

# The “Third Party Harm Rule”: Law or Wishful Thinking?

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## ABSTRACT

*Commentators today suggest that the Establishment Clause forbids religious exemptions when they could lead to harm to third parties. But the public contemporary understanding of the Establishment Clause allowed for such religious exemptions, and the Supreme Court has never adopted such a prohibition. This article demonstrates each of these errors, which in combination reveal that the proposed “third-party harm rule” is just legalistic advocacy—in other words, wishful thinking.*

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## INTRODUCTION

An important event in early American history sheds substantial light on the proper interpretation of the First Amendment’s Establishment Clause as applied

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to exemptions from generally applicable laws. It occurred in Connecticut's First State House<sup>1</sup> in Hartford on October 11, 1792, after the state's ratification of the United States Constitution in early 1788,<sup>2</sup> and after the ratification of the First Amendment and the rest of the Bill of Rights.<sup>3</sup> The event was the Connecticut legislature's passage of a statute to exempt members of a minority religion—the Quakers—from military service.<sup>4</sup> This was significant because, for more than one hundred years, Quakers were persecuted throughout New England and elsewhere for their theology, including their opposition to war or force of any kind.<sup>5</sup> Indeed, a hundred years earlier, at the behest of clergy of the Congregational church—the same church that was the official church of Connecticut—Massachusetts had executed four Quaker missionaries for preaching their version of Christianity.<sup>6</sup> But by 1792, philosophers and more enlightened Christians had persuaded most people in Connecticut and elsewhere that the better approach to dissent was toleration, not persecution.<sup>7</sup> They concluded that, absent the *gravest* danger to the community, people should be allowed to live according to the dictates of their own consciences.

That the Connecticut statute was passed in 1792 illustrates just how serious the danger had to be before the community would override a believer's conscience. At the time, citizens of the fledgling nation remained concerned about military threats, especially from the British (who would in fact invade the country twenty years later in the War of 1812). To prepare to meet such threats, states generally required able-bodied men to train with the state militias, then envisioned as the likely backbone of the national defense. Any substantial exemptions from those requirements would obviously put the rest of the community at risk. Yet the 1792 statute exempted significant numbers of citizens from those requirements:

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1. See *The First State House*, CT.GOV, <http://portal.ct.gov/en/About/State-Symbols/The-First-State-House> [<https://perma.cc/CB5U-B4AS>] (last visited June 18, 2019). This is not to be confused with the Old State House, which was built later. *Id.*

2. See *Ratification of the Constitution by the State of Connecticut*, in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 87–89 (1894).

3. Mary Ryan, *Ratifying the Bill of Rights . . . in 1939*, NAT'L ARCHIVES (Nov. 25, 2016), <https://prologue.blogs.archives.gov/2016/11/25/ratifying-the-bill-of-rights-in-1939/> [<https://perma.cc/YVH6-G2KY>]; THOMAS H. LE DUC, CONNECTICUT AND THE FIRST TEN AMENDMENTS TO THE FEDERAL CONSTITUTION, S. DOC. NO. 75-96, at 2–3 (1937). Ironically, Connecticut did not actually ratify the Bill of Rights until 1939. See *id.*

4. Act for forming and conducting the Military Force of this State (1792), reprinted in ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 298, 309 (Hartford, Hudson & Goodwin 1805) [hereinafter ACTS AND LAWS OF THE STATE OF CONNECTICUT].

5. See generally CONSCIENCE IN AMERICA: A DOCUMENTARY HISTORY OF CONSCIENTIOUS OBJECTION IN AMERICA, 1757–1967 (Lilian Schlissel ed., 1968).

6. See generally Carla Gardina Pestana, *The Quaker Executions as Myth and History*, 80 J. AM. HIST. 441 (1993).

7. See JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD 1 (Hutchins ed., 1952); JAMES M. VOLO & DOROTHY DENNEEN VOLO, FAMILY LIFE IN 17TH- AND 18TH-CENTURY AMERICA 53–55 (2006); see also STEVEN K. GREEN, THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA 123–31 (2010).

“[A]ny of the people called Quakers, who shall produce to the commanding officer . . . a certificate . . . certifying that such person is a Quaker, he shall be exempt from equipping himself or doing military duty as required by this act, on his paying the sum of twenty shillings to such officer . . . .”<sup>8</sup>

There is no doubt that the legislators adopted this exemption knowing that some of *their* constituents—including their own sons and brothers—could well go to war and die in place of Quakers claiming the exemption. And the prospect of death or serious injury resulting from a religious exemption was and remains the paradigmatic “third party harm.” And there is no evidence that anyone viewed such exceptions as an establishment of religion—after all, Connecticut established Congregationalism, not the Quaker faith.

If this law were in effect today, would it violate the now-incorporated First Amendment? According to some lawyers and legal scholars, the answer must be “yes.” For example, a brief filed by Americans United for the Separation of Church and State a few years ago argued that “[t]he Establishment Clause forbids accommodations that would meaningfully burden third parties.”<sup>9</sup> The brief went on to claim there is a general “rule against accommodating religion in ways that burden third parties.”<sup>10</sup> Scholars have made similar claims.<sup>11</sup>

But is this “rule” really law, or is it simply scholarly opinion—or perhaps wishful thinking on the part of its advocates? This is an important question because if the *law* really prohibits exemptions that risk harm to third parties, legislatures should not enact them, regardless of their merits. But if the “rule against third party harms” is not really law, legislatures remain free to enact such exemptions if they feel they are justified on the merits—as the Connecticut legislature did in 1792.

So what, exactly, do we mean by “law”? Or more specifically, what do we mean when we say “the First Amendment forbids X as a matter of law”? That statement has three possible meanings. First, it could mean that the Amendment’s words forbid X of their own force.<sup>12</sup> Second, it could mean that the Amendment, construed in light of public contemporaneous understandings and traditions,

8. Act for forming and conducting the Military Force of this State (1792), *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT *supra* note 4, at 309.

9. Brief for Americans United for the Separation of Church and State as Amicus Curiae Supporting Petitioner at 9, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827) [hereinafter Americans United Amicus Brief].

10. *Id.* at 13.

11. 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 & Andy Toppleman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION (Nov. 27, 2013), <https://balkin.blogspot.com/2013/11/the-establishment-clause-and.html> [<https://perma.cc/JR32-F6LZ>].

12. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (highlighting the “words of the First Amendment”).

forbids X.<sup>13</sup> Did Connecticut think, for example, that it was “establishing” the Quaker faith by granting the religious exemption? Finally, it could mean that the Supreme Court’s binding interpretation of the Amendment forbids X.<sup>14</sup> If any of these is satisfied, it is fair to say the First Amendment forbids X as a matter of law. Let us, then, examine the third-party harm “rule” under each of these criteria.

#### I. DOES THE ESTABLISHMENT CLAUSE ITSELF FORBID EXEMPTIONS THAT HARM THIRD PARTIES?

As to the first possibility: The words of the Establishment Clause, drafted by James Madison in 1789 during the First Congress, specify that “*Congress shall make no law respecting an establishment of religion.*”<sup>15</sup> This provision has three significant features, each of which deserves separate treatment.

“*Establishment of religion.*” Beginning at the end, the provision deals with “establishment[s] of religion.” History indicates that at the time, this meant an official, state-sponsored *church* like the Congregational church that was Connecticut’s official religion until 1818,<sup>16</sup> and which benefited from such governmental support as state-mandated attendance<sup>17</sup> and state-collected taxes.<sup>18</sup>

As Professor Michael McConnell has summarized, the piecemeal legislation that made up the various established churches in the colonies and early states related to “(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.”<sup>19</sup>

It is true that, as Gedicks and Van Tassell note,<sup>20</sup> an established church does create third-party burdens—compulsory church attendance, for instance. But that does not imply that any law that created third-party burdens was necessarily an establishment of religion.<sup>21</sup> To the contrary, the Founding generation viewed establishment as a *bundle* of privileges—not any one law.<sup>22</sup>

13. See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (“It is not necessary to define the precise boundary of the Establishment Clause where history shows the practice is permitted.”); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184 (2012) (relying on historical practice during the Founding Era).

14. See, e.g., *Locke v. Davey*, 540 U.S. 712, 719 (2004) (looking to the Court’s “Establishment Clause precedent”).

15. U.S. CONST. amend. I (emphases added).

16. GREEN, *supra* note 7, at 123–31.

17. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2145–46 (2003).

18. *Id.* at 2152; see also, e.g., Act for forming and conducting the Military Force of this State (1792), reprinted in ACTS AND LAWS OF THE STATE OF CONNECTICUT *supra* note 4, at 310 (allocating funding for proselytizing on the same day the Quaker exemption was enacted).

19. McConnell, *supra* note 17, at 2131.

20. See Gedicks & Van Tassell, *supra* note 11, at 362–63 (claiming that the prohibition on third-party burdens dated from the Founding).

21. See McConnell, *supra* note 17, at 2111 (“No single law created the established church.”).

22. *Id.*

Indeed, Anti-Federalists—many of whom opposed the First Amendment—thought that the First Amendment did too little in preventing government control over religion. In Virginia, Anti-Federalists argued that the Establishment Clause did *not* prohibit levying taxes to support “any particular denomination,” but only that of a more direct establishment.<sup>23</sup> Of course, this is not to suggest that no single law today could ever violate the Establishment Clause—after all, the text of the First Amendment says, “no law,”<sup>24</sup> not “no laws.” Rather, this history illustrates that, to the Founding generation, establishment meant more than a law that might incidentally benefit certain religious individuals while burdening their fellow citizens. This is especially true if the law in question did not have *any* of the six traditional hallmarks of establishment listed above.

Because Connecticut had “established” Congregationalism as its state religion and would maintain it for another two decades, if someone had suggested to Connecticut’s legislators in 1792 that by granting a military exemption to the *minority* Quakers they were “establishing” Quakerism, they would have scoffed: “We know what an ‘establishment of religion’ looks like,” they would have said, “and this is a far cry from that.” While they were not bound by the Establishment Clause, they knew what Establishment meant, and this was not it.

“*Congress.*” Next, by its terms the Establishment Clause is directed at “Congress,” not at state governments.<sup>25</sup> Here again, drafting history indicates this was deliberate: Madison originally drafted a separate amendment to prohibit not only states, but also the federal government, from infringing upon rights of conscience. That amendment would have read: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”<sup>26</sup>

But that provision lacked the requisite votes in Congress.<sup>27</sup> Anti-Federalists stated that it was the role of the states to amend their own constitutions to make such protections available.<sup>28</sup> These Anti-Federalists were skeptical of a powerful central government dictating what a state could and could not do.<sup>29</sup> As Carl Esbeck summarized, the provision failed to pass the Senate because:

the Senate did not want the [provision] to disturb the varied state arrangements with respect to even the matter of liberty of conscience, a question on which there was some agreement among Americans at that time. In a larger sense, however, the First Congress (reflecting the concern that animated many Americans) envisioned a bill of rights as restraining only the national

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23. S. JOURNAL, 14th Sess., at 62–63 (Va. 1789).

24. U.S. CONST. amend. I.

25. *Id.*

26. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1201 (1992).

27. Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 558–59.

28. *Id.* at 548–49 (citing 1 ANNALS OF CONG. 783–84 (1789)).

29. *Id.* at 548 n.247.

government. The national government alone presented a new threat and thus the national government alone was in need of restraining by a new bill of rights.<sup>30</sup>

All this makes clear that the original scope of the Establishment Clause was clearly limited to the federal government (“Congress”), not the states.

“*Respecting*.” Finally, the Clause prohibits Congress from passing any law “respecting”<sup>31</sup> an establishment of religion—not just from “establishing” a national church. Why did Madison frame it this way? In 1789, at least three states—not only Connecticut,<sup>32</sup> but Massachusetts<sup>33</sup> and New Hampshire<sup>34</sup> as well—had official, state-supported churches. Apparently, those states’ representatives did not want the national government meddling with their present arrangements. Madison thus agreed to keep Congress out of the “establishment” business entirely. As Justice Thomas recently noted in *Town of Greece v. Galloway*, the “respecting” language meant that “the First Amendment was simply agnostic on the subject of state establishments; the decision to establish or disestablish religion was reserved to the States.”<sup>35</sup> Accordingly, under its original meaning, the Establishment Clause imposed no limits at all on the states.<sup>36</sup>

Arguments for a broader definition of “respecting” are unpersuasive with respect to the drafters’ view of what the phrase meant. For example, Kent Greenawalt has suggested that “respecting” could have an additional meaning of broadening the scope of the prohibition on establishment.<sup>37</sup> But he also acknowledges that the principal purpose of the word “respecting” was to protect state establishments.<sup>38</sup> Regardless, his more contemporary interpretation of the word is refuted by extensive evidence about how the clause was viewed at the time of its adoption.<sup>39</sup>

30. *Id.* at 558.

31. U.S. CONST. amend. I.

32. GREEN, *supra* note 7, at 123–31.

33. *Id.* at 131–44; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1524 (noting establishment in Massachusetts continued until 1833).

34. GREEN, *supra* note 7, at 119–23.

35. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1836 (2014) (Thomas, J., concurring).

36. See e.g., Fredrick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 676 (2013) (noting that “the most widely accepted original understanding of the Clause [is] as a purely structural limitation that prevented Congress from establishing a national church or interfering in state establishment or disestablishment decisions”); cf. *id.* at 670 n.4, 671 n.6 (noting that most scholars attack the concept of incorporation of the Establishment Clause—thus accepting the original understanding of the clause as a structural limitation).

37. See, e.g., Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 485 (2006).

38. *Id.*

39. See *supra* notes 21–23 and accompanying text.

For all these reasons, the drafters of the First Amendment plainly did not think the Establishment Clause’s language forbids *any* religious exemption to a generally applicable law—even if it imposes some harm upon third parties.

## II. DO CONTEMPORANEOUS UNDERSTANDINGS AND TRADITIONS FORBID EXEMPTIONS THAT HARM THIRD PARTIES?

What about the public understanding of the meaning of “establishment,” as evidenced by practices or traditions that were roughly contemporaneous with the adoption of the First Amendment? As Justice Kennedy noted for the majority in *Town of Greece v. Galloway*, “[i]t is not necessary to define the precise boundary of the Establishment Clause where history shows the practice is permitted.”<sup>40</sup> And his comment mirrors James Madison’s observation that “experience”—including perhaps the experience of the original states in establishing and disestablishing—“will be an admitted Umpire” in determining the scope of the establishment clause.<sup>41</sup> So what exactly does history say about religious exemptions that risked harm to third parties?

*Conscientious Objector Exemptions.* For one thing, it says that the 1792 Connecticut statute discussed at the outset was only one of many such statutes—both before and after the Constitution’s adoption—exempting Quakers and other conscientious objectors from military duties.<sup>42</sup> For example, an excellent article published in 2006 by Professor Douglas Laycock describes in detail the history of Pennsylvania’s adoption of a similar exemption in 1757—some 20 years before the Revolution.<sup>43</sup> Referring to other provisions generally requiring able-bodied men to “enroll” in the colony’s conscription system, that statute provided:

“[E]very of the Persons as aforesaid enrolled, *not conscientiously scrupling the use of Arms*, shall be sufficiently armed with One good Musket, Fuzee or other Fire lock [and] a Cartouch Box filled with Twelve or more Cartridges of Powder, Twelve or more sizeable Bullets, and Three good Flints . . . .”<sup>44</sup>

40. 134 S. Ct. at 1819.

41. Letter from James Madison to Jasper Adams (Sept. 1833), in *THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING* 612, 613 (David L. Dreisbach & Mark David Hall eds., 2009).

42. See, e.g., Act to exempt the people called quakers from the penalty of the law for non-attendance on military musters, ch. 294 (1763), in *THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY* 653 (Boston, T.E. Watt & Co. 1814); Act for the Addition to, and Amendment of an Act, entitled, An Act for Appointing a Militia, ch. 4 (1770), reprinted in *23 THE STATE RECORDS OF NORTH CAROLINA* 787–88 (Walter Clark ed., Goldsboro, N.C., Nash Bros. 1904); Act for forming and Regulating the Militia (1757), reprinted in *3 PENNSYLVANIA ARCHIVES* 123 (Samuel Hazard ed., Philadelphia, Joseph Severns & Co. 1853); Act to continue and amend the act for the better regulating and disciplining the militia, ch. 31 (1766), reprinted in *8 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA* 241, 243–44 (William Waller Hening ed., Richmond, J. & G. Cochran 1821).

43. Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 *NOTRE DAME L. REV.* 1793 (2006).

44. Act for forming and Regulating the Militia (1757), reprinted in *3 PENNSYLVANIA ARCHIVES*, *supra* note 42, at 123 (emphasis added).

The reference to people who “conscientiously scrupl[e] the use of Arms” was a reference to Quakers, Mennonites, and other pacifist religious groups. Pennsylvania enacted this statute even though these conscientious objectors accounted for a substantial portion of Pennsylvania’s population.<sup>45</sup> Thus, their exclusion from service substantially enhanced the likelihood that other Pennsylvania citizens would have to go to war and thereby risk death and serious injury. And local militias—particularly in Quaker-heavy areas of the state—would face an increased risk of losing any unexpected skirmishes, adding to the remaining soldiers’ danger.

Another example of the exception was enacted in Massachusetts on February 24, 1763. Massachusetts’ provision stated that “the inhabitants of this province [who] are called quakers . . . shall, during the continuance of this act, be exempted from the penalty of the law for non-attendance on military musters.”<sup>46</sup> Since Massachusetts continued to fund the Congregational church until 1833,<sup>47</sup> it is obvious the state never “establish[ed]” Quakerism. And the same is true of New Hampshire.<sup>48</sup>

Thus, every state with an established church at the time of the First Amendment’s ratification had statutory exemptions for non-established faiths that burdened third parties.<sup>49</sup> In addition to Pennsylvania, during the Founding Era, five of the remaining nine states that *lacked* an established church also had statutory exemptions from military service for conscientious objectors.<sup>50</sup>

Moreover, in many if not all such states, the exemptions created burdens on third parties. Soldiers in the militia engaged regularly in local skirmishes,<sup>51</sup> and also faced risk of illness.<sup>52</sup> Not surprisingly, given these burdens, they would frequently serve only the minimum time before returning home.<sup>53</sup> The risks of longer time away from home, injury during skirmishes, illness, and death are obvious third party burdens arising from the exemptions granted to conscientious objectors.

Some proponents of the idea that the Establishment Clause precludes third-party burdens have nevertheless argued that the draft exemptions produced only

45. Laycock, *supra* note 43, at 1810, 1810 n.82; GREEN, *supra* note 7, at 26–27.

46. Act to exempt the people called quakers from the penalty of the law for non-attendance on military musters, ch. 294 (1763), in THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, *supra* note 42, at 653.

47. Esbeck, *supra* note 33, at 1524.

48. Act for the more Speedy Levying One Thousand or at least Eight Hundred Men Inclusive of Officers to be Employ in his Majestys Service in the Current Year, ch. 3 (1759), reprinted in 3 LAWS OF NEW HAMPSHIRE 196, 198 (Henry Harrison Metcalf ed., Bristol, N.H., Musgrove Printing House 1915).

49. South Carolina disestablished in 1790, at approximately the same time as the ratification of the First Amendment. See Esbeck, *supra* note 33, at 1494.

50. See *infra* Appendix A.

51. See JAMES BISER WHISKER, THE AMERICAN COLONIAL MILITIA: INTRODUCTION TO THE AMERICAN COLONIAL MILITIA 71 (1997).

52. *Id.* at 73.

53. *Id.* at 72.



incidental third-party burdens.<sup>54</sup> For example, Fred Gedicks and Rebecca Van Tassell frame the burdens on third parties from the draft as merely increasing a mathematical probability of being drafted.<sup>55</sup> They conclude that such burdens are “barely measurable,”<sup>56</sup> and therefore insubstantial.<sup>57</sup> They also argue that if third parties or the government has to pay money to make an accommodation a reality, such payments violate the Constitution.<sup>58</sup> They thus argue that the existence of exemptions for the draft does not undercut their proposed “third-party burden” rule.

In support of this argument, Gedicks and Van Tassell also cite Madison’s opposition to the mandatory tax for providing Christian teachings in Virginia—the opposition stated in his legendary Memoriam and Remonstrance—to claim that the historical record demonstrates “concern with imposing the costs of established religion on others.”<sup>59</sup> The Americans United amicus brief already noted likewise cites a comment by Madison about church autonomy in support of an absolute third-party burden rule.<sup>60</sup>

These arguments ignore lessons from the Founding Era regarding the exemptions for Quakers. First, the distinctions drawn by Gedicks and Van Tassell are inapplicable to the localized militias that were in place at the Founding. Even the statutory language in at least one state—New Hampshire—emphasizes that *specific* men would be called in place of the objecting Quaker:

But in every Regiment within the Limits of which there are any Quakers, Liable to be Impressed, the Colonel or Chief Officer of the Regiment, is here by Impowerd & Requird to Engage & Employ, a Sum not Exceeding Ten pounds Sterling per Man, to hire into the Service, so many Men as by this Act are liable to be Impressed from the Quakers, in their Room and Stead, in a due Proportion to the other part of the Regiment, the Sums so Ingaged, to be paid out of the Public Treasury.<sup>61</sup>

By empowering the payment of replacements for the Quakers, the New Hampshire legislature acknowledged that specific men would need to carry the

54. Gedicks & Van Tassell, *supra* note 11, at 363–64.

55. *Id.* at 364.

56. *Id.*; see also Americans United Amicus Brief, *supra* note 9, at 12; Gedicks & Toppleman, *supra* note 11, at 56 (claiming that the draft exemption for conscientious objectors was insignificant because it was “small and distributed among millions of nonexempt potential draftees”).

57. Gedicks & Van Tassell, *supra* note 11, at 364. They also suggest because there was already a risk of being drafted, the marginal third party burden is reduced. *Id.* at 363–64, 367. This is obviously a function of the presumed large size of the draft pool—an size absent from the localized militias at the time of the Founding.

58. *Id.* at 363, n.88.

59. *Id.*

60. Americans United Amicus Brief, *supra* note 9, at 10.

61. Act for the more Speedy Levying One Thousand or at least Eight Hundred Men Inclusive of Officers to be Employ in his Majestys Service in the Current Year, ch. 3 (1759), reprinted in 3 LAWS OF NEW HAMPSHIRE, *supra* note 48, at 198.

dangerous responsibilities that ordinarily the Quakers would have fulfilled.<sup>62</sup> In New Hampshire, then, one could point to the specific man who replaced the Quaker—the one funded by the statute. And hence any burden imposed on him—disease, injury, or death—would be traceable to the religious exemption. This is the most direct third-party burden possible. New Hampshire’s payment structure also contradicts Gedicks and Van Tassel’s blanket claim that the Establishment Clause forbids paying funds to provide accommodations.

Moreover, the Quaker exemption drew support from the drafter of the Establishment Clause—James Madison. In 1816, while President, Madison *pardoned* Quakers in Maryland for violating a federal militia law.<sup>63</sup> Not only do Madison’s actions call into question Gedicks and Van Tassel’s reliance on his Memorial and Remonstrance, but Madison’s own actions would squarely violate the “rule” in the Americans United brief referenced above that “[t]he Establishment Clause forbids accommodations that would meaningfully burden third parties.”<sup>64</sup>

This history both refutes the idea that the third-party burden arising from the draft exemption is marginal and also, confirms that the third-party burden “rule” was not accepted by the Founding generation as an establishment of religion. After all, New Hampshire would continue to establish Congregationalism from 1759 until 1833. A simultaneous establishment of Quakerism would be a contradiction—a clear indication that the third-party burden did not amount to competition with or interference to the official established religion. And given the maxim that actions speak louder than words<sup>65</sup>—especially words reinterpreted two centuries later—Madison’s actions exemplify that he, like nearly every legislature in the Founding Era, would have rejected the third-party burden argument that some now advance. The military exemptions thus demonstrate the constitutionality of exemptions that burden third parties, because, as Justice Kennedy has reminded us, “[i]t is not necessary to define the precise boundary of the Establishment Clause where history shows the practice is permitted.”<sup>66</sup>

*Priest-Penitent Privilege.* Another religious exemption well-established during the Founding Era was the priest-penitent privilege, which prevents disclosure of

62. *See id.*

63. James Madison, Presidential pardon, November 20, 1816, in THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, *Conscientious objectors: Madison pardons Quakers, 1816*, at 4, [https://www.gilderlehrman.org/sites/default/files/inline-pdfs/00043\\_FPS.pdf](https://www.gilderlehrman.org/sites/default/files/inline-pdfs/00043_FPS.pdf) [<https://perma.cc/CLW8-RTL8>]; *id.* at 7 (reproducing original document).

64. Americans United Amicus Brief, *supra* note 9, at 9 (citing *Holt v. Hobbs*, 135 S.Ct. 853 (2015)).

65. *See, e.g.*, 2 COLLECTED WORKS OF ABRAHAM LINCOLN 352 (Roy P. Basler ed., 1953) (noting the maxim); WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, Act 5, Scene 1 (Portia says that Antonio is welcome in his house, but recognizes that such statements “must appear in other ways than words.”).

66. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

religious confessions in court.<sup>67</sup> The first case on the topic, *People v. Phillips*, involved an accusation that Daniel Phillips had criminally recovered stolen goods from the owner, James Cating.<sup>68</sup> But then Cating received the goods back from a Catholic priest.<sup>69</sup> The state sought to force the priest to testify regarding who gave him the goods to return.<sup>70</sup> The priest claimed privilege.<sup>71</sup> The New York court refused this request, noting that “[i]t is essential to the free exercise of a religion” that the Catholic Church be allowed to do the sacrament of penance:

The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated.<sup>72</sup>

The court went on to reject the third-party burden argument, which was framed in that case as a prohibition on “practices inconsistent with the peace or safety of the state.” Apparently, the state argued against allowing any priest-penitent exception based on the prospect of extreme third-party burdens, what the court termed as “hypothetical cases, in which the concealment of a crime communicated in penance, might have a pernicious effect.”<sup>73</sup> The court dismissed this argument as “founded on false reasoning, if not on false assumptions.”<sup>74</sup> It then rejected an absolute third-party burden: “To attempt to establish a general rule, or to lay down a general proposition from accidental [sic] circumstances which occur but rarely, or from extreme cases, which may sometimes happen in the infinite variety of human actions, is totally repugnant to the rules of logic and the maxims of law.”<sup>75</sup> The state’s argument in *Phillips* regarding hypothetical cases that occur rarely is remarkably similar to the modern argument for a per se third-party burden rule made today.<sup>76</sup> At any rate, the decision in *Phillips* during the Founding Era squarely forecloses per se rules against third-party burdens.

In 1828, fifteen years after *Phillips*, the New York legislature enacted the first legislative exception for priests in the United States:

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67. See generally Jacob M. Yellen, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96–104 (1983) (European, pre-Founding origin of the privilege); *id.* at 104–07 (nineteenth century American cases and statutes regarding the privilege).

68. *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813), in Note, *Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955) (This case was not officially reported, but an “editor’s report” of the case was reprinted.).

69. *Id.* at 199–200.

70. *Id.*

71. *Id.* at 207.

72. *Id.* at 207–08.

73. *Id.* at 208.

74. *Id.*

75. *Id.*

76. See, e.g., Gedicks & Van Tassell, *supra* note 11, at 378–79 (relying on marginal effects of a lack of contraception coverage).

No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.<sup>77</sup>

Both the *Phillips* decision and the broad statute that codified it were very influential.<sup>78</sup> This privilege is now established in all fifty states.<sup>79</sup> As the *Phillips* court correctly explained, the privilege is crucial to the free exercise of religion because, in some faiths, confession is an important sacrament—a step in returning to God.<sup>80</sup> But this privilege had—and still has—the potential to harm third parties by depriving them of information that might advance their position in litigation. And it has been criticized by numerous scholars and judges on that very ground.<sup>81</sup> Yet the privilege is a historical tradition dating to the Founding, and is at least presumptively constitutional for that reason alone.<sup>82</sup>

*Religious Exemptions from Fugitive Slave Laws.* Yet another tradition going back almost to the Founding was the ad hoc practice of exempting those with religious objections to slavery from laws—like the draconian Fugitive Slave Act—requiring the return of fugitive slaves. Although this wasn't a statutory exemption, it was a settled tradition that relied on jury nullification<sup>83</sup> and—just as with the Quaker exemption—executive clemency.<sup>84</sup> For example, “[i]n some jurisdictions, it proved impossible for prosecutors to secure convictions of the rescuers from juries sympathetic to the anti-slavery cause.”<sup>85</sup> Surely the religious beliefs of the rescuers animated many of these jury nullifications.<sup>86</sup> And when juries did

77. N.Y. Rev. Stat. § 72, pt. 3, ch. VII, tit. III, art. 8 (1829) (since amended).

78. Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 90 IND. L.J. 1037, 1056 (2005) (stating the New York Statute was based on *Phillips*, and was “hugely influential”).

79. See Julie Ann Sippel, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127, 1128 n.6 (1994) (cataloging state statutes).

80. See, e.g., CATECHISM OF THE CATHOLIC CHURCH §§ 1424–1498.

81. See, e.g., Rena Durrant, *Where There's Smoke, There's Fire (and Brimstone): Is It Time to Abandon the Clergy-Penitent Privilege?*, 39 LOY. L.A. L. REV. 1339, 1358–67 (2006) (arguing the exception violates the Establishment Clause); Karen L. Ross, *Revealing Confidential Secrets: Will it Save Our Children?*, 28 SETON HALL L. REV. 963, 998–99 (1998).

82. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). The priest-penitent exception is also consistent with the (largely discarded) *Lemon* test. See, e.g., Michael J. Mazza, *Should Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L. REV. 171 (1998).

83. See, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 890 n.119 (“In some jurisdictions, it proved impossible for prosecutors to secure convictions of the rescuers from juries sympathetic to the anti-slavery cause.”). Surely the religious beliefs of the rescuers animated many of these jury nullifications.

84. STEPHEN MIDDLETON, *THE BLACK LAWS: RACE AND THE LEGAL PROCESS IN EARLY OHIO* 239–40 (2005) (pardon of George Gordon by Abraham Lincoln); JOHN JOLLIFFE, *IN THE MATTER OF GEORGE GORDON'S PETITION FOR PARDON* (1862); WILLIAM T. McDONALD, *FINDING FREEDOM: THE UNTOLD STORY OF JOSHUA GLOVER, RUNAWAY SLAVE* 89 (2012) (pardon of Sherman Booth by James Buchanan).

85. See, e.g., Alschuler & Deiss, *supra* note 83, at 890 n.119.

86. See, e.g., HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (1852) (relying in part on religious reasons to oppose slavery).

not nullify the law, multiple presidents pardoned objectors. Abolitionist publisher Sherman Booth also helped a group rescue an escaped slave and was also arrested and convicted of violating the Fugitive Slave Act.<sup>87</sup> Booth was pardoned by President James Buchanan following an overly long sentence and an inability to pay the fine.<sup>88</sup> Likewise, in April 1862, President Lincoln pardoned Reverend George Gordon, “a minister in the Free Presbyterian Church, [which] regarded slavery as a sin in the eyes of God.”<sup>89</sup>

Exempting religious objectors to slavery from the requirements of the Fugitive Slave Act imposed obvious “harms” on third parties: specifically, the slave owners whose slaves were not returned in particular cases, and slave owners generally, whose property rights in slaves became much less certain as a result.<sup>90</sup> Indeed, the Act’s whole premise was that failing to return fugitive slaves—and failing to convict those who harbored them—would have an adverse effect on third-party slave owners. But again, American society was willing to incur those harms to protect those with conscientious, religion-based objections to slavery.

Like Professor Laycock,<sup>91</sup> we haven’t been able to find any contemporaneous suggestion that any of these exemptions, or others like them, might violate the Establishment Clause or were a way that states established religion prior to the Fourteenth Amendment. Nowhere were religious exemptions considered an establishment of a minority faith. Indeed, we have found nothing in the historical practice in the colonies or states suggesting that a benefit to a minority faith was considered an establishment of that faith. To the contrary, the traditions surrounding the adoption and early enforcement of the Establishment Clause not only fail to support the third-party harm “rule”: they refute it.

### III. DO SUPREME COURT DECISIONS SUPPORT THE THIRD-PARTY HARM “RULE?”

Finally, we turn to whether Supreme Court precedent compels the third-party harm rule. Here again, the short answer is no. With one exception, the Supreme Court has consistently rejected Establishment Clause challenges to religious exemptions of any kind. And the one successful Establishment Clause challenge provides no support for a general “rule against third-party harms.”

*Early cases.* The first Supreme Court case considering the constitutionality of religious exemptions occurred nearly one hundred years ago—after the First Amendment had been the law for over 125 years. In the *Selective Service Draft*

87. *Ableman v. Booth*, 62 U.S. 506 (1859) (vacating decision of the Wisconsin Supreme Court which held the fugitive slave act unconstitutional); *In re Booth*, 3 Wis. 1, 2 (1854) (lower court’s decision).

88. McDONALD, *supra* note 84, at 89.

89. MIDDLETON, *supra* note 84, at 239–40.

90. *See, e.g.*, ALBERT TAYLOR BLEDSOE, AN ESSAY ON LIBERTY AND SLAVERY 326 (1856) (“When we say that slaves are property, we merely mean that their masters have a right to their service or labor.”).

91. Laycock, *supra* note 43, at 1825 (“Some lawyers argued against exemptions, and some judges ruled against exemptions, but only one lawyer appears to have argued—briefly and unsuccessfully—that exemptions might violate a state or federal establishment clause.”).

*Law Cases*, the Court specifically upheld the federal conscientious objector exemption against an Establishment Clause challenge.<sup>92</sup> The Court's holding occupied less than one sentence, and it said (in more polite legal jargon): "This argument is so silly it requires no response."<sup>93</sup>

*More recent decisions.* More recently, a case arose in Utah involving the Deseret Gymnasium—*Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.<sup>94</sup> In that case, the Church of Jesus Christ of Latter-day Saints had fired a janitor for failing to live up to church behavioral standards. The employee sued under Title VII, and the Church invoked the statute's religious institutions exemption, Section 702.<sup>95</sup> The janitor challenged that exemption on the theory that the Establishment Clause prohibits harm to third parties—the very ground urged by modern proponents of the third-party harm doctrine.<sup>96</sup>

But the Court unanimously rejected that argument, holding that the exemption did not violate the Establishment Clause.<sup>97</sup> While Gedicks and Van Tassell have suggested that *Amos* only authorizes exemptions for *non-profit* religious institutions,<sup>98</sup> the Supreme Court majority didn't suggest any such rule might exist, much less adopt it.<sup>99</sup> Instead, it ruled that it was the religious objector—in this case a church—that had created the third-party burden, not the government, and that it was entirely consistent with the Establishment Clause for a government to "relieve governmental burdens on religion."<sup>100</sup> This logic would apply equally whether the religious objector was for-profit or non-profit.

A more recent case, *Hosanna-Tabor v. EEOC*<sup>101</sup> also implicitly refutes any categorical bar on third-party burdens. *Hosanna-Tabor* affirmed the absolute right of churches to select and fire their own ministers, even if that right burdens ministers by firing them.<sup>102</sup> True, *Hosanna-Tabor*, a church autonomy case, is one of the few third-party burdens that the Supreme Court has recognized as required by the Establishment Clause. But it would be odd jurisprudence to suggest that the

92. 245 U.S. 366, 389–90 (1918).

93. *Id.* ("And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.").

94. 483 U.S. 327 (1987).

95. *Id.* at 330–31.

96. *See, e.g., Amos v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791, 824 (D. Utah 1984), *rev'd*, 483 U.S. 327 (1987) (claiming Section 702 was unconstitutional in part because of the "coercion" on third parties that created "restricted alternatives"); Transcript of Oral Argument at 21, *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (No. 86-179) (reflecting plaintiff's argument that the statute is unconstitutional because it creates "substantial burdens on third parties").

97. *Amos*, 483 U.S. at 338–40.

98. Gedicks & Van Tassell, *supra* note 11, at 378–80.

99. *See Amos*, 483 U.S. at 337 n.15.

100. *Id.*

101. 132 S. Ct. 694 (2012).

102. *See id.* at 706.

Establishment Clause both *requires* the government to permit some third-party burdens and yet *forbids* third-party burdens in virtually every other context.

In addition to the historical and precedential problems with this argument, the Supreme Court has long acknowledged “room for play in the joints” for legislatures to act without violating either the Establishment or Free Exercise Clauses.<sup>103</sup> It is very odd to suggest that there is no play in the joints in perhaps the most basic religious freedom law—religious exemptions.

Even one of the most criticized<sup>104</sup> recent free exercise decisions, *Employment Division v. Smith*,<sup>105</sup> spoke to the *value* of allowing legislatures to permit exemptions for religious individuals such as the Quakers, who participate in “religious practices that are not widely engaged in.”<sup>106</sup> Indeed, most exemptions that allow religious practices impose some type of harm (whether the harm be direct, indirect, dignitary, or diffuse) to those who do not engage in the religious practice; if not, there is no reason for the practice to be legal for both the religious minority and the secular or other-religious majority. The third-party burden “rule” would thus actively discourage religious exemptions, contradicting *Smith*’s valuing of such exemptions.<sup>107</sup> *Smith* also failed to rely on any historical evidence about the meaning of the First Amendment,<sup>108</sup> a lack of reliance that is inconsistent with later decisions.<sup>109</sup> The widespread existence of statutory exemptions at the time of the Founding, discussed above, indicates that some exemptions may, contrary to some readings of *Smith*, be required by the First Amendment.

*Caldor*. The closest a majority of the Court has ever come to recognizing a third-party harm “rule” was when the Court decided *Estate of Thornton v. Caldor*.<sup>110</sup> That case involved a Connecticut statute giving workers the right to take time off for religious reasons on their chosen day of weekly worship, irrespective of other considerations. The Court held that this statute violated the Establishment Clause, but not based of some general third-party harm rule. Rather, the Court held this *particular* law had the impermissible effect of “advancing” religion because it forced private employers to give conclusive

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103. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 669 (1970)).

104. See, e.g., Douglas Laycock, *Symposium: New Directions in Religious Liberty: The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 221 (“In a pervasively regulated society, *Smith* means that religion will be pervasively regulated. In a society where regulation is driven by interest group politics, *Smith* means that churches will be embroiled in endless political battles with secular interest groups. In a nation that sometimes claims to have been founded for religious liberty, *Smith* means that Americans will suffer for conscience.”); James D. Gordon, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 114 (noting that, in *Smith*, “[t]he Court wanted to reach its result in the worst way, and it succeeded.”).

105. 494 U.S. 872 (1990).

106. *Id.* at 490.

107. *Id.*

108. See Gordon, *supra* note 104, at 93–94.

109. See *supra* note 13.

110. 472 U.S. 703 (1985).

weight to the interests of religious employees.<sup>111</sup> The case thus involved, not an exemption from a government mandate, but a *preference* that allowed believers to always impose the costs of their decisions on others in the private workplace.<sup>112</sup>

Moreover, the main decision on which *Caldor* relied<sup>113</sup>—*Lemon v. Kurtzman*<sup>114</sup>—has since been expressly narrowed by *Agostini v. Felton*,<sup>115</sup> and ignored, criticized, or sidestepped in other cases and opinions.<sup>116</sup> Thus, as Justice Scalia said of *Lemon* itself,<sup>117</sup> *Caldor* is like a ghoul in a horror movie that gets trotted out occasionally just to “frighten[] the little children and school attorneys.”<sup>118</sup>

*Cutter*. Some scholars who argue for a third-party harm rule also point to the Court’s unanimous decision in *Cutter v. Wilkinson*,<sup>119</sup> in which prison officials challenged the federal religious rights granted to prisoners—as against state and federal prisons—under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). But *Cutter* doesn’t support a general third-party harm “rule.” For one thing, *Cutter* upheld RLUIPA against an Establishment Clause challenge: it didn’t invalidate any part of it, on the basis of third-party harms or otherwise.<sup>120</sup> True, the Court cited *Caldor* for the proposition that “courts must take ‘adequate account’ of the burdens a requested accommodation may impose on nonbeneficiaries.”<sup>121</sup> But this does not suggest that there is an absolute bar to exemptions that create third-party harms. Indeed, *Cutter* explained that, when the burden on religious believers is large, an exception presumptively does *not* violate the Establishment Clause.<sup>122</sup>

Further, *Cutter*’s context indicates that its modest dicta about third-party harms was narrow: the decision arose in the setting of prisons, where “discipline, order,

111. *Id.* at 710.

112. *See id.* at 705–06.

113. *Id.* at 708–09.

114. 403 U.S. 602 (1971).

115. 521 U.S. 203, 232–36 (1997).

116. *See, e.g.,* Van Orden v. Perry, 545 U.S. 677, 686 (2005) (“Whatever may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s history.”); Green v. Haskell Co. Bd. of Comm’rs, 574 F.3d 1235, 1244, 1244 n.1 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing en banc) (noting that *Lemon* has been “criticized by many members of the Court” and confusion about *Lemon* has been “exacerbated” in the last two decades).

117. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . .”).

118. *Id.*

119. 544 U.S. 709 (2005); Gedicks & Van Tassell, *supra* note 11, at 373.

120. *Cutter*, 544 U.S. at 720.

121. *Id.*

122. *Id.*



safety, and security” are paramount concerns.<sup>123</sup> Because of these concerns, the Court recognized that in certain settings—such a prison or military service—“there is simply not the same [individual] autonomy as there is in the larger civilian community.”<sup>124</sup> Thus, just as in *Caldor*, where an *absolute* rule exempting Sabbatarians could create religious preferences in violation of the Establishment Clause in the regulated context of employment scheduling demands, the *Cutter* Court suggested that an absolute religious preference in the prison context that had the effect of endangering other prisoners or the public at large *could* violate the Establishment Clause. But the Court did not articulate, much less endorse, any general “rule against accommodating religion in ways that burden third parties.”<sup>125</sup>

*The last word (so far)*. The absence of any general third-party harm rule is confirmed by the Court’s reaction to this argument in the recent *Hobby Lobby* case.<sup>126</sup> There the 5-4 majority held that a religiously-oriented, for-profit company was entitled to a religious exemption from Obamacare’s “contraception mandate,” despite the disadvantage that exemption and others like it *could* potentially impose on the company’s female employees.<sup>127</sup>

Moreover, although Justice Ginsburg’s dissent for four Justices noted that potential disadvantage,<sup>128</sup> it did not articulate or adopt the rule against third-party harms that scholars proposed. Instead, the dissent simply stated—in a footnote—(1) that government’s ability to provide exemptions was “constrained” by the Establishment Clause (as expressed in *Cutter*’s dicta); (2) that the U.S. has many religious preferences; and (3) that “one person’s right to free exercise must be kept in harmony with the rights of her fellow citizens.”<sup>129</sup> Justice Ginsburg did this without identifying any *standard* for determining when the “constraint” has been exceeded or the “harmony” sufficiently compromised to invalidate the exemption. Not only did the remainder of her dissent not address the sweeping position that any religious accommodation that burdens third parties—or even

123. *Id.* at 723.

124. *Id.*

125. Brief of Amicus Americans United, *supra* note 9, at 13. Some scholars have also claimed that *Tony and Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290 (1985), “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.” Gedicks & Van Tassell, *supra* note 11, at 365. But that simply misreads *Tony and Susan Alamo Foundation*. Rather, the Court concluded that there was no burden on the religious claimant. *Tony & Susan Alamo Foundation*, 471 U.S. at 304–05. Addressing the lack of a burden on a *religious* party is simply not the same as applying some mystical third-party burden rule.

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

127. *Id.* at 2780–81, 2781 n.37. While the *Hobby Lobby* decision noted that the women would get coverage through their insurers without Hobby Lobby’s help, the Court never held or implied that the Establishment Clause would have been violated had the women been unable to do so. *Id.*

128. *Id.* at 2802 n.25 (Ginsburg, J., dissenting).

129. *Id.* (internal quotations omitted).

any class of such accommodations—is a per se violation of the Establishment Clause, but the one footnote that addressed the dicta from *Cutter* did not state any sweeping standard.

In short, as far as we can ascertain, the broad “third-party harm rule” pressed by some scholars and advocates has never been adopted, or even recognized, by any sitting Supreme Court Justice, much less by a binding Supreme Court decision.

#### CONCLUSION

For all these reasons, the third-party harm “rule” is not “law” under any reasonable understanding of the word. This means that, as the Connecticut legislature did in 1792, legislators must confront in each case the hard question of whether it makes sense to grant or withhold a religious exemption.

Obviously, some exemptions can appropriately be rejected because of their potential to harm third parties: no legislature in its right mind would grant an exemption to a murder statute so that a religious group—call it the Church of the Neo-Aztecs—can perform human sacrifice.

But in other areas of the law, legislatures need the right to make distinctions between religious and secular reasons for not following a law. Without the ability to make these distinctions, legislatures would be less likely to enact laws that they would find socially desirable if—but only if—they were paired with religious exemptions.<sup>130</sup> Lacking the choice to exempt religious individuals and institutions, the legislature would simply decline to act, which would expose third parties to harm on *both* secular and religious bases—the true lose-lose situation.<sup>131</sup> In contrast, when given the ability to provide broad religious exemptions and yet achieve greater benefits to society, legislatures have passed landmark laws that have stood the test of time.<sup>132</sup>

Setting this political reality aside, exemptions may well be worth considering despite their potential to result in third-party harms. For example, is it really necessary to *force* small wedding service providers like Jack Phillips,<sup>133</sup> Elane Hugenin,<sup>134</sup> and

130. See, e.g., Bart Stupak, *Contraception Mandate Doublecross*, USA TODAY (Mar. 11, 2014), <https://www.usatoday.com/story/opinion/2014/03/11/obamacare-stupak-hobby-lobby-birth-control-column/6264861/> [<https://perma.cc/68FJ-65BM>] (noting that negotiations leading to the passage of the Affordable Care Act hinged on the granting of the very type of religious exemptions that the executive branch later refused to give to Hobby Lobby).

131. See *id.* Had the Affordable Care Act not passed, millions of additional women would not have access to cost-free contraception through employers’ insurance plans in addition to those who allegedly were burdened by their religious employers. See *supra* note 126.

132. See, e.g., 20 U.S.C. § 1681 et seq. (1971) (Title IX protects students from sex discrimination while respecting the rights of religious schools); 2015 Utah Laws 13 (pairing protections for the LGBT Community with protections for religious groups).

133. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

134. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

Baronelle Stutzman<sup>135</sup> to either close their businesses or lend their artistic talents to ceremonies they believe are sinful and will thus put their eternal salvation at risk—especially where those seeking their services have plenty of other options? Do we really think an enlightened society needs to do that to further its view of equality?

Those are the kinds of questions legislators and others need to be asking, rather than worrying about whether a proposed exemption is foreclosed as a matter of law by the Establishment Clause.

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135. *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *vacated and remanded sub nom.*, *Arlene’s Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018).

## APPENDIX: STATE PROVISIONS ON CONSCIENTIOUS OBJECTION IN THE FOUNDING ERA

**Connecticut**

That any of the people called Quakers, who shall produce to the commanding officer of the company in which he resides, a certificate from the clerk of the society of Quakers to which he belongs, certifying that such person is a Quaker, he shall be exempt from equipping himself or doing military duty as required by this act, on his paying the sum of twenty shillings to such officer, at the expiration of each year during such exemption; and in case such Quaker refuse to pay said sum of twenty shillings, the same shall be collected and disposed of in the same manner as is heretofore provided for fines incurred by a breach of this act.<sup>136</sup>

**Massachusetts**

Whereas the people called quakers profess themselves conscientiously scrupulous of attending in arms in military musters,

Be it therefore enacted by the governor, council and house of representatives, that such of the inhabitants of this province are called quakers . . . shall, during the continuance of this act, be exempted from the penalty of the law for non-attendance on military musters.<sup>137</sup>

**New Hampshire**

And be it further Enacted, That such Inhabitants of this Province, as Profess themselves to be Quakers, are hereby Declared to be Exempted from the Penalties aforesaid. But in every Regiment within the Limits of which there are any Quakers, Liable to be Impressed, the Colonel or Chief Officer of the Regiment, is here by Impowerd & Requird to Engage & Employ, a Sum not Exceeding Ten pounds Sterling per Man, to hire into the Service, so many Men as by this Act are liable to be Impressed from the Quakers, in their Room and Stead, in a due Proportion to the other part of the Regiment, the Sums so Ingaged, to be paid out of the Public Treasury, upon an Account thereof Exhibited to, and allowd by the Governor with the Advice of the Council. And the Province Treasurer shall be & hereby is Impowerd & Directed, to add the said Sums to the Proportion of the Town or Parish where such Quakers Live, of the Province Tax, over and above the said Tax. but to be kept Distinct from it. and the Respective Selectmen & Assessors of said Town or Parish, shall Assess the People therein called Quakers, for the Same. And the Account to be Exhibited to the Governor as aforesaid, shall Ascertain in what Town, Parish or Place the Person lives calld

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136. Act for forming and conducting the Military Force of this State (1792), *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT, *supra* note 4, at 309.

137. Act to exempt the people called quakers from the penalty of the law for non-attendance on military musters, ch. 294 (1763), *in* THE CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, *supra* note 42, at 653.

a Quaker in whose Stead another shall be hired as aforesaid.<sup>138</sup>

### **New Jersey**

It is therefore Resolved and Directed, That each and every Captain in this Colony, within ten days after the publication hereof, shall make out a list of all persons residing in his district capable of bearing arms, between the ages of sixteen and fifty years, who, by the first Military Ordinance of a former Congress, were advised or requested to enrol themselves by signing a muster-roll therein mentioned, such persons only excepted whose religious principles will not suffer them to bear arms, who are hereby particularly exempted therefrom; a copy of which list each Captain respectively, within ten days after completing the same, shall deliver to the Colonel of the Regiment to which he shall belong, and such Colonel shall make return thereof to the Brigadier General of the division to which he shall belong; and also transmit a duplicate thereof to the Provincial Congress at their next sitting. And the respective Captains shall also make out exact lists of all such persons residing in their several districts capable of bearing arms, between the ages of sixteen and fifty years, whose religious principles will not suffer them to bear arms; which lists the said Captains shall lay before the Committee of the County to which they belong.<sup>139</sup>

### **New York**

AND Whereas it is Enacted and Declared in and by the aforesaid Act That the several Rates Penalties Fines and Forfeitures which should Accrue and grow due from the People called the United Brethren and from the People Called Quakers should be paid to the Respective City or County Treasurers where the same Should Arise and that on Nonpayment thereof Such Treasurers respectively Should forthwith make Application to any one Justice of the Peace for a Warrant to Levy the same by Distress and Sale of the offenders Goods But it not being Mentioned to whom the Said Warrant should be directed a doubt has Arisen Touching the Execution of the said Warrant for Clearing which Doubt BE IT ENACTED by the Authority Aforesaid That the said Warrant Shall be directed to and Executed by the Constables of the respective City's Towns Manors or Precincts within whose limits the said People dwell and Reside and the Money's levied by them Paid unto the respective City or County treasurers according to the directions of the said Act And in case any of the said Rates Penalties Fines and Forfeitures heretofore incurred remain yet unpaid the respective City and

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138. Act for the more Speedy Levying One Thousand or at least Eight Hundred Men Inclusive of Officers to be Employd in his Majestys Service in the Current Year, ch. 3 (1759), *reprinted in* 3 LAWS OF NEW HAMPSHIRE, *supra* note 48, at 198.

139. Minutes of the Provincial Congress and the Council of Safety in State of New Jersey (Oct. 28, 1775), *reprinted in* 3 AMERICAN ARCHIVES: FOURTH SERIES 1235 (Peter Force ed., Washington, D.C., M. St. Clair Clarke & Peter Force 1840).

County Treasurers are hereby impowered enjoined and Required to cause the same to be FORTHWITH Levied After the publication of this Act.<sup>140</sup>

### North Carolina

I. Whereas there are in divers parts of this Province several of the People called Quakers, who demean themselves in a quiet and Peaceable Manner, and from a religious Principle, are conscientiously scrupulous of bearing Arms, or appearing or answering to their Names in Muster Fields, and therefore subject to many Fines and Distresses to be made upon their Goods, to their great Hurt and Prejudice: For the Relief of such,

II. Be it Enacted by the Governor, Council, and Assembly, and by the authority of the same, That from and after the passing of this Act, the People called Quakers shall not be obliged to appear and muster at any general or Private Muster within this Province, nor be liable to any Fines or Penalties for not appearing and mustering; any Law, Usage, or Custom to the contrary, notwithstanding.

III. Provided nevertheless, and be it Enacted by the Authority aforesaid, That the Colonel or Chief Commanding Officer of the Militia in every County shall list all Male Persons of the people called Quakers, between the age of Sixteen and Sixty, within his County, under the Command of such Captain as the Governor, or Commander in Chief for the Time Being, shall think fit: And if upon any Invasion or Insurrection, the Militia of the Counties to which such Quakers belong shall be drawn out into actual service, and any Quakers so enlisted shall refuse to serve, or provide an able and sufficient Substitute in his Room, if thereto required by the Colonel, or Chief Officer of the Militia of his County; in such Case, every Quaker so refusing to serve, or provide a Substitute as aforesaid, shall forfeit and pay Ten Pounds; to be recovered before any Justice of the Peace of the County, upon Complaint of the Colonel or Chief Officer; and to be levied by Distress and Sale of the Estate of the Quaker so refusing; which Sum shall be applied, by the said Colonel or Chief Officer, towards providing a Substitute in the Room of such Quaker, upon whom the same shall be levied as aforesaid.

IV. Provided always, That the Number of Quakers required by the Colonel or Chief Officer of any County to serve, or find Substitutes as aforesaid, shall not exceed the Proportion the whole Number of Quakers bear to the whole Number of Militia upon the Muster Rolls of the said County.

V. Provided also, and be it further Enacted by the Authority aforesaid That no man under the Denomination of a Quaker shall be exempted from Musters and bearing Arms, or from paying such Fines and Forfeitures as by Law inflicted, in Case of Refusal or Neglect, without producing, if required by the Colonel or

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140. Act to amend an act, entitled An Act, for regulating the Militia of the Colony of New York, ch. 1042 (1757), reprinted in 2 LAWS OF NEW YORK 113, 114 (William Livingston & William Smith eds., New York, William Weyman 1762).

Chief Officer of the Militia, a Testimonial or Certificate from the Monthly Meeting, that he is considered and excepted a Member of that Society.<sup>141</sup>

### **Pennsylvania**

“And be it enacted, That every of the Persons so as aforesaid enrolled, not conscientiously (10) scrupling the use of Arms, shall be sufficiently armed with One good Musket, Fuzee or other Fire lock well fixed, a Cutlass, Bayonet or Tomhawk, a Cartouch Box filled with Twelve or more Cartridges of Powder, Twelve or more sizeable Bullets, and Three good Flints . . . .”<sup>142</sup>

### **Rhode Island**

Bee it therefore enacted, and hereby it is enacted by his Majesty’s authority, that noe person (within this Collony), that is or hereafter shall be persuaded in his conscience that he cannot or ought not to trayne, to learne to fight, nor to war, nor kill any person or persons, shall at any time be compelled against his judgment and conscience to trayne, arm, or fight, to kill any person or persons, by reason of or at the command of any officer of this Collony, civil nor military, nor by reason of any by-law here past or formerly enacted; nor shall suffer any punishment, fine, distraint, pennalty, nor imprisonment, who cannot in conscience traine, fight, nor kill any person nor persons for the aforesaid reasons.<sup>143</sup>

### **Virginia**

Provided also, and be it further enacted, by the authority aforesaid, That no Quaker shall be exempted from appearing at musters as aforesaid, until he shall produce, to the lieutenant or chief officer of the militia of his county, a testimonial or certificate from the monthly meeting to which he belongs, that he is really and bona fide one of the people called Quakers, and is acknowledged and received by them as a member of their society; and if at any time any person calling himself a Quaker shall be excommunicated or excluded from the said society, the monthly meeting to which such excluded person did belong, shall within three months after such exclusion, cause the same to be certified to the lieutenant or chief officer of the militia of the county, and thereupon, the person so excluded shall be deprived of the exemption from appearing at musters as aforesaid, and shall be subject to fines and penalties inflicted by the recited act for not appearing at musters.

And be it further enacted by the authority aforesaid, That every person so exempted (not being a Quaker) shall always keep in his house or place of abode,

141. Act for the Addition to, and Amendment of an Act, entitled, An Act for Appointing a Militia, ch. 4 (1770), *reprinted in* 23 THE STATE RECORDS OF NORTH CAROLINA, *supra* note 42, at 787–88.

142. Act for forming and Regulating the Militia (1757), *reprinted in* 3 PENNSYLVANIA ARCHIVES, *supra* note 42, at 123.

143. 2 RHODE ISLAND COLONY RECORDS 495–99 (John Russell Bartlett, ed., Providence, A. Crawford Greene and Brother 1857) (cited by RUFUS M. JONES, THE QUAKERS IN THE AMERICAN COLONIES 179 (1962)).

such arms, accoutrements and ammunition, as are by the said act required to be kept by the militia of this colony; and if he shall fail or refuse so to do, he shall forfeit and pay the sum of five pounds, to be levied and assessed on him in the same manner as the several fines and forfeitures, inflicted by the said act, are directed to be levied and assessed: And such exempts shall also, in case of any invasion or insurrection, appear with their arms and ammunition, at such place as shall be appointed by the commanding officer of the militia of their respective counties, cities, or boroughs, and shall then be incorporated with, and be subject to the same discipline, rules and orders, and also the same fines, forfeitures and penalties, for non-appearing or misbehaviour, as the other militia of this colony are subject to.<sup>144</sup>

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144. Act to continue and amend the act for the better regulating and disciplining the militia, ch. 31 (1766), reprinted in 8 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA *supra* note 42, at 243–44.