PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 2021 | Issue 1 Article 1

3-15-2022

Inviting an Impermissible Inquiry? RFRA's Substantial-Burden Requirement and "Centrality"

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Abstract

The Religious Freedom Restoration Act (RFRA) prohibits the federal government from substantially burdening a person's religious exercise unless the government can satisfy strict scrutiny. The statute also defines religious exercise to prohibit courts from inquiring into how central a particular religious exercise is to a person's religion. "The term 'religious exercise,'" reads the relevant provision, "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

Despite this prohibition on centrality inquiries, some scholars argue that RFRA's substantial-burden element requires courts to consider the religious costs a law imposes on a religious adherent who chooses to comply with the law. This Note argues that approach is wrong. Considering the religious costs a law imposes in turn requires courts to consider the place or importance of a particular religious exercise in a person's religion—i.e., whether it is compelled by, or central to, the person's religion. But since 2000, RFRA has defined religious exercise to preclude such inquiries.

So how should a court conduct a substantial-burden analysis? By focusing on the secular costs (e.g., the magnitude of civil penalties) a law imposes on a religious adherent who refuses to comply with the law for religious reasons. This Note surveys four categories of substantial secular burdens under RFRA. It also restates RFRA's substantial-burden requirement. But the main purpose of the Note is to stress what should be clear from RFRA's text: that considering how central a religious exercise is to a person's religion is impermissible.

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Inviting an Impermissible Inquiry?
RFRA's Substantial-Burden Requirement and "Centrality"

D. Bowie Duncan[*]

"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?"[1]

I. INTRODUCTION

Not all burdens on religious exercise are equal. So says Congress, at least. The Religious Freedom Restoration Act (RFRA) provides protection only when the government *substantially* burdens a person's religious exercise.[2] A mere burden is not enough to trigger RFRA's protections.[3] But where is the line between a mere burden and a substantial one? And given that courts must avoid inquiring into the centrality of a religious practice to a person's religion, how, exactly, are they to determine whether a law substantially burdens a person's religious exercise?

The second question is the focus of this Note. In *Employment Division v. Smith*, Justice Scalia argued that judges should avoid asking whether a religious act is central to a person's religion.[4] Many cases before *Smith* recognized that such an inquiry is impermissible.[5] RFRA has since adopted this principle, defining religious exercise to include "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief."[6] And yet some argue that

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[1] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

[2] 42 U.S.C. § 2000bb-1(a).

[3] *Id.*

[4] 494 U.S. at 887.

[5] *See infra* note 46 and accompanying text.

[6] 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also id.* § 2000bb-2(4) (incorporating RLUIPA's definition of religious exercise).

RFRA requires judges to consider the *religious costs* (the threat to salvation, for instance) of complying with a law when determining whether a burden on religious exercise is substantial.[7]

This Note argues that approach is wrong. It is impossible to consider whether complying with a law would impose religious costs without considering whether a particular religious exercise is compelled by, or central to, a person's religion. But doing so would be contrary to RFRA's text and the Court's long-standing prohibition on centrality inquiries.[8] So what does that leave of the substantial-burden inquiry? All that remains is the question of the *secular costs* (civil or criminal penalties, for instance) a law imposes on someone who disobeys the law for religious reasons.

This Note's discussion proceeds in two parts. Part II offers background on the Free Exercise Clause and RFRA. It introduces the "prohibition" on judges inquiring into the centrality of religious practice to a person's religion, as well as RFRA's substantial-burden requirement.[9] Part III analyzes several proposed approaches to the substantial-burden inquiry RFRA requires.[10] Some of these approaches (those that focus on religious costs) incorporate a centrality inquiry, or something like it, into the substantial-burden inquiry.[11] Others attempt to avoid the centrality inquiry by focusing on the secular burden the challenged law imposes.[12] Part III ends with a proposal for how courts should conduct a substantial-burden analysis.[13] The Note concludes with

[7] *See infra* subpart III.A.

[8] *See infra* note 135 and accompanying text.

[9] See *infra* Part II.

[10] *See infra* Part II. For simplicity's sake, this Note focuses on RFRA's substantial-burden requirement, though, where useful, it also analyzes to the Religious Land Use and Institutionalized Persons Act (RLUIPA), which has an identical requirement.

[11] *See infra* subpart II.A.

[12] *See infra* subpart III.B.

[13] *See infra* subpart III.C.

thoughts on how likely courts and religious-liberty lawyers are to stop considering the centrality of beliefs or practices to a person's religion (in short, not very).

II. BACKGROUND: THE FREE EXERCISE CLAUSE AND RFRA

The Free Exercise Clause bars Congress from making any law "prohibiting the free exercise [of religion]."[14] The Clause protects religious beliefs and religious practices, too. But it does not protect religious practices *absolutely*—nor could it, "in the nature of things."[15] The Supreme Court had to operationalize the Clause's protection for a society that could not help but incidentally burden religion. It did so, in time, by applying strict scrutiny to laws that burden individuals' free exercise rights, even if incidentally.[16] Thus, the Supreme Court held in *Sherbert v. Verner*[17] that the government may not incidentally burden religious exercise unless it has a compelling government interest to do so.[18]

But the Court's decision nearly three decades later in *Employment Division v. Smith* departed from *Sherbert* and limited the circumstances in which strict scrutiny applies.[19] Indeed, it protected a whole category of laws from Free Exercise challenges, even though those laws might burden, or even substantially burden, religious practices.[20] The Court held that neutral laws of general applicability do not violate the First Amendment, even if they incidentally burden religious

[14] U.S. CONST. amend. I. The Court incorporated the Free Exercise Clause against the states in Cantwell v. Connecticut, 310 U.S. 296 (1940).

[15] *Cantwell*, 310 U.S. at 303–04.

[16] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963) (applying strict scrutiny to a state's decision to refuse unemployment benefits to a Seventh-day Adventist who would not work on Saturdays).

[17] *Id.*

[18] *Id.* at 403, 406.

[19] 494 U.S. 872, 878 (1990).

[20] *Id.* at 883.

exercise.[21] Thus, in *Smith*, the Court concluded that Oregon's law prohibiting peyote (a law that applied with equal force to all Oregonians) was constitutional under the Free Exercise Clause.[22] The plaintiffs below, members of the Native American Church, could therefore be denied unemployment benefits for having used peyote.[23]

Congress responded to *Smith*, and restored *Sherbert*, by enacting RFRA. RFRA provides protection whenever a law substantially burdens a person's religious exercise, even if the law is neutral and generally applicable.[24] RFRA originally applied to the federal government and the states. But a few years after Congress enacted RFRA, the Court, in *City of Boerne v. Flores*, [25] struck down the part that applied to states. Congress responded to this ruling by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA), again extending, in a limited form, the blessing of religious liberty to the states.[26]

As we will see, Congress adopted RFRA and RLUIPA against a backdrop of other doctrines guiding courts' conduct in religious liberty cases. One of those doctrines forbids courts from inquiring into how central a belief or practice is to a person's religious belief system.[27] Drawing on this doctrine, RLUIPA defines religious exercise to preclude courts from inquiring

[21] *Id.* at 878–85.

[22] *Id.* at 890.

[23] *Id.*

[24] 42 U.S.C. § 2000bb-1(a).

[25] 521 U.S. 507 (1997).

[26] 42 U.S.C. § 2000cc(a)(1).

[27] *See infra* subpart II.A.

into the centrality of a religious practice to a person's religion.[28] RFRA has incorporated this definition, too.[29]

The remainder of this Part considers the origins and nature of the prohibition on centrality inquiries. It then considers the origins and nature of RFRA's substantial-burden requirement. It ends by offering a brief interpretation of RFRA's text, focusing on the meaning of "substantially burden" and "religious exercise."[30]

A. Centrality

In most religions, some practices and beliefs are more central than others.[31] And we might be more concerned about the government inhibiting religious adherents from engaging in central (or required) religious acts than merely peripheral (or recommended) ones. In the same way, we might be more concerned about the government requiring or encouraging adherents to engage in forbidden acts than merely discouraged ones.

But the Supreme Court has routinely recognized that courts should not inquire into the centrality of religious practices to a person's religion. This principle has its roots in the Court's decisions concerning church property disputes. In *Watson v. Jones*[32] and *Kedroff v. St. Nicholas Cathedral*,[33] the Court refused to independently decide who among the litigating factions

[28] 42 U.S.C. § 2000cc-5(7)(A).

[29] *Id.* § 2000bb-1(a).

[30] *See infra* subpart II.B.

[31] *See* John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 785 (1986) ("Belief or conduct may be commanded, recommended, rewarded, encouraged, desired, permitted, discouraged, forbidden, or punished within a claimant's belief system."); *see also* Pope John XXIII, *Ad Petri Cathedram* (June 29, 1959), https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_29061959_ad-petri.html (last visited Oct. 3, 2021) (calling for resolution of religious controversies in the Catholic Church by applying the following principle: "in essentials, unity; in doubtful matters, liberty; in all things, charity").

[32] 80 U.S. 679 (1871).

[33] 344 U.S. 94 (1952).

represented the "true" church and was therefore entitled to use the church property.[34] It adopted a rule to avoid deciding questions of internal church governance. Under this rule, how a court is to proceed depends on whether the church is hierarchical, like the Catholic Church, or congregational, like many evangelical churches.[35] When the church is hierarchical, courts should defer to the decision of the denomination's highest ecclesiastical authority on who owns the church property.[36] When the church is congregational, courts should apply the laws governing voluntary associations to determine who owns the property.[37]

This line of cases ultimately led the Court to adopt a rule against inquiring into the centrality of religious practices to a person's religion.[38] As with church-property disputes, in determining whether a belief or practice is central to a person's religion, courts run the risk of deciding theological matters they are not well-suited to decide.[39] This is what led Justice Scalia, writing for the majority in *Smith*, to reject the contention that judges should weigh the centrality of a belief when inquiring whether a statute violates the Free Exercise Clause. Quoting *Hernandez v. Commissioner*,[40] he wrote that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[41] Justice Scalia found support for this principle—that Courts "must not presume to

[34] *Watson*, 80 U.S. at 728–29, 734; *Kedroff*, 344 U.S. at 116, 120–21.

[35] *See Kedroff*, 344 U.S. at 110 (establishing a judicial definition of hierarchical congregations).

[36] *Watson*, 80 U.S. at 727; *see also Kedroff*, 344 U.S. at 113–16.

[37] *Watson*, 80 U.S. at 725.

[38] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

[39] *Id.*

[40] 490 U.S. 680 (1989).

[41] *Smith*, 494 U.S. at 872 (quoting *Hernandez*, 490 U.S. at 699).

determine the place of a particular belief in a religion"—in a number of the Court's religious liberty precedents, including those on church-property disputes.[42]

This principle has leaked into the modern religious liberty statutes. RLUIPA, adopted after RFRA, defines "religious exercise" broadly to preclude a centrality inquiry. "The term 'religious exercise,'" reads the relevant provision, "includes any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief."[43] RLUIPA also amended RFRA's definition of "religious exercise." Before 2000, RFRA defined religious exercise to mean "the exercise of religion under the First Amendment to the Constitution";[44] since then, however, RFRA has incorporated RLUIPA's definition of religious exercise.[45] Thus, religious exercise under RFRA, too, means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[46]

The rule against centrality inquiries reflected in RFRA, RLUIPA, and Supreme Court precedent is sensible. Judges are lawyers, not theologians. Their judgment on whether a practice is central to a religion is likely to be flawed.[47] This is especially true for religions outside the mainstream. A Catholic or Protestant judge's understanding of a Hare Krishna's beliefs—and

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[42] *Id.* at 887 (citing Thomas v. Rev. Bd. of Ind. Emp. Sec'y Div., 450 U.S. 707, 716 (1981); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969); Jones v. Wolf, 443 U.S. 595, 602–06 (1979); United States v. Ballard, 322 U.S. 78, 85–87 (1944)).

[43] 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

[44] *Id.* § 2000bb-2(4) (amended 2000).

[45] *Id.* (current version) ("[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."). Several mini-RFRAs recommend against judges conducting centrality inquiries. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (West 2019).

[46] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695–96 (2014) (surveying the 2000 amendments, which were central to the Court's holding that privately held for-profit corporations were "persons" under RFRA).

[47] *See, e.g.*, *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

whether certain beliefs or practices are more important to a Hare Krishna than others—is sure to be limited. More than that, though, when a court conducts a centrality inquiry, it risks "entangling church and state," raising Establishment Clause concerns.[48]

RFRA's text is clear, and its current definition of religious exercise is sweeping. The statute protects *any* exercise of religion regardless of whether the particular exercise is central to (or compelled by) a religious adherent's system of beliefs.[49] But where does that leave RFRA's still-undefined substantial-burden requirement? If judges are to avoid inquiring into centrality, can they nonetheless inquire into the religious (as opposed to secular) costs a law imposes?

B. Substantiality

RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion, even if the burden results from a rule of general applicability," unless the rule furthers "a compelling government interest" and "is the least restrictive means of furthering that interest."[50] RLUIPA speaks in the same terms. The statute prohibits state governments from imposing land-use regulations that "substantial[ly] burden" a person's religious exercise.[51] It also prohibits state governments from substantially burdening a prisoner's religious exercise.[52] Many states have adopted "mini-RFRAs," too.[53] These statutes (or constitutional provisions) mimic the federal RFRA's protections at the state level. And like the federal RFRA, they typically prohibit

[48] Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. 19, 19.

[49] 42 U.S.C. § 2000bb-1(a).

[50] *Id.* § 2000bb-1.

[51] *Id.* § 2000cc.

[52] *Id.* § 2000cc-1.

[53] *See State Religious Freedom Acts*, NATIONAL CONFERENCE OF STATE LEGISLATORS, https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (last visited Oct. 30, 2021) (listing twenty-one states as having enacted mini-RFRA statutes since the Court decided *Boerne*).

"substantial" burdens on religious exercise.[54] Some states, however, have omitted the requirement that the burden be "substantial."[55] What work does the word do, anyhow?

Congress, at least, added "substantial" to modify "burden" in RFRA "in an apparent effort to avoid the floodgates problem of subjecting all incidental burdens on religion to strict scrutiny."[56] But it gave no guidance on what courts are supposed to do when conducting a substantial burden inquiry.[57] Indeed, it left substantial burden undefined.[58]

To be fair, though, Congress did not come up with the substantial-burden requirement on its own. The requirement has origins in the Supreme Court's pre-*Smith* cases. As the Court wrote in *Wisconsin v. Yoder*,[59] "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."[60] That principle, in part, led the Court to hold that Wisconsin could not compel Amish students to attend secondary school until age sixteen.[61]

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[54] *E.g.*, LA. STAT. ANN. § 13:5233 (2020) ("Government shall not substantially burden a person's exercise of religion . . . ."); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (2021) ("[A] government agency may not substantially burden a person's free exercise of religion.").

[55] *E.g.*, ALA. CONST. amend. 622, § 5 (West 2020) ("Government shall not burden a person's freedom of religion . . . ."); CONN. GEN. STAT. ANN. § 52-571b(a) (West 2021) ("The state or any political subdivision of the state shall not burden a person's exercise of religion . . . ."); *see also, e.g.*, 42 R.I. GEN. LAWS § 42-80.1-3(a) (2014) ("[A] governmental authority may not restrict a person's free exercise of religion.").

[56] Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1212–13 (1996); *see also* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 120, 121 (2017) (arguing that the Senate added "substantially" to modify "burden" in the Senate RFRA bill to "preclude RFRA claims for less weighty religious costs").

[57] Dorf, *supra* note 56, at 1213.

[58] *See* 42 U.S.C. § 2000bb-2 (defining terms such as "exercise of religion" and "covered entity" but not substantial burden).

[59] 406 U.S. 205 (1972).

[60] *Id.* at 220 (emphasis added).

[61] *Id.* at 234.

Along the way, the *Yoder* Court wrote that "Old Order Amish communities," like the one to which the respondents belonged, believed that "salvation requires life in a church community separate and apart from the world and worldly influence."[62] And that belief was "central to their faith."[63] Failing to adhere to this *central* belief would thus have imposed significant religious costs on the parents (and their children). But violating Wisconsin's compulsory-attendance statute also carried criminal—that is, secular—penalties.[64] The respondents had been convicted and fined $5, the minimum under a statute with a maximum penalty of a fine of $50 and three months' imprisonment.[65] Though the *Yoder* Court ultimately concluded that the compulsory-education statute imposed an undue burden on the Amish respondents' religious exercise, it did not analyze in detail what, exactly, made the burden *undue*. Was it the ($5) criminal penalty? Or did the centrality of the religious belief concerning education to the Amish faith have some bearing on the Court's decision?

Sherbert v. Verner,[66] an earlier case ushering in the later-rejected strict-scrutiny approach, spoke mostly of "burdens" *simpliciter*.[67] The *Sherbert* Court framed the question before it as whether denying unemployment benefits to a Seventh-day Adventist who refused to work on

[62] *Id.* at 210.

[63] *Id.* ("Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts.").

[64] *Id.* at 207 n.2 (quoting the relevant parts of the Wisconsin compulsory attendance statute).

[65] *Id.* at 208 & n.3.

[66] 374 U.S. 398 (1963).

[67] *Id.* at 403 ("We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion.").

Saturday "impose[d] *any burden* on the free exercise of appellant's religion."[68] It answered in the affirmative.[69]

For Seventh-day Adventists like Ms. Sherbert, Saturday is the Sabbath. Because Sherbert refused to work on the Sabbath, she was fired from one job and could not find another.[70] Unable to find work, she filed an unemployment-benefits claim.[71] But South Carolina denied her claim.[72] The state deemed Sherbert ineligible for benefits under its Unemployment Compensation Act because she was able to work but would not accept work when offered.[73] Her refusal to work on Saturday was not "good cause" to refuse available work, the South Carolina unemployment agency concluded, a decision South Carolina courts upheld.[74]

To analyze the burden South Carolina imposed on Sherbert in denying her benefits, the Court imported the unconstitutional-conditions doctrine from its Free Speech cases.[75] The Court acknowledged that the Unemployment Act's eligibility provisions only indirectly burdened

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[68] *Id.*

[69] *Id.* ("We think it is clear that it does.").

[70] *Id.* at 399.

[71] *Id.* at 399–400.

[72] *Id.* at 401.

[73] *Id.*

[74] *Id.* at 400–01.

[75] For an explanation of the unconstitutional-conditions doctrine, see, for example, Edward J. Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RSRV. L. REV. 97 (1989). Fuhr writes:

> One version of the doctrine states that the government may never grant a privilege subject to the condition that the recipient not exercise a constitutional right. Placing such pressure upon constitutional rights is absolutely prohibited under this version of the doctrine. The other version of the doctrine states that the government may only condition a government benefit on an individual's abstention from exercising a constitutional right when "the state presents compelling state interests" for doing so.

Id. at 100 (footnotes omitted). The *Sherbert* Court applied the second version of the doctrine. *Sherbert*, 374 U.S. at 403–06 (applying this test to Sherbert's claims).

Sherbert's religious exercise.[76] Sherbert was, the Court admitted, not subject to criminal sanctions for failing to work on Saturday.[77] But the effect of the eligibility provisions was the same. Those provisions unmistakably "pressur[ed]" her "to forego the practice" of observing the Sabbath.[78] Sherbert was left with a choice: either observe the Sabbath and forfeit unemployment benefits or abandon observing the Sabbath and start working.[79] And putting Sherbert to this choice between her livelihood and her religion burdened her religious exercise.

The *Sherbert* Court then applied strict scrutiny to decide whether the South Carolina Unemployment Act's eligibility provisions were constitutional as applied to Sherbert.[80] Though earlier in the opinion the Court spoke of mere burdens, when it reached the stage of considering whether the government had a compelling government interest, the Court asked "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the *substantial infringement* of [Sherbert's] First Amendment right."[81] It ultimately answered no, meaning the statute was unconstitutional as applied to Sherbert.[82] But the "substantial infringement" phrasing laid the foundation for future cases in which the Court stated that the Free

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[76] *Sherbert*, 374 U.S. at 403.

[77] *Id.*

[78] *Sherbert*, 374 U.S. at 404. A similar case decided over two decades after *Sherbert* described *Sherbert*'s pressure test this way:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Rev. Bd. of Ind. Emp. Sec'y Div., 450 U.S. 707, 717–18 (1981).

[79] *Sherbert*, 374 U.S. at 404.

[80] *Id.* at 409.

[81] *Id.* at 406.

[82] *Id.* at 409.

Exercise Clause prohibited the government from *substantially* burdening religious exercise without a compelling government interest.

Take for example *Hernandez v. Commissioner*,[83] decided a year before *Smith*. The *Hernandez* Court framed its inquiry as "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[84] In *Hernandez*, members of the Church of Scientology argued that not being able to deduct payments for audit and training sessions as charitable contributions violated their Free Exercise rights.[85] The Court disagreed.[86]

Unfortunately, though, the Court did not conclusively decide whether the tax laws substantially burdened the Scientologists' religious exercise.[87] Instead, it decided the case on the grounds that Congress had a compelling "interest in maintaining a sound tax system."[88] Yet the Court wrote in passing that it had "doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices [was] a substantial one."[89] The burden was not unique. Like any tax or fee, it reduced the amount of money a Scientologist would have at his disposal to pay for the auditing and training sessions.[90] And the financial burden imposed by not

[83] 490 U.S. 680 (1989).

[84] *Id.* at 699. For more cases articulating some form of Free Exercise burden requirement, see Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 894–95 (1990) (O'Connor, J., concurring) (collecting cases).

[85] *Hernandez*, 490 U.S. at 698.

[86] *Id.* at 684.

[87] *Id.* at 699.

[88] *Id.* at 700 (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).

[89] *Id.* at 699.

[90] *Id.* at 688.

being allowed to deduct these particular payments "would seem to pale by comparison to the overall federal income tax burden on an adherent."[91]

One other pre-*Smith* case is worth mentioning before proceeding: *Lyng v. Northwestern Indian Cemetery Protective Association*,[92] in which the Court concluded the government did not substantially burden the plaintiffs' religious exercise.[93] *Lyng* concerned the U.S. Forest Service's decision to build a road through (and harvest timber in) part of a National Forest a group of American Indians used for religious purposes. A commissioned study concluded that constructing the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the [American Indians'] belief systems."[94] The Forest Service decided to proceed nonetheless.[95]

Upset, a number of plaintiffs (including American Indians and organizations representing them) sued, arguing that the Forest Service's proposed actions violated their Free Exercise rights. But, though the Court recognized that these actions would "have severe adverse effects on the practice of [the American Indians'] religion," it concluded that the burden the actions imposed was not heavy enough to trigger strict scrutiny.[96] The Court explained that allowing the Forest Service to proceed with construction followed from *Bowen v. Roy*.[97] In *Bowen*, the Court rejected a Free Exercise challenge to a statute requiring welfare recipients to provide the Social Security numbers

[91] *Id.*

[92] 485 U.S. 439.

[93] *Id.* at 441–42.

[94] *Id.* at 442

[95] *Id.* at 443.

[96] *Id.* at 447.

[97] 476 U.S. 693 (1986).

of all family members to receive benefits.[98] Roy, an American Indian, argued that obtaining a Social Security number for his daughter would rob her spirit and hinder her spiritual development.[99] Concluding that Roy could not prevail on his Free Exercise challenge to the government's Social Security number requirement, the *Bowen* Court wrote: "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[100]

The same principle controlled in *Lyng*. In *Lyng*, as in *Roy*, the government's actions would interfere with the American Indians' ability to pursue their spiritual development. Yet the governmental action at issue—building a road and harvesting timber—would not coerce the Indians "into violating their religious beliefs; nor would [it] penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[101] The Forest Service's decision thus withstood the plaintiffs' Free Exercise challenge.

So we see that RFRA's substantial-burden requirement originated in the Court's pre-*Smith* case law. A good deal of doctrine developed around the requirement. This doctrine informs how courts apply RFRA's requirement today. But RFRA not only codified the substantial-burden requirement in the Supreme Court's precedents; it codified the prohibition on centrality inquiries, too.[102] The rest of this Note seeks to reconcile those two codifications. It begins by interpreting two key elements of RFRA.

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[98] *Id.* at 712.

[99] *Id.* at 696.

[100] *Id.* at 700.

[101] *Lyng*, 485 U.S. at 449.

[102] To the extent the prohibition is based on Establishment Clause concerns (which Congress could not unilaterally override), the codification may have been unnecessary. *But see infra* notes 146–51 and accompanying text.

C. Interpreting RFRA's Text: Substantial Burden on Religious Exercise

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion . . . ."[103] This subpart briefly interprets "substantially burden," then revisits Congress's definition "exercise of religion." It ends by restating the substantial-burden requirement.

1. Substantially Burden

Congress failed to define "substantially burden" in RFRA, so we will have to arrive at a definition ourselves. *Merriam-Webster's* defines "burden" as "something that is carried: load,"[104] while *Black's Law Dictionary* defines it as "[s]omething that hinders or oppresses."[105] And "substantially" means "to a great or significant extent."[106] So, it seems, a burden makes doing something (or avoiding doing something) more difficult, as does carrying a load. And the modifier "substantially" requires a heightened, i.e., significant, degree of difficulty. But "substantially" does not require the government to make it impossible for an adherent to exercise his religion—the burden need not be "complete" or "total."[107]

2. Exercise of Religion

Fortunately, Congress has provided a definition of "exercise of religion." It is a broad one, as we have seen: "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[108] This definition does not refer to a person's religious exercise generally but rather to the particular exercise(s) of religion that make

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[103] 42 U.S.C. § 2000bb-1(a).

[104] *Burden*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011).

[105] *Burden*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[106] *Substantially*, LEXICO.COM, https://www.lexico.com/en/definition/substantially.

[107] Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) ("The term 'substantial,' after all, doesn't mean complete or total, so a 'substantial burden' need not be a complete or total one." (internal citations omitted)).

[108] 42 U.S.C. § 2000cc-5(7)(A).

up a person's religion. And *any* exercise of religion within a person's religious belief system counts. So the question, as we will see in more detail below,[109] is whether the government has substantially burdened the *particular* religious exercise at issue in the case.

But courts still have an important role in determining what qualifies as religious exercise. On the surface, "religious exercise" would seem to protect only religious *acts*, insofar as exercise is an active enterprise. Yet the Court has taken a broader reading of "religious exercise" to protect religious adherents from being forced or encouraged to do what their religion forbids or discourages.[110] This broader reading accords with the tenets of most religions, in which "thou shalt nots" feature prominently. The Ten Commandments—eight of which are framed in the negative—are an obvious example.[111] Religions often require or encourage fasting and other forms of abstinence, too. RFRA's protections would be meager if it failed to cover these forms of religious exercise.

We should therefore understand RFRA as protecting religious adherents against the government saying "thou shalt" when his religion says "thou shalt not," just as it protects religious adherents against the government saying "thou shalt not" when his religion says "thou shalt." This broad reading comports with RLUIPA's requirement that the statute "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter

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[109] *See infra* subpart III.A.

[110] *See* Murphy v. Collier, 139 S. Ct. 1475, 1484 (2019) (Alito, J., dissenting from grant of application for stay) (noting that "[i]n past cases, [the Court has] assessed regulations that compel an activity that a practitioner's faith prohibits," although "some Members of th[e] Court have been reluctant to find that even a law compelling individuals to engage in conduct *condemned by their faith* imposes a substantial burden" (emphasis in original) (internal citations omitted)); *see also* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990) ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of (*or abstention from*) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." (emphasis added)).

[111] *See Exodus* 20:2–17.

and the Constitution."[112] The Court has read this RLUIPA provision as mandating broad construction of religious exercise under RFRA as well.[113]

3. Restatement

With the help of the definitions above, we can restate the substantial-burden requirement: the government substantially burdens a person's religious exercise if it makes it significantly more difficult for the person to carry out (or avoid carrying out) a particular religious act (or an act forbidden or discouraged by the person's religion). A rule can make it financially, practically, or psychologically more difficult to carry out a particular religious act—the broad wording of "substantial burden" admits all three types of difficulties.

Why "*more* difficult"? Because it is already difficult, in the nature of things, for religious adherents to carry out their religion's requirements and recommendations. Temptation and distractions—TV, sports bars, politics—stand in their way. The question under RFRA is whether the *government* has made it significantly more difficult for religious adherents to carry out their religions' requirements and recommendations. The government may do so several ways, explored in the next Part.[114] Criminal prohibitions, civil penalties, and other forms of pressure (like that in *Sherbert*) may all substantially burden religious exercise.

III. RELIGIOUS AND SECULAR BURDENS UNDER RFRA

Do substantial burdens imply central beliefs?[115] The first subpart below argues they do not.[116] Questions of religious costs that would result from a person complying with a law have no

[112] 42 U.S.C. § 2000cc-3(g).

[113] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014).

[114] *See infra* Part III.

[115] *See* DeGirolami, *supra* note 48, at 21 (arguing that substantial burdens *do* imply central beliefs).

[116] *See infra* subpart III.A.

place in a substantial-burden analysis. That leaves the question of secular costs of refusing to comply with a law. The second subpart considers the four categories of secular burdens on religious exercise.[117] The third and final subpart offers thoughts on how a court should conduct a substantial-burden analysis.[118]

A. Religious Costs (Theological Substantiality)

According to one scholar, RFRA's substantial-burden test is often seen as entailing two separate questions: (1) would the religious adherent suffer substantial *religious* costs by complying with the challenged law, and (2) would the religious adherent suffer substantial *secular* costs by refusing to comply with the challenged law?[119] The first question is the focus of this subpart, which argues, for reasons that should be clear,[120] that it is improper for courts to consider the religious costs a religious adherent would suffer from complying with a challenged law.

The two-part framework nonetheless has many proponents. For example, the Supreme Court seems to have embraced a version of it in *Burwell v. Hobby Lobby Stores, Inc*.[121] At issue in that case was the contraceptive mandate Health and Human Services (HHS) adopted under the Affordable Care Act.[122] The mandate required employers who provide insurance to their employees to cover certain contraceptives.[123] Hobby Lobby's owners, the Greens, who believe that life begins at conception, objected to covering these contraceptives.[124] They alleged that the

[117] *See infra* subpart III.B.

[118] *See infra* subpart III.C.

[119] Gedicks, *supra* note 56, at 96, 104.

[120] Most importantly, that RFRA, by its terms, prohibits centrality inquiries.

[121] 573 U.S. 682.

[122] *Id.* at 682.

[123] *Id.* at 697–99.

[124] *Id.* at 683.

contraceptive mandate substantially burdened their religious exercise (and that the government had no compelling government interest to enforce it against them). Thus, they argued, the mandate violated RFRA.[125] The Court ultimately agreed and struck down the mandate as applied to closely held corporations like Hobby Lobby.[126]

In concluding that the mandate substantially burdened the plaintiffs' religious exercise, the Court took into account *both* the religious and the secular costs the mandate imposed.[127] The mandate imposed religious costs because it demanded that Hobby Lobby's owners and their stores "engage in conduct that *seriously violates* their religious beliefs."[128] It imposed secular costs because refusing to comply with the mandate would "entail substantial economic consequences."[129] Refusing to comply meant that Hobby Lobby would have to pay a tax of up to "$1.3 million per day or about $475 million per year."[130] The Court paired both types of costs in concluding that the mandate substantially burdened the plaintiffs' religious exercise: the mandate met the substantial-burden requirement because it forced the plaintiffs to choose between *seriously* violating their religious beliefs and paying a *substantial* tax.[131]

The Court took a similar approach to the substantial-burden analysis in *Holt v. Hobbs*, a RLUIPA case.[132] There, the Court held that an Arkansas Department of Corrections grooming policy violated RLUIPA as applied to a Muslim prisoner who wanted to grow a ½-inch beard in

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[125] *Id.*

[126] *Id.* at 736.

[127] *Id.* at 720–23.

[128] *Id.* at 720 (emphasis added).

[129] *Id.*

[130] *Id.*

[131] *Id.* at 723.

[132] 574 U.S. 352 (2015).

accordance with his religious beliefs.[133] As relevant here, the Court concluded that the prisoner met his burden of proving that the grooming policy substantially burdened his religious exercise.[134] The policy did so by putting the prisoner to a choice: either comply with the policy (which meant shaving his beard) and *seriously* violate his religious beliefs (suffering religious costs) or refuse to comply and "face serious disciplinary action" (suffering secular costs).[135] Thus, in *Holt*, as in *Hobby Lobby*, the Court considered both the religious and the secular costs in its substantial-burden analysis. But does RFRA (or RLUIPA) allow a court to consider the religious costs of complying with a law or policy?

This Note proposes that whether RFRA's substantial-burden requirement allows courts to consider religious costs (and thus the centrality of a given practice, for we cannot know whether complying with a law would carry substantial religious costs without knowing whether the practice is "central" or "significant") turns on the meaning of "religious exercise." Religious exercise could, in the abstract, mean a religious adherent's exercise of religion *generally*—i.e., including all practices and beliefs that make up one's religion. Or it could mean a *particular* religious exercise within one's religious belief system.

If the first, a centrality inquiry makes sense. The question would be whether the law substantially burdens the religious adherent's religious exercise as a whole. Framed this way, a law that burdens only a minor practice within the adherent's belief system would not substantially burden his religious exercise. After all, the law's impact on his religious exercise (a broad term

[133] *Id.* at 358–59.

[134] *Id.* at 369–370.

[135] *Id.* at 361.

capturing all the dos and don'ts of his religion) would be minor—insubstantial, as far as burdens go. He would suffer few religious costs.

If the second, a centrality inquiry makes no sense. The only question would be whether the law substantially burdens the *particular* religious exercise at issue in the case. Does, say, a criminal law forbidding the sacramental use of peyote substantially burden that particular religious practice—the sacramental use of peyote?[136] Framed this way, the particular religious practice is divorced from the religion as a whole. The remaining question is how the law impacts *that* practice. Does the law, for whatever reason, make it significantly more difficult for the religious adherent to carry out the practice?

The second interpretation is the correct one under RFRA. RFRA covers "*any* exercise of religion" within "a system of religious belief."[137] The particular exercise is singled out, and asking whether the exercise is compelled by, or central to, a person's religion is, by definition, impermissible. That, in turn, means a court must *not* ask whether the person would suffer religious costs by complying with a law. To do so would entail analyzing whether a particular religious exercise is compelled by, or central to, a person's religion.

Though RFRA's text is clear, the Supreme Court has not yet addressed how RFRA's definition of religious exercise affects the substantial-burden analysis.[138] Yet Justice Alito recently wrote: "[I]t may be that RLUIPA and RFRA do not allow a court to undertake for itself the

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[136] *See, e.g.*, Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause did not prohibit the application of Oregon drug laws to ceremonial ingestion of peyote).

[137] 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *id.* § 2000bb-2(4).

[138] *See* Murphy v. Collier, 139 S. Ct. 1475, 1484 (2019) (Alito, J., dissenting from grant of application for stay of execution) ("We have not addressed whether, under RLUIPA or its cousin, [RFRA] . . . , there is a difference between a State's interference with a religious practice that is compelled and a religious practice that is merely preferred.").

determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect 'any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief.'"[139] That, indeed, *must be* the case, and it is due time for the Court to address the issue. Until then, judges will continue to consider (improperly) the relative importance of a particular religious exercise to a person's religion when conducting substantial-burden analyses.

Justice Kagan seems to have done just that in her concurring opinion in *Dunn v. Smith*,[140] decided last year. There, the Court denied an emergency application to vacate an injunction prohibiting Willie Smith's execution without a clergy member in the execution chamber.[141] Justice Kagan concurred, arguing that Alabama's policy preventing Smith from having a clergy member in the execution chamber imposed a substantial burden on his exercise of religion.[142] Why? Because "Smith understands his minister's presence as 'integral to [his] faith' and 'essential to [his] spiritual search for redemption.'"[143] That may well be true, but the Court should not be asking how "integral" or "essential" a particular practice is to someone's faith. Those matters have no place in a substantial-burden analysis.

Instead, the Court should have asked two questions. First, does having a clergy member in the execution chamber qualify as religious exercise? *Any* religious exercise counts, "whether or not compelled by, or central to," a person's religion.[144] Assuming, as seems to be true, this was

[139] *Id.* (internal citation omitted).

[140] 141 S. Ct. 725 (2021) (Kagan, J., concurring).

[141] *Id.* at 725.

[142] *Id.*

[143] *Id.*

[144] 42 U.S.C. § 2000cc-5(7)(A).

a religious exercise, the Court should have moved to the second question: does the policy substantially burden that particular religious exercise? The answer here must be yes. Smith was forbidden from having a clergy member in the execution chamber. It was *impossible*, not just significantly difficult, for him to carry out the religious practice.[145]

Justice Kagan's reasoning in *Dunn* is similar to the reasoning some circuits employed before the 2000 amendments to RFRA's definition of religious exercise. The Tenth and Ninth Circuits, for instance, applied *religious*-substantiality tests in pre-2000 RFRA cases. These tests directed courts to consider whether the practice at issue in a given RFRA case was compelled by, or central to, the religious adherent's religion. Take, for example, *Werner v. McCotter*,[146] a Tenth Circuit case decided before *City of Boerne v. Flores*.[147] Concluding that access to a sweat lodge and possession of a medicine bag may be sufficiently central to a Native American prisoner's religion to trigger RFRA's protections,[148] the Tenth Circuit wrote: "To exceed the 'substantial burden' threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner's individual beliefs . . . or [among other things] must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion."[149]

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[145] Of course, that still leaves the question whether the state satisfied strict scrutiny. It may well have. Justice Kagan thought not. *See Dunn*, 141 S. Ct. at 725. Justice Kavanaugh, joined by Chief Justice Roberts, disagreed: "Because the State's policy . . . serves the State's compelling interests in ensuring the safety, security, and solemnity of the execution room, I would have granted the State's application to vacate the injunction." *Id.* at 726 (Kavanaugh, J., dissenting from denial of application to vacate injunction).

[146] 49 F.3d 1476 (10th Cir. 1995).

[147] 521 U.S. 507 (1997); *see supra* note 26 and accompanying text.

[148] 49 F.3d at 1481.

[149] *Id.* at 1480.

Thus, in *Werner*, the test the Tenth Circuit applied required it to consider how central (or fundamental) the religious act was to a person's religion. But RFRA's new definition of religious exercise bars courts from doing so.[150] The question of whether a religious act is central (or fundamental) to a person's religion has no place in a substantial-burden analysis.

Similarly, the Ninth Circuit in *Bryant v. Gomez* considered whether a prisoner's religion compelled the particular religious exercise he alleged the prison substantially burdened.[151] The Ninth Circuit applied a test requiring it to determine whether the plaintiff's religion mandated the conduct in question.[152] To establish a substantial burden under RFRA, wrote the court, the religious adherent must "prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates."[153] And the prisoner in *Bryant* failed to prove that his Pentecostal religion mandated certain practices he sued the prison for failing to provide.[154] The prison's policies therefore did not substantially burden the prisoner's religious exercise, and he was not entitled to relief.[155]

Thus, in *Bryant*, the Ninth Circuit considered whether a religious adherent's religion compelled the acts alleged to be substantially burdened. But RFRA's new definition of religious exercise bars courts from doing so.[156] The question of whether a religious act is compelled by a person's religion has no place in a substantial-burden analysis.

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[150] 42 U.S.C. § 2000cc-5(7)(A).

[151] 46 F.3d 948, 948 (9th Cir. 1995) (per curiam).

[152] *Id.* at 949.

[153] *Id.* (alterations in the original).

[154] *Id.* at 949–50.

[155] *Id.*

[156] 42 U.S.C. § 2000cc-5(7)(A).

And yet, despite RFRA's clear break from cases like *Werner* and *Bryant* with the 2000 amendments, some scholars continue to argue that RFRA requires a centrality inquiry. Take, for example, Professor DeGirolami, who argues that RFRA's current text requires courts to measure the substantiality of a burden on religious exercise "against the 'system of religious belief' of which the religious exercise at issue forms a part."[157] "[A] burden on religious exercise," he writes, "is substantial if it interferes in a significant, important, or central way with the claimant's religious system."[158] But, again, this must be wrong. RFRA's text forecloses inquiries into the significance, importance, or centrality of a religious practice.[159] The statute protects *any* exercise of religion, *regardless* of its place in the person's "system of religious belief."[160]

Granted, Professor DeGirolami rightly recognizes that, by inquiring into centrality (as he argues courts must do), courts risk entangling themselves in theological matters they should not be entangled in.[161] To address this problem, he argues that "[c]ourts surely ought to defer to claimants' understandings of their system of religious belief" and (by implication) the importance of certain practices within their system of belief.[162] Recognizing the same problem, Professor Gedicks argues that courts should apply neutral principles of law, like common law tort principles, when conducting a substantial-burden analysis (i.e., one that includes inquiring into religious costs).[163] These are fine ways to help courts avoid resolving theological questions, but they are

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[157] DeGirolami, *supra* note 48, at 21.

[158] *Id.*

[159] 42 U.S.C. § 2000cc-5(7)(A).

[160] *Id.*

[161] DeGirolami, *supra* note 48, at 21.

[162] *Id.*

[163] Gedicks, *supra* note 56, at 131. Gedicks argues that the "substantial burden element requires both a substantial religious cost for obeying a religiously burdensome law and a substantial secular cost for disobeying the law." *Id.* at 114. This Note, as should be clear, disagrees.

unnecessary. Courts should not ask the underlying question about religious costs at all. Given RFRA's definition of "religious exercise," the focus of the substantial-burden requirement should be secular costs alone.

For the same reason, this Note takes issue with part of the framework for analyzing substantial burdens Gabrielle M. Girgis proposed in a recent article.[164] Her framework requires courts to ask two questions. First, is this the kind of religious exercise that can be substantially burdened? And second, does the law impact the person's religious exercise in a way that substantially burdens it?[165]

Girgis's formulation of the first step is problematic. She suggests that only two kinds of religious exercise can be substantially burdened: (1) religious obligations and (2) a broader category of "non-mandatory but protected religious conduct" she calls "exercises of religious autonomy."[166] The second group includes "decisions that religion has a natural tendency to motivate, direct, or organize in the lives of religious believers," and implicates things like a religious adherent's education, profession, and relationships.[167] Only *substantial* exercises of religious autonomy, she suggests, fall into this second group of religious exercise that can be substantially burdened.[168]

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[164] Gabrielle M. Girgis, *What is a "Substantial Burden" on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1765 (2020).

[165] *Id.*

[166] *Id.* at 1767, 1768.

[167] *Id.* at 1768, 1769.

[168] *Id.* at 1770–71.

Under RFRA,[169] however, *all kinds* of religious exercise can be substantially burdened. Narrowing the reach of the substantial-burden test to only two kinds of religious exercise is unnecessary and contrary to the text. Yes, questions remain about what qualifies as religious exercise under RFRA. And we can perhaps use Girgis's second category, encompassing substantial exercises of religious autonomy, to determine whether something is or is not religious exercise.[170] But the point remains: anything that qualifies as religious exercise is eligible for a substantial-burden analysis.

B. Secular Costs (Secular Substantiality)

Judges and scholars have proposed other approaches to determining whether a law substantially burdens religious exercise. This subpart considers four of them.[171] These approaches focus on the secular costs of complying with the law. In general, they do not run afoul of RFRA's bar on inquiring into the centrality of religious beliefs. Nor do they, taken alone, invite judges to consider the religious costs of complying with a challenged law. To be sure, not all the approaches are satisfactory if treated as the only way to determine whether a law substantially burdens a person's religious exercise, and some (especially the pressure test) are troubling if they are paired with a centrality inquiry.

1. Punitive (Criminal) Laws

[169] To be fair, Girgis's article is not narrowly focused on RFRA. She is also anticipating a world without *Smith* and giving guidance to courts on how to apply a (constitutionally grounded) substantial-burden test in that world.

[170] Her second category is similar to some mini-RFRAs' definitions of religious exercise. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (2021) ("'Free exercise of religion' means an act or refusal to act that is substantially motivated by sincere religious belief."); N.M. STAT. ANN. § 28-22-2 (2021) (same).

[171] *See infra* sections III.B.1–III.B.4.

The most obvious substantial burden a law could impose on a religious adherent is a criminal penalty for religious exercise. Putting a religious adherent to the choice between exercising his religion and being convicted of a felony or misdemeanor will almost always substantially burden the particular exercise of religion—it is pure coercion. All the more so because most exercises of religion are not one-off acts but rather should be regularly repeated.

The law prohibiting peyote use in *Smith* would fall into this category.[172] Violating such a law would be a felony offense, carrying significant prison time.[173] In addition, the law prohibiting bigamy at issue in *Reynolds v. United States*[174] would, by today's standard, substantially burden the particular religious practice, namely, bigamy.[175] Remember, though, that a religious exemption from such a law is not a sure thing. The government may well be able to establish that it has a compelling government interest in uniformly enforcing these laws. It would be difficult, for example, to overcome Chief Justice Waite's formulation of the government's compelling interest (to use today's terms) in prohibiting bigamy.[176]

The more difficult question is whether criminal laws that carry minimal criminal penalties can substantially burden religious exercise. The Amish parents in *Yoder* had to pay a $5 fine (roughly $30 today) for refusing to send their kids to public school.[177] Would that be substantial enough under RFRA? This Note suggests it would be, since the criminal arm of the state would

[172] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

[173] *Id.* at 874.

[174] 98 U.S. 145, 146 (1878).

[175] *Id.* (reprinting the Utah Territory bigamy statute, violation of which carried a maximum punishment of a $500 fine and five years' imprisonment).

[176] *See id.* at 164–68 (suggesting, among other things, that polygamy is subversive to civil order and that evil consequences flow from plural marriages).

[177] 406 U.S. 205, 207–08 (1972).

be levied against religious adherents who choose to exercise their religion.[178] And *Yoder* itself supports the idea that even minimal criminal penalties, like the $5 fine, qualify as substantial. After all, one of RFRA's purposes was to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[179]

2. Civil Penalties

In a similar vein, Professor Helfand argues that courts should consider whether engaging in a religious practice will result in civil penalties and how high those penalties are.[180] A steep penalty for engaging in a religious practice would qualify as a substantial burden, whereas a less steep penalty would not.[181] As with the previous test, the focus here is the penalty, not the religious practice. The civil-penalty test would therefore protect all religious practices equally, regardless of their centrality. But laws might burden religious practices differently, imposing high penalties for engaging in certain practices but lower penalties for engaging in others. Only those practices the law substantially penalizes would be eligible for a RFRA exemption.[182]

This approach has two benefits. First, as mentioned, it keeps courts from inquiring into the centrality of religious beliefs. Second, it is a straightforward test.

But the approach has drawbacks, too. For starters, considering only the magnitude of civil (or criminal) penalties leaves out many other possible substantial burdens. The government has a

[178] Choosing between being a criminal and following a religion's requirements or recommendations should be hard for any law-abiding citizen to bear.

[179] 42 U.S.C. § 2000bb(b)(1) (italics added) (internal citations omitted). *Cf.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014).

[180] Michael A. Helfand, *The Substantial Burden Puzzle*, 2016 U. ILL. L. REV. 1, 4–5.

[181] *Id.*

[182] *Id.* at 6.

number of tools at its disposal to pressure or prevent people from exercising their religion. The next two sections consider these other types of substantial burdens.[183] Suffice it to say here that considering the magnitude of the penalties for refusing to comply with the law is inadequate if taken as the only test for determining whether a law substantially burdens a religious exercise.

In addition, this approach could raise line-drawing problems. Some scholars worry that all civil penalties Congress imposes would count as substantial under Helfand's approach. For example, Professor Gedicks notes that "[i]t seems unlikely Congress or a state legislature would attempt to shape or control general public behavior by laws that may be safely ignored because violations carries trivial sanctions."[184] He doubts that religiously burdensome laws carrying insignificant penalties exist.[185] The result (absent a centrality inquiry) would be that all laws that burden religious exercise by subjecting it to some sort of penalty would count as substantial burdens.[186] And he cannot bear that notion.[187]

On the other hand, RFRA invites an individualized inquiry into whether a law substantially burdens *a person's* free exercise. Might, then, a given civil penalty burden a low-income religious adherent more than a middle- or high-income one? Professor DeGirolami raises this issue in the context of *Hobby Lobby*.[188] He suggests that for an immensely wealthy family (like the Greens) or a profitable business (like Hobby Lobby), paying $26 million a year (the penalty if Hobby Lobby had dropped insurance coverage and left their employees to buy insurance on an exchange)

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[183] *See infra* sections III.B.3–III.B.4.

[184] Gedicks, supra note 56, at 114.

[185] *Id.*

[186] *Id.*

[187] *Id.*; *see also* 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.").

[188] DeGirolami, *supra* note 48, at 24–25.

might not rise to the level of a substantial burden.[189] To that, we can respond by quoting Justice Alito: "These sums are surely substantial."[190] That is true regardless of who would have to pay them.

Finally, emphasizing the limits of the civil-penalty approach, Girgis offers a helpful hypothetical on communion wine.[191] In the hypothetical, the U.S. government bans consumption of Bordeaux; one-million dollars is the fine for non-compliance.[192] The question is whether this would qualify as a substantial burden on Catholics, who need some sort of red wine, though not Bordeaux in particular, for communion.[193] Girgis argues that it would qualify as a substantial burden under Helfand's formulation of the civil-penalty test; after all, one-million dollars is a substantial sum.[194]

Girgis's conclusion seems to be wrong, and it highlights the importance of framing "religious exercise" properly. The religious exercise at issue in the hypothetical is drinking *any type* of red wine for communion, not drinking Bordeaux specifically. A million-dollar fine for drinking Bordeaux thus would not substantially burden the religious exercise at issue, assuming other types of red wine are available. The fine would hardly make it more difficult for Catholics to carry out communion. Of course, if a group of Catholics insisted (based on sincerely held religious beliefs) on drinking Bordeaux, the law *would* substantially burden their religious exercise. But that is not the case here. The religious exercise could be satisfied by other means,

[189] *Id.* at 25.

[190] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014).

[191] Girgis, *supra* note 164, at 1766.

[192] *Id.*

[193] *Id.*

[194] *Id.*

without having to pay a million-dollar fine. Whether there are reasonable alternatives therefore seems to matter a good deal for purposes of a substantial-burden analysis.

The civil-penalty approach thus has many shortcomings. It is partly for that reason this Note has argued that the driving question should be whether the government has made it significantly more difficult for a person to carry out (or avoid carrying out) a particular religious act (or an act forbidden or discouraged by the person's religion). Incurring a financial penalty for engaging in a particular religious exercise will often meet this standard. Having to choose between paying large sums of money to the government and abiding by one's religion is a difficult choice to make, including for wealthy individuals and for-profit businesses.

3. Substantial Pressure

Next is the broader pressure test, which encompasses, but extends beyond, the two tests mentioned above. *Sherbert v. Verner* originated this type of test, though it has many iterations.[195] Ms. Sherbert was not subject to any civil fine for not working on Saturdays.[196] Her burden was of a different nature: she had to choose between observing the Sabbath (in which case she could neither work nor receive unemployment benefits) or abandoning the Sabbath to find work.[197] This choice put substantial pressure on her to abandon her practice of observing the Sabbath.

The pressure test captures more than situations like *Sherbert*, where a public benefit is on the line.[198] Forcing a person to choose between exercising his religion and suffering a criminal or

[195] Sherbert v. Verner, 374 U.S. 398, 404 (1963).

[196] *Id.* at 399–402.

[197] *Id.* at 404.

[198] For a scholar's endorsement of the pressure test, see Chad Flanders, *Insubstantial Burdens*, *in* RELIGIOUS EXEMPTIONS 279 (Kevin Vallier & Michael Weber eds., 2018). As the introduction puts it, Flanders argues that plaintiffs in religious liberty cases need only "to show that that the government is doing something that pressures them to act in a way contrary to their beliefs." Kevin Vallier & Michael Weber, *Introduction*, *in* RELIGIOUS EXEMPTIONS, *supra*, at 1, 8.

civil penalty may also impose substantial pressure on his religious exercise, thus encompassing the two categories above. So too may losing some other sort of benefit or being put at a competitive disadvantage. Some, for example, think that the Pennsylvania statute in *Braunfeld v. Brown*[199] requiring all business to close on Sunday substantially burdened the Saturday-Sabbath-observing Jewish business owners' religious exercise. As Girgis puts it, this statute pressured "Jewish business owners into a trilemma: they must choose between giving up an exercise of substantial religious autonomy (by giving up running a business in accordance with their belief that the Sabbath falls on Saturday), a fine for non-compliance (by opening on Sunday), or surrendering their ability to run a business on equal or competitive terms (by closing on Saturday *and* Sunday)."[200] But the *Braunfeld* Court upheld the statute, albeit before *Sherbert* changed the Free Exercise landscape (until *Smith*).[201]

The substantial-pressure test is perhaps the easiest to grasp conceptually. The difficulty with it, as with other tests, lies in deciding when the pressure is significant enough to qualify as a s*ubstantial* burden. The question becomes one of magnitude, but cases like *Sherbert* can help guide courts to the right decision.

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[199] 366 U.S. 599 (1961); *see also* Girgis, *supra* note 164, at 1772.

[200] Girgis, *supra* note 164, at 1772.

[201] *Braunfeld*, 366 U.S. at 609. Explaining why it thought the statute should survive a Free Exercise challenge, the Court wrote:

> [T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution.

Id. at 605 (footnote omitted).

Another possible difficulty arises when the pressure test is paired with a centrality inquiry. This Note has argued that judges should avoid centrality inquiries altogether. The pressure test demonstrates the importance of doing so. Imagine a court, in conducting a substantial-burden inquiry, first asks whether a religious exercise is central to (or compelled by) a person's religion, then asks whether the law pressures that person to abandon the religious exercise. Proceeding as this hypothetical court does could lead to anomalous results. As a psychological matter, a religious adherent will feel far *more pressure* to abandon a religious practice if it is *not* central to (or compelled by) their religion than he would if it is central. So a (hypothetical, whacky) court might conclude the law in question substantially burdened the adherent's religious exercise *because* the religious exercise was not central to their religion. But surely RFRA does not treat less-important religious practices more favorably than more-important ones. By avoiding a centrality inquiry altogether, no anomalies of this nature result. All religious exercises are treated equally.

4. Preclusive Burdens

This final category—preclusive burdens[202]—includes many types of substantial burdens that do not fit in the other three categories. These burdens arise when religious adherents *cannot* undertake their religious exercise under any circumstances because of a law or policy.[203] Where there is a preclusive burden, religious adherents are left choiceless—there is no option to violate the law and suffer a criminal or civil penalty, as things stand.

Though these burdens do not necessarily carry secular *costs*, the existence of a substantial burden is indisputable under the restatement offered in Part II.[204] They are most common in the

[202] Girgis calls these types of burdens "preventive burdens," *see* Girgis, supra note 164, at 1774, but this Note prefers "preclusive burdens."

[203] *Id.*

[204] *See supra* section II.C.3.

RLUIPA cases. Willie Dunn, for example, could not, of his own accord, invite a clergy member into the execution chamber. In a case like *Dunn*, as well as cases concerning religious-diet accommodations, the decision-making power lies elsewhere.[205] Until the decision-maker changes the policy (or agrees to an accommodation), religious adherents will be precluded from engaging in the particular religious exercise.

Girgis argues that *Lyng* also falls into this category.[206] By destroying sacred land, she argues, the government prevented the American Indians from exercising their religion.[207] Professor Flanders agrees. Though he stresses the importance of the land to the American Indians in a way this Note would not (for purposes of an RFRA analysis), he captures the idea of preclusive burdens nicely: "There is no reason to think that a law burdens religion any less when it makes the exercise of religion impossible than when it compels action or inaction inconsistent with religious commitment."[208] Indeed, though we might need to consider how RFRA's substantial-burden requirement interacts with pre-RFRA cases like *Bowen* and *Lyng* (in which the Court concluded the government had not substantially burdened the plaintiffs' religious exercise),[209] *Lyng* seems to fit squarely within the definition of substantial burden this Note arrived at earlier.[210] Destroying the sacred land would make it significantly more difficult—impossible, really—to carry out specific religious acts associated with the land.

C. Brief Thoughts on the Proper Test

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[205] *See supra* notes 141–47 and accompanying text.

[206] Girgis, *supra* note 164, at 1777.

[207] *Id.* at 1780.

[208] DeGirolami, *supra* note 48, at 23.

[209] For an early discussion on the relationship between RFRA's text and pre-RFRA cases *Bowen* and *Lyng*, see Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEXAS L. REV. 209, 228–30 (1994).

[210] *See supra* section II.C.3.

In conducting a substantial-burden analysis, a court should ask two questions. The first is whether something qualifies as a religious exercise for purposes of RFRA.[211] The second is whether the plaintiff has met his burden[212] of proving that the challenged rule substantially burdens that *particular* religious exercise. But the second question should not involve any analysis of the centrality or importance of the religious exercise to the plaintiff's religion as a whole. The focus must be secular, not religious, costs. The tests from the previous subpart can help the court determine whether a rule substantially burdens the particular religious exercise.[213] They are not the only tests but rather helpful guides. The driving question should be whether the government has made it significantly more difficult for a person to carry out (or avoid carrying out) a particular religious act (or an act forbidden or discouraged by the person's religion).

Conducting this inquiry requires judges to *exercise their judgment*. They will have to determine whether the civil penalty or other pressure a law imposes is substantial enough. Unfortunate, perhaps, but RFRA's substantial-burden requirement admits of few bright-line rules. Could that have been part of the motivation behind Justice Scalia's decision in *Smith*? RFRA's substantial-burden test, though unique in that it is not judge-made, is susceptible to many of the same criticisms as the undue-burden test in the abortion context.[214]

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[211] The plaintiff must, of course, also establish that the religious exercise is grounded in a sincerely held religious belief. *Burwell*, 573 U.S. at 717 n.28 (stating that "[t]o qualify for RFRA's protection, an asserted belief must be 'sincere'"). Though sincerity is not this Note's topic, this Note does agree with Professor Helfand that doing away with the centrality inquiry may require courts to take a more active role in evaluating whether religious adherents' claims are grounded in sincerely held religious beliefs. *See* Helfand, *supra* note 180, at 9 ("[C]ourts should respond to substantial burden claims not by interrogating their theological basis, but with an increased skepticism of sincerity.").

[212] *See* Holt v. Hobbs, 574 U.S. 352, 362 (2015) (concluding that the "petitioner met his burden of showing that the Department's grooming policy substantially burdened his exercise of religion").

[213] *See supra* subpart III.B.

[214] *See* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 985 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing the joint opinion for "call[ing] upon federal

IV. CONCLUSION

What exactly the substantial-burden requirement is remains somewhat unclear. But we know what it is not. It is not an invitation for judges to inquire into the centrality of a particular religious exercise to a person's religion. Such an inquiry is, after all, impermissible.

And yet we can expect courts to continue considering how central or significant a particular religious exercise is to a person's religion when conducting substantial-burden analyses. The reason is simple. Incorporating centrality into substantial-burden analyses makes the argument against the government more compelling. It is intuitively more unjust for the government to prevent someone from engaging in religious exercise that is central to, or compelled by, their religion—and readers, whether of a legal brief or a judicial opinion, will recognize as much. That is why Willie Smith's lawyers emphasized in their briefs how "integral" and "essential" having a minister in the execution chamber was to Smith's religion. It is also why Justice Kagan quoted these statements in her concurrence.[215]

district judges to apply an 'undue burden' standard as doubtful in application as it is unprincipled in origin").

[215] Dunn v. Smith, 141 S. Ct. 725, 725 (2021).