

WHO MOVED MY HARM PRINCIPLE?
HOW THE RELATIONSHIP BETWEEN
COMPLICITY CLAIMS AND THE
CONTRACEPTION MANDATE SHOWS
THAT CONSIDERATIONS OF THIRD-
PARTY HARMS IN RELIGIOUS
EXEMPTION CASES ARE NOT WHERE
WE THINK THEY ARE

ELYSSA STERNBERG*

*“Men and women are persons of equal dignity and they should count
equally before the law.”*

– Justice Ruth Bader Ginsburg¹

TABLE OF CONTENTS

I. INTRODUCTION	166
II. IS THERE A HARM PRINCIPLE IN RELIGIOUS FREEDOM JURISPRUDENCE?	171
A. WHY A HARM PRINCIPLE IS NECESSARY, AS ILLUSTRATED BY COMPLICITY CLAIMS	172

* J.D. Candidate, University of Southern California, Gould School of Law, 2019; B.S., Journalism, Boston University, 2015; Submissions Editor, Volume 28, *Southern California Review of Law and Social Justice*. I would like to thank Professor Nomi Stolzenberg for her guidance and advice throughout the process of writing this Note. Thank you to my parents and friends who have constantly supported my education and work: “look, I made a hat.”

¹ Magnolia Pictures & Magnet Releasing, *RBG – Official Trailer*, YOUTUBE, Mar. 7, 2018, <https://www.youtube.com/watch?v=biRlcQqmOc>.

B. THERE IS A HARM PRINCIPLE IMPLICIT IN THE FREE EXERCISE CLAUSE 173

C. THERE IS A HARM PRINCIPLE IMPLICIT IN THE ESTABLISHMENT CLAUSE 175

III. THE HARM PRINCIPLE IS NOT LOCATED IN THE COMPELLING INTEREST TEST OF RFRA 178

A. COMPELLING INTERESTS ARE NOT A PROXY FOR THIRD PARTIES’ INTERESTS 179

B. THE TEST ALLOWS FOR SUBJECTIVE JUDICIAL OUTCOMES, WHICH CAN LEAD TO MISCALCULATIONS IN THE DEGREE OF HARM TO THIRD PARTIES 182

C. THE STATE’S INTERESTS ARE NOT ADEQUATELY CONSIDERED DUE TO THE LEAST RESTRICTIVE MEANS PRONG 187

D. THE COMPELLING INTEREST PRONG PERMITS ANARCHY AND UNDERCUTS THE SUPREMACY OF LAW 189

IV. THE SOLUTION OF THE SUBSTANTIAL BURDEN PRONG... 190

V. CONCLUSION 194

I. INTRODUCTION

In an effort to make essential parts of women’s health care accessible to all, the Affordable Care Act (“ACA”) requires all employers to provide health insurance that includes contraception coverage to their employees.² The provision requiring contraceptive coverage became known as the “contraception mandate.” While religious organizations received an exception to the mandate, a number of for-profit employers sued the government to receive a similar exemption because they opposed contraception on religious grounds and believed they would be “complicit” in sin if they provided such insurance.³

On October 6, 2017, the Trump administration created a new rule through the Department of Health and Human Services (“HHS”) which expanded the number of exemptions to the ACA’s contraception mandate.⁴

² Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 120 (2010). Similar to other parts of the ACA, businesses with less than 50 employees and grandfathered plans were exempt from this mandate.

³ Ethan Bronner, *A Flood of Suits Fights Coverage of Birth Control*, N.Y. TIMES (Jan. 23, 2013), <https://www.nytimes.com/2013/01/27/health/religious-groups-and-employers-battle-contraception-mandate.html>.

⁴ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792 (Oct. 6, 2017) (to be codified at 26 C.F.R. 54); see also Robert Pear et. al, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES

This new rule provides an exemption for any employer that objects to contraceptives on religious grounds or general moral convictions.⁵ The Trump administration claimed that these new policies were valid under the Religious Freedom Restoration Act (“RFRA”).⁶ This announcement prompted lawsuits from the ACLU and the attorneys general of Massachusetts, California, and Washington,⁷ and judges in Pennsylvania and California blocked the administration from enforcing these new rules in December 2017.⁸

The Supreme Court of the United States has been faced with deciding the limits of religious liberty several times in the past in cases like *Reynolds v. United States*⁹ and *Braunfeld v. Brown*.¹⁰ *Sherbert v. Verner*¹¹ was the leading case for granting religious exemptions from generally applicable laws until 1990. In *Sherbert*, a claimant had her employment terminated because, as a Seventh-day Adventist, she could not work on Saturdays due to the Sabbath.¹² She was later denied state unemployment compensation benefits because she did not accept suitable jobs that required her to work on Saturdays.¹³ The Court held that by denying her unemployment benefits for declining jobs that required her to work on the Sabbath, the law was burdening her as if she was fined for worshipping on a Saturday.¹⁴ Thus, the

(Oct. 6, 2017), https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html?_r=1.

⁵ *Id.*

⁶ *Id.* This announcement came with an additional announcement by the Justice Department that changed the department’s position on religious exemption to anti-discrimination on the basis of sex to include transgender persons.

⁷ *ACLU Filing Lawsuit Challenging Trump Administration Contraceptive Coverage Rule*, AM. C.L. UNION (Oct. 6, 2017), <https://www.aclu.org/news/aclu-filing-lawsuit-challenging-trump-administration-contraceptive-coverage-rule>; see also Jesse Hellman, *ACLU Files Lawsuit Against Trump Administration Over Roll Back of Birth Control Mandate*, THE HILL (Oct. 6, 2017, 1:25 PM), <http://thehill.com/policy/healthcare/354266-aclu-promises-lawsuit-against-trump-elimination-of-birth-control-mandate>.

⁸ Dan Levine, *Second U.S. Judge Blocks Trump Administration Birth control rules*, REUTERS (Dec. 21, 2017, 11:43 AM), <https://www.reuters.com/article/us-usa-trump-healthcare/second-u-s-judge-blocks-trump-administration-birth-control-rules-idUSKBN1EF2OH>. At time of press, the Trump administration was expected to issue new birth control regulations. Samantha Schmidt, *Trump Administration Set to Expand Religious Exemptions to Birth Control Coverage*, WASH. POST (Oct. 19, 2018), https://www.washingtonpost.com/religion/2018/10/19/trump-administration-set-expand-religious-exemptions-birth-control-coverage/?utm_term=.c68058773f0a.

⁹ *Reynolds v. United States*, 98 U.S. 145 (1879).

¹⁰ *Braunfeld v. Brown*, 366 U.S. 599 (1961).

¹¹ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹² *Id.*

¹³ *Id.* at 399–400.

¹⁴ *Id.* at 404.

Court, using a two-part test, granted an exemption from the law, thereby allowing the claimant to collect unemployment benefits.¹⁵ The *Sherbert* test first asks if the law “imposes any burden on the free exercise of the appellant’s religion.”¹⁶ If the answer is yes, the Court then looks to see if there is a compelling state interest that justifies the infringement.¹⁷ The *Sherbert* test was later reaffirmed in *Wisconsin v. Yoder*¹⁸ and its use was continued for nearly 30 years, with requests for exemption failing only because the state proved it had a compelling interest.¹⁹ Courts created additional exemptions by carving out situations where the *Sherbert* test did not apply (such as prisons, military, and tax systems).²⁰

However, the Court’s religious freedom jurisprudence took a significant turn in *Employment Division v. Smith*, in which the Court departed from the *Sherbert* test and held that religious exemptions to generally applicable laws could be denied.²¹ The claimants in *Smith* had been fired from their jobs for ingesting the drug peyote during a religious ceremony, and they could not receive unemployment benefits because the ingestion of peyote violated criminal laws.²² In *Smith*, the Court held that unemployment benefits *could* be denied because the Free Exercise Clause does not limit the state from prohibiting drug use, even though certain religions use drugs as part of religious ceremonies.²³

In response to the Court’s ruling in *Smith*,²⁴ Congress passed the Religious Freedom Restoration Act (“RFRA”) in 1993, which restored the *Sherbert* test.²⁵ Under RFRA’s two-prong test, the federal government cannot infringe on, nor burden, a person’s free exercise of religion, even if the rule is generally applicable, unless there is a “compelling governmental interest” and the law is the “least restrictive means of furthering” that interest.²⁶ Ideally, the compelling governmental interest prong of RFRA would allow the courts to balance the interests of the burdened party with other legitimate interests the government may have in enacting the

¹⁵ *Id.*

¹⁶ *Id.* at 403.

¹⁷ *Id.* at 406.

¹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972).

¹⁹ MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 123 (4th ed. 2016).

²⁰ *Id.*

²¹ *Emp’t Div. v. Smith*, 494 U.S. 872, 872 (1990).

²² *Id.* at 874.

²³ *Id.* at 890.

²⁴ 42 U.S.C. § 2000bb(a)(4) (2012).

²⁵ 42 U.S.C. § 2000bb(b)(1) (2012).

²⁶ 42 U.S.C. § 2000bb-1 (2012).

burdening law, such as preventing harm to third parties.²⁷ The idea that the government is allowed to limit liberty for the sake of preventing harm to others is known as the harm principle.²⁸

However, recent cases have brought a novel type of claim known as a complicity claim. A complicity claim is an objection to government regulation that makes the claimant “complicit in the assuredly sinful conduct of others.”²⁹ The existence of complicity claims shows that the compelling interest prong of RFRA does not allow courts to consider the harm principle. These cases have received widespread media attention. Examples include *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*³⁰ and the recently decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.³¹ The claimants in *Hobby Lobby* requested an exemption from the ACA’s contraception mandate because their religion dictates that the use of contraception is a sin.³² They claimed that by providing health insurance that covered contraceptives, they were, in essence, “complicit” in the sin of contraception use.³³ This “complicity claim” is a very different claim from those brought in *Sherbert* and *Smith* because a complicity claim necessarily controls the conduct of a third party. In *Hobby Lobby*, the Court permitted a religious exemption despite the existence of both a burden on the free exercise of religion and a compelling state interest³⁴ because the Court decided that the contraception mandate of the ACA was not the least restrictive means of furthering that interest.³⁵

Thus, there is no binding precedent that forces the courts to consider the effects that any requested exemption might cause to third parties.³⁶ The rise in complicity claims makes this omission problematic because these types of claims necessarily control the conduct of a third party.³⁷ Although the idea of preventing harm to third parties may have been a structuring

²⁷ Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 886 (1994).

²⁸ Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CAL. L. REV. 953, 954 (2016).

²⁹ Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2518 (2015).

³⁰ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751 (2014).

³¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

³² *Hobby Lobby*, 134 S. Ct. at 2765–66.

³³ *See id.* (describing the claimants’ positions that it would violate their religious convictions to provide health insurance that included certain forms of contraception).

³⁴ *Id.* at 2786–87.

³⁵ *Id.*

³⁶ Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897, 1960 (2015).

³⁷ NeJaime & Siegel, *supra* note 29, at 2518.

principle of the Court's decision in *Hobby Lobby*,³⁸ the harms to third parties were not seriously considered. *Hobby Lobby* and subsequent contraception cases question if there is a harm principle in religious exercise jurisprudence, and if so, where is it?

This Note seeks to answer the following questions: is there a harm principle that limits what is considered a protectable free exercise of religion? If so, where can the Court consider the harm principle in its analysis? Having a harm principle would mean that when a party makes a claim for an accommodation under the Free Exercise Clause, the accommodation could not be granted if it imposes serious harm to third parties. Together these two questions consider how the Court balances the burden that a conduct regulation has on the religious beliefs of a claimant, with the effects that an exemption to the law would have on third parties. Complicity claims, such as those implicated by the contraception mandate, can help clarify the problems and risks associated with not adequately recognizing the harm principle.

The Court should formally recognize a harm principle that limits the right to free exercise of religion because support for the harm principle already exists in its religious freedom jurisprudence. While both Free Exercise³⁹ and general First Amendment jurisprudence have implicitly supported the idea of the harm principle,⁴⁰ they have not directly acknowledged it. Additionally, the Establishment Clause has a harm principle baked into it by requiring neutrality toward religion.⁴¹

Although the most obvious place to apply this harm principle might be in the countervailing interest prong of RFRA, the substantial burden prong may be the best place for the Court to consider the harm principle. The Court's decision in *Hobby Lobby* provides grounds for concern that the compelling interest test will not be an effective or reliable way of vindicating the harm principle because of its various limits: the fact that the state's interest does not necessarily encompass all harms that could affect third parties, judge's subjective judgments on what counts as a compelling state interest, and the least restrictive means principle, among other concerns.⁴² While the compelling interest prong of RFRA is an insufficient

³⁸ *Id.* at 2530, 2533.

³⁹ *Id.* at 2530; *see also* *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 437 (2006) (stating that the Court has considered and found administrative harms under the compelling interest test in cases such as *United States v. Lee*, 455 U.S. 252 (1982) and *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

⁴⁰ *Brown*, *supra* note 28, at 957.

⁴¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (discussed *infra*).

⁴² *Sepinwall*, *supra* note 36, at 1967.

basis for contemplating the harm principle, the substantial burden prong of the *Sherbert* test can allow courts to find certain forms of religious exercise to be unprotectable due to their harmful effects on third parties.

II. IS THERE A HARM PRINCIPLE IN RELIGIOUS FREEDOM JURISPRUDENCE?

John Stuart Mill described the harm principle as the idea that the exercise of a right is limited to the extent it affects, or harms, third parties.⁴³ “Everyone who receives the protection of society owes a return for the benefit . . . that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interests of one another; or rather certain interests, which . . . ought to be considered as rights.”⁴⁴ As the late law professor Zechariah Chafee, Jr. later stated in his discussion of free speech: “your right to swing your arms ends just where the other man’s nose begins.”⁴⁵ The idea that rights are limited by the harm principle is supported in case law discussing issues ranging from free speech⁴⁶ to vaccinations,⁴⁷ and of course, free exercise of religion.⁴⁸ Recognizing the harm principle is important because it affects which claims to religious liberty are granted and how they are accommodated.⁴⁹

A harm principle in Free Exercise doctrine would stand for the notion that one’s right to exercise religion does not include the right to significantly harm third parties. The definition of “harm” has evolved and become broader over time.⁵⁰ The founding fathers might have considered only immediate bodily threats like assault to be a harm, but what would be considered a harm today can include less tangible harms.⁵¹ This gives the

⁴³ JOHN STUART MILL, *ON LIBERTY* 22 (2d ed. 1859).

⁴⁴ *Id.* at 134.

⁴⁵ Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919).

⁴⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (stating that First Amendment principles have limitations and speech that is offensive or shocking is not entitled to “absolute constitutional protection.”).

⁴⁷ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (finding that the power of the police state embraces regulations that will protect the public health and safety).

⁴⁸ *Reynolds v. United States*, 98 U.S. 145, 167 (1879) (stating that the government would only exist in name if religious accommodations from generally applicable laws were allowed); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (stating that the government has a fundamental interest in eradicating racial discrimination in education, which outweighs the “burden [that the] denial of tax benefits places on petitioners’ exercise of their religious beliefs.”).

⁴⁹ NeJaime & Siegel, *supra* note 29, at 2521.

⁵⁰ Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J. L. & GENDER 103, 131 (2015).

⁵¹ *Id.*

legislature more freedom to define what is considered a harm.⁵² The definition of what is considered a harm is its own issue and certainly needs limits,⁵³ whether the line be “substantial,” “unreasonable,” “targeted,” or “threats to fundamental rights.” Regardless, whatever this limit is, it must be broad.

A. WHY A HARM PRINCIPLE IS NECESSARY, AS ILLUSTRATED BY
COMPLICITY CLAIMS

Complicity claims illustrate the need for the Court to acknowledge a harm principle in religious freedom jurisprudence. Generally, in a complicity claim case, a person⁵⁴ is refusing to partake in an activity due to the belief that participation will “assist” someone else in engaging in an activity that the person’s religion deems to be “wrong.”⁵⁵ However, in the religious accommodation cases that RFRA was based on, such as *Sherbert* and *Smith*, the “exercise” of religion did not regard the conduct of “persons outside the faith community,”⁵⁶ and any potential costs or affects were “borne by society as a whole.”⁵⁷ Congress did not consider complicity claims when writing RFRA; in fact, it passed on legislation that would have specifically allowed for complicity claims because granting religious exemptions from, for example, anti-discrimination laws could harm groups of citizens that are particularly vulnerable.⁵⁸ This shows that even Congress could tell the difference between previous religious accommodation claims and complicity claims, recognizing the “underlying intuition . . . that one citizen should not be singled out to bear significant costs of another person’s religious exercise.”⁵⁹ Yet “[c]omplicity-based conscience claims differ in form and social logic from the claims featured in the free exercise cases RFRA invokes . . . these differences in form and logic matter because they

⁵² *Id.*

⁵³ *Id.* at 132.

⁵⁴ There is an additional issue of whether a for-profit business is a “person” that can exercise religion, which is still being debated but was discussed in *Hobby Lobby*. See *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2767–75 (2014). In Chief Judge Briscoe’s dissent at the Tenth Circuit Court of Appeals, she noted that treating the religious beliefs of Hobby Lobby’s owners as the beliefs of the corporation “disregarded [the] basic principles of corporation law.” Brief for the Petitioners at 11, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354), 2014 WL 173486.

⁵⁵ NeJaime & Siegel, *supra* note 29, at 2524–26.

⁵⁶ *Id.* at 2591 n.263.

⁵⁷ *Id.* at 2526.

⁵⁸ *Id.* at 2527–28.

⁵⁹ *Id.* at 2528.

amplify the material and dignitary harms that accommodation of the claims can inflict on other citizens.”⁶⁰ Complicity claims present a greater need for considering the harm principle because under a complicity claim, specifically identified persons or groups who do not share the claimant’s belief can be forced to bear the burden of the claimant’s exercise, instead of society in general.⁶¹ Essentially, requests for exemptions under a complicity claim require a heightened concern for the harm principle⁶² because they can result in the denial of services and benefits to third parties.

B. THERE IS A HARM PRINCIPLE IMPLICIT IN THE FREE EXERCISE
CLAUSE

The Court has already decided free exercise religious accommodation cases with concern for the harm to third parties, which shows that these ideas are already present in its jurisprudence.⁶³ For example, in *United States v. Lee*, the Court denied an Amish claimant a requested exemption from paying social security taxes because of the “broad public interest in maintaining” the tax system.⁶⁴ Additionally, the Court’s decisions in *Cutter v. Wilkinson* and *Estate of Thornton v. Caldor* stated that courts should account for the burdens that are imposed on third parties when a group or individual is given a free exercise accommodation.⁶⁵ Even when the Court granted accommodations, such as in *Sherbert* and *Hobby Lobby*, it at least *considered* how the exemption would affect third parties. In *Sherbert*, the Court held that granting an exemption would not “abridge any other person’s religious liberties.”⁶⁶ While the Court focused on one specific type of liberty in *Sherbert*—the liberty of the claimant to freely exercise her religion—its decision shows that third-party liberties are at least a consideration.⁶⁷ Indeed, even the *Hobby Lobby* Court considered third-party interests (although it claimed that harm to employees would be “precisely

⁶⁰ *Id.* at 2519–20.

⁶¹ *Id.* at 2524.

⁶² *Id.* at 2518.

⁶³ Marie Killmond, Note, *Why is Vaccination Different? A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913, 924 (2017).

⁶⁴ *United States v. Lee*, 455 U.S. 252, 260 (1982).

⁶⁵ *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–10 (1985).

⁶⁶ *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

⁶⁷ *See id.* at 408–409 (stating that the government’s decision to deny the claimant unemployment benefits because she refused to work on the Sabbath did not “present an administrative problem of such magnitude, or . . . afford the exempted class . . . [a great] competitive advantage”).

zero”).⁶⁸ The Court specifically noted that laws supported by the state’s desire to, for example, combat the spread of disease, could withstand a religious objection attack because of the need to prevent mass contagion,⁶⁹ which is a way of protecting third parties. Even though the Court might be wrong in assuming there would be “precisely zero” burdens on third parties, the fact that the Court acknowledged *Hobby Lobby* employees “signaled that, at the very least, third-party harms do not completely fall out of the analysis when RFRA claims are involved.”⁷⁰

While it should be acknowledged that there is debate on whether the harm principle is already recognized in the doctrine,⁷¹ many scholars argue that consideration of third-party harms is necessary.⁷² One illustration of the harm principle’s necessity can be seen in vaccination laws. While not making a First Amendment claim, the claimant opposing a mandatory vaccination law in *Jacobson v. Massachusetts*⁷³ essentially argued that the law would cause him to violate his religious beliefs.⁷⁴ The Court held that the public health benefits of vaccinations outweighed his claims.⁷⁵ In the First Amendment context, courts have held that countervailing interests were significant, especially when public health is concerned.⁷⁶ The harm principle is especially important when considering complicity claims since the rights of third parties become marginalized and undermined when accommodations are given in response to complicity claims.⁷⁷ Specifically, “complicity-based conscience claims are oriented toward third parties who do not share the claimant’s beliefs about the conduct in question. For this reason, their accommodation has distinctive potential to impose material and dignitary harm on those the claimants condemn.”⁷⁸

⁶⁸ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2760 (2014).

⁶⁹ *Id.* at 2783.

⁷⁰ Killmond, *supra* note 63, at 936; *see also* NeJaime & Siegel, *supra* note 29, at 2530 (“Concern about protecting third-parties from harm was a structuring principle of the Court’s decision, even if the Court may have erred in assuming that the accommodation would impose no burdens on third parties.”).

⁷¹ *Compare* Sepinwall, *supra* note 36, at 1968 n.259 (doubting that the Court has read a harm principle into the Establishment Clause) *with* Brown, *supra* note 28, at 957 (stating that the Supreme Court has “responded” to the idea of the harm principle).

⁷² Killmond, *supra* note 63, at 952.

⁷³ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁷⁴ Killmond, *supra* note 63, at 946–48.

⁷⁵ *Id.*

⁷⁶ *Id.* at 926.

⁷⁷ NeJaime & Siegel, *supra* note 29, at 2519–20.

⁷⁸ *Id.* at 2527.

C. THERE IS A HARM PRINCIPLE IMPLICIT IN THE ESTABLISHMENT
CLAUSE

The Establishment Clause has inherent elements of a harm principle because it requires the government to be neutral concerning religion. While jurisprudence has yet to develop a solid theory of how the clause should be applied,⁷⁹ there are general principles that help guide what is a violation of the Establishment Clause. One such principle is that it demands neutrality in issues regarding religion,⁸⁰ which prevents results such as cost shifting from one party to another in the name of religion.

The reason the government must be neutral toward religion is to prevent discrimination against and alienation of those who do not adhere to the majority religion.⁸¹ As Justice Blackmun noted, “[w]hen the government arrogates to itself a role in religious affairs, it abandons its obligation as a guarantor of democracy.”⁸² The importance of this neutrality can be seen in the second prong of the “*Lemon* test.”⁸³ This test, developed in *Lemon v. Kurtzman*,⁸⁴ states that a law’s primary effect cannot advance nor inhibit religion.⁸⁵ Compliance with the Establishment Clause is important because, as Justice Ginsburg noted in her *Hobby Lobby* dissent, “the government’s license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause.”⁸⁶

One way the Court has determined if the government is advancing a religion is by looking at how the government action affects third parties. In fact, “the Court condemns permissive accommodations on Establishment Clause grounds when the accommodations impose significant burdens on third parties who do not believe or participate in the accommodated

⁷⁹ Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 590 (2013).

⁸⁰ *Id.* at 592.

⁸¹ *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring) (“Direct government action endorsing religion or a particular religious practice is invalid under this [Establishment Clause] approach because it sends a message to non-adherents that they are outsiders, not full members or the political community”) (internal citations omitted).

⁸² *Lee v. Weisman*, 505 U.S. 577, 607 (1992) (Blackmun, J., concurring).

⁸³ Additionally, although it has been criticized, the *Lemon* Test is helpful in understanding what the Court has considered when faced with an Establishment Clause issue. *Cf.* Sedler, *supra* note 79, at 592.

⁸⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁸⁵ *Id.* at 612–13.

⁸⁶ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2802 n.25 (2014) (Ginsburg, J., dissenting) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720–22 (2005)).

practice.”⁸⁷ In *Estate of Thornton v. Caldor*,⁸⁸ the Court struck down a law that gave employees the right not to work on the Sabbath of their religion because the law would override the interests of third parties.⁸⁹ The Court explained that the Sabbath law gave “unyielding weighting in favor of Sabbath observers over all other interests [which] contravenes a fundamental principle of the Religion Clauses . . . as such, the statute goes beyond having an incidental or remote effect of advancing religion. The statute has a primary effect that impermissibly advances a particular religious practice.”⁹⁰

One example of an impermissible effect on third parties is cost shifting.⁹¹ By allowing a third party to “bear the costs” of a religion, the government is advancing a religion by effectively saying that religious practice is more important than cost the third-party is bearing. In *Estate of Thornton*, the Court held that the law violated the Establishment Clause after considering the effects that following the law would have on a business, stating that the statute advanced a *particular* religious practice that would force businesses to conform their business practices to the religious decrees of the employee’s faith.⁹² Additionally, in *Cutter v. Wilkinson*, the Court upheld a law that provided religious accommodations to prison inmates, finding that while those accommodations did not violate the Establishment Clause,⁹³ “courts must take adequate account of the burdens a requested accommodation may imposed on nonbeneficiaries”⁹⁴ and that “must be measured so that it does not override other significant interests.”⁹⁵

Complicity claims show how granting religious accommodations from generally applicable laws can violate the Establishment Clause because they induce cost-shifting, which advances a religious practice. These types of

⁸⁷ 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, 349 (2014).

⁸⁸ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 703 (1985).

⁸⁹ *Id.* at 710 (“The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities”) (internal citation omitted).

⁹⁰ *Id.*

⁹¹ Gedicks & Van Tassell, *supra* note 87, at 384.

⁹² *Estate of Thornton*, 472 U.S. at 708–10 (“The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath.”).

⁹³ *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

⁹⁴ *Id.* at 721.

⁹⁵ *Id.* at 722.

claims force third parties, who may not adhere to the claimant's religion or do not share the claimant's belief, to "bear the costs" of the religious practice of another.⁹⁶ In *Hobby Lobby*, the costs of granting an exemption to the mandate were shifted onto third parties, the employees,⁹⁷ because these employees lost coverage that they were otherwise entitled to have. The lack of coverage for "approved contraceptives in an employer health plan imposes significant out-of-pocket costs on employees, who then have to pay for the excluded contraceptives with after-tax wages instead of having them fully covered by insurance that they pay for only in part and with pre-tax wages."⁹⁸ In addition, the interim rules promulgated by the Trump administration clearly state that their sole purpose is to "expand exemptions to protect religious beliefs,"⁹⁹ meaning that these rules do not have a secular legislative purpose and are therefore intended to advance religious beliefs.¹⁰⁰ The interim rules, exemptions, and the general logic of complicity claims all violate the Establishment Clause because they place the effects of these religious beliefs on third parties. While the interim rules are new, it can be presumed that they will allow more employers to seek exemptions on the basis of their religion,¹⁰¹ which means, as the ACLU plans to argue, their effect will be to advance religion.¹⁰² This means allowing accommodations and expanding exemptions to the contraceptive mandate violates the Establishment Clause.

Thus, a harm principle is necessary. Luckily, this harm principal has implicit support in Free Exercise jurisprudence and explicit support in

⁹⁶ Gedicks & Van Tassell, *supra* note 87, at 363.

⁹⁷ *Id.* at 379. Gedicks provided a great illustration of the illegality of cost shifting under the Establishment Clause. Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J. L. & GENDER 153, 173–75 (2015).

⁹⁸ Gedicks, *supra* note 97, at 170.

⁹⁹ Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47792 (Oct. 6, 2017) (to be codified at 26 C.F.R. 54).

¹⁰⁰ Sedler, *supra* note 79, at 600 ("Whenever the government takes action solely for the purpose of advancing religion, the existence of this improper purpose alone renders the governmental action unconstitutional.").

¹⁰¹ Notre Dame was one of the first prominent employers to take advantage of Trump's interim rules but rolled back requesting an exemption after "recognizing . . . the plurality of religious and other convictions among its employees." See Camila Domonoske, *In Reversal, Notre Dame Says Health Plans Will Still Cover Birth Control*, NPR: THE TWO-WAY (Nov. 7, 2017, 7:06 PM), <https://www.npr.org/sections/thetwo-way/2017/11/07/562630831/in-reversal-notre-dame-says-health-plans-will-still-cover-birth-control>.

¹⁰² Complaint at 46, 52, *American Civil Liberties Union v. Wright* (2017) (No. 17-cv-05572), <https://www.aclu.org/legal-document/american-civil-liberties-union-et-al-v-wright-et-al-complaint>.

Establishment Clause jurisprudence.

III. THE HARM PRINCIPLE IS NOT LOCATED IN THE COMPELLING INTEREST TEST OF RFRA

It might seem that the logical place in the religious freedom doctrine to consider third-party harms would be in the compelling interest test of RFRA. By stating that the government can burden religion only when there is an exception, RFRA effectively gives the accommodation unless the government can show its compelling state interest.¹⁰³ Thomas Jefferson wrote that “the legitimate powers of government extend to such acts only as are injurious to others.”¹⁰⁴ Therefore, it would make sense that preventing harm is a compelling state interest, and that the compelling interest test of RFRA is the place where this harm would be evaluated. It seems natural that consideration of third-party harms would be logically placed here because it is the time in the analysis when the government is able to bring the harm to the Court’s attention.¹⁰⁵ Considering harms in the countervailing interest prong also allows the Court to avoid looking into the nature of religion in under the substantial burden prong. The Court has been quite hesitant to do this¹⁰⁶ because “courts are not arbiters of scriptural interpretation” and “the judicial process is singularly ill-equipped to resolve such asserted differences [of beliefs even within a religion itself].”¹⁰⁷

Yet complicity claims and the *Hobby Lobby* decision are clarifying examples of how the compelling interest test is not up to the task of adequately providing a counterweight to balance the burden on religion against the potential for harm to third parties. In *Hobby Lobby*, the claimants argued that the contraception mandate, which directed businesses to provide health insurance that included all FDA-approved contraception to their employees, would make them “complicit” in the sin of using contraception,¹⁰⁸ therefore violating their right to free exercise of their religion because they could not decide to provide health insurance without

¹⁰³ 42 U.S.C. § 2000bb-1(b) (2012).

¹⁰⁴ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 166 (1832).

¹⁰⁵ Laycock, *supra* note 7, at 886 (“The compelling interest test allows government to regulate for sufficiently strong reasons, principally to prevent tangible harm to third persons who have not joined the faith.”).

¹⁰⁶ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2778 (2014).

¹⁰⁷ *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715–16 (1981).

¹⁰⁸ *Cf. Hobby Lobby*, 134 S. Ct. at 2766 (stating that the petitioners’ belief in when human life begins means that to “facilitate access to contraceptive drugs or devices” would violate their religion.).

contraception.¹⁰⁹ Although the Court noted that the ruling in *Hobby Lobby* was limited to the contraception mandate and not insurance mandates in general,¹¹⁰ the use of the compelling interest test can and will appear in other religious accommodation cases, as it has most recently in the oral arguments for *Masterpiece Cakeshop*.¹¹¹ Overall, the decision in *Hobby Lobby* shows that the compelling interest test is not a sufficient resource for “[taking] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,” which the Cutter court required.¹¹²

As described below, the compelling interest prong is ineffectual in adequately taking into account the harm principle because:¹¹³ (1) a compelling governmental interest is not necessarily a complete proxy for the interests of third parties; (2) the test allows for subjective judgments from judges that might undervalue third-party harms, so those harms never rise to the level of a “compelling interest;” (3) in the application of the test, the state’s interests are not equally weighed against the substantial burden on religious exercise because of the least restrictive means prong; and (4) the application of the test in this context would permit anarchy and undercut the supremacy of law.

A. COMPELLING INTERESTS ARE NOT A PROXY FOR THIRD PARTIES’ INTERESTS

The consideration of a harm principle would not be complete under the compelling interest test because a “compelling governmental interest” is not necessarily a complete proxy for interests of third parties.¹¹⁴ Just because the government might have a compelling reason for a law does not necessarily mean that the compelling reason is the cause, or encompasses all of the causes, of a third-party harm.¹¹⁵ This is a problem because if third-party interests are only considered when they also happen to be a

¹⁰⁹ This is a generalization of many claims that have been made. Some of the plaintiffs in *Hobby Lobby* objected to a subset of contraception that they considered to be abortifacients. *See id.* at 2759.

¹¹⁰ *Id.* at 2783.

¹¹¹ Transcript of Oral Argument at *30, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111).

¹¹² *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

¹¹³ These are just some of the issues with the compelling interest test; there are also practical considerations such as every time a law is challenged by a religious objector, the state would be required to jump the hurdle of strict scrutiny to demonstrate its *compelling* interest through expensive litigation.

¹¹⁴ Sepinwall, *supra* note 36, at 1967.

¹¹⁵ *Id.*

compelling state interest, the harm principle is not adequately being considered. For example, professor Amy J. Sepinwall contrasted the government's interest in enforcing the repeal of "Don't Ask, Don't Tell" with the interests of someone who refuses to serve in the military alongside openly gay men and women due to their religious beliefs; while the government's compelling interest might be national security concerns, it does not adequately consider the harm that is also suffered by the LGBTQ+ community.¹¹⁶

Hobby Lobby also highlights how a compelling governmental interest does not necessarily encompass all the harms experienced by third parties. In *Hobby Lobby*, the government argued that broad protection is needed for "public health," "gender equality," and access to contraception without co-payments, which are all valid concerns. However, there are many more harms to women caused by the denial of contraception, which are as varied as the reasons women might use contraceptives to begin with.¹¹⁷ Although many of these cultural reasons would not necessarily be considered compelling state interests, they nonetheless present a grave harm to women by subjecting women to social inequality. The *Hobby Lobby* Court concluded "that religious accommodation was possible with 'precisely zero' effect on the statute's beneficiaries . . . never [considering] whether accommodating the employers' belief . . . might create harmful social meanings that undermine individual and societal interests the statute promotes."¹¹⁸ Traditional employee benefit programs that do not adequately cover all of women's needs signal to women that they are not equals in the workforce. Employee insurance developed based on the needs of men because women did not join the work force until much later and as a result, it often does not include women's needs.¹¹⁹ These programs might cover male-only needs, such as male sterilization or treatment for erectile dysfunction—which was widely covered after its introduction by insurance plans—without covering the most widely used forms of female contraception.¹²⁰ This reflects "a long-standing history of social citizenship highly influenced by gender" in which women are temporarily in the

¹¹⁶ *Id.*

¹¹⁷ 31% of birth control users utilize birth control for menstrual pain, 28% use for menstrual regulation, 14% use for acne, and 4% use for endometriosis. RACHEL K. JONES, GUTTMACHER INSTITUTE, BEYOND BIRTH CONTROL: THE OVERLOOKED BENEFITS OF ORAL CONTRACEPTIVE PILLS 3 (2011).

¹¹⁸ NeJaime & Siegel, *supra* note 29, at 2581–83.

¹¹⁹ Elizabeth Sepper, Note, *Gendering Corporate Conscience*, 38 HARV. J. L. & GENDER 193, 214 (2015).

¹²⁰ *Id.* at 214.

workforce and are “more suitably situated in the home.”¹²¹ Finally, while the fact that only those with female reproductive systems can bear children and use prescription contraceptives cannot be ignored, “the imposition of financial burdens on reproductive control is social. By allowing employers to exclude contraceptives from insurance plans, society, not biology, has subjected women to inequality.”¹²²

Additionally, denying contraception reinforces traditional notions of marriage and motherhood in which women are not seen as equals. Contraception laws have a history of inequality in allowing contraception for men but not for women, even when a lack of contraception negatively affects women’s health.¹²³ For example, when Connecticut banned contraception in 1958, it allowed an exemption for men to use condoms to help prevent the spread of sexually transmitted diseases.¹²⁴ However, the exemption did not allow women physically unable to survive pregnancy or childbirth to use contraception; instead, courts told these women to abstain from sex, a decree the men were not given.¹²⁵ This gave men more control over sex and childbearing, reinforcing traditional gender roles.¹²⁶ Additionally, while the Court recognized a right to privacy in *Griswold v. Connecticut*,¹²⁷ privacy does not capture all of the harms that denying contraception imposes on women.¹²⁸ Law professor Melissa Murray argues that equality *and* privacy can help create a world where women can “aspire to more than traditional marriage and motherhood.”¹²⁹ As an example, Murray pointed to *Trubek v. Ullman*,¹³⁰ in which the claimants challenged a Connecticut law prohibiting contraception. Claimants were a married couple who sought to access contraception because both spouses were in law school and wanted to avoid a pregnancy that might disrupt their

¹²¹ *Id.* at 219 (internal quotations omitted).

¹²² *Id.* at 208–09.

¹²³ Neil S. Siegel & Reva B. Siegel, *Contraception as A Sex Equality Right*, 124 YALE L.J. FORUM 349, 353–54 (2015); *see generally* Lorraine A. Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL’Y 139 (2006).

¹²⁴ Siegel & Siegel, *supra* note 123, at 352.

¹²⁵ *Id.* at 353–54. “The court granted a health exception to men—even when their lives were not threatened by venereal disease—after having refused a health exception for women even when their lives were threatened by pregnancy.” *Id.* at 352.

¹²⁶ *Id.* at 355.

¹²⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹²⁸ Melissa Murray, *Overlooking Equality on the Road to Griswold*, 124 YALE L. J. FORUM 324, 331 (2015).

¹²⁹ *Id.*

¹³⁰ *Trubek v. Ullman*, 367 U.S. 907 (1961). The case was eventually dismissed on procedural grounds.

education.¹³¹ *Trubek* showed that contraception “was about restructuring marriage by allowing wives to step out of the confines of domesticity to participate in spheres traditionally reserved for their husbands.”¹³² Contraception has allowed, and is necessary to, the restructuring of the traditional notion of marriage, which provides more equality for women.¹³³ The denial of contraception “impedes the ability of women (and their partners) to live out their own religious and moral beliefs about reproduction.”¹³⁴ Additionally, some insurance plans may even deny of emergency contraception, which for sexual assault survivors means, “people who have just suffered the trauma of a sexual assault may be denied the ability to prevent the added trauma of a resulting pregnancy — stripping survivors of control over their bodies at a critical time.”¹³⁵

B. THE TEST ALLOWS FOR SUBJECTIVE JUDICIAL OUTCOMES,
WHICH CAN LEAD TO MISCALCULATIONS IN THE DEGREE OF
HARM TO THIRD PARTIES

Additionally, the compelling interest test allows for subjective judgments of what is considered a state interest, giving reason for concern that judges might undervalue third-party harms when making decisions about the validity of the state’s compelling interest. The compelling interest test essentially turns third-party harms into a tangential consideration,¹³⁶ leaving decisions about what a harm is up to judges’ discretion. The Court treated its consideration of third-party harms as “minimal to its analysis” in *Hobby Lobby*.¹³⁷ Academics and scholars have taken note of this lack of consideration for third-party harms in the *Hobby Lobby* decision:

Following *Hobby Lobby*, it seemed that some lower courts understood a reduction in the importance of third-party harms—relative to the burden on religious exercise—in their analyses of free exercise and RFRA claims. *Hobby*

¹³¹ Murray, *supra* note 128, at 327 (“In this regard, decision-making about contraception and family planning permitted wives to forego marriage’s gendered expectations in order to pursue their own ambitions in and outside of the home.”).

¹³² *Id.* at 328.

¹³³ *Id.* at 326, 328.

¹³⁴ Sepper, *supra* note 119, at 206.

¹³⁵ Gretchen Borchelt, *The Trump Administration’s Birth Control Rules May Harm Sexual Assault Survivors*, TEEN VOGUE (Apr. 25, 2018, 6:00 AM), <https://www.teenvogue.com/story/the-trump-administrations-birth-control-rules-may-harm-sexual-assault-survivors>.

¹³⁶ Sepinwall, *supra* note 36, at 1907.

¹³⁷ Ryan Azad, Comment, *Can a Tailor Mend the Analytical Hole? A Framework for Understanding Corporate Constitutional Rights*, 64 UCLA L. REV. 452, 500 (2017).

Lobby and the influx of claims for religious exemptions, not only from the ACA contraceptive mandate, but also from antidiscrimination statutes aim at protecting LGBT individuals, illustrate the troubling absence of a consistent understanding of third-party harms in the context of religious exemption claims.¹³⁸

Judicial discretion has become of particular importance recently due to the high number of white men being appointed to the bench by the Trump administration, who might not understand the particular harms that affect women and minorities. As of September 2018, only 28% of President Trump's nominees to the federal bench were women, in comparison with President Obama's 42% at the end of his second term.¹³⁹ Research has shown that a judge's racial and gender identity affect judicial decision-making.¹⁴⁰ Additionally, there is a concern that religious exemptions are not granted fairly in that Muslim claimants are denied exemptions at nearly twice the rate of claimants from other religions.¹⁴¹

Furthermore, while the all-male majority in *Hobby Lobby* did decide that a compelling interest existed, the opinion's lack of depth when exploring the issue shows how judges' subjectivity¹⁴² can still play a role in their decision-making. The Court spent fewer than two pages¹⁴³ discussing the compelling interest, with the overwhelming majority of this discussion limited to the idea that women have a constitutional right to obtain contraceptives and that moderate copayments can deter patients from obtaining contraceptives.¹⁴⁴ The court also miscalculated what the effect of

¹³⁸ Killmond, *supra* note 63, at 938.

¹³⁹ John Gramlich, *Trump Has Appointed A Larger Share of Female Judges Than Other GOP Presidents, But Lags Obama*, PEW RES. CTR.: FACT TANK (Oct. 2, 2018), <http://www.pewresearch.org/fact-tank/2018/10/02/trump-has-appointed-a-larger-share-of-female-judges-than-other-gop-presidents-but-lags-obama/>.

¹⁴⁰ Angela Nicole Johnson, *Intersectionality, Life Experience & Judicial Decision Making: A New View of Gender at the Supreme Court*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 353, 381 (2014) (“[W]hen deciding a case that involves a form of discrimination that only a certain class of discriminatees can experience, those life experiences will impact judicial decision making.”).

¹⁴¹ Michael Heise & Gregory C. Sisk, *Free Exercise of Religion Before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1386 (2013).

¹⁴² Additionally, the Court didn't discuss the “sympathetic case” of non-Catholics employed by Church-affiliated institutions. Daniel J. Rudary, *Drafting a “Sensible” Conscience Clause: A Proposal for Meaningful Conscience Protections for Religious Employers Objecting to the Mandated Coverage of Prescription Contraceptives*, 23 HEALTH MATRIX 353, 359 (2013).

¹⁴³ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2780 (2014).

¹⁴⁴ *Id.*; see also NeJaime & Siegel, *supra* note 29, at 2582–83 (“The Court never considered whether accommodating the employer's belief...might create harmful social meanings that undermine individual and societal interests that the statute promotes In these ways,

the exemption would be,¹⁴⁵ stating that the effects of the accommodation on Hobby Lobby's employees would be "precisely zero,"¹⁴⁶ a claim that has been rightfully¹⁴⁷ challenged.¹⁴⁸ Notably, not a single female justice made this miscalculation, as they all joined the dissent.¹⁴⁹

The all-male majority's miscalculation, along with the ineffectiveness of the compelling interest prong, is demonstrated by the fact that controlling reproduction is important to advancing women's equality for both logistical and cultural reasons. Therefore, granting a religious accommodation which allows denial of contraception for female employees is a violation of the constitutional right to equality for women.¹⁵⁰ As the Court in *Planned Parenthood v. Casey* states, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."¹⁵¹

Logistically, contraception allows women to plan if and when to have children—allowing them to pursue their ambitions with more ease¹⁵²—and helps facilitate equality in society. In particular, the ability to control when to have children allows women to access higher-paying jobs.¹⁵³ For example, oral contraceptives became more widespread in the late 1960s and

sanctioning the employer's refusal to pay can create meanings that deter women from using contraception . . .").

¹⁴⁵ NeJaime & Siegel, *supra* note 29, at 2530.

¹⁴⁶ *Hobby Lobby*, 134 S. Ct. at 2760.

¹⁴⁷ *Id.* at 2801–02 (Ginsburg, J., dissenting) ("[T]he Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive at no cost to them, the preventive care needed to safeguard their health and well-being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets.").

¹⁴⁸ NeJaime & Siegel, *supra* note 29, at 2581–83 ("Accommodating such religious beliefs may stigmatize women who use contraception, either by entrenching old norms that condemn women for seeking sex while avoiding motherhood or by labeling contraception as an 'abortifacient.' In these ways, sanctioning the employer's refusal to pay can create meanings that deter women from using contraception, compromising both the individual and societal interests that the statute furthers.").

¹⁴⁹ *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

¹⁵⁰ See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

¹⁵¹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992).

¹⁵² Sepper, *supra* note 119, at 208 ("As feminists have long recognized, without control over their reproductive health, women can pursue their professional and educational ambitions only with great difficulty").

¹⁵³ *Id.*

early 1970s, coinciding with a substantial increase in female applicants to professional training programs, such as law and medicine.¹⁵⁴ This increase in enrollment resulted in a rise in women's presence in these professions.¹⁵⁵ Furthermore, the contraception mandate also helps remove financial inequalities; the mandate was included in the ACA in response to the fact that women paid 68% more in out-of-pocket healthcare costs in comparison to men because they alone bore the costs of contraception.¹⁵⁶ As the ACLU noted in its amicus brief in *Griswold v. Connecticut*,¹⁵⁷

In this respect, effective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions. Thus, the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively.¹⁵⁸

Additionally, the subjectivity of judges is evidenced by the procedural history of *Hobby Lobby*, in which the Court of Appeals did not fully appreciate the logistical challenges that women face when choosing a method of birth control.¹⁵⁹ The lower court determined that because claimants refused to cover only four out of twenty types of contraception, their requested exemption was not burdensome on female employees.¹⁶⁰ Yet, "contraception methods are not interchangeable," as some contraceptive methods are more effective than others and some women have health issues that prevent them from using certain types of contraceptives.¹⁶¹ Women's equality is also harmed for cultural reasons when accommodations to the contraception mandate are granted: accommodations signal that women's healthcare needs are illegitimate, reinforcing the idea that women are active in the workforce on a temporary basis before motherhood and stigmatizing women who chose to use contraception. Even though "religious liberty claims do not directly

¹⁵⁴ Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, J. POL. ECON. 749, 763 (2002). Although there are alternative explanations for this correlation, they include access to abortion and the rise in feminism which are both related to control over reproduction and gender equality.

¹⁵⁵ *Id.* at 749.

¹⁵⁶ Sepper, *supra* note 119, at 205.

¹⁵⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁵⁸ Siegel & Siegel, *supra* note 123, at 355–56.

¹⁵⁹ Brief for the Petitioners at 48, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 17 (citing INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 16 (2011)).

ban contraceptive use, as the criminal statutes did, they nonetheless cultivate social meanings about contraception and contraceptive use.”¹⁶² These social harms are the very type that the *Hobby Lobby* Court was blind to, as they are not economic harms¹⁶³ yet are significant as a form of discrimination, which is a harm in its own right.¹⁶⁴ “[G]ender discrimination against women is implicit in government-endorsed attempts to deny access to birth control.”¹⁶⁵

By allowing contraception to be considered healthcare that employers can “opt-out” of, the Court is sending the message that women’s healthcare is not legitimate healthcare,¹⁶⁶ despite the fact that both *Griswold v. Connecticut*¹⁶⁷ and *Eisenstadt v. Baird*¹⁶⁸ established a constitutional right to contraception.¹⁶⁹ Denying women “contraceptive coverage sends the message that society does not value her ability to make decisions about her life and her body.”¹⁷⁰ This is why the *Hobby Lobby* Court’s notion that the government can pay for women’s healthcare is also discriminatory, because while all or most of men’s healthcare needs are covered by employment-based insurance, women’s healthcare needs are relegated to government-funded clinics.¹⁷¹ While women might still be able to obtain contraception under this scheme, this does not mean there has been no harm, as “the fact that coverage will, in some cases, be provided by another entity does not undo the discrimination.”¹⁷²

Denying contraception access also sends a signal that women’s healthcare needs are not only insignificant, but that using contraception is immoral. “[S]anctioning religious claimants’ objections to contraception, as the Court did in *Hobby Lobby*, may reiterate older messages that

¹⁶² Murray, *supra* note 128, at 330.

¹⁶³ Social harms are also broader than the class the *Hobby Lobby* Court determined was affected by the mandate, as the majority categorized the government’s interest narrowly as “the health of female employees.” Sepper, *supra* note 119, at 200.

¹⁶⁴ *Id.* at 211.

¹⁶⁵ Schmall, *supra* note 123, at 141.

¹⁶⁶ Sepper, *supra* note 119, at 224.

¹⁶⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁶⁸ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁶⁹ *Id.* at 443 (explaining that the right of married persons to access contraceptives established in *Griswold v. Connecticut* meant that single persons could not be denied access to contraceptives under the Equal Protection Clause of the Fourteenth Amendment).

¹⁷⁰ Sepper, *supra* note 119, at 211.

¹⁷¹ *Id.* at 220. Sepper also noted that the *Hobby Lobby* Court “ignored the inequality inherent in a health plan that meets all of men’s health needs and fails to meet women’s [health needs].” *Id.* at 226.

¹⁷² *Id.* at 211.

mark contraceptive use as illegitimate, while stigmatizing those women who, for professional reasons or out of simple desire, seek to avoid motherhood by using contraception.”¹⁷³ The fact that contraception allows women more equality and liberty in their sexual lives could be part of the reason complicity claims arise. Some have argued that filing a request for an exemption to the contraception mandate is not merely a means of avoiding complicity, but also a means of limiting women’s access to contraceptives in general. This is because filing an exemption is an attempt to win the “culture war” to limit what some employers find to be the deplorable sexual liberalization of women in general.¹⁷⁴ As complicity claims become part of a “mobilized political action seeking law reform designed to preserve traditional sexual morality,”¹⁷⁵ it is clear that their purpose is to harm third parties by limiting or encouraging the social disapproval of women’s reproductive choices.

The fact that the *Hobby Lobby* majority failed to consider any of the logistical and cultural reasons that an exemption to the contraceptive mandate could harm women shows how the subjectivity of judges is a limit of the compelling interest test’s consideration of third-party harms.

C. THE STATE’S INTERESTS ARE NOT ADEQUATELY
CONSIDERED DUE TO THE LEAST RESTRICTIVE MEANS
PRONG

Even if the compelling interest prong perfectly captured third-party harms, RFRA’s framework makes it so that the state’s compelling interest is not equally weighed against the substantial burden due to the limitations of the least restrictive means principle. This shows that even when a state’s interest meets the difficult threshold of strict scrutiny, the interests of third parties are not actually weighed against the substantial burden, since the Court considers whether a law is the least restrictive means of achieving the government’s interest. *Hobby Lobby* showed that the threshold for a claimant to show another, less restrictive means of burdening the exercise

¹⁷³ Murray, *supra* note 128, at 330–31; *see also*, Sepper, *supra* note 119, at 228–29 (“Amici for the Hobby Lobby corporation . . . expressed concern that access to contraception harms women by making them “the mere instrument for the satisfaction of men’s own desires” and encourages marital infidelity. Such objections reflect discomfort with women’s sexuality and stereotyping about sex roles. Women’s ability to have sex without suffering the consequences (pregnancy, childbirth, and childrearing) lies at their heart.”).

¹⁷⁴ Sepinwall, *supra* note 36, at 1925; *see also*, NeJaime & Siegel, *supra* note 29, at 2543 (“Our brief consideration of healthcare refusals legislation suggests that complicity-based conscience claims are entangled in long running ‘culture war’ conflicts . . .”).

¹⁷⁵ NeJaime & Siegel, *supra* note 29, at 2522.

of religion is a low bar to meet, in contrast to the high bar the government must meet in demonstrating its compelling interest. The government's argument that it used the "least restrictive means" may now be refuted by the mere suggestion of a 'less restrictive alternative,' even if Congress is unlikely to enact that alternative or the alternative is otherwise impractical."¹⁷⁶

The issue is that the least restrictive means principle encourages cost shifting, which is not permitted under the Establishment Clause.¹⁷⁷ Despite the Court's finding in *Hobby Lobby* that there was a compelling state interest, the Court still found that offering an exemption was not the "least restrictive means" of achieving low-cost contraception because the government could just assume the cost.¹⁷⁸ As Justice Ginsburg stated in her *Hobby Lobby* dissent, the "let the government pay" argument is a slippery slope and defeats the goal of the ACA and the mandate itself.¹⁷⁹ Additionally, Justice Ginsburg noted that the "least restrictive means" principle should not require employees to give up benefits to which they are entitled or force them to jump through logistical and administrative hurdles in the name of their employer's religion.¹⁸⁰

The contraception mandate shows how problematic cost shifting can be for third parties. Permitting "[a]ccommodation of complicity-based conscience claims may impose material burdens on third parties by deterring or obstructing access to goods and services."¹⁸¹ Exemptions' harm to contraception use goes beyond mere paperwork to receive contraception elsewhere: the high cost of contraceptives is significant, and restricted access can have a large effect on how lower income women's use contraceptives.¹⁸² While noting that there is a burden on religious employers, the harm to religious liberty is too indirect in comparison to the harm caused to women by allowing a religion-based exemption from the contraception mandate.¹⁸³

They [women] will have to pay for the care themselves if their insurance doesn't cover it. And, for many low-wage-earning women, the anticipated \$1,000-a-year cost is a

¹⁷⁶ Gedicks, *supra* note 97, at 156.

¹⁷⁷ See Gedicks & Van Tassell, *supra* note 87, at 384.

¹⁷⁸ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2759–60 (2014).

¹⁷⁹ *Id.* at 2802 (Ginsburg, J., dissenting).

¹⁸⁰ *Id.* (Ginsburg, J., dissenting).

¹⁸¹ NeJaime & Siegel, *supra* note 29, at 2566.

¹⁸² Gedicks & Van Tassell, *supra* note 87, at 377.

¹⁸³ Alan E. Garfield, *The Contraception Mandate Debate: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 23 (2014).

major obstacle. They can either bear this cost, which puts them at an economic disadvantage with their male counterparts whose medical costs are lower, or they can forgo purchasing the contraceptives and take the risk of unwanted pregnancies with the more expensive and invasive option of terminating these pregnancies with an abortion.¹⁸⁴

This added cost is exacerbated by the gender pay gap.¹⁸⁵ Additionally, it is not always clear that a for-profit business is faith-based: for instance, In-N-Out, Forever 21, Tyson Foods and Domino's Pizza all either market themselves as Christian-based, faith-based, or founded by religious conservatives. Not being able to discern whether a for-profit business is tied to a religion makes it difficult for potential employees to predict whether an employer is likely to request an exemption; this could force them to turn down employment with a certain business entirely.¹⁸⁶

D. THE COMPELLING INTEREST PRONG PERMITS ANARCHY AND UNDERCUTS THE SUPREMACY OF LAW

In *Employment Division v. Smith*, Justice Scalia acknowledged that the compelling government interest test is not equally applicable to religious exemptions as it is to the government's racial classifications or regulations of free speech because such a test would then allow "a private right to ignore generally applicable laws,"¹⁸⁷ this was also a concern of the *Reynolds* court one hundred years prior to the *Smith* decision.¹⁸⁸ Justice Scalia believed that applying the high bar of the compelling interest test when evaluating religious beliefs would be "courting anarchy."¹⁸⁹ Scalia explained: "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule . . . would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."¹⁹⁰

¹⁸⁴ *Id.*

¹⁸⁵ Schmall, *supra* note 123, at 162, 166.

¹⁸⁶ Gedicks & Van Tassell, *supra* note 87, at 377 n.153, 378.

¹⁸⁷ *Emp't Div. v. Smith*, 494 U.S. 872, 885–86 (1990).

¹⁸⁸ See *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself").

¹⁸⁹ *Smith*, 494 U.S. at 888.

¹⁹⁰ *Id.*

The high bar of the compelling interest test as required by RFRA and its tendency to allow the types of exemptions that promote anarchy was demonstrated sixteen years after the *Smith* decision in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*.¹⁹¹ The claim in *Gonzales* was similar to that in *Smith*, in which claimants suffered harm because they ingested a plant during a religious ceremony that was classified as a “controlled substance”;¹⁹² however, *Gonzales* was decided after RFRA was enacted. The government’s claim regarding the special characteristics of controlled substances, its need for uniformity in drug laws, and its desire to comply with UN Conventions regarding psychotropic substances did not satisfy the compelling interest test codified in RFRA.¹⁹³ This was a unanimous decision by the Court,¹⁹⁴ including Scalia, who was now bound by the compelling interest test. *Gonzales* showed how the high bar of strict scrutiny produced the result Scalia had predicted in the *Smith* decision—“a private right to ignore generally applicable laws” or “a constitutional anomaly.”¹⁹⁵ This is significant because, as professor Frederick Mark Gedicks noted—with an eye towards vaccinations, minimum wages, taxes, and social security pensions—“[i]f RFRA’s strict scrutiny test was so hard to satisfy in the case of the [contraception m]andate, why should it be so easy to satisfy in every other case the Justices could imagine?”¹⁹⁶

IV. THE SOLUTION OF THE SUBSTANTIAL BURDEN PRONG

Knowing that the Establishment Clause requires the government to be neutral in matters regarding religion, but that the compelling interest standard is ineffectual in protecting third parties from becoming burdened by religion, the question becomes: how can the Court reconcile RFRA and the Establishment Clause?¹⁹⁷ The answer may lie within RFRA itself.

The first step in a RFRA claim is for the claimant to show a substantial burden on the free exercise of religion.¹⁹⁸ For example, those who seek religious exemptions from the contraception mandate argue that the

¹⁹¹ *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006).

¹⁹² *Id.* at 423.

¹⁹³ *Id.* at 432–35, 437–38.

¹⁹⁴ Justice Alito did not participate, so the decision was 8-0.

¹⁹⁵ *Emp’t Div. v. Smith*, 494 U.S. 872, 886 (1990).

¹⁹⁶ Gedicks, *supra* note 97, at 164.

¹⁹⁷ This is just one example of how the Free Exercise Clause and the Establishment Clause are often at odds. *See also* *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“While the two Clauses express complementary values, they often exert conflicting pressures”).

¹⁹⁸ 42 U.S.C. § 2000bb-1(a) (2012).

mandate forces religious employers to “facilitate” the “sinful” behavior of their employees.¹⁹⁹ Courts, not wanting to muddle in the question of what a religious belief is, have traditionally steered clear of delving into what constitutes a substantial burden beyond making sure that the religious belief is both sincerely held and an actual teaching of the religion.²⁰⁰ Yet, this is the exact prong that courts should look to in considering the harm principle.

Courts should be adding a question to their analysis of the substantial burden prong. After determining that there is a burden on an exercise of religion, they should ask: is this exercise a *protected* exercise under the Free Exercise Clause? This opens the door for the court to evaluate the substantial burden without having to parse through religious doctrine, particularly if the logical implications of the claim are tenuous at best.²⁰¹ This analysis would limit the types of claims that can be brought under the Free Exercise Clause and would mean that not all exercises of religion are protected, such as exercises that force third parties to conform their conduct to the claimant’s religious beliefs.

These types of limits are already seen in other areas of First Amendment doctrine. For example, the Court has noted that not all types of speech are afforded the same degree of constitutional protection.²⁰² There are distinctions based on censorial and non-censorial speech;²⁰³ non-censorial speech is speech that is banned not for the ideas it communicates but for the effect the exposure to the ideas has on others.²⁰⁴ A classic example of this distinction is the First Amendment’s lack of protection for the false incitement of a panic by shouting “fire” in a crowded theater,²⁰⁵

¹⁹⁹ Rudary, *supra* note 142, at 375 (citing *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007)).

²⁰⁰ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

²⁰¹ For the sake of argument, I assume that the claimants are making factually-sound claims. There is an additional issue in the contraceptive mandate issue of to what extent certain contraceptives are abortifacients. Aaron Carroll, *Doubtful Science Behind Arguments to Restrict Birth Control Access*, N.Y. TIMES: THE UPSHOT (Oct. 10, 2017), <https://nyti.ms/2y7Yi6i>; *see also* Brief for the Petitioners at 9 n.4, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486 (“Although respondents describe these devices and drugs as ‘abortion-causing,’ federal law, which defines pregnancy as beginning at implantation, does not so classify them.”) (internal citations omitted) (citing 45 C.F.R. 46.202(f)).

²⁰² *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *see also Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“Not all speech is of equal First Amendment importance, however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”) (internal citations and quotations omitted).

²⁰³ *Brown*, *supra* note 28, at 976.

²⁰⁴ *Id.* at 1001.

²⁰⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

not because of an “animus” toward fire, but because of potential for third-party harm: “the provocation of instant harmful conduct—panicked efforts to escape—unmediated by thought.”²⁰⁶ Legislative history shows that Congress has already considered and limited the substantial burden prong by adding the word “substantially” to the text of the law.²⁰⁷ As Justice Ginsburg noted in her *Hobby Lobby* dissent, this limit “does not require the Government to justify every action that has some effect on religious exercise.”²⁰⁸

What constitutes a “protected” exercise of religion depends on the harm principle. Although the free exercise of religion is protected by the Constitution, that does not mean that all exercises of religion are protected,²⁰⁹ especially if the practice includes discrimination and denial of constitutional rights.²¹⁰ The prohibition on exercise of religion may be allowed when permitting the exercise would infringe on the rights of a third party. A religious practice may be infringed on or burdened to the extent it is necessary to protect third-party interests: the right to free exercise ends where one’s religious practice hits another’s nose.²¹¹ Essentially, if the religious exercise affects third parties, the substantiality of the burden becomes insubstantial.

This leads to the conclusion that there is a harm principle incorporated into the substantial burden prong, which can solve the issue of balancing harms to third parties and promoting the free exercises of religion. For example, it is fair to ask if being “complicit” in another’s “sin” is actually a *protectable* exercise of religion,²¹² since this exercise of religion has the

²⁰⁶ Brown, *supra* note 28, at 976.

²⁰⁷ *Burwell v. Hobby Lobby Stores, Inc. (Hobby Lobby)*, 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting) (quoting 139 CONG. REC. 26180).

²⁰⁸ *Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting).

²⁰⁹ Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2382 (1997).

²¹⁰ *Id.* at 2382.

²¹¹ See Chafee, *supra* note 45, at 957 (“Your right to swing your arm ends just where the other man’s nose begins.”) (internal quotations omitted).

²¹² Additionally, the law has drawn distinctions between different types of complicity. By legal standards “direct participation” is seen as a valid form of complicity and “remote facilitation” is not recognizable by law. Sepinwall, *supra* note 36, at 1938. For example, regarding conscription, the law allowed an exemption from actually being drafted but not from paying the portion of taxes that would fund the war. *Id.* at 1939. As previously discussed, the Court has not found exemptions from tax laws because the money might be used to fund activities the person objects to are not valid. *United States v. Lee*, 455 U.S. 252, 260 (1982). In the contraceptive landscape, it is the employee and the employee’s dependents making the choice of which contraception to use and actually using it, making this complicity claim an act of “remote facilitation” at best. Sepper, *supra*

possibility of causing harm to third parties. Nevertheless, “respect for conscience does not require us to ignore the special features of complicity-based conscience claims that endow them with capacity to harm other citizens.”²¹³ Because complicity claims depend on controlling—and therefore harming—a third party, complicity claims are not *protectable* exercises of religion. This differentiates complicity claims from other types of religious accommodation claims that do not have the same significant third-party harms.

Thus, permitting *some* accommodations²¹⁴ while not allowing others would require an inquiry into the way the free exercise of a religion is practiced, to see if it harms third parties. Even though the free exercise of religion might be protected in general, the specific *way* of practicing religion is not necessarily protected, particularly when it affects the constitutional rights of third parties. For example, the logic of complicity claims regarding the contraception mandate is that in order *not* to be complicit in another’s use of contraceptives, the claimant would have to control a woman’s conduct, which infringes upon her constitutional rights.²¹⁵ Although the contraception mandate might be a conduct-regulating law, it is regulating conduct to prevent a harm; therefore, exceptions to the mandate would necessarily be imposing that harm. By seeking to avoid compliance with the contraception mandate, the employers are expressing their religious beliefs in a way that is harmful to third parties. The burden on them is no more than a burden on the *way* they are expressing their belief, which is not constitutionally protected.²¹⁶ This means that in evaluating whether a law is a “substantial burden,” the Court should include an evaluation of whether it is a substantial burden *on a protected exercise*, based on whether the exercise of religion harms third parties.

Looking at the *way* a right is expressed is already embedded into other

note 119, at 193 (quoting *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 414 (E.D. Pa. 2013)).

²¹³ NeJaime & Siegel, *supra* note 29, at 2521.

²¹⁴ Recognizing the harm principle incorporated into the substantial burden prong leads to two possible outcomes: either no accommodations are permitted, or accommodations will be permitted only when they do not inflict substantial harm to third parties. Yet, the Court has noted that religious exemptions are not invalid on their face, meaning that some accommodations are permitted. *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (for example, “[c]ongressional permission for members of the military to wear religious apparel while in uniform would fail [if exemptions were invalid on their face]”).

²¹⁵ See *Griswold v. Connecticut*, 381 U.S. 469, 485–86 (1965); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (standing for the proposition that the Fourteenth Amendment protects the right to purchase and use contraceptives).

²¹⁶ *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990) (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

First Amendment claims, such as free speech. There are time, place, and manner restrictions on speech (for example, the infamous “fire in a crowded theatre” scenario discussed earlier), and there should also be time, place, and manner restrictions on the exercise of religion.²¹⁷ One of these restrictions should be that the manner in which individuals exercise their religion cannot cause serious harm to third parties. Complicity claims will always involve the serious harm of subjecting a third party to the religious beliefs of another. An additional example is Yale Law School professor Jed Rubenfeld’s explanation that people could still go to jail for expressing their political opinion if they were expressing it by driving above the speed limit or harming their neighbor; they just cannot be punished *because* they were expressing a political opinion.²¹⁸

V. CONCLUSION

In arguing for religious freedom, Thomas Jefferson wrote: “[I]t does me no injury for my neighbour [sic] to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.”²¹⁹ However, through the rise of complicity claims requesting religious accommodations, religion has begun to “pick pockets” of third parties by, for example, denying access to birth control coverage in employee health care plans.²²⁰ Although it might not be explicitly codified into law, there is a harm principle embedded in claims for exemptions from generally applicable laws on the basis of religious freedom.

The problem is that the harm principle is not necessarily where one might think it should be, nor is it applied in the way one might think. *Hobby Lobby* showed that in practice, the compelling governmental interest prong of RFRA does not include a consideration of harm to third parties, and that even if it did, a compelling governmental interest does not always align with the interests of third parties. This leaves the substantial burden prong of RFRA for judges to consider the effect of an exemption on third parties. Courts could state that the limit on a substantial burden is the harm principle, which would allow the Establishment Clause to work with RFRA to fully paint a picture of how the courts should evaluate religious exemption claims. The lack of concrete analysis of the harm principle is

²¹⁷ For example, the line of cases regarding religion in public schools have made it clear the involvement of religion in public schools is limited. *See generally* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); *see generally* Engel v. Vitale, 370 U.S. 421 (1962).

²¹⁸ Rubenfeld, *supra* note 209, at 2382.

²¹⁹ JEFFERSON, *supra* note 104, at 166.

²²⁰ Gedicks, *supra* note 97, at 170.

shown by the rise in the number of claimants bringing complicity claims.²²¹ Complicity claims are a concern because they have been used not only against mandates for contraception but also against anti-discrimination laws.²²² Claimants seeking exemptions from these laws are usually successful.²²³

Finally, there is also a constitutional concern that complicity claims are violations of the basic rights to liberty and equality. While employers are trying to opt out of laws meant to fix inequality, women cannot “opt out of the need to control [their] fertility.”²²⁴ As Judge Learned Hand noted, “the First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to [one’s] own religious necessities.”²²⁵

²²¹ Killmond, *supra* note 63, at 934–35.

²²² Heise & Sisk, *supra* note 141, at 1375.

²²³ *Id.*

²²⁴ Schmall, *supra* note 123, at 175.

²²⁵ Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (quoting Learned Hand, J., Otten v. Balt. & O.R. Co., 205 F.2d 58, 61 (2d Cir. 1953)).