2018

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Christopher C. Lund

# Religious Exemptions, Third-Party Harms, and the False Analogy to Church Taxes

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*In recent years, scholars have developed a variety of arguments as to how the Establishment Clause might limit religious exemptions that impose costs on others. Seeking historical footing for such claims, some have analogized the harm imposed by religious exemptions to church taxes, a classic feature of religious establishments traditionally conceived. This analogy has some appeal. But it also runs into some real problems, both practical and conceptual. On the practical level, it would invalidate religious exemptions that almost everyone finds sensible—like prisons providing Kosher meals to Jewish inmates. This practical problem can be traced back to its mistaken conceptual root: the analogy conflates government support for religious liberty with government support for religion. This is a deep mistake, as the two are quite different things. Government support for religion is impermissible in a system like ours, but government support for religious liberty is a bedrock constitutional principle. When the government provides Kosher meals to Jewish inmates, it is not a tax for Jews, a tax for Judaism, or a tax for religion. It is, in a sense, a tax for religious liberty and the religious liberty of Jews specifically. But that is an entirely different thing.*

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Do religious exemptions violate the Establishment Clause? Might a legal exemption from a generally applicable law be considered an establishment of religion? Early work by two of the best minds in the field, Douglas Laycock and Michael McConnell, examined such claims from a historical perspective. They concluded there was little evidence that the Establishment Clause, as originally conceived, put any limits on religious exemptions.[2]

In recent years, scholars have advanced various arguments as to how the Establishment Clause might limit religious accommodations that burden third parties. But with history looming so large, they have also naturally wanted to address the historical difficulty. Religious accommodations that put unfair burdens on third parties are certainly a bad thing. But the Establishment Clause does not forbid bad things; it forbids bad things that amount to an establishment of religion.[3] So what is the historical case for thinking that religious accommodations which burden third parties amount to an establishment of religion?

Though this question has lingered for years, leading scholars have now developed an answer. Burdens imposed on outsiders by religious accommodations, they say, are akin to church taxes—the forced taxes for religion imposed by western European countries and American colonies centuries ago. Take the case of Hobby Lobby and the contraceptive mandate.[4] If Hobby Lobby were given a full religious exemption from the contraceptive mandate (as currently is the case under the Trump Administration's new rules),[5] then Hobby Lobby's female employees would go without the prohibited forms of contraception. Those female employees, in other words, would be paying the cost of Hobby Lobby's religious observance. Frederick Gedicks lays out the argument well:

> Like the prototypical established church, cost-shifting accommodations grant a privilege to those who engage in the accommodated practice at the

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[2] Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1795–96 (2006) (footnote omitted) ("There is much originalist debate about whether the founding generation understood regulatory exemptions to be constitutionally *required*. But there is virtually no evidence that anyone thought they were constitutionally *prohibited* or that they were part of an establishment of religion."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511 (1990) ("Even opponents of exemptions did not make th[e] claim [that religious exemptions amounted to an establishment of religion].").

[3] It would also presumably forbid good things that amount to an establishment of religion. To me, the idea that an establishment of religion could be a good thing seems exceedingly unlikely given the history of religious establishments in the West and given prevailing societal conditions in this country. But if you want to think about how an establishment of religion might potentially be a good thing, consider Michael W. McConnell, *Establishment and Toleration in Edmund Burke's "Constitution of Freedom,"* 1995 SUP. CT. REV. 393, 396 (1995) (exploring how Edmund Burke could see a "symbiosis between establishment and toleration," one admittedly "antithetical to the disestablishmentarianism of America").

[4] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[5] Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. 47,792, 47,835 (Oct. 13, 2017) (to be codified at 45 C.F.R. pt. 147).

> expense of unbelievers and other nonadherents who do not. Indeed, forcing those who do not belong to a religion to bear the material costs of practicing it is functionally equivalent to taxing nonadherents to support the accommodated faith.[6]

From this starting point, Gedicks naturally conceives of particular exemptions—like exemptions from the contraceptive mandate—in the same way: "The *Hobby Lobby* exemption functions like a tax or assessment imposed on Hobby Lobby employees to facilitate the exercise of their employer's religion."[7]

The analogy to church taxes has something to it. There is no doubt that religious exemptions sometimes affect others. And it is widely agreed that church taxes were a core part of an established church as traditionally conceived.[8] So if burdens imposed by religious exemptions are tantamount to church taxes—if they are really church taxes in disguised form—then stringent Establishment Clause limits on religious exemptions follow as a matter of course.

But the argument does not work. The analogy to church taxes nicely captures the way things seem to one of the two affected sides, but it does not appreciate at all how things seem to the other. Examine the analogy carefully and it begins to fall apart.[9]

Start by considering that the analogy to church taxes, taken seriously, would invalidate an astounding number of religious exemptions. It would invalidate exemptions that everyone thinks of as both sensible and just. Take Kosher meals and Jewish inmates. States and the federal government often provide Kosher (and Halal) meals to Jewish (and Muslim) prisoners. But those meals, of course, cost extra, and federal taxpayers are ultimately the ones footing the extra cost.[10]

Think about this example with the analogy of church taxes in mind. If the government taxing me for Kosher meals is really the government taxing me for

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[6] 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, 363 (2014); *see also* NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 52 (2017) ("[T]he founding generation of Americans committed themselves to the idea that the costs of accommodating the faith of some citizens should not be imposed on citizens of other faiths or no faith.").

[7] Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 174 (2015).

[8] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2146–52 (2003) (listing "public financial support," including "land grants" and "religious taxes" as quintessential parts of the traditional established church).

[9] For different, though similar, criticisms of the analogy, see Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 FEDERALIST SOC'Y REV., Oct. 2016, at 50, 57 & nn.57–66, 58 & n.67.

[10] How much is that extra cost? Those interested should take a look at *United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341 (11th Cir. 2016), where the United States Department of Justice successfully sued the state of Florida for terminating its religious dietary programs under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *Id.* at 1344–46. There, the certified Kosher meal cost the prison $3.55 per prisoner per day, while the mainline option cost $1.89 per prisoner per day. *Id.* at 1345–46. The United States estimated a future cost of around $400,000 per year for the program altogether, but Florida claimed the annual cost would be more than $12,000,000. *Id.* at 1345.

Judaism, then the whole thing is unconstitutional, full stop. It does not matter how much extra the government spends for the Kosher meals, and it does not matter that the burden will be spread widely over all federal taxpayers. Church taxes are unconstitutional, full stop. *Flast v. Cohen* and the line of funding cases make this perfectly clear.[11] Taxpayers can complain of the smallest governmental expenditure on religion; they can complain even if their own contributions are too small to be identifiable.[12] So if the analogy to church taxes works, it will invalidate things like Kosher meals to Jewish prisoners. But that is neither the only example nor the most problematic.

Mary Stinemetz was a Jehovah's Witness in Kansas.[13] She was on Medicaid and needed a liver transplant. Being a Jehovah's Witness, she objected to the blood transfusion that an ordinary liver transplant would require. Yet a newfangled medical procedure, called a bloodless liver transplant, meant that Stinemetz could get a new liver without a blood transfusion. But Stinemetz ran into a problem—no facility in Kansas could do a bloodless liver transplant for her. The nearest one was in Omaha, and Kansas's Medicaid office refused to reimburse out-of-state medical procedures.[14] Now in the actual case, the bloodless liver transplant cost less than a regular liver transplant, so Stinemetz's religious exemption would have actually saved Kansas money.[15] But change the facts. Say the bloodless liver transplant would have cost Kansas an extra dollar. Now let us ask what Kansas should do. Should Kansas spend a dollar of taxpayer money to save the life of this Jehovah's Witness?

If you accept the church-tax analogy, the answer is no. I am not a Jehovah's Witness; I should not have to pay a tax to their church, not even if that tax is only a dollar. Mary Stinemetz should die and the Establishment Clause requires that she die. Take the analogy of church taxes seriously; this is where it leads.

Now folks like Fred Gedicks and Nelson Tebbe are sensitive, thoughtful, considerate people. There is no chance in the world that they would allow any of this

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[11] *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 85–87, 103–06 (1968).

[12] *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 614 (2007) ("If . . . the question is whether the challenged action can be traced to the contributions of a *particular* taxpayer-plaintiff, the answer will almost always be no . . . ."). And, of course, taxpayers can complain about government expenditures on religion without any "allegation that the contested expenditures will in any fashion affect the amount of these taxpayers' own existing or foreseeable tax obligations." *Flast*, 392 U.S. at 118.

[13] For the case and the facts that follow, see Stinemetz v. Kan. Health Policy Auth., 252 P.3d 141, 143–46 (Kan. Ct. App. 2011).

[14] Stinemetz ultimately won her legal case—the Kansas Court of Appeals gave her a religious exemption from Kansas's reimbursement rules. *Stinemetz*, 252 P.3d at 155–56, 161–62. But she lost in the larger sense—by the time the decision came down, Mary Stinemetz was no longer eligible for a transplant and she died. For a longer discussion of *Stinemetz*, with relevant citations, see Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 166–67 & nn.16–20 (2016).

[15] *See Stinemetz*, 252 P.3d at 155 (noting that because "it appears that the bloodless technique for a liver transplant is less expensive than a procedure involving blood transfusions," the government "is unable to argue that the agency is being fiscally responsible as the steward of Kansas tax dollars by denying Stinemetz' request").

to happen. They would be as quick as anyone else (faster, in fact) to give Mary Stinemetz that religious exemption. If forced to confront the real implications of their church-tax analogy, they would abandon it.

They should abandon it. And, in a way, they already have abandoned it. Tebbe, for example, says that "relatively light" or "comparatively light" burdens on third parties are acceptable.[16] Gedicks says that only "material" burdens are a problem.[17] But even to speak that way, of course, acknowledges the problem with the church-tax analogy. One would never say that a church tax is constitutionally permissible if it is "relatively light" or if it is "immaterial"; one would stand instead with Madison and his famous remark about the three pence.[18] The church-tax analogy simply does not permit the distinction between religious exemptions that impose discrete burdens on individuals from religious exemptions that spread their costs widely; the church-tax analogy would invalidate them all.

So there must be a conceptual mistake then with this argument. Where is it? It lies in the conflation of government support for religion (which is impermissible in a secular state like ours) and government support for religious liberty (which is permissible and in fact salutary). And this particular mistake has a long intellectual history. A generation ago, people used to claim that religious accommodations categorically violated the Establishment Clause because religious accommodations were simply support for religion and nothing more. The Supreme Court never bought this claim and eventually rejected it explicitly. Religious liberty and religion were different; religious accommodations promoted religious liberty but did not necessarily promote religion.[19] This is a distinction every student of the subject knows in their heart of hearts. Twelve years ago, the Supreme Court unanimously protected the use of hoasca by a small Brazilian religious group.[20] But probably none of the justices use hoasca or think it efficacious in worship. A secular state like ours does not promote religion. But it can, does, and should promote religious liberty.[21]

The same lesson applies here. Maybe we should think of the government providing Jewish inmates with meals as involving a kind of tax. But it is not a tax for

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[16] *See* TEBBE, *supra* note 6, at 61.

[17] Gedicks & Van Tassell, *supra* note 6, at 371.

[18] *See* 2 JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901) ("[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever[.]").

[19] *See, e.g.*, *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 483 U.S. at 334 ("There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" (citations omitted)). Others have elaborated on this theme in thoughtful ways. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39, 45 (2014).

[20] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006).

[21] Douglas Laycock captured much of this in his concept of substantive neutrality. *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–06 (1990).

Judaism or for Jews. It is not a tax for religion. It is a tax for religious liberty. And that is different from a tax for religion, not just in degree but in kind.

This is not to say that the analogy to church taxes completely misses the boat. There is an important connection between church taxes and harms imposed by religious exemptions. From the standpoint of one of the two real parties in interest, the two seem the same. But from the standpoint of the other, they are entirely different. This is a deep problem with the church-tax analogy: it conceives of the problem only as it appears to one of the two sides.

To conclude, everyone agrees that third-party harms are important. And I still think the Establishment Clause has a role to play here. But it is a mistake to think that third-party burdens are really disguised church taxes. Such a claim has some appeal, but it gets as much wrong as it does right.