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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

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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."[20] 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.*

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

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.[42]

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.[43] The Supreme Court addressed the case not under the equal protection clause,[44] or even the scope of congressional power to regulate interstate commerce,[45] but under the dormant commerce clause.[46]

The Court in *Morgan* recognized a need to balance any possible legitimate state police power interests[47] against a competing need for uniformity in practice on the interstate or national level.[48] 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.[49]

Typically, as the Court recognized,[50] burdens on interstate commerce take the form of more or less significant financial costs and delays.[51] 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."[52] And as well, cumulative or interactive effects,[53] as well as

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.

loosely to time, place, and manner regulations,[75] would be that qualifying gun regulations would receive something less than strict scrutiny.[76]

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.[77] The logic here is that if a regulation realistically leaves available ample[78] or at least adequate[79] 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.[80] This openness has not always been universally shared.[81] 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.[82] In such cases, why not just

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

uphold any otherwise unobjectionable regulation?[83] 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.

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.[89] 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.[90]

The Second Amendment cases thus begin to add genuine subjectivity and emotional depth7 Tm[(BT1 0 0 1 138.05 661.87 Tm[(o)22(f)7( )-10(s[(de)31(f)-14(e)( )-1 138.05 609

grounds. No doubt courts have applied what is thought of as an undue burden test in various abortion access cases.[102] 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.[103] In the recent *Hellerstedt*

regulation cases.[118] 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.[119] 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,[120] are assumed by Hobbes to be nearly universally shared, in more or less roughly equivalent fashion.[121] At lefs-12(st)-6(a)-10( )33eversally05m (ve

expressed, will typically be appropriate on the issue of substantial burdening in the abortion access cases.[125]

As it turns out, though, yet a further layering of adjudicative

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.[142]

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.[143] Unfortunately, this princiLo2(i)1780aims pk-4(i)-44(i)17(0.21002 612.18 792.18 reW* nBT/F1 6

religious claimant's[160] 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."[161] Silence, or publicly meaningless discourse, does not advance the claimant's legal assertion of substantial burdening.[162] But these rare instances need not be blamed on the use of the particular legal test, or on the legal system in general.[163]

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, PHILOS.

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

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[173] to the Second Amendment cases,[174] to the abortion access regulation cases,[175] and then to the religious exercise cases.[176]

Thus as we have seen, the commerce clause cases can certainly involve difficult issues of empirical evidence and of long-term or indirect policy

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 2(nd)-10(c)9(e)31(r)-14(t)-4(i)17(t)-4(ud(t)-25(i)-4(on)22(o(