

# SUBSTANTIAL BURDENS IN THE LAW

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## I. INTRODUCTION

The idea of a substantial burden is important to a number of areas of the law. The presence or absence of a substantial burden of one sort or another is central to, in particular, many cases involving the Commerce Clause,<sup>1</sup> the Second Amendment right to keep and bear arms,<sup>2</sup> regulation of access to the constitutional right to abortion,<sup>3</sup> and to statutory protections of the free exercise of religion.<sup>4</sup>

This Article discusses the difficulties that courts have in determining, in each of these contexts, what constitutes a substantial burden on whatever right, interest, process, or institution is arguably being burdened. A basic problem is that courts and legal scholars have thus far not tried to develop any broader understanding of substantial burdens in the law in general, including, ironically, the possibility that what constitutes a substantial burden in the law may importantly depend upon the context in question.

This Article thus seeks to clarify the idea of a substantial burden in various legal contexts. This clarification depends in part on increased attention to the general idea of a substantial burden in the law, in its ordinary meanings, or as a term of art. The emphasis below, however, is on what a broad survey of substantial burdens in the law can tell us about how substantial burden analysis should crucially differ from one legal context to another. The aim herein is ultimately to illustrate that progress in substantial

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1. *See infra* Section II.

2. *See infra* Section III.

3. *See infra* Section IV.

4. *See infra* Section V. A “substantial burden” test also arises in other kinds of cases, as in some electoral campaign regulation and voting rights contexts. *See, e.g.*, *Ariz. Free Enter. Club v. Bennett*, 564 U.S. 721, 737 (2011) (quoting *Davis v. FEC*, 554 U.S. 724, 739-40 (2008)). *See also* *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). For discussion of substantial burden “proportionality” and exacting scrutiny in this particular area, see R. George Wright, *A Hard Look at Exacting Scrutiny*, 83 UMKC L. REV. (forthcoming 2016).

burden analysis in the law is possible. But we will also conclude that in some discrete kinds of cases, substantial burden analysis implicates remarkably difficult problems involving the limits of understanding and communication.

To begin with, focusing merely on the idea of “substance,” in itself, of course, can only carry us so far. As a philosophical concept, the idea of “substance” has a distinguished history,<sup>5</sup> but that history does not avail us much in enhancing our understanding of substantial burdens in the law.<sup>6</sup> Taken as an adjective, “substantial” encompasses a number of meanings,<sup>7</sup> including, familiarly, “of ample or considerable amount or size; sizeable.”<sup>8</sup>

Such definitions add little to our intuitive understanding of “substantial.” But they may prompt us to consciously appreciate what we have in a sense always known: the idea of “substantial” seems to straddle the boundary between description and evaluation. We may not be able to measure the substantial in any rigorously quantitative fashion. But when we call anything “substantial,” we are to some degree reporting what we think we see before us. On the other hand, to find anything to be “substantial” also clearly involves some sort of evaluative or normative judgment, beyond merely reporting what we observe.

Doubtless the very idea of a clear distinction between the descriptive and the evaluative, in this or any other context, can always be contested. But there does seem to be some sort of difference in general between, say, noticing and condemning.<sup>9</sup> And when we describe something as either substantial or insubstantial, we are not merely reporting, but normatively judging or evaluating as well. We see this whenever we judge an amount to be “considerable,”<sup>10</sup> and even more clearly so when we characterize an amount as “ample,”<sup>11</sup> as sufficient, or as otherwise reaching some such partly evaluative target.

Now, the precise roles of, and interactions between, describing and evaluating in determining whether something is substantial will doubtless be subject to debate. Such matters may well depend upon context, even when

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5. One might think, for example, of classical Platonic forms as a kind of substance. See Howard Robinson, *Substance*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/spr2014/entries/substance> (last updated Feb. 3, 2014).

6. See *id.* (generally linking “substance” to being fundamental or basic).

7. See the entry for “substantial,” OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/193050> (last visited Sept. 9, 2016).

8. *Id.* at A.I.3.

9. This and related distinctions, as between describing and prescribing, are at some level contested. Perhaps our observations and perceptions already embody some sort of evaluative theory.

10. See *supra* text accompanying note 8.

11. See *id.*

we focus more narrowly on the idea of substantial burdens in the law. For now, the main point is that the idea of “substantial” in general seems to partake, to one degree or another, of both descriptive and evaluative elements of one sort or another.

The idea that the “substantial” incorporates both descriptive and evaluative elements in turn suggests that one can think of being “substantial,” in whatever context, as what the philosophers refer to as a relatively “thick,” as opposed to a relatively “thin,” concept.<sup>12</sup> The distinction between thick and thin concepts can vary, but for our purposes, the idea is roughly that “thick” concepts tend more, in themselves, to concretely convey what is taking place in particular contexts, than do “thin” concepts.<sup>13</sup> Thick concepts tend to tell us more of concrete interest than do thin concepts.<sup>14</sup>

While this distinction is initially obscure, it can be clarified by a moment’s reflection on some standard examples. Concepts like bravery or courage, steadfastness, fidelity, and generosity, as well as cowardice, betrayal, and treachery, are taken to be “thick” concepts.<sup>15</sup> By contrast, important but more purely abstract and bloodless concepts such as right and wrong, good and bad, or even just and unjust are thought of as “thin” concepts.<sup>16</sup> Thick concepts thus more clearly have both a descriptive as well as an evaluative component.

The idea of “substantial,” as in cases of a substantial burden, thus qualifies as a “thick” concept. “Substantial” partakes, to one perhaps variable degree or another, of both descriptive and evaluative components.<sup>17</sup> The idea of an “ample or considerable amount or size”<sup>18</sup> clearly invokes some sort of literal, if imprecise, or at least metaphorical attempt to measure some quantity

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12. The crucial source of the various distinctions between “thick” and “thin” concepts is BERNARD WILLIAMS, *ETHICS & THE LIMITS OF PHILOSOPHY* 140-42, 150-52 (1985). For discussion of Williams on this distinction, see, e.g., Samuel Scheffler, *Morality Through Thick and Thin: A Critical Notice of Ethics and the Limits of Philosophy*, 96 *PHIL. REV.* 411 (1987); Michael Smith, *On the Nature and Significance of the Distinction Between Thick and Thin Ethical Concepts*, in *THICK CONCEPTS*, 97-121 (Simon Kirchin ed., 2013). More broadly, see *THICK CONCEPTS* (Simon Kirchin ed., 2013).

13. See Scheffler, *supra* note 12, at 414.

14. See *id.*

15. See *supra* sources cited in note 12.

16. See *supra* sources cited in note 12. The distinction between thick and thin concepts may well be a matter of degree. See Smith, *supra* note 12, at 6.

17. Whether it is possible to somehow fully separate these descriptive and evaluative elements remains contested. See the contributions in *THE IS/UGHT QUESTION* (W.D. Hudson ed., 3d ed. 1969).

18. See *supra* text accompanying note 8. The boundary between insubstantial and substantial will typically be inescapably vague. For background, see Dominic Hyde, *Sorites Paradox*, *STAN. ENCYCLOPEDIA PHIL.*, <http://plato.stanford.edu/entries/sorites-paradox> (last updated December 6, 2011).

or magnitude. In most contexts, for example, someone who has inherited a single dollar under a will has not thereby inherited a substantial amount of money. This would not be a substantial bequest. But we must first find out how much has been inherited, quantitatively, in order to begin to make that judgment.

But this descriptive or investigative element is not all there is to the idea of a substantial bequest. Even if we know all the conceivably relevant numbers—e.g., the beneficiary's pre-existing budget and wealth, the size of the total estate, its division, the beneficiary's needs and age, the purchasing power of the dollar, average estate size, applicable estate fees, and taxes—we must still then make an independent evaluative judgment in order to conclude that a given bequest was or was not substantial. A bequest of, say, \$500 does not tell us whether it is substantial or not. And the evaluative component of our judgment as to whether a legal burden is substantial or not is likely to loom even larger.

In fact, it might initially be tempting to assume that the evaluative judgment, as opposed to the more descriptive component, will dominate any interesting legal case involving an allegedly substantial burden. Why not then simplify matters by treating all substantial burden cases as matters of pure normative evaluation?

The problem with such an approach to the substantial burden cases lies in the legal, and typically constitutional, context in which cases arise. The substantial burden inquiry is often undertaken because we ultimately want to know whether some practice or policy violates some provision of the Constitution. Whether the practice or policy in question violates the Constitution is already, crucially, a normative or evaluative question.<sup>19</sup> So if we treat the question of the existence, or not, of a substantial burden as a purely evaluative test we will be answering a largely evaluative question by means of considering another, possibly narrower, but often rather broad and open, evaluative question. This may well be productive, and perhaps the best we can do.

But it is also possible that our best answers to constitutional and related legal questions may sometimes emerge from adjudicative processes that include careful descriptive investigation into what is taking place in the world. A burden, for example, may strike us as less substantial if we discover, as a mostly descriptive matter of fact, that the burden can be

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19. This seems uncontroversial enough, but one could ask whether it is possible for judges to agree on the descriptive facts in some constitutional case, yet disagree as to the proper constitutional outcome of the case. Judges, might for example, agree on the relevant descriptive facts, but disagree as to the priority, normatively, of religious free exercise and equal protection or substantive due process.

promptly, entirely, and nearly costlessly shifted, in the ordinary course of events, to some third party.

In any event, being “substantial,” as in the substantial burden cases, will thus invariably involve a “thick” concept that may usefully bridge the descriptive and normative realms, as do concepts such as “courageous” and “generous.”<sup>20</sup> We see this already at work in cases in which “substantial” is paired not with the idea of a “burden,” but with the arguably more neutral idea of “evidence.” The question of how much, or what kind, of evidence amounts to “substantial” evidence is inevitable.

Thus in the classic administrative law case of *Universal Camera v. National Labor Relations Board*,<sup>21</sup> the Court confronted the unenviable task of clarifying the substantial evidence standard.<sup>22</sup> Setting aside the complications unnecessary for our purposes, the Court verbally distinguished substantial evidence from a “mere scintilla.”<sup>23</sup> Substantial evidence must be such that “a reasonable mind might accept [it] as adequate to support a conclusion.”<sup>24</sup> The quantum, weight, or force of the evidence “must do more than create a suspicion of the existence of the fact to be established.”<sup>25</sup>

The full discussion in *Universal Camera* leaves us with a substantial evidence standard that is “imprecise,”<sup>26</sup> but that may provide “as much clarity as the area affords.”<sup>27</sup> The basic problem here involves the unavoidable “thickness” of the idea of being “substantial,” in the context of substantial evidence. The substantial evidence standard is caught somewhere between the metaphor of placing evidence in the balancing pan of a set of scales, and the more clearly normative process of deciding whether it is fair, or otherwise normatively permissible, to uphold a finding, given the evidence in question.<sup>28</sup>

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20. See *supra* note 15 and accompanying text.

21. 340 U.S. 474 (1951).

22. See *id.* at 477-78.

23. *Id.* at 477.

24. *Id.*

25. *Id.* (further indicating that the evidence must be sufficient to justify denying a directed verdict motion in a jury case). For further discussion, see *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

26. *Kopack v. NLRB*, 668 F.2d 946, 951 (7th Cir. 1982) (quoting *NLRB v. Gold Standard Enters., Inc.*, 607 F.2d 1208, 1212 (7th Cir. 1979)).

27. *Id.* For a possible general hierarchical ranking of evidentiary standards, including that of substantial evidence, see Parker B. Potter, Jr., *Substantial Evidence*, 11 GREEN BAG 2D 416, 417 (2008), [http://www.greenbag.org/v11n4/v11n4\\_to\\_the\\_bag.pdf](http://www.greenbag.org/v11n4/v11n4_to_the_bag.pdf).

28. For a contrast between the “mechanics” of judging, and judging as seeking what is “fair,” see Louis L. Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record,”* 64 HARV. L. REV. 1233, 1239 (1951).

Some attempt to disentangle the more descriptive aspects from the more normative aspects of substantial evidence review may still be worth making. For one thing, we can imagine an appellate court deferring to an agency's decision where the amount or weight of evidence is thought to be crucial, and especially where witness credibility issues are relevant.<sup>29</sup> But to the degree that substantial evidence is instead thought to be more a matter of broad normative fairness, we would hardly expect the same degree of judicial deference to an underlying administrative agency judgment.<sup>30</sup>

In any event, we have at this point only begun to explore the unavoidable complications of "substance" in the law, and of substantial burdens in particular. As we shall now illustrate, even the most straightforward cases of substantial burdening, as in the commerce clause area, can occasionally hint at the deeper problems lurking within substantial burdening analysis in general.

## II. SUBSTANTIAL BURDENS IN THE COMMERCE CLAUSE CASES

Substantial burdens on the flow of goods and services in interstate commerce are often central to commerce clause cases. This holds for cases testing the scope and limits of the active legislative authority of Congress,<sup>31</sup> as well as for cases relying on the commerce clause in its dormant or "negative" dimension to limit the exercise of state police power authority.<sup>32</sup>

As a useful example, consider the case of *Raymond Motor Transportation, Inc. v. Rice*.<sup>33</sup> *Raymond* involved Wisconsin state

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29. See *Universal Camera*, 340 U.S. at 490-91; *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-10 (1974).

30. For background on the general requirements of adjudicative fairness, see Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-95 (1975).

31. For reference to substantial burdens in this context, see, e.g., *United States v. Morrison*, 529 U.S. 598, 612-13 (2000) (striking down the federal Violence Against Women Act) and *United States v. Lopez*, 514 U.S. 549, 562 (1995) (striking down the federal Gun-Free School Zones Act). See also *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942) (upholding the Agricultural Marketing Agreement Act of 1937).

32. See, in the dormant commerce clause context, *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984) (plurality opinion); *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982) (plurality opinion); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981); *Raymond Motor Trans., Inc. v. Rice*, 424 U.S. 429, 445, 447 (1978); *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1142, 1147 (9<sup>th</sup> Cir. 2012). For general discussion, see Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 436, 438 (1998) (discussing the *Raymond* "substantial burden" standard); Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 41 (1998) (discussing the "substantial burden" test in the context of the multi-factor balancing test endorsed in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

33. 434 U.S. 429 (1978).

regulations on double trailer trucks and on trucks exceeding fifty-five feet in length.<sup>34</sup> The Court cited evidence that the petitioners' "operations are disrupted, their costs are raised,<sup>35</sup> and their service slowed<sup>36</sup> by the challenged regulations."<sup>37</sup> Under these circumstances, the Court sought to implement a rather abstract interest balancing test. The Court's balancing test in *Raymond* was articulated in the following terms:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits.<sup>38</sup>

Assessing the relevant regulatory costs and delays as best as they could be ascertained, the Court in *Raymond* concluded that "the challenged regulations violate the Commerce Clause because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety."<sup>39</sup>

Thus in the dormant commerce clause area in particular, the Court has looked to the presence or absence of a substantial burden on interstate commerce as an important constitutional threshold. The Court has recognized that while the commerce clause is literally a congressional regulatory power,<sup>40</sup> the clause also operates as "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on [interstate] commerce."<sup>41</sup>

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34. See *id.* at 436-38.

35. See *id.* at 436-38, 445. Query what degree of financial cost increase, in the competitive context, alone or in combination with other factors, would amount to a burden on interstate commerce that deserves to be adjudged "substantial."

36. See *id.* The slowing or delay of service, in however many instances and however severely, might raise shipper costs as referred to in note 35 *supra*, but might also have other effects on the petitioners' competitive positions. The question of when slowed or delayed service becomes a substantial burden on interstate commerce must address both these considerations, as well, presumably, as the number of adversely affected parties, their overall economic impact, price elasticities, and factor substitution possibilities.

37. *Raymond*, 434 U.S. at 438, 445. Possible increases in the number or cost and severity of various sorts of accidents are to be somehow factored in as well. See *id.*

38. *Id.* at 441 (quoting *Huron Cement Co. v. Detroit*, 361 U.S. 440, 443 (1960)).

39. *Raymond*, 434 U.S. at 447. Among other considerations, the Wisconsin regulations tended to result in more total miles being driven, as loads were either broken down and separately hauled, or diverted around the state. See *id.* at 438-41, 443-45. The *Raymond* formula is discussed and validated in, e.g., *Kassel*, 450 U.S. at 670-75, and in particular in *id.* at 674 ("Consolidated . . . demonstrated that Iowa's law substantially burdens interstate commerce").

40. See, e.g., *Wunnicke*, 467 U.S. at 87 (plurality opinion).

41. *Id.* See also *MITE Corp.*, 457 U.S. at 646 ("the Illinois Act imposes a substantial burden on interstate commerce which outweighs its putative local benefits") (plurality opinion); *Harris*, 682 F.3d at 1148 ("[a] critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden on interstate commerce*") (emphasis in original).

Considerations bearing upon whether there is a burden on interstate commerce, and whether that burden may be characterized as substantial, will seem, in the typical such case, largely a matter of more or less readily measured and quantifiable evidence, as of increased financial costs, mileage, time delays, or accident rates and even the evident severity of injuries.<sup>42</sup>

But even in the dormant commerce clause area, deeper and more evocative issues can occasionally arise. Consider in particular a remarkable 1946 case involving a criminal conviction of an African-American passenger on a bus in interstate commerce. A Virginia statute required bus passengers to move from one seat to another, at any time of the day or night, at the behest of the driver, for the sake of what was deemed to be appropriate racial relations.<sup>43</sup> The Supreme Court addressed the case not under the equal protection clause,<sup>44</sup> or even the scope of congressional power to regulate interstate commerce,<sup>45</sup> but under the dormant commerce clause.<sup>46</sup>

The Court in *Morgan* recognized a need to balance any possible legitimate state police power interests<sup>47</sup> against a competing need for uniformity in practice on the interstate or national level.<sup>48</sup> Under this historically quite understandable, if doctrinally contorted, analysis, the Court sought to determine whether the Virginia statute placed an undue burden on interstate commerce.<sup>49</sup>

Typically, as the Court recognized,<sup>50</sup> burdens on interstate commerce take the form of more or less significant financial costs and delays.<sup>51</sup> But the Court in *Morgan* declared that a burden on interstate commerce might also "arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements."<sup>52</sup> And as well, cumulative or interactive effects,<sup>53</sup> as well as

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42. See *supra* note 39.

43. *Morgan v. Virginia*, 328 U.S. 373, 374, 386 (1946).

44. See, some eight years later, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (public school racial segregation, as addressed under the Fourteenth Amendment's equal protection clause).

45. See, some eighteen years later, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (racial discrimination by private parties engaged in interstate commerce as addressed by Title II of the 1964 Civil Rights Act).

46. See *Morgan*, 328 U.S. at 385-86.

47. *Id.*

48. *Id.*

49. *Id.* at 380.

50. See *id.*

51. See *supra* note 39.

52. *Morgan*, 328 U.S. at 380-81.

53. See *id.* at 381-82.

matters of practical implementation,<sup>54</sup> can be properly taken into account.<sup>55</sup> In this case, the Court held, the statutory burden on interstate commerce was undue, or excessive.<sup>56</sup>

It is difficult to honestly conclude, however, that the circumstances of *Morgan* are exhausted by considerations of substantial burdens and inefficiencies imposed on interstate commerce in the most typical mundane, pedestrian sense. It is certainly possible that the prospect of being awakened and imperiously re-seated, for racial reasons, may have some, perhaps a cumulatively<sup>57</sup> substantial, net adverse effect on interstate commerce. But this is really not entirely a matter of tangible monetary costs and time delays. At some level, whether consciously or not, the various and subtle costs, in a much broader and deeper sense, of indignity, humiliation, integrity, privacy, responsive emotion and subjectivity, group dominance and subordination, and of sheer personal inconvenience enter into a case like *Morgan*.<sup>58</sup>

*Morgan* is thus not typical of the commerce clause substantial burden inquiries. Its very uniqueness, however, begins to illustrate the potential depth, complications, and subjectivities that may more commonly arise in other, less fundamentally commercial contexts. A further step in that direction is taken below in the often emotionally tinged, if not personal identity-implicating, cases of substantial burden analysis under the Second Amendment.

### III. SUBSTANTIAL BURDENS IN THE SECOND AMENDMENT CASES

The idea of a substantial burden on a Second Amendment right to keep and bear arms is not central to the Supreme Court's recent case law. *District of Columbia v. Heller*<sup>59</sup> recognized a prima facie individual constitutional right to, at a very minimum, possess handguns and similar weapons in appropriate circumstances for appropriate purposes, including home

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54. See *id.* at 382-83.

55. See *id.* at 381-83.

56. *Id.* at 380, 386.

57. Note the aggregating of minimal individual effects into a substantial overall effect on interstate commerce in *Wickard v. Filburn*, 317 U.S. 111 (1942) (aggregating the effects of home-consumed wheat produced in excess of federal quotas).

58. For background, see Martin Luther King, Jr., *Letter From a Birmingham Jail* (April 16, 1963), [http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (last visited Sept. 20, 2016).

59. 554 U.S. 570 (2008).

protection.<sup>60</sup> *McDonald v. City of Chicago*<sup>61</sup> then made the right recognized in *Heller* binding on the states by incorporation into the Fourteenth Amendment due process clause.<sup>62</sup> *Heller* and *McDonald* were thus more about recognizing and defining the scope and boundaries of a right than about weighing a recognized right against conflicting governmental interests.

Unavoidably, though, cases arise in which some more or less limited restriction of recognized Second Amendment rights is imposed, for the sake of public safety or some other cited public interest. In such cases, recognized Second Amendment rights may be said to be burdened, whether justifiably or not. Thus it is not surprising that even *Heller*<sup>63</sup> and *McDonald*<sup>64</sup> refer to the idea of somehow weighing a regulatory burden on the right in question, as do, even more explicitly, later judicial discussions by Justices Thomas and Scalia.<sup>65</sup>

An explicit “substantial burden” inquiry, as a frequently relevant element of a Second Amendment analysis, is now established in the court of appeals case law.<sup>66</sup> What does or does not constitute a substantial burden in the Second Amendment context is, not surprisingly, difficult to clarify with any verbal formula.

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60. *See id.* at 630-35 (recognizing several familiar categorical and circumstantial exceptions to the general constitutional right). *See also, e.g.,* *Hollis v. Lynch*, 827 F.3d 436, 445-46 (5th Cir. 2016) (citing *Heller*, 554 U.S. at 627-28).

61. 561 U.S. 742 (2010).

62. *Id.* at 750, 791.

63. *See, e.g., Heller*, 554 U.S. at 631 (referring to Justice Breyer’s proportionality analysis); *id.* at 634 (same); *id.* at 681, 689 (“where a law significantly implicates competing constitutionally protected interests in complex ways,” the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests”) (Breyer, J., dissenting) (quoting the free speech electoral campaign spending regulation case of *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring)). For discussion of Justice Breyer’s proportionalist balancing more generally, see Wright, *A Hard Look at Exacting Scrutiny*, *supra* note 4.

64. *See McDonald*, 561 U.S. at 858, 889, 892 (Stevens, J., dissenting) (raising at least hypothetically the idea of potentially undue or unacceptable regulatory burdens on Second Amendment rights).

65. *See Jackson v. City and County of San Francisco*, 135 S. Ct. 2799, 2799, 2801 (2015) (Thomas & Scalia, J.J., dissenting from denial of cert.) (“nothing in our decision in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a ‘substantial burden’ on the core of the Second Amendment right”; arguing as well for a more stringent level of scrutiny while apparently distrusting certain kinds of judicial balancing of burdens and benefits).

66. *See, e.g.,* *Teixeira v. County of Alameda*, 822 F.3d 1047 (9th Cir. 2016); *Kolbe v. Hogan*, 813 F.3d 160, 180 (4th Cir.), *reh’g en banc granted*, 636 Fed. App’x 880 (4th Cir. 2016); *Horsley v. Trame*, 808 F.3d 1126, 1134 (7th Cir. 2015); *Deearth v. Lynch*, 791 F.3d 32, 43 (D.C. Cir. 2015); *Kwong v. Bloomberg*, 723 F.3d 160, 165-68 (2d Cir. 2013); *United States v. DeCastro*, 682 F.3d 160, 164 (2d Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1233, 1262 (D.C. Cir. 2011).

At a verbal level, a substantial burden might be contrasted with a merely minimal<sup>67</sup> or even an incidental<sup>68</sup> burden on core Second Amendment rights. A burden, as in the form of a gun licensing fee, that is found to be “exclusionary or prohibitive”<sup>69</sup> might conceivably be deemed substantial.<sup>70</sup> Heightened constitutional scrutiny, however, need not be accorded to every “marginal, incremental, or even appreciable restraint on the right to keep and bear arms.”<sup>71</sup>

In wrestling with the constitutional meaning of a substantial burden in the Second Amendment context, the courts have attempted to draw upon free speech case law under the First Amendment.<sup>72</sup> In particular, some courts have analogized restrictions on, say, long guns, or concealed weapons, or openly carried weapons, or on the number of gun sales outlets, as akin to content-neutral<sup>73</sup> time, place, and manner restrictions on speech.<sup>74</sup> The implication of any analogy to content-neutral speech regulations, or more

67. See *Kolbe*, 813 F.3d at 179-80, *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016).

68. See *DeCastro*, 682 F.3d at 164-65.

69. *Kwong*, 723 F.3d at 166.

70. See *id.*

71. *DeCastro*, 682 F.3d at 166. Some of the case law appears to combine a substantial burden inquiry with a determination of whether a “core” Second Amendment right is being infringed, such that even a “severe” burden may evoke only intermediate scrutiny if the severe burden is not imposed upon a “core” aspect of the Second Amendment right. See *Dearth*, 791 F.3d at 43-44. For an arguably somewhat more rigorous test, see *Jackson*, 746 F.3d at 961 (“if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny”). Both *Dearth* and *Jackson* can be seen as responses to the proportionalist test in *Heller II*, 670 F.3d at 1257 (“a regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify”). See also *Jackson*, 746 F.3d at 965 (not all burdens on “core” Second Amendment rights also count as substantial burdens).

72. See, e.g., *Kwong*, 723 F.3d at 165; *DeCastro*, 682 F.3d at 167; *Heller II*, 670 F.3d at 1257. *But cf.* *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas & Scalia, J.J., dissenting from denial of cert.) (denying the relevance of whether alternative means of armed self-defense, etc., remain available under the particular Second Amendment regulation in question).

73. See, e.g., *Teixeira*, 822 F.3d at 1059 (citing *Jackson*, 746 F.3d at 964).

74. It is not easy to say whether a prohibition of one particular type of weapon, on grounds of undue danger, should be thought of as somehow analogous to a content-neutral or a content-based restriction on speech. For background, see the Court’s attempt to treat such issues in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (adopting an apparently expansive view of what constitutes a content-based speech regulation) and in *Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (adopting in context an apparently less expansive view). For critique, see R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081 (2015); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

loosely to time, place, and manner regulations,<sup>75</sup> would be that qualifying gun regulations would receive something less than strict scrutiny.<sup>76</sup>

As well, courts have tried to address substantial burden questions by considering, as in content-neutral speech regulation cases, whether the regulation at issue leaves the affected parties with adequate alternative means of exercising their Second Amendment rights.<sup>77</sup> The logic here is that if a regulation realistically leaves available ample<sup>78</sup> or at least adequate<sup>79</sup> alternative means of exercising one's Second Amendment rights, no substantial burden on such rights has been imposed, and the regulation can properly be tested by less than rigorous judicial scrutiny.

Free speech law, at least in some content-neutral regulation contexts, has been open to considering the adequacy of a regulated party's remaining available means of communicating the message.<sup>80</sup> This openness has not always been universally shared.<sup>81</sup> But the willingness of courts considering Second Amendment substantial burden issues to borrow from free speech jurisprudence is certainly understandable.

What is less understandable is why a Second Amendment regulation that genuinely leaves available ample alternative means of exercising one's constitutional rights, thus not substantially burdening such rights, should still be tested by anything like mid-level scrutiny.<sup>82</sup> In such cases, why not just

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75. One complication is that time, place, and manner restrictions may not also be content-neutral, as in the hypothetical case of prohibiting the expression of a disfavored viewpoint, but not other viewpoints, by loud amplifiers, or in residential neighborhoods after dark. See the articles cited *supra* note 74. As well, a free speech regulation can often be content-based more or less regardless of the absence of any government intent to target particular ideas. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

76. See *Reed*, 135 S. Ct. at 2228; *Renton*, 475 U.S. at 56-57.

77. See, e.g., *United States v. DeCastro*, 682 F.3d at 167-68 (citing the content-neutral speech regulation case of *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989)); *Horsley*, 808 F.3d at 1134.

78. See *DeCastro*, 682 F.3d at 168 (“[i]n light of the ample alternative means of acquiring firearms for self-defense purposes, [the regulation] does not impose a substantial burden on . . . Second Amendment rights”).

79. See *id.* at 167-68; *Horsley*, 808 F.3d at 1134. The interesting concealed carry regulation case of *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) arguably turns on issues of the adequacy of the remaining alternative means of exercising the plaintiff's Second Amendment rights.

80. See, e.g., *Renton*, 475 U.S. at 47, 50.

81. See, e.g., the content-neutral anti-littering ordinance in *Schneider v. State*, 308 U.S. 147, 163 (1939) (“[i]t is suggested that the . . . ordinances are valid because their operation . . . leaves persons free to distribute printed matter in other public places. But . . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place”).

82. See *DeCastro*, 682 F.3d at 167-68; *Horsley*, 808 F.3d at 1134; *Peruta*, 824 F.3d at 959.

uphold any otherwise unobjectionable regulation?<sup>83</sup> Complicating such matters comes at some inevitable cost.

More broadly, we can now begin to compare substantial burden analysis in the Second Amendment cases and in the commerce clause cases.<sup>84</sup> We have seen that in the typical commerce clause cases, the question of a substantial burden on interstate commerce can certainly be highly complex, but ordinarily without much interesting emotional, psychological, cultural, or spiritual depth, or any other problems of unshared experience, of incomplete articulability, or of otherwise undistorted and full public communication.<sup>85</sup> As mere shorthand, we may refer collectively to all such considerations as the public communication problem.

The Second Amendment substantial burden cases, more than the typical commerce clause substantial burden cases, do tend to raise some elements of this overall public communication problem, to at least some modest degree.<sup>86</sup> But as we shall eventually appreciate, the public communication issues that do arise in the Second Amendment cases typically lack the subtlety, centrality, the less than broadly shared experience quality, and the profundity of the substantial burden issues addressed in certain other areas of the law.<sup>87</sup>

It seems fair to say that whether we recognize them or not, subjective, various emotional, cultural, and even subconscious elements may underlie a substantial burden analysis in at least some Second Amendment cases. Such considerations may often lack the subtlety, centrality, the unshared quality, and the inscrutability of substantial burdening questions in some other legal areas. They tend to involve more public communicability, in that some of the relevant underlying psychology, including fear of physical violence, tends to be widely, if not universally, shared.

Whatever its implications for gun regulation, gun control, or gun availability more broadly,<sup>88</sup> the desire for the physical safety and security of

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83. One might imagine complications in making such determinations, potential abuses and misapplications, and perhaps even, in rare cases, some sort of dignity issue, particularly with respect to enforcement. But such a principle would offer some forms of reasonable simplification, beyond its straightforward normative logic. For discussion in the arguably parallel free speech context, see R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Free Speech Channels*, 9 PACE L. REV. 657 (1989). Perhaps emotion and strategic thinking play a role in these contexts. See, e.g., R. George Wright, *An Emotion-Based Approach to Free Speech*, 34 LOY. U. CHI. L.J. 429 (2003).

84. See *supra* Section III.

85. Even in the commerce clause area, though, we encounter rare instances in which some such complications arise, as in *Morgan v. Virginia*, 328 U.S. 373 (1946).

86. See *infra* notes 88-90 & 119-122 and accompanying text.

87. See *infra* Sections IV-V.

88. For a prohibitory argument extending beyond the most typical proposed gun control measures, see Amitai Etzioni, *Gun Control? We Need Domestic Disarmament*, HUFFINGTON POST

self and family, and for some means of justifiable and proportionate defense of self and others, is widespread and often treated as a matter of moral right, if not moral duty.<sup>89</sup> As well, substantial burden analysis in the Second Amendment context should be sensitive to differential cultural, demographic, and racial impacts of various sorts of regulation, again in light especially of realistic self-defense concerns.<sup>90</sup>

The Second Amendment cases thus begin to add genuine subjectivity and emotional depth to substantial burdening analysis. For broader perspective, and additional depth and complexity, we can now draw as well upon the expansive case law addressing the question of undue burdening, if not precisely substantial burdening, of the constitutional rights recognized in the context of *Roe v. Wade*<sup>91</sup> and subsequent abortion access regulation cases.<sup>92</sup> It is to those cases that we now turn.

(Apr. 21, 2013), [http://www.huffingtonpost.com/amitai-etzioni/gun-control-we-need-domes\\_b\\_2718536.html](http://www.huffingtonpost.com/amitai-etzioni/gun-control-we-need-domes_b_2718536.html). Of course, the constitutional focus would also shift with the adoption of the dissenting perspectives in the *Heller* and *McDonald* cases. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); *McDonald v. City of Chicago*, 561 U.S. 742, 858 (2010) (Stevens, J., dissenting); *id.* at 912 (Breyer, J., dissenting).

89. Consider, e.g., THOMAS HOBBS, *LEVIATHAN* 189 (C.B. Macpherson ed.) (reprint ed. 1971) (1651) (“[t]he Right of Nature . . . is the Liberty each man hath, to use his own power, as he will himself, for the preservation of . . . his own life; and consequently, of doing anything, which in his own Judgment, and Reason, he shall conceive to be the aptest means thereto”). Again, we need take no position on what such a principle should suggest regarding the availability of firearms or their regulation. For discussion of Hobbes on this point, see A.P. MARTINICH, *HOBBS* 78-79 (2005); RICHARD TUCK, *HOBBS: A VERY SHORT INTRODUCTION* 70 (1989); RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 130 (1998 ed.) (1979); Alan Ryan, *Hobbes’s Political Philosophy*, in *THE CAMBRIDGE COMPANION TO HOBBS* 208, 223 (Tom Sorrell ed., 1996).

Hobbes’s state of nature-based account is in this respect later taken up and significantly modified in SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 48-52 (Michael Silverthorne trans., 1991) (1673); Condorcet, *On the Influence of the American Revolution on Europe*, in *SELECTED WRITINGS* 71, 73 (Keith Michael Baker ed., 1976) (1786); J.G. FICHTE, *FOUNDATIONS OF NATURAL RIGHT* 216-25 (Michael Baur trans., 2000) (1796).

For sophisticated contemporary treatments of self-defense and related issues, see, e.g., the contributions in *THE ETHICS OF SELF-DEFENSE* (Christian Coons & Michael Weber eds., 2016); Russell Christopher, *Self-Defense and Defense of Others*, 27 *PHIL. & PUB. AFF.* 123 (1998); Jonathan Quong, *Killing in Self-Defense*, 119 *ETHICS* 505 (2009).

90. For a sense of the realistic group impact of various possible armed defense law regimes, consider, e.g., CHARLES E. COBB, JR., *THIS NONVIOLENT STUFF’LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE* (2014); NICHOLAS JOHNSON, *NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS* (2014); Akinyele Omowale Umoja, *We Will Shoot Back: Armed Resistance in the Mississippi Freedom Movement*, 32 *J. BLACK STUD.* 271 (2002); Erica Evans, *Does the 2nd Amendment Apply to African Americans?*, *L.A. TIMES* (July 8, 2016, 3:00 AM), <http://www.latimes.com/nation/la-na-second-amendment-20160707-snap-story.html>.

91. 410 U.S. 113 (1973).

92. Most authoritatively, see *Planned Parenthood v. Casey*, 505 U.S. 833, 874, 877 (1992) (plurality opinion) and *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

#### IV. SUBSTANTIAL BURDENS IN THE ABORTION ACCESS REGULATION CASES

Only rarely do the contemporary abortion access regulation cases refer, literally and explicitly, to the presence or absence of a “substantial burden” on such a right.<sup>93</sup> The plurality opinion in *Planned Parenthood v. Casey*<sup>94</sup> refers instead to a “substantial obstacle”<sup>95</sup> in the woman’s path as amounting to an “undue burden”<sup>96</sup> on her abortion access rights. In the context of the magnitude of a burden, the idea of an “undue” burden seems more purely normative than the somewhat “thicker,”<sup>97</sup> or normatively and descriptively mixed, idea of a substantial burden.

The *Casey* plurality then seeks to contrast a “substantial obstacle” to abortion access with a mere state-created “structural mechanism”<sup>98</sup> by means of which the government may promote other goals, as long as the structural mechanism in question does not also amount to a substantial obstacle to abortion access.<sup>99</sup> The reference to a structural mechanism thus does not tell us whether any particular such mechanism is also a substantial obstacle to abortion access, and thus an undue burden on the constitutional right.<sup>100</sup>

If the language of structural mechanisms by itself thus does not much help in identifying substantial obstacles or, ultimately, an undue burden on abortion access rights, can the idea of an undue burden provide useful judicial guidance? If we know that a burden is, all things considered, genuinely undue, it is hard to see, at least *prima facie*, how such a burden can be constitutionally permissible.

The problem is that a burden that is genuinely undue, like a burden we assume to be wrong, bad, or unjust, is already heavily if not dispositively normative.<sup>101</sup> The normative conclusion, and the case outcome, seem largely built into the very term “undue.” By itself, “undue burden” seem less of a test than a way of formulating a conclusion already reached on some other

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93. For an unusually close approach to this precise phrase, see *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 912 (9th Cir. 2014) (“we compare the extent of the burden a law imposes on a woman’s right to abortion with the strength of the state’s justification for the law. . . . *The more substantial the burden*, the stronger the state’s justification must be to satisfy the undue burden test. Conversely, the stronger the state’s justification, the greater the burden may be before it becomes ‘undue’”) (emphasis added).

94. 505 U.S. 833 (1994).

95. *Id.* at 877-78.

96. *Id.* at 876-78.

97. For discussion, see *supra* notes 12-20 and accompanying text.

98. *Casey*, 505 U.S. at 877.

99. *See id.*

100. *See id.* at 877-78.

101. *See supra* text accompanying notes 12-20.

grounds. No doubt courts have applied what is thought of as an undue burden test in various abortion access cases.<sup>102</sup> But the important question remains how one determines, in some judicially appropriate way, whether a burden on a right is undue or not.

One reasonable approach to this question involves something like the proportionalist balancing of Justice Breyer.<sup>103</sup> In the recent *Hellerstedt* case,<sup>104</sup> Justice Breyer examined Texas statutory requirements that abortion physicians have admitting privileges at a hospital within thirty miles,<sup>105</sup> and that abortion facilities meet the state's requirements for ambulatory surgical centers.<sup>106</sup> The Court held that both requirements placed a substantial obstacle in the woman's path, and thus constituted an undue and therefore impermissible burden on the petitioners' constitutional rights.<sup>107</sup>

Underlying this general formula, however, are distinguishable possible routes to the result. A judge could decide the substantial obstacle question, and thus the case, by looking solely at the obstacle in question, by itself, and determining whether or not it is, independently, substantial in magnitude. If the obstacle in question is determined to be either substantial or insubstantial, the case result immediately follows, assuming in the latter case that some legitimate state interest is thought to be a stake.

But this narrow literalism would not catch the essence of a more inclusive, proportionalist balancing, under the circumstances, of rights and interests and the incremental effects thereon. A judge could thus seek to somehow compare the value of promoting any at least legitimate regulatory interest with any thereby unavoidably imposed obstacles, or any increased obstacles, for the regulated parties. If the obstacle then seems disproportionately large, it could be deemed to be substantial, thus effectively determining the case.<sup>108</sup> Or in the alternative, a proportionalist balancing

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102. The *Casey* plurality refers to "the undue burden standard." 505 U.S. at 876. See also, e.g., *MKB Management Corp. v. Stenhjem*, 795 F.3d 768, 772 (8th Cir. 2015); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 454 (5th Cir. 2014); *Planned Parenthood v. Abbott*, 748 F.3d 583, 598 (5th Cir. 2014); *Planned Parenthood v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013).

103. See *Hellerstedt*, 136 S. Ct. at 2309-10. For a discussion of Justice Breyer's constitutional proportionalism in other contexts, see Wright, *A Hard Look at Exacting Scrutiny*, *supra* note 4. Justice Breyer's proportionalism in the abortion regulation context draws support from case language such as that quoted above from *Humble*, *supra* note 93. See also Emma Freeman, Note, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279 (2013).

104. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

105. See *id.* at 2310.

106. See *id.* at 2314-15.

107. *Id.* at 2318.

108. See *id.*

judge could strike down a regulation even if the obstacle in question is slightly less than substantial, if the state's legitimate interest therein is only minimal, or only minimally promoted.<sup>109</sup>

Whatever method is adopted, and whatever the terminology employed, courts applying *Hellerstedt* will consider, in some fashion, the degree of substantiality of any burden imposed upon the constitutional rights of the affected parties. Some sort of inquiry into the substantiality of this burden may be avoided in name, but not in effect.

Our concern herein is with the broader nature and character of the burdens typically involved in the abortion access cases. Such burdens have taken many legal forms. Of late, merely for example, the courts have addressed regulations on hospital admitting privileges,<sup>110</sup> on-site medical equipment,<sup>111</sup> on-label prescription drug requirements,<sup>112</sup> and hospital site requirements.<sup>113</sup>

In such cases, courts often seek to determine the substantiality of the burden in ways that may superficially resemble considerations typically at work in the commerce clause cases.<sup>114</sup> Thus courts in both contexts consider, in some fashion, matters such as increases in travel time and distance,<sup>115</sup> the relevance in the burdening context of the need to cross state borders,<sup>116</sup> and the burdens of time delays and compliance requirements more generally.<sup>117</sup>

Despite these verbal similarities, though, the differences among substantial burden analyses in the commerce clause cases, the Second Amendment cases, and the abortion access regulation cases are more significant than the similarities. The vast majority of the commerce clause substantial burden cases lack the subjective, deeply emotional, basic personal autonomy and constraint dimensions often central to many abortion access

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109. *See id.* at 2322, 2324-26 (Thomas, J., dissenting).

110. *See id.* at 2310; *Planned Parenthood v. Van Hollen*, 738 F.3d 786, 796-98 (7th Cir. 2013).

111. *See Hellerstedt*, 136 S. Ct. at 2314-15.

112. *See Planned Parenthood Arizona, Inc., v. Humble*, 753 F.3d 905, 907 (9th Cir. 2014).

113. *See McCormack v. Herzog*, 788 F.3d 1017, 1029-30 (9th Cir. 2015).

114. *See* the factors discussed throughout Section III *supra*.

115. *See Hellerstedt*, 136 S. Ct. at 2318; *Planned Parenthood v. Abbott*, 748 F.3d 583, 597-98 (5th Cir. 2014).

116. *See, e.g., Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457-58 (5th Cir. 2014). In this context as well, the state's arguments that a burden is not substantial because the right can be exercised in some nearby jurisdiction are unavailing. *See Planned Parenthood v. Schimel*, 806 F.3d 908, 918-19 (7th Cir. 2015) (Posner, J.) (quoting the free speech case of *Schneider v. State*, 308 U.S. 147, 163 (1939), as cited *supra* note 81).

117. *See, e.g., Humble*, 753 F.3d at 907. Compare the various commerce clause costs and delays noted *supra* Section II.

regulation cases.<sup>118</sup> Assessing substantial burdens in the latter cases should involve an attempt of some sort to account for or defer to those distinctive subjective, emotional, and personal autonomy-related considerations.

As we have seen, deep and often conflicting emotions of one sort or another, including various sorts of fears, can characterize the Second Amendment substantial burden cases as well.<sup>119</sup> We need not here undertake to catalog all of the differences between the emotions associated with the Second Amendment and the abortion access cases. But one jurisprudentially relevant difference does stand out.

In particular, the basic fears and concerns associated with violent physical assault and self-defense, as described in Thomas Hobbes' classic account of a state of nature,<sup>120</sup> are assumed by Hobbes to be nearly universally shared, in more or less roughly equivalent fashion.<sup>121</sup> At least, no one is exempt, based on their personal characteristics, from the logic of such concerns.<sup>122</sup> In contrast, the subjective experiences and the various emotions and concerns often associated with the abortion access regulation cases<sup>123</sup> are less universally shared, and to some degree only imperfectly communicable to a broader public.

This difference poses a distinct challenge to many judges seeking to determine anything like a substantial burden question in the abortion access regulation cases. Such judges should here especially resist any impulse to universalize their own experiences, or even to rely confidently on the range of their own empathy and imagination.<sup>124</sup> Deference to the experiences of those persons most directly affected, however necessarily imperfectly

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118. For background and discussion, see Lena Alex & Anne Hammarstrom, *Women's Experiences in Connection with Induced Abortion: A Feminist Perspective*, 18 SCAND. J. CARING SCI. 160 (2004); Maggie Kirkham et al., *Reasons Women Give For Abortion: A Review of the Literature*, 12 ARCHIVES WOMEN'S MENTAL HEALTH 365 (2009), <http://link.springer.com/article/10.1007/s00737-009-0084-3>; Mabel L.S. Lic et al., *Experiences of Abortion: A Narrative Review of Qualitative Studies*, BMC HEALTH SERVICES RESEARCH (July 17, 2008), <http://bmchealthservices.biomedcentral.com/articles/10-1186>; Catherine Pearson, *17 Women Share How Planned Parenthood Transformed Their Lives*, HUFFINGTON POST: WOMEN (Sept. 15, 2015, 4:55 PM ET), [http://www.huffingtonpost.com/entry/planned-parenthood-transforms-womens-lives\\_us\\_55fc49e7e4b00310edf6da3e](http://www.huffingtonpost.com/entry/planned-parenthood-transforms-womens-lives_us_55fc49e7e4b00310edf6da3e); Meaghan Winter, *26 Women Share Their Abortion Stories*, NYMAG (Nov. 10, 2013), <http://nymag.com/news/features/abortion-stories-2013-11>.

119. See *supra* notes 89-90.

120. See *supra* note 89.

121. See *id.*, and in particular, HOBBS at chs. 13-14.

122. See *id.*

123. See the sources cited *supra* note 118.

124. Concisely put, an additional 150 road miles, or the necessity of a return trip, in a typical commerce clause case and then in a typical abortion access regulation case, may have little relevant substance in common.

expressed, will typically be appropriate on the issue of substantial burdening in the abortion access cases.<sup>125</sup>

As it turns out, though, yet a further layering of adjudicative complications is added in a final category of substantial burdening cases. These are the religious exercise cases. It is to that often remarkably subtle and sometimes profoundly difficult category of cases that we now turn.

## V. SUBSTANTIAL BURDENS IN THE RELIGIOUS EXERCISE CASES

In many cases involving restrictions on the practice of religion, it is natural to ask, as one element of the overall statutory or constitutional analysis, whether the exercise of religion is being substantially burdened. A substantial burdening element is in fact explicitly written into the Federal Religious Freedom Restoration Act of 1993 (RFRA)<sup>126</sup> and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)<sup>127</sup> in particular.

The courts have devoted considerable attention to the question of what constitutes a substantial burden on the exercise of religion. Religious exercise itself has been defined broadly to include “any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs.”<sup>128</sup> But this does not imply that whether an activity is required by, or is thought to be central to, a given religion is irrelevant to whether a particular burden is substantial or not.<sup>129</sup>

As for the idea of a religious substantial burden, the courts have often focused on the idea of choice on the part of the claimant, and in particular, on something like a compelled or coerced choice,<sup>130</sup> a pressured choice, or a

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125. It could be argued that regulating the lengths of passenger trains, the width of trucks, or the design aspects of large trucks, *see supra* notes 33-39 and accompanying text, can involve fears for personal safety, whether supported or not by available accident studies. Even if so, the role of such considerations in typical commerce clause cases is typically reduced, less central, and more manageable, partly through undisputed empirical data. The *Morgan* case, 328 U.S. 373 (1946), is plainly exceptional in this regard. As well, the chances that a particular judge will be incapable of empathizing with anyone being passed on the highway by a large truck in the rain seem limited.

126. Pub. L. No. 103-41, 107 Stat. 1488, codified at 42 U.S.C. §§ 2000bb(1)-(4) (2016).

127. Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. §§ 2000cc(1)-(5). (2016).

128. RLUIPA, 42 U.S.C. § 2000cc-5(7)(A), quoted in *Holt v. Hobbs*, 135 S. Ct. 853, 860, 862 (2015). We may similarly assume that the reference to a belief “system” is not intended to deny protected status to otherwise recognizable religions and beliefs that one might not think of as especially “systematic.”

129. Of course, judicially determining whether a particular belief is central to a claimant’s other beliefs, or to some identified religious tradition, is likely to itself be controversial.

130. For an argument that the concept of “coercion” in much of the Religion Clause area is currently muddled, see R. George Wright, *Why the Coercion Test Is of No Use in Establishment Clause Cases*, 41 CUMB. L. REV. 193 (2011).

substantially or unmistakably pressured choice between religious fidelity, and obtaining some significant government benefit or avoiding the imposition of some meaningful penalty.<sup>131</sup>

In determining whether there is a substantial burden on religious exercise, the availability of alternative religious activities may be of questionable relevance. Resolving such issues may require some degree of precision in describing the circumstances. We can, on the one hand, understand how there could be a substantial burden on religion in a case in which some religiously mandatory, non-substitutable practice is prohibited, even if the claimant is permitted religious exercise in various other separate respects.<sup>132</sup> On the other hand, there is again<sup>133</sup> an argument that if the religion itself clearly and uncontestedly allows for a number of equally appropriate available ways of complying with a given general requirement, then the burden on religion is in that respect not substantial.<sup>134</sup>

As well, in typical cases, the imposition of a generally applicable, non-confiscatory tax on religious entities, among other parties, does not amount to a substantial burden on religious exercise.<sup>135</sup> Nor does a government's failure to itself join in a particular religious practice,<sup>136</sup> or, without more, a government's adoption of policies the claimant regards as religiously objectionable.<sup>137</sup>

The most interesting substantial burden cases, however, are those in which the claimant's argument regarding the burden in question strikes many observers as murky, incoherent, mistaken as to law or fact, unintelligible, or

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131. See, at the level of the free exercise of religion before Emp't Div. v. Smith, 494 U.S. 872 (1990), the unemployment compensation case of Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988); Bowen v. Roy, 476 U.S. 693, 706 (1986). Under the more recent religious exercise statutes, see, e.g., Navajo Nation v. United States Forest Serv., 533 F.3d 1058, 1070 (9th Cir. 2008) (referring to a "forced" choice or coercion under "threat of civil or criminal sanctions"); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (8th Cir. 2004) (requiring "more than an incidental effect on religious exercise," with a substantial burden as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"). An "incidental" burden in this sense is non-substantial, as are burdens on unrelated parties, and burdens that are only "slight, negligible, or de minimus." Priests for Life v. HHS, 772 F.3d 229, 248 (D.C. Cir. 2014), vacated on other grounds; Zubik v. Burwell, 136 S. Ct. 1557 (2016) (per curiam).

132. See, e.g., Hobbs, 135 S. Ct. at 862; Oklevueha Native Am. Church v. Lynch, No. 14-15143, 2016 WL 1359239, at \*4 (9th Cir. Apr. 26, 2016).

133. See *supra* notes 81 & 116 and accompanying text.

134. See *Midrash Sephardi, Inc.*, 366 F.3d at 1227; *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995).

135. See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990); *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989).

136. See *Roy*, 476 U.S. at 699-70.

137. See *id.*

otherwise relevantly deficient.<sup>138</sup> Remarkably subtle and even profound difficulties can arise in such cases, as it is also well established that courts are not, in general, to assess the plausibility or the public comprehensibility of a religious claim or doctrine.<sup>139</sup>

Thus the deepest and most interesting substantial burden cases tend to involve religious claims that seem to rest, in some crucial respect, on what many outsiders consider a cognizable mistake of one sort or another. This kind of case can be illustrated through a much simplified version of the substantial burden analyses in the cases ultimately vacated by the Court in the *Zubik v. Burwell*<sup>140</sup> contraceptive health insurance case.

In our simplified version of *Zubik*, we assume that a religiously motivated party is legally required to sign or otherwise simply process a single-page document, at only a minimum administrative cost, where noncompliance would involve significant financial penalties. The religious party objects to this requirement as a substantial burden on its religious exercise. When asked to explain the nature of the burden, the religious party responds that processing the document would, on its religious view, involve something like causing, enabling, triggering, facilitating, participating in, condoning, or some religiously objectionable form of complicity or other form of cooperation with what the religious party considers a serious moral evil.<sup>141</sup>

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138. See, e.g., *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 619, 623 (7th Cir. 2015) (Hamilton, J., concurring), *vacated on other grounds*, 136 S. Ct. 2007 (2016) (per curiam) (“[t]his is not an issue of moral philosophy but of federal law. Federal courts are not required to treat Notre Dame’s erroneous legal interpretation as beyond their reach—even if that interpretation is also a sincere and religious belief. Notre Dame is not entitled to nullify the law’s benefits for others based on this mistake of law, which is the foundation of its claim of a substantial burden”).

139. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981); *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2778 (2014) (citing, inter alia, *Smith*, 494 U.S. at 887; *Hernandez*, 490 U.S. at 999; *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927, 942 (8th Cir. 2015), *vacated*, *Univ. of Notre Dame v. Burwell*, 136 S. Ct. 2006 (2016) (per curiam) (“[r]eligious beliefs need not be ‘acceptable, logical, consistent, or comprehensible to others’ to deserve protection” (quoting *Thomas*, 450 U.S. at 714)). See also the Flying Spaghetti Monster RLUIPA case of *Cavanaugh v. Bartelt*, No. 4:14-CV-3183, 2016 WL 1446447 (D. Neb. Apr. 12, 2016), *appeal filed* (8th Cir. May 5, 2016).

140. 136 S. Ct. 1557 (2016) (per curiam). Among the vacated cases, the majority of which had found no substantial burden on the claimants under RFRA, were *Michigan Catholic Conference & Catholic Family Serv. v. Burwell*, 807 F.3d 738 (6th Cir. 2015); *Sharpe Holdings, Inc. v. HHS*, 801 F.3d 927 (8th Cir. 2015); *Grace Schools v. Burwell*, 801 F.3d 788 (7th Cir. 2015); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015); *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. 2015); *Priests for Life v. HHS*, 772 F.3d 229 (D.C. Cir. 2014).

141. Such language recurs throughout the relevant cases. See, e.g., *Catholic Health Care Sys.*, 796 F.3d at 222; *Eternal Word Television Network*, 756 F.3d 1339, 1340, 1343, 1345 (Pryor, J., specially concurring).

To this, the government and many courts may reply that the religious party is mistaken, at least as to the legal meaning and implications of processing the document in question. Processing the document instead, it has thus been argued by the government, has the legal effect of absolving the religious party of any relevant consequences, and of shifting causal responsibility for any supposedly evil effects to other independent voluntary actors.<sup>142</sup>

Given this conflict between the religious actor and the government, it might be tempting to conclude that all such cases are actually easy, as it is well established that the existence of a substantial burden in this context is a question of law, for determination not by private claimants, but by the courts.<sup>143</sup> Unfortunately, this principle marks only the beginning, and not the key to the resolution, of the inquiry.

The court alone clearly must determine whether a substantial burden exists in the religion cases.<sup>144</sup> The important question, though, is how the court is to do so. Crucially, this involves the court's determining when to declare the religious claimant's assertions to be somehow relevantly legally defective,<sup>145</sup> and when to accommodate a religious assertion, or more particularly its grounds, as entitled to accommodation despite its implausibility or apparent incoherence.<sup>146</sup>

In our simplified case, for example, a court might reasonably find that merely processing the document in question does not amount to triggering, enabling, facilitating, or legally causing any alleged evil. Nor would it suffice for legal complicity, in the sense of legal accomplice liability,<sup>147</sup> in any such evil. The crucial question, however, is whether a court should take into account, for example, the possibility that sincere religious standards for religious or moral complicity, or for moral responsibility in general, may be more scrupulous and more demanding than the typical legal standard.

At a very minimum, it has been argued that moral complicity may be broader than legal complicity,<sup>148</sup> or than familiar understandings of

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142. For such arguments in the actual cases, see, e.g., *Grace Schools*, 801 F.3d at 804-05; *Little Sisters of the Poor Home for the Aged*, 794 F.3d at 1182-83; *Geneva College*, 778 F.3d at 438-40.

143. See, in the actual cases, *Grace Schools*, 801 F.3d at 804; *Catholic Health Care Sys.*, 796 F.3d at 217; *Little Sisters of the Poor Home For the Aged*, 794 F.3d at 1176.

144. See the sources cited *supra* note 143.

145. See, e.g., the authorities cited *supra* notes 138 & 142.

146. See the authorities cited *supra* note 139.

147. For discussion of some of the complications of corporate accomplice liability in civil and criminal contexts, see R. George Wright, *A Negotiation-Based Approach to Corporate Human Rights Liability*, 53 SAN DIEGO L. REV. (forthcoming 2016).

148. See, e.g., Gregory Mellema, *Legal Versus Moral Complicity*, 1 AM. INT'L J. CONTEMP. RES. 126, 126 (2011). Cf. Henry David Thoreau, *Civil Disobedience* (1849),

causation.<sup>149</sup> On some religious understandings, complicity can be subtle, apparently passive, multi-dimensional, a matter of public perception, and in some cases, unusually broad in scope. In particular, religious understandings of culpable complicity need not require what would ordinarily be thought of as participation, or assistance. In some circumstances, religious complicity could conceivably involve even merely perceived or actual toleration, acquiescence, passivity, or subtle legitimation.<sup>150</sup> The actual or publicly perceived degree of association with the purported evil may matter.<sup>151</sup> In some cases, though, any degree of association with the evil may be thought to be deeply objectionable.<sup>152</sup>

Under current law, the degree of persuasiveness of any religious belief as to good and evil is largely irrelevant, as is the degree of moral scrupulousness that is religiously required.<sup>153</sup> On the other hand, in cases in which a religious entity perceives a need to dissociate or publicly distance itself from some objectionable activity, the courts should ask whether, paradoxically, a claimant's sustained public course of actively litigating the case in the federal courts does not, on the claimant's own theory, itself reduce or eliminate the complicity at issue.

Unfortunately for the clarity of the law, the familiar document-processing moral complicity cases do not begin to plumb the depths of the difficulties in adjudicating religious based substantial burden cases. The claimant in such a case must characterize and establish the weight of a burden that may derive from experiences that are not only emotional,<sup>154</sup> or not widely

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<http://xroads.virginia.edu/~hyper2/thoreau/civil.html> (last visited Sept. 21, 2016) (“[w]hat I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn”). In Thoreau's usage, the idea of “lending” oneself may be unclear, variable, or debatable in its scope and meaning. For more specific discussion, see Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897 (2015).

149. See Christopher Kutz, *Causeless Complicity*, 1 CRIM. L. & PHIL. 289 (2007). More broadly, see CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000).

150. For broad discussion of cooperation with presumed evil on several distinct axes, see Germain Grisez, *Difficult Moral Questions, Appendix 2: Formal and Material Cooperation in Others' Wrongdoing*, THE WAY OF THE LORD JESUS, <http://www.twotlj.org/G-3-A-2.html> (visited Sept. 21, 2016). See also ANDREW MCLEAN CUMMINGS, *THE SERVANT AND THE LADDER: COOPERATION WITH EVIL IN THE TWENTY-FIRST CENTURY* (2014).

151. See *supra* note 150; Christian Medical & Dental Association, *Moral Complicity with Evil Ethics Statement*, <https://cmda.org/resources/publication/moral-complicity-with-evil-ethics-statement> (last visited Sept. 21, 2016).

152. See *supra* notes 150 & 151.

153. See *supra* note 146 and accompanying text. For present purposes, we of course set aside all questions as to the merits of the statutes in question, or of special protection for religious exercise. For discussion, see RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2014); STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* (2014).

154. See *supra* Sections III-IV.

shared,<sup>155</sup> but that are in some sense intensely private, personal, mystical, visionary, ineffable, barely articulable, and thus only minimally susceptible to verbal formulation and public communication.<sup>156</sup> Thus many religious claims going to the nature and weight of a burden must rely, to one degree or another, on something like crude translation, analogy, imperfect model, indirection, symbol, and metaphor.<sup>157</sup>

When courts consider claims as to the nature and weight of religious burdens that cannot entirely bypass all reliance on inadequate language, two opposing perspectives should each play a role. On the one hand, courts may to one degree or another appropriately apply what is known as a principle of interpretative charity, or of interpretive humanity.<sup>158</sup> While such a principle can be interpreted in various ways,<sup>159</sup> one such approach would, all else equal, actively seek as much meaning, coherence, and intelligibility in the

155. See *supra* Section V.

156. Consider the practical problem of conveying, in the course of federal litigation, the magnitude of a burden that is crucially grounded in one's sense of the "numinous." See RUDOLF OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR IN THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* (John W. Harvey trans., 1958) (1925).

157. For discussion, see THOMAS AQUINAS, *SUMMA THEOLOGICA I-I*, at question 13, <http://www.newadvent.org/summa/1013.htm> (last visited Sept. 21, 2016); IAN G. BARBOUR, *MYTHS, MODELS, AND PARADIGMS* 7, 127-31 (1974); WILLIAM DOWNES, *LANGUAGE AND RELIGION: A JOURNEY INTO THE HUMAN MIND* 253 (2011); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (2d ed. 2003) (arguing for a recognition of our broad reliance on metaphor); SALLIE MCFAGUE, *METAPHORICAL THEOLOGY: MODELS OF GOD IN RELIGIOUS LANGUAGE* 1 (1982) (noting that one can "feel conviction at the level of experience . . . but great uncertainty at the level of words"); BASIL MITCHELL, *HOW TO PLAY THEOLOGICAL PING-PONG: ESSAYS ON FAITH AND RELIGION* 185 (William J. Abraham & Robert W. Prevost eds., 1990) (distinguishing among the above cited categories); FRANK J. SHEED, *THEOLOGY AND SANITY* 59 (1993 ed.) (1946); JANET MARTIN SOSKICE, *METAPHOR AND RELIGIOUS LANGUAGE* 141, 152 (reprint ed. 2002) (1985); ROBERT M. WHITE, *TALKING ABOUT GOD: THE CONCEPT OF ANALOGY AND THE PROBLEM OF RELIGIOUS LANGUAGE* 186 (2010); William P. Alston, *Religious Language*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF RELIGION* 6 (William J. Wainwright ed., 2007) (noting the possibility that in some cases, the meaning of a religious claim may crucially depend on criteria internal to the practice of that religious language); Cynthia B. Cohen, *The Logic of Religious Language*, 9 *RELIG. STUD.* 143, 143 (1973); Brian Davies, *The Limits of Language and the Notion of Analogy*, in *THE OXFORD HANDBOOK OF AQUINAS* ch. 28, at 390, 394 (Brian Davies & Eleonore Stump eds., 2012); Victoria S. Harrison, *Metaphor, Religious Language, and Religious Experience*, 46 *SOPHIA* 127, 130 (2007); Kai Nielsen, *Religious Discourse and Arguing From Ordinary Language*, 5 *METAPHILOSOPHY* 106 (1974); Paul Ricoeur, *Philosophy and Religious Language*, 54 *J. RELIG.* 71 (1974); J. Heywood Thomas, *Religious Language as Symbolism*, 1 *RELIG. STUD.* 89 (1965).

158. For background, see Christopher Gauker, *The Principle of Charity*, 69 *SYNTHESE* 1, 1 (1986); Richard Grandy, *Reference, Meaning, and Belief*, 70 *J. PHIL.* 439 (1973); Frank I. Michelman, *On the Uses of Interpretive Charity* (Harv. Pub. L. Working Paper No. 08-26, 2008), <http://ssrn.com/abstract=1263503>; David Vessey, *The Method of Question and Answer As a Principle of Charity in Gadamer's Hermeneutics*, 51 *RECHERCHES EN PHILOSOPHIE* 1 (2009).

159. See *supra* note 158.

religious claimant's<sup>160</sup> language as such language will admit. This is roughly a matter of assuming, until the contrary is established, the lucidity and general common groundness of one's fellow human persons, and of reasonably seeking to validate that assumption.

On the other hand, or at the other extreme, there is also the view that at least some religious considerations, even if crucial to a claim of substantial burdening, simply cannot be meaningfully articulated. At such points Ludwig Wittgenstein famously concluded that "whereof one cannot speak, thereof one must be silent."<sup>161</sup> Silence, or publicly meaningless discourse, does not advance the claimant's legal assertion of substantial burdening.<sup>162</sup> But these rare instances need not be blamed on the use of the particular legal test, or on the legal system in general.<sup>163</sup>

More typically, judges should try to distinguish between arguments that a claimant does not understand her own religious beliefs and perhaps also that the court or others do, which is possible, but unlikely and arguments, in contrast, that a claimant is crucially relying on her own mistaken interpretation of some publicly accessible and readily investigable matter of

160. There is of course no reason to limit a principle of interpretive charity to the realm of religious discourse, as distinct from the public communicability issues raised *supra* Section IV.

161. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS*, prop. 7, at 90 (C.K. Ogden trans., 1922) (Cosimo Pub. ed., 2007) (1921). For discussions of Wittgenstein on religion, see D.Z. PHILLIPS, *WITTGENSTEIN AND RELIGION* (1993); NORMAN MALCOM, *WITTGENSTEIN: A RELIGIOUS POINT OF VIEW?* 77 (1994); Brian Davies, *Wittgenstein on God*, 55 *PHIL.* 105 (1980). To the extent that religious discourse can be viewed as a distinct "language game," with partially internal meanings, rules, and practices, see LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATION* § 23, at 15 (G.E.M. Anscombe, P.M.S. Hacker & Joachim Schulte trans.) (rev. 4th ed., 2009) (1953); James Kellenberger, *The Language-Game View of Religion and Religious Certainty*, 2 *CAN. J. PHIL.* 255 (1972); Patrick Sherry, *Truth and the "Religious Language-Game,"* 47 *PHIL.* 18 (1972).

162. Neither, presumably, would the also-rare phenomenon in which a religious substantial burden case genuinely hinged on a matter of logic or meaning that was inevitably entirely internal to the lived practice of the religion in question. For background, see the authorities cited *supra* note 161.

163. For a more general discussion of contexts in which we should be either more, or less, willing to defer to the assertions of other persons when we are unable to find such assertions sufficiently understandable or persuasive on the merits, see PHILIP SOPER, *THE ETHICS OF DEFERENCE* 176 (2002) (focusing in particular on intensity of belief and on the nature of the conviction in question). Of course, a judge would in many cases wish to factor in any disparities in acknowledged expertise, considerations of arrogance and magnanimity, the possibility of public educative or symbolic effects, risks of abuse of one judicial outcome or another, the degree of predictability of the effects of judicial outcomes, and, typically most importantly, the effects of deference to the religious exemption claimants, on the judicial outcome in general, on the important rights and interests of third parties. See Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 *U. CHI. L. REV.* 1897 (2015).

genuinely relevant secular law or fact.<sup>164</sup> Making due allowances for the claimant's foibles and limitations, and for their own fallibility, courts should, where necessary, be generally willing to undertake the latter sort of investigation.

Unavoidably, any sensitive approach to substantial burdening issues in the religious exercises cases will result in some false positives, in the sense of finding a substantial burden on the exercise of religion where no such burden genuinely exists. There will also be, more importantly, cases in which the burden on religion can be considered substantial, but not especially weighty in comparison with the rights and interests of unconsenting third parties that would have to be sacrificed in order to reduce or eliminate the burden on religion.

It should be remembered that in the latter cases, a finding of a substantial burden on religion does not decide the case, even where strict scrutiny of any such burden is legally required.<sup>165</sup> Some countervailing rights and interests may prevail. What counts as a sufficiently crucial right or as a compelling governmental interest, and as narrow tailoring, can certainly be contested.<sup>166</sup> It might even be possible, in some cases, to cite demonstrable financial cost concerns, and related effects of those costs, as a sufficiently compelling such interest.<sup>167</sup>

More important than direct compliance costs imposed on governments by religious accommodation, typically, will be any thereby required sacrifices, and perhaps disproportionate sacrifices, on the part of unconsenting third parties. Those effects on the rights and interests of unconsenting third parties may range from minimal<sup>168</sup> to dramatic.<sup>169</sup> And there is in any event ample room for debate over the propriety of the strict

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164. This could include cases in which the claimant's case crucially depends on the reasonably demonstrable truth or falsity of her characterization of the religious beliefs of some other person or organization, to which she may not have or claim privileged access. For interesting background, see *Ben-Levi v. Brown*, 136 S. Ct. 930 (2016) (Alito, J., dissenting from denial of cert.) (regarding a North Carolina prison system construal of Jewish doctrine).

165. See the statutory citations *supra* notes 126 & 127. The RLUIPA statute, for example, requires that the substantial burdening advance "a compelling governmental interest" through "the least restrictive means." 42 U.S.C. § 2000cc-1(a).

166. For background, see R. George Wright, *What If the Levels of Constitutional Scrutiny Were Abandoned?*, 45 U. MEMPHIS L. REV. 165 (2014); R. George Wright, *Electoral Lies and the Broader Problem of Strict Scrutiny*, 64 FLA. L. REV. 759 (2012).

167. For discussion of such a possibility, see the prisoner kosher meal RLUIPA case of *United States v. Sec'y, Fla. Dep't. Corrections*, No. 4:16cv27-WS/GRJ, 2016 WL 4708479 (11th Cir. Sept. 8, 2016).

168. See, e.g., the prison beard length RLUIPA case of *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

169. For background, see Sepinwall, *supra* note 163.

scrutiny standard, among other possible standards,<sup>170</sup> in some or all of the religious substantial burdening cases.<sup>171</sup> On any such question, though, we need here take no position.<sup>172</sup>

## VI. CONCLUSION: RELATING THE SUBSTANTIAL BURDEN ANALYSES IN THE VARIOUS CONTEXTS

As it turns out, the various substantial burden subject matter areas discussed above are therein ranked in ascending order of their typical depth and complexity. Thus, what we have called problems of public communicability generally become more difficult as we move, in order, from the commerce clause cases<sup>173</sup> to the Second Amendment cases,<sup>174</sup> to the abortion access regulation cases,<sup>175</sup> and then to the religious exercise cases.<sup>176</sup>

Thus as we have seen, the commerce clause cases can certainly involve difficult issues of empirical evidence and of long-term or indirect policy consequences. Commerce clause substantial burden cases involving meaningful elements of deep emotion and other subjectivities will, however,

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170. For less stringent, perhaps proportionalist, alternatives, see the discussion in Wright, *A Hard Look at Exacting Scrutiny*, *supra* note 4.

171. For commentary on substantial burdening issues confined to the specific context of the RFRA statutory religious exercise cases, see, e.g., University of Illinois Law Review, *Symposium on Substantial Burdens Under the Religious Freedom Restoration Act*, <https://illinoislawreview.org/online/2016/substantial-burdens> (last visited Sept. 23, 2016); and *Coverage of Zubik v. Burwell*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/zubik-v-burwell> (last visited Sept. 23, 2016) (focusing largely on the developing *Zubik v. Burwell* litigation), as well as the debate between Professors Steven D. Smith and Caroline Mala Corbin, *The Contraception Mandate and Religious Freedom*, 161 U. PA. L. REV. ONLINE 261 (2013). See also Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47 (2010) (noting the frequent use of de facto interest balancing in such cases); Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021 (2012); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom, The Immanent Frame*, IMMANENT FRAME, <http://blogs.ssrc.org/tif/2014/07/08/impossibility-of-religious-freedom> (last visited Sept. 23, 2016); Eugene Volokh, *Prof. Michael McConnell on Zubik v. Burwell*, WASH. POST: THE VOLOKH CONSPIRACY (May 17, 2016), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/17/prof-michael-mcconnell>.

172. If some courts decide religious substantial burden issues, specifically, based partly on the effects of such a determination on the rights and interests of others, see Greenawalt, *supra* note 171, the judicial process is then not a matter of weighing a separately determined substantial burden and then separately applying some level of judicial scrutiny, or a distinct balancing test. The judicial determination in such a case would instead seem to be irreducibly holistic, as opposed to sequential or step-wise, and perhaps largely intuitive. For general background, see R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUSTON L. REV. 1381 (2006).

173. See *supra* Section II.

174. See *supra* Section III.

175. See *supra* Section IV.

176. See *supra* Section V.

be rare. The Second Amendment substantial burden cases, to the extent that they implicate physical risks of one sort or another to self and others, tend to involve a greater role for emotion and subjectivity. But these cases tend, in this respect, in turn to be less judicially problematic than the abortion access regulation cases. This is largely because the emotions and subjective elements of the Second Amendment cases, however profound, tend to be more nearly universally shared, at least at some basic level, and thus more fully publicly communicable even in the course of formal litigation.

By contrast, the abortion access substantial burden cases tend to involve subjective elements, including complex and deep emotion, that resist full articulation and public communication, particularly to courts whose members cannot, despite their best intentions, fully share the experiences and subjectivities at stake in the substantial burden determination. Such cases thus raise more difficult cases of judicial deference and certitude.

The religious substantial burden cases, under current law, then add what might be called a further cultural or even metaphysical aspect. Some religious substantial burden cases, certainly, will involve enough public communicability for a confidently arrived at judicial conclusion. Other such cases, however, may unavoidably involve attempts by the claimant to construct a publicly accessible logic of the ineffable and the numinous, or to show a partial reliance on such phenomena, in the course of litigation. At the very least, ideas may be relied upon by the religious claimant that may seem incomprehensible, or simply confused, to the judicial mind. In such cases, courts may sometimes reach a satisfactory result without resolving the substantial burden issue, perhaps by conceding a substantial burdening, but then focusing on the rights and interests of third parties. But if not, courts must then be prepared to consider the proper scope and limits of a reasonable interpretive charity and of judicial deference in the most profoundly difficult contexts.