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DO DISCRETIONARY RELIGIOUS EXEMPTIONS VIOLATE THE ESTABLISHMENT CLAUSE?

Carl H. Esbeck*

The Establishment Clause is not violated when government enacts regulatory or tax legislation but provides, concerning these new burdens, an accommodation for those holding conflicting religious beliefs or practices. Such religious exemptions are at the discretion of the legislature and have as their purpose to ameliorate hardships borne by religious minorities and other dissenters who find themselves out of step with the prevailing social or legal culture. Statutory religious exemptions are a common occurrence in a nation where there is a venerable tradition of religious tolerance toward our neighbors as well as those who have made their way to America to escape persecution.

The presence of third parties who complain of incidental harm as a result of a religious exemption does not alter the exemption's constitutionality. In an unbroken line of cases now spanning a century, the Supreme Court of the United States has ten times rejected the argument that a religious exemption in a larger regulatory or tax framework is a government-induced advancement of religion that contravenes the Establishment Clause. There are no cases to the contrary that have ever commanded a majority of the Supreme Court.

A mischaracterization has emerged where religious exemptions have been conflated with what are really statutory religious preferences. For government to intentionally favor religion is indeed more problematic, and a few such preferences have rightly been struck down as unconstitutional when the preference was unyielding in that it failed to take into account consequential injury to third parties. Being able to distinguish a religious exemption from a religious preference has become paramount to correcting this mistake.

An exemption occurs when a dissenter's religious observance is simply left alone even as others are made to labor under a new burden of the legislature's creation, be it a tax or regulatory duty. Government does not establish religion by leaving it alone. An exemption, rather, ensures that a regulatory burden being imposed on others is not also thrust in the path of individuals who are inclined to privately follow the dictates of their faith. Because the government's exemption is not the causal agent behind this religious observance, any harm to third parties is entirely the result of private conduct. Harm redressable under the Establishment Clause must be, of course, injury caused by the government and not the handiwork of private actors.

This understanding of religious exemptions is nicely illustrated in the leading case of *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*.¹ In

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¹ 483 U.S. 327 (1987).

Amos, a building custodian who was dismissed from employment by his Church-affiliated employer for failing to tithe his income was acknowledged by the Supreme Court to have his religious liberty restrained. However, the loss of liberty was at the hands of the Church and not due to the religious exemption written by Congress into the employment nondiscrimination act. “Undoubtedly, [the custodian’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.”² The Establishment Clause restrains “state actors” not the Church.

A preference, on the other hand, arises when government takes note of a disagreement in the private sector that involves religion and moves to resolve it. If the subsequent law takes the side of the religious disputant, the government is intentionally preferring religion. That preference occurs in a situation not of the state’s creation, but in circumstances arising out of private social or market forces. Should the form of the government’s intervention go on to unyieldingly side with religion such that any harm to others is not weighed in the balance, then the Supreme Court will strike down the preference. The prototypical case is *Estate of Thornton v. Caldor, Inc.*³ In *Caldor*, a Connecticut statute permitted individuals who observe a Sabbath to demand that their employer accommodate the employee’s religious practice. The statute neither took into account scheduling difficulties of the employer nor the interests of fellow employees who also might want their weekends free. The First Amendment does not require that persons in the private sector be forced to readjust their lives so that a neighbor can better practice his or her religion. In the case of a religious preference – unlike an exemption – the government is the causal agent or “state actor” behind the harm to others.

The blurring of the line between an exemption and a preference has become a point of attack by academicians and litigators who resist government carving-out religious exemptions from general legislation. They insist that no-establishment means that the letter of the law be religion-blind. That is, the face or text of a law must neither single out religion for special benefits nor special burdens.⁴ This formal neutrality means that lawmakers would have to shut their eyes to the fact of religious pluralism, namely: that many of their constituents are religious, indeed they practice many different types of religions. Exemptions are said by some scholars to be unconstitutional when there is incidental harm to third parties. These academics became particularly distressed by the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*,⁵ with its broad application of the Religious Freedom Restoration Act (“RFRA”).⁶ RFRA is a true religious exemption, one that is particularly powerful in getting the federal government to pay attention when it promulgates laws that are formally neutral as to religion. RFRA requires the

² *Id.* at 337 n.15.

³ 472 U.S. 703 (1985).

⁴ Formal neutrality is not a new idea. Over fifty-five years ago Professor Philip Kurland proposed a “neutral principle” where the text of a law must not acknowledge religion, whether it be to help or hinder it. See Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 2 (1961). Kurland’s abstraction initially drew widespread interest, in part because of its simplicity in application. Indeed, the article was soon republished as small monograph. See Philip B. Kurland, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1962). Interest just as quickly faded when the “neutral principle” was discredited by a scholar who had actual experience with church-state law and was familiar with the American story of welcoming religious minorities. See Leo Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389 (1963).

⁵ 134 S. Ct. 2751 (2014).

⁶ 42 U.S.C. 2000bb to 2000bb-4 (2012).

federal government to accommodate religious claimants case-by-case or show a compelling reason not to. Notwithstanding the breadth of RFRA after *Hobby Lobby*, for democratic lawmakers to have to feign ignorance of America's religious pluralism, as suggested by the theory of formal neutrality, will mean that many modern laws will end up hurting religious minorities.

In some instances, no doubt, lawmakers should exercise their discretion and narrow or deny an exemption for a countercultural religious observance. Such balancing by political branches is entirely proper. However, the subject of this article is whether refusal of such an exemption is constitutionally required. It is not. The presence of adverse effects on parties who do not benefit from an exemption does not cause an otherwise lawful accommodation to violate the Establishment Clause.

Part I of this article compares the leading cases of *Amos* and *Walz v. Tax Commission of the City of New York*,⁷ on the one hand, with *Caldor*, on the other, drawing out the conceptual differences between a religious exemption and a religious preference. This article will show that exemptions continue to permit, but do not cause, private religious observance. Also surveyed are nine additional Supreme Court exemption cases, which are set apart from preference cases like *Caldor*, *Board of Education of Kiryas Joel Village School District v. Grumet*,⁸ *Larkin v. Grendel's Den, Inc.*,⁹ and *Trans World Airlines, Inc. v. Hardison*.¹⁰ Part II notes that progressive scholars want religious exemptions to be balanced against the incidental harms that befall third parties. They want this balancing, not as a matter of prudence but as a constitutional imperative of the command to not establish religion. The argument assumes that "third-party harm" as a juridical category can be both defined and bounded. It cannot. The logic behind this category is in danger of expanding and overwhelming every religious exemption. Finally, Part III demonstrates that the plain text of the Religion Clauses does not require religion-blind government or facial neutrality. It goes on to draw upon surveys to show that the founding generation did not regard a religious exemption as an establishment. Additionally, there are presently thousands of religious exemptions in local, state, and federal law. To abolish them all would work primarily to the injury of religious minorities, which would bring a sea change in the venerable American practice of extending a welcoming hand to peoples of diverse faith.

I. A TALE OF TWO CASES: AMOS AND CALDOR

A. For Government to Leave Religion Alone does not Establish Religion

The Supreme Court of the United States has consistently held that when general regulatory or tax legislation imposes a burden on religious belief or practice, a legislative body is free to forestall the burden by providing an exemption for religion. To statutorily "withhold" such a burden is what is termed a discretionary religious exemption.¹¹ To exempt religious

⁷ 397 U.S. 664 (1970).

⁸ 494 U.S. 872 (1990) (plurality opinion in part).

⁹ 459 U.S. 116 (1982).

¹⁰ 432 U.S. 63 (1977).

¹¹ Religious exemptions required by the Free Exercise Clause, or what might be termed mandated religious exemptions, also have been found not to run afoul of the Establishment Clause. *See Wisconsin v. Yoder*, 406 U.S.

observance from general regulatory or tax legislation has the net effect of leaving religion alone. And, the government does not establishment religion by leaving it alone.

The Establishment Clause is not implicated when government does nothing, but only when it takes an active step to aid or advance religion. As the Court famously said in *Walz*:

[F]or the men who wrote the Religious Clauses of the First Amendment the “establishment” of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.¹²

It is more than just a nice turn of phrase when, as stated above, the government does not establish religion by leaving it alone. That the Establishment Clause requires “sponsorship, financial support, [or] active involvement” has consequences is evident in the difference between an exemption and a preference. In the case of an exemption, the government did not alter the status quo ante. In the instance of a preference, the government has taken steps to affirmatively intervene in a private dispute and resolve it, namely by passing a law taking the side of religion over the secular.

In an unbroken line of seven cases, the Supreme Court has rejected the argument that a religious exemption in a larger regulatory or tax framework is an involvement with religion that violates the Establishment Clause. The leading case is *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*,¹³ in which the Court upheld a statutory exemption in Title VII of the Civil Rights Act of 1964.¹⁴ The Title VII exemption excuses religious employers from the prohibition on discrimination when the adverse employment decision is based on the employer’s religion. Mayson, a building custodian employed at a gymnasium operated by the Church of Jesus Christ of Latter-day Saints (Mormon), was discharged because he ceased to be a church member in good standing. The Court began by reaffirming that the Establishment Clause does not mean that government must be indifferent to religion, but it aims at government not “acting with the intent of promoting a particular point of view in religious matters.”¹⁵ The Title VII exemption, however, was not an instance of government “abandoning neutrality,” for “it is a permissible legislative purpose to alleviate” a regulatory law when it burdens religion, thereby continuing to leave religious organizations free “to define and carry out their religious missions” as they see fit.¹⁶

In addition to *Amos*, the Court has on six other occasions turned back an Establishment Clause challenge to a discretionary religious exemption. In *Cutter v. Wilkinson*,¹⁷ the Religious Land Use and Institutionalized Persons Act (“RLUIPA”),¹⁸ which accommodates religious observance by prison inmates otherwise subject to correctional policies, was found not to violate

205, 234 n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963). This is only logical, for otherwise we would have the nonsensical situation in which the Free Exercise Clause violates the Establishment Clause.

¹² 397 U.S. at 668.

¹³ 483 U.S. 327 (1987).

¹⁴ 42 U.S.C. 2000e to 2000e-17 (2012). The religious employer exemption at issue in *Amos* is found at § 2000e-1(a).

¹⁵ 483 U.S. at 335.

¹⁶ *Id.*

¹⁷ 544 U.S. 709, 720 (2005).

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

the Establishment Clause. In *Gillette v. United States*,¹⁹ a religious exemption from the military draft for those opposed to all wars was found not to violate the Establishment Clause. In *Walz v. Tax Commission of the City of New York*,²⁰ a municipal property tax ordinance that exempted religious nonprofit organizations was held not to violate Establishment Clause. The Court in *Zorach v. Clauson*,²¹ found that a public school policy of release-time from the state compulsory education law to allow pupils who desired, with parental permission, to attend private religion classes away from the school grounds did not violate the Establishment Clause. In *Aver v. United States*,²² the draft exemption during World War I pertaining to clergy, seminarians, and pacifists was said not to violate the Establishment Clause. Finally, in *Goldman v. United States*,²³ the Court summarily rejected constitutional claims to the same military draft exemption, relying on the newly decided *Aver*.

There are no cases to the contrary that have ever commanded a majority of the Supreme Court. A case similar to *Amos* did reach the Supreme Court through mandatory appellate review and was summarily dismissed.²⁴ Additionally, two cases similar to *Walz* reached the Supreme Court through mandatory appellate review and were summarily dismissed.²⁵ So the results in *Amos* and *Walz* were presaged by these three summary dismissals.²⁶

In addition to the seven plenary opinions of the Supreme Court and the three summary dismissals that are also binding precedent, there are cases in which a religious exemption was prominent but neither party bothered to argue that the exemption violated the Establishment Clause. These cases can be viewed as giving tacit approval to the discretionary religious exemption featured in the case.²⁷ Moreover, occasionally the Supreme Court itself fashions a

¹⁹ 401 U.S. 437, 448-60 (1971).

²⁰ 397 U.S. 664 (1970).

²¹ 343 U.S. 306, 308-15 (1952).

²² 245 U.S. 366, 374 (1918).

²³ 245 U.S. 474, 476 (1918).

²⁴ See *Arlan's Dep't Store v. Kentucky*, 371 U.S. 218 (1962), *app'l dismissed for want of a sub'l fed'l question*, 357 S.W.2d 708, 710 (Ky. 1962) (holding that state law requiring retail businesses to close on Sunday, with the exception of those businesses owned by persons who had Saturday as their Sabbath, did not violate the Establishment Clause).

²⁵ See *Gen. Fin. Corp. v. Archetto*, 369 U.S. 423 (1962), *app'l dismissed for want of a sub'l fed'l question*, 176 A.2d 73 (R.I. 1961) (holding that property tax exemption available to religious organizations did not violate Religion Clauses of the First Amendment, nor did the exemption violate equal protection or due process); *Heisey v. Cty. of Alameda*, 352 U.S. 921 (1956), *app'l dismissed for want of a sub'l fed'l question*, 46 Cal.2d 644, 298 P. 1 (1956) (holding that property tax exemption available to religious school did not violate Establishment Clause).

²⁶ A summary dismissal for lack of a substantial federal question by the Supreme Court is a decision on the merits and thus binding precedent on all lower courts. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

²⁷ See *Advocate Health Care Network v. Stapleton*, 137 S. Ct. ____ (2017) (applying "church plan" exception to employee benefit plans formed by religious health care organizations otherwise subject to ERISA); *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (applying Religious Land Use and Institutionalized Persons Act to provide religious accommodation for prison inmate); *Davis v. United States*, 495 U.S. 472 (1990) (concerning federal income tax deductibility of contributions to religious charities); *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (same); *United States v. Lee*, 455 U.S. 252 (1982) (concerning exemption from federal Social Security contributions by Amish who have long history of taking care of their aged members as a religious obligation); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (Federal Unemployment Tax Act exempted churches and church-related schools).

religious exception to generally applicable legislation.²⁸ The Court would not create a religious exception if to do so violated the Establishment Clause. Finally, individual Justices have stated that they do not think that discretionary religious exemptions from general regulatory legislation are a violation of the Establishment Clause.²⁹

One would think that this formidable array of binding precedent was bullet proof. Nevertheless, progressives have relied on *Estate of Thornton v. Caldor, Inc.*,³⁰ and secondarily on two plurality opinions involving religious accommodations: *Board of Education of Kiryas Joel Village School District v. Grumet*³¹ and *Texas Monthly, Inc. v. Bullock*.³² However, both *Grumet* and *Texas Monthly* were decided on grounds other than the progressive's argument that the Establishment Clause is violated when there is incidental harm to third parties. In *Grumet*, the New York legislature responded to complaints from parents by creating a new public school district coterminous with the boundaries of a village enclave housing an Orthodox Jewish community. The purpose was to better serve the special education needs of children born to this insular Jewish sect. The legislation violated a longstanding rule that government may not utilize a classification, based on a particular denominational or sectarian affiliation, to extend benefits or impose burdens,³³ no matter how meritorious the cause. Furthermore, like *Caldor* the statute in *Grumet* was a preference not an exemption. Perhaps most important for present purposes, all nine Justices in *Grumet* took care to say that discretionary religious exemptions are constitutional.³⁴

²⁸ See *Trammel v. United States*, 445 U.S. 40 (1980) (federal recognition of common law clergy testimonial privilege); *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490 (1979) (K-12 religious schools not subject to National Labor Relations Act and collective bargaining); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (federal legislation prohibiting employment of aliens to work in the U.S. not applied to clergy being recruited by church).

²⁹ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. ___ slip op. at 9, 22 (2017) (Sotomayor, J., dissenting, joined by Justice Ginsburg) (approving of the religious exemptions in *Walz* and *Amos*); *Welsh v. United States*, 398 U.S. 333, 371-72 (1970) (White, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 511 (1961) (Frankfurter, J., separate opinion).

³⁰ 472 U.S. 703 (1985).

³¹ 512 U.S. 687 (1994) (plurality opinion in part).

³² 489 U.S. 1 (1989) (plurality opinion).

³³ *Grumet*, 512 U.S. at 702-08; *Gillette v. United States*, 401 U.S. 437, 450-51, 454 (1971) (upholding military draft exemption for those that oppose all war but not those who only oppose wars believed unjust); *Larson v. Valente*, 456 U.S. 228 (1982) (state charitable solicitation law struck down because it intentionally discriminated against new or emerging religious movements); see *id.* at 246 n.23 (explaining *Gillette*). The rationale for the rule is that the Supreme Court wants to avoid making membership in a religious denomination more or less attractive. If this were not the rule of law, then merely holding religious membership in a particular religious denomination would result in the availability of a desirable civil advantage. For example, it would violate the rule if Congress were to confer conscientious objector draft status “on all Quakers,” for that may induce conversions (real or *pseudo*) to Quakerism. Although unintended, that would have establishment implications.

³⁴ 512 U.S. at 705 (“the Constitution allows the State to accommodate religious needs by alleviating special burdens” and reaffirming *Amos*); *id.* at 711-12 (Stevens, J., concurring) (distinguishing the facts of *Grumet* from “a decision to grant an exemption from a burdensome general rule”); *id.* at 716 (O'Connor, J., concurring) (“The Constitution permits ‘nondiscriminatory religious-practice exemption[s],’” (quoting *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (emphasis by Justice O'Connor, meaning that exemptions cannot discriminate among faiths)); *id.* at 723-24 (Kennedy, J., concurring) (approving *Amos* and similar cases); *id.* at 744 (Scalia, J., dissenting) (“The Court has . . . long acknowledged the permissibility of legislative accommodation.”).

All of the Justices in *Employment Division v. Smith*, also went out of their way to affirm that religious exemptions were constitutional. 494 U.S. 872, 890 (1990) (“a nondiscriminatory religious-practice exemption is permitted”); *id.* at 893-97 (O'Connor, J., concurring in the judgment) (regulatory exemptions are not only permitted, but sometimes constitutionally required).

In *Texas Monthly*, a case that did strike down an exemption, the three-Justice plurality did not follow the rule that progressives urge here.³⁵ The case involved a sales tax exclusion on purchases of sacred books and other literature that promote a particular religious faith. No opinion in *Texas Monthly* commanded the vote of more than three Justices, so the decision is unsuitable as precedent for much of any rule.³⁶ Justice Brennan, writing for himself and two other Justices, advanced the idea that third-party harm rose to a violation of the Establishment Clause.³⁷ However, three votes out of nine demonstrates that the third-party harm proposition is not the law and never has been. What cannot be dismissed in *Texas Monthly* is that eight Justices explicitly reaffirmed the rule in *Amos* upholding discretionary religious exemptions, and the ninth (Justice White) wrote the opinion in *Amos*.³⁸ Clearly, statutory religious exemptions have been broadly and unwaveringly supported by the United States Supreme Court for the past one hundred years.

B. *Caldor* Overturned a Religious Preference, not an Exemption

The important case of *Estate of Thornton v. Caldor, Inc.*,³⁹ did indeed strike down a Connecticut statute because it was in violation of the Establishment Clause. However, the statute at issue in *Caldor* was not a religious exemption from a regulatory or tax burden but was a religious preference. Additionally, the statute in *Caldor* was “unyielding” in that it disregarded the competing interests of the religious claimant’s employer and his fellow workers. In was the combination of these two features that was fatal to the statute.

As a consequence of making retailing on Sunday lawful, Connecticut’s legislature sought to remedy a coming dispute that would be created by private market forces. Anticipating that repeal of the Sunday-closing law would lead to conflicts between employers and employees, the state legislature took sides, specifically the side of the religious employee over the retail employer. The new statute read: “No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day.”⁴⁰ Donald

³⁵ If the plurality’s rule in *Texas Monthly* is that marked by “we hold,” then the relevant words are:

We hold that, when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause.

Texas Monthly, 489 U.S. at 5 (three Justice plurality). Given that the tax exemption in question was limited to writings by a religion of “books that consist wholly of writings sacred” and “consist wholly of writings promulgating the faith,” that narrow class carved from a larger class consisting of all religions publications is going to prefer some denominations while excluding others. As such, the classification advances some religious groups but leaves others behind. That violates the same rule applied in *Grumet*. See, *supra*, note 33, and accompanying text.

³⁶ That sales tax statute exempted only publications by religious organizations, not religious publications generally. Further, the law exempted only “writings promulgating the faith,” not those more generally about the religion but not promoting it, and certainly not writings critical of the faith. These are content-based and viewpoint discriminations that are normally fatal under free speech and free press precedent. So there were multiple ways of finding the tax exemption in *Texas Monthly* unconstitutional without implicating the rule at issue here.

³⁷ 489 U.S. at 18 n.8.

³⁸ *Id.* (approving *Amos*); *id.* at 28 (Blackmun, J., concurring) (approving *Amos*); *id.* at 38-40 (Scalia, J., dissenting) (arguing that regulatory and tax exemptions are generally permitted and sometimes required). Justice White said nothing about the exemption and third parties, but would have struck down the tax exemption as a discriminatory speech regulation in violation of the Free Press Clause. See *id.* at 25-26 (White, J., concurring).

³⁹ 472 U.S. 703 (1985).

⁴⁰ *Id.* at 706.

Thornton was an employee of Caldor, Inc., a retail department store. He was a Presbyterian and observed Sunday as his Sabbath. When the department store began opening on Sundays, Thornton worked Sundays once or twice a month. Growing unhappy with this arrangement, he invoked the Connecticut statute seeking his Sundays off. The store resisted and in time a lawsuit was filed on Thornton's behalf by the State Board of Mediation.⁴¹ The store's defense was that the Connecticut statute violated the Establishment Clause, and the Supreme Court agreed.⁴²

The Supreme Court found that the Connecticut law was forcing some in the private sector to assist in the religious observance of a fellow citizens.⁴³ That is what a preference often does: the government puts one private citizen to work helping another private citizen better conform to his or her religion.⁴⁴ An exemption does not do that, as *Amos* shows.⁴⁵ Indeed, the religious preference in *Caldor* was doubly offensive, for the statutory right was "unyielding" or absolute.⁴⁶ The statute took no notice of commercial burdens imposed on the employer or of the inconvenience to other workers who would have to fill in for Thornton during his absence.⁴⁷

Thornton's religious burden, lifted by the state law, was not the result of a duty of the government's own making but by the demands of the store's retailing. The Connecticut law, in response to anticipated employee demands for Sunday off, empowered people like Thornton to demand the assistance of private parties to more easily secure the observance of his Sabbath. *Caldor* is thus unlike *Amos*, the latter being a statutory exemption that prevented a government-imposed burden. Connecticut, by contrast, actively intervened and lifted a burden imposed by private market forces.

A few months later, the Supreme Court distinguished the exemption in *Amos* from the preference in *Caldor*. In *Amos*, a religious exemption in Title VII of the 1964 Civil Rights Act permitted religious employers to avoid the general prohibition on employment discrimination when employers are motivated by their religion. Mayson, a building custodian, claimed that the statutory exemption shifted a burden to him resulting in the loss of his job.⁴⁸ He argued that the exemption pressured him to conform his conduct to the religious rules of his Church. This taking sides in favor of religion was, claimed Mayson, a violation of the Establishment Clause. The High Court disagreed:

Undoubtedly, Mayson'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. This is a very different case than *Estate of Thornton v. Caldor, Inc.* In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had

⁴¹ *Id.* at 705-07.

⁴² *Id.* at 707, 710-11.

⁴³ *Id.* at 710.

⁴⁴ *Id.* at 708 ("[G]overnment . . . must take pains not to compel people to act in the name of any religion.").

⁴⁵ *Amos*, 483 U.S. at 337 n.15 ("Undoubtedly, Mayson'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.").

⁴⁶ *Caldor*, 472 U.S. at 709, 710.

⁴⁷ *See id.* at 708-09.

⁴⁸ *Amos*, 483 U.S. at 337.

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. *See Hobbie* . . . 480 U.S. [at] 145 n.11. In the present case, appellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute.⁴⁹

The Court thus distinguished *Caldor* from *Amos* in two steps. First, the Connecticut statute was not a mere shield from a larger regulatory burden imposed by the state, but a sword wielded by the state forcing others in the private sector to facilitate the religious practices of Thornton. Unlike *Caldor*’s preference in which the government intervened in a private-sector dispute by siding with religion, in *Amos* Congress left religious employers with the same powers as they had before the passage of Title VII.⁵⁰ Accordingly, it was the actions of Mayson’s Church and not the exemption provided by Congress that was the cause of Mayson losing his job. The Establishment Clause restrains the government, not the Church. Second, the statute in *Caldor* favored the religious claimant absolutely, thus wholly disregarding the interests of others in the private sector. This second factor pushed the preference over the line – making it unconstitutional.

It is possible to have a religious preference and still pass constitutional challenge. In *Trans World Airlines, Inc. v. Hardison*,⁵¹ the statutory provision in question was a religious preference. The provision appears in § 2000e(j) of Title VII of the Civil Rights Act of 1964,⁵² and requires employers to adjust to the religious needs of their employees. However, the employer’s duty of religious accommodation is not “unyielding,” for the duty dissolves in the face of the employer meeting the burden of showing an “undue hardship.”⁵³ The Supreme Court did not reach the claim that § 2000e(j) was in violation of the Establishment Clause,⁵⁴ albeit the prospect of such a ruling likely influenced the Court’s interpretation of how little was required to show “undue hardship.”⁵⁵ The Court held:

To require TWA to bear more than a *de minimis* cost in order to give [the employee-claimant] Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are

⁴⁹ *Id.* at 337 n.15. Cited in the quotation in the text is *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 145 n.11 (1987). *Hobbie* was a successful claim under the Free Exercise Clause, and thus involved not a discretionary religious exemption but one that was mandated. *See, supra*, note 11. Nevertheless, as the quotation in the text indicates, footnote 11 in *Hobbie* identifies the same two factors for why the preference in *Caldor* was unconstitutional.

⁵⁰ 483 U.S. at 337 n.15.

⁵¹ 432 U.S. 63 (1977).

⁵² 42 U.S.C. 2000e(j) (2012). Care should be exercised to not confuse Title VII’s preference favoring religious employees in § 2000e(j), a duty imposed on employers, with Title VII’s exemptions for religious employers found in §§ 2000e-1(d) and 2000e-2(e)(2). *TWA* involved the former and *Amos* the latter.

⁵³ *TWA*, 432 U.S. at 84-85.

⁵⁴ *Id.* at 69 n.4, 70.

⁵⁵ *See id.* at 89 (Marshall, J., dissenting) (“The Court’s interpretation of the statute, by effectively nullifying it, has the singular advantage of making consideration of [TWA’s] constitutional challenge unnecessary.”).

incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.⁵⁶

The Court sought to avoid a preference favoring the religion of the employee-claimant over his or her fellow employees who might want the day off for secular reasons, for such favoritism had the appearance of an establishment.

The preference at issue in *TWA* was unlike the religious exemption in *Amos*. In *TWA*, there was no larger regulatory legislation binding on an employee from which he or she was being “relieved” for religious reasons. Rather, Congress enacted § 2000e(j) to address a conflict created by private market forces. To that conflict, the government stepped in and took the side of the religious claimant over that of the commercial employer. In that sense, § 2000e(j) is like *Caldor*, a religious preference, and one for which the Court harbored Establishment Clause concerns. Unlike *Caldor*, however, the § 2000e(j) preference was not absolute in that employers need not comply if they can show the requested accommodation would create an “undue hardship.” The *TWA* Court avoided reaching the Establishment Clause question by interpreting the statute as relieving the employer when the burden was more than *de minimis*. So long as the statutory preference costs the employer nothing or next to nothing, then the preference is harmless to the employer. No harm, no foul.

In addition to *Caldor* and *TWA*, *Larkin v. Grendel's Den, Inc.*⁵⁷ is a helpful example of a religious preference. *Larkin* struck down a veto right vested in churches by a municipal ordinance concerning issuance of liquor licenses within a 500-foot radius of any church. Religion was preferred by the city over private retailing interests, and the preference was unyielding. The Court pointed out that it was not uncommon for a city to consider, along with others factors, the desire of churches to not have noisy and rowdy neighbors. That would have been constitutional. But the zoning ordinance cannot go so far as to grant an absolute veto in favor of religion over business interests.⁵⁸

C. *Walz, Cutter, and O Centro* all Upheld Statutory Religious Exemptions

In *Walz v. Tax Commission of the City of New York*,⁵⁹ the Supreme Court considered whether a municipal property tax exemption for churches and other houses of worship advanced religion and thereby violated the Establishment Clause. By a lopsided division of 8 to 1, the Court held that it did not. The Court in *Walz* reached two important conclusions of law. First, it held that the tax exemption for religious organizations was not a subsidy but the government electing not to impose a burden on religion and thus leaving religion alone. In the Court’s own words, the “grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but [it] simply abstains from demanding that the church support

⁵⁶ *Id.* at 84 (footnote omitted).

⁵⁷ 459 U.S. 116 (1982).

⁵⁸ 459 U.S. at 124 nn.7-8. Unlike the preference in cases like *Caldor* and *Larkin*, which involve attempts by the legislature to intervene in a private-sector dispute on the side of religion, there are laws that might be called a naked religious preference. These are uncommon today, but *Torcaso v. Watkins*, 367 U.S. 488 (1961) is illustrative. The case involved an oath declaring belief in God as a requirement for holding state office. The Court had little trouble finding the preference for monotheism unconstitutional. It is termed a “naked” preference because it came about quite apart from any effort by the state to resolve a private dispute between two of its citizens.

⁵⁹ 397 U.S. 664 (1970).

the state.”⁶⁰ The Court distinguished between an exemption and a subsidy saying that it “cannot read New York’s statute as attempting to establish religion: it is simply sparing the exercise of religion from the burden of property taxation levied on [others].”⁶¹ The proposition is simple: government does not establish religion by leaving it alone. As to the virtue of “leaving churches alone” arising from the principle of church-state separation, the Court observed: “The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches: each relationship carries some involvement rather than the desired insulation and separation.”⁶² Unlike a religious preference, a tax exemption for religious entities “tends to complement and reinforce the desired separation [thereby] insulating each from the other.”⁶³

Second, as a justification for the tax exemption the *Walz* Court rejected a *quid pro quo* argument, to wit: the exemption is compensation for religious groups generating considerable social capital by their provision of welfare services, education, and health care.⁶⁴ Religious charities do just that,⁶⁵ but viewing the tax exemption as a reward for “good works” invites unconstitutional entanglement by way of “governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.”⁶⁶ Moreover, a reward-for-works rationale would risk violating the rule against authorities resolving religious questions concerning the validity, meaning, or importance of religious beliefs and practices.⁶⁷ The rationale behind the no-religious-questions rule is that government lacks the jurisdiction to make judgments concerning the civic value of religious practices. If the state had such power, soon there would be churches “approved” by the state and those not. There are no heresy trials in the United States. To contemplate such a trial implies an established church against which “unapproved” ministries and “underperforming” churches are civilly weighed and found wanting. The courts are not theological umpires, scoring each church’s performance on a five-star Yelp scale.

The *Walz* Court noted in passing that religious organizations were not alone in being tax-exempt under the city ordinance, but were joined by arts, educational, and poor-relief

⁶⁰ *Id.* at 675.

⁶¹ *Id.* at 673.

⁶² *Id.* at 675.

⁶³ *Id.* at 676.

⁶⁴ *Id.* at 674.

⁶⁵ The annual socioeconomic impact of religion in the United States is presently valued at \$1.2 trillion, with social services and health care comprising \$256 billion of that share. Brian J. Grim and Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISCIPLINARY JOURNAL OF RESEARCH ON RELIGION 3 (2016), <http://faithcounts.com/wp-content/uploads/Summary-Sheet.pdf> and <http://www.religjournal.com/pdf/ijrr12003.pdf>.

⁶⁶ 397 U.S. at 674. A separate concurrence by Justice Brennan did rely on the reward-for-works justification, but no other justice joined that opinion. *See id.* 680, 687–88.

⁶⁷ The rule denying civil authority to pass on religious questions arises frequently, and it appears in cases decided under the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause. *See* *Thomas v. Review Bd. of Indiana*, 450 U.S. 707, 715–16 (1981) (free exercise clause); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 187-90, 194-95 (2012) (Establishment Clause barred question whether minister’s duties were exclusively religious or a mix of religious and secular.); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981) (free speech clause).

organizations.⁶⁸ However, the Court never said that the inclusion of secular organizations in the tax exemption was necessary to its holding. Indeed, in cases like *Amos*⁶⁹ and *Zorach v. Clauson*,⁷⁰ the Court upheld an exemption that was exclusive to religious organizations or religion.

In *Cutter v. Wilkinson*,⁷¹ the religious exemption at issue was by application of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) to a state correctional facility. Justice Ginsburg, writing for the Court, said that given RLUIPA’s “tak[ing] adequate account of the burdens [that] a requested accommodation may impose on nonbeneficiaries,” the statute met the strictures of the Establishment Clause.⁷² The Court chose to emphasize the second of the two-step criteria (unyielding vs. interest balancing), and not the first criteria (exemption vs. preference). Because RLUIPA was not “unyielding” to the interests of third parties, a unanimous Court upheld its constitutionality. The *Cutter* Court did not, of course, do away with the first step in the distinguishing criteria.

In an encounter with the Religious Freedom Restoration Act (“RFRA”), the federal government argued that it had satisfied its burden under the compelling-interest test by claiming that there was a need for uniform application of a controlled substances statute. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,⁷³ a small religious sect successfully sought an exemption from the federal criminal law banning the importation of a hallucinogenic drug. The Court rejected the government’s argument because a bald claim for uniformity is not how RFRA operates. Rather, under RFRA the judiciary is charged with striking “sensible balances” that often lead to religious accommodations and thus nonuniformity. RFRA assumes “the feasibility of case-by-case consideration of religious exemptions.”⁷⁴ And both RLUIPA in *Cutter* and RFRA in *O Centro* avoided transgressing the Establishment Clause by their case-by-case interest balancing, in contrast with the “unyielding” preference struck down in *Caldor*.

From *Amos*, *TWA*, *Larkin*, *Walz*, *Cutter*, and *O Centro* we have the two steps that set *Caldor* apart. First, unlike the religious exemption from a general regulatory law in *Amos*, which shielded the religious employer from the labor-law burdens imposed by Title VII, the state in *Caldor* gave the employee a sword to force others in the private sector to aid him in religious observance. Second, the state statute in *Caldor* created an “unyielding” preference for a religious observance. RFRA and RLUIPA create no such absolute preference. Rather, by their terms the statutes set up the familiar interest-balancing calculus of strict scrutiny.

II. THE CONCEPT OF “THIRD-PARTY HARM” IS UNDEFINED AND IMPOSSIBLY EXPANSIVE

Burwell v. Hobby Lobby Stores, Inc.,⁷⁵ involved a RFRA challenge to regulations under the Affordable Care Act that concerned the broad compliment of contraceptive drugs and devices

⁶⁸ *Walz*, 397 U.S. at 666-67, 667 n.1, 673.

⁶⁹ 483 U.S. 327 (1987) (upholding religious employer exemption in employment nondiscrimination laws).

⁷⁰ 343 U.S. 306 (1952) (upholding local public school release-time policy that exempted students from state compulsory education attendance law to attend religion classes).

⁷¹ 544 U.S. 709 (2005).

⁷² *Id.* at 720.

⁷³ 546 U.S. 418, 435-36 (2006).

⁷⁴ *Id.* at 436 (referencing *Cutter*).

⁷⁵ 134 S. Ct. 2751 (2014).

that an employer's health care plan must offer. Various corporations, some of which were for-profit but closely held by families with pro-life religious scruples, had religious objections to the contraceptive mandate. The two closely held corporations that were represented in the consolidated appeals in *Hobby Lobby* objected to four drugs and devices that sometimes acted as abortifacients. If the corporations prevailed in their RFRA claims, which eventually they did, then employees who wanted health care coverage for these abortifacients would not receive the four drugs and devices. This reduction in the employees' health care benefits was mischaracterized by progressives as a harm caused by RFRA.⁷⁶ They went on to claim that the reduction, said to be brought about by RFRA, was a violation of the Establishment Clause.

The Solicitor General of the United States did not argue that RFRA violated the Establishment Clause because it imposed a harm, in the form of lost contraception benefits, to employees of the closely held corporations. However, he made a parallel argument, to wit: the loss of contraceptive benefits categorically tipped RFRA's prescribed compelling-interest test against the corporations. The Court rejected that argument:

[I]t could not reasonably be maintained that any burden on religious exercise [incurred by the closely held corporations], no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious [closely held corporations] to confer a benefit on third parties.⁷⁷

Thus, while RFRA requires consideration of any harm to third parties whatever the source, it does so by the balancing test prescribe by the act not a categorical rule. The Court went on to point out how easily a third-party benefit as a result of an entitlement program can be characterized, when withheld, as a "harm" and thus – under the Solicitor General's theory – would overthrow RFRA:

By framing any Government regulation as benefitting a third party, the Government could turn all regulations into [third-party] entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.⁷⁸

If allowed, the Solicitor General's clever framing of third-party entitlements would render, not only RFRA but all religious exemptions a nullity. Under such an unbounded theory, "the Government could turn all regulations into [third-party] entitlements to which nobody could object on religious grounds." The Court's logic goes further than government benefit programs. For example, the legislation that is subjected to a RFRA challenge could be entirely regulatory, such as a labor law, and the third parties that progressives characterize as harmed by loss of the regulatory "benefit" said to be the employer's entire workforce. Because there is no stopping point to this clever framing of the loss of regulatory protection as "third-party harm," the logic would not just defeat RFRA but would upend all religious exemptions. Fortunately, the *Hobby*

⁷⁶ Because RFRA is an exemption rather than a preference, the real cause of the harm was Hobby Lobby Stores. This was also the case in *Amos*, where the cause of the harm was the Church and not the civil rights exemption. And, of course, the Establishment Clause no more runs against Hobby Lobby Stores than it does the Church.

⁷⁷ *Id.* at 2781 n.37.

⁷⁸ *Id.*

Lobby Court repudiated this transformation of “lost entitlements” into third-party “harms” that overcome RFRA.

In an attempt to cap the third-party harm theory, progressive have suggested that the “harms” should count only if the third parties are individually identifiable. Harms suffered more generally, indeed by large swaths of the general public, would not on this theory qualify for Establishment Clause treatment. Accordingly, in the military draft exemption cases, it is conceded that there is no disqualifying “harm to third parties” because extending an exemption to a few young men does not produce specific, identifiable victims who are drafted in their stead. In the instance of property tax exemptions for religious organizations as in *Walz*, it is conceded that there is no unconstitutional “harm to third parties” because the other taxpayers that must make up the shortfall in the municipal budget are not individually identifiable. *Amos*, of course, goes against this attempt to cap or limit what counts as third-party harm, for in *Amos* the “victim” of the religious exemption in Title VII was easily identifiable, namely, the building custodian who lost his job.⁷⁹

More fundamentally, this attempt to salvage the third-party harm argument by capping it misconceives the nature of the Establishment Clause. Unlike a rights-based clause where the focus is on the rights holder and his or her injury against any compelling interests of the state, no-establishment is about policing the boundary between two centers of authority, church and state.⁸⁰ This is widely acknowledged by the colloquialism “separation of church and state.” There is no interest balancing; either the Establishment Clause is violated or it is not. That is why, for example, the Court has been less stringent when it comes to the “injury in fact” requirement to have standing to raise an Establishment Clause claim.⁸¹

III. PLAIN LANGUAGE, COMMON SENSE, AND ORIGINAL MEANING

The Establishment Clause reads, “Congress shall make no law respecting an establishment of religion.”⁸² The plain text does not deny Congress the power to “make . . . law” about religion. Rather, it more narrowly denies Congress the power to “make . . . law” about “an establishment” of religion. Assume, for example, that soon after 1791 Congress enacted a comprehensive law regulating conscription into the Army and Navy. In exercising its

⁷⁹ See, *supra*, notes 1-2, 13-16, 48-50, and accompanying text (discussing *Amos*).

⁸⁰ See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). Structural limits are categorical and cannot be waived, such as the limitations on a federal court’s subject matter jurisdiction. A federal court either has subject matter jurisdiction or it does not; there is no balancing between competing interests. In like manner, the Establishment Clause is regarded by the federal judiciary as categorical in its operation, separating church and government. Either the church–state boundary is violated or it is not. There is no balancing test with the Establishment Clause. Yet a rule based on third-party harms necessitates such talk of balancing by its scholar proponents. In their theory, harms might be a little incurred or greatly incurred, small injuries or big injuries, substantial or trivial in the burden to be borne. Injuries of this sort are in the nature of those protected by a constitutional rights clause, not injuries safeguarded by a power-limiting restraint such as the Establishment Clause.

⁸¹ *Id.* at 34-43. Even taxpayer standing is permitted in claims under the Establishment Claim; by nature there is no individualized injury in a taxpayer claim.

⁸² U.S. CONST. amend. I

enumerated constitutional power to oversee the armed forces,⁸³ Congress also provided an exemption from the military draft for religious pacifists. Nothing in the Establishment Clause prohibits such an exemption.⁸⁴ The adoption of a draft exemption for religious pacifists and clerics is certainly to “make [a] law” expressly about religion, but it is not more narrowly to “make [a] law” about “an establishment” of religion. Stated differently, the Establishment Clause does not require religion-blind government or formal neutrality.⁸⁵ The draft exemption is designed to merely allow pacifists and clergy to follow religious precepts to which they are already so inclined, not to permit the government to affirmatively advance pacifistic religions. In short, the object of the exemption is not to advance religion but to have government stay out of the way and thereby let religion privately happen or not.

As a second example, it is fully consistent with the scope of the Establishment Clause for Congress to enact comprehensive legislation under the Interstate Commerce and Taxing Clauses⁸⁶ requiring large employers to provide unemployment compensation to their employees, but also to exempt religious organizations from the regulation and accompanying tax. To enact such a religion-specific exemption is certainly to “make [a] law” about religion. But the exemption is not more narrowly a law about “an establishment” of religion.⁸⁷ Once again, religion-blind government is not constitutionally required. And, once again, the statutory exemption is designed to merely allow religious employers to privately follow certain religious beliefs and practices when already motivated to do so.

With respect to the constitutional text, it is a categorical mistake to presume that a statutory religious exemption is a form of religious favoritism or preference. Although the government cannot “make [a] law” in support of “an establishment” of religion, it may “make [a] law” in support of “the free exercise” of religion. Indeed, that would have to be so because the Free Exercise Clause is itself a law in support of religious freedom. Moreover, there are three provisions in the 1787 U.S. Constitution that expressly safeguard independent acts of religious exercise: the Religious Test Clause,⁸⁸ the provisions permitting an affirmation in lieu of an oath to accommodate Quakers and other minority sects,⁸⁹ and in not counting Sunday against the ten-day time limit for a President or sign or veto a bill before it becomes law of its own force.⁹⁰ The First Amendment would not make any sense if the Establishment Clause contradicted the Free

⁸³ The Constitution grants to Congress the authority “[t]o make Rules for the Government and Regulation of the land and naval Forces.” *Id.* at art. I, § 8, cl. 14.

⁸⁴ See *Aver v. U.S.*, 245 U.S. 366, 374 (1918) (holding that clergy, theology students, and religious pacifists could be exempt from the military draft consistent with the Establishment Clause).

⁸⁵ See, *supra*, note 4, and accompanying text (discussing formal neutrality or color-blind government).

⁸⁶ The Interstate Commerce Clause grants to Congress the power “[t]o regulate Commerce . . . among the several States.” *Id.* at art. I, § 8, cl. 3. The Taxing Clause reads, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States.” *Id.* at art. I, § 8, cl. 1.

⁸⁷ See *Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997) (holding that a statutory exemption for faith-based organizations from an unemployment compensation tax did not violate the Establishment Clause).

⁸⁸ U.S. Const. art. VI, cl. 3.

⁸⁹ There are three such accommodations: U.S. CONST. art. I, § 3, cl. 6; *id.* at art. II, § 1, cl. 8; and *id.* at art. VI, cl. 3.

⁹⁰ U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sunday excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a law.”).

Exercise Clause, or if the Establishment Clause overrode or nullified these three explicit accommodations of religious exercise in the Constitution.

In a similar vein, the plain language of the Free Exercise Clause does not allow for a law “prohibiting the free exercise [of religion].” However, it is a one-way clause. It prohibits the government from restraining free exercise, but it does not categorically prohibit Congress from being helpful to religion. On the “being-helpful” side, rather, the only restriction is not to go so far as to “make [a] law” about “an establishment.” Therefore, Congress retains discretion to pass a law allowing those wishing to privately pursue their religious interests to do so without government interference. For example, a public school district may have a policy allowing a teacher to observe a religious holy day as one of the teacher’s paid “personal days.” Not only is such a policy not “prohibiting” free exercise, but it falls well short of “mak[ing a] law” about “an establishment.” The plain text clearly demonstrates that there is considerable room between the two Religion Clauses for discretionary religious exemptions.

The common sense of this plain-language reading is also readily evident. All agree that the First Amendment is pro freedom of speech and pro freedom of the press. By the same token, the First Amendment is pro religious freedom. This is as true of the Establishment Clause as it is true of the Free Exercise Clause. Government supporting religion, on the one hand, and government supporting acts of religious freedom, on the other hand, are two very different things. The former is bad and thus prohibited; the latter is good and so allowed. One application of this allowable “good” is the enactment of religious exemptions.

At the time of the nation’s founding, Americans did not regard statutory religious exemptions as “an establishment.”⁹¹ Thus, the original public meaning of the Establishment Clause is that it allows religious exemptions at the discretion of the legislature. Even for the nonoriginalist, this history cannot be ignored. Moreover, looking at the question from the other end of history, a survey done twenty-five years ago showed that there were approximately 2,000 statutory religious exemptions in federal and state codes.⁹² Hundreds more such exemptions have been added since the survey as a result of the explosive growth in regulatory government and increased religious pluralism. Historically, religious exemptions were enacted as a safeguard to protect religious minorities against an oppressive established church: “The established church had no need for exemptions, because its teachings were in accord with government policy. Exemptions protect minority religions, and they emerged only in the wake of toleration of dissenting worship.”⁹³ If all or most religious exemptions were to fall today because of some ersatz no-establishment theory, religious minorities will be the most to suffer.

⁹¹ Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1795-98, 1808-30 (2006) (the understanding of religious exemptions in seventeenth and eighteenth America was that they were not regarded as an establishment of religion).

⁹² James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445-50 (1992). The survey did not try to count exemptions appearing in regulations and official practices.

⁹³ Laycock, 81 NOTRE DAME L. REV. at 1801, 1842.

CONCLUSION

In weighing the merits of religious exemptions, it is entirely proper for Congress or a state legislature to consider any incidental effects on third parties. In some instances, no doubt, elected lawmakers should exercise their discretion and narrow or deny an exemption for religious observance. What is not the law, however, is that the presence of adverse effects on those who do not benefit from a religious exemption does not cause an otherwise lawful exemption to violate the Establishment Clause.

Progressives have little to align against the array of cases like *Amos*, *Walz*, and *O Centro*. Of the other cases in which the Supreme Court has formed a majority opinion, like *Caldor*, *TWA*, and *Larkin*, all involved a religious preference not an exemption. The logic of a religious exemption leaving religion alone, as distinguished from the active intervention of government characteristic of a religious preference, is straightforward and compelling. Further, the plain language of the text of the Religion Clauses, which does not require formal neutrality, as well as the original interpretation of an “establishment,” point to one conclusion: discretionary religious exemptions do not violate the Establishment Clause. The presence of incidental harm to others cannot change that outcome. The causal agent behind any such third-party harm is not the government-enacted exemption but the interactions between one private citizen and another. The Establishment Clause, of course, does not run against private actors.