

*Essay***“SUBSTANTIAL” BURDENS: HOW COURTS MAY (AND WHY THEY MUST) JUDGE BURDENS ON RELIGION UNDER RFRA**

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I am grateful to Ronan McCrea, Maleiha Malik, and Louise Melling for the spirited dinner conversation which generated the idea for this Essay, and to Elise Carter, Scott Elder, Alexandra Sandvik, and Jordan Smith for excellent research assistance. I received valuable comments and criticisms on earlier drafts from participants in the *Hobby Lobby* working-paper conference at The Wharton School Department of Business & Ethics December 12, 2014, an internal workshop at BYU Law School January 29, 2015, the Annual Law & Religion Roundtable at Georgetown University Law Center June 26, 2015, and a conference on “Doing Justice without Doing Harm” at Pepperdine University College of Law March 11, 2016; and from Kif Augustine-Adams, Susan Cancelosi, Cole Durham, Chad Flanders, Rick Garnett, Marci Hamilton, Christine Hurt, Marty Lederman, Ronan McCrea, Aaron Nielson, Jim Rasband, Liz Sepper, Brett Scharffs, Paul Stancil, and Michael Worley.

## Abstract

*The Religious Freedom Restoration Act (RFRA) excuses believers from federal laws which “substantially burden” their religious exercise, unless they satisfy strict scrutiny. Who decides if a burden is “substantial”? RFRA claimants argue that they do.*

*The “substantial-burden” element consists of two questions: whether the claimant would suffer “substantial” religious penalties from complying with a law, and “substantial” secular penalties from violating it. Courts may decide the second question, but not the first; courts are barred under the “religious-question” doctrine from adjudicating theological issues. So courts may decide whether claimants are “sincere” in alleging substantial religious penalties, but not whether those penalties are truly “substantial.” The difficulty is that judicial review of claimant sincerity and secular penalties is meaningless in practice. Accusing claimants of lying about their religion is an “inquisitor-like” tactic the government rarely pursues, and nearly all laws trigger significant punishments when violated.*

*The problem is exemplified by one of the religious nonprofit contraception mandate cases pending before the Supreme Court. In Little Sisters of the Poor Home for the Aged v. Burwell, an order of Roman Catholic nuns which operates several nursing homes has objected to the mandate’s requirement that their employee health plan cover contraceptives. The mandate would relieve the Little Sisters of this requirement if they notify the government of their objections, after which their insurer would then supply the contraceptives directly to employees. But the Little Sisters object to this, too, because in their view notifying the government implicates them in contraception use by causing their insurer to supply contraceptives in their place—even though they’ve been telling their insurer precisely this for years, and even though a regulatory quirk prevents the government from enforcing the substitute distribution requirement. In short, the Little Sisters claim that the mandate substantially burdens their religious exercise, even though (i) they may exempt themselves from its requirements by telling their insurer the same thing they’ve always told it, and (ii) the government has no power to require their insurer to distribute contraceptives in their place, because (iii) their insurer might voluntarily distribute contraceptives in their place.*

*One need not question the Little Sisters’ sincerity to wonder whether this burden is “substantial” under RFRA. Surely a court should review it. But because the Little Sisters are sincere, and the penalty for violating the mandate severe, substantiality is deemed established by the Little Sisters’ bare allegation—or so they argue.*

*It makes no legal sense to entrust the question of substantial burden to persons so self-interested in the answer, however sincere their belief. A bedrock principle of Anglo-American due process holds that no one may judge her own cause. Exemption boundaries must be tended by courts, not exemption beneficiaries, lest the rule of law be swallowed by a sea of self-interested yet functionally unreviewable exemption claims.*

*This Essay explains that courts may judge the substantiality of burdens on religion under the religious-question doctrine by relying on neutral principles of secular law. It concludes that courts must do this to implement RFRA’s purpose and to uphold the rule of law.*

“SUBSTANTIAL” BURDENS: HOW COURTS MAY  
(AND WHY THEY MUST) JUDGE BURDENS ON RELIGION UNDER RFRA

*No man is allowed to be a judge in his own cause.*

—James Madison (1787)<sup>1</sup>

*Permitting [a person] to become a law unto himself,  
contradicts both constitutional tradition and common sense.*

—Justice Antonin Scalia (1990)<sup>2</sup>

*It sounds like what you are telling us is that the entire U.S. Code is  
subject to strict scrutiny any time somebody raises a sincere religious  
objection.*

—Judge David Hamilton (2014)<sup>3</sup>

INTRODUCTION: RFRA AND THE ADJUDICATION OF “SUBSTANTIAL” BURDENS

The Religious Freedom Restoration Act (RFRA) excuses believers from any federal law which “substantially burdens” their religious exercise unless the law furthers a compelling government interest” in the least restrictive manner.<sup>4</sup> Who decides whether a burden on religion is “substantial”? The judiciary is charged with interpreting and applying federal statutes as one of its core responsibilities, but recent challenges to the reach of judicial review in RFRA cases have complicated this task.

RFRA’s “substantial burden” element is commonly disaggregated into two conceptual parts: (i) the suffering of “substantial *religious* costs” if the claimant complies with the burdensome law, and (ii) the suffering of “substantial *secular* costs” if the claimant violates it.<sup>5</sup> Courts may properly adjudicate the question of “secular costs” under RFRA—that is,

<sup>1</sup> THE FEDERALIST No. 10, at 59 (Jacob E. Cooke ed. 1961).

<sup>2</sup> *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990) (internal quotation marks & citation omitted).

<sup>3</sup> Recording of Oral Argument at 27:23,

[http://media.ca7.uscourts.gov/sound/2014/rs.13-3853.1303853\\_02\\_12\\_2014](http://media.ca7.uscourts.gov/sound/2014/rs.13-3853.1303853_02_12_2014) (replying to counsel’s argument that courts may review only a RFRA claimant’s sincerity in alleging a substantial burden on religious exercise), *University of Notre Dame v. Sebelius*, 743 F.3d 547 (7<sup>th</sup> Cir. 2014) (2-1 dec.) (argued Feb. 12, 2014), *vacated & remanded sub nom.* *University of Notre Dame v. Burwell*, 135 S.Ct. 1544 (2015).

<sup>4</sup> 42 U.S.C. § 2000bb-1.

<sup>5</sup> IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 241-42 (2014) (citing and discussing *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972)) (emphasis added); e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2775 (2014) (“By requiring the [claimants] and their companies to arrange

whether the legal sanctions for disobeying a burdensome law are “substantial.” The Supreme Court, however, has consistently held that judicial review of the substantiality of “religious costs” is precluded by the Court’s “religious-question” doctrine, which bars courts from adjudicating issues of theology, doctrine, or belief.<sup>6</sup> Courts may adjudicate whether claimants are “sincere” in alleging religious costs, whether they honestly believe a law interferes with religious practice,<sup>7</sup> but courts may not rule directly on the substantiality of those costs.

Courts and commentators are divided over the correctness and wisdom of this limitation on judicial review. Some have concluded that review of claimant sincerity and secular costs is a sufficient to check excessive or unlikely RFRA claims,<sup>8</sup> especially since the government may justify even substantial religious burdens by showing they further a compelling interest in the least restrictive manner.<sup>9</sup> This Essay contends they are wrong.

As a practical matter, limiting review to sincerity and secular costs leaves the question of substantiality wholly to RFRA claimants. Challenging a claimant’s sincerity requires the government to argue and the courts to hold that claimants are lying about their beliefs—an

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for [emergency contraception] coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs. If the [claimants] and their companies do not yield to this demand, the economic consequences will be severe.”) (paragraph indentation deleted).

The disaggregation of the substantial-burden element into substantial religious and substantial secular costs is also implicit in a formulation of the substantial-burden test widely employed by the federal courts—whether government action puts “substantial pressure” on a claimant to alter religious behavior or violate beliefs. *See, e.g.*, *Thomas v. Review Board*, 450 U.S. 707, 716-17 (1981); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1175 (10<sup>th</sup> Cir.) (2-1 dec. as to self-insured ERISA plans), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 15-105 & -119); *East Texas Bapt. Univ. v. Burwell*, 793 F.3d 449, 456 (5<sup>th</sup> Cir.), *cert. granted*, 136 S.Ct. 444 (2015); *Priests for Life v. Burwell*, 772 F.3d 229, 246 (D.C. Cir. 2014), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 14-1453 & -1505).

<sup>6</sup> Part I-A.

<sup>7</sup> *Cf. United States v. Ballard*, 322 U.S. 78, 80-82, 88 (1944) (affirming jury instruction submitting whether defendant was sincere in his religious beliefs, but prohibiting finding whether those beliefs were true or false).

<sup>8</sup> *E.g.*, John Bursch, *Symposium: Contraception mandate cases—why the Supreme Court will instruct lower federal courts to stop second-guessing religious beliefs*, SCOTUSBLOG (Dec. 14, 2015), <http://www.scotusblog.com/2015/12/symposium-contraceptive-mandate-cases-why-the-supreme-court-will-instruct-lower-federal-courts-to-stop-second-guessing-religious-beliefs/>; Chad Flanders, *Insubstantial Burdens* (unpub. ms. June 2015), <http://ssrn.com/abstract=2727423>; Michael Helfand, *Identifying Substantial Burdens*, 2016 ILL. L. REV. (forthcoming) [hereinafter Helfand, *Substantial Burdens*], <http://ssrn.com/abstract=2728952> (Feb. 1, 2016); Eugene Volokh, *The Religious Freedom Restoration Act and complicity in sin*, WASH. POST - VOLOKH CONSPIRACY (June 30, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-religious-freedom-restoration-act-and-complicity-in-sin/>; *see, e.g.*, *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015) (finding substantial burden based solely on findings of claimant sincerity and substantial secular costs); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2779 (2014) (same); *cf. Amy J. Sepinwall, Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897 (2015) (arguing that courts must absolutely defer to a claimant’s understanding of religious wrong, and also defer to his or her claim that a legally required act makes one complicit in such a wrong unless it is based on a mistaken assertion of empirical fact).

<sup>9</sup> 42 U.S.C. § 2000bb-1(b); *see also Hobby Lobby*, 134 S.Ct. at 2783, 2785 (suggesting that the government is often able to justify substantial burdens on religion under RFRA’s compelling-interest/least-restrictive means test).

“inquisitor-like” tactic for which lawyers and judges have little appetite.<sup>10</sup> For this reason the government rarely contests sincerity and courts rarely adjudicate it.<sup>11</sup> Judicial review of the secular costs of disobeying a burdensome law is also of little practical consequence, as well as a conceptual non sequitur. It is the rare law whose violation triggers only trivial sanctions, and the presence of substantial secular costs proves literally nothing about the presence of substantial religious costs.<sup>12</sup>

If judicial review is confined to claimant sincerity and secular costs, the substantiality of a claimed religious burden under RFRA is effectively established by the claimant’s mere say-so. Once a claimant honestly pleads unacceptable religious costs—that complying with a law violates his or her religious convictions—there remains no justiciable question whose answer will make any difference. By holding formally nonjusticiable the disaggregated question whether a law imposes “substantial religious costs,” the religious-question doctrine also renders functionally nonjusticiable the ultimate “aggregated” question posed by RFRA’s text: whether a law substantially burdens the claimant’s religious exercise.

The problem is exemplified by one of the contraception mandate cases currently pending before the U.S. Supreme Court.<sup>13</sup> In *Little Sisters of the Poor Home for the Aged v. Burwell*, an order of Roman Catholic nuns which operates several nursing homes has objected to the mandate’s requirement that they supply contraceptives prohibited by their faith in their employee health plan.<sup>14</sup> The mandate would relieve the Little Sisters of this requirement if they notify the government of their objections, after which their insurer would then supply the contraceptives directly to employees and be reimbursed by the government.<sup>15</sup> The Little Sisters object to this as well, claiming that notifying the government implicates them in contraception use by causing their insurer to supply contraceptives in their place.<sup>16</sup> Because of a regulatory quirk, however, the government cannot enforce this substitute distribution requirement against the Little Sisters’ insurer.<sup>17</sup> In sum, the Little Sisters claim that the mandate *substantially* burdens their religious exercise within the meaning of RFRA, even though (i) they may exempt themselves from its requirements by notifying the government, and (ii) the government has no power to require their insurer to distribute contraceptives

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<sup>10</sup> See William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 SUP. CT. REV. (forthcoming 2015), <http://ssrn.com/abstract=2562949> (Feb. 10, 2015), at 23.

<sup>11</sup> Part I-B.

<sup>12</sup> Part I-C.

<sup>13</sup> *Little Sisters*, 794 F.3d 1151 (10<sup>th</sup> Cir. 2015).

<sup>14</sup> *Id.* at 1167. The Little Sisters have a self-insured health plan actually operated by an insurer acting as a “third-party administrator” or “TPA.” See *infra* note 132 & accompanying text.

<sup>15</sup> *Id.* at 1166.

<sup>16</sup> *Id.* at 1178 & n.25, 1188.

<sup>17</sup> The Little Sisters have a self-insured “church plan” which is exempt from the Employee Retirement Income Security Act (ERISA)—the only means by which the government can legally enforce the accommodation’s substitute distribution requirement against TPAs. See *infra* notes 132 & 167 & accompanying text. The government’s generous reimbursement scheme might entice church-plan TPAs to provide contraceptives under the accommodation even though the government cannot require them to do so. On the other hand, the Little Sisters have threatened to terminate contractual relations with any TPA that voluntarily complies with the accommodation, which obviously weighs against voluntary compliance.

directly to employees, because (iii) their insurer *might* decide to comply with the mandate *voluntarily*.

One need not question the Little Sisters' sincerity—and indeed the government did not—to wonder whether the burden they claim should count as “substantial” under RFRA. At the least, a court should review the claim that the voluntary action of an independent third party could “substantially burden” a RFRA claimant’s religious exercise. Yet, because the Little Sisters are admittedly sincere and the fines from violating the mandate obviously debilitating, the substantiality of the claimed burden is deemed established without further judicial inquiry—or so the Little Sisters argue.<sup>18</sup>

Does it make legal sense that the Little Sisters' bare allegation is sufficient to establish the “substantiality” of a burden on their religious exercise without meaningful judicial review? It is folly to leave this question in the hands of persons so self-interested in the answer, however sincere their belief. A bedrock principle of Anglo-American due process holds that “[n]o man is allowed to be a judge in his own cause,” as James Madison put it.<sup>19</sup> The reasons are obvious, but Madison spelled them out anyway: “[H]is interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”<sup>20</sup> For the good of both law and religion, exemption boundaries must be tended by courts, not exemption beneficiaries, lest the rule of law be swallowed by a sea of self-interested yet functionally unreviewable exemption claims.

The prospect of exemptions “on demand” has spurred other judges and commentators to question a doctrinal regime that renders RFRA’s substantial-burden element functionally nonjusticiable.<sup>21</sup> Interpreting and applying ambiguous statutory terms is simply what courts do, and reviewing RFRA’s substantial-burden element is no exception.<sup>22</sup> None of them, however, has explained how adjudication of religious costs could be squared with the religious-

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<sup>18</sup> Brief for Pets. in Nos. 15-35, 15-105, 15-119 & 15-191, at 41-51, *Zubik v. Burwell*, et.al., 136 S.Ct. 444 (2015); *accord* Brief for Pts. in Nos. 14-418, 14-1453 & 14-1505, at 32-34, 37-40, *id.*; *see also* Brief for Amici Curiae Religious Institutions Supporting Pets., at 19-33 (arguing that claimant sincerity and substantial secular costs are sufficient to prove that government action “substantially burdens” religious exercise under RFRA), *id.*; Bursch, *supra* note 8 (“[O]nce the Little Sisters of the Poor have decided as a matter of moral judgment that facilitating the delivery of abortifacients by signing the HHS form is to be complicit in the sin, Article III judges lack the constitutional authority to second-guess that moral judgment and reach a different conclusion.”).

<sup>19</sup> THE FEDERALIST No. 10, at 59 (Jacob E. Cooke ed. 1961). *See generally* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY ch. 2 (2003).

<sup>20</sup> THE FEDERALIST No. 10, *supra* note 19, at 59

<sup>21</sup> *E.g.*, Abner S. Greene, *Religious Freedom and (Other) Civil Liberties: Is There a Middle Ground?*, 9 HARV. L. & POL’Y REV. 161, 184 (2015); Matthew A. Melone, *Corporations and Religious Freedom: Hobby Lobby Stores—A Missed Opportunity to Reconcile a Flawed Law with a Flawed Health Care System*, 48 IND. L. REV. 461, 502 (2015); *see, e.g.*, *Hobby Lobby*, 134 S.Ct. at 2787, 2799 (accusing the Court of “elid[ing] entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger,” allowing believers and their commercial businesses to “opt out” of virtually any law “they judge incompatible with their sincerely held religious beliefs”) (Ginsburg, J., dissenting);

<sup>22</sup> *See, e.g.*, *Hobby Lobby*, 134 S.Ct. at 2798 (RFRA “distinguishes between factual allegations that plaintiffs’ beliefs are sincere and of a religious nature, which a court must accept as true, and the legal conclusion that plaintiffs’ religious exercise is substantially burdened, an inquiry the court must undertake.”) (ellipses, brackets, and internal quotation marks deleted) (Ginsburg, J., dissenting); *accord* Greene, *supra* note 21, at 184-90; Melone, *supra* note 21, at 502-06.

question doctrine, let alone *Hobby Lobby*.

The constitutional stakes are high. Because disaggregation functionally disables courts from adjudicating the substantiality of the alleged burden on a RFRA claimant's religious exercise, it invests believers with a presumptive entitlement to exemption from any federal law they feel inclined to challenge. The rule-of-law problem posed by this functional nonjusticiability is not just present in RFRA, but also in the Religious Land Use and Institutionalized Persons Act (RLUIPA), a companion to RFRA applicable to state land use regulation and prison administration which contains an identical substantial-burden element,<sup>23</sup> and in religious freedom acts and judicial decisions in more than half the states which contain comparable substantial-burden language. The efficacy of federal law and wide swaths of state law, therefore, is threatened by a religious exemption regime whose limits depend mostly on the self-restraint of the believers it benefits.

This threat to the rule of law is a judicially self-inflicted wound. The fact that a court may not adjudicate the religious costs of obeying a law does not mean it may only adjudicate the secular costs of disobeying. This confuses the question whether a RFRA claimant correctly understands his or her religion (which courts may not address), with the question whether the claimant has satisfied statutory or other legal requirements for exemption (the adjudication of which has always been an essential feature of the Court's exemption jurisprudence).

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, for example, the Court held that the religious-question doctrine prohibited it from deciding whether a fired teacher satisfied the definition of "minister" prescribed by Lutheran theology, but not from deciding whether she met the Court's own secular definition of "minister" which governs the so-called "ministerial exception" to federal employment law.<sup>24</sup> Rather than treating as dispositive the defendant's admittedly sincere allegation that the plaintiff was a minister under Lutheran doctrine and practice, the Court fashioned its own secular definition of "minister" to decide whether the ministerial exception applied.<sup>25</sup> Similarly, in *Jones v. Wolf* the Court decided that the religious-question doctrine prevented courts from resolving church property and office disputes by deciding which theological faction was more faithful to the church's doctrine and teachings.<sup>26</sup> But courts may nevertheless resolve disputed church property claims on the basis of religiously neutral principles of secular law.<sup>27</sup>

As *Hosanna-Tabor* and *Jones v. Wolf* illustrate, neither the religious-question doctrine nor the Court's religious-exemption jurisprudence requires the disaggregation of "substantial burden" into religious and secular costs, or the functional nonjusticiability that follows from it. While courts are properly disabled from contradicting believers when they claim that obeying a law entails substantial religious costs, courts—and not claimants—must decide whether the law in question imposes a substantial burden on claimant religious exercise under RFRA. This Essay argues that courts may adjudicate this question directly, without

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<sup>23</sup> 42 U.S.C. §§ 2000cc to 2000cc-4.

<sup>24</sup> 132 S.Ct. 694, 706-07 (2012).

<sup>25</sup> *Id.* at 708.

<sup>26</sup> 443 U.S. 595, 602, 608 (1979).

<sup>27</sup> *Id.* at 602-05.

disaggregation, so long as they rely on secular law to do so. Courts may determine whether a law imposes a substantial burden on religious exercise if they make this determination by reference to secular law.

This Essay proceeds in four parts. Part I summarizes the religious-question doctrine,<sup>28</sup> and explains why confining judicial review to claimant sincerity and secular costs will effectively allow a RFRA claimant's bare allegation of substantial burden to be the final word.<sup>29</sup> Part II summarizes the abundant authority that counsels adjudication of substantiality. The Court's own precedents adjudicated substantiality, both before and after *Employment Division v. Smith*,<sup>30</sup> and for good reason: Preservation of the rule of law requires some way for courts to police the boundaries of religious exemptions lest the exceptions swallow the rule.<sup>31</sup> Congress understood and intended that courts would review the ultimate question whether a claimed burden is "substantial" under RFRA, and not merely the disaggregated subquestion whether the secular costs of violating a burdensome law are substantial.<sup>32</sup>

Part III illustrates this Essay's approach by reference to the religious nonprofit claims for RFRA exemptions from the contraception mandate of the Affordable Care Act (ACA). Unlike churches, synagogues, and other "houses of worship," which are categorically exempt from the mandate, religious nonprofit organizations must affirmatively "self-certify" their eligibility for exemption by providing the government with written notice of the contraceptives to which they religiously object.<sup>33</sup> Some religious nonprofits, such as the Little Sisters, have sought RFRA exemptions from the requirement of self-certification—effectively, an "exemption from the exemption"—claiming that it causes or facilitates the provision of contraceptives by their health plan insurers to plan beneficiaries, and thus constitutes a substantial burden on their beliefs by making them complicit in and appearing to encourage contraception use their faith condemns.<sup>34</sup> Although the federal circuits have largely rejected these claims, they have sometimes done so on grounds that appear to violate the religious-

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<sup>28</sup> Part I-A.

<sup>29</sup> Parts I-B & -C.

<sup>30</sup> Part II-A.

<sup>31</sup> Part II-C.

<sup>32</sup> Part II-B.

<sup>33</sup> Part III-A.

<sup>34</sup> Part III-B. This Essay will focus on the circuit panel decisions denying this claim currently pending before the Supreme Court. *See* Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151 (10<sup>th</sup> Cir.) (2-1 dec. as to self-insured ERISA plans), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 15-105 & -119); East Texas Bapt. Univ. v. Burwell, 793 F.3d 449 (5<sup>th</sup> Cir.), *cert. granted*, 136 S.Ct. 444 (2015); Geneva Coll. v. Burwell, 778 F.3d 422 (3<sup>rd</sup> Cir.), *cert. granted sub nom. Zubik v. Burwell*, 136 S.Ct. 444 (2015) (Nos. 14-1418 & 15-191); Priests for Life v. Burwell, 772 F.3d 229 (D.C. Cir. 2014), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 14-1453 & -1505).

Other similar decisions include Michigan Cath. Conf. & Cath. Fam. Servs. v. Burwell, 807 F.3d 738 (6<sup>th</sup> Cir. 2015); Grace Schools v. Burwell, 801 F.3d 207 (2<sup>nd</sup> Cir. 2015) (2-1 dec.); Catholic Health Care System v. Burwell, 796 F.3d 207 (2<sup>nd</sup> Cir. 2015); Wheaton Coll. v. Burwell, 791 F.3d 792 (7<sup>th</sup> Cir. 2015); University of Notre Dame v. Burwell, 786 F.3d 303 (7<sup>th</sup> Cir. 2015).

Only the Eighth Circuit has found that the accommodation constitutes a substantial burden under RFRA. *See* Sharpe Holdings, Inc. v. HHS, 801 F.3d 927 (8<sup>th</sup> Cir. 2015); Dordt Coll. v. Burwell, 801 F.3d 946 (8<sup>th</sup> Cir. 2015). *But cf.* Eternal Word Telev. Network, Inc. v. Sec. HHS, 756 F.3d 1339 (11<sup>th</sup> Cir. 2014) (summarily granting relief pending appeal in light of *Hobby Lobby*).

question doctrine.<sup>35</sup> Part III concludes by explaining how the circuits could have adjudicated claims of substantial burden without transgressing the religious-question doctrine, by following *Hosanna-Tabor* and *Jones v. Wolf* in relying on religiously neutral principles of secular law—namely, causation in tort and products liability.<sup>36</sup>

Part IV explains that despite some extravagant language, *Hobby Lobby* did not confine courts to adjudication of claimant sincerity and secular costs, and permits courts to decide directly whether alleged religious burdens are substantial based on relevant secular law. This Essay concludes that in light of *Hobby Lobby*'s apparent adoption of genuinely “strict” review of laws that substantially burden religious exercise, it is imperative that courts adjudicate the substantiality of alleged religious burdens to preserve the viability and legitimacy of exemption statutes and uphold the rule of law.

### I. ILLUSIONS OF JUSTICIABILITY

Conventional analysis disaggregates RFRA's substantial-burden element into two questions: (i) Would the claimant suffer “substantial religious costs” from obeying a burdensome law?, and (ii) would the claimant suffer “substantial secular costs” from disobeying it?<sup>37</sup> While courts are free to address the second question, the religious-question doctrine prohibits them from answering the first, restricting judicial review to adjudication of the claimant's sincerity in alleging religious costs.<sup>38</sup>

Some commentators maintain that judicial review of claimant sincerity and secular costs are sufficient to define the reach of RFRA's substantial-burden element and provide a check on excessive or abusive exemption claims. Professor Helfand, for example, maintains that once a claimant demonstrates to the court his or her sincerity in alleging that a law burdens religious exercise,<sup>39</sup> the court can judge the substantiality of that burden under RFRA by ascertaining “whether engaging in religious exercise will, in fact, lead to the imposition of civil penalties that are substantial.”<sup>40</sup> By judging only claimant sincerity and secular costs, he concludes, “[c]ourts can avoid simply deferring to the assertions of plaintiffs as well as abdicating their statutory obligations under RFRA.”<sup>41</sup> Professor Flanders similarly argues that once a RFRA claimant demonstrates to the court that a law “is actually pressuring” the claimant to abandon a sincere religious practice, RFRA's substantial-burden requirement has been satisfied.<sup>42</sup>

These arguments are mistaken for both practical and conceptual reason. Challenging a claimant's sincerity is a risky and difficult litigation strategy that the government almost never

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<sup>35</sup> Part III-C.

<sup>36</sup> Part III-D.

<sup>37</sup> See *supra* note 5 & accompanying text.

<sup>38</sup> See *infra* Part I-A.

<sup>39</sup> Helfand, *Substantial Burdens*, *supra* note 8, at 24.

<sup>40</sup> *Id.* at 25.

<sup>41</sup> *Id.* at 25-26.

<sup>42</sup> Flanders, *supra* note 8, at 2; see also *id.* at 4 (“The court is relegated to determining that the plaintiff's beliefs were religious, and sincerely held, and only in a very minor way, that they were burdened.”).

pursues.<sup>43</sup> Laws that entail trivial penalties are likewise rare, and conceptually, the presence or absence of substantial secular costs says nothing about the presence or absence of substantial religious costs, which goes to the heart of the substantial-burden element.<sup>44</sup> Neither claimant sincerity nor the substantiality of secular costs, therefore, will often make a difference in answering the ultimate question whether a law substantially burdens religious exercise.

### A. *The Religious-Question Doctrine*

The religious-question doctrine prohibits civil courts from deciding questions of religious doctrine or practice,<sup>45</sup> including whether a belief or practice is logically consistent, plausible, reasonable, or weighty, or a claimant properly understands what his or her (or its) religion requires.<sup>46</sup> Such matters are “off-limits” to government.<sup>47</sup>

The doctrine emerged in *Watson v. Jones*, a federal diversity case involving a Reconstruction-era church property dispute between pro- and anti-slavery factions of a border-state Presbyterian congregation.<sup>48</sup> Each faction claimed the church’s property, on the ground that it adhered to theologically authentic Presbyterian belief and doctrine from which the other faction had departed.<sup>49</sup> Among other things, *Watson* held that principles of general

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<sup>43</sup> See *infra* Part I-B.

<sup>44</sup> See *infra* Part I-C.

<sup>45</sup> Jared Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U.L. REV. 497, 497-98 (2005); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998); Christopher C. Lund, *Rethinking the “Religious-Question” Doctrine*, 41 PEPP. L. REV. 1013, 1013 (2014); see also Marci Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1190-96 (agreeing with this characterization of the doctrine, but calling it by a different name); Michael Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 520-41 (2013) [hereinafter Helfand, *Litigating Religion*] (acknowledging this understanding of the doctrine, but criticizing it as a departure from its original purpose).

<sup>46</sup> *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2778 (2014) (“[T]he federal courts have no business addressing whether the religious belief asserted in a RFRA case is reasonable.”) (internal parentheses deleted); *Employment Division v. Smith*, 494 U.S. 872, 887 (1990) (“It is [not] appropriate for judges to determine the ‘centrality’ of religious beliefs [or] the place of a particular belief in a religion or the plausibility of a religious claim.”); *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) (“[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceive the commands of their common faith. Courts are not arbiters of scriptural interpretation.”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (People “may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”); see also *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872).

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

<sup>47</sup> LUPU & TUTTLE, *supra* note 5, at 53; accord Goldstein, *supra* note 45, at 497-98; Greenawalt, *supra* note 45, at 1844, 1856; Helfand, *Litigating Religion*, *supra* note 45, at 547; Lund, *supra* note 45, at 1015.

<sup>48</sup> 80 U.S. (13 Wall.) 679 (1872).

<sup>49</sup> *Id.* at 690-700.

jurisprudence precluded American courts from deciding essentially religious questions,<sup>50</sup> and thus deprived courts of the power to decide which of the litigating factions of a church was the “true” representative entitled to the use and enjoyment of congregational property.<sup>51</sup> Instead, courts were required to defer to the decision of the highest ecclesiastical authority in the denomination about who owned church property, if the church were hierarchical,<sup>52</sup> or to the decision indicated by laws governing voluntary associations, if the church were congregational.<sup>53</sup>

Eighty years later, *Kedroff v. St. Nicholas Cathedral* elevated *Watson*’s “religious-question” doctrine from general common law to constitutional rule.<sup>54</sup> *Kedroff* involved whether a New York City cathedral was owned and controlled by the Patriarch of the Russian Orthodox Church residing in Moscow, or by American diocesan authorities residing in New York City (who feared the Patriarch had been coopted by Soviet authorities).<sup>55</sup> Constitutionalizing *Watson*, the Court sided with the denominational leader in the Soviet Union, holding that the free exercise of religion protects the right of religious bodies to make their own decisions about internal governance free from pressure or interference by government.<sup>56</sup> Subsequent decisions confirmed the doctrine,<sup>57</sup> extended it to disputes about church offices,<sup>58</sup> and disavowed judicial review even when a church ignored or violated its own procedures.<sup>59</sup>

The religious-question doctrine received a recent and ringing endorsement in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, in which the Court endorsed the judge-made “ministerial exception” to the antidiscrimination provisions of the Americans With Disabilities Act (ADA).<sup>60</sup> Reasoning that a congregation’s choice of its leader was a quintessentially religious decision that courts are powerless to review, the Court confirmed “that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”<sup>61</sup> The Free Exercise and Establishment Clauses thus precluded application of the ADA (or any other federal or state employment law) to *any* claim relating to a church’s employment of its ministers:

By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will

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<sup>50</sup> *Id.* at 733-34.

<sup>51</sup> *Id.* at 728-29.

<sup>52</sup> *Id.* at 727.

<sup>53</sup> *Id.* at 725.

<sup>54</sup> 344 U.S. 94 (1952).

<sup>55</sup> *Id.* at 93-94, 102-03, 108-09.

<sup>56</sup> *Id.* at 116, 119, 120-21.

<sup>57</sup> *Presbyterian Ch. v. Mary Elizabeth Blue Hull Ch.*, 393, U.S. 440, 449 (1969).

<sup>58</sup> *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

<sup>59</sup> *Id.* at 713.

<sup>60</sup> 132 S.Ct. 694 (2012).

<sup>61</sup> *Id.* at 704.

minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.<sup>62</sup>

Although the religious-question doctrine evolved in the context of church property and office cases, it also played a decisive role in pre-*Smith* exemption cases. In *Thomas v. Review Board*, for example, Thomas, a Jehovah's Witness steelworker, was denied unemployment benefits after quitting his job rather than work on military weapons in violation of his religion, which prohibited him from "producing or aiding in the manufacture of items used in the advancement of arms."<sup>63</sup> Thomas had been working without objection in a job in which the steel he fabricated went to the manufacture of various military weapons, among other industrial uses.<sup>64</sup> But that job was eliminated, and Thomas was involuntarily transferred to a new one which required that he work directly on military tanks, to which he did object.<sup>65</sup> The Court held that Thomas was entitled to benefits, even though a Witness co-worker had no objection to the same job,<sup>66</sup> and both jobs seemed to constitute "producing or aiding" in the manufacture of weapons:<sup>67</sup>

Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. [I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.<sup>68</sup>

In similar fashion, the Court rejected attempts in *Smith* itself to save constitutionally mandated exemptions by restricting their application to government burdens on "important" or "central" beliefs and practices. "What principle of law or logic," asked the Court, "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 different religious claims."<sup>69</sup>

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<sup>62</sup> *Id.* at 706.

<sup>63</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 711 n.4 (1981).

<sup>64</sup> *Id.* at 710-11. Although there was no specific finding on how much of the steel Thomas fabricated went to weapons manufacture, Thomas's employer devoted virtually all of its activities to weapons manufacture, *id.* at 711 n.4, and the Court found it "reasonable to conclude" that some of the steel Thomas processed ultimately went to "tanks or other weapons," *see id.* at 711 n.3.

<sup>65</sup> *Id.* at 710. Thomas had no objection to working on steel that was later made into weapons, but that he could not in good conscience work directly on weapons. *Id.* at 710, 711.

<sup>66</sup> *Id.* at 710.

<sup>67</sup> *Id.* at 715.

<sup>68</sup> 450 U.S. at 715, 716; *accord Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (Courts are not competent "to question . . . the validity of particular litigants' interpretations of th[eir] creeds.") (dictum).

<sup>69</sup> *Smith*, 494 U.S. at 887 (citation and internal quotation marks deleted); *accord Hernandez*, 490 U.S. at 699 (Courts are not competent "to question the centrality of particular beliefs or practices to a faith") (dictum).

The religious-question doctrine does not apply to exemption claims involving government administration of its own programs and properties. *E.g.*, *Lyng v. Northwest Ind. Cem. Protective Ass'n*, 485 U.S. 439 (1988) (holding Native Americans not entitled to enjoy construction of road on government property even

## B. Review of Claimant Sincerity

Professor Helfand suggests that the boundary-maintenance problems created by nonjusticiable religious costs should be solved by “increased sincerity skepticism,” not “increased substantial burden skepticism.”<sup>70</sup> By closely evaluating whether a claimant has honestly alleged a substantial burden on religious exercise, he predicts, courts can prevent RFRA from being abused by fraudulent claims: “[T]he more considerations courts can incorporate into their sincerity analysis, the better courts can serve as gatekeepers, ensuring the overall integrity of a religious accommodations regime.”<sup>71</sup> Others have made similar claims.<sup>72</sup> None of them acknowledges the difficulties and dangers that close review of sincerity would entail.

The government rarely questions sincerity in exemption cases. Since the development of religious-liberty jurisprudence began in the early 1960s, the government has conceded claimant sincerity in virtually every religious-exemption case to have reached the Supreme Court,<sup>73</sup> including all of the religious nonprofit cases now pending.<sup>74</sup> The only in which

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though road would burden their ability to practice their religion on adjacent property); *Bowen v. Roy*, 476 U.S. 693 (1986) (holding parent not entitled to enjoin government use of child’s social security number in government’s possession, even though he sincerely believed this use was inflicting spiritual harm on his daughter).

<sup>70</sup> Helfand, *supra* note 32.

<sup>71</sup> *Id.* at 33.

<sup>72</sup> *E.g.*, Samuel Levine, *A Critique of Hobby Lobby and the Supreme Court’s Hands-Off Approach to Religion*, 91 NOTRE DAME L. REV. ONLINE 26, 46 (2015) (Judicial review of sincerity is “one of the safeguards against the unfettered reliance on religious claims as a defense to prosecution for otherwise illegal conduct, or as a basis for an exemption from an otherwise valid law. [A] court has the authority to inquire whether an individual is expressing a sincerely held religious belief.”).

<sup>73</sup> *E.g.*, *Holt v. Hobbs*, 135 S.Ct. 853, 862 (2015); *Wheaton Coll. v. Burwell*, 134 S.Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2774 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Employment Div. v. Smith*, 494 U.S. 872, 919 (1990) (Blackmun, J., dissenting); *Frazee v. Department of Empl. Sec.*, 489 U.S. 829, 831 (1989); *Employment Div. v. Smith*, 485 U.S. 660, 664 (1988); *Lyng v. Northwest Ind. Cem. Protective Ass’n*, 485 U.S. 439, 447 (1988); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987); *Hobbie v. Unemployment App. Comm’n*, 480 U.S. 136, 138 n.2 (1987); *Bowen v. Roy*, 476 U.S. 693, 725, 729 (1986) (O’Connor, J., concurring in part & dissenting in part); *Goldman v. Weinberger*, 475 U.S. 503, 525 (1986) (Blackmun, J., dissenting); *United States v. Lee*, 455 U.S. 252, 257 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 209 (1972); *Sherbert v. Verner*, 374 U.S. 398, 399 n.1 (1963); *Braunfeld v. Brown*, 366 U.S., 599, 601 (1961); *see also* *Bob Jones Univ. v. United States*, 461 U.S. 574, 584 (1983) (noting lower court assumed sincerity of university’s racially discriminatory beliefs for purposes of summary judgment motion); *Gillette v. United States*, 401 U.S. 437, 440 (1971) (noting lower court rejected exemption “not because of doubt about the sincerity or the religious character of petitioner’s objection to military service but because his objection ran to a particular war”); *United States v. Seeger*, 380 U.S. 163, 166 (1965) (noting lower court found claimant’s anti-war beliefs sincere).

Professor Levine has argued that Justice Ginsburg’s *Hobby Lobby* dissent appears to preclude review of claimant sincerity even when the government contests it. Levine, *supra* note 72, at 43-45.

<sup>74</sup> *See* *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1170 n.16, 1175 (10<sup>th</sup> Cir.), *cert. granted*, 135 S.Ct. 444 (2015); *East Texas Bapt. Univ. v. Burwell*, 793 F.3d 449, 454 (5<sup>th</sup> Cir.), *cert. granted*, 135

claimant sincerity was seriously in question are *Thomas* and *Hosanna-Tabor*—both of which the government lost.<sup>75</sup>

The government’s reticence to challenge claimant sincerity is not surprising. Sincerity challenges require the government’s attorney to convince the trier of fact that the claimant is a liar—that he or she has fabricated either the allegedly burdened religious belief or practice, or the claimant’s religious obligation to observe it. Attempting to prove this is risky. Merely making the accusation may forfeit the sympathy of the trier of fact, especially if it’s a jury; no one likes their faith to be called a fraud, and most aren’t anxious to tell others their faith is fraudulent.

The proof is also difficult. The government might examine the claimant,<sup>76</sup> but this is almost certainly a losing proposition. The claimant will be hostile and uncooperative, and interrogating a witness under oath to prove she doesn’t believe what she claims evokes images of the Inquisition, the Salem witch trials, and other such sordid episodes in European and American history.<sup>77</sup>

Insincerity can be proved with extrinsic evidence, but this, too, is hard to come by. Consider a Catholic who uses contraception, or whose spouse uses it, but seeks exemption from the contraception mandate for business reasons.<sup>78</sup> Finding a prescription for

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S.Ct. 444 (2015); *Geneva Coll. v. Burwell*, 778 F.3d 422, 435 (3<sup>rd</sup> Cir.), *cert. granted*, 135 S.Ct. 444 (2015); *Priests for Life v. Burwell*, 772 F.3d 229, 247 (D.C. Cir. 2014), *cert. granted*, 135 S.Ct. 444 (2015).

<sup>75</sup> For *Hosanna-Tabor*, see Brief of Respondent EEOC at 17. 24-25 (arguing termination of teacher by private religious school was “textbook case” of employer retaliation for teacher’s assertion of rights under ADA), *Hosanna-Tabor Evangel. Lutheran Ch. & Sch. v. EEOC*, 132 S.Ct. 694 (2012); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 *MERCER L. REV.* 405, 409-13 ((2013) (detailing evidence in record suggesting school’s deployment of ministerial exception was pretext for disability discrimination). For *Thomas*, see *supra* text accompanying notes 63-68 (detailing lower court skepticism of Thomas’s theological distinctions).

<sup>76</sup> See Marshall, *supra* note 10, at 23 (“How else can the state refute the sincerity of a religious claim other than by uncovering alleged inconsistencies and contradictions in the claimant’s religious convictions in order to impeach her assertions?”).

<sup>77</sup> See *supra* text accompanying note 10.

<sup>78</sup> Cf. *Eden Foods, Inc. v. Sebelius*, 733 F.3d 626, 629 & n.3 (8<sup>th</sup> Cir. 2013) (suggesting that corporate challenge to mandate was motivated as much by CEO’s anti-regulatory and libertarian commitments as by his Catholic faith), *vacated & remanded sub nom. Eden Foods, Inc. v. Burwell*, 134 S.Ct. 2902 (2014); Frank Newport, *Americans, Including Catholics, Say Birth Control is Morally OK*, Gallup (May 22, 2012) (reporting 82% of Catholics say using birth control is morally acceptable), <http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx>.

Under the mandate’s religious accommodation, self-insured claimants are relieved of the obligation to cover contraception and related services, which are instead provided directly to plan beneficiaries by claimant TPAs who, in turn, are reimbursed that expense by the government. Self-insured claimants thus receive the financial benefits of increased contraceptive use—reduced claims for prenatal care, childbirth, and post-natal complications—without incurring the expense of covering the contraception that generates these benefits.

Now that *Hobby Lobby* has extended the mandate’s religious accommodation to closely held business corporations, it is at least conceivable that some of these corporations might find a RFRA exemption from the mandate financially attractive, irrespective of their owners’ subjective religious beliefs about contraception. See generally Marshall, *supra* note 10, at 39 (“A financial incentive combined with a high likelihood of success is a dangerous mix.”).

contraceptives filled by the claimant or spouse would be evidence of insincerity, but such information is protected by medical privacy laws.<sup>79</sup> One might depose friends and family in hopes of uncovering an admission of contraception use, though they are likely to be as uncooperative as the claimant. One could hire a private investigator to troll through the claimant's or spouse's activities in hopes of finding behavior inconsistent with claimed anti-contraception beliefs—a visit to Planned Parenthood, perhaps, or a purchase of over-the-counter contraceptives? Such a fishing expedition is expensive, a court is unlikely to permit it, and a jury would almost certainly be repulsed by it.<sup>80</sup>

The risk of alienating the trier of fact might worth the gamble, and the difficulty of gathering evidence the trouble, if there were the real possibility of significant government pay-off—a judicial finding of insincerity which would defeat a claim for RFRA relief. The Court's sincerity doctrines, however, make any such payoff unlikely. Courts must defer to the claimant's construction of her beliefs, however implausible that may appear.<sup>81</sup> For example, it would seem that if Thomas's old job did not constitute a material contribution to war in violation Jehovah's Witness beliefs, then the new job shouldn't have either—as both Thomas's co-religionists urged and the state supreme court found.<sup>82</sup> But the Court held Thomas entitled to draw his own theological distinctions, however nonsensical or implausible they might appear to others.<sup>83</sup> In *Holt v. Hobbs* the Court similarly accepted without question a prison inmate's contentions that (i) his Muslim beliefs prohibited the trimming of his beard altogether, (ii) those beliefs were nevertheless not burdened by trimming his beard to one-half inch, but (iii) were substantially burdened by trimming to the one-quarter inch length that prison regulations might have permitted.<sup>84</sup>

The courts also defer to explanations a claimant offers for inconsistent behavior. In *Hobby Lobby*, for example, the company's health plan had covered emergency contraception for years despite its owners' belief that it is an abortifacient prohibited by their religion.<sup>85</sup> It was only after the contraception mandate controversy arose and a law firm approached the owners about a court challenge that they became aware of this coverage and eliminated it.<sup>86</sup>

<sup>79</sup> E.g., Health Insurance Portability and Accountability Act, Pub.L. 104–191, 110 Stat. 1936 (1996).

<sup>80</sup> Cf. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

<sup>81</sup> See *supra* note 46 & accompanying text.

<sup>82</sup> See *Thomas v. Review Bd.*, 450 U.S. 707, 711, 714-16 (1981).

<sup>83</sup> See *supra* text accompanying notes 63-68.

The Court left open the possibility that a claimant could press a belief or practice “so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause,” *Thomas*, 450 U.S. at 715., but gave no hint of what such a claim might look like.

<sup>84</sup> 135 S.Ct. 853, 860-61(2015). Regulations allowed inmates with skin conditions irritated by shaving to grow one-quarter inch beards. *Id.* at 860.

<sup>85</sup> Pls.' Compl. at 14 ¶55, *Hobby Lobby Stores, Inc. v. Sebelius*, No. CIV-12-1000-HE (W.D. Okla. Sept. 12, 2012), available at

<http://www.becketfund.org/wp-content/uploads/2012/09/Hobby-Lobby-Complaint-stamped.pdf>.

<sup>86</sup> See *id.* at 14 ¶ 55; Janet Adamy, *Are Firms Entitled to Religious Protections?* WALL ST. J., March 21, 2014 (reporting that Hobby Lobby was unaware its health plan covered emergency contraception until the Becket Fund

The company claimed an oversight, but these events would also have supported an inference that the owners were insincere in claiming a substantial burden on their religious exercise: After all, they had not been very careful to ensure that objectionable contraceptives were excluded from coverage, and discovered and excluded that coverage only when preparing to sue the government. At every level, however, the courts ignored this possibility, accepting the company's explanation at face value.<sup>87</sup>

It's no surprise that the government hardly ever challenges an exemption claimant's sincerity. In the vast majority of RFRA cases, proof of insincerity can be had only at great risk and with great difficulty, and thus is rarely sought.

### C. Review of "Secular Costs"

It's worth asking whether religiously burdensome laws with insignificant penalties even exist. None of the commentators who argue for the adequacy of reviewing claimant sincerity and secular costs have offered a single real-world example in which such review did or would result in a finding of no substantial burden on religion.<sup>88</sup>

It is not surprising that religiously burdensome laws with insignificant sanctions are scarce. It seems unlikely that Congress or a state legislature would attempt to shape or control general public behavior by laws that may safely ignored because violation carries trivial sanctions. Where such laws exist, it is doubtful that government devotes its scarce resources to enforcing them. If this is the kind of RFRA claim that adjudication of secular costs screens out, then judicial review is hardly worth the trouble.

Adjudication of secular costs also fails for a more fundamental reason than improbability: Substantial secular costs are not correlated—at all—with substantial religious costs.<sup>89</sup> 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. This is a matter of simple logic: If two factual premises are necessary to prove a conclusion, then the conclusion cannot follow from proof of only one of the premises. If a claimant suffers only minor or insignificant religious costs in obeying a purportedly burdensome law, then his or her religious exercise has not been "substantially" burdened, regardless of the substantiality

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for Religious Liberty solicited its participation in a lawsuit planned against the forthcoming mandate.

<sup>87</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278, 1285 (W.D.Okla. 2012) (observing without explanation that claimants "elected not to maintain grandfathered status"), *rev'd*, 723 F.3d 1114, 1124 (10<sup>th</sup> Cir. 2013) (same), *aff'd sub nom.* *Hobby Lobby Stores, Inc. v. Burwell*, 134 S.Ct. 2751, 2766 (2014) (same).

<sup>88</sup> See *supra* note 8. Professor Helfand implies that perhaps the compulsory school attendance law in *Wisconsin v. Yoder* was such a law, since the fine for violating it was only \$5. Helfand, *Substantial Burdens*, *supra* note 8, at 27 (observing that the Court deeply explored whether a state compulsory school attendance law burdened the Amish claimants, but not the \$5 fine for violating it) But violation of the *Yoder* statute would have triggered criminal liability for Amish parents without an exemption. 406 U.S. 202, 205 & n.2 (1972); *id.* at 237 (Stewart, J., concurring). 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 considered minor and the monetary punishment trivial.

<sup>89</sup> See Greene, *supra* note 21, at 181 (If a law's burden on religious practice "is legally insubstantial, it cannot be come legally substantial just because the penalty for disobeying is high.").

of the secular cost of violating the law.<sup>90</sup> This is why the disaggregated substantial-burden element requires *both* a substantial religious cost for obeying a religiously burdensome law *and* a substantial secular cost for disobeying the law.<sup>91</sup>

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Judicial review of claimant sincerity does no meaningful analytic work in identifying “substantial” burdens on religion, because it is almost never questioned. As for review of secular costs, laws with trivial or nonexistent sanctions are rare, and in any event one cannot logically conclude that a “substantial burden” exists under RFRA solely from proof of substantial secular costs for disobedience. The only way to reach a conclusion of substantial burden from substantial secular costs is to assume the existence of substantial religious costs, thereby begging the very question the substantial-burden element is designed to answer.

Disaggregation presents the illusion of adjudication, while rendering the ultimate question of substantial burden functionally nonjusticiable. Disaggregation appears to leave courts with important things to do in deciding whether a legal burden on religion is substantial, but in practice it guarantees that the only material question to prove the substantial-burden element will be one the court is barred from answering. Restricting judicial review to claimant sincerity and secular costs thus leaves courts in a doctrinal Catch-22: The religious-question doctrine prohibits them from answering the only question that matters: whether the religious costs of obeying an allegedly burdensome law are substantial.<sup>92</sup> Disaggregating the substantial-burden element into substantial religious costs and substantial secular costs thus leaves the entire substantial-burden question functionally nonjusticiable.

## II. JUSTIFICATIONS FOR JUSTICIABILITY

The Court’s own precedents, RFRA’s text and legislative history, and the need for independent assessment of substantiality to preserve the rule of law, together provide compelling authority for judicial review of the substantiality of religious burdens alleged by RFRA claimants.

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<sup>90</sup> Kent Greenawalt, *Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 125, 138 (Micah Schwartzman, Zoë Robinson & Chad Flanders eds. 2015) [hereinafter *CORPORATE RELIGIOUS LIBERTY*].

<sup>91</sup> Professor Greene argues that a “substantial burden” on religious exercise exists under RFRA so long as a claimant shows that obeying a law would involve substantial religious costs, even if the secular costs of disobedience are trivial or nonexistent. *See* Greene, *supra* note 21, at 181. But if a claimant may disobey a religiously burdensome law without legal repercussions, it’s hard to see any burden at all, let alone a “substantial” one. The practical consequences of Greene’s position nonetheless coincide with those of mine because laws with trivial or nonexistent sanctions are rare. We thus agree that courts should address the ultimate question of substantial burden directly, without disaggregating it into religious and secular costs. *See* Greene, *supra* note 21, at 181 (“The proper RFRA question is whether the legal demand to do X or to fail to do Y substantially burdens the religious exercise in question . . .”).

<sup>92</sup> *See* Priscilla J. Smith, *Who Decides Conscience? RFRA’s Catch-22*, 22 *J.L. & POL’Y* 727 (2014).

### A. *Limits of the Religious-Question Doctrine*

The religious question doctrine is sometimes misunderstood as precluding judicial review of any dispute that involves a theological or other religious question.<sup>93</sup> The doctrinal prohibition is narrower: Judges may not decide a case involving a theological question *by answering that question*; they are fully empowered, however, to decide such cases by reliance on principles of secular law.<sup>94</sup>

The Court made this clear nearly 40 years ago in *Jones v. Wolf*.<sup>95</sup> *Jones* involved the familiar pattern of congregational schism over theological disagreement, with the parties divided on whether the congregation’s property legally belonged to the national denominational body with which the congregation was affiliated, or to the congregational majority who wished to break away.<sup>96</sup> As we’ve seen,<sup>97</sup> the religious-question doctrine prohibits courts from deciding which of the factions in such a situation is truer to denominational beliefs. *Jones* held, however, that courts are free to decide church property disputes—even those in which theological disagreement plays a material role—by reference to “neutral principles of law.”<sup>98</sup> Courts may rely, for example, on the name in which legal title is held, the provisions of local and national denominational constitutions, corporate charters and bylaws, relevant state statutes, the course of dealing between the local congregation and national denomination, and so on.<sup>99</sup> In other words, the religious-question doctrine prohibits courts from deciding cases between religious parties by answering theological disputes, but not from deciding such cases on the basis of secular legal principles.

*Hosanna-Tabor* applied this distinction to the ministerial exception in an illuminating way. The Court found that ministerial employment decisions are exempt from the ADA because the Religion Clauses each prohibit government from telling a church who it must appoint as its minister.<sup>100</sup> The Court nevertheless formulated its own definition of “minister” for the purpose of administering the ministerial exception that it had just recognized. Carefully

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<sup>93</sup> See Goldstein, *supra* note 45, at 502 (criticizing the growth of the doctrine into “an apparently absolute prohibition on judicial examination of all questions touching on religion”); Helfand, *Litigating Religion*, *supra* note 45, at 557 (“[A]ny hint of a religious question is currently understood by courts to trigger First Amendment concerns . . . .”); Lund, *supra* note 45, at 1019 (suggesting that the doctrine seems “massively overbroad” and may have “grown far beyond what its rationales would justify”); see also Hamilton, *supra* note 45, at 1191 (“The mere presence of religious belief or ecclesiology” in a case “does not necessarily bar the Court’s jurisdiction.”).

<sup>94</sup> See LUPU & TUTTLE, *supra* note 5, at 69-70; Hamilton, *supra* note 45, at 1190, 1191.

<sup>95</sup> 443 U.S. 595 (1979).

<sup>96</sup> *Id.* at 597-99.

<sup>97</sup> See *supra* Part I-A.

<sup>98</sup> 443 U.S. at 602; accord *Presbyterian Ch. in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Ch.*, 393 U.S. 440, 449 (1969) (“[T]here are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”).

<sup>99</sup> 443 U.S. at 603; e.g., *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 723 & n.15 (1976) (denominational constitutions and property deeds); *Maryland & Va. Eldership of Churches of God v. Sharpsburg Church of God*, 396 U.S. 367, 367-68 (1970) (state religious corporation statutes, conveyance deeds, corporate charters, and the national denominational constitution); see LUPU & TUTTLE, *supra* note 5, at 66.

<sup>100</sup> 132 S.Ct. at 706-07.

reviewing the record, the Court found that the ADA plaintiff in that case, Cheryl Perich, “was a minister within the meaning of the exception”<sup>101</sup> because both she and the defendant church had held her out as a minister, she had been formally educated and commissioned as a minister, and, perhaps most important, she had performed duties which *the Court* found quintessentially ministerial—teaching the Church’s beliefs and practices and otherwise working in service to its mission.<sup>102</sup> “In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”<sup>103</sup> Courts may not decide the ministerial exception cases on the basis of a theological definition of “minister,” but they are free to do so on the basis of a secular common law definition.

In sum, both *Jones* and *Hosanna-Tabor* teach that courts may decide cases involving religious questions so long as they rely solely on secular law to do so.

### B. RFRA’s Text and Legislative History

In 1990, *Employment Division v. Smith* held that the Free Exercise Clause does not require that religious believers be excused from obeying religiously neutral and generally applicable laws, even when obedience would significantly interfere with their religious exercise.<sup>104</sup> Congress was outraged at this apparent doctrinal revision,<sup>105</sup> and immediately set about to mitigate or reverse it. *Smith* itself endorsed so-called “permissive” legislative exemptions—those not constitutionally mandated by the Free Exercise Clause, but voluntarily enacted by legislatures in accordance with the Establishment Clause—so Congress sought to restore religious exemptions by means of a statute that would allow government to interfere with religious exercise only when it had a strong justification.

Congress’s early efforts at restoring religious exemptions did not specify the weight or significance of the government interference with religion that Congress wished to alleviate.<sup>106</sup> The first version of RFRA provided only that “[g]overnment shall not burden a

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<sup>101</sup> *Id.* at 709.

<sup>102</sup> 132 S.Ct. at 707-08.

<sup>103</sup> 132 S.Ct. at 708; *accord id.* at 711-12 (“The ‘ministerial’ exception . . . should apply to any ‘employee’ who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”) (Alito, J., concurring).

<sup>104</sup> 494 U.S. 872 (1990).

<sup>105</sup> It has been widely observed that *Smith* did not effect a significant doctrinal change because the exemption regime it abandoned was honored mostly in the breach. This was reinforced by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), which clarified that the *Smith* rule does not apply to religious gerrymanders and other targeted discrimination against religion.

<sup>106</sup> *See, e.g.*, H.R. 5377 § 2, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. (introduced July 26, 1990) (“[A] governmental authority may not restrict any person’s free exercise of religion” unless it satisfies strict scrutiny.); S. 3254 § 2, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. (introduced Oct. 26, 1990) (“[T]he government of the United States, a State, or a subdivision of a State may not restrict any person’s free exercise of religion” unless it satisfies strict scrutiny); H.R. 2797 § 3, 102<sup>nd</sup> Cong. 1<sup>st</sup> Sess. (introduced June 26, 1991) (“Government shall not burden a person’s exercise of religion” unless it satisfies strict scrutiny); H.R. 4040 § 3, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess. (introduced Nov. 26, 1991) (“Government shall

person's exercise of religion" unless the burden furthered "a compelling government interest" by the "least restrictive means."<sup>107</sup> Although both the House and Senate committee reports occasionally referred to "substantial" burdens on religious exercise,<sup>108</sup> each committee reported out the actual bill unchanged, with all textual references to "burden" left unqualified.<sup>109</sup> The House passed the bill in the same form.<sup>110</sup> As we will see, it was only very late in the enactment process that "substantial" and "substantially" were added to modify "burden" and create the version of RFRA that actually became law: "Government shall not *substantially* burden a person's exercise of religion even if the burden results from a rule of general applicability, [unless] it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."<sup>111</sup>

A purely textual analysis of RFRA would require judicial review of the substantiality of burdens on religion under mainstream approaches to statutory interpretation. Interpretive canons provide that a law should be interpreted in a manner that gives independent significance to each of its words.<sup>112</sup> As judges later observed, a "substantial" burden must mean something other than "any" burden, or there would have been no point to adding "substantial" and "substantially" to the statute.<sup>113</sup> RFRA's legislative history decisively confirms that Congress did indeed intend "substantial" to narrow the range of RFRA relief by requiring that a claimant show that the burden on religion is objectively serious or weighty as a precondition.

RFRA enjoyed broad congressional support despite its initial failure to specify the substantiality of the religious burden that would trigger exemptions. Some members of Congress, however, expressed concern that governments would have to satisfy strict scrutiny even to deny exemptions from laws that only trivially or minimally burdened religious exercise; the effect of RFRA on public school and prison administration was a particular concern.<sup>114</sup> Senators Harry Reid (D-Nev.) and Alan Simpson (R-Wyo.) ultimately introduced

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not burden the practice of religion by any person" unless it satisfies strict scrutiny"); S. 2969 § 3, 102<sup>nd</sup> Cong., 2<sup>nd</sup> Sess. (introduced July 2, 1992) ("Government shall not burden a person's exercise of religion" unless it satisfies strict scrutiny).

<sup>107</sup> See S. 578, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (introduced March 11, 1993) ("Government shall not burden a person's exercise of religion" unless it satisfies strict scrutiny.); H.R. 1308 § 3, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (introduced May 11, 1993) (same).

<sup>108</sup> The House Report's section-by-section analysis describes RFRA as providing simply that "the government cannot burden a person's free exercise of religion" unless it satisfies strict scrutiny, H.R. REP. No. 103-88, at 10 (May 11, 1993), and is elsewhere inconsistent in its usage, sometimes referring to "substantial burdens" on religious exercise, and at other points referring only to unspecified "burdens" on such exercise, *see id.* at 6, 7. The Senate Report more consistently uses "substantial" to modify "burden", in both the section-by-section analysis and other parts of the report, *see* S. REP. No. 103-111, at 2, 8, 9, 14, (July 27, 1993), though it refers only to unspecified "burdens" in criticizing government interference with the free exercise of religion by prisoners and members of the military, *see id.* at 10, 11.

<sup>109</sup> See H.R. REP., *supra* note 108, at 10; S. REP., *supra* note 108, at 3.

<sup>110</sup> H.R. 1308 § 3, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (May 11, 1993).

<sup>111</sup> 42 U.S.C. § 2000bb-1(a) & (b) (emphasis added, dashes & paragraph designations omitted).

<sup>112</sup> *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

<sup>113</sup> *E.g.*, *Hobby Lobby*, 134 S.Ct. at 2798 (Ginsburg, J., dissenting).

<sup>114</sup> *E.g.*, S. REP., *supra* note 108, at 18-37 (additional views of Sen. Alan Simpson (R-Wyo.), with letter from 20

an amendment to RFRA that would have categorically removed the nation's prisons from its reach.<sup>115</sup> Expressing similar concerns about public school administration, the National School Boards Association (NSBA) urged that RFRA be amended to provide relief only from “substantial” government burdens on religion.<sup>116</sup>

Neither amendment would have made much sense if the existence of a “burden” depended solely on the substantiality of secular costs—that is, the substantiality of the penalty for violating a burdensome law. In most cases both inmates and public school children are already subject to objectively significant penalties for violating rules and regulations governing their respective institutions, ranging from loss of privileges to denial of early release (in case of prisoners) or detention and expulsion (in case of school children). In these two contexts, any claim of burden is always a claim of “substantial” burden, because violation of the religiously burdensome rule or regulation to keep faith with one's religion would trigger objectively significant penalties. Why the need to clarify that only *substantial* burdens qualify for RFRA relief, when “substantial” would merely describe already-substantial secular costs for violation?

Of course, the focus of both the Reid amendment and the NSBA proposal was the potential cost of providing religious exemptions from institutional rules and regulations based modest or minimal burdens on religious practice, and not the seriousness of any penalty for violating the law imposing such burdens. This was borne out by the Senate floor debate that ended in the addition of “substantial” and “substantially” to modify “burden” in the version of RFRA ultimately adopted by the Senate. Support for the proposed Reid amendment was sufficiently strong when RFRA reached the Senate floor that its floor managers and principal co-sponsors, Senators Edward Kennedy (D-Mass.) and Orrin Hatch (R-Utah), felt compelled to co-opt it. They offered the NSBA's suggested amendment, proposing that the terms “substantial” or “substantially” be inserted to modify every use of the term “burden” in the language of the bill,<sup>117</sup> thereby making explicit that RFRA would provide relief only from “substantial” government burdens on religious exercise. This changed the operative provision of RFRA to require strict scrutiny only of substantial government burdens on religion rather than all government burdens, as the text originally provided.

The expectation that judicial review of substantiality would preclude RFRA claims for less weighty religious costs was the principal argument made by Hatch, Kennedy, and other

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state attorneys general urging amendment exempting prisons from RFRA); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 238-42 (1994) (describing concerns relayed to Senate Judiciary Committee by state attorneys general); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 188 n.74 (1995) [hereinafter Lupu, *A Lawyer's Guide*] (describing concerns relayed to House Judiciary Committee by the National School Boards Association).

<sup>115</sup> 139 CONG. REC. S14353 (Oct. 26 1993); *see* Laycock & Thomas, *supra* note 114, at 242-43.

<sup>116</sup> *See* Lupu, *A Lawyer's Guide*, *supra* note 114, at 188 n.74.

The NSBA suggested additionally amending RFRA's strict scrutiny test to use the words “narrowly tailored” to a compelling government interest, rather than the “least restrictive means” of furthering such an interest. This amendment was never formally proposed. *Id.*

<sup>117</sup> 139 CONG. REC. S14352 (Oct. 26, 1993).

opponents of the Reid amendment. Kennedy urged that his and Hatch's amendment would eliminate the need for extraordinary justification "for every government action that ha[s] an incidental effect on religious institutions," requiring this only for actions imposing a "substantial burden on the exercise of religion."<sup>118</sup> Hatch similarly observed that the amendment would prevent the government from having "to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion" would have to satisfy strict scrutiny.<sup>119</sup>

Kennedy and Hatch offered their arguments against the backdrop of a Supreme Court that had historically adjudicated allegedly burdensome laws by a direct judgement of the substantiality of the burden on religion, rather than the disaggregation of religious and secular costs that became common in the wake of RFRA's passage.<sup>120</sup> Their arguments would not have made sense had they been directed only at the substantiality of penalties for violating religiously burdensome laws.

The Kennedy-Hatch amendment eventually passed (apparently by unanimous consent).<sup>121</sup> The Senate then proceeded to debate the Reid amendment,<sup>122</sup> which ultimately failed on a formal vote, 41 to 58.<sup>123</sup> RFRA as amended by Senators Kennedy and Hatch was thereafter adopted by the Senate;<sup>124</sup> the House passed RFRA in the same form a week later,<sup>125</sup> and it became law with President Clinton's signature on November 16, 1993.

The Senate floor debate of the Reid and the Kennedy-Hatch amendments left little doubt that Congress anticipated judicial evaluation of the objective substantiality of alleged burdens on religious exercise in the adjudication of RFRA exemption claims. Neither the House and Senate reports, nor the crucial floor debate that added substantiality to RFRA's prima facie claim for relief, ever linked "substantial burdens" to the penalty for violating a burdensome law, but only ever referred to it as an objective measure of the degree of government interference with religious exercise itself.

### *C. Boundary Maintenance and the Rule of Law*

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<sup>118</sup> *Id.* at S14352.

<sup>119</sup> *Id.* at S14352.

<sup>120</sup> *E.g.*, *Jimmy Swaggart Ministries v. Board of Equal.*, 493 U.S. 378 (1990) (analyzing general sales tax applied to sale of Bibles and other religious materials in terms of its effect of ministry rather than weight of sanction for failing to collect tax); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (analyzing denial of tax deductibility of Scientology "auditing" session in terms of its effect on Scientologist beliefs rather than weight of sanction for unauthorized deduction) (dictum); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (analyzing Fair Labor Standards Act in terms of its effect on activities of religious foundation rather than weight of sanction for violating it); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (analyzing compulsory school attendance law in terms of its effect on religious exercise of Amish community rather than weight of \$5 misdemeanor fine for violating it).

<sup>121</sup> 139 CONG. REC. at S14352 (statement of presiding officer).

<sup>122</sup> *Id.* at S14352-68; 139 CONG. REC. S14461-68 (Oct. 27, 1993).

<sup>123</sup> *Id.* at S14468.

<sup>124</sup> *Id.* at S14468-71.

<sup>125</sup> 139 CONG. REC. H8713 (Nov. 3, 1993).

As *Hosanna-Tabor* makes clear, courts may properly reject a church’s classification of an employee as a minister whose hiring and firing are exempt from federal and state employment law, when the employee does not function in accordance with the *Court’s* definition of “minister.” The church remains free to treat the employee as a minister in accordance with its theology and doctrine, but before the law the employee is nonministerial and entitled to the protections of federal and state employment law. The courts must have the final say on which employees are left unprotected by the law, not employers accused of violating employee rights.

Judicial review is crucial. Without a secular definition of minister, church employers would decide for themselves which of their employees are ministers lacking the protections of federal and state employment law. The potential for abuse is obvious. Any person or body that may exempt itself from legal liability by means of a self-administered definition not subject to judicial review, has powerful incentives to fashion as broad a definition as possible.<sup>126</sup> If employers are to be relieved from legal liability when they hire and fire ministers, it is crucial that courts, not employers, police the boundary of that relief. Allowing churches to make this determination without meaningful judicial review would subvert majoritarian government and the rule of law.

Believers seeking RFRA exemptions have every incentive to draw the boundary between “substantial” and “insubstantial” burdens so as to exempt the maximum amount of their activities from the law.<sup>127</sup> Judicial maintenance of this boundary is thus necessary and proper to prevent RFRA from spawning a regime of exceptions that swallow the rule.

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During the pre*Smith* era and despite the religious-question doctrine, the Court denied exemptions based upon its own independent determinations that exemption claimants had not alleged legally cognizable burdens on their religious exercise notwithstanding the sincerity of their allegations. *Jones v. Wolf*, *Hosanna-Tabor*, and other church property and office cases teach that the religious-question doctrine bars courts from deciding whether an alleged burden on religious exercise is *theologically* substantial, but courts are free to decide whether an alleged burden is *legally* substantial for the purpose of applying the substantial-burden prong

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<sup>126</sup> Judicial review has reigned in excessive ministerial-exception claims. *See, e.g.*, *Herx v. Diocese of Ft. Wayne-South Bend*, 2014 WL 4373617, \*7-8 (N.D. In. 2014) (rejecting claim by Catholic school that female teacher was “minister” exempt from Title VII protection because her position required that she be a Christian role model); *Davis v. Baltimore Hebrew Congregation*, 985 F.Supp.2d 701 (D.Md. 2013) (rejecting same claim by synagogue regarding custodian); *Buscetto v. St. Bernard High Sch.*, No. CV116011089 (Conn. Super. Ct. July 25, 2014) (rejecting same claim by Catholic high school regarding athletic director/baseball coach) (unpublished op.), 58 Conn. L. Rptr., 2014 WL 4494362; *Weiter v. Kurtz*, No. 2011-CA-oo1058-MR (Ky. Ct. App. Dec. 14, 2012) (rejecting same claim regarding bookkeeper/receptionist of Catholic parish) (unpublished op.), 2012 WL 6213759.

<sup>127</sup> *Cf. Hamilton, supra* note 45, at 1108 (“RFRA was a brash repudiation of the principle that laws governing conduct apply to United States citizens, regardless of identity . . .”).

of RFRA.<sup>128</sup> The latter is simply a matter of implementing the congressional understanding of substantiality evident in RFRA's legislative history.<sup>129</sup> Courts must decide and define the kind of burden from which RFRA was enacted to provide relief, if the rule of law and RFRA's purpose are to be upheld in exemption cases.<sup>130</sup>

### III. JUDGING "SUBSTANTIAL" BURDENS: THE RELIGIOUS NONPROFIT CONTRACEPTION CASES

The religious nonprofit complicity cases now pending before the Supreme Court provide an instructive example of how courts may properly adjudicate substantial religious costs under RFRA without violating the religious-question doctrine. The mandate's religious accommodation is at the heart of these cases,<sup>131</sup> with the nonprofits seeking RFRA exemptions from the process prescribed for claiming the accommodation.<sup>132</sup> Although some of these decisions seemed to make prohibited theological judgments about claims of complicity with the evil of contraception,<sup>133</sup> the panels could have adjudicated these claims in accordance with the religious-question doctrine, by relying on traditional legal principles governing responsibility for private wrongs—namely, factual causation in tort and products liability.<sup>134</sup>

#### A. *The Religious Nonprofit Accommodation*

The mandate regulations creating the "religious accommodation" initially provided that a religious nonprofit would be exempted from the mandate if it completed a government form certifying that it (i) has religious objections to some or all of the mandated contraceptives; (ii) is organized and operated as a nonprofit entity under applicable federal law; and (iii) holds itself out as a religious organization, and then provide that form to its third-party insurer or, if self-insured, to its third-party administrator (TPA).<sup>135</sup> The form constitutes notice to the insurer or TPA that the nonprofit's employee health plan will not offer the religiously objectionable contraceptives, and that the insurer or TPA must consequently supply them directly to plan beneficiaries outside of the health plan.<sup>136</sup> In case of TPAs, the form is additionally treated as a designation of the TPA as a "plan administrator" under ERISA, thereby authorizing the TPA to provide contraception directly and otherwise to process beneficiary claims for contraception and related services in accordance with ERISA.<sup>137</sup>

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<sup>128</sup> Part II-A.

<sup>129</sup> Part II-B.

<sup>130</sup> Part II-C.

<sup>131</sup> Part III-A.

<sup>132</sup> Part III-B.

<sup>133</sup> Part III-C.

<sup>134</sup> Part III-D.

<sup>135</sup> 45 C.F.R. § 147.131(b) (2013).

<sup>136</sup> 45 C.F.R. § 147.131(c)(1) (2013).

<sup>137</sup> ERISA requires that any entity that reimburses or otherwise processes health insurance claims be designated

Mandate regulations prohibit the insurer or TPA from shifting any costs of supplying religiously objectionable contraceptives to the accommodated nonprofit, and may not commingle funds used to supply such contraceptives with plan premiums paid by the nonprofit and its employees or any other funds used to pay covered expenses under the nonprofit's health plan.<sup>138</sup>

The government recently amended the final regulations to permit self-certification by letter to the government instead of by providing the government form to its insurer or TPA.<sup>139</sup> Any objecting religious nonprofit may now also obtain the accommodation by advising the government of its objections in writing and naming its insurer or TPA.<sup>140</sup> Under this arrangement, upon receipt of the self-certification letter the government notifies the insurer or TPA of its obligation to directly supply the religiously objectionable contraceptives,<sup>141</sup> and this notice constitutes the required designation of the TPA as an ERISA plan administrator.<sup>142</sup>

### B. Circuit Adjudications of Substantiality

Religious nonprofit challenges to the accommodation process make two basic arguments: The act of self-certifying their eligibility for the accommodation facilitates the sin or evil of contraceptive use, or fosters “scandal” by appearing to encourage the use of contraceptives, by (i) “triggering,” “authorizing,” “facilitating,” or otherwise causing the provision of contraceptives to employees by a claimant's health plan insurer or administrator;<sup>143</sup> or (ii) converting employee and student health plans into “conduits” or

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as a “plan administrator”—not to be confused with a third-party administrator or TPA—by an “instrument under which the plan is operated.” The regulations thus provide that the accommodation form supplied by the nonprofit to its TPA shall be treated as an “instrument under which the plan is operated” designating the TPA as a “plan administrator,” thereby authorizing the TPA under ERISA to supply contraceptives directly to plan beneficiaries and otherwise to process claims for contraceptives and related services. *See generally* Lederman, *supra* note 20.

<sup>138</sup> 45 C.F.R. § 147.131(c)(2)(ii) (2013).

<sup>139</sup> *See* Preventive Services (2015), 80 Fed. Reg. at 41318-41347 (codifying orders in *Wheaton College*, 134 S.Ct. 2806 (2014) (granting preliminary relief from completion of government form so long as claimants advise government by letter of religious objections to contraceptives); *Little Sisters of the Poor*, 134 S.Ct. 1022 (2014) (same); *Zubik*, 135 S.Ct. 2924 (2015) (enjoining enforcement of contraception mandate pending disposition of petitions for certiorari if claimants supply required information by letter).

The government also amended the final regulations to take account of the holding in *Hobby Lobby* itself, *see* Preventive Services (2015), 80 Fed. Reg. at 41318-41347, which held that the religious nonprofit accommodation constituted a less restrictive alternative to unconditionally imposing the mandate on closely held *business* corporations whose owners religiously object to the mandate, 134 S.Ct. at 2780-83. The amendments extend the accommodation to such businesses. 45 C.F.R. § 147.131(b)(2) (2015).

<sup>140</sup> 26 C.F.R. §54.9815-2713A(b)(1)(ii) (2015).

<sup>141</sup> 26 C.F.R. §54.9815-2713A(b)(2) (2015).

<sup>142</sup> Coverage of Certain Preventive Services (2015), 80 Fed. Reg. at 41323.

<sup>143</sup> *E.g.*, *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1167, 1168-69,1174 n.20, 1178 (10<sup>th</sup> Cir.) (2-1 dec. as to self-insured plans), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 15-105 & -119); *East Texas Bapt. Univ. v. Burwell*, 793 F.3d 449, 459 (5<sup>th</sup> Cir.), *cert. granted*, 136 S.Ct. 444 (2015); *Geneva Coll. v. Burwell*, 778 F.3d 422, 435, 437 (3<sup>rd</sup> Cir.), *cert. granted sub nom. Zubik v. Burwell*, 136 S.Ct. 444 (2015) (Nos. 14-1418 & 15-191); *Priests for Life v. Burwell*, 772 F.3d 229, 237, 253-54 (D.C. Cir. 2014), *cert. granted*, 136 S.Ct. 444 (2015) (Nos. 14-1453 & -1505).

otherwise “commandeering” such plans to be used by insurers and TPAs as the vehicle for providing religiously objectionable contraceptives.<sup>144</sup>

The circuit courts have largely rejected these arguments, and generally in the same way. They first have held that as a component of the RFRA prima facie case, the substantiality of an alleged burden on religious exercise is a question of secular law which courts are fully empowered to consider and decide.<sup>145</sup> They have then found that the legal obligation of insurers and administrators to supply the mandated contraceptives exists whether or not religious nonprofits opt out of the mandate under the nonprofit accommodation.<sup>146</sup> The panels generally maintained, in other words, that a religious nonprofit’s self-certification is entirely outside any conceivable chain of factual causation ending in the use of religiously problematic contraceptives by plan beneficiaries. As the Fifth Circuit reasoned, the legal obligation of insurers and TPSs to supply directly to health plan beneficiaries all mandated contraceptives which a religious nonprofit refuses to cover exists whether or not the nonprofit perfects the accommodation by self-certifying.<sup>147</sup> The nonprofit’s self-certification, in other words, “cannot authorize or trigger what others are already required by law to do.”<sup>148</sup>

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<sup>144</sup> E.g., *Little Sisters*, 794 F.3d at 1193-94; *Priests for Life*, 772 F.3d at 253-54; see *Geneva College*, 778 F.3d at 438 n.13; *East Texas Baptist*, 793 F.3d at 459-60 & n.36.

For a finer-grained dissection of the various nonprofit claims, see Marty Lederman, “Unpacking the forthcoming RFRA challenges to the government’s accommodation (with emphasis on self-insured plans),” BALKINIZATION (July 18, 2014), <http://balkin.blogspot.com/2014/07/unpacking-forthcoming-rfra-challenges.html>.

A third argument not developed in the courts below, but emphasized in the claimants’ Supreme Court briefing is that the mandate regulations substantially burden their religious exercise by forcing them to contract for health plans or administrative services with insurers or TPAs that supply the claimants’ plan beneficiaries with religiously objectionable contraceptives. See, e.g., *Priests for Life*, 772 F.3d at 251, 254. Contrary to the conclusion of one circuit panel, see *Priests for Life*, 772 F.3d at 255-56, the mandate regulations do indeed appear to prevent an insurer or TPA that is subject to ERISA and that objects to supplying contraceptives directly to an accommodated plan’s beneficiaries from continuing as an insurer or TPA, see *Preventive Services* (2013), 78 Fed. Reg. at 39880-81, which would necessarily require the plan to find another insurer or TPA willing to supply the contraceptives directly, see Lederman, *supra*, pt. 7.

<sup>145</sup> *Little Sisters*, 794 F.3d at 1176-77; *East Texas Baptist*, 793 F.3d at 456; *Geneva College*, 778 F.3d at 435; *Priests for Life*, 772 F.3d at 247. But see *Sharpe Holdings, Inc. v. U.S. Dept. HHS*, 801 F.3d 927 (8<sup>th</sup> Cir. 2015) (“[We] must accept a religious objector’s description of his religious beliefs, regardless of whether we consider those beliefs acceptable, logical, consistent, or comprehensible. [] [O]ur narrow function in this context, therefore, is to determine whether the line drawn reflects an honest conviction.”) (internal quotation marks & ellipses deleted), *pet. for cert. filed*, No. 15-775 (Dec 15, 2015).

<sup>146</sup> E.g., *Little Sisters*, 794 F.3d at 1180-85; *East Texas Baptist*, 793 F.3d at 459-60; *Geneva College*, 778 F.3d at 437-38; *Priests for Life*, 772 F.3d at 252-53. But see *Sharpe Holdings*, 801 F.3d at 939-42 (rejecting this conclusion).

<sup>147</sup> *East Texas Baptist*, 793 F.3d at 459.

<sup>148</sup> *East Texas Baptist*, 793 F.3d at 459; accord *University of Notre Dame v. Burwell*, 786 F.3d 606, 615 (7<sup>th</sup> Cir. 2015).

If the government is entitled to require that female contraceptives be provided to women free of charge, it is unclear how signing the [self-certification] that declares Notre Dame’s authorized refusal to pay for contraceptives for its students or staff, and its mailing the authorization document to those companies which under federal law are obligated to pick up the tab, could be thought to “trigger” the provision of

### C. Religious-Question Pitfalls

To conform to the religious-question doctrine, a court must avoid substituting its judgment about theological complicity for the claimant's. The circuit panels were not uniformly successful in avoiding this. The Third Circuit flatly rejected the claim that self-certification would make the claimants there complicit in the supply of contraceptives:

[S]ubmission of the self-certification form does not make the appellees “complicit” in the provision of contraceptive coverage. If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage.<sup>149</sup>

The Tenth Circuit rejected a theological distinction offered by the claimants in *Little Sisters of the Poor*, because it didn't make sense to the panel: “[P]laintiffs have not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not.”<sup>150</sup> The D.C. Circuit in *Priests for Life* even concluded that neither the mandate nor the accommodation compelled a claimant to facilitate contraception “in a manner that violates *the teachings of the Catholic Church*.”<sup>151</sup>

The panels apparently did not grasp that the claimants' were using causal concepts with theology rather than law in mind. It really doesn't matter that the distinctions drawn by Geneva College, the Little Sisters of the Poor, or Priests for Life may not have made legal or rational sense to the panel—what matters is whether they made theological sense to the religious entities that drew them. As the Court held in both *Hobby Lobby* and *Thomas*, claimants are entitled to draw their own theological lines and make their own doctrinal distinctions about what their religion does and doesn't permit, and these need not track the lines and distinctions that might be drawn by unbelievers, those of other faiths, judges and other government officials, or even members of the same faith.<sup>152</sup>

The circuit panels obviously violated the religious question doctrine if they rejected the claimants' apparently theological conclusions about complicity and scandal for not making rational sense from the panel's secular perspective. As the Court's religious-question precedents make clear, rationality or plausibility to secular or other outsiders is irrelevant; what

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contraceptive coverage.

*Id.*

<sup>149</sup> *Geneva College*, 778 F.3d at 439 (emphasis in original); *accord East Texas Baptist*, 793 F.3d at 459 (“Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives.”).

<sup>150</sup> *Little Sisters*, 794 F.3d at 1178 n.25.

<sup>151</sup> 772 F.3d at 246-47 (emphasis added).

<sup>152</sup> 134 S.Ct. at 2778-79 (quoting *Thomas*, 450 U.S. 707, 715 (1981)); *see supra* text accompanying notes 63-69.

matters is not whether *the court* finds a claimant's understanding of theological consequences credible, but whether *the claimant* does.<sup>153</sup> Unless claims like this are to be dismissed outright as nonjusticiable, what is needed is a way to adjudicate them on the basis of secular law without slipping into substantive review and rejection of the religious beliefs offered as predicates for substantial burden claims.

#### D. Properly Adjudicating Substantial Burdens

To judge whether the accommodation process constitutes a “substantial” burden on religion within the meaning of RFRA without running afoul of the religious question doctrine, courts must decide substantiality without challenging the claimant's own religious understanding of complicity, scandal, or other theological doctrines which are believed to prevent participation in the process. Courts might create their own definitions of substantiality from whole cloth using their judicial power to interpret federal statutes and make federal common law in appropriate circumstances,<sup>154</sup> much as the Court in *Hosanna-Tabor* set forth touchstones for defining those “ministers” not protected by Title VII because of the ministerial exception.<sup>155</sup> Or, they may rely on existing bodies of relevant secular law, in the way that *Jones v. Wolf* held that church property disputes may be decided based on the law of property.<sup>156</sup> In this latter regard, American law is replete with legal doctrines which determine when responsibility for a wrongful act may properly be attributed to someone who was not the primary actor, notably the common law of torts.<sup>157</sup>

To enlist common law tort principles as secular sources for measuring the substantiality of burdens on religion in the religious nonprofit cases, one would posit contraception use as a “harm” or “injury” for which the claimant might be responsible.<sup>158</sup> The best analogy in the nonprofit religious accommodation cases is to the law of products liability: The religious nonprofit's participation in the accommodation process is analyzed as if the nonprofit were the defendant in a hypothetical products liability claim grounded on the nonprofit's participation

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<sup>153</sup> Secular inconsistency might function as a proxy for insincerity. This only underlines, however, the dangers of the sincerity inquiry, *see supra* text accompanying notes 11-13, which too often functions as a proxy for the unreasonableness of minority and otherwise unfamiliar religious practices. *Cf. Thomas*, 450 U.S. at 715 (“One can, of course, imagine an asserted [religious exemption] claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.”).

<sup>154</sup> *See Greene, supra* note 21, at 179-80.

<sup>155</sup> *See supra* text accompanying notes 104-07.

<sup>156</sup> *See supra* text accompanying notes 100-03.

<sup>157</sup> *See Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933 (1989) [hereinafter Lupu, *Where Rights Begin*] (suggesting use of a common law tort baseline to adjudicate claims of religious burden under the pre-Smith Free Exercise Clause.); *see also* MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 3, 7 (2009) (noting the widespread use of causal rules in criminal and tort law and their importance to theories of liability).

<sup>158</sup> *See, e.g., Lupu, Where Rights Begin, supra* note 157, at 966-67 (arguing that a whether a constitutionally cognizable government burden on religious exercise exists could be determined by asking whether common law tort liability would result if the religiously burdensome action had been committed by another private party rather than the government).

in the sale or other distribution of a harmful drug. Would the common law of torts hold a religious nonprofit that claims the accommodation liable for the hypothetical harm of third-party use of contraceptives subsequently supplied by the nonprofit's insurer or TPA?

The precise analysis depends on whether the claimant's health plan is (1) purchased from a third party insurer, (2) self-insured and administered by a TPA under ERISA, or (3) a "church plan" exempt from ERISA. Causation in fact deals with the first situation, distributor liability for defective drugs resolves the second, and intervening cause the third.

### 1. Third-Party Insured Plans Funded by Premiums

The argument most commonly made in the complicity cases is that the accommodation process authorizes or "triggers" the direct supply of contraceptives by the insurer to plan beneficiaries.<sup>159</sup> The religious nonprofits expressly framed this as a question of "but-for" or factual causation: In their view, the required notice to the government or the insurer initiates a causal chain that ends in religiously objectionable contraceptives being supplied by the insurer and used by plan beneficiaries.<sup>160</sup>

Proof of factual causation is necessary for products (and any other tort) liability.<sup>161</sup> This element is demonstrated by showing that "the harm would not have occurred" in the absence of the tortious act—in this case, distributing a harmful drug.<sup>162</sup> The presence or absence of factual causation is measured counterfactually: "[W]hat would have occurred if the actor had not engaged in the tortious act?"<sup>163</sup> If the claimed injury would have occurred

<sup>159</sup> *Little Sisters*, 794 F.3d at 1168-69, 1174 n.20, 1180; *East Texas Baptist*, 793 F.3d at 459; *Geneva College*, 778 F.3d at 435; *Priests for Life*, 772 F.3d at 251, 252; see also *Notre Dame*, 786 F.3d at 618.

<sup>160</sup> *Little Sisters*, at 1174 & n.20 ("Plaintiffs make causation the centerpiece of their RFRA claim. They allege that opting out of the Mandate would cause or make them complicit in providing contraceptive coverage, and thus substantially burdens their religious exercise."); *Geneva College*, 778 F.3d at 435 (Claimants "urge that there is a causal link between providing notification of their religious objection to providing contraceptive coverage and the offering of contraceptive coverage by a third party."); see *East Texas Baptist*, 793 F.3d at 460 ("[T]he self-insured plaintiffs contend that their completion of Form 700 or submission of a notice to HHS will make their third-party administrator eligible for the government's reimbursement."); *Priests for Life*, 772 F.3d at 251-52 (Claimants "believe that, even if they opted out, they would still play a role in facilitating contraceptive coverage."); see also *Notre Dame*, 786 F.3d at 613 (Claimant treats mandate regulations "as having made its mailing of the certification form to its third-party administrator . . . the cause of the provision of contraceptive services to its employees in violation of its religious beliefs.") (emphasis in original).

<sup>161</sup> RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIABILITY § 1, at 5 (1997) [hereinafter RESTATEMENT (THIRD): PRODUCTS LIABILITY] (seller or distributor of defective product is liable for harm "caused" by the product); *id.*, § 15, at 23 (Causation in products liability claims determined by same rules that govern causation in tort claims generally); 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (2010) [hereinafter RESTATEMENT (THIRD): PHYSICAL HARM] ("Tortious conduct must be the factual cause of harm for liability to be imposed."); *id.*, cmt. f, at 349, 350 (Causal analysis requires identification of "the relevant, legally cognizable harm" and "the conduct of the actor alleged to be tortious.").

<sup>162</sup> 1 RESTATEMENT (THIRD): PHYSICAL HARM, *supra* note 161, § 26, at 346; *accord id.*, cmt. b, at 351 ("[T]he causal inquiry asks whether the harm would have occurred if the actor had not acted tortiously."); see also H.L.A. HART & TONY HONORÈ, CAUSATION IN THE LAW 68 (2<sup>nd</sup> ed. 1985) ("Every event which would not have happened if an earlier event had not happened is the consequence of that earlier event").

<sup>163</sup> 1 RESTATEMENT (THIRD): PHYSICAL HARM, *supra* note 161, § 26 cmt. e, at 349; *cf.* MOORE, *supra* note 162,

anyway, even in the absence of defendant's act, that act is not a factual cause of the injury, and the defendant cannot be liable.<sup>164</sup>

Applying the causal analysis to health plans sold by third-party insurers and funded by premiums paid by the accommodated religious nonprofit and its employees, the relevant question is whether plan beneficiaries would have received and used contraception without cost sharing even in the absence of the nonprofit's self-certification for the accommodation. The answer is yes.

The analysis is straightforward. The contraception mandate regulations are part of a minimum legal coverage requirement for health insurance plans.<sup>165</sup> Accordingly, employers may only purchase, and third-party insurers may only offer, health plans that provide coverage of FDA-approved contraceptives without cost sharing. Unless the plan is exempt from the mandate or perfects the religious accommodation, therefore, the beneficiaries of a group health plan purchased by their employer from a third-party insurer receive the mandated contraception through the purchased plan. Under the law of causation, nothing legally significant changes when a religious nonprofit avails itself of the accommodation—as before, the third-party insurer remains obligated to supply contraceptives without cost sharing; it simply supplies them directly to plan beneficiaries rather than through the health plan it sold to the accommodated nonprofit. Plan beneficiaries receive the mandated contraceptives *in either event*.

Religious nonprofits that purchase a health insurance plan from a third-party insurer are only in a chain of factual causation ending in contraception use by virtue of their payment (along with employees) of health insurance premiums, of which a small portion funds mandated contraceptives. Once a nonprofit avails itself of the accommodation, none of its health plan premiums pay for religiously objectionable contraceptives, and it is removed entirely from the chain of causation. The causal chain instead runs directly from the third-party insurer to the employees and other plan beneficiaries who ultimately decide whether to use the contraceptives that the nonprofit has opted out of providing. In either event, therefore—that is, whether the religious nonprofit claims the accommodation or not—plan beneficiaries will receive the religiously objectionable contraceptives from the insurer without cost-sharing, either through the plan the insurer sells and operates, or directly from the insurer itself. Allowing religious nonprofit employers to opt out of the mandated coverage through the accommodation leaves the obligation where it has always been—on the insurer.

Courts do not violate the religious question doctrine when they rely on secular principles of factual causation in tort to hold, as all but one of the circuits have, that the process for claiming the religious accommodation does not entail substantial religious costs.<sup>166</sup> Participation in the process is simply not a factual cause of any subsequent use of contraceptives supplied directly to plan beneficiaries by the insurer. Claimants may continue

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at 84 (“[B]ut for the defendant’s action, would the victim have been harmed in the way the criminal law prohibits? [D]id the defendant’s act make a difference?”).

<sup>164</sup> DAN B. DOBBS, *THE LAW OF TORTS* 409, 411 (2000); HART & HONORÉ, *supra* note 162, at 110.

<sup>165</sup> See 26 U.S.C. §§ 4980H(a)(1) & (c)(2), 5000A(f)(2); 42 U.S.C. § 300gg-13(a)(4).

<sup>166</sup> See *supra* notes 34-35 & accompanying text.

to believe that participation constitutes a *theological* cause that they consider “substantial,” but the religious-question doctrine bars courts from reviewing that determination. Factual causation instead acts as an acceptable secular proxy for measuring the substantiality of the claimed religious costs, thus vindicating both congressional purpose in adding “substantial” to the statute, and due-process values that counsel against allowing a person to be the judge of her own cause.

## 2. Self-Insured Plans Administered by TPAs under ERISA

Causation in fact does not provide a basis for denying the substantiality of religious costs alleged in case of self-insured health plans funded by the accommodated nonprofit and administered by a TPA under ERISA. As indicated above,<sup>167</sup> a nonprofit’s written notice to the government or its TPA is essential for designation of the TPA as a plan administrator, and that designation is essential for the TPA to supply the religiously objectionable contraceptives directly to beneficiaries under ERISA. Only an ERISA “plan administrator” may provide health plan services and process and reimburse beneficiary claims, and the nonprofit’s notice to its TPA or the government that it is availing itself of the government is the principal means by which the TPA may designated a plan administrator.<sup>168</sup> Some self-insured religious nonprofits have argued that supplying the self-certification required to obtain the religious accommodation makes them complicit in use of religiously objectionable contraceptives, on the ground that self-certification is a “but-for” or factual cause of the direct supply of contraceptives by their TPAs and the eventual use of such contraceptives by their plan beneficiaries.<sup>169</sup> The circuit panels have struggled to explain why these circumstances do not make a religious nonprofit complicit in subsequent receipt and use of contraceptives by beneficiaries of its health plan. They emphasize that a TPA’s obligation to supply contraceptives directly originates with the government and not with accommodated nonprofit,<sup>170</sup> but this is a non sequitur: As dissenting and separate opinions have pointed out, so long as the self-certification is in the chain of causation ending in direct supply of contraceptives to employees and dependents, it is irrelevant where the legal obligation requiring such supply originates.<sup>171</sup>

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<sup>167</sup> See *supra* note 135-37 and accompanying text.

<sup>168</sup> The panels were unclear whether a claimant’s self-certification is necessary for the government to be able to designate the claimant’s TPA as a plan administrator under ERISA. Without the notice, one could argue, there’s no “instrument under which the plan is operated” which the government or the TPA can treat as a designation of the TPA as a plan administrator authorized to pay claims directly for contraceptives and related services. See *Little Sisters*, 794 F.3d at 1182 & nn.28 & 29; *Geneva College*, 778 F.3d at 438; *Priests for Life*, 772 F.3d at 2555. The government has taken the position that the government itself may designate the TPA of a self-insured plan as an ERISA administrator by written notice, and that such notice would constitute an “instrument under which the plan is operated.”

<sup>169</sup> E.g., *Little Sisters*, 794 F.3d at 1178 n.25, 1181-82 & n.28, 1185-86 & n.36; *East Texas Baptist*, 793 F.3d at 460; *Geneva College*, 778 F.3d at 439-40; *Priests for Life*, 772 F.3d at 254-55.

<sup>170</sup> See, e.g., *Little Sisters*, 794 F.3d at 1180, 1181, 1187; *East Texas Baptist*, 793 F.3d at 459; *Geneva College*, 778 F.3d at 437-38; *Priests for Life*, 772 F.3d at 254-55.

<sup>171</sup> See, e.g., *Little Sisters*, 794 F.3d at 1211-13 (opinion dissenting in part); *Priests for Life v. U.S. Dept. HHS*,

But even so, a religious nonprofit would not be considered responsible under products liability law for contraception use in a factual causation chain linked to the act of self-certification. A cause of action for products liability based on the defendant's sale or distribution of a harmful product generally requires that the defendant have sold or distributed the product.<sup>172</sup> Using the analogy of tort liability to adjudicate whether self-certification imposes a substantial burden on a religious nonprofit seeking the religious accommodation, a court should find that no substantial religious costs exist despite the presence of the notice in the chain of factual causation.<sup>173</sup>

A hypothetical illuminates the analysis. Assume a pharmaceutical Distributor which markets a drug made by a Manufacturer under an exclusive territorial license for sales of all of Manufacturer's drugs. Under an arrangement with Manufacturer, Distributor provides the drug to a low-income medical Clinic at no cost as a public service; Clinic doctors prescribe the drug to patients for free, and Clinic supplies copies of such prescriptions to Distributor and Manufacturer.

Over time, Distributor becomes concerned that the drug has harmful side effects, and advises Manufacturer that it is contemplating a withdrawal from the market. Manufacturer replies that while it would like Distributor to continue selling Manufacturer's other drugs, it will treat any notice of withdrawal by Distributor from the market for this particular drug as a waiver of its exclusive territorial license to distribute this particular drug, and a concomitant grant of permission to Manufacturer to supply the drug directly to Clinic. Distributor does in fact notify Manufacturer of its withdrawal from the market, and Manufacturer begins to distribute the drug directly to Clinic. The side effects suspected by Distributor turn out to be real, and all patients who have taken the drug eventually file suit against Clinic, Distributor, and Manufacturer.

Distributor is not likely to be found liable for harms caused by prescriptions supplied directly by Manufacturer to Clinic patients after Distributor had withdrawn from the market, even though it was precisely that withdrawal that enabled Manufacturer to (i) void Distributor's exclusive license, and (ii) distribute the drug directly to Clinic. Theories of distributor liability for defective drugs or other products are confined to sales or distributions in which the defendant participated.<sup>174</sup> Distributor would of course be liable for distributions of the drug to Clinic which took place before its withdrawal from the market, but not for the direct

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Nos. 13-5368, 13-5371, 14-5021 (D.C. Cir. May 20, 2015) (unpublished opinion dissenting from denial of rehearing en banc), 2015 WL 5692512, at 12 n.3; *Eternal Word Telev. Network, Inc. v. Sec. U.S. Dept. HHS*, 756 F.3d 1339, 1347-48 (5<sup>th</sup> Cir. 2014) (special concurring opinion).

<sup>172</sup> See RESTATEMENT (THIRD): PRODUCTS LIABILITY, *supra* note 161, § 1, at 5 (1997) ("One engaged in the business of selling or otherwise distributing products *who sells or distributes a defective product* is subject to liability for harm to persons or property caused by the defect.") (emphasis added); *id.*, § 6(a), at 144 (same with respect to "prescription drugs" and "medical devices"); *id.* § 7, at 160 (same with respect to "food products").

<sup>173</sup> *Cf. Chelton v. Keystone Oilfield Supply Co.*, 777 F. Supp. 1252, 1256 (W.D. Pa. 1991) (Distributor would be liable if it habitually sold manufacturer's products and plaintiff proved defective product was made by manufacturer and distributed through normal channels.); *Joseph v. Yenkin Majestic Paint Corp.*, 690 N.Y.S.2d 611, 612 (A.D.2d 1999) (holding products liability does not attach a "party that is outside the manufacturing, selling, or distribution chain).

<sup>174</sup> See *supra* notes 152-53 and accompanying text.

distributions by Manufacturer to Clinic patients in which Distributor played no role, because they took place after its withdrawal from the market. Despite Distributor's presence in the factual chain of causation, products liability law cuts off its liability once it removes itself from the distribution process.

By analogy, products liability law would similarly cut off a religious nonprofit's liability for the purported "harm" of downstream supply and use of contraceptives, once the nonprofit self-certifies for the accommodation and thus removes itself from the distribution chain of contraceptives to which it objects. By self-certifying and claiming the accommodation, the nonprofit precludes its self-insured employee plan from being used to distribute religiously objectionable contraceptives, which are then distributed directly by the TPA to plan beneficiaries who wish to use them. Using the products liability analogy, therefore, a court could find that the self-certification process is not a "substantial" burden on its anti-contraception beliefs notwithstanding that self-certification may be present in the factual chain of causation.<sup>175</sup>

### 3. Self-Insured Church Plans Not Subject to ERISA

Some self-insured religious nonprofit plans are exempt from ERISA as so-called "church plans." These include one of the most high profile and sympathetic of the complicity-claim plaintiffs, the Little Sisters of the Poor, a Catholic order of nuns which operates nonprofit residence and care facilities for the poor and elderly. Because church plans are exempt from ERISA, the government lacks authority to treat the notice by a nonprofit with such a plan as a means of designating the plan's TPA as a plan administrator under ERISA. As the government has conceded in such cases, it lacks any means of enforcing the obligation of church-plan TPAs to supply directly to beneficiaries the mandated contraceptives that nonprofit church-plan sponsors refuse to supply on religious grounds. In short, church plan TPAs are free to ignore their obligation to supply contraceptives directly in case of nonprofit self-certification under the accommodation.<sup>176</sup>

But not all. The government's reimbursement schedule to insurers and TPAs is generous. Some TPAs of church plans have indicated their intention to voluntarily fulfill their obligation to supply religiously objectionable contraceptives when a nonprofit is accommodated, even though the government has no means of forcing that compliance. Self-insured nonprofits that sponsor such plans have thus claimed a substantial burden under RFRA, arguing that the voluntary supply of contraceptives by church plan TPAs makes the claimants complicit in the distribution and eventual use of such contraceptives by their employees and dependents, by leaving them in the chain of causation that begins with the mandate and ends in the religiously prohibited use.

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<sup>175</sup> Additionally, as some of the circuits observed, a self-insured claimant could place itself entirely outside the chain of causation by switching from a self-insured plan operated by a TPA, to a third-party insured plan purchased from an insurer. *See, e.g., Little Sisters*, 794 F.3d at 1184 n.32.

<sup>176</sup> One of the Little Sisters' TPAs, Christian Brothers Trust, has indicated that it will not participate in direct distribution of contraceptives directly to Little Sisters employees and beneficiaries.

Tort law provides an analogy here as well, in the form of “intervening cause” principles. An intervening cause is “a new cause” that enters the scene after defendant’s tortious conduct.”<sup>177</sup> Intervening causes are conventionally divided into “extraordinary natural events” and “wrongful human actions.”<sup>178</sup> As Professors Hart and Honorè observed, the general rule holds that “the free, deliberate and informed act or omission of a human being, intended to exploit the situation created by defendant, negatives causal connection.”<sup>179</sup> In other words, the intervention of a third person which results in plaintiff’s harm or injury breaks the causal chain that would otherwise run from plaintiff to defendant, even (or especially) when the intervention is blameworthy.<sup>180</sup>

The application of this principle to sponsors of ERISA-exempt church health plans is simple. When a religious nonprofit which has a church plan gives the notice required to claim the religious accommodation, nothing legally obligates its TPA to supply contraceptives directly to the plan beneficiaries. If the TPA does so voluntarily, however, this would constitute the voluntary intervention of a third party which breaks any causal chain between the self-insured religious nonprofit and the eventual receipt and use by plan beneficiaries of religiously objectionable contraceptives.

#### E. *The “World of Second-Best”*

Some commentators are critical of arguments, like those of this Essay, which propose the assessment of “substantial burdens on religious exercise” under RFRA by reference to neutral principles of secular law. As Professor Helfand urges, “The fact that a claim for religious accommodation entails a theory of causation that would fail under standard tort principles should be irrelevant under RFRA.”<sup>181</sup> “[I]mposing a secular framework of causation” on RFRA’s substantial-burden element, argues Helfand, “misses the entire object of RFRA.”<sup>182</sup> Professor Flanders similarly argues that courts have “made a mess” of adjudicating the substantiality of burdens on religion: “It involves drawing fine lines, and lines that moreover courts are not good at drawing and really have no business drawing. Better that

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<sup>177</sup> DOBBS, *supra* note 161, at 461; *accord* MOORE, *supra* note 157, at 229 (“Certain interventions by third-party actors or by nature break the causal chains that would otherwise have existed between some defendant’s action and some harm to another.”).

<sup>178</sup> MOORE, *supra* note 157, at 233.

<sup>179</sup> HART & HONORÈ, *supra* note 162, at 136-37 (emphasis deleted); *accord* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 391 (1985).

When we examine a sequence of events that follows a person’s action, the presence in the sequence of a subsequent human action precludes assigning causal responsibility to the first actor. What results from the second actor’s action is something the second actor causes, and no one else can be said to have caused it through him.

*Id.*

<sup>180</sup> MOORE, *supra* note 157, at 234.

<sup>181</sup> Helfand, *Substantial Burdens*, *supra* note 8, at 20.

<sup>182</sup> *Id.*

courts stay out of it . . . .”<sup>183</sup> If there is really a need to define the substantiality of burdens on religion, Flanders concludes, “leave it to the plaintiff.”<sup>184</sup>

Conceptually, these critics are correct. Secular legal principles are, at best, an imperfect fit for measuring the substantiality of a burden on religious belief or practice—an indisputably theological judgment on which RFRA relief nevertheless depends. In a perfect world, only burdens on religious exercise that are truly substantial from the claimant’s internal point of view would generate such relief.

Of course, we do not live in a perfect world, and because we do not, we do not permit courts to judge whether a burden is theologically substantial. We do not trust courts to make these judgments correctly, and even if we did, allowing them to impose a religious orthodoxy on RFRA claimants would strike at the heart of the religious liberty protected by both Religion Clauses.

What, then, is the alternative? One cannot simply defer to the claimant’s view of the matter; however things stand in the realm of theory, in the real world where we all live, courts must exercise meaningful control over whether an alleged burden on religious exercise is truly “substantial.” Judicial review of the substantiality of alleged burdens on religion is necessary to implement Congress’s understanding of the limited reach of RFRA relief, and to uphold the rule of law. Professor Helfand proposes judicial review of claimant sincerity and secular costs,<sup>185</sup> but this will neither implement congressional purpose nor protect rule-of-law values, as I have shown. However imperfect, using neutral principles of secular law to judge the substantiality of burdens on religious exercise is currently the only theory in town.

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Resolving religious nonprofit claims of substantial religious costs by reference to secular principles of causation is essentially what the circuit panels in the religious nonprofit cases thought they were doing. The panels repeatedly invoked the idea of factual causation in support of their holdings that the accommodation did not substantially burden the claimants’ religion.<sup>186</sup> Their problems with the religious-question doctrine were two-fold. First, they sometimes cited secular principles of causation as if they were theologically normative, instead of making clear that they were deploying causal principles to give content to the statutory command that only “substantial” burdens on religion be afforded RFRA relief. Accordingly, it often appeared as if the panels were evaluating the reasonableness or correctness of the claimants’ theologies of complicity.<sup>187</sup> And second, principles of factual causation were insufficient to resolve complicity claims in case of self-insured ERISA and church plans; the panels should have relied on relevant principles of products distributor liability and intervening

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<sup>183</sup> Flanders, *supra* note 8, at 6.

<sup>184</sup> *Id.*

<sup>185</sup> See Helfand, *Substantial Burdens*, *supra* note 8, at 21-29.

<sup>186</sup> See *supra* Part III-B.

<sup>187</sup> See *supra* Part III-C.

cause.<sup>188</sup>

The foregoing use of causal and products liability law is not meant as a comprehensive solution to all RFRA claims or even to all complicity claims, but only as an example of how analogous principles of secular law can profitably be used to resolve such claims without violating the religious-question doctrine. Other bodies of secular law will undoubtedly be more apt for scandal claims and other aspects of complicity claims. The claim that self-certification constitutes the accommodated nonprofit's plan as a "conduit" for supplying religiously objectionable contraception might be judged by analogy to trespass to land or chattels, claims of scandal by reference to doctrines about government endorsement of religion or other activities as to which it has a constitutional obligation to remain neutral,<sup>189</sup> or whether government expenditures are attributable to taxpayers in such a way as to generate Article III standing to challenge them.<sup>190</sup> Principles of causation and accomplice liability in the criminal law might also provide sources for adjudication.<sup>191</sup> And so on. The adaptation of areas of secular law to the adjudication of religious costs and substantial religious burdens will involve complications and difficulties, but courts are capable of working these out case by case, in classic common law fashion.

Religious nonprofits are undoubtedly sincere when they argue that claiming the religious accommodation entails theological complicity or scandal, and thus entails religious costs from their internal theological perspective. This does not and cannot dispose of the legal question whether this sort of burden—that is, a burden on religious exercise that secular principles of law would not recognize as substantial—is nevertheless "substantial" under RFRA. Secular legal limits to complicity can provide a check on the level of complicity needed to support a judicial finding that a law "substantially" burdens religious exercise under RFRA.

#### IV. *HOBBY LOBBY* AND THE JUSTICIABILITY OF "SUBSTANTIAL" BURDENS

The use of secular legal principles to adjudicate substantial burdens in the nonprofit mandate cases must of course square with the Court's holding in *Hobby Lobby*. Language in the majority opinion seemed to take the side of Hobby Lobby's owners, suggesting that only they—and not a court—may decide whether a burden on religious exercise is "substantial." The holding, however, is narrower: A substantial burden under RFRA is obvious when the burdensome law requires a claimant to arrange and pay for goods and services whose use is religiously prohibited.

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<sup>188</sup> See *supra* Part III-D.

<sup>189</sup> E.g., Caroline Mala Corbin, *The Contraception Mandate*, 107 Nw. U.L. Rev. 1469, 1476-79 (2013); Greene, *supra* note 45, at 125-30.

<sup>190</sup> E.g., Sepinwall, *supra* note 8, at 34-39.

<sup>191</sup> E.g., Volokh, *supra* note 8. See generally HERBERT MORRIS, ON GUILT AND INNOCENCE (1976). One problem with the use of accomplice liability in this context, however, are the varying circumstances in which criminal liability requires and dispenses with the requirement that an accomplice have a specific intent to aid commission of the principal crime. See, e.g., Volokh, *supra* note 8; MORRIS, *supra*, at 129-30. The religious nonprofit claimants obviously have no specific intent to assist in the use of contraceptives.

The crucial language appears immediately after the Court accuses the government of having questioned the reasonableness of the owners' belief that emergency contraception destroys human life in the form of an embryo *in utero*,<sup>192</sup> and that covering this in its health plan would be inconsistent with their belief that life begins at conception:

This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed.<sup>193</sup>

After explaining that the religious-question doctrine prohibits the courts from making such a judgment,<sup>194</sup> the Court held that its “narrow function in this context is to determine whether the line drawn [by the owners] reflects an honest conviction, and there is no dispute that it does.”<sup>195</sup> The Court then concluded that the owners' sincerity, when coupled with the enormous fines they faced if they violated the mandate, proved that the mandate imposed a “substantial burden” on their religious exercise.<sup>196</sup>

Judges and commentators have pointed to this language as decisive authority that *Hobby Lobby* confines judicial review to claimant sincerity and secular costs.<sup>197</sup> If this is really

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<sup>192</sup> The *Hobby Lobby* majority's description of the government's argument bore little resemblance to the argument the government actually made. The government had argued that Hobby Lobby merely contributed with employees to an undifferentiated fund marked for employee health care treatments and services. Brief for Petitioners at 33, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (No. 130354), 2014 WL 173486. Only a miniscule portion of this pool paid for emergency contraception—and even then only if employees or covered dependents with their own rights and interests independently chose to use it. Brief for Petitioners at 33. The government thus urged the Court to find that “RFRA does not protect against the burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise wielding individuals who hold religious beliefs other than one's own.” Brief for Petitioners at 34) (internal quotation marks and citation deleted).

In the Court's defense, while the government sought to distinguish the content, validity, reasonableness, and centrality of the owners' anti-contraception beliefs from the substantiality of the burden on their ability to live out those beliefs, it failed clearly to explain how the Court could make the latter judgment without also making the former one. The government thus looked as if it were directly challenging either the validity of the owners' beliefs or the owners' understanding of them; neither, of course, is a judgment that any court may make. As I've suggested, some of the circuit panels made the same error in the religious nonprofit cases currently before the Court. *See* Part III-C.

<sup>193</sup> 134 S.Ct. at 2778.

<sup>194</sup> 134 S.Ct. at 2778.

<sup>195</sup> 134 S.Ct. at 2779 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (internal ellipses and quotation marks deleted).

<sup>196</sup> 134 S.Ct. at 1779.

<sup>197</sup> *E.g.*, *Priests For Life v. U.S. Dep't of Health & Human Servs.*, No. 13–5368 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc), 2015 WL 5692512, at \*8-10; *id.* at \*14-15 (Kavanaugh, J., dissenting from denial of rehearing en banc); *University of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir. 2015) (Flaum, J., dissenting); *Eternal Word Telev. Network, Inc. v. Sec. HHS*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J., specially concurring); Flanders, *supra* note #, at 3-5; Helfand, *Substantial Burdens*, *supra* note

what the Court held, however, it will inevitably have to limit its holding.<sup>198</sup> At some point, an allegedly burdensome connection to contraception use becomes so remote that the burden of complicity simply cannot count as substantial, regardless of what the RFRA claimant sincerely believes.<sup>199</sup> Suppose, for example, that Hobby Lobby had objected to its employees' using their wages to purchase emergency contraceptives, on the ground that it was indirectly paying for religiously objectionable contraceptives.<sup>200</sup> The courts would have undoubtedly rejected outright the proposition that an employee's use of her own lawfully earned wages to purchase contraception might substantially burden her employer's anti-contraception beliefs under RFRA.<sup>201</sup>

The religious costs at issue in *Hobby Lobby* were generated by the owners' direct participation in the purportedly wrongful act—arranging and paying for the coverage of emergency contraception which they knew would be used by employees and beneficiaries of their health plan. While one might have argued with Justice Ginsburg that the independent decisions of employees and beneficiaries to use contraception were something like “intervening causes” which cut off the owners' responsibility,<sup>202</sup> it is just as reasonable to conclude that those decisions were insufficient to terminate the responsibility because the owners' had actually arranged and paid for coverage of the objectionable contraceptives.<sup>203</sup>

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#, at 9-10, 21-24.

<sup>198</sup> See, e.g., Douglas Laycock, *The Campaign Against Religious Liberty*, in CORPORATE RELIGIOUS LIBERTY, *supra* note 90, at 231, 234 (declaring that the Court “will surely have to qualify” the apparent holding that courts may not adjudicate “how attenuated a burden on religion” is).

<sup>199</sup> See Greenawalt, *supra* note 90, at 140:

[G]iven the need for exemptions that are administrable, the substantiality of a burden should be based partly on whether the connection between the actions of a claimant and the practices to which he objects is not too remote from a more general perspective[,] tak[ing] account of practical difficulties and more general public perceptions.

*Id.*; cf. MORRIS, *supra* note 190, at 115 (“[I]f we are responsible for everything . . . there is no longer any service being performed by the concept of responsibility.”).

<sup>200</sup> Cf. O'Brien v. U.S. Dept. HHS, 894 F.Supp.2d 1149, (E.D.Mo. 2012) (“[C]ontribution to a health care plan has no more . . . impact on the plaintiff's religious beliefs than paying salaries and other benefits to employees.”), *rev'd & remanded*, 766 F.3d 862 (8<sup>th</sup> Cir. 2014); Melone, *supra* note #, at 505 (“Unless the shareholders are willfully blind, surely they must be aware that the paycheck that they provide to certain employees will be used to engage in activities that are deeply disturbing to their faith.”).

<sup>201</sup> See Frederick Mark Gedicks, *With Religious Liberty for All: A Defense of the Affordable Care Act's Contraception Coverage Mandate*, 6 ADVANCE 135, 144 (2012) (“It is axiomatic that religious employers have no religious liberty right to limit the spending of employee compensation to conform to the employer's religious sensibilities.”).

<sup>202</sup> 134 S.Ct. at 2799 (Ginsburg, J., dissenting).

<sup>203</sup> Although he later problematizes this argument, Professor Greenawalt states it clearly and powerfully:

If I believe, based on religious conviction, that use of a particular contraceptive device sometimes amounts to an abortion that constitutes the killing of innocent human life, I should not have to provide the device directly, any more than I myself should have actually to perform an act with that possible consequence. I may further think that if I provide money to someone knowing she will use it for that

*Hobby Lobby* thus raised very different question than the one raised in the nonprofit accommodation cases. As the circuit panels held,<sup>204</sup> there is a meaningful difference between arranging and paying for contraception coverage, knowing that employees and beneficiaries will decide independently to use it, and opting out of arranging and paying for such coverage, knowing that others will arrange and pay for it in one's place.

Nothing in *Hobby Lobby* overruled or limited *Hosanna-Tabor* (which the Court favorably cited) or *Jones v. Wolf*. The Court would have done better, therefore, to have rejected the government's arguments on their own terms—that is, to have simply found on the basis of common law tort principles that the independent decisions of employees to use the objectionable contraceptives were insufficient to relieve the employer of responsibility when the employer has financially and otherwise enabled coverage. This would not have been true because *Hobby Lobby* sincerely believed it to be so, but rather because secular legal principles so hold. As Professor Sepinwall has pointed out, “the law distinguishes between direct participation and remote facilitation.”<sup>205</sup> A person who pays for someone to acquire a harmful

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purpose, my involvement is still too great. And I may even believe that providing insurance coverage that some women will use in that way still keeps me so involved that I would rather suffer serious penalties. If I am convince I would somehow be involved in taking innocent life, does that not constitute a substantial burden on *my* religious exercise, determined by my religious convictions?

Greenawalt, *supra* note 90, at 140; *see also* Laycock, *supra* note 190, at 234 (Although courts “have to police the boundary of what burdens count as substantial,” *Hobby Lobby* was not near the boundary because this burden was not attenuated.”).

<sup>204</sup> *See* Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1186 (10<sup>th</sup> Cir. 2015) (“Although opting out is necessarily a but-for cause of someone else providing contraceptive coverage, that is the point of an accommodation . . . . The effect is to shift legal responsibility from the self-insured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable.”); East Texas Bapt. Univ. v. Burwell, 793 F.3d 449, 462 (5<sup>th</sup> Cir. 2015); (*Hobby Lobby* “did not resolve the issue [of remote facilitation, but] rejected the government’s notion that there was no substantial burden, because the intervening acts of third parties . . . made the connection between plaintiffs’ providing contraception coverage and the destruction of an embryo too attenuated.”); Geneva Coll. v. Burwell, 778 F.3d 422, 436-37, 442 (3<sup>rd</sup> Cir. 2015).

The issue of whether there is an actual burden was easily resolved in *Hobby Lobby*, since there was little doubt that the actual *provision* of services did render the plaintiffs ‘complicit. [W]here the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset, but totally disconnected from [the claimants].

*Id.*; Priests for Life v. Burwell, 772 F.3d 229, 245 (D.C. Cir. 2014).

[In *Hobby Lobby*,] the Court concluded that, *in the absence of any accommodation*, the contraceptive coverage requirement imposed a substantial burden on the [claimants] because [they] were required either to provide health insurance coverage that included contraceptive benefits in violation of their religious beliefs, or to pay substantial fines. [Here, they can avoid both providing the contraceptive coverage and the penalties associated with noncompliance by opting out of the contraceptive coverage requirement altogether.

*Id.*

<sup>205</sup> Sepinwall, *supra* note 8, at 34.

product with knowledge the person will use it to harm is generally held secondarily liable for the foreseeable harm,<sup>206</sup> but an employer is rarely held legally responsible for its knowledge about how employees spend their wages.<sup>207</sup> The latter connection is simply too remote and attenuated.

In any event, *Hobby Lobby* left courts free to measure the substantiality of religious costs without violating the religious-question doctrine when the claimant is not as directly involved in the religiously questionable conduct, so long as they do so by reference to relevant secular law.

#### CONCLUSION: WHY COURTS MUST JUDGE “SUBSTANTIAL” BURDENS

If judicial review of RFRA claims of substantial burden is limited to claimant sincerity and secular costs, then this element is effectively established by the claimant’s bare allegation of substantial burden. If this were really the law, then every burden on religion allegedly caused by federal law would yield a RFRA exemption unless the government could show that the burden furthers a compelling interest in the least restrictive manner—a standard of review that the government usually fails to satisfy.<sup>208</sup>

Allowing churches and believers to claim RFRA exemptions without the check of meaningful judicial review is bad for both law and religion. Knowing that their claims of substantial burdens are functionally nonjusticiable, churches and believers will be tempted to make such claims even if when burdens may not be theologically significant. And knowing that exemption might relieve them of substantial secular costs associated with obedience to generally applicable laws, they will also be tempted to shape their theologies and exaggerate religious costs in order to obtain a RFRA exemption yielding competitive advantages and other valuable secular benefits.<sup>209</sup> The first temptation undermines the secular integrity of the legal system, by allowing exemptions that are not really needed. The second threatens the spiritual

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<sup>206</sup> Cf. DOBBS, *supra* note 164, at 937 (“One who *knowingly* provides substantial aid or encouragement to another’s commission of a tort is also jointly and severally liable for it along with the person who actually carries out the tortious acts. . . . One who aids, abets or encourages a tort need not participate in it to be liable, but the aid or encouragement must be substantial.”).

<sup>207</sup> Cf. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (2006) (“If an employee’s tortious conduct is unrelated either to work assigned by the employer or to a course of conduct that is not subject to the employer’s control, the conduct is outside the scope of employment” and the employer is not liable for it.). What an employee does with his wages is obviously beyond the effective control of the employer.

<sup>208</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (reporting that government has historically satisfied strict scrutiny in only 22% of freedom of speech cases, 24% of fundamental rights cases, 27% of suspect-class discrimination cases, and 33% of freedom of association cases); see also *Hobby Lobby*, 134 S.Ct. at 2780 (characterizing RFRA’s least-restrictive means test as “exceptionally demanding” and the “most demanding test known to constitutional law”); *id.* at 2761 (reading RFRA to require the protection of religious exercise “to the maximum extent permitted” by federal statutes and the Constitution);

<sup>209</sup> Marshall, *supra* note 10, at 41 (“A system that encourages persons to frame their objections to neutral laws in religious terms in order to gain economic benefit can corrupt the purity and integrity of religious beliefs . . .”). See generally ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* (2013).

integrity of churches and believers themselves, by allowing the legal system to drive theological change.

The use by courts of tort and other established bodies of secular law to adjudicate the substantiality of religious burdens avoids both problems. Such a system is not perfect; it can only approximate substantiality from the internal theological viewpoint of RFRA claimants. Claimants will inevitably be disappointed and angry when, on the basis of analogous secular law, courts refuse to recognize the substantiality of religious burdens they sincerely believe to be onerous under their own theologies and beliefs. This is no different, however, than the disappointment and anger that congregations and denominations now experience when theologically rooted expectations of ownership are upended by neutral principles of property law, or a congregation suffers Title VII liability for terminating an employee it sincerely believes is a minister, but a court does not. Whatever the cost of using secular law as proxy for substantiality, however, it is bound to less than the costs of a regime of on-demand exemptions to claimant theologies, the rule of law, and the continued political viability of permissive exemptions themselves.<sup>210</sup>

As the Court's precedents show, the religious-question doctrine does not preclude courts from adjudicating the substantiality of burdens on religious exercise in determining whether to grant a RFRA exemption, so long as they do so on the basis of secular law. RFRA's text likewise suggests that courts may adjudicate the substantiality of religious burdens, and its legislative history shows that this was Congress's intention. The rule of law demands that the determination whether religious costs are substantial should be made by impartial courts and not self-interested claimants. The religious nonprofit cases, finally, illustrate that adjudication of substantial burdens on the basis of secular law is a practical and viable means of applying RFRA, and is consistent with *Hobby Lobby*.

All of these considerations counsel that courts may—and indeed *must*—decide the substantiality of burdens on religious exercise under RFRA.

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<sup>210</sup> See Andrew Koppelman & Frederick Mark Gedicks, *Is Hobby Lobby Worse for Religious Liberty Than Smith?*, ST THOMAS J.L. & PUB. POL'Y (forthcoming 2016), <http://ssrn.com/abstract=2578297> (Mar. 28, 2015), at 27 (“RFRA is a *statutory* accommodation, and *Hobby Lobby* is a mere *statutory* interpretation that Congress has the power to undo. The existence and vitality of RFRA—and other statutory accommodations of religion—ultimately depends on the sufferance of Congress and the voters who elect it.”).