

# RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion

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*Litigation surrounding use of the Religious Freedom Restoration Act (“RFRA”) to exempt employers from the “contraception mandate” of the Affordable Care Act (“ACA”) is moving steadily towards resolution in the U.S. Supreme Court. Both opponents and supporters of the mandate, however, have overlooked the Establishment Clause limits on such exemptions.*

*The heated religious liberty rhetoric aimed at the mandate has obscured that RFRA is a “permissive” rather than “mandatory” accommodation of religion — a government concession to religious belief and practice that is not required by the Free Exercise Clause. Permissive accommodations must satisfy Establishment Clause constraints, notably the requirement that the accommodation not impose material burdens on third parties who do not believe or participate in the accommodated practice. Many of the Court’s decisions under the Free Exercise Clause and Title VII of the Civil Rights Act of 1964 exhibit a similar aversion to cost-shifting religious accommodations.*

*While it is likely that RFRA facially complies with the Establishment Clause, it violates the clause’s limits on permissive accommodation as applied to the mandate. RFRA exemptions from the mandate would deny the employees of an exempted employer their ACA entitlement to contraceptives without cost sharing, forcing employees to purchase with their own money contraceptives and related services that would otherwise be available to them at no cost beyond their healthcare insurance premiums.*

*Neither courts nor commentators seem aware that a line of permissive accommodation cases prohibits shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to employees who do not. One federal appellate court has already mistakenly dismissed this cost shifting as irrelevant to the permissibility of RFRA exemptions from the mandate.*

*The impermissibility of material cost shifting under the Establishment Clause is a threshold doctrine whose application is logically prior to all of the RFRA issues on which the courts are now focused: if RFRA exemptions from the mandate violate the Establishment Clause, then that is the end of RFRA exemptions, regardless of whether for-profit corporations are “persons” exercising re-*

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ligion, the mandate is a substantial burden on employers' anticontraception beliefs, or the mandate is not the least restrictive means of protecting a compelling government interest.

Part I summarizes the legal mechanics of the mandate and briefly describes the three classes of antimandate plaintiffs — churches, religious nonprofit organizations, and for-profit businesses owned by anticontraception believers. Part II details Establishment Clause decisions that prohibit permissive accommodations imposing material burdens on third parties, as well as Free Exercise Clause and Title VII decisions that exhibit a similar concern with such burdens. Part III applies this rule to RFRA exemptions from the mandate, showing that the cost shifting entailed by such exemptions violates the Establishment Clause. We conclude that the existing regulatory regime that exempts churches, accommodates religious nonprofits, and leaves for-profit businesses subject to the mandate is the proper balance of private and government interests in the radically plural society that the United States has become.

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## INTRODUCTION: RFRA AS PERMISSIVE ACCOMMODATION

The “contraception mandate” of the Affordable Care Act<sup>1</sup> (“ACA”) requires employer healthcare plans to cover all FDA-approved contraceptives.<sup>2</sup> Some Roman Catholic and conservative Protestant employers have

<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 15, 26, 29, 30, and 42 U.S.C.).

<sup>2</sup> 42 U.S.C. § 300gg-13(a)(4) (2011). The “contraception mandate” is distinct from the ACA’s “individual mandate” (which taxes most persons who do not purchase health insurance) and “employer mandate” (which taxes employers with more than fifty employees who do not provide group health insurance to their employees). Professor Lederman has argued

challenged the “Mandate” (as we will refer to it) in federal court, arguing that it forces them to violate religious teachings that condemn some or all of the mandated contraceptives.<sup>3</sup> Although these plaintiffs make constitutional arguments,<sup>4</sup> their strongest claims arise under the Religious Freedom Restoration Act<sup>5</sup> (“RFRA”), which prohibits the federal government from substantially burdening religious exercise unless it proves that the burden is the least restrictive means of protecting a compelling interest.<sup>6</sup>

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that the “employer mandate” is misnamed since the ACA affords employers an economically viable choice not to supply group health insurance. Marty Lederman, *Hobby Lobby Part III — There Is No “Employer Mandate.”* BALKINIZATION (Dec. 16, 2013), <http://balkin.blogspot.com/2013/12/hobby-lobby-part-iii-theres-no-employer.html>, archived at <http://perma.cc/KNX2-E6BJ>.

<sup>3</sup> See *HHS Info Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral/> (last visited Mar. 1, 2014), archived at <http://perma.cc/5378-4XD4>. The Becket Fund maintains a website that tracks these actions. As of January 2014, ninety-three lawsuits had been filed challenging the Mandate as a violation of religious liberty. *Id.*

<sup>4</sup> The most common constitutional argument is that the Mandate is not a “generally applicable” law under current free exercise doctrine because of its many secular exemptions, and cannot satisfy strict scrutiny for the same reason. See, e.g., Terri Day & Leticia Diaz, *The Affordable Care Act and Religious Freedom: The Next Battleground*, 11 GEO. J.L. & PUB. POL’Y 63, 68, 94, 97 (2013); Steven D. Smith & Caroline Mala Corbin, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 261–62 (2013); Douglas Laycock, *Free Exercise of Religion and Insuring Contraception*, EERDWORD (Mar. 19, 2012), <http://eerdword.wordpress.com/2012/03/19/free-exercise-of-religion-and-insuring-contraception-by-douglas-laycock/>, archived at <http://perma.cc/JLS3-VDTZ>. This argument, however, depends on an implausibly expansive definition of “generally applicable.” Compare Douglas Laycock, *Religious Liberty and the Culture Wars*, U. ILL. L. REV. (forthcoming 2014) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2304427](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304427), archived at <http://perma.cc/M2N8-UCME> [hereinafter Laycock, *Religious Liberty*] (arguing that to satisfy general applicability, a “law that burdens the exercise of religion cannot have any exceptions, or any gaps in coverage, that allow secular conduct to cause the same alleged harm as the regulated religious conduct” (emphasis added)), with *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 99 (4th Cir. 2013) (finding ACA employer and individual mandates are generally applicable laws despite multiple secular exemptions because they “do not set apart any particular religious group” for special burdens (emphasis in original)). For succinct arguments that the Mandate is not sufficiently underinclusive to violate the Free Exercise Clause, see Andrew Koppelman, “*Freedom of the Church*” and the Authority of the State, 21 J. CONTEMP. LEGAL ISSUES 145, 156–164 (2013); and Marty Lederman, *Hobby Lobby Part IV: The Myth of Underinclusiveness*, BALKINIZATION (Jan. 21, 2014), <http://balkin.blogspot.com/2014/01/hobby-lobby-part-iv-myth-of.html>, archived at <http://perma.cc/Z3ZD-8S4N>.

Some anti-Mandate actions have also alleged that the regulatory process by which the Mandate was adopted violated the Administrative Procedure Act. See, e.g., *Priests for Life v. U.S. Department of Health & Human Services*, AM. FREEDOM LAW CENTER (Feb. 12, 2012), <http://www.usccb.org/news/2013/13-054.cfm>, archived at <http://perma.cc/B5H4-TNYM> (discussing and linking to complaint). A complete analysis of these and other arguments about the legality of the Mandate is beyond the scope of this Article.

<sup>5</sup> 42 U.S.C. §§ 2000bb–2000bb-4 (2011).

<sup>6</sup> *Id.* §§ 2000bb(b)(2), 2000bb-1(a)–2000bb-1(b). “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.” *Id.* § 2000bb-1(a)–(b) (em-dash & paragraph numbers omitted). RFRA is a general exemption statute that purports to grant relief from any statute or other government action that substantially burdens religious exercise, whether enacted before or after RFRA. The Supreme Court invalidated its application to the states in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), but it continues to apply to all federal government action.

Opponents contend that the Mandate substantially burdens their anticontraception beliefs and practices without satisfying RFRA's compelling-interest test.<sup>7</sup> Mandate supporters, meanwhile, have struggled to articulate the precise constitutional liberty that RFRA exemptions from the Mandate would burden: there is no constitutional right to have one's employer pay for contraceptives, and RFRA exemptions would not interfere with the reproductive privacy right of employees and their family members to purchase contraceptives with their own money.<sup>8</sup> When supporters complain that exemptions would license employers to impose their anticontraceptive beliefs on employees, opponents respond that employers just want the government to leave them alone.<sup>9</sup>

In all of this, no attention has been paid to the Establishment Clause implications of RFRA exemptions from the Mandate. Little in the fast-growing literature on the Mandate discusses whether RFRA exemptions might violate the clause's limitations on accommodation of religion,<sup>10</sup> and the question has been overlooked by every appellate opinion holding or arguing against the Mandate's legality under RFRA.<sup>11</sup>

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<sup>7</sup> See, e.g., Helen Alvaré, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 379–82 (2013); Michael Sean Winters, *Contra Kaveny*, NAT'L CATH. REP. (Jan. 14, 2013), <http://ncronline.org/blogs/distinctly-catholic/contra-kaveny>, archived at <http://perma.cc/TE7E-TGYF>.

<sup>8</sup> See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc) (5-3 decision), No. 13-354 (U.S. argued Mar. 25, 2014). See generally, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>9</sup> Compare Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, 6 ADVANCE: J. ACS ISSUE GROUPS 135, 135 (2012) ("One's religious liberty does not include the right to interfere with the liberty of others."), with Smith & Corbin, *supra* note 4, at 265 (anticontraception employers "are merely arguing that, under RFRA, and given their religious objections, they themselves should not be required to pay for the coverage").

<sup>10</sup> See, e.g., Alvaré, *supra* note 7; Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. CONTEMP. LEGAL ISSUES 279 (2013); Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. COLLOQUY 151 (2012); Day & Diaz, *supra* note 4; Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91 (2013); Koppelman, *supra* note 4; Laycock, *Religious Liberty*, *supra* note 4; Holly Fernandez Lynch, *Religious Liberty, Conscience, and the Affordable Care Act*, 20 ETHICAL PERSP. 118 (2013); Smith & Corbin, *supra* note 4, at 268; Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301 (2013); Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179 (2012); Symposium, *The Bishops & Religious Liberty*, COMMONWEAL (May 30, 2012, 3:50 PM), <http://commonwealmagazine.org/bishops-religious-liberty>, archived at <http://perma.cc/GK6X-JURC>. But cf. Kara Loewentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433 (2014) (arguing that burdens on third parties from RFRA exemptions from the Mandate is a factor to be weighed in the compelling-interest balance); Gregory P. Magarian, *The New Religious Institutionalism Meets the Old Establishment Clause* 28–29, 36–37 (Nov. 7, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2353186>, archived at <http://perma.cc/8PKJ-3WT5> (concluding that Mandate's religious nonprofit accommodation "protects employees who want contraceptive coverage from the power of accommodated religious employers").

<sup>11</sup> See, e.g., *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (2-1 decision) (holding substantial likelihood that Mandate violates RFRA, without analyzing Establishment Clause im-

This is a critical gap in Mandate case law and literature. The Establishment Clause protects religious liberty, but in a different manner than does the Free Exercise Clause: the Establishment Clause is a structural bar on government action rather than a guarantee of personal rights.<sup>12</sup> Violations of the Establishment Clause cannot be waived by the parties or balanced away by weightier private or government interests, as can violations of the Free Exercise Clause.<sup>13</sup> RFRA's compliance with the Establishment Clause is thus a threshold requirement not unlike subject matter jurisdiction.<sup>14</sup> If RFRA exemptions from the Mandate violate the Establishment Clause, then that would be the end of the matter, even if for-profit corporations were found to be "persons" entitled to RFRA protection and the Mandate were further found to substantially burden the religious exercise of such "per-

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plications of RFRA exemption); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1224 (D.C. Cir. 2013) (2-1 decision); *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 407-15 (3d Cir. 2013) (Jordan, J., dissenting), *cert. granted*, 134 S. Ct. 678 (2013); *Hobby Lobby*, 723 F.3d at 1136-44 (finding substantial likelihood that Mandate violates RFRA and declaring third-party burdens constitutionally irrelevant); *see also* *Annex Medical, Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at \*3 (8th Cir. Feb. 1, 2013) (granting preliminary injunction pending appeal because plaintiff showed reasonable likelihood of success on RFRA exemption claim, without mention of Establishment Clause).

The government raised the Establishment Clause issue at oral argument in *Korte*, but the court refused to consider it, finding that the issue was raised too late and noting that the Supreme Court had rejected a facial Establishment Clause challenge to RFRA's nearly identical twin, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *See* 735 F.3d at 684 n.19.

<sup>12</sup> *E.g.*, *Agostini v. Felton*, 521 U.S. 203, 243, 244 (1997) (Souter, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 589-90 (1992); *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991); *REX E. LEE, A LAWYER LOOKS AT THE CONSTITUTION* 129 (1981); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 6, 21 (1998); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 122-23 (2009); Jessica Powley Hayden, Note, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, 243 (2007); *see* Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 698 (2013) (arguing that although the other provisions of the First Amendment are conceptualized as personal rights, the Establishment Clause is understood to be "a structural limitation that wholly disables government from establishing religion").

<sup>13</sup> *E.g.*, *Weisman*, 505 U.S. at 596; *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (opinion by McConnell, J.); *Johnson v. Sanders*, 319 F. Supp. 421, 432 n.32 (D. Conn. 1970), *aff'd mem.*, 403 U.S. 955 (1971); Lupu & Tuttle, *supra* note 12, at 129, 135-36, 146; Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 n.14 (1985); Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 153-54 (2008); *see* Gedicks, *supra* note 12, at 698 ("Unlike violations of personal rights . . . Establishment Clause violations may not be counterbalanced by weighty government interests or subjected to equitable defenses like waiver.").

<sup>14</sup> *See* *EEOC v. Catholic Univ. of Am.*, 856 F. Supp. 1, 12-13 (D.D.C. 1994) (holding *sua sponte* that court lacked jurisdiction over case under Establishment Clause), *aff'd*, 83 F.3d 455 (D.C. Cir. 1996); *cf.* *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 713-14 (1976) (holding courts may "exercise no jurisdiction" over a "subject matter" involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to [its] standard of morals").

sons” or their owners without satisfying the compelling-interest test under RFRA.

While RFRA seems *facially* to comply with the Establishment Clause,<sup>15</sup> it nevertheless violates the clause *as applied to the Mandate*.<sup>16</sup> Amidst the heated religious liberty rhetoric surrounding the Mandate,<sup>17</sup> it is easy to miss that RFRA is a “permissive” accommodation — that is, a voluntary government accommodation of religion that is not constitutionally required by the Free Exercise Clause. RFRA’s stated purpose, after all, is to provide *more* protection for religious exercise<sup>18</sup> than is provided by the Free Exercise Clause after *Employment Division v. Smith*.<sup>19</sup> RFRA, therefore, must satisfy the various Establishment Clause limitations on permissive government accommodation of religion.

Establishment Clause doctrine is famously chaotic. It encompasses multiple “tests” that purport to control the outcome of cases even though the

<sup>15</sup> See *Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 (2006) (upholding RFRA as applied to 130-member sect seeking exemption for sacramental use of hallucinogen prohibited by comprehensive federal drug-control statute, without addressing its facial constitutionality); cf. *Cutter v. Wilkinson*, 544 U.S. 709, 713–14 (2005) (rejecting facial Establishment Clause challenge to RLUIPA). The Court has never directly addressed this issue, and some commentators continue to argue that RFRA facially violates the Establishment Clause. See, e.g., Lawrence Sager, Remarks at Brooklyn Law School Symposium, Religious Freedom and Equal Treatment: An International Look (Oct. 12, 2013), available at <http://www.youtube.com/watch?v=7tgIrZq6J5Y>, archived at <http://perma.cc/C6NP-YHT5>.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> The Mandate ignited a firestorm of rhetorical excess that shows no sign of abating. E.g., Steve Chapman, *Inoculating Against Religious Freedom*, REALCLEARPOLITICS (Feb. 2, 2012), [http://www.realclearpolitics.com/articles/2012/02/02/innoculating\\_against\\_religious\\_free\\_dom\\_112995.html](http://www.realclearpolitics.com/articles/2012/02/02/innoculating_against_religious_free_dom_112995.html), archived at <http://perma.cc/4S2T-KNJ3> (“[M]any of those who think it’s wrong to forbid Americans to buy contraceptives think it’s just fine to require them to buy contraceptives. In this group, unfortunately, are President Barack Obama and [Health and Human Services] Secretary Kathleen Sebelius, who are hell-bent on enforcing that mandate on nearly everyone.”); Michael Foust, *New HHS Rule on Abortion Mandate ‘Inadequate,’ BAPTIST PRESS* (Feb. 1, 2013), <http://www.bpnews.net/printerfriendly.asp?ID=39628>, archived at <http://perma.cc/3H8R-4AMY> (quoting an outside source as characterizing Mandate’s religious exemption and accommodation as “radically inadequate”); Shane Goldmacher, *Gingrich Says Obama ‘Declared War on the Catholic Church,’ NAT’L J.* (Feb. 5, 2012), <http://www.nationaljournal.com/2012-presidential-campaign/gingrich-says-obama-declared-war-on-the-catholic-church-20120205>, archived at <http://perma.cc/AW3A-EE6H>; John S. Hoff & Grace-Marie Turner, *The Tortured Path of Evading the Constitution*, REALCLEARPOLICY (Apr. 8, 2013), [http://www.realclearpolicy.com/articles/2013/04/08/the\\_tortured\\_path\\_of\\_evading\\_the\\_constitution\\_479.html](http://www.realclearpolicy.com/articles/2013/04/08/the_tortured_path_of_evading_the_constitution_479.html), archived at <http://perma.cc/6KTV-FTKZ> (“Many employers . . . argue that the Mandate is a violation of their First Amendment right to freely exercise their religion. . . . The administration’s most recent attempt at an accommodation is begrudgingly narrow in scope, inadequate, and unworkable.”).

The rhetoric of Mandate supporters is hardly more restrained. See, e.g., Joan Vennoch, Opinion, *Catholic Church’s Unfair Attack Against Obama*, BOS. GLOBE (Feb. 2, 2012), <http://www.bostonglobe.com/opinion/2012/02/02/catholic-church-unfair-attack-against-obama/Qn99lhKZGNBGMATZPCzxiO/story.html>, archived at <http://perma.cc/ZTP8-TGRX> (“[Catholic] bishops are basically saying to hell with Obama.”).

<sup>18</sup> See 42 U.S.C. § 2000bb(b)(1) (2006).

<sup>19</sup> 494 U.S. 872 (1990), superseded by statute, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, as recognized in *Sossamon v. Texas*, 131 S. Ct. 1651 (2011).

Court frequently ignores the tests.<sup>20</sup> One consistent theme in permissive accommodation decisions, however, is the impermissibility of cost shifting. Irrespective of the doctrinal test it applies (or ignores), the Court condemns permissive accommodations on Establishment Clause grounds when the accommodations impose significant burdens on third parties who do not believe or participate in the accommodated practice. Broad swaths of the Court's jurisprudence under the Free Exercise Clause and Title VII of the Civil Rights Act of 1964<sup>21</sup> exhibit a similar aversion to such cost-shifting religious accommodations. Indeed, the Court has permitted a cost-shifting permissive accommodation in only one case, which involved the nonprofit activities of a church.<sup>22</sup>

Courts and commentators seem unaware that by shifting the material costs of accommodating anticontraception beliefs from the employers who hold them to their employees who do not, RFRA exemptions from the Mandate violate an Establishment Clause constraint on permissive accommodation. One federal appellate court has already mistakenly dismissed this cost shifting as constitutionally insignificant.<sup>23</sup>

This Article proceeds in four Parts. Part I summarizes the legal mechanics of the Mandate and the three classes of entities and persons that have objected to it — churches, synagogues, and other religious congregations; religious nonprofit businesses; and for-profit business entities and their individual religious owners. Part II discusses relevant aspects of Establishment Clause doctrine governing permissive accommodation, notably its prohibition on government action that shifts the material costs of an accommodated religious practice from adherents to nonadherents. Part II also discusses free exercise and Title VII decisions that demonstrate a similar

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<sup>20</sup> The Court generally relies on two doctrinal tests to decide Establishment Clause cases: the “endorsement test,” *see, e.g.*, *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 797 (1989) (holding government action that an informed and reasonable observer would understand to have the purpose or effect of endorsing religion violates Establishment Clause), and the much-maligned “*Lemon* test,” *see Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that government action that aids religion violates Establishment Clause if it lacks a secular purpose or a primarily secular effect, or entangles government with religion). It has never explained why it uses one test rather than the other, and not infrequently decides cases without invoking either one. *See, e.g.*, *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality opinion) (finding Latin cross at veterans memorial could have secular meaning, without applying either test); *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment) (upholding Ten Commandments monument displayed on state capitol grounds on basis of “legal judgment,” without invoking either test); *Marsh v. Chambers*, 463 U.S. 783, 791 (1982) (upholding practice of nondenominational state legislative prayer on basis of historical analysis without invoking *Lemon*).

<sup>21</sup> 42 U.S.C. §§ 2000e–2000e-17 (2006).

<sup>22</sup> *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), discussed *infra* at text accompanying notes 116–29.

<sup>23</sup> *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1144–45 (10th Cir. 2013) (en banc) (summarily dismissing government's argument that RFRA exemption would impose employer's anticontraception beliefs on employees who do not share them because, *inter alia*, “[a]ccommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere”) No. 13-354 (U.S. argued Mar. 25, 2014).

concern. Part III shows how exemptions from the Mandate for the benefit of for-profit and many nonprofit businesses would violate this Establishment Clause prohibition. We conclude with some observations about the limits of permissive accommodation in a radically plural society like the United States.

## I. THE MANDATE AND ITS LITIGATION OPPONENTS

### A. *Statutory and Regulatory Structure*

The ACA requires that group health plans and individual insurance policies cover a range of “preventive healthcare services” without cost to the patient beyond the basic health insurance premium.<sup>24</sup> Final administrative rules adopted by the Departments of Health and Human Services, Labor, and the Treasury (the “Departments”) under the ACA defined “preventive healthcare services” for women to include medically prescribed FDA-approved contraceptive methods, including emergency contraception, together with related services and counseling.<sup>25</sup> Employers and insurers are thus legally “mandated” by the ACA and associated regulations to cover these contraceptives and services in their healthcare plans as preventive services not subject to cost sharing.<sup>26</sup>

The final rules implementing the Mandate exempted some religious organizations and accommodated others. The Mandate exempts the health insurance plans of churches, their “integrated auxiliaries,” conventions and associations of churches, and religious orders falling within Internal Revenue Code provisions defining religious nonprofit organizations.<sup>27</sup> Exempt religious employers are wholly relieved from complying with the Mandate without any action on their part beyond what might already be required by

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<sup>24</sup> 42 U.S.C. § 300gg-13(a) (2006).

<sup>25</sup> Section 2713 included within the definition of preventive healthcare services “such additional preventive care and screenings” not otherwise covered, “as provided for in comprehensive guidelines supported by the Health Resources and Services Administration” (the “HRSA”). 42 U.S.C. § 300gg-13(a)(4). The HRSA subsequently adopted women’s coverage guidelines that included “contraceptive methods and counseling,” defined as “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, HRSA, <http://www.hrsa.gov/womensguide/lines/> (last visited Mar. 1, 2014), archived at <http://perma.cc/YW4-Y57E>. These Guidelines were adopted by the Departments on July 2, 2013. 45 CFR § 147.130(a)(i)(iv)(A) (2013).

This Article cites throughout to the final Mandate rules as codified at 45 C.F.R. §§ 147.130–131 (2013).

<sup>26</sup> “Cost sharing” is defined by the Department of Health and Human Services as “[a]ny contribution consumers make towards the cost of their healthcare.” The two most common types are fees to be paid by the consumer “up-front,” such as premiums and enrollment fees, and “at-time-of-service” fees, such as copayments and deductibles. *Cost-Sharing Definition*, AGENCY FOR HEALTHCARE RES. & QUALITY, [http://archive.ahrq.gov/chip/text/content/cost\\_sharing/cost\\_sharing.htm](http://archive.ahrq.gov/chip/text/content/cost_sharing/cost_sharing.htm) (last visited Mar. 1, 2014), archived at <http://perma.cc/CJ2V-NW2T>.

<sup>27</sup> 45 C.F.R. § 147.131(a) (2013).



the Internal Revenue Code.<sup>28</sup> “Exempt” employers, in other words, may operate as if the Mandate does not exist and refuse to cover mandated contraceptives in their health plans without action, application, or notice to the government on their part.

Religious employers that fall outside the foregoing exemption are subject to the Mandate, but may be eligible for an “accommodation” that relieves them of the obligation to cover mandated contraceptives in their health plans while still ensuring that such contraceptives are made available to employees without cost sharing. Nonexempt religious employers are eligible for this accommodation if they meet four criteria:

- (1) They have religious objections to providing some or all of the mandated contraceptives;
- (2) They are organized and operate as nonprofit entities;
- (3) They hold themselves out as religious organizations; and
- (4) They “self-certify” that they satisfy criteria (1) through (3).<sup>29</sup>

“Self-certification” involves completion and execution of a form provided by the Department of Health and Human Services representing the religious nonprofit’s satisfaction of the accommodation criteria listed above. The religious nonprofit need not file the form with any government agency, but must retain it and make it available upon proper government request.<sup>30</sup>

This accommodation is premised on numerous studies that conclude adding complete contraceptive coverage to a health insurance plan is, at worst, cost neutral — the expense incurred by insurers to provide contraceptives is equal to or less than the expenses of pregnancy, childbirth, and other health events that are prevented by the use of contraceptives.<sup>31</sup> In other words, health insurers who provide full contraceptive coverage at no additional cost to their plan participants will find that the cost of doing so is offset by the plan expenses that such coverage avoids.

Nonexempt religious employers eligible for an accommodation must notify their third-party health plan insurer (or, if self-insured, their plan administrator) that they object to some or all of the mandated contraceptives.<sup>32</sup> The insurer or administrator is then required to pay the cost of mandated contraceptives itself,<sup>33</sup> without cost sharing on the part of either plan partici-

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<sup>28</sup> See I.R.C. §§ 6033(a)(3)(A)(i), 6033(a)(3)(A)(iii) (2012) (defining religious nonprofit entities for purposes of federal income tax code).

<sup>29</sup> 45 C.F.R. § 147.131(b) (2013).

<sup>30</sup> *Id.* § 147.131(b)(4).

<sup>31</sup> See Gedicks, *supra* note 9, at 145 n.47 (summarizing the argument and data on cost neutrality).

<sup>32</sup> *Id.* § 147.131(c)(1). The plan issuer or administrator is not permitted to ask for evidence supporting the self-certification or otherwise to question the employer’s eligibility for the accommodation. See *id.*

<sup>33</sup> *Id.* § 147.131(c)(2)(i).

pants or the accommodated religious employer.<sup>34</sup> The final rules expressly prohibit the insurer or administrator from shifting to the accommodated religious employer any of the costs of covering mandated contraceptives directly,<sup>35</sup> and even require insurers and administrators to segregate funds used to pay mandated contraceptive expenses from funds used to pay covered expenses under the accommodated employer's healthcare plan.<sup>36</sup>

Because studies show that provision and payment for contraception within a healthcare plan is at least cost neutral, the Departments concluded that third-party insurers would incur no net additional costs in providing contraception without cost sharing to employees of accommodated religious employers.<sup>37</sup>

The situation of administrators for self-insured plans is more complicated, because their costs incurred in covering employee expenses for mandated contraceptives are not offset by savings in plan reimbursements for covered expenses like childbirth. If third-party plan administrators cannot recoup such costs in connection with self-insured plans, they are entitled to an offsetting credit against the federal tax they pay on premiums they collect from the healthcare plans that they sell through the ACA's insurance exchanges.<sup>38</sup>

The structure of the Mandate, its church exemption, and its regulatory accommodation of religious nonprofits have meant that various kinds of plaintiffs have brought anti-Mandate litigation. As the Mandate treats each

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<sup>34</sup> *Id.* § 147.131(c)(2)(ii). The insurer or administrator is also required to supply notice of the availability of this direct coverage when employees and covered dependents enroll in the plan. *Id.* § 147.131(d).

We have assumed that insurers or administrators will directly reimburse the providers of mandated contraceptives, rather than requiring plan participants to pay for them out-of-pocket and then seek reimbursement themselves from the insurer or administrator. Although the final rules are ambiguous, out-of-pocket payment by participants with later reimbursement would appear to violate the ACA's statutory requirement that preventive services be provided without cost sharing. *See* 42 U.S.C. § 300gg-13(a) (2011).

<sup>35</sup> 45 C.F.R. § 147.131(c)(2)(ii).

<sup>36</sup> *Id.* The Departments conceded that this accommodation does not work for self-insured plans without a third-party administrator, but determined that there is no current evidence that any such plans exist. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,869, 39,880 (July 2, 2013) [hereinafter Preventive Services] (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pts. 147, 156). The final rules nevertheless provide a safe-harbor exemption from the Mandate for any self-insured plan that lacks a third-party administrator upon certification that it lacks such an administrator and has provided notification to plan beneficiaries that its plan does not cover some or all of the mandated contraceptives. *Id.*

<sup>37</sup> Preventive Services, 78 Fed. Reg. at 39,872–73, 39,877. The final rules also provide that, to the extent insurers in fact incur net costs from providing mandated contraceptives without cost sharing, the insurers may allocate these costs as an administrative expense to all healthcare plans that they insure (other than those entitled to the religious accommodation). Preventive Services, 78 Fed. Reg. at 39,878.

<sup>38</sup> *See* Preventive Services, 78 Fed. Reg. at 39,882–86. Third-party administrators who do not pay the federally funded exchange tax are authorized to arrange for an insurer that does pay the tax to cover the cost of mandated contraceptives that the accommodated employer declines to cover. *Id.*

type of plaintiff differently, they allege different harms, and their employees are burdened to different degrees.

### B. *Varieties of Litigation Opponents*

The Roman Catholic Church condemns the use of artificial contraception to prevent pregnancy as a violation of the natural procreative order.<sup>39</sup> Protestant denominations and Jewish groups, by contrast, do not generally oppose contraception on religious grounds. However, the Mandate covers so-called “emergency” contraceptives such as “morning-after” and “week-after” pills and intrauterine devices (“IUDs”), which some believe avoid pregnancy by preventing a fertilized ovum from implanting in the womb.<sup>40</sup> Many evangelical and conservative Protestant denominations and orthodox Jewish groups denounce emergency contraception as tantamount to abortion, as does the Catholic Church.<sup>41</sup>

Anti-Mandate plaintiffs include actual churches and synagogues, religious nonprofit businesses and entities, and for-profit businesses owned by persons holding religious anticontraception beliefs.

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<sup>39</sup> Pope Paul VI, *Humane Vitae: Encyclical Letter of His Holiness Paul VI on Regulation of Birth*, VATICAN (July 25, 1968), [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html), archived at <http://perma.cc/C7SZ-XWP9>. Catholic teaching does permit the use of contraceptives for medical reasons other than prevention of pregnancy. Pope Francis has recently moderated the Church’s tone on this teaching. See, e.g., Laurie Goodstein, *Pope Says Church Is “Obsessed” with Gays, Abortion and Birth Control*, N.Y. TIMES (Sept. 19, 2013), [http://www.nytimes.com/2013/09/20/world/eu/pope/pope-bluntly-faults-churchs-focus-on-gays-and-abortion.html?\\_r=0](http://www.nytimes.com/2013/09/20/world/eu/pope/pope-bluntly-faults-churchs-focus-on-gays-and-abortion.html?_r=0), archived at <http://perma.cc/CG4X-ZAZC>.

<sup>40</sup> Although FDA-mandated labels indicate that some emergency contraceptives may operate by preventing implantation, see Laycock, *Religious Liberty*, *supra* note 4, at 14, the great weight of scientific evidence shows that they prevent pregnancy only by inhibiting ovulation or otherwise preventing fertilization in the first place, see, e.g., JAMES TRUSSELL ET AL., EMERGENCY CONTRACEPTION: A LAST CHANCE TO PREVENT UNINTENDED PREGNANCY 5–7 (2014), available at <http://ec.princeton.edu/questions/ec-review.pdf>, archived at <http://perma.cc/JE26-5UR3>; see also Greenawalt, *supra* note 10, at 120. While religious believers are constitutionally entitled to believe as a matter of faith that emergency contraception works by preventing implantation and thus is tantamount to abortion, scientific invalidation of that belief might preclude a finding that mandated coverage of emergency contraception constitutes a substantial burden on religious exercise under RFRA. See Smith & Corbin, *supra* note 4, at 279–80; cf. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005) (holding policy requiring teaching creationism as part of high school biology curriculum violated Establishment Clause). A complete analysis of whether religious beliefs about emergency contraception are scientifically unfounded and how this might affect their protection by RFRA is beyond the scope of this Article.

<sup>41</sup> See Laycock, *Religious Liberty*, *supra* note 4, at 14; Ira C. Lupu & Robert Tuttle, *The Contraception Mandate and Religious Liberty*, PEW RES. (Feb. 1, 2013), <http://www.pewforum.org/2013/02/01/the-contraception-mandate-and-religious-liberty/>, archived at <http://perma.cc/LK9F-DEBX>.

### 1. Churches, Integrated Auxiliaries, and Associations.

Churches objected that the initial exemption proposed by the Departments was too narrow and created unacceptable risks of intrusive government regulation and litigation.<sup>42</sup> The Departments responded by eliminating the burdensome conditions for obtaining an exemption in the final rules.<sup>43</sup> As a consequence, anti-Mandate actions brought by churches have been dismissed or have gone inactive.

### 2. Nonprofit Religious Organizations.

The Mandate did not initially provide for any accommodation of religiously sponsored hospitals, social service organizations, colleges and universities, or other nonprofit entities not exempt as churches.<sup>44</sup> Many religious nonprofits have since announced their satisfaction with the accommodation provided in the final rules;<sup>45</sup> however, many continue to maintain that even the accommodation substantially burdens religious exercise by requiring them to be involved in the use of contraception, albeit in a more limited way. Such entities have successfully pressed forward with anti-Mandate litigation, though no final resolution of the issue has been reached by any court.<sup>46</sup>

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<sup>42</sup> The exemption originally was confined to religious employers whose purpose was the “inculcation of religious values,” who primarily employed and served persons of their own faith, and who were nonprofit organizations within the meaning of sections 6033(a)(1), 6033(a)(3)(A)(i), and 6033(a)(3)(A)(iii) of the Internal Revenue Code. *See* Preventive Services, 78 Fed. Reg. at 39,871 (2013). This initial formulation of the exemption was taken from an earlier California statute upheld by the California Supreme Court against religion clause challenges in a decision on which the United States Supreme Court denied certiorari. *See* Catholic Charities of Sacramento v. Superior Court, 85 P.3d 67, 76 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004).

<sup>43</sup> The final rules exempt all churches that satisfy the definitions in sections 6033(a)(3)(A)(i) and 6033(a)(3)(A)(iii) of the Internal Revenue Code, with which churches already must comply for federal tax-exempt status. 45 C.F.R. § 147.131(a) (2013); *see* Preventive Services, 78 Fed. Reg. at 39,873–74; Berg, *supra* note 10, at 326 (noting that the final rules “eliminated the element that had caused the greatest offense: denying an organization protection simply because it served others outside its faith”).

<sup>44</sup> *See* Preventive Services, 78 Fed. Reg. at 39,871.

<sup>45</sup> *See, e.g.*, Joan Frawley Desmond, *Catholic Health Association ‘Pleased’ with HHS Mandate Rule*, NAT’L CATH. REG. (July 11, 2013), <http://www.ncregister.com/daily-news/catholic-health-association-pleased-with-hhs-mandate-rule/>, *archived at* <http://perma.cc/CJQ4-WL8P>.

<sup>46</sup> The argument is that even though a religious nonprofit’s self-certification relieves it of the obligation to pay or arrange for contraception coverage in its health plan, it nevertheless initiates a chain of events that ends in the supply of religiously objectionable contraceptives to at least some employees. *See, e.g.*, *Zubik v. Sebelius*, Nos. 13cv1459, 13cv0303 Erie, 2013 WL 6118696, at \*32 (W.D. Pa. Nov. 21, 2013) (granting preliminary injunction on ground that Mandate violates RFRA as applied to nonexempt religious nonprofit employer); Stanley Carlson-Thies, *Colorado Christian University Rejects the HHS Contraceptives Accommodation*, INST. RELIGIOUS FREEDOM ALLIANCE (Aug. 27, 2013), <http://www.irfalliance.org/colorado-christian-university-rejects-the-hhs-contraceptives-accommodation/>, *archived at* <http://perma.cc/BD6A-9LXH>; *see also* U.S. CONFERENCE OF CATHOLIC BISHOPS ET AL., *STANDING TOGETHER FOR RELIGIOUS FREEDOM: AN OPEN LETTER TO ALL AMERICANS* (2013), *available at* <http://www.usccb.org/issues-and-action/religious-liberty/upload/standing-together-for-religi>

### 3. *For-Profit Businesses Owned by Religious Individuals.*

The Mandate provides neither exemption nor accommodation to for-profit employers, who are thus also moving forward with anti-Mandate actions seeking full exemption from the Mandate under RFRA. Most of these actions have been brought by corporations, which have a separate legal existence from their religious owners. Although a few for-profit corporate plaintiffs can make colorable claims to being *religious* institutions,<sup>47</sup> the vast majority are carrying on indisputably secular activities.<sup>48</sup> Most appellate decisions on the Mandate have focused on whether such entities are “persons” that are “exercising religion” within the meaning of RFRA when they engage in unambiguously secular activities, and whether the anti-Mandate beliefs of the religious individuals who own them can be attributed to such entities notwithstanding a separate legal existence independent of their owners.<sup>49</sup> These issues would be mooted if RFRA exemptions were found to

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ous-freedom.pdf, archived at <http://perma.cc/59GX-UG4B> (issuing anti-Mandate statement after the final rules, signed by conservative Christian churches and orthodox Jewish groups); *HHS Final Rule Still Requires Action in Congress, Says Cardinal Dolan*, USSCB.ORG (July 3, 2013), <http://www.usccb.org/news/2013/13-137.cfm>, archived at <http://perma.cc/D55J-VG5Y>.

Most religious nonprofits that find the regulatory accommodation insufficient have been granted preliminary relief. *See, e.g.*, *Grace Sch. v. Sebelius*, No. 3:12-CV-459 JD, 2013 WL 6842772, at \*19 (N.D. Ind. Dec. 27, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. 4:12-cv-3009, 2013 WL 6838893, at \*25 (S.D. Tex. Dec. 27, 2013); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265, at \*11 (W.D. Okla. Dec. 23, 2013); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 3071481, at \*12 (W.D. Pa. June 18, 2013). *But see* *Univ. of Notre Dame v. Sebelius*, No. 3:12CV253RLM, 2012 WL 6756332, at \*4 (N.D. Ind. Dec. 31, 2012) (denying preliminary injunctive relief), *aff'd*, No. 13-3853, 2014 WL 687134 (7th Cir. Feb. 21, 2013).

<sup>47</sup> *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1122 (10th Cir. 2013) (en banc) (describing one corporate plaintiff as a for-profit bookstore that sells only “Christian books and materials”) No. 13-354 (U.S. argued Mar. 25, 2014); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 111 (D.D.C. 2012) (describing for-profit corporate plaintiff as engaged in the publication of “Christian books ranging from Bible commentaries to books about family issues to Christian fiction”), *interlocutory appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013).

Of course, the fact that a for-profit corporation manufactures or sells only religious materials does not by itself dispose of the question whether it is a “religious” organization or a “person” who “exercises religion” within the meaning of RFRA. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1165 (Briscoe, C.J., concurring in part and dissenting in part) (arguing that for-profit Christian bookstore is “focused on selling merchandise to consumers” like any secular for-profit corporation).

<sup>48</sup> *See, e.g.*, *Korte v. Sebelius*, 735 F.3d 654, 662 (7th Cir. 2013) (for-profit “construction company”); *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1210 (D.C. Cir. 2013) (2-1 decision) (for-profit supplier of fresh produce and transportation); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 620 (6th Cir. 2013) (for-profit manufacturer “for the automotive and medical industries”); *Conestoga Wood Specialties Corp. v. Sec’y of the U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013) (for-profit manufacturer of “wood cabinets”); *Hobby Lobby*, 723 F.3d at 1120 (for-profit “craft store chain”); *Annex Medical, Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at \*1 (8th Cir. Feb. 1, 2013) (for-profit manufacturer of “medical devices”).

<sup>49</sup> *See, e.g.*, *Autocam*, 730 F.3d at 623–24, 626–28 (holding individual owners of for-profit corporation lack standing to challenge application of Mandate to corporation, and corporation is not a person protected by RFRA); *Conestoga Wood*, 724 F.3d at 381 (holding for-profit

violate the Establishment Clause because they impose a material burden on third parties.

## II. PERMISSIVE ACCOMMODATION AND THIRD-PARTY BURDENS

In general, government accommodations of religion can be “mandatory” or “permissive.” The Free Exercise Clause mandates accommodation when religion is singled out for special burdens that are not imposed on secular conduct.<sup>50</sup> Although a mandatory accommodation is not required in cases where burdens on religious exercise are imposed by religiously neutral, generally applicable laws,<sup>51</sup> Congress and the state legislatures are free to alleviate such burdens if they wish via permissive accommodations.<sup>52</sup>

Mandatory accommodation raises no Establishment Clause issue. Although mandatory accommodations obviously assist religious exercise, they do so at the command of the Constitution, in the same way that the Speech Clause assists communication. This immunizes them from Establishment Clause attack. It would make little sense to find that the affirmative command of the Free Exercise Clause facially violates the negative prohibition of the Establishment Clause.

When an accommodation is *not* required by the Free Exercise Clause, no interclause conflict exists, because the Free Exercise Clause is not at issue. The resultant aid to religious exercise is accordingly subject to the limitations of the Establishment Clause as the only religion clause in play.<sup>53</sup> An

corporation cannot exercise religion within meaning of Free Exercise Clause and is not a person protected by RFRA); *Hobby Lobby*, 723 F.3d at 1121 (holding for-profit corporations can be persons exercising religion who are thus protected by RFRA).

<sup>50</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding ordinances that had the effect of prohibiting ritual animal slaughter by minority sect but not secular and other religious animal killings subject to strict scrutiny).

<sup>51</sup> See *id.* at 531; *Emp’t Div. v. Smith*, 494 U.S. 872, 878 (1989).

<sup>52</sup> See *Smith*, 494 U.S. at 890 (“[S]o also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation . . . . But to say that a nondiscriminatory religious-practice exemption is permitted . . . is not to say that it is constitutionally required.”); see also *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”); *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970) (“The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”).

<sup>53</sup> See, e.g., Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional*, *Period*, 1 U. PA. J. CONST. L. 1, 11 (1998) (“Congress does not have a free hand to supplement [religious] liberty. The Establishment Clause provides a ceiling that does not permit the government significant room within which to expand religious liberties.”); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 751, 753 (1992) (“Claims to permissive accommodations always raise Establishment Clause questions, because their underlying theory is that government is free to respond beneficially to religion-specific concerns.”); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 687 (1992) (“Under the Establishment Clause, the question is when (or whether) accommodations are constitutionally permitted.”).

accommodation of religious exercise that is not required by the Free Exercise Clause is thus “permissive,” and must satisfy the demands of the Establishment Clause.

### A. *Negative Religious Externalities*

Three lines of decisions demonstrate the Court’s general rejection of accommodations that shift the costs of accommodating a religion from those who practice it to those who don’t. First and most important, a line of decisions holds that the Establishment Clause prohibits cost-shifting accommodations in the for-profit or secular workplace. Additionally, many of the Court’s exemption decisions under the Free Exercise Clause are animated by this same aversion to accommodations that impose third-party burdens, as are its decisions interpreting the religious accommodation provision of Title VII of the Civil Rights Act of 1964. Finally, academic commentators at all points of the accommodation spectrum agree that the Establishment Clause precludes cost-shifting accommodations.

#### 1. *The Establishment Clause.*

It is by now a commonplace view that Establishment Clause doctrine is unstable, inconsistent, and incoherent. With respect to permissive accommodations, the Court itself has contributed to doctrinal uncertainty by often articulating isolated Establishment Clause limitations without synthesizing them into a complete and coherent approach.<sup>54</sup>

Nevertheless, the Court has been uncharacteristically consistent in condemning permissive accommodations that protect believers at the expense of others in the for-profit workplace and other secular environments. The leading case is *Estate of Thornton v. Caldor*,<sup>55</sup> where the Court invalidated a state statute that granted employees an absolute right not to work on their chosen Sabbath, irrespective of the costs their choices might impose on their employer and coworkers<sup>56</sup>:

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<sup>54</sup> See, e.g., *Bd. of Educ. v. Grumet (Kiryas Joel)*, 512 U.S. 687, 702–07 (1994) (noting that statutory permissive accommodation for orthodox Jewish sect constituted endorsement of religion because it was not clear that legislature would grant comparable accommodations to other religious groups); *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985) (new state law encouraging moment of silence in public schools for individual student prayer lacked secular purpose because, inter alia, preexisting law already permitted individual prayer and thus new law did not relieve students of a state-imposed burden on praying). *But see Cutter v. Wilkinson*, 544 U.S. 709, 720–21 (2005) (upholding RLUIPA against facial Establishment Clause challenge because it relieves a government burden on religious exercise, does not impose significant burdens on third parties or discriminate denominationally, and facilitates private religious exercise).

<sup>55</sup> 472 U.S. 703 (1985).

<sup>56</sup> *Id.* at 708–10.

This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . : 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.<sup>57</sup>

The statute invalidated in *Caldor* generated what economists call a “negative externality” — “a cost that one person, firm, or group imposes on others without their consent.”<sup>58</sup> By giving employees an unqualified right not to work on their chosen Sabbath, the statute “externalized” the cost of accommodating Sabbath observance from the Sabbath-observing employees onto employers and other employees who did not observe a Sabbath. *Caldor* thus involved a negative *religious* externality, because the externalized behavior — Sabbath observance — is religious.

A few years after *Caldor*, a plurality of the Court relied on the same principle to invalidate a permissive state sales-tax exemption in *Texas Monthly v. Bullock*.<sup>59</sup> By restricting the exemption to religious newspapers and magazines, the plurality reasoned, the state had increased the sales-tax burden of secular newspapers and magazines subject to the tax in violation of the Establishment Clause.<sup>60</sup>

*Caldor*'s invalidation of permissive accommodations that generate negative religious externalities was unanimously affirmed in the Court's most recent permissive accommodation decision, *Cutter v. Wilkinson*.<sup>61</sup> The Court rejected a facial attack on a provision of the Religious Land Use and Institutionalized Persons Act<sup>62</sup> (“RLUIPA”), which prohibits government from interfering with the religious exercise of prison inmates without compelling justification.<sup>63</sup> In doing so, however, the Court held that to properly apply RLUIPA, “courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.”<sup>64</sup> It further declared that

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<sup>57</sup> *Id.* at 710 (quoting *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)) (internal quotation marks omitted).

<sup>58</sup> Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CH. L. REV. 1, 46 (1989). “The damage to a farmer’s crops caused by engine sparks [from a passing train] is a cost of railroading that the railroad, unless forced by law to do so or unless it is the owner of the farmland, will not take into account in making its decisions; the cost is external to the decision making process.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.10, at 71 (6th ed. 2003).

<sup>59</sup> 489 U.S. 1, 2 (1989).

<sup>60</sup> *Id.* at 15, 18 n.8 (reasoning that “[w]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that . . . burdens nonbeneficiaries,” it has unconstitutionally endorsed the accommodated religion).

<sup>61</sup> 544 U.S. 709, 709 (2005) (unanimous opinion).

<sup>62</sup> 42 U.S.C. §§ 2000cc-2000cc-5 (2006).

<sup>63</sup> *Id.* § 2000cc-1(a), (b).

<sup>64</sup> *Cutter*, 544 U.S. at 720 (citing with approval *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985)). In *Caldor*, the Court struck down a Connecticut law that “arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath.” We held the law invalid under the Establishment Clause because it “unyielding[ly] weigh[ted]” the interests of Sabbatarians “over all other interests.” *Id.* at



particular accommodations of prisoner free exercise under RLUIPA would violate the Establishment Clause if they threatened the safety or other interests of third parties such as prison administrators or other inmates.<sup>65</sup>

## 2. *The Free Exercise Clause.*

Several of the Court's Free Exercise Clause decisions exhibit the same aversion to cost-shifting accommodations as is manifest in its Establishment Clause decisions. In *United States v. Lee*,<sup>66</sup> for example, the Court rejected the free exercise claim of an Amish employer who objected to payment of Social Security taxes on his employees on religious grounds.<sup>67</sup> The Court made it clear that neither the Free Exercise Clause nor Congress could excuse employers who object on religious grounds to social welfare programs from payment of employee Social Security taxes, because doing so would impermissibly "impose the employer's religious faith on the employees" by reducing or foreclosing employee Social Security benefits.<sup>68</sup> Similarly, in *Tony & Susan Alamo Foundation v. Secretary of Labor*,<sup>69</sup> the Court construed the Fair Labor Standards Act to require that a nonprofit religious organization pay the minimum wage to employees working in its for-profit commercial activities.<sup>70</sup> The Court observed that exempting a religious organization's for-profit activities from federal minimum wage laws would give it a competitive advantage over secular businesses competing in the same markets, and "exert a general downward pressure on wages" paid to employees in such businesses.<sup>71</sup>

## 3. *Title VII.*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against a current or prospective employee on the basis of religion.<sup>72</sup> Title VII defines prohibited religious discrimination to include an employer's failure to make "reasonable accommodations" of an em-

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722 (quoting with approval *Caldor*, 472 U.S. at 710) (alterations in original) (internal citation omitted).

<sup>65</sup> *Id.* at 722–23, 726.

<sup>66</sup> 455 U.S. 252 (1981).

<sup>67</sup> *Id.* at 252.

<sup>68</sup> *Id.* at 261.

<sup>69</sup> 471 U.S. 290 (1985).

<sup>70</sup> *Id.* at 290.

<sup>71</sup> *Id.* at 302 (dictum). Even decisions that mandate accommodation under the Free Exercise Clause betray a concern with cost-shifting religious accommodations. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 204, 208 (1972) (observing that exemption of Amish children from school attendance statute would not cause "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare . . ."); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (observing that exemption of Sabbatarian from Saturday work requirement of unemployment compensation regime would not "abridge any other person's religious liberties"). For an excellent analysis of the impact of third-party burdens on the compelling-interest test, see Loewentheil, *supra* note 10.

<sup>72</sup> 42 U.S.C. § 2000e-2(a) (2006).

ployee's religious practices unless accommodation would pose "undue hardship."<sup>73</sup> In *Trans World Airlines, Inc. v. Hardison*,<sup>74</sup> however, the Court authoritatively defined "undue hardship" as any burden on the employer amounting to more than an insignificant or "de minimis cost."<sup>75</sup>

The Court's opinion in *Hardison* made crystal clear its concern with the burdens that a stronger duty of religious accommodation would have imposed on employers and other employees. The employee in *Hardison* claimed a right under Title VII not to work on his Saturday Sabbath. The Court expressly found that the employer, Trans World Airlines ("TWA"), could have accommodated the employee's demand "only at the expense of others," by denying a more senior employee his or her preferred shift in violation of collective bargaining rights.<sup>76</sup> To do so, the Court reasoned, would have violated Title VII's prohibition on religious discrimination in the workplace by depriving another employee of seniority rights and shift preferences based on whether or not the other employee observed a Saturday Sabbath.<sup>77</sup>

The Court found the same prohibited religious discrimination in the employee's proposals that TWA either require supervisory employees with other duties to cover his Saturday shifts or attract volunteers by offering overtime or other premium pay:

[T]o 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. By suggesting that TWA should incur certain costs in order to give [the complaining employee] Saturdays off . . . [the employee] would in effect require TWA to finance an additional Saturday off and then to choose the employee who would enjoy it on

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<sup>73</sup> *Id.* § 2000e(j).

<sup>74</sup> 432 U.S. 63 (1977).

<sup>75</sup> *Id.* at 84.

<sup>76</sup> *Id.* at 81.

<sup>77</sup> *Id.* ("It would be anomalous to conclude that by 'reasonable accommodation' Congress meant an employer must deny shift and job preferences to some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others . . . .").

Justice O'Connor expressed the same understanding of religious accommodation under Title VII. See *Estate of Thornton v. Caldor*, 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) (finding "[s]ince Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observer," it does not endorse a particular religion or religion generally). Lower courts have also expressed this understanding. See, e.g., *Protos v. Volkswagen of Am.*, 797 F.2d 129, 136 (3d Cir. 1986) ("Title VII does not require absolute deference to the religious practices of the employee, allows for consideration of the hardship to other employees and to the company, and permits an evaluation of whether the employer has attempted to accommodate the employee."); see also *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (reaffirming the *Hardison* de minimis standard).

the basis of his religious beliefs. [T]he privilege of having Saturdays off would be allocated according to religious beliefs.<sup>78</sup>

The Court concluded that in the absence of powerful contrary evidence of congressional intent, it would not construe Title VII “to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.”<sup>79</sup>

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In short, the Court has consistently resisted religious accommodations that impose significant costs on third parties who derive no benefit from the accommodation. As the California Supreme Court observed in upholding the application of a state contraception mandate to objecting religious employers, the U.S. Supreme Court has never approved permissive accommodations when “the requested exemption would detrimentally affect the rights of third parties.”<sup>80</sup>

Commentators have been as consistent as the Court in condemning permissive accommodations that materially burden third parties. Ardent accommodationists,<sup>81</sup> strict separationists,<sup>82</sup> and many in between<sup>83</sup> agree that

<sup>78</sup> 432 U.S. at 84–85.

<sup>79</sup> *Id.* at 85.

<sup>80</sup> *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93 (Cal. 2004).

<sup>81</sup> *See, e.g.,* McConnell, *supra* note 53, at 698, 703 (arguing permissive accommodations that impose “undue” or “disproportionate” burdens on third parties violate the Establishment Clause); *see also* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 886 (1994) (“The compelling interest test allows government to regulate for sufficiently strong reasons, principally to prevent tangible harm to third persons who have not joined the faith.”); *cf.* McConnell & Posner, *supra* note 58, at 46 (arguing that accommodations are not mandated under Free Exercise Clause when they entail substantial third-party burdens).

<sup>82</sup> *See, e.g.,* BRIAN LEITER, *WHY TOLERATE RELIGION?* 99–100 (2013) (“Burden-shifting exemptions [that undermine the general welfare] are prima facie objectionable.”); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 *N.Y.U. L. REV.* 437, 453 (1994) (stating the Establishment Clause does not allow permissive accommodation to “proceed beyond neutrality to favoritism. When purported accommodations have given preference to religious commitments at the expense of comparably serious secular commitments, the Court has been understandably uneasy.”); Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 *W. VA. L. REV.* 89, 115 (2007) (arguing that permissive accommodations that “impose significant burdens on third parties” violate the Establishment Clause).

<sup>83</sup> *See, e.g.,* 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 340–41 (2008) (“A valid exercise in accommodation . . . does not impose unacceptably on others . . .”). “[A]ny religious freedom right that’s solely grounded in the religious motivation for one’s actions simply can’t extend to actions that impair others’ rights or impose improper externalities on others. . . . Constitutional protection for inflicting harm on others simply because of the nature of one’s motivation . . . is virtually unprecedented.” Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 *UCLA L. REV.* 1465, 1511 (1999). *See also* JESSE CHOPER, *SECURING RELIGIOUS LIBERTY* 122 (1995) (“The Religion Clauses should bar government from implementing one person’s religious liberty at the expense of another’s.”); Alan Brownstein, *Protecting the Religious Liberty of Religious Institutions*, 21 *J. CONTEMP. LEGAL ISSUES* 202, 272 n.288 (2013) (“There are constitutional questions . . . over the extent to which the Establishment Clause imposes constraints on discretionary political accommodations that . . . go too far in privileging religious individuals and

the Establishment Clause precludes permissive accommodations that shift the material costs of practicing a religion from the accommodated believers to those who believe and practice differently.

In short, the Court and academic commentators are united in disapproving permissive accommodations that generate negative religious externalities — that is, in condemning accommodations that shift significant financial and other costs of a religious practice from those who engage in it to those who do not.

### B. *Religious Externalities and Establishment Clause Origins*

The consistent condemnation of permissive accommodations that burden third parties reflects an original concern of the Establishment Clause. There is broad consensus that, whatever else it was originally understood to accomplish, the Establishment Clause was meant to prohibit the federal government from setting up any “establishment of religion” that resembled the eighteenth-century Church of England.<sup>84</sup> The Court and commentators are sharply divided on whether the Clause was intended to do anything more, but everyone agrees that preventing this paradigm case of religious establishment is the irreducible minimum.

In both England and the American colonies, the Anglican establishment received land grants, tax subsidies, and other government assistance to support devotional and other unambiguously religious activities.<sup>85</sup> It was subject to government control of its leaders and liturgy,<sup>86</sup> and — most important for our purposes — it imposed legal and other burdens on dissenters and nonmembers that it did not impose on members.<sup>87</sup> The entire English population, for example, was taxed to support the Anglican establishment, while Anglicans themselves had no reciprocal obligation to financially support dissenting churches. Just as prohibiting negative religious externalities does not account for all of Establishment Clause doctrine, neither does it exhaust

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institutions at the expense of non-religious individuals or groups or the general public.”); cf. Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 85 MINN. L. REV. 589, 593 (2000) (showing that Court tends to find that purportedly religious activity is not religious or not burdened when it imposes significant costs on third parties).

<sup>84</sup> See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 32 (1998); ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 82 (2013); STEVEN D. SMITH, *FOREORDAINED FAILURE* 23 (1995); JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 89 (3d ed. 2011); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 388–89 (2002); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 488, 491 (2006).

<sup>85</sup> CHESTER JAMES ANTIEAU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT* 1–10, 20–24 (1964); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131, 2146–59 (2003).

<sup>86</sup> See, e.g., McConnell, *supra* note 85, at 2131–44.

<sup>87</sup> See, e.g., ANTIEAU ET AL., *supra* note 85, at 1, 4–20, 24–29; McConnell, *supra* note 85, at 2131, 2144–46.

the original meaning of the clause. But concern with imposing the costs of established religion on others was part of that meaning.<sup>88</sup>

Permissive accommodations that require unbelievers and nonadherents to bear the costs of someone else's religious practices constitute a classic Establishment Clause violation. Like the prototypical established church, cost-shifting accommodations grant a privilege to those who engage in the accommodated practice at the expense of unbelievers and other nonadherents who do not. Indeed, forcing those who do not belong to a religion to bear the material costs of practicing it is functionally equivalent to taxing nonadherents to support the accommodated faith.<sup>89</sup> As Professor Ira Lupu has observed, "If coercive taxation to support the religious practices of others is a constitutional vice, so is coercive regulation of one's economic affairs to the same end."<sup>90</sup>

### C. *Material Third-Party Burdens*

Although there is broad consensus that the Establishment Clause prohibits permissive accommodations that shift the costs of the accommodated religious practices onto third parties,<sup>91</sup> there is uncertainty about how weighty the shifted costs must be before they trigger anti-establishment concerns. In *Caldor*, for example, the Court employed "significant" and "substantial" to characterize this trigger weight.<sup>92</sup>

The Court's actual holdings supply some content to "significant" and "substantial." The Court generally has not found a violation of the Establishment Clause when a *preexisting* burden on third parties was marginally increased as the result of permissive accommodation. For example, exemp-

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<sup>88</sup> Cf. Thomas Jefferson, Draft of Bill Exempting Dissenters from Contributing to the Support of the Church (Nov. 30, 1776), in 5 THE FOUNDERS' CONSTITUTION 74, 74 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[A]ll Dissenters of whatever Denomination from the said Church [of England] shall . . . be totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the said Church as it now is or may hereafter be established and its Ministers."); James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in THE U.S. CONSTITUTION: A READER 130, 130–31, at para. 4 (Hillsdale Coll. Pol. Dep't ed., 2012), available at <http://perma.cc/HB2B-8HDA> (asserting that proposed Virginia religious tax "violat[e] equality by subjecting some to peculiar burdens" and "granting to others peculiar exemptions").

<sup>89</sup> CHOPER, *supra* note 83, at 124–25.

<sup>90</sup> Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 593 (1991).

<sup>91</sup> See *supra* section II.A.

<sup>92</sup> Estate of Thornton v. Caldor, 472 U.S. 703, 709 (1985) (striking down permissive Sabbath accommodation because "there is no exception when honoring the dictates of Sabbath observers would cause the employer *substantial* economic burdens or when the employer's compliance would require the imposition of *significant* burdens on other employees required to work in place of the Sabbath observers" (emphasis added)); accord *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) ("substantial"); McConnell, *supra* note 53, at 702 ("substantial"); Lupu & Tuttle, *supra* note 82, at 116 ("significant").

tion from the draft for religious pacifists<sup>93</sup> increases the mathematical likelihood that nonpacifists and secular pacifists will be drafted in their place, and exemption from availability-for-work requirements for Sabbatarians<sup>94</sup> increases the premiums of all who pay into unemployment insurance programs. The risk of being drafted already exists and is already substantial; the same holds for mandatory unemployment insurance premiums. The additional burden imposed by accommodating religious pacifists or Sabbatarians, by contrast, is barely measurable; those accommodated are so few compared to the entire population subjected to the law that it is not reasonable to understand the exemption as a meaningful third-party burden.

The same analysis applies to narrow, targeted exemptions of religious individuals from general taxes imposed on a broad swath of the population, such as payroll or sales taxes.<sup>95</sup> The exemptions are so small relative to the remainder of the tax base that the increase imposed on those subject to the tax is negligible.<sup>96</sup>

Released-time programs, which allow participating students to leave school for religious instruction while nonparticipating students engage in appropriate school-related activities,<sup>97</sup> provide still another example. While it is true that formal lessons must halt until the participating students return,<sup>98</sup> the suggestion that this constitutes the school as a "temporary jail"<sup>99</sup> or the released time as a "dead hour" for nonparticipating students<sup>100</sup> is hyperbole. It is hard to see the burden in leaving nonparticipating students to the normal activities they would undertake even if participating students were not re-

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<sup>93</sup> See *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>94</sup> See *Frazee v. Dep't of Unemp't Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136 (1986); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>95</sup> We are not arguing here that all tax exemptions have a de minimis effect on others. Exemption of religious nonprofit organizations from federal and state income taxes undoubtedly shifts a material portion of the overall tax burden to for-profit businesses. Income-tax exemptions for religious nonprofits, however, are not generally understood as permissive religious accommodations; rather, religious organizations are excused from paying income taxes along with numerous secular nonprofit activities that contribute to the overall welfare of the community. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1971); *McConnell & Posner*, *supra* note 58, at 12–13 ("[T]he exemption of church property from real estate taxation is approximately neutral because the same exemption is available to other nonprofit institutes that provide charitable services . . .").

<sup>96</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 260–61 (1982) (impliedly approving statutory exemption from payment of Social Security taxes by self-employed individuals whose religious beliefs prevent their acceptance of social insurance benefits); *Loewentheil*, *supra* note 10, at 23 (concluding that the cost to nonobjectors of a religious tax exemption is "small" when "spread across a large base of taxpayers").

<sup>97</sup> *Zorach v. Clauson*, 343 U.S. 306 (1952); see also *McCullum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948).

<sup>98</sup> *Zorach*, 343 U.S. at 309, 314.

<sup>99</sup> See *id.* at 325 (Jackson, J., dissenting) (stating that school serves as a "temporary jail" for nonreligious students during released-time programs).

<sup>100</sup> *Lupu*, *supra* note 53, at 745.

leased for religious instruction in the first place,<sup>101</sup> especially when these activities were typically substituted with voluntary reading or homework that would otherwise have to be completed after school.<sup>102</sup>

On the other hand, the Court has tended to find an Establishment Clause violation when accommodation imposes a noticeable or perceptible increase in the marginal weight of a preexisting burden on identifiable third parties, or creates such a burden where none previously existed. In most workplaces, for example, employees either take their turns working holidays, weekend days, and other undesirable shifts, or these shifts are filled by those with the least seniority. Either way, the burden is fairly distributed among employees regardless of their religious belief or unbelief, with no one working all or most disfavored shifts indefinitely. In *Caldor*, however, the Court seemingly recognized that employees belonging to the dominant religion — usually Christianity — would demand Sunday off, forcing non-Christian employees to work virtually every Sunday or employers to hire hard-to-find Sunday-only employees at a premium.<sup>103</sup> There can be little doubt that employers and non-Christian employees would reasonably perceive these as burdens imposed on them by the state's accommodation of Christian employees.

Although a Free Exercise rather than Establishment Clause decision, *Tony & Susan Alamo Foundation*<sup>104</sup> illustrates a situation in which the Court felt compelled to deny a claim for accommodation because it would have created (rather than marginally increased) a third-party burden. The Court construed the minimum wage requirement of the Fair Labor Standards Act to apply to the for-profit commercial activities of a religious organization because exemption would have created a competitive advantage: allowing religious organizations to pay less than minimum wage would have disadvantaged secular businesses (and, potentially, their employees) operating in the same markets, where no such disadvantage would exist in the absence of exemption.<sup>105</sup> Again, it is reasonable to think that those compet-

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<sup>101</sup> Cf. *McCollum*, 333 U.S. at 209 (“Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies.”); *id.* at 227 (Frankfurter, J., concurring) (stating that a nonparticipating student “is required to attend a regular school class, or a study period during which he is often left to his own devices”). This proposition was also implicit in *Cutter v. Wilkinson*, where there was no suggestion that release of prisoners to religious services under RLUIPA might burden nonparticipating prisoners who continue with their normal activities. See 544 U.S. 709, 726 (2005).

<sup>102</sup> This was Professor Gedicks' personal experience as a nonparticipating student in a released-time program in place throughout his elementary school years. Professor Lupu experienced the same kind of program more negatively. See Lupu, *supra* note 53, at 743–44.

<sup>103</sup> See *Estate of Thornton v. Caldor*, 472 U.S. 703, 709–10 (1985).

<sup>104</sup> 471 U.S. 290 (8th Cir. 1985).

<sup>105</sup> See *id.* at 299 (“[T]he Foundation's businesses serve the general public in competition with ordinary commercial enterprises, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors.” (internal citations omitted)); see also Lipson, *supra* note 83, at 618 (“The *Alamo* Court appears to have

ing in for-profit markets with religious entities relieved of compliance with minimum wage laws would find such relief to be a competitive advantage for the religious entities.

These decisions point to an organizing principle: the Court finds third-party burdens problematic when shifted costs are likely to be taken into account in the private ordering of such parties. That is, the Court looks to whether shifted costs are relevant to third-party decisions about how to act in some relevant way. This principle determines whether the Court affords weight to third-party burdens, and is nothing more than the concept of “materiality” that commonly controls liability in many statutory and common law causes of action.<sup>106</sup> A misrepresentation or omission in a securities disclosure document is actionable only if “material” — only if a reasonable person would have considered the misrepresented or omitted fact within the total “mix of information” relevant to a decision whether to invest in or how to vote on a security.<sup>107</sup> Similarly, a contract is voidable if assent was obtained by a “material” misrepresentation<sup>108</sup> — if the misrepresentation “would be likely to induce a reasonable person to manifest his assent.”<sup>109</sup> And the tort of fraudulent misrepresentation makes one liable in case of “justifiable reliance” on the misrepresentation — if “a reasonable person would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.”<sup>110</sup>

From a textual standpoint, “material” is a virtual synonym for “significant” and “substantial,”<sup>111</sup> which the Court has already used to describe the

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based its conclusion on concern for third parties. Without an obligation to pay a minimum wage, the Court reasoned that the Foundation enjoyed a competitive advantage over ‘ordinary commercial enterprises’ that were so obligated.”)

<sup>106</sup> Cf. BLACK’S LAW DICTIONARY 1086 (9th ed. 2009) (defining “material” as “[o]f such a nature that knowledge of the item would affect a person’s decision-making.”).

<sup>107</sup> Applying an SEC rule that prohibits material misstatements or omissions in proxy solicitation materials, the Court found: “An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . What the standard . . . contemplate[s] is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.” *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 449 (1976).

<sup>108</sup> RESTATEMENT (SECOND) OF CONTRACTS § 164 (1979) (“If a party’s manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.”).

<sup>109</sup> *Id.* § 162.

<sup>110</sup> RESTATEMENT (SECOND) OF TORTS § 538 (1977).

<sup>111</sup> Compare OXFORD ENGLISH DICTIONARY (defining “material” evidence or facts as “significant or influential, especially] in having affected a person’s decision-making”), and *supra* notes 106–110 and accompanying text, with OXFORD ENGLISH DICTIONARY (defining “significant” as “[s]ufficiently great or important to be worthy of attention; noteworthy, consequential, influential”), and OXFORD ENGLISH DICTIONARY (listing the fourth definition of substantial as “[f]irmly or solidly established; of solid worth or value, of real significance, weighty; reliable; important, worthwhile”). See also OXFORD ENGLISH DICTIONARY (defining “substantial” as “constitut[ing], or involv[ing] an essential part, point, or feature; essential,



weight of shifted costs that triggers an Establishment Clause violation.<sup>112</sup> In fact, the materiality (or lack thereof) of shifted costs accounts for nearly all of the Court's holdings and pronouncements condemning cost-shifting permissive accommodation. The Court generally invalidates or disapproves cost-shifting permissive accommodations when a reasonable person would likely include the shifted cost as a consideration in deciding whether to alter behavior burdened by the accommodation.<sup>113</sup>

In *Caldor*, for example, it is reasonable to assume that a non-Christian would consider the likelihood of having to work most Sundays (rather than merely occasional ones) in deciding whether to remain in or to accept employment at a business having Sunday hours. Likewise in *Cutter*, it also seems reasonable that threats to the safety of prison employees from accommodation of prisoners' free exercise would cause them to consider whether remaining on the job was worth it. In *Tony & Susan Alamo Foundation*, finally, it seems reasonable to conclude that secular entrepreneurs would take into account a religiously owned for-profit business's exemption from minimum wage requirements in deciding whether to enter the market and compete with the religiously owned business.

On the other hand, it is difficult to imagine that permissive exemption of religious pacifists from the draft would be a factor in the decision of nonpacifists to comply with or evade the draft, since the exemption is merely a slight, marginal increase in the large preexisting risk of being drafted;<sup>114</sup>

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material," and noting that in "later use" this definition is "difficult to distinguish from [definition] 4").

<sup>112</sup> See sources cited *supra* note 92.

<sup>113</sup> We are not proposing a causation or other such test designed to determine whether a person has actually altered his or her behavior in response to shifted accommodation costs. We are arguing, rather, that as in securities, contract, and tort causes of action, a third-party burden is material if it is sufficient to enter into a reasonable person's decisionmaking calculus, regardless of the actual outcome of that calculus.

<sup>114</sup> We disagree with Professors Leiter and McConnell, each of whom has asserted that draft exemptions impose serious costs on third parties, although for opposing reasons — McConnell argues that permissive accommodations involving substantial cost shifting do not necessarily violate the Establishment Clause, and Leiter questions permissive accommodation altogether. Both contend that the burden is significant, presumably because it constitutes an increased risk of death. See LEITER, *supra* note 82, at 99; McConnell, *supra* note 53, at 704 & n.77. But many ordinary activities involve risks of death that people undertake without a thought, like driving a car (being hit by a drunk or otherwise reckless driver) and traveling by air (plane crashes). The risk of harm is so remote that people simply do not consider it in deciding whether to drive or to fly. Similarly, what matters in evaluating the Establishment Clause constitutionality of a permissive accommodation is whether the costs it shifts to third parties might be considered sufficient to enter into a person's decisionmaking calculus, not whether the consequences of a realized risk would be severe. It seems unlikely that a decision to flee to Canada or go underground to evade the draft during the Vietnam War would have been affected by knowledge that religious pacifists were exempt.

For the same reason we disagree with Justice Brennan's argument in *Texas Monthly* that the increased sales tax burden on secular transactions caused by exempting religious publications from sales taxes constituted unconstitutional cost shifting under the Establishment Clause. See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion). Sales of religious materials are a very small percentage of overall transactions in the economy of any state or locality; the drop in sales-tax revenue caused by exempting them is miniscule, and any conse-

that the miniscule increase in unemployment insurance premiums from coverage of Sabbatarians would affect bottom-line decisions of profit-seeking businesses purchasing such insurance; or that the parents of students required to remain at school during released-time religious instruction would consider this in deciding, say, whether to send their children to another school.<sup>115</sup>

*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*<sup>116</sup> is the lone decision in which the Court has upheld a permissive accommodation that shifted material costs to third parties. In *Amos*, the Court held that a statutory exemption of religious organizations from Title VII of the Civil Rights Act of 1964<sup>117</sup> did not violate the Establishment Clause as applied to the organization's nonprofit activities.<sup>118</sup> The exemption enabled the Mormon Church to fire an employee whose termination would otherwise have been illegal. It thus created a substantial burden on the employee where none previously existed.<sup>119</sup>

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quent increase in the tax liabilities of others likewise insignificant. *Cf. GREENAWALT, supra* note 83, at 347 (suggesting that a permissive accommodation is not constitutionally problematic if it merely entails a "marginal increase in [one's] tax liabilities"). The result in *Texas Monthly* is better explained by the fact that a relatively small percentage sales tax on religious publications is not a burden on religion, *see Jimmy Swaggert Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990) (holding on the eve of *Smith* that general sales tax on ministry's sales of Bibles and religious literature did not burden its proselytizing), so that exemption from the tax unconstitutionally endorsed or otherwise favored religion, *see Texas Monthly*, 489 U.S. at 28 (Blackmun, J., concurring in the judgment).

<sup>115</sup> As with all line-drawing rules, materiality creates a difficult issue at the margin — how to distinguish between a slight (immaterial) shifted cost and a heavier (material) one. *Compare GREENAWALT, supra* note 83, at 348 ("A slight cost borne by private individuals will not violate the Establishment Clause; a heavy cost will amount to an advancement of religion at the expense of other interests."), with *Lupu, supra* note 53, at 746 ("it is impossible to determine how much" of a third party burden "is too much"). One might deal with the line-drawing problem with a rebuttable presumption that shifted costs are considered material unless shown to be trivial. *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding, *inter alia*, that it constituted an "undue hardship" under Title VII to require employers to bear more than de minimis costs in accommodating employee religious preferences). One would assume that burdens from shifted costs are a factor in the private ordering of those to whom the costs are shifted, unless the shifted costs are shown to be trivial.

<sup>116</sup> 483 U.S. 327 (1987).

<sup>117</sup> 42 U.S.C. § 2000e-1(a) (2011) ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

<sup>118</sup> *Amos*, 483 U.S. at 330. One might argue that other outliers are *Walz v. Tax Commission*, 397 U.S. 664 (1971), which justified a religious property tax exemption on the basis of the unique social contributions of religious organizations, *id.* at 696–97, and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), which upheld the judge-made "ministerial exception" to Title VII under both religion clauses, *id.* at 707. *Walz*, however, has long been understood as a case about neutrality towards religion, under which permissive tax exemptions for religious property and activity conceptually fall under tax exemptions for secular and religious nonprofit activities that contribute to the general welfare and wellbeing of society, and thus are not *religious* accommodations at all. *See supra* note 95. *Hosanna-Tabor*, on the other hand, is a mandatory accommodation. *See* 132 S. Ct. at 706.

<sup>119</sup> The Court curiously offered that the burden was imposed by the church rather than the law, *Amos*, 483 U.S. at 337 n.15, but this made no sense: as Justice O'Connor pointed out, it

The Court observed that a religious organization would be put at risk if Title VII exempted only “religious activities” (as it did originally), thereby forcing a church to predict which of its activities a secular court might consider “religious” and thus exempt from Title VII.<sup>120</sup> Accordingly, it held that the exemption permissibly alleviated “significant governmental interference with the ability of *religious* organizations to define and carry out their *religious* missions.”<sup>121</sup> This holding was expressly limited, however, to a religious organization’s *nonprofit* activities. Addressing the district court’s fear that wealthy churches might “extend their influence and propagate their faith by entering the commercial, profit-making world,” the Court emphasized that the Church’s operation of the gymnasium was both a religious and a nonprofit activity that had endured for more than seventy-five years.<sup>122</sup>

The Title VII exemption upheld in *Amos* must be considered a permissive accommodation case in the wake of *Smith*.<sup>123</sup> In the post-*Smith* world, *Amos*’s holding can be justified by either of two alternate rationales. First, Congress may choose to relieve a religious nonprofit organization of the risk of liability when it insists that employees adhere to its religious mission.<sup>124</sup> In this sense, *Amos* is now better understood as a modest extension to permissive accommodation doctrine of the mandatory church governance and office decisions that (1) shield churches from government regulation or oversight under the Free Exercise Clause so that they may effectively define

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was precisely the statutory exemption that enabled the church to shift the burden of its religious beliefs and practices to an employee who did not subscribe to some of them. *Id.* at 347 (O’Connor, J., concurring in the judgment).

<sup>120</sup> See *id.* at 336 & n.14 (noting the Church’s argument that “the District Court failed to appreciate that the Gymnasium . . . is expressive of the Church’s religious values”).

<sup>121</sup> *Id.* at 335 (emphasis added).

<sup>122</sup> *Id.* at 337.

<sup>123</sup> Things were not so clear in the pre-*Smith* world in which *Amos* was actually decided. There it was presumed (at least formally) that the Free Exercise Clause granted relief from even incidental burdens on religious exercise. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that incidental burdens on religious exercise must satisfy strict scrutiny); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (same). Justices Brennan and Marshall, for example, made clear in *Amos* their view that the statutory exemption at issue there was probably mandated by the Free Exercise Clause: “Determining that certain activities are in furtherance of an organization’s religious mission, and that only those committed to that mission should conduct them, is . . . a means by which a religious community defines itself. . . . The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets. We are willing to countenance the imposition of such a condition because we deem it vital that, if certain activities constitute part of a religious community’s practice, then a religious organization should be able to require that only members of its community perform those activities.” *Amos*, 483 U.S. at 342–43 (Brennan, J., concurring in the judgment). The Court also suggested as much: “[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions. . . . [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.” *Id.* at 335–36 (majority opinion). It did, however use permissive accommodation language elsewhere. See *id.* at 334.

<sup>124</sup> *Amos*, 483 U.S. at 336–37.

and pursue their religious missions and goals, and that concomitantly (2) deprive secular courts under the Establishment Clause of the power to engage in theological decisionmaking.<sup>125</sup> Indeed, there is considerable resonance between *Amos*'s holding that Congress may, if it chooses, protect a church's ability to define itself and its religious mission and goals by allowing it to discriminate in favor of religiously faithful employees, and the Court's recent holding that the religion clauses protect a right of churches to hire and fire those who perform ministerial functions, for the same reasons.<sup>126</sup>

Alternatively, *Amos* can be understood to allow Congress to remedy religious institutional inequalities if it wishes. Under this theory of the case, *Amos* merely gave to religious nonprofit organizations the same right held by secular cause-based nonprofits to discriminate in favor of employees who affirm and live according to the principles on which the organization is founded.<sup>127</sup> As Justice Brennan reasoned, the third-party burden in *Amos* was unavoidable if the church's right to define itself and its mission were to be protected.<sup>128</sup> *Amos* is thus of a piece with other decisions in which the

<sup>125</sup> *E.g.*, *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 698 (1976) (holding that church had final authority to decide whether and by what means to remove bishop); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 107 (1952) (invalidating state law that would have superseded church authority to determine what ecclesiastical body controlled use of cathedral); *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702 (2012) (decided after *Amos*) (reaffirming under both religion clauses that "ministerial exception" requires dismissal of lawsuits by ministers against their churches for adverse employment actions).

<sup>126</sup> *Compare Amos*, 483 U.S. at 335 ("[I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."), *with Hosanna-Tabor*, 132 S. Ct. at 706 (holding state imposition of an "unwanted minister" on a church would violate a "religious group's right to shape its own faith and mission through its appointments").

<sup>127</sup> *See Lupu & Tuttle*, *supra* note 82, at 111 n.184. As Professors Lupu & Tuttle explain: "[P]olitical parties are free to hire only those who are politically loyal to the party, feminist organizations may insist that their employees be feminists, and so on. Similarly, the inclusion of student religious clubs in the class of student organizations to which public schools must give 'equal access' if the schools permit noncurricular clubs represents an accommodation for religious clubs equal to that provided their secular counterparts." *Id.* (citing *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (upholding Equal Access Act against Establishment Clause challenge)).

<sup>128</sup> *See Amos*, 483 U.S. at 335–36. One might have argued that the Title VII exemption was constitutionally required, but by the Speech Clause's freedom of association rather than the Free Exercise Clause's protection of religion. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (holding that the Boy Scouts of America is exempt from law prohibiting discrimination on basis of sexual orientation by public accommodations, because discrimination was essential to its communication of its traditional moral values); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984) (acknowledging that advocacy organization could discriminate on basis of gender if doing so was essential to communication of its message, but holding that such discrimination was not essential to communication of Jaycees's message). The Court rejected this theory, however, in *Hosanna Tabor*. 132 S. Ct. at 706. In holding that both the Free Exercise and Establishment Clauses constitutionally required a "ministerial exception" to Title VII, the Court purported to distinguish *Smith*, but the neutrality and generality of Title VII suggest that *Hosanna-Tabor* actually created an exception to *Smith*. It appears, therefore, as if the doctrinal landscape surrounding *Amos* has been altered yet again. Whether *Hosanna-*

Court has held that granting religious organizations the same rights and privileges afforded to secular organizations does not generally violate the Establishment Clause.<sup>129</sup>

In short, the Establishment Clause generally provides that material costs of permissive accommodation of religion may not be shifted to third parties. The only exception involves the nonprofit activities of churches and other religious nonprofit organizations, where shifted costs are an unavoidable incident to either (1) preservation of the religious organization's right to define and control its religious mission, or (2) equalization of the rights of such organizations with secular cause-based organizations.

#### D. Cost Shifting and Baselines

Any argument about impermissible cost shifting must identify the proper status quo ante as the baseline measure of whether and to what extent costs have been shifted.<sup>130</sup> For permissive accommodations, this baseline can only be the distribution of relevant burdens and benefits for religious exercise immediately preceding enactment of the accommodation.

Prior to enactment of the Sabbath-choice statute in *Caldor*, for example, no employee had the unqualified right to refuse Sabbath work. Whether any particular employee was required to work depended on formal and informal factors like the observant employee's workplace seniority or the availability of other employees willing voluntarily to cover the observant employee's shifts. These and other factors insured that some of the costs of accommodation were borne by Sabbath observers themselves, who had to work Sabbaths until they acquired sufficient seniority to opt out or find willing substitutes to cover their Sabbath shifts.

Once the statute gave Sabbath-observers an absolute right not to work on their Sabbath, however, nonobservant employees bore all the costs of Sabbath observance because they found themselves assigned to Sabbath shifts regardless of their seniority or preferences. The statute, therefore, shifted the costs of accommodating Sabbath observers from a situation in which at least some of those costs were borne by the accommodated Sabbath observers, to one in which all such costs were borne by nonobservant employees.

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*Tabor* created a class of mandatory accommodations that now encompasses the heretofore-permissive Title VII exemption upheld in *Amos* is beyond the scope of this Article.

<sup>129</sup> See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (allowing religious student groups same access to public university facilities as secular student groups did not violate Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1971) (including religious nonprofit organizations in class of nonprofit groups entitled to property tax exemption did not violate Establishment Clause).

<sup>130</sup> Cf. *McConnell & Posner*, *supra* note 58, at 6 (observing that the determination whether government action has "aided" or "penalized" religion in violation of the Establishment Clause, "one needs a baseline: 'aid' or 'penalty' as compared to what?").

The draft-exemption cases provide a similar example. In the absence of an exemption for religious pacifists, those in the draft-eligible pool (including pacifists) face an equal chance of being drafted, and religious pacifists who are actually drafted are subject to criminal penalties if they refuse to report. Once a religious-pacifist exemption is introduced, however, religious pacifists are immunized from criminal liability and removed from the draft-eligible pool, thus increasing the probability that a person remaining in the pool will be drafted. The cost of observing religious pacifist beliefs has thus shifted from pacifists to nonpacifists (although, as we have argued, the shifted cost is not material).

### III. RFRA, THE MANDATE, AND UNCONSTITUTIONAL COST SHIFTING

We demonstrated in Part II that the Court's Establishment Clause and other decisions prohibit permissive accommodations that shift material costs of the accommodated religious practice from those who participate in it to those who don't. In the context of the Mandate, therefore, the primary issue is whether employer exemptions under RFRA would burden third parties to an extent that would violate the Establishment Clause.

#### A. *RFRA Exemptions as Permissive Accommodations*

A plaintiff who brings a successful RFRA claim is entitled to "obtain appropriate relief" from the law or other government action that burdens her religious rights.<sup>131</sup> "Appropriate relief" does not usually require complete invalidation of the burdensome law; instead, the plaintiff is simply "exempted" or excused from complying with the law. RFRA, therefore, is essentially a means for plaintiffs to obtain individualized permissive accommodations that relieve them from governmentally imposed obligations.

When a legislature directly grants a specific "retail" permissive accommodation to a named class of religious adherents, it must comply with the Establishment Clause limit on negative religious externalities.<sup>132</sup> It follows that when Congress indirectly grants permissive accommodations "wholesale" through a general statute like RFRA it must also work within Establishment Clause limitations.<sup>133</sup> Although RFRA is probably not unconstitutional on its face, it is unconstitutional when applied to grant a religious exemption that the Establishment Clause would have prevented the government from creating specifically.

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<sup>131</sup> 42 U.S.C. § 2000bb-1 (2011).

<sup>132</sup> See *supra* Part II.

<sup>133</sup> Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1977 (2001) ("RFRA is not the Free Exercise Clause, and courts therefore must apply the Establishment Clause to draw the constitutional boundaries of Federal RFRA.").

The Court itself all but confirmed this in *Cutter v. Wilkinson*.<sup>134</sup> As discussed, *Cutter* considered a facial Establishment Clause challenge to RLUIPA, which Congress enacted to partially fill the void left when the Court invalidated RFRA as applied to state government action.<sup>135</sup> Like RFRA, RLUIPA applies strict scrutiny to state regulations that substantially burden religious adherents, though it is expressly limited to prison and land-use contexts. Its text is virtually identical to RFRA's.<sup>136</sup>

In *Cutter*, the Court rejected the facial Establishment Clause challenge, but acknowledged that RLUIPA is vulnerable to as-applied Establishment Clause challenges.<sup>137</sup> It observed that if an inmate requests a RLUIPA accommodation that would “impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist” and “as-applied challenges would be in order.”<sup>138</sup>

If RLUIPA is subject to as-applied Establishment Clause challenges based on unacceptable cost shifting, as the Court held in *Cutter*, it is certain that RFRA, its nearly identical twin, is subject to such challenges as well.<sup>139</sup> If an employer claims an accommodation under RFRA that imposes unjustified burdens on others, an as-applied challenge and invalidation under the Establishment Clause would be in order.

In short, Congress enacted RFRA precisely to afford protection to religious exercise that the post-*Smith* Free Exercise Clause does not. Accordingly, each application of RFRA to relieve incidental government burdens on religious exercise is a permissive accommodation that must comply with the Establishment Clause prohibition on shifting material costs of such accommodations to third parties.

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<sup>134</sup> 544 U.S. 709 (2005).

<sup>135</sup> Laycock, *Religious Liberty*, *supra* note 4, at 8 (discussing aftermath of invalidation of RFRA as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

<sup>136</sup> Compare RLUIPA, 42 U.S.C. § 2000cc-1(a)–(b) (2011) (“No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.” (em-dash & paragraph numbers deleted)), with RFRA, 42 U.S.C. § 2000bb-1(a)–(b) (2011) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.”).

<sup>137</sup> 544 U.S. at 726.

<sup>138</sup> *Id.*

<sup>139</sup> *Cf.* Magarian, *supra* note 133, at 1995–96 (suggesting that RFRA “may be appropriately applied” when it does not “impose substantial costs on nonbeneficiaries” of the exemption).

### B. *Preemption (Not Pre-Mandate) Baseline*

The RFRA exemptions sought by anti-Mandate employers would excuse them from complying with the requirement that their health plans cover FDA-approved contraceptives without cost sharing. Absent RFRA exemptions, in other words, the employees of such employers would receive the benefit of contraception without cost sharing. The Mandate thus marks the baseline for measuring whether such exemptions shift costs from the accommodated employers to employees who do not share their employer's religious anti-Mandate beliefs. The Mandate, in other words, is the status quo ante that RFRA exemptions would disrupt.

Some Mandate opponents have argued that RFRA exemptions for anti-Mandate employers would not shift costs to employees, because employees of RFRA-exempted employers are no worse off than they would have been in the absence of the Mandate — employees in both situations must use their own funds to purchase contraceptives.<sup>140</sup> This makes no sense. It is like defending a denial of Social Security benefits by observing that it merely puts the disappointed claimant in the same position she would have been in had the Social Security program never been enacted.<sup>141</sup> The problem, of course, is that we do not live in a world in which Social Security does not exist; Social Security *has* been enacted, and its enactment created a social welfare entitlement, the denial of which to any particular claimant deprives her of its benefits.

Other Mandate opponents simply rule the Mandate out of order. Noting that the Mandate is new and controversial, they define the baseline for measuring whether RFRA exemptions trigger impermissible cost shifting by reference to a status quo ante in which the ACA and Mandate do not exist.<sup>142</sup> This makes no sense either. There is no vesting period for federal statutory entitlements.<sup>143</sup> The Supreme Court has upheld the ACA as a valid exercise of congressional power, and unless the Mandate itself were to be invali-

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<sup>140</sup> See, e.g., Brief of Nat'l Ass'n of Evangelicals as Amicus Curiae Supporting Hobby Lobby and Conestoga, et al. at 7–8, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 27, 2014); cf. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1144 (10th Cir. 2013) (“[W]e note a concern . . . that Hobby Lobby and Mardel are, in effect, imposing their religious views on their employees or otherwise burdening their employees’ religious beliefs. But Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here.”) No. 13-354 (U.S. argued Mar. 25, 2014).

<sup>141</sup> Cf. *McConnell & Posner*, *supra* note 58, at 5–7 (deriding as a *reductio ad absurdum* the strict separationist argument that denying government benefits to otherwise qualified religious groups merely because they are religious is consistent with religious neutrality because it puts the groups in the same position they would be in if there were no government).

<sup>142</sup> See, e.g., Marc DeGirolami, *On the Claim that Exemptions from the Contraception Mandate Violate the Establishment Clause*, CENTER FOR L. & RELIGION F. (Dec. 5, 2013), <http://clrforum.org/2013/12/05/on-the-claim-that-exemptions-from-the-contraception-mandate-violate-the-establishment-clause/>, archived at <http://perma.cc/7GJ4-9CPJ>.

<sup>143</sup> See *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) (arguing that once the government “makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured”).



dated,<sup>144</sup> it defines contraception as “preventive care,” which the ACA entitles employees to receive without cost sharing.

Finally, still other Mandate opponents contend that RFRA is a preexisting external limit on the Mandate (and every other federal statute and regulation). Under this argument, no employee has a legal entitlement to the benefits of the Mandate because the Mandate violates RFRA. Thus, depriving employees of benefits by granting their employers RFRA exemptions is not a legally cognizable burden.<sup>145</sup> But this begs the question whether the Establishment Clause, like all provisions of the Bill of Rights, is itself such a limit on RFRA — that is, whether the clause constrains applications of RFRA that impose material costs on third parties, as we have argued. If the Establishment Clause constitutes a preexisting external limit on RFRA, then it of course trumps any application of RFRA that violates it.

In sum, the ACA and the Mandate created an entitlement to contraception without cost sharing for employees and beneficiaries of employer health plans. RFRA exemptions would deprive the employees of exempted employers of this entitlement. Such exemptions would necessarily shift some of the cost of accommodating employers’ anticontraception beliefs from employers to employees and others who would derive no compensating benefit from a RFRA exemption.

### C. *RFRA Exemptions and Negative Religious Externalities*

The classic “third parties” implicated in the Mandate litigation are those who either do not share the religious beliefs of their employers or who share them as a matter of coincidence. They have a limited employer-employee relationship in which their employment is not conditioned on the employee’s being a member of a certain religion or adhering to any religious requirements. In these cases, the employees are truly bystanders in the conflict between their employer and the government. They will normally derive no benefit from a permissive accommodation of the employer’s religious beliefs or practices. On the contrary, many third parties are likely to prefer the Mandate’s provision of contraception without cost sharing, which they will lose if their employer obtains a RFRA exemption from the Mandate.

The actual burden imposed on employees by RFRA exemptions from the Mandate varies depending on the kind of employer and the breadth of the accommodation it seeks. The situation in which cost shifting is most burdensome is the one being litigated most vigorously — for-profit businesses seeking a complete exemption from the Mandate. In case of complete ex-

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<sup>144</sup> See *supra* note 4.

<sup>145</sup> See, e.g., Brief for Respondents Hobby Lobby Stores, Inc. et al. at 54–55, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Feb 10, 2014); Brief of Constitutional Law Scholars as Amici Curiae in Support of Hobby Lobby & Conestoga, et al. at 3–4, 18–19, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 28, 2014); Brief of Nat’l Ass’n of Evangelicals, *supra* note 140, at 2–3, 5–8.

emption, the costs of accommodating a for-profit employer's anticontraception beliefs are not confined to the objecting employer or its owners, but externalized onto its employees as well.

In the case of a permissive RFRA exemption from the Mandate, employees who do not share their employer's anticontraception beliefs would be denied their statutory and regulatory entitlement to contraception coverage without cost sharing, and thus would be directly saddled with material costs they would not incur in the absence of the exemption. Employees and their families would be deprived of the benefits of the Mandate to which they are otherwise legally entitled. The RFRA exemption would require that they pay the out-of-pocket expense of contraceptives and related services that they ought to receive at no expense beyond their monthly healthcare insurance premium. This is a direct burden that would not exist without the permissive accommodation of RFRA exemption.

The externalized cost will be material for most employees. Effective oral contraceptive drugs cost between \$180 and \$960 per year, depending on the drug prescribed and the area of the country where the prescription is filled.<sup>146</sup> Many women experience unpleasant side effects from the cheapest oral contraceptives (which are usually generic brands<sup>147</sup>) or find that they are less effective in preventing pregnancy.<sup>148</sup> Some of the most cost-effective and reliable contraceptives, such as IUDs and contraceptive drug implants, have high up-front costs ranging from \$500 to \$800, in addition to one or more examination fees, which can range from \$75 to \$250.<sup>149</sup> Such costs are a significant financial obstacle to the use of contraception by working-class and lower-income employees.<sup>150</sup> Individuals of all but the highest income classes would find the hundreds of dollars of annual out-of-pocket expense

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<sup>146</sup> See *Birth Control*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/birth-control-4211.htm> (last visited Mar. 1, 2014), archived at <http://perma.cc/CZV6-UMRB>.

<sup>147</sup> Consumers also may have legitimate reasons to prefer more expensive brand-name prescriptions instead of generics that are unrelated to medical effectiveness. In recent products liability cases, the Court has held that the federal Food, Drug, and Cosmetic Act bars products liability suits against the manufacturers of generic drugs under either a failure to warn theory, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), or a design defect theory, *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013). These cases have given generic drug makers extensive immunity from tort claims when their products injure users. This immunity does not apply to manufacturers of brand-name drugs. Consumers may prefer to use brand-name pharmaceuticals to preserve strict liability actions against manufacturers in the event the drug causes them injury.

<sup>148</sup> Cf. Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7, 9 (2011) ("[O]ne-third of women using reversible contraception would switch methods if they did not have to worry about cost; these women were twice as likely as others to rely on lower-cost, less effective methods.").

<sup>149</sup> *Birth Control*, *supra* note 146; James Trussell et al., *Cost Effectiveness of Contraceptives in the United States*, 79 CONTRACEPTION 5, 5–6, 9–10, 13 (2009).

<sup>150</sup> See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 392–93 (1998).

imposed on them by a RFRA exemption more than a trivial inconvenience.<sup>151</sup>

One can easily imagine that low-income women might consider putting off the refill of even a generic oral contraception prescription until payday because, by the end of a pay period, they do not have \$15 or \$20 to spare.<sup>152</sup> For the same reason, such women may often find the \$30 to \$50 cost of morning-after or week-after pills impossible to purchase when they are needed or most effective. And of course, it requires little imagination to conclude that the high monthly expense of branded oral contraceptives and the high up-front costs of IUDs and implants will cause even middle- and upper-income women to consider whether using these methods without health insurance coverage is worth the opportunity cost of foregoing other purchases.

To put the matter succinctly, the high absolute cost of branded contraceptives, IUDs, and drug implants is material for women of most income groups. And, women of most income groups who use the least expensive forms of contraception would consider using more expensive forms if the out-of-pocket cost were not a factor (as it would not be under the Mandate).<sup>153</sup> This burden is also borne by male and female employees whose

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<sup>151</sup> Although we focus here on the materiality of out-of-pocket financial costs, others have argued that RFRA exemptions would also impose less tangible costs. *See, e.g.*, Loewentheil, *supra* note 10, at 53–55 (arguing RFRA exemptions from the Mandate would symbolically place the government on the side of believers as against the ability of women to participate in the economic and social life of the nation by controlling reproduction).

<sup>152</sup> *See id.* at 53.

<sup>153</sup> Although not directly relevant to the materiality of shifted costs, the burden on employees can be measured by its breadth as well as its effect on each individual. For-profit employers employ tens of millions of people; exemption of even a small percentage of such employers from the Mandate would financially burden large numbers of people. The situation is further complicated by the fact that it will rarely be clear to prospective employees that a for-profit corporation providing secular goods or services is a “religious organization” or “exercising religion” as those terms are ordinarily understood. Before the controversy and litigation over the Mandate, for example, few people (including prospective and, one imagines, even some existing employees) suspected that Hobby Lobby self-identifies as a religious organization. *Cf. Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1164 (10th Cir. 2013) (en banc) (Briscoe, C.J., concurring in part and dissenting in part) (noting the paucity of evidence that Hobby Lobby was actually operated as a religious organization), No. 13-354 (U.S. argued Mar. 25, 2014); *accord Korte v. Sebelius*, 735 F.3d 654, 703 (7th Cir. 2013) (Rovner, J., dissenting) (same regarding corporate plaintiffs in that case). The general public would likely also be surprised to learn that many well-known national corporations engaged in unambiguously secular activities claim to self-identify as religious. *See* Mark Oppenheimer, *At Christian Companies, Religious Principles Complement Business Practices*, N.Y. TIMES (Aug. 2, 2013), <http://www.nytimes.com/2013/08/03/us/at-christian-companies-religious-principles-complement-business-practices.html?smid=pl-share>, archived at <http://perma.cc/JBG2-MQW2> (noting “In-N-Out Burger, Chick-fil-A, the trucking company Covenant Transport, and the clothing store Forever 21 all call or market themselves as Christian or faith-based,” and Tyson Foods and Domino’s Pizza were founded by religious conservatives). This is not to mention countless small or local companies that do so as well.

Another real but not easily quantified cost would be the undermining of the health of women covered by RFRA-exempted plans, and a perpetuation of inequality in payment for healthcare and in workplace competition. Professor Koppelman succinctly summarizes these costs:

spouses and dependents are beneficiaries of health plans sponsored by RFRA-exempted employers.<sup>154</sup>

Direct, out-of-pocket financial costs to employees are the easiest to quantify, but they are not the only material costs shifted from employers to employees by RFRA exemptions. Individuals who wish to take advantage of their legal entitlement to contraceptive coverage under the ACA would have to decline employment opportunities with companies that are or might be exempted from the Mandate. In times and localities in which jobs are scarce, this will either significantly limit an individual's employment options, or cause her to sacrifice a legal entitlement as the cost of obtaining or keeping a job.

The loss of contraception without cost sharing is a material shifted cost. It is reasonable to think that a portion of the millions of employees and family members affected by a RFRA exemption will consider forgoing the contraceptive services they prefer in favor of less effective, cheaper methods. The requirement that they pay out-of-pocket for contraception significantly alters the "mix of information" bearing on decisions about which method of contraception to use.<sup>155</sup> Women who must pay out-of-pocket for contraception are less likely to effectively avoid unplanned pregnancies, and they and their children are likely to face significant health risks as a result.<sup>156</sup> In crafting the Mandate, the Departments acknowledged the greater risk of

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If the fundamental purpose of government is to empower people to lead good lives, then a basic element of this is enabling them to control their fertility. Unwanted pregnancy can deprive a person of control over the entire course of her life. It also is relevant that one of the principal equities of the health care system before the Affordable Care Act was that insurance often excluded coverage of medical needs specific to women, and so women bore higher health care costs than men — as much as a billion dollars a year in the aggregate.

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The contraception mandate improves the health of pregnant women and newborns, reduces the disparity in health costs between men and women, and most importantly, allows women to determine the course of their lives.

Koppelman, *supra* note 4, at 158, 162.

<sup>154</sup> Since the passage of the Affordable Care Act, young adults may remain on a parent's health insurance policy until they turn twenty-six years old, even if they are married, not living with their parents, financially independent, or eligible to enroll in their own employer's plan. 29 C.F.R. §§ 2590.715–2714 (2013).

<sup>155</sup> See *supra* section II.C.

<sup>156</sup> See Gedicks, *supra* note 9, at 149 & n.66; Brief of Guttmacher Institute as Amicus Curiae Supporting Government, at 21–22, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 28, 2014).

Health risks most directly burden the women and children who bear them, but they also come at a cost to society more generally. Healthier populations are less of a strain on social safety nets. Additionally, the effectiveness of the Mandate as a policy tool to increase the health of the country would be significantly compromised if accommodations become commonplace. Standing alone, these generalized costs may be marginal, like increased tax burdens or the likelihood of nonpacifists being drafted. Therefore, they are probably not material enough to rise to the level of an Establishment Clause violation. But when viewed as part of the cumulative costs of accommodation on third parties, these added costs demonstrate that the overall burden would be high.

preterm birth and low birth weight when pregnancies are unintended.<sup>157</sup> Women with unintended pregnancies are often unaware of their pregnancies for longer than women with intended pregnancies. They may unwittingly delay seeking prenatal care or discontinuing harmful behaviors such as alcohol use or smoking until later in their pregnancies, when substantial harm to the fetus already may have occurred.<sup>158</sup> Even when women are not surprised by pregnancy, a longer period between two pregnancies — the “interpregnancy interval” — decreases the later child’s risks of low birth weight, preterm birth, and small size for gestational age.<sup>159</sup>

In short, if RFRA exemptions are granted to otherwise nonexempt religious nonprofit and secular for-profit businesses with owners who religiously object to the Mandate, employees and their covered dependents will lose hundreds of dollars annually as the result of a permissive accommodation from which they derive no benefit. They will suffer health risks as well as healthcare and workplace inequalities. These costs are material because they are significant enough that a reasonable person would consider them in deciding whether to use less effective contraception or forgo it altogether. Applying RFRA to exempt such employers from the Mandate thus violates the Establishment Clause prohibition of permissive accommodations that shift the material costs of accommodation from believers to nonadherents and other third parties.<sup>160</sup>

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<sup>157</sup> Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8727 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

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

<sup>159</sup> Sonfield, *supra* note 148, at 8.

<sup>160</sup> RFRA exemptions from the Mandate may also violate the Establishment Clause in another way, independent of their constitutionally impermissible cost shifting. As discussed, *see supra* text accompanying notes 72–78, since 1977 the Supreme Court and the U.S. Courts of Appeal have construed Title VII to permit accommodations of employee religions only when the cost to employers is insignificant or *de minimis*, because accommodation at the material expense of the employer or other employees would constitute the very religious discrimination that Title VII prohibits. For nearly forty years, therefore, employees have been entitled to accommodation of their religious beliefs and practices under Title VII only when accommodation is essentially costless to the employer and other employees.

The exemption jurisprudence of Title VII, however, is in serious tension with employer exemptions under RFRA. A RFRA exemption for an employer with religious objections to the Mandate, for example, would accommodate its religion despite the material costs exemption would impose on its employees. By contrast, accommodation of the religious beliefs and practices of those very same employees is precluded by Title VII whenever it would impose comparable material costs on the RFRA-exempted employer or other employees, since under Title VII employee exemptions are permitted only when such costs are insignificant.

There is no imaginable justification for a permissive accommodation regime in which the government affords *employer* religions more protection in the for-profit workplace than *employee* religions. This sort of accommodation regime may violate the Establishment Clause as a governmental preference for the religious beliefs of employers over those of employees. *Cf.* Bd. of Educ. v. Grumet (*Kiryas Joel*), 512 U.S. 687, 690 (1994) (sect-specific accommodation violated Establishment Clause in absence of evidence that other religions would be similarly accommodated); Larson v. Valente, 456 U.S. 228, 246 (1982) (laws exhibiting denominational preference subject to strict scrutiny under the Establishment Clause). *See also* Ira C. Lupu & Robert W. Tuttle, *Symposium: Religious Questions and Saving Constructions*, SCOTUSBLOG

*D. RFRA Exemptions and Litigation Opponents*

Many churches and other such religious employers are already exempt from the Mandate and so have no need to bring a RFRA claim.<sup>161</sup> Of employers that remain subject to the Mandate, those that would create the most severe negative externalities on third parties are for-profit businesses that seek total exemption from the Mandate under RFRA. This accommodation would almost certainly impose unconstitutional burdens on third parties.

Because RFRA authorizes a court to grant any “appropriate relief,” courts ruling on RFRA challenges to the Mandate might allow something less than a complete exemption even if the challenge is successful. For example, a for-profit employer might claim the same accommodation as that afforded to religious nonprofit employers under the Mandate — to have employee contraception covered by third-party insurers or administrators — or a court might impose that remedy as “appropriate relief.”

Finally, self-certifying nonprofit employers may feel that the federal regulations inadequately accommodate their beliefs.<sup>162</sup> If those employers bring a successful RFRA claim to seek a complete exemption from the Mandate, such an accommodation would impose at least some constitutionally significant costs on others.<sup>163</sup>

*1. Churches and Integrated Auxiliaries.*

Churches and their integrated auxiliaries are the employers best situated to argue that they need not be subject to the Mandate because their employees are overwhelmingly likely to share their anticontraception views. These employers, of course, are already entirely exempt from the Mandate.<sup>164</sup>

Where the employer is an actual church, association of churches, or an “integrated auxiliary” closely related to a church, it possesses a statutory right under Title VII to discriminate in favor of employees who faithfully follow the religious employer’s teachings. Although employees of churches are certainly bearing a significant burden as a result of this exemption, in the loss of the statutory protections of Title VII, actual churches have a strong constitutional interest in ordering their “internal affairs,” including the defi-

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(Feb. 18, 2014, 11:13 AM), <http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/>, archived at <http://perma.cc/4B38-KS8R> (“Weaving together the threads of *Hardison*, *Caldor*, and *Cutter*, the Court [in *Hobby Lobby*] should recognize the government’s ‘compelling interest’ in limiting employers to exemptions that impose no more than de minimis harm on employees . . . in symmetry with employees asserting rights under Title VII . . .”).

<sup>161</sup> See *supra* section I.A.

<sup>162</sup> For-profit employers challenging the Mandate under RFRA have uniformly claimed a right to complete exemption rather than to the religious nonprofit accommodation (which, of course, has also been deemed inadequate even by many religious nonprofits).

<sup>163</sup> See *supra* text accompanying notes 44–46.

<sup>164</sup> See *supra* section I.A.

dition and pursuit of the church's religious mission.<sup>165</sup> Churches thus have powerful interests in ensuring that the individuals who participate in this mission and represent it to the outside world are not only members of their belief system, but exemplary ones.<sup>166</sup>

## 2. *Nonprofit Religious Organizations.*

*Amos* held that it was permissible for Congress to categorically exempt all nonprofit activities of religious organizations from the religious discrimination requirements of Title VII.<sup>167</sup> Unlike churches, however, many religious nonprofits choose to hire from the general pool of applicants, rather than exclusively from a specific religious group. They are thus more likely than churches to employ nonadherents or adherents who understand the requirements of the affiliated religion differently.

In short, granting religious nonprofit organizations that are unsatisfied with the regulatory compromise a complete RFRA exemption from the Mandate would often impose impermissibly heavy burdens on their employees in the same way as granting for-profit employers a complete exemption from the Mandate.

## 3. *For-Profit Businesses Owned by Religious Individuals.*

In *Amos*, Justice Brennan wrote separately to “emphasize” that the Court's holding only applied to the nonprofit activities of religious nonprofit organizations,<sup>168</sup> while expressly leaving open the question whether for-profit businesses might prove that they are religious in character.<sup>169</sup> Some of this uncertainty stems from the difficult judicial analysis that is required to determine whether for-profit activities can ever be sufficiently religious to claim religious group self-definition and autonomy rights. In *Amos*, the Court held that the activities of nonprofit organizations are categorically presumed to be religious in the context of Title VII.<sup>170</sup> But as the Court held and Justice Brennan emphasized in his concurrence, this categorical designation does not reach for-profit activities.<sup>171</sup> Justice Brennan suggested that

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<sup>165</sup> *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

<sup>166</sup> *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Amos*, 483 U.S. at 341 (Brennan, J., concurring in the judgment).

<sup>167</sup> 483 U.S. at 330 (majority opinion).

<sup>168</sup> *Id.* at 340 (Brennan, J., concurring in the judgment).

<sup>169</sup> *Id.* at 345 n.6. “It is also conceivable that some for-profit activities could have a religious character, so that religious discrimination with respect to these activities would be justified in some cases. The cases before us, however, involve a nonprofit organization; I believe that a *categorical* exemption authorizing discrimination is particularly appropriate for such entities, because claims that they possess a religious dimension will be especially colorable.” *Id.* (emphasis added).

<sup>170</sup> *Id.* at 340.

<sup>171</sup> *Id.*

for-profit businesses *might* present a colorable claim for an exemption with respect to activities that “have a religious character,”<sup>172</sup> but the courts would still have to engage in a case-by-case analysis to determine whether the activity was sufficiently religious.<sup>173</sup>

It is not enough for for-profit employers to claim, like churches, that their employees are likely to share their religious beliefs. Unlike churches, for-profit employers are not thought to have a strong church autonomy or religious associational interest in being left free to define a religious mission for their for-profit business, whereas these same interests allow and may compel government to leave churches and religious nonprofits free to engage in precisely this self-definition. Many individuals who subscribe to religious faiths that condemn contraception will nevertheless use contraception themselves.<sup>174</sup> Those employees would still be burdened with paying out-of-pocket for contraceptives that would otherwise be supplied to them without cost sharing.

Furthermore, for-profit employers subject to the Mandate are in most cases subject to Title VII,<sup>175</sup> which prohibits discrimination based on religion.<sup>176</sup> Even if the employees happened to share the religious beliefs of the employers, they are protected by the religious discrimination prohibition in Title VII from employers who would inquire into their particular religious beliefs and practices. For-profit employers are thus barred from controlling the religious practices of their employees, because they cannot discriminate in hiring and firing in favor of those with religious anticontraception beliefs.<sup>177</sup>

Not only are employers prohibited from asking their employees about their specific religious beliefs and practices, including whether they use contraceptives, but contraceptive use is “protected health information” that, under the Health Insurance Portability and Accountability Act of 1996,<sup>178</sup> insurance companies and other healthcare providers are prohibited from disclosing to employers.<sup>179</sup>

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<sup>172</sup> *Id.* at 345 n.6.

<sup>173</sup> *Id.* at 340.

<sup>174</sup> *Cf. Corbin, supra* note 10, at 156 (“98% of American Catholic women have used contraception.”).

<sup>175</sup> Title VII applies to all “employers,” which means “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” 42 U.S.C. § 2000e (2011).

<sup>176</sup> *Id.* § 2000e-2(a) (“It shall be an unlawful employment practice for an employer to . . . discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”).

<sup>177</sup> *Cf. Amos*, 483 U.S. at 329–30 (finding nonprofit organization owned by church permitted to fire employee who did not adhere to basic tenets of faith).

<sup>178</sup> Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

<sup>179</sup> 45 C.F.R. § 164.502 (2013) (healthcare providers may not disclose protected health information except in limited circumstances).



In short, even if religious employers could make the showing that Justice Brennan suggests in *Amos*, and demonstrate that they have a colorable religious dimension, for-profit employers are constrained by civil rights and privacy laws from avoiding unconstitutional cost shifting by attempting to assemble a workforce that uniformly reflects the employer's religious anticontraception beliefs.

#### CONCLUSION: "RELIGIOUS LIBERTY" AND THIRD-PARTY BURDENS

Numerous studies have documented the remarkable religious pluralism of the contemporary United States — including dramatically increasing numbers of unbelievers as well as believers who do not identify with a religion or even as religious.<sup>180</sup> Religious liberty remains a good of American society, but it is only one of many such goods, and no longer the predominant one.<sup>181</sup> In such an environment, there is a limit to what the government can do to accommodate religious beliefs and practices when the effect of accommodation would reach far beyond the intended beneficiaries to burden the religious and other liberties of those who reject the accommodated beliefs and practices.<sup>182</sup>

Despite the weakness of their constitutional free-exercise claims,<sup>183</sup> Mandate opponents have relentlessly deployed the rhetoric of "religious liberty" against the Obama administration,<sup>184</sup> going so far as to accuse it of a waging a "war on religion."<sup>185</sup> Whatever one might think of the original

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<sup>180</sup> See, e.g., ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE* 3 (2010); PewResearch Religion & Pub. Life Project, *Religious Landscape Survey*, PEWRESEARCH, <http://religions.pewforum.org/> (last visited Mar. 1, 2014), archived at <http://perma.cc/VGE2-PVKT>.

<sup>181</sup> Cf. Koppelman, *supra* note 4, at 156 ("[R]eligion is one among many incommensurable human goods that the state is bound to respect and promote. . . . That's a reason to promote religious liberty, but it is not a reason to elevate religious liberty over other equally valid human ends.").

<sup>182</sup> See, e.g., *United States v. Lee*, 455 U.S. 252, 261 (1982). "[E]very person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others." *Id.*; see also *Catholic Charities v. Serio*, 859 N.E.2d 459, 468 (N.Y. 2006) ("[W]hen a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit.").

<sup>183</sup> See *supra* note 4.

<sup>184</sup> Letter from Rev. Paul S. Loverde, Bishop of Arlington, and Rev. Francis X. DiLorenzo, Bishop of Richmond (Jan. 30, 2012), available at <http://www.vacatholic.org/documents/HHSMandate-BishopsLetter-Jan2012.pdf>, archived at <http://perma.cc/4GTQ-T7HV> ("[In issuing the Mandate,] the Administration has cast aside the First Amendment of the Constitution of the United States, denying to Catholics our Nation's first and most fundamental freedom, that of religious liberty. . . . We cannot — we will not — comply with this unjust law.").

<sup>185</sup> See, e.g., PHYLLIS SCHLAFELY & GEORGE NEUMAYR, *NO HIGHER POWER: OBAMA'S WAR ON RELIGIOUS FREEDOM* (2012); Bill Donohue, *Obama's War on Religion*, CATALYST (Oct. 2012), <http://www.catholicleague.org/obamas-war-on-religion-2/>, archived at <http://perma.cc/>

regulatory proposals implementing the Mandate, the final rules refute this accusation: the rules implement substantial protection for the liberty of those religious groups that have traditionally enjoyed special treatment under American law — churches and religious nonprofit organizations — and are strong evidence of the extent to which the administration listened and responded to the religious liberty concerns of such groups while still adhering to the statutory purposes and directives of the ACA,<sup>186</sup> which is the constitutional law of the land.<sup>187</sup>

For many Mandate opponents, this is not enough. They insist that RFRA — if not the Free Exercise Clause itself — grants them a total exemption from the Mandate, an exemption that will deprive millions of women of the considerable benefits of contraceptive coverage without additional cost. They insist on the priority of their own religious liberty, in other words, without apparent care for its cost to those who believe and live differently.<sup>188</sup>

But this is also a violation of “religious liberty” — the liberty, long protected by the Establishment Clause, to live one’s life free of the religious commitments of others. And unlike statutory claims asserted under RFRA, this liberty is protected by the Constitution.

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XD8A-NQX5; see also Rachel Weiner, *Romney Ad: Obama Waging ‘War on Religion,’* WASH. POST — THE FIX (Aug. 9, 2012, 8:04 AM), [http://www.washingtonpost.com/blogs/the-fix/post/romney-obama-waging-war-on-religion/2012/08/09/192c4e02-e213-11e1-a25e-15067bb31849\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/romney-obama-waging-war-on-religion/2012/08/09/192c4e02-e213-11e1-a25e-15067bb31849_blog.html), archived at <http://perma.cc/E5UG-6PEX> (“During the Republican primary, when the Health and Human Services Department mandated that most insurance cover contraception without a co-pay, charges of a war on religion were commonplace.”).

<sup>186</sup> See, e.g., Laycock, *Religious Liberty*, *supra* note 4, at 24 (“[The] *Final Rules* offer a serious plan to protect religious liberty without depriving women of contraception.”); Lynch, *supra* note 10, at 122 (“[T]he government’s bend-over-backwards efforts to accommodate religious employers with objections to the contraceptives coverage mandate demonstrates how serious the Obama Administration is about preserving religious liberty without sacrificing patient access.”).

<sup>187</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012).

<sup>188</sup> See, e.g., Symposium, *supra* note 10, at 2 (“[T]he bishops make no effort to understand why their antagonists think that justice requires what the Catholic hierarchy thinks it forbids.”). As Cathleen Kaveny has pointed out, there is no little irony in the bishop’s lack of concern for those who would be harmed by exemptions from the mandate, since “[f]or years, Catholic moralists and lawyers have railed against the assertion of rights claims without any consideration of relational responsibilities.” Symposium, *supra* note 10, at 10.