

WHAT IS A “SUBSTANTIAL BURDEN” ON RELIGION UNDER RFRA AND THE FIRST AMENDMENT?

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ABSTRACT

*What is the meaning of a “substantial burden” on religion under the federal Religious Freedom Restoration Act (and its state-level equivalents)? This question is timelier than ever, as several pending cert petitions before the Supreme Court ask it to overturn the landmark decision that spurred RFRA’s enactment: *Employment Division v. Smith*, which held that exemptions for burdens on religion are not required from neutral and generally applicable laws. Whether or not the Court grants any of these cert petitions, judges will continue to need a clear and reliable method for identifying substantial burdens on religion. This Article considers several existing tests and proposes a new framework designed to remedy their shortcomings.*

Put simply, a court’s analysis of a substantial burden requires it to ask two questions: (1) What type of religious exercise does the law burden? And (2) what type of impact does the law have on that exercise? The Article develops answers to both questions, by specifying the kind of religious exercise that can be substantially burdened in the first place (what I’ll call obligation and substantial religious autonomy), and by sketching several types of substantial impact laws might have on religion (what I’ll call simply punitive, indirectly punitive, non-punitive, or preventive burdens). Only burdens that meet these two criteria together can properly be considered substantial. Taken together, these two prongs of the framework help us generate a taxonomy of at least eight different kinds of substantial burdens on religion.

But a challenge remains: Would judicial application of this framework—particularly, would asking what type of religious exercise the law burdens—

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violate the Establishment Clause? In response, the Article clarifies the kinds of Establishment Clause concerns one might have about any judicial effort to interpret the substantiality of a burden on religion. Ultimately, it finds, the proposed framework can withstand all those concerns. Finally, the Article shows more precisely how the framework would help the Supreme Court decide a number of recent and potentially forthcoming cases involving substantial-burden claims.

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INTRODUCTION

Consider this case from the Supreme Court’s last term: Patrick Murphy, a prisoner on death row, approaches his execution day. In prison he has converted to Pure Land Buddhism, and he has requested that his spiritual advisor, Rev. Hui-Yong Shih, be at his side in the execution chamber—not just in the viewing room—to help him preserve focus on his rebirth in the Pure Land as he passes into the next life. The prison says no, because Rev. Shih is not one of the many state-and-prison-approved ministers who can be present in the chamber. So when the day for his execution arrives, Murphy is to die in the chamber alone.¹

How should the Court have understood the religious liberty issues at stake here? At the eleventh hour, it granted a stay of his execution, requiring the prison to permit Murphy’s advisor to be at his side in the chamber. The Justices offered two grounds for this outcome. Justices Kagan and Kavanaugh supported the stay by appeal to the Establishment Clause, as a remedy for the religious discrimination inherent in the prison’s permitting advisors of other religious denominations in the execution chamber: “What the State may not do,” Justice Kavanaugh wrote, “is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.”² But Justice Alito, in his dissent from the stay (on procedural grounds), suggested that Murphy might have a case

1. *Patrick Henry Murphy v. Bryan Collier, Executive Director, Texas Department of Criminal Justice*, BECKET, <https://www.becketlaw.org/case/murphy-v-collier/> [<https://perma.cc/4DUX-FX5F>].

2. *Murphy v. Collier*, 139 S. Ct. 1475, 1476 (2019) (Kavanaugh, J., concurring).

against the prison’s protocol, if he could show that “excluding Rev. Shih would *impose a substantial burden* on his exercise of religion.”³ The complexities of Murphy’s case—and this judicial conversation about it—drive home a question that has vexed courts and scholars from the time of the American founding: When should courts grant exemptions from laws that burden religious exercise?

Federal law answers that question with the Religious Freedom Restoration Act (RFRA, which many states have adopted their own versions of), as well as the Religious Land Use and Institutionalized Persons Act (RLUIPA). These statutes provide that exemptions are required whenever the law “substantially burdens” someone’s religion, unless (1) that law serves a compelling state interest and (2) burdening someone’s religion is the least restrictive way to achieve that interest.⁴ But this test, known as the test of strict scrutiny, raises a further question that is surprisingly underexplored both among U.S. judges and justices and in the fields of constitutional and political theory—a question that will be the focus of this Article: How do we determine what counts as a substantial burden on religion?

Getting clearer about substantial burdens on religion is a key intermediary step toward solving the much bigger problem of exemptions. We need a good answer to this question not only as a matter of public policy—to understand the meaning of RFRA’s (and RLUIPA’s) “substantial burden” language in an age where religious liberty claims are ever more fraught and contested—but also, we’re quite likely to see, as a matter of constitutional law. RFRA introduced the substantial burden test in response to a landmark religious liberty decision by the Court in 1990, *Employment Division v. Smith*.⁵ There, the Court decided that neither courts nor state legislatures were required to exempt Native Americans from a law prohibiting the use of peyote, because that law was neutral in its aim (it didn’t target religion) and generally applicable to everyone.⁶ Prior to *Smith*, the Court’s precedent was just the opposite: any neutral and generally applicable law that imposed on someone’s exercise of religion was constitutionally suspect. Courts were expected to grant people exemptions from laws that burdened their religion, unless that burden satisfied strict scrutiny (as the least restrictive way to serve a compelling state interest).⁷

3. *Id.* at 1484 (Alito, J., dissenting) (emphasis added).

4. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2018); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(a) (2018).

5. 494 U.S. 872 (1990).

6. *Id.* at 878–79, 882.

7. Some have debated whether pre-*Smith* burdens had to satisfy something less stringent than strict scrutiny. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57

Why does this reversal in legal history matter? Because recent murmurings from the Court suggest it might be going back the other way. Quite recently, in a joint opinion authored by Justice Alito and joined by Justices Thomas, Gorsuch, and Kavanaugh, Justice Alito noted the “drastic[.]” reduction in free exercise protection under U.S. constitutional law since *Smith*, and implicitly invited future petitioners to ask the Court to reconsider that decision.⁸ Now, some petitions for a writ of certiorari *do* challenge *Smith*, with others likely to follow.⁹ If the Court were to reverse *Smith*, then it would need a clear and reliable method for identifying substantial burdens not just under RFRA, which is part of statutory law, but also under the First Amendment of the Constitution: burdens from laws that are otherwise neutral and generally applicable would most likely be subjected to a substantial burden test, and where they were deemed substantial, the Court would then have to apply strict scrutiny.

Of course, the Court might choose to do something less than fully overturn *Smith*. But there’s at least a meaningful chance that the Court *will* fully reverse it, and that makes it important for us to ask what the future of free exercise jurisprudence would look like.¹⁰

The goal of this Article, then, is to build a conceptual framework that courts could use to identify substantial burdens on religion, which would in turn help them decide when to apply strict scrutiny under RFRA or the Free Exercise Clause.

U. CHI. L. REV. 1109, 1127 (1990); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1494–96 (1999).

8. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 635, 637 (2019).

9. See, e.g., Ricks v. State of Idaho Contractors Bd., 435 P.3d 1 (Idaho Ct. App. 2018), *petition for cert. filed*, (U.S. July 10, 2019) (No. 19-66); *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (U.S. Feb. 24, 2020) (No. 19-123).

10. One might wonder why overturning *Smith* would raise the stakes of deciding the meaning of “substantial burden,” since courts already have to decide what that is now under RFRA (both at the federal and state levels). There are three possible answers: First, the question might have different answers under the Constitution as opposed to statutes. The right answer for how we should interpret the language of “substantial burden” in a statute might differ from the answer to the question of what kinds of burdens the Supreme Court was scrutinizing pre-*Smith*, because it’s at least possible that the standard tools of statutory interpretation (dictionary definitions; reliance on the legal context composed of other language in the bill and of other laws on the books, which will differ from state to state; legislative intent or purpose, according to at least some theories of statutory interpretation) would yield a different result than we’d get if we were just asking “what did the Supreme Court have in mind when it was looking for substantial burdens—i.e., what did it tend to treat as ‘substantial’?” Second, even if the answer to these two questions is the same, the scrutiny of substantial burdens under the federal Constitution would happen much more often, because it would be required for burdens imposed by any state or federal law or regulation—including state laws and regulations in states that lack their own RFRAs, and federal statutes in which Congress says the federal RFRA doesn’t apply. Third, the answer to the meaning of a “substantial burden” after *Smith*’s reversal would be set in stone, politically speaking, rather than subject to being overridden or revised by Congress or state lawmakers (a power Congress has exercised, for example, by clarifying—in response to some lower court interpretations of RFRA’s substantial burden language—that religious conduct does not need to be “compelled” or “central” to a religion to be capable of being substantially burdened).

Part I presents three kinds of tests that legal scholars and federal U.S. courts have proposed to help identify substantial burdens. Each test fails when taken on its own, I argue, but together they help us articulate two key questions courts need to consider to determine whether a law imposes a substantial burden. First, about the kind of religious exercise that can experience a *substantial* burden in the first place; and second, about what the impact of a law on religious exercise must be to count as a *burden* at all. Only by considering these two questions together could we give courts a useful framework—or mode of analysis—for identifying substantial burdens.

Part II answers these questions, and so begins to fill out the framework. First, I offer an account of two types of religious exercise—obligation and what I will call substantial religious autonomy—that are susceptible to a substantial burden from law if they are burdened at all; and second, I sketch four categories of impact the law can have on these types of religious exercise that would create substantial burdens on them. This yields a taxonomy, so to speak, of eight different kinds of substantial burdens on religion that we are likely to see under conditions of liberal democracy and pluralism.

Some scholars, however, including those whose work I build on here, might contend that this way of evaluating substantial burdens violates the Establishment Clause. For judges to ask what kind of religious exercise the law burdens might seem a step too far. As Michael Helfand has argued, judicial line-drawing between burdens that are substantial and those that are not according to their theological significance for the claimant “runs afoul of core Establishment Clause prohibitions.”¹¹ Ira Lupu and Robert Tuttle share these concerns.¹² And some scholars driven by this concern have proposed tests for substantial burdens that seek to prevent that kind of inquiry altogether,¹³ or have intimated that one solution to the problem might be a regime with no exemptions, period.¹⁴ Part III thus seeks to clarify what exactly *are* the establishment violations at stake in substantial burden analyses, and offers three possibilities. But the framework sketched in Part II, I maintain, risks none of them, and could inform not only legal and constitutional interpretation but also the fields of public policy and theoretical scholarship on religious liberty more broadly.

11. Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1787.

12. Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1916–17 (2011).

13. See, e.g., Frederick Mark Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94 (2017); Chad Flanders, *Insubstantial Burdens*, in RELIGIOUS EXEMPTIONS 279 (Kevin Vallier & Michael Weber eds., 2018).

14. See, e.g., Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. 19, 20.

Part IV, finally, puts this framework into practice, applying it to explain, to re-envision, and to predict the outcome of past and future Supreme Court cases. The framework makes sense, for example, of the Court’s discussion of Murphy’s religious liberty claims, and gives us a better articulation of prisoners’ religious liberty rights more generally. It also better explains the Court’s internal disagreement over the meaning of a substantial burden under RFRA in *Burwell v. Hobby Lobby*.¹⁵ It gives us new reasons to think that some of the Court’s pre-*Smith* cases on minority religious liberty rights were wrongly decided, or at least should have required strict scrutiny analysis. And finally but perhaps most importantly, it helps us chart the way forward from the cert petitions that are now asking the Court to reverse its biggest religious liberty decision in the twentieth century.

I. THREE TESTS FOR IDENTIFYING SUBSTANTIAL BURDENS ON RELIGION

Courts and legal scholars have proposed a range of tests for substantial burdens on religion under RFRA. Here I’ll focus on three kinds that I think narrow in on what’s most important for courts to consider in substantial burden analyses: what we can call the “religious substantiality” test, the “severe penalty” test, and the “pressure” test.

A. *Religious Substantiality Tests*

A “religious substantiality” test requires courts to ask what type of religious exercise has been burdened. Only certain kinds of religious exercise, under this test, can experience substantial burdens. Lower courts developed at least two kinds of religious substantiality tests when they began to interpret the meaning of RFRA in the 1990s. Under the centrality standard, for instance, burdens on religion are substantial if they forbid or penalize practices sufficiently *central* to religion. In *Werner v. McCotter*, the Tenth Circuit considered the claims of Robert Werner, a Native American prisoner, that a prison had substantially burdened his religion by refusing to give him access to (among other things) a prison-maintained sweat lodge and a medicine bag.¹⁶ The circuit court reversed and remanded the district court’s dismissal of those substantial burden claims.¹⁷ Why? Because, the circuit court suggested, access to the sweat lodge and possession of a medicine bag might be *sufficiently central* to Werner’s exercise of religion. Noting the case as an opportunity to interpret the

15. 573 U.S. 682 (2014).

16. 49 F.3d 1476, 1478 (10th Cir. 1995).

17. *Id.* at 1480–81.

meaning of RFRA's "substantial burden" language, the court drew on other prisoner religious liberty cases to argue that:

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; must meaningfully curtail a prisoner's ability to express adherence to his or her faith; or must deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner's religion.¹⁸

Werner had proved to the circuit court that "the sweat lodge plays an indispensable role in his own sincerely held beliefs,"¹⁹ and the court further realized that a rule preventing some prisoners from possessing a medicine bag might, "for those faiths for whom the symbol has *sufficient importance*," count as a "substantial burden."²⁰

Another kind of "religious substantiality" test is the compulsion standard: to show that the law has imposed a substantial burden, claimants must be able to show that the burdened practice is a *strict obligation* of religion. As Helfand shows, sometimes courts have used just one of these two kinds of religious substantiality tests, while other courts have combined them.²¹ We have in *Bryant v. Gomez*, for example, the Ninth Circuit's explanation that:

[T]he religious adherent . . . has the obligation to 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*. This interference must be more than an inconvenience; the burden must be substantial and *an interference with a tenet or belief that is central to religious doctrine*.²²

So in decisions like these, the lower courts started to interpret what a substantial burden on religion might be, by qualifying the kind of religious exercise that law can substantially burden. As I discuss further in Part III, Congress responded to these tests by broadening RFRA's application: religious exercise did not need to be compelled by or "central" to someone's religion to qualify as substantially burdened.²³ And today RFRA defines

18. *Id.* at 1480 (emphasis added) (citations omitted).

19. *Id.*

20. *Id.* at 1481 (emphasis added).

21. Helfand, *supra* note 11, at 1785.

22. 46 F.3d 948, 949 (9th Cir. 1995) (per curiam) (second, third, and fourth alteration in original) (emphasis added) (quoting *Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987)).

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

religious exercise as including “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²⁴ But even if we support Congress’s likely reason for these changes—which was to ensure that the courts’ metrics of “compelled” or “central” did not unduly narrow the law’s range of protection, especially for minority religions—we can still affirm and build on the courts’ instinct in crafting these tests, which was to find a way of distinguishing between trivial and non-trivial burdens on religion. Indeed, RFRA’s “substantial burden” language leaves courts no choice but to rely on some kind of guidelines for discerning that the claimant’s religious exercise can be *significantly* burdened. Religious substantiality tests, in other words, speak to the first prong of any proper substantial-burden analysis: What is the relevant category of religious “exercise” that laws can *substantially* burden? Of course, it’s unclear from the centrality test just what makes a practice central to someone’s religion, and a compulsion standard would seem to exclude too much. We’ll consider these problems further in Part II.

B. The Severe Penalty Test

First, though, I want to introduce two other helpful tests that legal scholars have proposed, so we can lay out the second type of question that courts need to be able to answer about substantial burdens. Helfand’s test—which I’ll call the “severe penalty” test—identifies substantial burdens according to whether the *penalty* a law imposes on religious believers for noncompliance is substantial, either in the form of a tax, a sanction, or some other cost for engaging in religious exercise.²⁵ For Helfand, we should favor this kind of test because courts either lack the capacity or are constitutionally forbidden (by the Establishment Clause) to adjudicate between different claims about the importance of a particular religious belief for a particular religion—a question that seems to be thoroughly theological and not secular-interpretive.²⁶ So instead courts should look to the magnitude of the penalty a law imposes on religion.

But the severe penalty test is incomplete. After all, before we can say that a law imposes a substantial penalty on religious exercise, we have to fill out the first prong I introduced above: we have to determine what counts as a religious exercise that can be substantially burdened at all. Otherwise, the severe penalty test would have us scrutinize, under the *Religious Freedom Restoration Act* (and the Free Exercise of *Religion* Clause), laws that severely penalize even non-religious conduct (by telling us to look for

24. 42 U.S.C. § 2000cc-5(7)(A) (2018).

25. Helfand, *supra* note 11, at 1791.

26. *Id.* at 1787–88.

substantial penalties on any human pursuit). And more to the point, even on clearly religious conduct, some steep fines aren't substantial burdens on religion. Someone who's late for church might speed in order to satisfy a religious duty to get there on time, but surely the speeding laws don't substantially burden her religion,²⁷ as I'll discuss in Part II.²⁸

C. *The Pressure Test*

The incompleteness of the severe-penalty test points us toward the second prong of an adequate substantial burden analysis: What kinds of *impact* on religious exercise are *substantially* burdensome? Some legal scholars try to answer that question by offering yet a third test for substantial burdens: the “pressure” test. What singles out substantial burdens on this view isn't that they impact a particular *type* of religious exercise (e.g., the “central” or “compelled” practices denoted by religious substantiality tests), or that they impose a severe *penalty* on religion, but instead that they have a specific kind of *impact* on religion: the *pressure* a law puts on religious people to change their beliefs or behavior.

So Chad Flanders, for example, says plaintiffs have to meet a “bare burden” requirement: to get courts to consider whether a substantial burden is present at all, they have to show that “the government is doing something that pressures them to act in a way contrary to their beliefs.”²⁹ Thus in *Wisconsin v. Yoder*, the Court rightly decided that the Amish should not be required to send their children to secular public schools,³⁰ because that requirement pressured them through coercive means (the threat of a fine and perhaps prison time) to act against their belief that their children should only be educated in Amish schools through the eighth grade.³¹ And Kathleen Brady suggests that in identifying substantial burdens, “[c]ourts should look for burdens that place significant pressure on the believer to change their behavior,” or for laws and regulations that “have the effect of requiring a believer to choose between following their faith and retaining or obtaining a good of substantial value.”³²

27. Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Policy*, 9 HARV. L. & POL'Y REV. 129, 131 (2015).

28. And as it will be important for Part III to show, judicial decisions about whether the burdened religious exercise falls in the right category—about whether it is capable of being substantially burdened in the first place—needn't violate the Establishment Clause.

29. Kevin Vallier & Michael Weber, *Introduction*, in RELIGIOUS EXEMPTIONS, *supra* note 13, at 1, 8.

30. 406 U.S. 205 (1972).

31. *Id.* at 299.

32. KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW 231–232 (2015).

We know from the severe penalty test, though, that pressure doesn't cover every instance of what is at least intuitively a substantial burden on religion. In fact, Helfand and Flanders divide sharply over the Supreme Court's controversial 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*³³ that the U.S. Forest Service could construct a road through lands held sacred by Native American tribes. While Helfand disagrees with this decision,³⁴ Flanders supports it: “What distinguishes *Yoder* from [*Lyng*] is the idea that the Forest Service wasn't really doing anything directly to the tribes, wasn't making them do anything, wasn't putting them to a choice between their faith and a penalty.”³⁵

So if we want to be able to explain why a case like *Lyng* also involves a substantial burden on religion even if the state isn't *penalizing* or *pressuring* Native Americans (or claimants more generally), we need a better account of what *effects* of law on a given form of exercise count as *burdening* that exercise *substantially*. We also know, from the religious substantiality tests discussed above, that we need some idea of the kind of religious exercise that is capable of being substantially burdened in the first place.

To sum up, then: the religious substantiality test, the severe penalty test, and the pressure test together help us articulate two parts, two prongs, of a framework for identifying substantial burdens on religion. What I want to do in the next part of the Article, then, is fill out this two-part framework, by asking:

- (1) First, what kind of religious exercise can be substantially burdened at all?
- (2) Second, which kinds of impact on those forms of exercise are substantially burdensome?

Only if we have these two things together—if we know both the *type of religious exercise* at stake, and the *type of impact* the law has on that exercise—will we know how to identify a *substantial burden* on *religious exercise*.

II. A NEW FRAMEWORK FOR IDENTIFYING SUBSTANTIAL BURDENS

Below I propose an improved framework for courts' substantial burden analysis, in two parts. First, I discuss two natural and pervasive tendencies of religion—its *fragility* and uniquely *architectonic* role in human life³⁶—

33. 485 U.S. 439 (1988).

34. Helfand, *supra* note 11, at 1804.

35. Flanders, *supra* note 13, at 299.

36. I draw these concepts from recent work on religious liberty by Sherif Girgis and Melissa Moschella; see *infra* notes 37 and 39 respectively.

in order to identify two kinds of exercise that are likely to be substantially burdened if they are burdened at all. Those forms of exercise are *obligations* and what I describe as *substantial religious autonomy*. Second, I introduce four ways the law can impose burdens on these kinds of exercise—types of impact that become substantial when they threaten significant material (or in the last case, religious) costs. These categories include *simply punitive*, *indirectly punitive*, *non-punitive*, and *preventive* burdens.

A. What Type of Exercise Does the Law Burden?

To start, consider two examples that bring to light the importance of each part of the framework: of knowing what type of religious exercise is at stake and what kind of impact the law has on it.

Example 1—*Communion Wine*. Let's say a law forbids the consumption of Bordeaux in the U.S., and imposes a million-dollar fine for noncompliance. It so happens that Catholic parishes tend to use Bordeaux as the wine consecrated by the priest at Mass. But Catholics aren't required to use Bordeaux; they are only required to use some kind of red wine. So we can say that the law burdens Catholics' exercise of religion, and by Helfand's measure it would surely be substantial, since it would impose a *very steep* penalty on their religiously motivated conduct—but surely no one would think this burden is substantial in the relevant sense. Why not? Because the impact on religion isn't significant enough.

Now take Example 2—*Toll Booth*. A toll booth happens to go up between your house and the mosque, requiring you to pay an extra fifty cents each way when you attend Friday services. Those services might be obligatory for you, in which case the booth burdens your discharge of a serious religious duty. But the burden doesn't seem substantial in a way that warrants strict scrutiny. Why not? Because the material penalty isn't significant enough.

Both of these examples show us that even when a law burdens someone's religion, knowing that the burden is significant or substantial requires us to say both something about the law's extent of impact on the religious conduct, *and* something about the religious significance of that conduct.

I'll begin with the second issue. To address it—to figure out what types of religious exercise we should think are capable of being substantially burdened in the first place—we have to draw on some premises about what religion is *like* as a human good that the state has reasons to protect.

We can find the seeds of such an account by returning to the lower courts' religious substantiality tests. I think the courts developed the compulsion standard because they recognized that obligations generally must be carried out in a specific or limited number of ways (indeed, perhaps

just one way). As Ryan Anderson and Sherif Girgis have put the same point in an essay comparing religion to other human goods, like self-determination:

[I]f you're barred from pursuing one project, you can adopt another, live out that new one, and your self-determination doesn't take much of a hit. You need only a respectable range of options. But if you're pressured into flouting even one of your perceived *obligations*, you're stuck; your integrity is cracked.³⁷

Here Anderson and Girgis argue that religion is a “fragile” good: its demands tend to be rigid and precise, and so someone easily becomes deficient in her religion because it's easy to fail to meet those demands.³⁸ This general feature of religion, they suggest, explains the need for any substantial-burden test to pick out laws that prevent or penalize the pursuit of religious obligations. So it seems reasonable, as a matter of political philosophy and legal tradition, to include obligations in the category of religious exercise that is capable of being substantially burdened.

But I think that obligations aren't the *only* conduct that might require this protection. This point may have motivated the lower courts that once looked for any conduct deemed “central” to a religion. This seems to be how they covered religious practices that *aren't* mandatory but whose proscription still counts, intuitively, as a substantial burden. Indeed, some religions may not have *any mandates at all*: if only mandatory conduct were covered, those religions could be regulated out of existence without raising a legal problem.

What should the category of non-mandatory but protected religious conduct include? Here again I think we can build from the ground up—by looking at the nature of religion as a human good calling out for protection at all. Anderson and Girgis argue that if religion warrants any legal protection, then religion's relative “fragility” means that our substantial-burden test will have to extend protection to religious *obligations*. I think we can craft another component of a sound substantial-burden test from the fact that religion tends to be especially or even uniquely “architectonic,” as political theorist Melissa Moschella puts it: religion naturally tends to motivate, direct, or organize many if not all other spheres of life.³⁹ For whatever religion is, it surely includes, as paradigmatic examples, efforts at harmony with a higher or ultimate source of reality. Sociologists of religion

37. Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism: Empowering All, Encumbering None*, in JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 108, 135 (2017).

38. *Id.* at 135–36.

39. Melissa Moschella, *Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom*, 32 *J.L. & RELIGION* 123, 132 (2017).

such as Martin Riesebrodt and Christian Smith compellingly argue that seeking alignment or harmony with a superhuman power (or powers) is essential to religion as a category of human activity.⁴⁰ And if this is true, it will easily be the case that quite a wide range of the actions of religious believers can be construed as efforts to preserve or advance that harmony. For insofar as the ultimate source is the ultimate ground of everything, including all that we are and could be and do, then believers might see every effort and action in some way as an effort to cooperate with that superhuman source of all meaning, existence, and value.⁴¹ That is why religion often spills beyond the bounds of conventional practices such as worship and prayer: it shapes choices about where to live, whom to befriend and to marry, how to raise children and where to send them to school, and which profession to pursue. Call these *exercises of religious autonomy*—decisions that religion has a natural tendency to motivate, direct, or organize in the lives of religious believers.

Of course, even if the architectonic nature of religion means that every choice of a religious person is at least potentially an exercise of her religious autonomy, it doesn't follow that every single action of a religious person equally warrants legal protection. But some of those exercises of religious autonomy—which are again, not obligations but still important exercises of religion because of their connection to fostering harmony with the ultimate—are surely hard to replace in an easily acceptable way: in that sense they are more *significant* or *substantial* (such as a choice about our professional path, or where to educate our children, or how to run a business). These kinds of opportunities are different from other exercises of religious autonomy in that they cover a wide swath of significant, decisive undertakings or pursuits that look different than they would if one were *not* in a perceived relationship to an ultimate source, or did *not* have beliefs about what that source asks or requires one to do with respect to other activities (activities in which, again, a believer might reasonably understand that source to be involved, since it is (perceived to be) the source of, ultimately, everything). To be pressured to cut short or give up religion's architectonic direction of one's life in these ways, say by avoiding particular lines of education or work, can leave a religious person seriously deficient in their experience or pursuit of religion overall.

These are also some of the kinds of choices, I want to suggest, that are likely to be substantially burdened by law. In other words, it's not just

40. See MARTIN RIESEBRODT, *THE PROMISE OF SALVATION* 74–76 (2010); CHRISTIAN SMITH, *RELIGION: WHAT IT IS, HOW IT WORKS, AND WHY IT MATTERS* 6–7 (2017).

41. Christopher Tollefsen, *Conscience, Religion and the State*, 54 AM. J. JURIS. 93, 99 (2009); see also Joseph Boyle, *The Place of Religion in the Practical Reasoning of Individuals and Groups*, 43 AM. J. JURIS. 1, 4–6 (1998).

perceived obligations that the law can substantially burden: it's also those significant or substantial exercises of religious autonomy. To put it simply, any adequate protection of religion as a human good (involving pursuit of some kind of harmony with ultimate sources of meaning and value) will have to take into account religion's natural and inherent tendency not only to bind the consciences of believers but also to shape wide areas of the rest of their lives (their education, profession, relationships, etc.).

To draw an analogy that further supports avoiding this second kind of substantial burden, consider that our law and policy frequently accommodate and make room for other goods to extensively organize and structure wide areas of human life—notably, for example, marriage. The reason the law does so, ultimately, is because of the nature and value of marriage itself, which gives it a similarly “architectonic” role: as a cooperative relationship between two people who coordinate across a wide range of activities, a marriage naturally plays that organizing role, and so it can't be fully expressed unless it is given room to play that role. So the liberal state doesn't just avoid compromising the freedom minimally required for living out a marriage at all (by respecting people's freedom to choose their own spouse, out of respect for the consent required to form a valid marriage).⁴² It also protects a wide range of opportunities for marriage to direct people's lives. Allowing couples to get married but then denying them freedom to make any decisions about how they rear their children (a freedom protected, for example, under the Constitution's substantive due process right to direct the education of one's children),⁴³ or what they decide to share with each other but not with other people (a discretion protected in ours and many other liberal regimes by marital privacy rights, including testimonial privileges),⁴⁴ would fail to protect marriage adequately, by ignoring its natural tendency to organize other aspects of life. To respect that feature of marriage, the state needs to protect not just the initial instantiation of marriage (our freedom to choose whom to consent to marry), but also, at least to some extent, its natural expression, which is to regulate many features of the common life shared by those who marry each other.

So too with religion, another relationship in which someone is (or understands herself to be) coordinating with a source or being across a number of spheres: to guarantee sufficient access to this good, the state should protect not only the very beginning of its citizens' pursuit of it (by leaving them free to choose whether to accept a particular religion's set of claims about the ultimate source, and to carry out the strict obligations a relationship to that source might require); it should also protect a wide

42. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

43. See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

44. See, e.g., *Hawkins v. United States*, 358 U.S. 74, 77–78 (1958).

sphere of freedom for religion to continue to do its architectonic work, by shaping many kinds of decisions. To do otherwise is a kind of violation of citizens' substantial religious autonomy (as opposed to their strict obligations of conscience). It interferes with their discretion over the significant contributions that religion makes to their lives; with the organizing role it plays.

Just how wide that sphere needs to be—the kinds of encroachments on this broader sense of free exercise that the state should avoid and which should be subject to strict scrutiny when they arise—should depend, as I've suggested, on whether a law urges citizens to give up a *substantial* opportunity for religion to organize their lives. And "substantiality" in this sense should be judged from within a person's faith tradition. Suppose that as a matter of religion, you consider it very important to be able to preach about your faith, but you have only a slight preference (not a strong one, much less a perceived *obligation*) to evangelize on a quiet neighborhood street in the middle of the night.⁴⁵ That slight preference doesn't entail that neutral and reasonable noise ordinances should be subject to heightened scrutiny when applied to you. By your own religious lights (by hypothesis), your experience of religion won't be substantially worse off if you carry out your evangelizing work in a different way: during the day, during a set period of hours in which noise is permitted. By contrast, when your relationship to an ultimate source leads you to think you have a vocation specifically to devote your life to running a school, or a business, or a charitable organization, according to your religious principles, you might well be substantially worse off in your experience or pursuit of religion if a law urges you to give up *that* form of religious exercise.

In short, even if both the choice to evangelize at *this* time rather than *that* one, and the choice to run a charitable organization along one set of principles (or vision of the good) rather than another, are exercises of discretion, only the second (on the hypothetical facts described above) involves discretion we can reasonably call, for these purposes, *substantial*;⁴⁶ and so, in my view, only burdens on the second would warrant heightened scrutiny.

So by thinking about the nature of religion, we can give courts a better picture of what practices might be capable of being substantially burdened

45. For a similar example, put to different purposes, see Anderson & Girgis, *supra* note 37, at 132.

46. Some would probably argue that this distinction just shifts the focus of judicial decisions about what's a substantial burden, and doesn't get around the Establishment Clause problems that might be inherent to substantial burden analysis. For reasons I explain further in Part III, I think the distinction can withstand that objection. For now, it's worth pointing out that the concept of substantiality is used in many other areas of law, as indeterminate as it often seems. And the point of this Article is to show that we can be much more specific about "substantiality" as it applies to free exercise jurisprudence.

by law: not only religious obligations but also significant or substantial exercises of religious autonomy.

B. What Type of Impact Does the Law Have on Religion?

But to complete the framework, we need the other half of the picture, which the penalty and pressure tests begin to sketch. We need to know the types of impact law can have on religion that could be *substantially* burdensome (as opposed to the light burden imposed in the Toll Booth example). And to answer that question, we need to know what kinds of impact might make religious obligations or substantial autonomy too expensive. I want to propose four possible categories of this kind of substantial impact that law might have on religion. This will help us complete the framework: we will end up with a taxonomy of at least eight different types of substantial burdens that courts could use (two categories of religious exercise times four types of impact the law can have on those kinds of exercise). I’ll then be able to apply this framework in a discussion of past and possible future Supreme Court cases in Part IV.

How do the penalty and pressure tests come into play? The first three categories of impact I’m about to describe are organized around different ways the law can set the cost of religious exercise too high by pressuring people to give it up, sometimes by threatening a penalty, but also, sometimes, by withholding access to a benefit. Substantial burdens in these three categories will meet Helfand’s severe penalty criterion: the material cost they impose on religious exercise will be significant.

The fourth category is one that I’ve already suggested the pressure test leaves out entirely: it captures the total prevention of religious exercise that minority religions and religious prisoners (who don’t face the same range of options as ordinary citizens) are especially likely to experience.⁴⁷

Burdens imposed by laws in these categories, I should also clarify, are *incidental* burdens (side effects of laws that are designed to be neutral and generally applicable—I’m not referring here to laws that burden religion intentionally, with the aim of targeting or discriminating against them). But we should count them substantial, in any given case, when and because they

47. Helfand addresses the objection that his proposed test won’t cover these burdens by arguing that they are even clearer cases of substantial burdens.

In cases like *Lyng* . . . 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 . . . 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.

Helfand, *supra* note 11, at 1805.

make someone's religion costly enough that she is pressured (or forced, in the last category) to become deficient in her experience of it (by failing to carry out her obligations, or a substantial form of religious autonomy). That is the feature they all share that explains why each of them can contribute to a substantial burden on religion.

The first kind of burden, then, we can call "simply punitive." This includes laws that force religious citizens to choose between two options: their religious exercise—whether that's an obligation or substantial religious autonomy—and a criminal penalty or other punishment. One example of a simply punitive substantial burden would be the law at issue in *Employment Division v. Smith*.⁴⁸ That law banned peyote use by religious and nonreligious alike (it was generally applicable), and there was no indication it was motivated by hostility to the members of the Native American religion who consumed it in their worship rituals (so it was neutral in aim).⁴⁹ Still, the law pressured them to give up a substantial form of religious autonomy (discretion over a central element of their worship rituals) by setting as the price of that exercise of their religion a significant criminal punishment: punishment for a felony.⁵⁰

The second kind of burden, which we might label "indirectly punitive," forces citizens to choose from a slightly wider set of options: (a) to violate their religious obligations or their substantial religious autonomy; (b) to accept a criminal or civil penalty; or (c) to accept a significant cost of a third kind, giving up access to a public benefit or entitlement that would otherwise be available to them, including the exercise of *other* civil rights or liberties, such as freedom of movement, speech, or association. The choices in short are religious exercise, legal punishment, or benefit.⁵¹

What kinds of laws might create indirectly punitive substantial burdens? Sabbatarian laws are one plausible example. These would incidentally require a Jewish business to close on Sunday by requiring *all* businesses to close on Sunday, and thereby pressure 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).⁵²

48. 494 U.S. 872 (1990).

49. *Id.* at 878.

50. *Id.* at 874.

51. I'm proposing a much broader conception of "benefits" here: I mean it to cover not just funding, but also the wide range of privileges citizens of liberal regimes typically exercise (e.g., the freedom to own and operate a business according to one's political-moral principles).

52. *See, e.g., Braunfeld v. Brown*, 366 U.S. 599, 601–02 (1961) ("Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion

“Indirectly punitive” laws might also include bans on certain forms of attire in public spaces that would incidentally require some Muslim women to choose among an aspect of religious autonomy (e.g., the choice to wear a *niqab* in public), a punitive sanction, and freedom of movement in certain public spaces.⁵³ Other indirectly punitive burdens might arise from anti-discrimination laws designed to ensure equal access to certain goods or to prevent dignitary harm to certain historically marginalized groups of people. When these laws have the incidental effect of, say, requiring a business owner to provide services that violate her religious conscience, they create another trilemma: the business person must choose among her religious obligations, a fine for non-compliance with the antidiscrimination law applicable to her business, or a surrender of the associational and other interests involved in operating the business.⁵⁴

Third, there are also what we could call “non-punitive” burdens: burdens imposed by laws that are not backed by any punishment at all. This category includes laws that force a choice between someone’s religion (whether obligation or substantial religious autonomy) and access to a public benefit. *Sherbert v. Verner*⁵⁵ presents us with a non-punitive substantial burden. There, Justice Brennan argued for the majority that the EEOC could not refuse Adell Sherbert a significant benefit (unemployment compensation) after she was fired from her job for her refusal to work on Saturday (the day she, as a Seventh Day Adventist, understood to be the Sabbath).⁵⁶ Denying her this compensation, Brennan wrote, “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.”⁵⁷ Another case that suggests a non-punitive substantial burden is *Trinity Lutheran Church of Columbia, Inc. v. Comer*: here, the Court upheld a Lutheran church-affiliated school’s challenge to Missouri’s constitutional prohibition on giving public funds to churches,

because, due to the statute’s compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath.”); *see also id.* at 600 n.1 (quoting the Sabbatarian law at issue in *Braunfeld*).

53. See, for example, written comments from the NGO Liberty in the ECHR case *S.A.S. v. France*, which argued that the burqa ban put some Muslim women to “the agonising choice between remaining at home or removing their veil.” *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 341, 365.

54. This part of the taxonomy I’m developing overlaps with Anderson and Girgis’s view of the burden at stake in *Hobby Lobby*. See Anderson & Girgis, *supra* note 37, at 138–40. Yet I’m arguing that the same trilemma extends beyond cases involving obligations to those involving substantial exercises of religious autonomy.

55. 374 U.S. 398 (1963).

56. *Id.* at 399.

57. *Id.* at 404.

and concluded that the state was required to consider Trinity Lutheran's application for a public grant that would cover the costs of resurfacing the school's playground.⁵⁸ On the framework constructed here, Missouri's exclusion of Trinity Lutheran from consideration could be interpreted as a non-punitive substantial burden because it required the church to choose between substantial religious autonomy (running a school according to its religious principles) and access to a public benefit (state funding). As the Court argued, Missouri's rule "puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution."⁵⁹

Fourth and finally, I want to introduce "preventive burdens." These are burdens on religious obligations or substantial religious autonomy not covered by the pressure test discussed above. People can't choose to opt out of preventive burdens in the way they can choose (albeit at a heavy cost) to opt out of burdens in the first three categories (by violating their obligations or autonomy, by accepting a legal punishment, or by waiving access to a benefit). And because they can't choose to opt out, there is no pressure of the kind central to those other types of burdens: they are simply stopped altogether from exercising their religion in either of the two ways I've specified. As I'll discuss more in Part IV, preventive substantial burdens could include prison policies that fail to accommodate prisoners' religious obligations or substantial autonomy (say in choosing a minister to be present in the execution chamber), or some kinds of prevention of minority religious practices—e.g., road construction that destroys the integrity of land essential to Native American worship.

Distinguishing these four kinds of substantial burdens doesn't prove that they should all fail strict scrutiny analysis (which is required under RFRA for an exemption to be given in the end). All I've shown here is that courts would be required to apply strict scrutiny to laws within these categories that impose substantial material costs on (or entirely prevent) religion (obligations or substantial autonomy), not necessarily that lawmakers or courts would be required to give exemptions from those laws (for again, exemptions won't be required where the law's burdening of religion is the least restrictive means to achieve a compelling state interest).

So to sum up, we now have a developed framework for identifying substantial burdens on religion. I've argued that two types of religious exercise reflect deep and pervasive natural tendencies of religion, and so must be protected if religion as a human good is to be sufficiently protected—and furthermore that law can substantially burden those

58. 137 S. Ct. 2012, 2024 (2017).

59. *Id.* at 2021–22.

exercises of religion by pressuring people to give them up through threat of substantial material costs.

III. WHEN DOES IDENTIFYING SUBSTANTIAL BURDENS ON RELIGION VIOLATE THE ESTABLISHMENT CLAUSE?

So far I’ve sketched a framework that would allow courts to identify substantial burdens on religion, in two steps: first, by determining the type of religious exercise at stake, and second, by asking what kind of impact the law would have on it. But I’ve not yet answered a crucial challenge that some scholars might pose: does evaluating the substantiality of a burden in terms of its particular impact on religion violate the Establishment Clause? In other words, someone might think that the first step—asking whether obligation or substantial religious autonomy is at stake—is a kind of religious substantiality test (outlined in Part I) that the Establishment Clause forbids. Answering that concern here will be useful in two ways. First, it will help us get clearer on just what establishment violations might be at risk in substantial burden analyses—a problem already debated in the legal literature, but which lacks a clear resolution. And second, addressing this objection will show us just how courts might put this framework into practice.

Avoiding establishment violations is the prime motivation for Helfand’s severe penalty test, and more broadly the reason for some scholars’ concern that RFRA’s language invites them. “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,” Helfand writes.⁶⁰ Similarly, Ira Lupu and Robert Tuttle contend that while state agents are permitted to ask questions about whether a particular activity is religious or whether it has “been burdened in some legal sense,” questions “involving the religious substantiality of the burden” are “jurisdictionally off-limits.”⁶¹ “A jurisprudence that propels judges into the evaluation of such questions,” they argue, “is a contra-constitutional excursion into appraising theological questions, as well as an exercise in amateur sociology.”⁶² So we have here at least two establishment-related concerns about judicial efforts to identify substantial burdens according to the type of exercise they impact: (1) that judges are incompetent and/or ill-trained to make that assessment; and (2) that judges are restrained by the Constitution from asking these sorts of questions.

60. Helfand, *supra* note 11, at 1788.

61. Lupu & Tuttle, *supra* note 12, at 1916.

62. *Id.* at 1916–17.

Perhaps the first kind of concern explains the second: the reason the Establishment Clause could be interpreted to prevent judges from asking if a legal burden impacts someone's obligations or her substantial religious autonomy, but not from asking, say, whether it takes too much out of her wallet (as per Helfand's test), is that judges simply aren't equipped by their professional background to decide the first kind of question. Even apart from judicial overreach, though, I think we can articulate at least two further Establishment Clause violations that might be inherent to the framework I've offered, only to see that the framework can withstand all three of them.

The first concern is that asking whether a law has burdened religious obligations or substantial autonomy could lead courts to discriminate among religions. As the Court insisted in *Larson v. Valente*: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."⁶³ One might think judges will be more likely to gauge what counts as an "obligation" or "substantial autonomy" according to their experience or knowledge of mainstream religions, and the protection and accommodation of minority religious practices (which judges might more easily misunderstand) will be more likely to slip through the cracks. Indeed, this kind of concern about the protection of minority religious practices seems to have led Congress to clarify RFRA's language in 1999: responding to the compulsion and centrality standards developed by the lower courts, Congress explained that "the burdened religious activity [under RFRA] need not be compulsory or central to a religious belief system."⁶⁴ And RFRA now defines a "religious exercise" as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."⁶⁵

I highly doubt, however, that the first step of the framework I'm proposing would encourage discrimination of this kind. First, because the point of distinguishing obligation from substantial autonomy is precisely to cover a wider range of practices, including those not part of traditional or mainstream religions, than what the centrality standard protected in its earliest (and all-too-vague) articulation. And second, the framework's specification of religious exercise that can be substantially burdened leaves less room for judicial misunderstanding of (or worse, aversion to) minority religions to bias the analysis.

The second kind of establishment concern one might raise is that by using a religious substantiality test like mine (by asking whether the burdened activity is either an obligation or a substantial exercise of autonomy), courts will end up endorsing a particular view about what a

63. 456 U.S. 228, 244 (1982).

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

65. See 42 U.S.C. § 2000cc-5(7)(A) (2018).

religion teaches, by favoring one interpretation of what a religion requires or invites its believers to do over another. Prior to RFRA’s enactment and the lower courts’ effort to interpret its meaning through the compulsion and centrality tests, a long tradition in judicial interpretation held, as the Supreme Court put it, that “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith.”⁶⁶ Or to take the Court’s opinion in *Lyng*: the majority rejected the dissent’s proposal of “a legal test under which it would decide which public lands are ‘central’ or ‘indispensable’ to which religions, and by implication which are ‘dispensable’ or ‘peripheral,’” as an occasion for the Court to hold “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.”⁶⁷ In other words, the Court rejected the possibility that it would have “to rule that some religious adherents misunderstand their own religious beliefs”—“an approach [that] cannot be squared with the Constitution or with our precedents,” and which would “cast the Judiciary in a role that we were never intended to play.”⁶⁸

Of course, as we saw above, some think that the reason courts shouldn’t play this role is because they are incompetent to do so. Maintaining that courts are incompetent to use a religious substantiality test—in the above framework, a test of whether obligation or substantial autonomy is at stake—sometimes stems from a third kind of establishment worry, which is that it would too thickly entangle government with religion. In cases that would involve “judicial resolution of claims turning on religious doctrine or practice,” Helfand explains, “courts dismiss the plaintiff’s claims because adjudicating the case would entail constitutionally impermissible judicial involvement in the resolution of religious questions.”⁶⁹ And the grounds for this “religious questions doctrine,” though of “ambiguous constitutional origin,” are at least for some judges to be found in the Establishment Clause’s prohibition of “excessive entanglement.”⁷⁰

On closer look, these two establishment concerns about endorsement and entanglement seem to boil down to one deeper problem, which Sheriff Girgis has identified as the primary concern of most of the case law and commentary on this issue: that in trying to determine whether a particular burden is substantial, judges will end up displacing, or second-guessing, the

66. *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). In another decision, the Court maintained that it was not within the sphere of judicial authority to resolve “controversies over religious doctrine and practice.” *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969).

67. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457 (1988).

68. *Id.* at 458.

69. Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 503 (2013).

70. *Id.* at 503 & n.49.

claimant's own view of what her religion requires.⁷¹ And it seems there are several ways judges could do that: they could

- (a) say that a given theological proposition is true (or false, or reasonable, or plausible);
- (b) say that a given religious practice is spiritually valuable (or obligatory, or sinful, or worthless);
- (c) say that Claimant Smith is *wrong* about what her own religion says about (a); or
- (d) say that Claimant Smith is *wrong* about what her own religion says about (b).

Someone might worry that the kind of questioning required by the first step of the above framework—asking if the burden falls on an obligation or substantial exercise of autonomy—necessarily forces judges to take a position on some of these things. But I don't think this kind of second-guessing is needed or even useful. All the first step of my framework requires is that judges decide, based on Smith's presentation of her case, whether Smith *feels* religiously obligated to do the thing the law burdens, or whether she *believes* it would be substantially more spiritually valuable for her to do the thing the law burdens instead of something else.

In this way, I think we can build on Marc DeGirolami's suggestion that "[t]here can be no evaluation of the substantiality of a burden without some understanding of the place . . . or comparative importance of the exercise at issue within a religious system."⁷² DeGirolami suggests that substantial burden analysis requires deferring to the claimant on whether the burdened exercise is more central or peripheral (and accordingly of greater or lesser significance) within the claimant's "system of religious belief."⁷³ Obligations and substantial forms of religious autonomy are likely to occupy a more central place or greater importance within religious traditions—as indeed the lower courts seemed to think in the early years after RFRA's enactment.⁷⁴ I've argued that the centrality standard in those decisions reflects a deeper insight from the courts: namely, that respect for the good of religion requires protecting its distinctly fragile and architectonic role in human life, which tends to play out in the two forms of exercise I've described. It's not the centrality or weight alone of a religious exercise, but rather the *form* of exercise that it is (obligation or religious

71. Sherif Girgis, *More Fragile, Even if Not More Worthy: A New Defense of Religion's Special Constitutional Protection* (unpublished manuscript) (on file with author).

72. DeGirolami, *supra* note 14, at 21.

73. *Id.*

74. *See supra* Part I.

autonomy, both of which will tend to be central or important in many religious systems), that should help courts identify substantial burdens.

In fact, in implementing the framework I’ve constructed, I think courts could adopt both parts of it by following something like Flanders’s proposal (which we considered but ultimately rejected in Part I). In their analysis, courts should first ask what type of religious practice the burden impacts, but defer to claimants—take them at their word—on whether that practice is truly an obligation or a form of substantial religious autonomy. They can interpret, based on things the claimant says about the exercise in question, whether it falls into the general categories of obligation or substantial autonomy, but they cannot take a view about whether the exercise is in truth required, or reasonable, or architectonic, or about whether the claimant has wrongly interpreted his religion’s position on any of those things. Then, courts should require claimants to meet something like Flanders’s “bare burden requirement,”⁷⁵ but with broader parameters. Claimants should have to show that the law substantially impacts their religious exercise (either of the two kinds I’ve described), in one of the four ways I’ve presented: as the kind of pressure at stake in simply punitive, indirectly punitive, or non-punitive burdens or more broadly the kind of deprivation at stake in preventive burdens.

We now have better clarity on the possible establishment violations at risk in judicial evaluation of substantial burdens, and reason to think the framework proposed here would avoid them. What remains is a more thorough application of this framework to past and possible forthcoming religious liberty cases at the Supreme Court.

IV. THE FUTURE OF SUBSTANTIAL BURDEN ANALYSIS UNDER RFRA AND THE FIRST AMENDMENT

Now, finally, how would this framework help us interpret not only the language of RFRA but also—as the Court decides whether to reconsider its decision in *Smith*—the scope of the First Amendment’s protection of free exercise? Some of the cases given as examples in Part II already show us how we might apply the categories sketched above. Here I’ll show at greater length how it might have shaped the Court’s analysis of burdens on religion, both in past cases and some that might come before the Court in the near future.

Let’s start with a case that divides other methods for identifying substantial burdens that I discussed in Part I (from Helfand and Flanders): *Lyng*. There the Court decided to uphold state road construction through

75. See *supra* note 29 and accompanying text.

lands integral to Native American worship.⁷⁶ On the expanded framework developed here, the state imposed a *preventive burden on a substantial exercise of religious autonomy*. Native American worship doesn't share the contours of monotheistic religions: it doesn't carry identical concepts of sin and obligation and atonement. But preservation of land that Native American tribes held sacred would protect a significant opportunity for religion to organize and direct their lives: a substantial exercise of religious autonomy. The integrity, and more basically the adequacy, of their whole religious experience is entirely shaped by the land's preservation.⁷⁷ The majority in *Lyng* overlooked this: it argued that because the state's road construction didn't pressure Native Americans into violating any of their beliefs (as I would put it, in any of the first three ways described in Part II), there was no significant burden that needed relief.⁷⁸ But as DeGirolami succinctly puts it: "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."⁷⁹ Indeed, the essential importance of land to Native Americans' religious experience certainly renders destroying the land's integrity (absent a compelling state interest that can only be preserved by its destruction) a preventive burden. So the state's prevention of their ability to exercise their religion altogether should have been counted a substantial burden, and subject to strict scrutiny accordingly.

Another case the Court might look to to determine the meaning of a substantial burden under the First Amendment would be its decision in *Burwell v. Hobby Lobby*.⁸⁰ There a Christian family's ability to continue operating its retail arts and crafts business according to the family members' religious convictions (specifically, by offering employee health insurance plans that do not cover the cost of certain abortifacient contraceptives) was conditioned on their paying a fine of up to \$475 million dollars a year.⁸¹ So the Greens, on this framework, faced an *indirectly punitive burden on a religious obligation*: the HHS mandate created a trilemma for them between violating their conscience (either by providing insurance coverage for contraceptives that could cause early abortions or dropping insurance coverage for their employees altogether); paying a fiscally crippling fine for

76. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

77. *Id.* at 451 ("[W]e have no reason to doubt[] that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. . . . According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible.").

78. *Id.* at 449.

79. DeGirolami, *supra* note 14, at 23.

80. 573 U.S. 682 (2014).

81. *Id.* at 691.

not complying with the mandate; or waiving their right to exercise another basic democratic freedom—of association, in running a business.

The Court’s majority seemed to adopt this reading of the burden and subjected the mandate to strict scrutiny analysis.⁸² The Greens, it suggested, could only experience the associational benefits available to other citizens of incorporating their business if they either violated their religious beliefs in providing insurance coverage for abortifacient contraceptives, *or* violated their religious duty to provide their employees insurance plans in the first place by dropping insurance plans altogether. Analogizing the Greens’ burden to the one faced by Orthodox Jewish owners of small retail businesses in *Braunfeld v. Brown*, which challenged Pennsylvania’s requirement that businesses stay closed on Sunday (the owners already closed their stores on Saturday in keeping with their Sabbath), the Court argued that requiring the Greens to provide contraceptive coverage simply because they are an incorporated business would be like telling the Jewish merchants that by incorporating their small retail businesses, they must give up their rights to religious liberty protection (including an accommodation from laws requiring Sunday closure for businesses).⁸³ “According to HHS,” the Court reasoned, “if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights.”⁸⁴ “HHS would put these merchants to a difficult choice,” it continued: “either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.”⁸⁵

The Court accepted the state’s argument that the mandate served compelling interests in “guaranteeing cost-free access to the four challenged contraceptive methods,” but ruled that the mandate did not pursue those interests in the least restrictive way—the burden on religious exercise was unnecessary for the achievement of those interests.⁸⁶ In short, the Court’s mode of substantial burden analysis in this recent RFRA case offers a template for how that same kind of analysis might proceed under the First Amendment, if *Smith* is fully overturned.

The framework I’ve proposed could also broaden the scope of prisoner religious liberty rights. Because prisoners don’t face the same range of options as other citizens, they can’t be said to experience pressuring burdens (simply punitive, indirectly punitive, or non-punitive). To return to the case at the Article’s opening, prisoners like Murphy on death row aren’t going

82. *Id.* at 719–20.

83. *Id.* at 705–06.

84. *Id.* at 706.

85. *Id.*

86. *Id.* at 728.

to suffer a *penalty* for having a minister of their choosing in the death chamber, and they're not going to give up some *benefit* in exchange for practicing their religion. So burdens on their religion will tend to be preventive ones. Indeed, on this framework, prison limits on the denominations that can be present in the death chamber are likely to impose a *preventive burden on a substantial exercise of religious autonomy*—at least for a number of religions that specify the importance of having a minister present at one's passing (in Murphy's case, it's something close to a requirement for his rebirth in the Pure Land). So in deciding prisoners' religious liberty claims, courts could require them to show that a prison policy or requirement completely prevents or deprives them of an opportunity to fulfill an obligation or organize their lives substantially according to their religion. They should defer to prisoners, as I argued in Part III, on whether the type of exercise at stake is truly an obligation or a substantial exercise of autonomy.

Indeed, that deference and understanding of burdens on prisoners' free exercise is exactly the direction tentatively recommended by Justice Alito, who dissented from Murphy's stay on procedural grounds. While Justice Kavanaugh presented the stay as a remedy for religious discrimination (inherent in the prison's practice of allowing Muslim or Christian ministers in the chamber but not Buddhist ones), Alito suggested that Murphy might have a stronger case that the policy *substantially burdened his religion*. He noted that Murphy "raises serious questions" not only under the Establishment Clause but also RLUIPA.⁸⁷ For Murphy's RLUIPA claim to succeed, Alito suggested, he "would have to show at the outset that excluding Rev. Shih [his preferred Buddhist adviser] would impose a substantial burden on his exercise of religion."⁸⁸ And crucially, Alito recognized that to do this, Murphy would have to show that laws can substantially burden religion *even when* they do not force citizens to violate strict obligations of conscience: "We [the Court] have not addressed whether, under RLUIPA or its cousin, the Religious Freedom Restoration Act of 1993 (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."⁸⁹ He continued, while past cases such as *Hobby Lobby* considered "regulations that compel an activity that a practitioner's faith prohibits," and some Justices "have been reluctant to find that even a law compelling individuals to engage in conduct *condemned by their faith* imposes a substantial burden, . . . a majority of this Court has held that it is not for us to determine the *religious* importance or rationality of the affected

87. Murphy v. Collier, 139 S. Ct. 1475, 1482 (2019) (Alito, J., dissenting).

88. *Id.* at 1484.

89. *Id.*

belief or practice.”⁹⁰ On this basis, Alito ultimately found his way to concluding, albeit tentatively,

it may be that RLUIPA and RFRA *do not allow a court to undertake for itself the 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.”⁹¹

So Alito’s dissent actually pushes us quite clearly in the direction recommended by this framework. For he recognizes, on the one hand, the limits of a compulsion or centrality test to capture a sufficient range of substantial burdens people might experience on their religion; and he also sees, on the other, that judges are limited in their ability to carry out such tests. I’ve shown that we can solve both of these problems: first by broadening—and then specifying—both the kinds of religious exercise that we think can be substantially burdened at all, as well as the kinds of legal impact that might significantly burden religion. And second, by requiring judicial deference to claimants on the type of exercise at stake—by limiting judicial “tests” of substantial burdens to asking claimants to show that the law impacts their religion in one of four specific ways I’ve traced.

Finally, to take a case that directly invites the Court to overturn *Smith*: *Ricks v. State of Idaho Contractors Board* is a case pending before the Court (at the cert review stage) in which George Ricks, an independent construction contractor, has objected on religious grounds to providing his Social Security number in his mandatory license registration with the State of Idaho.⁹² Ricks believes, on his understanding of the Bible, that “it is morally wrong to participate in a governmental universal identification system, especially to buy or sell goods and services.”⁹³ In his petition to the Court, Ricks argued that the state has wrongly put him to a choice between full time work to provide for his family and practicing his religion. In making that case, he is challenging *Smith*’s holding that neutral, generally applicable laws—such as Idaho’s regulation requiring independent contractors to register with the state—don’t require exemptions for burdens on religious exercise. So, if the Court were to hear Ricks’s case and reverse its decision in *Smith*, it would have to decide whether the regulation substantially burdens Ricks’s faith in the relevant sense.

90. *Id.*

91. *Id.* (emphasis added) (emphasis omitted).

92. *Ricks v. State of Idaho Contractors Bd.*, 435 P.3d 1 (Idaho Ct. App. 2018), *petition for cert. filed*, (U.S. July 10, 2019) (No. 19-66).

93. *Petition for a Writ of Certiorari at 7, Ricks*, 435 P.3d 1 (No. 19-66).

On the framework I've sketched here, the answer is yes: Ricks is experiencing a substantial burden on his religion because the regulation imposes a *non-punitive burden on an obligation of conscience*. It creates for him a dilemma between violating his conscience (by providing his SSN) and exercising a standard privilege of liberal democratic citizenship—to seek full-time employment. There's no legal or civil penalty Ricks will suffer for refusing to provide his Social Security number, but he'll have to give up the benefit of full-time work if he wants to continue his employment.

The same analysis might apply to an older, pre-*Smith* case involving Native Americans' objection to the use of Social Security numbers. In *Bowen v. Roy*, two Native American parents objected first, to the mandatory provision of their daughter's Social Security number in an application for a government benefits program, and second, to the government's use of her number in administering the benefits.⁹⁴ The first requirement, on this new framework, could also be construed as a *non-punitive burden on an obligation of conscience*: it asks the parents to choose between violating their conscience (by providing their daughter's SSN) or a government benefit (financial aid for families with children, and food stamps). But the government's use of their daughter's number does not seem to be a substantial burden covered by the framework, because there isn't any religious exercise on the part of the parents or their daughter that the government's use of the number either pressures or prevents.

So there are at least several kinds of burdens on religion that the framework would *not* treat as substantial: (a) cases like *Bowen*, where there's no religious exercise the law can be said to burden; (b) cases like the *Communion Wine* example, where the kind of exercise ruled out is insignificant by the religion's own criteria; and (c) cases like the *Toll Booth* example, involving an incidental, minimal material cost to religious exercise (i.e., one not designed to target or discriminate against that exercise).

In sum, we can see that the framework constructed in this Article could be applied to a wide range of religious liberty cases at the Court. I've suggested how the Court might interpret the burdens implicated in the above cases by telling us both how we might understand the religious exercise at stake and the law's likely impact on it. But to avoid the establishment problems discussed in Part III, it would be important in every case for the Court to defer, ultimately, to the claimant on whether the burdened activity is an obligation or substantial exercise of religious autonomy.

94. 476 U.S. 693, 699 (1986).

CONCLUSION

The Supreme Court has never needed as much as it does now a clear method for identifying substantial burdens on religion. The framework I’ve sketched here categorizes substantial burdens into four types of legal impact on two kinds of religious exercise. These kinds of burdens are all substantial because they all seriously undermine religion, understood as a human good that is uniquely fragile and architectonic. Whether it reconsiders its decision in *Smith* and/or tries to interpret more clearly the meaning of a substantial burden under RFRA, the Court could apply this framework to many forthcoming religious liberty cases.

The framework also has implications for religious liberty cases under other liberal constitutional regimes. In Europe, for example, bans on wearing the hijab or religious symbols in courts or schools or even some kinds of public places could be understood as indirectly punitive burdens: they force Muslims and other religious citizens to choose between giving up their religious autonomy (or violating their conscience), a legal penalty (such as a fine or civic education classes), and full freedom of movement and participation in liberal plural societies.

It’s worth addressing here a final question that might sooner or later loom large for the framework’s application: what about secular claims of conscience? It hasn’t been my goal here to argue that RFRA’s definition of religion should be expanded to cover these claims. But if it were expanded, or if the Court reverses *Smith* and then hears a case about an exemption for a secular conscience claim, we might ask ourselves whether the proposed framework would apply (assuming, of course, that the Court would decide in that case that the Free Exercise Clause covered such claims).

I think it would apply. We could use the framework to assess whether burdens on secular conscience claims are costly enough in any of the four ways I’ve sketched. The analysis, of course, could not reliably predict the outcome of these cases, for it doesn’t tell us how courts should apply the test of strict scrutiny against the burdens they present. Indeed, the possibility of secular substantial burden claims drives home that the framework I’ve proposed has only been designed to help courts narrow in on truly substantial burdens, not to determine whether those burdens require exemptions. That is a much bigger question that remains largely unresolved in the legal literature, because we need a more comprehensive method that would tell us not only how to identify substantial burdens, but also how to gauge compelling state interests and least restrictive means. But perhaps the Court’s reversal of *Smith* would be just the sort of impetus we’d need to finally settle that debate.