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To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion

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TO PROHIBIT FREE EXERCISE: A PROPOSAL FOR JUDGING SUBSTANTIAL BURDENS ON RELIGION

ABSTRACT

In Employment Division v. Smith*, the Supreme Court famously held that the First Amendment Free Exercise Clause permits neutral laws of general applicability to incidentally burden religion without offering religious exemptions. Today, many people—including Justice Alito in his concurrence in* Fulton v. City of Philadelphia*—are calling for* Smith *to be replaced by a jurisprudence that applies strict scrutiny to neutral, generally applicable laws that place a substantial burden on religion.*

Yet, both before and after Smith*, what exactly has constituted a "substantial burden" on religion has been far from clear. While some courts indicate that burdens on religion can only exist when the state threatens penal consequences or the withholding of benefits to coercively pressure religious adherents to forgo their faith, other courts indicate that burdens can also exist when the state—without coercion or pressure—directly prevents or hinders persons from exercising their faith. While some courts have suggested that the substantiality of a burden on religion hinges on the weight of the penalties or losses that the state attaches to a claimant's exercise of religion, other courts have also measured substantiality by examining whether the religious exercise affected is central, obligatory, or mandated.*

Not only have existing conceptions of burden conflicted with one another, but some definitions of "substantial burden" also leave room for the state to effectively prevent religious activity without being subject to heightened scrutiny. Other definitions have failed to clarify when burdens cross the threshold of substantiality. Some definitions prompt courts to engage in ill-equipped decision-making that risks violating the Establishment Clause. And still other definitions run afoul of the Free Exercise Clause itself.

In the wake of these problems, this Comment proposes a definition of "substantial burden" by starting from the operative verb of the Free Exercise Clause—to prohibit. This Comment argues that the state imposes a substantial burden on religion when it creates a de jure or de facto ban on any form of religious exercise—i.e., when the state legally forbids or effectively prevents the exercise of one's religion. Whenever neutral, generally applicable laws create

such a burden, they should be subject to strict scrutiny. The definitional framework proposed by this Comment can exist alongside the existing doctrine that laws (including facially neutral ones) that discriminate against religion, and thus fall outside of Smith*, should be subject to strict scrutiny.*

As this Comment argues, defining substantial burdens (in the context of neutral laws of general applicability) to include de jure and de facto bans on any religious exercise not only better comports with the text of the Free Exercise Clause itself, but also mitigates many of the problems raised by definitions of "substantial burden" used by courts in the past few decades. While this Comment's de jure and de facto framework does not purport to solve all of these problems, it provides a structured way for judges and legislators alike to think more rigorously about constitutionally faithful standards that might replace Smith *should it be overturned.*

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INTRODUCTION

Where some concurrences are flashes of lightning, others are rolls of thunder. Justice Alito opted for the latter in *Fulton v. City of Philadelphia*.[1] There, in a lengthy and mighty concurrence,[2] Justice Alito called for an end to the free exercise standard set forth in *Employment Division, Department of Human Resources of Oregon v. Smith*.[3] Under *Smith*, neutral laws of general applicability that incidentally burden religion are not violations of the First Amendment Free Exercise Clause, and religious claimants have no constitutional right to be exempt from such laws so long as they are reasonable.[4] As Justice Alito argued, *Smith* deviated not only from decades of free exercise precedent, but also from the Free Exercise Clause text itself,[5] which mandates: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[6] Thus, Justice Alito stated, it was time to "reconsider *Smith* without further delay."[7]

But not so fast, other Justices seemed to proclaim. After all, "what should replace *Smith*?" Justice Barrett asked in her concurrence.[8] One answer was to

[1] *See generally* 141 S. Ct. 1868, 1883–1926 (2021) (Alito, J., concurring).
[2] *Id.*
[3] 494 U.S. 872 (1990).
[4] *Id.* at 872, 879.
[5] *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring).
[6] U.S. CONST. amend. I, § 1, cl. 1.
[7] *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring).
[8] *Id.* at 1882 (Barrett, J., concurring).

replace *Smith* with the pre-*Smith* standard that the Court had set out in *Sherbert v. Verner*.[9] That case, and the case law that relied upon it, mandated that courts apply strict scrutiny to a government law or policy whenever the government imposed a substantial burden on a claimant's religious exercise, *even if* the law was neutral and generally applicable.[10] To pass strict scrutiny, the government had to demonstrate that its challenged law was narrowly tailored to serve a compelling state interest; otherwise, claimants whose religion was substantially burdened by the law could be granted an exemption from it.[11]

While Justice Barrett acknowledged the "serious arguments" made for overturning *Smith*, she was hesitant to do so, writing that there were "a number of issues to work through if *Smith* were overruled."[12] One issue concerned the content of a substantial burden: as Justice Barrett asked, "[s]hould there be a distinction between indirect and direct burdens on religious exercise?"[13]

Indeed, what constitutes a "substantial burden" on religious exercise has been far from clear, both in pre-*Smith* and post-*Smith* free exercise jurisprudence. For some courts, such a burden only exists when the government forces a religious practitioner to choose between forgoing a religious obligation and facing a direct or indirect consequence.[14] For other courts, a burden can also be found even outside these dilemmas—for example, when the government takes action rendering it "effectively impracticable" for claimants to continue practicing their faith.[15] For some courts, the "substantiality" of a burden derives from the weight of the penal or economic consequences that claimants will face if they choose to practice their religion.[16] For other courts, "substantiality" can

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9 *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring) ("Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a neutral and generally applicable law burdens religious exercise.").

10 *See Sherbert*, 374 U.S. at 402–08; *Fulton*, 141 S. Ct. at 1890 (Alito, J., concurring) ("The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for the next 37 years.").

11 *Sherbert*, 374 U.S. at 403–04, 406; *Fulton*, 141 S. Ct. at 1890 (Alito, J., concurring).

12 *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring).

13 *Id.* at 1883 (citing *Braunfeld v. Brown*, 366 U.S. 599, 606–07 (1961) (plurality opinion)). As the Court explained in *Braunfeld*, legislation imposes an "indirect burden" on religious exercise when it "does not make unlawful the religious practice itself," but, nonetheless, still makes it more challenging to practice one's faith. *See Braunfeld*, 366 U.S. at 606. By logical extension, then, direct burdens occur when the government makes a religious practice unlawful.

14 *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449–53 (1988) (suggesting that burdens needed to take the shape of coercion or penalty).

15 C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

16 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 710 (2014) (pointing to monetary penalties as the substantial burden).

also derive from the importance of the burdened religious exercise to the claimant's faith.[17]

Uncertainty is not the only problem. For one, definitions of burden that focus solely on coercion fail to acknowledge that noncoercive government action can still effectively prohibit religious adherents from practicing their faith.[18] Moreover, definitions of substantiality that require courts to assess the weight or centrality of the affected religious exercise may force courts to make determinations that they lack the expertise, if not authority, to make, and determinations whose very intrusiveness may trigger a violation of the First Amendment Establishment Clause.[19] Perhaps most importantly, a law imposing a substantial burden on religion may not necessarily form a law "prohibiting the free exercise [of religion]," and vice versa.[20] In other words, the substantial burden threshold—a test that courts have used to help determine whether the state violates the Free Exercise Clause—may not even align with the test(s) commanded by the Free Exercise Clause itself.

Since the Supreme Court may replace *Smith* with a standard applying strict scrutiny to any law imposing a substantial burden on religious exercise,[21] it is timely and pertinent to define "substantial burden" in a clear way that addresses problems raised by existing definitions. This Comment seeks to provide a definition of a substantial burden for purposes of constitutional interpretation, by starting from the verb used in the First Amendment: to *prohibit*.

This Comment argues that the state imposes a substantial burden on religious exercise when its actions amount to a de jure or de facto ban of any religious

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[17] *See* Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995) (noting that a burden exists when the state "significantly inhibit[s] . . . conduct . . . that manifests *some central tenet* of a prisoner's individual beliefs" (emphasis added)).

[18] *See Lyng*, 485 U.S. at 440, 451 (indicating that even state actions that "virtually destroy[ed]" tribal capacity to practice religion were not burdens).

[19] *See* Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1787 (2016) ("Interrogating the religious substantiality of conduct on a theological metric runs afoul of core Establishment Clause prohibitions.").

[20] U.S. CONST. amend. I, § 1, cl. 1.

[21] Justices Thomas and Gorsuch joined Justice Alito's *Fulton* concurrence calling for *Smith* to be overturned. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring). Though Justices Barrett and Kavanaugh decided that *Fulton* was not the case to overturn *Smith*, they did seem *open* to overturning *Smith* as well. *See id.* at 1882–83 (Barrett, J., joined by Kavanaugh, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."). Thus, it is possible, if not probable, that at least a 5–4 majority of the current Supreme Court—Justices Alito, Thomas, Gorsuch, Barrett, and Kavanaugh—overturns *Smith* in a future case.

exercise—i.e., when the state legally prohibits or effectively prevents a person or persons from exercising any aspect of his, her, or their religion. Compared to other definitions, this two-part definition not only better comports with the text of the Free Exercise Clause, but also avoids or mitigates many problems presented by free exercise jurisprudence from these past few decades.

To make this Comment's argument, Part I narrates the development of the "substantial burden" standard since *Sherbert* in 1963. First, Part I walks through the Court's burden analysis up to *Smith*. Second, after discussing *Smith*, it highlights post-*Smith* Supreme Court and circuit court interpretations of "substantial burden" as used in post-*Smith* federal legislation, as well as the Supreme Court's post-*Smith* constitutional jurisprudence on religious discrimination.

Using Part I's case law, Part II then maps different approaches as to (1) what constitutes a *burden*—specifically, coercion and impact; and (2) what constitutes substantiality—specifically, the consequences attached to practicing one's religion and the weight of the religious exercise affected.

Next, Part III discusses the problems raised by existing definitions of a substantial burden. First, Part III focuses on "burden," and argues that definitions that only look at coercion fail to recognize that noncoercive government action can effectively prohibit religious exercise. Second, Part III focuses on "substantial," and argues that definitions of substantiality grounded in the weight or centrality of the religious exercise affected both fail to comport with the Free Exercise Clause itself, and push courts to make decisions that they are unequipped to make and that risk violating the Establishment Clause. Third, Part III explains how definitions of substantiality focused solely on the consequences attached to exercising one's religion run into problems in establishing the threshold at which such consequences become substantial.

Part IV proposes this Comment's definition of "substantial burden." The first section of Part IV focuses on constitutional text and history to decipher the ordinary and original meaning of the Free Exercise Clause's phrase, "prohibiting the free exercise thereof."[22] Working from the word "prohibit," Part IV argues that the government unconstitutionally imposes a substantial burden when its actions create a de jure or de facto ban on any part of a claimant's religious exercise. Part IV explains in detail what it means for the state to legally ban religious exercise, and why such a ban, even if neutral and generally applicable, should constitute a substantial burden regardless of the size of the penalty

[22] U.S. CONST. amend. I, § 1, cl. 1.

prescribed by the ban. Next, Part IV explains what it means for the state to create a de facto ban on religious exercise, and why a de facto ban—even if not in the shape of coercion—should constitute a substantial burden.

Part V explains how this Comment's definitional framework avoids or mitigates the problems mentioned in Part III more effectively than definitions already advanced. Part V then raises and responds to potential objections against this Comment's framework.

I. A BRIEF HISTORY OF "SUBSTANTIAL BURDENS"

Decades before *Smith*, the Court had already examined burdens imposed on the free exercise of religion.[23] To narrate the development of "burden" as a concept, this Comment starts in 1963, in *Sherbert v. Verner*—a significant, though certainly not the first, case to discuss burdens on religion.[24]

*A. Pre-*Smith *Jurisprudence*

In *Sherbert*, at issue was whether South Carolina's Employment Security Commission could constitutionally deny unemployment benefits to the appellant, a Seventh-Day Adventist who was fired from her job and unable to find new employment because she refused to work on Saturday, her faith's Sabbath Day.[25] Under the South Carolina Unemployment Compensation Act, a person was ineligible for unemployment benefits if he or she "fail[ed], without good cause . . . to accept available suitable work when offered."[26] The Commission found that the appellant's faith-motivated refusal to work on Saturdays brought her within the category of those who, "without good cause," refused new employment, and thus found her ineligible for unemployment compensation.[27]

[23] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) ("But to condition the solicitation of aid for the perpetuation of religious views . . . upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden *burden* upon the exercise of liberty . . . ." (emphasis added)); Jones v. Opelika, 316 U.S. 584, 612 (1942) (Murphy, J., dissenting) ("Being satisfied by the evidence that the ordinances . . . impose a *burden* on the circulation and discussion of opinion and information in matters of religion, and therefore violate the petitioners' rights to . . . freedom of worship[,] . . . I am obliged to dissent . . . ." (emphasis added)), *vacated*, 319 U.S. 103 (1943); Braunfeld v. Brown, 366 U.S. 599, 603 (1961) ("Certain aspects of religious exercise cannot, in any way, be restricted or *burdened* by either federal or state legislation." (emphasis added)).

[24] Sherbert v. Verner, 374 U.S. 398 (1963); *see supra* note 23 (listing pre-*Sherbert* cases that discussed burdens on the free exercise of religion).

[25] *Sherbert*, 374 U.S. at 399–401.

[26] *Id.* at 400–01 (internal quotations omitted).

[27] *Id.* at 401.

The Court held that the appellant's disqualification from unemployment benefits was only constitutional if the "incidental burden on the free exercise of [her] religion" caused by such disqualification could "be justified by a compelling state interest."[28] In other words, the constitutionality of the Commission's decision rested on a two-step inquiry: (1) whether there was a burden; and (2) if so, whether it was warranted by a compelling state interest.[29] The Court found that a burden did exist, because the Commission forced the appellant "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other."[30] As the Court emphasized, even if unemployment benefits were construed as privileges and not rights, "condition[ing] the availability of benefits upon [the] appellant's willingness to violate a cardinal principle of her religious faith effectively *penalize*[*d*] the free exercise of her constitutional liberties."[31] In other words, a burden existed because the state imposed a *cost* or *loss* on the appellant's exercise of her faith.

Although the Court did not explicitly discuss whether or why the burden was "substantial," it seemed to attest to the weight of the burden by pointing to the fact that a "cardinal principle" of the appellant's faith was affected, and by suggesting that even a person's interest in government "benefits" could be of "sufficient *substance* to fall within the protection from arbitrary governmental action afforded by the Due Process Clause."[32] The implicit substantiality of the burden seemed to be rooted in both the centrality of the religious exercise affected and the weight of the benefits of which the appellant was deprived.

About a decade later, in *Wisconsin v. Yoder*, the Court examined whether the Free Exercise Clause required the state to exempt respondents from a compulsory school-attendance law.[33] In *Yoder*, the respondents, members of an Amish family, were fined for violating Wisconsin's school-attendance law when they refused to enroll their children in high school—a choice the respondents made because they believed that sending their children to high school "was contrary to the Amish religion and way of life."[34] Though the respondents were ultimately only fined five dollars, the statute itself subjected its violators to (1)

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[28] *Id.* at 403.
[29] *See id.*
[30] *Id.* at 404.
[31] *Id.* at 404–06 (emphasis added).
[32] *Id*. at 405–06 (emphasis added) (quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960)).
[33] 406 U.S. 205, 207 (1972).
[34] *Id.* at 207–09.

fines between five and fifty dollars; (2) imprisonment up to three months; or (3) both.[35]

To assess whether the Free Exercise Clause obligated the state to grant a religious exemption, the *Yoder* Court first examined whether the Wisconsin statute imposed a burden on the Amish respondents.[36] To conclude that a burden did indeed exist, the Court not only referenced the "threat of criminal sanction" that the petitioners could face for exercising their religion, but also discussed the theological implications of the religious exercise affected.[37] As the *Yoder* Court wrote:

> [T]he values and programs of the modern secondary school are in sharp conflict with the *fundamental* mode of life *mandated* by the Amish religion . . . . The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences . . . and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community . . . contravenes the *basic* religious tenets and practice of the Amish faith . . . .[38]

By observing what was "basic," "mandated by," and "fundamental" in the Amish religion and way of life, the *Yoder* Court spoke to the theological gravity of the religious exercise affected—i.e., how important abstinence from secondary education was to the Amish religion.[39]

Two years later, in *Johnson v. Robison*, the Court assessed whether the Free Exercise Clause prohibited the Veterans' Readjustment Benefits Act of 1966 from denying education benefits to alternative service conscientious objectors (the appellees).[40] The Court ruled that "[t]he withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all."[41] As the Court reasoned, the challenged legislation, which simply withheld benefits, did not force the appellees to choose between their faith and freedom from criminal sanctions.[42] Unlike in *Sherbert*, the Court in *Robison* did not find the denial of benefits sufficient to trigger strict scrutiny; instead, it questioned whether such a denial was a burden at all.[43]

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[35] *Id.* at 207 n.2, 208 (citing WIS. STAT. § 118.15 (1969)).
[36] *Id.* at 215–19.
[37] *Id.* at 218; *see* Helfand, *supra* note 19, at 1795.
[38] *Yoder*, 406 U.S. at 217–18 (emphasis added).
[39] *See* Helfand, *supra* note 19, at 1795.
[40] 415 U.S. 361, 363–64, 383–84 (1974).
[41] *Id.* at 385.
[42] *Id.* at 384–85.
[43] *Compare id.*, *with* Sherbert v. Verner, 374 U.S. 398, 405–06 (1963).

In 1978, in *McDaniel v. Paty*, the Court had to decide whether the Free Exercise Clause conflicted with a Tennessee statute that barred ministers from serving as delegates to a Tennessee constitutional convention.[44] The Court held that the statute violated the Free Exercise Clause because it forced the appellant—a Baptist minister—to choose between his right to exercise his faith and his right to seek office as a delegate.[45] In other words, the statute "conditioned the exercise of one [right] on the surrender of the other."[46] Unlike in *Sherbert*, the law in *McDaniel* targeted religion by specifically barring religious ministers from serving as delegates.[47] Yet, like in *Sherbert* and unlike in *Robison*, the *McDaniel* Court suggested that a burden existed even though the religious adherents did not face criminal sanctions for exercising their faith, but instead suffered a loss of rights, benefits, or privileges.[48]

Three years later, *Thomas v. Review Board of the Indiana Employment Security Division* affirmed that a loss of benefits could constitute a burden.[49] In *Thomas*, the Court had to decide whether the Free Exercise Clause barred the state from denying unemployment benefits to the petitioner, a Jehovah's Witness who terminated his job because his understanding of his religion forbade him from participating in the production of armaments.[50] The Court first determined that the record suggested that the petitioner was, in fact, motivated by his conception of his religion to refuse to engage in such production (other Jehovah's Witnesses "had no scruples about working on tank turrets").[51] Then, the Court held that there was a burden upon the petitioner's religion (as he understood it), reasoning:

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

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44 435 U.S. 618, 620 (1978).

45 *Id.* at 626.

46 *Id.*

47 *Id.* In *Sherbert*, the South Carolina Unemployment Compensation Act did not explicitly single out religion, though a commission did have the discretion to determine what were legitimate reasons for refusing work. *Sherbert*, 374 U.S. at 399–401, 400 n.3.

48 *See McDaniel*, 435 U.S. at 626 (stating that "Tennessee has *encroached* upon [appellant's] right to the free exercise of religion," but not explicitly mentioning that a "burden" existed (emphasis added)). *Compare id.*, *and Sherbert*, 374 U.S. at 399–401, *with Robison*, 415 U.S. at 385.

49 450 U.S. 707, 709, 720 (1981).

50 *Id.* at 709.

51 *Id.* at 715–16.

> compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[52]

Notably, the *Thomas* Court considered several factors in determining the existence of a burden: (1) the basic question of whether the religious claimant's conduct (or lack thereof) at issue was in fact religiously motivated and, if so, whether the claimant's religion (as he understood it) *compelled* or *proscribed* such conduct; and (2) whether the state denied benefits or conditioned them upon such conduct.[53] In other words, the sincerity of the religious claimant, the nature of the claimant's religious exercise, and the behavior of the state were all components of the burden inquiry.

In 1986, the Court seemingly moved away from *Thomas* and closer to *Robison* when it decided *Bowen v. Roy*.[54] A key issue in *Roy* was whether the Free Exercise Clause prohibited the state from conditioning the petitioners' receipt of welfare benefits upon them providing state agencies with the Social Security numbers of their household members, an action that they believed violated their Native American religious beliefs.[55] The Court held that the state's denial of welfare benefits to the petitioners in response to their refusal to provide Social Security numbers did not constitute a "burden."[56] As the Court explained, previous decisions rejecting religiously-based challenges "recited the fact that a mere denial of a governmental benefit by a uniformly applicable statute" did not form an "infringement of religious liberty."[57] As the Court emphasized, legislation that criminalized religious activity was "wholly different" from legislation that "incidentally call[ed] for a choice between securing a governmental benefit and adherence to religious beliefs."[58]

To reconcile its understanding of "burden" with *Sherbert* and *Thomas*—which found the denial of benefits to constitute a burden—the *Roy* Court argued that in those cases, the statute denied unemployment benefits to claimants who quit or refused work "without good cause."[59] As the *Roy* Court reasoned, the "good cause" language in *Sherbert* and *Thomas* created a mechanism for the state to offer exemptions on an individual basis; thus, in those cases, the "refusal

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52. *Id.* at 717–18 (emphasis added).
53. *Id.*
54. 476 U.S. 693 (1986).
55. *Id.* at 695.
56. *Id.* at 703–07.
57. *Id.* at 704.
58. *Id.* at 706.
59. *Id.* at 708 (first citing Sherbert v. Verner, 374 U.S. 398, 401–02 (1963); and then citing Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 725 (1981)).

to extend an exemption to an instance of religious hardship suggest[ed] a *discriminatory intent*."[60] Yet, in this case, the *Roy* Court explained, there was no room for individual exemptions; hence, the state's conditioning of benefits exhibited no "antagonism by Congress towards religion generally or towards any particular religious beliefs."[61] And, "[a]bsent proof of [such] an intent to discriminate," the neutral state "requirement for governmental benefits" passed muster so long as it was "a reasonable means of promoting a legitimate public interest."[62] In other words, unless the state targeted a religion or religion in general, its neutral, generally applicable requirements did not trigger strict scrutiny even if they incidentally burdened religion.

Yet, only one year later, the Court seemed to change its position again in *Hobbie v. Unemployment Appeals Commission of Florida*.[63] There, the Court held that the Free Exercise Clause prohibited Florida's denial of unemployment benefits to a petitioner, another Seventh-Day Adventist fired for refusing to work on certain hours due to religious reasons.[64] Echoing *Thomas*, the Court reasoned that a burden upon religious exercise exists and triggers strict scrutiny "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, *or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to . . . violate his beliefs*."[65] The Court rejected the reasonable means standard set forth in *Roy*.[66]

In 1988, the Court faced another free exercise challenge in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[67] In *Lyng*, the Court evaluated whether the Free Exercise Clause prohibited the government from building a road and harvesting timber in a portion of the National Forest that the respondents, three Native American tribes, used for religious purposes.[68] The Court acknowledged that the tribal members were sincere in their religious beliefs, and that the government's proposed programs would have "severe adverse effects on the [tribes'] practice of their religion."[69]

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[60] *Id.* (emphasis added).
[61] *Id.*
[62] *Id.* at 707–08.
[63] 480 U.S. 136 (1987).
[64] *Id.* at 137–39.
[65] *Id.* at 141 (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981)).
[66] *Id.*
[67] 485 U.S. 439 (1988).
[68] *Id.* at 441–42.
[69] *Id.* at 447.

Yet, the Court declined to apply strict scrutiny, reasoning that even if the government's road project were to "virtually *destroy* the . . . Indians' ability to practice their religion,"[70] the respondents would still lose the case because they were neither "coerced" by the state to violate their beliefs, nor penalized or denied rights or benefits for practicing their beliefs.[71] Thus, the harmful impact of the government's actions—even if enough to *destroy* a group's religious practice—did not form the "burden" necessary to trigger strict scrutiny: a burden needed to take the particular shape of *coercion* or *pressure*—something that forced a claimant (whether through penalties or the denial of benefits) to act contrary to her beliefs.[72] In other words, mere impact, no matter how strong, did not constitute a cognizable burden for free exercise jurisprudence purposes.

Taken together, this batch of pre-*Smith* free exercise cases painted a muddied landscape. On one hand, *Sherbert*, *Thomas*, and *Hobbie* suggested that a burden on religion existed—and thus triggered strict scrutiny—when a religious practitioner could not access government benefits because of her religion, even if the requirements for those benefits were neutral and generally applicable.[73] On the other hand, *Roy* suggested that neutral, generally applicable laws that denied benefits to religious adherents did not impose a burden on religion and need only pass a reasonable means test.[74] Similarly, *Robison* questioned whether the withholding of benefits created a burden at all.[75] Other cases added nuance to the picture: *McDaniel* (a case in which the law was *not* neutral toward religion) emphasized that a burden existed when a religious claimant was forced to choose between two rights, and *Lyng* established that even if the government virtually destroyed religion, no burden existed at all so long as the state's actions did not take the shape of coercion.[76]

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[70] *Id.* at 451 (emphasis added) (quoting Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986)).

[71] *Id.* at 449 ("The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy.* In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be *coerced* by the Government's action into violating their religious beliefs; nor would either governmental action *penalize* religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." (emphasis added)).

[72] *See id.* at 449–51. *See generally* Jonathan Knapp, *Making Snow in the Desert: Defining a Substantial Burden under RFRA*, 36 ECOLOGY L. Q. 259, 265 (2009) (differentiating between government coercion and impact).

[73] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987).

[74] Bowen v. Roy, 476 U.S. 693, 704 (1986).

[75] Johnson v. Robison, 415 U.S. 361, 385 (1974).

[76] *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978); *Lyng*, 485 U.S. at 449.

Though already replete with twists and turns, free exercise jurisprudence took a more pronounced shift in 1990 with the (in)famous case of *Smith*.

B. Smith*, RFRA(s), and RLUIPA*

If *Sherbert* established a "doctrinal regime" wherein courts applied strict scrutiny to neutral, generally applicable laws that burdened religious exercise, that regime came to an end in *Employment Division v. Smith*.[77] In *Smith*, the issue turned on whether the Free Exercise Clause permitted Oregon to criminally prohibit peyote use and deny unemployment benefits to persons discharged for using peyote for religious purposes.[78] Led by Justice Scalia, the Court ruled affirmatively, holding that the Free Exercise Clause permitted a generally applicable law to prohibit the exercise of religion if doing so was "merely the incidental effect" of the law and not its "object."[79]

Unlike in *Sherbert*, strict scrutiny would no longer apply—even if a law burdened religious exercise—so long as the law was neutral and of general applicability.[80] As the Court reasoned, "[t]he government's ability to enforce generally applicable prohibitions . . . [could not] depend on measuring the effects of a governmental action on a religious objector's spiritual development."[81] If an individual's duty to obey a generally applicable law were "contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling,'" then this would permit the individual "to become a law unto himself."[82] A society adopting this system, the Court argued, "would be courting anarchy."[83]

Not only did Justices Blackmun, Brennan, and Marshall dissent, arguing that strict scrutiny should still apply,[84] but Congress dissented too. Only a few years following *Smith*, Congress passed two statutes that reinstated the *Sherbert* standard: the Religious Freedom Restoration Act of 1993 ("RFRA"),[85] and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[86] Under the 1993 version of RFRA, "governments should not substantially burden

[77] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990).
[78] *Id.* at 874.
[79] *Id.* at 878.
[80] *See id.* at 878–79.
[81] *Id.* at 885 (quoting *Lyng*, 485 U.S. at 451).
[82] *Smith*, 494 U.S. at 885 (internal quotation marks omitted) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
[83] *Id.* at 888.
[84] *Id.* at 907–09 (Blackmun, Brennan & Marshall, JJ., dissenting).
[85] 42 U.S.C. § 2000bb (1994).
[86] *Id.* § 2000cc (2000).

religious exercise without compelling justification" even if the burden was caused by "laws 'neutral' toward religion."[87] Similarly, under RLUIPA, the government shall neither "implement a land use regulation in a manner that impose[d] a substantial burden on the religious exercise of a person,"[88] nor "impose a substantial burden on the religious exercise of a person residing in or confined to an institution,"[89] unless the government met strict scrutiny. Importantly, RLUIPA defined "religious exercise" to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief."[90] And, in 2008, RFRA was amended to define "religious exercise" in the exact same manner as RLUIPA.[91]

*C. Post-*Smith *Jurisprudence*

Following *Smith* and the passage of RFRA and RLUIPA, religious claimants now had statutory protections resembling the constitutional protections set forth in *Sherbert*: unless the government could meet strict scrutiny, it could not impose a substantial burden on a person's exercise of religion even if the burden stemmed from rules of general applicability.[92] Moreover, though the Free Exercise Clause after *Smith* no longer required neutral and generally applicable laws burdening religion to pass strict scrutiny, the post-*Smith* Court has carefully scrutinized whether a government's laws or actions are actually "neutral" toward religion.[93] This section looks into post-*Smith* free exercise jurisprudence: the first subsection discusses how the Supreme Court has interpreted "substantial

[87] *Id.* § 2000bb(a)(2)–(3) (1994).

[88] *Id.* § 2000cc(a) (2000).

[89] *Id.* § 2000cc-1(a).

[90] *Id.* § 2000cc-5(7)(A) (emphasis added).

[91] *Id.* § 2000bb-2(4) (1994) ("[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."). 42 U.S.C. § 2000cc-5 defined "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5 (2000).

[92] *See id.* §§ 2000bb(a), 2000cc(a). Following the *City of Boerne v. Flores*, RFRA only applied to the laws or actions taken by the federal government, and not by the governments of the states. *See* 521 U.S. 507, 533–38 (1997) ("The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. . . . Even assuming RFRA would be interpreted in effect to mandate some lesser test, . . . the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives . . . ."); *see also* Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 675 (2016) ("The Court struck down RFRA as applied to the states as a violation of federalism guarantees."). Yet, many states soon passed their own versions of RFRA as well: some called for strict scrutiny to apply when burdens existed, others only when *substantial* burdens existed. *See* Christopher C. Lund, *Religious Liberty after* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 & tbl.1 (2010).

[93] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729–31 (2018) (finding that Colorado's Civil Rights Commission displayed hostility toward religion when it publicly disparaged a cake baker's religious beliefs and treated him differently from other bakers).

burdens" under RFRA and RLUIPA, and how the Court has treated laws discriminating against religion; the second subsection briefly discusses splits amongst circuit courts on the meaning of "substantial burden."

1. Definitions from the Court

In *Burwell v. Hobby Lobby Stores, Inc.*, the Court had to determine "whether [RFRA] . . . permitt[ed] the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate[d] the sincerely held religious beliefs of the companies' owners."[94] To make this determination, the Court needed to decide whether the "HHS regulations substantially burden[ed] the exercise of religion."[95] Led by Justice Alito, the Court held that there was a burden, pointing to the penalties that the petitioners would have to pay if they did not comply with the regulations.[96] As the Court wrote:

> [I]f they do not comply, they will pay a very heavy price—as much as *$1.3 million per day*, or about *$475 million per year*, in the case of one of the companies. If *these consequences* do not amount to a substantial burden, it is hard to see what would.[97]

Later in the opinion, the Court directly refuted the HHS, which, according to the Court, had argued that it had not imposed a substantial burden because there was too weak of a connection between (A) the conduct that the HHS required of the corporations (providing insurance coverage to its employees for contraceptive methods); and (B) the end that the corporations found morally wrong (the destruction of embryos), which motivated their non-compliance.[98] The Court argued that it had "no business" analyzing the reasonability of the corporation owners' religious beliefs: whether a connection existed between the required conduct and the feared end—a question that implicated deeper religious and moral inquiries—was not for courts to decide.[99] Thus, in determining whether a substantial burden on religion existed, the *Hobby Lobby* Court limited its focus to the penal consequences attached to the claimants' expression of their beliefs, and not the reasonability of those beliefs. And, later in 2020, relying on *Hobby Lobby*, Justices Alito and Gorsuch in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* similarly grounded their assessment of the

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94 573 U.S. 682, 688–91 (2014) (internal citations omitted).
95 *Id.* at 691.
96 *Id.* at 690–91.
97 *Id.* at 691 (emphasis added).
98 *Id.* at 723.
99 *See id.* at 724.

substantiality of a burden under RFRA upon the *size* of the *financial penalties* that religious practitioners would face for non-compliance with the contraceptive coverage mandate.[100]

One year later, in *Holt v. Hobbs*, the Court had to decide what constituted a "substantial burden," this time under RLUIPA instead of RFRA.[101] In *Holt*, at issue was whether RLUIPA required a prison that prohibited inmates from growing beards, to provide an exemption for a Muslim inmate "who wish[ed] to grow a 1/2-inch beard in accordance with his religious beliefs."[102] Led by Justice Alito again, the Court ruled affirmatively, after first deciding that the prison had imposed a substantial burden on the petitioner's religious beliefs.[103] Like in *Hobby Lobby*, the Court limited its substantial burden inquiry to the penal *consequences* that the claimant would suffer for acting in accordance with his religious beliefs, writing: "If petitioner contravenes that policy and grows his beard, he will face *serious disciplinary action*. Because the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise."[104] The burden's shape was the pressure the claimant would face for complying with his beliefs; the burden's substantiality seemed to be rooted in the weight of the penalty.

While *Hobby Lobby* and *Holt* illuminate the Court's definitions of substantial burdens under RFRA and RLUIPA, other cases illustrate the Court's post-*Smith* free exercise jurisprudence under the Constitution. Though the Free Exercise Clause no longer requires that neutral, generally applicable laws burdening religion be subject to strict scrutiny, the post-*Smith* Court has repeatedly applied strict scrutiny to state action that displays discrimination or hostility against religion.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court held that while the City of Hialeah's ordinances restricting animal sacrifice under threat of fines and imprisonment could have appeared facially neutral,[105] the case record indicated that suppression of animal sacrifice—which the Court found to

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[100] 140 S. Ct. 2367, 2389 (2020) (Alito & Gorsuch, JJ., concurring) (explaining how in *Hobby Lobby* the Court found the $100 per day, per employee penalty to be a "substantial" practical effect of non-compliance with the Affordable Care Act's contraceptive coverage mandate).

[101] 574 U.S. 352, 361–62 (2015).

[102] *Id.* at 355–56.

[103] *Id.* at 361.

[104] *Compare id.* (emphasis added), *with Hobby Lobby*, 573 U.S. at 691, 724.

[105] *See* 508 U.S. 520, 527–28, 533–34, 549 (1993) ("Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court." (quoting City of Hialeah, Florida, Ordinance No. 87-40 (June 9, 1987))).

be the "central element" of the petitioner's (a Santeria church) worship service—"was the *object* of the ordinances."[106] As the Court ruled, "if the *object* of a law is to . . . restrict practices because of their religious motivation, the law is not neutral," and thus is invalid under the Free Exercise Clause unless it passes strict scrutiny.[107]

Similarly, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court examined state action that was not neutral or generally applicable, but that treated religion unequally.[108] In *Trinity Lutheran*, the Missouri Department of Natural Resources offered grants to help schools and nonprofits purchase playground surfaces, but "had a policy of categorically disqualifying churches and other religious organizations," including the petitioner (a church), from receiving such funds.[109] The Court subjected the Department's policy to strict scrutiny, reasoning that: (1) even if the state did not criminalize religious activity as it did in *Lukumi*, it could still infringe upon the free exercise of religion by "placing . . . conditions upon a benefit or privilege";[110] and (2) the state discriminated against the petitioner by denying it funds "solely because it [was] a church."[111] The Court did not explicitly state whether it was specifically the denial of the funds, the discrimination, or both, that constituted a "burden" sufficient to trigger strict scrutiny. Yet, as it made clear, such scrutiny applied when the state "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character."[112]

In 2020, the Court in *Espinoza v. Montana Department of Revenue* adhered to *Trinity Lutheran*'s logic, by applying strict scrutiny to a provision of the Montana Constitution that, as interpreted by the Montana Supreme Court, barred religious schools from a state scholarship program that offered scholarships for children attending private schools.[113] As the Court reasoned, "[w]hen otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny."[114]

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[106] *Id.* at 534 (emphasis added).
[107] *Id.* at 532–33 (emphasis added).
[108] 137 S. Ct. 2012 (2017).
[109] *Id.* at 2017.
[110] *Id.* at 2022 (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).
[111] *Id.*
[112] *Id.* at 2021.
[113] 140 S. Ct. 2246, 2254, 2260 (2020).
[114] *Id.* at 2260 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court found a violation of the Free Exercise Clause without even explicitly engaging in strict scrutiny.[115] The petitioner, a Christian cake shop owner, refused to sell wedding cakes to same-sex couples because he believed that doing so was contrary to his faith.[116] After a same-sex couple filed a complaint that ascended to Colorado's Civil Rights Commission, the Commission held that the petitioner violated the Colorado Anti-Discrimination Act ("CADA"), and ordered him to (1) "cease and desist" from practicing the cake shop's policy of refusing to sell wedding cakes to same-sex couples, and (2) partake in a host of remedial measures, including staff training and policy changes to comply with the CADA.[117] Justice Kennedy, delivering the opinion of the Court, held that the Commission violated the Free Exercise Clause because it displayed "a clear and impermissible hostility toward the sincere religious beliefs that motivated [the petitioner's] objection," both through the comments made in public hearings, and the differences in the ways the Commission treated the petitioner versus other bakers "who objected to a requested cake on the basis of conscience."[118] The opinion neither delved into strict scrutiny analysis,[119] nor mentioned "burden" a single time; instead, the Commission's hostility to religion was already "inconsistent with the First Amendment's guarantee that . . . laws be applied in a manner that is neutral toward religion."[120] Thus, *Masterpiece Cakeshop* seemed to suggest that state hostility against religion could itself violate the Free Exercise Clause.[121]

In *Fulton v. City of Philadelphia*, the Court's majority opinion touched on neutrality and focused on general applicability, but first discussed "burden."[122] In *Fulton*, the City of Philadelphia decided that "it would not enter a full foster care contract" with the petitioner, a Catholic foster care agency, "unless the agency agreed to certify same-sex couples."[123] The petitioner sued the city for

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115 138 S. Ct. 1719, 1729–31 (2018).
116 *Id.* at 1724.
117 *Id.* at 1725–26.
118 *Id.* at 1729–31.
119 Justice Kennedy did implicitly reference some form of scrutiny, by stating that "the State's interest could have been weighed against [the petitioner's] sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed." *Id.* at 1732. But even this quote suggests that (A) the interest balancing found in heightened scrutiny, and (B) the test of religious neutrality, are two distinct issues. Justice Kennedy's opinion seemed to turn not on a weighing of state and individual interests, but on the state's lack of neutrality toward religion.
120 *Id.*
121 *See id.*
122 *See* 141 S. Ct. 1868, 1876–81 (2021).
123 *Id.* at 1874–76.

violating the Free Exercise Clause.[124] Led by Chief Justice Roberts, the Court held that "[a]s an initial matter, . . . the City's actions . . . *burdened* [the petitioner's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs."[125] In other words, a "burden" existed because the petitioner faced a dilemma between religious adherence and the retention of a benefit (continued contracts with the City).[126]

After finding that a burden existed, the Court determined whether it was "constitutionally permissible."[127] To do so, the Court first examined whether the City's policy that foster care providers could not refuse couples on the basis of sexual orientation was "generally applicable as required by *Smith*."[128] The Court held that the policy was not generally applicable, because the City gave a commissioner "sole discretion" to grant exemptions from the requirement.[129] As the Court explained, this exemption mechanism took away general applicability, since it "invite[d] the government to decide which reasons for not complying with the policy [were] worthy of solicitude."[130] Having found that the City's policy fell outside *Smith*, the Court then applied strict scrutiny, which the City's policy did not pass.[131]

This past year, the Court again ruled in several cases that state policies would trigger strict scrutiny by discriminating against religious activity through the denial of otherwise available rights, benefits, or privileges. In *Carson ex rel. O.C. v. Makin*, the Court applied strict scrutiny to Maine's tuition assistance program because it disqualified various private schools from funding, solely due to their religious character.[132] In *Kennedy v. Bremerton School District*, a school district disciplined a high school football coach for publicly and quietly praying

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124 *Id.* at 1876.

125 *Id.* (emphasis added).

126 *See id.*

127 *Id.*

128 *Id.* at 1878.

129 *Id.* at 1879.

130 *Id.* (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)).

131 *Id.* at 1881 ("A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests. . . . Once properly narrowed, the City's asserted interests are insufficient." (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))).

132 142 S. Ct. 1987, 1997 (2022) (explaining that a law operating so as "to 'disqualify some private schools' from funding 'solely because they are religious'" must be subject to strict scrutiny (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257, 2261 (2020))). The state argued that it excluded religious schools from the tuition assistance program not based on their religious status, but instead on their "'use[]' of public funds." *Id.* at 1998, 2001. But the Court explained that its precedents in *Trinity Lutheran* and *Espinoza* "never suggested that use-based discrimination is any less offensive to the Free Exercise Clause." *Id.* at 2001.

on a football field after several football games.[133] The Court subjected the district's actions to strict scrutiny, because in "forbidding [the coach's] brief prayer, the District failed to act pursuant to a neutral and generally applicable rule."[134] The district failed to act neutrally since it restricted the coach's actions "*because* of their religious character,"[135] and it failed the "general applicability test" since it applied against the petitioning coach a supervisory requirement that it did not apply to other coaching staff.[136] While the Court did not explicitly clarify whether the lack of neutrality or general applicability was *itself* the "burden," the Court did find that failure to meet "either the neutrality or general applicability test [was] sufficient to trigger strict scrutiny."[137]

Importantly, all the aforementioned post-*Smith* Free Exercise Clause cases have involved state action that targeted or discriminated against religion in some manner, thus placing these cases outside *Smith*, which concerned neutral laws of general applicability. As these cases have indicated, targeting or discriminating against religion triggers strict scrutiny.[138] And, as seen in *Masterpiece Cakeshop*, hostility against religion might directly violate the First Amendment, even without strict scrutiny analysis.[139] Some cases indicated that the discriminatory denial of benefits (the contractual opportunities in *Fulton* or state funds in *Trinity Lutheran*, *Espinoza*, and *Carson*) can trigger strict scrutiny.[140] Others suggested that punishments targeting religious exercise (the

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133 142 S. Ct. 2407, 2415 (2022). The school district disciplined the coach by placing him on administrative leave, prohibiting him from participating in football activities, and giving him a poor performance evaluation that advised against rehiring him. *Id.* at 2418–19.

134 *Id.* at 2422.

135 *Id.* at 2422–23 (emphasis added).

136 *Id.* at 2423. Specifically, the district's performance evaluation advised against rehiring the coach "on the ground" that he (by praying after games) "failed to supervise student-athletes after games." *Id.* (internal quotation marks omitted). The school did not apply this supervisory requirement to other coaching staff, however, since it permitted them to "forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls." *Id.*

137 *Id.* at 2422. The Court did state that a plaintiff could prove a "free exercise violation . . . by showing that a government entity has *burdened* his sincere religious practice *pursuant* to a policy that is not 'neutral' or 'generally applicable.'" *Id.* at 2421–22 (emphasis added) (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879–81 (1990)). But, again, this leaves uncertainty over what exactly the "burden" was—whether it was the discrimination itself (a relative matter involving comparison between the ways that multiple coaching staff were treated), the discipline itself (an absolute matter focused solely on the petitioning coach), or both.

138 *See* Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1997 (2022); *Kennedy*, 142 S. Ct. at 2422.

139 Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018).

140 *See Fulton*, 141 S. Ct. at 1881; *Trinity Lutheran*, 137 S. Ct. at 2021; *Espinoza*, 140 S. Ct. at 2257; *Carson*, 142 S. Ct. at 1997.

imprisonment in *Lukumi*, cease and desist command in *Masterpiece Cakeshop*, and discipline in *Kennedy*) can trigger strict scrutiny too.[141] Despite their application of strict scrutiny, these cases have left uncertainty over the meaning of the "burden" that triggers it. Some cases do not use the word "burden" at all.[142] Others mention, but do not explicitly clarify, what the "burden" is—i.e., whether it is the discrimination qua discrimination (a "relative" matter), or the withholding of benefits or imposition of punishments (a more "absolute" matter).[143]

Collectively, the post-*Smith* cases interpreting the Constitution, RFRA, and RLUIPA, suggest: (1) the weight of penal consequences shapes a burden's substantiality; (2) forcing religious claimants to choose between their faith and a benefit or freedom from punishment can create a burden; and (3) discrimination or hostility against religion triggers strict scrutiny under the Free Exercise Clause, or even directly violates it.

2. *Circuit Splits*

Following *Smith*, circuit courts diverged on aspects of substantial burdens under RFRA and RLUIPA. While many cases abound, this Comment, for economy of space, discusses a select few.

Prior to the passage of RLUIPA and the 2008 Amendment to RFRA, circuit courts diverged on what type of religious exercise needed to be affected for a substantial burden to exist. On the one hand, the Tenth Circuit suggested that the religious exercise affected needed to be central or fundamental to the claimant's exercise of religion.[144] For example, as Gabrielle Girgis points out, in *Werner v. McCotter*, the Tenth Circuit ruled that a prison had substantially burdened a Native American prisoner's religion by refusing him access to a sweat lodge and medicine bag, items that were "central" to the prisoner's exercise of his faith.[145] The court held, "[t]o exceed the 'substantial burden' threshold" under (the pre-2008) RFRA, the challenged state action "must significantly inhibit or constrain

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[141] *See Lukumi*, 508 U.S. at 546; *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring); *Kennedy*, 142 S. Ct. at 2422.

[142] *See generally, e.g.*, *Carson*, 142 S. Ct. 1987.

[143] *See supra* note 137 and accompanying text.

[144] *See* Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995); Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1761–62 (2020).

[145] 49 F.3d at 1480–81; Girgis, *supra* note 144, at 1762.

conduct . . . that manifests some *central* tenet of a prisoner's individual beliefs."[146]

Other circuits focused not only on the centrality of the religious conduct affected, but also on the conduct's *nature*, emphasizing that the conduct needed to be mandated or prohibited by the claimant's religion.[147] For example, the Ninth Circuit in *Stefanow v. McFadden* found no burden under (the pre-2008) RFRA because the appellant, a prisoner, had not shown that the state's confiscation of a religious book that had been sent to him "prevent[ed] him from engaging in conduct or having a religious experience that his faith *mandate*[*d*]."[148] As the court reasoned, the appellant did "not contend that his Christian Identity religion *require*[*d*] him to read" the confiscated book.[149]

Additionally, circuits have split over the effect that a law must have to impose a "substantial" burden on religious exercise.[150] For example, as Professor Mark Strasser highlights, in *Civil Liberties for Urban Believers v. City of Chicago*, a case in which churches alleged that a city's zoning ordinance violated RLUIPA, the Seventh Circuit held that a land use regulation "imposes a substantial burden on religious exercise" under RLUIPA when it "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . *effectively impracticable*."[151] As the court emphasized, a lower threshold wherein "the slightest obstacle to religious exercise incidental to the regulation of land use . . . could then constitute a burden sufficient to trigger" strict scrutiny, would "render meaningless the word 'substantial.'"[152]

In contrast, in *Midrash Sephardi, Inc. v. Town of Surfside*, the Eleventh Circuit explicitly declined to adopt the Seventh Circuit's definition of substantial burden in *Civil Liberties for Urban Believers*.[153] While the court agreed that a "'substantial burden' require[d] something more than an incidental effect on religious exercise," it opted for a standard lower than that of the Seventh

146 *Werner*, 49 F.3d at 1480 (emphasis added).

147 *See* Girgis, *supra* note 144, at 1762–63; Knapp, *supra* note 72, at 285–86, 286 n.180 (discussing how the Fourth, Ninth, and Eleventh Circuits defined substantial burden in a way that only provided free exercise protections for practices *required* by a claimant's religion).

148 103 F.3d 1466, 1471 (1996) (emphasis added).

149 *Id.* (emphasis added).

150 *See* Strasser, *supra* note 92, at 679–83 (discussing several cases representative of the circuit split over the meaning of substantiality). This and the next paragraph draw upon two cases and several key case quotations that Strasser selected.

151 342 F.3d 752, 755, 759–61 (7th Cir. 2003) (emphasis added); *see* Strasser, *supra* note 92, at 680–81.

152 *C.L. for Urb. Believers*, 342 F.3d at 761; *see* Strasser, *supra* note 92, at 681.

153 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

Circuit.[154] As the *Midrash* court held, a substantial burden under RLUIPA "is akin to *significant pressure* which directly coerces the religious adherent to conform his or her behavior accordingly."[155] The court did *not* mention that the pressure had to render religious exercise effectively impracticable.[156]

Even the few cases surveyed in this subsection have suggested that circuit courts have differed on what type of religious exercise must be affected for there to be a substantial burden, and on the impact of government policy necessary for the burden to be substantial.

II. MAPPING THE SUBSTANTIAL BURDEN TERRAIN

Using Part I's precedent on burdens under the Free Exercise Clause, as well as post-*Smith* precedent on burdens under RFRA and RLUIPA, Part II maps the substantial burden landscape: Section A maps out different approaches to "burden;" and Section B, "substantiality."

A. Burdens

First, the types of burden on religious exercise that have existed can be broadly categorized into two buckets: (1) coercion or pressure; and (2) hindrance or prevention.[157] Under the coercion or pressure conception of burden, the state imposes a cognizable burden on religious exercise when it imposes consequences for exercising one's faith.[158] In some cases, consequences have taken the shape of penalties—fines (*Hobby Lobby* and *Little Sisters of the Poor*), criminal sanctions (*Smith* and *Yoder*), and serious disciplinary action (*Holt*).[159] Where the state specifically targeted religion, consequences took the shape of fines and imprisonment (*Lukumi*), costs of changing company training and

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[154] *Compare id.*, *with C.L. for Urb. Believers*, 342 F.3d at 759–61. *But see* Strasser, *supra* note 92, at 681–82 (explaining that although the Eleventh Circuit's "significant pressure" standard seemed less demanding than the Seventh Circuit's standard, the Eleventh Circuit still interpreted its standard in a much more demanding manner that one might have expected).

[155] *Midrash*, 366 F.3d at 1227 (emphasis added).

[156] *See id.*

[157] *See generally* Knapp, *supra* note 72, at 265 (explaining a "coercion test" and a "substantial impacts test"); Girgis, *supra* note 144, at 1761 (discussing three tests: a "religious substantiality," a "severe penalty," and a "pressure" test).

[158] *See* Knapp, *supra* note 72, at 265; Girgis, *supra* note 144, at 1761.

[159] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2389 (2020) (Alito & Gorsuch, JJ., concurring); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990); Wisconsin v. Yoder, 406 U.S. 205, 207 n.2 (1972); Holt v. Hobbs, 574 U.S. 352, 361 (2015).

policy (*Masterpiece Cakeshop*), and school district disciplinary action (*Kennedy*).[160]

Second, the consequences a state imposes upon religious exercise may not be direct punishments, but, instead, the withholding or loss of benefits, privileges, or rights.[161] In cases involving neutral laws of general applicability, these kinds of consequences have included the withholding of unemployment benefits (*Sherbert*, *Thomas*, *Hobbie*).[162] In cases where the state targeted a religious group, or religion in general, these non-punitive penalties have included disqualification from a political office (*McDaniel*), the state's refusal to contract (*Fulton*), and the withholding of state funds or tuition assistance for religious schools (*Trinity Lutheran*, *Espinoza*, and *Carson*).[163] Indeed, some courts have refused to recognize the denial of benefits alone as sufficient to constitute a burden: the *Roy* Court refused to acknowledge that the state's denial of welfare benefits burdened religious exercise, and the *Robison* Court questioned whether the withholding of educational benefits to conscientious objectors generated a burden at all.[164]

Third, in some cases, courts have recognized that a burden might exist in the shape of impact (and not necessarily coercion). As the Seventh Circuit held, land use regulations under RLUIPA impose a burden on a religious group's free exercise by rendering the practice of religion "effectively impracticable" (*Civil Liberties for Urban Believers*).[165] The Eleventh Circuit, while also using the coercion-evoking language of "pressure," suggested that a burden could exist under RLUIPA when the state's zoning ordinances made religious practice significantly more difficult (*Midrash*).[166] Sadly, the *Lyng* Court did not acknowledge that destructive harm outside the shape of coercion could still constitute a burden.[167]

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[160] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 549 (1993); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1726 (2018); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2418–19 (2022).

[161] *See generally* Girgis, *supra* note 144, at 1772 (discussing "indirectly punitive" burdens).

[162] Sherbert v. Verner, 374 U.S. 398, 401 (1963); Thomas v. Rev. Bd. of the Ind, Emp. Sec. Div., 450 U.S. 707, 709 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 138–39 (1987).

[163] McDaniel v. Paty, 435 U.S. 618, 621, 626 (1978); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875–76 (2021); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017, 2022 (2017); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254, 2260 (2020); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1997 (2022).

[164] Bowen v. Roy, 476 U.S. 693, 704 (1986); Johnson v. Robison, 415 U.S. 361, 385 (1974).

[165] C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 761 (2003).

[166] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (2004).

[167] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

Finally, a host of free exercise cases from *Lukumi* to *Kennedy* all illustrate that discrimination against a religion, or against religion in general, is sufficient to trigger strict scrutiny (or directly violate the Free Exercise Clause, as shown in *Masterpiece Cakeshop*).[168] In these cases, the Court did not explicitly equate discrimination to the burden that a religious entity experiences; in fact, in *Fulton*, the Court concluded a "burden" existed *before* launching into discrimination analysis.[169] Yet, since religious discrimination triggers strict scrutiny under the Free Exercise Clause, such discrimination should be kept in the background of a conceptual map on burdens (which also trigger strict scrutiny).

B. Substantiality

Over the past few decades, two broad kinds of approaches to substantiality analysis have emerged: approaches that examine (1) the *consequences* attached to a claimant's exercise of her faith; or (2) the importance or nature of the *religious exercise* affected by the challenged government conduct.

First, consequence-focused assessments of substantiality have examined the weight of the penalties prescribed for religiously motivated conduct. In *Hobby Lobby* and *Little Sisters of the Poor*, Justice Alito suggested that the size of the monetary penalty made the burden imposed upon the petitioners substantial.[170] In *Holt*, the Court suggested that the type of penalty—"serious disciplinary action"—contributed to the burden's substantiality.[171] Even when a religious claimant faced a loss of benefits (as opposed to the threat of sanctions), courts have considered the weight of that loss in their burden analysis. In *Sherbert*, the Court noted that an interest in government "benefits" could be of "sufficient *substance* to fall within the protection . . . afforded by the Due Process Clause."[172]

Circuit courts have factored in the preventative *impact* of state action to assess substantiality—whether land use requirements rendered religious practice "effectively impracticable" (*Civil Liberties for Urban Believers*), or formed

[168] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993); *Fulton*, 141 S. Ct. at 1878, 1881; *Trinity Lutheran*, 137 S. Ct. at 2021; *Espinoza*, 140 S. Ct. at 2257; *Carson*, 142 S. Ct. at 1997; Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1732 (2018).

[169] *Fulton*, 141 S. Ct. at 1876.

[170] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2389 (2020) (Alito & Gorsuch, JJ., concurring).

[171] Holt v. Hobbs, 574 U.S. 352, 361 (2015).

[172] Sherbert v. Verner, 374 U.S. 398, 405–06 (1963) (emphasis added) (quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960)).

"significant pressure" for a religious adherent to change their behavior (*Midrash*).[173]

Second, considerations of substantiality that focus on religious exercise have examined the weight or nature of the exercise affected: in *Yoder*, the Court highlighted that the choice to withhold children from secondary schooling was "basic," "mandated by," and "fundamental" to the Amish religion; in *Sherbert*, the Court acknowledged that a "cardinal principle" of the appellant's faith was affected; in *Lukumi*, the Court acknowledged that animal sacrifice was the "central element" of the Santeria church's worship service.[174] Moreover, following *Smith* (and before the passage of the 2008 Amendment to RFRA), circuit courts also considered the centrality of the religious exercise affected when considering whether a statutory burden was substantial. In *Werner*, the Tenth Circuit acknowledged that the objects to which a prisoner was refused access were "central" to his faith.[175]

Courts considered not only the centrality, but also the nature of the religious conduct affected. In *Thomas*, the Court recognized a burden when "the state condition[ed] receipt of an important benefit upon conduct *proscribed* by a religious faith" or denied the benefit "because of conduct *mandated* by religious belief."[176] In *Stefanow*, the court emphasized that the religion of a prisoner did not *require* him to read a religious book confiscated by the state.[177]

C. A Visual Taxonomy

Table 1 below charts the definitions of substantial burden manifested across the past few decades. Other cases abound, but for simplicity's sake, Table 1 only charts cases mentioned in Parts I and II. For many of Table 1's cases, the court did in fact consider in its burden analysis the factors listed in the case's row and column. In other cases, the fact pattern fit into Table 1's x-y intersection, but the court did not explicitly consider both or any of the relevant row and column's factors. For example, in *McDaniel*, though disqualification of the right to seek office was a burden falling within the "Withholding of Benefits, Privileges, or Rights" column, the Court did not explicitly consider the importance of this right

[173] C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 761 (2003); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (2004).

[174] Wisconsin v. Yoder, 406 U.S. 205, 215–18 (1972); *Sherbert*, 374 U.S. at 405–06; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

[175] Werner v. McCotter, 49 F.3d 1476, 1479–80 (10th Cir. 1995).

[176] Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981) (emphasis added).

[177] Stefanow v. McFadden, 103 F.3d 1466, 1471 (1996).

within a framework of substantiality analysis.[178] Finally, in other cases, the fact pattern fit into Table 1's x-y categorization, but the court recognized no burden.

Importantly, as cases such as *Lukumi*, *Trinity Lutheran*, *Masterpiece Cakeshop*, *Espinoza*, *Fulton*, *Carson*, and *Kennedy* all illustrated, religious discrimination can trigger strict scrutiny or directly violate the Free Exercise Clause.[179] Yet, Table 1 does not include religious discrimination as a "burden" because this Comment primarily concerns substantial burdens created not by laws targeting religion, but by neutral laws of general applicability in line with *Smith*. Yet, to better illustrate what a "burden" means, Table 1 still draws from the fact patterns of these cases.

Table 1: A Map of Burdens and Substantiality

		Burden		
		Coercion or Pressure		Preventative Impact
		Penal or Remedial Consequences	Withholding of Benefits, Privileges, or Rights	
Substantiality	Consequence-Focused	*Hobby Lobby* and *Little Sisters of the Poor* (fines for non-compliance) *Holt* (disciplinary action for non-compliance) *Masterpiece Cakeshop* (forced company training and policy changes) *Kennedy* (school district discipline)	*Sherbert*, *Thomas*, and *Hobbie* (denial of unemployment benefits) *Robison* (denial of educational benefits) (no burden recognized) *Roy* (denial of welfare benefits) (no burden recognized) *McDaniel* (disqualification from running for office) *Trinity Lutheran*, *Espinoza*, and *Carson* (denial of funds or financial aid for schools)	*Civil Liberties for Urban Believers* (land use requirements rendering religious practice "effectively impracticable") *Midrash* (land use requirements resulting in "significant pressure")

178 *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978).
179 *See supra* note 168 and accompanying text.

				Fulton (state's refusal to further contract with religious entity)	
	Religious Exercise-Focused	Centrality of Religious Exercise	*Yoder* (fines and fees for the central practice of withholding children from secondary school) *Lukumi* (fines and criminal sanctions for animal sacrifice central to Santerian worship)	*Sherbert* (unemployment benefits conditioned upon violation of cardinal faith principle)	*Werner* (prisoner refused access to items central to faith) *Lyng* (destruction of forest important to Native religious practice) (no burden recognized)
		Nature of Religious Exercise		*Thomas* (conditioning unemployment benefits upon conduct prescribed by religion; denying benefits because of conduct mandated by religion)	*Stefanow* (prisoner denied a book that his religion did not mandate he read) (no burden recognized)

III. THE PROBLEMS WITH EXISTING DEFINITIONS

The definitions of "burden" and "substantial" fleshed out in Parts I and II's case law analysis present problems for both the courts and the religious exemption claimants that come before them. Part III explains these problems, paving the way for Part IV to propose a definitional framework that better addresses them. While Section A speaks to issues with the ways that courts have defined a "burden," Section B discusses problems with how courts have considered "substantiality."

A. The Shape of a Burden on Religious Exercise

Jurisprudence confining the shape of a burden on religion to "coercion" fails to acknowledge that noncoercive government action can violate the Free Exercise Clause by effectively prohibiting practitioners from practicing their faith. *Lyng* was the quintessential example of this.[180] There, as Justice O'Connor blatantly explained, even if the Court were to assume that the government's proposed road project would "virtually *destroy* the . . . Indians' ability to practice their religion," no cognizable burden existed because the state was not "coercing" the respondents to violate their beliefs.[181] The irony in Justice O'Connor's coercion-only definition of burden was painful to see. Under this definition, if the state had merely *threatened* to destroy the ability of the respondents to practice their religion, the state could have generated a burden-triggering strict scrutiny; yet, if the state actually *destroyed* the capacity of Native American tribes to exercise their faith, no burden on religion existed.

The troubling irony becomes even clearer when *Lyng* is juxtaposed with cases such as *Sherbert* or *Trinity Lutheran*. In these latter cases, the state did not directly punish people for practicing their faith—instead, it merely withheld benefits, an action that the Court found sufficient to constitute a burden on religion.[182] The *Lyng* Court, by confining burden to the shape of coercion, ended up subjecting the denial of benefits to greater scrutiny than outright destruction.[183]

[180] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449, 451 (1988).

[181] *Id.* at 451–52 (emphasis added).

[182] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017).

[183] Moreover, by confining the definition of a "burden" to coercion of a person to act against her beliefs, the Court misses the reality that religions in today's pluralistic landscape may not necessarily center on belief, conscience, or spirituality. *See generally* Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American*

B. *Judging Substantiality*

Existing assessments of a burden's substantiality have their problems too, whether the court derives substantiality from the importance of the religious exercise at issue, or from the consequences that religious practitioners incur for exercising their faith. While the first subsection discusses problems with assessments of substantiality that focus on the religious exercise affected, the second subsection critiques substantiality assessments that focus on the consequences attached to practicing one's faith.

1. *Substantiality Focused on Religious Exercise*

When courts decide whether a substantial burden exists based on their judgments about the centrality of the religious exercise burdened, a few problems emerge. First, as a matter of common sense, when compared to religious institutions or leaders themselves, courts have much less expertise to adjudicate religious questions: judges specialize in understanding and applying the law, not in deciding the importance of a particular religious practice to a person's religion.

The problems, however, go beyond relative expertise. When judges decide on or second-guess the centrality of a claimant's religious exercise, they risk violating the Establishment Clause. Under *Lemon v. Kurtzman*, the Establishment Clause prohibits the government from becoming excessively entangled with religion.[184] Courts may run the risk of excessive entanglement by interpreting theologically loaded questions, such as the importance of a religious tenet to a person's religion.

Notably, just this past year, the Court in *Kennedy* powerfully declared the *Lemon* test to be "long ago abandoned,"[185] indicating that *Lemon* was finally overruled.[186] Yet, even cases apart from *Lemon* suggest that courts may run the risk of violating the Establishment Clause by interpreting religious questions. In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment*

Religion, 30 J.L. & RELIGION 36 (2015) (explaining how substantial burden analysis has been clouded by the misrecognition of Native American religions as simply spirituality).

[184] *See* 403 U.S. 602, 612–13 (1971), *abrogated by* Kennedy v. Bramerton Sch. Dist., 142 S. Ct. 2407 (2022); *see also* Aguilar v. Felton, 473 U.S. 402, 409 (1985) ("[T]he supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine.").

[185] *Kennedy*, 142 S. Ct. at 2427.

[186] The dissent in *Kennedy* interprets the majority opinion as officially overruling *Lemon*. *See id.* at 2434 (Sotomayor, J., dissenting) ("The Court overrules *Lemon v. Kurtzman*, . . . and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision.").

Opportunity Commission, the Equal Employment Opportunity Commission ("EEOC") sued a Lutheran church and school, the petitioner, for allegedly firing one of its employees in retaliation for the teacher's threat to file a suit under the American Disabilities Act.[187] Accepting that the employee was one of the petitioner's "ministers,"[188] the Court ruled against the EEOC, reasoning (without ever mentioning *Lemon*) that the Establishment Clause "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers."[189] In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court extended the "ministerial exception" presented in *Hosanna-Tabor*, and emphasized that "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[190] If state interference with matters of church employment, government, and doctrine runs afoul of the First Amendment, judicial interference on the weight or centrality of a doctrine may run afoul of the First Amendment as well.

Finally, when courts require that the religious exercise affected be "central" or "mandatory" for a substantial burden to exist, they adjudicate free exercise cases in a manner that fails to comport with the language of the First Amendment. The Free Exercise Clause does not forbid the government from prohibiting the "cardinal" or "obligatory" aspects of one's religion; instead, it simply forbids the state from prohibiting "free exercise," period.[191] If substantial burdens are to comport with the text of the Constitution, a substantial burden on *any* form of religious exercise should suffice.

Indeed, this is why it would be problematic *even if* courts were to show tremendous deference to the religious practitioner when deciding whether the religious exercise the practitioner claimed was central or obligatory.[192] By showing deference, courts might mitigate issues stemming from their relative lack of theological expertise; yet, the very requirement that the religious exercise burdened be "central" or "obligatory" can stand in conflict with the

[187] 565 U.S. 171, 180 (2012).

[188] *Id.* at 190–92 (explaining why the discharged employee qualified as a minister).

[189] *Id.* at 181.

[190] 140 S. Ct. 2049, 2055 (2020) (quoting Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952)).

[191] U.S. CONST. amend. I, § 1, cl. 1.

[192] For scholars who propose such deference, see Girgis, *supra* note 144, at 1778–79, who suggests that courts need only determine—*with deference*—whether religious claimants *believe* their affected exercise is mandatory or important, and that courts need not themselves determine the importance or obligatory nature of the exercise.

constitutional text, which does not differentiate between central and ordinary, obligatory and permissible exercises of one's faith.

2. *Substantiality Focused on Consequence*

While some approaches to substantiality focus on the weight or nature of the religious exercise affected, others focus on the *consequences* faced by religious adherents who refuse to abide by a legal requirement or prohibition. The Court majority employed the latter approach in *Hobby Lobby* and *Holt*, by factoring in the monetary weight and disciplinary nature of penalties to decide that the burden imposed upon the religious claimants was "substantial."[193]

While this approach avoids the dangers of judges making theological determinations, it still runs into challenges. For one, it is unclear what amount or type of penalty is substantial. In *Hobby Lobby*, the penalty of $1.3 million per day or $475 million per year seemed gigantic—but should courts consider the firm's gross profit per day or year in determining substantiality?[194] In *Holt*, what threshold of "disciplinary action" would be serious enough to constitute a substantial burden?[195]

But even apart from the issue of line-drawing, a consequence-based assessment of substantiality seems unfaithful to the constitutional text. If the state officially bans the free exercise of a religion—i.e., uses its monopoly over violence to forbid some form of religious exercise—should the size of the penalty that the state attaches to a violation of the ban still matter? Whether the state fines an organization $1.3 million per day or $1,000 per day, it still uses its coercive authority to "prohibit" some sort of religious exercise. The size of the penalty does not make a difference.

Moreover, issues also arise in cases where the consequence is not a criminal penalty, but, instead, the deprivation of a benefit, privilege, or right. When a religious person is unable to access unemployment benefits (e.g., *Sherbert*) or education benefits (e.g., *Robison*),[196] is he or she really "prohibited" from exercising his or her faith? Even in cases where the law is not neutral and generally applicable, but rather targets a religion, or religion in general, the same question arises. Is disqualifying someone from running for office (e.g.,

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[193] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); Holt v. Hobbs, 574 U.S. 352, 361 (2015); *see also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2389 (2020) (Alito & Gorsuch, JJ., concurring).

[194] *See Hobby Lobby*, 573 U.S. at 691.

[195] *See Holt*, 574 U.S. at 361.

[196] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); Johnson v. Robison, 415 U.S. 361, 385 (1974).

McDaniel) or discontinuing contracts (e.g., *Fulton*) because of one's religion,[197] the same as *prohibiting* one from practicing one's faith? Yes, the state may treat the religious adherent differently from others and thus violate equal protection provisions, but cannot discriminatory treatment (a seemingly relative matter) fall short of a "prohibition" (a seemingly absolute matter)?

Finally, issues also arise when the measurement of substantiality is grounded in the size of the impact of a government action. Even if courts reject *Lyng* and hold that preventative impact outside the shape of coercion *can* still constitute a burden on religion,[198] questions remain. Courts will need to decide whether a "substantial" burden on religion created through the state's preventative impact entails only state action that renders religious exercise "effectively impracticable" (*Civil Liberties for Urban Believers*), or also entails state action that merely renders such exercise significantly more difficult (*Midrash*).[199]

Indeed, definitions of substantiality grounded in the state's punishments or withholding of benefits, or in the impact of a government action, all need to establish a threshold for when those consequences or impacts arise to the level of a prohibition. This Comment does not purport to solve all the challenges thus far outlined; however, it offers a framework that provides a meaningful start.

IV. A DEFINITIONAL FRAMEWORK STARTING FROM "TO PROHIBIT"

In light of the uncertainty and challenges with existing definitions of "substantial burden," this Comment proposes a definition starting from the operative verb in the First Amendment Free Exercise Clause itself: to prohibit. What does "to prohibit" mean? What did the Framers intend to forbid when they stated that Congress shall pass no law "prohibiting" the free exercise of religion?[200] To answer these questions, this Comment draws heavily from Justice Alito's concurrence in *Fulton*.[201] While Subsections A and B discuss the meaning of the word "prohibit" and the history surrounding the Free Exercise Clause, Subsections C and D explain this Comment's definitional framework.

Importantly, the framework provides a way for adjudicating burdens when *neutral, generally applicable* laws affect religion; in other words, the framework

[197] *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874–76 (2021).

[198] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

[199] C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 761 (2003); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (2004).

[200] U.S. CONST. amend. I, § 1, cl. 1.

[201] 141 S. Ct. at 1883 (Alito, J., concurring).

is meant to apply to cases that fall within *Smith*. Thus, the framework does not replace, but rather complements, cases falling outside of *Smith*—i.e., cases where the government targeted religion and the Court found that discrimination against religion triggered strict scrutiny or directly violated the Free Exercise Clause.[202] This Comment supports a constitutional jurisprudence where *both* (1) the burdens outlined in this Comment's definitional framework *and* (2) discrimination against religion, trigger strict scrutiny.

A. *The Normal and Ordinary Meaning of the Word "Prohibit"*

Like Justice Alito in *Fulton*, this Comment starts from the "normal and ordinary meaning" of the Free Exercise Clause's verb, "to prohibit."[203] As Justice Alito explained, to prohibit means essentially the same as it did in 1791.[204] In 1791, "to prohibit" meant either (1) to *forbid* (to bar, to interdict by authority) or (2) to *hinder* (to prevent, to preclude, to keep from).[205] To reach this twofold definition, Justice Alito relied on a plethora of dictionaries, including, amongst others: the first edition of Johnson's *A Dictionary of the English Language* (published in 1755); the twenty-second edition of Bailey's *Universal Etymological English Dictionary* (published in 1770); and the second edition of Ash's *The New & Complete Dictionary of the English Language* (published in 1795).[206] As Justice Alito continued, once one combined the meaning of "prohibiting" with the surrounding text of the First Amendment, one could conclude that "the ordinary meaning of 'prohibiting the free exercise of religion' was (and still is) forbidding or hindering unrestrained religious practices or worship."[207]

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[202] *See supra* note 168 and accompanying text.

[203] *Fulton*, 141 S. Ct. at 1895 (Alito, J., concurring).

[204] *Id.* at 1896.

[205] *Id.* at 1896 & n.30 (quoting 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (Johnson 1755)).

[206] *Id.* at 1896 n.30. Indeed, to arrive at his twofold definition of the word "to prohibit," Justice Alito consulted a multitude of dictionaries in *Fulton*:

> See also N. Bailey, Universal Etymological English Dictionary (22d ed. 1770) (Bailey) ("to forbid, to bar, to keep from"); T. Dyche & W. Pardon, A New General English Dictionary (14th ed. 1771) (Dyche & Pardon) ("to forbid, bar, hinder, or keep from any thing"); 2 Johnson (6th ed. 1785) ("1. To forbid, to interdict by authority . . . . 2. To debar; to hinder"); 2 J. Ash, The New & Complete Dictionary of the English Language (2d ed. 1795) (Ash) ("To forbid, to interdict by authority; to debar, to hinder"); 2 N. Webster, An American Dictionary of the English Language (1828) (Webster) ("1. To forbid; to interdict by authority; . . . 2. To hinder; to debar; to prevent; to preclude"); 2 J. Boag, The Imperial Lexicon of the English Language 275 (1850) (Boag) ("To forbid; to interdict by authority. To hinder; to debar; to prevent; to preclude").

Id.

[207] *Id.* at 1896.

Moreover, the absence of words surrounding the verb "prohibiting" illuminated what the Free Exercise Clause did not mean. As Justice Alito emphasized, the First Amendment did not qualify itself with a provision on the general applicability of the law forbidding or hindering worship.[208] Contrary to the interpretation of the Free Exercise Clause in *Smith*, the Clause itself did not assert that the state could not forbid or hinder religious practice *unless* it forbade or hindered every group equally; the text was not simply an anti-discrimination provision.[209] Also, the Free Exercise Clause did not qualify itself by stating that the state could not prohibit the free exercise of the central or obligatory tenets of one's religion.[210] Instead, the language of the Free Exercise Clause prohibited the state from forbidding or hindering the free exercise of religion, *even if* the state did so in a neutral and generally applicable manner, and *even if* the religious exercise prohibited was not central or mandatory in one's religion.[211]

B. The Constitutional History Surrounding the Text

Second to the normal and ordinary meaning of the Free Exercise Clause, the Clause's surrounding history can also shed light on the definition of "prohibit." Legal historian John Witte, Jr. has presented and analyzed numerous drafts of the Free Exercise Clause leading up to its final version.[212] The alternative, and ultimately rejected, words can illuminate what "prohibiting" means.

Indeed, the individual states and the House of the First Congress proposed a spectrum of verbs concerning the government's relationship with religion. Earlier drafts of the Free Exercise Clause stated that "Congress was not to 'touch,' 'infringe,' 'abridge,' 'violate,' 'compel,' or 'prevent' the exercise of religion or the rights and freedom of conscience."[213] Moreover, twenty earlier drafts of the religion clauses contained provisions protecting the rights of conscience.[214] In the final draft, however, the Free Exercise Clause ultimately

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[208] *Id.* at 1896–97 ("The language of the Clause does not tie this right [to free exercise of religion] to the treatment of persons not in this group.").

[209] *Id.* An anti-discrimination provision in this context means that the government "cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct." *Id.* at 1897.

[210] *See* U.S. CONST. amend. I, § 1, cl. 1.

[211] *See id.*

[212] John Witte, Jr., *Back to the Sources? What's Clear and Not So Clear About the Original Intent of the First Amendment*, 47 BYU L. REV. 1303, 1306 (2022).

[213] *Id.* at 1351 (referencing Draft Nos. 2, 6, 11–13, 15–18, 20–23 of the establishment clause).

[214] *Id.* at 1351–52.

stated that Congress was not to "prohibit" the free exercise of religion; the earlier verbs and the provisions on conscience were dropped.[215]

On the one hand, the use of the verb "prohibit," instead of the other verbs that afforded greater protections of religion from the state, may suggest that the Framers intended only meager constitutional protections for religion—i.e., that all conduct short of outright prohibition was constitutionally permissible.[216] The Framers—as "minimalist" readers of the word "prohibit" might argue—*could* have used verbs such as "touch" or "abridge," but instead chose to use "prohibit."[217]

On the other hand, it is dangerous to read too much into the Framers' choice to not use other terms. As Professor Witte explains, a minimalist conception of the word "prohibit" is difficult to reconcile with the premium that states placed on protecting religious activity in their drafts of the religion clauses.[218] Moreover, as Professor Michael McConnell has illustrated, dictionaries and political texts of the eighteenth century often interchanged the verb "prohibiting" with other verbs such as "infringing," "restraining," or "abridging."[219] The interchangeability of these verbs suggests that there may be a grey area of actions outside of the definition of "prohibit" itself—a family of similar actions—that the Framers intended to fall under the coverage of the Free Exercise Clause.[220] As Witte writes, "[i]t was left an open question whether the First Amendment forbids government laws and conduct that fall short of outright prohibition of religious exercise."[221]

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215 *Id.* at 1351.

216 *Id.* at 1365–66.

217 *Id.* at 1365.

218 *Id.* at 1366 ("Too minimal a reading of the free exercise clause is hard to square with the widespread solicitude for rights of conscience and free exercise reflected in the First Congress's debates. Every one of the ten state drafts of the religion clauses included such protections.").

219 *Id.* at 1366–67 (citing Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1486–88 (1990)). Witte points to the preamble of the Virginia convention's draft for proffered amendments, which stated "that 'essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, *or* modified, by any authority.'" *Id.* at 1367 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 208, 1:360 (Jonathan Elliot ed., 1836)). As Witte explains, the point of listing all these verbs, according to James Madison, was to emphasize "that the liberty of conscience and the freedom of press were equally and completely exempted from all authority whatever of the United States." *Id.* at 1367 (quoting Report on the Virginia Resolutions (January 7, 1800), *in* THE FOUNDERS' CONSTITUTION 5:141, 146–47 (Philip B. Kurland & Ralph Lerner eds., 1987)).

220 *See id.* at 1351–52.

221 *Id.* at 1351.

Given that history does not clearly suggest otherwise, courts should assume that "prohibit" meant its normal and ordinary meaning at the time of America's founding, the late eighteenth century. And in eighteenth century parlance, as Justice Alito explained, "to prohibit" ordinarily had two meanings—to "forbid" or to "hinder."[222] This Comment thus proposes a definition of "substantial burden" that starts from these two areas of action: to forbid and to hinder. This Comment labels the first camp of actions de jure prohibitions; the second area, de facto prohibitions.

C. De Jure Prohibitions

The first area of state actions that would constitute a substantial burden would be any de jure prohibition—any prohibition, by law, of religious exercise. A legal prohibition would occur when the government uses its legal authority to forbid the exercise of religion. The state might prohibit religious exercise through a command to not do something, or a requirement to do something.[223]

A de jure prohibition can occur under four alignments of state action and religious exercise: specifically, (1) when the state forbids exercise required by one's religion; (2) when the state forbids conduct that is not required by one's religion, but still constitutes the *exercise* of one's religion; (3) when the state requires activity that one's religion prohibits—i.e., that the exercise of one's religion would not permit; and (4) when the state requires something that one chooses (but is not required) to forgo because of her religion—i.e., when one's affirmative choice to *not* do an activity required by law, constitutes an exercise of his or her religion.[224]

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[222] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring).

[223] Indeed, a requirement can always be framed as a prohibition: requiring someone to do something is the same thing as *prohibiting* someone from not doing what is required. Both actions involve using the coercive power of the state to compel someone to not do something.

[224] One might ask, if the reason why courts should not assess the centrality or weight of the religious exercise affected is that the language of the First Amendment does not differentiate between central and peripheral religious exercise, then why should courts examine whether the affected exercise is *forbidden, permitted, or required*? This Comment's response is twofold. First, drawing from Gabrielle Girgis, this Comment suggests that courts need not actually determine whether the religious exercise affected was actually forbidden, permitted, or required, but can deferentially examine whether the claimant was *sincere* in claiming that a religious act was forbidden, permitted, or required. *See* Girgis, *supra* note 144, at 1778–79 (discussing deference to the claimant's assertions about the importance of the religious exercise affected). Second, the court needs to consider the sincerity of the claimant's take on the nature of the religious activity affected, because doing so is critical for determining whether there is actually a "prohibition" of the free exercise of religion. If a state law prohibits something that one's religion also prohibits, then there is *no conflict* between the state's actions and the claimant's religion—it makes little sense to say that such a law "prohibits" the free exercise of one's religion. There must be a "conflict" between the prohibition/requirement of the state's law, and the obligatory/permissible/required nature of the religious exercise at issue.

Importantly, when analyzing whether a prohibition de jure exists, courts should not, and need not, examine whether the religious exercise affected is central or peripheral to one's faith. However, they *should* examine whether the conduct affected constitutes the "exercise"—i.e., the practice or performance—of one's religion.[225] Conduct that does not constitute the practice or performance of one's religion does not fall under this definition.[226]

Moreover, unlike courts applying other approaches to "substantiality," courts under this framework need not assess the consequences placed on religious claimants should they exercise their faith against the law. Whenever the state legally bans a religious practice, it already "prohibits" the free exercise of religion, regardless of whether it prescribes fines or imprisonment, large or small, for violations of the ban. Additionally, even if the prescribed penalty for a de jure prohibition is small, the threat, backing, and weight of the state's monopoly over violence behind the law, already places a "substantial" burden upon the religious claimant.

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[225] As Justice Alito explained in *Fulton*, "'exercise' had both a broad primary definition ('[p]ractice' or 'outward performance' [of one's religion]) and a narrower secondary [definition] (an '[a]ct of divine worship whether publick or private')." *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring) (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, AND ILLUSTRATED IN THEIR DIFFERENT SIGNIFICATIONS BY EXAMPLES FROM THE BELT WRITERS (Johnson (1755))). Justice Alito cites the dictionary sources upon which he relies, writing:

> See also Bailey ("to practice"); Dyche & Pardon ("to practice or do a thing often; to employ one's self frequently in the same thing"); 1 Ash ("Practise, use, employment, a task, an act of divine worship"); 2 Johnson (9th ed. 1805) ("Practice; outward performance"; "Act of divine worship, whether publick or private"); 1 Webster ("1. Use, practice; . . . 2. Practice; performance; as the *exercise* of religion . . . 10. Act of divine worship"); 1 Boag 503 ("Use; practice; . . . Practice; performance . . . Act of divine worship").

Id. at 1896 n.31.

[226] Of course, even this inquiry is nebulous. Some people might say that every aspect of their lives constitutes practice or performance of their religion. For example, a religious practitioner might say: "To practice my religion is to honor or follow God in everything I do." Does that mean that any conduct such a person does would be exempt from prohibitions? No—that would truly make everyone "become a law onto himself" or herself. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990). Nonetheless, it is difficult to delineate the appropriate boundary between acts constituting an "exercise" of religion cognizable by the Free Exercise Clause, and other acts merely "motivated" by religion. Perhaps one line might be that an act that constitutes an "exercise" of religion is an action (or omission) whose performance cannot be adequately justified but for reference to the claimant's religion. Many actions—eating, drinking, getting a job, etc.—are explainable by other motives shared by religious and non-religious people alike: one is hungry, thirsty, must survive, or make a living. But then there are actions that, but for one's faith, could not be adequately explained—e.g., choosing to not work on Saturdays or choosing to not send one's kids to school. *See generally* Sherbert v. Verner, 374 U.S. 398, 399–401 (1963); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). Since religion is a *primary* or *necessary* explanation behind the performance of these actions, it makes sense to say that these actions constitute an "exercise" of religion.

What might a de jure prohibition look like in practice? The following four subsections provide illustrations, using both hypothetical facts and facts from cases discussed in Parts I and II.

1. Forbidding Exercise Required by Claimant's Religion

Amongst other examples, *Holt* illustrates how a de jure prohibition might prohibit exercise that a claimant finds to be required by his or her religion. In *Holt*, the state (specifically, the prison) officially prohibited inmates from growing beards, but the petitioner (a Muslim inmate) believed that his Islamic faith required him to grow a half-inch beard.[227] In such a case, (1) the state promulgated a rule forbidding the growing of beards and backed the rule with its monopoly over violence; and (2) the affected exercise constituted an obligatory exercise of the claimant's religion.[228] Here, then, the state's rule against beards would constitute a prohibition de jure subject to strict scrutiny. If courts were to use this Comment's framework, they would examine neither (1) the extent of the consequences that the inmate(s) would face for not abiding by the no-beard requirement, nor (2) whether growing a beard was a central or peripheral part of Islam. The fact that the state officially forbade the growing of a beard would be enough to form a substantial burden.

2. Forbidding Permissible Exercise of Claimant's Religion

A timely example of these types of cases may be religious liberty cases that involve COVID-19 restrictions on worship.[229] For some Christians, gathering together *in person* in a church, to sing, pray, fellowship, or worship, is not necessarily a requirement of their faith.[230] Rather, attending church altogether may simply be a permissible, non-obligatory way—amongst others—of freely expressing one's love for Christ and neighbor. Of course, attending church would constitute an "exercise" of religion—a practice or performance of the

[227] Holt v. Hobbs, 574 U.S. 352, 354 (2015).

[228] *Id.*

[229] *See generally* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–69 (2020) (involving the State of New York's COVID-19 restrictions on the abilities of both a Roman Catholic community and an Orthodox Jewish community to attend mass and synagogue, respectively); Tandon v. Newsom, 141 S. Ct. 1294, 1296–98 (2021) (involving the State of California's COVID-19 restrictions on religious exercise); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716–17 (2021) (same).

[230] *See generally* Jeffrey Barrows & Christopher Hook, *A Plea to Our Churches*, CHRISTIAN MED. & DENTAL ASS'NS (Nov. 19, 2020), https://cmda.org/a-plea-to-our-churches/ (emphasizing that church is a "major priority . . . but it should not become an idol by itself," thus indicating that attending church is an important, but not always *required*, exercise of one's religion).

Christian faith.[231] Under a prohibition de jure framework, if New York passed COVID-19 legislation restricting in-person gatherings of more than ten people—thereby forbidding a multitude of church gatherings—New York would be prohibiting the free exercise of religion (i.e., placing a "substantial burden" on religion), and its COVID-19 legislation would be subject to strict scrutiny. This would be the case even for religious litigants who did not feel *obligated* to attend church, but instead, saw church as a permissible way to practice their faith. Of course, the importance of fighting COVID-19 could very well enable New York to pass strict scrutiny, but that discussion exceeds the scope of this Comment's analysis.

3. *Requiring Acts Prohibited by Claimant's Religion*

Hobby Lobby was a prime example of the state requiring an action that a claimant believed was prohibited because of religious reasons. In *Hobby Lobby*, (1) the HHS *required* that several corporations provide health insurance coverage for contraception methods, and (2) the corporate owners believed their faith *prohibited* them from doing so.[232] Requiring the religious claimants to do something their religion prohibited them from doing was the equivalent of prohibiting them from *not* engaging in the required conduct. The choice to *not* engage in the prohibited conduct—i.e., provide a form of insurance coverage—constituted an exercise of religion.

Under a de jure prohibition framework, HHS's requirement for contraception coverage would constitute a substantial burden sufficient to trigger strict scrutiny. In deciding that a burden existed, the Court would analyze neither the (1) weight of the $1.3 million-per-day fines that would need to be paid,[233] nor the (2) importance of not providing the coverage at issue, to the corporate owners' Christian faith. A state requirement that one does what one's religion forbids would be enough to trigger strict scrutiny.

What if the cost imposed were not fines or imprisonment, but the withholding of benefits? The answer depends on whether the state forbade, by law, the claimant from exercising his or her religion. In *Sherbert*, the Employment Security Commission (the "Commission") did not directly require employees to work on Saturdays.[234] The state "requires" a person to do something when it punishes the person—takes away life, liberty, or property—

[231] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1896 & n.31 (2021) (Alito, J., concurring).
[232] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014).
[233] *See id.* at 691.
[234] Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).

for not doing the action the state commands. In *Sherbert,* the Commission did not deprive the appellant of something that she already owned; instead, the Commission conditioned its provision of unemployment benefits on the existence of a "good cause" for the failure to obtain new work, and did not recognize the appellant's choice to observe the Sabbath as a "good cause" reason to refuse otherwise potentially available work.[235] Even if the Commission, all in all, required employees to be willing to work on Saturdays *as a precondition* to receiving unemployment benefits, it would not be accurate to say that the Commission required, by law, all persons to be willing to work on Saturdays. Thus, no prohibition de jure exists.

Still, this does not mean that the claimant would be unable to get an exemption. Importantly, insofar as the state discriminated against religion in its withholding of benefits, the case would then fall outside of *Smith* and this Comment's framework. In line with cases from *Lukumi* to *Fulton*, such discrimination would still trigger strict scrutiny.[236]

4. *Requiring Acts When the Choice to Not Act is an Exercise of the Claimant's Religion*

While no case in Parts I and II of this Comment perfectly aligns with this fourth category of cases, the facts of *Yoder*—if slightly modified—provide a fitting fact pattern. Assume a situation with nearly the same facts as *Yoder*. Say Wisconsin, through its compulsory school-attendance law, requires all families to send their high-school-aged children to high school.[237] Suppose that the religious litigants are an Amish family.[238] However, suppose that the family did not believe that the "tenets of [the] Old Order Amish communit[y]"[239] *required* them to not send their children to school. Rather, imagine that the family decided—as a permissible expression of their faith—to not send their children because by not doing so, they could better push their children to live a purer life uncorrupted by the values spread at school. The act of *not* sending their children to school, though not compelled by faith, would be a free devotional act the family performs to have their children grow closer to God.

In this scenario, Wisconsin's compulsory attendance statute would form a de jure ban (and thus a substantial burden) sufficient to trigger strict scrutiny. The

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[235] *See id.* at 399–401, 399 nn.1–2.
[236] *See supra* note 168 and accompanying text.
[237] *See* Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).
[238] *See id.*
[239] *Id.* at 207–09.

state *requires* an action—sending one's children to school—and the affirmative choice to *not* perform the action, though not compelled by one's religion, still constitutes an exercise of religion, since the choice cannot be adequately explainable but for reference to the Amish family's religion. In determining the existence of a burden, a court using this Comment's framework would not assess the weight of the $5 to $50 fines or the three months of imprisonment that the family could face for exercising its religion.[240] Nor would it assess how "fundamental" the family's act of keeping its children from school was to the Amish faith.[241]

Using the cases and scenarios discussed above, Table 2 provides a visual mapping of the four types of fact patterns where a prohibition de jure might occur.

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240 *See id.* at 207 n.2 (citing WIS. STAT. § 118.15 (5) (1969)).
241 *See id.* at 217–18.

Table 2: When A De Jure Prohibition of Religious Exercise Exists

The Type of Religious Exercise	**The Law of the State**	
	Forbids	Requires
Exercise that one's religion forbids	***No de jure prohibition***	***De jure prohibition exists*** Example: *Hobby Lobby* Does not encompass: *Sherbert*, *Thomas*, *Hobbie*, and *Roy*
Exercise that one's religion permits	***De jure prohibition exists*** Examples: COVID-19 and church in-person worship fact pattern	***De jure prohibition exists*** (when the permissible exercise of one's religion is the affirmative choice to not perform the activity that the state requires) Example: *Yoder* (with modified facts)
Exercise that one's religion requires	***De jure prohibition exists*** Example: *Holt*	***No de jure prohibition***

D. De Facto Prohibitions

"To prohibit" does not only mean "to forbid."[242] As Justice Alito explained, it also means—both today and in 1791—"to hinder."[243] State actions that "hinder" the free exercise of one's religion—i.e., effectively prohibit a person from exercising his or her faith—are what this Comment treats as "de facto prohibitions" that constitute substantial burdens that should trigger strict scrutiny. Two types of scenarios illustrate de facto prohibitions.

242 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring).
243 *See id.*

1. *When the State Destroys Religiously Significant Objects*

The quintessential example of this was *Lyng*, where the government, while not coercing Native American tribes to disavow their religion, proposed a road construction project that would destroy a portion of the National Forest that tribal members needed for their religious practice.[244] To determine whether the road proposal would constitute a de facto prohibition—i.e., a state action that "hindered" free exercise—a court using this Comment's framework would examine factors such as: (1) whether the tribes could still engage in the religious practice served by the forests at issue should the road be built; (2) if so, the costs the tribes would incur for engaging in that practice; and (3) the resources that the tribes possessed relative to those costs. Based on these factors, if the court determined that the construction project would effectively prevent the affected tribes from exercising their religion—i.e., rendered the tribes unable to exercise their religion—there would be a de facto prohibition subject to strict scrutiny.

2. *When the State Effectively Penalizes Religious Activity*

Cases falling in this category could include *Sherbert*, *McDaniel*, or *Fulton*, where the government denies important benefits or rights to a religious adherent in response to her religious conduct.[245] Without legally banning religious activity, the states in these cases still imposed a *loss* upon religious practitioners for exercising their religion, whether that loss was the denial of unemployment benefits,[246] an inability to run for office,[247] or the loss of the opportunity to contract.[248]

To assess whether the government in these cases *effectively* prohibited the free exercise of religion, courts would examine: (1) the weight of these losses and their effects on the practitioner; and (2) the resources possessed by the practitioners to mitigate these losses (e.g., their ability to still find other sources of income or other contracting partners). Based on these factors, courts would determine whether the state rendered the religious practitioner effectively unable to exercise his or her faith. If so, the government's actions would be subject to

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[244] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442–43 (1988).

[245] Sherbert v. Verner, 374 U.S. 398, 403 (1963); McDaniel v. Paty, 435 U.S. 618, 626 (1978); *Fulton*, 141 S. Ct. at 1878, 1881; *see supra* notes 162–163 and accompanying text (discussing fact patterns where the denial of benefits, rights, or privileges are at issue).

[246] *Sherbert*, 374 U.S. at 403, 408.

[247] *McDaniel*, 435 U.S. at 626.

[248] *Fulton*, 141 S. Ct. at 1878, 1881. Of course, *McDaniel* and *Fulton* are slightly different because in these cases, the state targeted religion; however, these cases, like *Sherbert*, still involve the loss of benefits. *See supra* note 245 and accompanying text.

strict scrutiny. Table 3 is a simple diagram of the different types of state action that might constitute a de facto prohibition.

Table 3: When a De Facto Prohibition of Religious Exercise Exists

State Action	
Harms, removes, or destroys a religious resource Example: *Lyng* (destruction of forests)	**Imposes losses upon the practice of one's faith** Examples: *Sherbert* (withholding unemployment benefits); *McDaniel* (inability to run for office); *Fulton* (loss of further chance to contract)

Of course, the elephant in the room is this: what state actions effectively prevent religious adherents from practicing their faith? What level of destruction must the proposed road construction project create to render the tribes "unable" to continue their religious practices? To "effectively prohibit" the claimant's free exercise, must the state render it metaphysically *impossible* for a claimant to exercise her faith? This Comment does not provide a clear-cut answer: indeed, courts will have to exercise discretion. However, as this Comment has illustrated, courts should consider a few factors in making this determination. First, if the government takes away something used in a religious community's practice of faith (e.g., forests in *Lyng*),[249] courts should look at the availability and costs of replacement or alternative ways to continue one's religious practice. Second, if the government imposes some form of a loss, courts should examine the size of the lost benefit, right, or privilege; the impact of the loss on the religious adherent; and the capacity of the religious adherent to recover from the loss while still engaging in the religious practice at issue.

V. MERITS AND OBJECTIONS

A framework of substantial burdens centered around the operative verb "to prohibit" would cover six types of prohibitions (four de jure and two de facto)

[249] *Lyng*, 485 U.S. at 449.

that trigger strict scrutiny. This framework, compared to other definitions of substantial burdens, would be more faithful to the constitutional text and would better mitigate jurisprudential concerns. Sections A and B discuss this framework's relative merits, while Section C responds to possible objections.

A. Adherence to the Constitutional Text

As aforementioned, the Free Exercise Clause does not say that the state cannot forbid religious practice *unless* it forbids every group equally: it simply does not allow the state to prohibit the free exercise of religion, period.[250] This Comment's framework more faithfully recognizes this textual reality than does *Smith*. Whereas *Smith* limits heightened scrutiny to cases where the government burdens religious groups unequally,[251] this Comment's framework also protects religious groups anytime the state "prohibits" free exercise—regardless of how the state treats others.

Second, this Comment's definition of substantial burden—which includes legal bans on any religious exercise regardless of the size of the prescribed penalty—is more faithful to the constitutional verb "prohibit" than are definitions only including legal prohibitions with sufficiently large penalties. Indeed, so long as the state uses its coercive authority to *ban* some form of religious exercise, it has "prohibited" religious exercise, regardless of the magnitude of the penalty. Also, by including legal bans on *any* religious exercise, this Comment's definition is more faithful to the Free Exercise Clause text, which does not differentiate between more and less central forms of religious exercise.[252]

Finally, this Comment's framework, which includes de facto bans on religious exercise, recognizes the reality that the verb "prohibit"—both today and in 1791—not only means "to forbid," but also "to hinder." [253] By covering hindrances to religious exercise not in the shape of coercion—e.g., outright destruction of religiously significant material—this Comment, more than *Lyng*, adheres faithfully to the full meaning of the word "prohibit."[254]

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[250] *See Fulton*, 141 S. Ct. at 1896–97 (Alito, J., concurring).
[251] *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878 (1990).
[252] U.S. CONST. amend. I, § 1, cl. 1.
[253] *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring).
[254] *See Lyng*, 485 U.S. at 449.

B. *Jurisprudential Merits*

A de jure and de facto framework for substantial burdens better allows courts to address questions that they can and should address, and avoid ones they should not. By avoiding questions about the *centrality* of the religious exercise affected, this Comment's framework avoids having courts make theological decisions that they are unequipped to make and that risk violating the Establishment Clause.[255] Moreover, by establishing that a de jure prohibition triggers strict scrutiny regardless of the size of the penalty prescribed, this Comment's framework avoids the trouble of having courts decipher what quantity of fines or length of imprisonment impose "substantial" burdens on religious exercise.[256]

Yet, what about de facto prohibitions? How much destruction can the state cause before it creates a de facto prohibition? What quantity of unemployment benefits can a state deny before the burden it imposes on religion is "substantial"? This Comment does not provide quantitative metrics, but it has proposed a *qualitative* standard. State action that falls short of a legal ban—but that nonetheless renders the religious adherent *unable* to practice her faith, i.e., effectively *prevents* her from exercising her faith—rises to the level of a de facto prohibition that triggers strict scrutiny. As Part IV explained, the qualitative standard will still involve discretion. However, unlike an approach that asks courts to make open-ended judgments on the weight of a consequence, this Comment's qualitative standard presents a clearer threshold: it asks courts to identify *whether* the state action takes a certain *shape* rather than assess the *weight* of the action.

C. *A Few Objections*

Expectedly, this Comment's definitional framework will also raise objections. This section anticipates and addresses a few concerns, the first of which returns to Smith.

1. *Becoming a Law unto Himself*

In *Smith*, one of Justice Scalia's chief reasons for not applying strict scrutiny to neutral, generally applicable laws that burdened religion was that doing so

[255] *See supra* Section III.B.1.
[256] *See supra* Section III.B.2.

would permit each claimant "*to become a law unto himself*."[257] Moreover, as the State of Oregon feared in *Smith*, if the Court granted "an exemption for religious peyote use, a flood of other claims to religious exemptions [would] follow."[258] Whereas most laws do not often specifically target religion, almost any generally applicable law—given America's size and diversity[259]—could incidentally compel *somebody* to act against his or her faith.

These concerns have merit, but do not justify rejecting *Sherbert*-style strict scrutiny. Start with Scalia's concern that every man becomes "a law unto himself."[260] Part of the concern here is social feasibility: if everyone can carve out religious exemptions from obedience to the law, then the state would be unable "to enforce generally applicable prohibitions of socially harmful conduct."[261] However, would this be true? This would depend not only on how many religious claimants bring suits, but how many *win* them. Certainly, claimants often win on strict scrutiny analysis,[262] but claimants must still pass strong hurdles to get there: to list a few, they may need to show standing, pass immunity hurdles, pay litigation fees, and endure the time and psychological costs of litigation. Moreover, even if claimants get to strict scrutiny, they may not necessarily win. Unlike in cases where the state targets religion, courts applying strict scrutiny to generally applicable laws could factor the need for legal uniformity and enforceability into their analysis of whether a state interest is compelling.

All these hurdles to actually winning a case cast doubt on the idea that millions of claimants will be suddenly able to *win* exemptions and render it impossible for the state to enforce generally applicable rules on social conduct.[263] Moreover, these hurdles—which make it harder to sue in court and to win in court—also challenge the State of Oregon's fear in *Smith* that floods of litigation would ensue if strict scrutiny were applied to generally applicable laws that burdened religion.[264]

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[257] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) (emphasis added) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

[258] *Id.* at 916 (Blackmun, J., dissenting).

[259] *See id.* at 888 (majority opinion) (describing how a jurisprudence applying strict scrutiny to generally applicable laws burdening religion "would be courting anarchy" and that this "danger increases in direct proportion to the society's diversity of religious beliefs").

[260] *Id.* at 885 (quoting *Reynolds*, 98 U.S. at 167).

[261] *Id.* at 885, 888.

[262] *See id.* at 888 ("[I]f 'compelling interest' really means what it says . . . many laws will not meet the test.").

[263] *See id.* at 885.

[264] *See id.* at 916 (Blackmun, J., dissenting).

But the other part of Scalia's "law unto himself" concern seems to be not only social enforceability, but also a matter of principle: even if a regime with strict scrutiny and generally applicable laws were enforceable, such a regime might still be problematic because it would "make the professed doctrines of religious belief *superior* to the law of the land."[265] Why should a person's *religiously* motivated obligations be placed above a person's *legal* obligations?

The problem with this concern, however, is that applying strict scrutiny to neutral, generally applicable laws that burden religion would not necessarily make one's religious doctrines *superior* to the law of the land. A *Sherbert*-style framework does not simply allow religious claimants to do whatever religious activity they want—i.e., religion does not just trump law. Courts still must negotiate religion and law in a framework of strict scrutiny. Strict scrutiny elevates the weight of religious conduct in the negotiation—religion is treated as something important enough such that the government must show not just any interest, but a "compelling" interest, if it wants to force someone to act against their faith. Yet, elevating religion in the battle between religion and law is not asserting religion's *superiority*.

Finally, neither the projected social consequences, nor perspectives on the place of religion vis-à-vis secular law, refute the textual reality that the First Amendment forbids the state from prohibiting religion, without mention of whether the prohibition is singularly or equally applied.[266] Thus, whenever a law, even if neutral and generally applicable, prohibits free exercise—i.e., does exactly what the First Amendment forbids—courts should assess that law with heightened scrutiny.

2. *Objections to De Jure and De Facto Thresholds*

Others might object to the specific de jure and de facto thresholds set out in this framework. On one hand, those who support *Smith* might argue that enabling courts to apply strict scrutiny *whenever* the government legally prohibits *any* form of religious exercise (even non-central activity) would result in excessive amounts of litigation: courts should at least consider the weight of the penalties that the law prescribes. This Comment presents several responses. First, all of Section V.C.1's hurdles in religious exemption litigation apply here and can serve to keep out claimants whose claims are insincere or frivolous. Second, it seems logically unlikely that governments—for laws that apply generally to a

[265] *Id.* at 879 (majority opinion) (emphasis added) (citing *Reynolds*, 98 U.S. at 171).
[266] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1896–97 (2021) (Alito, J., concurring).

large swath of people—would prescribe very "light" penalties to begin with. If a penalty is extremely light, it seems unlikely that the government cared to seriously have the law enforced in the first place. Finally, to be faithful to the constitutional text—which proscribes government action that *prohibits* the free exercise of religion—courts should look carefully at laws that do just that (*prohibit* free exercise) even if the penalty attached to the prohibition does not seem substantial.

On the other hand, those who contest *Smith* might challenge the de-facto-prohibition threshold, which asks religious claimants to prove that the government rendered them unable to exercise their religion. This threshold, these objectors may argue, is too high, since state actions that do not prevent but *still make it more difficult* for a religious adherent to practice her faith, still "hinder" the free exercise of religion. Moreover, these objectors may argue, under this Comment's framework, even de jure prohibitions with small penalties that do not render a religious adherent "unable" to practice her faith could still trigger strict scrutiny.

Indeed, the de facto prohibition prong of this Comment's framework derives from the word "hinder." The verb "hinder" must itself be interpreted in light of the operative word it defines—to "prohibit."[267] Many things could be "hindrances" to religion in the sense that they add a nonzero amount of difficulty to a person exercising her faith: for example, traffic lights that increase the time it takes to get to a synagogue could "hinder" a Jewish believer from exercising her faith. But common sense tells us that it would not make sense to say that a traffic light "prohibited" someone from attending a synagogue, given the size and shape of the hindrance. Additionally, the rejection of earlier drafts of the

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[267] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court had to assess the meaning of the word "take" within The Endangered Species Act of 1973, which made it "unlawful for any person subject to the jurisdiction of the United States to—. . . take any [protected] species within the United States." 515 U.S. 687, 715 (1995) (Scalia, J., dissenting) (alteration in original) (quoting the Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(B)). The term "take" was defined to mean, "to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* (quoting 16 U.S.C. § 1532(19)). The case as a whole revolved around the proper definition of "harm," a word used to define "take." Justice Scalia, in his dissent, emphasized that in interpreting the word "harm," the Court should consider the ultimately operative word that "harm" was used to define—the word "take." *Id.* at 718–23. As he emphasized, the Court should not read the "operative term . . . out of the statute altogether." *Id.* at 718.

Similarly, then, even though the word "hinder" has a range of meanings that vary according to the level of impact of the hindrance, the Court should interpret the word "hinder" in light of the operative word that it defines—"prohibit." The verb "prohibit" denotes action that functions and aims to do much more than add marginal hindrances to the activity prohibited; it functions and aims instead to *stop*, to *prevent* the activity altogether. Thus, "hinder," interpreted in light of the word "prohibit," denotes action that arises to hindrances that prevent an activity altogether.

First Amendment, which contained verbs of lesser magnitude than prohibit—e.g., "touch," "infringe," "abridge"—further suggests that the Free Exercise Clause was meant to apply to state actions that exceeded slight hindrances to religion.[268] Finally, insofar as the point of a prohibition in its principal sense (an official forbiddance) is to *stop* someone from doing the prohibited activity, it makes synchronic sense to say that the line at which a "hindrance" becomes a prohibition is the line at which the hindrance effectively *stops* the claimant—*prevents* him, renders him *unable*, to perform the activity being hindered.

3. *The Intentionality Behind Prohibitions*

A final objection is that the verb "prohibit" cannot encompass governmental actions that "incidentally" ban or prevent religious exercise, because the word "prohibit" inherently contains an intentionality component. In *Lyng*, Justice O'Connor did not explicitly state this objection, but possibly implied it.[269] As she argued, while "to prohibit" would not cover state road construction projects that virtually destroyed tribal capacity to practice faith, the verb *would* cover government actions that "*discriminate* against religions that treat particular physical sites as sacred."[270] The critical difference between (1) state programs or laws that discriminate against religion, and (2) generally applicable laws that incidentally burden religion, is not merely disparate impact upon religion: after all, in *Smith*, generally applicable bans on peyote likely incidentally burdened Native peyote-using groups *more* than it burdened others who did not use peyote religiously.[271] Rather, the difference is that discrimination involves directed focus, purposeful action, and an intention to target a group.

As some might argue, in the context of the Free Exercise Clause, the word "prohibit" inherently must contain the directed focus embedded in discrimination. One reason is that prohibitions are often made *in response* to the practice of the activity prohibited—e.g., drinking alcohol, doing drugs, bringing weapons to a school. Put differently, prohibitions of an activity are made *for the purpose of* stopping the activity that follows the word "prohibit." With that in mind, one might interpret the Free Exercise Clause—which says that Congress shall not "prohibit *the free exercise* [*of religion*]"—to mean that Congress shall not legislate or act *for the purpose* of stopping a religion, or religion in general.[272]

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[268] Witte, *supra* note 212, at 1351.
[269] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–53 (1988).
[270] *Id.* (emphasis added).
[271] *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).
[272] U.S. CONST., amend I, § 1, cl. 1.

This reading, however, is too narrow. Common sense itself suggests that the state could prohibit something, even if it did not specifically aim for that thing to be prohibited. Even if the State of Oregon in *Smith* did not criminally ban peyote use *for the purpose of* prohibiting Native American religious exercise,[273] it still makes logical and linguistic sense to say that in prohibiting peyote use in general, Oregon "prohibited" a form of Native American religious exercise.

As Justice Alito indicated, a discrimination-only reading of "prohibit" does not comport with how other amendments are read. As he explained, the Sixth Amendment "gives a specified group of people (the 'accused' in criminal cases)" the right to legal counsel.[274] Stated negatively, the Sixth Amendment proscribes the state from "prohibiting" the accused in criminal cases from obtaining legal counsel.[275] If one day Congress prohibited access to "counsel in *all litigation*, civil and criminal," would anyone doubt that this law also *prohibited* the specified group—the accused in criminal cases—from accessing counsel?[276] "Would anyone doubt that this law would violate the Sixth Amendment rights of criminal defendants?"[277] Resoundingly, no. Even if Congress did not specifically *aim* to restrict the rights of criminal defendants? Again, no. A law that prohibits Person *A*, *and others*, from doing *X*, and that does not *aim* to prohibit Person *A* from doing *X*, clearly still prohibits Person *A* from doing *X*.[278]

CONCLUSION

In light of *Smith*'s problems and the challenges with existing burden jurisprudence, this Comment has presented a framework for defining "substantial burdens" in the hopes of shaping part of the doctrinal regime that might replace *Smith*. The framework begins from the Free Exercise Clause's verb "to prohibit," a verb that primarily means "to forbid," and secondarily "to hinder."[279]

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[273] *See Smith*, 494 U.S. at 874 (suggesting that Oregon passed a general criminal prohibition against a drug, and not suggesting that it passed a law intended to target Native American religious practice).

[274] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1897 (2021) (Alito, J., concurring).

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] Stated differently, a legal prohibition that is generally applicable (prohibits Person *A and* all others from doing *X*), and neutral (was not passed with the *aim* of prohibiting Person *A* from doing *X*), still prohibits Person *A* from doing *X*. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422–23 (2022) (providing related, but separate, definitions of neutrality and general applicability). In other words, contrary to *Smith*, neutral laws of general applicability can still "prohibit" religious activity. *See id.*

[279] *Fulton*, 141 S. Ct. at 1868 (Alito, J., concurring).

This Comment has proposed that the Court recognize a substantial burden and apply strict scrutiny whenever government action amounts to a de jure or de facto ban on religious exercise. De jure prohibitions would come usually in four shapes: when the state (1) forbids religious exercise that one's religion *requires*; (2) forbids religious exercise that one's religion *permits*; (3) requires action that one's religion prohibits; or (4) requires action when one's refusal to act as required constitutes an exercise of the one's religion. De facto prohibitions would usually come in two shapes: when the state (1) destroys a person's religious resources; or (2) imposes losses such that a person is rendered effectively unable to practice her religion. In all six scenarios, courts would apply strict scrutiny—permitting the challenged government action only if it is narrowly tailored to fulfill compelling interests.

Compared to other definitions of substantial burden, this Comment's two-part framework adheres more closely to the text of the Constitution. Just as the Free Exercise Clause itself does not discriminate between central and peripheral religious exercise, this framework does not either, but instead affirms that prohibitions on *any* religious activity warrant heightened scrutiny. Just as the verb "prohibit" does not differentiate between official bans of religious conduct based on the size of the penalties, this framework does not either, but instead, affirms that any prohibition by law is a prohibition that warrants strict scrutiny. Just as the verb "prohibit" includes some situations where the government does not ban but still "hinders" religious activity, this framework does so too, recognizing that state action "prohibits" religious exercise by effectively preventing it.

Relative to other frameworks, this Comment's framework also better mitigates jurisprudential difficulties: it avoids having courts decide theological questions on the centrality of religious practice, as well as nebulous questions of when penalties prescribed in a legal ban become "substantial." Moreover, this framework sets a justiciable line for when state action, outside of formal coercion, amounts to a de facto prohibition.

Not all will be satisfied. Some, raising similar concerns to those voiced in *Smith*, might fear that this approach will overprotect religion, giving religious exemption claimants too much opportunity to carve out their own bubbles of disobedience and too much incentive to litigate. Yet, while this framework may make religious exemption litigation easier, it stands in conjunction with other hurdles that make it difficult to sue and to win, and even if not, accords with the command of the constitutional text.

Others on the opposite end might fear that this framework insufficiently protects religion—that it fails to protect those who can still legally practice their faith but would incur much difficulty in doing so. Yet, while this framework does set a high threshold for state actions that amount to de facto prohibitions, the threshold interprets the verb "hinder" in a way that comports with the operative verb in the Free Exercise Clause itself—to "prohibit."

Of course, underlying this whole discussion thus far is the question: why afford religious exercise strong protection at all? And, why more protection than other activity motivated by non-religious desires, wishes, feelings, and so forth? What makes religion special? Needless to say, whole books have been dedicated to this subject, and this Comment will not dive deep into them.[280]

Yet, a few reasons serve as good reminders on the importance of religious freedom. Religion shapes the whole of human existence and guides people's deepest thoughts, desires, and convictions, providing hope, meaning, purpose, and salvation. Religion is a foundation for morality: it gives *reasons*, at the deepest level, that justify respecting human rights, obeying the government, fighting for justice, and caring for one's neighbor, even when there are no enforceable legal consequences for not doing so.[281] Religion serves as a backbone for communities to hold fast to norms that are separate from those of the state, that can prophetically highlight a state's wrongs, and that can compel people to stand resolute in their convictions when governments or majorities try to monopolize definitions of right and wrong.[282]

After centuries of religious wars and persecution—centuries where these virtues of religion were suppressed, destroyed, and ignored—our Framers afforded tremendous protection to religion through the words of the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[283] To recognize the

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280 *See generally, e.g.*, JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 57–67 (2017) (discussing arguments as to why there should be religious exemptions). For a historical perspective, see generally JOHN WITTE, JR., THE BLESSINGS OF LIBERTY: HUMAN RIGHTS AND RELIGIOUS FREEDOM IN THE WESTERN LEGAL TRADITION (2021), which discusses the historical narratives and justifications leading to the establishment of religious freedoms in the West.

281 *See* Michael W. McConnell, *Establishment at the Founding*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 45, 60–64 (T. Jeremy Gunn & John Witte, Jr. eds. 2012) (discussing Chief Justice Theophilus Parsons's comments that laws and temporal punishment alone cannot prevent "secret offences, committed without witness").

282 *See generally* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 80–84 (1984) (discussing the effects of excluding religion from the public square and the importance of religious institutions checking and challenging the state and other actors in society).

283 U.S. CONST. amend I, § 1, cl. 1.

importance of religion and the dangers of crushing it, to take heed of the history that led up to this nation's founding, to remain faithful to the Constitution, why not start from the most logical of starting points—there, the Constitution? May this Comment be one drop in the ocean of literature aiding that effort.

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