

# Substantial Burdens as Civil Penalties

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*ABSTRACT: What is a substantial burden on religious exercise? This question continues to stand at the very center of religious liberty debates, animating both present interpretation of the Religious Freedom Restoration Act as well as the trajectory of future free exercise doctrine. In this Essay, I defend the view that courts should interpret the substantiality of burdens by examining the extent of government-imposed civil penalties for noncompliance. Doing so ensures courts avoid assessing the theological substantiality of burdens—inquiries that are prohibited by the Establishment Clause’s religious question doctrine. At the same time, a civil penalties approach to substantial burdens provides courts with a method for limiting religious liberty claims; that is, claimants would still have to demonstrate that the imposition of civil penalties constitutes a substantial burden and judges would have the opportunity to evaluate whether claimants had satisfied that burden. Critics have contended that the civil penalties approach to substantial burdens fails for a variety of reasons. But carefully following the underlying logic behind the approach demonstrates its ability to meet these challenges and provide courts with a meaningful and principled opportunity to evaluate claims for religious accommodations.*

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INTRODUCTION

What is a substantial burden on religious exercise? This question continues to stand at the very center of religious liberty debates, animating both present interpretation of the Religious Freedom Restoration Act (“RFRA”) as well as the trajectory of future free exercise doctrine.<sup>1</sup> Not surprisingly, numerous judges and scholars have presented competing glosses on the “substantial burden” category. In previous work, I argued that courts should assess the substantiality of burdens based upon the “civil penalties triggered by religious exercise.”<sup>2</sup> To do so would prevent courts from assessing the theological substantiality of burdens, which—I argued—would violate the Establishment Clause’s prohibition on resolving religious questions.<sup>3</sup> At the same time, it would still provide courts with a method for limiting religious liberty claims predicated on this existence of a substantial burden—that is, claimants would still have to demonstrate that the imposition of civil penalties constituted a substantial burden and judges would have the opportunity to evaluate whether claimants had satisfied this burden.<sup>4</sup>

Since that time, numerous scholars have criticized this view, arguing that it is flawed and inadequate. The critiques have, by and large, been quite thoughtful, generating a set of important questions for the doctrine.<sup>5</sup> But ultimately, I believe

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1. See *infra* notes 2–8.

2. Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1775 [hereinafter Helfand, *Identifying Substantial Burdens*]. For an abridged version of the argument, see generally Michael A. Helfand, *The Substantial Burden Puzzle*, 2016 U. ILL. L. REV. ONLINE 1 (proposing that substantial burdens be determined on the basis of the civil penalties imposed).

3. Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1787–88.

4. “Civil” penalties, in this context, are not as opposed to criminal penalties, but as opposed to theological penalties or, more accurately, assessment of the theological substantiality of burdens. Indeed, criminal penalties qualify, on this view, as prime examples of civil penalties.

5. See, e.g., Sherif Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1774 (2022) [hereinafter Girgis, *Defining Substantial Burdens*]; Gabrielle M. Girgis, *What is a “Substantial Burden” on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1764 (2020) [hereinafter Girgis, *What is a Substantial Burden*]; Christopher Lund, *Answers to Fulton’s Questions*, 108 IOWA L. REV. 2075, 2083 (2023); Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. ONLINE 19, 21–22; Chad Flanders, *Insubstantial Burdens*, in RELIGIOUS EXEMPTIONS 299 (Kevin Vallier & Michael Weber eds., 2017); Anna Su,

the civil penalties approach can meet these challenges, and responding to these critiques will help clarify why interpreting substantial burdens through the prism of civil penalties is the preferred method for judicial analysis.

Below, I provide a thumbnail sketch of the civil penalties approach to substantial burdens, both in terms of its underlying logic and its doctrinal applications. I respond to five categories of criticism leveled against the civil penalties approach in the hopes of presenting a full vision of how the approach can operate as a theoretically attractive and doctrinally practical method for adjudicating the range of religious liberty claims.

### I. THE SUBSTANTIAL BURDEN QUESTION

Already back in 1989, Chip Lupu famously worried that although “[t]he concept of burden is . . . emerging as crucial in free exercise law. . . little has been written” by scholars addressing the concept, and courts have failed to provide “a coherent and principled approach to the subject.”<sup>6</sup> Since that time, the concept of burdens has become entrenched at the heart of much religious liberty litigation.<sup>7</sup> And, concomitantly, scholars have attempted to provide both theoretical grounding and doctrinal heft to this somewhat ambiguous concept.<sup>8</sup>

Importantly, this doctrinal elaboration—and, in turn, scholarly analysis—has taken a particular form. As the doctrine has developed, it is not any burden that can trigger religious liberty protections; those burdens must be *substantial*

*Varieties of Burden in Religious Accommodations*, 34 J.L. & RELIGION 42, 61 (2019); Abner S. Greene, *A Secular Test for a Secular Statute*, 2016 U. ILL. L. REV. ONLINE 34, 36; D. Bowie Duncan, *Inviting an Impermissible Inquiry? RFRA's Substantial-Burden Requirement and "Centrality,"* 48 PEPP. L. REV. 1, 27–29 (2021); Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. ILL. L. REV. ONLINE 53, 56–59.

6. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 935, 936 (1989).

7. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 356 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005); *Apache Stronghold v. United States*, 38 F.4th 742, 752 (9th Cir. 2022); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008); *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 836 (11th Cir. 2020); *Canaan Christian Church v. Montgomery County*, 29 F.4th 182, 192 (4th Cir. 2022); *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1001 (6th Cir. 2017); *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007); *Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs.*, 867 F.3d 338, 355 (3d Cir. 2017); *Roman Cath. Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 93 (1st Cir. 2013).

8. See, e.g., Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 96–104 (2017); Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 633–34 (2016); Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL'Y REV. 161, 180 (2015); Steven D. Smith & Caroline Mala Corbin, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261, 279 (2013); Girgis, *Defining Substantial Burdens*, *supra* note 5, at 1761–67; Girgis, *What is a Substantial Burden*, *supra* note 5, at 1764; Lund, *supra* note 5, at 2086; DeGirolami, *supra* note 5, at 19; Flanders, *supra* note 5, at 299–300; Su, *supra* note 5, at 61; Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1909–10 (2015); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–2522 (2015).

burdens. This shift is, by and large, the result of the text of the Religious Freedom Restoration Act, which in providing enhanced protections for religious liberty, states that the “[g]overnment shall not substantially burden a person’s exercise of religion . . . .”<sup>9</sup> As noted in its text, the purpose of RFRA was to counteract the Supreme Court’s decision in *Employment Division v. Smith*,<sup>10</sup> which held that neutral laws of general applicability did not violate the First Amendment even in circumstances where such laws imposed significant, but incidental, burdens on religious exercise.<sup>11</sup> Congress therefore prohibited government from substantially burdening religious exercise unless the justification for doing so could satisfy the demands of strict scrutiny.<sup>12</sup>

Congress’s choice of the word “substantial” to modify the prohibited category of burdens on religious exercise presented somewhat of a curiosity. While the text of RFRA indicates that one of the purposes of the statute was to restore the constitutional standard prior to *Smith*,<sup>13</sup> the phrase “substantial burden” rarely appeared in pre-*Smith* Supreme Court decisions—and when it did, it appeared with very little elaboration.<sup>14</sup> The term also was a late addition to the text of RFRA.<sup>15</sup>

9. 42 U.S.C. § 2000bb-1(a) (2018). Of course, the substantial burden standard was subsequently incorporated into the provisions of RLUIPA. *See* 42 U.S.C. § 2000cc (as applied to land use claims); 42 U.S.C. § 2000cc-1 (as applied to institutionalized persons).

10. *See generally* *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990) (deciding that a neutral, generally applicable law is not invalid if it incidentally burdens a religion).

11. 42 U.S.C. §§ 2000bb(a)–(b).

12. *See* 42 U.S.C. §§ 2000bb-1(a)–(b).

13. *See id.* § 2000bb(b)(1) (stating that one of the “purposes of this chapter” is “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)”).

14. For the phrase substantial burden, see *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384–85 (1990) (“Our cases have established that ‘[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.’” (alteration in original) (quoting *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989))). In some instances, the Court made reference to substantial pressure. *See Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981) (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.”); *see also Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (quoting *Thomas*, 450 U.S. at 717–18). The Court also used the term substantial infringement although it was not clearly in the context of the constitutional trigger for a free exercise claim. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (“We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant’s First Amendment right.”); *see also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (“The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child . . . contravenes the basic religious tenets and practice of the Amish faith . . .”).

15. *See Gedicks*, *supra* note 8, at 119–22 (recounting RFRA’s legislative history and amendment of the statutory text to include “substantial”).

But with its inclusion, the “substantial burden” category became the center of the RFRA inquiry. By definition, the existence of a category of substantial burdens—which triggers RFRA’s protections—means that there is also another category of insubstantial burdens which do not receive RFRA’s protections. As a result, courts adjudicating RFRA claims would have to begin by identifying the burden on religious exercise and then determine whether that burden was substantial or insubstantial.<sup>16</sup>

Moreover, assessing the substantiality of burdens on religious exercise has import beyond RFRA cases. The Supreme Court has, of late, certainly entertained the possibility of reversing *Employment Division v. Smith*. In *Fulton v. City of Philadelphia*, “[w]hether *Employment Division v. Smith* should be revisited” was one of the questions presented to the Court by the petitioners.<sup>17</sup> In turn, commentators wondered aloud whether the Court would overrule *Smith*.<sup>18</sup> The Court, however, took a more modest approach, deciding the free exercise claims at stake in *Fulton* on far narrower grounds.<sup>19</sup> While *Fulton* was a unanimous decision, one prominent feature of the voting breakdown was Justice Barrett’s concurrence, where she expressed reluctance in overturning *Smith* because of the free exercise puzzles such reversal would generate.<sup>20</sup> And prominent on that list of doctrinal puzzles was a concern over how courts ought to determine what sorts of burdens ought to trigger First Amendment protections.<sup>21</sup> In this

16. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 228 (1994) (“The level of scrutiny under RFRA is strict, but that scrutiny applies only to government action that ‘substantially burdens’ the exercise of religion. Insignificant burdens on religious exercise, as well as significant burdens on activities that are not religious exercise, fall outside RFRA’s protections.”).

17. Petition for Writ of Certiorari at i, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123), 2019 WL 3380520, at \*i.

18. See, e.g., Michelle Boorstein, *Religious Conservatives Hopeful New Supreme Court Majority Will Redefine Religious Liberty Precedents*, WASH. POST (Nov. 3, 2020, 1:31 PM), <https://www.washingtonpost.com/religion/2020/11/03/supreme-court-religious-liberty-fulton-catholic-philadelphia-amy-coney-barrett/> [<https://perma.cc/9GY7-EHW4>] (“The possibility that the newly 6-3 conservative-majority court could overturn *Smith* and set a new precedent about the legal status of religion comes as the country is deeply unsettled about how to balance LGBTQ and other rights with the rights of religious traditionalists.”). But see Michael Helfand, *Religious Liberty and Religious Discrimination: Where Is the Supreme Court Headed?*, 2021 U. ILL. L. REV. ONLINE 98, 100–01 (predicting that the Court would not overturn *Smith* in *Fulton*).

19. *Fulton*, 141 S. Ct. at 1876–77 (“CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so . . . . But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.”).

20. *Id.* at 1882–83 (Barrett, J., concurring) (“[W]hat should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*’s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court’s resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced.”).

21. *Id.* at 1883 (“Should there be a distinction between indirect and direct burdens on religious exercise?”).

way, it isn't just that methodological challenges to assessing the substantiality of burdens impact current RFRA cases, but they also impact the future possibilities of free exercise doctrine.

So how should courts adjudicate substantial burden questions? Figuring out what doctrine courts ought to employ requires, by necessity, first answering a more fundamental question: why should we care whether a burden is substantial?

#### A. WHY SUBSTANTIAL BURDENS?

Why should courts differentiate between substantial and insubstantial burdens? No doubt, the substantial modifier is intended to limit the scope of burdens that trigger religious liberty protections.<sup>22</sup> But to figure in what way it is intended to limit the scope of burdens requires a theory as to why the scope of burdens ought to be limited.

The civil penalties approach aims to provide an answer to this question—one that can be used by courts to actually adjudicate substantial burden questions. On this view, to determine whether a law imposes a burden that is substantial, courts should evaluate “whether, by engaging in religious exercise, persons will be subject to some sort of civil penalty.”<sup>23</sup> This sort of civil penalty could come in various forms. In some instances, the penalty might be an additional cost or tax for engaging in governmentally regulated conduct. In other instances, the civil penalty might be a sanction for noncompliance with a legal prohibition. In all such cases, courts should determine whether there exists a substantial burden by evaluating how substantial those penalties are.

Looking to civil penalties to police the line between substantial and insubstantial burdens captures an important intuition about the nature of the inquiry. Thus, on the civil penalties approach:

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.<sup>24</sup>

Put in this way, not every civil cost to a religious claimant can provide a basis to trigger strict scrutiny. For those with religious commitments, it is possible that a particular law or rule will incidentally impose some small and tolerable costs on their religious exercise. What differentiates tolerable costs from intolerable costs—that is, costs that are insubstantial and costs that are substantial—is the amount of the civil penalty. For these reasons, the civil penalties approach encourages courts to evaluate the substantiality of a burden by asking whether, given the existence of a particular government regulation or penalty, “*can a*

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22. See Gedicks, *supra* note 8, at 119–22 (recounting RFRA’s legislative history).

23. Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1791.

24. *Id.* at 1793.

person still engage in religious exercise while only enduring an insubstantial civil burden?" So long as citizens can continue to engage in religious exercise with only minor, tolerable, and, therefore, insubstantial burdens, there are no grounds to invoke RFRA's religious liberty protections.

To appreciate the implications of this approach to substantial burdens, consider how it contrasts with two competing approaches.

### 1. Substantial Burdens as Theologically Significant

The first—what we might term the theological substantiality approach—contends that courts ought to evaluate whether the religious exercise at stake is sufficiently important to warrant the strict-scrutiny protections of RFRA. Advocates of this approach don't always quite formulate it in these terms, but it is the orientation that animates their application of the substantial burden standard. Maybe the best examples come from criticism of the Supreme Court's majority opinion in *Burwell v. Hobby Lobby*.<sup>25</sup>

In *Hobby Lobby*, the Court held that for-profit companies could assert a RFRA defense against 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.<sup>26</sup> In reaching this conclusion, the Court held that requiring such companies to provide such contraception coverage—and levying financial penalties for any failures to comply—constituted a substantial burden on their religious exercise.<sup>27</sup> Painting in broad strokes, critics of the majority's substantial burden analysis argued—among other critiques—that the burden imposed by the contraception mandate was insubstantial.<sup>28</sup> The petitioner for-profit companies were not being asked themselves to engage in behavior they believed to be sinful. Instead, the Affordable Care Act simply required them to purchase insurance for their employees that covered contraception; and even then, it was only in a subset of instances where the for-profit employers believed that the contraception might be used by employees in religiously prohibited circumstances. In sum, given the multiple links in the causal chain, critics concluded that the *Hobby Lobby* majority was wrong in its conclusion that the for-profit corporations had been *substantially* burdened; the companies' RFRA claim merely constituted a religious objection to being complicit in someone else's conduct, not in actually engaging in religiously prohibited conduct themselves.<sup>29</sup> In turn, the attenuated nature

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25. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–736 (2014).

26. *See id.* at 690–91, 727–28.

27. *See id.* at 728.

28. *See, e.g.*, Gedicks, *supra* note 8, at 148–49; Sepinwall, *supra* note 8, at 1939–41.

29. For more on the structure of such claims, see NeJaime & Siegel, *supra* note 8, at 2522

of the for-profit petitioners' objection to the contraception mandate ought not have been afforded the protections of RFRA.<sup>30</sup>

There is a strong intuition driving such claims. At their core, they rest on a premise that only significant religious conduct ought to receive protection from government burdens. Some religious commitments—such as complaints about being complicit in the sinful conduct of others—are not sufficiently theologically significant; and therefore, burdening such commitments cannot constitute a *substantial* burden on religious exercise. Put differently, the law differentiates between substantial and insubstantial burdens because it seeks to protect significant religious commitments and not minor religious commitments.

But the civil penalties approach to substantial burdens rejects this approach because engaging in such an inquiry—assessing whether a government regulation imposes a burden on a theologically substantial religious commitment—violates the Establishment Clause. Maybe the clearest statement from the Court on this front comes from *Thomas v. Review Board*, where the majority emphasized “it is not for us to say that the line [the petitioner] drew was an unreasonable one. Courts should not undertake to dissect religious beliefs . . . .”<sup>31</sup> The Court expressed similar concerns in *Employment Division v. Smith*: “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.’”<sup>32</sup> Indeed, there is strong reason to think that judicial assessment of theological substantiality might disfavor minority religions whose theological commitments may be foreign or obscure to judges, and such lack of familiarity can all-too easily lead courts to conclude that those commitments simply aren’t sufficiently weighty to deserve protection.

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30. Maybe the most prominent example of this criticism was Justice Ginsburg’s dissent in *Hobby Lobby, Hobby Lobby*, 573 U.S. at 760 (Ginsburg, J., dissenting) (“[T]he connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans.”). Among academics, the most prominent version of this criticism was leveled by Professor Frederick Gedicks, although his approach provides a more nuanced version of this critique. See Gedicks, *supra* note 8, at 132 (arguing that court ought “[t]o enlist common law tort principles as secular sources for measuring the substantiality of burdens on religion”); see also Sepper, *supra* note 5, at 59 (“While courts lack expertise in religious studies, they regularly apply principles of proximity, causation, and attenuation in a variety of First Amendment contexts and in tort and criminal cases. The fact that legal questions raised by the substantial burden standard can be tricky does not require judges to throw up their hands.” (footnote omitted)). For an extended analysis of Professor Gedicks’s view, see Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1789–90.

31. *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 715 (1981).

32. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).



For these reasons, the civil penalties approach to substantial burdens encourages courts to focus on the extent of the government-imposed sanctions or costs to determine whether a burden is substantial. This sort of inquiry avoids constitutionally prohibited inquiries and places courts in familiar territory by employing secular metrics as opposed to theological metrics. Indeed, avoiding Establishment Clause concerns serves as one of the primary motivations behind the civil penalties approach to substantial burdens.

That being said, it is worth noting that the inability to confirm and evaluate both the existence of a theological burden and the extent of the theological burden may not absolve a petitioner from pleading the existence of a theologically substantial burden. One can imagine an interpretation of the substantial burden standard as entailing two requirements: first, the existence of civil penalties that are substantial and, second, the claim that such civil penalties are burdening religious exercise. It is true that courts could only interrogate and evaluate the claim that the civil penalties are substantial. But that does not mean that a petitioner would not have to assert that they have a sincerely held belief that the religious exercise at stake is being burdened.<sup>33</sup>

My initial articulation of the civil penalties approach focused on how courts ought to police the boundary between substantial and insubstantial burdens given the constraints of the Establishment Clause.<sup>34</sup> In this way, it was a theory that focused on the actual adjudication of substantial burden claims. But the remaining elements of a RFRA claim, for example, would still need to be pled by the claimant.

By contrast, adopting the civil penalties approach does not entail a commitment as to whether a claimant must plead that the substantial civil penalties are also burdening theologically significant religious exercise. One

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33. In this way, the civil penalties approach doesn't, in principle, take issue with Professor Anna Su's suggestion that "the evaluation of whether the monetary penalty reaches the substantial threshold would only come after the court has already determined the presence of burden." Su, *supra* note 5, at 61. The alignment of the two theories depends, ultimately, on the scope of this judicial inquiry. Professor Su provides some indication of what she has in mind:

For instance, it would hardly be anathema for secular courts to take judicial notice of the fact that opposition to abortion is part of Catholic doctrine, or that various religions have rules on dietary restrictions. This type of inquiry is not the kind of theological inquiry envisioned by the so-called religious question doctrine to be avoided by courts. Indeed, there is an important difference between ruling on the validity of a claimant's beliefs or adjudicating intra-faith differences and that of examining whether the asserted belief or infringement has any relation to the creed or tradition to which one subscribes for the purpose of determining the presence of burden.

*Id.* at 62. To the extent an examination of "the asserted belief or infringement has any relation to the creed or tradition to which one subscribes" entails simply assessing the existence of a sincerely-held religious belief, this sort of inquiry can fit alongside the civil penalties approach. *Id.* To the extent it requires something more searching—an inquiry that requires providing an objective assessment of the existing theology or doctrine—then it will likely conflict with the underlying commitments of the civil penalties approach.

34. Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1775.

might take the view that the Establishment Clause prohibition on judicial assessment of theological substantiality does not absolve a claimant from at least *pleading* a sincerely held belief that the religious exercise in question is theologically substantial. One might also take the view, however, that the fact that courts cannot evaluate the theological substantiality of religious exercise ought to influence the interpretation of the substantial burden requirement. Put differently, we ought not interpret the substantial burden standard to require pleading a form of substantiality that courts cannot assess. Either of these approaches to a pleading requirement is entirely consistent with a civil penalties approach.<sup>35</sup>

## 2. Substantial Burdens as Theological Interference

Another alternative interpretation of the substantial burden requirement is that a burden is substantial to the extent it exerts sufficient pressure to modify the beliefs and practices of a religious claimant. As argued by Professor Chad Flanders, the substantial burden standard is interpreted through the prism of the harm it is geared to prevent: government manipulation of religious exercise. On his view, to satisfy the substantial burden standard, “the plaintiff has to show that something the government is doing is putting pressure on her to change or modify her religious beliefs.”<sup>36</sup> As a result, a claimant “cannot say the government is burdening her just because the government has done something that makes the practice of her beliefs more difficult: it has to be doing something *to her*, where she is being put to a choice where that choice involves some secular costs.”<sup>37</sup> In these ways, Professor Flanders’s theory contends that the object of the substantial burden standard is to ensure that government does not use civil sanctions to incentivize, modify, or manipulate religious behavior. It is when government threatens to impose substantial civil burdens for certain forms of religious conduct that it uses its power to encourage individuals to change their religious behavior.

Indeed, some of the Court’s prior decisions certainly provide a strong basis for Professor Flanders’s view. Maybe the best example is the Court’s articulated logic underlying the substantial burden standard in *Thomas v. Review Board*:

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35. Because claimants must still, on any account, plead the existence of a sincerely held religious belief that is being burdened, the civil penalties approach is not solely focused on vindicating the monetary rights of the claimant. For an argument to the contrary, see DeGirolami, *supra* note 5, at 26 (“[A] test of substantial burden that segregates religious and secular reasons, and that fails to incorporate or account for the religious reasons at stake, is likely to misunderstand a religious claimant’s true reasons and motivations. To argue that the bare fact of assessing a company like Hobby Lobby a \$1,000 fine would pose a substantial burden to its religious exercise strains credulity. It is to mistake a family’s, or a company’s, money for its principles.”); *see also* Su, *supra* note 5, at 61–62 (exploring how substantiality can be assessed).

36. Flanders, *supra* note 5, at 299; *see also* Chad Flanders, *Substantial Confusion About “Substantial Burdens,”* 2016 U. ILL. L. REV. ONLINE 27, 27–28 (“[A] religious belief or believer is burdened’ when the government *puts some kind of pressure on* someone to act contrary to his religious beliefs.”).

37. Flanders, *supra* note 5, at 299–300.

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, *thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists.<sup>38</sup>

The civil penalties approach, however, rejects this approach largely because of some of its counterintuitive consequences. Consider the following: If the purpose of the substantial burden standard is to prevent the manipulation of religious doctrine and practice, then it would not apply to cases where government exercises its power to wholly prevent religious exercise. So if government imposes a hefty tax on Sunday travel—in an attempt to incentivize leisure—such a tax might very well qualify as a substantial burden as it could, by design, disincentivize participation in collective religious worship in church. However, if government were to take its objective a step further and physically lock all citizens in their homes on Sunday—wholly preventing participation in Sunday church services—its regulations would not constitute a substantial burden. This is simply because the enhanced regulation would not incentivize anything; citizens would be physically disabled from participating in in-person Sunday church worship.

To be sure, Professor Flanders fully embraces this consequence; in that way, his views are wholly consistent.<sup>39</sup> But one can hopefully see why alternative approaches to the substantial burden standard—including the civil penalties approach—might view rendering religious exercise impossible as a more significant burden than merely taxing religious exercise—or at least, why it would be committed to providing more protection against the former than the latter. For this reason, the civil penalties approach is best “[...]formulated as follows: *notwithstanding government regulation, can a person still engage in religious exercise while only enduring an insubstantial civil burden?*”<sup>40</sup> Applied to our Sunday leisure case, government would still be substantially burdening religious exercise if it locked all citizens in their homes. This is for the simple reason that citizens seeking to attend Sunday mass would be unable to engage in religious exercise while only enduring insubstantial burdens—the government, after all, has made that form of religious exercise impossible.

In this way, the civil penalties approach aims at ensuring that individuals are not constrained in their capacity to exercise their religion, save for enduring insubstantial—and therefore tolerable—burdens. Such minor inconveniences,

38. *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981) (emphasis added); see also Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 CONN. L. REV. 959, 982 (2018) (“*Thomas* could be read to suggest something slightly different—namely, that the loss of government benefits should count as a burden only when it creates religious pressure in the individual case. . . . *Thomas* should not be read this way. The idea that a burden exists only when there is ‘substantial pressure’ in some individual case, cannot square with the Supreme Court’s other cases.”).

39. See Flanders, *supra* note 5, at 299–300.

40. Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1805.

so long as they do not target religion, are simply part of a life committed to religious exercise. Sometimes such a life comes with minor and insubstantial costs. As a result, in instances where government either imposes substantial burdens on religious exercise or where government makes a certain form of religious exercise wholly impossible, the civil penalties approach concludes that the government's conduct ought to be subjected to strict scrutiny. Without sufficient justification, religious exercise should not be put beyond the reasonable reach of citizens—either through substantial burdens or through even more drastic government regulation that makes such exercise impossible.

To best see the impact of reformulating the substantial burden standard in this way—one that focuses on the expectation that citizens endure insubstantial burdens in the exercise of religion—consider a pair of controversial decisions handed down by the Court in the late 1980s, rejecting Native American free exercise claims. In the first such case, *Bowen v. Roy*, the Court addressed a claim that the Free Exercise Clause prohibited state welfare agencies from requiring that recipients of certain welfare benefits first provide the Social Security numbers of those seeking to participate in the welfare program.<sup>41</sup> The parents of one such welfare-program participant contended that giving their daughter a Social Security number would “serve to rob [her] spirit.”<sup>42</sup> The Court, however, rejected the claim on substantial burden grounds, concluding that “[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”<sup>43</sup>

Similarly, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court rejected the free exercise claims of three Native American tribes; the tribes argued that government construction through a national forest would substantially burden their ability to continue using the land for religious purposes.<sup>44</sup> The Court concluded, relying heavily on its decision in *Bowen*, that while “the challenged Government action would interfere significantly with private persons’ ability to pursue spiritual fulfillment,” such considerations were insufficient to constitute a substantial burden because “the affected individuals” were not being “coerced by the Government’s action into violating their religious beliefs[.]”<sup>45</sup>

On Professor Flanders’s account, the free exercise claims in both *Bowen* and *Lyng* ought to fail because the religious claimants were not put to a choice.<sup>46</sup> In *Bowen*, the government simply issued a Social Security number,<sup>47</sup> and in *Lyng*,

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41. *Bowen v. Roy*, 476 U.S. 693, 695 (1986).

42. *Id.* at 696 (internal quotation marks omitted).

43. *Id.* at 699.

44. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42, 447 (1988).

45. *Id.* at 449.

46. Flanders, *supra* note 5, at 298.

47. Professor Flanders is careful to note that the prong of the free exercise challenge that objected to conditioning welfare benefits on the issuing of a Social Security number ought to qualify

the government sought to construct a road. There was no penalty or sanction that might incentivize the claimants to manipulate or modify their religious doctrine. “[T]he plaintiff has to show that something the government is doing is putting pressure on her to change or modify her religious beliefs,” and without putting free exercise claimants to a choice, Professor Flanders concludes there is no burden—and therefore, by definition, no substantial burden.<sup>48</sup>

One of the challenges of Professor Flanders’s approach is that, taken to its logical conclusion, it might privilege claimants who are more likely to change or modify their religious practice in response to government pressure. The more susceptible you are to pressure, the more likely government-imposed sanctions are to trigger protection under the substantial-burden framework. By contrast, faith communities whose commitments do not waver will not be eligible for such protections. As Professor Christopher Lund has noted, “if exemptions are designed to relieve religious pressure, true martyrs will not need them.”<sup>49</sup> This sort of counterintuitive consequence provides strong reasons to worry about Professor Flanders’s approach to the substantial burden question.<sup>50</sup>

By contrast, the civil penalties approach concludes that both cases were wrongly decided. In each instance, the Court ought to have inquired whether the claimants could have engaged in the relevant form of religious exercise while only enduring insubstantial civil burdens. In *Bowen*, the answer is no. Part of the claimant’s religious exercise was to protect and grow the spiritual power of their daughter.<sup>51</sup> That exercise was made impossible by the government issuing a Social Security number. And by putting that exercise beyond the reach of the claimants—a form of spiritual religious exercise that could no longer be pursued through merely enduring insubstantial burdens—the government’s conduct ought to have been held to violate the Free Exercise Clause, unless the government could satisfy the demands of strict scrutiny.

And the same is true of *Lyng*. By constructing a road through land used for religious purposes, the government would make the religious exercise of the affected Native American tribes impossible. The fact such decisions are “internal”

as a substantial burden. Conditioning a government benefit in that way does constitute the kind of choice that might influence religious doctrine. *See id.* at 300.

48. *Id.* at 299.

49. Lund, *supra* note 38, at 983.

50. Note that Professor Flanders might avoid this consequence by taking an objective approach to the inquiry. On such an approach, courts would assess whether a particular government sanction or regulation would lead the typical religious claimant to modify his or her religious practice. Therefore, whether or not a particular claimant would martyr themselves would not factor into the analysis. Of course, creating a “reasonable religious claimant” standard is a fraught inquiry under the Establishment Clause—and has led to disposition in favor of the defendant in cases of clergy malpractice. *See, e.g.,* Schmidt v. Bishop, 779 F. Supp. 321, 327–28 (S.D.N.Y. 1991); Nally v. Grace Cmty. Church, 763 P.2d 948, 954–55 (Cal. 1988); Wisniewski v. Diocese of Belleville, 943 N.E.2d 43, 75 (Ill. App. Ct. 2011); H.R.B. v. J.L.G., 913 S.W.2d 92, 98–99 (Mo. Ct. App. 1995); F.G. v. MacDonell, 696 A.2d 697, 703 (N.J. 1997); Jones v. Trane, 591 N.Y.S.2d 927, 930–31 (Sup. Ct. 1992); White v. Blackburn, 787 P.2d 1315, 1318–19 (Utah Ct. App. 1990).

51. *Bowen v. Roy*, 476 U.S. 693, 696 (1986).

government decisions should not alter the substantial burden calculus.<sup>52</sup> It is one thing to require those with religious commitments to endure insubstantial burdens; but rendering religious exercise impossible is one of the forms of government overreach that the civil penalties approach is meant to prohibit.

It is worth here noting one other way in which *Bowen* and *Lyng* have been deployed to capture a limitation on the substantial burden standard. Sherif Girgis has argued that the Court's decision in *Bowen*—as opposed to *Lyng*—can be justified not based on distinctions between internal and external government decision-making, but by distinctions between government “actions that do and do not inhibit the claimant's religious conduct.”<sup>53</sup> *Lyng* is therefore wrongly decided because the government decision to build the road would “have a negative impact on religious conduct[.]”<sup>54</sup> By contrast, *Bowen*'s outcome was correct, even if its reasoning wasn't, because there was no conduct at stake. This is because, according to Girgis, “civil liberties, in general, advance interests only by protecting from state interference the *private conduct that advances* those interests.”<sup>55</sup>

There are a variety of reasons why one might disagree with Girgis's focus on conduct. One can imagine critics of such a view worrying that the privileging of conduct over other forms of spiritual religious impact might tilt the scales of religious liberty protections toward majoritarian and familiar forms of religious exercise—and away from minority faith traditions that emphasize forms of religious exercise that prioritize spiritual fulfillment. For our purposes, though, Girgis's distinction provides a useful contrast to the civil penalties approach. On the civil penalties approach, there is no reason to differentiate between religious conduct or spiritual impact. In each case, the civil penalties approach deems government regulation that renders religious exercise impossible as violating the demands of the substantial burden standard. Government can ask individuals to suffer insubstantial burdens on religious exercise; imposing regulations that require individuals to forego religious commitments, whether or not they implicate conduct, must be justified by satisfying the demands of strict scrutiny.

## II. RESPONDING TO CRITICS

A successful methodological approach to assessing substantial burdens must accomplish two primary tasks. On the one hand, it must avoid the pitfalls of the Establishment Clause, which is conventionally understood to prohibit courts from resolving questions implicating religious doctrine or practice.<sup>56</sup>

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52. See *id.* at 699; *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

53. Girgis, *Defining Substantial Burdens*, *supra* note 5, at 1806.

54. *Id.*

55. *Id.*

56. For my part, I have argued that much of the religious question doctrine as applied by courts stems from doctrinal errors. See generally Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493 (2013) (contending “that where there is no alternative religious institution available to

At the same time, it must also provide a meaningful opportunity for courts to narrow the field of religious liberty claims; it seems only reasonable that the purpose of restricting the sorts of burdens that can trigger religious liberty claims to *substantial* burdens is to limit the scope of potential claims.

As I have argued previously, the civil penalties approach can accomplish both objectives.<sup>57</sup> It both avoids judicial resolution of religious questions, and by requiring substantial civil penalties, it provides a meaningful threshold inquiry to ensure that not all claims of burden trigger religious liberty protections.

Critics, however, have claimed otherwise.<sup>58</sup> For some, the civil penalties approach fails to provide courts with a meaningful metric to make principled distinctions between substantial and insubstantial burdens.<sup>59</sup> For others, the metric lacks utility because there are no real-world examples of insubstantial civil penalties.<sup>60</sup> Yet others claim that the civil penalties approach fails to account for circumstances where claimants had other, equally good, opportunities for religious exercise.<sup>61</sup> And still others worry that the civil penalties approach fails because it treats all forms of religious exercise similarly, regardless of how important or weighty they are.<sup>62</sup>

Below I respond to these criticisms. And all told, the logic and operation of the civil penalties approach stands up quite well to these criticisms. Indeed, evaluating the civil penalties approach against these thoughtful critiques highlights the framework's full force, further bolstering its claim to being the preferred method for assessing the substantiality of burdens.

A. *THERE IS NO PRINCIPLED DIFFERENCE BETWEEN SUBSTANTIAL AND INSUBSTANTIAL CIVIL PENALTIES*

Much of the criticism leveled against the civil penalties approach focuses on the capacity of courts to make reasonable and principled judgments differentiating between different kinds of civil penalties.<sup>63</sup> On this view, it may be true that courts should not assess the substantiality of burdens by rendering determinations regarding the theological impact of government regulations. But solving that problem by asking courts to assess civil substantiality does little to advance the ball.

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resolve a dispute turning on religious doctrine or practice, courts should resist dismissing the case"). That being said, when courts allocate governmental benefits and burdens on the basis of theological substantiality, I have argued that the religious question doctrine remains on solid theoretical and doctrinal footing. See Michael A. Helfand, *When Judges Are Theologians: Adjudicating Religious Questions*, in RESEARCH HANDBOOK ON LAW AND RELIGION 262 (Rex Ahdar ed., 2018).

57. See discussion *supra* Part I; Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1775.

58. See discussion *infra* Sections II.A–E.

59. See discussion *infra* Section II.A.

60. See discussion *infra* Section II.C.

61. See discussion *infra* Section II.D.

62. See discussion *infra* Section II.E.

63. See, e.g., Lund, *supra* note 5, at 2087.

As an example of this criticism, consider Professor Christopher Lund's contention that assessing the substantiality of burdens by looking solely at the degree of civil penalties "will not work."<sup>64</sup> The reason: "It would be impossible to say how much of a civil or penalty is too much, and might even descend into messy contextual judgments about a particular religious claimant's ability to pay."<sup>65</sup>

Here Professor Lund combines two related critiques of the civil penalties approach. The first is that such distinctions are simply impossible for courts to make. They will, on this view, ultimately be either unreasonable or unprincipled—line drawing that does not provide sufficiently meaningful content to the substantial burden category.

But given the sorts of determinations courts make in other legal contexts, there is good reason to be skeptical of Professor Lund's prediction as to how a civil penalties approach would work out in practice. Indeed, courts engage in this sort of analysis all the time. One prominent example is judicial determinations regarding material and total breach.<sup>66</sup> In such cases, courts are asked to evaluate the extent of a breach based upon, among other considerations, the degree to which the breach's victim will be deprived of the expected benefit.<sup>67</sup> This consideration, which is often the primary consideration, requires a court to evaluate "the extent to which the injured party will be deprived of the benefit which he reasonably expected."<sup>68</sup> As the Restatement (Second) of Contracts notes, this sort of inquiry is certainly contextual. But all that means is that courts should take all circumstances into account and render a determination:

Although the relationship between the monetary loss to the injured party as a result of the failure and the contract price may be significant, no simple rule based on the ratio of the one to the other can be laid down, and here, as elsewhere under this Section, all relevant circumstances must be considered.<sup>69</sup>

Assessing the substantiality of a civil penalty requires a similar sort of judicial analysis. And if courts have successfully navigated this kind of inquiry when it comes to private law, it seems perfectly reasonable to assume that they can do so when it comes to religious liberty protections.

#### B. ASSESSING CIVIL PENALTIES IS TOO SUBJECTIVE AN INQUIRY

Criticism that the civil penalties approach fails to provide courts with a reliable method for identifying substantial burdens cuts a level deeper.

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64. *Id.*

65. *Id.*

66. *See generally* Sackett v. Spindler, 56 Cal. Rptr. 435 (Ct. App. 1967) (determining whether a breach is partial or total based upon a variety of factors).

67. RESTATEMENT (SECOND) OF CONTRS. § 241 (AM. L. INST. 1981).

68. *See id.* § 241 cmt. b.

69. *Id.*



Consider Professor Lund's second criticism.<sup>70</sup> It isn't simply that courts will struggle to determine if a penalty is "too much." Professor Lund worries that the determinations will have to be subjective—the very same burden in the very same context may be deemed substantial for one person, but insubstantial for another—simply because one party has a higher net worth and therefore has an easier time paying the civil penalty.

Others have leveled similar critiques of the civil penalty approach. For example, Professor Marc DeGirolami has argued as follows:

[S]uppose that had Hobby Lobby dropped insurance coverage, the civil/secular penalty in *Hobby Lobby* would have amounted to approximately \$26 million per year. Hobby Lobby has roughly \$3.7 billion in annual revenue. The Green family likely has profits in the hundreds of millions of dollars each year. Many families could live comfortably on even a small fraction of those millions. And a certain number of millions of dollars is likely what the Greens have given up in profits by declining to open for business on Sundays. If, therefore, the Greens have already shown that degree of financial sacrifice for religious reasons, is the \$26 million quantum a burden? A substantial burden? \$26 million is quite a bit more than \$1,000, which seemed to be the threshold of a burden's civil/secular substantiality proposed by Professor Helfand. Yet how onerous is it from the perspective of a business that produces profits orders of magnitude greater than \$26 million each year and that is already sacrificing millions of dollars in sales for religious reasons?<sup>71</sup>

This passage weaves together multiple critiques, but one strong theme is that civil penalties are subjective—that is, to determine their subjectivity requires measuring those burdens against the other financial circumstances of the claimant. And therefore, the civil penalties approach does not provide an administrable test.

But, at least with respect to the subjectivity claim, it isn't clear why that should be an issue. Why does the subjective nature of civil penalties present a problem? To the contrary, it has long been a feature of this approach that it would assess the civil substantiality of burdens on a sliding scale.<sup>72</sup> This element of the inquiry derives directly from the logic underlying the civil penalties approach. The law differentiates between substantial and insubstantial burdens because it expects religious claimants to tolerate and absorb costs that simply have little impact on them. Put crudely, if the burden is not a big deal, then

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70. Lund, *supra* note 5, at 2087.

71. DeGirolami, *supra* note 5, at 25 (footnotes omitted).

72. See Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1791 ("In some cases, that penalty would be framed simply as an additional cost or tax for engaging in governmentally regulated conduct. In other cases, the civil penalty would be framed as a sanction for noncompliance with a governmental rule.").

the law asks those with religious commitments to live with those sort of minor annoyances—and not make a federal case out of it. And, for those with significant resources, the law can reasonably expect them to tolerate more significant civil penalties precisely because—for them—it isn't a big deal.

Indeed, it appears that free exercise doctrine, at least at some point, operated with this sort of intuitive approach to the substantiality of burdens. In *Braunfeld v. Brown*, the Supreme Court famously discounted the burden Sunday Closing laws imposed on Orthodox Jewish merchants.<sup>73</sup> True, such laws might mean that the merchants would only be open five days a week—closing on Saturday in observance of their Sabbath and on Sunday in accordance with the law. But for the Court, this consequence simply meant that Sunday Closing laws “operate[d] so as to make the practice of their religious beliefs more expensive.”<sup>74</sup> As a result, the burden on religious practice was insufficient to trigger the protections of the Free Exercise Clause.<sup>75</sup> Yet two years later, in *Sherbert v. Verner*, the Supreme Court held that denial of unemployment benefits served as a burden sufficient to trigger free exercise protections.<sup>76</sup> And this was true even though the aggregate cost of the Sunday Closing law to the merchants in *Braunfeld* undoubtedly exceeded the amount of unemployment benefits initially denied in *Sherbert*.<sup>77</sup> The *Sherbert* Court provided other distinctions between the two cases<sup>78</sup>—distinctions that scholars have famously found wanting<sup>79</sup>—but if there is any explanation for why the Court didn't describe the refusal to grant unemployment benefits as merely making life “more expensive,” the subjectivity of burdens may very well provide the best answer. After all, the merchants were still able to generate profits five days a week; *Sherbert* was denied unemployment benefits at a time where she had no other source of income.

That being said, the subjectivity of the civil penalties approach has its limits. The fact that a claimant has, in other circumstances, voluntarily forgone financial advantages—that is, chosen to prioritize faith commitments over and above generating revenue—should not, in any way, alter the substantial burden

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73. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

74. *Id.*

75. *Id.* (“But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive.”).

76. *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

77. *Id.* at 417–18 (Stewart, J., concurring) (“Even upon the unlikely assumption that the appellant could not find suitable non-Saturday employment, the appellant at the worst would be denied a maximum of [twenty-two] weeks of compensation payments.” (footnote omitted)).

78. *Id.* at 408 (majority opinion).

79. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 (1970) (“*Sherbert* was an aberration when it was decided; it and *Braunfeld v. Brown*, decided two years earlier, are as irreconcilable as two cases not involving the same parties can be.” (footnote omitted)).

calculus. Professor DeGirolami appears to argue to the contrary.<sup>80</sup> Using the frame of *Hobby Lobby*, he asks about the Green family, owners of Hobby Lobby: “If, therefore, the Greens have already shown that degree of financial sacrifice for religious reasons, is the \$26 million quantum a burden? A substantial burden?”<sup>81</sup> But the fact that the Greens have chosen to take a financial hit in order to adhere to religious commitments—staying closed on Sundays, for example—doesn’t tell us whether that financial penalty is substantial or not. People with religious commitments will, at times, choose to absorb substantial—and even extraordinary losses—in order to remain faithful to their religious commitments.<sup>82</sup> By way of poignant example, Quakers famously refused to take up arms during the American Revolution, even to protect their families, but that decision certainly tells us nothing about whether their sacrificing of their loved ones constituted a substantial burden.<sup>83</sup> The fact that Quakers and other citizens with religious commitments have made such choices doesn’t mean that the burdens they voluntarily endured were any less substantial. It therefore tells us precious little about the circumstances under which courts should, under a civil penalties approach, assign substantiality to particular costs.

### C. NO INSUBSTANTIAL CIVIL PENALTIES ACTUALLY EXIST

While the first two criticisms focus on the administrability of the civil penalties approach, a third criticism contends that the approach does not provide a meaningful metric to limit accommodation claims. Professor Gedicks makes this point somewhat emphatically as follows: “Do religiously burdensome laws with insignificant penalties even exist? None of the commentators who argue for the adequacy of reviewing claimant sincerity and secular costs has offered a single real-world example in which such review did or would result in a finding of no substantial burden on religion.”<sup>84</sup> And if the civil penalties approach has no real-world applications, the argument goes, then it fails to constrain substantial burden claims, rendering the very purpose of the substantiality inquiry unfulfilled.

Evaluating this argument begins with maybe the most likely counterexample, *Wisconsin v. Yoder*.<sup>85</sup> *Yoder* is often seen as the high watermark for the substantial burden regime, providing robust free exercise protections for Amish families

80. See DeGirolami, *supra* note 5, at 25.

81. *Id.*

82. See 1 ANNALS OF CONG. 779 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sherman, Aug. 17, 1789) (“[T]hose who are religiously scrupulous of bearing arms . . . are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other . . .”).

83. See *District of Columbia v. Heller*, 554 U.S. 570, 590 (2008) (“Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use arms to defend their families . . .”).

84. See Gedicks, *supra* note 8, at 113.

85. *Wisconsin v. Yoder*, 406 U.S. 205, 207–13 (1972).

who refused, on religious liberty grounds, to send their children to school beyond eighth grade.<sup>86</sup> “[The Amish] object[ed] to . . . high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life” and because “they view[ed] secondary school education as an impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs.”<sup>87</sup> The challenge with *Yoder* has long been that the Court never provided meaningful analysis of the fact that the fine imposed on the claimants for failing to send their children to school was only five dollars,<sup>88</sup> leaving the following puzzle: Did the Court err in finding the existence of a substantial burden,<sup>89</sup> given that the parents could have kept their children out of school by simply paying the \$5 fine? If it did, then *Yoder* provides a prominent example of where the civil penalties approach, properly applied, might do some useful work.

Professor Lund has, in fact, argued just that. On his view, one of the reasons to be skeptical of the civil penalties approach is because “[i]t . . . squarely contradicts the Court’s precedents,” and in support of that view, he notes that “in *Yoder*, for example . . . the Court held the burden was cognizable, even though the only penalty the parents faced was a five-dollar fine.”<sup>90</sup> Of course, the fact that a doctrinal approach provides grounds for criticism of the Court’s prior opinions may actually highlight its utility as opposed to providing a reason to discount it. But for present purposes, Professor Lund’s claim, if true, provides a counterpoint to Professor Gedicks’s critique; there are real-world examples where there actually are insubstantial civil penalties.

Professor Gedicks, by contrast, is of the view that the substantial burdens in *Yoder* have little to do with the financial penalty.<sup>91</sup> As he notes, the substantiality of the penalty in *Yoder* stems from the fact that failure to send their children to school “triggered criminal liability”; and “[a] violation that labels one a convicted criminal, creates a criminal record, and triggers collateral penalties would seem to be per se ‘substantial’ even if the violation is otherwise considered minor and the monetary fine trivial.”<sup>92</sup> There is good reason to think the *Yoder* Court imagined something along the lines of what Professor

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86. *Id.* at 210–11, 13.

87. *Id.* at 210–11.

88. *Id.* at 208; see also Ira C. Lupu & Robert W. 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> [<https://perma.cc/LKX6-Z6BA>] (“The *Yoder* Court barely mentioned the five-dollar fine that the state had imposed on the parents of children who did not attend school.”).

89. To be sure, the *Yoder* Court referred to it as an ‘undue’ burden, see *Yoder*, 406 U.S. at 220, although RFRA has subsequently characterized the *Yoder* test as a substantial-burden test. 42 U.S.C. § 2000bb(b)(1) (noting that one of the purposes of RFRA is to “guarantee [the] application [of the *Yoder* test] in all cases where free exercise of religion is substantially burdened”).

90. Lund, *supra* note 5, at 2087–88.

91. See Gedicks, *supra* note 8, at 113 n.94.

92. *Id.*

Gedicks proposes. After all, the Court did state, even if briefly: “The impact of the compulsory-attendance law on respondents’ practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, *under threat of criminal sanction*, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.”<sup>93</sup>

But the fact that the Court leaned on criminal liability does not mean the Court was correct in doing so. Employing a civil penalties approach, I have argued, would require delving further into the consequences of criminal liability.<sup>94</sup> And if being labeled a criminal did, in fact, entail other substantial consequences, then it might very well qualify as a substantial burden under the civil penalties framework. All told, though, *Yoder* either provides another example of how the doctrine has deployed the civil penalties approach or it provides an example for how the civil penalties approach has real-world application. *Yoder* cannot be deployed to justify both criticisms simultaneously.

Maybe most importantly, to the extent one reads *Yoder* as failing to provide a real-world example of civil penalties in practice, other examples abound. To appreciate how, consider the criticism above that assessing substantiality based on the degree of civil penalties is too subjective. On this view, the same civil penalty might be deemed substantial for an individual claimant while insubstantial for a large corporation given the revenues that large corporation generates. I previously noted that this subjectivity might best be seen as a feature, and not a bug, of the civil penalties framework.<sup>95</sup> Indeed, another reason to see it as a feature is because it provides a ready method for discounting the claims of large corporations when it comes to substantial burdens. And this consequence follows directly from the underlying premise of the civil penalties approach. The reason why the law differentiates between substantial and insubstantial burdens—at least in some contexts—is because it expects claimants to tolerate and absorb the low-level costs of their religious commitments. For large corporations, the range of low-level costs ought to be expanded; large corporations can tolerate more and therefore ought to view some burdens as insubstantial even if individuals might view them as substantial. In this way, the civil penalties approach provides individuals with protections that large for-profit corporations might not receive. And importantly, these applications constitute a bevy of circumstances where the civil penalties approach does indeed have real world application.

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93. *Yoder*, 406 U.S. at 218 (emphasis added).

94. See Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1795 n.142 (“The availability of such additional sanctions, which included the possibility of labeling the offender a convicted criminal, potentially raise additional considerations for a substantial-burden inquiry.”).

95. See discussion *supra* Section II.B.

D. *THE CIVIL PENALTIES APPROACH FAILS TO ACCOUNT FOR ALTERNATIVE FORMS OF RELIGIOUS EXERCISE*

Another criticism of the civil penalties approach is its purported inability to address avoidable costs. Maybe the most succinct and direct version of this criticism comes from Professor Sherif Girgis who has argued as follows: “Simply put, high material costs are not sufficient for a substantial burden. The steepest fine for breaking a public park’s curfew in search of a quiet place to pray is not a substantial burden if your religion is equally satisfied with prayers elsewhere.”<sup>96</sup> Professor Gabrielle Girgis has levelled another version of this criticism as follows:

And more to the point, even on clearly religious conduct, some steep fines aren’t substantial burdens on religion. Someone who’s late for church might speed in order to satisfy a religious duty to get there on time, but surely the speeding laws don’t substantially burden her religion . . . .<sup>97</sup>

Professors Sherif Girgis and Gabrielle Girgis are both correct that, if true, these sorts of applications would certainly render the civil penalties approach deeply problematic. But the reality is that the civil penalties approach addresses precisely these sorts of cases. Consider again how the civil penalties approach queries whether claimants have been afforded the possibility of engaging in religious exercise while only enduring insubstantial burdens.<sup>98</sup> The underlying logic is that individuals are expected, as part of a life committed to engaging in religious exercise, to endure insubstantial burdens. Tolerating such burdens is the reasonable and legitimate cost of religious exercise. It is only when such burdens become substantial that the law ought to trigger protections.

Applied to the speeding parishioner, the question becomes whether he or she could have participated in mass while only enduring insubstantial burdens. The answer would appear to be an unequivocal yes. It would simply require waking up a little earlier in order to make it on time. Waking up can, no doubt, be hard. But it ought not qualify as a substantial burden. Similarly, the praying curfew-breaker could also have engaged in the religious exercise in question while only enduring insubstantial burdens. A quick walk to another, equally quiet location could hardly be construed as a substantial burden.<sup>99</sup>

96. Girgis, *Defining Substantial Burdens*, *supra* note 5, at 1774.

97. Gabrielle M. Girgis, *What is a Substantial Burden*, *supra* note 5, at 1764.

98. See Michael A. Helfand, *Identifying Substantial Burdens*, *supra* note 2, at 1789–90 (formulating the civil penalties inquiry as “notwithstanding government regulation, can a person still engage in religious exercise while only enduring an insubstantial civil burden?”).

99. Professor Girgis, responding to this rejoinder, suggests the following:

[The civil penalties test] would, after all, require a sizing up of the religious as well as civil burdens—contrary to his aim to avoid just that. For courts would have to see, in this case, how much the plaintiff’s faith is set back if she is forced to engage in one form of exercise (praying on a stroll through her neighborhood) rather than another (praying on a stroll through the closed public park).

It is worth noting one assumption of this response. It does assume that the substantial burden inquiry should not be frozen in time—that is, a court should not ask whether, given the circumstances at the moment of government sanction, the claimant could exercise religion while only enduring insubstantial burdens. For if asked in such a way—after, for example, the parishioner has already overslept—it is true that his or her only option is to speed in order to make it to Sunday mass on time. But the fact that the time of enduring only an insubstantial burden has passed ought not change the inquiry. The underlying logic of the civil penalties approach is to provide a pathway to religious exercise free of substantial burdens, but not free of insubstantial burdens. And given that opportunity to wake up a little earlier, the parishioner surely had such an option, even if that option is no longer on the table.

*E. THE CIVIL PENALTIES APPROACH TREATS ALL RELIGIOUS EXERCISE THE SAME*

A final criticism of the civil penalties approach is its failure to differentiate between different forms of religious exercise based upon their relative theological significance.<sup>100</sup> This argument is pressed forcefully by Professor Gedicks. On his view, there can be no substantial burden on religious exercise if the religious exercise at stake is insufficiently weighty.<sup>101</sup> Or, as he puts it:

Adjudication of secular costs also fails for a more fundamental reason: substantial secular costs are not correlated—at all—with substantial religious costs. If obedience to a law entails minimal religious costs, then the law has not imposed a substantial burden on the believer’s free exercise, even if the secular sanction is enormous.<sup>102</sup>

Professor Gedicks argues that “[t]his is a matter of simple logic” because “[i]f a claimant suffers insubstantial religious costs in obeying a purportedly burdensome law, then his or her religious exercise has not been ‘substantially’ burdened, regardless of the substantiality of the secular cost of violating the law.”<sup>103</sup>

But describing this outcome as a matter of logic doesn’t seem quite right. For example, RFRA’s phrasing runs as follows: “Government shall not substantially burden a person’s exercise of religion . . . .”<sup>104</sup> One *can* certainly read

Girgis, *Defining Substantial Burdens*, *supra* note 5, at 1774 n.80. But this misapprehends the operation of the civil penalties approach. The court, in such circumstances, would not need to interrogate religious claims. If the claimant alleged that praying on a stroll through the neighborhood did not provide a theologically adequate alternative to praying in the park, then the alternative could not be used to undermine the substantial burden claim. Like all theological claims, the praying curfew-breaker’s claim that the neighborhood stroll is an inadequate alternative would not be interrogated for its underlying theological accuracy, but for its sincerity.

100. See Gedicks, *supra* note 8, at 114.

101. *Id.*

102. *Id.* (emphasis removed) (footnote omitted).

103. *Id.*

104. 42 U.S.C. § 2000bb-1 (a).

this phrase as stating that ‘for any exercise of religion, government shall not impose a substantial civil penalty.’ Nothing about the text of RFRA precludes such a reading. Moreover, there is nothing logically inconsistent with such a reading.

Ultimately, picking between the alternatives is a judgment in light of other legal and moral judgments. As I’ve argued above, interpreting a substantial burden standard as requiring courts to determine the degree of religious costs at stake in a case—that is, figuring out if the exercise in question is substantial or insubstantial—violates the demands of the Establishment Clause.<sup>105</sup> And, maybe more importantly, there is good reason for this constitutional prohibition. To do otherwise would easily open the door to gross inequalities in application. Courts are, no doubt, more familiar with majoritarian religions than they are with minority religions. That difference in familiarity means that when deciding which religious practices are significant, courts will likely be predisposed to favoring religious practices that are more well-known and respected. In such circumstances, more obscure faith commitments of religious minorities may very well get short shrift.<sup>106</sup> 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 the protections afforded by RFRA.<sup>107</sup> It is therefore not surprising that the Supreme Court has “[r]epeatedly and in many different contexts, . . . warned that courts must not presume to determine . . . the plausibility of a religious claim.”<sup>108</sup> To do so would amount to the 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.

### CONCLUSION

The future of religious accommodations remains uncertain. As it stands, the federal RFRA and its state analogs require courts to subject substantial burdens on religious exercise to strict scrutiny.<sup>109</sup> Will free exercise doctrine ever revert to a similar standard? Some justices have certainly expressed a desire to overturn *Smith* and return to a standard that provides constitutional protection against incidental, but substantial, burdens on religious exercise.<sup>110</sup> But, as

105. See discussion *supra* Section II.A.

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

107. See *id.*

108. Emp. Div., Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872, 887 (1990).

109. See 2022 State Legislative Sessions: An Overview on Religious Freedom Restoration Acts, FAM. RSCH. COUNCIL, <https://www.frc.org/statelegislativeoverview/2022-state-legislative-sessions-an-overview-on-religious-freedom-restoration-acts> [https://perma.cc/R4LB-MW9K].

110. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring) (“[Th]e severe holding [in *Smith*] is ripe for reexamination.”); *id.* at 1931 (Gorsuch, J., concurring)



Justice Barrett's concurrence in *Fulton* demonstrates, returning constitutional doctrine to a time before *Smith* requires careful consideration of what exactly the substantial burden doctrine should look like.<sup>111</sup>

Regardless of the free exercise doctrine's future, the substantial burden inquiry will remain a mainstay of religious liberty litigation. And in navigating those cases, courts would be best served by determining the substantiality of burdens on religious exercise with reference to the civil penalties at stake. Notwithstanding criticism to the contrary, that standard provides the best option for keeping courts out of the religious question business, while still ensuring that it is only significant civil costs—and not just run of the mill annoyances—that can trigger religious liberty protections.

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(“Justice [Alito] has offered a comprehensive opinion explaining why *Smith* should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?”).

111. *Id.* at 1883 (Barrett, J., concurring) (contending that “[t]here would be a number of issues to work through if *Smith* were overruled[,]” including whether there should “be a distinction between indirect and direct burdens on religious exercise” and what standard of scrutiny should apply).