THE SUBSTANTIAL BURDEN PUZZLE

*Michael A. Helfand**

I. INTRODUCTION

When is a burden "substantial"?** This question stands at the center of recent clashes between law and religion, testing the scope and application of the Religious Freedom Restoration Act (RFRA).[1] RFRA prohibits federal law from "substantially burden[ing] a person's exercise of religion," unless doing so is the "least restrictive means of furthering [a] compelling governmental interest."[2] Unfortunately, the text and legislative history of RFRA provide limited guidance for evaluating substantiality.[3] As RFRA affords protection only against "*substantial* burdens" on religious exercise, articulating a methodology for evaluating substantiality has become the central question in many of the most important court battles over religious liberty.

Indeed, arguments over what constitutes a substantial burden have emerged as a recurring issue in the ongoing litigation over the Affordable Care Act's so-called contraception mandate, which would have otherwise required companies to include certain forms of contraception in their employee's insurance coverage.[4] The substantial burden question stood as maybe the central issue in the Supreme Court's 2014 landmark decision, *Burwell v. Hobby Lobby*, where the Court concluded that, pursuant to RFRA, a requirement to provide such contraception coverage constituted a *substantial* burden.[5]

This substantial burden question emerged once again in *Zubik v. Burwell*,[6] yet another challenge to the contraception mandate, which the Court decided earlier this month. In *Zubik*, religiously motivated non-

* Associate Professor, Pepperdine University School of Law; Associate Director, Diane and Guilford Glazer Institute for Jewish Studies.

** This question is also discussed in the full version of this article, which is forthcoming in Michael A. Helfand, Identifying Substantial Burdens, 2016 U. Ill. L. Rev. (forthcoming Aug. 2016), *available at* http://ssrn.com/abstract=2728952.

1. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
2. 42 U.S.C. § 2000bb–1(b) (2012).
3. *See, e.g.*, Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996).
4. *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2775–83.
5. *Id.*
6. *See* Transcript of Oral Argument at 10–11, 14–15, Zubik v. Burwell, 136 S. Ct. 891 (2016) (No. 14-1418).

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

The Court, however, instead of deciding the case on the merits,[9] vacated the decisions before it and remanded them to the federal courts of appeals. In so doing, the Court took the extraordinary step of indicating a strong desire for the parties to compromise, stating, "the parties on remand should be afforded an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"[10] While the spirit of compromise is laudable, the Court's decision left the "substantial burden" question unanswered, leaving it to the federal courts of appeals to decide the question on remand.

So how should the courts determine whether a law has imposed a burden on religious exercise that is *substantial*? Can claims of attenuated complicity in conduct believed by plaintiffs to be sinful—like those at stake in debates over the contraception mandate cases—satisfy RFRA's standard? During oral argument, the justices in *Zubik* repeatedly questioned the parties on how a court should draw the line between substantial and insubstantial burdens—and did not appear to receive a clear answer.[11]

In response to such claims, some judges and scholars have criticized broad judicial acceptance of substantial burden claims under RFRA in a number of ways. Some have argued that courts cannot simply defer to the assertion of claimants that they have experienced a substantial burden.[12] And it is precisely such deference, they argue, that is being granted to RFRA claimants when courts refuse to evaluate how much of a religious burden the law imposes. Others have focused on the text of RFRA,

7. Zubik v. Burwell, No. 14-1418 (argued Mar. 23, 2016).

8. *See* Geneva College v. Sec'y U.S. Dep't. of Health & Human Servs., 778 F.3d 422, 435 (3d Cir. 2015).

9. Zubik v. Burwell, 578 U. S. ____ (2016) (slip op. at 4–5) ("The Court expresses no view on the merits of the cases. In particular, the Court does not decide whether petitioners' religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.").

10. *Id.*

11. Transcript of Oral Argument at 10–11, 14–15, 22–23, Zubik v. Burwell, 136 S. Ct. 891 (2016) (No. 14-1418).

12. *See, e.g.*, Abner S. Greene, *Religious Freedom and (Other) Civil Liberties*, 9 HARV. L. & POL'Y REV. 161, 180 (2015); Samuel J. Levine, *A Critique of* Hobby Lobby *and the Supreme Court's Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 31 (2015).

emphasizing that courts are required by the statute to evaluate substantiality and thereby differentiate between different degrees of substantiality when applying RFRA.[13] Thus, judicial failure to interrogate the religious implications of a law—and the extent of the burden it imposes—is to fail in the application of RFRA by its terms.

What all of these arguments boil down to is the following: we cannot simply treat all religious burdens equally. The purpose of RFRA is to protect against *substantial* burdens; insubstantial burdens are not sufficiently worrisome to justify a mandatory religious exemption. Accordingly, courts must only allow a RFRA claim to go forward after it has determined that the religious consequences of a law are, in fact, substantial.

The problem with this sort of line-drawing—that is, interrogating the religious substantiality of conduct on a theological metric—is that it would seem to run afoul of core Establishment Clause prohibitions. As the Supreme Court noted in *Thomas v. Review Board*, "it is not for us to say that the line [Petitioner] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ."[14] Similarly, it was precisely this sort of line drawing that led the Court in *Employment Division v. Smith* to adopt a more narrow reading of the Free Exercise Clause: "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'"[15] And it was this skepticism of theological line drawing that also motivated Congress when it subsequently clarified RFRA's substantial burden standard: "[T]he burdened religious activity need not be compulsory or central to a religious belief system as a condition for the claim."[16]

Importantly, to interpret RFRA to require such an inquiry into the theological substantiality of legal burdens would likely lead to gross inequalities in application. Courts are predisposed to favoring religious majorities, whose religious practices are more well-known and respected, as opposed to religious minorities, whose religious practices are more obscure.[17] Under a regime where courts evaluate the theological substantiality of religious burdens, the impact of laws on religious minorities is likely to be underestimated and underappreciated, unfairly circumscribing

13. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting); Caroline Mala Corbin, *Closing Statement: Sincere Is Not Substantial and a Corporation Is Not an Orchestra*, 161 U. PA. L. REV. ONLINE 278, 279 (2013).

14. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

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

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

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

the protections afforded by RFRA.[18] As I have noted elsewhere, such a result would be the height of irony as it would invert RFRA's core commitment to protecting religious minorities.[19] As the Supreme Court emphasized, it is for this reason that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim."[20] To do so would amount to government allocating legal burdens on the basis of which religious claims it found more appealing, more important—and potentially more in keeping with its own notions of morality and ethics.

But, if this is true, what tools do courts have to differentiate between *substantial* burdens and just plain old generic burdens? The answer is two-fold.

II. EVALUATING THE SUBSTANTIALITY OF CIVIL SANCTIONS

The protections of RFRA are, according to the statute, only available where the law imposes a substantial burden. But if the Establishment Clause prohibits courts from evaluating the theological impact of a law on religious exercise, how can courts determine whether a burden is truly substantial? The answer, in short, is that courts should evaluate not theological substantiality, but the substantiality of civil sanctions.

To see how this works, consider the full structure of a substantial burden claim, starting with the text of RFRA: "Government shall not substantially burden a person's exercise of religion . . . ."[21] Claims of substantial burden must, of course, be sincere; without sincerity, no claim under RFRA can go forward.[22] The text of RFRA provides little in terms of guidance regarding the definition of "substantial."

This raises the following question: what *type* of burden qualifies as a substantial burden? Or put differently, what is the metric courts use when evaluating whether a burden is substantial? In theory, one way to do so is by determining whether a law substantially burdens a person's religious exercise. Along these lines, a court might investigate the importance or centrality of a particular religious practice within the grand scheme of their religious theology or doctrine. As argued above, doing so in the context of RFRA would run afoul of fundamental Establishment Clause principles, drawing courts into impermissible questions of theology.[23]

On the other hand, to determine whether a law substantially burdens a person's religious exercise, a court might consider whether, by en-

18. *Id.*

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

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

21. 42 U.S.C. § 2000bb-1(a) (2012).

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

23. *See supra* notes 11–17 and accompanying text.

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

To appreciate the distinction between these two approaches, consider the following two examples. Imagine if Congress enacted a law similar to the proposed, and failed, 2011 San Francisco circumcision ban, which prohibited the "circumcis[ion] . . . of the foreskin, testicles, or penis of another person who has not attained the age of 18 years."[24] As the penalty for engaging in the religious ritual of circumcision, the ban proposed "a fine not to exceed $1,000" and/or "imprisonment in the County Jail for a period not to exceed one year."[25] Now, if Congress were to enact such a law, its survival would quite possibly hinge on whether the law violated the provisions of RFRA.[26] And employing RFRA as a defense, a claimant would first need to establish that the law *substantially* burdened his religious exercise.

One way of expressing the substantiality of the burden would involve evaluating the importance of circumcision in both Jewish and Islamic theology—and how failure to circumcise a male child might thereby *substantially* burden the parent's exercise of religion. Another way of establishing the substantiality of the burden would require evaluating whether a fine of $1,000 and/or being imprisoned for a up to a year is a sufficiently grave sanction and therefore a *substantial* burden on a person's religious exercise.[27] Thus, a court would have two alternative metrics for determining whether a burden is substantial. The first focuses on the substantiality of the theological obligation; the second focuses on the civil consequences triggered by the relevant religious exercise.

24. *See San Francisco MGM Bill*, MGMBILL.ORG, http://www.mgmbill.org/san-francisco-mgm-bill.html (last visited Apr. 28, 2016) (website advocating for bill).

25. *Id.*

26. *But see* Order Granting Writ of Mandate, Jewish Cmty. Relations Council v. Arntz, No. CPF-11-511-370, at 2–3 (S.F. Cnty. Super. Ct. Apr. 6, 2012) (holding, in the alternative, that the proposed San Francisco Circumcision Ban violated even the post-*Smith* interpretation of the Free Exercise Clause).

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

Importantly, not only does each inquiry focus on a different metric of substantiality, but they also appear to have different underlying objectives. The purpose of focusing on the theological or religious substantiality of a burden is to ensure that not all religious burdens allow individuals to avoid the demands of otherwise valid laws. On this interpretation, the purpose of RFRA is to ensure that certain forms of religious exercise—those that are particularly important to an individual's theology or religious worldview—are shielded from legal burdens. By contrast, RFRA should not provide protection against laws that restrict less important forms of religious exercise, those that are not particularly important as a matter of religious practice or theological commitment. In turn, we might conclude that a law prohibiting the circumcision of male minors constitutes a substantial burden, but only because of the importance of the ritual to the relevant religious groups. Laws prohibiting religious exercise might not be deemed by a court to be sufficiently theologically significant to qualify as a substantial burden.

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

Because there are two different methods and metrics for evaluating substantiality, concluding that courts cannot evaluate the theological or religious substantiality of a burden does not mean—at least in the typical run of cases[28]—that there is no alternative metric available for courts to evaluate the substantiality of a burden. Courts can evaluate substantiality by examining whether a person's religious exercise will trigger significant civil taxes or sanctions, thereby imposing a substantial burden on that religious exercise.

28. For some cases deviate from the typical pattern. *See* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. (forthcoming Aug. 2016), *available at* http://ssrn.com/abstract=2728952, at Part IV.B.

Consider, as an example, the current litigation over Form 700 and the Affordable Care Act's process of self-certification.[29] Motivated by the Establishment Clause argument outlined above, a court might conclude that evaluating the theological substantiality of the burden imposed by filling out Form 700 would constitute the type of impermissible religious inquiry prohibited by the First Amendment.

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

Accordingly, arguments that see prohibiting judicial inquiry into the theological substantiality of burdens as tantamount to either simply deferring to the assertions of the plaintiffs or as ignoring RFRA's requirement to assess the substantiality of the asserted burden miss the mark. To assess substantiality, courts should determine whether engaging in religious exercise will, in fact, lead to the imposition of civil penalties that are substantial. By engaging in that inquiry, courts can avoid simply deferring to the assertions of plaintiffs without abdicating their statutory obligations under RFRA.

III. EVALUATING THE SINCERITY OF SUBSTANTIALITY CLAIMS

One of the challenges of focusing solely on the civil consequences for engaging in religious exercise is that doing so would seemingly allow parties to allege burdens on the basis of obviously false factual claims. Thus, if courts avoid evaluating the internal theological logic of a substantial burden claim, parties seeking religious accommodations can claim laws impose a substantial burden in ways that fly in the face of conventional scientific knowledge. In turn, foreclosing theological inquiry into a plaintiff's assertions of substantial burden would appear to require granting significant judicial deference when evaluating a RFRA claim.

Caroline Mala Corbin has raised this concern in the context of the contraception mandate, arguing that courts cannot ignore science,[30] and emphasizing that "[p]eople are entitled to their own religious beliefs but not to their own facts. Blatant distortions of science ought to be rejected outright."[31] According to Corbin, it is scientifically implausible to con-

29. *See e.g.*, Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10th Cir. 2015), *cert. granted in part*, 136 S. Ct. 446 (2015).

30. Corbin, *Closing Statement*, *supra* note 11, at 280.

31. Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175, 1177 (2014).

clude that the contraceptives at stake in the *Hobby Lobby* litigation cause an abortion;[32] and if so, then the claim that providing contraceptive insurance substantially burdens religious exercise is predicated on the falsehood that those contraceptives in reality cause abortions. Similarly, Amy Sepinwall has argued that courts cannot grant religious accommodation claims on the basis of scientifically false assertions.[33] To do so, argues Sepinwall, "would commit us to a life of irrationality."[34]

But why should this be so? The entire enterprise of religious accommodations is predicated on providing some degree of protection to religious exercise from the imposition of substantial burdens. Religious exercise—and the beliefs that motivate it—quite often do not meet scientific standards of truth. The practices are, in the end, motivated by faith in a variety of propositions. And the fact that the law grants some degree of protection for religious practices is because faith-based claims regarding reality are deemed worthy of insulation from some forms of legal regulation. It is therefore the *sincere experience* of a substantial burden on religious exercise—not *scientific evidence* of a substantial burden on religious exercise—that RFRA protects. Otherwise, it seems likely that no claims for religious accommodations could assert the existence of a substantial burden. Taken to its logical conclusion, claims for religious accommodation typically presuppose the existence of a deity—an assertion that most likely cannot be justified using standard scientific methods of proof.[35]

Indeed, this fundamental feature of religion is what has led Brian Leiter to conclude that "[r]eligious beliefs, in virtue of being based on 'faith,' are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science."[36] The very nature of religion, according to Leiter, is that it requires embracing assertions that do not satisfy standard scientific methods of proof.[37] And it is because of this quality that the Supreme Court has concluded that the truth or falsity of a theological claim cannot serve as the basis for allocating legal burdens—to do so would be to impose legal burdens on the basis of an inquiry that is "beyond the ken of mortals."[38] In addition, to allow scientific error to undermine claims of substantial burden is to miss the way in which religious claimants often experience substantial burdens on their religious practice, even as science would encourage them to view the world otherwise.

32. *Id.* at 1197–200

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

34. *Id.*

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

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

37. LEITER, *supra* note 34, at 33–36.

38. United States v. Ballard, 322 U.S. 78, 86–87 (1944) (describing these inquiries as "beyond the ken of mortals").

This is not to say that all factually fantastic religious claims should be treated equally with respect to the substantial burden inquiry. As religious accommodation claims assume facts that are increasingly outlandish—veering further and further away from commonly held scientific truths—courts might reasonably begin to wonder whether the claim is truly sincere. For example, consider the following hypothetical posed by Judge Judith Rogers during an oral argument, which tweaks the facts of *Thomas v. Review Board*, a case in which the Supreme Court addressed the claims of a Jehovah's Witness who objected to working for a company that produced sheet metal for weapons:

> Would it have been open to the Court to have found that in fact, as a matter of fact, the munitions factory for which it worked was not supplying arms for the war, that in fact it was supplying gadgets for tractors used on farms? Could the Court have examined whether his statement about what his employer was doing was correct?[39]

In such a case, granting the factual assertions of the claimant would seem absurd. But what makes it absurd is not the fact that he is factually incorrect, but that it seems highly implausible that the claimant—faced with the actual facts—can still maintain the sincerity of his claim that he is being substantially burdened. Of course, if a claimant can overcome this implausibility by convincing a court that his belief in the final destination of the produced metal is as plausibly sincere as a claim in the existence of a particular deity, then the claim should be allowed to proceed.

In this way, courts should respond to substantial burden claims not by interrogating their theological basis, but with an increased skepticism of sincerity. In turn, courts can evaluate the sincerity of religious beliefs in order to ensure that the constitutional and statutory protections afforded to religion are not being abused by fraudulent claimants. And, as a result, the more considerations courts can incorporate into their sincerity analysis, the better courts can serve as gatekeepers, ensuring the overall integrity of a religious accommodations regime. But the relative "truth" of a religious belief—as it compares to widely held scientific beliefs—should not serve as a basis for concluding that a claim for religious accommodation should fail on the ground that the burden in question is insubstantial.

39. *See* Leslie C. Griffin, *A Tractor Is Not a Gun, Even If You Sincerely Believe It Is*, HAMILTON AND GRIFFIN ON RIGHTS (May 18, 2014), http://hamilton-griffin.com/a-tractor-is-not-a-gun-even-if-you-sincerely-believe-it-is/ (quoting from oral argument for Thomas v. Review Bd., 450 U.S. 707 (1981)).