IDENTIFYING SUBSTANTIAL BURDENS

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Pursuant to the Religious Freedom Restoration Act ("RFRA"), government cannot "substantially burden" religious excercise—unless, of course, the substantial burden is the least restrictive means to achieve a compelling government interest. But what constitutes a substantial burden? The importance of this inquiry has been front and center in both litigation over the application of RFRA to the contraception mandate as well as in application of anti-discrimination laws to same-sex couples seeking services from public accommodations. Many courts and scholars have argued that claiming RFRA protections for complicity in the conduct of others—whether it be triggering contraception insurance coverage or providing professional services at a same-sex wedding—must fail because such complicity claims cannot satisfy RFRA's requirement that the burden in question be substantial. Indeed, to claim otherwise would, on this view, be tantamount to writing the word "substantial" out of the statute. Others, by contrast, have argued that assessing the substantiality of a burden would constitute an impermissible inquiry into theology and thereby violate the requirements of the Establishment Clause. Such a view, however, would seem to raise significant challenges for applying RFRA's "substantial burden" requirement, rendering a core provision of RFRA toothless.

In this Article, I argue that courts, in applying the substantial burden category, should examine not the theological or religious substantiality of the burden. Instead, courts should assess the substantiality of the civil penalties triggered by religious exercise. Doing so ensures that courts can apply RFRA's statutory standard without running afoul of Establishment Clause concerns. In turn, courts can adequately address the next wave of RFRA cases that raise important questions about the substantiality of burdens, providing a workable method for distinguishing between those claims deserving of RFRA's protections and those that do not.

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I. INTRODUCTION

When is a burden "substantial"? This question stands at the center of recent clashes between law and religion, testing the scope and application of the interpretation of the Religious Freedom Restoration Act ("RFRA"). Enacted on the heels of the Supreme Court's decision in *Employment Division v. Smith*,[1] RFRA prohibits government from "substantially burden[ing] a person's exercise of religion," unless doing so is the "least restrictive means" for achieving a "compelling governmental interest."[2]

Because *Smith* limited the free-exercise protections available under the First Amendment, RFRA has become *the* flashpoint as religiously-motivated individuals and institutions seek exemptions from otherwise valid laws. Unfortunately, the text and legislative history of RFRA provide limited guidance for evaluating substantiality.[3] And as RFRA affords protection only against "*substantial* burdens" on religious exercise, articulating a methodology for evaluating substantiality has become the central question in many of the most important court battles over religious liberty.

Indeed, arguments over what constitutes a substantial burden emerged as maybe the central issue in the Supreme Court's 2014 landmark decision, *Burwell v. Hobby Lobby Stores Inc.*[4] In its opinion, the Court held that for-profit companies could assert a RFRA defense against the so-called contraception mandate in the Patient Protection and Affordable Care Act ("Affordable Care Act"), which would have otherwise required companies to include certain forms of contraception in their employee's insurance coverage.[5] In so doing, the Court concluded

1. 494 U.S. 872 (1990).
2. 42 U.S.C. § 2000bb–1 (2012).
3. *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996) ("Neither the text nor the legislative history of RFRA provides any clear indication of how courts ought to determine whether an incidental burden on religion is in fact substantial.").
4. 134 S. Ct. 2751, 2759 (2014).
5. *Id.* at 2775–85.

that a requirement to provide such contraception coverage not only imposed a burden on religiously-motivated employers who believed providing such coverage would violate their own religious commitments, but that such a burden for the purposes of RFRA was *substantial*.[6]

Similarly, religiously motivated nonprofit employers have also challenged the contraception mandate, contending that the current process for religious accommodation, which requires some nonprofits to self-certify as religious institutions, also violates RFRA. These nonprofit employers believe that filing the paperwork that confirms they are a religious institution, and thereby secures their religious exemption, will trigger contraceptive insurance coverage for their employees. In turn, triggering such coverage—even if provided by a third party and not paid for by the employers—makes them complicit in conduct they believe to be sinful.[7] Thus, the process of securing the exemption itself not only burdens, but *substantially* burdens their religious exercise.[8]

The question of substantial burden under RFRA has also emerged as one of the key issues in controversies over the refusal of some religiously-motivated "public accommodations" to provide their services at same-sex weddings or commitment ceremonies. In three recent, separate, and highly publicized cases, a baker,[9] a florist,[10] and a photographer[11] were each found liable for impermissibly discriminating on the basis of sexual orientation—in one case, over and above the defendant's attempt to assert RFRA as a defense.[12]

In response to these cases, the Indiana legislature introduced its own version of RFRA in order to, in the words of one supporter of the bill, protect "Christian bakers, florists and photographers [who] should not be punished for refusing to participate in homosexual marriage."[13] Thus, the bill would allow commercial entities to assert that providing services at a same-sex wedding constitutes a substantial burden on their religious exercise. The bill, initially enacted by the Indiana legislature,[14] endured unrelenting criticism from around the country,[15] eventually lead-

6. *See infra* notes 43–54 and accompanying text.

7. *See infra* notes 58–61 and accompanying text.

8. *Id.*

9. Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 WL 4760453, at *1 (Colo. App. 2015).

10. State v. Arlene's Flowers, Inc., No. 13-2-00871-5, 2015 WL 720213, at *4 (Wash. Super. filed Feb. 18, 2015) (granting summary judgment as to liability in favor of plaintiffs).

11. Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

12. *Id.* at 77.

13. *See Victory at the State House! Governor Pence Signs Senate Bill 101!*, ADVANCE AM. (Mar. 26, 2015, 10:21 AM), http://www.advanceamerica.com/blog/?p=1849.

14. ASSOCIATED PRESS, *Indiana Enacts Religious-Objections Law*, WALL ST. J. (Mar. 26, 2015, 11:20 AM), http://www.wsj.com/articles/indiana-enacts-religious-objections-law-1427383220.

15. *See, e.g.*, Mark Peters & Jack Nicas, *Indiana Religious Freedom Law Sparks Fury*, WALL ST. J. (Mar. 27, 2015, 7:34 PM), http://www.wsj.com/articles/indiana-religious-freedom-law-sparks-fury-1427491304; *see also Celebs Respond to Indiana's Religious Freedom Law*, CNN (Mar. 30, 2015, 6:41 PM), http://www.cnn.com/2015/03/30/politics/celebrities-indiana-religious-freedom-response/.

ing to the bill's modification.[16] And the controversy in Indiana has turned out to be just the beginning. Other states have subsequently introduced their own bills, with many including new wrinkles to the RFRA framework.[17] Each has similarly faced significant criticism. And in light of that criticism, some have been amended,[18] some have been vetoed,[19] and some have still been enacted,[20] but are now the object of litigation.[21] These controversies will likely proliferate in the coming years, especially given that numerous states have their own version of RFRA that prohibit each state's respective laws from *substantially* burdening a person's religious exercise.[22]

So how should a court determine whether a law has imposed a burden on religious exercise that is *substantial*? Can claims of attenuated complicity in conduct believed by litigants to be sinful—like those at stake in debates over the contraception mandate or same-sex marriage cases—satisfy RFRA's standard? On the one hand, the Establishment Clause is typically understood to prohibit courts from investigating matters of religion and theology; so evaluating the theological substantiality of a law's burden on a person's religious exercise would seem to be off limits. On the other hand, RFRA requires courts to determine not only whether a burden exists, but whether that burden is substantial. And, therefore, courts, in enforcing the statute, cannot simply defer to the as-

16. Monica Davey et al., *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES (Apr. 2, 2015), http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html; Mark Peters & Ana Campoy, *'Religious Freedom' Measures Revamped*, WALL ST. J. (Apr. 2, 2015, 6:27 PM), http://www.wsj.com/articles/indiana-lawmakers-unveil-changes-to-religious-freedom-law-1427981035. Indiana is not the only state to face significant backlash of late when attempting to enact or modify a state RFRA. *See, e.g.*, Tamara Audi, *Arizona Vetoes Religious Bill Criticized as Anti-Gay*, WALL ST. J. (Feb. 27, 2014, 10:26 AM), http://www.wsj.com/articles/SB10001424052702304255604579407784144050074; Laura Meckler & Ana Campoy, *Arkansas Governor Calls for Changes to 'Religious Freedom' Bill*, WALL ST. J. (Apr. 1, 2015, 7:43 PM), http://www.wsj.com/articles/arkansas-governor-calls-for-changes-to-religious-freedom-bill-1427904740.

17. For a collection of attempts to enact state Religious Freedom Restoration Acts in 2015, see *2015 State Religious Freedom Restoration Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 3, 2015), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx. For legislative attempts made in 2016, see *2016 State Religious Freedom Restoration Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 5, 2016), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/2016-state-religious-freedom-restoration-act-legislation.aspx.

18. *See, e.g.*, Eric Bradner, *Arkansas Governor Signs Amended 'Religious Freedom' Measure*, CNN.COM (Apr. 2, 2015, 5:59 PM), http://www.cnn.com/2015/03/31/politics/arkansas-religious-freedom-anti-lgbt-bill/.

19. *See, e.g.*, Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/?utm_term=.85a716f3c87e.

20. *See, e.g.*, Camila Domonoske, *Mississippi Governor Signs 'Religious Freedom' Bill into Law*, NPR (Apr. 5, 2016, 12:55 PM), http://www.npr.org/sections/thetwo-way/2016/04/05/473107959/mississippi-governor-signs-religious-freedom-bill-into-law.

21. *See, e.g.*, Michael Pearson, *ACLU Sues Over Mississippi Religious Freedom Law*, CNN.COM (May 9, 2016, 1:04 PM), http://www.cnn.com/2016/05/09/us/mississippi-religious-freedom-bill-lawsuit/.

22. *See* Eugene Volokh, *What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/; *see also* David Johnson & Katy Steinmetz, *This Map Shows Every State with Religious Freedom Laws*, TIME (Apr. 2, 2015), http://time.com/3766173/religious-freedom-laws-map-timeline/.

sertions of a litigant without conducting the statutorily required inquiry of a burden's substantiality.

To avoid these twin pitfalls, this Article argues that in order to determine whether a burden is substantial, courts must examine the substantiality of the *civil penalties triggered by religious exercise*. By focusing on the substantiality of civil penalties—as opposed to the substantiality of religious or theological burdens—courts can avoid Establishment Clause concerns, while still enforcing the threshold inquiry required by RFRA. In this way, courts can both avoid allocating government burdens on the basis of a judicial inquiry into theology, while still ensuring that RFRA's protections are not granted simply on the say so of claimants who assert that the burdens they have experienced are substantial.

This Article proceeds in four parts. Part II of the Article considers the current controversies over the substantial burden standard, focusing largely on the debate in the context of the contraception-mandate litigation. Part III then recounts various forms of substantial-burden skepticism, or judicial and legislative criticism of the substantial burden standard as a doctrinal vehicle for protecting religious liberty. In light of these concerns, Part IV provides a framework for evaluating substantial burdens. Finally, Part V considers some hard cases for the version of the substantial burden standard articulated in this Article.

II. THE CURRENT DEBATE OVER SUBSTANTIAL BURDENS

The concept of "burden" has long been at the center of litigation over religious accommodations.[23] It first appeared as a passing comment in the Supreme Court's 1961 opinion *Braunfeld v. Brown*,[24] which considered the claims of Orthodox Jewish merchants who argued that Pennsylvania's Sunday-closing law violated their Free Exercise rights.[25] According to these merchants, the Sunday-closing laws put them at a significant disadvantage because, in keeping with Jewish law, they already closed their stores on Saturday; as a result, the Sunday-closing law put them at a "serious economic disadvantage."[26] While the Supreme Court rejected their claim—explaining that the law simply made "their religious beliefs more expensive"[27]—it also noted in passing that government may not impose an incidental and indirect burden on religious conduct where "the State may accomplish its purpose by means which do not impose such a burden."[28]

23. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937–42 (1989) (describing the origins of the substantial burden standard in free exercise doctrine).

24. 366 U.S. 599, 606 (1961).

25. *See id.* at 601–02; *see also supra* note 23, at 939.

26. *Braunfeld*, 366 U.S. at 602.

27. *Id.* at 605.

28. *Id.* at 607.

This nascent concept of "burden" famously came into full bloom in the Supreme Court's subsequent 1963 decision, *Sherbert v. Verner*.[29] Addressing the claims of a Seventh-day Adventist who, having been terminated for refusing to work on Saturday, was denied unemployment benefits, the Court made the substantial-burden standard an explicit centerpiece of its free exercise doctrine.[30] According to the Court in *Sherbert*, a law may not impose an "incidental burden on the free exercise of appellant's religion," unless that burden can be justified by a "compelling state interest."[31] The Court further entrenched the substantial burden framework in *Wisconsin v. Yoder*, holding that Wisconsin's compulsory education law infringed on the free exercise rights of Amish parents who, in accordance with their religious beliefs, refused to send their children to public school beyond eighth grade.[32] In reaching this conclusion, the Court—echoing its decision in *Sherbert*—stressed that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[33] And this concept of burden animated the Court's application of the free exercise clause in a number of subsequent cases.[34]

Of course, the centrality of the burden concept in free exercise doctrine waned in the 1980s,[35] and was then subsequently dispatched in the Supreme Court's landmark decision, *Employment Division v. Smith*.[36] Indeed, in *Smith*, the Supreme Court rejected the notion that an incidental burden on a person's religious exercise could trigger a free exercise claim;[37] so long as a law is "neutral" and "generally applicable," it could not constitute a violation of the Free Exercise Clause even where the law incidentally imposed a burden on religious conduct.[38]

In response, Congress blunted the impact of *Smith* by enacting the Religious Freedom Restoration Act, which once again moved the concept of "burden"—or, more specifically, "substantial burden"—to the center of religious accommodation doctrine. Thus, RFRA sought to restore the state of constitutional law to the standard that preceded the Court's decision in *Smith*.[39] To do so, RFRA provided that, "[g]overnment shall not substantially burden a person's exercise of reli-

29. Sherbert v. Verner, 374 U.S. 398 (1963).
30. *Id.* at 403.
31. *Id.*
32. 406 U.S. 205, 235–36 (1972).
33. *Id.* at 220 (citing *Sherbert*, 374 U.S. at 409).
34. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983); United States v. Lee, 455 U.S. 252, 257–58 (1982); Thomas v. Review Bd. of Ind. Emp't, 450 U.S. 707, 717–18 (1981).
35. *See, e.g.*, Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 451 (1988); Bowen v. Roy, 476 U.S. 693, 699–700 (1986).
36. Emp't Div. v. Smith, 494 U.S. 872 (1990).
37. *Id.* at 878–79.
38. *Id.* at 879–80.
39. *See* H.R. REP. NO. 103–88, at 15 (1993) (describing RFRA as "'turn[ing] the clock back' to the day before *Smith* was decided.").

gion even if the burden results from a rule of general applicability,"[40] unless that burden was the "least restrictive means of furthering a compelling government interest."[41] While the Supreme Court limited RFRA's application to federal laws, numerous states enacted their own parallel versions of RFRA,[42] ensuring that the concept of "substantial burden" remained at the center of the religious accommodation enterprise.

The centrality of the substantial burden inquiry, however, has also frequently proven to be the most difficult doctrinal hurdle for religious accommodation claims, often proving to be an Achilles heel of sorts. Indeed, courts have long maintained significant skepticism of "substantial burden" claims. Whether under the pre-*Employment Division v. Smith* interpretation of the Free Exercise Clause[43] or the post-RFRA standard for evaluating religious accommodation claims,[44] courts have consistently questioned whether claimants seeking religious accommodations have truly experienced a *substantial* burden on their religious exercise.

The most recent iteration of this substantial-burden skepticism has emerged in the context of the Affordable Care Act's so-called contraception mandate. Pursuant to the guidelines promulgated by the Department of Health and Human Services,[45] covered insurance plans must include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[46] The final rules issued by the

40. 42 U.S.C. § 2000bb–1(a) (2012).

41. *Id.* § 2000bb–1(b).

42. *See* Volokh, *supra* note 22.

43. *See* James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416 (1992) ("Thus, even prior to *Smith*, the free exercise claimant faced something of a Catch-22. In order to demonstrate a burden, the government involvement or interference with the adherent's religious practices had to be significant enough that it could potentially 'coerce' the adherent to abandon her faith. Yet such extensive involvement or interference would almost always signify that the government had a compelling interest in the law or practice in question, particularly considering what constituted 'compelling' in the Court's eyes. In other words, to show a burden was often to present simultaneously the government's compelling interest. Conversely, if the government's involvement or interference was not strong, i.e., its interest was not compelling, it was unlikely that a burden could be demonstrated.").

44. *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L. REV. 575, 594 (1998) ("Consequently, as catalogued below, judges in the earliest RFRA cases were not well-guided by pre-RFRA law and launched out on their own, typically in ways which limited the scope of RFRA. And, later RFRA cases built upon the earlier ones to develop a body of RFRA 'burdens' law that placed the bar very high for RFRA claimants. Indeed, so effective was this RFRA-limiting device that a stunningly high proportion of all RFRA claims decided on the merits prior to *Boerne* involved rejection of claims as presenting insubstantial burdens.").

45. The Affordable Care Act required that covered health insurance plans provide "preventative care" for women in accordance with guidelines promulgated by the Health Resources and Services Administration, which is an agency of the Department of Health and Human Services. 42 U.S.C. § 300gg-13(a)(4) (2016) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.").

46. *Women's Preventative Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/ (last visited Mar. 3, 2016). These guidelines were subsequently incorporated into the final rules issued by the Department of Health and Human Services. *See* Group Health

Department of Health and Human Services provided an exemption for "religious employers,"[47] although that exemption did not cover for-profit companies.[48]

In response to the guidelines, numerous Christian institutions filed suit, arguing that complying with the contraception mandate would require them to violate their religious consciences.[49] This wave of lawsuits fell into two broad categories.

The first category of lawsuit included for-profit companies who argued that the government's refusal to extend its exemption beyond the category of nonprofit companies violated their rights under the federal RFRA. And in 2014, this claim made its way before the Supreme Court. The specific case before the Court considered the claims of three closely held for-profit corporations: Hobby Lobby, an arts-and-crafts chain; Mardel, a chain of bookstores selling Christian books and products; and Conestoga Woods, a custom cabinet manufacturer. All three of these corporations objected to providing insurance coverage for four of twenty contraceptives mandated under the Affordable Care Act.[50]

In its landmark decision, *Burwell v. Hobby Lobby*, the Supreme Court found in favor of these three plaintiffs, holding that the contraception mandate substantially burdened the companies' religious exercise and was not the least restrictive means for ensuring employees received cost-free contraception.[51] Indeed, the Court noted the government could extend the exemption crafted for nonprofit companies to for-profit companies as well, thereby ensuring that employees received cost-free contraception without burdening their employers' religious commitments.[52]

In what is likely the key holding of the decision, the Supreme Court concluded that the plaintiffs had demonstrated that the application of the contraception mandate would constitute a substantial burden.[53] Given the implications of this holding, the Court provided extensive analysis of the question, outlining a three-tiered argument supporting its conclusion that the mandate imposed a substantial burden on the employers.

First, the Court held that the cost to the employers of refusing to provide contraception insurance would be $100 a day per employee, leaving Hobby Lobby with an annual $475 million bill, Conestoga Woods with an annual bill of $33 million, and Mardel with an annual $15 million

Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient, 76 Fed. Reg. 46623 (Aug. 3, 2011) (codified at 45 C.F.R. § 147.130 (2011)).

47. 45 C.F.R. § 147.131.

48. *Id.*

49. For updated information on the range of lawsuits filed against the contraception mandate, see *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, http://www.becketfund.org/hhsinformationcentral/ (last updated Nov. 2, 2015).

50. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759, 2764–66 (2014).

51. *Id.* at 2779, 2782, 2785.

52. *Id.* at 2782–84.

53. *See infra* notes 55–62 and accompanying text.

bill.[54] Such costs, explained the Court, clearly constituted a substantial burden.[55]

Critics, however, argued that this conclusion was flawed. Employers could simply eliminate their employee health-care plan completely, thereby avoiding the $100 per day, per employee penalty.[56] In the second step of its argument, the Court responded to this contention by noting that if the employers dropped their employee health-care plan completely—thereby avoiding the contraception mandate—they would face costly penalties of $2,000 per year, per employee. Thus, the Court concluded that, regardless of which alternative these employers selected—either providing their employees insurance without contraception coverage or not providing an employee health-care plan at all—they would face a substantial burden imposed by the Affordable Care Act.[57]

The Government, however, contended that even if the employers' religious exercise did, as the Court in fact argued, trigger significant penalties, the claim that it imposed a substantial burden was still flawed. The reason: the injuries caused by the mandate should not be considered "cognizable . . . where the relationship between the claimed injury and the challenged governmental action is too attenuated."[58] Thus, the fact that the employer provided insurance coverage for contraception was several causal steps removed from the conduct violating the employer's religious convictions—the destruction of an embryo.[59] And this causal break, argued the government, undermined the claim that the burden imposed on the employers satisfied RFRA's requirement that the burden be *substantial*.

The Court, however, disagreed, advancing a third argument supporting its conclusion that the mandate imposed a substantial burden. As the Court noted, the First Amendment prohibits judicial inquiry into the theological grounds for the professed substantial burden.[60] And, according to the Court, determining whether the employers' asserted burden was, indeed, substantial, implicated the types of questions that the First Amendment prohibited:

> The [employers] 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

54. *Burwell*, 134 S. Ct. at 2775–76.

55. *Id.*

56. Marty Lederman, *Hobby Lobby Part III—There is No "Employer Mandate"*, BALKINAZATION BLOG (Dec. 18, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html (arguing that employers are not mandated to provide conception, but have other alternatives—including not providing an employee health-care plan).

57. *Burwell*, 134 S. Ct. at 2776–77 (concluding that eliminating health-insurance coverage would be quite costly for the employers). *But see* Lederman, *supra* note 56 (arguing that the $2,000 cost per year for not providing an employee health-care plan would not raise costs for these companies).

58. Brief for Petitioners at 32, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354), *available at* http://www.becketfund.org/wp-content/uploads/2014/03/SG-Merits-Brief-Hobby-Lobby.pdf.

59. *Burwell*, 134 S. Ct. at 2777.

60. *Id.* at 2778–79.

> the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.[61]

Accordingly, the Court concluded that the only constitutionally permissible inquiry into the employers' beliefs was as to whether those beliefs were sincerely held—and the Court noted no party disputed that they were.[62] Thus, the Court concluded, the contraception mandate did in fact pose a substantial burden, as employers would face significant financial penalties for failing to provide insurance for contraception, a step that violated a sincerely held religious belief.

In a scathing dissent, Justice Ginsburg harshly criticized the majority's conclusion that the mandate imposed a substantial burden. Relying on pre-*Smith* Supreme Court decisions,[63] Justice Ginsburg contended that "beliefs, however deeply held, do not suffice to sustain a RFRA claim"; a court must still determine whether a plaintiff's "'religious exercise is substantially burdened.'"[64] And evaluating the mandate against this standard, Justice Ginsburg concluded:

> [T]he connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans.[65]

Accordingly, Justice Ginsburg argued that the majority's holding that the mandate imposed a substantial burden failed both because it failed to determine whether the employers truly experienced a burden that was *substantial* and, relatedly, because it failed to take into account the attenuated relationship between the requirements of the mandate and the actual conduct that the employers found objectionable. That attenuation, Justice Ginsburg concluded, undermined any claim that the burden was, in reality, substantial.

Notwithstanding the Court's decision in *Hobby Lobby*, the battle over what constitutes a *substantial* burden in the context of the contraception mandate was far from over. In the wake of the Court's decision

61. *Id.* at 2778.
62. *Id.* at 2779.
63. *Id.* at 2798–99 (Ginsburg, J., dissenting).
64. *Id.* at 2798 (Ginsburg, J., dissenting) (quoting Kaemmerling v. Lappin, 553 F.3d 669, 679 (D.C. Cir. 2008)).
65. *Id.* at 2799 (Ginsburg, J., dissenting).

in *Hobby Lobby*, the Government amended its regulations to exempt both nonprofit as well as closely-held, for-profit entities that "hold[ ] [themselves] out as [ ] religious organization[s]" from the contraception mandate.[66] Initially, as opposed to core religious organizations such as churches and their auxiliaries,[67] these nonprofits and closely-held, for-profit entities had to self-certify to qualify for this exemption by filling out Form 700 and sending the form to their respective insurers and third-party administrators.[68] Many nonprofit companies, however, objected to filling out Form 700; they believed doing so still made them complicit in the eventual provision of contraception. Therefore, they contended that filling out the form constituted a substantial burden on their religious exercise—and thus imposing the self-certification requirement violated the protections afforded by RFRA.[69]

By and large, the federal courts of appeals have roundly rejected this claim, concluding that the requirement to fill out Form 700 could not be considered a "substantial burden." For example, the D.C. Circuit concluded that,

> the challenged regulations do not impose a substantial burden on Plaintiffs' religious exercise under RFRA. All Plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form. That bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state.[70]

Other federal courts of appeals reached similar decisions.[71]

The Supreme Court, without issuing a ruling on the merits, initially indicated that it might be receptive to claims that filling out Form 700 might very well constitute a substantial burden.[72] For example, the Court issued an injunction in favor of Wheaton College, not requiring it to submit Form 700 to the third-party administrator of its health insurance

66. 45 C.F.R. § 147.131(b) (2016).

67. *Id.* § 147.131(a) (incorporating the definition from 26 U.S.C. § 6033(a)(3)(A)(i) (2012)).

68. If the entity is self-insured, it can provide Form 700 to the third-party administrator of its health plan. 45 C.F.R. § 147.131(c)(1)(i).

69. For an updated list of cases filed by nonprofits against the Affordable Care Act's self-certification process, see *HHS Mandate Information Central*, *supra* note 49.

70. Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 237 (D.C. Cir. 2014).

71. Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 442 (3d Cir. 2015) ("[C]an the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a 'substantial' burden on the appellees' free exercise of religion? We think not . . . . [W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees."); Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372, 388 (6th Cir. 2014) ("The government's imposition of an independent obligation on a third party does not impose a substantial burden on the appellants' exercise of religion . . . . [T]he Government's instruction to insurance issuers and third-party administrators to provide contraceptive coverage does not force the appellants to provide, pay for, and/or facilitate access to the coverage."); *see also* Univ. of Notre Dame v. Burwell, 786 F.3d 606, 613–16 (7th Cir. 2015).

72. *See, e.g.*, Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528, 1528 (2015) (granting certiorari, vacating the appellate court's decision, and remanding for further consideration); Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014) (issuing an injunction against the requirement that the petitioner use Form 700).

plan.[73] Instead, the Court noted that Wheaton College could simply "inform[ ] the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services."[74] In the wake of the *Wheaton College* injunction, the government amended its regulations to allow religious organizations to self-certify by sending Form 700 directly to the government.[75]

Justice Sotomayor harshly criticized the majority's grant of the injunction, specifically attacking the conclusion that filling out and filing Form 700 could constitute a substantial burden: "Let me be absolutely clear: I do not doubt that Wheaton genuinely believes that signing the self-certification form is contrary to its religious beliefs. But *thinking* one's religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so."[76] In turn, Justice Sotomayor argued, that Wheaton was mistaken about the legal import of its role in the provision of contraception insurance: "[T]he obligation to provide contraceptive services . . . arises not from the filing of the form but from the underlying law and regulations."[77] Accordingly, because filling out Form 700 did not, according to Justice Sotomayor, trigger the underlying legal obligation, it was not possible for the requirement to self-certify via the form to constitute a substantial burden. To claim it was a substantial burden was to misunderstand the way the law worked.

Subsequent to the Supreme Court's injunction in *Wheaton*, the Eighth Circuit—in contrast to the other federal courts of appeals to address the issue—held that RFRA protects nonprofit companies who refuse to submit Form 700 because the self-certification requirement does constitute a substantial burden.[78] In light of the circuit split, the Supreme Court granted certiorari on the issue, ostensibly putting the definition of substantial burden front and center in current law and religion debates.[79]

Instead of addressing the substantial burden question, however, the Court—left with only eight justices because of Justice Scalia's death—chose to vacate the nonprofit cases and remand them to the federal courts of appeals.[80] In so doing, the Court took the extraordinary step of indicating a strong desire for the parties to compromise, stating "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise

73. *Wheaton Coll.*, 134 S. Ct. at 2806.

74. *Id.*

75. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,322–23 (July 14, 2015) (to be codified at 45 C.F.R. pt. 147).

76. *Wheaton Coll.*, 134 S. Ct. at 2812 (Sotomayor, J., dissenting).

77. *Id.* at 2813.

78. *See, e.g.*, Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Serv., 801 F.3d 927, 936–37 (8th Cir. 2015).

79. *See* Order Granting Certiorari, Zubik v. Burwell, 136 S. Ct. 444 (Nov. 6, 2015) (No. 14-1418).

80. Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) ("The Court expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.").

while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[81] While the spirit of compromise is laudable, the Court's decision left the "substantial burden" question unanswered.

And all this brings us back to our initial question: how should we identify which burdens are, for the purposes of RFRA, *substantial*?

III. SUBSTANTIAL-BURDEN SKEPTICISM

Although the recent contraception-mandate litigation has raised serious questions about the definition of a substantial burden, the reality is that substantial-burden skepticism has permeated both free exercise as well as RFRA doctrine for some time. Already in the 1980s, in the years leading up to *Smith*, the Supreme Court issued two decisions—*Bowen v. Roy* and *Lyng v. Northwest Indian Cemetery Protective Association*—where it cast significant doubt on the viability of the substantial-burden doctrine.

In *Bowen*, the Court addressed a claim that the Free Exercise Clause prohibited state welfare agencies from requiring recipients of certain welfare benefits first provide the social security numbers for those submitting to participate in the welfare programs.[82] According to the parents of one such welfare-program participant, procuring a social security number for their child would "'rob the spirit' of their daughter and prevent her from attaining greater spiritual power."[83] The Court rejected the claim, arguing that the plaintiffs had failed to demonstrate a substantial burden on their religious exercise; without making such a showing, their claim under what was then a pre-*Smith* interpretation of the Free Exercise Clause would fail. The majority opinion first supported this conclusion by arguing that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[84]

But in Part III of its opinion, which was authored by Chief Justice Burger and joined by only Justices Rehnquist and Powell, the Court expressed even deeper skepticism of expanding the category of substantial burdens: "[T]he Court has steadfastly maintained that claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional."[85] It then explained why it believed expanding the category of what qualified as a substantial burden would be untenable:

> Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires cer-

81. *Id.*
82. Bowen v. Roy, 476 U.S. 693, 695 (1986).
83. *Id.* at 696.
84. *Id.* at 699.
85. *Id.* at 702.

> tain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference.[86]

Concern about the range of government-provided benefits thereby generated a strong skepticism of the substantial-burden doctrine and the need to subject laws that substantially burdened religion to the rigors of strict scrutiny. Accordingly, foreshadowing the decision in *Smith*, the opinion argued that "[i]n the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs," the Government's regulations should not be subjected to strict scrutiny.[87]

Similar skepticism of substantial burdens emerged from the majority opinion in *Lyng*, where the Court addressed claims that government construction through a national forest would substantially burden the religion of three Native American tribes who had been using the forest for religious purposes.[88] The Court rejected these claims, relying heavily on its decision in *Bowen*. Thus, comparing the claim in *Bowen* to the claim in *Lyng*, the Court concluded:

> In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs . . . .[89]

As a result, only government regulations that coerced individuals to act in a manner contrary to their faiths would constitute the type of substantial burden that would thereby trigger strict-scrutiny analysis. Imposing a coercion test on the category of substantial burdens represented somewhat of a turn in free-exercise doctrine and therefore, not surprisingly, raised the ire of the dissent.[90]

86. *Id.* at 707.

87. *Id.*

88. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988).

89. *Id*. at 449.

90. *Id.* at 468 (Brennan, J., dissenting) ("Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance."). As if to recognize the need to provide some alternative limitation on the substantial burden category, Justice Brennan proposed an inquiry into whether the burden imposed a burden on a central tenet of the faith. *Id.* at 474 ("I believe it appropriate, therefore, to require some showing of 'centrality' before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forego that use altogether."). The majority rejected an inquiry into centrality as wholly untenable. *Id.* at 457 ("Unless a 'showing of centrality,' . . . is nothing but an assertion of centrality . . . the dissent thus offers us the prospect of this Court holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit.") (citations omitted).

This growing substantial-burden skepticism culminated with the Court's decision in *Employment Division v. Smith*, where the Court eliminated the need to interrogate what burdens qualified as legally relevant. But with the enactment of RFRA in 1993, courts once again were required to determine when a government regulation "substantially burden[ed] a person's exercise of religion."[91]

Notwithstanding RFRA's legislative resuscitation of the substantial-burden standard, many federal courts expressed a new version of substantial-burden skepticism by advancing a narrow interpretation of RFRA's provisions that limited the category of what qualified as a substantial burden. Thus, some federal courts held that a burden would be deemed substantial only if the burden implicated central tenets of the claimant's faith.[92] Other courts—channeling *Bowen* and *Lyng*—interpreted substantial burdens as those that compelled conduct that violated a claimant's faith.[93] And yet others combined the centrality and the compulsion standards, using both to limit the category of substantial burdens.[94] To be sure, some federal courts did eschew this prevailing substantial-burden skepticism—holding that burdens could be substantial so long as the conduct in question was religiously motivated[95]—but this expansive approach to the substantial-burden inquiry was very much in the minority.[96]

Like the initial response of RFRA to *Smith*, Congress responded to the wave of judicial limitations on the substantial burden standard by revising RFRA to reflect far more expansive legislative ambitions.[97] Accordingly, RFRA now incorporates a definition of "exercise of religion"[98] to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[99] Accordingly, RFRA currently prohibits any substantial burden on religious exercise irrespective of whether religiously motivated conduct is religiously compelled or whether the religiously motivated conduct is not central or essential to the person's faith commitments.

While these recurring skirmishes between substantial-burden skeptics and enthusiasts have persisted for some time, they now appear to have reached an apex. As noted above, in the most recent round of litiga-

91. 42 U.S.C. § 2000bb–1(b) (2012).

92. *See, e.g.*, Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996); Abdur-Rahman v. Mich. Dep't of Corr., 65 F.3d 489 (6th Cir. 1995); Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995).

93. *See, e.g.*, Goodall v. Stafford Cnty. Sch. Bd., 60 F.3d 168 (4th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

94. *See, e.g.*, Small v. Lehman, 98 F.3d 762, 767–68 (3d Cir. 1996); Hicks v. Garner, 69 F.3d 22 (5th Cir. 1995); Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995).

95. *See, e.g.*, Jolly v. Coughlin, 76 F.3d 468, 476–77 (2d Cir. 1996).

96. Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1473 (1997) ("Despite this effort to restore religious freedom, the Act has not fully achieved its remedial goals due to narrow judicial interpretations of the substantial burden requirement.").

97. *See* H.R. REP. NO. 106-219, at 13 (1999).

98. 42 U.S.C. § 2000bb-2(4) (2012).

99. *Id.* § 2000bb–1(b); *id.* § 2000cc-5(7)(A).

tion over the contraception mandate, various nonprofits have asserted that filling out self-certification Form 700—the very form that provides religious institutions with an accommodation—itself constitutes a substantial burden.[100] As noted above, the Supreme Court has avoided answering this question on the merits.[101] But can it really be that filling out a form constitutes a *substantial* burden?[102] And if so, does the substantial-burden hurdle have any meaning? Surely the law should differentiate this sort of burden and deem it insubstantial for the purposes of RFRA—or so the argument goes.

In the context of the contraception mandate litigation, substantial-burden skeptics have advanced this claim in a couple of ways. Some have argued that courts cannot simply defer to the assertion of claimants that they have experienced a substantial burden.[103] And it is precisely such deference, they argue, that is being granted to RFRA claimants when courts refuse to evaluate how much of a religious burden is being imposed by the law. Others have focused on the text of RFRA, emphasizing that courts are required by the statute to evaluate substantiality and thereby differentiate between different degrees of substantiality when applying RFRA.[104] Thus, judicial failure to interrogate the religious im-

100. *See, e.g.*, Univ. of Notre Dame v. Burwell, 786 F.3d 606 (7th Cir. 2015); Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs., 778 F.3d 422 (3d Cir. 2015); Priests for Life v. U.S. Dep't of Health & Human Serv's, 772 F.3d 229 (D.C. Cir. 2014); Mich. Catholic Conference Servs. v. Burwell, 755 F.3d 372 (6th Cir. 2014). For additional lawsuits filed, see *HHS Mandate Information Central, supra* note 49.

101. Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) ("The Court expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.").

102. For an example of this skepticism, see Caroline Mala Corbin, *Paperwork as a Substantial Burden*, JURIST (May 22, 2015, 1:05 PM), http://jurist.org/forum/2015/05/Caroline-Corbin-Religious-Burden.php.

103. *See, e.g.*, Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 180 (2015) ("But, alas, in Part IV.C, the majority opinion simply defers to Hobby Lobby's views, and thus fails to examine whether the law places a substantial burden on Hobby Lobby's religious exercise."); Samuel J. Levine, *A Critique of* Hobby Lobby *and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 31 (2015) ("[A]s a practical matter, requiring that judges defer to a religious claimant's characterizations of the nature of a religious claim may have the effect of broadening the range of religious rights in a way that proves unworkable for the government, courts, and society as a whole.").

104. *See, e.g.*, Caroline Mala Corbin, *Closing Statement: Sincere Is Not Substantial and a Corporation Is Not an Orchestra*, 161 U. PA. L. REV. ONLINE 278, 279 (2013) [hereinafter *Closing Statement*] ("As RFRA makes explicit, the law's strict scrutiny provision is triggered only by *substantial* burdens on religion, not *all* burdens on religion. To simply assume a substantial burden whenever someone claims one exists essentially reads out that requirement. Without some objective evaluation of burden, all burdens would become eligible for accommodation."); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J., dissenting) ("Congress no doubt meant the modifier 'substantially' to carry weight . . . . The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial."); Catholic Health Care Sys. v. Burwell, 796 F.3d 207, 217–18 (2d Cir. 2015) (determining that "accept[ance of] the plaintiff's assessment of the magnitude of any burden on their religious exercise" would "'read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement'") (internal citation omitted); Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1176 (10th Cir. 2015) ("If plaintiffs could assert and establish that a burden is 'substantial' without any possibility of judicial scrutiny, the word 'substantial' would become wholly devoid of independent meaning."); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 248–49 (D.C. Cir. 2014)

plications of a law—and the extent of the burden it imposes—is to fail in the application of RFRA by its terms.

What all these arguments boil down to is the following: we cannot simply treat all religious burdens equally. The purpose of RFRA was to protect against *substantial* burdens; insubstantial burdens are not sufficiently worrisome to justify a mandatory religious exemption. Thus, courts must differentiate between substantial and insubstantial burdens if RFRA is to serve its filtering function of only protecting against the more egregious impositions on religious exercise. Accordingly, courts must only allow a RFRA claim to go forward after it has determined that the religious consequences of a law are, in fact, substantial. In turn, restricting RFRA protections to substantial burdens means that courts must draw lines between impositions that have greater theological significance and impositions that have less theological significance.

Notwithstanding the superficial allure of such arguments, however, this sort of a line drawing within the category of substantial burdens would be a grave error. Interrogating the religious substantiality of conduct on a theological metric runs afoul of core Establishment Clause prohibitions.[105] As the Supreme Court noted in *Thomas v. Review Board*, "it is not for us to say that the line [the petitioner] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[106]

And this constitutional objection has been, at least in the past, something that both advocates and critics of religious accommodations agreed upon. In fact, when the Supreme Court in *Smith* rejected an interpretation of the First Amendment that provided mandatory exemp-

(reasoning that the court "must give effect to each term in the governing statute" and to accept plaintiffs' "view of the existence and substantiality of any burden on their own religious exercise" would "prevent the court from evaluating the substantiality of the asserted burden.").

105. I have elsewhere argued that the Establishment Clause does not prohibit courts from adjudicating disputes simply because they implicate religious questions. *See* Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013). In so doing, I argued that courts are, in principle, both sufficiently competent and constitutionally authorized to resolve such cases. *Id.* at 542–61. However, while courts remain competent and authorized to resolve religious questions, assessing the theological substantiality of burdens on religious exercise seems to implicate far more central Establishment Clause worries. To enforce RFRA by assessing theological substantiality would amount to the application of government-imposed legal burdens on the basis of which religious practices the government viewed as sufficiently religiously significant. As opposed to resolving a religious dispute between two private parties on the basis of a religious question, giving RFRA's *substantial*-burden standard a theological gloss would amount to the divvying out of legal benefits and burdens on the basis of the government's perception of religious significance. Indeed, it is precisely the core inequalities at the center of such an endeavor—and the potential for significant discrimination against the RFRA claims of religious minorities—which renders such a proposition far more problematic on Establishment Clause grounds than merely resolving disputes between competing claims over religious doctrine. To be sure, like many other Establishment Clause considerations, these distinctions are matters of degree, but the degree of Establishment Clause concern remains important when it comes to the enterprise of RFRA exemptions. *Cf. id.* at 559 ("[I]f we are taking institutions seriously, it seems fair to draw a line between cases actually implicating religious institutional autonomy and worries that judicial intervention might trickle down to impact religious institutional development of religious doctrine.").

106. 450 U.S. 707, 715 (1981).

tions from facially neutral and generally applicable laws, it was precisely because line drawing between degrees of theological impact was not a constitutionally permissible inquiry for courts: "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"[107] Courts lack the tools to engage in line drawing when it comes to determining and calibrating the degree of theological impact a particular law imposes on religion. And it was this skepticism of theological line drawing that also motivated Congress to clarify the substantial burden inquiry: "the burdened religious activity need not be compulsory or central to a religious belief system as a condition for the claim."[108]

Importantly, to interpret RFRA to require such an inquiry into the theological substantiality of legal burdens would likely lead to gross inequalities in application. Courts are predisposed to favoring religious majorities, whose religious practices are more well-known and respected, as opposed to religious minorities, whose religious practices are more obscure.[109] Under a regime where courts evaluate the theological substantiality of religious burdens, the impact of laws on religious minorities are likely to be underestimated and underappreciated, unfairly circumscribing the protections afforded by RFRA.[110] As I have noted elsewhere, such a result would be the height of irony as it would invert RFRA's core commitment to protecting religious minorities.[111] As the Supreme Court has emphasized, it is for this reason that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."[112] To do so would amount to government allocating legal burdens on the basis of which religious claims it found more appealing, more important—and potentially more in keeping with its own notions of morality and ethics.[113]

107. Emp't Div. v. Smith, 494 U.S. 872, 887 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

108. H.R. REP. NO. 106-219, at 13 (1999).

109. As an example, consider the far lower success rates of religious-liberty claims advanced by Muslims in the United States. Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 235–36, 260 (2012).

110. *Id.*

111. *See, e.g.*, Michael A. Helfand, *The Future of Religious Liberty in the Wake of Hobby Lobby*, *in* DIVORCING MARRIAGE FROM THE STATE (Robin Fretwell Wilson ed.) (forthcoming).

112. *Smith*, 494 U.S. at 887.

113. Indeed, a number of authors have argued that either moral norms or secular legal norms—instead of the claimant's internal theology—should provide the relevant guide to courts when determining the substantiality of a burden. *See, e.g.*, Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby's *Wake*, 82 U. CHI. L. REV. 1897, 1933 (2015) ("Our enlightenment ethos has anointed certain methodologies as truth-conferring: observation, the scientific method, certain theoretical constructs, and so on have all been identified as reliable methods for capturing what the world is like. The state need not have a role in discovering and promoting moral truth, and by the lights of some versions of liberalism it should not have such a role. But it does need to have a role in policing empirical truth, at least in the areas where it is permitted to regulate."); Frederick Mark Gedicks, "*Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, GEO. WASH. L. REV. (forthcoming 2016) (manuscript at 44), *available*

To meet these constitutional challenges, some substantial-burden skeptics have tried to reformulate RFRA's substantial burden inquiry. In a recent paper, Frederick Gedicks hopes to meet the constitutional obstacles implicit in the substantial burden inquiry, recognizing that "rationality or plausibility to secular or other outsiders is irrelevant."[114] Accordingly, explains Gedicks, "what matters is not whether *the court* finds a claimant's understanding of theological consequences credible, but whether *the claimant* does."[115] Gedicks, however, believes that courts can still evaluate the theological substantiality of a claim when it comes to cases of complicity—such as the claims implicated in the contraception mandate cases—by "enlist[ing] common law tort principles as secular sources for measuring the substantiality of burdens on religion in the religious nonprofit cases."[116] In turn, when it comes to complicity cases, courts could reject many of the RFRA claims advanced by nonprofit companies refusing to comply with the government's self-certification process via Form 700.[117] Courts could apply the tort requirement of factual causation—for example, the factual causation requirement employed in product liability cases—to determine whether the asserted connection between the self-certification process and the actual use of contraception gave rise to a substantial burden. In so doing, courts could evaluate whether the theological claim of causation could satisfy the law's general requirements for factual causation, thereby—according to Gedicks—differentiating between degrees of substantiality without engaging in a constitutionally prohibited theological inquiry.[118]

The problem with Gedicks' proposed solution is that imposing a secular framework of causation misses the entire object of RFRA. As Gedicks notes, the question is not whether the religious claim satisfies legal requirements of causation. Religionists perceive a set of obligations that frequently do not track the notions of liability articulated by prevailing legal standards. Accordingly, the fact that a claim for religious accommodation entails a theory of causation that would fail under standard tort principles ought to be irrelevant for the purposes of RFRA. Again, as Gedicks notes, "what matters is not whether *the court* finds a claimant's understanding of theological consequences credible, but whether *the claimant* does."[119] Thus, a court cannot reject the religionist's experience of a substantial burden simply because that experience would be insubstantial if evaluated against prevailing legal standards. To do so, notwithstanding the attempt to employ secular legal standards, would be to take the court's understanding of religious obligations as relevant over

at http://ssrn.com/abstract=2657733 (proposing that courts "enlist common law tort principles as secular sources for measuring the substantiality of burdens on religion in the religious nonprofit cases").

114. Gedicks, *supra* note 113, at 43.

115. *Id.*

116. *Id.* at 28.

117. *Id.* at 28–34.

118. *Id.*

119. *Id.* at 27–28.

and above the claimant's understanding. And it is precisely that type of analysis that violates the strictures of the Establishment Clause.

To be sure, rejecting such attempts to massage tensions between the Establishment Clause and RFRA's substantial-burden inquiry leaves us with a problem. RFRA does require courts to evaluate the substantiality of a burden. And if the Establishment Clause prohibits evaluating the theological substantiality of such burdens—and, in turn, divvying up RFRA protections on the basis of that theological substantiality—then what should we make of RFRA's substantial-burden requirement? If only *substantial* burdens trigger RFRA's religious liberty protections, how should we apply that standard? Is RFRA simply a statute that fails on its own terms?

The answer is no, RFRA does not need to fail on its own terms. And to see how, requires considering a more complete picture of substantial burden analysis.

IV. STRUCTURE OF BURDEN ANALYSIS

Substantial-burden skeptics worry that the constitutional prohibition against distinguishing between the substantiality of theological burdens renders RFRA unworkable. The protections of RFRA are, according to the statute, only available where the law imposes a *substantial* burden. But if courts cannot evaluate the theological impact of a law on religious exercise, how can courts determine whether a burden is truly substantial?

This argument moves too quickly. To see how, consider the full structure of a substantial-burden claim, starting with the text of RFRA: "Government shall not substantially burden a person's exercise of religion . . . ."[120] Claims of substantial burden must, of course, be sincere; without sincerity, no claim under RFRA can go forward.[121] The text of RFRA provides little in terms of guidance regarding the definition of "substantial."[122] In fact, the term "substantial" is, as a pure textual matter, open to at least two types of questions.

The first is a simple question of *degree*: how "substantial" must a burden be in order to qualify under RFRA? To answer this question, a court must engage in standard judicial line-drawing, which—while difficult—does not pose any fundamental challenges to the structure of a substantial-burden inquiry. Put differently, employing some metric, courts will determine when the burden has crossed the line from being insubstantial to substantial.

The second question is a far more fundamental question regarding the structure of substantial-burden claims: what *type* of burden qualifies

120. 42 U.S.C. § 2000bb-1(a) (2012).

121. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 n.28 (2014) ("To qualify for RFRA's protection, an asserted belief must be 'sincere[.]'").

122. *See, e.g.*, Dorf, *supra* note 3, at 1213–14 (noting that *Sherbert* "provides little guidance for the substantiality inquiry," while *Yoder* is "equally unilluminating").

as a substantial burden? Or put differently, what is the metric courts use when evaluating whether a burden is substantial? In theory, one way to do so is by determining whether a law substantially burdens a person's religious exercise; along these lines, a court might investigate the importance or centrality of a particular religious practice within the grand scheme of their religious theology or doctrine. As argued above, doing so in the context of RFRA would run afoul of fundamental Establishment Clause principles, drawing courts into impermissible questions of theology.[123]

On the other hand, to determine whether a law substantially burdens a person's religious exercise, a court might consider whether, by engaging in religious exercise, persons will be subject to some sort of civil penalty. In some cases, that penalty would be framed simply as an additional cost or tax for engaging in governmentally regulated conduct. In other cases, the civil penalty would be framed as a sanction for noncompliance with a governmental rule. However, regardless of how the civil penalty is framed, if there are civil penalties for engaging in the prohibited religious exercise, a court could evaluate how substantial those penalties are. As a result, having a stiff penalty for engaging in religious exercise—whether framed as a tax or as a sanction—might constitute a substantial burden if that penalty is judicially determined to be sufficiently significant and that penalty is triggered by engaging in religious exercise.

To appreciate the distinction between these two approaches, consider the following two examples. Imagine if Congress enacted a law similar to the proposed, and failed, 2011 San Francisco circumcision ban, which prohibited the "circumcis[ion] . . . of the foreskin, testicles, or penis of another person who has not attained the age of 18 years."[124] As the penalty for engaging in the religious ritual of circumcision, the ban proposed a penalty of "a fine not to exceed $1,000" and/or "imprisonment in the County Jail for a period not to exceed one year."[125] Now if Congress were to enact such a law, its survival would quite possibly hinge on whether the law violated the provisions of RFRA.[126] And employing RFRA as a defense, a claimant would first need to establish that the law *substantially* burdened his religious exercise.

One way of expressing the substantiality of the burden would involve evaluating the importance of circumcision in both Jewish and Islamic theology—and how failure to circumcise a male child might thereby *substantially* burden the parent's exercise of religion. Another way of

123. *See supra* Part II.

124. *See* Matthew Hess, *San Francisco MGM Bill*, MGMBILL.ORG, http://www.mgmbill.org/san-francisco-mgm-bill.html (last visited July 31, 2016).

125. *Id.*

126. *But see* Order Granting Writ of Mandate at 3, Jewish Cmty. Relations Council of S.F. v. Arntz, Case No. CPF-11-511-370 (S.F. Cnty. Super. Ct., Apr. 6, 2012) (holding, in the alternative, that the proposed San Francisco Circumcision Ban violated even the post-*Smith* interpretation of the Free Exercise Clause).

establishing the substantiality of the burden would require evaluating whether a fine of $1,000 and/or being imprisoned for a up to a year was a sufficiently grave sanction and therefore a *substantial* burden on a person's religious exercise.[127]

Or, consider the following example. Imagine a state-imposed tax for driving on public roads on Sunday, enacted for the secular purpose of lessening traffic on the most popular non-work day.[128] Of course, such a tax would raise the cost of attending Sunday church services and Sunday worshippers might contend that the tax thereby imposed a substantial burden on their religious exercise.[129] In this case, like in the case of a circumcision ban, there would be two ways of evaluating such a substantial burden claim. Courts could evaluate whether, within the relevant religious traditions, attending Sunday religious services was sufficiently important such that government's burdening of attendance could constitute a substantial burden on religious exercise. Alternatively, courts might evaluate the burden by determining whether the amount of the tax was enough to be deemed substantial. If the tax was simply a few dollars, a court might not think the tax to be substantial; but if the tax climbed higher, the court would have to draw a line at the point where it thought the amount of the tax was indeed a substantial burden on religious exercise.

In each of these cases—a sanction for circumcision of a male minor or a tax on Sunday driving—the court has two different metrics for determining whether a burden is substantial. The first focuses on the substantiality of the theological obligation; the second focuses on the civil consequences triggered by the relevant religious exercise.

Importantly, not only does each inquiry focus on a different metric of substantiality, but they also would appear to have different underlying objectives. The purpose of focusing on the theological or religious substantiality of a burden is to ensure that not all religious burdens allow individuals to avoid the demands of otherwise valid laws. On this interpretation, the purpose of RFRA is to ensure that certain forms of religious exercise—those that are particularly important to an individual's theology or religious worldview—are shielded from legal burdens. By contrast, RFRA should not provide protection against laws that restrict less important forms of religious exercise, those that are not particularly important as a matter of religious practice or theological commitment. In turn, we might conclude that a law prohibiting the circumcision of male minors or taxing travel on public roads on Sunday present a substantial

127. One could also interpret RFRA to require a court to engage in both forms of analysis as well. *See* Ira Lupu & Robert Tuttle, *Symposium: Religious Questions and Saving Constructions*, SCOTUSBLOG (Feb. 18, 2014, 11:12 AM), http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions/ ("What is rarely noticed, however, is that the collision of interests must meet two measures of substantiality, not just one.").

128. *Cf.* Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

129. *Id.*

burden, but only because of the importance of the ritual to the relevant religious groups. Laws prohibiting or taxing other forms of religious exercise might not be deemed by a court to be sufficiently significant to qualify as a substantial burden.

Focusing on the substantiality of the civil penalty for engaging in religious exercise achieves a very different purpose. To focus exclusively on the substantiality of a civil penalty would provide protection to all forms of religious practice, regardless of their internal religious significance, but would only do so where the costs imposed by the law for engaging in those practices was too high. On this interpretation, RFRA would first require a claimant to demonstrate that a sincerely held religious belief required him to engage in a practice that was being burdened by the law. Having made that threshold showing, RFRA would still tolerate the imposition of civil costs, penalties or sanctions on religious practice so long as those costs were not substantial—as if to express that religious individuals can be expected to absorb some minimal costs for their religious observances, just not costs that will price them out of the practice.[130] Therefore, using our circumcision-ban example, a court might conclude that a $1,000 penalty and/or imprisonment for a year would qualify as a substantial penalty for non-compliance. If the law, however, simply required the payment of a $1 penalty—or alternatively a similarly low tax for driving on public roads on Sundays—a court might conclude that the law did not substantially burden religious practice.[131]

Because there are two different methods and metrics for evaluating substantiality, concluding that courts cannot evaluate the theological or religious substantiality of a burden does not mean—at least in the typical run of cases[132]—that there is no alternative metric available for courts to evaluate the substantiality of a burden. Courts can evaluate substantiality by examining whether a person's religious exercise will trigger significant civil taxes or sanctions, thereby imposing a substantial burden on that religious exercise.

Consider, as an example, the current litigation over Form 700 and the Affordable Care Act's process of self-certification. Motivated by the

130. Chad Flanders has presented an alternative justification for what he describes as the "bare burden" requirement—that is, a requirement that the government must be bringing some sort of secular pressure to bear on religious exercise to trigger RFRA. *See generally* Chad Flanders, *Insubstantial Burdens* (June 2015) (unpublished draft), *available at* http://ssrn.com/abstract=2727423. According to Flanders, the reason why a secular burden is necessary for a RFRA claim is because "the plaintiff has to show that something the government is doing is putting pressure on her to change or modify her religious beliefs." *Id.* at 16. Thus, the burden matters for RFRA because government should not be using civil sanctions to modify or manipulate religious behavior. Articulating the burden principle in this way has important consequences for some of the more unconventional claims of substantial burden. *See infra* notes 135 & 170 and accompanying text.

131. Abner Greene has asserted to the contrary. *See* Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 181 (2015) ("[I]t cannot be the case that the amount of the penalty or tax determines what constitutes a substantial burden on religious exercise. Otherwise, we might say that a statute imposing a nominal penalty or tax (say, a dollar) doesn't constitute a substantial burden on religious exercise, even though the operative legal burden does so."). Greene, however, does not appear to explain further why this cannot be so.

132. For some cases that deviate from the typical pattern, see *infra* Part V.B.

Establishment Clause argument outlined above, a court might avoid evaluating how theologically substantial the burden of filling out Form 700 might be for the plaintiffs.[133] In so doing, a court would thereby conclude that distinguishing between different degrees of theological substantiality would constitute the type of impermissible religious inquiry prohibited by the First Amendment.

But reaching that conclusion would not be the end of the substantial-burden inquiry. A court would then have to determine whether the plaintiff's religious exercise would be subject to substantial civil penalties. If it turned out that the plaintiffs could refuse self-certifying—and, at the same time, refuse to provide insurance that included coverage for mandated forms of contraception—without significant civil penalties, then there would be no substantial burden on their religious exercise. They could simply flout the legal requirements and pay some sort of nominal fee that a court could, in its judgment, conclude was not substantial.[134]

Accordingly, arguments that see prohibiting judicial inquiry into the theological substantiality of burdens as tantamount to either simply deferring to the assertions of the plaintiffs or as ignoring RFRA's requirement to assess the substantiality of the asserted burden miss the mark. To assess substantiality, courts should determine whether engaging in religious exercise will, in fact, lead to the imposition of civil penalties that are substantial. And by engaging in that inquiry, courts can avoid simply deferring to the assertions of plaintiffs as well as abdicating their statutory obligations under RFRA.[135]

To be sure, the Supreme Court has been far from consistent in identifying the appropriate metric—whether theological or civil—for its substantial-burden inquiry. Even in the two cases singled out in RFRA—*Sherbert v. Verner*[136] and *Wisconsin v. Yoder*[137]—as representing the "compelling interest test" embodied by the statute,[138] the Court appeared

133. *See supra* notes 100–06 and accompanying text.

134. To be sure, the imposition of a nominal civil sanction could potentially trigger other Establishment Clause considerations, especially with respect to denominational preference. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982).

135. Flanders has argued to the contrary, worrying that line drawing when it comes to civil costs also entails "a judgment about that person's religion, or at least her relationship to it: what kinds of pressures might make her go against what her religion says, and how serious those pressures have to be before she bends or breaks." Flanders, *supra* note 130, at 14. While it does seem true that the same civil burden might have more or less influence on a person's religious exercise depending on the theological importance of that exercise, courts can still employ secular metrics for substantiality that do not take theological importance into account. Flanders appears to recognize this, presenting a more modest claim: "Even if we can analytically separate religious and secular burdens . . . maybe our respect for religious freedom should extend to deferring to when a plaintiff says that there is substantial secular cost at play as well." *Id.* While understandable, the problem with Flanders' conclusion is that it would leave courts without any real mechanism to assess the substantiality of burdens on religious exercise, rendering a provision of RFRA void.

136. 374 U.S. 398 (1963).

137. 406 U.S. 205 (1972).

138. 42 U.S.C. § 2000bb(b)(1) (2012).

to move in opposite directions when it came to assessing substantial burdens.[139]

In *Sherbert*, the Court evaluated the substantial burden imposed on the plaintiff not by considering the theological import of observing the Sabbath, but by examining the unemployment benefits she lost:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[140]

By contrast, the Court's decision in *Yoder* seemed to explore the question of substantial burden by focusing on the theological implications of the compulsory education law on the Amish community:

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.[141]

The Court did not, however, evaluate whether the $5 fine for failing to abide by the state's compulsory education law constituted a substantial burden.[142]

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139. *See, e.g.*, Dorf, *supra* note 3, 1213–14 (noting that *Sherbert* "provides little guidance for the substantiality inquiry," while *Yoder* is "equally unilluminating").

140. *Sherbert*, 374 U.S. at 404. In other cases, the Court also focused much of its substantial burden inquiry on the civil costs triggered by the religious exercise in question. *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990) ("The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant's wares (caused by the marginally higher price) and from the costs associated with administering the tax. As the Court made clear in *Hernandez*, however, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant."); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("Any burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions.").

141. *Yoder*, 406 U.S. at 218; *see also* Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. GENDER 35, 81–82 (2015) ("Justice Ginsburg did not argue that *Wisconsin v. Yoder*, the lynchpin exemption case and explicit model for RFRA's operative standards, teaches somewhat to the contrary with respect to the judicial role in evaluating the substantiality of religious burdens. The *Yoder* opinion is thick with references to both the impact of compulsory education on the religious development of adolescents and the attendant consequences for survival of the Amish community.").

142. *See* Lupu & Tuttle, *supra* note 127 ("The *Yoder* Court barely mentioned the five-dollar fine that the state had imposed on the parents of children who did not attend school."). To be sure, violating the *Yoder* statute did also authorize the imposition of sanctions beyond the $5, including imprisonment for up to three months. *See Yoder*, 406 U.S. at 207 n.2 ("Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than [three] months or both."). The availability of such additional sanctions, which included the possibility of labeling the offender a convicted criminal, potentially raise additional considerations for a substantial-burden inquiry.

The Court's inconsistent treatment of the "which metric" question is not the only challenge for focusing judicial inquiry on the civil costs of religious exercise. Evaluating the substantiality of civil costs, even as it avoids theological questions, can be quite dicey. First, it requires some judicial line drawing, which—while a typical task for courts—can present borderline cases where the outcome can feel arbitrary. Second, evaluating the substantiality of civil costs also raises more fundamental questions. Consider the recent case *Singh v. McHugh*, where the plaintiff—who had sought to enroll in the ROTC—asserted a RFRA claim against the army, which had failed to provide him with a religious accommodation from the army's grooming code; Singh, a practicing Sikh, could not cut his beard or hair without violating his religious commitments.[143]

> In contesting the claim, the army made the following argument:
>
> The Army did not conscript him into service; or is it in any way coercing him into joining. Instead, Plaintiff is affirmatively trying to place himself in a position, as a cadet or, eventually a military officer, where he may not be able to engage in the full range of religious practices that he would be able to perform if he remained a civilian. The Court should hold that the Army does not "substantially burden" an applicant's religious expression for purposes of RFRA merely because it cannot guarantee, at the outset, that Plaintiff will be able to engage in all of his desired religious practices.[144]

The district court rejected this argument, contending that anytime a federal law requires a person "to choose between following the tenets of [his] religion and receiving a governmental benefit," it imposes a substantial burden and thereby triggers RFRA's protections.[145]

But that argument seems to move too fast. Imposing a choice between a governmental benefit and religious exercise might constitute a burden, but a court would still need to evaluate whether the civil cost of the burden is *substantial*. Therefore, application of RFRA in *Singh* should have turned on whether the inability to enroll in ROTC constitutes a substantial burden.

Answering this question is a bit tricky. The ACLU, which represented Singh, advanced what appears to be a broad definition of the substantial-burden category. First, it cited to precedent from cases addressing grooming in the context of schools and prisons.[146] Such cases, however, provide limited guidance given that the plaintiffs in the school and prison contexts did not have the option to avoid enrolling in the first place. The ACLU also cited to precedent that conditioning receipt of "important" government benefits on conduct prohibited by a person's

143. Singh v. McHugh, 109 F. Supp. 3d 72, 74–75 (D.D.C. 2015).

144. Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction at 17, Singh v. McHugh, 109 F. Supp. 3d 72 (D.D.C. 2015) (No. 14-1906).

145. *Singh*, 109 F. Supp. 3d at 87–88 (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008)).

146. *Id.* at 90–93.

faith constitutes a substantial burden.[147] But this just begs the question of what qualifies as a sufficiently important government benefit such that conditioning it on conduct prohibited by one's faith constitutes a *substantial* burden.

It is hard to know whether admittance into the ROTC constitutes an *important* government benefit. The plaintiff, who aspires to join the ROTC, clearly feels that it is important. Surely someone who has chosen to commit himself to the ROTC would see denial of that opportunity as a substantial burden. From an objective standpoint, however, it is possible that most people would not see denial into the ROTC as particularly important. Most people have no interest in enrolling in the ROTC.

In this way, the lesson of *Singh*, and cases like it, is that courts—when assessing the substantiality of civil costs—must not only do some line drawing, but must also have to provide a methodological framework for assessing civil substantiality. They can take the perspective of the particular plaintiff; they can also take a "reasonable person" perspective as well—and the choice may generate different outcomes. Accordingly, focusing the substantiality inquiry on the civil costs for religious exercise provides answers to some questions, but it also raises a host of others.

These inconsistencies and challenges highlight that identifying and applying the appropriate metric for the substantial burden inquiry has been, for quite some time, a matter of deep judicial confusion. If, however, we are to identify a methodology that both avoids simply deferring to the assertions of claimants, while still avoiding the Establishment Clause violations entailed in a theological assessment of burdens, then focusing on the substantiality of civil costs for religious exercise provides a workable solution. In the standard run of cases—from *Sherbert* and *Yoder* through *Hobby Lobby* and now *Zubik*—courts can apply RFRA's framework by evaluating the substantiality of the civil impact of laws as opposed to the theological substantiality of particular religious observances and doctrines. And in so doing, they can ensure that RFRA protects against the substantial burdening of religious exercise—unless, of course, doing so is the least restrictive means to achieving a compelling government interest.

V. HARD CASES

In the standard run of cases, courts can apply this version of the substantial-burden inquiry without much fanfare. Courts, to be sure, will have to draw lines between different degrees of substantiality. They may therefore have to ask challenging line-drawing questions, such as how many dollars must a penalty be before it would constitute a substantial burden. And it may also require adopting a methodological frame that identifies the appropriate vantage point for evaluating the substantiality

147. Plaintiff's Motion for Preliminary Injunction at 16, Singh v. McHugh, 109 F. Supp. 3d 72 (D.D.C. 2015) (No. 14-1906).

of civil burdens. But those sorts of line-drawing and methodological questions are well within the competency and authority of judges. Focusing the substantial-burden inquiry on the civil costs triggered by religious exercise ensures that courts neither get mired in Establishment Clause concerns, nor that their inquiry constitutes simply deferring to the claimant's assertion of substantiality and thereby abdicate the judicial responsibility under RFRA of identifying an actual substantial burden.

Not all cases, however, follow this standard blueprint. Below, I consider two hard questions for the substantial-burden doctrine, each of which helps illuminate the outer edges of the RFRA standard.

A. Substantial-Burden Claims Predicated on "False" Beliefs

One of the challenges of focusing solely on the civil consequences for engaging in religious exercise is that doing so would seemingly allow parties to allege burdens on the basis of obviously false factual claims. Thus, if courts avoid evaluating the internal theological logic of a substantial burden claim, parties seeking religious accommodations can claim that certain laws impose a substantial burden in ways that fly in the face of conventional scientific knowledge.

For example, in the contraception mandate context, Caroline Mala Corbin has argued that courts cannot ignore science,[148] emphasizing that "[p]eople are entitled to their own religious beliefs but not to their own facts. Blatant distortions of science ought to be rejected outright."[149] According to Corbin, it is scientifically implausible to conclude that the contraceptives at stake in the *Hobby Lobby* litigation cause an abortion; and if so,[150] to claim that providing contraceptive insurance substantially burdens religious exercise is predicated on the falsehood that those contraceptives in reality cause abortions.

Similarly, Amy Sepinwall has argued that courts cannot grant religious accommodation claims on the basis of scientifically false assertions.[151] To do so, argues Sepinwall, "would commit us to a life of irrationality."[152] Such a refusal is justified because:

> [S]tates, like individuals, must act, and they can do so rationally only if they have an accurate grasp of what the world is like. This is especially true of courts, which function as finders and triers of fact. There must be some agreed-upon set of standards and methods that allows courts to determine what facts are true. Our enlightenment

148. Corbin, *Closing Statement*, *supra* note 104, at 280.

149. Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1177 (2014) [hereinafter *Abortion Distortions*].

150. To be sure, Hobby Lobby, among others, argued based upon FDA labeling that the contraceptives in question could prevent uterine implantation of the embryo of a fertilized egg, which it believed to be the equivalent of an abortion. *See* Brief for Respondents at 5 n.2, Sebelius v. Hobby Lobby Stores, Inc. 723 F.3d 1114 (10th Cir. 2013) (No. 13-354) *available at* http://www.becketfund.org/wp-content/uploads/2014/02/13-354-bs.pdf.

151. *See* Amy J. Sepinwall, *Conscience and Complicity: Assessing Please for Religious Exemptions in* Hobby Lobby's *Wake*, 82 U. CHI. L. REV. 1897, 1932 (2015).

152. *Id.*

> ethos has anointed certain methodologies as truth conferring: observation, the scientific method, certain theoretical constructs, and so on have all been identified as reliable methods for capturing what the world is like. The state need not have a role in discovering and promoting moral truth, and by the lights of some versions of liberalism it should not have such a role. But it does need to have a role in policing empirical truth, at least in the areas in which it is permitted to regulate.[153]

In this way, according to both Corbin and Sepinwall, courts must reject claims that contend laws impose a substantial burden where the religious claimant is simply wrong about the impact the law will have on his or her religious exercise.

But should this always be so? The entire enterprise of religious accommodations is predicated on providing some degree of protection to religious exercise from the imposition of substantial burdens. The religious beliefs that motivate religious practices quite often do not meet scientific standards of truth. The practices are, in the end, motivated by faith in a variety of propositions. And the assumptions underlying these practices often entail faith commitments to facts about the universe that are motivated by religious belief. Thus, religious individuals might object to using certain forms of contraception based on a theological commitment as to when life begins.

This claim, and others like it, is something that is often viewed as within the province of science—and therefore, religious claims about such topics are often viewed as missing the mark completely. In turn, critics of religious accommodations may very well view substantial burden claims predicated on assertions deemed scientifically false as highly problematic; a court cannot find a burden—let alone a substantial one—where the underlying factual claim is scientifically false.

But such arguments, taken to their logical conclusion, raise serious problems. For example, claims for religious accommodation typically presuppose the existence of a deity. Were scientists, using standard forms of scientific evidence, to prove that there was no deity, would we simply discard the entire enterprise of religious accommodation?[154]

The point here is that embedded in the enterprise of accommodating some subset of sincerely held religious beliefs is a commitment to protecting some accommodation claims where the claimant believes a particular fact about the world *for religious reasons*. Whether it is a claim about the existence of god or when life begins, the fact that a predicate of the substantial burden claim is deemed by science to be false or deeply problematic should not—on its own—lead to the rejection of the claim. Religion, by its very nature, generates faith-based claims—as opposed to

153. *Id.* at 1932–33. *See also* Leslie C. Griffin, *A Tractor Is Not a Gun, Even If You Sincerely Believe It Is*, HAMILTON AND GRIFFIN ON RIGHTS (May 18, 2014), http://hamilton-griffin.com/a-tractor-is-not-a-gun-even-if-you-sincerely-believe-it-is/.

154. To be sure, many have argued to the contrary. *See, e.g.*, ALVIN PLANTINGA, WARRANTED CHRISTIAN BELIEF (2000).

evidence-based claims—about the world. Indeed, this fundamental feature of religion is what has led Brian Leiter to conclude that religious beliefs, "in virtue of being based on 'faith,' are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science."[155] The very nature of religion, according to Leiter, is that it requires embracing assertions that do not satisfy standard scientific methods of proof. And it is because of this quality that the Supreme Court has concluded that the truth or falsity of a theological claim cannot serve as the basis for allocating legal burdens—to do so would be to impose legal burdens on the basis of an inquiry that is "beyond the ken of mortals."[156] If we protect some subset of conduct that is motivated by sincerely held religious beliefs, then part of what we would protect are faith-based claims about the world that do not accord with science.

That being said, there are cases where the admixture of religious belief and empirical fact raise more complicated questions. Consider, for example, the following hypothetical—posed by Judge Judith Rogers during oral argument—which tweaks the facts of *Thomas v. Review Board*, where the Supreme Court addressed the claims of a Jehovah's Witness who objected to working for a company that produced sheet metal for weapons:

> Would it have been open to the Court to have found that in fact, as a matter of fact, the munitions factory for which it worked was not supplying arms for the war, that in fact it was supplying gadgets for tractors used on farms? Could the Court have examined whether his statement about what his employer was doing was correct?[157]

In such a case, granting the factual assertions of the claimant would seem absurd. Should we say that, in a case where the claimant erroneously contended—based upon, for example, his own skepticism of the government's assertion—that the metal was being used for munitions that he could maintain a bona fide claim of a substantial burden? What makes such a case different is that the claimant maintains a factual belief about the world that is not motivated by faith, but simply a personal skepticism stemming from secular considerations. Can these kinds of factual claims be granted the same deference, motivated by Establishment Clause worries, that religiously-motivated factual claims are granted?

As a first pass at such claims, the requirement of sincerity will typically afford a viable judicial response. What makes these kinds of claims absurd is not as much the claimant's factual error, but that it is highly implausible that the claimant—faced with the actual facts—can still maintain the sincerity of his claim that he is being substantially burdened. Indeed, as religious accommodation claims assume facts that are increas-

155. BRIAN LEITER, WHY TOLERATE RELIGION? 34 (2013). For a critique, see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013).

156. United States v. Ballard, 322 U.S. 78, 87 (1944) (describing these inquiries as "beyond the ken of mortals").

157. *See* Griffin, *supra* note 153.

ingly outlandish—veering further and further away from commonly-held scientific truths—courts might reasonably begin to wonder whether the claim is truly sincere. Thus, faced with empirical evidence demonstrating that the metal in question is not being used for munitions, it would be very hard to believe that the claimant was sincere in his assertion that working in the factory substantially burdened his religious exercise.

Thus, in most cases, when facing RFRA claims predicated on secularly-motivated factually false claims, courts can respond not with substantial-burden skepticism, but increased sincerity skepticism.[158] In turn, courts can evaluate the sincerity of religious beliefs in order to ensure that the constitutional and statutory protections afforded religion are not being abused by fraudulent claimants. And, as a result, the more considerations courts can incorporate into their sincerity analysis, the better courts can serve as gatekeepers, ensuring the overall integrity of a religious accommodations regime.

Still, deploying sincerity in this way—while resolving many cases—does not fully address the fundamental problem. There can, at least in theory, remain cases where a court is completely convinced that a claimant sincerely believes, based upon secular considerations, a scientifically false fact which serves as the basis for a RFRA claim. Thus, for example, a claimant might truly believe—for non-religious reasons—that his factory is using metal for munitions even as the evidence indicates to the contrary. In such circumstances, how should the court address claims that working in the factory substantially burdens religious exercise because the claimant religiously objects to participating in the war effort? On the one hand, a court might simply conclude that there cannot be a substantial burden in such a case because as a factual matter, the claimant is *not, in reality,* participating in the war effort. In such circumstances, a court might embrace a version of the view that "[p]eople are entitled to their own religious beliefs but not to their own facts."[159]

At the same time, taking such a view does discount the consequences of the interaction between a claimant's religious beliefs and factual commitments. Imagine again a court denying a RFRA claim predicated on the erroneous fact that a factory is producing munitions when it is really just producing farm equipment. The court, by telling the claimant he is simply wrong about the existence of a substantial burden does nothing to alleviate the religious predicament of the claimant. In the end, because of the claimant's unique—and erroneous—factual views about the world, he still believes that he is being placed on the horns of a dilemma: engage in religiously prohibited conduct or lose a significant government benefit. At bottom, even though the claimant's view is a function of a secularly-motivated factual belief, the result is a dilemma that leaves the claimant

158. *See also* Gedicks, *supra* note 113, at 43 n.153 ("Secular inconsistency might function as a proxy for insincerity. This only underlines, however, the dangers of the sincerity inquiry, . . . which too often functions as a proxy for the unreasonableness of minority and otherwise unfamiliar religious practices.") (citations omitted).

159. Corbin, *Abortion Distortions*, *supra* note 149, at 1177.

with the *experience of a substantial burden* even if it is based on a sincerely held secular mistake. RFRA, to be sure, only protects substantial burdens on religious exercise. It tells us precious little about whether it does so because it wants to alleviate only factually correct substantial burdens or because it is based upon a normative commitment that religious individuals should be protected from dilemmas that force them, at least as they see the world, from choosing between religious exercise and some government benefit or sanction. It at least seems plausible for a court to take the view that RFRA ought to be construed to grant some degree of protection against the *experience* of a substantial burden on religious exercise—and not only *evidence* of a substantial burden on religious exercise. And if a court were to take such a view, it would seem wholly justified in concluding that scientific error should not *per se* undermine claims of substantial burden; to do so, a court might conclude, would miss the way in which religious claimants often experience substantial burdens on their religious practice even as science would encourage them to view the world otherwise.

B. Substantial-Burden Claims Where No Civil Cost Is Present

As noted above, in the general run of cases, courts can interrogate the substantial burden of a law by considering not its theological substantiality, but the substantiality of the tax, penalty, or sanction triggered by the religious exercise. Accordingly, arguing that evaluations of theological substantiality are constitutionally off limits does not mean that courts must simply defer to the assertions of claimants or fail in their statutory obligation to assess substantiality under RFRA. Courts can assess whether the triggered civil sanction, tax, or penalty is substantial—whether, for example, the cost to the religious claimant is sufficiently significant to be deemed substantial.

But not all cases follow this format. Consider again the facts of *Lyng v. Northwest Indian Cemetery Protective Association*.[160] As described above, the Court in *Lyng* addressed claims that government construction through a national forest would substantially burden the religious exercise of three Native American tribes who had been using the forest for religious purposes.[161] On the account described thus far, the Court should avoid assessing the theological substantiality of the petitioners' claims. Accordingly, it should not evaluate the substantiality of the burden by examining the road's impact on the religious life of the three Native American tribes. Indeed, to do so, would violate core Establishment Clause concerns.

But then how should the Court assess substantiality in *Lyng*? In contrast to the general run of cases, the facts in *Lyng* do not raise a civil cost of any sort that the Court might examine to determine whether the

160. 485 U.S. 439 (1988).
161. *Id.*

building of the road constituted a substantial burden. This is because in *Lyng* the question was not about the constitutionality of a particular cost, tax or sanction; it was whether the government had the authority to follow through on its plan to build a road. Thus, it was not as if the religious exercise of the tribes would trigger some sort of penalty that could be evaluated for substantiality: either the government would build the road or it would not. And in this way, cases like *Lyng* raise a significant question. How can a court apply the substantial burden framework if there is no civil cost, tax, or sanction in question to evaluate?

One way to respond to these sort of cases is to simply discard the substantial-burden inquiry as an unworkable doctrinal framework. In fact, this appears to have been the tactic adopted by the Supreme Court in *Lyng*. In rejecting the claims of the tribes, the Court did not evaluate the substantiality of the burden, but concluded that the claims failed because the petitioners were not being "coerced by the Government's action into violating their religious beliefs."[162] In this way, the Court chose to focus on the presence of coercion, and not the substantiality of the burden. Not surprisingly, discarding the pre-*Smith* substantial burden framework opened the *Lyng* majority's opinion to criticism from both the dissent[163] as well as legal scholars.[164]

But what the critics failed to fully acknowledge is that the case did not lend itself to the standard application of the substantial-burden doctrine. The majority emphasized this point, quoting from *Bowen v. Roy*: "[t]he Free Exercise Clause . . . does not afford an individual a right to dictate the conduct of the Government's internal procedures."[165] This concern highlighted the core of the Court's problem. Because there was no civil penalty to evaluate for substantiality, the Court was—in essence—being asked to give the petitioners the authority to dictate the terms of government policy. In most cases, this was not the case; the government would have to bend its policy only where claimants complained of a *substantial* burden. But here there was no penalty in question—and so the claim in *Lyng* appeared to be one of the uncommon cases where claimants were directly telling the government what to do without any assessment of substantiality. The Court could not assess the theological substantiality because of the Establishment Clause and it could not eval-

162. *Id.* at 449.

163. *Id.* at 468 (Brennan, J. dissenting) ("Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance.").

164. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 964 (1989) (describing *Lyng*'s coercion-based approach to burdens as "both murky at its edges and dangerously narrow"); James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1415–16 (1992) ("[In *Lyng*,] Justice O'Connor concluded that the Indian's free exercise rights were not burdened. A burden on religion can only exist, she continued, if the government action has a 'tendency to coerce individuals into acting contrary to their religious beliefs . . . .' As Professor Ira C. Lupu describes, this coercion theory of burdens creates a threshold requirement that few free exercise claimants could overcome.").

165. *Lyng*, 485 U.S. at 448 (quoting Bowen v. Roy, 476 U.S. 693, 699–700 (1986)).

uate the substantiality of the civil penalty because there was nothing to evaluate.

Given the challenge *Lyng* posed to the substantial-burden framework, it isn't surprising that the Court's decision in *Smith* followed shortly thereafter. If courts cannot assess the substantiality of theological burdens, then the only way to assess substantiality is to evaluate the civil penalties of the given religious exercise. But *Lyng*—and other cases like it[166]—seemed to present scenarios where there was no civil penalty to evaluate. As a result, the Court in *Lyng* responded by ignoring the substantial-burden framework in light of the unique facts the case presented. And the Court in *Smith* later extended this lesson, discarding the framework in its entirety.

Should we embrace the lesson of *Lyng* and conclude that RFRA made a mistake in resuscitating the substantial-burden framework? While presenting somewhat of a puzzle, there are good reasons to think that doing so would be a mistake. To see why, consider the following.

Imagine, akin to the facts in *Holt v. Hobbs*,[167] a prison that prohibited all inmates from growing a beard of any length, notwithstanding any religious commitments to the contrary. And imagine that failure to comply with this rule subjected the inmate to three months in solitary confinement. If an inmate were to claim that the law imposed a substantial burden, a court might reason as follows: while we cannot assess the theological substantiality of the burden, surely imposing three months in solitary confinement on the inmate constitutes a substantial penalty triggered by the religious exercise.[168]

Now imagine a parallel case where a prison also prohibited inmates from growing a beard. However, instead of placing violators in solitary confinement, any inmate growing a beard would simply be rendered unconscious by the prison's staff and have his beard shaved off. Assuming the process of shaving did not inflict any pain or discomfort, this second case presents somewhat of a *Lyng*-like problem. The no-beard rule does not present any civil cost that can be evaluated for substantiality. If an inmate violates the rule, the prison would simply remove the beard. Thus, if a court cannot evaluate the theologically substantiality of growing the beard, then there would appear to be nothing for the court to evaluate. And yet, it would also seem that the burden on the inmate in this second case is more severe than the first case; it seems like more of a significant burden on the inmate's religious exercise to actually remove

166. Other cases that fall into the pattern of *Lyng* include many prison cases filed by inmates pursuant to RLUIPA. In many such cases, the prison simply prevents certain religious activity or conduct as opposed to placing a high cost for engaging in the activity. *See, e.g.*, Taylor G. Stout, *The Costs of Religious Accommodations in Prison*, 96 VA. L. REV. 1201, 1209–14 (2010) (detailing cases where prisoners were prevented from engaging in religious exercise on account of security concerns).

167. *See* 135 S. Ct. 853 (2015).

168. *Cf.* Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

the beard then it does to put him in solitary confinement for growing the beard.

What these hypothetical cases seem to capture is a key underlying justification of the substantial-burden framework. A law imposes a substantial burden because it leaves the aggrieved party with limited options for engaging in religious exercise. In a case of a substantial burden, the only option that remains to engage in religious exercise is to incur some sort of significant civil sanction, tax, or penalty. And in leaving only such an option, the law has thereby imposed a substantial burden that is triggered by religious exercise. In cases like *Lyng*—or the hypothetical shaved inmate—a law has imposed an even more significant burden on religious exercise. Instead of providing an option to engage in religious exercise and then endure a significant sanction, tax or penalty, the law refuses even that option. And in so doing, such laws—whether they be building a road or shaving an inmate—ought to be understood as constituting a substantial burden. What those laws have done is leave a person in a position that is even worse than enduring a substantial burden; they are actually *coercing* a person's failure to engage in religious exercise.[169] Thus, the intuition at the core of the substantial burden framework should be reformulated as follows: *notwithstanding government regulation, can a person still engage in religious exercise while only enduring an insubstantial civil burden?* In cases where government coerces a person's failure to engage in religious exercise, such laws therefore should constitute a substantial burden—both under the Court's pre-*Smith* doctrine as well as under the Court's current RFRA framework.[170]

169. Justice Brennan understood this well, noting the following in his dissent in *Lyng*: "Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance." *Lyng*, 485 U.S. at 468 (Brennan, J., dissenting). It is worth noting that in other decisions from the years leading up to *Smith*, the Court appeared to further embrace the notion that laws imposed a substantial burden only where the law required conduct that was religiously prohibited by the claimant. *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990) (rejecting the petitioner's claims because "appellant's religious beliefs do not forbid payment of the sales and use tax."); Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) ("Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically.").

170. Flanders, based on his "bare burden" requirement has reached the opposite conclusion, arguing that in cases like *Lyng*, courts should reject the claim. *See* Flanders, *supra* note 130. According to Flanders, a plaintiff "cannot say the government is burdening her just because the government has done something that makes the practice of her beliefs more difficult: it has to be doing something to *her*, where she is being put to a choice where that choice involves some secular costs." *Id.* at 16. Flanders' claim appears to assume that the reason why RFRA prohibits burdening religious practice is because government should not be using civil sanctions to modify or manipulate religious behavior. And in *Lyng*, because the government did not use a burden to present the claimant with a choice—such as using a government sanction to dis-incentivize religious exercise—then there was no worry that the burden would manipulate the claimant's religious exercise. As noted here, however, RFRA might be justified on a completely different principle: a view that individuals should be able to engage in religious exercise while only enduring an insubstantial civil burden. And on such an account, the facts in *Lyng*—and the rendering of certain religious exercise impossible—present an even stronger case than mere civil sanction for finding a substantial burden; rendering religious exercise impossible, on such an account, is far worse than making it difficult.

This conclusion is of particular importance given the current litigation over the contraception mandate and Form 700.[171] The substantial-burden skepticism that lives at the heart of *Lyng* has been deployed by courts in their rejecting claims that the self-certification process violates RFRA.[172] Thus, for example, the Tenth Circuit cited *Lyng* for the following proposition: "Pre-*Smith* case law and RFRA's legislative history underscore that religious exercise is not substantially burdened merely because the Government spends its money or arranges its own affairs in ways that plaintiffs find objectionable."[173] The problem, however, in leveraging *Lyng* in this context is two-fold. First, as argued above, *Lyng* represented a mistaken diagnosis of a subset of cases where a government policy made certain forms of religious exercise impossible; those cases should have qualified as a substantial burden because the petitioners could not have chosen to engage in the relevant religious exercise and then simply accepted some insubstantial civil burden as a consequence. The government foreclosed the possibility of engaging in the relevant religious exercise.

Second, invocation of *Lyng* in this context ignores that unique challenge the case posed to the substantial-burden framework. *Lyng* represents the height of substantial-burden skepticism because it presented no obvious civil penalty to evaluate for substantiality. Of course, the above serves as an argument against the conclusion in *Lyng*. But appreciating the unique challenge of *Lyng* strongly counsels against invoking its skepticism—and possible rejection—of the substantial-burden framework in a case where there is a civil cost to evaluate for substantiality; in the context of Form 700 and the contraception mandate's self-certification process, the civil penalties for noncompliance provide an obvious opportunity to consider whether the regulation in question imposes a substantial civil cost triggered by religious exercise.[174] It thus, in no way, falls into the category of cases like *Lyng*.

Criticizing *Lyng*—and its misuse—does raise one final question: what of the Court's worry that allowing petitioners to assert such claims successfully would "afford an individual a right to dictate the conduct of the Government's internal procedures"?[175] The correct answer here would seem to rely in trusting the strict-scrutiny framework of RFRA to do its work. Petitioners can assert RFRA claims that contend various government policies—from building roads to issuing social security numbers—constitute substantial burdens on religious exercise. And so long as these petitioners cannot simply engage in that religious exercise by enduring insubstantial burdens, their claims should go forward. At the same

171. *See supra* notes 100–06 and accompanying text.

172. Geneva Coll. v. Sec'y U.S. Dep't of Health and Human Servs., 778 F.3d 422, 435–36 (3d Cir. 2015); Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 552 (7th Cir. 2014).

173. Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1193 (10th Cir. 2015).

174. *See supra* notes 100–06 and accompanying text.

175. Lyng v. Northwest Indian Cemetery, 485 U.S. at 439, 448 (1988) (quoting Bowen v. Roy, 476 U.S. 693, 699–700 (1986)).

time, such claims will not be successful if the government regulation in question is the least restrictive means for accomplishing a compelling government interest.[176] If courts reject the worries expressed by the Court in *Lyng*—and allow such claims to constitute substantial burdens—they may also have to recalibrate the compelling-government-interest standard to include instances where the government must implement a policy effectively and uniformly.[177]

Such a recalibration—which amounts to lowering the bar for what constitutes a compelling government interest—already appears in the Supreme Court's decision in *United States v. Lee*.[178] There the Court upheld the constitutionality of social security taxes against a free exercise challenge on account of the compelling government interest at stake: "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."[179] Instead of taking a narrow approach to the compelling-government-interest inquiry, the Court looked at the overall impact some free exercise claims might have on the effective functioning of a government program. This broader approach accounts for concerns about free exercise claims interfering with the government's internal procedures; it takes this worry into account not by discarding the substantial-burden inquiry, but incorporating that worry into the compelling-government-interest inquiry.

Broadening the reach of the compelling-government-interest category ensures that substantial burden claims will not overreach and interfere with important government policies. And these limitations will be directly tied to the importance of a government policy, ensuring that systems that require evenhanded application are not undermined by an avalanche of religious exemptions. On such an approach, the limitations on substantial-burden claims will come not from judicial attempts to ignore the degree of constraints imposed on religious claimants, but the importance of the government policies at stake. Or, put succinctly, it amounts to endorsing the Court's approach to compelling government interests in *Lee* over the Court's missteps in *Lyng*.

VI. CONCLUSION

Undoubtedly, RFRA's substantial-burden standard is meant to distinguish between those burdens on religious exercise worthy of legal protection and those that are not. Its role as doctrinal gatekeeper, however, has been greatly imperiled by all the uncertainty associated with its interpretation and application. The purpose of this Article has been to

176. 42 U.S.C. § 2000bb–1(b) (2012).

177. For more on the need to lower the bar for what qualifies as a compelling government interest, see Michael A. Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 578–84 (2015).

178. 455 U.S. 252 (1982).

179. *Id.* at 260.

provide a workable framework for assessing the substantiality of burdens thereby ensuring that courts can appropriately identify those burdens on religious exercise that RFRA prohibits. This standard both gives real teeth to the substantial-burden inquiry without leading courts to allocate legal burdens on the basis of theological assessments. To accomplish this goal, the Article has advanced the following methodology for evaluating substantiality: courts should apply RFRA by assessing the substantiality of the civil penalties triggered by religious exercise. This ensures that individuals and institutions will not be forced to endure significant costs, taxes, or sanctions in the pursuit of religiously motivated conduct. At the same time, where laws impose insubstantial civil costs, taxes or sanctions on religiously-motivated conduct, individuals and institutions—absent other countervailing constitutional concerns—will be expected to shoulder those minimal burdens. In so doing, courts can give meaning to the terms of RFRA, both providing meaningful religious liberty protections without allowing those protections to run roughshod over the various other interests implicated in contemporary debates over the appropriate scope of religious liberty protections.