CONSCIENCE AND COMPlicity: ASSESSING PLEAS FOR RELIGIOUS EXEMPTIONS IN
HOBBY LOBBY’S WAKE
Amy J. Sepinwall* (forthcoming 82 U. CHI. L. REV. ____ (2015)).

In the paradigmatic case of conscientious objection, the objector claims that his religion forbids him from actively participating in a wrong (e.g., by fighting in a war). In the religious challenges to the Affordable Care Act’s employer mandate, on the other hand, employers claim that their religious convictions forbid them from merely subsidizing insurance through which their employees might commit a wrong (e.g., by using contraception). The understanding of complicity underpinning these challenges is vastly more expansive than what standard legal doctrine or moral theory contemplates. Courts routinely reject claims of conscientious objection to taxes that fund military initiatives, or to university fees that support abortion services. In Hobby Lobby, however, the Supreme Court took the corporate owners’ complicity claim at its word: the mere fact that Hobby Lobby believed that it would be complicit, no matter how idiosyncratic its belief, sufficed to qualify it for an exemption. In this way, the Court made elements of an employee’s healthcare package the "boss’s business" (to borrow from the title of the Democrats' proposed bill overturning the Hobby Lobby decision).

Much of the critical reaction to Hobby Lobby focuses on the issue of corporate rights of religious freedom. Yet this issue is a red herring. The deeper concerns Hobby Lobby raises – about whether employers may now refuse, on religious grounds, to subsidize other forms of health coverage (e.g., blood transfusions or vaccinations) or to serve customers whose lifestyles they deplore (e.g., gays and lesbians) – do not turn on the organizational form the employer has adopted. Instead, the more significant issue goes to our understanding of complicity: When is it reasonable for an employer (for-profit or non-profit, corporate or individual) to think itself complicit in the conduct of its employees or customers? And when is a reasonable claim of complicity compelling enough to warrant an accommodation, especially where that accommodation would impose costs on third parties?

Hobby Lobby does not provide the proper guidance for answering these questions, and no wonder. As I aim to argue here, the conception of complicity pervading the treatment of conscientious objection in the law is murky and misleading, and it often yields unjust results. This Article seeks to offer the guidance that the doctrine does not. To that end, it exposes the flaws in the understandings of complicity evident in both the majority and dissenting opinions in Hobby Lobby, as well as in RFRA cases more generally. It then seeks to disaggregate the elements in a complicity claim and to identify which of these deserve to be treated deferentially.

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Deference, however, is not decisive. The Article’s second ambition is to expose a glaring oversight in the law’s treatment of conscientious objection — viz., its failure to inquire into how a religious accommodation will affect third parties. Exemption opponents contend that the law already requires this inquiry. They are wrong. I end the Article by proposing a revised balancing test — one that reflects a far more nuanced grasp of what is at stake for the objector while yielding far more just outcomes for third parties.
INTRODUCTION

In Burwell v. Hobby Lobby, the Supreme Court faced a plea for an exemption from the Affordable Care Act that was based on an unusually broad conception of complicity: Hobby Lobby, a closely-held for-profit corporation, claimed that merely by subsidizing insurance through which its employees might access contraception that might operate by destroying embryos, it would be participating in a wrong. The understanding of complicity underpinning this claim is vastly more expansive than what standard legal doctrine or moral theory contemplates. As such, the Court could have rejected Hobby Lobby’s claim, and so denied it an exemption from the so-called contraceptive mandate, on the ground that Hobby Lobby’s connection to the conduct it finds objectionable was too tenuous to be cognizable. Courts have proceeded in just this way in countless other cases where, say, taxpayers have lodged conscientious objections to subsidizing military spending, or students have lodged conscientious objections to paying university...

1 573 U.S. ____ (2014).
3 See infra ____.
5 See, e.g., United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (“there is virtually no room for a ‘constitutionally required exemption’ on religious grounds from a valid tax law that is entirely neutral in its general application”); Marjorie E. Kornhauser, For God and Country: Taxing Conscience, 1999 WIS. L. REV. 959, 972 (1999) (surveying cases and concluding that “[e]ach has held that … RFRA … does not require the income tax laws to accommodate religious beliefs, specifically those of conscientious objectors to war”); Michelle O’Connor, The Religious Freedom Restoration Act: Exactly What Rights Does It “Restore” in the Federal Tax Context?, 36 ARIZ. ST. L.J. 321, 329 (2004) (“the Supreme Court never has held that the Free Exercise Clause requires the government to grant a person an exemption from a generally applicable, neutral tax law.”). See also notes ____ and accompanying text, infra, collecting cases where courts have rejected claims of conscientious objection to taxes aimed at funding initiatives the taxpayer opposes.
fees that cover medical services providing abortion counseling. Instead, the 
Court took Hobby Lobby at its word: the mere fact that Hobby Lobby believed 
that it would be complicit, no matter how idiosyncratic its belief, sufficed to 
qualify it for an exemption. In a similar vein, the Court proceeded with grand 
deference in an order it issued just three days after rendering its Hobby Lobby 
decision. There, the Court acceded to Wheaton College’s request for a 
preliminary injunction exempting it not from having to cover its employees’ 
contraception costs—the government had already released Wheaton from the 
contraceptive mandate—but from having to fill out the form that would 
formalize its exemption. Thus, the mere fact that Wheaton College believed that 
filling out the form would make it complicit in contraceptive coverage was 
sufficient to qualify it too for an exemption.

These cases suggest that we have entered an era of unstinting deference 
to religious belief, often based on fantastical conceptions of complicity exercised 
at the expense of third parties who incur a burden in light of the accommodation 
the religious adherent obtains. As Sandy Levinson puts it, “Because this is the 
way I feel’ seems to be a conclusive argument in the religio[us] realm.”

Invocations of religion, that is, threaten to function as bald trumps, foreclosing 
legal intervention for everything from discrimination against gays and lesbians to

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6 Goehring v. Brophy, 94 F.3d 1294, 1300 (9th Cir., 1996) (use of university registration fee to fund student health insurance plan that included abortion coverage did not substantially burden free exercise rights of students who objected to abortion on religious grounds because, in part, “plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services”), overruled on other grounds by City of Boerne v. Flores, 521 U.S. 507; Erzinger v. Regents of Univ. of Cal., 137 Cal.App.3d 389, 187 Cal.Rptr. 164, cert. denied, 462 U.S. 1133 (1983).
7 573 U.S. ___. Hobby Lobby in fact consolidated two cases involving claims of conscientious objection on the part of three employers: In the first case, an appeal from the Tenth Circuit, two closely-held corporations owned by the Green family—Hobby Lobby, Inc., a chain of craft stores, and Mardel, Inc., a publisher of Christian texts—challenged the contraceptive mandate and won. Hobby Lobby v. Sebelius, 723 F.3d 1114 (10th Cir., 2013). In the second case, an appeal from the Third Circuit, Conestoga Wood, a closely-held corporation owned by the Hahn family that manufactures kitchen cabinets, also challenged the contraceptive mandate, but lost. Conestoga Wood v. Sebelius, 724 F.3d 377 (3d Cir., 2013). For ease of exposition, I refer in the text only to Hobby Lobby, though everything I say about it applies to Mardel and Conestoga, unless otherwise indicated.
8 See 45 C.F.R. § 147.131(b)(4) (dictating the procedure for receiving the accommodation—viz., completion of a form certifying that the organization is a religious non-profit that opposes contraception). The form itself, EBSA Form 700-Certification, can be viewed here: www.dol.gov/ebsa/pdf/preventiveserviceseligibleorganizationcertificationform.pdf.
9 Wheaton College v. Burwell 573 U.S. ___ (2014). In a Seventh Circuit case raising a similar challenge, Judge Posner emphasized the “novelty” of the claim at issue in this pithy way: The plaintiff asks “not for the exemption, which it has, but for the right to have it without having to ask for it.” Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 557 (7th Cir. 2014).
refusals to cover life-saving care. *Hobby Lobby*, then, would have religion reign supreme.\(^{11}\)

This unprecedented reverence for religious freedom is the decision’s key failing, and the aspect of the doctrine most in need of interrogation and rectification. It is appropriate, then, that the bill Democrats have proposed to overturn *Hobby Lobby* bears the short title “Not My Boss’s Business Act.”\(^{12}\) The central question in *Hobby Lobby*’s undoubted progeny should be, “When is a decision about healthcare coverage an employer’s business?” or, more perspicuously, “When does an employer have a strong enough reason to think itself complicit in its employees’ healthcare choices that it should enjoy an exemption from having to subsidize those choices?” And because the *Hobby Lobby* decision has implications not just for healthcare coverage but also for anti-discrimination laws – as where a business seeks to deny service or employment to gays and lesbians\(^ {13}\) – the question of complicity should be cast more broadly still: “When may a business owner claim an exemption from a legal requirement that would connect him to conduct he opposes on religious grounds?”\(^ {14}\)

Unfortunately, both the *Hobby Lobby* decision as well as the larger doctrine of free exercise provide reason to doubt that courts will arrive at the right answers going forward.

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\(^{11}\) I consider here only religiously based claims of conscientious objection because *Hobby Lobby* was decided under a statute protecting religious freedom. See infra note ____ and accompanying text (describing RFRA). With that said, I note that conscience can be informed by religious as well as secular moral convictions, and some scholars argue that the law should be equally hospitable to both. See, e.g., Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* 65-71 (1996); Brian Leiter, *Why Tolerate Religion?* 54-67 (2012); Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* 51-77 (2007). For arguments on the other side, see, for example, Chad Flanders, *The Possibility of a Secular First Amendment*, 26 Quinnipiac L. Rev. 257, 301 (2008); Michael W. McConnell, *The Problem of Singling Out Religion*, 30 DePaul L. Rev. 1, 3 (2000). Cf. United States v. Seeger, 380 U.S. 165 (1965) (accommodating non-religious pacifistic objections to the draft because these played the role in their bearers’ lives that religious convictions play for religious pacifists); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. Chi. L. Rev. 195, 197 (1992) (arguing that each of the free exercise clause and the establishment clause entails protections for religious freedom as well as freedom from religion). For an especially searching inquiry into whether religion is special, see Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. Chi. L. Rev. 1351, 1353 (2012). And for the claim that conscience, whether informed by religious or secular precepts, is both over- and under-inclusive when it comes to identifying the set of legal requirements from which one should be able to claim an exemption, see Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 Legal Theory 215 (2009).


\(^{14}\) For a survey of some of the issues that might give rise to a clash between claims to religious freedom and legal protection for historically disfavored lifestyle choices, see Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. Rev. 1417, 1426-29 (2012).
The doctrine at issue in these cases is based on the Religious Freedom Restoration Act (RFRA), which allows a religious adherent to claim an exemption from a neutral law of general application where that law imposes a “substantial burden” on him and the government cannot show that the law aims to serve a “compelling interest” in the “least restrictive” way possible. The legal requirement at issue in Hobby Lobby follows from the Patient Protection and Affordable Care Act, which imposes an employer mandate: Businesses employing fifty or more full-time workers must provide health insurance, and this health insurance must include preventive care for women. Federal rules promulgated in light of the PPACA, and developed in consultation with the Institute of Medicine, identify just which kinds of preventive care employer healthcare packages must offer. Among these is the so-called contraceptive mandate: the rules dictate that all twenty methods of FDA-approved contraception must be made available through the health plans offered by large employers. Employers that object on religious grounds to some or all forms of contraception have challenged the contraceptive mandate under RFRA, claiming that it imposes a “substantial burden” on their religious exercise. The Court, in Hobby Lobby, ruled for the first time that for-profit corporations could claim rights of religious freedom under RFRA, and it thus granted Hobby Lobby an exemption from having to provide the forms of contraception it opposed.

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16 The precise text of the relevant part of the statute is as follows: The government may “not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, … [unless] it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” Id. RFRA has been deemed “both a rule of interpretation” and “an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place.” Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 TEX. L. REV. 209, 211 (1994). As such, this “super-statute,” Michael Stokes Paulsen, A RFRA Runs Through It: Religious Freedom and the U.S. Code, 56 MONT. L. REV. 249, 253 (1995), can constrain the operation of any federal legislation that fails RFRA’s test.
18 See, e.g., Sandhya Somashekhar, As Health-Care Law’s Employer Mandate Nears, Firms Cut Worker Hours, Struggle with Logistics, WASH. POST, Jun. 23, 2014.
19 See, e.g., Health insurance for businesses with more than 50 employees, HEALTH CARE, https://www.healthcare.gov/what-do-large-business-owners-need-to-know/ (last visited Aug. 31, 2014)
22 The Becket Fund maintains a list of the contraceptive mandate challenges. See HHS Mandate Information Central, THE BECKET FUND, http://www.becketfund.org/hhsinformationcentral/. To date, there have been 102 cases filed, with “victories” (mostly preliminary injunctions) for plaintiffs in 71 of them.
23 573 U.S. ____.
Much has been made of the corporate law implications of the decision. These are important questions in their own right, but *Hobby Lobby*'s deeper significance, and the "parade of horribles" it threatens, do not in fact turn on the employer's organizational form. This is because the exemptions at issue in *Hobby Lobby* and those predicted to be sought in its wake would be troubling whether it was a corporation, a partnership, or a sole proprietorship that was appealing for the accommodation. The cause for concern lies not so much with the extension of RFRA to for-profit entities, then, as with the doctrine itself, which grants exemptions just so long as the religious adherent believes himself to be implicated in the conduct his religion opposes, and no matter the costs an exemption imposes on others.

*Hobby Lobby* and its anticipated progeny fit into a larger debate about the place of religious freedom in public life, a debate that "continues to divide and trouble the legal system." But the case, and its likely successors, also raise distinctive questions about the appropriate scope of claims of complicity. In particular, these cases invite us to determine when we ought to accede to the

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25 *Could the Hobby Lobby Ruling Unleash a 'Parade of Horribles'*, KNOWLEDGE@WHARTON (Jul. 02, 2014), http://knowledge.wharton.upenn.edu/article/hobby-lobby-case/ (quoting author).

26 I offer a narrower argument to this effect in Amy J. Sepinwall, *Can a Corporation Have a Conscience?,* WASH. POST, Mar. 21, 2014, at B02 ("[T]hose who oppose Hobby Lobby’s stance do so because they want to ensure that women have adequate access to reproductive health care. They would object to efforts to circumvent the contraceptive mandate whether it was a corporation or an individual business owner who sought an exemption.").

27 See, e.g., *Complaint, Wieland v. United States Department of Health and Human Services*, 4:13-cv-01577 (E.D. MI.2013) (filed on behalf of individual insurance subscribers who object to paying insurance premiums that partly subsidize contraception for other subscribers to the same insurance plan).

28 Cf. Korte v. Sebelius, 735 F.3d 654, 689 (7th Cir. 2013) *cert. denied*, 134 S. Ct. 2903 (U.S. 2014) ("The [Court of Appeals'] holding today [exempting two for-profit businesses from the contraceptive mandate] has the potential to reach far beyond contraception and to invite employers to seek exemptions from any number of federally-mandated employee benefits to which an employer might object on religious grounds.").

29 As Michael McConnell puts it, "[D]oes the freedom of religious exercise… require the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations? Or does this freedom guarantee only that religious believers will be governed by equal laws, without discrimination or preference?" Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411 (1990).

30 Id. [McConnell] at 1411.
religious adherent’s belief that abiding by a law of general application makes him complicit in conduct that his religious convictions deprecate. While questions about the general bounds of religious freedom have received ample attention, questions about complicity remain among the “the most serious and difficult” in this area because they raise “fundamental questions about the nature of collective responsibility in a democratic society.” Two questions in particular arise here: First, when does a person become responsible for the acts of her compatriots in light of a legal requirement that creates an association between her and them, as the ACA’s employer mandate does? Second, when should the state exempt her from the requirement on conscientious grounds?

This Article aims to make progress on these two questions, engaging religious objections to legal requirements that compel the adherent to contribute to conduct by others that her religion opposes. To that end, the Article seeks to diagnose, and then remedy, two problems afflicting the doctrine and scholarship around conscientious objection -- first, the impoverished understanding of complicity therein, and second, the near neglect of third-party effects. More specifically, the doctrine does not dictate the scope of cognizable complicity claims – it offers too little guidance as to when courts should heed a claim that some legal requirement makes the religious adherent morally responsible for conduct to which the religious adherent objects. One sees evidence of this problem in the understandings of complicity contained in both the majority and dissent opinions in *Hobby Lobby*, in the doctrine pre-dating *Hobby Lobby*, and in the RFRA scholarship more generally. As we shall see, courts, as well as scholars, operate with understandings of complicity that are murky, under-theorized, and at times just plain wrong.

The doctrine is afflicted by a second problem as well, as it does not take account of third-party interests except to the extent that these align with the government’s interest in imposing the legal requirement. As such, women’s interest in easy access to the full spectrum of the ACA-approved contraceptive methods gets factored into the doctrine’s balancing test only if the government takes this interest to be compelling. So too with gays’ and lesbians’ interest in equal treatment in the commercial sphere. The dissent is sensitive to this concern, as it faults the majority in large part because the majority accords an exemption without due regard for the effect of the exemption on the “thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.”

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33 Id. [Schwartzman]
34 See infra text accompanying notes ____.
35 Burwell v. Hobby Lobby 573 U.S. ___ (2014) (Ginsburg, J., dissenting) (slip op., *2). See also id. [dissent] at *27 (“No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the
complaint. Instead, the relevant precedents treat third-party interests as merely tangential to the inquiry about whether to accommodate the religious believer’s objection to the legal requirement with which he disagrees. What matters, according to the doctrine, is the government’s interest in the contested regulation. But there is no reason to think that the government’s interest overlaps with the interests of the third parties who would incur a burden were the religious objector to receive an exemption. As such, the government is poorly placed to defend the interests of third parties in the face of a complaint about governmental infringement of religious freedom. And yet the doctrine’s failure here has escaped the notice of virtually all commentators, who contend either that third parties suffer no cognizable harm from an exemption, or else that the doctrine really does factor in third-party costs.

In short, the question of whether contraception (or other health interventions like blood transfusions, or sexual orientation, for that matter) is a “boss’s business” is one that the doctrine is ill-equipped to answer, both because it lacks a well-founded theory of complicity and because it doesn’t adequately consider how the boss’s interests should interact with those of the employees or potential customers whom the boss’s interests affect. The purpose of this Article is to provide the missing theoretical and doctrinal pieces in a way that leads to much more justifiable, and just, results. The revised doctrine at which I arrive comes out in favor of Hobby Lobby, but it avoids the troubling implications to which the Hobby Lobby decision could, if unchecked, give rise.

36 I provide an example to this effect in Part V.B, infra.
37 Cf. 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, 65 (2014) (“The most depressing aspect of discussion surrounding the Hobby Lobby litigation is the total failure to acknowledge the women who would be harmed by RFRA exemptions from the Mandate.”). Alan Garfield does not fault the doctrine for overlooking women’s interests, but he does contend that the doctrine underdetermines the issues here. Given the indeterminacy, and given that women’s interests are more important than are those of the religious objectors, Garfield concludes that the exemption should be denied. Alan E. Garfield, The Contraception Mandate Debate: Achieving A Sensible Balance, 114 COLUM. L. REV. SIDEBAR 1, 22-23 (2014) http://columbialawreview.org/wp-content/uploads/2014/01/Garfield-114-Columbia-Law-Review-Sidebar-1.pdf.
More specifically, I shall argue that we should treat complicity claims with great deference—I hope to show that we are, in many cases, without the moral clarity or authority to challenge someone’s belief that the conduct legally required of him would make him complicit in what he perceives as a wrong. Yet if we are restricted in challenging the truth of his assertion of complicity, then it becomes especially important to be able to assess his objection on the basis of the cost that honoring it would impose upon others. Thus I shall contend that the smaller the burden on third parties of a religious exemption, the more readily courts should grant the requested exemption. By the same token, the greater the burden that a conscience-based exemption would impose on third parties, the less willing courts should be to accede to the religious objector’s request. I end the Article with a proposal for a revised balancing test that captures this interplay.  

The Article begins, in Part II, with a critical assessment of the understandings of complicity in both the majority and dissenting opinions in *Hobby Lobby*. I shall argue that the majority is overly deferential to the religious believer’s assertions of complicity, while the dissent operates with a conception of complicity that is too stringent. Looming over both positions is a disagreement about the role courts may play in evaluating complicity claims. A subsidiary aim of Part II is to tease apart just what kinds of claims—empirical, moral or relational—courts must treat deferentially, as a matter of respecting religion.

In Parts III and IV, I draw out and critique the conception of complicity immanent in the law. The aim here is twofold: First, I seek to demonstrate that, had the Court relied on that conception, rather than deferring to the more expansive one underpinning Hobby Lobby’s claim, the Court would have denied Hobby Lobby an exemption. The Court’s own precedents, that is, would have found Hobby Lobby to be too tenuously connected to the conduct it opposes to give its claim of complicity credence, as I aim to show in Part III.  

But I also seek to argue, in Part IV, that the law’s understanding of complicity is not unassailable. In particular, I aim to establish that considerations of proximity play too prominent a role in complicity determinations, and that proximity is neither a reliable nor always a compelling guide when it comes to judging whether someone has reason to feel implicated in conduct they deem wrong. Proximity is given this prominence, I argue, because we tend to feel more implicated in conduct to which we bear a closer causal relation, whether or not we are in fact

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40 Micah Schwartzman also advocates a balancing approach in cases where, for example, taxpayers are made to support government activity that their convictions oppose. But Schwartzman’s balancing approach remains faithful to the RFRA doctrine insofar as it restricts its focus to the interests of the objector, on the one hand, and the government, on the other. As with the RFRA test, then, Schwartzman’s test does not attend to the interests of third parties who might come to be burdened were the religious objector granted an accommodation. Micah Schwartzman, *Conscience, Speech, and Money*, 97 Va. L. Rev. 317 (2011).

more complicit. Proximity, in other words, tracks a subjective sense of complicity. But if what matters is one’s subjective sense then there is no reason to privilege the law’s conception of complicity over that of the religious objector where the religious objector happens to feel complicit in a greater range of conduct than the standard legal account contemplates. I conclude then that courts should, in general, take claims of complicity at face value, at least where they do not rest on factual errors.

That conclusion does not automatically entail that the religious objector is entitled to an exemption, however. For even while courts should in general treat as true the religious adherent’s claim of complicity, they must still consider whether acceding to a request for an accommodation would impose undue burdens on third parties. In Part V, I argue (pace Justice Ginsburg’s dissent) that the doctrine does not currently mandate consideration of third-party costs, and that this oversight is deeply problematic. I then propose a revision to the test for a religious accommodation that aims to include third-party considerations. I conclude in Part VI with some personal reflections.

A note about terminology before proceeding: I frame the issues here in reference to a business’s rights of conscience, or religious freedom, or those of its owners. I do not mean to imply that the business itself, whether or not it is incorporated, can exercise religion in its own right, or have its own conscience. Indeed, elsewhere I argue that it cannot. Instead, I use the term “business” as a shorthand for “the members of the business who have reason to feel implicated in its acts.” This is in keeping with Hobby Lobby, which grounds its extension of RFRA rights to the corporation in the rights of free exercise of the corporation’s individual members. But Hobby Lobby assumes, without argument, that the relevant members consist only of the closely-held corporation’s owners. Others have contested this assumption, on the ground that the company’s decisions about healthcare provision might contravene the deeply held convictions of its employees and they too have reason to care about what the company does. I do

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43 573 U.S. at ____ (slip op. *19-25).

not seek to challenge this assumption here. Instead, I assume, first, that there is a set of members who have exclusive authority over the corporation’s acts and so have reason to care about how its acts redound to them and, second, that these members are entitled to seek exemptions from legal requirements to which the corporation is otherwise subject in virtue of their own rights. I will refer to these members as “owners” but I use that term provisionally. Those who think that there are non-owning members who are entitled to press their rights through the corporate form may substitute for “owners” the generic name of these other constituents (e.g., employees, creditors, etc.).

II. COMPLICITY AND DEFERENCE

In this Part, I argue that the RFRA doctrine lends itself to confusion about the scope of permissible complicity claims because it requires the person seeking an exemption to demonstrate that a neutral law of general application imposes a “substantial” burden on the religious believer, and the question of when a burden becomes “substantial” is under-theorized and controversial.

I begin, in Part II.A, with the Hobby Lobby owners’ claims, in an effort to get clear on what is at stake – morally, for them, and conceptually, for the courts assessing these claims. To that end, I seek to distinguish between three different bases for evaluating the truth of these claims – on moral, empirical or relational grounds. I then turn to the conceptions of complicity advanced in the opinion. In Part II.B, I argue that the dissent accords too little deference to the owners’ beliefs. By contrast, the majority, as we shall see in Part II.C, is too solicitous, as it thinks challenging the owners on any ground is beyond the competence and prerogative of the Court. Part II.D returns to the three dimensions upon which conscientious objections might be evaluated, and it addresses the extent of deference to be accorded to each one.

A. Moral, Factual and Relational Elements of Complicity Claims

The ACA’s contraceptive mandate requires coverage of all twenty FDA-approved forms of contraception. Hobby Lobby objected to four of these, on the ground that they posed a risk of functioning as “abortifacients” – i.e., drugs or

45 Supra note 17.
46 See, e.g., Steven D. Smith & Caroline Mala Corbin, Debate: The Contraceptive Mandate and Religious Freedom, 161 U. PENN. L. REV. ONLINE (Apr. 24, 2013) (staking opposite positions on how courts should think about the term “substantial” in ascertaining whether the burden on the religious adherent is “substantial”).
devices that destroy embryos. The majority described Hobby Lobby’s concerns about subsidizing these forms of contraception in this way:

The owners of the businesses have (1) religious objections to abortion, and (2) according to their religious beliefs the four contraceptive methods at issue are abortifacients. (3) If the owners comply with the HHS mandate, they believe that [will] connect [them] to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.

Claim (1) is a moral claim: the owners believe (on religious grounds) that abortion is wrong. Moral claims, that is, assert propositions about right and wrong. Claim (2) is an empirical claim: the owners believe that four of the forms of contraception coverage that the ACA mandates work by aborting embryos. Claim (3) is a relational claim: the owners believe that complying with the HHS mandate – i.e., “providing the coverage demanded by the HHS regulations” connects them to the conduct they deem wrong, or relates them to the wrong, in a way that would make them complicit.

All three of these claims are controversial, and many people would reject each one. Clearly, a good many people deny that abortion is wrong. A greater percentage still think abortion should be legal. Claim 2 is even more controversial, as the medical establishment firmly rejects the notion that any of the contested forms of contraception works by destroying an embryo. Finally, given how remote an employer’s contribution to his employee’s contraceptive choices, Hobby Lobby’s claim that the contraceptive mandate connects it to the supposedly wrongful conduct flies in the fact of the accounts of complicity in standard secular moral and legal doctrines, as we shall see in Part III.

49 573 U.S. at ___, slip op. *2 (numbers in parentheses added to the block quote to ease the exposition that follows).
50 Id. at *36.
51 Id. [slip op., *36]
52 This third claim in fact contains both a moral element and a relational one. I elaborate on this in Section D of this Part, infra.
54 See id. (reporting on a contemporaneous poll in which 49% of Americans identified as pro-choice, while 45% identified as pro-life).
55 See infra notes 100-102 and accompanying text.
In light of the idiosyncratic nature of Hobby Lobby’s views on the permissibility of using these modes of contraception and on the role it would play were it subsidize them, the Justices faced the difficult question of whose views should prevail. Should they defer to Hobby Lobby’s contention that it was complicit, or was it within the Court’s purview to judge the merits of the empirical, moral or relational predicates of that contention? The dissent, as we shall now see, took issue with the latter two bases of Hobby Lobby’s complicity claim; the majority, on the other hand, refused to engage any of them.

B. Complicity As Intentional Participation

The dissent in Hobby Lobby, along with some lower courts and commentators, maintained that the Court may determine for itself whether the conscientious objector has reason to believe herself complicit in the conduct she opposes, and that the locus for that determination is the “substantial burden” prong of RFRA’s test. They underscore the word “substantial,” and contend that this word “invites the court to distinguish large or considerable burdens from minor or incidental ones,” lest “any honestly-perceived burden on religion resulting from government action would suffice to make out a prima facie free exercise claim.”

Notwithstanding the semantic plausibility of the argument, however, it is far from clear that the doctrine’s treatment of the “substantial burden” prong in fact contemplates an inquiry into whether the religious adherent is right to think himself complicit in the conduct his religion opposes, let alone an inquiry into whether he is rendered sufficiently complicit such that his burden counts as “substantial.” Nor does Justice Ginsburg make good on her contention that judges enjoy a prerogative to assess the strength of complicity claims. If

56 See, e.g., Korte v. Sebelius, 735 F.3d 654, 708 (7th Cir. 2013) cert. denied, 134 S. Ct. 2903 (U.S. 2014) (Rovner, J., dissenting). In her rebuttal in the Penn Law Review debate, Caroline Mala Corbin presages Justice Ginsburg’s contention that the term “substantial” entail that not just any burden should count under RFRA. See Smith & Corbin, supra note ____ at 279.
57 573 U.S. at ____ (Ginsburg, J., dissenting) (slip op., *21-23).
59 Justice Ginsburg articulated a distinction between “‘factual allegations that [plaintiffs’] beliefs are sincere and of a religious nature,’ which a court must accept as true, and the ‘legal conclusion . . . that [plaintiffs’] religious exercise is substantially burdened,’ an inquiry the court must undertake.” 573 U.S. ____, at *22 (Ginsburg, J., dissenting) (quoting Kaemmerling v. Lappin, 553 F. 3d 669, 679 (CADC 2008).) But the two cases she cites do not support her assertion that courts may judge whether the religious adherent is right to believe himself complicit in the conduct contravening his religious convictions. Instead, in both cases the Court punted on the question of whether the adherent’s burden was substantial because, in both, the Court found that the asserted burden was not of the kind that courts need take cognizance in the first place. Thus, in the first case Justice Ginsburg cites, Bowen v. Roy, 476 U.S. 693 (1986), the Court argued that the free exercise clause did not include a right of the religious believer to mandate that the government conduct its affairs in a manner consistent with the believer’s faith. The issue there, then, was not so much whether the
anything, in many cases the substantial burden inquiry elides the question of complicity altogether, and focuses exclusively on the extent of the penalty the adherent would face were he to decline to follow the law. The burden, then, tracks the consequences of non-compliance with the challenged legal requirement, not the felt repercussions of compliance.

The dissent in Hobby Lobby, however, was unperturbed and it sought to contest Hobby Lobby’s claim of complicity on moral and relational grounds. More specifically, the dissent judged the owners’ claims of complicity against its own understanding, which can be summarized by this proposition: Unless an actor has (1) taken part in the decision to pursue some act and (2) participated directly in that act, she should not be taken to be responsible for that act. I take up each of these supposed requirements in turn.

1. Decision-Making and Complicity

The dissent, along with some commentators as well as some of the lower court opinions in the contraceptive mandate challenges, maintains that the mandate does not make the employer complicit in its employee’s use of

believer would be complicit in the government’s conduct of its own affairs as it was whether his concerns about his (supposed) complicity warranted accommodation. The second case, Hernandez v. Commissioner, 490 U.S. 680 (1989), did speculate about whether the alleged burden was substantial, but it did not conclusively decide the issue, arguing that even if the burden were substantial, the government’s compelling interest would justify the burden’s imposition. 490 U.S. at 699. Put differently, we might see the issue here in terms similar to those in Bowen: The question might be not “does the regulation impose a substantial burden on the religious adherent?” so much as it is (and as it was in Bowen), “is this the kind of burden we have reason to accommodate?” Neither Bowen nor Hernandez, then, stands for the proposition that the substantial burden inquiry invites the Court to challenge a believer’s assertion that she is complicit (although again it does permit the Court to determine whether to exempt her at the end of the day).

By contrast, the dissent agreed with the majority that courts “must accept as true” the religious objectors’ factual allegations. 573 U.S., at ____ (Ginsburg, J., dissenting) (slip op., *22). I go on to argue that deference to the objectors’ understanding of the facts is unwarranted.

See 573 U.S., at ___, (Ginsburg, J., dissenting) (slip op., *22); Grote, 708 F.3d at 865 (Rovner, J., dissenting). Cf. Autocam, 2012 WL 6845677, at *7 (“[t]he mandate does not compel the [owners] as individuals to do anything. They do not have to use or buy contraceptives for themselves or anyone else. It is only the legally separate entities they currently own that have any obligation under the mandate. The law protects that separation between the corporation and its owners.”).
contraception because the employer does not participate in the decision about whether to use contraception. As Justice Ginsburg states, “the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers.” As such, “[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer’s] decision or action.” Judge Rovner, dissenting in a Seventh Circuit mandate challenge, makes a similar argument, contending that “[a]lthough funds from the company health plan are being used to facilitate the employee’s contraceptive choice, no objective observer would attribute that choice to the company, let alone its owner.” And so, Justice Ginsburg and Judge Rovner each conclude, the employee’s decision cannot impose a substantial burden on the employer’s exercise of religion.

The line of argument here is familiar from cases in which taxpayers have raised Establishment Clause objections to public funding for programs where the funding recipient elects to use the funds at a religious institution. Thus, for example, in Zelman v. Simmons-Harris, the Supreme Court rejected the idea that a school voucher program compelled taxpayers to subsidize religion. The Court reasoned that because the program did not privilege or otherwise single out religious institutions, and because public money reached religious schools solely by way of “genuine and independent private choice,” taxpayers had no reason to think that they or the government was funding religion.

The general form of these arguments is as follows: The objector does not choose the conduct she deems objectionable, so she is not responsible for that conduct. Yet this is a very cramped view of complicity, for it presumes that one can be complicit only in conduct that one chooses. The real question here is not whether an employee’s decision belongs to, or is attributable to, her employer, but instead whether the employer bears some responsibility for the employee’s act even if the employer did not participate in the decision to pursue that act.

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64 Id. (quoting Grote v. Sebelius, 708 F. 3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting)).
66 Id.
68 536 U.S. at 652.
69 Compare H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 129 (2 ed. 1985) (articulating interventionist position supporting dissent) with MICHAEL MOORE, CAUSATION AND RESPONSIBILITY 233-53 (2009); (arguing that an accomplice’s responsibility does not evaporate simply because the perpetrator’s intention “intervenes” in the causal chain).
To see that one can bear responsibility for another’s act independent of whether one took part in the decision to pursue that act, consider the gun merchant who sells a weapon she knows the buyer will use to kill someone else. There is no sense in which the decision to kill this other person is the merchant’s. There is here, as in the contraceptive mandate case, an “interruption” in the causal “linkage” between the merchant’s act and the killing – namely, the decision on the part of the buyer to commit the killing. But the mere fact that the decision is not the merchant’s does not absolve her of moral responsibility for the resulting death. (Nor would she escape criminal liability under the law.) And indeed many of us would hold that she is complicit in the killing, because she provided the gun to the killer knowing that he would use it as a murder weapon, and without seeking to prevent the killing, warn the victim or police, and so on.

Moreover, on other accounts of shared responsibility something even less than knowledge can be enough to sustain a judgment of complicity. Thus, on these accounts, a person can be complicit in another’s wrong if she merely shares the wrongful attitudes that motivated the wrong (e.g., all racist individuals share responsibility for a racially motivated crime), or if she and the perpetrator are participating in a joint project that the wrong furthers, even if she did not know and had no reason to know that the perpetrator would choose wrongful means to advance their shared end. In short, conceptions of complicity may be far more expansive than the dissent recognizes.

With that said, it is certainly not the case that facilitation always makes the facilitator responsible for the act or choice she facilitates. The point is instead

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70 The language here borrows from the terminology Judge Rovner uses in her dissenting opinion: “It is doubtful that Congress, when it specified that burdens must be ‘substantial,’ had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed.” 735 F.3d 654, 718 (7th Cir. 2013) (Rovner, J., dissenting).

71 Cf. Blackun v United States, 112 F.2d 635 (4th Cir. 1940) (“One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun...”). For an excellent and probing overview of accomplice liability under domestic and criminal law in the context of weapons provision, see James Stewart, The Accomplice Liability of Arms Vendors (manuscript on file with author).

72 See, e.g., LARRY MAY, SHARING RESPONSIBILITY 42-52 AND 73-86 (1992) (one can bear responsibility for, e.g., a hate crime simply because one publicly endorsed the attitudes that the crime expresses); KUTZ, supra note ____ (grounding shared responsibility in shared ends, even where one party undertakes measures to achieve those ends that another party opposes); MARGARET GILBERT, SOCIALITY AND RESPONSIBILITY (2000) (grounding shared responsibility for a group act in the obligations members owe one another to form and sustain a “plural subject” of their joint activity).

73 See May, supra note ____ at 42-52 and 73-86.

74 See Kutz, supra note _____. The understanding of complicity here is embodied in the kind of conspiracy liability captured in the Pinkerton doctrine. See United States v. Pinkerton, 328 U.S. 640 (1946).
that an account that denies that one can be complicit in an act unless one chooses that act overlooks a great many ways in which one can be responsible.

2. Complicity As Direct Participation

Justice Ginsburg’s overly narrow view of complicity finds an echo in Justice Sotomayor’s dissent in Wheaton College, which the two other female Justices join. In that case, Wheaton College, “an explicitly Christian” institution, contended that it would be complicit in contraceptive use as a result of its filling out a form registering its objection to the contraceptive mandate because filling out the form would “trigger[] the obligation for someone else to provide the services to which it objects.” In response, the dissent argued that Wheaton’s “claim ignores that the provision of contraceptive coverage is triggered not by its completion of the self-certification form, but by federal law.”

To buttress its argument, the dissent borrowed an analogy that Judge Posner invoked in another contraceptive mandate challenge.

Judge Posner described a scenario involving a Quaker who seeks an exemption from a wartime draft because he subscribes to his religion’s pacifism. The selective service officer grants the Quaker the exemption but then notes that someone else will be drafted in his place. The Quaker is indignant, insisting that recruiting someone else will violate the very religious belief that prompted him to seek the exemption in the first instance: “Because [the Quaker’s] religion teaches that no one should bear arms, drafting another person in his place would make him responsible for the military activities of his replacement.” But, Judge Posner continued, the Quaker is in fact responsible neither for the drafting of a replacement nor for any fighting in which the replacement participates. By “exempting him the government [has not] forced him to ‘trigger’ the drafting of a replacement who was not a conscientious objector.” As such, Posner concluded, “the Religious Freedom Restoration Act [does not] require a draft exemption for both the Quaker and his non-Quaker replacement.”

The conclusion here is right: RFRA does not require the military to forsake finding a replacement for the pacifist to whom it grants an exemption. But the conclusion does not follow from the argument preceding it. The Quaker does in fact cause military participation that would not have occurred otherwise:

77 Wheaton College, 573 U.S. at ____ (Sotomayor, J., dissenting) (slip op., *3).
78 Notre Dame v. Sebelius, 743 F. 3d 547, 556 (CA7 2014).
79 Id. This quote, as well as the one in the text accompanying the following note, have been altered such that rhetorical questions in the original are recast here as the assertions the rhetorical questions are meant to imply.
80 Id.
Someone will end up serving who would not have served but for the Quaker’s exemption. The situation would be different if the military called someone up, call him Smith, but then turned Smith away, deciding that he was unfit for service. The selective service officer would then go to the next names on the list and someone, say, Jones, would end up serving who would not have been recruited but for the unfitness of Smith. Smith would not have “triggered” Jones’s recruitment. What distinguishes Smith from the Quaker, then? The very choice that the exemption opponents invoke as the consideration that makes the moral difference: The Quaker chooses not to serve, thereby altering the set of individuals who do serve in virtue of his intentional act. But Smith is turned away; the fact that someone else will serve in his place is not attributable to him.

Moreover, suppose that Judge Posner and the Wheaton dissent were right that it is the draft itself that does the triggering, and not the Quaker’s successful bid for an exemption. The Quaker and Smith are still distinguishable, on moral grounds, because the Quaker would have an independent reason for caring about the fact that someone will be replacing him that Smith (who presumably is not a pacifist) does not have. What matters for the Quaker is not (or not just) that his choice places someone in battle who would have escaped the draft were it not for the Quaker’s exemption; it is that the Quaker’s exemption is undermined if the result for the world – one more soldier fighting – is the same whether or not the Quaker is granted the exemption. One does no more than an end-run around the moral prohibitions that should constrain one’s conduct – in the Quaker’s case, the prohibition against participating in warfare – if one merely outsources the prohibited conduct.81 This is not to say that the military must, as a matter of respecting the Quaker’s objection, desist from finding someone to take his place; the cost to the war effort of reducing the number of available soldiers so that no conscientious objector is replaced might well be too great. But it is to point out that the Quaker’s objection to the military’s replacing him has some merit, Judge Posner’s (or the Wheaton dissent’s) rejection of it notwithstanding. If there is a reason to deny the Quaker’s request that no one replace him, then, it is not because he has no legitimate reason to think himself complicit in the fighting in which his replacement will engage but because the burden on others of acceding to the request is more than he has a right to impose.

81 Cf. Steven D. Smith, Taxes, Conscience, and the Constitution, 23 CONST. COMMENT. 365, 375 (2006) (“If it would be a violation of your conscience to do X, it should similarly be a violation of conscience if you pay other people to do X.”); Ed Hedemann, Personal Histories, in WAR TAX RESISTANCE: A GUIDE TO WITHHOLDING YOUR SUPPORT FROM THE MILITARY 92 (Ruth Benn ed., 4th ed. 1992) (“It's immoral to pay someone to do what it would be immoral to do yourself . . . . War is immoral and I can't pay taxes that will buy war.”) (quoting Richard Catlett).

More generally, the flaw in the Quaker analogy is that it acknowledges complicity only for those acts in which one participates directly, ignoring the possible responsibility one comes to bear through a surrogate, or simply by facilitating someone else’s commission of a wrong. We shall see that this narrow understanding of complicity permeates much of the legal and moral treatment of conscientious objection, and that much of this understanding is problematically chary. Before turning to a more general survey and critique of the conceptions of complicity in the law and their moral underpinnings, however, we should assess the understanding of complicity in the majority opinion, for it is as troublingly broad as the dissent’s is narrow.

C. Complicity As Subjective Implication

The majority described what was at stake for the religious owners in *Hobby Lobby* in this way: “[The owners] believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage.” The majority insisted that “it [was] not for [the Court] to say that [the owners’] religious beliefs are mistaken or insubstantial.” The owners believed that the mandate imposed a “substantial burden” on their religious exercise and the Court took them at their word. In so doing, the majority accepted at face value the owners’ factual assertion that the four contraceptive measures to which they object result in the “destruction of an embryo,” even though the medical community does not believe that this is how these measures in fact work. The majority deferred to the owners’ moral claim that it is wrong to destroy embryos. And the majority further accepted the owners’ relational claim that the contraceptive mandate would connect the owners to this (supposed) destruction in a way that would render them complicit in it. In short, the majority deferred completely to the owners’ factual, moral and relational claims. The Court’s unhesitating deference stands in stark contrast to the dissent’s approach, which evidenced an equally unhesitating effort to review, and then reject, the owners’ belief that they would be complicit in embryo destruction were they to subsidize coverage of (alleged) abortifacients. Which approach should we prefer – one that does or does not seek to judge the factual, moral and relational underpinnings of a complicity claim? It is now time to assess just which of these elements, if any, warrants deference.

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82 See infra notes ____ and accompanying text.
84 *Hobby Lobby*, 573 U.S. at ____, slip op. *38.
85 573 U.S. at ____, slip op. *2.
86 See infra notes 100-102 and accompanying text.
D. Deference to Non-Standard Beliefs

1. Moral deference

Deference to the moral claim at issue in a conscientious objection requires a court to take at face value the objector’s claim that his religion finds some species of conduct morally impermissible. This form of deference is not difficult to defend.

In moral and religious matters, we are often without a capacity for certitude that would allow us to discern truth and falsity. Thus, some theorists defend moral deference on the part of the state on the basis of the skepticism and humility we owe one another as compatriots in a pluralistic society. Moral deference also protects against “the totalization of morality” on the part of the government. And moral convictions, unlike empirical or relational ones, can be deeply entwined with a person’s sense of self and purpose. Given that we lack agreed upon ways to adjudicate between moral convictions, and given the importance these convictions can play in a person’s life, the state should in general refrain from declaring them true or false. In other words, moral deference is the appropriate stance for a polity rife with multiple and competing conceptions of the good.

Thus the doctrine here is in general correct to find that it is not for courts “to say that the line [of permissibility the religious adherent draws is] an unreasonable one.”

With that said, one might think that there are some moral beliefs so noxious that they deserve no deference at all. Consider, for example, the belief that “homosexuality is wrong” (or, worse still, “homosexuals are evil”). Shouldn’t there be limits on moral deference to ensure that courts – which are state actors par excellence – are not compelled to treat animus as on a par with other moral beliefs?

Two responses are in order. First, according a claim that denigrates another

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87 But cf. Simon C. May, Principled Compromise and the Abortion Controversy, 33 Phil. & Pub. Aff. 317, 336 (2003) (implicitly embracing the view that we can and should adjudicate between moral claims on the basis of their truth or falsity; “Complicity in an activity is only really a moral problem if that activity really is unethical. Merely believing it to be immoral does not in itself ground a claim to special treatment.”)

88 See, e.g., Michele Moody Adams, Democratic Conflict and the Political Morality of Compromise (manuscript on file with author); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 85 (1996).


92 See, e.g., Ex Parte Virginia, 100 U.S. 339, 345 (1880) (“A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.”); Shelley v. Kramer, 334 U.S. 1, 15 (1948) (“judicial action is to be regarded as action of the State”).
group deference is not the same as endorsing that claim. A court faced with such a claim should treat it with deference but also clearly articulate that the claim flies in the face of our most fundamental constitutional values. Courts, that is, must not only serve religious freedom but also speak in favor of the notion of equal respect that underpins our constitutional regime. Second, deferring to this religious claim does not commit a court to issuing an exemption as a result. The court must still weigh the objector’s assertion against the government’s interest, and against the interest of third parties, as I go on to argue below. Third parties will presumably be able to marshal arguments that accessing to the believer’s hateful claim inflicts a grave injury on them -- one so grave that the court should find it dispositive. But even if third parties choose not to get too vexed about the believer’s claim, the state must, again in its capacity as defender of our constitutional regime, add to its arguments about the compelling interests underpinning the challenged legal requirement a statement decrying the challenge because it deviates from our most cherished constitutional values.

In short, then, moral deference should be absolute, but it need not be enthusiastic, and it is but the first step in an inquiry anyway. We might expect that an interest against hate-based claims will be strong enough in most cases to defeat the request for an accommodation, even if courts must take the reasons for the request at face value.

2. Empirical deference

The facts at issue here are empirical ones, subject to assessment in light of observation (mediated by technology, if necessary). In contrast to moral claims, when it comes to factual assertions, we freely adjudicate truth and falsity based on indicia that receive broad support and whose adoption disrespects no one. It is thus surprising that both the majority and the dissent announced that assessing the factual -- and, in particular, the scientific -- merits of Hobby Lobby’s claim

93 See Corey Brettschneider, How Should Liberal Democracies Respond to Faith-Based Groups That Advocate Discrimination? State Funding and Non-Profit Status, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 72, 74-75 (Austin Sarat ed., 2012) (describing “democratic persuasion,” or the state’s responsibility to counter freedom of expression with efforts to explain why discriminatory viewpoints “are inconsistent with a respect for free and equal citizenship”).

94 See supra.

95 See infra Part V.

96 One might worry that the role I assign the state in defending our constitutional values contravenes the neutral stance that a liberal state should occupy. The position I am advocating does indeed deviate from a commitment to neutrality, but the deviation is in the service of other, even more foundational values, without which liberalism would collapse. For a stirring and persuasive defense of this “value democracy,” see Brettschneider, supra note 98 along with his book, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY (2012). In a narrower context (though one connected to reproductive rights), I take issue with the notion of neutrality, especially where and because it threatens equality, in Amy J. Sepinwall, Defense of Others and Defenseless “Others”, 17 YALE J. L. & FEMINISM 327 (2005).
was verboten.97

As we have seen, the owners refer to the four contested forms of contraception as “abortifacients” — i.e., measures that have the effect of killing nascent human life. Yet medical authorities — the Institute of Medicine, which identified the forms of preventive care for women that the Affordable Care Act should make available,98 along with the American College of Obstetricians and Gynecologists, as well as other medical experts — believe that the drugs do not act directly on the embryo at all.99 According to the medical community, there is a very small possibility that the contested methods interfere with implantation, and without implantation, the embryo could not develop.100 But the general mechanism through which these methods work is by preventing sperm from fertilizing the egg in the first place,101 in which case there is no embryo at all. In short, then, the owners’ objection relies on an understanding of the facts with which the medical establishment disagrees.102

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97 See 573 U.S. at ____, *37 and id. at ____, 21 n. 21 (Ginsburg, J., dissenting).
101 See, e.g., Editors, Fill This Prescription, SCIENTIFIC AMERICAN (Sept. 26, 2005), available at http://www.sciam.com, (“By medical definition, the pills block rather than terminate pregnancy.”).
102 See, e.g., Anna Glasier, Emergency Postcoital Contraception, 337 NEW ENGLAND JOURNAL OF MEDICINE 1058, 1063 (1997) (“it cannot be stressed too strongly that if hormonal emergency contraception works largely by interfering with ovulation, then it cannot be regarded as an abortifacient”).
No matter, the Court and dissent maintained, since courts are not permitted to gauge the “plausibility” of a religious claim. But surely this position overstates the bounds of deference that are and should be required. Thoroughgoing empirical deference would commit courts to taking at face value a religious adherent’s objection to subsidizing blood transfusions because, say, he believes the donated blood to have come from the devil. More generally, so long as the religious adherent’s belief was sincerely held and religiously based, it would establish a presumption in favor of an exemption. The government could rebut that presumption only in the face of a compelling interest that the challenged law provided the least restrictive means of serving.

Judge Rogers, during oral argument in another contraceptive mandate challenge, expressed incredulity in response to the claim that courts are hamstrung when it comes to weighing in on the factual merits of a religious claim. And commentators contend not only that courts should be permitted to assess the factual bases of a claim of complicity, but also that they should not grant an exemption where these bases are false. The American College of Obstetricians and Gynecologists in particular counsels against exemptions to providing emergency contraception when these are based on “unsupported beliefs about its primary mechanism of action.”

The willingness to weigh in on the empirical merits of a religious claim is not undue. Unlike moral convictions, empirical beliefs about non-moral matters rarely structure a person’s sense of who she is. To be sure, some factual truths devastate when they come to light – secrets and lies would be far less ubiquitous if the truth were always anodyne. But there is much wider agreement both on the bases for assessing factual claims relative to moral ones, and on the value of undertaking this assessment. Thus, for example, we prize robust protections for

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103 573 U.S. at ____, slip op. *37; id. at ____, 21 n. 21 (Ginsburg, J., dissenting).
104 To be clear, this is not the ground upon which Jehovah’s Witnesses rest their prohibition against blood transfusions. Instead, they rely on a verse from the Old Testament prohibiting the ingestion of blood.
105 See supra note 17.
106 See Leslie C. Griffin, A Tractor Is Not a Gun, Even If You Sincerely Believe It Is, HAMILTON AND GRIFFIN ON RIGHTS, http://hamilton-griffin.com/a-tractor-is-not-a-gun-even-if-you-sincerely-believe-it-is/ (last visited Aug. 31, 2014). The post reproduces the colloquy between Judge Rodgers and the attorney representing Priests for Life, who maintained that the court would have to accept a religious objector’s claim that he was being asked to produce sheet metal for munitions even if he were just mistaken, and the sheet metal would be used only for farm equipment.
107 Cf. id. [Griffin] (“The idea that all the federal laws can be challenged by any irrational belief is unprecedented. And that’s a fact.”).
108 See id.
speech not because we think ourselves unable to judge which assertions are true or false and so may not discriminate among them but because we think that only a free exchange of ideas allows the truth to emerge. And we see ourselves in a collective quest for more and greater truths, as we aspire to know about life long ago, what the future holds, how our minds work, and so on.

The marked difference in our attitudes toward moral claims and empirical claims – largely deferential, when it comes to the former, and aggressively probing, when it comes to the latter – is not arbitrary. Accepting all factual assertions as true no matter their plausibility would commit us to a life of irrationality. Practical reasoning depends for its success on a grasp not only of our convictions and aspirations but also of the truth about our factual circumstances, so that we may apply the former to the latter successfully. For these reasons, courts should accord no deference to empirical claims that are manifestly false. To do otherwise would be to consign not just the parties before the court, but also those whom deference affects, to absurdity. More generally, factual plausibility should indeed be a factor in determining how much deference a claim of complicity should enjoy. As such, if the scientific community were to have concluded that the four contested modes of contraception never interfered with implantation, and instead always worked pre-fertilization, then the Court would have been within its rights to reject Hobby Lobby’s claim of complicity, for the conduct to which Hobby Lobby objected ought not to have constituted a wrong even by the light of its own moral principle (i.e., that destroying an embryo is wrong). More generally, courts do not tread on religious beliefs by engaging empirical matters, for religious adherents have no special authority when it comes to empirical facts.

3. Relational Deference

Hobby Lobby’s objection to the four contested contraception methods turns not only on its understanding of the medical facts, however far-fetched that understanding may be, but also on its understanding of when the company or its owners become complicit in the conduct to which they objects. More specifically, Hobby Lobby contended that its moral and religious convictions entail that it may not subsidize coverage of the contested contraceptive methods because

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110 This is the basis of our constitutional commitment to a “marketplace of ideas.” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).


112 I also note that, no matter the legitimacy of Hobby Lobby’s objection to the four so-called abortifacients, the larger issue – whether employers may exempt themselves from the contraceptive mandate – would remain for those employers who object on religious grounds to all forms of contraception.
subsidization is a form of facilitation, and it may not facilitate or contribute to another’s wrong or probable wrong, no matter how small the probability. Its concerns about its own complicity, then, turned not so much on its assessment of the facts as on a particularly demanding conception of moral purity, as governed by a particularly expansive conception of responsibility: By Hobby Lobby’s lights, mere facilitation of an act that has even a small potential to involve a wrong causes Hobby Lobby to be morally responsible for that wrong. Nor is Hobby Lobby alone in subscribing to this expansive conception of complicity: All employers who object to the ACA because it provides for health coverage to which the owners object (e.g., the full panoply of contraceptive devices, or vaccinations, or blood transfusions, etc.) worry that subsidization relates them to the medical treatment they deem wrong in a way that makes them morally responsible for that wrong.

It bears noting that this relational claim – i.e., that subsidization makes one complicit in a (supposed) wrong – contains both moral and metaphysical components. We can disaggregate these components in this way: Suppose that W is the wrong in question, A is the agent whose complicity is at issue, and S is the strength of the connection between A and W that would make A complicit in W. The claim that A is complicit in W rests on the prior claims that (1) connections between agents and wrongs that are at least S* strong suffice to make an agent so connected complicit in W and (2) the agent here bears a connection to W that is at least S* strong. The first of these claims is a moral claim: to be complicit is to be worthy of blame in light of one’s relationship to a wrong. The domain consisting of the acts or relations that render one blameworthy is the domain of morality. Thus, the determination that S* suffices for complicity is a moral determination. The second claim – the assertion about the strength of the connection at issue – is a metaphysical claim, and metaphysical claims cannot be judged true or false empirically.

The difference between those who oppose the contraceptive mandate on religious grounds and those who would deny the objectors an exemption can then be cashed out in terms of a difference regarding how large S* must be for A to be complicit. More specifically, if strength of connection resides on a spectrum with S* marking the threshold between non-complicity and complicity – i.e., only those connections of strength S* or greater render one complicit – then we can say that Hobby Lobby (and the other objectors) would have S* reside lower down

114 See also Gilardi, 2013 WL 781150, at *4.
116 See, e.g., IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSIC Bk I at 7 (transl. Jonathan Bennett, 1783) at www.earlymoderntexts.com (“basic principles [of metaphysics] can never be taken from experience, nor can its basic concepts; for it is not to be physical but metaphysical knowledge, so it must be beyond experience.”).
on the spectrum than would Justice Ginsburg, Judge Rovner and those theorists who deny that the contraceptive mandate imposes a “substantial” burden on an employer. In other words, Hobby Lobby allows that S* might arise through connections to the wrong that are weaker than those that the exemption opponents require. What should we make of their disagreement?

I have argued that courts should proceed with great deference when it comes to the moral elements of a conscientious objector’s complicity claim, but no deference when it comes to assessing the claim’s empirical elements. Relational claims fall somewhere in between. In this regard, Justice Alito was right to contend that knowing when one “enabl[es] or facilitat[es] the commission of an immoral act by another” is a “difficult and important question.” Thus, some jurists and scholars contend that these claims should be treated no differently than moral ones, which is to say with great deference. Others maintain that the extent of implication determines the substantiality of the burden, and so questions of the extent of the connection fall squarely within a court’s purview. Which of these positions do we have reason to prefer?

To begin answering that question, note that some relational claims of complicity are clearly too far-fetched to tolerate. We would hardly grant an

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117 See, e.g., Corbin, supra note ____.
118 I have been construing the relevant relationships to a wrong as differing in terms of degree—contending in particular that a relationship must connect an agent sufficiently strongly to a wrong to make the complicit in that wrong. It may be that the consideration in question is better cashed out as a difference in kind, however. As such, we would note that there are different kinds of ways in which one can be related to a wrong—e.g., by participating in it, by helping it along, by knowing about it and failing to prevent it, etc. — and then see that not all of these relationships connect one to the wrong in the way they would need to for one to be complicit in that wrong. I adopt the construction that has the relevant relations vary in strength, rather than degree, because I think the former better tracks the way the law thinks about causation. For an extended argument to that effect, see Michael Moore, Causation and Responsibility 122-23 (2009). One can find further support for the idea that relationships grounding complicity can vary in kind, and not just degree, in the work of those theorists who maintain that one need not be causally responsible for a wrong to bear responsibility for that wrong. See, e.g., Karl Jaspers, The Question of German Guilt, E.B. Ashton, transl. 99 (New York: Fordham University Press, 2001) (describing metaphysical guilt, or responsibility, as one comes to incur not because one culpably caused a wrong but simply because one is a member of a group that did so, and one identifies with the other members); Christopher Kutz, Complicity: Ethics and Law for a Collective Age (2000) (describing non-causal guilt).
119 573 U.S. at ____ n.36.
120 See, e.g., Notre Dame, 743 F.3d at ____ n.37 (Flaum, J., dissenting) (“by putting substantial pressure on Notre Dame to act in ways that (as the university sees it) involve the university in the provision of contraceptives, I believe that the accommodation... runs afoul of RFRA.”) (emphasis added); Mark Rienzi, Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases, 99 Va. L. Rev. Online 10 (2013) (arguing that the fact that religious believer’s effect on contraceptive use is attenuated—because employees decide whether they will take drug in question—should be irrelevant for RFRA analysis. All that is required is that belief be sincerely held.).
121 See supra notes 55 and 58-62 and accompanying text.
exemption from having to subsidize some medical treatment because the objector worried that it would cause the recipient of the treatment to grow horns and a tail. Nor should our solicitude extend this far. Although causal claims are metaphysical rather than empirical, there are causal “facts” – claims of causal connection that, for purposes of practical reasoning, we take to be no less true than empirical facts. Among these facts are what David Hume calls “constant conjunctions” – pairs of events where the first always precedes the second (assuming there is no intervening event between the two) (e.g., you flip the switch and the light turns on). The connection between administering the medical treatment in question and the patient’s growing horns and a tail does not even count as a constant conjunction, however. Indeed, in no instance has anyone grown horns and a tail after receiving any medical treatment. A rough rule of thumb might then be the following: Assertions of supposed causal connections that have never been documented and for which there is uniform contradictory evidence need not be accorded any deference.

Similarly, we should also reject those relational claims that amount to pleas that the objector should be taken to be less responsible than standard legal or moral theories would allow. For example, we should not permit someone who has intentionally facilitated a crime to evade conviction because he operates with an unusually narrow conception of complicity – say, one that requires that the perpetrator function as a sufficient cause of the crime in order for him to be found guilty. Even if this narrower conception is mandated by his religious convictions, our fidelity to the law counsels rejecting it: A person who repudiates the theories of responsibility upon which legal liability turns poses a far greater challenge than the run-of-the-mill conscientious objector, whose opposition is directed to a discrete set of laws, typically encompassing just a small area of regulation. The challenge arises because the objection of the former targets modes of liability, and these cut across numerous legal domains (torts, criminal law, regulatory violations (everything from traffic laws to environmental and

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122 Notice that we arrive at causal claims on the basis of inductive reasoning: Event B has always followed event A; nature is uniform; and so we should expect future occurrences of A to be followed by B. The constant regularity of <A then B> licenses our concluding that A causes B. See generally David Hume, *An Enquiry concerning Human Understanding* (Tom L. Beauchamp ed., 1999).

123 *Id.* at 7.2.29. For the view that at least some causal claims are necessarily true, rather than simply inferred by induction, see, for example, TED HONDERICH, MIND AND BRAIN: A THEORY OF DETERMINISM, VOL. 1 (1990).

124 Such a view would, I presume, rule out accomplice liability altogether; the only “accomplices” on this view would be co-perpetrators.

Of course, the defendant who would seek to prevail on these grounds would have to contend not only that his religion construed complicity more narrowly but also that his religion mandated that he not permit himself to be subject to a more expansive conception – perhaps on the ground that any wider sense of responsibility would thwart the freedom that he requires to live out his individuality, as his religion conceives of it. (Though not typically rooted in religion, we might think of libertarians’ or objectivists’ resistance to positive obligations as residing along something like these lines. See, e.g., AYN RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM (1964).)
financial regulations, etc.)). His is an anarchic challenge, as he effectively attempts to immunize himself from all legal censure, and thereby seeks to be treated as “a law unto himself.” At the same time, he is not completely without respect for the rule of law – after all, he is seeking an exemption through legal channels. (Were he to flout even these, we would have reason to think him unfit for political society.) His exemption should be denied, again because recognizing his conception of complicity would place him above the law altogether.

But what of the paradigmatic cases of conscientious objection, where the objector takes himself to be more responsible than the law would have it? This is just the nature of the claim at issue in the contraceptive mandate challenges: There, the religious adherent believes that subsidizing insurance through which someone else can commit a wrong connects the subsidizer sufficiently to the wrong to make him complicit. In the next Part, we will see that that relationship is not one that the law or standard moral theories recognize as a ground of complicity. One might think that fidelity to law should decide the issue here just as it does in the case of the person who operates with an unusually narrow conception of responsibility. But two considerations should give us pause. First, this objector does not pose a challenge to the rule of law; if anything, he holds himself to a more demanding standard than the law’s. Second, and on the other hand, applying our law to him affirms the values underpinning our own conception of complicity – in particular, values of individual freedom that function to keep notions of complicity within bounds that are believed to be reasonable. And indeed, if these bounds were entirely reasonable, we would be right to think they should prevail. But we shall see that there is in fact reason to doubt the cogency of the legal conception of complicity – reason enough to put the religious adherent’s conception on an equal footing with the law’s. I turn now to surveying the legal conception, and then offer a critique of that conception in Part IV.

III. Complicity in Law and Ethics

In this Part, I seek to argue that the general legal and moral treatment of conscientious objection operates with a conception of complicity far narrower than the conception underpinning the contraceptive mandate challenges. Had the Court applied the law’s conception of complicity to Hobby Lobby’s claim, then, it would have rejected that claim. The argument turns on a comparison between paying taxes to fund measures some of which the taxpayer opposes and paying an insurance company to provide healthcare coverage some of which the subsidizer opposes. I seek to establish here that these two practices are morally on a par. Given that the law declines to recognize tax resistance, I conclude that as a

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126 Cf. id. [Reynolds] at 167 (contending that “[g]overnment could exist only in name” if religious adherents were permitted to escape foundational legal tenets).
matter of applying the law consistently, it should also decline to recognize challenges to the employer mandate. Importantly, the claim at issue here is interpretive, not normative: In Part IV, I provide reason for thinking that courts should treat both tax resistance and insurance challenges more deferentially than they do. The ambition in this Part, however, is more modest: I aim to show that the legal conception of complicity and that of the conscientious objectors diverge. It is the idiosyncratic nature of the latter that requires that courts decide whether to defer to their conception or instead to insist on the one that the law embodies.

A. Subsidization and Tax Resistance

When it comes to conscientious objection, the law distinguishes between direct participation and remote facilitation, treating the former as compelling and the latter as negligible. This can be seen clearly in the case of pacifistic objections to the military: The law tends to accord an exemption to the pacifist where he would be made to participate in the war effort, but it denies an exemption to the pacifist who would withhold the portion of his taxes that would fund military expenditures. By the lights of the law, participating in a war is recognizably unconscionable for the pacifistic conscript; funding a war is not. In a similar vein, taxpayers are made to fund capital punishment and government-subsidized abortions no matter their moral or religious qualms about one or both of these practices. And similar reasons undergird the rule that students may be

127. The U.S. Military recognizes two classes of conscientious objectors – first, those who oppose only combat and, second, those who oppose all military service. In the event of a draft, the first class of conscientious objectors will have to serve in the armed forces, but they will be exempt from all training or duties involving the use of weapons. The second class will be exempt from all military activity, but will have to pursue alternative service (e.g., working with the very young or elderly). See generally Fast Facts: Conscientious Objection and Alternative Service, SELECTIVE SERVICE SYSTEM, https://www.sss.gov/FSconsobj.htm (last visited Aug. 31, 2014).

128. See, e.g., Autenrieth v. Cullen, 418 F.2d 586, 588 (1969), cert. den. 397 U.S. 1036 (“The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax.”); Lull v. Commissioner, 602 F.2d 1166 (4th Cir., 1979), cert. denied, 444 U.S. 1014 (1980); Graves v. Commissioner, 579 F.2d 392, 393-94 (6th Cir., 1978), cert. denied, 440 U.S. 946 (1979). Cf. United States v. Lee, 455 U.S. 252, 260 (1982) (rejecting religiously based objection to social security taxes on the ground that “religious belief in conflict with the payment of taxes affords no basis for resisting the tax”); Micah Schwartzman, Conscience, Speech, and Money, 97 VA. L. REV. 317, 354 (2011) (noting that, “when [taxpayers'] protests are aimed at general taxation [i.e., all taxes, and not just those funding a particular initiative some taxpayers oppose], their First Amendment interests are significantly attenuated, and the government's interest in promoting its policies will ordinarily be sufficient to overcome them.”).

129. But see Henry David Thoreau, Civil Disobedience, in CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT: ORIGINS THROUGH THE CIVIL WAR, 932, 935, (Scott J. Hammond ed., 2007). (“I have heard some of my townsmen say, 'I should like to have them order me out to help put down an insurrection of the slaves, or to march to Mexico; — see if I would go'; and yet these very men have each, directly by their allegiance, and so indirectly, at least, by their money, furnished a substitute.”).

130. See, e.g., Zach Carter, Catholic Bishops' Contraception Coverage Argument Ridiculed By Pacifist
compelled to pay fees that support university services they oppose, like abortion provision or counseling – again, because the objecting students are taken to be too remotely connected to those services.\textsuperscript{131}

Insurance subsidization is like the payment of taxes because it too relates the subsidizer to the party engaging in the objectionable conduct in an attenuated and mediated way. More specifically, the connection between Hobby Lobby’s contribution to its employees’ health insurance and its employees’ use of one of the four contested contraceptive methods is not stronger in a meaningful sense than that between a taxpayer’s contribution to, say, Medicaid, and a Medicaid subscriber’s use of one of these methods.\textsuperscript{132} The components of the healthcare package were decided upon by the government, just as the expenditures that tax dollars fund are decided upon by the government. Further, it is notable that courts have rejected religious objections to the PPACA’s \textit{individual} mandate because they find the objector’s connection to the healthcare others in the insurance pool receive too attenuated to warrant an exemption.\textsuperscript{133} To be sure, Hobby Lobby pays for a greater proportion of its employees’ healthcare than any taxpayer pays for a Medicaid subscriber’s healthcare (or that of others in the same insurance pool). But brute dollar amounts cannot be said to make a relevant difference\textsuperscript{134} – after all, we do not think wealthy individuals who pay more taxes are for that reason more implicated in government conduct.

Courts fail to take seriously taxpayer complicity not because the amount any taxpayer pays to fund some initiative is vanishingly small but because there are too many steps in the causal chain between the taxpayer’s payment of taxes and pursuit of the activity she deprecates. For example, in some of the cases involving taxpayer resistance to military spending, the resisting taxpayer looks at the percentage of the federal budget devoted to military spending – say, 39\% in some years\textsuperscript{135} – and she deducts that amount from her total tax burden, sometimes


\textsuperscript{131} \textit{See, e.g.,} Erzinger v. Regents of Univ. of California, 137 Cal. App. 3d 389, 394-95, 187 Cal. Rptr. 164, 167-68 (Ct. App. 1982).

\textsuperscript{132} \textit{Cf.} Elizabeth Sepper, \textit{Contraception and the Birth of Corporate Conscience,} 22 \textit{Am. U. J. GENDER POL’Y & L.} 303, 329-30 (2014) (“Doctrine dictates that contributions to insurance fall into a zone of limited responsibility and, therefore, do not significantly burden religious freedom.”)

\textsuperscript{133} \textit{See, e.g.,} Mead v. Holder, 766 F. Supp. 2d 16, 42 (D.D.C. 2011) aff’d sub nom. Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) abrogated by Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (U.S. 2012) (“Plaintiffs have failed to allege any facts demonstrating that this conflict is more than a \textit{de minimis} burden on their Christian faith.”). This portion of the opinion was affirmed by the D.C. Court of Appeals. Seven-Sky v. Holder, 661 F.3d 1 & n. 4 (D.C. Cir. 2011). \textit{See generally} Sepper, \textit{supra} note ____ at 330 [Am. U.] (“Until now, courts have consistently dismissed the burden imposed on religious objectors by insurance programs as both attenuated and justified by compelling government interests.”).

\textsuperscript{134} \textit{But cf.} Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008) (“An inconsequential or \textit{de minimis} burden on religious practice does not rise to th[e] level [of a substantial burden]…. ”).

\textsuperscript{135} http://www.globalissues.org/article/75/world-military-spending.
offering to contribute that money to a charitable organization unrelated to war.\textsuperscript{136} Thirty-nine percent of a person’s tax burden is not an insignificant amount. And yet courts do not welcome those claims for a partial exemption from one’s tax burden any more than they do other claims, where the amount of money the objector would contribute to the initiative he opposes is considerably less. Nor should it make a difference under the law that Hobby Lobby has an interest in its employees’ spiritual standing (their souls, say) that is stronger than the taxpayer’s interest in the spiritual standing of her fellow citizens, for this is not the kind of interest of which courts will take cognizance.\textsuperscript{137}

In sum, given the considerations the law takes to be relevant – considerations that largely turn on the proximity between the objector and the conduct to which he objects – there is no distinction between employer-subsidized healthcare and taxpayer-subsidized healthcare. If taxpayers are taken to be too remotely connected to the initiatives they fund to count as complicit then so too employers should be taken to be too remotely connected to their employees’ contraception use to count as complicit. On the basis of proximity considerations, then, the legal understanding of complicity would have compelled rejection of Hobby Lobby’s objection.

Moreover, ethics and the law align here. Thus, proximity considerations inform moral judgments as to whether someone is in fact complicit in conduct he opposes. For example, in evaluating claims of complicity to participating in the sale of the morning after pill, Kent Greenawalt considers the relative strength of objections raised by the pharmacist, a drugstore clerk, and a cashier, and he concludes that “[t]here comes a point at which an individual’s involvement is so remote, a right to refuse seems excessive.”\textsuperscript{138} And other moral philosophers agree, both with respect to the pharmacist case,\textsuperscript{139} and with respect to claims of taxpayer complicity too.\textsuperscript{140}

\textsuperscript{136} See, e.g., Pennock, supra note _____.
\textsuperscript{137} See, e.g., Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 552 (7th Cir. 2014) (“while a religious institution has a broad immunity from being required to engage in acts that violate the tenets of its faith, it has no right to prevent other institutions, whether the government or a health insurance company, from engaging in acts that merely offend the institution.”); Lyng v. Northwest Indian Cemetery Protective Ass’n, 485 U.S. 439, 450–51, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); Bowen v. Roy, 476 U.S. 693, 699–700, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986).” Cf. In Otten v. Baltimore & Ohio R. Co., 205 F.2d 58 (CA2 1953), Judge Learned Hand offers a general statement to this effect: “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.” Id. at 61.
\textsuperscript{138} Kent Greenawalt, Refusals of Conscience: What Are They and When Should They Be Accommodated?, 9 Ave Maria L. Rev. 47, 57 (2010). See also id. at 60 (“I do not think everyone remotely connected to patients, including those who type their forms, make their beds, dish out their meals, and clean their rooms, should have a right of conscience to refuse based on the procedure the patient undergoes. The tie to the objectionable practice is too remote.”).
\textsuperscript{139} See, e.g., Eve LaFollette & Hugh LaFollette, Private Conscience, Public Acts, 33 J. Med. Ethics 249 (2007). Cf. Robert Card at 11 (arguing that if the chances that a harm will result from some act one
Nor is it surprising that the prevailing conception of complicity among moral philosophers is a narrow one. Moral philosophical accounts of responsibility are predominantly individualistic. Individuals bear responsibility on these accounts only for what they do, and only to the extent that what they do causes harm. This narrow understanding of responsibility is taken to be a necessary corollary of liberalism’s commitment to individual freedom: More expansive conceptions of responsibility, especially where these would license blame or sanction, threaten to limit too much action and so to be too restrictive. So it is that there is a general inclination in the western philosophical canon to overlook or even deny claims that an upstream agent can bear moral responsibility for a downstream event, particularly where other agents intervene in, and thereby rupture, the causal chain, by interposing their own intentions or decisions. Thus, on these accounts, a gun seller is not responsible for a gun buyer’s murder of the latter’s nemesis because the buyer’s decision functions as an intervening cause breaking the causal chain between the gun sale and the murder. And, as we have seen, commentators and jurists adduce a similar line of argument in the contraceptive mandate challenges, contending that the employee’s decision to buy the morning-after pill eclipses her employer’s responsibility for her use of contraceptives.

Given the role that proximity plays in these cases, it seems clear that Hobby

undertakes are very low, then one is not morally responsible for that harm; as such, conscientious refusal ought not to be permitted in these speculative cases: “it is simply unreasonable to withhold medication because of the mere possibility that this may contribute to an immoral result.”

See Brock supra note 143 at 197 (“Suppose, as I and many others believe, that thousands of innocent Iraqis have died unjustly in the Iraq war. Donald Rumsfeld’s complicity in those deaths is great; senators who voted to authorize President Bush to initiate the war have complicity that is significant though lesser; ordinary citizens whose tax dollars help pay for the war have complicity that is minimal at most.”)

See generally Hart and Honore, supra note 142.

See, e.g., Joel Feinberg, Collective Responsibility, 65 J. Phil. 674, 674 (1968) (“[I]n the standard case of responsibility for harm, there can be no liability without contributory fault.”); Christopher Kutz, Complicity: Ethics and Law for a Collective Age 3 (2000) (describing the paradigmatic principle of responsibility in Anglo-American law and ethics as the “individual difference principle,” which holds that “I am only accountable for a harm if something I did made a difference to its occurrence.” Kutz goes on to argue, convincingly, that this principle is gravely in need of supplementation); H.D. Lewis, The Non-Moral Notion of Collective Responsibility, in INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: MASSACRE AT MY LAI 119, 121 (Peter A. French ed., 1972) (“no one can be responsible, in the properly ethical sense, for the conduct of another.”). Cf. Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 1-3 (1988) (noting this feature of American jurisprudence, and arguing that it reflects only men’s existential experiences). See generally Amy J. Sepinwall, Responsibility for Historical Injustices: Reconceiving the Case for Reparations, 22 J.L. & Pol. 183, 189 (2006) (arguing that the individualist conception “of responsibility [is one] that American law has made familiar to us. On this conception, responsibility is limited to the individual’s contribution, and liability may be imposed on an individual only for her actions, and only to the extent that these wrongfully caused the injury to be redressed.”) (footnotes omitted).

See, e.g., Kutz, supra note 143.

See generally Hart and Honore, supra note 142.

See, e.g., Corbin, supra note 144; Hobby Lobby, supra note 145 at (Ginsburg, J., dissenting), slip op. * 144.
Lobby’s objection to the contraceptive mandate fails as a matter of the standard moral and legal understanding of complicity.\textsuperscript{145} Morally, the fact that it is employees who decide to use contraception would be taken to absolve Hobby Lobby (and, a fortiori, its owners) of responsibility for that contraceptive use. And, legally, the principled rationale for prohibiting taxpayer resistance\textsuperscript{146} would seem to apply with equal force to pleas for a religiously-based exemption from mandatory insurance subsidization.

Before moving on, it is worth underscoring that the claim in this Section has been conditional in two respects. First, the deliberations here have been aimed at showing how Hobby Lobby would have come out \textit{if} the Court had applied the understanding of complicity contained in the law (which itself follows the understanding in standard moral accounts), rather than the more capacious understanding of complicity that the owners accept. We have seen that, under the legal understanding of complicity, Hobby Lobby’s connection to the asserted wrong would be too tenuous to render Hobby Lobby complicit in “embryo destruction” simply on the basis of its providing health insurance that included the so-called abortifacients. Nor would the result have been different had Hobby Lobby instead opposed all methods of contraception, or different medical interventions altogether (e.g., blood transfusions, treatments derived from embryonic stem cells, etc.) The relevant considerations contemplate not how much healthcare the objecting subsidizer funds but how strong the connection is between the objecting subsidizer and the conduct she opposes. Again, given the law’s fixation on proximity, the connection created by the employer mandate would not be deemed strong enough.

Further, the claim that I have sought to defend is conditional in a second sense, as well: \textit{If} proximity is relevant to determining when courts should grant exemptions, then the mandate cases should be decided no differently from the tax resistance cases. In the next Part, I take issue with the role that proximity plays in law and ethics, and thereby seek to show that the antecedent in this second conditional is problematic.

\section*{IV. The Troubling Role of Proximity in Complicity Determinations}

Our standard thinking about complicity, in both law and ethics, relies to a

\textsuperscript{145} See, e.g., Jay Michaelson, \textit{Why Hobby Lobby Will Be Bad for Conservatives}, http://www.thedailybeast.com/articles/2014/06/30/the-hobby-lobby-decision-is-bad-for-conservatives-and-religious-liberty.html (“[the owners’] causal nexus is so thin as to be basically nonexistent. I can be responsible for anything.”).

\textsuperscript{146} There is of course an administrative rationale for prohibiting tax resistance – the tax system as a whole would falter if taxpayers could opt out of paying taxes for any initiative they oppose. But that rationale is not decisive. Courts routinely invoke concerns about attenuation in justifying their decisions to deny tax relief on conscientious grounds. \textit{See infra} notes 148-49 and accompanying text.
significant extent on considerations of proximity for purposes of distinguishing between different complicity claims on the basis of their strength. In this Part, I aim to establish that proximity does indeed play this role and to argue that it is a misleading guide when it comes to conscientious objection. Part IV.A contains the argument for the claim that proximity does a good deal of work in the adjudication of complicity claims in both ethics and the law. In Part IV.B, I seek to ascertain what is really at stake for the conscientious objector – why is participation in an act she opposes so difficult for her? I contend that the fact of our agency does make a difference to us; we do not want to be connected to an act we deem wrong, even if our connection is compelled by law and even if the outcome will be the same no matter whether or not we participate. Yet concerns for our own implication can be – reasonably – insensitive to degree: Even where there are good reasons to see oneself as more or less implicated in an act given the strength of one’s causal connection to it, there may be good reasons to overlook proximity considerations too, as I seek to argue in Part IV.C. In Part IV.D, I apply the insights of the previous sections to the employer mandate case, and I argue that, given the amount of deference complicity claims deserve, considerations of proximity under-determine the proper response to requests for an exemption. We shall see that we are without the resources to arrive at anything like fine and firm distinctions between different claims of complicity. I conclude that if we are to decide which of these claims the law should recognize we will have to look beyond the merits of a given complicity claim, and to the effects of an exemption on others.

A. Proximity as the Prevailing Criterion for Conscientious Objection

We have seen that courts generally reject claims of conscientious objection to particular tax expenditures. The rationale for denying citizens a right to opt out of paying that portion of their taxes that would go to fund initiatives to which they object is, in part, avowedly administrative – the whole tax system would falter if the government were made to carve out exceptions to the myriad governmental expenditures that some individual or other opposes on moral or religious grounds. As the Court has noted, “the proper and efficient exercise of [the tax function] may sometimes entail the possibility of encroachment upon

147 The exception here arises in cases where the contested government expenditure would constitute an Establishment Clause violation. See Flast v. Cohen, 392 U.S. 83 (1968).
148 See, e.g., United States v. Lee, 455 U.S. 252, 260 (1982) (contending that the social security “tax system could not function if denominations were allowed to challenge the tax system because tax payments [are] spent in a manner that violates their religious belief.”); Autenrieth v. Cullen, 418 F.2d 586, 588 (9th Cir. 1969) (“If every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed.”).
individual freedom.” The Court also expresses separation of powers concerns, rejecting the objecting taxpayers’ claims not on the merits but on standing grounds. And scholars adduce another, principled rationale for denying taxpayers a right to withhold taxes that would fund initiatives they find objectionable: These expenditures, like all government expenditures, result from established democratic means. Today’s tax levies do not involve “taxation without representation;” instead, it is “our own duly elected governmental officials who imposed these taxes.” Put differently, what it is to live in a democracy is to recognize that one’s policy preferences will not always prevail and that one is under an obligation to obey the law even if one’s preferences have not prevailed.

Yet while all of these considerations provide a partial explanation for the law’s stance against conscientious taxpayer resistance, they do not – either singly or in combination – fully account for that stance. The law already permits taxpayers to contest government expenditures that violate constitutional constraints on government activity, most notably in the Establishment Clause context. If the tax system can withstand these challenges then it can presumably withstand at least some others too. Similarly, if courts are equipped to weigh the merits of tax objections in the Establishment Clause context then surely they can weigh the merits of at least some other tax objections too – especially those that are based on conscience and so not “generalized

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151 Cf. Emp’t Div. v. Smith, 494 U.S. 872, 890 (1990) (“It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”).
152 Robert T. Pennock, Death and Taxes: On the Justice of Conscientious War Tax Resistance, 1 J. ACCOUNTING, ETHICS & PUB. POL’Y 1, 10 (1998) (raising this argument as a hypothetical objection to his own position, which argues that conscientious objection to war taxes should be permissible). See also Michele Moody Adams, Democratic Conflict and the Political Morality of Compromise (2014) (manuscript on file with author).
153 Pennock, supra note ___ at 10.
154 Cf. Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 222 (1992) (“while financial support is withdrawn from religion, religionists may still be required to give financial support to the state, for all religions gain from the truce and the common goods of the civil public order it established.”).
155 Flast v. Cohen, 398 U.S. at 102-03, articulates the relevant test.
156 To soften the blow, the government could mandate that the objecting taxpayers direct the portion of their taxes that would have gone to the objectionable activity to some other initiative, like the Peace Corps or Headstart. See Pennock supra note ___ at 20 & n. 32.
grievances” or injuries that are “indefinite [and held] in common with people generally.” Finally, the fact that the contested government expenditures were decided upon through legitimate democratic means fails as a justification for similar reasons, because exemptions are granted for other government measures whose democratic pedigree is no less venerable. For example, the pacifist who seeks an exemption from the draft lodges an objection to a war effort that Congress authorized.

The consideration that tips the scale against most cases of taxpayer resistance, then, must lie elsewhere – viz., in considerations of the proximity between the objector’s conduct and the result or activity to which he objects. Thus, as we have seen, the connection between taxpayers and government initiatives they oppose has been deemed too remote or attenuated to warrant an exemption. And remoteness here is not simply a factor bearing on the justiciability of the complaint. It is instead a finding on the merits that the burden on the taxpayer is too negligible, or too far removed from an activity important to the adherent’s religious scheme.

Moreover, considerations of proximity underpin not only the differential treatment accorded to pacifistic military conscripts and pacifistic tax resisters but other complicity determinations as well. Thus proximity explains law and morality’s greater tolerance for physicians who assist suicide (legal in some states) relative to those who engage in euthanasia (illegal in all states), as well as the greater protection afforded pharmacists who refuse to fill prescriptions for the morning-after pill but not pharmacy clerks who refuse to ring up the bill for customers waiting to pick up their morning-after pill subscriptions. Yet it is not clear that considerations of proximity are relevant to the objector, nor that they should be, as I now endeavor to show.

B. The Grounds of Conscientious Objection

I begin with a relatively uncontroversial case of conscientious objection – that

157 *Flast*, 392 U.S. at 114.
159 See supra notes ___ and accompanying text.
160 See *Frothingham*, 262 U.S. at 487 (“any payment out of the funds [is] so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.”).
161 See, e.g., *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (denying claim on the ground that burden on objector was “de minimis”).
162 See, e.g., Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. Rev. 1417, 1465-66 (2012) (describing an Iowa Attorney General Opinion that concluded that “the state's abortion conscience clause extended by its terms only to those who ‘recommend[][, perform[][, or assist[] in an abortion procedure.’ Consequently, nurses who provide comfort to a patient and pharmacists who prepare the saline solution used in abortions could not use the conscience clause to refrain from doing their jobs.) (quoting 41 Iowa Op. Att'y Gen. 474, 478 (1976)).
of the physician who refuses to perform abortions on moral or religious grounds. Doctors who object to abortion on moral or religious grounds may, without penalty, refuse to perform abortions. This is a well-established right of physicians, and it is met with virtually no objection on the part of the public. Yet notwithstanding the widespread acceptance of conscientious objection in the case of abortion provision, it is surprisingly difficult to identify or articulate the rationale for accommodating the physician’s objection. Especially if we know that the outcome will be the same no matter whether the objecting physician participates (if he will not, the patient will find another provider who will) and especially given that doctors bear a fiduciary duty to act in the best interests of their patients, why permit the physician to refuse? Why not just think the objecting physician’s concern precious and, worse still, violative of the commitment to his patient’s welfare that forms the backbone of his profession?

The answer, it turns out, depends on the special value each of us attaches to our own agency. In general, it is a moral commonplace that no one should be made to participate in an act that she deems immoral. We safeguard people from such participation because we recognize that, from the perspective of the actor, it makes a difference that the wrong occur through her hands, even if she knows that the wrong will occur whether or not it is she who brings it about.

The interest at stake for an individual in keeping her own hands clean can be cashed out in several ways. On a narrative account, the idea might be that one has an interest in having a life story that does not include an episode in which one

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164 I assume that the situation is not one in which the woman faces an imminent threat to her health or life, such that she would not have time to find another doctor if the first one refuses. Cf. Committee on Ethics, The Limits of Conscientious Refusal in Reproductive Medicine, 385 ACOG COMMITTEE OPINION, (November 2007), https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine (“In an emergency in which referral is not possible or might negatively have an impact on a patient's physical or mental health, providers have an obligation to provide medically indicated and requested care.”).

165 In general, a fiduciary must “promote the interests of [the] beneficiary[y] rather than [the fiduciary’s] own interests.” Sharrona Hoffman & Jessica Wilen Berg, The Suitability of IRB Liability, 67 U. Pitt. L. REV. 365, 393 (2005). The doctor is a fiduciary to her patients. See, e.g., Thomas L. Hafemeister & Richard M. Guhrandsen, Jr., The Fiduciary Obligation of Physicians To “Just Say No” If an “Informed” Patient Demands Services That Are Not Medically Indicated, 39 SETON HALL L. REV. 335, 369 & n. 171-72 (collecting cases where courts have noted that the physician bears a fiduciary relationship to her patients).

acted against one’s convictions. The notion of moral integrity and its role in constituting one’s identity might also capture what is at stake. Thus Dan Brock writes,

Deeply held and important moral judgments of conscience constitute the central bases of individuals’ moral integrity; they define who, at least morally speaking, the individual is, what she stands for, what is the central moral core of her character. Maintaining her moral integrity then requires that she not violate her moral commitments and gives others reason to respect her doing so … because the maintenance of moral integrity is an important value, central to one’s status as a moral person.

Or, again, in a more existentialist vein, one might say that one is what one does, and one’s actions instantiate one’s values in the world and so stand as beacons for others in discerning right from wrong. At bottom, all of these understandings are about meaning – how we construct meaning for ourselves, about ourselves, in light of what we do in the world.

167 The idea here is given a powerful evocation in a hypothetical that might seem far afield of the example here – viz, where a “lorry” driver hits and kills a child through no fault of the driver’s. BERNARD WILLIAMS, MORAL LUCK 27-30 (1981). Given that the driver is not responsible for the accident, one might have expected his reaction to the child’s death to be no different from that of an onlooker who witnesses the scene. Not so, however, Williams explains: The driver’s agency has been implicated in the death in a way that the bystander’s has not. Id. at 30. The driver’s biography has been punctuated by this tragic event – it figures in the narrative of his life in a way different from the way it will figure in the life of a mere bystander to the event. For this reason, in addition to caring about the child’s fate, the driver has reason to care that it was he who brought about this fate. See also Susan Wolf, The Moral of Moral Luck, 31 PHIL. EXCHANGE 1, 9 (2001) (explaining why it would be untoward for the lorry driver to feel no differently from the spectator thusly: “What is problematic is [the lorry driver’s] failure to take the consequences of his faultliness to have consequences for him, to be a significant part of his personal history, in a way in which witnessing, much less reading about an accident would not be.”).

168 See generally Elizabeth Sepper, Taking Conscience Seriously, 98 VA. L. REV. 1501, 1529 (2012) (“a number of scholars have argued [that] an individual's moral integrity offers the most compelling moral basis for respecting her conscience.”); Nathan S. Chapman, Disentangling Conscience and Religion, 2013 U. ILL. L. REV. 1457, 1494 (2013) (“as many theorists have noted, protecting conscience promotes obedience to conscience, which in turn promotes personal integrity.”) Cf. JOHN RAWLS, POLITICAL LIBERALISM 312-13 (2005) (defending “liberty of conscience” in light of its relationship to our conception of the good, which includes a sense of self-awareness – we come to know “why … our ends [are] good and suitable for us”); MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 19 (2008) (referring to conscience as the “faculty in human beings with which they search for life’s ultimate meaning.”)

169 Dan. W. Brock, Conscientious Refusal by Physicians and Pharmacists: Who Is Obligated To Do What, and Why?, 29 THEOR. MED. & BIOETHICS 187 (1998). Cf. J. David Bleich, The Physician as Conscientious Objector, 30 FORDHAM URB. L. J. 245, 245 (2002) (“to demand of a physician that she act in a manner she deems to be morally unpalatable not only compromises the physician's ethical integrity, but is also likely to have a corrosive effect upon the dedication and zeal with which she ministers to patients.”).

170 See JEAN PAUL SARTRE, EXISTENTIALISM IS A HUMANISM (Carol Macomber transl., 2007).
Notice, though, that once we locate the reason to grant an accommodation to others in a quest for meaning, it becomes difficult to judge some assertions of complicity to be more or less legitimate than others. From a first-person perspective, other factors may occlude proximity considerations in determining how complicit a person feels, and even has reason to feel. Or so I shall now argue, by examining cases where responsibility for some conduct is taken to be greater than others on proximity grounds, but where the asserted disparity falters on closer analysis.

C. Pitting Proximity Against First-Person Perceptions of Complicity

Law and morality agree that it is worse for a doctor to kill a patient than to give the patient the means to kill himself (typically, with a lethal dose of medicine that the patient self-administers). That is, euthanasia is taken to be worse than physician-assisted suicide (PAS). It is for this reason that PAS is legal in some states whereas euthanasia is illegal everywhere. On what do these judgments rest?

According to some commentators, proximity makes the relevant difference. Yet much of the greater concern euthanasia invites results from considerations that bear only a contingent connection to proximity. Instead, these are better cashed out as concerns for patient autonomy, and proximity is but a rough proxy for them: For example, we have reason to prefer PAS to euthanasia because it elides the worry that perhaps the patient was coerced, or that he had a change of heart that he was unable to communicate in time. If he self-administers the lethal drugs, we have greater reason to think that he was committed to the end of ending his life.

The question for our purposes, however, is whether there is an intrinsic moral difference between the two


172 See, e.g., Timothy E. Quill et al., Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician Assisted Suicide, 327 NEW ENG. J. MED. 1380, 1381 (1992); Daniel Callahan, When Self-Determination Runs Amok, HASTINGS CENTER REPORT 52 (March/April 1992) (arguing that euthanasia, unlike suicide, cannot be seen as an exercise of self-determination since euthanasia has someone else do the killing, and contending further that no one else can have the right to kill another, even with the other’s consent).


174 But cf. Susan M. Wolf, Gender, Feminism and Death: Physician-Assisted Suicide and Euthanasia, in Feminism and Bioethics: Beyond Reproduction 282-317 (Susan M. Wolf ed., 1996) (arguing that, given social and cultural norms celebrating, or mandating, self-sacrifice on the part of women, we have reason to doubt the conviction of the gravely ill woman who professes to want to end her life, whether through euthanasia or PAS).
practices, not whether one is more likely to raise concerns in practice. Suppose one could be confident that the patient in the euthanasia scenario is as committed to ending his life as is the patient in the PAS scenario. Does the fact that euthanasia has the physician administer the lethal medicine whereas PAS has the patient do so give the physician more reason to feel complicit in the former than the latter?

One might think that a distinction between the two exists because, with euthanasia, the physician intends her patient’s death whereas in PAS the physician need intend only to facilitate her patient’s choice to die. But that way of describing the two practices is tendentious. The physician who offers euthanasia may intend only to facilitate her patient’s choice to die too, and the physician who prescribes lethal medication that the patient will self-administer may intend by so doing to participate in bringing about her patient’s death. Given that the intention underlying euthanasia and PAS may be the same, the difference between the two may then simply be one of means.

This difference in means cannot sustain a moral distinction between the two practices, however. To see this, consider a stylized version of the way euthanasia and PAS occur. Suppose that death in both occurs as a result of a lethal combination of medicines that is administered through injection (euthanasia) or orally (PAS). Whichever route the patient chooses, his death will occur in the doctor’s office – either the doctor will administer the injection in her office or she will hand the patient the pills and he will take them in her office. (The example is stylized because, with PAS, the physician provides the patient with a prescription for the lethal drugs, the patient fills the prescription, and then typically ingests the pills at home.) Arguably at least, the injection has the physician participate more directly in the patient’s death than does the provision of the pills. But surely there can be no moral difference that turns on the difference in the method by

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175 Those who consider the question from a utilitarian perspective will not recognize a difference between a practice’s practical consequences and its intrinsic moral status. Compare Yale Kamisar, Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia, in EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES 225 (John Keown ed., 1995) (finding no difference between euthanasia and PAS on practical grounds) and John Deigh, Physician Assisted Suicide and Voluntary Euthanasia: Some Relevant Differences, 88 J. CRIM. L. & CRIMINOLOGY 1155, 1164-65 (1998) (concluding that “utilitarian methods advise treating the two practices separately”).

176 Cf. Vacco v. Quill, 521 U.S. 793, 802 (1997) (“in some cases, painkilling drugs may hasten a patient’s death, but the physician’s purpose and intent is, or may be, only to ease his patient’s pain. A doctor who assists a suicide, however, ‘must, necessarily and indubitably, intend primarily that the patient be made dead.’”) (quoting congressional testimony of Dr. Leon Kass). For an extended discussion of the difficulty in distinguishing, on moral grounds, an intention to omit treatment from acts of hastening death, see for example, Sepper, supra note ____ [Va. L. Rev.] at 1536-38.

which the legal drugs enter the patient’s body. The physician is not more morally implicated in the death when she administers a lethal injection that kills her patient than when she hands over the lethal pills and simply watches as the patient kills himself. (The same would hold true if what were at stake were a distinction between surgical and medical (i.e., drug-induced) abortions where, in the case of a medical abortion, the patient ingested the pills in the doctor’s office with the doctor at her side.)

Yet if there is no reason to distinguish morally between the euthanasia and PAS cases in the stylized versions just describe, why think that a distinction exists between euthanasia and PAS as the two typically occur – i.e., with the former taking place in the doctor’s office and the latter occurring some time after the doctor prescribes the lethal medications, and in the doctor’s absence? The decision to end one’s life is no more the patient’s when it is effectuated in his home than when it is effectuated in the doctor’s office. Yet in the case where the patient ingests the lethal drugs at home, the doctor is undoubtedly more removed – in space and time – from the patient’s death than she is in the euthanasia case. If the fact of further remove does not entail a diminution in the physician’s moral responsibility – and for the foregoing reasons, I believe it does not – then it must be that what matters in our thinking about any moral differences between PAS and euthanasia is not the extent of the doctor’s intervention in the patient’s death so much as other concerns for which causal proximity might function as a proxy (for example, concerns about whether the patient persists in his intent to die, or whether he has been pressured).

What then of the pharmacist who objects to filling a prescription for PAS? The pharmacist is situated differently from the physician: Doctor and patient share responsibility for the patient’s treatment choices, as physician and patient are appropriately conceived of as a team. The doctor is not some mere commercial purveyor while the patient plays the role of consumer. Instead, doctor and patient decide together, in consultation, what the best course of action for the patient will be. As such, the doctor is aligned with the patient’s treatment choices in a way that a pharmacist is not. Instead, the pharmacist

178 Cf John Keown, Euthanasia, Ethics and Public Policy: An Argument Against Legalisation 33 (2002) (“[s]hat, for example, is the supposed difference between a doctor handing a lethal pill to a patient; placing the pill on the patient's tongue; and dropping it down the patient's throat?”).

179 But cf. Dan Brock, Voluntary Active Euthanasia, 22 Hastings Center Rep. 10, 10 (1992) (“If there is no significant, intrinsic moral difference between the two, it is also difficult to see why public or legal policy should permit one but not the other; worries about abuse or about giving anyone dominion over the lives of others apply equally to either.”).


181 This alignment explains why physicians and terminally ill patients together brought suit challenging the constitutionality of Washington’s and New York’s statutes prohibiting physician
who is handed a prescription for a lethal dose of medicine because the patient has
elected, and has been certified for. PAS is like the gun merchant who is asked
to sell a gun to someone who intends to kill herself with it and who – let us
imagine, for purposes of more closely aligning the pharmacist and gun merchant
cases – is also terminally ill and has also been certified for PAS. (Imagine further
that the terminally ill gun buyer who intends to end her life prefers the drama of
a gunshot to lethal sedation.) Both the pharmacist and gun merchant in these
scenarios provide their customers with instruments that they know the customer
intends to use to end her life. And, as a brute causal matter, it may well be that
the physician prescribing the lethal medication for PAS is not so differently
situated from either the pharmacist or the gun merchant. Determining the
strength of a causal connection for legal purposes is, as we have seen, a matter for
both normative and metaphysical judgment. But the physician has a reason
over and above the extent of her causal role to feel implicated – again, as part of
the team that decided on the course of treatment, the doctor is aligned with the
patient’s ends in a way that the pharmacist is not. The physician is a participant
in the patient’s care whereas the pharmacist is a detached facilitator of it. For that
reason, the physician has reason to feel herself to be more implicated in PAS than
the pharmacist does.

Now compare the pharmacist to the pharmacy clerk who hands the vial to
the patient, or the cashier who rings the patient up. Assume all three of them
know the contents of the vial. On the basis of the features typically salient to us,
the pharmacist is more directly involved than the other two – the pharmacist acts
with greater specificity toward the patient’s end. The clerk and cashier can
proceed mindlessly but the pharmacist must focus his attention on providing the
patient with the drugs that will arm her with the means to take her life. And the
pharmacist may feel more implicated in light of his professional training too:
“Today I used my expertise to give someone drugs that she will use to kill
herself,” is a plausible thought for him to have. For these reasons, it would be
understandable if he were to see himself as more bound up in the patient’s suicide
than either the clerk or cashier would be. But the fact that his own role would
seem to him more salient than the clerk’s or cashier’s role would seem to either of
them does not mean that the pharmacist is in fact more complicit than these
other two drugstore employees. From a disinterested standpoint, the pharmacist
is just doing his job, just as the clerk and cashier are doing their jobs. The fact

182 See, e.g., Engber, supra note ____ (describing process for having physicians authorize PAS).
183 See supra note ____; cf. Moore, supra note ____ (contending that the law’s conception of
causation is stylized and based largely on the ends the law seeks to serve, rather than any genuine
metaphysical truths).
184 There is a well-known case in continental criminal law theory involving a waiter who serves a
dish that she knows to be poisonous to a customer, without alerting the customer to the lethal
danger he now faces. See, e.g., Luis E. Chiesa, The Evil Waiter Case (manuscript on file with
author). The waiter is not responsible for the presence of the poison and, according to continental

assisted suicide. See, respectively, Washington v. Glucksberg, 521 U.S. 702 (1997); Vacco v. Quill,
that the pharmacist cannot ignore his contribution as readily as the clerk or cashier can does not make him more responsible; it just makes him feel more responsible.

More generally, many assertions of complicity appear far more compelling from a first-person, rather than third-person, perspective. This is unsurprising given the relationship between conscience and identity. I have more reason to care about some state of affairs when it is I who has brought it about. And proximity can function as a proxy for other considerations that are relevant too. For example, the person who purposely contributes to A will often want to ensure A’s successful completion, and so may involve himself more. But it is not then his proximity that does the work of rendering him more responsible but instead his greater commitment, or sense of purpose.

It is good that we feel more implicated in acts where we have played a greater causal role: We have more power to ensure that these acts do not happen, or that they happen in a better way than they might, and our feeling more implicated may well provide us with greater motivation to prevent these acts, or to modify them for the better. But the point here is that this stronger feeling of implication need not reflect, and indeed may well exceed, the genuine extent of one’s complicity.

On the other hand, it is also, generally speaking, good if we feel implicated in acts to which our connection is remote. A person who places a premium on her moral purity will feel responsible for her contributions to wrongs or harms that most of us ignore, not unreasonably but also not laudably. As such, she will constrain her conduct at the expense of freedoms the rest of us claim as our right, restricting her buying choices, carbon footprint, dietary rules, practices at work, relationships with others, etc., in the service of dissociating herself from conduct she deems wrongful. The effect is, in general, to lessen harm in the world. To be sure, the tendency she exhibits is not always morally desirable – extreme versions of this posture can reflect narcissism or neuroticism or moral fetishism. But in general, holding oneself to an unusually high moral standard is rightly taken to be a mark of virtue, not psychological pathology.

All of this suggests that the factors that determine the magnitude of an individual’s responsibility when judged by an impartial observer need not coincide with those that are salient from a first-personal perspective. Thus a systems, she will not be held responsible for the customer’s death notwithstanding her failure to warn. The waiter’s job was to deliver the dish, and she is relieved of responsibility because she did what her job commanded. Many of us would find the continental stance overly permissive – surely the waiter bears some responsibility for the death, and the law ought to track that responsibility. But the pharmacist case is distinguishable at any rate, because the patient knows (and indeed intends) that the drugs he is giving her will cause her demise.

185 See supra notes ____ and accompanying text.
186 Cf. Schwartzman at 376-77.
person’s sense of her own complicity may be greater or less than we would judge it to be. More specifically, her own sense may depend on factors that are — again, from an impartial perspective — morally irrelevant but — from the perspective of the person whose contributions they are — not so readily dismissed. If her contribution claims more of her attention, or strikes more acutely at her sense of self, she will feel herself to be more responsible than we, impartial observers, would judge her to be. Sometimes, we should respond to this divergence by seeking to bring her around to our way of seeing the matter. But sometimes we should not: As I have said, her heightened moral sensitivity is sometimes salutary, and oftentimes laudable for its own sake. And, in any event, because her assessment is connected to her self-conception, we should be wary of trying to dissuade her, on the worry that doing so will interfere with her sense of self. For example, the pharmacist’s sense of what it is to be a pharmacist, or his conception of the kind of pharmacist he wants to be, might include a prohibition on using his skills to dispense medications whose aim is to end human life. Even if we would not judge him responsible in any measure were he to fill a prescription for PAS, he might think his own contribution abominable. And his thought here isn’t wrong, even if different from our own: in matters of professional or personal identity, individuals should be given some latitude to forge meaning, and set boundaries for themselves (at least where those boundaries are stricter than what professional, moral or legal norms require).

The very same factors that favor conscientious objection in cases of direct participation (as in the draft) also favor deference when it comes a person’s heightened sense of her own complicity: Being made to contribute to conduct one opposes is painful, because it entails a dislocation from the self. So too being told that one has overly grand ideas about her professional identity, or her personal agency, can be painful, because these ideas constitute one’s sense of self in important ways. Given the pain of betraying one’s sense of self, we should treat first-personal assessments of complicity with solicitude — at least presumptively.

In the text that follows, I contemplate the way we should treat first-personal assessments of responsibility only where the person judges herself more harshly than an impartial observer would. The case where someone judges herself less harshly can give rise to two points of divergence in practice: First, this more lax judge may decide that she is not sufficiently implicated in the conduct she deems wrong to seek an exemption. As such, questions of whether to grant her conscientious objector status do not arise. Second, this more lax judge may recognize that she bears no more responsibility than we would ascribe to her but she might nonetheless think that even the (relatively little) responsibility she bears is more than her personal morality can handle. Thus she might seek an exemption even though she would think the magnitude of her responsibility less than we would think it. I don’t see that there is any difference between this case and the one where the person judges herself to be more responsible because she thinks she is meaningfully connected to some harm, even though we think her contribution negligible. At the end of the day, both find their connection to the wrong intolerable — one because she sees her causal role as greater than we see it, and the other because she sees the magnitude of her causal role accurately but she posits the threshold for complicity lower on the spectrum than we do. In both cases, then, deference is in order for the reasons I adduce in the text above.
D. Morally Mandated Indifference to Proximity

This leaves us with a problem: On an account that grounds a conscientious exemption in the objector’s interest in not having his agency implicated in what he perceives as a wrong, there is no reason not to take the objector’s concerns at face value. It is his sense of meaning that is at stake and so we should defer to his understanding of the circumstances that make him complicit. Who are we to say that he is being overly sensitive or stringent when it comes to his own moral purity? On this way of proceeding, we are without the resources to distinguish between assertions of complicity on the basis of their strength. In particular, if we must accept assertions of complicity at face value then we may not accord them more or less weight on the ground that complicity itself is, in Anglo-American law, a scalar concept whose magnitude turns at least in part on the actor’s causal proximity to the act in which he is (or takes himself to be) morally implicated.

And yet as a practical matter, we cannot defer to every sincere claim of complicity and exempt the person who would see herself as complicit from the conduct to which she objects in every instance when a complicity claim is raised. Two considerations, which I explore in the next Part, provide counterweights to balance against a claim of complicity. First, we must consider whether the grant of an exemption would impose costs on third parties and, if so, the magnitude of these costs. Second, we may bring to bear the insights culled from the three kinds of deference we discussed earlier, and use them to evaluate how compelling different claims of complicity are.

V. Missing Third Parties: An Unconscionable Oversight

In her *Hobby Lobby* dissent, Justice Ginsburg rails against the majority’s position in significant part because, according to her, the Court impermissibly overlooks the costs of an accommodation to third parties—the thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Justice Ginsburg cites a handful of cases for the proposition that “[a]ccommodations to religious beliefs or observances… must not significantly impinge on the interests of third parties.”

As I argue in Part V.A, however, those cases contemplate third-party interests only tangentially, if at all. In Part V.B, I contend that the doctrine’s failure to consider third-party costs is an unconscionable oversight, especially given the

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188 573 U.S. at _____ (Ginsburg, J., dissenting) (slip. op., *2) (“In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith.”)

189 Id.

190 Id. at *7.
presumptive deference that RFRA should entail. Part V.C aims to remedy this oversight, by describing a balancing test through which courts can weigh the amount of deference a complicity claim warrants against the magnitude of the burdens, if any, an accommodation would impose upon third parties. Part V.D applies this balancing test to *Hobby Lobby* and its possible progeny.

### A. The Hobby Lobby Dissent’s Strained Efforts To Find Third-Party Considerations in the Doctrine

Justice Ginsburg is right to note that the Court should have considered the costs of an accommodation on third parties, but she is wrong to think that the Court betrayed the RFRA doctrine in neglecting to do so. While she cites four cases for her contention that the doctrine requires courts to factor in third-party costs, I now argue that these cases do not provide the requisite support.

In rejecting religious adherents’ requests for accommodation, two of these cases do make reference to the interests of third-parties, but only in an extremely tangential way. In Wisconsin v. Yoder, the first case Justice Ginsburg cites, the Court faced a religious challenge to a law requiring students to attend school through the age of 16. The challengers were Amish parents with high-school aged children who maintained that their faith prohibited their sending their children to secular school past the eighth grade, for fear of the corrupting influence of a secular education and in order to protect the youths’ time to assume the farming obligations they incurred in later adolescence. In upholding the Amish parents’ religious objection, the Court was careful to note that religion would not always function as a trump. It thus referenced cases where religious beliefs have been made to yield to secular laws because the religious conduct sought to be protected posed a “substantial threat to public safety, peace or order.” The Court then noted that the conduct at issue in *Yoder* posed no such threat, and so those cases did not determine the outcome for the case at hand.

There is, to be sure, a sense in which threats to public safety, peace and order affect third parties. But the Court can weigh these threats in its determination to grant an exemption without referencing third parties at all. The government’s interest in maintaining public safety, peace and order suffices. And indeed that is the most plausible way to read the other related case that Justice Ginsburg cites, Cutter v. Wilkinson. There, facing inmates’ requests for religious

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191 406 U.S. at 209-213.
accommodation under RLUIPA, the Court recognized the Bureau of Prison’s “need to maintain order and safety” (although, again, the Court concluded that safety could be maintained consistent with the accommodations). But here again, order and safety are concerns of the government, not concerns of third parties – i.e., other inmates – who might be harmed if hell were to break loose. The Court expressed as much when it noted, in the context of discussing relevant prior decisions, that “[c]ourts may be expected to recognize the government’s... compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order.” Describing the relevant interests as the government’s makes clear that the Court is concerned not with protecting the targets of racism but instead with providing for a safe and orderly prison.

The third case that Justice Ginsburg cites involved an Establishment Clause claim. Estate of Thornton v. Calder addressed a Connecticut statute that required businesses to grant Sabbath leave to any employee who requested it on religious grounds, no matter the day of the Sabbath observed. The Court did refer to third parties there, but not to claim that they have interests that the Court must consider in their own right but instead to establish that an exemption would violate the Establishment Clause by privileging one set of interests (e.g., those of religious employees who observe a Saturday Sabbath) over another (e.g., those of employees who do not but who might nonetheless have good reasons to want Saturday as their day off). Thus, the Court reviewed all of the ways in which the statute’s “absolute” requirement – its “unyielding weighting in favor of Sabbath observers” – elevated the interests of religious employees over non-religious ones, and it then said: “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.” We can see, then, that third-party interests do not function here as they would need to in order to conclude that they are what matters in the Court’s determination. The Court references the effect on third parties as premises in an argument whose conclusion is that the law violates the Establishment Clause. If the Court cared about third-party interests for their own sake, it would have been enough that the law imposed burdens on third parties, by making it harder for them to have their preferred day off. There would have been no need for the Court to justify its

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195 544 U.S. at 722.
196 Id. at 723 (emphasis added).
198 472 U. S. at 709.
199 472 U.S. at 709.
200 472 U.S. at 710.
refusal to grant the exemption on Establishment Clause grounds.201

Justice Ginsburg’s final case was a California Supreme Court decision involving a non-profit seeking an exemption from a contraceptive mandate contained in California’s healthcare law.202 This case has the most direct, seemingly supportive statement of Justice Ginsburg’s position. There, the court stated: “We are unaware of any decision in which this court, or the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties,”203 and it cited Yoder and United States v. Lee as evidence. But Yoder, we have seen, did not involve third-party rights.204 And Lee, a case rejecting an Amish employer’s plea for an exemption from social security taxes, does not turn on the interests of third parties either.205 Instead, Lee turns on the adverse consequences to the system as a

201 Similar considerations allow us to dispose of the suggestion that Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84-85 (1977), turned on third-party interests, as some commentators have suggested, see, e.g., Fretwell Wilson, supra note ____ at 1465 n. 183. In TWA, the Court addressed a religious adherent’s claim that TWA violated his rights to religious accommodation under Title VII by failing to give him a day off on the day of his Sabbath. In response, the Court noted that it would be costly to TWA to grant the requested day off, and it held that “to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.” Title VII could not support this kind of discrimination and so the Court denied the accommodation. Here, as in Yoder, the Court invokes third parties but it does not do so because third-party interests are themselves at issue; instead, and again as in Yoder, the treatment of third parties is relevant only as an evidentiary matter – that treatment demonstrates that the religious adherent is indeed seeking a privilege that the company does not bestow upon others. Acceding to the religious adherent’s request, then, would have the Court favor religion impermissibly and it is this favoring, and not the effect on third parties, that sustains the Court’s decision.


203 85 P.3d at 93.

204 See supra note ____ and accompanying text. The California Supreme Court also appears to read Yoder incorrectly. It states that, in Yoder, in evaluating whether to grant an “exemption from a general law requiring their older children to attend public school, the [Supreme C]ourt emphasized that its conclusion depended on the assumption that no Amish child wished to attend.” 85 P.3d at 93 [emphasis added]. But the United States Supreme Court said exactly the opposite: “our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents.” 406 U.S. at 230 [emphasis added]. And Chief Justice Burger, writing for the Court, went on to say that “it is their right of free exercise, not that of their children, that must determine Wisconsin’s power to impose criminal penalties on the parent.” 406 U.S. at 230-31. In this way, the Court considered only the parents’ interests, and not the interests of their children, who were third parties to the litigation. The discrepancy between the California Supreme Court’s reading of Yoder and the text of Yoder itself hardly inspires confidence in the former’s ability to proceed as a faithful reader of constitutional doctrine.

205 United States v. Lee, 455 U.S. 252 (1982). The Court does say in passing that “[g]ranting an exemption from social security taxes to an employer operates to impose the employer’s religious faith on the employees.” 455 U.S. at 261. But this is dictum. The Court’s reason for refusing the exemption is, as I go on to argue in the text following this note, a concern about the workability of the social security system as a whole, not a concern about depriving the business’s non-Amish workers social security benefits. See also id. at 263 [Stevens, J., concurring] (“I agree with the Court's
whole if courts begin granting exemptions to tax burdens on an ad hoc basis.\textsuperscript{206} And the more general review of the caselaw undertaken here demonstrates that it is entirely reasonable that the California Supreme Court’s would not have been aware of Supreme Court cases where the Court squarely recognized third-party costs and yet granted the exemption anyway.\textsuperscript{207} These cases do not exist because the Court never squarely factors third-party costs into its determinations about whether to grant a religious exemption in the first place.\textsuperscript{208}

**B. The Unconscionable Omission of Third-Party Costs**

One might think that current doctrine already allows for the consideration of third-party interests, even if their interests have been given short shrift in practice. Here I address three doctrines that look, at least superficially, to address third-

\textsuperscript{206} “If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. … Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.” 455 U.S. at 260 (citations omitted).

\textsuperscript{207} See 85 P.3d at 93.

\textsuperscript{208} The California Supreme Court cites two other cases in passing for the proposition that courts will not grant religious exemptions where the exemptions would adversely affect third parties. In the first case, Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 304 (1985), the Supreme Court rejected a plea for exemption from the Fair Labor Standards minimum wage and reporting requirements. The Court did so because it found that the FLSA imposed no burden whatsoever on the objector. 471 U.S. at 303-306. As such, the Court did not need to undertake an inquiry into the interests that the legal requirement was intended to serve, and it did not undertake that inquiry. In the second case, also involving an as-applied challenge to the FLSA, the Fourth Circuit Court of Appeals also found that the burden on religion, if any, was “limited.” Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398 (4th Cir. 1990). It nonetheless went on to assess the interest intended to be served by the FLSA, which it identified as an interest in protecting women from employment discrimination, by ensuring equal pay for both sexes. This looks to be an interest in protecting third parties but it is an interest that “counts” only because it is the asserted interest of the government in imposing the FLSA in the first place. In this way, the interest in women’s equality is like the interest of the Cutter inmates in security — they are interests that receive judicial notice only because the government has chosen to adopt these interests as its own. I elaborate on the distinction between addressing third-party interests squarely versus tangentially in the text following this note. In any event, the court in Shenandoah Baptist Church upheld the FLSA requirements not so much because of anyone’s interests in equal pay as because of reasons similar to those underpinning Lee — viz., interests in maintaining Congress’s objectives by ensuring the universal application of the law. As the court said, “There is no principled way of exempting the school without exempting all other sectarian schools and thereby the thousands of lay teachers and staff members on their payrolls. This would undermine the congressional goal of making minimum wage and equal pay requirements applicable to private as well as public schools.” 899 F.2d at 1398. Only a very strained reading of the case, then, would allow one to infer that it sought to protect the interests of those whom an exemption would directly affect.
1. *The Compelling Interest Prong of RFRA*

In defending a legal requirement against a claim that the requirement substantially burdens an objector’s exercise of religion, the government is asked to adduce the compelling interest that the challenged requirement is designed to serve.\(^{209}\) Sometimes the government’s interest coincides with that of third parties. Yet there is no reason to think that this will always be true. Thus, for example, consider a religious adherent who objects to a military draft because he believes homosexuality is evil and, in the wake of the repeal of Don’t Ask Don’t Tell, he would find it too offensive to his values to serve alongside individuals who are openly gay. The legal requirement he challenges — i.e., his conscription — is motivated by concerns for national security. These may be compelling enough in their own right to deny the objector an exemption but even if they are, they do not at all track what is at stake for the gays and lesbians whom this objector’s claim denigrates. The government’s compelling interest, then, may not include the interests of third parties. Accordingly, a test that does not look to third-party costs over and above considering the government’s interest is likely to leave third parties out in the cold.

2. *The Establishment Clause*

Some commentators look to the Establishment Clause to protect third parties from a religious exemption that would otherwise burden them. Thus, for example, Frederick Gedicks and Andrew Koppelman argue that an exemption from the contraceptive mandate violates the Establishment Clause, which “prohibit[s] RFRA’s application when … a particular exemption would shift the costs of the accommodated religious practice to identifiable and discrete third parties…”\(^{210}\) Even assuming that their contention is correct,\(^{211}\) it does not fully capture the concern here — that the doctrine does not adequately consider burdens third parties may incur in light of an exemption. For one thing, all of Hobby Lobby’s employees who do not share its religious views have reason to feel affronted by its religious exercise. The Establishment Clause worry is not restricted, then, to the women who will be denied contraception as a result of the exemption. Second, there may be cases where a religious exemption does not result in an Establishment Clause violation and yet third parties do have genuine cause to feel that their interests have been sacrificed. Suppose the Amish teens in *Yoder,* for example, had wanted to continue with their secular schooling because they found their interactions with secular peers enriching. Their interest in

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\(^{209}\) RFRA, supra note 17.

\(^{210}\) Gedicks and Koppelman, supra note ____ at 54. See also Hobby Lobby, 573 U.S. at ____ (Ginsburg, J., dissenting) (slip op., *28 n. 25).

\(^{211}\) Gedicks and Koppelman cite no sources in support of their claim, and none of the caselaw reviewed here suggests that the Establishment Clause is as solicitous of third-party interests as they would have it.
continued schooling – viz., exposure to diverse peers – is different from the interests Wisconsin proffered in support of the law requiring schooling through age 16 – viz., ensuring a reasonably educated electorate;\(^\text{212}\) and the teens’ interest is not rooted in a complaint about the state’s undue support of religion. If the Court were then to grant the teens’ parents the requested exemption, the teens would have reason to feel aggrieved and their grievance would have nothing to do with an Establishment Clause violation. In this way, the Establishment Clause can protect the rights of third parties in only a subset of the cases where their interests are threatened.

3. Third-Party Intervention

One might think that the concern about overlooking third-party interests is mitigated by the possibility that third parties will seek to intervene in the case, and get their interests before the court in that way.\(^\text{213}\) But it would be foolhardy to rely on this mechanism alone. For one thing, possibly affected third parties must seek a court’s permission in order to be heard, and the court has discretion to grant or deny the intervention.\(^\text{214}\) For another, while the contraceptive mandate cases received a lot of publicity, and so readily put third parties on notice that their rights were subject to abrogation, many other cases seeking religious exemptions may not be so prominent. Where they are not, third parties cannot be counted on to know of their own accord that their interests are at stake. Finally, it is unfair for third parties to incur litigation costs to protect their interests when they are not impinging on the objectors’ rights of free exercise anymore than anyone else is.

4. Summary

I argued above that courts should proceed with great deference when facing a claim for religious exemption – they should, in particular, judge these claims on the merits only to the extent that the claims rest on suspect empirical facts. But if there are few intrinsic limits on claims of complicity, then there is an even greater need to attend to extrinsic concerns – specifically, the effect an accommodation might have on third parties. Pluralism demands respect for religious differences, but that respect goes both ways: it entails that we must be open to many claims of conscience but we must also ensure that these do not unduly or

\(^{212}\) Wisconsin had argued that education was necessary for participation in democratic life, and for cultivating self-sufficiency. 406 U.S. at 222.
\(^{213}\) In Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014), the Seventh Circuit Court of Appeals granted leave to three Notre Dame students who claimed an interest in the contraceptive coverage they would receive were Notre Dame not to be granted an exemption.
\(^{214}\) See Fed. R. Civ. Pro. 24(b). There are cases where third parties are accorded intervention as of right. See Fed. R. Civ. Pro. 24(a). But it isn’t at all clear that the religious exemption cases are of this kind. Indeed, the Seventh Circuit treated the Notre Dame students’ intervention as one requiring the court’s permission. See 743 F.3d 558 (“We need to say something about the three Notre Dame students whom we have allowed to intervene.”) (emphasis added).
disproportionately interfere with the interests of discrete others. I turn now to some concrete suggestions for operationalizing this careful balancing act.

C. Balancing Concerns for Complicity Against Third-Party Costs

We have seen that claims of complicity have moral, empirical and relational dimensions, and that each of these may require a different level of deference. At the same time, whatever the level of deference accorded to a complicity claim, it must still be balanced against the burdens, if any, that an accommodation would impose upon third parties. In this Section, I seek to put these two pieces together, reviewing first the kinds of claims warranting deference on the merits, and then bringing to bear the extrinsic consideration of third-party costs.

1. Assessing the Strength of Complicity Claims

As I argued above in the discussion about the three kinds of deference, the government need not defer to complicity claims that are premised on mistakes of fact. As such, the government may deny an exemption based on a claim of complicity that turns on factual errors, and this is so even if an exemption would impose no third-party costs.

Matters are more complicated when it comes to complicity claims that turn on non-standard moral or relational premises, however. Given that courts may not assess the cogency of an objector’s moral claims, the moral elements of a conscientious objection must be treated with absolute deference, for the reasons stated above. Courts must then, take at face value, an objector’s claim that some act A (e.g., use of contraception, receiving a blood transfusion, etc.) is wrong. With that said, courts are not without the resources to address hate-based claims, such as those declaring homosexuality immoral, as I argued above.

It is more difficult to grant a categorical right of deference to relational claims, especially given the possibility that someone might claim a causal connection that is extravagantly far-fetched. Nonetheless, deference should be the default here, given that concerns about complicity can strike at the heart of the believer’s conscience and given that, unlike with factual claims, we lack resources to which all reasonable persons should assent to dispute the metaphysics underpinning the more expansive notions of complicity with which opponents of the employer mandate operate. Courts may abandon the default only when the claim is interwoven with metaphysical and empirical assertions

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215 See supra notes ____ and accompanying text.
216 See supra notes ____ and accompanying text.
217 See supra [example involving asserted connection between paying taxes and facilitating an alien invasion].
218 Cf. Rawls, supra note ____ (describing an overlapping consensus).
and the latter are themselves clearly mistaken. Thus, for example, consider an employer who seeks to exclude coverage for ultrasounds during pregnancy from his health insurance plan on the belief that ultrasounds are a sufficient cause of left-handedness in the resulting child and left-handedness is evil. It would be easy to defeat this claim on the factual merits (most women have ultrasounds during pregnancy and most children are not left handed). Less far-fetched metaphysical claims, at least where they entail more responsibility rather than less, must be treated with deference.

2. Balancing Deference Against Third-Party Interests

The fact that all moral and many relational claims must be treated with deference does not automatically entail an exemption; it merely shifts the burden of the inquiry. The government then needs to defend the challenged legal requirement, as RFRA requires. But a separate, additional set of considerations must be brought to bear – viz., considerations tracking the interests of third parties.

Deference is a binary term in this context (a claim of complicity either does or does not get deference). There is no middle ground when it comes to moral or relational claims because there is no legitimate scale according to which one could measure the magnitude of the claim’s plausibility. Instead, plausibility weightings are off the table.

Third-party costs, by contrast, are scalar. The greater the cost to third parties of an exemption, the more weight third-party interests should carry. The process of weighing something with an absolute value against something with a scalar value requires that we posit a threshold on the scalar side of the equation: Costs exceeding some threshold amount should be found to be untenable and so exemptions denied where these excessive costs would otherwise result.

Specifying the location of the threshold on a cost spectrum is a matter for democratic deliberation. There is no a priori, context-independent answer to the question of how much of a burden it is fair to impose on third parties for the sake of respecting religious adherence. Several ancillary considerations warrant mention, however. First, the government should seek to minimize occasions for conflict between religious belief and third-party interests. (I note, for example, that a national healthcare plan (whatever its other demerits) would have obviated employers’ conscientious objections to Obamacare.) The government did so when it excluded churches from the contraceptive mandate at the outset. It might have foreseen objections to the contraceptive mandate from religious institutions and even for-profit entities, and so provided universal access to contraception outside of the employer-subsidized insurance delivery system. Second, where

\footnote{See supra text accompanying note _____. [asymmetry]}

\footnote{I elaborate on this suggestion in a Washington Post op-ed. See supra note _____.}
third-party interests would be implicated were an exemption to be granted, courts and the government must work to ensure that these interests are raised and adequately defended.

3. Getting Third Party Interests Before a Court

This brings us to the final piece of doctrinal revision, which provides a means for third parties to have their interests represented in court. The government bears an obligation to assess whether a requested exemption would impose costs on third parties. Where the government determines that it would, the government must make a good faith effort to alert the relevant third parties to the proceedings. For example, the government might contact a representative advocacy group (e.g., NARAL, in the case of the contraceptive mandate), or take out ads in national news sources (paper and electronic). Further, the government—which is to say taxpayers—should fund the third parties’ legal representation. As a society, we should be willing to incur some costs in exchange for conferring religious freedom. But those costs should be shared equally among us. We would impermissibly chill requests for religious exemption were we to require the objectors to pay for third parties’ legal representation. And requiring third parties to fully fund their efforts to protect themselves would expose them to a disproportionate burden, even if they were to prevail. Accordingly, the government should have to subsidize third parties’ legal costs, on behalf of us all.

D. Assessing Hobby Lobby and Its Progeny in Light of the Proposed Balancing Test

The proposed revisions to the doctrine articulated here would likely not have altered the outcome in Hobby Lobby. To be sure, women of childbearing age ought to have been entitled to express the nature and meaning of the consequences an accommodation would yield for them. But the Court should have ruled in favor of Hobby Lobby’s requested exemption even were it to have attended to third-party costs. This is because an exemption for Hobby Lobby would not in fact have imposed any costs on third parties: The government had already established a work-around for the contraceptive mandate for religious non-profits. With that alternative arrangement in place, the Court was in a position to offer Hobby Lobby an exemption at virtually no cost to Hobby Lobby’s employees or their dependents. As such, given the fact that Hobby Lobby’s claim deserved deference (it turned on moral and relational premises that courts may not challenge), and

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221 It would not be sufficient to contact only the third parties most immediately affected by the case—for example, Hobby Lobby’s employees given that the exemption affects the healthcare coverage they will enjoy. Hobby Lobby has precedential value for pending contraceptive challenges, and any other challenges that will be filed in its wake. Thus it stands to affect the interests of many women of reproductive age and it is for this reason that notice should extend beyond the Hobby Lobby employees themselves.
that granting the claim would not ultimately impose burdens on third parties, the Court was right to uphold Hobby Lobby’s exemption.

But *Hobby Lobby* was unusual. We should expect that other cases will not involve a work-around that is so ready to hand. In these other cases, courts will have to do the serious work of weighing the religious adherent’s claim of complicity against the costs that an accommodation would impose on third parties. Again, just how much of a burden it would be legitimate to impose on third parties is a matter for democratic deliberation. We can nonetheless anticipate the proper outcomes in a few discrete examples.

Claims seeking religious exemptions from coverage for life-saving measures (e.g., blood transfusions) should be denied, given the magnitude of the interests at stake for third parties (here, life or death). We should expect that claims seeking religious exemptions from anti-discrimination laws would typically fail as well. The third parties whose interests are implicated in these cases are not just the ones immediately denied service or employment by the religious objector. All members of the group facing discrimination can claim an expressive injury from the discrimination. And other historically oppressed groups can claim that an exemption threatens them with an injury too: the state that would grant a request to discriminate fails to take seriously the great evil of discrimination, and so undermines the sense of security and respect that a decent state should confer on all its citizens.

There will of course be cases far harder than these. But we should feel more confident in the ability of courts to appropriately assess claims of complicity once we appreciate the reasons for which these claims can be inherently compelling and once we expand the test for an accommodation so that it factors in the costs that an exemption would impose on third parties.

**VI. Conclusion, and a Personal Apologia**

The freedom that we cherish and that our constitutional regime enshrines is the freedom to create for ourselves lives of meaning and value.\(^{222}\) Conscience is central to that endeavor, and the law should then protect each of us from having to act against conscience, at least where the protection can be had without imposing undue costs on others. Moreover, conscience is not an after-work or off-hours indulgence. Only a cruel and unyielding conception of work

would require that we turn our selves off during the time we spend on the job. Conscience has as much of a claim to respect in the work-a-day world as in our private pursuits. It is for this reason that courts should treat requests for religious exemptions from specific provisions of the employer mandate with substantial deference.

With that said, I confess that the prospect that women’s sexual or reproductive choices might be anyone else’s business – let alone a business’s business – is one that I find deeply discomfiting. I consider myself to be a liberal legal scholar. Like many of my colleagues in arms, I rail against governmental efforts to limit women’s reproductive freedom, and construe many of these as reflections of a deep-seated sexism that no decent government should harbor. I have thus written in ardent support of women’s rights, including their reproductive rights. And other pieces of my writing evince a deep skepticism about the notion of corporate personhood, and especially of corporate constitutional rights. My scholarly commitments are, then, such as to propel me toward the anti-Hobby Lobby camp. More than that, as a woman of childbearing age who is perfectly happy with the family she has, challenges to the contraceptive mandate strike especially close to home. Hobby Lobby vexes me personally as much as it occupies me professionally and politically.

I offer these statements, unusual though they are in a law review publication, to shed some light on the internal struggle involved in advancing the thoughts contained here. Hobby Lobby, I have contended, was rightly decided, both as a matter of the doctrine as it stands, and as a matter of the doctrine as it should be. More generally, as I have argued, claims of conscientious objection warrant great (though not absolute) deference, even when they do not track the understanding of complicity in our standard legal and moral theories (as challenges to insurance subsidization do not). I arrive at these claims in spite of my personal, ideological and political orientation but, for all that, with no less conviction about their truth. If I do not relish the company of my bedfellows on these matters I hope at least to take refuge in the fidelity to conscience that has compelled the reflections here.