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RELIGIOUS EXEMPTIONS, THIRD-PARTY HARMS, AND THE ESTABLISHMENT CLAUSE

*Christopher C. Lund**

Religious exemptions are important, and sometimes required by the Free Exercise Clause. But religious exemptions can also be troubling, and sometimes forbidden by the Establishment Clause. It is the latter issue with which this Essay concerns itself.

The Establishment Clause forbids religious favoritism, or at least many of us think it does. And if that's true, the Establishment Clause naturally prohibits religious exemptions when they amount to religious favoritism. Now the argument that religious exemptions *always* amount to religious favoritism has never persuaded the Court. It is just too obvious that one can support religious exemptions without necessarily supporting the religious belief or practice underlying it.¹ It is not for the truth of the matter asserted, a trial lawyer might say.

Even so, particular religious exemptions might still violate the Establishment Clause. One might think, for example, of the parsonage allowance.² But that may not be the best example, because it might be too easy. The parsonage allowance is a tax exemption rather than a regulatory one, and (at least from one perspective) tax exemption is equivalent to government subsidy, and government subsidy of clergy implicates the core of the Establish-

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1 To give just one example, the Supreme Court unanimously protected the use of hoasca when used sacramentally by a small Brazilian religious group, even though presumably no one on the Court uses hoasca or thinks it efficacious in worship. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

2 The parsonage allowance, 26 U.S.C. § 107 (2012), allows ministers to deduct the fair-rental value of their homes from their income. It is broader than the exemption available to anyone whose job requires them to live in employer-provided housing, 26 U.S.C. § 119, because clergy can deduct the value of their home regardless of how much they use it for work.

ment Clause.³ But one could imagine a regulatory exemption that amounts to religious favoritism. An exemption sufficiently disconnected from the protection of religious exercise—a modern benefit-of-clergy statute, for example, that exempted ministers from the murder laws—would seem to be a solid case of that.⁴ None of this seems all that controversial.

But now a different question, which raises a different conception of the Establishment Clause: When are religious exemptions improper or unconstitutional because they burden third parties? This issue of third-party harms has received a lot of attention,⁵ especially in light of *Hobby Lobby*.⁶ *Hobby Lobby* initially sought an exemption from the contraceptive mandate that would have come at the expense of their employees, who would have then lacked insurance coverage for certain forms of contraception. The employees would have had, in essence, to shoulder the cost of someone else's religious commitments.

The general principle here—that burdens on third parties matter—is well established. It fits with common sense; it accords with long-established free exercise notions of what counts as a compelling governmental interest. It also fits with well-established Establishment Clause precedent. In *Cutter v. Wilkinson*, following longstanding precedent, a unanimous Court said plainly that religious exemptions must “take adequate account of the burdens . . . impose[d] on nonbeneficiaries.”⁷ That seems to answer it.

I. FOUR FACTORS

Even so, much of the debate thus far has been about whether this third-party harm principle exists rather than what it might mean. Disagreements over baseline issues have taken up a lot of attention.⁸ Take *Hobby Lobby*. One

3 Insiders know how the Supreme Court has gone back and forth on the issue of whether tax exemptions should be equated with monetary grants for Establishment Clause purposes. Sometimes the Court has emphasized their similarities. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989); *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). Sometimes the Court has emphasized their differences. See *Mueller v. Allen*, 463 U.S. 388, 396 n.6 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970).

4 “Benefit of clergy” originally allowed clergy to claim they were outside the jurisdiction of the secular courts and thus should be tried by the (usually) more lenient ecclesiastical courts. Benefit of clergy declined slowly as various limitations were placed on it. Benefit of clergy was abolished for murder, for example, under King Henry VII. See *An Acte to Make Some Offence Petty Treason*, 1496, 12 Hen. 7 c. 7 (Eng.), reprinted in 2 THE STATUTES OF THE REALM 639 (1819).

5 See, e.g., Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014).

6 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

7 *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (citations and quotations omitted).

8 See, e.g., Marc O. DeGirolami, *On the Claim That Exemptions from the Contraception Mandate Violate the Establishment Clause*, CTR. FOR L. & RELIGION F. (Dec. 5, 2013), <http://>

side says the baseline is the Affordable Care Act, and that any religious exemption to it therefore imposes discrete harm on workers. The other side says the baseline is the situation before the Affordable Care Act, as the objection in *Hobby Lobby* is directed at the Act itself, seeing it as a violation of religious conscience.

This dispute deserves the attention it has gotten. But this Essay will accept that third-party harms matter.⁹ (Otherwise this Essay will be over before it starts.) It turns instead to the practical details of the theory. And while this piece is a quick and rough examination of the issue, this Essay will suggest four factors relevant to the issue of third-party harms.

A. *The Magnitude of the Third-Party Harm*

The first is perhaps the most obvious and the most important—how severely are third parties injured by the religious exemption in question? How heavy is the third-party burden? This was one of the points stressed in *Hobby Lobby*, when scholars pointed out how severely the religious exemption would affect the female employees of Hobby Lobby.¹⁰ The greater the third-party harm, the more problematic the religious exemption becomes. The difficulty here, of course, will be in categorizing the various kinds of harms and in figuring out how much harm is too much. *Caldor* spoke of “significant” burdens.¹¹ But the significance of a burden is more of a spectral variable than a dichotomous one, and there will be no clear boundary between significant and insignificant burdens. One wonderful little recent case, reminiscent of Joel Feinberg’s old bus hypothetical,¹² involves an Establishment Clause challenge to a local noise ordinance that exempted church bells.¹³ The plaintiff said the bells had wrecked his marriage;¹⁴ it is not clear whether

clrforum.org/2013/12/05/on-the-claim-that-exemptions-from-the-contraception-mandate-violate-the-establishment-clause/; Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BALKINIZATION (Dec. 4, 2013), <http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html>; Eugene Volokh, *Prof. Michael McConnell (Stanford) on the Hobby Lobby Arguments*, WASH. POST: VOLOKH CONSPIRACY (Mar. 27, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/>; Kevin C. Walsh, *A Baseline Problem for the “Burden on Employees” Argument Against RFRA-Based Exemptions from the Contraceptives Mandate*, MIRROR OF JUSTICE (Jan. 17, 2014), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2014/01/a-baseline-problem-for-the-burden-on-employees-argument-against-rfra-based-exemptions-from-the-contr.html>.

9 Even the Court in *Hobby Lobby* took this as settled. See *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (citing *Cutter*, 544 U.S. at 720).

10 See, e.g., Gedicks & Van Tassel, *supra* note 5, at 375–79.

11 *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

12 JOEL FEINBERG, *OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 10–13 (1985).

13 *Devaney v. Kilmartin*, 88 F. Supp. 3d 34 (D.R.I. 2015).

14 *Id.* at 40 (“The impact of this accumulation of sound on Mr. Devaney has been catastrophic: despite no air-conditioning, he is forced to keep the storm windows closed

the district judge took this claim seriously or not.¹⁵ But the case prompts useful questions about what harms should count. Is the sound of church bells too trifling to count as a harm? On the other hand, doesn't it matter how loud they are? In any event, the questions with this first factor may be difficult but they are relatively straightforward. What kinds of harms to third parties count? Which kinds of harms are the most severe? And how much harm is too much?

B. *The Likelihood of the Third-Party Harm*

Just as the magnitude of the threatened harm is important, so too is the likelihood of it actually happening. *Holt v. Hobbs*, the Supreme Court's recent case about beard-length restrictions in prison, is precisely this kind of case.¹⁶ Arkansas raised security concerns as a reason for denying Gregory Holt permission to wear a half-inch beard; Arkansas saw his beard as a threat to prison guards and other inmates.¹⁷ But the Court decided that those threatened harms—which were certainly serious enough—were just not sufficiently likely to happen.¹⁸ Perhaps religious draft exemptions can be explained the same way. The likelihood of you being drafted because someone else got an exemption is infinitesimal; it is barely more than the risk you had originally of being drafted.¹⁹ And related here is a point about the *spread* of third-party burdens. Even large burdens, if sufficiently diffused over enough people, do not seem all that troubling. The aggregate cost of the Bureau of Prisons providing Kosher meals to inmates may be enormous, but it is spread over all federal taxpayers and so any individual's share will be quite small.

and to wear earplugs, his marriage has collapsed and he has been alienated from his children.”).

15 After describing the plaintiff's allegations, the judge refers to the plaintiff's “understandable rage at the Churches,” *id.* at 56 (footnote omitted), but then says, “[u]nderstandable, of course, based on the assumption that the facts alleged in his pleading are true, as this Court must assume when assessing whether the Second Amended Complaint states a claim.” *Id.* at 56 n.18.

16 135 S. Ct. 853 (2015). Of course, *Holt v. Hobbs* was a RLUIPA case and not an Establishment Clause case. But the facts of this case are helpful and well known, and it seems obvious that the Court did not think the religious exemption at stake would violate the Establishment Clause.

17 See *id.* at 859–61.

18 Justice Alito joked at oral argument about a prisoner using his half-inch beard to conceal a revolver. See Transcript of Oral Argument at 49, *Holt*, 135 S. Ct. 853 (No. 13-6827) (“[A]s far as searching a beard is concerned, why can't the prison just give the inmate a comb, you could develop whatever kind of comb you want, and say comb your beard, and if there's anything in there, if there's a SIM card in there or a revolver or anything else you think . . . can be hidden in a [half-inch] beard, a tiny revolver, it'll fall out.”).

19 See Gedicks & Van Tassell, *supra* note 5, at 367 (noting this is “a slight, marginal increase in the large preexisting risk of being drafted”).

As an even clearer example of the likelihood factor coming into play, consider a thorny and fascinating issue arising in child-custody cases between divorced parents when one is a Jehovah's Witness and the other is not. Jehovah's Witnesses refuse blood transfusions for religious reasons. And in these custody proceedings, this creates a logical and almost irresistible line of attack: if the child gets sick, he might end up needing a blood transfusion, and she might not give it to him because she's a Jehovah's Witness, and he could die. Now it is rightly settled that parents cannot legally deny blood transfusions to their minor children.²⁰ (This, of course, is yet another manifestation of our third-party-harm principle at work.) But a problem arises because this argument takes place routinely in custody disagreements even when the child is perfectly healthy and when there is no solid evidence the religious parent would try to deny the child a blood transfusion anyway. Courts here have rejected the third-party burden argument not because the threatened harm to third parties is insufficiently grave but because it is insufficiently likely.²¹

C. *The Religious Interest at Stake*

A third factor is the magnitude of the religious interest on the other side. A strong religious interest in an exemption justifies more of a burden being placed on third parties. This becomes clear when one considers the cases together. Compare, for example, the employees in *Hobby Lobby* with those in *Amos*.²² The potential harm to the employees in *Hobby Lobby* was the

20 See B. Jessie Hill, *Medical Decision Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL'Y 37, 45–46 (2012) (“Parents have authority to consent to, or withhold consent for, health care for their children that is routine but not, strictly speaking, medically necessary. . . . But with medical treatment that is required to prevent serious harm to the child, it may be accurate to say that parents both can and must consent on behalf of their children.” (footnote omitted)).

21 This issue receives surprisingly little academic attention given the frequency of the cases in the lower courts. Courts have rightly insisted on some amount of evidentiary proof before taking away custody on this ground. See, e.g., *Harrison v. Tauheed*, 256 P.3d 851, 867 (Kan. 2011) (“It would not have been appropriate for [the district judge] to speculate about an unlikely future event; and, in fact, Monica [the Jehovah's Witness parent] testified that she would consult Adiel [the non-Jehovah's Witness parent] in the event a blood transfusion was recommended for J.D.H. . . . [And] Adiel would be empowered to consent to the treatment for his minor son.”); *Garrett v. Garrett*, 527 N.W.2d 213, 221 (Neb. Ct. App. 1995) (“[N]o evidence was presented showing that any of the minor children were prone to accidents or were plagued with any sort of affliction that might necessitate a blood transfusion in the near future. We cannot decide this case based on some hypothetical future accident or illness which might necessitate such treatment.”); *Varnum v. Varnum*, 586 A.2d 1107, 1112 (Vt. 1990) (“We are also concerned about the use of the finding that defendant would not allow her children to have blood transfusions even if medically necessary, in the absence of any evidence that such an eventuality is likely and cannot be resolved in ways other than depriving defendant of custody.” (citations omitted)).

22 *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (upholding, from Establishment Clause challenge, the federal

loss of part of the contraceptive coverage provided by their medical insurance. But the employees in *Amos* lost their jobs and everything that came with them: their contraceptive coverage if any, their medical insurance, their retirement benefits, and (most importantly) their salaries. The same thing was true in *Hosanna-Tabor*, where the Court said that the Establishment Clause did not just allow the ministerial exception but required it.²³ The third-party burden in *Hobby Lobby* was thus a lesser-included case of the third-party burden in both *Amos* and *Hosanna-Tabor*. But the Court unanimously upheld the religious exemption in the latter two cases. That could mean that the Establishment Clause claim in *Hobby Lobby* is frivolous. But a better way of thinking about it is that the religious interest at stake in cases like *Amos* and *Hosanna-Tabor* is more serious. And the more serious the religious interest, the more of a third-party burden it justifies.

One can see this point a different way by viewing *Amos* from another angle. Remember that *Amos* upheld a statute shielding religious organizations from claims of *religious* discrimination in employment.²⁴ But some states go further, immunizing religious organizations from all claims of discrimination—race, gender, disability, etc.²⁵ Courts rightly see the latter immunities as creating much more of a constitutional concern, even though from the employee’s perspective, they involve the same third-party harm.²⁶

As a final example of this point, return to *Hobby Lobby* and recall how certain highly religious nonprofits—like churches and associations of churches—were, from the very beginning, exempt entirely from the contraceptive mandate.²⁷ Few think that exemption violates the Establishment Clause, though it too creates precisely the same burden on third parties. Part of this relates back to our first factor (the magnitude of the third-party harm), in the sense that fewer women at these highly religious institutions will want to use the prohibited forms of contraception. But if there is a single woman working at a church who wants them—and surely there is—then she suffers precisely the same third-party harm as an employee denied contraception by *Hobby Lobby*. So part of the analysis must also be about the strength of the religious interest in obtaining an exemption.²⁸

statute that shields religious organizations from claims of religious discrimination by all employees, ministerial or non-ministerial).

23 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

24 *Amos*, 483 U.S. at 339.

25 See, e.g., WASH. REV. CODE § 49.60.040(11) (2015) (“‘Employer’ includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.”).

26 See, e.g., *Ockletree v. Franciscan Health Sys.*, 317 P.3d 1009, 1020 (Wash. 2014) (upholding the exemption discussed in footnote 25).

27 See Exemption and Accommodations in Connection with Coverage of Preventative Health Services, 45 C.F.R. § 147.131(a) (2014).

28 In his *Hobby Lobby* brief, in discussing the exemption of highly religious employers, the Solicitor General emphasized both the strength of the religious interest and the less-

D. Exemptions Made for Nonreligious Reasons

Also relevant are the secular exemptions made by the law in question. Now when secular exemptions are enough to *create* a right of religious exemption under the Free Exercise Clause is a highly contested matter—at some point, if there are enough of them, the law is no longer generally applicable. But when secular exemptions are enough to *protect* an existing religious exemption from Establishment Clause invalidation is a different issue altogether.

Again take *Hobby Lobby*, where scholars contended that the sought-after religious exemption would have unconstitutionally burdened third parties. The existing exceptions for small employers and grandfathered plans,²⁹ which limited the health coverage of millions of employees,³⁰ are surely relevant to the Establishment Clause issue. The more secular exceptions there are, the more understandable a religious exemption becomes.

II. THREE QUESTIONS

This Essay has tried to sketch a theory of what factors might enter into the analysis of when religious exemptions violate the Establishment Clause. It ends with a sketch of three general questions that any theory of third-party harms will have to address, at least at some point.

A. A Concern About Balancing

Any theory of third-party harms will have to involve a number of considerations, and above, this Essay has sketched out some likely candidates. But the very fact that a number of considerations will inevitably be involved raises an important concern about balancing. *Employment Division v. Smith*³¹ aban-

ened nature of the third-party harm. See Brief for the Petitioners at 51–52, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486, at *51–52 (“The regulatory exemption for religious employers extends to ‘churches and other houses of worship’ and their integrated auxiliaries. . . . [T]here is a long tradition of protecting the autonomy of a church through exemptions of this kind. The Religion Clauses of the First Amendment give ‘special solicitude to the rights of religious organizations as religious organizations’ [And] [i]n establishing the religious-employer exemption, the Departments explained that ‘[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection.’” (citations and quotations omitted)).

²⁹ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1251, 1304(b), 1513, 124 Stat. 119, 161–62, 172, 253–56 (2010) (codified as amended at 42 U.S.C. §§ 18011, 18024 (2012); 26 U.S.C. § 4980H (2012)).

³⁰ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2764 (2014) (“Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers.”).

³¹ 494 U.S. 872 (1990).

done judicially required exemptions in significant part because the Court was so convinced of the inappropriateness of judicial balancing.³² *Smith* openly feared judges trying to balance the need for a religious exemption against the harm created by a religious exemption. But any theory of third-party harm will require exactly this kind of balancing. Now for those who think *Smith* was a mistake, that will probably not be much of a problem. But the defenders of *Smith* will be harder to convince, especially now, with some of the concerns (like respect for democratic decisionmaking) on the other foot.

B. *A Concern About Justification*

The third-party harm argument seems intuitive at first glance; that people should not bear the cost of other peoples' religious exercise seems quite natural and, at some level, must be right. Even so, when we think about it more, there is reason to pause, for legislatures distribute and redistribute burdens all the time—that is the very stuff of legislation. We are routinely expected to bear each other's burdens; remember again *Hobby Lobby* arises only because of the Green family's objections to bearing the burden of providing someone else's contraceptive coverage. But a theory of third-party burdens grounded in the Establishment Clause requires that religious exercise be singled out for disadvantageous treatment. And phrasing it that way provides an occasion for further reflection.

Take again the Establishment Clause issue in *Hobby Lobby*, and consider the existing legislative exceptions for small employers and grandfathered plans. This raises a question: If Congress can legitimately worry about the burdens ACA imposes on small businesses (i.e., the small-employer exception³³) and if Congress can legitimately worry about various problems potentially arising from overly rapid onset of the ACA (i.e., the grandfathered-plan exception³⁴), why can't Congress also legitimately worry about the free exercise of religion? And don't just consider the exemptions that Congress actually made. Think about the exemptions Congress *could* have made. If Congress wanted to exempt McDonald's from the contraceptive mandate, that would have been fine—fine under anyone's theory of the Establishment Clause. Women working at McDonald's would have suffered precisely the same third-party harm as feared in *Hobby Lobby*, but they would have had no legal complaint. Congress could, this argument goes, exempt any business from the mandate and for any reason, as long as that reason isn't a concern about the free exercise of religion.

And, of course, this isn't just about the mandate. Legislatures are in the business of protecting interests. This Establishment Clause argument

32 See, e.g., *id.* at 889 n.5 (“[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”).

33 See Patient Protection and Affordable Care Act, §§ 1304(b), 1513.

34 See *id.* § 1251.

presumes that legislatures can care about any secular interest; they can care about any secular interest to any degree; they can care about any secular interest and impose any kind of third-party harms in pursuit of it—subject only, presumably, to the minimal constraints of the rational-basis test. The one thing that legislatures cannot do is care about free exercise in the same way. Religious liberty is thus relegated to the lowest rung of human values, for it is the only value for which legislatures cannot impose burdens on others. And all this may even be right, but such powerfully distinctive treatment should require an equally powerful set of justifications.

C. *A Concern About Practical Implications*

Theories of third-party harm will also have to deal with existing religious exemptions. Now RFRA is sufficiently malleable to incorporate third-party-harm concerns internally. Accommodations required by RFRA by definition will not violate the Establishment Clause, because any religious accommodation that would violate the Establishment Clause will not be required by RFRA in the first place. But particular religious exemptions will have to be considered in light of our theory. And either the theory will have to square with the exemption, or the exemption will have to fall in light of the theory.

And many long-established religious exemptions impose real harm on others, or at least seem to do so. Take the priest-penitent privilege.³⁵ Consider a tort case where a plaintiff wants a priest's testimony—say the defendant has confessed the bad act to the priest—and the plaintiff might lose the case (and thus thousands of dollars) without it. That is a serious third-party harm. But of course, that third-party harm is only half the story. The alternative is pretty ugly too. We would have to force a priest to testify about what happened in the confessional against his will and against his conscience, which would simultaneously implicate a whole host of concerns—concerns about religious intensity (for Catholics, confession is sacramental and sacraments are at the heart of Catholicism), concerns about futility (the Catholic clergy would probably not comply even if held in contempt), concerns about religious nondiscrimination (confession may not be a sacrament for Protestants or Jews, but they too respect clerical confidences and the law is rightly afraid of drawing lines between faiths), and concerns about the host of ostensibly similar other privileges (between spouses, between doctors and patients, between attorneys and clients). Similar questions about third-party harm could be directed at draft exemptions: religious conscientious objectors have long been protected from the draft, but if objectors are replaced by drafted substitutes, that third-party burden is extraordinary.

Those are two of the most salient examples, but there are many others. Legislative accommodations for religious exercise are all over the place, and they often impose third-party burdens. There are exemptions for churches

³⁵ For a thoughtful overview of the privilege, see *Mockaitis v. Harclerod*, 104 F.3d 1522, 1531–34 (9th Cir. 1997).

from ERISA,³⁶ from the Social Security Act,³⁷ from the Americans with Disabilities Act,³⁸ and from the Copyright Act.³⁹ What happens to them? And what about the exemptions courts have given out? What about the exemptions given in *Yoder*⁴⁰ and *Gonzales*?⁴¹ And what about the exemptions at stake in *Lyng*⁴² and *Lee*,⁴³ which were rejected by the Court but granted subsequently by Congress?⁴⁴ The list goes on and on: one will need to sit down with a list of religious exemptions to think through the ramifications.

III. A PLEA FOR FURTHER THOUGHT

Third-party burdens are an important consideration with regard to religious exemptions. Frankly, third-party burdens are important everywhere. Central to questions of every constitutional right are the harms that a right imposes on others. Hate speech causes genuine harm to others; firearms cause genuine harm to others. The main hesitation about the right established in *New York Times Co. v. Sullivan*⁴⁵ is harm to others, and that is true too for cases as diverse as *Roe v. Wade*⁴⁶ and *Maryland v. Craig*.⁴⁷

It is tempting to say that constitutional rights are fine as long as they impose no harm on others. It is tempting, but it cannot survive scrutiny. Constitutional rights always involve some degree of harm to others.⁴⁸ And our willingness to tolerate that harm depends heavily on context. We once accepted that white suburban families would have to bus their kids to distant and sometimes difficult schools because desegregation was critically impor-

36 See 29 U.S.C. §§ 1002(33), 1003(b)(2) (2012).

37 See 26 U.S.C. § 3121(w) (2012).

38 See 42 U.S.C. § 12187 (2012).

39 See 17 U.S.C. § 110(3) (2012).

40 *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (exempting the Amish from having to send their children to public schools until the age of sixteen).

41 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425, 439 (2006) (exempting the UDV from the Schedule I prohibition of DMT).

42 See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42 (1988).

43 See *United States v. Lee*, 455 U.S. 252, 261 (1982).

44 See Smith River National Recreation Area Act, Pub. L. No. 101-612, 104 Stat. 3209 (1990) (codified at 16 U.S.C. § 460bbb (2012)) (protecting the contested area in *Lyng*); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3781 (codified at 26 U.S.C. § 3127(a) (2012)) (effectively overruling *Lee*).

45 376 U.S. 254 (1964).

46 410 U.S. 113 (1973).

47 497 U.S. 836 (1990).

48 For such a claim in the context of free speech, see Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. REV. 1284, 1294 (1983) (arguing that if we “accept the principle that speech may be restricted when it causes harm to others . . . then what is the point of a principle of free speech?” as “it is hard to think of any first amendment case in which the communicative acts at issue did not cause some degree of harm . . .” (citation omitted)). For such a claim in the context of free exercise, see Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1171 (2007) (“The no-harm principle sounds plausible on first reading, but it cannot withstand analysis.”).

tant;⁴⁹ now we have so much trouble accepting that some students might not get into their preferred college that the Court may toss out affirmative action altogether.⁵⁰ Questions of whether (and how much) I have to pay for your rights are intractable. They will always be with us.

Religious exemptions are, and always have been, matters of degree. Everyone agrees that religious exemptions that impose significant burdens on nonconsenting third parties can be improper and perhaps unconstitutional. But we need to do more to unpack this widely held sentiment if this idea is going to get off the ground. This piece has sketched out a number of relevant factors that will have to be pondered, and a number of issues that will have to be thought through. This short symposium piece leaves almost nothing answered, instead looking forward to the contributions of others in the years to come.

49 See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

50 See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

