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## Do Discretionary Religious Exemptions Violate the Establishment Clause?

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**DO DISCRETIONARY RELIGIOUS EXEMPTIONS VIOLATE  
THE ESTABLISHMENT CLAUSE?**

**Carl H. Esbeck**

**106 KY. L.J. 629 (2018)**

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# DO DISCRETIONARY RELIGIOUS EXEMPTIONS VIOLATE THE ESTABLISHMENT CLAUSE?

*Carl H. Esbeck*<sup>1</sup>

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## INTRODUCTION

The Establishment Clause is not violated when government enacts regulatory or tax legislation but provides, concerning these burdens, an exemption for those holding conflicting religious beliefs and practices. Such accommodations are at the discretion of a 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 commonplace in this nation where there is a long and 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 said to be the result of these discretionary religious exemptions does not alter their constitutionality. In an unbroken line of cases now spanning a century, the

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Supreme Court of the United States has ten times rejected the argument that a religious exemption in a larger regulatory or tax framework is an advancement of religion in contravention of the Establishment Clause. There are no cases to the contrary that have ever commanded a majority of the Supreme Court.

A categorical mistake has emerged in the secondary literature (but not the case law) where statutory religious exemptions are being conflated with what are really religious preferences. The two are quite different. As to preferences, it is entirely proper to be concerned when a government intentionally favors religion over the secular. Indeed, a few such statutory preferences have rightly been struck down as unconstitutional when the preference in question was absolute in that it failed to take into account consequential injury to third parties. Being able to distinguish those cases upholding religious exemptions from cases that involve a religious preference is paramount so as to not confuse these distinct lines of precedent.

Unlike preferences, a true exemption occurs when a dissenter's religious observance is not swept into the scope of regulation even as others similarly situated are made to labor under some new duty of the legislature's creation. Concerning an exemption's constitutionality: simply put, government does not establish religion by choosing to leave it alone. A true exemption, then, ensures that a regulatory or tax burden imposed on others is not also thrust in the path of the religiously devout who are predisposed to conform to their faith. Because their religious devotion, and not the government's decision to withhold regulation, is the driving force behind the religious observance complained of, any harm that befalls a third party is the result of wholly private conduct. And, of course, harm redressable under the Establishment Clause (indeed, any provision of the Bill of Rights) must be injury caused by a "state actor," not the work of a private actor. This is not to deny that third parties sometimes incur harm, only a denial that the source behind any such harm is the government.

This understanding of religious exemptions is nicely illustrated by the leading case of *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*.<sup>1</sup> In *Amos*, a janitor who was dismissed from employment by his church-affiliated employer for failing to tithe to the church filed a claim for religious discrimination.<sup>2</sup> The janitor was acknowledged by the Supreme Court to have his religious liberty constrained.<sup>3</sup> The loss of liberty was at the hands of his own church, however, and not as a consequence of a religious exemption provided by Congress in the employment non-discrimination act.<sup>4</sup> Justice White for the Court wrote: "Undoubtedly, [the janitor's] freedom of choice in religious matters

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<sup>1</sup> 483 U.S. 327 (1987).

<sup>2</sup> *Id.* at 330.

<sup>3</sup> *Id.* at 337 n.15.

<sup>4</sup> *Id.*

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.”<sup>5</sup> The Act’s exemption is such that the church’s religious discrimination was never, in the first instance, within the regulatory scope of Title VII of the Civil Rights Act of 1964.<sup>6</sup> So the church’s private act of religious discrimination was not covered by the civil rights law. The Establishment Clause, of course, restrains “state actors,” not the private actions of the church.

A religious preference, on the other hand, first arises when government takes note of a dispute that involves religion and proceeds to try and resolve the conflict. These disputes often emerge in a situation not of the state’s creation, usually from private social or market forces. When the legislature’s intervening law takes the side of the religious disputant, the government is intentionally preferring religion over the secular. If the form of the government’s resolution of the dispute goes on to unyieldingly side with religion such that any harm to third parties is not also weighed in the balance, then the Supreme Court will strike down the preference. This is entirely proper. The prototypical case is *Estate of Thornton v. Caldor, Inc.*<sup>7</sup> In *Caldor*, a newly enacted Connecticut statute permitted employees who observe a Sabbath to demand that their employer accommodate the employee’s religious practice.<sup>8</sup> In the case of such a preference—unlike an exemption—the government, by empowering the religious claimant, is the causal agent or “state actor” behind any harm to others. The Connecticut legislation failed to

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<sup>5</sup> *Id.*

<sup>6</sup> 42 U.S.C. §§ 2000e–2000e-17 (2012). In Title VII, Congress did not cover acts of religious discrimination by religious employers. *Id.* § 2000e-1(a). The nature of the religious employer exemption in Title VII is sometimes misunderstood. The exemption reflects a determination by Congress that religious employers should not be subjected to claims of religious discrimination. The exemption begins with language that places this type of claim outside the scope of all Title VII (“This subchapter shall not apply to . . .”). *Id.* Nevertheless, courts still face misguided claims for religious discrimination brought against a religious employer. The employee’s argument is that the employer had a Title VII exemption, but it behaved in such a way as to waive or forfeit the exemption. The courts, however, will not entertain the question of waiver or forfeiture. This is proper because, given the employee’s claim, the religious employer was never within the scope of Title VII in the first instance. If not within the scope of Title VII, then nothing the religious employer could have done or failed to do can expand upon Congress’s decision not to extend Title VII liability to religious employers acting out of their religion. See *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000) (holding that a religious employer who received federal funding or held itself out as an equal opportunity employer did not and could not cause waiver of Title VII exemption); *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding that a Catholic K-12 school that knowingly hires a Lutheran teacher did not and could not result in a waiver of Title VII exemption); *Lown v. Salvation Army, Inc.*, 393 F. Supp. 2d 223, 249–51 (S.D.N.Y. 2005) (holding the Protestant church’s acceptance of a federal social-service grant did not cause forfeiture of Title VII exemption); *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1345 (N.D. Ga. 1994) (hiring of Jewish faculty member by a Christian college did not and could not cause a waiver of Title VII exemption); *Ward v. Hengle*, 706 N.E.2d 392, 395 (Ohio Ct. App. 1997) (holding entries by religious employer in employee handbook concerning equal opportunity practices of employer did not and could not cause waiver of Title VII exemption).

<sup>7</sup> 472 U.S. 703 (1985).

<sup>8</sup> *Id.* at 705–06.

account for the scheduling difficulties of the employer or the interests of fellow employees who also may want their weekends free.<sup>9</sup> Ultimately what mattered, however, was not the pecuniary injury to others, but the state's affirmative advancement of religion.<sup>10</sup> The latter injury is where the boundary between church and state was crossed. *Caldor* rightly held that the Establishment Clause does not permit government to compel people to have to readjust their lives in order that a fellow citizen can better practice his or her religion.<sup>11</sup>

The blurring of the line between a true exemption and a true preference has become a point of attack by a few academics who mount a constitutional objection to the government carving-out religious exemptions.<sup>12</sup> These scholars are particularly distressed by the decision in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>13</sup> with its broad application of the Religious Freedom Restoration Act ("RFRA")<sup>14</sup> that brought relief to a closely held for-profit corporation.<sup>15</sup> More deeply, however, underlying the academics' view is that

<sup>9</sup> *Id.* at 708–09.

<sup>10</sup> *Id.* at 710–11.

<sup>11</sup> *Id.* at 708–11.

<sup>12</sup> See Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAN. L. REV. EN BANC 51, 54–55, 61–62 (2014), [https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2014/03/Gedicks-and-Koppelman\\_Invisible-Women.pdf](https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2014/03/Gedicks-and-Koppelman_Invisible-Women.pdf) [<https://perma.cc/L9JH-UKF6>] (conflating the exemption in *Amos* with the preference in *Caldor*); 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, 357–71 (2014) (conflating exemption cases like *Amos* with preference cases like *Caldor*); Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BLOGGER: BALKINIZATION (Nov. 27, 2013, 2:05 PM), <http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html> [<https://perma.cc/6DU8-QXAT>] (characterizing *Caldor* as an exemption case rather than as a preference). For helpful contrary views, see Brief of Amici Curiae Constitutional Law Scholars in Support of Petitioners at 15–17, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, 15–191), 2016 WL 183794 at \*15–17; Marc DeGirolami, *On the Claim that Exemptions from the Mandate Violate the Establishment Clause*, LAW PROFESSOR BLOGS NETWORK: MIRROR OF JUSTICE, (Dec. 5, 2013), <http://mirrorofjustice.blogs.com/mirrorofjustice/2013/12/exemptions-from-the-mandate-do-not-violate-the-establishment-clause.html#> [<http://perma.cc/8GBW-T57U>].

<sup>13</sup> 134 S. Ct. 2751 (2014).

<sup>14</sup> 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

<sup>15</sup> Even before the Supreme Court heard argument in *Hobby Lobby*, a few academics were urging the Court to hold that the Establishment Clause prohibited a victory for Hobby Lobby Stores because of incidental harm to third-party employees in terms of lost healthcare benefits. They were, of course, unsuccessful in that effort. See Gedicks & Koppelman, *supra* note 12 at 54–57; Gedicks & Van Tassell, *supra* note 12 at 357–62; Schwartzman, Schragger & Tebbe, *supra* note 12; Nelson Tebbe, Richard Schragger, & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BLOGGER: BALKINIZATION (Dec. 4, 2013, 6:04 PM), <https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html> [<https://perma.cc/MC24-D8L9>] [hereinafter Tebbe, *Establishment Clause Part II*]; Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BLOGGER: BALKINIZATION (Dec. 9, 2013, 11:15 AM), [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) [<https://perma.cc/54GH-6PNC>] [hereinafter Schwartzman, *Establishment Clause Part III*].

the Establishment Clause requires that the law be religion-blind.<sup>16</sup> That is, the text or face of legislation should not single out religion for special benefits or special burdens.<sup>17</sup> This “formal neutrality” means that lawmakers would have to shut their eyes to the fact of America’s religious pluralism, namely that many of their constituents and fellow citizens are religious, and indeed Americans practice many different religions. In *Hobby Lobby*, the operation of RFRA is the opposite of formal neutrality. It is a religious exemption writ large, 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 federal lawmakers to accommodate religious claimants case-by-case or show a compelling reason not to.<sup>18</sup> In the context of *Hobby Lobby*, where as suggested by the theory of formal neutrality elected lawmakers must feign ignorance of America’s religious diversity, that would mean modern regulatory and entitlement laws will end up brushing aside the special needs of religious minorities. This is not who we are as Americans.

In some instances, no doubt, elected lawmakers should exercise their discretion and narrow or deny a class of religiously faithful people their sought-after exemption. In lawmaking, it is entirely proper that any palpable harm to third parties is part of the overall political calculus. This is the familiar balancing for the common good by the two political branches, legislative and executive. However, the focus of this article is on whether elected lawmakers are constitutionally prohibited from enacting religious exemptions. They are not. And once the political branches have struck their balance and enacted a law, the judicial branch should not interject itself into the matter and rebalance the equities under the guise of discovering a constitutional violation. There is no rule, longstanding or recent, that statutory religious exemptions violate the Establishment Clause when there is incidental harm to third parties.

Part I of this article compares the leading cases of *Amos* and *Walz v. Tax Commission of City of New York*,<sup>19</sup> on the one hand, with *Caldor*, on the other, clarifying the distinction between a religious exemption and a religious preference. The article will show that discretionary exemptions leave private religious observance outside the scope of intended regulation. Should that observance cause harm to others, the harm is that of a private actor—not “state

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<sup>16</sup> See BRIAN LEITER, WHY TOLERATE RELIGION? 100–01, 130–33 (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

<sup>17</sup> Formal neutrality is not a new idea. Fifty-seven 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. 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 a small monograph. See PHILIP B. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1st ed. 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 long American story of welcoming religious minorities. See Leo Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389 (1963) (book review).

<sup>18</sup> 42 U.S.C. § 2000bb-1 (2012).

<sup>19</sup> 397 U.S. 664 (1970).

action”—and thus the Establishment Clause cannot possibly be triggered. Also surveyed are eight additional Supreme Court exemption cases, which are distinguished from preference cases like *Caldor, Board of Education of Kiryas Joel Village School District v. Grumet*,<sup>20</sup> *Larkin v. Grendel's Den, Inc.*,<sup>21</sup> and *Trans World Airlines, Inc. v. Hardison*.<sup>22</sup> Part II notes that a few scholars assume—mistakenly—that private conduct within the scope of a religious exemption is “state action,” and they seek to balance that exemption against incidental harms that sometimes befall third parties. They insist on this balancing, not as a matter of legislative discretion, but as a constitutional imperative derived from the Establishment Clause. The claim further assumes that “third-party harm” is a juridical category that can be both defined and bounded. It cannot. Thus, the logic behind the category risks expanding and overwhelming every religious exemption. Finally, Part III demonstrates that the plain text of the Religion Clauses does not categorically require religion-blind government or formal neutrality. Rather, the matter of exemptions is discretionary with the two political branches. Thus, the First Amendment allows and sometimes requires accommodating our fellow citizens who are religious. The article goes on to draw upon surveys showing that the nation’s founding generation did not regard a religious exemption as an establishment. Indeed, at present there are 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 about a sea of change in the venerable American practice of extending a welcoming hand to peoples of diverse faiths.

I. FOR GOVERNMENT TO LEAVE RELIGION ALONE DOES NOT ESTABLISH  
RELIGION

A. *A Tale of Two Cases: Amos and Caldor*

The Supreme Court of the United States has consistently held that when generally applicable regulatory or tax legislation imposes a burden on religious belief or practice, a legislative body is free to forestall the burden by providing an accommodation. For the lawmaker to refrain from imposing such a burden is what is termed a discretionary religious exemption.<sup>23</sup> To exempt religious observance from general regulatory or tax legislation has the net effect of leaving religion alone. And government does not establish religion by leaving it alone.

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<sup>20</sup> 512 U.S. 687 (1994).

<sup>21</sup> 459 U.S. 116 (1982).

<sup>22</sup> 432 U.S. 63 (1977).

<sup>23</sup> Religious exemptions required by the Free Exercise Clause, or what might be termed a “mandated religious exemption,” also do not run afoul of the Establishment Clause. See *Wisconsin v. Yoder*, 406 U.S. 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.

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 active involvement with religion that violates the Establishment Clause. The leading case is *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,<sup>24</sup> in which the Court upheld a statutory exemption in Title VII of the Civil Rights Act of 1964.<sup>25</sup> Title VII refrains from regulating religious employers when it comes to an adverse employment decision based on the employer's religion. Mayson, a janitor employed at a gymnasium operated by the Church of Jesus Christ of Latter-day Saints, was discharged because he ceased to be a church member in good standing.<sup>26</sup> The Court began by reaffirming that the Establishment Clause does not mean that government must be indifferent to religion, but aims at government not "acting with the intent of promoting a particular point of view in religious matters."<sup>27</sup> 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.<sup>28</sup>

In addition to *Amos*, the Court has on six other plenary reviews turned back an Establishment Clause challenge to a discretionary religious exemption. In *Cutter v. Wilkinson*, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),<sup>29</sup> which accommodates religious observance by prison inmates otherwise subject to correctional policies, was

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<sup>24</sup> 483 U.S. 327 (1987). Progressives realize that *Amos*, more than any other case, stands athwart their agenda. See Gedicks & Van Tassell, *supra* note 12 at 368–70; Schwartzman, *Establishment Clause Part III*, *supra* note 15. One of their attempts to narrow *Amos* is to cite arguments by Justices Brennan and O'Connor who authored separate opinions concurring in the judgment. See, e.g., Schwartzman, *Establishment Clause Part III*, *supra* note 15. But Justice White, writing for the *Amos* Court, did not need the vote of either justice to command a majority and, obviously, was not persuaded by their views. So *Amos* is not only not narrowed by either concurrence, but it is fair to infer that the Court majority considered their arguments for narrowing *Amos* and rejected them. Justices Brennan and O'Connor would have limited the holding to nonprofit employers. But any such distinction between for-profit and nonprofit corporations was rejected in *Hobby Lobby*, 134 S. Ct. at 2769–72. A second means by which progressives seek to push aside *Amos* is to recast it in terms of church autonomy. See Gedicks & Van Tassell, *supra* note 12 at 369–71; Schwartzman, *Establishment Clause Part III*, *supra* note 15. But the Supreme Court has never "explained" *Amos* in that fashion. Indeed, in the leading church-autonomy case a unanimous Supreme Court failed to even mention *Amos*. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). The Court's past church-autonomy cases were catalogued in *Hosanna-Tabor*, and *Amos* was not among them. *Id.* at 185–87.

<sup>25</sup> The religious employer exemption at issue in *Amos* is 42 U.S.C. § 2000e-1(a). There is a second religious employer exemption in the 1964 Civil Rights Act for educational institutions only. See *id.* § 2000e-2(e)(2).

<sup>26</sup> *Amos*, 483 U.S. at 330.

<sup>27</sup> *Id.* at 335.

<sup>28</sup> *Id.* *Amos* is further discussed *supra* notes 1-6 and *infra* notes 73-81 and accompanying text.

<sup>29</sup> 42 U.S.C. §§ 2000cc–2000cc-5 (2012).

found not to violate the Establishment Clause.<sup>30</sup> In *Gillette v. United States*, a religious exemption from the military draft for those opposed to all wars was found not to violate the Establishment Clause.<sup>31</sup> In *Walz v. Tax Commission of New York*, a municipal property tax ordinance that exempted religious nonprofit organizations was held not to violate the Establishment Clause.<sup>32</sup> The Court in *Zorach v. Clauson* found that a public-school policy of release from the state compulsory education law to allow pupils who desired to attend, with parental permission, private religion classes away from the school grounds did not violate the Establishment Clause.<sup>33</sup> In *Arver v. United States*, the draft exemptions during World War I pertaining to clergy, seminarians, and pacifists were found not to violate the Establishment Clause.<sup>34</sup> Finally, in *Goldman v. United States*, the Court summarily rejected constitutional claims to the same military draft exemptions, relying on the newly decided *Arver*.<sup>35</sup>

A case similar to *Amos* previously had reached the Supreme Court through mandatory appellate review and was dismissed for want of a substantial federal question.<sup>36</sup> Additionally, two cases similar to *Walz* previously had reached the Supreme Court through mandatory appellate review and were also summarily dismissed.<sup>37</sup> So the results in *Amos* and *Walz* were presaged by these summary dismissals. All three cases are binding precedent.<sup>38</sup>

In addition to the seven plenary opinions of the Supreme Court and the three summary dismissals, there were cases in the High Court in which a religious exemption was prominent but neither party bothered to argue that

<sup>30</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); see also *infra* notes 107–113 and accompanying text.

<sup>31</sup> *Gillette v. United States*, 401 U.S. 437, 448–60 (1971).

<sup>32</sup> *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 680 (1970).

<sup>33</sup> *Zorach v. Clauson*, 343 U.S. 306, 308–15 (1952).

<sup>34</sup> *Arver v. United States*, 245 U.S. 366, 376, 389 (1918).

<sup>35</sup> *Goldman v. United States*, 245 U.S. 474, 476 (1918). *Arver* and *Goldman* also illustrate that a religious exemption can be granted by a legislature even in the absence of coercion of religiously informed conscience. The World War I exemption to the draft embraced not only religious pacifists, but also clergy and seminarians without regard to the latter two showing they would suffer a religious burden if drafted. See *id.*; *Arver*, 245 U.S. at 367.

<sup>36</sup> See *Arlan's Dep't Store of Louisville, Inc. v. Kentucky*, 371 U.S. 218 (1962), *dismissing appeal for want of a substantial federal question from* 357 S.W.2d 708, 710 (Ky. 1962) (holding that state law requiring retail businesses to close on Sunday, with an exception for those businesses owned by persons who observed Saturday as their Sabbath, did not violate the Establishment Clause).

<sup>37</sup> See *Gen. Fin. Corp. v. Archetto*, 369 U.S. 423 (1962), *dismissing appeal for want of a substantial federal question from* 176 A.2d 73, 76–78 (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. City of Alameda*, 352 U.S. 921 (1956), *dismissing appeal for want of a substantial federal question from* *Lundberg v. City of Alameda*, 298 P.2d 1, 7–8 (Cal. 1956) (holding that property tax exemption available to a religious school did not violate Establishment Clause).

<sup>38</sup> 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. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

the exemption violated the Establishment Clause. These cases can be viewed as giving tacit acceptance to the lawfulness of the religious exemption featured in each case.<sup>39</sup> But that is not all: occasionally the Supreme Court itself fashions a religious exception to generally applicable legislation.<sup>40</sup> The Court would not have created a judge-made religious exemption to avoid governmental oversight of religion if it violated the Establishment Clause. Finally, numerous individual justices have stated that they do not think that discretionary religious exemptions from general regulatory legislation are a violation of the Establishment Clause.<sup>41</sup>

One would think this array of binding precedent and a century of case-law fidelity is bulletproof.<sup>42</sup> Nevertheless, a handful of progressives seek to break with this formidable wall of precedent when there is incidental harm to third parties. Early on they relied on *Caldor*,<sup>43</sup> then on two plurality opinions that

<sup>39</sup> See, e.g., *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017) (applying “church plan” exception to employee benefit package formed by religious health care organizations that would otherwise be subject to ERISA); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (applying RLUIPA to provide accommodation for prison inmate); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (applying RFRA to exempt for-profit closely held employer from employee health insurance mandate promulgated under Affordable Care Act involving coverage for abortifacients); *Davis v. United States*, 495 U.S. 472, 488–89 (1990) (concerning federal income tax deductibility of contributions to religious charities); *Hernandez v. Comm’r*, 490 U.S. 680, 688 (1989) (concerning federal income tax deductibility of contributions to religious charities); *United States v. Lee*, 455 U.S. 252, 256–60 (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, 776–77 (1981) (holding that the Federal Unemployment Tax Act exempted churches and church-related schools).

<sup>40</sup> See, e.g., *Trammel v. United States*, 445 U.S. 40, 51 (1980) (recognizing federal common-law clergy testimonial privilege); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504–07 (1979) (holding that K-12 religious schools are not subject to National Labor Relations Act and collective bargaining); *Holy Trinity Church v. United States*, 143 U.S. 457, 458, 463 (1892) (holding that federal legislation prohibiting employment of aliens to work in the U.S. not applicable to clergy being recruited by U.S. church).

<sup>41</sup> See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2031–32 (2017) (Sotomayor, J., dissenting) (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).

<sup>42</sup> With respect to some of the Supreme Court’s religious exemption cases there is no measurable harm incurred by identifiable third parties. See, e.g., *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 667, 675–76 (holding that less property tax revenue received by the city causes no measurable harm to identifiable third parties). With respect to other religious exemption cases there is measurable incidental harm to identifiable third parties. See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330, 339–40 (1987) (holding that a Mormon Church employee’s dismissal for failing to maintain membership in the church did not violate the Establishment Clause). However, this is not a distinction made by the Supreme Court when applying the Establishment Clause. A few academics, objecting to discretionary religious exemptions, insist on the distinction to salvage their theses. See *infra* notes 161–168 and accompanying text (criticizing the distinction).

<sup>43</sup> *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). For progressive reliance on *Caldor*, see Gedicks & Koppelman, *supra* note 12, at 54, 61–62; Gedicks & Van Tassell, *supra* note 12, at

involve religious accommodations: *Grumet*<sup>44</sup> and *Texas Monthly, Inc. v. Bullock*.<sup>45</sup> 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 harm to third parties. In *Grumet*, the New York legislature had 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.<sup>46</sup> The purpose was to better serve the special education needs of an unusually high numbered of disabled children born to this insular Jewish sect.<sup>47</sup> However, the legislation violated a longstanding rule that government may not utilize a classification, one based on denominational or sectarian affiliation, to extend benefits or impose burdens, no matter how meritorious the cause.<sup>48</sup> Furthermore, like *Caldor*, the statute in *Grumet* was a preference and not an exemption. Perhaps most important for present purposes, all nine Justices in *Grumet* took care to say that discretionary religious exemptions are constitutional.<sup>49</sup>

In *Texas Monthly*, a case that struck down a religious exemption, the three-justice plurality did not follow the rule that progressives urge here.<sup>50</sup>

357–58, 363–67; Schwartzman, Schragger & Tebbe, *supra* note 12; Schwartzman, *Establishment Clause Part III*, *supra* note 15.

<sup>44</sup> Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994) (plurality opinion in part).

<sup>45</sup> 489 U.S. 1 (1989) (plurality opinion). For progressive reliance on *Grumet* and *Texas Monthly*, see Gedicks & Van Tassell, *supra* note 12, at 357–58 & n.54.

<sup>46</sup> *Grumet*, 512 U.S. at 690.

<sup>47</sup> *Id.* at 693.

<sup>48</sup> *Id.* at 702–08; see also *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, 246–48, 246 n.23, 253 (1982) (striking down state charitable solicitation law because it intentionally discriminated against new or emerging religious movements and 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.

<sup>49</sup> *Grumet*, 512 U.S. at 705 (“[T]he Constitution allows the State to accommodate religious needs by alleviating special burdens.”); *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] . . . .’”) (emphasis added by Justice O’Connor) (quoting *Emp. Division, Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990)); *id.* at 723–24 (Kennedy, J., concurring) (approving *Amos* and similar cases); *id.* at 744 (Scalia, J., dissenting) (“The Court has also long acknowledged the permissibility of legislative accommodation.”). Further, all the justices in *Emp. Division v. Smith*, went out of their way to affirm that religious exemptions were constitutional. *Smith*, 494 U.S. at 890 (1990) (“[A] nondiscriminatory religious-practice exemption is permitted . . . .”); see also *id.* at 893–97 (O’Connor, J., concurring in the judgment) (explaining that regulatory exemptions are not only permitted but sometimes constitutionally required).

<sup>50</sup> If the plurality’s rule in *Texas Monthly* is that marked by “we hold,” then the relevant words

The case involved a sales tax exclusion on purchases of sacred books and other literature that promote a particular religious faith.<sup>51</sup> No opinion in *Texas Monthly* commanded the vote of more than three justices, so the result is unsuitable as precedent for much of any principle of law.<sup>52</sup> In a footnote, Justice Brennan, writing for himself and two other justices, advanced the idea that third-party harm rose to a violation of the Establishment Clause.<sup>53</sup> However, three votes out of nine demonstrates that the third-party harm suggestion is not the Court's rule 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*.<sup>54</sup> In sum, statutory religious exemptions have been broadly and unwaveringly supported by the United States Supreme Court for the past one hundred years. Not one case to the contrary has ever commanded the support of a majority of the Court.

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

The important case of *Estate of Thornton v. Caldor, Inc.* did indeed strike down a Connecticut statute because it was in violation of the Establishment Clause.<sup>55</sup> The statute, however, was not a religious exemption from a regulatory or tax burden but was a religious preference.<sup>56</sup> Additionally, the statute in *Caldor* was “unyielding” in that it disregarded the competing interests of the religious claimant's employer and his fellow workers.<sup>57</sup> It was the combination of these two features that was fatal to the state statute.

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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 publications by a religion of “books that consist wholly of writings sacred” and “consist wholly of writings promulgating the teaching of the faith,” that narrow class carved from a larger class consisting of all religions publications is going to prefer some denominations while excluding others. *Id.* As such, the classification advances some religious groups but leaves others behind. That violates the same rule applied in *Grumet*. See *supra* note 48 and accompanying text.

<sup>51</sup> *Texas Monthly*, 489 U.S. at 5.

<sup>52</sup> That sales tax statute exempted only publications by religious organizations, not religious publications generally. *Id.* 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. *Id.* These are content-based and viewpoint discriminations that are normally fatal under free speech and free press precedent. Thus, there were multiple ways of finding the tax exemption in *Texas Monthly* unconstitutional without implicating the rule at issue here.

<sup>53</sup> See 489 U.S. at 18 n.8.

<sup>54</sup> See *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. *Id.* at 25–26 (White, J., concurring).

<sup>55</sup> *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710–11 (1985).

<sup>56</sup> See *id.* at 709–10.

<sup>57</sup> See *id.*

The Connecticut legislature was making retailing on Sunday lawful.<sup>58</sup> Anticipating that the repeal of the Sunday-closing law would soon lead to scheduling conflicts between employers and employees, the state legislature took sides, specifically the side of the religious employee over the retail employer.<sup>59</sup> The new statute read in part: “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.”<sup>60</sup> Donald Thornton was an employee of Caldor, Inc., a retail department store.<sup>61</sup> He was a Presbyterian and observed Sunday as his Sabbath.<sup>62</sup> When the department store began opening on Sundays, Thornton worked Sundays once or twice a month.<sup>63</sup> Unhappy with this arrangement, he invoked the statute demanding his Sundays off.<sup>64</sup> The store resisted and in time a lawsuit was filed on Thornton’s behalf by the State Board of Mediation.<sup>65</sup> The store’s defense was that the Connecticut statute violated the Establishment Clause, and the Supreme Court agreed.<sup>66</sup>

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.<sup>67</sup> That is what a preference often does: the government compels one private citizen to help another private citizen better conform to his or her religion.<sup>68</sup> An exemption does not do that; in *Amos*, for example, the janitor lost his job as a result of the private action of his church not the government.<sup>69</sup> The religious preference in *Caldor* was doubly offensive, for the statutory right was “unyielding.”<sup>70</sup> That is, the statute took no notice of the commercial burden imposed on the employer or of the inconvenience to co-workers who would have to fill in for Thornton during his absence on Sundays.<sup>71</sup> The commercial burden on Caldor Stores gave it standing to raise the Establishment Clause defense. But it was the statute compelling private parties to assist Thornton in his religious duties that crossed the boundary between church and state, thus violating the Establishment Clause.<sup>72</sup>

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<sup>58</sup> See *id.* at 705 n.2.

<sup>59</sup> See *id.* at 706 n.3.

<sup>60</sup> *Id.* at 706.

<sup>61</sup> *Id.* at 705.

<sup>62</sup> *Id.* at 705–06.

<sup>63</sup> See *id.* at 705.

<sup>64</sup> *Id.* at 706.

<sup>65</sup> *Id.* at 706–07.

<sup>66</sup> *Id.* at 707, 710–11.

<sup>67</sup> See *id.* at 710.

<sup>68</sup> See *id.* at 708 (“[G]overnment . . . must take pains not to compel people to act in the name of any religion.”).

<sup>69</sup> See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, at 337 n.15 (1987) (“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.”).

<sup>70</sup> See *Caldor*, 472 U.S. at 709–10.

<sup>71</sup> *Id.* at 708–09.

<sup>72</sup> The Court in *Caldor* quoted with approval a line from an opinion by Judge Learned Hand: “The First Amendment . . . gives no one the right to insist that in pursuit of their own interests, others must conform their conduct to his own religious necessities.” *Id.* at 710 (omission in the

Thornton's religious burden, lifted by the state law, was not the result of a regulatory duty of the government's own making but the result of the private demands of the store's retailing. In response, the Connecticut law actively empowered people like Thornton to demand the assistance of private parties to secure the observance of his Sabbath. That is "state action." *Caldor* is thus unlike *Amos*, the latter involving an exemption reflecting a government that is passive. Passivity is not "state action."

Several months later, the Supreme Court was called on to distinguish the exemption in *Amos* from the preference in *Caldor*. In *Amos*, a religious exemption in Title VII of the 1964 Civil Rights Act meant that religious employers were not subject to the general prohibition on employment discrimination when motivated by their religion.<sup>73</sup> Mayson, a janitor, claimed that the statutory exemption shifted a burden to him resulting in the loss of his job.<sup>74</sup> He argued that the exemption pressured him to conform his conduct to the religious rules of his church.<sup>75</sup> This taking sides in favor of religion was, claimed Mayson, a violation of the Establishment Clause.<sup>76</sup> 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 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 (1987). In the present cases, appellee Mayson was not legally

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original) (citation omitted). Progressives latched onto the quote to buttress their claim that exemptions are unconstitutional. *See* Gedicks & Van Tassell, *supra* note 12, at 357–58; Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall*, SLATE (Nov. 26, 2013, 2:32 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/obamacare\\_birth\\_control\\_mandate\\_lawsuit\\_how\\_a\\_radical\\_argument\\_went\\_mainstream.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html) [<https://perma.cc/RHC9-44JY>]. But they have taken Judge Hand's quotation out of context. *See* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. OF CHI. L. REV. 1897, 1968 n.259 (2015). On more careful examination, the Hand quotation "contemplates not cases in which someone seeks a religious accommodation and third parties are affected *incidentally*; instead, it applies to cases in which controlling third parties' conduct is *the precise and only purpose* of the sought-after accommodation." *Id.* (emphasis in original). This fuller reading "underscores that what mattered to the Court in *Thornton* was *government support for religion* and not government accommodations that shift burdens to third parties." *Id.* (emphasis in original). In short, the Hand quotation applies to preferences, not exemptions.

<sup>73</sup> *Amos*, 483 U.S. at 329. *See supra* note 6.

<sup>74</sup> *See id.* at 337 n.15.

<sup>75</sup> *See id.* at 330–31.

<sup>76</sup> *Id.* at 331.

obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute.<sup>77</sup>

As is now plain, important to understanding *Amos* is that the Court did not deny that Mayson suffered a harm. Rather, the Court saw that the source of Mayson's harm was not the government and thus there was no "state action" capable of triggering the Establishment Clause.<sup>78</sup>

The Court distinguished *Caldor* from *Amos* by two features. First, the Connecticut statute was not a passive 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 and others like him.<sup>79</sup> 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. 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. The church is not a "state actor." This rule is not unique to the Establishment Clause. It is a longstanding "state action" doctrine;<sup>80</sup> the government's passivity concerning the conduct of a private party, and that party in turn electing to take some action to the harm of a third party, has never been considered "state action." Second, the statute in *Caldor* favored the religious claimant absolutely, thus wholly disregarding the interests of others in the private sector. This second feature pushed the preference over the line separating church and state, making it unconstitutional.<sup>81</sup>

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<sup>77</sup> *Id.* at 337 n.15. Cited in the quotation in the text is *Hobbie v. Unemp't Appeals Comm'n of Fla.*, 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 23. 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. *Hobbie*, 480 U.S. at 145 n.11.

<sup>78</sup> *See Amos*, 483 U.S. at 337.

<sup>79</sup> *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–11 (1985).

<sup>80</sup> *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) ("As we have said before, our cases will not tolerate the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement.") (citation and quotation marks omitted); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157–64 (1978) (holding that acknowledgement in UCC of landlord's right of self-help in evicting tenant is not "state action" and thus the Due Process Clause is not implicated). For a similar "state action" analysis to explain why religious exemptions have government merely leaving religion alone and thus cannot violate the Establishment Clause, see Josh Blackman, *Hobby Lobby, RFRA, and a "Private" Establishment Clause*, JOSH BLACKMAN'S BLOG (Jan. 21, 2014), <http://joshblackman.com/blog/2014/01/21/hobby-lobby-rfra-and-a-private-establishment-clause/>.

<sup>81</sup> Progressives attempt to discredit how *Amos* distinguished *Caldor* by calling it "incoherent" and "mistaken," and then engage in a little chest thumping over how "[their] account is superior" to the *Amos* Court's reconciliation of *Caldor* to *Amos*. Schwartzman, *Establishment Clause Part III*, *supra* note 15. The essence of their bravado, however, is that they disagree with the Court's interpretation of the Establishment Clause—an original meaning shared by the nation's founding generation—that religious exemptions are not an establishment of religion. *See infra* notes 144, 186, 189 and accompanying text.

It is possible to have a religious preference and still pass constitutional challenge. In *TWA v. Hardison* the statutory provision in question was a religious preference.<sup>82</sup> The provision appears in section 2000e(j) of the U.S.C. codification of the 1972 amendments to Title VII of the Civil Rights Act of 1964, and requires employers to adjust to the needs of their religious employees.<sup>83</sup> 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 "undue hardship."<sup>84</sup> The Supreme Court did not reach the claim that section 2000e(j) violated the Establishment Clause,<sup>85</sup> albeit the prospect of such a ruling likely influenced the Court's interpretation of the statute so that little is required to show "undue hardship."<sup>86</sup> 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 incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.<sup>87</sup>

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 nonreligious reasons, for such favoritism had the appearance of a religious establishment.

The preference at issue in *TWA* was unlike the religious exemption in *Amos*. In *TWA*, there was no regulatory scheme generally binding on employees from which a religious claimant was being relieved by the government. Rather, Congress enacted section 2000e(j) to address a religious 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, section 2000e(j) is like *Caldor*, a religious preference, and one for which the Court harbored Establishment Clause concerns. However, unlike in *Caldor*, the section 2000e(j) preference is not absolute: employers need not comply if they can show that the requested

<sup>82</sup> *TWA v. Hardison*, 432 U.S. 63, 66 (1977).

<sup>83</sup> 42 U.S.C. § 2000e(j) (2012). Care should be exercised to not confuse Title VII's preference favoring religious employees in section 2000e(j), a duty imposed on employers, with Title VII's exemptions for religious employers found in sections 2000e-1(a) and 2000e-2(e)(2). *TWA* involved the former and *Amos* the latter.

<sup>84</sup> See *TWA*, 432 U.S. at 84–85.

<sup>85</sup> See *id.* at 69 n.4.

<sup>86</sup> 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.").

<sup>87</sup> *Id.* at 84 (majority opinion) (footnote omitted).

accommodation would create an “undue hardship.”<sup>88</sup> The *TWA* Court avoided reaching the Establishment Clause question by interpreting the preference as relieving the employer from the duty to accommodate an employee when the burden was more than *de minimis*.<sup>89</sup> So long as the statutory preference costs the employer nothing or next to nothing, then the employee preference is harmless to the employer. No harm, no foul.

In addition to *Caldor* and *TWA*, *Larkin v. Grendel's Den, Inc.*,<sup>90</sup> 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.<sup>91</sup> Religion was preferred by the city over private retailing interests, and the preference was unyielding. The Court hastened to point out that it was not uncommon for a city to consider, along with other factors, the desire of churches to be free from noisy and rowdy neighbors.<sup>92</sup> That would have been constitutional. But the zoning ordinance cannot go the next step and grant an absolute veto in favor of religion over business interests.<sup>93</sup>

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

In *Walz v. Tax Commission of the City of New York*, the Supreme Court considered whether a municipal property tax exemption for churches and other houses of worship advanced religion in violation of the Establishment Clause.<sup>94</sup> By a lopsided division of 8-to-1, the Court held that it did not. The Court in *Walz* reached two 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.<sup>95</sup> 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 the state.”<sup>96</sup> The Court distinguished between an exemption and a subsidy saying that it

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<sup>88</sup> 42 U.S.C. § 2000e(j) (2012).

<sup>89</sup> See *TWA*, 432 U.S. at 84.

<sup>90</sup> 459 U.S. 116 (1982).

<sup>91</sup> See *id.* at 117.

<sup>92</sup> See *id.* at 125.

<sup>93</sup> *Id.* 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. *Id.* at 489–90. The Court had little trouble finding the preference for monotheism unconstitutional. *Id.* at 496. It is termed a “naked” preference because the law came about quite apart from any effort by the state to resolve a private dispute between two of its citizens. The Religious Test Clause, U.S. CONST. art. VI, cl. 3, likewise prevents a naked religious preference with respect to the qualifications of federal officeholders.

<sup>94</sup> *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 666–67 (1970).

<sup>95</sup> See *id.* at 675 (majority opinion).

<sup>96</sup> *Id.*

“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].”<sup>97</sup> 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 government supporting churches; each relationship carries some involvement rather than the desired insulation and separation.”<sup>98</sup> Unlike a religious preference, a tax exemption for religious entities “tends to complement and reinforce the desired separation [thereby] insulating each from the other.”<sup>99</sup>

Second, as a justification for upholding the tax exemption, the *Walz* Court rejected a *quid pro quo* argument: that the exemption compensates religious groups for generating social capital through their provision of welfare services, education, and health care.<sup>100</sup> Religious charities do just that,<sup>101</sup> 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.”<sup>102</sup> Moreover, a reward-for-works rationale would risk violating the rule against authorities taking-up religious questions concerning the validity, meaning, or importance of religious beliefs and practices.<sup>103</sup> The rationale behind the no-religious-questions rule is that the 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 government, and those not. To contemplate civil courts passing on such questions implies an established church against which “unapproved” ministries and “underperforming” churches are civilly tested and found wanting. The courts are not theological umpires, scoring each church’s performance on a Yelp-like five-star scale.

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<sup>97</sup> *Id.* at 673.

<sup>98</sup> *Id.* at 675 (footnote omitted).

<sup>99</sup> *Id.* at 676.

<sup>100</sup> *Id.* at 674.

<sup>101</sup> The annual socioeconomic impact of religion in the United States is presently valued at nearly \$1.2 trillion, with social services and health care comprising \$256 billion of that share. Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 *INTERDISCIPLINARY J. OF RESEARCH ON RELIGION* 2, 24–25 (2016).

<sup>102</sup> *Walz*, 397 U.S. at 674. Justice Brennan’s concurrence did rely on the reward-for-works justification, but no other justice joined his opinion. *See id.* at 687–88 (Brennan, J., concurring).

<sup>103</sup> The rule denying civil authority to pass on religious questions arises frequently; it appears in cases decided under the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause. *See, e.g.*, *Thomas v. Review Bd. of Ind. Emp’t Sec.*, 450 U.S. 707, 715–16 (1981) (Free Exercise Clause); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981) (Free Speech Clause); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 181–90 (2012) (holding that Establishment and Free Exercise Clauses barred civil resolution of question whether minister’s duties were exclusively religious or a mix of religious and secular).

The *Walz* Court noted that religious organizations were not alone in their tax-exempt status under the city ordinance, but were joined by art, educational, and poverty-relief organizations.<sup>104</sup> 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*<sup>105</sup> and *Zorach v. Clauson*,<sup>106</sup> the Court upheld exemptions that were exclusive to religious organizations or religion.

The religious exemption at issue in *Cutter v. Wilkinson* was the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), a law accommodating religious inmates in federal and state correctional facilities.<sup>107</sup> Justice Ginsburg, writing for a unanimous Court, said: given the provision in RLUIPA that required courts to “take adequate account of the burdens [that] a requested accommodation may impose on nonbeneficiaries,” the act satisfied the strictures of the Establishment Clause.<sup>108</sup> Because it was a facial challenge, *Cutter* was an easy case. The Court could either uphold RLUIPA because the act was an exemption not a preference or because RLUIPA by its terms was not “unyielding” to the interests of third parties. The former path would have commanded a majority of the Court but—even better—the latter course would yield a unanimous opinion.<sup>109</sup> The Court took the path where all nine justices could agree on a single rationale for upholding the act’s constitutionality. Unanimity in a First Amendment church-state case is both desirable and rare, made possible in *Cutter* because the challenge was facial and thus the holding was narrow. Being a facial challenge, however, *Cutter* did not do away with the first feature of the distinguishing criteria: exemptions versus preferences.

Those relying on *Cutter* as rejecting *Amos*<sup>110</sup> are vastly overreading the case.<sup>111</sup> This can be seen in another RLUIPA case that came along ten years

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<sup>104</sup> *Walz*, 397 U.S. at 666–67 & n.1, 673.

<sup>105</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 325, 338–39 (1987) (upholding religious employer exemption in employment nondiscrimination laws).

<sup>106</sup> 343 U.S. 306, 315 (1952) (upholding a local public school release-time policy that exempted students from a state compulsory education attendance law to attend religion classes).

<sup>107</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005).

<sup>108</sup> *Id.* at 720. The Court was referring to RLUIPA’s compelling interest test. 42 U.S.C. § 2000cc-1(a) (2012).

<sup>109</sup> *Id.* at 720 (majority opinion) (“[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 [.]” (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985))). It was also the easier path because a balancing of all competing interests, including those of third parties, was facially required by the compelling-interest test built into RLUIPA. See 42 U.S.C. § 2000cc-1(a).

<sup>110</sup> See, e.g., Gedicks & Koppelman, *supra* note 12, at 61–62; Schwartzman, Schragger & Tebbe, *supra* note 12; Schwartzman, *Establishment Clause Part III*, *supra* note 15.

<sup>111</sup> The *Cutter* Court, without so much as a concurring or dissenting opinion, would not sweep aside a long line of ten of its own cases, including such workhorses as *Amos* and *Walz*, without so much as a word about breaking with precedents that go back a century to the World War I draft exemption upheld in *Arver* and *Goldman*. See *supra* notes 24–41 and accompanying text. Moreover, the *Cutter* Court would not, without so much as a concurring or dissenting opinion,

later, *Holt v. Hobbs*.<sup>112</sup> Like *Cutter*, the Court in *Holt* ended up granting relief for a prison inmate in a claim for religious accommodation.<sup>113</sup> The State of Arkansas in *Holt* did not even bother to raise the argument that to accommodate the religious needs of one or a few inmates would inconvenience others at correctional facilities in violation of the Establishment Clause.<sup>114</sup>

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, involving an encounter with the Religious Freedom Restoration Act (“RFRA”), a small religious sect successfully sought an exemption from the federal criminal law banning the importation of a hallucinogenic drug.<sup>115</sup> In the case, the federal government argued that it had satisfied its burden under RFRA’s compelling-interest test by claiming a need for uniform application of a controlled substances statute.<sup>116</sup> The Court rejected the government’s defense because a bare claim for uniformity is not sufficient to meet the burden of RFRA.<sup>117</sup> Rather, under RFRA the judiciary is charged with striking “sensible balances” that often lead to religious accommodations and thus nonuniformity.<sup>118</sup> RFRA assumes “the feasibility of case-by-case consideration of religious exemptions.”<sup>119</sup> And both RLUIPA in *Cutter* and RFRA in *O Centro* avoided transgressing the Establishment Clause by their case-by-case interest balancing,<sup>120</sup> in contrast with the “unyielding” preference struck down in *Caldor*.<sup>121</sup>

From *Amos*, *TWA*, *Larkin*, *Walz*, *Cutter*, and *O Centro* we have the two features that set *Caldor* apart. First, unlike the religious exemption from the general regulatory law in *Amos* which shielded a religious employer from the labor-law burdens imposed on others by Title VII, the state in *Caldor* gave the employee a sword to force others in the private sector to aid in his 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 these two statutes codify the familiar interest-balancing calculus of strict scrutiny.

#### *D. Finding Something, Where There is Little to Nothing*

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brush aside the two-feature test for distinguishing *Caldor* from *Amos*. See *supra* notes 79–81 and accompanying text.

<sup>112</sup> 135 S. Ct. 853 (2015).

<sup>113</sup> *Id.* at 863–67. In accord with his Islamic faith, a penitentiary inmate sought to grow a half-inch beard. *Id.* at 859. The case turned on correctional authorities being unable to show that their concern for prison security was plausible, let alone compelling. *Id.* at 863–66. The Court was unanimous. *Id.* at 867–68.

<sup>114</sup> See *infra* notes 124–128 and accompanying text, for additional discussion of *Holt*.

<sup>115</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 435–37.

<sup>118</sup> *Id.* at 436.

<sup>119</sup> *Id.* (referencing *Cutter v. Wilkinson*, 544 U.S. 709, 721–22 (2005)).

<sup>120</sup> *Id.*

<sup>121</sup> *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

We have seen that when dealing with a true religious exemption there are no cases adopting a constitutionally based rule of third-party harm that commanded a majority of the Court.<sup>122</sup> The closest thing to it is remote: footnote 25 in a dissenting opinion by Justice Ginsburg in *Hobby Lobby*.<sup>123</sup> Just a year later, in *Holt*, a unanimous Court upheld an inmate's RLUIPA claim.<sup>124</sup> Justice Ginsburg, subscribing fully to the Court's opinion, stated that she joined the *Holt* opinion because accommodating the inmate's "religious belief . . . would not detrimentally affect" other inmates.<sup>125</sup> The Court's opinion makes no mention of the Establishment Clause. So Justice Ginsburg's words were referring to her understanding of the operation of the statute, RLUIPA, the only law applied by the Court in its opinion. She did not say her understanding was attributable to the Establishment Clause. If her understanding had been derived from the Establishment Clause, Justice Ginsburg certainly knew how to name the Clause explicitly having just done so in her *Hobby Lobby* dissent.

A handful of commentators, eager to find some sign of life in their third-party harm theory, cite interest-balancing language in *Hobby Lobby* and *Holt*.<sup>126</sup>

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<sup>122</sup> *United States v. Lee*, 455 U.S. 252 (1982), involved an unsuccessful claim under the Free Exercise Clause by an Amish employer to be excused from the payment of social security taxes where the payments were for himself and the retirement of his employees. *Lee* did not involve the constitutionality of a statutory religious exemption or a statutory religious preference, so the case is of no applicability to the question here. There is dicta in *Lee* to the effect that an employer waives his religious liberty when he forms a for-profit business and enters general commerce. *Id.* at 261. However, that dictum was not followed by the Court in *Hobby Lobby*, a case where the RFRA rights of a for-profit corporation prevailed. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–75 (2014). Finally, *Lee* is sometimes referenced because after the Court's decision came down Congress enacted legislation that accommodated Amish employers insofar as they were excused from paying the social security taxes of employees who also were Amish and thus had made alternative arrangements within the sect for retirement security. *See* 26 U.S.C. § 3127(a) (2012). That compromise is cited as a proper response to situations where religious liberty causes harm to third parties. *See, e.g.*, Frank S. Ravitch, *Be Careful What You Wish For: Why Hobby Lobby Weakens Religious Freedom*, 2016 BYU L. REV. 55, 112–13 (2016). I agree. Congress and state legislatures are the proper venue for the narrowing or denying of requests for statutory religious exemptions. My point all along is that the question of third-party harm is for the political branches, not a question to be answered by the judicial branch conjuring a violation of the Establishment Clause.

<sup>123</sup> *Hobby Lobby*, 134 S. Ct. at 2802 n.25 (Ginsburg, J., dissenting).

<sup>124</sup> *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015).

<sup>125</sup> *Id.* at 867 (Ginsburg, J., concurring).

<sup>126</sup> *See* Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* (forthcoming 2018) (manuscript at 2, 5) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2812121](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812121) [<https://perma.cc/J2ME-2Y68>] (follow "Open PDF in Browser" hyperlink) [hereinafter Tebbe, *When Accommodations Burden Others*] (relying on *Hobby Lobby* language); Micah Schwartzman, Richard Schragger, & Nelson Tebbe, *Holt v. Hobbs and Third Party Harms*, *BLOGGER: BALKINIZATION* (Jan. 22, 2015, 6:11 PM), <http://balkin.blogspot.com/2015/01/holt-v-hobbs-and-third-party-harms.html> [<https://perma.cc/J8A9-JQZN>] [hereinafter Schwartzman, *Holt v. Hobbs*] (relying on *Hobby Lobby* and *Holt*); *see also* Schwartzman, *Establishment Clause Part III*, *supra* note 15 (relying on *Cutter* language).

There are postings in blogs refuting that interpretation,<sup>127</sup> because the cited language is in the context of the compelling-interest test required by RFRA and RLUIPA—not the Establishment Clause.<sup>128</sup> This is so, for there was no defense raised by the federal government in *Hobby Lobby* or by the state in *Holt* that cost-shifting to third parties was prohibited by the Establishment Clause. And it would make no sense for the Court to have raised such a far-reaching First Amendment theory on its own motion when it was not raised by the government’s lawyers.

The same few academics look to *Zubik v. Burwell*,<sup>129</sup> conjuring action by the Court that would keep alight their torch.<sup>130</sup> Once again, however, *Zubik*, and the cases consolidated with it, are entirely about how to interpret a statute, RFRA—not about the Establishment Clause.<sup>131</sup> And, again, the federal government did not see fit to argue to the Court that RFRA violated the Establishment Clause due to third-party harm. Nor is there any indication that the Court raised the theory *sua sponte*. Finally, all eight Justices in *Zubik* were intent on the per curiam disposition not being understood as deciding any issue on the merits.<sup>132</sup> In sum,

<sup>127</sup> See Marc DeGirolami, *Holt v. Hobbs and the Third-Party-Harm Establishment Clause Theory*, MIRROR OF JUSTICE (Oct. 7, 2014), <http://mirrorofjustice.blogs.com/mirrorofjustice/2014/10/where-has-the-establishment-clause-third-party-harm-argument-gone.html> [<https://perma.cc/65YL-6NKV>] (explaining that the absence of the third-party-harm-Establishment-Clause argument in *Holt* suggests abandonment of the theory); Kevin C. Walsh, *Did Justice Ginsburg Endorse the Establishment Clause Third-Party Burdens Argument* in *Holt v. Hobbs?*, MIRROR OF JUSTICE (Jan. 21, 2015), <http://mirrorofjustice.blogs.com/mirrorofjustice/2015/01/did-justice-ginsburg-endorse-the-establishment-clause-third-party-burdens-argument-in-holt-v-hobbs.html> [<https://perma.cc/9W42-GWD9>] (arguing that Justice Ginsburg’s concurrence in *Holt* no longer relies on a third-party harm Establishment Clause theory).

<sup>128</sup> In *Cutter*, the Court wrote: “[T]he Act on its face does not founder on shoals the Court’s prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). By the Court’s own words, the quoted language is referencing an application of a statute—not the Establishment Clause. The statute expressly requires government to apply a compelling-interest test. 42 U.S.C. § 2000cc-1(a) (2012). That passage from *Cutter* is quoted with approval in *Hobby Lobby*, and presumably for the same application of the companion act, RFRA, not an application of any requirement found in the Establishment Clause. *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (2014). In *Holt*, these tireless scholars are unable to find any language arguably applying their theory, so they content themselves with repeating the above-referenced quotes from *Hobby Lobby* and *Cutter*. See Schwartzman, *Holt v. Hobbs*, *supra* note 126.

<sup>129</sup> 136 S. Ct. 1557, 1560 (2016) (per curiam) (remanding with directions to explore settlement). There were only eight justices on the Court at the time of this unusual disposition of a case fully briefed and argued. See Lyle Denniston, *Opinion Analysis: A Compromise, with Real Impact, on Birth Control*, SCOTUSBLOG (May 16, 2016, 11:46 AM), <http://www.scotusblog.com/2016/05/opinion-analysis-a-compromise-with-real-impact-on-birth-control/> [<https://perma.cc/34CZ-9BMB>].

<sup>130</sup> See Nelson Tebbe, Micah Schwartzman & Richard Schagger, *Symposium: Zubik and the Demands of Justice*, SCOTUSBLOG (May 16, 2016, 9:07 PM), <http://www.scotusblog.com/2016/05/symposium-zubik-and-the-demands-of-justice/> [<https://perma.cc/6YH7-C5FA>]; Tebbe, *When Accommodations Burden Others*, *supra* note 126, at 5.

<sup>131</sup> See *Zubik*, 136 S. Ct. at 1559.

<sup>132</sup> *Id.* at 1560; see also *id.* at 1561 (Sotomayor, J., concurring).

downstream of Justice Ginsburg's footnote 25 in her *Hobby Lobby* dissent, there is no life to be found in the Court's cases of a third-party harm Establishment Clause theory.

### *E. Of Baselines and Fundamental Values*

The Establishment Clause is not triggered when government does nothing. Only when government takes an active step to aid or advance religion is the Clause implicated. As the Supreme Court famously said in *Walz*: “[F]or the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>133</sup> It is more than just a nice turn of phrase when, as previously stated, the government does not establish religion by leaving it alone. That the Establishment Clause requires “sponsorship, financial support, [or] active involvement” of the state has real consequences and is manifested in the difference between an exemption and a preference. In the case of a religious exemption, the government never altered the status quo ante. By way of contrast, in the instance of a religious preference the government takes steps to affirmatively intervene in a private dispute and resolve it, namely by promulgating a law favoring religion over the secular. Accordingly, in the case of a preference any harm is because the government newly empowered the religious claimant. That empowerment is state action. With an exemption, the Court does not deny that third parties may have suffered a harm. Rather, the Court is saying that if there was such incidental harm, it was not caused by the government. By leaving religion alone, the government never did “state acts” and there can be no Establishment Clause violation in the absence of state action.

This view of the Supreme Court marks the line for measuring government inaction at just prior to the effective date of the general regulatory or tax scheme in question. In *Amos*, for example, the Court said: “[W]e find no persuasive evidence in the record before us that the Church’s ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964.”<sup>134</sup> Thus, if we must speak of baselines, the Court’s baseline in *Amos* was just before the effective date of the Civil Rights Act.

Critics of *Amos* would reset the baseline to fit their politics. For example, because they favor the Affordable Care Act (“ACA”) as a matter of social policy, they make the effective date of this new statutory entitlement the baseline from which to measure future advancement of religion.<sup>135</sup> If that is the baseline, then when a RFRA suit later comes along and forces a religious

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<sup>133</sup> *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 668 (1970).

<sup>134</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 325, 337 (1987).

<sup>135</sup> See Gedicks & Van Tassell, *supra* note 12, at 371; Tebbe, *Establishment Clause Part II*, *supra* note 15.

exemption to the ACA mandate of January 1, 2014,<sup>136</sup> it gives the appearance that religion is advanced on the date RFRA is invoked. That choice of baseline, however, is contrary to what the Court did in *Amos*. The ACA counterpart to the *Amos* baseline is just prior to the effective date of the ACA mandate. In accord with the Court's practice in *Amos*, the ACA mandate became effective on January 1, 2014, but via RFRA the mandate never covered religious employers like Hobby Lobby Stores.

The critics' desire to reset the baseline would have major implications. Their choice favors a much larger role for government in the lives of religious people and organizations, thereby shrinking that part of civil society for church-state separation and the desired religious self-governance. Whether such an expansion is good or bad is not the issue here. Rather, the question is who has the authority to make that decision and how is it made. The judgment of government expansion by regulations, taxes, and entitlements is to be made at the discretion of Congress and state legislative bodies, that is, democratically via these representative political bodies. The Establishment Clause does not overturn that democratic judgment.

Still other criticism of the *Amos* and *Walz* baseline asserts that the Court's point of view is without a guiding principle or "value."<sup>137</sup> They point out that the Court's chosen baseline is likely a field not void of regulation.<sup>138</sup> For example, the "pre-regulatory" field may be a domain where religion or religious organizations are already controlled by common law or by existing state legislation.<sup>139</sup> In any event, say the critics, a "pre-regulatory" baseline is not necessarily a wholly unfettered market of goods and services fixed in time but a domain governed by state law that is itself evolving.<sup>140</sup>

First, note that while these critics attack the principle behind the Supreme Court's baseline, they do not deny that this is the line laid down by the Court in cases like *Amos* and *Walz*. They thereby tacitly concede that the Court's point of view for measuring governmental inaction is the one identified here. And, as previously pointed out, that baseline is binding precedent reaffirmed again and again by the Court and individual justices.<sup>141</sup>

Second, the "value" embraced by the Supreme Court is not in the common law or existing state legislation. The Court is untroubled that its baseline in a given case might lie within a field already regulated by the common law or existing state legislation. Rather, the Court's choice of baseline is to embrace the same point of view as the lawmakers behind the general regulatory or tax

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<sup>136</sup> 26 U.S.C. § 5000A(a) (2012).

<sup>137</sup> See Tebbe, *When Accommodations Burden Others*, *supra* note 126, at 7.

<sup>138</sup> See *id.*

<sup>139</sup> See Elizabeth Sepper, *Religious Exemption, Harm to Others, and the Indeterminacy of a Common Law Baseline*, 106 KY. L.J. 697 (2018).

<sup>140</sup> See *id.*

<sup>141</sup> See authorities collected *supra* notes 24–41 and accompanying text.

scheme in question.<sup>142</sup> That point of view is that the lawmakers intend to leave religion undisturbed even as others similarly situated are being newly regulated or taxed. In that sense, religion suffers no new disturbance even though it may continue to be subject to the preexisting common law or state law. This refraining from any new disturbance or “leaving religion alone” is the thing that is valued.<sup>143</sup> That “value,” or fundamental meaning, comes from embracing the original public meaning at the nation’s founding that religious exemptions were not considered an establishment of religion.<sup>144</sup> For the Modern Court to align with this “value,” that is, its interpretation of the Establishment Clause aligns with the meaning of the Establishment Clause back at the founding, is more than sufficient rationale for its baseline.

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

*Hobby Lobby* involved a RFRA challenge to regulations under the Affordable Care Act that concerned the broad complement of contraceptive drugs and devices that an employer’s health care plan was required to offer employees.<sup>145</sup> Various corporations, some of which were for-profit but closely held by families with pro-life scruples, had religious objections to the contraceptive mandate.<sup>146</sup> The two closely held corporations that were represented in the consolidated appeals in *Hobby Lobby* objected to four

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<sup>142</sup> RFRA and RLUIPA operate as religious exemptions writ large. RFRA is, by its terms, effectively incorporated into every act of Congress that does not expressly reject it. 42 U.S.C. § 2000bb-3 (2012). The lawmaker’s point of view assumes RFRA and RLUIPA operate as if they are part of the regulatory or tax scheme in question.

<sup>143</sup> Academics, displeased with *Hobby Lobby*, claim that the Court’s baseline-setting principle is laissez-faire capitalism. See, e.g., Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1471-83 (2015). This represents the technique of taking something you do not like and attempting to disparage it by association with something widely disliked. But the Court in *Hobby Lobby* never identifies anything close to economic libertarianism as its pole star. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–68 (2014). Nor did the *Hobby Lobby* dissenters accuse the majority of being driven by zealous capitalism. *Id.* at 2787 (Ginsburg, J., dissenting); *id.* at 2806 (Breyer and Kagan, JJ., dissenting). What motivated the *Hobby Lobby* majority and dissenters was plainly stated. At one level, it was whether to go where the plain text of the statute led, even when it meant providing relief to a closely held for-profit corporation. See *id.* at 2768–75 (majority opinion). And at the policy level, clearly the justices were struggling between a sincere claim to religious liberty on the one hand, and a desire for widespread employee access to no-cost contraception, on the other hand. See, e.g., *id.* at 2785–87 (Kennedy, J., concurring).

<sup>144</sup> See 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 century America was that they were not regarded as an establishment of religion); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 693 (1992) (same); Vincent Phillip Muñoz, *Church and State in the Founding-Era State Constitutions*, 4 AM. POL. THOUGHT 1, 33 (2015) (same).

<sup>145</sup> *Hobby Lobby*, 134 S. Ct. at 2762–63.

<sup>146</sup> *Id.* at 2764–66.

drugs and devices that sometimes acted as abortifacients.<sup>147</sup> If the corporations prevailed on 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.<sup>148</sup> This reduction in the employees' health care benefits was mischaracterized by progressive scholars as harmful cost-shifting caused by RFRA.<sup>149</sup> The Court did not deny that there was a loss of benefits among employees, just that the cause of the loss was not the government.<sup>150</sup> Because RFRA is an exemption rather than a preference, the real cause of the third-party loss of benefits was the private acts of Hobby Lobby Stores.<sup>151</sup> The scholars go on to argue that the reduced insurance coverage, said to be brought about by RFRA, was a violation of the Establishment Clause.<sup>152</sup> But Hobby Lobby Stores, not RFRA, was the cause of the third-party loss. The Establishment Clause checks "state action," not the private acts of Hobby Lobby Stores.

As previously noted, progressives argue that, in setting the baseline for purposes of the Establishment Clause, the courts should assume that healthcare is universally available.<sup>153</sup> Universal coverage, of course, is not the actual state of affairs under the ACA. However, if we are to assume a world where the default position is comprehensive healthcare coverage for all workers, then it is a mere tautology that departure from such a baseline because of a RFRA accommodation for Hobby Lobby Stores is a loss or "burden" for the store's employees and a windfall or "benefit" for the employer's religion. But that is a political assumption, not constitutional law. Why not assume a world where RFRA accommodations are universal? Then it is a mere tautology that there is no "burden" on store employees because the status quo ante would be no healthcare benefits. Indeed, one can make all sorts of fantasy assumptions and draw the resulting baseline accordingly. What these commentators have forgotten is that the baseline is fixed to serve the principles of the Establishment Clause.<sup>154</sup> That is what guided the Court in *Walz* and *Amos* and it is what must guide us here.

Despite the prodding of these scholars,<sup>155</sup> the Solicitor General of the United States did not argue that RFRA violated the Establishment Clause.

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<sup>147</sup> *Id.* at 2762–64.

<sup>148</sup> *See id.*

<sup>149</sup> *See, e.g.,* Gedicks & Van Tassell, *supra* note 12, at 372–80; Tebbe, *Establishment Clause Part II*, *supra* note 15.

<sup>150</sup> *See Hobby Lobby*, 134 S. Ct. at 2784–85.

<sup>151</sup> This is also what happened in *Amos*, where the cause of the harm was the Mormon Church and not the civil rights exemption. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). And, of course, the Establishment Clause no more runs against Hobby Lobby Stores than it does against a church.

<sup>152</sup> *See* Gedicks & Koppelman, *supra* note 12, at 55–56; Gedicks & Van Terrell, *supra* note 12, at 348; Schwartzman, *Establishment Clause Part III*, *supra* note 15.

<sup>153</sup> *See* Tebbe, *Establishment Clause Part II*, *supra* note 15.

<sup>154</sup> For the view that, at the nation's founding, statutory exemptions were not an establishment of religion, see *supra* note 144 and *infra* notes 186, 189 and accompanying text.

<sup>155</sup> *See* discussion and sources cited *supra* note 15.

However, he did make a parallel argument, to wit: the loss of contraceptive benefits categorically tipped RFRA's prescribed compelling-interest test against the employers.<sup>156</sup> The Court rejected that argument with these words:

[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.<sup>157</sup>

Thus, while RFRA requires consideration of any harm to third parties whatever the source, it does so by the balancing test prescribed 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—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."<sup>158</sup>

If allowed, the Solicitor General's clever framing of third-party entitlements would render not only RFRA, but all religious exemptions a nullity. With such an unbounded theory, "the Government could turn all regulations into [third-party] entitlements to which nobody could object on religious grounds."<sup>159</sup> The Court's logic applies beyond 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" could 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 Solicitor General's logic would not just overthrow RFRA but would upend all religious exemptions. Fortunately, the *Hobby Lobby* Court repudiated this transformation of "lost entitlements" into third-party "harms" that defeat RFRA.<sup>160</sup>

Scholars propounding the third-party harm theory could see that the extended logic of their theory would wipe out all religious exemptions.<sup>161</sup>

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<sup>156</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> The following discretionary religious exemptions in federal legislation are illustrative. Under the Federal Insurance Contributions Act (FICA), certain members of religious groups can avoid paying Social Security and Medicare taxes if they have taken a vow of poverty as a member of a religious order and they perform tasks usually required of an active member of such order. *See* 26 U.S.C. § 3121(r) (2012). Under the Self-Employment Contributions Act (SECA), members

After all, the extension of exemptions to some is a loss to all others differently situated, however attenuated the “damage” done by such differential treatment. In an attempt to generate a limiting principle and save their theory, progressives suggest that the “harm” should count only if the third parties are individually identifiable.<sup>162</sup> Harms suffered more generally, indeed by large parts of the general public, would not by their theory qualify for Establishment Clause treatment.<sup>163</sup> 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.<sup>164</sup> 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 (or those who must do without because of revenue shortfalls) are not individually identifiable.<sup>165</sup> *Amos*, of course, goes against this attempt to cap or limit what counts as a third-party harm, for in *Amos* the putative “victim” of the Title VII religious exemption was easily identifiable, namely, the building janitor who lost his job.<sup>166</sup>

*Amos* aside, it is true that with some religious exemption cases there is no measureable harm incurred by identifiable third parties, whereas in other exemption cases there is measureable incidental harm to identifiable third parties.<sup>167</sup> However, this is a distinction not found anywhere in Supreme

of certain religious groups, including the Amish and Mennonites, are exempt from Social Security taxes if they are a member of a recognized religion and hold conscientious objections to accepting benefits of retirement insurance. See 26 U.S.C. § 1402(g)(1) (2012). Under the Federal Unemployment Tax Act (FUTA), some religious employers that perform certain services (such as services for a church or church-sponsored school) do not have to pay unemployment taxes. See 26 U.S.C. § 3309(b) (2012). Under the Employee Retirement Income Security Act (ERISA), pension plans maintained by some religious organization—called “church plans”—are exempt from regulation. See 29 U.S.C. § 1002(33) (2008). Under the National Labor Relations Act, workers who have religious beliefs that object to joining a union are not required to pay union dues, but they may have to pay an equal amount to a non-religious, non-labor charitable organization. See 29 U.S.C. § 169 (2012).

<sup>162</sup> See Gedicks & Van Tassell, *supra* note 12, at 363–71 (making *ad hoc* determinations between “material” burdens and those the authors deem constitutionally acceptable). Hence, in the case of the ACA mandate, Gedicks & Van Tassell would allow religious exemptions for employees of churches, but not Hobby Lobby. *Id.* at 380–83. Yet, the women working for a church are just as harmed by loss of their health benefits as are women working for a retail store. This is personal-preference lawmaking, not constitutional law.

<sup>163</sup> See *id.* at 364.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 368; see also *supra* notes 1–6, 24–28, 73–81 and accompanying text (discussing *Amos*).

<sup>167</sup> With respect to some of the Supreme Court’s religious exemption cases there is no measurable harm incurred by identifiable third parties. In addition to *Walz*, see, for example, *Zorach v. Clauson*, 343 U.S. 306 (1952) (releasing some students to attend off-campus classes in religion causes no measurable harm to other identifiable students); *Arver v. United States*, 245 U.S. 366 (1918) (exempting some from military draft causes no measurable harm to other draft-age men). With respect to other religious exemption cases there is measurable incidental harm

Court cases decided under the Establishment Clause, and that is to be expected. Given the historic purposes of the Establishment Clause—restraining government in its involvement with and authority in religious matters—it makes no difference whether the individuals harmed by a church-state breach are specifically identifiable or not. While perhaps relevant to an issue like standing, that the harm is either concrete or diffused does not change the work of the Establishment Clause. Rather, progressives are making this distinction not because it is one required by the Establishment Clause, but because it is necessary to salvage their theory of third-party harm, a theory sweeping so broadly as to do away with all religious exemptions.

This attempt to save the third-party harm theory by requiring an identifiable victim misconceives the basic nature of the Establishment Clause. The third-party harm thesis is that at some point the cost shifting becomes so great that the “scales tip” against a religious exemption’s validity under the Establishment Clause.<sup>168</sup> But that is at odds with the operation of the Establishment Clause, which progressive scholars correctly admit is structural in nature.<sup>169</sup> Unlike a rights-based clause (like free speech or free exercise) where the focus is on the rights holder, and his or her injury, the no-establishment restraint is about policing the boundary between two centers of authority, church and state, much like a separation of powers doctrine.<sup>170</sup> A structural analysis asks about the outer boundary of the

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to identifiable third parties. In addition to *Amos*, see, for example, *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) (religious school’s lay teachers could not form a union); *Trammel v. United States*, 445 U.S. 40 (1980) (in civil litigation between two private-sector parties, recognition of clergy testimonial privilege will harm the party seeking the testimony).

<sup>168</sup> See Gedicks & Van Tassell, *supra* note 12, at 375–82 (discussing interest-balancing that would permit cost-shifting by churches and religious nonprofits but not religious for-profits); Schwartzman, *Establishment Clause Part III*, *supra* note 15 (same).

<sup>169</sup> See Gedicks & Van Tassell, *supra* note 12, at 347. However, with a structural Establishment Clause this sort of balancing is never done. Further, as if the case law under the clause is not complex enough, these commentators would turn the Establishment Clause into an occasion for *Lochner*-era balancing of competing economic interests. *See id.* at 375–79 (implying that a little economic cost-shifting is said to be constitutionally valid, but at some juncture a federal judge is to just know when too many dollars tote up to the tipping point against RFRA). Such a rule is dangerous for all sorts of reasons, such as lack of uniformity in application of constitutional line-drawing, as well as putting unguided discretion in the hands of the judiciary.

<sup>170</sup> See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998). Progressives concede that the Establishment Clause is structural, *see* Gedicks & Van Tassell, *supra* note 12, at 347, but seem not to realize that their concession is fatal to their theory. 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. In a given case, 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 scholarly 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

government's power; when that power is exceeded, the constitution is violated without regard to who is injured or the degree of the injury.<sup>171</sup> Thus in a separation of powers analysis, there is no case-by-case interest balancing.<sup>172</sup> Rather, either the Establishment Clause is violated or it is not, the boundary between church and state needing to be fixed no matter who the claimant is.

### III. PLAIN LANGUAGE, COMMON SENSE, AND ORIGINAL MEANING

The Establishment Clause reads, “Congress shall make no law respecting an establishment of religion.”<sup>173</sup> The plain text does not deny Congress the power to “make . . . law” about religion.<sup>174</sup> Rather, it more narrowly denies Congress the power to “make . . . law” about “an establishment” of religion.<sup>175</sup> Assume, for example, that soon after 1791 Congress enacted a comprehensive law regulating conscription into the Army and Navy. In exercising its constitutional power to oversee the armed forces,<sup>176</sup> Congress also provided an exemption from the military draft for religious pacifists. Nothing in the Establishment Clause prohibits such an exemption.<sup>177</sup> The adoption of a draft exemption for religious pacifists is certainly to “make [a] law” 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

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protected by a constitutional rights clause, not injuries safeguarded by a power-limiting restraint such as the Establishment Clause.

<sup>171</sup> Proponents of the third-party harm theory attempt to answer a question that is not asked by the Establishment Clause, to wit: who is individually harmed enough that the boundary between church and state is breached? See Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 215 (Holly Fernandez Lynch et al. eds., 2017) (suggesting a test that differentiates between small and large harms incurred by third parties). The Establishment Clause, however, is not about personal rights. Church-state relations are about hard lines that restrain the institutions of government from exceeding their power when it comes to religion. If that line is crossed and thus legitimate power abused, it is a constitutional violation whether or not identifiable individuals suffer harm. By asking the wrong question these scholars embark on a fool's errand.

<sup>172</sup> That is why the Court has been less stringent when it comes to the “injury in fact” requirement for standing to raise an Establishment Clause claim. Esbeck, *supra* note 170, at 34–42. Hence, even taxpayer standing is permitted in claims under the Establishment Clause. See *Flast v. Cohen*, 392 U.S. 83 (1968). By definition there is no individualized injury in a taxpayer claim; nonetheless, standing is allowed because without such allowances many clear-cut church-state violations could not be addressed by the judiciary.

<sup>173</sup> U.S. CONST. amend. I.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> The Constitution grants to Congress the authority “[t]o make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8, cl. 14.

<sup>177</sup> See *Arver v. United States*, 245 U.S. 366, 389–90 (1918) (holding that clergy, theology students, and religious pacifists could be exempt from the military draft consistent with the Establishment Clause).

religion-blind government or formal neutrality.<sup>178</sup> 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 for the government to stay out of the way and thereby let those subscribing to religious beliefs to continue (or not) to act on them.

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 Clauses,<sup>179</sup> 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.<sup>180</sup> 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 (or not) certain religious beliefs and practices when they are 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, this would have to be so because the Free Exercise Clause is itself a law in support of religious freedom. Moreover, there are two types of provisions in the 1787 U.S. Constitution that expressly safeguard independent acts of religious exercise: the provisions permitting an affirmation in lieu of an oath to accommodate Quakers and other minority sects,<sup>181</sup> and not counting Sunday against the ten-day time limit for a President to sign or veto a bill before it becomes law by its own force.<sup>182</sup> The First Amendment would not make any sense if the Establishment Clause

<sup>178</sup> See *supra* note 17 and accompanying text (discussing formal neutrality or religion-blind government).

<sup>179</sup> The Interstate Commerce Clause grants to Congress the power “[t]o regulate Commerce . . . among the several States.” U.S. CONST. 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.” U.S. CONST. art. I, § 8, cl. 1.

<sup>180</sup> See *Rojas v. Fitch*, 127 F.3d 184, 187–89 (1st Cir. 1997) (holding that a statutory exemption for faith-based organizations from an unemployment compensation tax did not violate the Establishment Clause).

<sup>181</sup> There are three such accommodations: U.S. CONST. art. I, § 3, cl. 6; U.S. CONST. art. II, § 1, cl. 8; U.S. CONST. art. VI, cl. 3.

<sup>182</sup> 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.”).

contradicted the Free Exercise Clause, or if the Establishment Clause overrode or nullified these two 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].”<sup>183</sup> However, it is a one-way clause. It prohibits the government from restraining free exercise, but it does not 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 enact 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 a paid “personal day.”<sup>184</sup> 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, what the Court has called the “play in the joints” between the Religion Clauses.<sup>185</sup>

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 deemed harmful to liberty and thus prohibited; the latter is good for liberty and so allowed. One long-standing application of this allowable “good” is the discretionary enactment of religious exemptions.

Research has shown that at the time of the nation’s founding Americans did not regard statutory religious exemptions as “an establishment.”<sup>186</sup> Thus, the original public meaning of the Establishment Clause is that it allows religious exemptions at the discretion of the legislature. Even for the non-originalist, this history is not easily ignored. As the Supreme Court recently said, “the Establishment Clause must be interpreted by reference to historical practices and understandings.”<sup>187</sup> Moreover, looking at the question from the other end of history, a survey done just twenty-five years ago showed that there were approximately 2,000 statutory religious exemptions in federal

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<sup>183</sup> U.S. CONST. amend. I.

<sup>184</sup> See, e.g., *OP 201: Application for Excuse of Absence Without Pay and/or as Non-Attendance*, N.Y.C. DEPT OF EDUC., [http://www.uft.org/files/attachments/op201\\_o.pdf](http://www.uft.org/files/attachments/op201_o.pdf) [<https://perma.cc/BLY6-X2LQ>] (New York City Department of Education form showing teacher absence may be excused for “Religious Observance”).

<sup>185</sup> *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 669 (1970).

<sup>186</sup> See authorities collected *supra* note 144.

<sup>187</sup> *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (internal quotation omitted).

and state codes.<sup>188</sup> Hundreds more such exemptions have been added since the survey because 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.”<sup>189</sup> If all or most religious exemptions were to fall today because of some ersatz no-establishment theory, religious minorities will suffer the most.

Finally, recent social science surveys show that religious claims brought before the courts to secure exemptions from generally applicable laws are few, and even fewer are successful.<sup>190</sup> This data refutes the alarmist cries that religionists want to treat with impunity laws that are binding on everyone else. There is some value to the argument that reproductive rights and anti-discrimination laws should be followed by all, no exceptions. But that is an argument to be directed to the political branch that makes the law, Congress and state legislatures. Once that branch has heard these arguments and struck the balance between competing interests, it is wrong for progressive scholars, who did not get their way in the political arena, to distort the Establishment Clause so that they can make another run at achieving their policy preferences.

#### CONCLUSION

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

Progressives have little to align against the formidable array of century-old precedents, especially such venerable cases as *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 involve a religious preference

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<sup>188</sup> 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 those existing by longstanding official practice, thus the actual number of exemptions is even greater.

<sup>189</sup> Laycock, *supra* note 144, at 1796.

<sup>190</sup> See Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1596 (2018); Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353 (2018).

rather than a religious exemption. The logic of a religious exemption as a way of leaving religion alone or not regulating religious observance, as distinguished from active intervention by government, is straightforward and compelling. Further, both the plain language of the text of the Religion Clauses, which does not require formal neutrality, as well as the original understanding of “an establishment of religion” at the founding, point to one conclusion: discretionary religious exemptions do not violate the Establishment Clause. The presence of incidental harm to others does not change that outcome. This is because the causal agent behind any such third-party harm is not the government, but an individual privately following the dictates of his or her faith. The Establishment Clause, of course, requires “state action” and so does not run against these private actors.