A PROXY FOR PIETY: A CLOSER LOOK AT RELIGIOUS COST IN THE SUBSTANTIAL BURDEN INQUIRY

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This Comment discusses whether the Establishment Clause and "religious question" doctrine prohibit courts from considering the subjective religious harm suffered by free exercise claimants when determining if laws impose a "substantial burden" on the claimant, as defined by the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). It explores a dilemma that courts are presently facing. They must choose either to wade into constitutionally perilous theological debates to decide cases on their merits, or to defer to free exercise claimants on their own assertions of substantial burden and risk swallowing up the law with politically fraught religious exemptions. This Comment discusses the work of leading scholars and evaluates their positions using formal logic to determine how courts might best resolve this conflict. Ultimately, this Comment concludes that judicial evaluation of claimants' religious cost by a secular "proxy concept" permits the courts to

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rule on the merits of free exercise claims without jeopardizing constitutional adherence.

INTRODUCTION

What happens when the laws of civil society threaten to upend and destroy a religious practice? In the United States, the Religious Freedom Restoration Act[1] (RFRA) and the Religious Land Use and Institutionalized Persons Act[2] (RLUIPA) grant exceptions to generally applicable, neutral laws that "substantially burden a person's free exercise of religion."[3] Courts, however, struggle to discern what constitutes a substantial burden on religious exercise. Courts have distinguished between "religious cost," meaning the moral harm of violating one's religious precepts, and "secular cost," meaning government-imposed sanctions triggered by religious adherence.[4] Judges know that, if they probe too deeply into theological disputes, they risk running afoul of the religious question doctrine, the constitutional principle that prohibits courts from deciding questions of a religious nature.[5] In the last decade, the U.S. Supreme Court has avoided contemplation of religious cost in the context of substantial burden litigation.[6] Scholars worry that when courts defer to claimants' subjective assertions of substantial burden in this way, claimants are likely to frame any burden as "substantial," even those that clearly do not constitute significant moral or spiritual burdens.[7] Courts therefore have a hard choice. Either they can emulate the Supreme Court in judging these cases with a blind eye to the religious cost, or they can try to engage with the material religious questions and risk running up against the Establishment Clause.[8] In support of the latter option, legal theorists have proposed various ideas for reincorporating the discussion of religious cost into the substantial burden inquiry without causing constitutional violations.[9]

Part I of this Comment describes the substantial burden inquiry, the religious question doctrine, and the concept of religious cost. Subsequently, Part II introduces the arguments for and against the incorporation of religious cost in the substantial burden inquiry and discusses the strengths and weakness of the "proxy concept" and "doctrinal consistency" approaches, respectively. Ultimately, in Part III, this Comment concludes that only the "proxy concept" approach can both meaningfully limit the power of claimants to manipulate the substantial burden inquiry and avoid violating the religious question doctrine.

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1. 42 U.S.C. §§ 2000bb to 2000bb-4.
2. *Id.* §§ 2000cc to 2000cc-5.
3. *Id.* § 2000bb-1(a); *see also id.* § 2000cc(a)(1).
4. *See infra* Part I.
5. *See infra* Part I.B.
6. *See infra* Part I.C.
7. *See infra* Part II.
8. *See infra* Part II.
9. *See infra* Part II.B.

I. SUBSTANTIAL BURDENS AND THE RELIGIOUS QUESTION DOCTRINE

A. Substantial Burdens on the Free Exercise of Religion

The Free Exercise Clause of the First Amendment guarantees that the government will not make any law "prohibiting the free exercise" of religion.[10] The framers of the U.S. Constitution drafted the Free Exercise Clause to protect the right of individuals to believe and worship as their consciences dictate, free from the coercive influence of the state.[11] However, many neutral, generally applicable laws indirectly regulate religious exercise by imposing incidental burdens on those engaged in religious activity. The extent of the government's power to enact and enforce laws that indirectly burden free exercise is the subject of robust jurisprudence.

In *Cantwell v. Connecticut*,[12] the Supreme Court upheld the government's power to regulate religious activities so long as such regulation does not "unduly . . . infringe" on religious freedom.[13] The Court expounded on this constitutional balancing test in *Sherbert v. Verner*[14] and *Wisconsin v. Yoder*.[15]

In *Sherbert*, the Court held that the government must show "some compelling state interest" to justify infringement of the right to free exercise—that is, the state law must pass strict scrutiny.[16] The appellant, Adell Sherbert, was a Seventh-day Adventist whose religious beliefs prohibited her from working on Saturday.[17] Because Sherbert refused employment that would require her to work on Saturday, the South Carolina Employment Security Commission denied her unemployment compensation benefits.[18] The Court reversed the Supreme Court of South Carolina, ruling that the denial of benefits was a burden on her religion and that the State did not have a compelling state interest justifying the infringement.[19]

Subsequently, in *Yoder*, the Supreme Court held that even laws protecting compelling state interests, such as universal education, "[are] not totally free from a balancing process when [such law] impinges on fundamental rights . . . protected by the Free Exercise Clause."[20] The Court, with the help

10. U.S. CONST. amend. I.

11. The Enlightenment era's insistence on conformity with personal conscience, rather than obedience to the state in matters of religion, greatly influenced the United States' framing documents. *See* GEORGE MASON, VIRGINIA DECLARATION OF RIGHTS (1776). Thomas Jefferson drew upon the text of the Virginia Declaration of Rights to inform subsequent federal and state enshrinements of religious liberty throughout the early United States. *See The Virginia Declaration of Rights*, NAT'L ARCHIVES (Sept. 29, 2016), https://www.archives.gov/founding-docs/virginia-declaration-of-rights [https://perma.cc/AXC9-23KW].

12. 310 U.S. 296 (1940).

13. *Id.* at 304.

14. 374 U.S. 398 (1963).

15. 406 U.S. 205 (1972).

16. *Sherbert*, 374 U.S. at 406.

17. *Id.* at 399–401.

18. *Id.*

19. *Id.* at 410.

20. *Yoder*, 406 U.S. at 214.

of religious and historical experts, determined that the plaintiffs' Amish religion "pervade[d] and determine[d] virtually their entire way of life" and that the plaintiffs' religious expression had remained static for "almost 300 years of consistent practice."[21] Informed by that testimony, and deciding that Wisconsin's school attendance law was not narrowly tailored to achieve the interests of universal education,[22] the Court ruled that the State could not compel Amish families to enroll their children in formal school after the eighth grade.[23] However, this strict scrutiny regime would not last forever.

The Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[24] abruptly changed course on the issue of strict scrutiny for incidental burdens on religious free exercise. In *Smith*, the Court announced that neutral, generally applicable laws that incidentally burden religious exercise are not subject to strict scrutiny.[25] Congress opposed this holding, and in response, enacted the RFRA in 1993[26] to reintroduce strict scrutiny as the standard of review under which courts would address neutral, generally applicable laws that allegedly burden religious practice.[27] RFRA provided that state and federal governments "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the burdening law "is in furtherance of a compelling governmental interest" and uses the "least restrictive means" of achieving that interest.[28] Despite the fact that *Smith* remained the Supreme Court's definitive interpretation of the First Amendment,[29] Congress, in passing RFRA, effectively restored the standard adopted in *Yoder* and *Sherbert*.[30] Many states followed suit, establishing their own RFRA-like statutes containing the same "substantial burden" language.[31]

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21. *Id.* at 216, 219.
22. *See id.* at 229.
23. *Id.* at 234.
24. 494 U.S. 872 (1990).
25. *Id.* at 890.
26. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).
27. *See* 42 U.S.C. § 2000bb.
28. *Id.*
29. Some members of the Court have recently voiced a willingness to overturn *Smith*. *See* Fulton v. City of Phila., 141 S. Ct. 1868 (2021). Although the majority deciding *Fulton* ultimately decided that the holding of *Smith* was not implicated, the concurrences of Justices Gorsuch and Alito chastised the Court for dodging the reconsideration of *Smith*. *See id.* at 1926 (Alito, J., concurring); *id.* at 1931 (Gorsuch, J., concurring). Justice Alito stated that he would have overruled *Smith* and reimposed a requirement of strict scrutiny. *Id.* at 1926 (Alito, J., concurring).
30. 42 U.S.C. § 2000bb.
31. *See* ALA. CONST. amend. 622; ARIZ. REV. STAT. ANN. § 41-1493.01 (2024); ARK. CODE ANN. § 16-123-404 (2024); CONN. GEN. STAT. § 52-571b (2023); FLA. STAT. §§ 761.01 to 761.05 (2024); 775 ILL. COMP. STAT. 35/1 to 35/99 (2024); IND. CODE §§ 34-13-9-0.7 to 34-31-9-11 (2024); KAN. STAT. ANN. §§ 60-5301 to 60-5305 (2023); KY. REV. STAT. ANN. § 446.350 (West 2024); LA. STAT. ANN. § 13:5233 (2024); MISS. CODE ANN. § 11-61-1 (2024); OKLA. STAT. tit. 51, §§ 251–58 (2024); 71 PA. STAT. AND CONS. STAT. ANN. § 2404 (West 2024); S.C. CODE ANN. §§ 1-32-10 to 1-32-60 (2024); TENN. CODE ANN. § 4-1-407 (2024); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2023); VA. CODE ANN. § 57-

Congress, however, did not create a definition for the term "substantial burden."[32] Thus, the task of interpreting the meaning of the term passed to the courts. In the years that followed, courts developed two different tests for determining substantial burdens. These were the "centrality" test and the "compulsion" test.[33] Under the centrality test, a law substantially burdens a claimant's religious exercise only when conformity would violate some centrally important tenet of the claimant's faith.[34] Other courts employed the compulsion test, predicating their analyses exclusively on a claimant's religious duties.[35] Under the compulsion test, a law substantially burdens a claimant's religious practice when it pressures the claimant to choose between compliance and violating a discrete command of their faith.[36]

In 1997, the Supreme Court limited the application of RFRA to the federal government on federalism grounds.[37] Three years later, Congress enacted RLUIPA, a narrower rearticulation of RFRA.[38] Congress included in RLUIPA the same "substantial burden" language as RFRA, but this time with specific jurisdictional hooks.[39] In passing RLUIPA, Congress also took the opportunity to define the term "religious exercise" as meaning "any exercise of religion, whether or not compelled by, or central to, a system of religious

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2.02 (2024) (all containing the same "substantial burden" language as the federal RFRA); *see also* MO. ANN. STAT. § 1.302 (2024); N.M. STAT. ANN. § 28-22-3 (West 2024); R.I. GEN. LAWS § 42-80.1-3 (2024) (state statutes that similarly forbid government actions that "restrict" the free exercise of religion).

32. *See* 42 U.S.C. § 2000bb.

33. Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1761–62 (2020).

34. *See, e.g.*, Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (holding any law that "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs" constitutes a substantial burden on an individual's exercise of religion); Abdur-Rahman v. Mich. Dep't. of Corr., 65 F.3d 489, 491–92 (6th Cir. 1995) (holding that Friday prayer was not "an essential tenet of [the plaintiff's] religious beliefs" and thus did not entitle the plaintiff to an exemption under RFRA). One critic took issue with the centrality test for forcing judges to make theological decisions and questioned the assumption that religions can be understood as having either "central" or "peripheral" parts. *See* Steven C. Seeger, Note, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 MICH. L. REV. 1472, 1482 (1997). A similar critique persists, insofar as one commentator perceived the test to be resurrected in other forms. *See generally* D. Bowie Duncan, Note, *Inviting an Impermissible Inquiry? RFRA's Substantial-Burden Requirement and "Centrality"*, 2021 PEPP. L. REV. 1.

35. *See, e.g.*, Goodall v. Stafford Cnty. Sch. Bd., 60 F.3d 168, 172–73 (4th Cir. 1995) (finding no substantial burden because the claimants "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take"); Cheffer v. Reno, 55 F.3d 1517, 1522 (11th Cir. 1995); Mahoney v. Doe, 642 F.3d 1112, 1121 (D.C. Cir. 2011).

36. One critic has rejected the compulsion test as violative of the Establishment Clause by requiring judges to determine what obligations a faith tradition imposes on its adherents and by assuming that the only significant forms of religious exercise will be compulsory, rather than permissive, religious practices. *See* Seeger, *supra* note 34, at 1499.

37. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

38. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

39. 42 U.S.C. § 2000cc-5.

belief."[40] This definition, also incorporated into RFRA by amendment, definitively prohibited the centrality and compulsion tests.[41] The 2000 amendment forced courts back to the drawing board with respect to setting a workable definition of substantial burden on free exercise. Since then, the task of distinguishing between substantial and insubstantial burdens on religious exercise has been a persistent source of judicial confusion,[42] made only more difficult by the specter of the Establishment Clause and the religious question doctrine.

B. The Religious Question Doctrine

The Establishment Clause of the First Amendment guarantees that the government will make no law "respecting an establishment of religion."[43] The Establishment Clause arose in response to colonial era abuses and persecutions of minority religious communities at the hands of established churches and the government.[44] The religious question doctrine is an outgrowth of the Establishment Clause; it instructs courts to dismiss as nonjusticiable any case that hinges on the resolution of a religious question.[45]

Scholars have identified two key justifications for the religious question doctrine's broad prohibition: judicial incompetence and government entanglement with religion.[46] Judicial incompetence stems from the fact that judges generally lack the requisite experience to understand and resolve matters of faith and thus suffer an "adjudicative disability."[47] Judges do not typically have backgrounds in theology, and even those who are familiar with some religions may import bias when adjudicating matters relating to lesser-known or minority faiths.[48]

In *United States v. Ballard*,[49] the Supreme Court explained the limits of judicial competency to rule on religious issues.[50] The defendant, a

40. *Id.* § 2000cc-5(7)(A).

41. *Id.* § 2000bb-2 note (Amendments).

42. Chad Flanders, *Substantial Confusion About "Substantial Burdens"*, 2016 U. ILL. L. REV. ONLINE 27, 29.

43. U.S. CONST. amend. I.

44. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947) ("The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions . . . . With the power of government supporting them . . . Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.").

45. Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 494 (2013). *See also* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [their] creeds."); Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.").

46. Helfand, *supra* note 45, at 495.

47. *Id.*

48. *See* Michael A. Helfand, *Substantial Burdens as Civil Penalties*, 108 IOWA L. REV. 2189, 2212 (2023).

49. 322 U.S. 78 (1944).

50. *See id.* at 86.

self-proclaimed spiritual messenger of "ascended masters," was convicted of mail fraud for making false representations to donors about his supernatural healing abilities.[51] The Court vacated Ballard's conviction, holding that the U.S. Court of Appeals for the Ninth Circuit violated the Establishment Clause by making an impermissible inquiry into the "truth or falsity" of Ballard's healing powers on the conviction's appeal.[52] The Supreme Court stated that "[m]en may believe what they cannot prove" and that "[t]hey may not be put to the proof of their religious doctrines or beliefs."[53] It held that religious beliefs, though "beyond the ken of mortals," cannot be "made suspect before the law."[54] In so holding, the Court declared the judiciary incompetent to adjudicate on the truth of religious matters.[55]

The Supreme Court later expanded on this prohibition in *Thomas v. Review Board of the Indiana Employment Security Division*,[56] holding that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[57] The claimant, a Jehovah's Witness and foundry worker, quit after being transferred to a department fabricating weapons, asserting that his religion forbade him doing so.[58] At trial, another Jehovah's Witness advised that such work did not violate their religion.[59] Relying on the witness, the Indiana Supreme Court held that Thomas quit for personal philosophical reasons rather than religious reasons and thus was not entitled to unemployment benefits.[60] The U.S. Supreme Court reversed, ruling that the state court erred in giving weight to the religious opinions of Thomas' coreligionist in considering whether Thomas' articulation of his religious beliefs seemed inconsistent with the larger faith tradition.[61] In issuing its holding, the Court announced that the judiciary is not competent to parse the internal consistency of any system of religious belief.[62]

The concern about impermissible government entanglement with religion stems from the fear that, by declaring winners and losers in a dispute about religion, the government will pick the side of one religion or religious sect to the disadvantage of all others.[63] In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[64] the Court ruled that it could not settle a property dispute that hinged on the resolution of sectarian infighting over church doctrine because of entanglement

51. *Id.* at 80.
52. *Id.* at 88.
53. *Id.* at 86.
54. *Id.* at 87.
55. *See id.*
56. 450 U.S. 707 (1981).
57. *Id.* at 714.
58. *Id.* at 710.
59. *Id.* at 711.
60. *Id.* at 712.
61. *Id.* at 716.
62. *See id.*
63. *See* Helfand, *supra* note 45, at 495.
64. 393 U.S. 440 (1969).

concerns.[65] The plaintiffs were local churches that dissented from their general church's decision to ordain women.[66] The local churches sought to break away from their general church, reconstitute as a new religious organization, and retain their local church property.[67] When the general church sought to exercise control over the local churches' property, the local churches sued to enjoin the trespass. Georgia state courts applied an old English rule that required them to determine which religious faction was closer to the original faith of the church and to award the property to the more orthodox faction.[68] The U.S. Supreme Court overturned the Supreme Court of Georgia, holding that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice."[69]

These three paradigmatic cases show that the religious question doctrine prohibits courts from (1) making inquiries into the truth or falsity of a religious claim, (2) ruling on the internal consistency of a religious claim, and (3) answering a question that forces the court to endorse a certain religious view as orthodox.

C. Religious Cost

Given the existing statutory and constitutional environment, courts have competing obligations. Judges are obligated to assess the substantiality of religious burdens but are prohibited from deciding religious questions.[70] Recently, courts have attempted to navigate these obligations by relying on a conceptual distinction between the religious and secular costs borne by the claimant.[71] The term "religious cost" refers to the spiritual or moral harm that would befall the claimant by conforming to the burdening law.[72] For example, a law forcing Muslim or Jewish prisoners to consume pork would impose significant religious costs due to the psychic distress they would suffer in being forced to violate their religious dietary obligations.[73] On the other hand, the term "secular cost" refers to the nonreligious penalties faced by adherents such as monetary fines or criminal punishment.[74] In the last decade, the Court has taken this distinction to heart, wholly declining to

65. *See id.* at 441, 449–50.

66. *Id.* at 442 n.1.

67. *Id.* at 443.

68. *Id.* at 443–44.

69. *See id.* at 449. On remand to the Supreme Court of Georgia, title to the church grounds was found to reside with the local churches. *See* Presbyterian Church in the U.S. v. E. Heights Presbyterian Church, 167 S.E.2d 658, 660 (Ga. 1969).

70. *See supra* Part II.B.

71. *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 104–05 (2017).

72. *See id.*

73. *See, e.g.*, Rich v. Sec'y, Fla. Dep't of Corr., 716 F.3d 525, 532 (11th Cir. 2013) (noting that failure to provide Orthodox Jewish inmate with a kosher diet clearly and substantially burdened his religious practice).

74. *See* Gedicks, *supra* note 71, at 96; *cf. id.* at 113 n.94.

discuss the issue of religious cost and looking only to analysis of secular costs.[75]

In so doing, the Court has created a litigation environment that some scholars believe is unduly deferential to free exercise claimants.[76] One of these scholars, Professor Frederick Mark Gedicks, argues that, if courts defer completely to religious claimants on the question of religious cost, parties to litigation would be allowed to judge their own cases in violation of bedrock principles of American law.[77] Professor Abner S. Greene, another critic, argues that the current arrangement swallows up the law with religious exemptions, renders the statutory term "substantial" meaningless surplusage, and frustrates the intention of Congress in limiting the remedy to cases of only substantial burden.[78] This aligns with Justice Sotomayor's dissent in *Wheaton College v. Burwell*:[79] "thinking one's religious beliefs are substantially burdened—no matter how sincere or genuine that belief may be—does not make it so."[80]

Some of these scholars, however, agree with the Court's recent position that judicial analysis of religious cost is prohibited by the Constitution.[81] Furthermore, such scholars believe that the issue of overdeference to claimants can be solved through a careful analysis of secular cost, without appealing to judicial consideration of religious cost.[82] The next part of this Comment outlines these opposing scholarly positions, presenting a picture of the arguments and rejoinders animating the debate over the justiciability of religious cost.

II. RELIGIOUS COST AS A FACTOR IN THE SUBSTANTIAL BURDEN INQUIRY

A. Rejecting Religious Cost

On one side of the conceptual divide stands the Supreme Court and scholars like Professor Michael A. Helfand, who take judicial consideration of religious cost to be constitutionally impermissible. Despite advocating for a narrowing of the religious question doctrine generally,[83] and urging courts

75. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021); Holt v. Hobbs, 574 U.S. 352, 360–62 (2015); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014).

76. *See* Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1779–80 (2022). *See generally* Gedicks, *supra* note 71; Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161 (2015).

77. *See* Gedicks, *supra* note 71, at 96 ("No man is allowed to be a judge in his own cause." (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961))).

78. *See* Greene, *supra* note 76, at 180.

79. 573 U.S. 958 (2014).

80. *Id.* at 966 (Sotomayor, J., dissenting).

81. *See infra* Part II.A.

82. *See infra* Part II.A.

83. *See* Helfand, *supra* note 45, at 542.

to adjudicate religious disputes in the private law context,[84] Professor Helfand firmly rejects the incorporation of religious cost into the substantial burden analysis.[85] Pursuant to his conviction that consideration of religious cost is off-limits, he articulated a substantial burden test that is purposefully blind to the issue of religious cost.[86]

Professor Helfand's "civil penalties" test defines substantial burden as any significant civil penalty triggered by the claimant's religious practice.[87] Professor Helfand uses the term "civil penalty" to refer to any government sanction, civil or criminal, that imposes a significant secular cost on the religious adherent.[88] The threat of significant criminal punishment or large monetary fines would qualify as significant civil penalties under Professor Helfand's test, triggering claimants' protections under RFRA and RLUIPA.[89]

The civil penalties test directs courts to totally defer to the claimant's assertion of substantial religious cost and only adjudicate whether the civil penalty triggered by the law is sufficiently significant.[90] To illustrate this idea, Professor Helfand offers the example of a proposed San Francisco law that sought to ban the circumcision of male infants.[91] The law would authorize the government to penalize lawbreakers with "a fine not to exceed $1,000" and "imprisonment in the County Jail for a period not to exceed one year."[92] On its face, such a law would burden the religious exercise of Muslim and Jewish citizens who practice infant circumcision.[93] The civil penalties test would spare courts from the need to conduct a difficult and constitutionally suspect deep dive into the religious and moral significance of circumcision.[94] Under this test, courts would only consider whether the civil penalty of a thousand-dollar fine or a single year of jail amounts to a substantial *secular* burden.[95]

The civil penalties test has attracted considerable critique from legal scholars.[96] One critic, Professor Christopher Lund, argues that there is no

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84. *See* Michael A. Helfand, *When Judges Are Theologians: Adjudicating Religious Questions*, *in* RESEARCH HANDBOOK ON LAW AND RELIGION 262, 277–79 (Rex Ahdar ed., 2018).

85. *See* Helfand, *supra* note 48, at 2190.

86. *See* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775.

87. *See* Helfand, *supra* note 48, at 2190; Helfand, *supra* note 86, at 1771, 1775.

88. *See* Helfand, *supra* note 86, at 1791–92.

89. Helfand, *supra* note 48, at 2208. Professor Helfand notes that criminal sanction alone is not a substantial civil penalty under his test, but it could amount to one if the attendant consequences of the criminal sanction give rise to a substantial civil penalty. *Id.* (citing Gedicks, *supra* note 71, at 113 n.94).

90. *See* Helfand, *supra* note 86, at 1775.

91. *Id.* at 1791.

92. *See* Matthew Hess, *San Francisco MGM Bill*, MGMBILL.ORG, https://web.archive.org/web/20230811203620/http://www.mgmbill.org/san-francisco-mgm-bill.html [https://perma.cc/8REE-BKVP] (last visited Nov. 14, 2024).

93. Helfand, *supra* note 86, at 1791.

94. *See id.* at 1791–92.

95. *See id.*

96. *See* Helfand, *supra* note 48, at 2190–91 (collecting and responding to criticism).

principled difference between a substantial and insubstantial civil penalty,[97] that the test is arbitrary and subjective,[98] that the test unduly discriminates between rich and poor claimants,[99] and that the very idea of an "insubstantial civil penalty" is unsubstantiated by caselaw.[100] Critics also argue that the civil penalties test is not consistent with Supreme Court precedent.[101]

Most critically, scholars decry the civil penalties test as being fundamentally ill-conceived. They argue that, because the substantial burden test is a composite of religious and secular costs, the adjudication of substantial burden cannot logically proceed without an analysis of religious cost.[102] Because secular costs are totally unrelated to religious costs, the civil penalties test permits clearly unmeritorious claims to sail through the substantial burden test unhindered.[103] Consider, for example, that under the civil penalties test, a speeding regulation could be deemed to substantially burden someone who was speeding if the claimant was late driving to their place of worship.[104] Because the civil penalties test purposefully blinds itself to the issue of religious cost, it leaves open the door to all kinds of claimant activity that, to the ordinary observer, does not merit statutory protection under RFRA or RLUIPA.[105]

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97. *See* Christopher Lund, *Answers to* Fulton*'s Questions*, 108 IOWA L. REV. 2075, 2087 (2023). *But see* Helfand, *supra* note 48, at 2203 (arguing that courts are equipped to engage in educated line drawing).

98. *See* Lund, *supra* note 97, at 2087. *But see* Helfand, *supra* note 48, at 2205 (explaining that judges are generally well equipped to make such determinations).

99. Helfand, *supra* note 48, at 2205. Professor Helfand, however, considers it a strength of his test that certain civil penalties that would be burdensome to some poor claimants would not be substantially burdensome to rich, institutional claimants. *Id.* at 2205–06 (explaining how the subjectivity of burdens justifies the Court's distinction between Braunfeld v. Brown, 366 U.S. 599, 605 (1961), wherein the Sunday Closing Laws only deprived the Jewish merchants of a portion of their income, and Sherbert v. Verner, 374 U.S. 398, 410 (1963), where such laws deprived Sherbert of unemployment benefits which were her only source of income).

100. Professor Gedicks gestures at the paucity of examples where the Court has been sensitive to the idea that a law imposed too small a penalty to be a substantial burden. *See* Gedicks, *supra* note 71, at 113 & n.94. Professor Helfand retorts by arguing that there is a wide range of practically insubstantial civil penalties, especially when considering that rich claimants, such as well-established business entities would be expected to tolerate costs associated with religious exercise that a natural person could not reasonably tolerate. *See* Helfand, *supra* note 48, at 2209.

101. *See, e.g.*, Lund, *supra* note 97, at 2087–88; Gedicks, *supra* note 71, at 113 n.94; *see also* Wisconsin v. Yoder, 406 U.S. 205, 208 (1972). *But see* Helfand, *supra* note 48, at 2209 (arguing that *Yoder* serves either as an example of an insubstantial civil penalty or otherwise that the civil penalties test can be construed as a principled critique of *Yoder*).

102. *See* Gedicks, *supra* note 71, at 114; *cf.* Greene, *supra* note 78, at 181.

103. *See* Gedicks, *supra* note 71, at 114–15.

104. For Professor Helfand's response to this criticism, see Helfand, *supra* note 48, at 2210.

105. Professor Helfand retorts that this is not a matter of "simple logic" and that the applicable statutes could be reasonably read as "for any exercise of religion, government shall not impose a substantial civil penalty." *Id.* at 2211–12. However, this answer will not be convincing to those who are attracted to the notion that the command "shall not substantially burden a person's exercise of religion" refers in some part to the religious gravity of the burden. *See id.*

Other scholars have proposed various tests that take the opposite approach, explicitly incorporating analysis of religious cost to limit judicial deference to religiously insignificant alleged burdens.[106] However, scholars who argue that religious cost should factor into judicial decision-making must craft a test that avoids violating the religious question doctrine.[107]

B. Incorporating Religious Cost

1. The Proxy Concept Approach

Scholars who argue that courts must incorporate analysis of religious cost must contend with the prohibitions of the religious question doctrine. Legal thinkers have attempted to surmount this constitutional obstacle by substituting or analogizing a secular proxy concept in the place of religious reasoning.[108] Consider, for example, the "secular law" test proposed by Professor Gedicks. Under the secular law test, courts adjudicate claims of substantial burden by reaching for analogous secular doctrines that correspond to the substance of the religious allegation.[109] According to Professor Gedicks, applying existing legal doctrines to religious disputes cannot violate the religious question doctrine, because the courts will have applied secular law to adjudicate rights under a secular statute.[110] Consider the religious complicity cases of *Burwell v. Hobby Lobby Stores, Inc.*[111] and *Zubik v. Burwell*,[112] where the business-owning claimants alleged that the Affordable Care Act's[113] contraceptive mandate caused them to become complicit in the sins of their employees. In *Hobby Lobby*, the claimants argued that subscribing to employee health insurance plans that covered contraceptive medicine caused them to violate their religious beliefs surrounding contraceptive use.[114] The claimants in *Zubik* pushed this reasoning further, arguing that even signing the "opt-out" papers to allow their employees to seek third-party health insurance made them complicit in the sin of contraceptive use.[115] Dissenting members of the Court voiced the opinion that claimants' arguments in *Hobby Lobby* and *Zubik* were too causally weak to reasonably constitute a substantial burden on religious free exercise.[116]

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106. *See infra* Part II.B.
107. *See supra* Part I.C.
108. *See* Gedicks, *supra* note 71, at 135; *cf.* Greene, *supra* note 76, at 187 n.178.
109. *See* Gedicks, *supra* note 71, at 130–32.
110. Gedicks, *supra* note 71, at 117; *see also* Greene, *supra* note 76, at 185.
111. 573 U.S. 682 (2014).
112. 578 U.S. 403 (2016).
113. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).
114. *See* 573 U.S. at 689–90.
115. *See* 578 U.S. at 407.
116. *Cf.* 573 U.S. at 739–40 (Ginsburg, J., dissenting). In *Zubik*, the Court refused to discuss the issue of religious cost and remanded the issue to the district courts. 578 U.S. at 404.

Professor Gedicks argues that the Court could have framed the "sin" of contraceptive use as the "injury" element of a tort.[117] Reframing the issue in this way would have allowed the Court to use familiar legal concepts like cause-in-fact, proximate cause, and intervening cause to adjudicate whether the plaintiffs are legally complicit in the sin they allege.[118] By substituting the analogous secular doctrines of causation into the theological discussion of causation, the Justices would have gained a constitutionally permissible way to assess the religious cost and might have found that the claimants were not substantially burdened on those grounds.[119]

The secular law test, however, has also faced substantial scholarly critique. Critics of the secular law test argue that it is premised on the faulty assumption that religious claims will have any meaningful correspondence with secular reasoning, particularly with respect to causation.[120] Critics point out that common law doctrines do not map well onto religious questions and argue that the assumption would result in disproportionately worse outcomes for minority religious claimants.[121] They argue that, under the secular law test, those religions that most closely conform to Anglo-American common law concepts will disproportionately benefit from statutory protections, while others will more frequently fail at the substantial burden inquiry.[122] Professor Gedicks acknowledges that importing bodies of common law to solve religious questions is an "admittedly imperfect fit" but he notes that resolution by secular analogy best suits the courts' skills, avoids violating the religious question doctrine, and is thus the best solution in a "world of second best."[123]

The more difficult issue with the secular law test is whether the application of secular law actually succeeds at absolving the court of meddling in religious questions. One critique of the secular law test argues that the application of secular law doctrines violates the religious question doctrine by "second-guessing" the claimant on religious questions.[124] For example, if the court uses a common law causation doctrine to arrive at a legal conclusion different from that of the plaintiff, the court will have impermissibly contradicted the plaintiff on the theological question of sin.[125] Professor Gedicks' response is that the use of secular law is not intended to replace the theological reasoning of the claimant[126]—the claimant is free to continue believing, as in the above-discussed complicity cases, that the ACA causes them to sin.[127] Rather than replacing theological reasoning, the

117. Gedicks, *supra* note 71, at 132.
118. *See id.*
119. *See id.* at 132, 147–48.
120. *See* Helfand, *supra* note 86, at 1789–90; Girgis, *supra* note 76, at 1777.
121. Helfand, *supra* note 86, at 1789–90; Girgis, *supra* note 76, at 1777 ("The common law is neither here nor there.").
122. Helfand, *supra* note 86, at 1789–90; Girgis, *supra* note 76, at 1777.
123. Gedicks, *supra* note 71, at 140–41.
124. Girgis, *supra* note 76, at 1771.
125. *See id.*
126. *See* Gedicks, *supra* note 71, at 135.
127. *See id.*

secular law doctrines act as a mere proxy that the courts use to reach a legal conclusion and give effect to the statutory term "substantial."[128]

2. The Doctrinal Consistency Approach

As discussed above, some scholars are unconvinced that the proxy route is constitutionally permissible and question whether such a test would tend to favor the more meritorious parties in litigation. These scholars have adopted a different strategy for incorporating religious cost into the substantial burden test. They have produced tests that judge a claimant's assertion of religious cost on the claimant's own terms, determining whether the claim is inconsistent with the claimant's alleged beliefs.

Consider, for example, the test proposed by Dr. Gabrielle M. Girgis. Her work classifies all types of religious exercise into one of two kinds, and all types of burdens into one of four kinds.[129] The two kinds of religious exercises under this conception are obligations and exercises of "substantial religious autonomy."[130] The first of the four kinds of possible burdens under her test is the "simply punitive" burden,[131] which forces plaintiffs to choose between abstaining from their religious exercise or incurring a civil or criminal penalty.[132] The second kind is the "indirectly punitive" burden, which forces plaintiffs to choose between (1) engaging in a religious practice but incurring some legal penalty, (2) complying with the law but violating their religion, or (3) satisfying the demands of both the law and their religion but giving up some kind of benefit or entitlement.[133] The third kind is the "non-punitive" burden, which merely forces a plaintiff to choose between engaging in their religious exercise and forfeiting some benefit or entitlement.[134] The fourth and final kind of burden under her test is the "preventive" burden, which has the effect of rendering the plaintiff's religious exercise physically impossible.[135] She argues that a substantial

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128. *Id.*

129. *See* Girgis, *supra* note 33, at 1757–64.

130. *Id.* at 1765–66.

131. *Id.* at 1772.

132. *Cf.* Emp. Div. v. Smith, 494 U.S. 872, 882–83 (1990) (concerning an Oregon statute that forced religious adherents to choose between using peyote and being criminally sanctioned, or giving up their ancient religious practice).

133. Girgis, *supra* note 33, at 1772. Dr. Gabrielle Girgis offers the example of a Jewish shopkeeper faced with the enforcement of Sabbatarian laws. Because the shopkeeper has a religious obligation to close on Saturday and a legal obligation to close on Sunday, he faces the following trilemma: (1) open on Saturday and violate his religion, (2) open on Sunday and face legal penalties, or (3) stay shuttered for the whole weekend and suffer significant lost business. *Id.*

134. *See id.* at 1773. Nonpunitive burdens do not threaten civil or criminal sanction. *Id.* For example, the plaintiff in *Sherbert* faced a nonpunitive burden when the state refused to give her unemployment benefits unless she demonstrated a willingness to work on Saturday in violation of her faith. *See* Sherbert v. Verner, 374 U.S. 398, 398–401 (1963).

135. *See* Girgis, *supra* note 33, at 1774. For example, the Native American plaintiffs in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, who sued the government to enjoin its building of a road through the sacred lands near Chimney Rock, faced a preventive burden

burden on religious exercise is precisely where one of the four kinds of identifiable burdens impedes one of the two kinds of identifiable religious exercises.[136]

By design, Dr. Gabrielle Girgis' test leaves three kinds of situations out of the taxonomy where she argues courts should not find substantial burden.[137] First, the test does not cover situations where there is no discernable religious exercise.[138] For example, in *Bowen v. Roy*,[139] the plaintiff had attempted to secure government benefits for his daughter but feared that, through her identification by Social Security number, her "spirit would be robbed."[140] Therefore, he claimed that the government's insistence that he supply a Social Security number substantially burdened his religious exercise.[141] However, because the claimant could not point to a specific identifiable practice of religion that was burdened by the welfare requirements, Bowen's claim would fail the test as being insubstantially burdensome.[142] The second situation not covered by the test is in cases where the burdened practice is insignificant according to the religious beliefs of the plaintiff.[143] Dr. Gabrielle Girgis uses the example of a statute outlawing the purchase and consumption of Bordeaux wine.[144] She states that such a law would not burden Catholics, who according to the precepts of their own faith consider Bordeaux wine to be no more sacramentally fitting than any other red wine.[145] The third situation arises where the material cost to the plaintiff is both minimal and incidental.[146] She also uses the example of a toll booth that a municipality might set up between a parishioner and their place of worship.[147] Although it does add some minimal cost and delay to the exercise of the parishioner's faith, she argues that such burden is not substantial.[148]

Dr. Gabrielle Girgis' taxonomic test captures certain burdens that have not been typically afforded protection under RFRA and RLUIPA[149] and contemplates a wider array of religious expressions under the concept of

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insofar as the proposed construction would render the plaintiffs' religious exercise impossible. *See* 485 U.S. 439, 442 (1988).

136. *See* Girgis, *supra* note 33, at 1760.

137. *Id.* at 1784.

138. *Id.*

139. 476 U.S. 693 (1986).

140. *Id.* at 697.

141. *Id.* at 696.

142. Girgis, *supra* note 33, at 1784. Note that the Court was unable to dispense with Bowen's claim on substantial burden grounds, instead relying on the government's interest in managing its internal affairs. *See Bowen*, 476 U.S. at 699.

143. *See* Girgis, *supra* note 33, at 1784.

144. *See id.* at 1766.

145. *Id.* at 1766, 1784.

146. *Id.* at 1784.

147. *Id.* at 1766.

148. *Id.* at 1766, 1784.

149. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 443–44 (1988).

"substantial religious autonomy."[150] The test, however, is susceptible to the critique that it violates the religious question doctrine by contradicting the claimant's religious reasoning. The test seeks to weed out claims that are predicated on a contradiction in the claimant's understanding of their religion.[151] Consider the communion wine example discussed above. Dr. Gabrielle Girgis argues that a Catholic would not be substantially burdened by the outlawing of Bordeaux wine because the claimant themselves has previously alleged the belief that any red wine will be sacramentally acceptable.[152] The issue with limiting claims in this way is that the plaintiff's assertion, regardless of how inconsistent it is with their other beliefs, is itself a religious belief. The Court has definitively upheld the right of claimants to hold beliefs that, to both secular reason and the claimant themselves, are self-contradictory and unexplainable.[153] Because the courts are not entitled to the theological disputation of even the most poorly reasoned and inconsistent religious conclusions, a test that seeks to undermine a claimant's conclusion using their own alleged beliefs will violate the religious question doctrine.[154]

Another similar test looks at the effect laws have in foreclosing means of religious expression. Professor Sherif Girgis took up this angle in his proposed "adequate alternatives" test.[155] Under the adequate alternatives test, the state only substantially burdens a claimant's religious exercise if it leaves them no alternative that they consider religiously equal in significance and not significantly more costly than the legally foreclosed option.[156] Professor Sherif Girgis illustrates his test using the example of a person going for a prayerful walk in a park.[157] He argues that a law imposing a curfew and closing the park would not substantially burden the claimant because they could simply walk to another quiet place and thus have an adequate alternative not foreclosed by law.[158] Professor Sherif Girgis argues that the adequate alternatives test avoids violation of the religious question doctrine because it refers only to the plaintiff's alleged beliefs when adjudicating whether religiously adequate alternatives exist.[159] He points out that both *Yoder* and *Sherbert* fit nicely into the adequate alternatives framework.[160] Furthermore, the adequate alternatives test draws lines of comparison

150. Girgis, *supra* note 33, at 1766.
151. *See id.* at 1784.
152. *See id.* at 1766, 1784.
153. *See* Thomas v. Rev. Bd., 450 U.S. 707, 714 (1981). Take, for example, the doctrine of the Trinity, which is a mainstream belief of Christians asserting that God is both one and three entities simultaneously. Under Dr. Gabrielle Girgis' test, a believer of the trinitarian doctrine might be exposed to a finding of no substantial burden on the basis that their beliefs are contradictory. *See* Girgis, *supra* note 33, at 1784 (concluding that certain kinds of religious exercise rendered "insignificant by the religion's own criteria" cannot be substantial burdens).
154. *See Thomas*, 450 U.S. at 714.
155. *See* Girgis, *supra* note 76, at 1780.
156. *See id.* at 1795.
157. *See id.* at 1772.
158. *Id.*
159. *See id.* at 1800.
160. *See id.* at 1789.

between incidental burdens on religion and incidental burdens on other rights, such as the right to abortion[161] or gun ownership.[162] The importation of the "undue burden" jurisprudence of sister civil liberties endows the adequate alternatives test with the legitimizing weight of precedent.[163]

The adequate alternatives test is intended to weed out unmeritorious claims predicated on the plaintiffs' "mere taste or convenience."[164] Professor Sherif Girgis takes, as an example, a case where Muslim prisoners were denied the liberty to stand up in prison dayrooms to assume the postures necessary for *salat*, daily Muslim prayer.[165] He argues that, under the adequate alternatives test, those prisoners were not substantially burdened by the policy because they had the religiously equivalent alternative of standing in the courtyard to which they had access.[166] Conversely, in a case involving Muslim prisoners barred from attending an important weekly service, those prisoners would have been substantially burdened because their desire to attend service was "rooted in their religion, not taste."[167]

However, the adequate alternatives test also fails to draw out this distinction without impermissibly contradicting the claimant's religious reasoning in a way that violates the religious question doctrine. Professor Sherif Girgis argues that the adequate alternatives test avoids "second guessing" the claimant on matters of religion by only making reference to the claimant's own alleged beliefs.[168] However, the process that he outlines would mean that opposing counsel must depose the claimant about their individual religious beliefs to construct a narrative about what the claimant's faith is.[169] After establishing what the claimant's faith is through adversarial means, opposing counsel must argue before the court that the claimant's legal assertion is inconsistent with their alleged faith, and that the claimant still has viable alternatives for exercising their faith—all over the protests of the claimant.[170] This kind of lawyering invades the private theological reasoning protected by the religious question doctrine, which protects even the most inconsistent and theologically suspect assertions of articulable religious belief.[171] Therefore, despite the test's attempt to weed out inconsistent claims on the claimant's own admission, the test violates the religious question doctrine by penalizing them for having inconsistent religious convictions.

161. *Id.* at 1785–87.
162. *Id.* at 1787–88.
163. *Id.* at 1765, 1783.
164. *Id.* at 1810.
165. *See id.* at 1810 n.272 (citing DeMoss v. Crain, 636 F.3d 145, 153 (5th Cir. 2011)).
166. *See id.* at 1810.
167. *Id.* at 1811.
168. *See id.* at 1772.
169. *See id.*
170. *See id.* at 1803.
171. *See supra* note 153 and accompanying text.

III. A LOGICAL ARGUMENT FOR INCORPORATING RELIGIOUS COST BY PROXY CONCEPT

Having sketched out the standing proposals and critiques of different substantial burden tests and their ways of accommodating religious cost, we can begin to look more closely at their merits. Propositional logic can help evaluate these arguments more rigorously, hopefully dispelling some of the vagueness that has long plagued the inquiry.[172] As such, the following part of this Comment will make use of a few standard logic symbols to help formalize the legal arguments we have explored above. The symbol we will use for conjunction is the chevron "∧," which can be read as "and." Our symbol for conditionality will be the arrow "→," which will represent an "if-then" statement. The symbol for biconditionality will be the double arrow "↔," which can be read as "if and only if." The symbol for negation will be the tilde "~," which stands for the word "not" or "it is not the case that." Finally, the three-dot conclusion symbol "∴" stands for the word "therefore."

Consider again the claimants' argument in the complicity cases. They assert that doing some act results in a violation of their religious beliefs.[173] In the case of *Hobby Lobby*, this was providing the ACA-mandated employee insurance.[174] Let us call the act "*A*" and the violation "*V*." The claimant implies that the violation of their religious beliefs, by definition, results in substantial religious cost.[175] Let us call religious cost "*R*." Where there is both substantial religious cost and substantial secular cost, that religious exercise has been substantially burdened.[176] Let us call secular cost "*S*" and substantial burden "*B*." Assuming that the ACA did impose a substantial secular cost on the Hobby Lobby claimants, their argument then can be written as follows:

Figure 1

1.	A	
2.	S	
3.	$A \rightarrow V$	(theological proposition)
4.	$V \leftrightarrow R$	(definition of religious cost)[177]
5.	$(R \wedge S) \leftrightarrow B$	(definition of substantial burden)

6.	$\therefore B$	

172. Propositional logic is a branch of philosophy and mathematics that studies the meaning of logical connectors (e.g., "is," "and," "or," etc.) in sentences that assert statements of truth. *See* Curtis Franks, *Propositional Logic*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2023), https://plato.stanford.edu/archives/fall2023/entries/logic-propositional/ [https://perma.cc/K5NS-XBBY].

173. *See supra* notes 111–15 and accompanying text.

174. *See supra* note 114 and accompanying text.

175. *See infra* note 180 and accompanying text.

176. *See supra* note 71 and accompanying text.

177. *See infra* note 180 and accompanying text.

The statement "$A \rightarrow V$," is the assertion by the claimant that some act causes or implies a violation of faith. This is the core theological proposition at the heart of the claim. For example, the statement "eating pork causes me to sin," is a statement of this exact form. Courts cannot assert the negation of the statement, which would be expressed as "$\sim(A \rightarrow V)$," without violating the religious question doctrine.[178] Accordingly, the courts have deferred to the truth of the statement "$A \rightarrow V$."[179]

The statement "$V \leftrightarrow R$" is an extrapolation of Justice Alito's generally well-accepted assumption in *Hobby Lobby*.[180] It means that there is a substantial religious cost if and only if there is a violation of the claimant's religious beliefs. This statement is expressed as a biconditional because there is no instance where R can be true and V can be false. A claimant cannot suffer a religious cost, which is definitionally the moral or psychological harm associated with going against one's religion, if the claimant has not violated their religious beliefs.

The statement "$(R \wedge S) \leftrightarrow B$" is a purely legal proposition. It states that substantial burden exists if and only if there is both substantial religious cost and substantial secular cost.[181]

This argument is logically valid. The issue with this argument, as outlined above in Part I, is that a claimant need only successfully assert the existence of the act A and the secular cost S at trial to automatically win on the issue of substantial burden.[182]

The literature review in Part II examined ways that scholars have tried to unravel the above argument. One strategy was to totally ignore the concept of religious cost and focus the court's evaluation entirely on the issue of secular cost, expressed here as S.[183] This is what the Supreme Court did in *Hobby Lobby* and *Fulton v. City of Philadelphia*,[184] and what Professor Helfand's civil penalties test advises.[185] And it is true that, if a court can prove that there is no significant secular cost, "$\sim S$," then there is no substantial burden, "$\sim B$."[186] The issue with this strategy, however, is that it lacks the power to dismiss claims where there is no religious cost to the claimant.[187] As pointed out by multiple scholars, it makes little sense to grant a religious exemption to a claimant who does not stand to suffer moral or

178. *See supra* Part I.B.
179. *See supra* notes 76–80 and accompanying text.
180. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726 (2014) ("[T]he plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs . . . . [I]f they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs."); *see also* Abner S. Greene, *A Secular Test For a Secular Statute*, 2016 U. ILL. L. REV. ONLINE 34, 41–42 (citing Burwell, 573 U.S. at 723–26).
181. *See supra* note 71 and accompanying text.
182. *See supra* notes 76–80 and accompanying text.
183. *See supra* Part II.A.
184. 141 S. Ct. 1868 (2021).
185. *See supra* Part II.A.
186. *See supra* Figure 1.
187. *See supra* notes 102–05 and accompanying text.

spiritual harm by following the law.[188] Moreover, one might be concerned about the meaning of the court's deference on the theological proposition. If the theological proposition is asserted to the court as a link in the chain of legal argument, and the court does not take any steps to evaluate its truth, the court may appear to tacitly accept the truth of the theological proposition, $A \rightarrow V$. If so, then the deference itself may be suspect on religious question grounds.[189]

Another strategy is to determine whether the claimant's assertions of religious substantiality make sense within their own system of professed beliefs.[190] This route seeks to break the claimant's argument by disproving the truth of the theological proposition $A \rightarrow V$ in the claimant's argument. Indeed, proving the negation "$\sim(A \rightarrow V)$" would render the claimant's argument invalid. However, the religious question doctrine prohibits courts from making that assertion. The religious question doctrine bars the courts from asserting either the truth or falsity of religious questions.[191] Furthermore, the method by which the court would arrive at the conclusion of falsity is barred under *Ballard*, which declares that doctrinal inconsistency is an inappropriate standard by which to judge a claimant's religious convictions.[192] Because a religious person is entitled to assert the truth of two irreconcilable propositions,[193] the court cannot arrive at the conclusion $\sim(A \rightarrow V)$ because the claimant has made other inconsistent statements.[194]

This discussion puts the dilemma courts are facing into sharper focus. Courts cannot assert that a theological proposition is true. Nor can the courts assert that it is false. But the courts also cannot defer to the truth of a theological proposition because doing so permits abuse by unmeritorious claimants and may amount to a tacit acceptance of the proposition's truth. To apply the law and steer clear of the constitutional violations, courts need to meaningfully evaluate the merits of the theological proposition.

The proxy route endeavors to do so by substituting some secular proxy concept for the theological proposition.[195] Through substitution, the courts may evaluate the truth of the theological proposition without accepting, denying, or deferring outright. If the court can be said to have fairly evaluated the theological proposition, then it can deny the conclusion of substantial burden even when the occurrence of the offending act A and the existence of substantial secular cost S are uncontestable.[196] Proponents of the proxy route argue that courts can effectuate this substitution by analogical reasoning.[197]

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188. *See supra* notes 102–05 and accompanying text.
189. *See supra* Part I.B.
190. *See supra* Part II.B.1.
191. *See supra* Part I.B.
192. *See supra* notes 49–55 and accompanying text.
193. *See supra* note 153 and accompanying text.
194. *See supra* Part II.B.2.
195. *See supra* Part II.B.1.
196. *See supra* note 180 and accompanying text.
197. *See supra* Part II.B.1.

Under the proxy test, the court picks a secular law concept that shares similarities with the kind of violation of belief that the claimant is alleging.[198] Once the court has ascertained the right legal proxy concept, it inserts the relevant legal argument in place of the theological proposition to arrive at the truth of the assertion of substantial burden.[199] Consider again the example of the ACA complicity cases.[200] The claimants argued that paying for employee health insurance plans caused them to become complicit in the sin of abortion because the employees might use the drugs included in their insurance package to effectuate an abortion.[201] Professor Gedicks suggested that the closest legal analogy to the claimants' alleged religious harm would be the element of harm in tort.[202] Working with that example in our reformulation, let "*H*" stand for "legal harm" as we think of it in tort. The court knows that there cannot be legal harm in tort traceable to the tortfeasor if there is an intervening force that constitutes a superseding cause.[203] Let "*I*" stand for "intervening force that is a superseding cause." A court would then conduct its analysis using *H* as a proxy for *V* to make a conclusion about the religious cost borne by the claimant (the truth of proposition *R*). Here, the mathematical approximation symbol "≈" suffices to represent an analogical relationship, which can be articulated by the statement "$V \approx H$."[204]

But there is an important caveat: due to the fuzziness of the analogical relationship articulated by the statement $V \approx H$, the court cannot conclude with deductive certainty that religious cost, *R*, defined as the subjective moral harm to the claimant, follows from *H*. What the court can reasonably conclude, however, is that something at least similar to religious cost arises when the conditions for legal harm are met.[205] Let "*R**" represent a modified definition of "religious cost" defined as a function of purely secular legal concepts. The court then can proceed with a legal statement of substantial burden incorporating *R** in the place of *R*. The argument would proceed as follows:

198. *See supra* notes 116–19 and accompanying text.
199. *See supra* notes 104–19 and accompanying text.
200. *See supra* notes 111–15 and accompanying text.
201. *See supra* notes 111–15 and accompanying text.
202. *See supra* note 117 and accompanying text.
203. RESTATEMENT (SECOND) OF TORTS § 440 (AM. L. INST. 1965).
204. The statement $V \approx H$ is not a statement that can be captured using first-order propositional logic. *See* Franks, *supra* note 172. There are more powerful logic systems that can capture and accommodate propositions with varying degrees of truth. *See id.* However, for our present purposes, the symbol ≈ will suffice.
205. *See supra* 125–128 and accompanying text.

Figure 2

1.	A	
2.	S	
3.	I	
4.	$V \leftrightarrow R$	(definition of religious cost)
5.	$V \approx H$	(analogical comparison)
6.	$(A \wedge \sim I) \leftrightarrow H$	(substituted secular law doctrine)
7.	$H \leftrightarrow R^*$	(new definition of religious cost)[206]
8.	$(R^* \wedge S) \leftrightarrow B$	(new definition of substantial burden)
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9.	$\therefore \sim B$	

With the same circumstantial facts, this new argument arrives at the conclusion of "no burden" without asserting the falsity of the theological proposition.[207] However, as discussed above in Part II, this proxy strategy has sustained substantial critique. The most potent criticism of the proxy route concerns its permissibility under the religious question doctrine and the fear of noncorrespondence between the selected proxy concept and the claimant's religious proposition. The above argument's formalization, albeit far from perfect, allows us to more finely engage with and dispel those critiques.

Recall that Professor Sherif Girgis decried the proxy model as constituting an impermissible "second-guessing" of the claimant's beliefs.[208] He is arguing that, if the court engages in the substitution of secular concept for theological concept, the court will violate the religious question doctrine.[209] As discussed above, the substitution in the proxy argument hinges on the analogy asserted by the proposition $V \approx H$.[210] Therefore, Professor Sherif Girgis seems to be saying that asserting an analogy between a religious concept and a secular law concept violates the religious question doctrine. Indeed, to make such an assertion, the court must hold in its mind some theological concept and declare it similar to some other secular thing in the world. This may implicate concerns about adjudicative disability and the ability of judges to meaningfully understand the claimant's religious assertion.[211] Furthermore, an even sharper articulation of this critique would

206. After Step 6, the purely deductive reasoning breaks down. Even if one concedes that a permissible analogy can be drawn between the belief violation and the legal harm, running the argument with H in place of V does not guarantee that R is true. What this statement in Step 7 really represents is an argument from the best possible explanation, also known as an abductive argument. We are essentially saying: "if V implies R, and V is roughly equivalent to H, then H implies something roughly equivalent to R." While not deductively airtight, it is a reasonable abductive argument of a kind that is traditional in legal reasoning.

207. *See supra* Figure 2.

208. *See supra* note 124 and accompanying text.

209. *See supra* note 124 and accompanying text.

210. *See supra* Figure 2.

211. *See supra* notes 34–47 and accompanying text.

be that the judge's assertion of $V \approx H$ is an affirmative statement of what V is—thereby violating the prohibition on courts asserting the truth or falsity of religious beliefs.

Professor Sherif Girgis' "second-guessing" critique, however, is too blunt. As Professor Helfand has noted with respect to adjudicative disability, judges still frequently engage with material that is out of their depth.[212] Just as in other cases presenting adjudicative challenges, judges grappling with the religious question doctrine could draw on experts to explain theological nuances—not to make a factual finding on a religious truth, but to assist in constructing the best analogy.[213] Using theological experts would not violate the religious question doctrine because judges would not be siding with any sect or interpretation of religion—they would merely be drawing an appropriate analogy.[214]

With respect to the argument that drawing the analogy at all asserts the truth or falsity of a religious question, recall that V is not a theological proposition. The only theological proposition is $A \rightarrow V$, or the asserted relationship between some fact in the world and the violation of the claimant's religious belief. Sticking with the example of *Hobby Lobby*, the statement "providing insurance causes me to become complicit in sin" is the theological proposition captured by $A \rightarrow V$.[215] The proposition V represents something different. It represents statements describing the character of the belief-violation. In this case, the statement "I have been made complicit in sin" is the idea captured by V. When the court draws its analogy, it is recognizing that the abstract idea of complicity in the statement V is at least in some way related to the concept of complicity in tort, H. In doing so, the court has not contradicted the claimant's views about what constitutes complicity under the claimant's religion, because in drawing its analogy the court has not considered the antecedent, A, at all. The court has only marked that some abstract idea of complicity, however loosely conceived, appears to be latent in both the theological proposition and the legal proposition.

Professor Sherif Girgis also argues that, even if one concedes that using a secular proxy concept does not outright violate the religious question doctrine, this tenuous connection between secular concept and religious concept does little to inform the court of the religious cost borne by the claimant.[216] Furthermore, using a somewhat arbitrary secular law advantages religions that happen to share greater similarity with the common law view of ideas like complicity. He put it succinctly: "the common law is neither here nor there."[217]

This Comment's formalization sheds some new light on this critique. The truth of the statement $H \leftrightarrow R^*$ rests on the strength of the analogy captured

212. *See* Helfand, *supra* note 45 at 548 & n.311.
213. *See id.* at 548–49.
214. *See supra* Part I.B.
215. Other examples of statements represented by $A \rightarrow V$ include: "working on the Sabbath is a sin" or "the inability to use peyote violates my religious beliefs."
216. *See supra* note 121 and accompanying text.
217. *See supra* notes 107–08 and accompanying text.

by $V \approx H$. If the analogy is too weak, the ability of the court to say it has meaningfully judged the claimant's religious cost is diminished. Nevertheless, making a strong analogy is not so difficult. The human mind grasps everyday thoughts and unsolvable fundamental truths of religion with the same tools of induction, deduction, and intuition. The courts understand these epistemic strategies and can recognize where a claimant's religious arguments bear a canny similarity of form and character with secular arguments.

As for the proxy strategy favoring some religions over others, it is important to recognize that any such test will ordain some winners and losers along doctrinal lines. Critiquing scholar Professor Sherif Girgis' own test would favor some religions over others on the basis of their internal coherency.[218] But what I take this critique to really be hinting at is that the proxy strategy, by favoring the religious traditions most similar to the common law, will favor majoritarian religions. Nevertheless, the common law diverges significantly from the alleged beliefs of majoritarian claimants. Indeed, the issues in *Hobby Lobby*, *Zubik*, and *Fulton* were that the Christian claimants were more scrupulous on the issue of complicity than the common law.[219] Furthermore, despite the data showing that minority religionists perform similarly well at the sincerity threshold inquiry,[220] it seems unlikely that minority religionists, who lack the same cultural entrenchment as majoritarian claimants, would be able to sustain the same kinds of tenuous complicity theories at trial. Moreover, it is important to remember that, as it stands, courts are working from a place of extreme deference to claimants.[221] The proxy route, even if it fails to deliver perfect fairness to minority religious claimants, is the best option in a sea of "second best" solutions.[222]

CONCLUSION

Courts judging substantial burdens on the free exercise of religion cannot ignore the issue of religious cost but are barred by the religious question doctrine from considering it directly. This Comment has argued that courts must therefore take an indirect route to incorporate religious cost into their substantial burden analyses. The proxy concept route, which instructs courts to test the merits of a claimant's theological assertion by referring to analogous secular ideas, is a workable strategy. By engaging with religious exceptions claims through secular proxy concepts, courts can fairly evaluate the issue of religious cost, and fulfill the purpose of the free exercise statutes, without violating the First Amendment.

218. *See supra* notes 168–70 and accompanying text.
219. *See supra* notes 29, 111–16 and accompanying text.
220. Xiao Wang, *Religion as Disobedience*, 76 VAND. L. REV. 999, 1044–45 (2023).
221. *See supra* notes 76–80 and accompanying text.
222. *See supra* note 123 and accompanying text.