

# STRICT SCRUTINY, RELIGIOUS LIBERTY, AND THE COMMON GOOD

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## INTRODUCTION

In *COMMON GOOD CONSTITUTIONALISM*, Adrian Vermeule critiques the “typical formulation” for protection of rights under both strict scrutiny and proportionality, where “rights of the individual . . . are opposed” to the “political collective” and “must be balanced against each other.”<sup>1</sup> Vermeule argues that “[r]ights, properly understood, are always ordered to the common good . . . . The issue is not balancing or override by extrinsic considerations, but internal specification and determination of the rights’ . . . proper boundaries or limits.”<sup>2</sup> In the religious exercise context, Vermeule does not explicitly describe his preferred legal framework for protecting these constitutional rights. But he does identify, with concern, an instance where government interfered

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1. Adrian Vermeule, *COMMON GOOD CONSTITUTIONALISM* 166 (2022) [hereinafter “CGC”].

2. *Id.* at 167.

with the religious exercise of the Little Sisters of the Poor for reasons not actually aimed at the common good.<sup>3</sup>

Vermeule's criticism of balancing rights echoes the concern of some originalist scholars and jurists, who have argued that strict scrutiny requires a judicial balancing exercise, allowing for moral reasoning the courts are incompetent to perform.<sup>4</sup>

I sympathize with the concerns these scholars share about ensuring the judiciary does not engage in adjudication that it lacks the institutional competence to perform.<sup>5</sup> Vermeule and other scholars such as Gregoire Webber et al.,<sup>6</sup> have also done important work drawing our attention to the false dilemma this conception of rights creates, pitting individual rights as at odds with the public interest. However, in this essay I argue that strict scrutiny is not necessarily susceptible to these flaws, at least not as applied by U.S. courts protecting religious exercise.

The critiques of strict scrutiny described above rely on some assumptions about what constitutes the most salient characteristics of that doctrine. This Article challenges the accuracy of this account, arguing that critics are at times critiquing a faux version of strict

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3. *Id.* at 119–20.

4. *See, e.g.*, Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 81 (2019); *Ramirez v. Collier*, 142 S. Ct. 1264, 1286–88 (2022) (Kavanaugh, J., concurring). Other scholars similarly critique the standard conception of individual rights under strict scrutiny's international sibling: proportionality. They argue that proportionality's balancing framework problematically places rights in opposition to the common good, rather than constitutive of the common good. Grégoire Webber & Paul Yowell, *Introduction: Securing Human Rights Through Legislation*, in LEGISLATED RIGHTS 13 (Grégoire Webber et al. eds., 2018); *see also* GRÉGOIRE C. N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 89 (2009); PAUL YOWELL, *CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN: MORAL AND EMPIRICAL REASONING IN JUDICIAL REVIEW* 19 (2018); FRANCISCO J. URBINA, *A CRITIQUE OF PROPORTIONALITY AND BALANCING* 288 (2017); John Finnis, *Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR*, in *LORD SUMPTION AND THE LIMITS OF THE LAW* 119 (N.W. Barber, Richard Ekins & Paul Yowell eds., 2018).

5. Indeed, as Vermeule points out, it is often conceptually erroneous to view rights as in tension with the common good. That is particularly true when it comes to religious liberty, a key component of a nation's common good.

6. *See supra* note 4.

scrutiny. Instead, strict scrutiny should be properly understood as primarily (1) a rule of exclusion regarding certain types of reasons, and (2) an evidentiary burden that ensures the government action is necessary to advance the nonexcluded reason the government has itself identified.<sup>7</sup>

The evidentiary analysis in strict scrutiny need not involve any judicial balancing, meaning weighing incommensurate interests and making political or moral judgments about the relative importance of the individual interests pitted against the community.<sup>8</sup> Rather, it is a mode through which the judiciary assesses things like the causal relationship between the government's stated goal and its action—a discrete type of analysis that the judiciary routinely performs in a variety of other contexts.<sup>9</sup> This Article argues that it is this sort of rule of exclusion and evidentiary burden that does the real work of strict scrutiny in litigation—precisely the type of work Vermeule points to positively when he mentions *Little Sisters of the Poor*.<sup>10</sup> Such work is necessary to identify situations where the government is not actually advancing the common good in the way it claims, or where it could do so in ways that simultaneously protect religious liberty (an important component of the common good). And as I have described elsewhere, in many important respects strict scrutiny resembles judicial modes of analysis that were employed to protect religious liberty during the Founding Era. In other words, this is a mode of analysis that the judiciary is constitutionally authorized—and perhaps required—to perform.

#### I. CHALLENGING THE FAUX ACCOUNT OF STRICT SCRUTINY

Critics of strict scrutiny often rely on some assumptions about what constitute the most salient characteristics of strict scrutiny. First, critics express concern about the judiciary's competence in

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7. See Stephanie H. Barclay, *Replacing Smith*, 133 YALE L. J. F. 436, 456 (2023).

8. *Id.*

9. See *id.* at 461, 469.

10. CGC, *supra* note 1, at 119–20.

determining whether a government's interest is "compelling." Second, critics question the process of "judicial balancing" through the weighing of the relative importance of incommensurate competing values involving moral and political questions. Third, critics argue that strict scrutiny is an ahistorical judicial invention that did not exist until the post-war, modern era. Fourth, critics point to courts that under the mantle of balancing tests, have engaged in problematic forms of judicial creativity, including inventing new rights or arbitrary tiers of rights.

The first two assumptions primarily relate to arguments about the institutional competency and democratic legitimacy of the judiciary to perform this analysis. The final two critiques relate to the constitutional authority of the judiciary to perform this analysis. This Part challenges and engages with each of these assumptions in turn, arguing that strict scrutiny—at least within the context of religious exercise protections—is analysis that is both within the judiciary's institutional competence and constitutional authority.

#### A. *Identifying the Compelling Government Interest*

Let us begin with critique that the judiciary is not the appropriate actor to decide the moral and political question of whether the government has a sufficiently "compelling" interest in advancing its challenged policy. Vermeule suggests that assessing this aspect of the common good is a task ill-suited for the judiciary.<sup>11</sup> Justice Kavanaugh recently raised concerns about strict scrutiny, asking "what does 'compelling' mean, and how does the Court determine when the State's interest rises to that level?"<sup>12</sup> Alicea and Ohlendorf argue that allowing judges to determine whether an interest is compelling results in the "constitutionality of governmental action depend[ing] on each judge's own subjective assessment of questions that can only be described as quintessentially political."<sup>13</sup> These critiques raise important concerns about the lack of institutional

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11. CGC, *supra* note 1, at 167–68.

12. *Ramirez v. Collier*, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J., concurring).

13. Alicea & Ohlendorf, *supra* note 4, at 81.

competence for the judiciary to decide this question, the legitimacy of the judiciary deciding these sorts of moral questions in a self-governing society.

Before addressing this concern directly, it's worth noting two things. First, under the Religious Freedom Restoration Act (RFRA)<sup>14</sup> and its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA),<sup>15</sup> the legislature has specifically *instructed* the judiciary to determine whether an interest is compelling. So whatever moral analysis the judiciary is engaging in when it performs this statutory analysis, it is doing so with clear authority—and in fact, a mandate—from a democratic institution. At least in this statutory context, then, democratic legitimacy concerns seem unfounded.

But what about the institutional competence of the judiciary to ask this question, both in the statutory context and in the broader constitutional context? If one looks at a common thread running through cases identifying whether a government interest is compelling or not, a potential pattern emerges. Specifically, as discussed below, courts seem to reject government interests that, if allowed to be raised at their particular level of generality, could *always* be used to defeat any request for religious exemption. For example, if a government's desire to avoid ever providing administratively inconvenient exemptions constituted a compelling government interest, then government would never be required to provide a religious exemption. The same is true of the government's desire or to avoid any marginal increase in cost. As Holmes and Sunstein and many other economists have explained, any time society protects individual rights in any respect, this results in additional cost and administrative burden for that society.<sup>16</sup> And if

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14. 42 U.S.C. §§ 2000bb–2000bb-4, *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

15. 42 U.S.C. §§ 1988, 2000cc–2000cc-5.

16. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 87–89 (2013); *see also* Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 2021 FLA. L. REV. 1440 (2021).

government were able to point to an interest in avoiding any marginal increase in risk, as Justice Kavanaugh suggested in his *Ramirez* concurrence,<sup>17</sup> government would be able to read the “least restrictive means” portion of the RFRA and RLUIPA analysis right out of the statute, making that text superfluous. All protection of rights requires marginal increases in costs and risks to society and government, including administrative inconvenience or marginal risks of harm.<sup>18</sup> Thus, one cannot both accept these sorts of government interests and require the protection of a right—those two scenarios are mutually inconsistent. And of course, certain types of government interests, such as open hostility to religious exercise, are inimical to the existence of the right in fairly obvious ways.

In other words, the very existence of a right means that some statutes like RFRA or the Constitution exclude certain government reasons as permissible basis on which to interfere with the constitutional interest (i.e., free exercise). Note that the opposite is also true: a right may also include within its very nature certain limitations whereby it *would* be permissible for the government to interfere with the identified constitutional interest. The “compelling interest” portion of the analysis can thus be understood as, at a minimum, excluding those sorts of reasons from government reliance that would defeat the identified constitutional interest in all contexts. Otherwise, the constitutional or statutory right at issue would be rendered a nullity.

But we need not plumb the depths of that interesting conceptual issue because the way courts deal with the “compelling interest” critique is much more practical. Under modern strict scrutiny analysis, the determination of whether or not a government interest is “compelling” almost always turns out to be irrelevant to the disposition of the case.<sup>19</sup> Courts will generally either agree that a

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17. *Ramirez v. Collier*, 142 S. Ct. 1264, 1287–88 (2022) (Kavanaugh, J., concurring).

18. HOLMES & SUNSTEIN, *supra* note 15, at 87–89; *see also* Barclay, *supra* note 16.

19. *See* Justin Collings & Stephanie H. Barclay, *Taking Justification Seriously: Proportionality, Strict Scrutiny, and the Substance of Religious Liberty*, 63 B.C. L. REV. 453 (2022).

government interest is compelling or else simply assume so for the sake of analysis, and then move on to assess whether the government denial of religious protection is the least restrictive means of accomplishing its asserted interest.

Still, another issue with identifying the government's interest, Alicea and Ohlendorf argue, is the difficulty determining the correct level of generality. For example, when it comes to the contraception mandate, was the government's interest in "public health," or was it in "seamless coverage of cost-free contraception?" Alicea and Ohlendorf state that "in many cases, to decide the level of generality is to decide the case," yet "the Supreme Court has never explained how the level of generality of the government's interest is to be determined."<sup>20</sup>

There is some irony in this argument, since the level of generality problem is often lobbed at originalists, and those who favor using historical analogs to inform legal tests (including Alicea and Ohlendorf presumably) must grapple with this same issue, perhaps even more acutely. In other words, there is nothing about strict scrutiny as a legal doctrine that raises unique concerns about the ubiquitous level of generality problem. In fact, for reasons discussed below, strict scrutiny may in fact ameliorate this concern.

Specifically, the pedestrian response to this level of generality object is that the argument is both not quite accurate, and also far less of a concern, than Alicea and Ohlendorf suggest. First, determining the level of generality of an interest is not something the judiciary mystically divines; it is generally something the government asserts.<sup>21</sup> In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,<sup>22</sup> for example, the Court analyzed "two of the compelling interests asserted by the Government, which formed part of the

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*But see* *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006).

20. Alicea & Ohlendorf, *supra* note 4, at 80 (emphasis omitted).

21. See Barclay, *supra* note 7, at 461.

22. 546 U.S. 418 (2006).

Government's affirmative defense."<sup>23</sup> In contraceptive mandate litigation, the Supreme Court adopted the articulation of the government's interest set forth in its briefing: providing "contraceptive coverage seamlessly, together with the rest of [a woman's] health coverage."<sup>24</sup>

The Court has also made clear, in the RFRA and RLUIPA contexts, that the government must articulate its interest at a low level of abstraction aimed at the specific claimant's request, rather than at a high level of abstraction. It has stated that strict scrutiny requires courts to "'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants' and 'to look to the marginal interest in enforcing' the challenged government action in that particular context."<sup>25</sup>

Finally, the Supreme Court has reminded government officials that the government interest needs to be identified contemporaneously, at the time of the denial of the religious exemption request, rather than years later during litigation. In *Kennedy v. Bremerton School District*,<sup>26</sup> the Court rejected an argument from the school district, raised years into litigation, that "it had to suppress Mr. Kennedy's protected First Amendment activity to ensure order at Bremerton football games."<sup>27</sup> The Court noted that "the District never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy."<sup>28</sup> In rejecting this late-coming rationalization, the Court emphasized that "Government 'justification[s]' for interfering with First Amendment rights 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'"<sup>29</sup>

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23. *Id.* at 428 (emphasis added).

24. *Zubik v. Burwell*, 578 U.S. 403, 408 (2016).

25. *Holt v. Hobbs*, 574 U.S. 352, 363 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014)).

26. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

27. *Id.* at 2432 n.8.

28. *Id.*

29. *Id.* (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).



B. *Balancing Incommensurate Interests or Evidentiary Burdens*

Now, setting aside the less significant concerns about identifying government interests, we can get to the heart of the matter. It seems the primary concern of strict scrutiny critics is that they view this doctrine as an exercise in judicial balancing of competing goods. Vermeule explains, “[t]he implicit premise of th[e strict scrutiny] framework is that the interest of ‘government’ as representative of the political collective, on the one hand, and the rights of individual, on the other, are opposed and must be balanced against each other.”<sup>30</sup> Vermeule compares this approach to the “proportionality test that is broadly characteristic of European constitutional and human rights law,” and questions the appropriateness of these balancing approaches.<sup>31</sup> Justice Kavanaugh has similarly stated that “the compelling interest standard that the Court employs when applying strict scrutiny . . . necessarily operates as a balancing test.”<sup>32</sup> Alicea and Ohlendorf agree that strict scrutiny “is a balancing inquiry, even if the balancing is structured into distinct stages.”<sup>33</sup>

The problem these critics quite fairly worry about is that a balancing framework puts the judiciary in the position of weighing the relative value of incommensurate goods, an inquiry which has no clear factual or legal answers. The vacuum of any analysis dependent on legal learning is thus filled with unbridled judicial discretion and moral judgment, tasks ill-suited to an institution that is neither democratically accountable nor institutionally designed for such analysis. As Alicea and Ohlendorf state, “The scrutiny analysis therefore asks judges to impose on the Constitution a hierarchy of values and interests that—due to their incommensurability—is not

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30. CGC, *supra* note 1, at 166.

31. *Id.* at 167.

32. *Ramirez v. Collier*, 142 S. Ct. 1264, 1286–87 (2022) (Kavanaugh, J., concurring) (citing Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1914–19 (2017)).

33. Alicea & Ohlendorf, *supra* note 4, at 77 (emphasis omitted); *see also* *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1053–54 (11th Cir. 2022) (Newsom, J., concurring) (calling for reconsideration of use of balancing tests in First Amendment cases).

objectively justifiable.”<sup>34</sup> In a well-known dictum, Justice Scalia once quipped that balancing competing constitutional values is like determining “whether a particular line is longer than a particular rock is heavy.”<sup>35</sup> Assuming judges can arrive at the optimal balance for the common good in any particular dispute they adjudicate has been described as “fairy-tale constitutionalism in which every constitutional dispute has a happy-ever-after ending that can be discovered by judges on a case-by-case basis.”<sup>36</sup>

The concern about the ability of the judiciary to weigh incommensurate values is understandable. And to be fair, in early iterations of modern strict scrutiny cases, the Supreme Court did engage in this type of incommensurate balancing in the past.<sup>37</sup> Consider *Wisconsin v. Yoder*,<sup>38</sup> which involved a trio of Amish families in rural Wisconsin who refused to send their fourteen- and fifteen-year-old children to school despite a mandatory attendance policy.<sup>39</sup> The Court in *Yoder* framed its analysis in terms 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.”<sup>40</sup> The majority further explained that Wisconsin could constitutionally compel school attendance only if “there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”<sup>41</sup> Ultimately, the Court concluded that the marginal contribution of requiring an

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34. Alicea & Ohlendorf, *supra* note 4, at 78 (emphasis omitted).

35. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

36. Alicea & Ohlendorf, *supra* note 4, at 78.

37. The vision of the judiciary making moral and political judgments about the weight of incommensurate interests is also more common in some proportionality jurisdictions (though not all of them). See Collings & Barclay, *supra* note 19, at 518–19.

38. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

39. *Id.* at 207.

40. *Id.* at 214 (emphasis added).

41. *Id.*

additional year or two of formal schooling was slight, and that the cost of accommodating the Amish request was small.<sup>42</sup> On these terms, the balance tilted toward the Amish side.

However, while this sort of judicial balancing may have characterized some of the early strict scrutiny cases of the modern era, it no longer represents the primary mode of analysis the U.S. Supreme Court employs under strict scrutiny to protect religious rights—certainly not under statutes like RFRA or RLUIPA. Rather, the Court has looked to whether the government is relying on a reason not excluded under the right (see discussion above about compelling interests), and whether the government has presented sufficient evidence to demonstrate that denying the religious exemption is necessary to advance the government’s stated reason for interference with the right (or, conversely, that granting the religious exemption will meaningfully undermine the government’s ability to accomplish its stated goal). For example, in *Gonzales*,<sup>43</sup> the Court explained that the government must “offer[] evidence that granting the requested religious accommodations would seriously compromise its ability to administer [its desired] program.”<sup>44</sup> In *Ramirez*,<sup>45</sup> the Supreme Court ruled against prison officials denying a religious accommodation for audible prayer during an execution because the officials had not presented evidence to explain why they couldn’t allow the religious practice now, when the same prison had allowed it in the past (along with other prisons who also allowed the practice).<sup>46</sup> In *South Bay II*,<sup>47</sup> Chief Justice Roberts concurred with the Court’s order granting injunctive relief against a COVID-19 restriction. “[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

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42. *Id.* at 225, 236.

43. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 435 (2006).

44. *Id.* at 435.

45. *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

46. *Id.* at 1279.

47. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

not expertise or discretion . . . .”<sup>48</sup> In *Hobby Lobby*,<sup>49</sup> the Court noted that HHS had not “provided evidence” to support some of its claims that it could not grant exemptions under the contraception mandate.<sup>50</sup>

Proving necessity as an epistemic matter is likely impossible through evidence available to litigating parties. But there are proxy questions to which the Court looks in assessing this evidentiary question. First, courts often ask whether the government has other means of accomplishing its goal that don’t involve burdening religion. Where the government has other alternatives available identified in litigation, and the government doesn’t present evidence making clear that those alternatives are in fact unfeasible, that suggests that the burdening action is not necessary.

Ruling against the government where such an alternative is available does not involve judicial balancing of incommensurate goods, or at least not the type envisioned by critics of balancing. Instead, it requires the government to select a pareto improvement, whereby government will not be meaningfully less well off in pursuing its goal through a different means, and the individual attempting to exercise religion will be in a better position if the government avoids the action that imposes the burden. To that end, requiring the judiciary to ask this question is premised on the idea that government can *both* pursue its policy goals and protect religious liberty—multiple things that are all constitutive of the common good rather than being at odds with each other.

Another way of looking at this judicial function is that it does not involve weighing of reasons that Joseph Raz envisioned as problematic.<sup>51</sup> Instead, it requires the judiciary to engage in a “sorting” of reasons, between those that are permissible to satisfy the

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48. *Id.* at 717 (Roberts, C.J., concurring).

49. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

50. *Id.* at 733.

51. *See, e.g.*, JOSEPH RAZ, *ENGAGING REASON* 47 (1999).

requirements of the relevant prong of the analysis, and those that are not.<sup>52</sup> Satisfying the conditions at one stage of the analysis just means the analysis continues; it does not mean reasons are being weighed against one another. This is similar to the multi-step satisfaction of conditions that must take place under many other legal burden-shifting frameworks, including antidiscrimination law under Title VII.<sup>53</sup>

The second type of question courts ask as a proxy for gauging necessity is whether the government is pursuing its interest in an even-handed way, including by not denying protections for religious activities that pose risks to the government's goal comparable

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52. See, e.g., William Lucy, *Adjudication*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW* 241–242 (Jules Coleman & Scott J. Shapiro eds., 2011).

53. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248 (1981).

to secular activity the government allows.<sup>54</sup> In *Holt v. Hobbs*,<sup>55</sup> for example, the Court ruled against a government when it could not explain why it needed to deny a half-inch beard for religious reasons, but could allow a quarter-inch beard for medical reasons.<sup>56</sup> The Court reiterated in *Fulton*<sup>57</sup> that government policies face greater scrutiny when they “prohibit[] religious conduct while permitting

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54. It’s worth noting that scholars and jurists debate what counts as comparable between secular and religious activities. 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.”); 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*, J.L. & POL., Winter 2002, at 119, 199 (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, *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 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 *Emp’t Div. v. Smith*, 494 U.S. 872, 889 (1990))); Zalman Rothschild, *Free Exercise’s Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 283–87 (2020) (summarizing the debate surrounding “The Meaning of Religious Discrimination”).

55. *Holt v. Hobbs*, 574 U.S. 352 (2015).

56. *Id.* at 367.

57. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

secular conduct that undermines the government's asserted interests in a similar way."<sup>58</sup>

Evidence of comparable secular exemptions is important because it often suggests one of two things: either the government's stated goal is not important enough to foreclose the possibility of exemptions from its policy in the relevant context, or there are less restrictive alternatives through which the government can accomplish its goal without restricting religious exercise.

How should we assess the judiciary's competence to address these more discrete evidentiary questions? Alicea and Ohlendorf have argued that "[w]hether a challenged law will, in fact, achieve its stated goal is often a contested empirical question, as is the question of whether there are other, less-restrictive means of achieving the same end."<sup>59</sup> Yet "there is something farcical about a federal judge hearing testimony about fraught and quintessentially legislative questions and pronouncing his conclusions as settled fact."<sup>60</sup> However, this claim raises the question of what sorts of questions the judiciary *is* competent to answer, if not discrete factual disputes between specific parties. After all, the judiciary is frequently vaunted for its unique role as a factfinder<sup>61</sup> and its ability to assess adjudicative facts.<sup>62</sup>

Looking to whether government-provided evidence that denying the religious accommodation request necessarily advances its interest is an inquiry not unlike other causation inquiries courts

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58. *Id.* at 1877.

59. Alicea & Ohlendorf, *supra* note 4, at 81.

60. *Id.*

61. John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 71 (2008) ("[T]he judiciary would appear to be a superior fact-finder both because of its institutional capacity and because of its relative lack of bias. . . . Indeed, the separation of powers supports a *de novo* judicial role in fact-finding.").

62. See YOWELL, *supra* note 4, at 63–65 (2018). The analysis, of course, is different if a court is deploying heightened scrutiny in a facial challenge to a law, which may be a reason why religious exemption requests subject to strict scrutiny should be limited to as-applied challenges (as RFRA currently limits them). See generally Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1609 (2018).

routinely perform in a variety of legal contexts.<sup>63</sup> It assesses the nexus between the government's stated goal and its action, often by relying on circumstantial evidence that the parties present during the course of litigation.<sup>64</sup> And looking to whether activities are analogous for purpose of comparators is also a mode of analysis courts frequently apply elsewhere. For example, in the realm of antitrust law, courts must address the similar question of whether one good is "substitutable" for another, as a precursor to determining what counts as the "relevant market."<sup>65</sup>

As it turns out, these two inquiries were the same types of questions that some early, Founding-era courts asked when deciding whether to provide a religious exemption from a general law burdening religious exercise.<sup>66</sup> In other words, as discussed below, strict scrutiny analysis is not as divorced from history and tradition as some critics would suggest.

There is no doubt that strict scrutiny as recognized by its modern label did not develop until the post-WWII era. But from that conclusion, it does not necessarily follow that there are no historical analogs of the judiciary engaging in legal analysis that resembles strict scrutiny in important respects.<sup>67</sup>

To the contrary, I've written elsewhere about how some of the earliest Founding-era courts that provided religious exemptions

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63. See generally H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985) (describing the common-sense ways in which courts analyze causation).

64. See generally Russell Brown, *The Possibility of "Inference Causation": Inferring Cause-in-Fact and the Nature of Legal Fact-Finding*, 55 MCGILL L.J. 1 (2010).

65. In *United States v. Columbia Steel Co.*, the Court had to determine whether the relevant market included only steel plates and shapes, or whether the market extended to all rolled steel products. 334 U.S. 495 (1948). Applying supply substitutability analysis, the Court held that the relevant market must include all comparable rolled steel products in the relevant geographic market. *Id.* at 510–11; see also Richard McMillan, Jr., *Special Problems in Section 2 Sherman Act Cases Involving Government Procurement: Market Definition, Measuring Market Power, and the Government as Monopsonist*, 51 ANTITRUST L.J. 689, 693 (1982).

66. Barclay, *supra* note 7.

67. Further, one could also argue that this critique misunderstands the difference between original meaning, and doctrines courts develop to implement that original meaning.



were doing so with analysis that looked remarkably similar to strict scrutiny in its most important aspects.<sup>68</sup>

### C. *Problematic Judicial Creativity*

A few final words are appropriate for some criticisms that have been launched at judicial balancing tests. First, some jurists and scholars have criticized the “tiered” approach to scrutiny, through which some rights are given strict scrutiny and others something like intermediate.<sup>69</sup> I largely agree with this critique. While there is evidence of Founding-era courts engaging in a heightened form of analysis resembling scrutiny, there is nothing I have found to suggest this analysis was tiered in any way. And in fact, some scholars dispute how meaningful (as opposed to muddled) our current tiering doctrine currently is. Justice Barrett raised questions about intermediate scrutiny in the speech context when considering what should replace *Smith*.<sup>70</sup> Thus, perhaps the speech context should provide a cautionary tale rather than an invitation to duplicate an intermediate scrutiny approach.

Another critique some scholars have raised is that judicial balancing tests have been the method through which jurists have identified new rights housed nowhere in the constitution. For example, Webber rightly draws attention to proportionality’s tendency to allow courts to “see rights everywhere.”<sup>71</sup> I share Webber’s concern about courts feeling entitled to see new rights everywhere and loosely interpreting written legal instruments to invent new rights. I’ve written elsewhere that judicial scrutiny should be limited only to rights that are clearly provided under a constitutional or

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68. Barclay, *supra* note 7; Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 70 (2020). Some of the analysis in this Section is pulled from portions of these Articles.

69. *See, e.g., Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (“The Constitution does not prescribe tiers of scrutiny.”).

70. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

71. WEBBER, *supra* note 4; *see also* YOWELL, *supra* note 4, at 19 (critiquing the way in which a court interpreted the right to life or liberty broadly to include the right to assisted suicide when applying proportionality).

statutory framework.<sup>72</sup> I do not, however, believe that trends involving the judicial creation of rights are inherent in the conceptual framework of strict scrutiny (or proportionality, for that matter).

## II. LOOKING FORWARD: RIGHTS AND THE COMMON GOOD

Common good constitutionalists, some originalists, and other scholars have all leveled criticisms at strict scrutiny. And these critiques often rely on some assumptions about the nature of strict scrutiny analysis. This Article pushes back on this account in a number of ways. First, the compelling interest portion of the test excludes, at a minimum, some government interests that are incompatible with a legal regime that would ever provide exemptions. And perhaps more importantly, this is a legal question that rarely resolves cases. Rather, courts usually just assume that the interest is compelling and then move to the more important aspects of the analysis. Second, strict scrutiny should be understood not primarily as a balancing exercise, but as an evidentiary burden that ensures the government action is necessary to advance the permissible interest it has itself identified, which includes assessing whether other options are feasible to advance the goal, and whether the government pursues its goal in an even-handed way. This sort of evidentiary burden, enforced by the judiciary through fact-finding relevant to the parties before the court, arguably falls particularly within the competence of the judiciary.<sup>73</sup> And these type of evidentiary questions have deep historical roots, asked by courts during the Founding-era.<sup>74</sup> This Article agrees with some of the concerns about judicial creativity in the balancing context but concludes that such creativity is not inherent strict scrutiny.

Vermeule has advocated for the judiciary to replace strict scrutiny with a type of deferential arbitrariness standard under

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72. Collings & Barclay, *supra* note 19.

73. See Barclay, *supra* note 7, at 451–52; see also McGinnis & Mulaney, *supra* note 60, at 71.

74. See Barclay, *supra* note 7, at 453–65.

administrative law when adjudicating constitutional rights.<sup>75</sup> Such an approach, he argues, would recognize a broad set of interests that advance the common good.

However, Vermeule also acknowledges that in contraception mandate litigation, the government sought to force the Little Sisters of the Poor to sign a form not to actually advance any interest related to contraception but instead to force the nuns to accept the government's ideology on this topic.<sup>76</sup> I would submit that fleshing out the government's improper motives in the contraceptive mandate litigation or other cases is only possible when the government must satisfy a heavy evidentiary burden and explain why it is not regulating in even-handed ways. Under the deferential test Vermeule has set forth that would essentially mirror the Administrative Procedure Act, the government in the Little Sisters case would have had a strong argument that its policy was not arbitrary, as it did in fact provide some authorization for third party insurers of contraception and was advancing its view of common good: broad access to contraception for women. The strength of the government's position from an administrative law point of view is highlighted by the fact that no litigants ever brought a successful APA challenge to the contraception mandate.

By contrast, the strong evidentiary burden of strict scrutiny operates to ensure that governments really *are* acting in pursuit of permissible goals to advance some aspect of the common good, rather than using that as mere pretext to burden religious rights. It also encourages governments to find ways to advance their policies while simultaneously finding ways to protect religious liberty. And it protects elements of the common good like religious liberty that are so important that super-majoritarian institutions like constitutional conventions enshrined them in our Constitution so they could not be overridden by mere administrative action or even normal legislative processes.

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75. CGC, *supra* note 1, at 168.

76. *Id.* at 120.