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Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty

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Abstract: Last term, five Justices on the Supreme Court flirted with the possibility of revisiting the Court's First Amendment test for when governments must provide an exemption to a religious objector. But Justice Barrett raised an obvious, yet all-important question: If the received test were to be revised, what new test should take its place? The competing interests behind this question have become even more acute in light of the COVID-19 pandemic. In a moment rife with lofty rhetoric about religious liberty but riven by fierce debates about what it means in practice, this Article revisits a fundamental question common to virtually all approaches to the issue: What must a government do to justify restrictions on religious exercise? Every extant adjudicatory framework—including proportionality and strict scrutiny approaches—purports to require such governmental justification. But they do so through different frameworks and with dramatically different degrees of rigor. In our view, it is rigor and not labels that really counts—the rigor with which courts require governments to justify religious restrictions. Differences in rigor cannot be explained in terms of the underlying adjudicatory framework. Neither the proportionality framework that prevails internationally nor the strict scrutiny framework prominent in the United States suffices, standing alone, to require governments to meaningfully justify restrictions on religious exercise. To require genuine justification, courts must: (1) require governments to treat religiously-motivated conduct in an evenhanded way vis-à-vis analogous secular conduct; (2) oblige governments to show, with evidence, that the religious restrictions are necessary; and (3) avoid redefining a controversy's theological stakes in ways that minimize the religious claimant's dilemma. Proportionality and strict scrutiny are both capable of incorporating these three factors, but

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courts applying the two tests do not always do so. In this Article, we survey how courts across several jurisdictions have succeeded or failed in this regard, paying particular attention to conflicts arising in the COVID-19 context. We also suggest some possibilities of convergence that will help both proportionality courts and strict scrutiny courts to better protect the core substance of religious liberty.

INTRODUCTION

We are living through a moment rife with the rhetoric of religious liberty—among judges and jurists, politicians and pundits, lawyers and laypeople.[1] Such rhetoric, however, often tells us little about underlying realities. The very nature of rights of conscience and religious exercise—as well as their practical implementation, judicial and otherwise—remains hotly contested. Recent clashes between religious practitioners and public health measures adopted in response to the COVID-19 pandemic have only intensified those debates.[2]

This Article seeks to shed light on these debates by zeroing in on the core substance of religious liberty rights. We begin from a simple proposition: governmental restrictions on religious exercise must be *justified*. This proposition should be uncontroversial. After all, every prominent framework available for adjudicating religious liberty claims adopts justification as its nominal core requirement.[3]

The devil, as always, is in the details. Some frameworks, such as the reigning (for now) framework in the United States, established in the 1990 Supreme Court case of *Employment Division, Department of Human Resources of Oregon v. Smith*, require very little in the way of justification.[4] Under some conceptions of *Smith*, restrictions on religious exercise are justified so long as the government is not trying to harm religious persons and is trying to do something else—provided that the "something else" is of a secular nature and

[1] *See, e.g.*, All Things Considered, *Balancing Coronavirus Limitations with Religious Liberty*, NPR (Dec. 6, 2020), https://www.npr.org/2020/12/06/943695925/balancing-coronavirus-limitations-with-religious-liberty [https://perma.cc/7LQ8-U8GB] (interviewing religious leaders navigating COVID-19 restrictions, safety, and maintaining their religious practice).

[2] *See generally* S. Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716 (2021) (Kagan, J., dissenting) (concerning the impact of California's COVID-19 executive orders on South Bay United Pentecostal Church and similarly situated religious institutions); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (enjoining enforcement of California's COVID-19 restrictions on in-home religious gatherings following a challenge by religious groups); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam) (granting an injunction in a challenge concerning the treatment of religious institutions under New York's COVID-19 restrictions).

[3] Justification is a key part of scrutinizing rights infringements under proportionality, strict scrutiny, stricter proportionality, or more proportional strict scrutiny approaches.

[4] *See* 494 U.S. 872 (1990).

not otherwise prohibited by the U.S. Constitution.[5] *Smith*, of course, appears to be imperiled. It nominally survived the Court's 2021 decision in *Fulton v. Philadelphia*, but perhaps only because the Court in *Fulton* famously ruled that the challenged regulation was not "neutral and generally applicable," and therefore *Smith* did not apply.[6] Even so, a concurring Justice Samuel Alito cried loudly for *Smith*'s burial,[7] and Justice Amy Coney Barrett wondered aloud during oral argument what might replace *Smith*.[8]

The two most obvious candidates are the traditional strict scrutiny framework developed in the United States and the proportionality framework dominant internationally. Both of these frameworks require much more, at least ostensibly, than does *Smith*. This Article critically examines those ostensible requirements.

Differences and commonalities between proportionality and tiered scrutiny have received increasing attention over the last decade.[9] Some view the gap as dramatic and consequential. For example, Professor Jamal Greene has championed proportionality as a superior alternative to the "categorical, zero-sum frame[work]" that he sees at the heart of American rights jurisprudence.[10] Professor Greene believes that the current American approach fosters a national obsession with rights that is "tearing America apart."[11] At the other pole of perspectives, another scholar argues that proportionality and strict scrutiny are functional analogs with few practical differences.[12]

Our view lies somewhere between these poles, but our main purpose is to argue that the substance of religious liberty depends less on *which* framework is adopted than on *how* that framework is employed. The real question is whether a court takes the justification requirement seriously or simply goes

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[5] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (noting that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice," but finding that the law under review did target a particular religious practice).

[6] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021).

[7] *Id.* at 1883–84 (Alito, J., concurring) (providing an impassioned case for the Court to revisit *Smith*).

[8] Transcript of Oral Argument at 30, *Fulton*, 141 S. Ct. 1868 (No. 19-123) ("What would you replace Smith with? Would you just want to return to Sherbert versus Verner?").

[9] *See, e.g.*, PAUL YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN: MORAL AND EMPIRICAL REASONING IN JUDICIAL REVIEW 27–35 (2018) (discussing the adjudication of constitutional rights through both proportionality and tiered scrutiny frameworks); Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 85–89 (2018).

[10] Greene, *supra* note 9, at 32.

[11] *See generally* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021) (examining rights jurisprudence in the United States and the shortcomings of judicially imposed boundaries to rights).

[12] *See* YOWELL, *supra* note 9, at 20–24 (analogizing the balancing tests U.S. courts use to the European proportionality analysis).

through the motions of requiring justification whilst, for all practical purposes, essentially taking the government's word for it. Taking religious rights seriously, we argue, means taking the justification requirement seriously. Some proportionality courts, in some cases, do just that, but other proportionality courts, in other cases, do not. Likewise for courts applying strict scrutiny. Different courts—and sometimes the same court in different cases—apply the justification requirement with different levels of rigor.[13] Therein lies the difference between the substance and the shadow, the rhetoric and the reality of religious liberty.

What does it mean to take justification seriously? After surveying the case law of several jurisdictions, we conclude that taking justification seriously requires that courts must incorporate three critical factors, whatever they call their underlying approach:

1. The approach must, at a minimum, prevent governments from imposing burdens on religious activity from which analogous secular activities are exempt. In other words, governments should be required to act in an even-handed way, rather than treat religion and believers as *sui generis*. To be sure, scholars and jurists alike legitimately debate what religious and secular conduct is *analogous*.[14] But our analysis begins by insisting that courts must at least ask this question, and by noting that many courts do not.

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[13] *Compare* Springs of Living Water Ctr. Inc. v. Gov't of Manitoba, 2020 MBQB 185 (Can.) (upholding COVID-19 restrictions without holding the government to its evidentiary burden), *with* Toronto Int'l Celebration Church v. Ontario (Att'y Gen.) (2020), 154 O.R. 3d 122, para. 18 (Can. Ont. Sup. Ct. J.) (noting that the government did not provide evidence that the COVID-19 policies were sufficiently targeted to address risks associated with religious gatherings).

[14] *See, e.g.*, Brief Amicus Curiae of Professor Eugene Volokh in Support of Neither Party at 27, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) ("[I]f the presence of the exceptions were seen as making the statute no longer 'generally applicable' for *Employment Division v. Smith* purposes, that would require more than just the application of strict scrutiny to religious exemption requests: It would also mean that the laws would often be seen as failing strict scrutiny, precisely because of their underinclusiveness." (quoting Employment Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 886 (1990))); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 195 (2001) ("[I]f the presence of just one secular exception means that a religious claim for exemption wins as well [absent a compelling interest], the result will undermine the *Smith* rule and its expressed policy of deference to democratically enacted laws." (citing Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1554 (1999))); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 199 (2002) (concluding that "the very foundation for the most favored nation framework is intellectually incoherent," and that "[t]here are too many conceptual and practical problems with the [framework] for it to be accepted"); Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 173 ("[T]hink about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are."); Douglas Laycock & Steven T. Collis, 2016 Roscoe Pound Lecture, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 10–11, 21–23 (2016) (discussing rules surrounding analogous secular conduct); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 664 (2003) (describing the

2. The approach must require the government to produce evidence demonstrating that affording religious accommodations would undermine the government's important interest. In essence, the government must show that the restriction on religious exercise is *necessary*.[15] Without providing this evidence, the government has not justified the restriction on religious exercise. A court that defers, in the absence of concrete evidence, to the government's *ipse dixit* is simply not requiring justification.

3. The approach must resist the temptation to weigh theological questions regarding the gravity of religious harm as a means of excusing the government from justifying religious restrictions. Instead, it should treat concrete interference with sincere religious voluntarism as a *prima facie* encroachment requiring justification.

As suggested earlier, some proportionality courts, some of the time, incorporate these factors in their analysis. Other courts, at other times, do not. The same is true of U.S. courts deploying the traditional tiers of scrutiny. When the three factors described above are absent, courts cannot know whether the government is in fact justified in infringing on religious exercise. Instead, governments are more likely to receive what amounts to a free pass to run roughshod over unpopular or minority believers or beliefs. This is true whether the analysis marches under the banner of proportionality or strict scrutiny or something else entirely.

Conflicts arising in the COVID-19 context provide a particularly telling case study because in these cases governments and courts across jurisdictions face largely the same issue—stopping the spread of a terrible disease—and on the basis of similar scientific information. Yet courts have treated similar government policies, and similar religious objections, in drastically different ways both within and across strict scrutiny and proportionality contexts. The differences depend on whether courts transparently apply the three factors—evenhandedness, imposing an evidentiary burden on the government, and theo-

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most favored nation approach as "an unprincipled and bizarre manner of distributing constitutional exemptions"); James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 731 (noting that "despite the fact that the *Smith* Court specifically cited laws 'providing for equality of opportunity for the races' as examples of generally applicable laws to which strict scrutiny should *not* apply," the most favored nation theory would apply strict scrutiny to such laws because they have small-employer exemptions (quoting *Smith*, 494 U.S. at 889)); Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 283–87 (2020), https://www.californialawreview.org/free-exercises-lingering-ambiguity/ [https://perma.cc/A83J-VXAB] (summarizing the debate surrounding "The Meaning of Religious Discrimination").

[15] Such evidence will also often be relevant to the first factor; whether proscribed religious activity is comparable to permitted secular activity will depend significantly on the relative risks the activities pose.

logical abstention—or whether they have smuggled in other normative commitments without addressing these key factors.

That both proportionality and heightened scrutiny are enriched by these factors does not mean that strict scrutiny and proportionality are interchangeable when it comes to protecting religious exercise. In what follows, we also explore similarities and differences between proportionality and strict scrutiny, some strengths and shortcomings of each in the context of religious liberty, and what the two approaches might learn from one another.[16] We conclude our comparative survey by highlighting—in an admittedly impressionistic way—some possibilities for convergence.[17]

Proportionality, for instance, could profitably follow strict scrutiny by taking more seriously the preliminary inquiry regarding a right's precise scope and whether it has been restricted in a particular case.[18] A stricter version of proportionality would reign in rights inflation and put an end to proportionality's "turn [away] from interpretation" in favor of an almost exclusive focus on justification.[19] It would also ensure that proportionality's necessity prong, particularly in the religious exercise context, had teeth.

Traditional U.S. approaches, by contrast, could benefit from proportionality's resolute focus on justification. This focus sees nothing anomalous in the prospect of religious accommodations—there is, in proportionality jurisdictions, no "get-out-of-law free" rhetoric[20]—and that sees possible harm to third

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[16] *See infra* notes 25–329 and accompanying text.

[17] *See infra* notes 330–371 and accompanying text.

[18] In our view, proportionality's neglect of these preliminary inquiries stems not from anything inherent in the test, but from how courts have applied it in practice—it is, as it were, an as-applied rather than a facial defect.

[19] Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 LAW & ETHICS HUM. RTS. 140, 144 (2010) (emphasis omitted); *see also* Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMPAR. L. 463, 489–90 (2011) ("The new focus of constitutional judges throughout the world on justification moves them away from the text and from interpretation."). *Cf.* Grant Huscroft, *Proportionality and the Relevance of Interpretation*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 186, 199 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014) ("For Kumm, it appears, the authority of legislation stems not from its democratic pedigree but, instead, from its justification. From here it is a short step to concluding that the provisions of a bill of rights are essentially irrelevant." (footnote omitted)).

[20] One U.S. scholar, by contrast, has criticized robust religious accommodations as providing an "'opt out' from generally applicable legislation." Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 176 (2015); *see also* Frederick Mark Gedicks, Opinion, *Is Religion an Excuse for Breaking the Law?*, NEWSWEEK (Mar. 12, 2016), https://www.newsweek.com/are-religious-beliefs-excuse-breaking-law-435664 [https://perma.cc/RE7H-VNE6]. Another scholar has raised concerns about "singling out religious practitioners for special treatment in applying generally applicable laws." Dan T. Coenen, *Free Speech and Generally Applicable Laws: A New Doctrinal Synthesis*, 103 IOWA L. REV. 435, 466 (2018).

parties as just one factor in a holistic analysis rather than a definitive factor that ends the analysis.[21] There might even be space, within a more proportional version of strict scrutiny, for courts to recognize that sometimes even a narrowly-tailored law passed in pursuit of a compelling public purpose might still restrict rights too much. In other words, there might be a place at the margins for a strict proportionality inquiry within our otherwise adjectival constitutionalism.

But whichever framework or label a court adopts or retains—proportionality, strict scrutiny, stricter proportionality, or more proportional strict scrutiny—our overarching contention is that courts must honor the three factors that allow judicial bodies to accurately (and actually) assess government justifications for infringing religious exercise.

We proceed as follows. Part I traces the origins and development of the American and the global models of rights adjudication.[22] It introduces the basic features of proportionality analysis and compares it to strict scrutiny. Part II evaluates the application of the two approaches in the context of religious liberty rights, highlighting ways in which both approaches can facilitate religious pluralism when applied to require governments to be evenhanded, to justify religious restrictions with substantiating evidence, and to avoid weighing theological questions.[23] Part III points to various possibilities of convergence and suggests something of a synthesis.[24] Because, in the aftermath of *Fulton*, the Supreme Court seems poised to revisit and potentially replace the received approach established in *Smith*, our proposals in Part III focus on amending the current American framework. But we believe that our proposals also point to profitable reforms to the received approach in classical proportionality jurisdictions. Lastly, a brief conclusion summarizes our main contentions and proposes a path forward.

I. Origins and Divergence

Appreciating the differences and the commonalities between proportionality and strict scrutiny requires some awareness of how the two approaches developed. In what follows, we trace the historical development and map the modern understanding, first of strict scrutiny, then of proportionality analysis. Section A examines the historical origins of judicial balancing in principles of

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[21] This concept, based on the notion that religious accommodations give preferential treatment to a small subset of society, is uniquely occupying American discourse. *See, e.g.*, Gregory P. Magarian, Response, *Whose Accommodation?*, 67 Vand. L. Rev. En Banc 135, 139 (2014), https://vanderbiltlawreview.org/lawreview/wp-content/uploads/sites/278/2014/05/Magarian-Response.pdf [https://perma.cc/8FVS-WHEH].

[22] *See infra* notes 25–137 and accompanying text.

[23] *See infra* notes 138–329 and accompanying text.

[24] *See infra* notes 330–371 and accompanying text.

equity.[25] Section B discusses the early formation of the strict scrutiny test in the United States during the first half of the twentieth century.[26] Section C examines the emergence of the exacting modern strict scrutiny test in the United States and discusses its contemporary application in the religious exercise context.[27] Section D explores the conceptual origins and international application of proportionality analysis.[28]

A. Equitable Origins of Judicial Balancing

Judicial balancing happens when courts decide whether a particular law, or its application in a particular case, is justified in light of a countervailing interest. Viewed in this way, the roots of judicial balancing run deep. Balancing's history is long. Before probing the modern developments that formalized the strict scrutiny and proportionality tests, it is worth noting briefly the equitable origins of certain forms of judicial balancing that resemble modern aspects of strict scrutiny and proportionality.[29]

Under equitable rules of interpretation like the "mischief rule," courts have long assessed carefully whether applying a given law to a particular set of facts was justified.[30] In such cases, courts asked whether the law's application would be appropriate under the circumstances and whether it would actually advance the government's asserted interests.[31]

In 1790, Judge Blackstone explored how courts might determine that a law's application was not justified. He posited a law decreeing that "whoever drew blood in the streets should be punished with the utmost severity."[32] Blackstone then asked whether, under such a law, a surgeon could be punished "who opened the vein of a person that fell down in the street with a fit."[33] Blackstone thought that the law could not be applied in this way. He analyzed "the effects and consequence, or . . . reason of the law," and explained that "the

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[25] *See infra* notes 29–37 and accompanying text.

[26] *See infra* notes 38–60 and accompanying text.

[27] *See infra* notes 61–87 and accompanying text.

[28] *See infra* notes 88–137 and accompanying text.

[29] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007) ("First, the modern strict scrutiny test is of relatively recent origin, having developed only in the 1960s."); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356–57 (2006) (arguing that strict scrutiny was first developed in the 1950s and 1960s in the First Amendment context).

[30] For an in-depth discussion of the mischief rule, see generally Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

[31] Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 95 NOTRE DAME L. REV. 55, 67–68 (2020).

[32] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS *60 (Worcester, Mass., Isaiah Thomas 1790) (citation omitted).

[33] *Id.*

rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them."[34] In other words, in this context, the court could determine that applying this law to a surgeon seeking to save someone's life, however misguidedly by modern medical lights, would not be justified. In modern terms, we might similarly conclude that such an application would be disproportionate, or that it would fail under a heightened-scrutiny analysis.

In the American Founding era, courts conducted this type of scrutiny in a variety of natural rights contexts, and sometimes simply in the name of fairness or justice.[35] Over time, however, this balancing methodology became the special province of constitutional adjudication.[36] Early courts also applied this type of reasoning to argue that laws infringing on religious exercise were not justified in certain contexts.[37]

B. Early Development of Judicial Balancing Tests in the U.S.

The development of strict scrutiny analysis is inextricably linked to the modern development of free exercise jurisprudence. Because the First Amendment did not originally apply to state and local action, the Supreme Court first interpreted the Free Exercise Clause in the 1878 case of *Reynolds v. United States*.[38] In *Reynolds*, the Court addressed whether the Free Exercise Clause prevented the federal government from prohibiting polygamy in the Utah territory.[39] The religious claimants had asked the lower court to instruct the jury that they must return a verdict of "not guilty" if they found that the claimant had acted out of "a religious duty."[40] Unsurprisingly, the Supreme Court was alarmed by this all-or-nothing proposal. In the Court's view, a rule requiring an automatic exemption every time an individual asserted a sincere conflict of conscience would foster a world in which each religious individual "bec[a]me

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[34] *Id.* at 59–60, 60.

[35] *See, e.g.*, Holden v. James, 11 Mass. 396, 405 (1814) (fusing constitutional and natural law principles to reason that a statute was "manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws"); Dupy v. Wickwire, 1 D. Chip. 237, 238 (Vt. 1814) (striking down a law for "being against the constitution of this State, the constitution of the United States, and even against the laws of nature"); Barclay, *supra* note 31, at 97–98 (discussing the interconnection of equitable principles, ideas of justice, and constitutional law for Founding-era jurists).

[36] *See* Barclay, *supra* note 31, at 96–103 (examining the evolution of constitutional adjudication in the United States).

[37] *Id.* at 73–90.

[38] 98 U.S. 145 (1878).

[39] *See id.* at 161–62.

[40] *Id.* ("Upon this proof he asked the court to instruct the jury that if they found from the evidence that he 'was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be "not guilty."'").

a law unto himself" and government "exist[ed] only in name."[41] The Court did not consider, and the parties did not raise, the possibility of balancing a religious claimant's interest against the government's interest in concrete cases. Nor did the Court consider scrutinizing the government's ability to secure its interest by other means.

According to some accounts, the first major step in developing strict scrutiny analysis came early in the twentieth century. Some scholars point to the Supreme Court's 1905 decision in *Lochner v. New York* as an important milestone on the path toward heightened scrutiny.[42] In *Lochner*, the Court held that because New York's labor laws interfered with the right to contract, the challenged provisions were unconstitutional unless New York could show that regulation was "necessary to promote the important state interest in health and safety"—a stringent requirement.[43] Applying what would eventually become the modern strict scrutiny analysis, the Court invalidated the statute.[44] In the three decades following *Lochner*, the Court struck down workplace regulations and labor laws with relative frequency.[45] One scholar suggests that these *Lochner*-era cases even influenced the German courts that crafted the proportionality test.[46]

One scholar traces the modern U.S. "tiers of scrutiny" approach to the Supreme Court's 1938 decision in *United States v. Carolene Products*.[47] In *Carolene Products*, the Court articulated a new self-understanding with respect to rights adjudication after repudiating *Lochner* and its epigones the previous year.[48] The Justices adopted a deferential approach that would approve socio-

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[41] *Id.* at 167.

[42] 198 U.S. 45 (1905), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 341 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 387 (2018); *see also* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 295 (2015) ("If one focuses on the logical components of strict scrutiny rather than use of identical or similar terms, however, this standard of review goes back to at least *Lochner* and the line of cases *Lochner* represents.").

[43] Beschle, *supra* note 42, at 388 (citing *Lochner*, 198 U.S. at 58); *see Lochner*, 198 U.S. at 57–58 ("The act must have a more direct relation . . . before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.").

[44] Beschle, *supra* note 42.

[45] *See* KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 146–73 (2019).

[46] *See* YOWELL, *supra* note 9, at 61–70 (suggesting that *Lochner*-era Supreme Court decisions informed the creation of the proportionality framework by German courts).

[47] United States v. Carolene Prods. Co., 304 U.S. 144 (1938); YOWELL, *supra* note 9, at 21.

[48] *Carolene Prods. Co.*, 304 U.S. at 147–54; YOWELL, *supra* note 46, at 21; *see* W. Coast Hotel v. Parrish, 300 U.S. 379, 392 (1937) ("[F]reedom of contract is a qualified and not an absolute right.").

economic legislation with at least a rational basis.[49] In the case's famous fourth footnote, however, the Court suggested that it would scrutinize much more closely laws that impinged on fundamental constitutional rights such as those enshrined in the Bill of Rights; laws aimed at "religious," "national," or "racial minorities"; and laws detrimental to other "discrete and insular minorities."[50]

By the time the Supreme Court decided *Minersville School District v. Gobitis* in 1940, it had not yet operationalized any sort of heightened protection for the "footnote four rights," embracing instead the deferential *Reynolds* approach that eschewed any sort of balancing.[51] As a result, the Court denied a Jehovah's Witness's request to be exempt from school flag-salute requirements.[52] The Court categorically refused to provide "exceptional immunity . . . to dissidents," and the Witness children were forced to choose between idolatry (as they saw it) and expulsion.[53]

Just three years later, however, the Court reversed course in *West Virginia State Board of Education v. Barnette*.[54] Writing for the Court, Justice Robert Jackson observed in a stirring peroration that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[55] In *Murdock v. Pennsylvania*, also decided in 1943, the Court again declined to follow the *Reynolds* approach and instead granted a religious exemption from an ordinance prohibiting door-to-door solicitation.[56] The Court held that "equality in treatment [did] not save the ordinance," because "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position."[57] This suggested some sort of heightened protection for rights like religious freedom, though the Court had not yet formalized a framework for such heightened scrutiny.

In the infamous 1944 case, *Korematsu v. United States*, the Supreme Court employed for the first time the language of "[p]ressing public necessity"

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[49] *Carolene Prods. Co.*, 304 U.S. at 152.

[50] *Id.* at 153 n.4.

[51] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 598–600 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *see Carolene Prods. Co.*, 304 U.S. at 153 n.4; Reynolds v. United States, 98 U.S. 145 (1878).

[52] *Minersville Sch. Dist.*, 310 U.S. at 597–600.

[53] *Id.* at 599–600.

[54] *Barnette*, 319 U.S. at 642.

[55] *Id.*

[56] Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943).

[57] *Id.* at 115; *see also* Cantwell v. Connecticut, 310 U.S. 296, 306–11 (1940) (holding that regulating solicitations in a manner that gave the state authority to determine what constituted a religious solicitation was unconstitutional).

and "most rigid scrutiny."[58] But the Court did not actually "employ the [strict scrutiny] test itself or any element of it."[59] Despite the policy's obvious racial discrimination, the Court upheld the government's actions. This case has been widely criticized, and the Supreme Court expressly renounced it in 2018.[60]

C. Modern U.S. Approach

Many scholars point to the late 1950s and early 1960s as the period when strict scrutiny emerged in its modern form.[61] In 1957, in *Sweezy v. New Hampshire*, the Supreme Court affirmed a college professor's right to refuse to answer the state attorney general's questions about his teaching.[62] "Political power," wrote Justice Felix Frankfurter in a concurring opinion, "must abstain from intrusion into this activity of freedom . . . except for reasons that are exigent and obviously compelling."[63] The Court echoed this rhetoric and reasoning in 1963 in *Sherbert v. Verner*,[64] a religious exercise case, and in *NAACP v. Button*, a freedom of association case.[65] In *Sherbert*, for the first time, Justice William Brennan linked the phrase "compelling state interest" with the concept of narrow tailoring.[66] The Court also used the narrow tailoring principle to highlight the possibility of less restrictive alternatives.[67]

Under the *Sherbert* formulation, a measure survives heightened scrutiny only if the government can (1) identify a compelling government interest that the challenged measure serves and (2) prove that its action or policy actually

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[58] Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018). Following Pearl Harbor, President Theodore Roosevelt had issued an executive order authorizing the War Department to create military areas from which any or all Americans might be excluded. *See Japanese-American Internment During World War II*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/japanese-relocation [https://perma.cc/5B6E-4F9X] (Nov. 26, 2021). Subsequently, the Army ordered "all persons of Japanese ancestry, both alien and nonalien" to relocate to internment camps. *Korematsu*, 323 U.S. at 229 (Roberts, J., dissenting).

[59] Siegel, *supra* note 29, at 355–56, 356 (citing *Korematsu*, 323 U.S. at 216).

[60] *Korematsu*, 323 U.S. at 219. This case has long been widely criticized, and the Supreme Court expressly renounced it in 2018. *Trump*, 138 S. Ct. at 2423 ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))); *see also* D. Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. 1555, 1598–1607 (2021) (discussing the fervent repudiation of *Korematsu* by scholars, Congress, the Supreme Court, and the President).

[61] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., concurring) (noting the modern emergence of strict scrutiny in the 1960s). *See generally* Fallon, *supra* note 29; Siegel, *supra* note 29.

[62] Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring).

[63] *Id.*

[64] Sherbert v. Verner, 374 U.S. 398 (1963).

[65] NAACP v. Button, 371 U.S. 415 (1963).

[66] *Sherbert*, 374 U.S. at 406.

[67] *See id.* at 403–04.

advanced this interest through the means least restrictive to religious rights.[68] By linking these two tests, Justice Brennan forged an enduring framework that the Court later adopted in many doctrinal areas.[69] In the religious exercise context, the Court has further clarified that strict scrutiny requires courts to "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants."[70] The test operates, in other words, at the margins.

Under the Court's strict-scrutiny approach to religious exercise claims, government actors were required to provide a religious exemption whenever their actions burdened religious exercise, unless the government's justifications for restricting religious exercise were compelling and their objectives unachievable in any less restrictive way.[71] The Court affirmed this approach in the 1972 case of *Wisconsin v. Yoder*, in which Amish families requested exemption from mandatory public school requirements.[72] Notably, in *Yoder* the Supreme Court did not analyze the government's interest in compulsory public education generally. Instead, it assessed the government's interest in making the specific Amish children before the Court attend one more year of public education instead of trade-oriented education provided by their families.[73]

The Supreme Court has described strict scrutiny as "the most demanding test known to constitutional law."[74] Theoretically at least, strict scrutiny places the burden of justifying rights restrictions entirely on the government.[75] Strict scrutiny thus stands in sharp contrast to rational basis review, under which a law is presumed constitutional, and the private challenger bears the heavy burden of establishing that the law is not even rationally related to any legitimate interest.[76] Intermediate scrutiny, which first appeared in the 1960s and now has

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[68] *See id.* at 406–09; YOWELL, *supra* note 9, at 22.

[69] *See* YOWELL, *supra* note 9, at 22 (discussing the application of the *Sherbert* framework in a variety of doctrinal areas including First Amendment and Equal Protection Clause contexts).

[70] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006).

[71] Kenneth Marin, Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1438–42 (1991).

[72] Wisconsin v. Yoder, 406 U.S. 205, 206, 235–36 (1972).

[73] *Id.* at 218–19.

[74] City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888 (1990)), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 804, *as recognized in* Holt v. Hobbs, 574 U.S. 352, 357 (2015).

[75] *See* McCutcheon v. FEC, 572 U.S. 185, 210 (2014).

[76] *See* YOWELL, *supra* note 9, at 21 (enumerating the three tiers of scrutiny in the U.S. framework, including rational basis review); Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 786 (describing the "presumption of constitutionality" of the rational basis test).

multiple iterations, falls somewhere in between.[77] Scholars and some Justices have criticized the proliferation of varying hues of heightened scrutiny—and the inconsistent application of those hues—under the U.S. tiered scrutiny approach.[78]

Within the context of religious exercise, scholars have long debated how faithfully the Court actually adhered to a strict scrutiny approach in the two decades after *Yoder*.[79] In any event, the Court reversed course in 1990, when it decided *Smith*.[80] Writing for the Court, Justice Antonin Scalia spurned the legal framework that had presumptively recognized religious exemptions. Instead, Justice Scalia ruled that religiously-neutral and generally-applicable laws warrant judicial deference akin to that afforded by rational basis review. Justice Scalia's approach openly and energetically eschewed any meaningful form of interest-balancing.[81] In Justice Scalia's view, there was no practicable alterna-

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[77] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 719–20, 726 (2000); Ward v. Rock Against Racism, 491 U.S. 781, 791, 798–99 (1989); United States v. Grace, 461 U.S. 171, 176–78 (1983); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–65 (1980); Bhagwat, *supra* note 76, at 783–84, 787–92 (citing United States v. O'Brien, 391 U.S. 367, 376–77 (1968)) (discussing the emergence of intermediate scrutiny test); *see also* Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s [R]Evolution of the* Central Hudson *and* O'Brien *Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 727 (2001) (discussing the Court's different applications of intermediate scrutiny).

[78] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326–28 (2016) (Thomas, J., dissenting) ("As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat."); Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3127, 3178 (2015) (noting "hard-to-account-for variations in the application of the various tiers of review" and observing that, in some recent cases, the Supreme Court has moved away from tiers of review without quite saying what has replaced them); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2342–47 (2006) (summarizing critiques of tiered review and various calls for reform); Maxwell L. Stearns, Obergefell*,* Fisher*, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1046–47 (2017) (arguing that, in practice, the Supreme Court applies five different tiers of scrutiny); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFFS. (Fall 2019), https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny [https://perma.cc/Y7PE-HAYR].

[79] *Compare* Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & STATE 237, 250 (2004) (observing that religious claimants enjoyed more success in lower courts before *Smith* and after RFRA than they did between *Smith* and RFRA), *with* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1412, 1416–29 (1992) (contending that, even in the pre-*Smith* era, most religious exercise claimants lost).

[80] 494 U.S. 872, 889 (1990).

[81] *See id.* at 882–83, 885–89; Barclay, *supra* note 31, at 66; Adamczyk et al., *supra* note 79, at 237 ("The *Smith* decision appeared to remove compelling state interest as the primary test for adjudicating free exercise claims.").

tive. Subjecting all laws burdening religious exercise to a compelling-interest test would, he wrote, spawn "a constitutional anomaly."[82] "Any society adopting" that approach, he continued, would be "courting anarchy"—a risk that would rise "in direct proportion to the society's diversity of religious beliefs."[83]

Congress reacted swiftly against *Smith* by passing statutes such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA) to reinstate heightened scrutiny in certain contexts.[84] But as a constitutional matter, *Smith* remains the law of the land.[85] *Smith*'s tenure, however, now seems tenuous. Five sitting Justices have signaled their willingness to revisit *Smith*—and perhaps to revise or replace it.[86] In November 2020, the Court heard oral arguments in *Fulton*, in which one of the questions presented was simply "[w]hether *Employment Division v. Smith* should be revisited."[87] In sum, the U.S. approach to protecting religious exercise has long involved a shifting patchwork of constitutional and statutory safeguards. That approach remains in flux; it might soon change dramatically.

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[82] *Smith*, 494 U.S. at 886.

[83] *Id.* at 888.

[84] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb), *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 534 (1997); Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc); Adamczyk et al., *supra* note 79, at 237–38 (describing the immediate outcry from civil liberties and religious organizations, legislators, and legal scholars in the aftermath of *Smith*); *see* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 1 (1994); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210, 243–44 (1994). Some states also responded by passing their own version of RFRA. *See generally* Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531 (1999) (describing situations to which state RFRAs have been applied); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 374–75 (1996) ("[S]tate legislatures and courts have become bolder in conducting their own experiments in religious liberty that seem calculated to revisit, if not rechallenge, prevailing Supreme Court interpretations of the . . . free exercise clauses." (citing Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275)).

[85] To be sure, *Smith* has been limited by cases such as *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

[86] *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (discussing the possibility of revisiting *Smith*). Justice Barrett asked questions about what legal test would replace *Smith* in oral argument in *Fulton*. *See* Transcript of Oral Argument, *supra* note 8, at 31.

[87] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1887 (2021) (Alito, J., concurring) (alteration in original); *see also Ricks v. Idaho Contractors Board*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/ricks-v-idaho-contractors-board/ [perma.cc/U5YH-4297] (describing a pending petition for certiorari that also raises this question).

This Article aims to provide some guidance regarding the form that change might take.

D. The Global Proportionality Model

The major international alternative to heightened scrutiny is, of course, proportionality analysis. The basic concept of proportionality is quite old—as old, at least, as Aristotle, for whom "[t]he just . . . [is] the proportionate . . . the unjust is that which violates proportion,"[88] and Dante, for whom the imaginatively gruesome punishments of the *Inferno* must observe "the 'law' of the *contrapasso*," by which each penalty must be exquisitely proportioned to match the crime.[89]

As a modern legal doctrine, however, proportionality's conceptual origins lie, according to standard accounts, primarily in German administrative law scholarship during the latter eighteenth century.[90] As a precept of positive public law, proportionality descends from Prussian administrative law in the second half of the nineteenth century.[91] As a doctrine of constitutional law, it was forged and refined by the German Federal Constitutional Court in the second half of the twentieth century.[92] It was the German Court that first elaborated and canonized the four-step approach discussed below. From Germany, the test spread to the two European courts—the Court of Justice of the European Union and the European Court of Human Rights—and, partly in response to those courts' edicts, to the apex courts of other European states. Proportionality has since permeated high-court jurisprudence in several English-speaking "Commonwealth" countries and has extended to parts of Asia and Africa, Central and Eastern Europe, Israel and South America.[93] "[W]e now live," writes Aharon Barak, "in the age of proportionality."[94] Outside the United States,

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[88] ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, at 273 (Jeffrey Henderson ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.); *see also* Bernhard Schlink, *Proportionality (1)*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718, 719 (Michel Rosenfeld & András Sajó eds., 2012) (describing Aristotle's view of proportionality as a complex but measurable conception of justice).

[89] DANTE ALIGHIERI, INFERNO 481 (Robert Hollander & Jean Hollander trans., Doubleday 2000) (1320) (quotation translated and adapted by authors).

[90] *See, e.g.*, AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 177–78 (Doron Kalir trans., 2012). *But see* YOWELL, *supra* note 9, at 61–70 (arguing that German proportionality derives from *Lochner*-era constitutional analysis in the United States).

[91] BARAK, *supra* note 90, at 178.

[92] *Id.* at 180; Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMPAR. & INT'L L. 291, 295 (2012).

[93] *See* BARAK, *supra* note 90, at 181–202, 208–10 (discussing the global migration of proportionality).

[94] *Id.* at 457.

proportionality is the dominant mode of constitutional rights adjudication.[95] And its dominance runs deep. Proportionality's reign is nearly absolute. The sun never sets on its empire. The framework has no rivals. It almost has no peers.[96]

Both friends and foes ransack the thesaurus for superlatives with which to chart proportionality's rise and rule. "To speak of human rights," observe three skeptics, "is to speak of proportionality."[97] In describing proportionality, writers of various persuasions make copious use of the definite article.[98]

Part of proportionality's attraction surely lies in its simplicity.[99] The test is easily described and readily learned. It can be adopted without fanfare and adapted without strain. It comprises two *phases*—a limitation phase and a justification phase—and, in its justification phase, four *steps*.

Start with the phases. A court engaged in proportionality analysis asks two broad questions: (1) Has the relevant interest been *restricted*?[100]—and, if it has—(2) Is the restriction *justified*? The first question constitutes the *limitation* phase, the second the *justification* phase.

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[95] It has gone everywhere, it seems, except the United States, where discussions of proportionality remain largely (and literally) academic. *See generally* Schlink, *supra* note 92 (describing the widespread acceptance of proportionality in constitutional courts globally, except for in the United States).

[96] *See* ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 95 (2019) (calling the proliferation of proportionality "the most striking development in global constitutional law of our time"); *see also* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 10–14 (2013) (describing the viral spread of proportionality); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 98–112 (2008) (same).

[97] Grant Huscroft, Bradley W. Miller & Grégoire Webber, *Introduction* to PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING, *supra* note 19 at 1, 1.

[98] *See* Kai Möller, *US Constitutional Law, Proportionality, and the Global Model*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 130, 136 (Vicki C. Jackson & Mark Tushnet eds., 2017) ("Proportionality has become *the* central doctrine of contemporary constitutional rights law . . . ."); KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 13 (2012) (describing proportionality as "*the* central concept in contemporary constitutional rights law"); *see also* Stone Sweet & Mathews, *supra* note 96, at 128 (describing proportionality as the "best practice standard[]"); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 874 (2011) (describing proportionality as "the defining doctrinal core of a global, rights-based constitutionalism"); Kai Möller, *Proportionality and Rights Inflation*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING, *supra* note 19, at 155, 155 (describing proportionality as "the most important principle of constitutional rights law around the world"); Huscroft, Miller, & Webber, *supra* note 97, at 3 ("[P]roportionality is the *jus cogens* of human rights law . . . .").

[99] *See* Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 469 (2009) (noting the great appeal of all-encompassing and simplicity in balancing).

[100] Or, has the relevant right been *limited* or *infringed*? Courts usually use these terms synonymously. BARAK, *supra* note 90, at 101.

The justification phase is the more famous of the two. It generally entails a four-step inquiry, the last prong of which gives proportionality its name. The justification phase asks, in general, whether the legal provision restricting the interest (1) pursues a legitimate aim; (2) actually advances that purpose; (3) restricts the interest no more than is necessary to achieve the purpose; and (4) restricts the interest in a proportionate way.[101] The steps are commonly designated the "legitimate aim" (or "proper purpose") step, the "rational relation" (or *suitability*) step, the "minimal impairment" (or *necessity*) step, and the "proportionality in the narrow sense" (or *balancing*) step.[102] For the sake of the uninitiated, we take them up in turn.[103]

1. Legitimate Aim (Legitimacy)

As an initial step, the proportionality court asks whether the restricting measure pursues a proper, or *legitimate*, aim.[104] If the end is improper, the in-

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[101] We try to avoid referring to proportionality as determining the infringement or restriction of the "right." The outcome of the proportionality analysis is what determines whether there is a "right" that has been infringed or not. The first stage merely determines whether there has been a restriction or limitation of an interest, which may or may not in the end be determined to be the basis for the assertion and recognition of a "right." While this may be contrary to the way that many proportionality advocates and courts speak of the structure of the proportionality test, this difference is significant in the context of importing the proportionality apparatus into U.S. constitutional law. The conventional way of speaking about proportionality and rights suggests that governments can and do legitimately violate rights all the time, so long as they are justified in doing so; the alternative suggests that if an interest is subject to legitimate limitation in its exercise it does not actually qualify as a right, but rather the limitation defines the scope of the right. Conversely, once there is a recognized right (properly delimited), the very meaning of designating it as a "right" is that is defeats governmental actions that are contrary to it. For additional discussion of this issue, see generally GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009).

[102] YOWELL, *supra* note 9, at 15–16 (outlining the four-step proportionality inquiry).

[103] Note that there are other formulations of the test—say, uniting the first two prongs into one, in some German case law, or omitting the balancing stage in some older Canadian and UK cases. But we have offered what we understand to be the standard, clearest, and most complete iteration of the test.

[104] This preliminary inquiry is whether the measure's means are categorically prohibited. If they are, there is no need to conduct a proportionality analysis. If, for instance, a constitutional regime bans torture categorically, it doesn't matter whether the use of torture is proportional in a given case. The categorical prohibition ends the proportionality analysis. *See* Schlink, *supra* note 88, at 719, 722. The German Constitutional Court, for instance, has held that the state may never treat individuals themselves as a means to an end. Human dignity, the supreme constitutional value under the German Basic Law, requires instead that individuals be treated always as ends in themselves. This Kantian conception of dignity has led the Court to rule that the state may not treat individual convicts as means to the end of deterring crime, nor may it treat passengers of hijacked planes as means to the end of rescuing persons in buildings or on the ground. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 118 (Ger.) (holding that a law permitting the military to shoot down hijacked planes violated the fundamental rights of innocent passengers).

quiry ends; if the end is illegitimate, the measure is unconstitutional.[105] Proportionality courts differ as to the height of this hurdle. For the German Constitutional Court, the bar is low: an end is improper only if the constitution commands the legislature not to pursue it.[106] The Canadian Supreme Court, by contrast, initially held that the aim of a restricting measure must "relate to concerns which are pressing and substantial in a free and democratic society."[107] Whatever the formula, laws rarely fail at this threshold step. In modern liberal democracies, governments do not often pursue openly an obviously improper end. But if a legislature were ever tempted to pass a law designed to suppress a minority faith, to quell an inconvenient idea, or to brand some group with a badge of inferiority, this threshold step would nip it in the bud.

2. Rational Relation (Suitability)

Having a legitimate aim, of course, is only a first step—necessary but not sufficient.[108] The interest-restricting measure must actually advance that purpose.[109] The means chosen must be rationally related, or *suited*, to the end pursued. If they are not, the infringement is unjustified, and the law must fail. The rational-relation inquiry poses an empirical question.[110] To answer it, the court must decide to what extent, if at all, to defer to legislative prognoses. Because courts have answered this deference question in inconsistent ways, the rational-relation step has been a source of minor controversy.[111] A broader objection has been that the step is surplusage—that the question of suitability is inevita-

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[105] *Cf.* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution . . . .").

[106] *See* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 389 (2007) (noting that the legitimate aim requirement affects only a "small number of runaway cases").

[107] R v. Oakes, [1986] 1 S.C.R. 103, 138–39 (Can.). In practice, however, the Canadian Court has been less exacting than this diction might suggest. *See* 2 PETER W. HOGG & WADE K. WRIGHT, CONSTITUTIONAL LAW OF CANADA § 38:13 (Thomson Reuters, 5th ed. Supp. 2021) (noting that the Canadian Court rarely quashes laws at the legitimate aim prong).

[108] *See generally* Stephen Gardbaum, *Proportionality and Democratic Constitutionalism*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING, *supra* note 19, at 259.

[109] *Cf.* Aharon Barak, *Proportionality (2)*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 88, at 738, 743 ("[T]he means have the potential to advance the purpose to some extent that is not merely marginal, scant, or theoretical.").

[110] *See* Schlink, *supra* note 88, at 723 (explaining that the suitability test requires "an empirical check" to identify and weigh the actual facts).

[111] *See* NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY, AND SOUTH AFRICA 119–40 (2017) (comparing the varying levels of legislative deference and the treatment of the rational relation inquiry in Canada, South Africa, and Germany).

bly encompassed by the question of necessity.[112] After all, any law not rationally related to some proper end restricts legally recognized interests unnecessarily.[113] If a restricting measure does not advance its aim at all, there will always be some less-restrictive alternative—such as no measure at all—that would be just as (in)effective. In any event, laws are rarely quashed as unsuitable, and the suitability step's practical significance is usually small.[114]

But there are exceptions. The German Constitutional Court, for instance, found there was no rational relation between the purpose of public safety and a law requiring falconers to undergo weapons examinations,[115] and both the Canadian Supreme Court and the Constitutional Court of South Africa have found no rational connection between the broader "war on drugs" and laws targeting the mere possession of small amounts of proscribed narcotics.[116] These three courts, of course, would also have deemed these laws unnecessary. Aharon Barak concedes that although it allows "a quick solution in extreme cases," the suitability step is really "not that significant."[117] "Its function," adds Dieter Grimm, "is to eliminate [a] small number of runaway cases."[118]

3. Minimal Impairment (Necessity)

The necessity step is much more meaningful. Functionally similar to the least-restrictive-means prong of the strict scrutiny test, the necessity prong requires that the challenged measure restrict the relevant interest no more than is necessary to achieve the asserted end. Put another way, the law flunks the necessity prong if there exists a less restrictive means of accomplishing the same purpose. This inquiry has been characterized as an optimization, or *necessity*, requirement.[119] If the law could capture its aspired end without making the

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[112] *See, e.g.*, COHEN-ELIYA & PORAT, *supra* note 96, at 19 (noting that the suitability requirement is encompassed by both the necessity requirement and the proportionality as such requirement). David Beatty goes even further, arguing that both suitability and necessity are merely obvious applications of proportionality in the strict sense. DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 163 (2004).

[113] *Cf.* YOWELL, *supra* note 9, at 31 ("[I]f the means are necessary then they are also suitable.").

[114] Robert Alexy, *Proportionality and Rationality*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES, *supra* note 98, at 13, 14–15.

[115] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 5, 1980, 55 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 159, 166 (Ger.).

[116] *See generally S v. Bhulwana; S v. Gwadiso* 1996 (1) SA 388 (CC) (S. Afr.); R v. Oakes, [1986] 1 S.C.R. 103 (Can.).

[117] BARAK, *supra* note 90, at 316.

[118] Grimm, *supra* note 106, at 389.

[119] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 67 (Julian Rivers trans., 2002).

rights-bearer worse off, it must do so.[120] Otherwise, it infringes the interest unnecessarily, and doing that is never justified.[121]

The necessity step is inherently speculative. In practice, it requires the legislature to choose, among a range of possible choices, the option that restricts rights least.[122] Like the suitability step, the necessity step raises an empirical question that, in its turn, raises questions about legislative deference and margin of appreciation. It isn't entirely clear, for instance, who bears the burden of empirical uncertainty—the rights claimant or the legislature.

It's also unclear whether the necessity test should apply in its weak form or its strong one. Under the weak form, necessity is understood narrowly: the law is unnecessary only if some less-restrictive alternative would be *equally* effective. Under the strong form, necessity is understood broadly: the law is unnecessary if some less-restrictive alternative would be *nearly as* effective.[123]

Both forms pose problems. Under the weak form, the test is, well, *weak*. Most alternative means entail at least some marginal cost to the government purpose, even if only in terms of lost administrative efficiency or funds foregone.[124] As John Hart Ely once wrote, discussing an analogous test in the American context, the "weak formulation would reach only laws that engage in the gratuitous inhibition of [rights]."[125] But most legislatures, Ely continued, "simply do not enact wholly useless provisions."[126]

The strong form, by contrast, smuggles balancing—which properly belongs at proportionality's fourth step—into the necessity inquiry. If the alternative law is only *almost* as effective as the challenged one, then the challenged law is unnecessary only if the court concludes that the difference in effectiveness between the two alternatives is not worth the difference in harm to the rights claimant.[127] But the court can only reach that conclusion by balancing. And at the necessity step, the court is not supposed to balance.

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[120] Schlink, *supra* note 88, at 724.

[121] *See id.* ("[T]he state has no good reason to use the more rather than the less intrusive means . . . .").

[122] STONE SWEET & MATHEWS, *supra* note 96, at 36; BARAK, *supra* note 90, at 317.

[123] On the difference between the two forms, see YOWELL, *supra* note 9, at 31 and John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1485 (1975).

[124] *Cf.* Ely, *supra* note 123, at 1485 ("[I]n virtually every case involving real legislation, a more perfect fit involves some added cost." (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 (1974))).

[125] *Id.*

[126] *Id.* at 1486; *see also* COHEN-ELIYA & PORAT, *supra* note 96, at 19 ("[G]overnmental actions rarely encumber a right for no reason at all . . . .").

[127] For a discussion of this issue, see generally KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (2012).

Some writers think the justification inquiry should end at the necessity step.[128] One might call this approach "Proportionality Lite." Proportionality Lite is attractive because it would seem to avoid the controversial balancing that drives the fourth, omitted step. But Proportionality Lite also makes the problem of a weak versus a strong necessity test even more acute: under this approach, the court either defers to the legislature in all but egregious cases, or it engages covertly in the very balancing that Proportionality Lite aspires to avoid.[129]

In any event, many proportionality courts frequently end their analysis at the necessity step.[130] In all likelihood, they do so as a measure of institutional self-preservation. The fourth step of the justification analysis, proportionality in the strict sense, exposes judges as policy-makers. Concerned about their legitimacy (i.e., diffuse acceptance) most courts avoid such exposure when they can. It appears that only popular, prestigious, and venerable tribunals like the German Constitutional Court regularly invalidate laws at the fourth and final step.[131] On the other hand, it may be that developing courts will eventually follow the German lead in regularly quashing laws at that last, most controversial step, to which we now turn.

4. Proportionality in the Narrow Sense (Balancing)

The final step in the justification phase—the step that gives proportionality its name and fame or, to some persuasions, its name and notoriety—requires that even a law pursuing a legitimate end rationally and necessarily must not restrict an individual interest unduly, excessively—in a word, *disproportionately*. This last step requires proportion, or *balance*: an equilibrium and fit between what the law giveth and what the law taketh away. The social good that the law secures must match the social good that the attendant restriction deprives.[132] This is the step, according to some commentators, that gives the test

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[128] One of the most prominent advocates of this approach is Bernhard Schlink. *See generally* Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* 2 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT: KLÄRUNG UND FORTBILDUNG DES VERFASSUNGSRECHTS 445 (Peter Badura & Horst Dreier eds., 2001) (advocating to apply this approach to legislation, but the full proportionality test for administrative and regulatory acts).

[129] *See* PETERSEN, *supra* note 111, at 51–54 (elaborating on this dilemma).

[130] BARAK, *supra* note 90, at 338. Niels Petersen has shown in great detail that this is the preferred approach of the apex courts in Canada and South Africa. *See* PETERSEN, *supra* note 111, at 116–57.

[131] *See generally* PETERSEN, *supra* note 111 (providing an overview of rights adjudication in Germany).

[132] *Cf.* HCJ 6055/95 Tzemach v. Minister of Defense, 53(5) PD 241 (1999) (Isr.), *translated in Tzemach v. Minister of Defense*, VERSA, https://versa.cardozo.yu.edu/opinions/tzemach-v-minister-defense [https://perma.cc/W95Y-4375] ("The greater the importance of the right infringed, and the more serious the infringement, the stronger the public interest must be, in order to justify the in-

its teeth.[133] It is strict both in its narrow focus on balancing and in its exacting protection of individual rights. It is also, by orders of magnitude, the most difficult step to apply. It gives judges a level of flexibility and discretion that some extol and others deplore. It is the source, to some, of proportionality's strongest attractions; it is the object, for others, of its severest critiques.

To some of proportionality's defenders, the balancing step is necessary to make rights effective.[134] Without it, "a legislature could usually find ways to reduce less restrictive alternatives to nil—thereby insulating the law from censure—by seeking the highest ideal level of protection."[135] But even some of the step's most prominent defenders concede that it is inescapably "value-laden"[136] and that it inevitably exposes judges as political actors—the makers, and not merely the mouthpiece, of the law.[137]

II. JUDICIAL BALANCING AND RELIGIOUS LIBERTY

Whether governments should protect religious exercise in a robust way that fosters peaceful pluralism is a normative question that many scholars, including one of the authors, have written about elsewhere.[138] For present pur-

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fringement."); *S v. Bhulwana; S v. Gwadiso* 1996 (1) SA 388 (CC) at 9 para. 18 (S. Afr.) ("The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."); R v. Oakes, [1986] 1 S.C.R. 103, 140 (Can.) ("The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.").

[133] *See, e.g.*, BARAK, *supra* note 90, at 340 (describing the balancing step as "the most important of proportionality's tests"); PETERSEN, *supra* note 111, at 2–3 (calling balancing "[t]he most important step").

[134] STONE SWEET & MATHEWS, *supra* note 96, at 37.

[135] *Id.*

[136] BARAK, *supra* note 90, at 245.

[137] STONE SWEET & MATHEWS, *supra* note 96, at 38.

[138] *See, e.g.*, Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1212, 1226–28 (2020); Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, *supra* note 147, at 173; John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad*, 92 NOTRE DAME L. REV. 427, 436 (2016) (discussing historical debates highlighting principles of religious pluralism); Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 304 (2009) ("In the end, both the Christian Right and gay rights movements make important advances yet face significant tensions as they craft doctrinal claims that operate within competing models of pluralism."). *But see* Nelson Tebbe, Essay, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 365, 369–76 (2015) (examining the skeptics' critique of the religious freedom doctrine as incoherent); Stephen L. Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1630 (1997) ("If Fish and other critics are right in thinking that true believers cannot truly believe in religious freedom and religious pluralism as valuable for their own sake, the ability of the religious to support the liberal state is called into question because the religious freedom that liberalism trumpets becomes a trivial sideshow rather than one of its main attractions."). *See generally* JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016) (discussing the need for pluralism in response to increasing po-

poses, it's sufficient to note that many of the countries that engage in proportionality analysis at least *claim* (i.e., in constitutional instruments, court decisions, and other official documents) to be committed to robust religious liberty and pluralism.[139] The United States is no exception to this sort of rhetoric.[140]

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larization in the United States); Richard W. Garnett, *Religious Accommodations and—and Among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493 (2015) (examining the important role of pluralism in discourse surrounding religious accommodation and discussing the existing tensions between religious liberty claims and other civil rights claims); Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in* Hosanna-Tabor, 64 MERCER L. REV. 405 (2013) (discussing the ministerial exception and the tension between increased pluralism and religious exemptions).

[139] For a nonexhaustive summary of the religious liberty protections guaranteed by the laws of the countries herein mentioned that engage in proportionality analysis, see OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, 2019 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM (2020), https://www.state.gov/reports/2019-report-on-international-religious-freedom/ [https://perma.cc/R7KA-SPDF] (providing a summary of the legal frameworks governing religious freedom throughout the world); OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, CANADA 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 3 (2020), https://www.state.gov/wp-content/uploads/2020/06/CANADA-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [https://perma.cc/G2MX-4NJV] ("[Canada's] constitution provides for freedom of conscience, religion, thought, belief, opinion and expression. Every individual . . . has the right to equal protection and benefit of the law without discrimination based on religion."); OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, FRANCE 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 1 (2020), https://www.state.gov/wp-content/uploads/2020/06/FRANCE-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [https://perma.cc/GQ3M-F3WE] ("[France's] constitution and the law protect the right of individuals to choose, change, and practice religion."); OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, GERMANY 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 3 (2020), https://www.state.gov/wp-content/uploads/2020/06/GERMANY-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [https://perma.cc/LN4M-2JGD] ("[Germany's] constitution prohibits discrimination based on religious opinion and provides for freedom of faith and conscience, freedom to profess a religious or philosophical creed, and freedom to practice one's religion."); OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, IRELAND 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2–3 (2020), https://www.state.gov/wp-content/uploads/2020/06/IRELAND-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [https://perma.cc/TS8S-32MU] ("[Ireland's] constitution guarantees the free profession and practice of religion . . . . It prohibits discrimination on the grounds of religion or belief and guarantees not to endow any religion."); OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, ISRAEL 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 1 (2020), https://www.state.gov/wp-content/uploads/2020/06/ISRAEL-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [https://perma.cc/GEL7-KG7C] ("[Israel's] laws and Supreme Court rulings protect the freedoms of conscience, faith, religion, and worship regardless of an individual's religious affiliation . . . ."); OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, SOUTH AFRICA 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2 (2020), https://www.state.gov/wp-content/uploads/2020/05/SOUTH-AFRICA-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [https://perma.cc/SF8W-BHJ4] ("[South Africa's] constitution provides for freedom of religion and belief, including the right to form, join, and maintain religious associations."); OFFICE OF INT'L RELIGIOUS FREEDOM, U.S. DEP'T OF STATE, UNITED KINGDOM 2019 INTERNATIONAL RELIGIOUS FREEDOM REPORT 4 (2020), https://www.state.gov/wp-content/uploads/2020/05/UNITED-KINGDOM-2019-INTERNATIONAL-RELIGIOUS-FREEDOM-REPORT.pdf [https://perma.cc/XL67-VLCC] ("[The United Kingdom's law] protects freedom of thought, conscience, and religion.").

In this Part we assert that neither strict scrutiny nor proportionality has cornered the market on meaningful protection for religious liberty in a pluralistic society. Rather, we argue that, regardless of which framework a court uses or what label that framework carries, meaningful protections for religious liberty often correlate with three concrete factors. These factors are compatible with both strict scrutiny and proportionality, but they are also capable, within either framework, of being ignored. When courts honor these factors, they have the tools to ensure protections for groups like religious minorities. When courts neglect these factors, they lack the tools to prevent governments from overriding religious objections, even when there is little justification for doing so.

The three factors are as follows: courts must (1) require that the government act in an evenhanded way, such as by not denying protections for religious activities that pose risks comparable to secular activity the government allows;[141] (2) place upon the government the evidentiary burden of demon-

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For only a sampling of official commentary on the importance of pluralism and religious liberty, for example, Melissa Eddy, *Looking to History and Recent Events, German Leaders Defend Democracy and Pluralism*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/world/europe/steinmeier-germany-democratic-patriotism.html [https://perma.cc/U27K-VBTS] ("We are commemorating today with the promise that we will set ourselves strongly against attacks on our open and plural society." (quoting Chancellor Angela Merkel)); Press Release, Glob. Affs. Can., Statement by Minister of Foreign Affairs on International Religious Freedom Day (Oct. 27, 2018), https://www.canada.ca/en/global-affairs/news/2018/10/statement-by-minister-of-foreign-affairs-on-international-religious-freedom-day.html [https://perma.cc/3KGB-NLPH] ("We are committed to working with international partners to protect and promote freedom of religion or belief . . . to encourage and deepen multilateral coordination on this critical issue." (quoting Hon. Chrystia Freeland, Minister of Foreign Affs.)); Interview with Emmanuel Macron, President of Fr. (Oct. 31, 2020), https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france-63815/article/president-macron-interviewed-by-al-jazeera-30-oct-2020 [https://perma.cc/EN4F-F45R] ("[O]ur country is one that has no problems with any of the world's religions whatsoever, because they are all practised freely in our country." (quoting President Emmanuel Macron)); Mary McAleese, President of Ir., Remarks at a Conference on 'Religious Freedom East and West' (June 3, 2011), https://president.ie/en/media-library/speeches/remarks-by-president-mcaleese-at-a-conference-on-religious-freedom-east-and [https://perma.cc/L5LV-BSF6] ("The freedom of thought, conscience, religion or belief applies equally to all persons. It is a fundamental freedom which includes all religions or beliefs, including those that have not been traditionally practised in a particular country, the beliefs of persons who belong to religious minorities, as well as nontheistic and atheistic beliefs.").

[140] *See, e.g.*, MICHAEL A. WEBER, CONG. RSCH. SERV., IF10803, GLOBAL HUMAN RIGHTS: INTERNATIONAL RELIGIOUS FREEDOM POLICY 2 (2021) (noting President Trump's 2020 declaration that international religious freedom was a "moral and national security imperative" (quoting Exec. Order No. 13926, 85 Fed. Reg. 34,951, (June 2, 2020))); *id.* at 1 ("Congress has been an advocate for international religious freedom issues and has sought to ensure continued support for religious freedom as a focus of U.S. foreign policy . . . ."); Proclamation No. 9569, 82 Fed. Reg. 7617, 7617–18 (Jan. 13, 2017) (proclaiming "January 16, 2017, as Religious Freedom Day" and calling religious liberty the "cornerstone of American life" and proclaiming that "[i]f we are to defend religious freedom, we must remember that when any religious group is targeted, we all have a responsibility to speak up").

[141] *See infra* notes 147–202 and accompanying text.

strating that the harms it anticipates from the restricted religious activity are actually likely to materialize;[142] and (3) avoid relieving the government of its justificatory burden by second-guessing or redefining sincere theological claims.[143] The first factor requires courts to scrutinize closely any differences in the way governments treat religious activities with respect to secular analogs. The second factor prevents courts from deferring routinely to unsubstantiated government claims. And the third factor enjoins courts to practice theological abstention, allowing religious claimants to speak for themselves. Separately and collectively, these factors require governments to meaningfully justify its encroachments on religious liberty.

Conflicts arising in the COVID-19 context provide particularly helpful case studies, because in these cases governments are largely dealing with the same issue (stopping the spread of COVID-19) and doing so on the basis of similar scientific information. Yet courts have responded to similar government policies in drastically different ways depending on whether and how they incorporate the three factors discussed above. This is true regardless of whether the courts have applied a proportionality or a strict scrutiny framework. In what follows, we assess cases from both proportionality and strict scrutiny jurisdictions—some involving COVID-19 and some not—that highlight each of the three factors. Section A, discusses how courts compare treatment of religious and secular activities during COVID-19 and beyond.[144] Section B examines the evidentiary burden courts must place on governments, inside and outside of the COVID-19 context.[145] Section C inspects whether courts resist the temptation to assist governments with justifying religious restrictions.[146]

A. Disfavored Double Standards

Whether governments give religious exercise the same sort of protections afforded to comparable secular activities is an important question courts can use to assess whether restrictions on activity are justified. Indeed, careful scrutiny of analogous activity can help to smoke out illicit, or even just indifferent, governmental motives vis-à-vis religious exercise. This section compares cases from both the proportionality and the strict scrutiny contexts in which courts have carefully assessed comparators to religious exercise, and contrasts them with cases in which courts have treated religion as essentially *sui generis* and

[142] *See infra* notes 203–298 and accompanying text.
[143] *See infra* notes 299–329 and accompanying text.
[144] *See infra* notes 147–202 and accompanying text.
[145] *See infra* notes 203–298 and accompanying text.
[146] *See infra* notes 299–329 and accompanying text.

secular comparators as largely irrelevant. Courts in the former cases, we suggest, often do a better job of taking religious rights seriously.

1. COVID-19 Cases

In France, comparisons between governmental treatment of religious gatherings and secular gatherings were key to the Council of State's rulings in favor of religious claimants during the COVID-19 pandemic. On March 17, 2020, France entered a lockdown that lasted until restrictions were eased on May 11, 2020.[147] Under these restrictions, places of worship were closed to the public—no public religious services were to be held. The only ceremonies that places of worship were permitted to hold were funerals capped at ten people.[148] Schools and nonessential businesses were closed. All nonessential travel outside of the home was prohibited.

These restrictions were not challenged in court. Instead, religious leaders engaged in drive-in services, like confession, and tried to collaborate with government leaders to ease restrictions moving forward.[149] But when the government indicated that places of worship would not open until June, religious leaders voiced frustration.[150]

On May 11, 2020, certain restrictions were eased.[151] Places of worship remained closed to public gatherings and ceremonies, but the cap on funeral attendance was increased to twenty persons.[152] Public gatherings of up to ten people were also newly permitted, and primary schools and most businesses

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[147] Louise Nordstrom, *As French Hunker Down for Second COVID-19 Lockdown, the New Rules Explained*, FR. 24 (Oct. 30, 2020), https://www.france24.com/en/france/20201030-french-hunker-down-for-second-covid-19-lockdown-this-is-what-s-new [https://perma.cc/6CHL-ZEKZ] (contrasting the rules of France's March 17 to May 11, 2020 lockdown with the rules of the lockdown initiated on October 29, 2020).

[148] *Id.*

[149] *See, e.g.*, Mark Armstrong, *Church in France Introduces Drive-in Confession During Coronavirus Lockdown*, EURONEWS (May 3, 2020), https://www.euronews.com/2020/05/03/church-in-france-introduces-drive-in-confession-during-coronavirus-lockdown [https://perma.cc/EKW3-BLRX].

[150] *See, e.g.*, Gauthier Vaillant, *Catholics in France at Odds with Government Over Continued Liturgical Lockdown*, LA CROIX INT'L (May 4, 2020) (Fr.), https://international.la-croix.com/news/religion/catholics-in-france-at-odds-with-government-over-continued-liturgical-lockdown/12295 [https://perma.cc/QF29-2A9G].

[151] Alice Tidey, *COVID-19: France's Top Court Orders Government to Reopen Places of Worship*, EURONEWS (May 18, 2020), https://www.euronews.com/2020/05/18/covid-19-france-s-top-court-orders-government-to-reopen-places-of-worship [https://perma.cc/85LR-WFTH] (quoting *Rassemblements Dans les Lieux de Culte: Le Conseil d'État Ordonne au Premier Ministre de Prendre des Mesures Moins Contraignantes* [*Gatherings in Places of Worship: The Council of State Orders the Prime Minister to Take Less Restrictive Measures*], CONSEIL D'ÉTAT (May 18, 2020), https://www.conseil-etat.fr/actualites/actualites/rassemblements-dans-les-lieux-de-culte-le-conseil-d-etat-ordonne-au-premier-ministre-de-prendre-des-mesures-moins-contraignantes [https://perma.cc/X9XN-BYWS]).

[152] *Id.*

were reopened.[153] Restaurants and secondary schools were to remain closed until June.[154]

These new restrictions prompted backlash from religious leaders. On May 18, 2020, France's Council of State held that the blanket ban on gatherings at places of worship was unlawful and ordered the Nation's leaders to lift it.[155] The Council held that the ban was "disproportionate to the objective of preserving public health."[156] In other words, the government had failed to demonstrate that the restrictions were justified. In support of this conclusion, the Council emphasized that religious groups were subject to strict prohibitions on religious ceremonies, whereas no other authorized activity is subject to such a limitation.[157] In fact, other types of secular gatherings were permitted, indicating that less restrictive alternatives to protect against COVID were allowed. Accordingly, the Council ordered the government to modify the limits to more carefully tailor them to the health risks posed by COVID, such that each would be subject to gathering size limits with a scientific basis.[158]

In the United States, the Supreme Court ruled in *Roman Catholic Diocese of Brooklyn v. Cuomo* that New York's new and heightened COVID-19 restrictions were not justified. In so ruling, the Court emphasized that New York had not acted in an evenhanded way because the new regulations "single[d] out houses of worship for especially harsh treatment."[159] Specifically,

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be

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[153] *Coronavirus: Paris Restrictions to Stay as France Reopens*, BBC NEWS (May 7, 2020), https://www.bbc.com/news/world-europe-52579482 [https://perma.cc/8XTM-XMC2].

[154] *Id.*

[155] Conseil d'État [CE] [Council of State], May 18, 2020, 440366 (Fr.), https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-05-18/440366 [https://perma.cc/259G-M2XF]; Tidey, *supra* note 151.

[156] Tidey, *supra* note 151 (noting that the French Council of State ordered the government to take measures "strictly proportionate to the health risks incurred" (quoting CE, May 18, 2020, 440466)).

[157] *See* Conseil d'État [CE] [Council of State], Nov. 29, 2020, 446930 (Fr.), https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-29/446930 [https://perma.cc/AB8H-MVRW] (comparing the restrictions on religious activities to nonreligious ones) (quotation translated by authors).

[158] Joshua Cohen, *U.S. and French High Courts Approach Covid-19 Limits on Religious Gathering Sizes Very Differently*, FORBES (Dec. 1, 2020), https://www.forbes.com/sites/joshuacohen/2020/12/01/us-and-french-high-courts-approach-coronavirus-restrictions-on-religious-services-very-differently/?sh=32967176202a [https://perma.cc/UBC9-9SFT].

[159] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam).

> regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities.[160]

In a concurring opinion, Justice Neil Gorsuch stressed that "there is no world in which the U.S. Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."[161]

Justice Gorsuch returned to this theme of demanding evenhanded—and denouncing differential—treatment in another recent COVID-19 decision, *South Bay United Pentecostal Church v. Newsom* (*South Bay II*).[162] The sprawling length of the pandemic, he observed, vitiates government assertions of "temporary exigency."[163] Justice Gorsuch acknowledged, "Drafting narrowly tailored regulations can be difficult."[164] Even so, he continued, "if Hollywood may host a studio audience or film a singing competition while not a single soul may enter California's churches, synagogues, and mosques, something has gone seriously awry."[165] For Justice Gorsuch and several of his colleagues, then, a core requirement of religious liberty is that religious exercise be protected at least as vigorously as comparable secular activity.

Courts in the United Kingdom, by contrast, have been unpersuaded by invocations of analogous secular conduct. Instead, at least in the COVID-19 context, U.K. courts have viewed secular and religious conduct as implicating two distinct rights. On this view, differential treatment of religious conduct is not evidence that religious rights are being violated.

In May 2020, in *R (on the Application of Hussain) v. Secretary of State for Health and Social Care*, for example, the Administrative Court of the Queen's Bench Division ruled that the mere fact that coronavirus restrictions for religious institutions were different from those for businesses and public parks was not evidence that religious exercise rights had been violated.[166] In that case, a claimant asked for interim relief from regulations requiring all places of worship to close and prohibiting gatherings of more than two people in public places. The claimant alleged that both provisions violated his religious freedom because they prevented him from attending services in a mosque during

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[160] *Id.*

[161] *Id.* at 72 (Gorsuch, J., concurring). Notably, this is a stricter approach to secular comparators than the Supreme Court had previously taken earlier in 2020, *South Bay Pentecostal Church v. Newsom* (*South Bay I*), 140 S. Ct. 1613 (2020), before its 2021 ruling in the same case.

[162] 141 S. Ct. 716 (2021) (statement of Gorsuch, J.).

[163] *Id.* at 720 (noting that the COVID-19 pandemic "hovers over a second Lent, a second Passover, and a second Ramadan").

[164] *Id.*

[165] *Id.*

[166] *See generally* [2020] EWHC (Admin) 1392 (Eng.).

Ramadan.[167] In evaluating this claim, the court considered the regulations' treatment of other religious entities, noting that "all religions which include an obligation to undertake communal prayer or worship are equally affected by the effect of the 2020 Regulations."[168] For this court, the relevant comparison was *among* religious actors, not *between* religious activities and their secular analogs.

The court conceded that there was "no dispute" that the restrictions were an infringement of the claimant's right to manifest his religious belief, but it stressed the need to balance the claimant's religious interests against the government's interest in "effective measures to safeguard public health."[169] That balance, the court found, tilted in favor of the government. The restrictions, the court noted, were temporary, affected only attendance at communal prayers, and were justified by the exceptional circumstances of a global pandemic.[170] To the claimant's contention that the restrictions were disproportionate—after all, many businesses were allowed to operate at fifty-percent capacity and public parks remained open—the court dismissed the relevance of the comparison, insisting breezily that the government deserves some discretion to implement the 2020 Regulations.[171]

Many of the U.K. courts' Commonwealth cousins in Canada similarly treat secular and religious conduct as different in kind and shielded by distinct rights, such that protections for the former have no bearing on the validity of restrictions on the latter. In the COVID-19 context, however, at least one Canadian court has considered secular comparators for contextual, albeit not controlling, evidence of religious liberty violations. In *Toronto International Celebration Church v. Ontario (Attorney General)*, the claimant challenged COVID-19 restrictions capping church attendance at ten people.[172] The claimant insisted that the cap on church attendance was a per se violation of religious rights, but also noted the inconsistency of sharply limiting religious gatherings, whereas some businesses could operate at half-capacity.[173] The Ontario Superior Court was at least somewhat receptive to this claim, observing that the disparities in treatment between secular and religious entities, as well as the lack of information about whether outbreaks linked to religious gatherings occurred before or after the government mandated precautions, raised serious questions as to whether the cap on church attendance was the "least restrictive way" of reduc-

[167] *Id.* [7].
[168] *Id.* [10].
[169] *Id.* [9].
[170] *Id.* [9]–[14].
[171] *Id.* [19].
[172] (2020), 154 O.R. 3d 122 (Can. Ont. Sup. Ct. J.).
[173] *Id.* para. 18.

ing the spread of COVID-19.[174] The court noted that this ultimate issue would eventually be resolved on the merits and did not rule for the claimant in the preliminary procedure. Nevertheless, it is worth noting that the court was at least asking the right questions—questions the court anticipated would potentially result in more robust religious liberty protections at the merits phase.

2. Beyond COVID-19

Secular comparisons, of course, played an important role in religious rights jurisprudence in many jurisdictions long before the outbreak of the COVID-19 pandemic. A prominent example comes from the famous 2006 Canadian case of *Multani v. Commission Scolaire Marguerite-Bourgeoys*.[175] In *Multani*, a Sikh student challenged a local ban on weapons in school that prevented him from carrying his kirpan (a ceremonial dagger) at school, even when it was sealed and sewn up inside his clothing.[176] The Canadian Supreme Court ruled that the ban infringed the student's religious freedom and could not be justified as a minimal impairment to the student's rights.[177] The court ruled both that the student's belief that complying with his religious convictions required carrying an unaltered kirpan was sincere and that the school board's interference with that belief was substantial, forcing him as it did "to choose between leaving his kirpan at home and leaving the public school system."[178]

In support of this conclusion, the court emphasized that school policies permitted a variety of secular objects and activities at least as dangerous as a kirpan carried inside the clothing. School safety was, to be sure, a substantial objective that could potentially justify some limits on religious exercise. But "absolute safety" was an "impossible" objective that would require banning "scissors, compasses, baseball bats and table knives in the cafeteria."[179] *Reasonable* safety, on the other hand, didn't require banning the kirpan any more than it required banning "scissors, pencils and baseball bats."[180] Accommodating the Sikh student by allowing him to wear the kirpan under certain conditions would underscore the countries' devotion to religious freedom.[181] For the *Multani* court, secular comparisons proved crucial, if not decisive.

Some U.S. courts have followed an approach similar to that of the Canadian Supreme Court in *Multani*. In 2013, for instance, the Fifth Circuit Court

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[174] *Id.* para. 18, 19–21.
[175] Multani v. Comm'n Scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256 (Can.).
[176] *Id.* para. 6.
[177] *Id.* para. 2.
[178] *Id.* para. 39–40.
[179] *Id.* para. 46.
[180] *Id.* para. 58.
[181] *Id.* para. 79.

of Appeals decided *Tagore v. United States*, in which a Sikh employee sued the IRS for banning her kirpan at work.[182] The Fifth Circuit ruled that the bar failed the RFRA's strict scrutiny standard in part because the government enforced its policy inconsistently.[183] The government permitted other weapons inside the building for lawful reasons and had allowed Sikh individuals to carry kirpans in the White House.[184] Accordingly, the court concluded that RFRA's "fact-sensitive inquiry" required a remand for further inquiry into less restrictive alternatives to the IRS measure.[185]

The European Court of Human Rights (ECtHR), by contrast, has paid less attention to secular analogs when employing a proportionality framework. In 2014, in *S.A.S. v. France*, for instance, in which the court approved a French law that prohibited concealing one's face in public places (the so-called Burka Ban),[186] the judges effectively dismissed the relevance of the law's three exemptions for secular face coverings. The ban did not apply to face coverings (1) required by other legislation, such as motorcycle helmets; (2) justified "for health or occupational reasons," such as those guarding against dangerous chemicals; or (3) worn "in the context of sports, festivities or artistic or traditional events," including religious processions.[187] The court did not consider that these secular exemptions—and, indeed, other *religious* exemptions—might undermine France's claim that banning burkas was necessary to ensure "a space of socialisation which makes living together easier," whereas banning the secular face coverings exempted from the law was not.[188] Put differently, the court didn't require France to explain why religious face coverings hindered "living together" while secular face coverings did not.

Had the ECtHR wrestled with the differential treatment of analogous secular practices, it would have had to confront more directly the law's true, and problematic, purpose: an open desire to "release women from the subservience of the full-face veil" and extirpate a public religious practice deemed "incom-

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[182] Tagore v. United States, 735 F.3d 324 (5th Cir. 2013). The court treated *Tagore v. United States* as a statutory case decided under the RFRA, rather than a constitutional case decided under the First Amendment.

[183] *Id.* at 331–32. The RFRA's strict scrutiny standard requires than any substantial interference with religious exercise be narrowly tailored to further a compelling government interest. 42 U.S.C. § 2000bb.

[184] *Tagore*, 735 F.3d at 331–32.

[185] *Id.* at 332.

[186] 2014-III Eur. Ct. H.R. 341.

[187] S.A.S. v. France, App. No. 43835/11, ¶ 31 (July 1, 2014), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22S.A.S.%20v.%20France%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-145466%22]} [https://perma.cc/6JE6-B74A].

[188] *Id.* ¶ 122.

pati[ble] with secularism."[189] Confronting that purpose directly would have required the court to decide openly whether forcibly "releas[ing]" women from their voluntary religious practices is even a legitimate government purpose and, *a fortiori*, whether a significant rights restriction is justified in light of that dubious purpose.[190] It has often been said that the necessity prong of the proportionality test—like the functionally similar least-restrictive-means prong of the strict scrutiny test—serves to smoke out illicit government motives.[191] Invigorating the necessity inquiry with an exacting review of secular comparators would certainly have exposed a problematic purpose in *S.A.S.*[192]

The ECtHR has occasionally done better. In 2013, in *Vojnity v. Hungary*, involving a child custody dispute, the court considered the extent to which the complainant father's religious convictions had influenced the Hungarian authorities' decision to deny him parental rights.[193] The judges concluded that "the applicant's religious convictions had a direct bearing on the outcome of the matter in issue," resulting in "a difference of treatment between the applicant and other parents in an analogous situation."[194] Through such differential treatment, the government had effectively "reproach[ed] the applicant for his strong religious convictions."[195] This, the court concluded, was impermissible. There was "no reasonable relationship of proportionality," the judges wrote, "between a total ban on the applicant's access rights and . . . the protection of the best interest of the child."[196] That being so, the Hungarian officials' treatment of the child custody applicant constituted religious discrimination.

In *Vojnity*, the ECtHR did not exactly look to secular comparators in the sense of comparing the government's treatment of religiously-motivated conduct to its treatment of analogous secular conduct. But it did apply what amounted to a "but-for" test to smoke out religious discrimination—an approach consistent with the ECtHR's broader pattern of applying "stricter scrutiny" in cases involving restrictions on parental rights.[197]

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[189] *Id.* ¶ 17.

[190] *Id*.

[191] *See supra* note 119 and accompanying text.

[192] For a contrasting view of a government body examining the same legislation and (using a proportionality analysis) reaching the opposite conclusion from the Strasbourg court, see Yaker v. France, Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2747/2016, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/123/D/2747/2016 (July 17, 2018).

[193] Vojnity v. Hungary, App. No. 29617/07 (Feb. 12, 2013), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-116409%22]} [https://perma.cc/4LNQ-66M5].

[194] *Id.* ¶ 31.

[195] *Id.*

[196] *Id.* ¶ 43.

[197] *Id.* ¶ 40.

More typical, however, is the ECtHR's pattern of deference in cases like *S.A.S.* or its 2013 decision in *Eweida v. United Kingdom*. In *Eweida*, a nurse challenged her hospital's refusal to let her wear a cross on her uniform—a refusal rooted in a broader policy of barring injurious jewelry at work.[198] In defending the policy, the U.K. government stressed the importance of minimizing the risk of injury to patients and emphasized that the policy applied equally to non-Christian religious items such as kirpans or kara bracelets.[199] Although the court conceded that the hospital had infringed the complainant's rights of religious exercise, it ultimately ruled that the interference was necessary in a democratic society (i.e., that it was proportional) because the hospital's interest in protecting patients outweighed the nurse's interest in wearing a cross at work.[200] The court also observed that the hospital had made efforts at accommodation: it would, for instance, have allowed the complainant to wear a cross as a brooch attached to her uniform or tucked under a turtleneck beneath her uniform.[201] But the court did not focus on analogous secular conduct—such as wearing necklaces without religious significance—but rather on the hospital's interest in safety and consistent treatment of other religious emblems.[202]

As these examples suggest, both proportionality and strict scrutiny courts protect religious exercise more effectively when they require governments to treat religious activity evenhandedly vis-à-vis comparable secular conduct, rather than merely requiring governments to engage in the equal-opportunity imposition of religious restrictions. The more meaningful comparison is with secular analogs—groups that government are typically more motivated to accommodate, than with other religious activity.

The requisite evenhandedness that we have just described is, or should be, central to the necessity and narrow-tailoring requirements under both proportionality and strict scrutiny, respectively. One reason for this is that the comparison between religious or secular activities allows courts to assess whether the level of restriction to religious liberty is truly the least restrictive possible, by providing the Court with an alternative (and non-hypothetical) measure against which to compare the challenged measure.

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[198] Eweida v. United Kingdom, 2013-I Eur. Ct. H.R. 215.

[199] *Id.* at 245. The government argued that the safety risks of wearing a cross necklace included that a patient might yank the chain and injure the practitioner or the patient, or that it could swing and "come into contact with an open wound." *Id.* at 258. Sikh religious items were also outlawed on the basis of patient safety, namely kara bracelets (heavy bangles worn around the wrist) and kirpan swords.

[200] *Id.* at 258–59.

[201] *Id.* at 258.

[202] *Id.* at 258–59.

B. Deference or an Evidentiary Burden?

As suggested earlier, proportionality's necessity prong and strict scrutiny's narrow-tailoring requirement are functional equivalents.[203] For courts applying these tests, both approaches raise the question of deference to empirical claims. Necessity assessments require empirical analysis, and both governments and courts operate in a world of empirical uncertainty. To what extent, then, should courts defer to political actors' empirical prognoses?

That is a hard question, but it becomes less difficult if courts focus on the narrow question that necessity requirements actually pose, namely, whether the rights restriction is necessary to secure the asserted public interest *at the margins*. Courts applying necessity tests do not question governments' assessments of the public interest in gross; they ask only whether restricting the complainant's rights is necessary to secure for that interest some marginal benefit. Accordingly, the question of deference *vel non* also operates only at the margins, and it is with respect to that narrower, marginal question of deference that we argue that courts should require governments to shoulder a reasonable evidentiary burden. Empirical uncertainties will undoubtedly persist, and courts should give good-faith government assessments the benefit of the doubt. But they shouldn't just take the government's word for it. Requiring governments to justify rights restrictions means that they must show—with evidence—that those restrictions are needful.

1. COVID-19 Cases

In the context of COVID-19, some religious practices—crowded indoor gatherings, for instance, and especially those that involve congregational singing—clearly pose a heightened risk of spreading the virus. Other religious activities are much less risky. How serious is the risk of transmission, for instance, if the building capacity is limited—to 50%, say, or to 30% or 20%—and accompanied by careful protocols for hand-washing, mask-wearing, and physical-distancing? What about drive-in services? Do the reduced risks of such activities still justify blanket bans on religious services?

The answers to these questions rely, of course, on empirical assessments—sometimes irreducibly difficult ones. Inevitably, different courts will weigh the risks differently. The trouble arises, however, when courts don't weigh them at all but simply defer to government assertions of overwhelming risk. But when the restrictions on religious exercise are as drastic as wholesale bans on all forms of public worship, that deferential posture gets the court's role precisely backwards. In the COVID-19 context, the deep divide is not be-

[203] *See supra* notes 119–131.

tween proportionality courts and strict scrutiny courts, nor yet between courts more or less willing to tolerate risk. It is between courts who require governments to shoulder the evidentiary burden of establishing the relevant risk of allowing the religious exercise and courts who deferentially assume such risk on the government's *ipse dixit*.

Different courts in Canada illuminate the divide. In Canada, all COVID-related restrictions on houses of worship have stemmed from provincial and territorial governments.[204] These restrictions vary in strictness.[205] So far, those implemented in Alberta, Manitoba, Ontario, and Quebec have been challenged in court on religious liberty grounds.[206] But these courts have responded to such challenges in strikingly different ways, even though all are operating in jurisdictions where proportionality is the guiding rubric.

In mid-November 2020, Manitoba moved to a Critical Response Level and implemented its strictest COVID-related restrictions yet that barred all indoor and outdoor social gatherings. Additionally, the new mandates ordered all "non-essential" businesses, including houses of worship, to close.[207] A partial exception was made for "funeral[s], wedding[s], baptism[s] or similar reli-

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[204] *Guidance on Essential Services and Functions in Canada During the COVID-19 Pandemic*, PUB. SAFETY CAN., https://www.publicsafety.gc.ca/cnt/ntnl-scrt/crtcl-nfrstrctr/esf-sfe-en.aspx [https://perma.cc/T7CM-EWSZ] (Oct. 14, 2021) (noting that closures and mask mandates are within the ambit of provincial governments).

[205] For a useful tool providing an interactive timeline of Canada's COVID interventions up to July 2021, see *COVID-19 Intervention Timeline in Canada*, CAN. INST. FOR HEALTH INFO. (Oct. 7, 2021), https://www.cihi.ca/en/covid-19-intervention-timeline-in-canada [https://perma.cc/4DGM-RYE2]. This tool can also be used to see a timeline of restrictions implemented at the provincial level, though it does not always make clear when religious institutions are included in a generally applicable restriction and does not reflect restrictions implemented after September. *Guidance on Essential Services and Functions in Canada During the COVID-19 Pandemic*, *supra* note 204.

[206] *See* Angela MacKenzie, *Quebec Superior Court Judge Rules in Favour of Hasidic Jewish Community*, CTV NEWS MONTREAL (Feb. 5, 2021), https://montreal.ctvnews.ca/quebec-superior-court-judge-rules-in-favour-of-hasidic-jewish-community-1.5297389 [https://perma.cc/TX6H-CTV4] ("[T]he Council of Hasidic Jews of Quebec and other communities argued that the limit of 10 people per building was unacceptable, and violated their freedom of religion."); Tyler Dawson, *During Christmas, Some Churches Appeal to a Higher Order to Protest COVID Lockdowns*, NAT'L POST (Dec. 22, 2020) (Can.), https://nationalpost.com/news/during-christmas-some-churches-appeal-to-a-higher-order-to-protest-covid-lockdowns [https://perma.cc/V6XM-4ZM8] ("Fines and closures have been slapped on a number of religious groups in several provinces, and Manitoba, Alberta and Ontario have been forced to defend their COVID-19 restrictions in court. So far, they have emerged victorious."). Notably, these provinces make up four of Canada's five largest provinces by population.

[207] Nonessential businesses include museums, galleries, libraries, performing arts and movie theaters, casinos, fitness clubs, gyms and training facilities, sports and recreation facilities, restaurants, bars, distilleries and other public food establishments, and personal service businesses including hair salons and aesthetic services. *See* COVID-19 Prevention Orders, s. 15(3)–(4), under the Public Health Act, C.C.S.M., c. P210, s. 67(3) (Can.) (as issued on Nov. 21, 2020), https://web2.gov.mb.ca/laws/orders/archived/_pdf-arch.php?ord=2020-11-22 [https://perma.cc/F5VY-W55F]; *see also Manitoba Pandemic Response System*, MANITOBA, https://manitoba.ca/covid19/restartmb/prs/ [https://perma.cc/U4GR-6Y4Y].

gious ceremon[ies]," but attendance was capped at five (excluding the officiant).[208] Places of worship were also allowed to continue offering "public or private school" and providing "health care, child care or social services."[209] With very few exceptions, then, houses of worship were shuttered unless offering critical services—and public worship was not deemed critical. Even drive-in religious services, previously permitted, were now verboten.[210]

On December 2, 2020, the Justice Centre for Constitutional Freedoms sent a legal warning letter to Brian Pallister, Manitoba's Premier, demanding that drive-in religious services be permitted to resume, consistent with Manitobans' freedoms of religion and peaceful assembly.[211] The Justice Centre also filed suit in the Court of Queen's Bench, alleging that the new restrictions violated the freedoms of conscience and religion enshrined in Canada's Charter of Rights and Freedoms.[212] On December 5, 2020, in *Springs of Living Water Centre Inc. v. Government of Manitoba*, the court denied the Centre's petition that drive-in services be exempted and enforcement immediately stayed.[213]

In denying the petition without expressly reaching the constitutional merits, Chief Justice Glenn Joyal of the Manitoba Court of Queen's Bench began by conceding that the constitutional issue was serious. But he presumed nonetheless, consistent with Canadian high court jurisprudence, that the legislation was constitutional—that it was enacted for the public good and served a valid public purpose—and placed upon the applicants the burden of showing that a stay would serve a greater public good. In concluding that the applicants had not met this burden, the court effectively took at face value the government's assertion that the policy was "designed to mitigate the risk of contact in order to prevent death, illness and the overwhelming of the Manitoba health care system."[214] It was enough, in other words, that the government meant well and that the drive-in religious services were not in compliance with public health orders.

Tellingly, the court did not require the government to produce any evidence that prohibiting drive-in religious services would, in fact, mitigate the

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[208] COVID-19 Prevention Orders, s. 15(3).

[209] *Id.* s. 15(4).

[210] Austin Grabish, *More Stand in Defiance of Public Health Order at Religious Events*, CBC, https://www.cbc.ca/news/canada/manitoba/religious-events-defy-public-health-order-1.5822714 [https://perma.cc/AL3L-K6WJ] (Nov. 30, 2020, 6:26 PM) ("The public health order forces places of worship to close and doesn't allow drive-in services to take place.").

[211] *Justice Centre to Seek Injunction Against Manitoba Government to Allow Drive-in Church Services*, JUST. CTR. (Dec. 2, 2020), https://www.jccf.ca/justice-centre-to-seek-injunction-against-manitoba-government-to-allow-drive-in-church-services/ [https://perma.cc/28AN-8T3V].

[212] *Id.*

[213] 2020 MBQB 185 (Can.).

[214] *Id.* para. 37.

risk of contact. Within days of the court's ruling, Manitoba voluntarily reversed its ban on drive-in religious services,[215] leading some to wonder whether the sweeping policies had really been limiting contact and reducing risk, as the government had previously claimed.[216]

The Ontario Superior Court took a somewhat different approach. The Reopening Ontario Act of October 1, 2020 had divided the province by zones with a discrete set of restrictions for each zone.[217] In "grey zones," like Toronto, both indoor and outdoor religious gatherings were limited to ten people or fewer.[218] Even for weddings, funerals, or religious rituals, rites and ceremonies were barred indoors and capped at ten people outdoors. The order also required pre-shift health screening, safety plans, physical distancing, and attendance logs.

On December 8, 2020, Toronto International Celebration Church (TICC) filed a legal challenge to the ten-person cap in grey zones—though only as it applied to them, rather than on behalf of all religious groups.[219] The church objected that fixing the cap at ten people rather than linking the limit to building capacity created arbitrary distinctions. As a result, smaller churches nearby could operate at thirty-percent capacity, whereas TICC was limited to less than one-percent capacity—a mere ten people rather than the 324 people that a thirty-percent rule would permit—in a 31,000-square-foot structure. In TICC's view, allowing other churches to house more than thirty times as many worshippers, with respect to building capacity, was unreasonable and hence violated their religious freedom.

On December 21, 2020, writing for the Ontario Superior Court of Justice in *Toronto International Celebration Church*, Justice Breese Davies carefully scrutinized the presented facts, finding it "not conclusive that restricting religious services to [ten] people is the least restrictive way to achieve the gov-

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[215] *Manitoba Removes Ban on Drive-in Church Services After Threat of Court Action*, JUST. CTR. (Dec. 8, 2020), https://www.jccf.ca/manitoba-removes-ban-on-drive-in-church-services-after-threat-of-court-action/ [https://perma.cc/3L3B-M28C].

[216] *See* Shane Gibson, *Manitoba Extends COVID-19 Restrictions into January; Drive-in Gatherings Allowed*, GLOB. NEWS, https://globalnews.ca/news/7508496/manitoba-extended-coronavirus-restrictions-update-tuesday-december-8/ [https://perma.cc/Z3UA-3Q6E] (Dec. 9, 2020).

[217] Reopening Ontario (A Flexible Response to COVID-19) Act, S.O. 2020, c. 17 (Can.).

[218] *What's Allowed and What's Not in Ontario's Lockdown Zone*, CP24, https://www.cp24.com/news/what-s-allowed-and-what-s-not-in-ontario-s-lockdown-zone-1.5198271 [https://perma.cc/Z3YU-4WUA] (Nov. 23, 2020); *see also* Katherine DeClerq, *Ontario Places Toronto and Peel Region Under Lockdown. Here's What You Need to Know*, CVT NEWS (Nov. 20, 2020), https://toronto.ctvnews.ca/ontario-places-toronto-and-peel-region-under-lockdown-here-s-what-you-need-to-know-1.5197410 [perma.cc/CV8B-3DR6].

[219] Jenna Moon, *Toronto Church Not Exempt from Region's Gathering Limits Under Lockdown, Superior Court Rules*, TORONTO STAR (Dec. 18, 2020), https://www.toronto.com/news-story/10293548-toronto-church-not-exempt-from-region-s-gathering-limits-under-lockdown-superior-court-rules/ [https://perma.cc/584Y-G3CY].

ernment's objective."[220] Although Justice Davies acknowledged public health data tracing some COVID-19 transmissions to religious gatherings, she also observed that such data established neither the efficacy of the challenged restrictions nor the reasonableness of allowing businesses to operate with fewer restrictions. In her preliminary assessment of the merits, Justice Davies concluded that "there is a serious issue to be decided in terms of whether the government has carefully tailored the restriction to ensure it impairs freedom of religion no more than is reasonably necessary," as well as "whether the means chosen by the government to minimize the spread of COVID-19 fall within a range of reasonable alternatives."[221] Because the procedural posture at that point was only preliminary, the court did not issue a final ruling on behalf of the complainants. But the court's reasoning suggested that the government would struggle, on the merits, to meet its justificatory burden.[222]

More recently, in February 2021, in *Council of Hasidic Jews of Quebec v. Attorney General of Quebec*, the Quebec Superior Court went even further, ruling in favor of the Hasidic Jewish community and allowing up to forty people to gather in appropriate worship spaces with sufficient exits.[223] Unwilling to defer to the government's empirical claims, the court concluded that the previous ten-person limit was not justified by the evidence.

Another dramatic example of requiring the government, at least implicitly, to shoulder an evidentiary burden comes from France's supreme administrative tribunal. In late November 2020, the Council of State invalidated the country's second wave of lockdown measures as applied to religious groups.[224] Although religious services increase the risk of spreading COVID-19, the Council wrote, "[I]t *does not follow* . . . that the absolute and general prohibition of any religious ceremony of more than thirty people . . . would be justified by the risks which are specific to these ceremonies."[225] The Council noted that the religious groups challenging the measures already required congregants over eleven years old to wear masks.[226] Rather than simply deferring to the government's assertions about risk, the Council scrutinized its failure to provide evidence regarding risks specific to gatherings for religious worship. That fail-

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[220] (2020), 154 O.R. 3d 122, para. 18 (Can. Ont. Sup. Ct. J.).

[221] *Id.* para. 21 (citing Frank v. Canada (Att'y Gen.), 2019 SCC 1, [2019] 1 S.C.R. 3 (Can.)).

[222] *See id.*

[223] Conseil des Juis Hassidiques du Québec c. Procureur Général du Québec [Council of Hasidic Jews of Quebec v. Attorney Gen. of Quebec], No. 500-17-115409-214, 2021 QCCS. 281 (Can. Que. Sup. Ct.); *see* MacKenzie, *supra* note 206 (reporting on the Quebec Superior Court decision).

[224] Conseil d'État [CE] [Council of State], Nov. 29, 2020, 446930 (Fr.), https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-11-29/446930 [https://perma.cc/AB8H-MVRW].

[225] *Id.* para. 18 (quotation translated by authors).

[226] *Id.*

ure weighed heavily in the Council's ultimate ruling on behalf of the religious groups.

In Germany, the Federal Constitutional Court has imposed increasingly stringent evidentiary burdens on governments as more information about the virus becomes available. On April 10, 2020, for instance, the court rejected a petition for a preliminary injunction against a Hessian State regulation that banned "gatherings in churches, mosques, and synagogues," as well as "the gatherings of other religious denominations."[227] The regulation went into force on March 18 and was set to expire automatically on April 19. The complainant, a Catholic who wished to receive the Eucharist, objected that the restrictions were disproportionate.

The court disagreed. The justices conceded that the regulation constituted an "extremely serious interference" of religious liberty—all the more so since the ban encompassed Holy Week, including Good Friday and Easter, the liturgical climax of the Christian calendar.[228] But even such a serious infringement was justified, the court concluded, by the imperative need to constrain the plague in its early stages.[229] The justices were reinforced in their conclusion by the fact that the heightened risk of infection associated with religious gatherings was not limited to believers who voluntarily took part. It was borne also by third parties who had no choice in the matter. Even so, the court made clear that the authorities did not enjoy carte blanche to combat COVID-19 by restricting religious worship. Instead, the regulation must be reevaluated on an ongoing basis to ensure the that the restrictions remained proportionate to the relative risks of infection. This ruling highlights an example of a court that appears to be engaging in truly rigorous scrutiny of the government action, but where—at least based on available information—the government action was justified.

Nineteen days later, the Federal Constitutional Court showed that it was serious about its provisos and its requirement that the government back its claims with evidence. In a decision dated April 29, 2020, the justices ruled that, in the current stage of the COVID-19 crisis, religious gatherings could no

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[227] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvQ 28/20, Apr. 10, 2020 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200410_1bvq002820.html [https://perma.cc/M2ZC-VJUE] (quotation translated by authors). Many of the issues discussed *infra* notes 227–231, derive from a piece published by Professor Justin Collings with the Brigham Young University Law International Center for Law and Religious Studies blog. *See* Justin Collings, *Religious Liberty and the Corona Crisis Before the German Constitutional Court*, BYU INT'L CTR. L. & RELIGION STUD. (May 15, 2020), https://talkabout.iclrs.org/2020/05/15/religious-liberty-and-the-corona-crisis-before-the-german-constitutional-court/ [https://perma.cc/TL3A-7NXU].

[228] 1 BvQ 28/20, para. 11 (Ger.).

[229] *Id.* para. 14.

longer be categorically banned.[230] During a transitional phase, authorities needed to allow the possibility of exceptions in individual cases.

In this second case, the petition for a preliminary injunction was filed by a Muslim Association that sought exceptional permission to gather in Mosques for Friday prayers during Ramadan. The Association pointed out that the relevant Lower Saxon regulations already allowed shops and stores to reopen. The Court observed that the risk of infection can be greater in religious gatherings than in shops but concluded that, under the current circumstances, a total ban on religious gatherings was excessive. Instead, the authorities needed to allow for individual exceptions, though they could qualify such permission by mandating precautions (face masks, physical-distancing, etc.).[231]

In the United States, the Supreme Court has been divided internally on whether and how broadly to defer to government measures to slow the pandemic's spread. In May 2020, in *South Bay United Pentecostal Church v. Newsom* (*South Bay I*), Chief Justice John Roberts joined Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor to reject a California church's petition for an order allowing it to hold worship services.[232] In his concurring opinion in *South Bay I*, Chief Justice Roberts began by highlighting the virus's dangers and devastation. COVID-19, he observed, had "killed thousands of people in California and more than 100,000 nationwide."[233] As yet, there was "no known cure, no effective treatment, and no vaccine" for a disease with which people "may be infected but asymptomatic" and with which they could therefore unwittingly infect others.[234] The challenged California order, he continued, temporarily restricted the size of public gatherings to control the spread of the disease. The Chief Justice deferred to the government's assessment that houses of worship posed sharper COVID-19 risks than grocery stores or banks, noting that "when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter"—one which the "Constitution principally entrusts . . . to the politically accountable officials of the States."[235] In this volatile context, the latitude af-

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[230] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvQ 44/20, para. 9, Apr. 29, 2020 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200429_1bvq004420.html [https://perma.cc/5BA8-MPRE].

[231] Collings, *supra* note 227 ("The Association pointed out that the relevant Lower Saxon regulations already allowed shops and stores to reopen. The Court observed that the risk of infection can be greater in religious gatherings than in shops but concluded that, under the current circumstances, a total ban on religious gatherings was excessive."); 1 BvQ 44/20, paras. 11, 14–16 (Ger.).

[232] 140 S. Ct. 1613 (2020).

[233] *Id.* at 1613 (Roberts, C.J., concurring).

[234] *Id.*

[235] *Id*.

forded government officials "must be especially broad."[236] "Where those broad limits are not exceeded," the Chief Justice concluded, "they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."[237]

By the end of 2020, however, the Court took a different approach. In *Roman Catholic Diocese of Brooklyn*, the Court gave very little deference to claims of government officials justifying particularly onerous COVID-19 restrictions in New York City.[238] "Members of this Court," the Justices wrote, "are not public health experts . . . . But even in a pandemic, the Constitution cannot be put away and forgotten."[239] In the view of Professor Cass Sunstein, this "absence of deference to state officials in a context in which deference might well be expected" was "[t]he most noteworthy feature of the *per curiam* opinion."[240] One might, of course, explain the Court's shift in terms of its altered composition—between May and November, Justice Barrett had replaced Justice Ginsburg. But the Chief Justice seems to have pivoted as well. Although he did not join the per curiam opinion, he did not wax eloquent, as he had in May, on the importance of deferring to the New York government. Instead, he dissented on the narrow grounds that the government had changed some of its policies at the last minute, and so he thought judicial review was no longer warranted.[241] He thought the case was moot, but he agreed that the regulations were unconstitutional.

Later news reports suggest that the Supreme Court's skepticism of New York's evidence was warranted. A February 2021 article in the *New York Times* indicates that Governor Cuomo's heightened COVID-19 orders were not designated by public health officials, but were instead driven by political considerations and implemented by the Governor's staff. As the article reports, "[S]tate health officials said they often found out about major changes in pandemic policy only after [Governor] Cuomo announced them at news conferences—and then asked them to match their health guidance to the announcements."[242] Indeed, "the State Health Department was not deeply involved in final decisions" regarding the microclusters the state identified for heightened

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[236] *Id.* (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)).

[237] *Id.* at 1613–14 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545 (1985)).

[238] 141 S. Ct. 63 (2020) (per curiam).

[239] *Id.* at 68.

[240] Cass R. Sunstein, *Our Anti*-Korematsu, 1 AM. J.L. & EQUAL. 221, 225 (2021).

[241] *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 75 (Roberts, C.J., dissenting).

[242] J. David Goodman, Joseph Goldstein & Jesse McKinley, *9 Top N.Y. Health Officials Have Quit as Cuomo Scorns Expertise*, N.Y. TIMES, https://www.nytimes.com/2021/02/01/nyregion/cuomo-health-department-officials-quit.html [https://perma.cc/VE25-PH38] (Sept. 23, 2021).

COVID-19 restrictions.[243] These were precisely the restrictions challenged before the Supreme Court by the Diocese of Brooklyn.

Still more recently, the Chief Justice shifted from muted dissent on mootness grounds to open articulation of deference's limits. In *South Bay II*, Chief Justice Roberts concurred with the Court's order granting injunctive relief against a blanket ban but leaving in place a twenty-five-percent-capacity cap. "[T]he State's present determination," he wrote, "that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."[244] In such cases, he continued, it was appropriate for the judiciary to intervene to enforce those unappreciated rights. Although the U.S. Constitution entrusts basic decisions about public health and safety to elected officials, he noted, it "also entrusts the protection of the people's rights to the Judiciary—not despite judges being shielded by life tenure . . . but because they are."[245] "Deference," he summarized, "though broad, has its limits."[246] In the Chief Justice's view, those limits had been breached when the government met no evidentiary burden and barely pretended to.

2. Non-COVID Cases

The difference between deferring to government assertions and requiring governments to shoulder an evidentiary burden is crucial outside the COVID-19 context as well. That difference is highlighted in the German Constitutional Court's frequent engagement with claims involving Islamic headscarves.

The German court issued its first major judgment in this context in 2003.[247] The complainant wished to become a public schoolteacher, but school officials in the state of Baden-Württemberg said she couldn't teach in a headscarf. She challenged this refusal before the Constitutional Court.

In response, the Court ruled, as an initial matter, that the requirement infringed the plaintiff's right to freedom of belief because it forced her to choose between fulfilling her professional aspirations or living the tenets of her faith.[248] She couldn't do both. The state maintained that the infringement was justified by other constitutional values, such as parents' rights relating to the

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[243] *Id.*

[244] *South Bay II*, 141 S. Ct. 716, 717 (2021) (Roberts, C.J., concurring).

[245] *Id.* (internal citation omitted).

[246] *Id*.

[247] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 24, 2003, 108 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 282 (Ger.).

[248] *Id.* at 294.

upbringing of their children,[249] as well as the state's duties to oversee public education[250] and to remain religiously neutral.[251] The court conceded that there is a possible tension between the state's duty of religious neutrality and the wearing of religious clothing or symbols by teachers.[252] But, at least for the time being, the risk was an abstract one; the state put forth no concrete evidence that teachers in headscarves were unduly disruptive.[253] And in any event, responsibility for negotiating the tensions inherent in this area fell to the democratic state legislature, not to unelected school officials.[254] Banning headscarves infringed teachers' religious exercise, the court reiterated, and such an infringement could be justified, if at all, only on the basis of legislation.[255]

Some state legislatures took this as a hint. In the years that followed, several states, including North-Rhine Westphalia, passed legislation barring school personnel from donning overt religious symbols. In 2015, the Constitutional Court ruled that North-Rhine Westphalia's amended School Law was unconstitutional; its infringement on teachers' religious exercise was disproportionate.[256]

Part of the problem was that the law seemed to privilege Christian and Western cultural values and traditions—a favoritism that fell afoul of constitutional guarantees of equality.[257] More salient for our purposes, the Court ruled that the law was not proportional in the narrow sense because it prevented teachers from fulfilling what they regarded as a religious command in the name of combating a danger—effectively, a disturbance of the peace at school (*Schulfrieden*)—that, for the time being at least, remained purely abstract.[258] To justify such a serious restriction, the justices explained, the government must point to a sufficiently concrete risk on the other side of the ledger.[259] In a pluralist society, moreover, individuals enjoyed no right to be spared confrontation with the symbols and ideas of those who think and believe differently.[260] And, for constitutional purposes, it made a big difference whether teachers

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[249] Grundgesetz [GG] [Basic Law], art. 6(2) (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/3Q6E-4P5D].

[250] *Id.* art. 7(1).

[251] *Id.* art. 4(1)–(2); 108 BVerfGE 282, para. 4 (Ger.).

[252] 108 BVERFGE 282, 303 (Ger.).

[253] *Id.* at 303–06.

[254] *Id.* at 302.

[255] *Id.* at 312–13.

[256] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, 138 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 296 (Ger.).

[257] *Id.* at 326.

[258] *Id.* at 335.

[259] *Id.* at 335–36.

[260] *Id.* at 336.

brought religious symbols into the classroom of their own accord, or whether such symbols were mandated by school authorities.[261]

Five years later, the German court addressed the headscarf question in a different setting. This time, in January 2020, the justices ruled that the state of Hesse *could* constitutionally prohibit a legal trainee[262] from wearing a headscarf in some work settings.[263] In this case, the court explained, the infringement of religious exercise could be justified in the name of other constitutional values, including the state's religious and ideological neutrality, the proper functioning of the justice system, and the negative religious freedom of third parties.[264]

It was a close case. The relevant constitutional values neither required nor forbade the challenged ban.[265] Instead, the legislature enjoyed a certain margin of appreciation when negotiating the inevitable tensions. In this case, the ban was limited to a few discrete tasks, such as appearing in court. And the justices acknowledged that some parties might suffer an infringement of their negative religious liberty should they be required to appear in a court whose officials were donning religious garb.[266] In dissent, Justice Ulrich Maidowski objected that, in practice, it would be very hard to limit the ban to four discrete tasks. He argued, moreover, that the majority had given too much weight to the constitutional values adduced in support of the ban and afforded too much deference to the government's factual claims.[267]

The approach of the ECtHR has been quite different. In the religious liberty context, the ECtHR is generally much more deferential to government action than the German Constitutional Court.[268] As a result, the ECtHR rarely intervenes to protect religious exercise. Indeed, although the court has "em-

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[261] *Id.*

[262] *Referendar*: a law clerk or intern serving a mandatory, post-graduation apprenticeship as part of qualifying for the practice of law.

[263] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 2020, 153 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (Ger.).

[264] *Id.* at 36.

[265] *Id.* at 46.

[266] *Id.* at 43–44.

[267] *Id.* at 53 (Majdowski, J., dissenting).

[268] *Compare* Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, *referral from* Şahin v. Turkey, App. No. 44774/98 (June 29, 2004), https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22leyla%20sahin%20v.%20turkey%22],%22itemid%22:[%22001-61863%22]} [https://perma.cc/7NXH-5KFK] (deferring to the role of the legislature to form policy for its jurisdiction), *with* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 27, 2015, 138 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 296 (Ger.) (declining to defer to the legislature and holding law banning headscarves in schools to be unconstitutional).

phatically declared" the right to religious freedom, its deferential caselaw has led some scholars to question how robust the right is in practice.[269]

The ECtHR's religious exercise jurisprudence takes its cues from Article 9 of the European Convention on Human Rights (the Convention), which enshrines "the right to freedom of thought, conscience and religion" and clarifies that this right encompasses the "freedom to change [one's] religion or belief and freedom, either alone or in community with others and in public or private," as well as "to manifest his religion or belief, in worship, teaching, practice and observance."[270] This guarantee is qualified by a limitations clause, according to which religious rights "shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[271]

The ECtHR's religious liberty jurisprudence roughly tracks the language of the limitations clause. The court asks, first, whether the right has been infringed and, second, whether the limitation was prescribed by law. The court then inquires whether the law serves an appropriate purpose as defined by the limitations clause (protecting public order, health, or morals, or others' rights and freedoms). Finally, the court reads the limitations clause as imposing a proportionality requirement. At the final step of its analysis, the court weighs the relevant rights and interests to determine whether the challenged measure restricts religious rights disproportionately. If it does, then the measure violates the Convention.

In applying this proportionality test in religion cases, the ECtHR has, as noted earlier, been quite deferential to the governments of the Convention's signatories. That deference has been especially pronounced in cases involving headscarves.

Consider *Şahin v. Turkey*, a 2005 case arising in Turkey. The complainant in *Şahin* had worn an Islamic headscarf for four years while attending col-

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[269] Lorenzo Zucca, *Freedom of Religion in a Secular World*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 388, 389 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015). Lorenzo Zucca suggests that the human right to freedom of religion "has a very limited role to play at the international level . . . . Moreover, the practice of freedom of religion shows that the scope and strength of the right can only be determined in relation to the local understanding of religion and what it means to be free for a religion. As a result, supranational institutions adjudicate on these issues by displaying a great deference to national institutions that are better positioned to evaluate local practices . . . ." *Id.* Mark Hill makes a similar observation: "The ECtHR leaves national governments a wide margin of appreciation to regulate relationships between state and religion." Mark Hill QC, *Freedom of Religion: Strasbourg and Luxembourg Compared*, *in* RELIGION AND EQUALITY: LAW IN CONFLICT 25, 32 (W. Cole Durham, Jr. & Donlu Thayer eds., 2016).

[270] Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221.

[271] *Id.* art. 9, ¶ 2.

lege.[272] During her fifth year of school, however, the Vice-Chancellor of her university issued a circular forbidding students who wear Islamic headscarves or have beards from attending "lectures, courses or tutorials."[273] Pursuant to this policy, the student was denied enrollment in orthopedic traumatology, as well as entrance to an oncology exam and a neurology lecture. The student challenged her exclusion before the ECtHR, claiming that the university's actions violated her rights under Article 9 of the Convention. By a vote of sixteen to one, the court sided with the Turkish government, ruling that there was no Article 9 infringement in the case.

Turkey claimed the infringement was justified because it served to "protect[] the rights and freedoms of others," as well as "public order."[274] The court was very deferential to this proffered justification. The judges explained:

> Where questions concerning the relationship between State and religions are at stake, on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance . . . . Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will depend on the specific domestic context . . . . This margin of appreciation goes hand in hand with a European supervision embracing both the law and the decisions applying it.[275]

The court concluded that restricting the rights of the Muslim student fell within Turkey's margin of appreciation, thus accepting Turkey's claim that the measure was necessary to protect "true religious pluralism, which is vital to the survival of a democratic society."[276]

In *S.A.S. v. France*, the ECtHR considered a challenge to an even more restrictive law in France, one that made it illegal to cover one's face in any public place, including by wearing an Islamic niqab.[277] The applicant who challenged this law was, the court recounted, a "devout Muslim" who "wears the burqa and niqab in accordance with her religious faith, culture and personal convictions" and who "emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner."[278] She did

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[272] 2005-XI Eur. Ct. H.R. at 173. The judgments and other decisions of the European Court of Human Rights are available at https://curia.europa.eu/jcms/jcms/Jo1_6308/ [https://perma.cc/3MED-QUGD].

[273] *Şahin*, 2005-XI Eur. Ct. H.R. at 181.

[274] *Id.* at 201.

[275] *Id.* at 204 (internal citations omitted).

[276] *Id.* (citation omitted).

[277] 2014-III Eur. Ct. H.R. 341.

[278] *Id.* at 353.

not wear the niqab at all times—she removed it, for example, at doctor's appointments and in public social settings. But she "wished to be able to wear it when she chose to" do so, including during Ramadan or other religious events, in order to express her faith.[279] The applicant "did not claim that she should be able to keep the niqab on when undergoing a security check, at the bank or in airports, and she agreed to show her face when requested to do so for necessary identity checks."[280] But she maintained that the French law's sweeping scope fell afoul of various guarantees under the Convention for the Protection of Human Rights and Fundamental Freedoms, including Article 8's protections for private and family life and Article 9's shield for religious liberty.[281]

The court disagreed, upholding the French law by a vote of 15–2. Although the ECtHR did not accept all of France's justifications for the law, the judges ultimately accepted France's contention that covering the face interferes with others' right "to live in a space of socialisation which makes living together easier."[282] The court admitted that the law mostly impacted Muslim women, but it nevertheless concluded it was not based on religion, "but solely on the fact that it conceals the face."[283] The judges professed their discomfort with the Islamophobic statements that riddled debates surrounding the law's enactment. But they decided it was up to French society, not the court, to decide whether to permit or proscribe full-face veils.[284] And with respect to such choices the government must enjoy, once again, "a wide margin of appreciation."[285]

Although the comparison might sound harsh, the structure and logic of the ECtHR's decision in *S.A.S.* resembles, in important respects, the Supreme Court's doggedly deferential reasoning in the malodorous case of *Korematsu v. United States*, in which the Supreme Court upheld the exclusion of Japanese Americans from the West Coast Military Area during World War II.[286] Today, of course, *Korematsu* sits squarely in the anticanon of U.S. constitutional law—occupying, together with *Dred Scott* and *Plessy v. Ferguson*, "the lowest circle of constitutional Hell."[287] And yet, as noted earlier, it was ironically in

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[279] *Id.*

[280] *Id.* at 354.

[281] S.A.S. v. France, App. No. 43835/11, ¶¶ 69–74 (July 1, 2014), https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22S.A.S.%20v.%20France%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-145466%22]} [https://perma.cc/6JE6-B74A]; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 270, at 230.

[282] *S.A.S.*, 2014-III Eur. Ct. H.R. at 371.

[283] *Id.* at 379.

[284] *Id.* at 380.

[285] *Id.*

[286] *See generally* 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[287] AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 270 (2012); *see* Sunstein, *supra* note 240, at 229. *See generally* Plessy v. Ferguson,

Korematsu that the Supreme Court first used the labels and framework that would later become hallmarks of strict scrutiny analysis.[288] In *Korematsu*, the Court explained that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[289] This didn't mean, the Court continued, "that all such restrictions are unconstitutional."[290] But it did require that courts "subject [such restrictions] to the most rigid scrutiny."[291] "Pressing public necessity may sometimes justify the existence of such restrictions," the Court concluded, but "racial antagonism never can."[292]

Yet despite tough talk of "rigid scrutiny," the Court in *Korematsu* deferred to government assertions of "[p]ressing public necessity" without any scrutiny at all.[293] The majority did not require the government to establish such necessity by meeting even the lightest evidentiary burden. Instead, protestations of strict scrutiny notwithstanding, the Court merely parroted the government's claims that "exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage."[294] The Court knew this only because the military said it was so.[295] It would have been better, the Court conceded, to distinguish between loyal and disloyal Japanese Americans, but it accepted without question the authorities' insistence that such distinctions were impractical. The Court concluded that it was the practical imperatives of a desperate war, and not any sort of "racial prejudice," that justified imprisoning "a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."[296]

Like the Supreme Court in *Korematsu*, the ECtHR in *S.A.S.* blinked at unsettling evidence that the challenged measure was motivated by animus against a vulnerable minority and conceded the measure's necessity on the mere say so of the government.[297] Both cases provide poignant reminders that rights rhetoric—whether adorned by a proportionality framework or heightened scrutiny

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163 U.S. 537 (1896); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). We borrow Amar's Dantean diction, but it should be noted that Amar places *Lochner* rather than *Korematsu* in his pit of *malebolge*.

[288] *See supra* notes 58–60 and accompanying text.

[289] *Korematsu*, 323 U.S. at 216.

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.* at 218.

[295] *Id.* ("The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion.").

[296] *Id.* at 223.

[297] *See* S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, 380 (acknowledging the ban's impact on Muslim women while instantaneously deferring to the "choice of society").

analysis—rings hollow unless courts deploy concrete tools to hold governments accountable. Neither test means much unless the government must justify restrictions on religious rights affirmatively and with supporting evidence. The rhetoric of religious liberty must support, rather than displace, its substance.

Requiring governments to meet evidentiary burdens does not, of course, mean that governments can never meet them. The Supreme Court, for instance, has long since recognized governments' police power to impose vaccine requirements.[298] One can confidently anticipate courts reaching a similar result, even against religious exercise challenges, if and when mandatory anti-COVID vaccination requirements are challenged. The imperative need for vaccination on a broad scale, and the marginal cost to that effort of exempting all religious objectors, will be readily demonstrable. The evidentiary hurdle, in such cases, will be one that governments should easily clear.

C. Redefining Theological Conflicts

The factors we have emphasized thus far both enjoin courts to impose affirmative requirements on governments—first, to act evenhandedly; second, to meet an evidentiary burden. The third factor stresses something courts should avoid. Some courts assist government efforts to justify religious restrictions by redefining religious objections so as to minimize the infringement and soft-pedal the conflict. As Mark Tushnet has observed, "[C]ourts may be tempted to adjust their assessment of a regulation's impact on the individual right to practice a religion by considering how important the specific practice regulated is to the believer."[299] That approach, Tushnet continues, is "highly likely to lead to sect-preference, as judges think they can assess centrality but actually treat some religious practices as not terribly important."[300] Courts should eschew such unliteral theological refinements, which have the effect of papering over clashes between public interests and private rights, and thus allow courts to duck hard questions by downplaying the extent to which religious rights are being curtailed. When courts redefine the conflict before balancing the competing interests, they are effectively—and illegitimately—tipping the scales. The better approach is to accept sincere religious beliefs as important to the religious believer, and to focus on assessing the objective interference with that religious exercise by the government penalty or restriction.[301]

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[298] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[299] Mark Tushnet, *Making Easy Cases Harder*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES, *supra* note 98, at 303, 311.

[300] *Id.*

[301] *See* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1344 (2021) ("The government has substantially burdened religious exercise, or exerted coercion for doctrinal purposes against a religious believer, when it has substan-

Some Canadian courts have done better at resisting this temptation than others, though all ostensibly apply the same proportionality test. In *Springs of Living Water Centre Inc.*, the 2020 Manitoba Queen's Bench case dealing with restrictions to drive-in worship services, Chief Justice Joyal concluded that the applicants had met neither their burden of showing irreparable harm absent an injunction nor of demonstrating that the balance of conveniences favored a stay.[302] The judge reasoned that, because the services were available remotely, the applicant was essentially asking "to be able to attend the otherwise same service (which is being broadcast remotely) while seated in their cars in the actual parking lot of the church where the service is taking place."[303] The difference, he thought, was de minimis. The gap between the one religious experience and the other could not, he concluded, be characterized as irreparable harm.

Reasonable enough, perhaps—to a nonbeliever. To a believer, however, the approximate equivalence *vel non* of two religious experiences—one of which might involve important communal elements—is essentially a theological question. It was inappropriate for the court to answer that question on the claimants' behalf.

Lord Braid of Scotland's Outer House of the Court of Session apparently agrees. In response to a petition for judicial review brought by twenty-seven ministers and church leaders challenging Scotland's decision to outlaw in-person communal worship, Lord Braid refused to equate remote and in-person services.[304] Like Chief Justice Joyal, Lord Braid used proportionality to assess the petitioner's claim that church closures violated Article 9 of the ECtHR. But Lord Braid did not yield to the government's argument that believers could "continue to engage in collective worship . . . albeit by different means."[305] Rather, he concluded "that worship in their faiths cannot properly take place on-line."[306] Given the petitioner's sincerely held belief that some features of worship could not take place under the regulations—like communion and baptism, neither of which could take place under Manitoba's regulations in the

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tially interfered with a religious individual's ability to voluntarily act on his or her theological commitments. Interference with voluntary choice might take an indirect form, by making that choice costlier through threatened penalties or denied government benefits. But sometimes the interference might be much more direct and simply make that voluntary choice impossible, rather than costly.").

[302] Springs of Living Water Ctr. Inc. v. Gov't of Manitoba, 2020 MBQB 185 (Can.).

[303] *Id.* para. 24.

[304] Reverend Dr William J U Philip for Judicial Review of the Closure of Places of Worship in Scotland [2021] CSOH 32 [108] (Scot.).

[305] *Id.* [59] (quoting respondent's answers to the petition).

[306] *Id.* [61].

case before Chief Justice Joyal either—online worship was, "[a]t very best . . . worship-lite."[307]

After establishing that relegation to "worship-lite" constituted an infringement of the petitioners' religious liberty, Lord Braid addressed the severity of the effect of the infringement. Careful not to trivialize the difference for believers between online and in-person services, he concluded that it was simply "impossible to measure the effect of [the] restrictions on those who hold religious beliefs."[308] Notwithstanding his recognition that "some people may derive some benefit" from virtual services, he refused to discount the significance of the finding that "certain aspects of certain faiths simply cannot take place, at all, under the current legislative regime."[309] However incapable of precise quantification the harm was, it was at least a significant and true harm.

And yet his analysis did not stop there—Lord Braid scrupulously balanced the respective interests by weighing the severity of the regulations' impact against the extent to which the regulations contributed to the aim of reducing COVID-related risks.[310] In the end, he concluded that the regulations had a disproportionate effect, failing under the fourth step of the proportionality assessment.[311]

Lord Braid's analysis demonstrates the appropriateness of resisting the temptation to redefine the theological significance of a government regulation's impact on claimants' genuinely held religious beliefs in two ways. First, his refusal to independently attempt to answer an essentially theological question—the approximate equivalence *vel non* of two religious experiences—protects minority beliefs. As Lord Braid reasoned, "[T]he beliefs of the petitioners and the additional party are valid" even if "the beliefs of some church leaders clearly differ," even if the court's beliefs differ, "even if they are minority beliefs."[312] So long as we accept that their beliefs are valid, it strikes us as inescapable that the claimants are better situated to evidence the intangible and immeasurable harm that *they* experienced as a result of the infringement of those beliefs. Allowing believers to do so is all the more vital where minority beliefs are involved because the impact of an infringement on those beliefs may not be as readily observed.

Second, Lord Braid's resistance to minimization did not strip him of the ability to compare the impact of the restriction to the benefit it served. On the

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[307] *Id.* [62].
[308] *Id.* [121].
[309] *Id.*
[310] *Id.* [123].
[311] *Id.* [126].
[312] *Id.* [123].

contrary, it improved the quality and transparency of his analysis by keeping the evidentiary onus where it belongs—on the government.[313] When courts engage in theological guesswork so as to minimize the impact of an infringement, they unjustifiably relieve the government of proving that the benefit of the restriction outweighs the detriment. To do so is to relieve both parties of their obligations in an adversarial arena—the government does not have to demonstrate how the balance tips in their favor, and the claimants are not given an opportunity to respond. By allowing the claimants to speak for themselves, Lord Braid required them to do so. That is what gives the court the information it needs to seriously assess whether *optimal*—rather than minimal or maximal—protection was achieved.

Canada's Supreme Court followed a different route in 2018 in *Trinity Western University v. Law Society of Upper Canada*, a high-profile case in which the court balanced religious rights against antidiscrimination principles.[314] Trinity Western University (TWU) is a private Christian liberal arts university in British Columbia. It proposed establishing a law school and sought accreditation from the Law Society of Upper Canada (LSUC). TWU was denied accreditation because of the school's mandatory Covenant that required that students abstain from sexual intimacy outside heterosexual marriage. TWU challenged the denial, but the Supreme Court of Canada upheld the LSUC's decision, concluding that the restriction of TWU's religious rights was proportional.[315]

The Canadian Supreme Court justified its ruling on various grounds, one of which involved downplaying the theological importance of TWU's religious belief. The court's assessment in this regard was as brazen as it was breezy. "In our view," the justices wrote, "the LSUC did not limit religious freedom to a significant extent. As discussed in the companion appeal, the LSUC's decision only interferes with TWU's ability to operate a law school governed by the *mandatory* Covenant."[316] The court reasoned that "[t]his limitation is of minor significance because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary, for prospective TWU law students."[317] One might have thought that the significance of a Covenant and of a Christian environment is more appropriately assessed by those framing the Covenant or fostering the environment. By dis-

[313] *Id.* [105]–[106].
[314] 2018 SCC 33, [2018] 2 S.C.R. 453 (Can.).
[315] *See id.* para. 38.
[316] *Id.*
[317] *Id.*

missing their significance, the court effectively discounted TWU's religious harm.

In other contexts, the Canadian Supreme Court has sometimes done better. In 2004, in *Syndicat Northcrest v. Amselem*,[318] for instance, the court made clear that religious practice is protected "regardless of whether the practice is required by a religious authority."[319] As a matter of principle, then, the court declined to weigh the theological importance of a particular practice before offering it constitutional protection. The majority opinion explained that freedom of religion comprises the ability:

> [T]o undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, *irrespective of whether a particular practice or belief is required by official religious dogma* or is in conformity with the position of religious officials.[320]

After the Court determined that the tenants' religious belief was sincere, the justices proceeded to conduct a proportionality analysis that, they concluded, tilted in favor of the religious claimant.[321] The court noted that, to cultivate human rights, society must embrace and acknowledge "the rights of others."[322]

The European Court of Human Rights has also sometimes been guilty of defining away a religious conflict by gesturing toward available alternative religious practices. In the *Şahin* case discussed earlier, for example, in which the court upheld Turkish medical schools' decision to exclude students with beards or Islamic headscarves from lectures or tutorials, the court observed that "Muslim students in Turkish universities are free, within the limits imposed by the constraints of educational organisation, to manifest their religion."[323] But that observation effectively begged the question. Religious freedom, conceived as the freedom to do whatever the authorities permit, is no freedom at all.

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[318] 2004 SCC 47, [2004] 2 S.C.R. 551 (Can.) (involving Orthodox Jews who built succahs on their balconies, violating a tenancy contract).

[319] Ran Hirschl, *Comparative Constitutional Law and Religion*, *in* COMPARATIVE CONSTITUTIONAL LAW 422, 432 (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar Publ'g Ltd. 2011) (describing *Syndicat Northcrest v. Amselem*).

[320] *Syndicat Northcrest*, 2004 SCC 47, para. 46 (Can.) (emphasis added).

[321] *Id.* paras. 74–84. The religious belief in question was the Orthodox Jewish obligation to dwell for nine days and eat all their meals in succahs during the festival of "Succot." *Id.* This case involved balancing competing Charter rights, so *Oakes* was not applied.

[322] *Id.* para. 87.

[323] Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 181, 207 *referral from* Şahin v. Turkey, App. No. 44774/98 (June 29, 2004), https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22leyla%20sahin%20v.%20turkey%22],%22itemid%22:[%22001-61863%22]} [https://perma.cc/7NXH-5KFK].

The record of American courts in this regard is also checkered. For some time, First Amendment doctrine invited courts to assess the "centrality" of particular practices to claimants' beliefs, and courts routinely upheld restrictions on religious exercise by highlighting alternative religious practices that were still allowed.[324] Congress put an end to this, or tried to, by passing RFRA and later RLUIPA.[325] Under these laws, courts assessing religious claims are forbidden to assess, theologically, how *central* a religious belief or practice is. More recently, in 2015, the Supreme Court ruled in *Holt v. Hobbs* that the existence of alternative religious practices can never, standing alone, justify religious restrictions.[326] In *Holt*, the Court ruled that a prison could not justify restricting a Muslim inmate's right to grow a half-inch beard simply by noting that they allowed him to pray.[327] The inquiry, the Court insisted, must focus on the specific religious practice in which the claimant would like to engage, not on whether he or she remains more or less able to live his or her religion writ large.

Holt and RFRA notwithstanding, the influence of the earlier regime lives on, and many state courts continue to conduct centrality analysis.[328] Two Jus-

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[324] *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 351–52 (1987) (upholding the restriction on religious practice because "respondents are not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations"); Turner v. Safley, 482 U.S. 78, 90 (1987) (providing that one factor in assessing the reasonableness of religious restrictions in prisons is "whether there are alternative means of exercising the right that remain open"), *superseded by statute*, Pub. L. No. 106-274, 114 Stat. 804, *as recognized in* Butler v. S. Porter, 999 F.3d 287 (5th Cir. 2021); Wisconsin v. Yoder, 406 U.S. 205, 210 (1972) (assessing central religious concepts); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (addressing the "cardinal principle of [Appellant's] religious faith"); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983) (holding that a zoning ordinance which forbade the religious sect from building in an all residential area was constitutional because building a church was not a "fundamental tenet"), *superseded by statute*, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004). Professor Tribe has argued that centrality has always been an important tenant of free exercise claims. LAURENCE H. TRIBE, TRIBE'S AMERICAN CONSTITUTIONAL LAW § 14-4 (3d ed. 2000).

[325] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb), *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 534 (1997); Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc).

[326] 574 U.S. 352 (2015).

[327] *Id.* at 361 ("[T]he District Court erred by concluding that the grooming policy did not substantially burden petitioner's religious exercise because [there were other ways he could practice his religion]."); *id.* at 361–62 ("RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a ½-inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise.").

[328] *Supra* note 324 and accompanying text (highlighting cases that formed the centrality analysis); *see, e.g.*, Jones v. Ryan, No. CV 18-002034-PHX-MTL (D. Ariz. Mar. 3, 2020) (upholding the denial of access to religious texts during Ramadan for a Muslim prisoner, Edward Jones, by erroneously questioning the validity of Jones's beliefs and limiting religious liberty protections to practices central to Jones's religion).

tices of the Supreme Court expressed concern about this phenomenon just last year.[329]

As should be clear by now, neither strict scrutiny nor proportionality can, without more, effectively promote the values which we take to lie at the heart of constitutional protections for religious exercise—namely, optimizing the capacity of religious dissenters to live out their faiths in a pluralistic society consistent with countervailing interests. The goal, in our view, is not to maximize the number and scope of religious accommodations, but rather to ensure that every denial of an accommodation is justified. Both strict scrutiny and proportionality purport to require such justifications. Neither fully succeeds unless courts require governments to treat religious activity in an evenhanded way vis-à-vis analogous secular conduct and to justify religious restrictions by meeting an evidentiary burden; and unless courts avoid tipping the scales by redefining the theological stakes and downplaying the religious harm.

III. CONVERGENCE?

None of this is to say, however, that the differences between proportionality and strict scrutiny are minor or unimportant. The differences, in theory and in practice, are real enough—as are the similarities. Practical comparisons are problematized by the inconsistent application of both approaches within and across jurisdictions. But one can, at the risk of cherry-picking, draw lessons from each approach that might profitably inform the other. And one can, as a theoretical matter, sketch out something of an ideal type that incorporates the best of both worlds—a kind of convergence that might harness the strengths and mitigate the weaknesses of both proportionality and strict scrutiny in the religious liberty context. Our remarks about possibilities of convergence, however, should be regarded as impressionistic and suggestive, rather than as a fully considered normative argument. We mean only to raise some possibilities for further discussion and debate.

A. Toward a More Proportional Strict Scrutiny?

In our view, the U.S. approach, at least with respect to religious exercise claims, might profitably learn a few things from the proportionality framework.

First, in the proportionality context, the idea that individuals might at times be excused from compliance with otherwise valid laws is not controversial. Indeed, this is the paradigmatic model that applies to a host of rights.[330]

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[329] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069–71 (2020) (Thomas, J., joined by Gorsuch, J., concurring).

[330] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (Ger.) (ruling that a

The debate centers around when government is justified in denying such requests, and when it is not. In this regard, it is a striking feature that in many proportionality jurisdictions—even those whose underlying political culture is profoundly secular—there is no sharp divide between "separationists" and "accommodationists." Indeed, in most proportionality jurisdictions, it is utterly uncontroversial that religious accommodations are available and sometimes constitutionally required. There is no sense that accommodations are anomalous or inappropriate—no talk of religious subsidies or get-out-of-law free cards.[331] Instead, there is a general consensus—evident in virtually all the cases discussed earlier—that governments must justify religious restrictions as necessary and proportional, and that, if they cannot do so, an accommodation must ensue. Accommodations, moreover, are a two-way street: they apply to negative religious liberty, as well as positive—or to what in the U.S. would sometimes be called Establishment Clause cases as well as to Free Exercise ones.[332]

In this regard, proportionality, we think, might offer a framework—or at least a point of reference—through which self-styled separationists and accommodationists might find a measure of common ground. At the very least, this aspect of proportionality elsewhere highlights the anomalous nature of the "get-out-of-law free" debate that consumes so much oxygen in the United States.[333]

Second, and relatedly, the current U.S. constitutional approach under *Employment Division, Department of Human Resources of Oregon v. Smith* provides far less protection for religious exercise than most proportionality juris-

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generalized ban on abortions was permissible—indeed, constitutionally required—but that the constitution also required exceptions in certain cases); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2347/15, Feb. 26, 2020 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/02/rs20200226_2bvr234715.html [https://perma.cc/VK8Q-DVKR] (ruling that assisted suicide is included in the right to personal autonomy).

[331] For a discussion of these types of concerns in the U.S. context, see Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1604–08 (2018).

[332] The German Constitutional Court, for instance, has upheld laws designating certain Christian holy days (like Good Friday) as public "Quiet Days," but also ruled that exemptions must be available in particular cases. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 27, 2016, 143 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 161 (Ger.).

[333] We are referring to the view, heard most prevalently from commentators in the United States, that religious accommodations are a legal loopholes giving preferential treatment to a small subset of society, hence the phrase "get-out-of-law-free" card. *See, e.g.*, Andrew Koppelman, *What Kind of Human Right Is Religious Liberty?*, *in* RESEARCH HANDBOOK ON LAW AND RELIGION 103 (Rex Ahdar ed., 2018) (discussing the criticisms of religious exemptions, including unfairness objections, while arguing that religion is a right); Magarian, *supra* note 21, at 139 (criticizing religious accommodations as favoritism).

dictions, at least so long as a law is truly neutral and generally applicable.[334] In such a context in the United States, the law simply receives rational basis review. Internationally, by contrast, even if a law is neutral and generally applicable, a religious claimant receives more protection than that.[335] As is well known, the weakest standard of review requires only that a law be rationally related to a legitimate government purpose. This looks a bit like a truncated version of the proportionality test—one that incorporates proportionality's first two steps (*legitimacy*[336] and *suitability*), but scraps the last two (*necessity* and *balancing*). That superficial similarity is important, but it should be qualified by noting that, in many proportionality jurisdictions, the legitimacy and rational-relation requirements have sharper teeth than their U.S. rational basis counterparts.[337] Rational basis requires only that the law have a conceivable legitimate purpose, not that such a purpose actually motivated its enactment.[338] Proportionality, by contrast, focuses on a law's actual purpose. And although some proportionality courts define a "legitimate government purpose" as anything not forbidden by the constitution, others require, at least ostensibly, that the public purpose be "pressing and substantial."[339] Similarly, for proportionality courts, the rational-relation inquiry is an empirical one. And although it is quite deferential to legislative prognoses, it requires more than that the legislature be not obviously insane.

In any case, and obviously, the proportionality analysis never stops after just two steps. Under proportionality, even mild restrictions of lesser rights are unconstitutional if they are unnecessary (step three) or disproportionate (step

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[334] 494 U.S. 872, 889 (1990).

[335] In this respect, it is perhaps telling that David Beatty, one of the most vociferous champions of proportionality, criticizes U.S. free exercise jurisprudence extensively. *See* BEATTY, *supra* note 112, at 49–57.

[336] *See* Vicki C. Jackson, *Proportionality and Equality*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES, *supra* note 98, at 171, 191 ("Legitimate purpose is a hallmark of constitutional law not only in Canada but in the United States . . . .").

[337] *See* BARAK, *supra* note 90, at 512, 515 (comparing the stronger protections under proportionality's legitimate aim requirement with the weaker protections under rational basis review).

[338] *See, e.g.*, F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (explaining that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature" and that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data" (first citing U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980); then citing Vance v. Bradley, 440 U.S. 93, 111 (1979))).

[339] *See, e.g.*, R v. Oakes, [1986] 1 S.C.R. 103, 138–39 (Can.) (ruling that a legitimate aim must be "sufficiently important" (i.e., that it must "relate to concerns which are pressing and substantial in a free and democratic society")). In practice, the Canadian Court is laxer than its diction might suggest. *See* HOGG & WRIGHT, *supra* note 107, § 38:13 (noting that the Canadian Court is fairly easily persuaded that the legislature acts with legitimate aim and rarely quashes laws at this prong). Aharon Barak, for one, thinks the Canadian threshold too high, the German too low. BARAK, *supra* note 90, at 531.

four). Champions of proportionality, who wonder aloud why the state should ever be permitted to restrict any constitutional interest more than is necessary to achieve a legitimate aim, tend to regard rational basis review as judicial abdication.[340] On this view, the Supreme Court has effectively used rational basis review to write property rights out of the Constitution, moving from one extreme to the other after treating property rights as a nearly categorical trump during the *Lochner* era.[341] We suggest that, in the free exercise context, *Smith* represents a similar abdication.[342] The *Smith* majority regarded the specter of innumerable accommodations claims, each of them triggering strict scrutiny, as a *Lochner*-like bogey from which it fled into the reassuring arms of rational basis. As with property rights, so with free exercise. The Court lurched from one extreme to another. The result, in both contexts, strikes us as, *le mot juste*, disproportionate.

The upshot is that any right that would trigger rational basis review in a categorization regime will be better protected in a proportionality regime.[343] As compared to proportionality, rational basis offers less protection at the legitimacy and suitability prongs; and at the necessity and balancing prongs, it offers no protection at all. This is particularly important because Justice Scalia justified his ruling in *Smith* as necessary to avoid having a religious exercise standard that was a "constitutional anomaly."[344] But in fact, from an international perspective, it is our constitutional standard under *Smith* that is a constitutional anomaly.

Third, there is a similarly striking consensus in proportionality jurisdictions regarding third-party harms—a consensus that regards harm to third parties as obviously relevant but never, *ipso facto*, determinative. Instead, third-party harm is just one element among many in a holistic proportionality analysis. Within the proportionality framework, the government is not justified, without more, in imposing a grave harm on a religious claimant in order to avoid a relatively minor harm to some third party. This, of course, is the basic insight behind proportionality courts' calibrated approach to COVID-19 cas-

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[340] STONE SWEET & MATHEWS, *supra* note 96, at 109–11; *see also* Mathews & Stone Sweet, *supra* note 98, at 838 ("[R]ational basis review leads American judges to abdicate their duty to protect rights, including property rights, that are expressly provided for by the Constitution.").

[341] *See* Mathews & Stone Sweet, *supra* note 340 (discussing the Supreme Court's flip from aggressive rights protection during the *Lochner* era to abdication). For discussion of the influence of *Lochner v. New York*, 198 U.S. 45 (1905), on the development of U.S. strict scrutiny analysis, see *supra* notes 42–46 and accompanying text.

[342] 494 U.S. 872, 889 (1990).

[343] Vicki Jackson suggests that rational basis might gain rigor if it followed proportionality by focusing on actual, rather than merely conceivable, legitimate purposes. Jackson, *supra* note 336, at 172.

[344] *Smith*, 494 U.S. at 886.

es.[345] The reverse, it should be added, is also true: an accommodation is not justified if it inflicts greater harm than it avoids. Our point is not to endorse any particular application of this framework, nor is it to endorse the framework writ large. It is only to suggest that the search for a silver bullet that will resolve all cases—such as neutral application or third-party harm—is perhaps chimerical.

Finally, a more proportional version of strict scrutiny might recognize that some *necessary* rights limitations might nonetheless be *excessive*. Think of Bernhard Schlink's example of the property owner and the apple thief:

> Let's assume there is a lame man who sits on his porch and sees a child climbing into his apple tree and picking apple after apple. He shouts, but the child just laughs. His only means to drive the child off the apple tree is to use a gun that he can reach and to shoot the child down. The means of shooting the child is helpful and it is even necessary to reach the end of defending his property. But we easily agree that it is inappropriate or imbalanced: The life of the child is much more precious than the value of a couple of apples.[346]

The lesson is clear: sometimes even a necessary measure is disproportionate. Indeed, in some rare cases, even a measure narrowly tailored to a proper government purpose is disproportionate.

Some writers suggest that such cases are rare, and that judicial intervention at the final step should be as infrequent as Schlink's example is dramatic.[347] But the German Constitutional Court, at least, regularly disposes of cases by finding government measures disproportionate in the strict sense.[348] In this respect, the German Court is something of an outlier—at least in terms of its transparency about it. In any event, the strict proportionality inquiry operates in Germany only as a one-way ratchet after the earlier requirements have been satisfied. In the religion context, this creates the possibility that a

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[345] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvQ 28/20, Apr. 10, 2020 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/qk20200410_1bvq002820.html [https://perma.cc/M2ZC-VJUE] (comparing the severity of restrictions on public worship with the likely risk such gatherings entail for third parties). The reverse, it should be added, is also true: an accommodation is not justified if it inflicts greater harm than it avoids.

[346] Schlink, *supra* note 92, at 293.

[347] *See, e.g.*, HOGG & WRIGHT, *supra* note 107, § 38:13 (asserting that if a measure is sufficiently important to overcome the first step of the proportionality inquiry, it will usually pass the fourth step). Schlink has prominently argued that the proportionality inquiry should end after the third step. *See* Schlink, *supra* note 128.

[348] *See* PETERSEN, *supra* note 111, at 80–115.

restriction on religious exercise that is evenhanded and addressed to a risk substantiated by the evidence might still be disproportionate.

At times, the Supreme Court seems to have recognized this possibility as well, though it has lacked the language and the framework to fully explain what it was doing. Consider *Wisconsin v. Yoder*, discussed earlier, that involved a trio of Amish families in rural Wisconsin who refused to send their fourteen- and fifteen-year-old children to school.[349] Wisconsin law required attendance at public or private school until age sixteen.

From the outset, the Court in *Yoder* framed its analysis in terms of strongly reminiscent of the global proportionality test. "[A] state's interest in universal education," the majority wrote,

> however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause . . . and the traditional interest of parents with respect to the religious upbringing of their children . . . .[350]

The majority further explained that Wisconsin could constitutionally compel school attendance from ages fourteen to sixteen only if "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[351] Tellingly, although *Yoder* remains one of the foremost examples of the strict scrutiny phase in the Court's religious accommodations jurisprudence, this language focuses not on the magnitude of the government's interest in the abstract, but on the match between the state's asserted interest and the complainant's restricted right *at the margins*. This was strict scrutiny of a pronouncedly proportional sort.

Indeed, in *Yoder*, the Court proceeded to march through steps clearly analogous to those of proportionality analysis. The law, the Court conceded, was "motivated by legitimate secular concerns" (legitimate aim) and might well be "necessary" to prepare "the child for life in modern society" (necessity).[352] But that, for the Court, was not enough. The majority's main concern in *Yoder* was whether the requirement "unduly burden[ed] the free exercise of religion," and it posed that question in a manner that strongly resembles proportionality in the strict sense.[353] The Court focused narrowly on the law's *marginal* contribution to its ostensible aims and compared that contribution to

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[349] 406 U.S. 205 (1972).
[350] *Id.* at 214.
[351] *Id*.
[352] *Id.* at 220, 222.
[353] *Id.* at 220.

the law's negative impact on the Amish complainants.[354] Ultimately, the Court concluded that the marginal contribution of requiring an additional year or two of formal schooling was slight, and that the cost of accommodating the Amish request was small.[355] In the other scale, the Court described the law's impact on Amish religious practice as "severe" and "grave."[356] It jeopardized "the Amish community and religious practice," requiring them to "either abandon belief and be assimilated into society at large, or . . . migrate to some other and more tolerant region."[357] On these terms, the case was not close. The law was protecting apples with a shotgun. The balance tilted overwhelmingly toward the Amish side.

For our purposes, the most striking feature of the *Yoder* decision is that, on the majority's own terms, the challenged law should have survived strict scrutiny. The Court described the state's interest as "admittedly strong" (compelling) and conceded that it might well be "necessary" (narrowly tailored) to prepare Amish children for the exigencies of life in modern society.[358] But the law still failed, and it failed because its marginal contribution to the state's interest was disproportionate to its marginal impact on the Amish community. It failed, that is, because it was not proportional in the strict sense.[359] In our view, a more proportional strict scrutiny would allow for rare cases like *Yoder* in which even a law narrowly tailored to a compelling government interest nevertheless unduly restricts religious exercise.

For a contrast to *Yoder*, consider the Supreme Court's 1988 decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[360] In *Lyng*, the Court approved a federal road-building and timber-harvesting initiative against the Free Exercise objections of Native American groups who said the project would defile their sacred lands and impede the performance of their religious rites. The Court conceded that accommodating "every citizen's religious needs and desires," though ideal, would impede governmental operation.[361]

From a proportionality perspective, the majority effectively begged the question. No one in *Lyng* was arguing that government must accommodate *all*

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[354] *Id.* at 221 ("[W]e must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption." (citation omitted)).

[355] *Id.* at 225, 236.

[356] *Id.* at 218.

[357] *Id.*

[358] *Id.* at 222, 236. The Court was skeptical, however, that Amish children actually needed another year or two in school to make themselves marketable should they later abandon their parents' faith. *Id.* at 222–26.

[359] It's also worth noting that the Court felt confident in making this marginal assessment because the Amish themselves made clear what accommodations *they* were willing to make.

[360] 485 U.S. 439 (1988).

[361] *Id.* at 452.

religious wishes under *all* circumstances. Proportionality requires, instead, that all restrictions of religious exercise be justified. And a more proportional version of strict scrutiny would require that even restrictive measures necessary to serve compelling purposes be proportional. Even granting that the highway program at issue in *Lyng* was of compelling importance and that the measures taken were necessary to achieve it,[362] the Court might still have acknowledged its devastating impact on the religious life of the objecting groups. And it might have asked whether the devastation wrought was proportionate to the gains secured.

In sum, a more proportional version of strict scrutiny might look more like *Yoder* and less like *Lyng*. It might deflate somewhat the strong threshold inquiries at the front end and leave room for a strict proportionality inquiry at the back end. We anticipate that measures limiting religious exercise would fail at that final, proportionality-as-such step only rarely—and likely most of even those potential candidates would present religious claims that would succeed in earlier prongs of the analysis. But those exceptional cases might be exceptionally important. Indeed, the very survival of religious communities was at stake in both *Yoder* and *Lyng*.

Something of a proportionality sensibility seemed to be animating the Court, at least in part, in the recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, where the Court noted that the government restrictions prevented Orthodox Jewish women from worshiping at all.[363] Specifically, a quorum of ten Jewish men is required for a worship ceremony, but the government had capped worship service capacity at ten people. The image of a cathedral that could "seat over 1,000" and yet would be limited to ten people was one the Court seemed to view as particularly disproportionate, particularly based on the sparse evidentiary record the government officials had presented.[364]

B. Toward a Stricter Proportionality

If the Supreme Court were to adopt a version of proportionality in religious accommodations cases, that version should perhaps be a relatively strict one. It might be strict in several senses. First of all, it could retain a distinct status for the right of religious exercise. Proportionality, of course, rejects the notion of treating all rights as absolutes or as categorical trumps—as does, in

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[362] *But see* Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, *in* INDIAN LAW STORIES 489 (CAROLE GOLDBERG, KEVIN K. WASHBURN & PHILIP P. FRICKEY eds., 2011).

[363] Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

[364] *Id.* at 67 ("It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows.").

most of its permutations, strict scrutiny.[365] But this need not relegate rights to the status of interests like any other. Even limitable rights remain special. Rights might be something less than absolute but still more than mere defeasible interests.

This has three potential practical implications for a possible stricter version of proportionality in the context of religious exercise claims. The first is that proportionality courts' occasional tendency to eschew close textual interpretation should be resisted. This isn't the place for a detailed elaboration or full-throated defense of our own interpretive commitments, but whatever an individual jurist's interpretive approach, a stricter version of proportionality shouldn't forget that the right of religious exercise is textually enshrined in the U.S. Constitution, whereas other rights are not. This means that the proportionality's preliminary infringement phase ought to be taken seriously.

The second possible implication flows from the first: not just any government interest should suffice to justify restricting religious exercise. On this view, the "legitimate aim" inquiry would need to ask more than whether the government's chosen purpose and means are expressly barred by other constitutional provisions. The purpose would also need to be appropriate in light of the right being restricted. This requirement wouldn't need to be so rigid as to impose a particular adjectival threshold (like "compelling"), but it could be more exacting than merely "not forbidden." Perhaps any formula will be fluid, flexible, and a little bit vague. But the Court could draw guidance from the "limitations clauses" of early state constitutions, or from German doctrine, under which religious exercise may be restricted only in the service of other constitutional provisions and values.[366] At the very least, mere assertions of efficiency or expense might not suffice. Rather, the Court could require a heavy burden of proof on the government to demonstrate that there is a meaningful risk that the harms it purports to prevent would likely come to pass if the religious exercise were accommodated.

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[365] Notably, some areas of religious protection in the United States do involve trumps for religious rights, and this includes areas like the ministerial exception. These sorts of protections need not be disturbed by a more proportionate approach to the framework currently covered under *Smith*. Likewise, while proportionality entails that not all rights are absolutes, it does not entail that no right is absolute or that there are no categorical trumps. The realm of proportionality can be broader or narrower, but even in proportionality jurisdictions some rights operate as absolute and in a more categorical fashion. For example, some specific features of religious liberty guarantees in human rights treaties specify both that the right is nonderogable and that its exercise is subject to limitations. *See, e.g.*, International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 171. That apparent tension only makes sense if we regard certain aspects or specifications of the right as absolute and others as reasonably balanced against other aspects of the common good (i.e., the rights of others).

[366] *See supra* notes 247–267 and accompanying text (discussing the German Constitutional Court's approach to headscarf bans).

Finally—and we make this suggestion with greater confidence than the earlier ones—the necessity prong must have teeth. At a minimum, it must ensure that governments treat religious individuals and entities in an evenhanded way.[367] As a general matter, the state must not disadvantage religious actors relative to similarly-situated secular actors. And even if the burdens imposed prove "necessary," they still must not be disproportionate. Further, requiring the Court to act in evenhanded ways will ensure that the interests the government is pursuing are sufficiently compelling to justify the relevant restrictions.

One benefit of increasing emphasis on the necessity prong is that it would decrease the number of cases that courts decide simply by comparing the value of the government interest to the value of religious liberty: a balancing act that involves difficult issues of incommensurability. Rather, it requires courts to assess whether the government itself has treated its interest in a way that is as important as the government claims. If the government has not advanced the interest in an evenhanded way, and is providing exemptions for more politically powerful groups, then the government's actions speak louder than its words in highlighting that its interest is not so important that the government cannot countenance any exemptions to its policy. Sunstein has discussed how this sort of analysis creates "political safeguards."[368] Across-the-board restrictions of any type would likely elicit serious criticism, so the government would only issue them "if they had compelling justifications."[369] In contrast, selective enforcement allows government to focus its enforcement on the politically unpopular or less powerful religious groups.

Regardless of whether the Supreme Court adopts anything resembling this approach, other jurisdictions that employ proportionality might consider modifying their approach along these lines to ensure meaningful solicitude for religious rights in a pluralistic society where religious minorities can participate as members in full.

C. The Problem of Incommensurability

The problem of incommensurability remains—how to balance the length of a stick to the weight of a rock? Although proportionality has been heavily criticized on incommensurability grounds, incommensurability is likely a problem under any approach. The U.S. approach engages in incommensurable balancing at the front end, by placing significant weight on the threshold adjectival inquiries. Is the burden on religious exercise *substantial*? Is the countervailing government interest *compelling*? Some scholars have argued that these

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[367] *See supra* notes 147–202 and accompanying text.

[368] Sunstein, *supra* note 240, at 232.

[369] *Id.* at 233.

terms are too slippery to perform the normative work required of them.[370] One of the authors has argued that the government interest could be limited to historically recognized interests that were viewed as permissible for restricting religious exercise.[371] Proportionality, by contrast, insists on the back end that *any* government restriction of a constitutional right must be justified and recognizes that courts should be wary about dismissing religious claims as trivial or de minimis.

Notably, however, requiring the government to justify its actions in terms of the three factors outlined above limits the number of cases that will be resolved through incommensurate balancing. These factors would require judges to focus less on their own subjective sense of whether the government's interest is *valuable* and more on an objective determination of whether it is *sincere*. That inquiry might expose some purported justifications as illusory, suggesting that the religious liberty conflict was unnecessary to begin with. This is not to contend that balancing of incommensurate interests will be avoidable altogether, so long judges rely on the three factors we advocate. But even if in some settings incommensurate comparisons prove inevitable under these three factors, they are likely, we think, to be resolve only the most difficult of cases.

CONCLUSION

Whether religious rights are protected under a framework labeled as "proportionality" or "strict scrutiny" is less important, we contend, than whether the legal test requires the government to justify the burdens it places on religious rights. Both tests include analytical tools capable of holding the government's feet to the fire on this question of justification. But both tests have sometimes been applied in anemic ways that allow even flimsy government excuses to suffice.

To require meaningful justification, and thus to optimize protections for religious liberty, courts must implement three factors, regardless of how they label the underlying test: (1) governments must demonstrate that they are imposing burdens on religious and secular activities in an evenhanded way; (2) governments must put forth evidence demonstrating that denying religious accommodations for the class of claimants at issue was necessary to avoid an outcome that undermined the government's interest; and (3) courts should

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[370] *See* Greene, *supra* note 9, at 76 (noting that the tiers-of-scrutiny approach has broken down in the contexts of disability rights, LGBTQ rights, and affirmative action); Jackson, *supra* note 336, at 196 (asserting that different tiers of scrutiny "should not be given talismanic weight").

[371] Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 113 (2020) ("[E]arly state constitutional protections of religious liberty were roughly the eighteenth-century versions of what judges today would do under a compelling-interest test.").

avoid engaging in theological reinterpretation to ignore the existence of religious conflicts and thus excuse government from offering any justification at all.

Some proportionality courts, some of the time, incorporate these factors in their analysis. At other times, these same courts do not. The same is true of U.S. courts ostensibly operating within the tiers of scrutiny. Where the three factors above are present, governments have much greater incentive to protect religious liberty where possible and to avoid needless conflicts. And where these factors are not present, governments face few impediments to unjustifiably restricting religiously-motivated conduct. Conflicts arising in the COVID-19 context provide a striking and timely example of these phenomena across the globe.

Whichever framework or label courts adopt or retain—proportionality, strict scrutiny, stricter proportionality, or more proportional strict scrutiny—guaranteeing the *substance* of constitutional protections for religious liberty requires courts to ensure that governments provide genuine justifications for burdening religious rights, and that they strike down policies and laws that inhibit religious exercise but lack such justifications.