# THE COSTS OF THE PUBLIC GOOD OF RELIGION SHOULD BE BORNE BY THE PUBLIC

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Professor Garnett has offered a measured and thoughtful defense of RFRA exemptions from the contraception mandate.[1] We agree with much of what he has written, particularly the idea that religious belief and practice represent public goods that government may promote (at least under certain conditions).[2] Though he contests that RFRA exemption of for-profit employers from the contraception mandate would constitute a legally cognizable burden on employees,[3] he goes on to argue that even if it does, that burden is merely and properly the cost to be paid for the public goods afforded by religion.[4] Our response focuses on this latter contention.

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1. Richard W. Garnett, *Accommodation, Establishment, and Freedom of Religion*, 67 VAND. L. REV. EN BANC 39 (2014).

2. *See* ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013) (arguing that government may promote the free exercise of religion because of its public benefits so long as it defines "religion" at high level of generality); *see also* Frederick Mark Gedicks, *The Recurring Paradox of Groups in the Liberal State*, 2010 UTAH L. REV. 47 (describing the social benefits goods promoted by religious groups, but also noting individual and social costs imposed by such groups).

3. *See* Garnett, *supra* note 1, at 47 (arguing that the ACA was enacted against a legal background that included RFRA and thus implictly "incorporates RFRA's religious-exercise-protecting invitation for judicial review," meaning that "RFRA did not allow the government to impose" the mandate "in the first place"). This is a weak argument that we have disposed of elsewhere. *See* Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 59–61 (2014); Frederick Mark Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate*, 49 HARV. C.R.-C.L. L. REV. (forthcoming 2014), http://ssrn.com/abstract=2328516 (Mar. 25, 2014), at 44–7.

4. Garnett, *supra* note 1, at 47–9.

Professor Garnett's argument reduces to the following syllogism.

(1) Government may impose costs on discrete and identifiable third parties in the pursuit of public goods.

(2) Religion is a public good.

Therefore, the government may impose costs on discrete and identifiable third parties in accommodating the public good of religion.

He illustrates this conclusion with *New York Times v. Sullivan* and its progeny, which famously leave government officials, "public figures," and others without a remedy when slandered or libeled, in order to promote the social good of robust and uninhibited debate on public issues: "[P]rotection and enjoyment of this public good necessarily involves tolerating excesses and abuses and imposing burdens (unpleasantly sharp attacks) on particular and identifiable people. Still this atmosphere . . . is a public good and sustaining it is a worthy public project. It is not cost-free, but it is worth the cost."[5]

A variety of scholars have disputed the minor premise,[6] but we challenge the major. As an intuitive matter, the public costs of public goods ought to be borne by the public rather than a small subset of the public. In other words, if the justification for the costs of pursuing a good is that the good is public, then the public ought to bear the costs of pursing the good.

Professor Garnett is correct that the Supreme Court has permitted the costs of some public goods such as freedom of speech to be focused on a quite narrow subset of the public, but this is not a uniformly applicable constitutional rule. The Takings Clause of the Fifth Amendment, for example, prohibits the cost of public goods flowing from government takings to be borne entirely by the owner whose property is taken; the government must pay the fair value for such property, thus distributing across the tax-paying public the cost of the public goods promoted by any taking.[7]

As we argued in our opening essay in this Roundtable,[8] the Establishment Clause imposes a comparable limit on government. The

5. Garnett, *supra* note 1, at 48 (internal quotation marks deleted).

6. *See, e.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2012).

7. U.S. CONST., Amend. V ("nor shall private property be taken for public use, without just compensation").

8. Gedicks & Koppelman, *supra* note 2, at 54–7; *see also* Gedicks & Van Tassell, *supra* note 2, at 28–9.

costs of permissive religious accommodation may be imposed on the public or one of its broad subsets. The Clause prohibits government, however, from shifting the costs of accommodating a religion from those who believe and practice it to a narrow and identifiable set of persons who don't.

This is not just a rule based in precedent—although *pace* Professor Garnett it has plenty of precedential and academic support[9]—but also in history. One of the many evils of established religion in the late eighteenth century was its imposition of taxes, legal disabilities, and other burdens on persons who did not adhere to the established faith. The Establishment Clause was originally understood to have disabled Congress from imposing this kind of burden.

The exemption of for-profit employers from the contraception mandate, therefore, would constitute a central violation of the Establishment Clause as originally understood by its drafters and ratifiers: It would permit Congress and the federal courts to single out certain religious employers for exemption from federal laws, at the real and material expense of employees who do not believe in or practice the favored employer religion. No theory of religious accommodation should permit this.

Professor Garnett concedes that "in a few cases the Court has treated the burdens that an accommodation would impose on third parties or on the government as relevant to the question whether the accommodation is constitutionally permissible."[10] But he never articulates the principle for which these cases stand. At a minimum, it must mean that those burdens can sometimes be so focused and onerous that it is unfair to impose them on nonadherents of the religion seeking accommodation. The exemption that Hobby Lobby seeks crosses that line.

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9. *See* Gedicks & Van Tassell, *supra* note 2, at 19–28.

10. Garnett, *supra* note 1, at 46. He also suggests that losing the benefits of the contraception mandate is not a harm that women are entitled to be protected from, because Congress could repeal the mandate altogether. *Id.* at 46–7. However, most baseline legal rights protections are, constitutionally, matters of state discretion. *See* DeShaney v. Winnebago County, 489 U.S. 189 (1989). It does not follow that the state can authorize religious believers to violate those rights.