order of Police Newark Lodge 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.) (granting an exemption allowing Muslim police officers to wear beards and suggesting that the Newark police department’s refusal to do so was based on a purpose to “suppress manifestations of the religious diversity that the First Amendment safeguards”).

<sup>88</sup> See Taylor Stout, *The Costs of Religious Accommodations in Prisons*, 96 VA. L. REV. 1201, 1217 (2010) (discussing the costs of providing kosher meals and other prison accommodations).

refusing to work on the Sabbath. In a series of free exercise decisions, the Supreme Court held that states lacked compelling interests in forcing employees to choose between receiving unemployment benefits and following their religious commitments.<sup>89</sup> And more recently, in *Hobby Lobby*, the Supreme Court granted a RFRA exemption from the contraception mandate on the assumption that the government would, if necessary, pay the cost of extending coverage to those employees affected by the accommodation.<sup>90</sup>

We have argued that, both normatively and doctrinally, there is an important distinction between accommodations that impose costs on the general public and those that burden particular individuals. When the government lifts burdens to protect religious liberty, and when those burdens are distributed across the general population, the grounds for any individual to register a complaint are minimized. In such cases, the costs of exemptions are socialized and impossible to trace back to identifiable taxpayers. Of course, as we noted above, the government may not use the public fisc to subsidize religion, rather than accommodating it, under the Establishment Clause. But among accommodations there is a stark distinction between those that impose costs on the public, many of which are relatively uncontroversial, and those that burden specific individuals.

It is this last category of harmful accommodations that tend to generate the most controversy. The exemptions within this category benefit particular religious believers at the cost of specific and identifiable nonbeneficiaries. We have already noted the example of *United States v. Lee*, which involved a religious objection to paying social security taxes.<sup>91</sup> That case was decided on free exercise grounds, but the exemption claim would also have implicated the third-party harm doctrine. Indeed, it is not difficult to imagine a law that grants an employer an exemption from having to pay for social security benefits. After the Court decided *Lee*, Congress provided an exemption for Amish employers.<sup>92</sup> But notably, that exemption applies only where both the employer *and* the employee share a religious objection to paying social security taxes and where both formally request the exemption.<sup>93</sup> In other words, under the existing statutory exemption, employers are not permitted to impose burdens on non-consenting employees. Any burdened

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<sup>89</sup> See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fl.*, 480 U.S. 136 (1987); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>90</sup> 134 S. Ct. at 2759, 2781–82 (“[B]oth RFRA and its sister statute, RLUIPA, may in some circumstances require the Government . . . to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”) (internal citation and quotation marks omitted). *But cf. id.* at 2786 (Kennedy, J., concurring) (“[I]t is the Court’s understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government.”).

<sup>91</sup> See *supra* text accompanying note 64.

<sup>92</sup> 26 U.S.C. § 3127.

<sup>93</sup> *Id.* (requiring as a condition of the employer’s exemption that an employee file an “identical application for exemption from the taxes imposed”).

employee would be a co-beneficiary of the exemption and so would not fall within the third-party harm doctrine.

There are, however, some existing accommodations that do appear to violate the doctrine. Critics have offered various parades of horrors, some longer than others, claiming that the doctrine would eliminate all kinds of federal and state religious accommodations.<sup>94</sup> Many of the exemptions mentioned fall into the two categories discussed above and so are not covered by the third-party harm doctrine. But some of the remaining exemptions that impose significant costs deserve additional scrutiny. Although we cannot survey all the possible cases here, perhaps we can illustrate some aspects of the doctrine and its scope of application by addressing a few paradigmatic examples.

We have already accounted for *Amos* and *Hosanna-Tabor*, which allow religious organizations to avoid liability under antidiscrimination laws. These cases have been understood to implicate constitutional values of institutional autonomy and freedom of association. They do involve third-party harms, but they are exceptional in this regard. There are no other cases in which the Supreme Court has granted a religious exemption, statutory or constitutional, while acknowledging the imposition of significant costs on identifiable non-beneficiaries.<sup>95</sup>

A possible counter-example is the priest-penitent privilege.<sup>96</sup> Although the form and scope of this testimonial privilege varies by jurisdiction, some version of it has been recognized in all fifty states and by the federal courts going back to the nineteenth century.<sup>97</sup> In cases where the privilege is invoked, the loss of testimony

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<sup>94</sup> See Esbeck, *supra* note 5, at 375–76; DeGirolami, *supra* note 7; Lund, *supra* note 7, at 1383–84.

<sup>95</sup> Between 1963, when the Court adopted a compelling interest test under the Free Exercise Clause, and 1990, when the Court abandoned that test for incidental burdens on religion, the Court granted religious exemptions in only four of seventeen free exercise cases. See James E. Ryan, Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 VA. L. REV. 1407, 1414 (1992). Three of those cases involved unemployment compensation benefits, in which the costs of accommodation were borne by the public. The fourth case was *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which granted an exemption from compulsory education laws for Amish children over the age of fourteen. Importantly, in granting the exemption, the Court denied that “any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.” *Id.* at 230. But see Storslee, *supra* note 4 (manuscript at 28) (“[T]he Court silently accepted that its ruling might well deny schooling to an unwilling child, but nonetheless concluded that the exemption was appropriate because it did not present ‘any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare’ sufficient to constitute a compelling interest. Once again, if the third-party thesis is right, *Yoder* seems to be wrong.”); Gage Raley, *Yoder Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 VA. L. REV. 681, 693–702 (2011) (arguing that the exemption granted in *Yoder* imposes significant harms on Amish children).

<sup>96</sup> See Lund, *supra* note 7, at 1383; see also Brief of Constitutional Law Scholars et al., *supra* note 63, at 15–16. For a helpful overview of the priest-penitent privilege, see 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 246–60 (2006).

<sup>97</sup> See R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?* 44 WM. & MARY L. REV. 1627, 1636–40 (2003) (discussing history of the privilege and surveying its adoption in state and federal law).

may be damaging or harmful to those against whom it is asserted.<sup>98</sup> And in recent years, use of the privilege has increased, in part because of child abuse reporting requirements and cases involving molestation by clergy.<sup>99</sup> At the same time, however, invocation of the privilege is uncommon in absolute terms, and courts frequently and increasingly deny assertions of it.<sup>100</sup> Furthermore, a number of states have modified the privilege with respect to child abuse and other sexual crimes, abrogating it either partially or entirely.<sup>101</sup>

The priest-penitent privilege should be situated in the context of other evidentiary privileges, such as those that apply to attorney advice, psychiatric treatment, and spousal confidences. To the degree that the priest-penitent privilege merely protects confidentiality in the same way as these other evidentiary rules, it may not single out religion or conscience in a manner that is problematic.<sup>102</sup> And to

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<sup>98</sup> There is an extensive law review literature discussing the priest-penitent privilege, especially in the context of child abuse by clergy. See Rena Durrant, *Where There is Smoke, There's Fire (and Brimstone): Is It Time to Abandon the Clergy-Penitent Privilege?* 39 LOY. L.A. L. REV. 1339, 1348 n.47 (2006) (collecting dozens of articles analyzing the privilege). Much of the existing literature is devoted to arguing for either abandoning the privilege or qualifying it in cases involving abuse and other forms of harmful conduct. See, e.g., Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. REV. 1780, 1892–93; Norman Abrams, *Addressing the Tension between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C. L. REV. 1127 (2003).

<sup>99</sup> In percentage terms, the numbers have grown significantly since the 1980s, increasing in rate from the 1990s through the present, with more than 320 cases reported by 2016. See Christine Bartholomew, *Exorcising the Clergy Privilege*, 103 VA. L. REV. 1015, 1027–28 (2017). The privilege is most often invoked in cases involving murder and sex crimes. *Id.* at 1028.

<sup>100</sup> Surveying over 700 state and federal cases, Christine Bartholomew reports that between 1835 and 1980, there were only 63 reported cases. *Id.* at 1027. Bartholomew also reports that in the majority of criminal and civil cases, courts deny assertions of the privilege. Moreover, the success rate has fallen over time, with brief exceptions, so that it was only twenty-six percent by 2016. *Id.* at 1028–29.

<sup>101</sup> See Paul Winters, *Whom Must the Clergy Protect? The Interests of At-Risk Children in Conflict with Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187, 190–91 (2012) (providing recent survey of state reporting requirements and abrogation of priest-penitent privilege).

<sup>102</sup> Although we are tentative on this point, the priest-penitent privilege might be distinguished from other religious exemptions because, as a confidentiality rule, it changes the baseline for the production of information in the priest-penitent relationship. It is the denial of information that harms third parties, but that very information may not exist without the privilege. After all, the point of the privilege is to encourage communication by ensuring confidentiality. Thus, the priest-penitent privilege may differ from other religious accommodations in how it affects the baseline of benefits and burdens for third parties. Most regulatory exemptions are not conditions for the production of benefits. Consider the exemption from the contraception mandate in *Hobby Lobby*. If the exemption is granted, employees lose part of their insurance coverage, and if the exemption did not exist, employees would receive that coverage. But with respect to the priest-penitent privilege, if the exemption did not exist, it is not clear that third parties would have access to the information they seek, which might only be produced in a world that contains the privilege.

It is, however, a difficult empirical question whether third parties would benefit generally from abrogation of the privilege. If penitents would no longer communicate sensitive information, then it is possible that systematic abrogation of the privilege would not, in fact, protect the interests of third parties. See Abrams, *supra* note 98, at 1150–51 (arguing that abrogation of the privilege would deter

the degree that the confessional privilege works like other privileges to allow citizens to discover and develop their deepest commitments, it may fall into the exception for close associations.<sup>103</sup> But to the extent that the priest-penitent privilege deviates significantly from other evidentiary privileges, especially in the direction of allowing greater harms, legislatures and courts ought to scrutinize the privilege to determine whether the law impermissibly favors belief at the expense of third parties and in violation of the Establishment Clause.

In cases where the priest-penitent privilege imposes significant harms, courts should skeptically inspect its application for violations of the third-party harm doctrine. In the most egregious cases, as in criminal and civil cases involving child abuse, state abrogation of the privilege might be required to comply with the principles stated in *Caldor* and *Cutter*. And in cases where lesser harms are contemplated, we think courts ought to take into consideration the interests of third parties in balancing the value of confidentiality protected by the privilege.

Of the counter-examples that have been pressed against the third-party harm doctrine, the most difficult are military draft exemptions.<sup>104</sup> Such exemptions have existed in the United States going back to the colonial period.<sup>105</sup> Federal law has provided for conscientious objectors since the first federal draft during the Civil War. In the twentieth century, Congress liberalized conscientious objector provisions, and during the Vietnam era, the Supreme Court's decisions in *United States v. Seeger*<sup>106</sup> and *Welsh v. United States*<sup>107</sup> interpreted those provisions broadly to cover those with unorthodox religious views and secular ethical objections to military service.

Military draft exemptions are a challenge for the third-party harm doctrine because those who are exempted impose burdens on those who take their place. Presumably, for every objector who does not serve, the government must find substitutes. And those who are then required to serve can complain that they should not have to bear the costs of others' religious convictions. The fact that legislatures and courts do not recognize this complaint and indeed persist in

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penitent disclosures to clergy); *but see* Bartholomew, *supra* note 99, at 1032-48 (questioning the empirical claim that the privilege promotes priest-penitent communication).

<sup>103</sup> See *infra* text accompanying notes 52-58.

<sup>104</sup> See, e.g., Lund, *supra* note 7, at 1384 ("Religious conscientious objectors have long been protected from the draft, but if objectors are replaced by drafted substitutes, that third-party burden is extraordinary."); Esbeck, *supra* note 5, at 376 ("For every conscientious objector excused from service, another unwilling soldier is pressed into military service with the risk of injury or death."); Brief of Constitutional Law Scholars et al., *supra* note 63, at 15 ("During the Vietnam era, the Court repeatedly upheld the selective service exemption for conscientious objectors, even though the exemption was facially limited to those whose objections were based on a belief in a 'Supreme Being,' and when an exemption for one otherwise eligible draftee necessarily sent another one to war.").

<sup>105</sup> See GREENAWALT, *supra* note 96, at 50.

<sup>106</sup> 380 U.S. 163 (1965).

<sup>107</sup> 398 U.S. 333 (1970).



granting exemptions to conscientious objectors implies rejection of the third-party harm doctrine.

There are several responses to this objection based on military draft exemptions. Some proponents of the third-party harm doctrine—including one of us<sup>108</sup>—have argued that draft exemptions are distinguishable because they cannot be said to impose substantial harms on identifiable third parties. Draftees may be ineligible for any number of reasons, including medical conditions and student status. For any particular draftee, it may be impossible to draw a causal connection between being sent to the battlefield and another citizen's conscientious objection. There are too many confounding factors for any draftee to complain that he is being put in harm's way *because of* the government's accommodation of another's conscientious objection.

Another response is that the increased risk of harm is too small. When conscientious objectors exit the draft, they raise the statistical probability of others being drafted. But the additional risk may be infinitesimal. In this way, draft exemptions are more like tax subsidies for religious accommodations imposed on the general public than they are like denials of significant benefits to particular individuals. Because the risk of harm is small and diffuse, it does not trigger the third-party harm doctrine.<sup>109</sup>

In his thoughtful contribution to this symposium, William Marshall casts doubt on these responses.<sup>110</sup> He notes that during Vietnam, the number of conscientious

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<sup>108</sup> TEBBE, *supra* note 3, at 58; *see also* Nelson Tebbe, *Reply: Conscience and Equality*, 31 J. C.R. & ECON. DEVEL. 1, 29 (2018).

<sup>109</sup> *See* Gedicks & Van Tassell, *RFRA Exemptions*, *supra* note 3, at 363–64 (“[E]xemption from the draft for religious pacifists increases the mathematical likelihood that nonpacifists and secular pacifists will be drafted in their place . . . The risk of being drafted already exists and is already substantial . . . The additional burden imposed by accommodating religious pacifists . . . is barely measurable; those accommodated are so few compared to the entire population subjected to the law that it is not reasonable to understand the exemption as a meaningful third-party burden.”); *see also* Gedicks & Koppelman, *supra* note 46, at 57 (“Like the incremental tax increase in *Walz*, the religious pacifist exemption barely increased an already-existing burden that was substantial in its own right and thus did not impose significant additional costs on others in violation of the Establishment Clause. Although whoever was drafted in place of the objectors faced the consequence of going to war, the pre-existing probability of those persons’ being drafted was not significantly increased by the exemption.”); *cf.* Lund, *supra* note 7, at 1378 (“Perhaps religious draft exemptions can be explained the same way. The likelihood of you being drafted because someone else got an exemption is infinitesimal; it is barely more than the risk you had originally of being drafted.”).

<sup>110</sup> William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KY. L.J. 685, 705–06 (2018); *see also* Storslee, *supra* note 4 (manuscript at 30 & n.130 (citing Marshall)). Marshall also argues that the third-party harm doctrine was not historically a source of objection to military draft exemptions. Marshall, *supra*, at 687–89. Yet, as he observes, draft exemptions in wars that required universal military service, such as the Revolutionary War and the two World Wars, did not impose on third parties the cost of having to serve in the military. That is because all able-bodied men had to serve. That is not to say that conscientious objection was embraced—far from it. As Marshall notes, fairness objections were often leveled against conscientious objectors. *Id.* at 691–92. Third-party harm arguments may not have been made in their contemporary form, but that is not surprising. If

objectors rose dramatically, to the point where they outnumbered draftees inducted into the military.<sup>111</sup> The numerical structure of the draft lottery also made it possible to determine with some accuracy which third parties were burdened by those opting for conscientious objector status. The combination of the sheer number of objectors and the transparency of the draft mechanism together make the argument from diffusion more difficult to sustain.

Another response, which Professor Marshall suggests, is that conscientious objections to military combat may be *sui generis* as a form of religious accommodation. Not only is there a long and unbroken history of granting draft exemptions, but deference to the military and prudential concerns about coercing objectors into fighting may be sufficient to distinguish this type of accommodation. It may be futile to force objectors into combat roles, and indeed doing so may impose further costs on those who are willing to serve.<sup>112</sup>

Nevertheless, to the extent conscientious objectors to military service impose harms on identifiable third parties, others can rightfully complain about the fairness of having to carry those burdens.<sup>113</sup> We suspect that if there were a military draft in the future, especially one in which there were more objectors than those entering service, arguments sounding in the unfairness of third-party harms would be front and center in debates about the legal and moral permissibility of continued exemptions.<sup>114</sup>

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everyone is required serve, the unfairness of conscientious objection lies not in forced substitution but in not doing one's part and in increasing the burdens on those who serve.

<sup>111</sup> *Id.* at 697.

<sup>112</sup> *Id.* at 715-16. For an argument that futility can ground a moral reason to accommodate conscientious objections, see Simon Cabulea May, *Contempt, Futility, and Exemption, in* RELIGIOUS EXEMPTIONS 60 (Kevin Vallier & Michael Weber eds., 2018).

<sup>113</sup> When the numbers of conscientious objectors to war are small and from insular communities, like the Quakers in the United States, accommodations are relatively costless. But when such accommodations become more commonplace—in some cases reaching a significant minority or majority of eligible inductees—costs increase significantly and arguments about fairness become more salient. For example, the Israeli Supreme Court has struggled repeatedly with religious exemptions to compulsory military service in that country. It ruled last year that exemptions from military service for the ultra-Orthodox are unconstitutional. See Isabel Kershner, *Israel's Military Exemption for Ultra-Orthodox Is Rule Unconstitutional*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/world/middleeast/israel-ultra-orthodox-military.html>; see also George Klosko, Michael Keren, & Stacy Nyikos, *Political Obligation and Military Service in Three Countries*, 2 POL. PHIL. ECON. 37 (2003) (discussing arguments from fairness and reciprocity in legal justifications for mandatory military service in Germany, Israel, and the United States).

<sup>114</sup> Another example that is sometimes raised by critics of the third-party harm principle is the tax exemption for nonprofits. See Brief of Constitutional Law Scholars et al., *supra* note 63, at 16 (arguing in a single sentence that “the Court upheld a New York City real property tax exemption for religious houses of worship, notwithstanding the cost imposed to taxpayers”). This example is inapposite for several reasons. First, the associated costs are shouldered by the taxpaying public, not by an identifiable subset of citizens. As we have argued above, that distinction matters. See *supra* text accompanying notes 18–22. Second, in upholding the New York property tax exemption, the Court emphasized that the exemption was not specific to religion. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 672–73 (1970) (“[The government] has not singled out one particular church or religious group or even

## V. LEVELING UP

Some have argued that the military draft exemptions do not impose third-party harms because they apply to non-religious objectors as well. This is the “leveling-up” argument against the third-party harm doctrine. According to this understanding, the effect of the Court’s decisions in *Seeger* and *Welsh* was to expand the scope of religious accommodations to include secular claims of conscience. As a result, the exemptions no longer favor religion, and those burdened cannot complain that they are forced to bear the costs of others’ religious practices. When exemptions are generalized—when the government “levels up” nonreligious claims so that they receive the same protections as religious claims—the government does not treat religion distinctively, which means that religion clause limitations cease to apply.<sup>115</sup>

Does the “leveling up” response to the military draft exemptions work? Does it save them from normative and legal objections over third-party harms? The question applies to other accommodations as well. For example, the Trump administration may have attempted to forestall the third-party harm argument when it coupled a religious exemption from the contraception mandate with a similar exemption for employers who opposed the mandate on secular moral grounds.<sup>116</sup> And some have defended vaccination exemptions that apply not only to religious objectors but to those with “philosophical” or “moral” objections as well.<sup>117</sup>

The difficulty with the “leveling up” argument is that it does not track the reasons why we have a principle against third-party harms in the first place. As we explained above, the doctrine is driven by concerns about infringement of the fundamental right to liberty of conscience, as well as concerns about stratified citizenship status on the basis of a basic identity characteristic.<sup>118</sup> Both of those concerns apply equally to government accommodations that cover both religious and nonreligious objections to regulations that implicate people’s most profound commitments.

Citizens who are made to bear a cost so that the government may accommodate a commitment of conscience have reason to complain that they are

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churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.”). Even if the third-party harm doctrine applies to government accommodations of religion *and* conscience, tax exemptions extend to nonprofits that engage in charitable activities not related to religion or conscience. For any or all of these reasons, the widespread practice of exempting nonprofits from taxation does not push against our argument.

<sup>115</sup> See, e.g., Levin, *supra* note 8, at 1226.

<sup>116</sup> Another reason the administration might have added an exemption for moral objections is to counter a complaint that accommodating only religious convictions was unfair or unequal. See *March for Life v. Burwell*, 128 F. Supp. 3d 116, 122 (D.D.C. 2015).

<sup>117</sup> Levin, *supra* note 8, at 1234.

<sup>118</sup> See *infra* Part I.

being forced to “pay for” the beliefs of another, and that complaint does not necessarily lose force just because the beliefs or practices at issue are not religious. Similarly, citizens may well suffer degradation of their standing in the political community on the basis of profound aspects of their identity that are connected to nonreligious objections.

For an example, consider *March for Life v. Burwell*.<sup>119</sup> In that case, a secular pro-life nonprofit organization sought an exemption from the contraception mandate that was similar to the exemption that the administration had granted to religious organizations. Under the law as it stood, in fact, religious pro-life organizations could take advantage of an existing accommodation, but secular pro-life organizations could not, even if their beliefs and their work were otherwise indistinguishable. The court ruled that the disparity between religious and secular pro-life nonprofits violated equal protection. Whether that ruling was correct is not the point here.<sup>120</sup> Rather, we mean to ask whether a rule that did exempt both types of organizations would implicate the third-party harm doctrine.

It would. Not only would employees who lose contraception coverage without cost sharing have reason to complain that they were being forced by the government to bear costs so that others’ fundamental beliefs could be accommodated, but they also would justifiably perceive that the government was favoring beliefs of the organizations over their own concerns about matters of ultimate importance. Where life and death are involved, as well as matters of bodily integrity, it is possible and even easy to understand how third parties could be harmed in their liberty of conscience regardless of whether the accommodation is granted for conduct motivated by religious convictions or whether it accommodates comparable secular ethical or moral commitments.

Another way to understand our objection to the “leveling up” argument is by returning to the example of military draft exemptions. Recall that the exemptions apply to secular claims of conscience because, in *Seeger* and *Welsh*, the Court interpreted the definition of religion broadly to include what would otherwise have been considered nonreligious ethical and moral convictions. But notice that this “definitional strategy” achieves equality between religious and secular claims of conscience by bringing secular claims within the ambit of existing religious exemptions. In other words, it treats secular claims *as if* they are religious. But a result of this strategy is the exemptions remain religious and therefore subject to scrutiny under the Establishment Clause, including limitations based on third-party harms. And from a normative perspective, that result should not be surprising. When conscience-based exemptions impose harms on others, third parties have the same complaint that they have when the harms are imposed under a narrow definition of religion, namely, that they should not be required to pay for

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<sup>119</sup> 128 F. Supp. 3d 116 (D.D.C. 2015).

<sup>120</sup> Another court has since ruled the other way in a similar case. *Real Alternatives, Inc. v. Sec’y Dep’t of Health and Human Servs.*, 867 F.3d 338, 349–52 (3d Cir. 2017).

costs associated with allowing someone else to comply with their deepest religious, philosophical, or ethical convictions. Even after “leveling up,” the third-party harm doctrine ought to apply, doctrinally and normatively, with equal force to religious and secular claims of conscience.

## VI. THE COST OF RIGHTS

A final objection to the third-party harm doctrine is that rights of religious free exercise are like other constitutional rights that result in harms to others. The exercise of rights such as freedom of speech, the right to keep and bear arms, rights against unreasonable search and seizure, and the right not to self-incriminate sometimes impose harms on others. With respect to these rights, however, the law tolerates significant third-party harms. The objection, then, is that the same is, and ought to be, true for religious liberty.<sup>121</sup>

In considering the force of this objection, it may be useful to have more specific examples. Consider free speech doctrine, which protects the speech of hateful speakers who convey messages of intolerance, intimidation, and violence.<sup>122</sup> These messages are not only offensive, but they create social conditions in which the targets of hateful and violent speech are made less secure and more vulnerable to attack. Or consider First Amendment limits on defamatory speech. The United States is unusual in providing speakers with immunity from tort liability that would require them to pay damages when they negligently defame public officials.<sup>123</sup> Yet another example involves limiting speakers’ liability for intentional infliction of emotional distress when their speech is about matters of public concern.<sup>124</sup> In all these cases—involving hate speech, defamation, and speech that inflicts emotional distress—the First Amendment allows speakers to impose harms on identifiable third parties. As a result of free speech doctrine, some victims who would otherwise be owed damages do not receive them because speakers have exercised their constitutional rights.

Now, proponents of free speech argue that to have a free and tolerant society requires a broad conception of freedom of speech. And they often argue that a consequence of this freedom is that some people will be harmed. Such harms are unavoidable if free speech is to be protected as a special constitutional right. As Leslie Kendrick has argued recently, for many free speech theorists, the guarantee is significant precisely because it protects a class of activities that includes harmful expressive conduct. If the freedom of speech did not protect such conduct, the right would have little, if any, meaning.<sup>125</sup>

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<sup>121</sup> See Esbeck, *supra* note 5, at 358 n.7; Lund, *supra* note 7, at 1384-85.

<sup>122</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>123</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>124</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>125</sup> See Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFF. 87, 96 (2017) (“[S]ome theorists argue that the class of protected activities *must* include harmful conduct, or else the

The same argument is made now in the context of religious freedom. To have a free and tolerant society requires accommodating religion. A broad conception of religious liberty reduces social divisiveness and lessens the cruelty of the state toward believers who would otherwise be forced to choose between following their consciences and obeying the law.<sup>126</sup> Thus, just as freedom of speech has important public benefits, so, too, does religious freedom. And, to continue the analogy, these benefits have attendant costs, which specific third parties are sometimes required to pay. If we recognize that the value and benefit of free speech has such costs, then we should do the same for religious freedom. There is no reason to single out religious freedom as the one right for which it is impermissible to impose significant costs on others.

We have two main responses to this objection about the cost of rights. The first is that even if some rights impose harms on third parties, rights involving claims of conscience are distinctive. That is because harms that follow from such exemptions also implicate the liberty of those who are burdened. When third parties complain, their objection is that the state is requiring them to subsidize another's commitments of conscience. And that claim also sounds in the value of a fundamental liberty. In short, when religious exemptions generate harms to third parties, there is liberty of conscience *on both sides*.

Moreover, the First Amendment provides a textual marker for this difference between religious freedom and other constitutional rights, such as the freedom of speech. That marker, of course, is the Establishment Clause, which sets limits on how the government can accommodate religious free exercise. Religious freedom may be unusual in this respect. When the government goes too far in exempting religion, it may violate the rights of third parties not to have the religious beliefs and practices of others imposed upon them. And that claim, to be free from religious domination, is itself a right of religious freedom.<sup>127</sup>

Religious freedom is not the only right that may conflict with other rights, such that there are rights claims on both sides. Liberty of conscience will present similar concerns, even when it is not grounded in religion, as we have argued above.<sup>128</sup> And conceivably other rights have a similar conceptual structure. But a challenge for critics of the third-party harm doctrine is to identify cases in which there are rights that conflict and in which those cases are relatively easily resolved in favor of those imposing on the rights of others. Perhaps there are such cases, but

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idea of free speech has no meaning. If a general liberty right already protects all harmless conduct, then a free speech right must do something more.") (emphasis in original and internal citation omitted).

<sup>126</sup> See, e.g., Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

<sup>127</sup> TEBBE, *supra* note 3, at 53.

<sup>128</sup> See also Tebbe, *supra* note 108, at 28-30 (arguing that *some* accommodations of nonreligious commitments raise the same kinds of normative concerns about third-party harms that religious exemptions do, such as accommodations of conscience, but that not all protections for speech implicate those concerns).

they are unlikely to be easily resolved. Even in a system that prioritizes rights over other considerations, rights must be limited when they cannot be protected in a manner consistent with granting equal rights to others. And that is the situation in the context of religious freedom, where the rights of those claiming exemptions conflict with the rights of others to be free from having others' religious practices imposed upon them.

This first response to the cost of rights objection focuses on the nature of religious liberty and one way in which that liberty may be distinguished from others. But a second response, which applies to constitutional rights more generally, is that we should be disturbed by the claim that individual rights can be exercised in ways that harm others. An important principle in the liberal tradition is that individual rights may extend up to the point at which they harm others, but no further.<sup>129</sup> This principle remains controversial, but its broad appeal may also help to explain why applications of rights that harm others are so contentious. One reason why most liberal democracies have not followed American free speech doctrines in the areas of hate speech, defamation, and offensive speech aimed at inflicting emotional distress is that these doctrines allow significant harms to third parties.

Even if we are committed to protective doctrines, such as the defamation standard under *New York Times v. Sullivan*,<sup>130</sup> we should still be concerned about who pays for the costs of harmful rights. As Frederick Schauer has argued, "It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries."<sup>131</sup> It is possible to recognize that rights protect important interests and public goods, while also regretting that they impose serious costs on others, including on those who are not well-positioned to bear those costs or to resist their imposition.

At this point, those concerned about both protecting rights and avoiding harms to others would seem to face a dilemma. It is possible either to (1) protect the right and impose costs on third parties, or (2) restrict the right and avoid imposing costs on third parties. But it should be clear that these are not the only available options. As Schauer observes, in many cases, it is also possible to "uncouple" protection of a right from the harms it imposes on others by requiring the public to compensate those who are harmed. There are various ways to

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<sup>129</sup> The classic statement of this principle is John Stuart Mill, ON LIBERTY, in 18 THE COLLECTED WORKS OF JOHN STUART MILL: ESSAYS ON POLITICS AND SOCIETY 213 (John M. Robson ed., 1977), available at <http://oll.libertyfund.org/titles/233>. There is, of course, a vast literature surrounding the harm principle, its meaning, scope, justification, and limitations. See, e.g., JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984); David Lyons, *Liberty and Harm to Others*, 9 CAN. J. OF PHIL. 1 (1979). Our purpose here is not to defend a specific account of the harm principle, but only to observe that claims to limit rights on the basis of third-party harms are familiar and not easily dismissed within the liberal rights tradition.

<sup>130</sup> 376 U.S. 254 (1964).

<sup>131</sup> Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992).

distribute the costs of protecting rights, including through social insurance or victim compensation schemes.<sup>132</sup>

Lest these options seem far-fetched, it should be noted that the only examples in which the Supreme Court has granted religious exemptions involve cost-spreading of this kind. In a line of cases beginning with *Sherbert v. Verner*<sup>133</sup> and extending through *Frazee v. Illinois Department of Employment Security*,<sup>134</sup> the Supreme Court held that religious believers cannot be forced to choose between receiving employment benefits and following the dictates of their consciences. In these cases, however, the costs of religious accommodation were borne not by employers or other identifiable third parties, but rather by the general public. The costs were distributed across society rather than concentrated on particular employers. The contrasting case, of course, is *Caldor*,<sup>135</sup> in which a state required employers to bear potentially significant costs. And that case, as we have argued above, stands for the proposition that the Establishment Clause bars the imposition of serious burdens on third parties.

Note that the result in *Hobby Lobby* tracks *Sherbert* and its progeny. The Court granted a RFRA exemption for religious employers who objected to the contraception mandate, but it did so on the assumption that there would be no cost to third parties. The government would require insurance providers (or administrators of self-insured plans) to guarantee contraceptive coverage for employees. The Court's suggestion in *Hobby Lobby* was that religious employers would be exempt, employees would receive coverage, and, if necessary, insurers would be reimbursed by offsets in fees owed to the government. Any resulting costs of the religious accommodation would be paid ultimately by the general taxpayer.<sup>136</sup>

The Trump administration has rejected the Court's approach. Under its interim final regulations granting sweeping exemptions from the contraception mandate, neither insurance providers nor the government are required to remedy the loss of coverage for employees.<sup>137</sup> If these regulations are permitted to go into

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<sup>132</sup> *Id.* at 1338–48 (considering insurance and victim compensation schemes in the contexts of libel and defamation).

<sup>133</sup> 374 U.S. 398 (1963).

<sup>134</sup> 489 U.S. 829 (1989).

<sup>135</sup> 472 U.S. 703 (1985).

<sup>136</sup> That insurers could recover their costs from the government was implied by the Court's suggestion that the existing nonprofit exemption could be extended to cover closely-held for-profits. *Hobby Lobby*, 134 S. Ct. at 2759, 2782. Under the nonprofit exemption, third-party administrators were required to provide costless contraceptive coverage. They could then seek reimbursement from insurers, who could in turn offset their costs by adjustments to user fees paid for participation in federally-facilitated exchanges. See 45 C.F.R. § 156.50 (d); see also Coverage of Certain Preventive Services under the Affordable Care Act, 78 Fed. Reg. 39,880 (July 2, 2013), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-07-02/pdf/2013-15866.pdf> (explaining reimbursement process for third-party administrators and insurers under the nonprofit exemption).

<sup>137</sup> 82 Fed. Reg. 47792 (Oct. 6, 2017); 82 Fed. Reg. 47838 (Oct. 6, 2017).



effect,<sup>138</sup> they will impose substantial harms on employees. The result will be to move, regressively, from a legal exemption regime in which costs are socially insured to one in which those who are least able to pay are required to bear the costs of accommodation for religious or moral objections.

The larger point here is that forcing third parties to pay for the exercise of others' constitutional rights is disturbing. Moreover, the fact that some rights have costs should not be a source of complacency in considering the distribution of those costs. That rights have costs does not mean that third parties must bear them. Indeed, as we have argued, courts have uncoupled or detached rights of religious freedom from the costs imposed by the exercise of those rights. They have done this mainly by requiring that the public cover those costs. But importantly, when this uncoupling of rights and costs has not been possible, courts have denied religious exemptions, rather than allow the imposition of significant burdens on third parties.

#### CONCLUSION

The third-party harm doctrine is an important constitutional limit on religious accommodations. Although critics have leveled a diversity of objections against it, none of these is persuasive. There remain important questions about how much harm religious accommodations may impose, but there should be no doubt that the Religion Clauses, and especially the Establishment Clause, require that courts closely scrutinize exemptions that impose significant costs on others. Many accommodations will pass such scrutiny, but not all. Within limits, when exemptions do impose serious burdens, the public must take responsibility for them. It is neither legally nor morally permissible to require that third parties bear the costs of conscience.

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<sup>138</sup> Two federal courts have granted preliminary injunctions blocking these regulations. *California v. Health & Human Servs.*, 281 F. Supp. 3d 86 (N.D. Cal. 2017); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553 (E.D. Pa. 2017).