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Replacing *Smith*

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ABSTRACT. As the Supreme Court has sought to ground more of its constitutional jurisprudence in original understanding, it has signaled an interest in revisiting *Employment Division v. Smith*, which overruled the use of strict scrutiny for religious burdens caused by neutral and generally applicable laws. But what replacement doctrinal test would both be workable for courts to administer and consistent with constitutional text and Founding Era understandings? Some scholars and jurists have juxtaposed the traditional scrutiny test against a type of historically and textually grounded approach. But this Essay contends that such a juxtaposition creates a false dichotomy. While certain facets of Free Exercise rights warrant categorical or absolute protection (including those aspects that overlap with antiestablishment interests), the full scope of the Free Exercise right as originally understood is also consistent with presumptive protection that can be reflected through the use of judicial scrutiny. And that judicial scrutiny need not involve judicial balancing. To that end, this Essay defends a historically grounded iteration of strict scrutiny that operates as an exclusionary norm rather than a balancing test. This Essay contends that such an approach can claim the benefits of both workability and consistency with original meaning.

INTRODUCTION

In *Employment Division v. Smith*, a controversial decision from 1990, the Supreme Court decreased protections it had recognized under the Free Exercise Clause. The Court concluded that neutral and general laws that create burdens on religious exercise would no longer be subject to heightened scrutiny, even if those laws substantially burdened religious exercise.[1] But since *Smith* was

1. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 885-86 (1990).

decided, the Supreme Court has steadily lessened its reach.[2] In the 2021 Term, at least five Justices on the Supreme Court indicated that they are considering overruling *Smith*.[3] And the following Term, six Justices made clear that this issue is still alive and well. In *Kennedy v. Bremerton School District*, the Court stated, "[W]hile the [*Smith*] test we do apply today has been the subject of some criticism, we have no need to engage with that debate today because no party has asked us to do so."[4] In other words, litigants in future cases were not discouraged from asking the Court to overrule *Smith* and to replace it with a different doctrinal test.

But exactly what test should replace *Smith* has proven a tricky question. Three Justices—Justices Thomas, Alito, and Gorsuch—have called for *Smith* to be overruled. These Justices have suggested replacing it with something like the previous approach, which required strict scrutiny for government actions that substantially burdened religious exercise, even if the law at issue is neutral and generally applicable.[5] Such a test could be viewed as reviving, in one form or another, the *Sherbert v. Verner* test that was in place before *Smith* was decided.[6] Three other Justices—Justices Breyer, Kavanaugh, and Barrett—expressed skepticism about *Smith* but simultaneously questioned what test should replace it.[7] Some scholars have argued that the Court should return to the strict scrutiny balancing test from *Sherbert* and *Yoder*,[8] or a weaker version of that balancing test that resembles intermediate scrutiny.[9] Still, other scholars have critiqued the

2. *See* Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2124 (2023).

3. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883-84 (2021) (Alito, J., joined by Thomas & Gorsuch, JJ., concurring) (calling for the Court to revisit *Smith*); *id.* at 1882-83 (Barrett, J., joined by Kavanaugh, J., concurring) (finding "textual and structural arguments against *Smith* . . . more compelling").

4. 142 S. Ct. 2407, 2422 n.1 (2022) (citation omitted).

5. *See Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring); *id.* at 1929-30 (Gorsuch, J., concurring).

6. Sherbert v. Verner, 374 U.S. 398, 403 (1963). *Smith* did not overrule *Sherbert*, but it massively reduced the scope of its application.

7. *See Fulton*, 141 S. Ct. at 1882-83 (Barrett, J., concurring).

8. *See* Christopher C. Lund, *Answers to* Fulton*'s Questions*, 108 IOWA L. REV. 2075, 2093 (2023); Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 CATO SUP. CT. REV. 33, 40-49; THOMAS BERG, RELIGIOUS LIBERTY IN A POLARIZED AGE 185 (2023).

9. James M. Oleske, Jr., *A Regrettable Invitation to "Constitutional Resistance," Renewed Confusion Over Religious Exemptions, and the Future of Free Exercise*, 20 LEWIS & CLARK L. REV. 1317, 1318, 1355-70 (2017); *cf.* Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1197 (2008) (proposing a test that resembles "rationality with bite"); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1503 (1999) (proposing the test focus on whether "a burden is justified").

balancing tests that the Court has employed in the past as unworkable and ahistorical and have juxtaposed that approach with what they view as the more desirable historical-analog test for protecting religious-exercise rights.[10] Under this approach, courts would deem a challenged government action permissible only if it is sufficiently analogous to a regulation with a longstanding history or tradition.[11]

This historical-analog approach with respect to constitutional rights was arguably on display in the 2022 Term in *New York State Rifle & Pistol Ass'n v. Bruen*.[12] There, the Court focused on whether there was a historical practice of government regulation resembling the modern gun-control law at issue in that case;[13] the Court did not ask whether such restrictions served an important government interest. Some commentators have argued that this approach should be extended to the First Amendment as well, meaning that "the Free Exercise Clause would presumptively protect a given religious exercise unless the opposing party can show a long, unbroken tradition of restriction that is analogous to the burden at issue."[14] In other words, these scholars argue that instead of "weighing government interests," as courts currently do under strict scrutiny, courts should simply determine "the scope of constitutional rights and powers through textual and historical analysis"; once that is determined, courts should simply provide categorical or absolute protection for the scope of that right.[15]

There is no doubt that the Supreme Court has increasingly focused on Founding Era historical sources to interpret the meaning of Constitutional text. But this Essay argues that setting up a scrutiny test as the foil to a historically and textually grounded test creates a false dichotomy. While I agree that some constitutional rights (including some aspects of Free Exercise) should receive categorical or absolute protection, the full scope of the Free Exercise right as historically understood captures more than just categorical protections. Instead, free-exercise rights (like any other rights) as a conceptual matter can receive two

10. *See* J. Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 83-85 (2019); William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 HARV. J.L. & PUB. POL'Y 419, 421 (2023); *see also* Ramirez v. Collier, 142 S. Ct. 1264, 1286-88 (2022) (Kavanaugh, J., concurring) (critiquing strict scrutiny under the Religious Land Use and Institutionalized Persons Act as a form of balancing).

11. *See* Haun, *supra* note 10, at 421.

12. 142 S. Ct. 2111 (2022).

13. *Id.* at 2126.

14. *See, e.g.*, Haun, *supra* note 10, at 421.

15. Brief of Amicus Curiae J. Joel Alicea in Support of Petitioners and Reversal at 5, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843) (emphasis omitted), https://www.supremecourt.gov/DocketPDF/20/20-843/184323/20210720094135925_20-843%20Amicus%20Brief%20of%20J.%20Joel%20Alicea.pdf [https://perma.cc/QGW5-WVJJ].

types of doctrinal protections: (1) presumptive protection (a rebuttable presumption against government limitations that can be overcome when the government makes the requisite showing), or (2) absolute protection (a no-limits rule wherever the rights-holder demonstrates his or her relevant activity falls within the scope of the right).[16] As I argue elsewhere, a constitutional right can receive either of these forms of protection or a blend of both.[17]

Typically, absolute protections for rights are narrow and deep, focusing on certain well-defined, limited aspects of the rights; presumptive protections are generally shallower but can protect a broader range of activity. *Both* absolute and presumptive doctrinal protections can be crafted in ways that are consistent with the text and historical understanding of the Religion Clauses. And both types of protections can be crafted in ways that are ahistorical and inconsistent with original meaning.

This Essay explains why at least one version of strict scrutiny is both judicially administrable and historically grounded. And assuming the Court wanted an even more history-based test to replace *Smith*, this Essay offers potential modifications to strict scrutiny. This Essay also explains how Free Exercise protections include both absolute and presumptive protections.[18] Specifically, Part I begins by addressing aspects of religious-exercise rights that do receive absolute protections – some already on the books and others that the Court has signaled an interest in developing. The Supreme Court has identified existing absolute constitutional protections for religious exercise generally in limited and carefully defined contexts, often when antiestablishment interests are also at stake. Thus, both the Free Exercise Clause and Establishment Clause provide overlapping justification for this particularly strong form of protection. Given the Court's emphatic assertion in *Kennedy v. Bremerton School District* that the Establishment

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16. *See* Stephanie H. Barclay, The Nature of Constitutional Rights (unpublished manuscript) (on file with author).

17. *Id.* One could question whether there is really a difference between absolute and presumptive protection. After all, if government isn't able to rebut a presumptive constitutional protection through evidence, wouldn't the protection be absolute in the sense that no government limitation is permissible at that point? Certainly, that's true. But here, I'm distinguishing conceptually between absolute versus presumptive protections based on who carries the burden. If the *only* burden that must be satisfied is a prima facie burden by the rights-holder (e.g., to demonstrate that the activity being limited by government falls within the relevant scope of the right), then I'm classifying that protection as absolute. But I'm classifying that protection as presumptive if, after the rights-holder satisfies that prima facie burden, the burden then *shifts* to the government, which can still make some sort of showing that would justify a limitation on the relevant activity.

18. As Christopher C. Lund has observed, a bifurcated approach to the Free Exercise Clause is "not new." Lund, *supra* note 8, at 2084.

Clause and Free Exercise Clause have "complementary purposes,"[19] this is an area where we may see further doctrinal development. But this is also an area where treating absolute protection as exhausting the universe of doctrinal mechanisms for protecting religious exercise would create significant workability problems. Limiting Free Exercise protections to absolute protections may also fail to most accurately reflect a historical understanding of some aspects of religious exercise as understood at the Founding.

Regarding presumptive protection, Part II proposes a version of strict scrutiny that avoids the concerns identified in *Smith*. This Part also explores additional modifications that could further ground strict scrutiny. Instead of balancing incommensurable values, this test could operate to exclude all government justifications for interfering with religious exercise other than those government interests recognized in the Founding Era. This rule would preserve the second prong of strict scrutiny as it currently exists, requiring the government to demonstrate its actions were necessary to advance its permissible interest. Part II also identifies historical sources that are consistent with an objective approach to the threshold inquiry of the substantial burden test, and with the least-restrictive-means evidentiary aspect of strict scrutiny. And of particular note, this Part argues that presumptive government limitations on religious exercise were not viewed as external to (and something to be balanced against) a natural right to religious exercise at the Founding. Rather, limitations on the ability to exercise one's religion based on certain government interests helped define the scope of the right.

To be sure, the process of distilling original meaning into workable legal doctrine is somewhat indeterminate.[20] A small number of constitutional provisions are easy to apply.[21] Most, however, involve more complexity.[22] That is why

19. 142 S. Ct. 2407, 2426 (2022).

20. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 298-311 (2012); *see generally* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 15 (2018) (arguing under originalism that "constitutional construction" when developing legal doctrines is "unavoidable"); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 74-77 (2004) (analyzing the use of strict scrutiny to enforce the Equal Protection Clause); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 43, (2001) (acknowledging that "there is often no clear line between applying an established principle or test and adapting a doctrinal structure to previously unforeseen circumstances"); FALLON, *supra*, at 57 (discussing these problems in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)).

21. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 4 ("No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . . .").

22. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013) ("In some cases, construction can simply translate the plain meaning of the constitutional text into corresponding doctrines of constitutional law . . . But in other cases, the constitutional text does not provide determinate answers to constitutional questions.").

judges must develop doctrines to implement constitutional requirements, and doing so is generally an act of constitutional construction rather than interpretation.[23]

Accordingly, this Essay does not argue that the proposed doctrinal tests discussed here are *required* by original meaning; rather, it makes the more modest claim that the doctrines proposed here would offer a constitutional construction that is at least *consistent* with the constitutional limits and historical sources this Essay identifies. This Essay also argues that these proposed tests provide clear guidance to lower courts and are more administrable than alternatives, while still ensuring robust and historically grounded protection for religious exercise.

I. ABSOLUTE PROTECTIONS UNDER BOTH RELIGION CLAUSES

While the vigorous debate about strict scrutiny is important for presumptive protections under the Free Exercise Clause and will be discussed below in Part II, this Essay begins by recognizing a number of ways in which free-exercise rights receive absolute protection. Some of these protections are in a state of flux and warrant further development. And all of this is true regardless of whether *Smith* stays on the books.[24] The Supreme Court has identified existing absolute constitutional protections for religious exercise generally in contexts where all of the following conditions are present: (1) the religious interest is limited and carefully defined, (2) clear Founding Era evidence supports that narrow interest's importance, (3) similar evidence shows Founding Era governments did not think they had sufficient reason to interfere with the interest, and (4) the interest also raises antiestablishment concerns.

This Part addresses a few different areas where absolute protections do or could apply in the religious-exercise context: government hostility to religion, the ministerial exception, and other church-autonomy employment issues. It also explores why absolute protection would not be a useful tool for other important aspects of religious exercise.

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23. *See* Barnett & Bernick, *supra* note 20, 15-18; Berman, *supra* note 20, at 80-82.

24. *See, e.g.*, Michael A. Helfand, *What Is a "Church"?: Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 413-14 (2013) (observing the distinction between the free-exercise claims in *Smith* and claims where free exercise is related to the Establishment Clause under the church-autonomy doctrine); EEOC v. Cath. Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) ("[T]he burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith* . . . ."); Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 BYU L. REV. 1593, 1606 ("The Supreme Court, in [*Smith*], ruled that individuals are not entitled to . . . exemptions under the Free Exercise Clause in most cases. But other decisions suggest that religious organizations may enjoy some rights to exemption . . . .").

A. Government Hostility Toward Religious Exercise

One context where the Supreme Court has recently clarified that religious exercise receives absolute protection is when government burdens religious exercise based on "official expressions of hostility to religion."[25] When the government is hostile, it does not get an opportunity to present a justification for its exercise-burdening action. Instead, the action is per se invalid. Indeed, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court did not analyze the government's justification and allow it the chance to meet its burden under strict scrutiny; identifying expressions of hostility was enough to decide the case.[26] The Supreme Court affirmed this absolute approach in *Kennedy*, when it stated that courts should "set aside" government policies accompanied by "official expressions of hostility," without "further inquiry" under strict scrutiny.[27]

Antiestablishment interests likewise ground absolute protections. The established church often "punished dissenting churches and individuals for their religious exercise."[28] The Establishment Clause generally gives rise to categorical, rather than rebuttable, prohibitions. Accordingly, the Establishment and Free Exercise Clauses speak with one voice in strongly prohibiting state-sponsored persecution or hostility towards religious exercise.[29]

B. The Ministerial Exception

Another classic case demonstrating the Religion Clauses' overlapping and absolute protection is *Hosanna-Tabor*, in which the Court ruled that government could not interfere with the relationship between a religious organization and a "minister."[30] The ministerial exception is another area where the Court determined that the Free Exercise Clause and the Establishment Clause speak with

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25. Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1729-31 (2018); *Kennedy*, 142 S. Ct. at 2422 n.1.

26. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731-32.

27. 142 S. Ct. at 2422 n.1.

28. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring in the judgment) (discussing this type of persecution as a hallmark of established religion).

29. Stephanie H. Barclay, *The Religion Clauses After* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097, 2112 (2023).

30. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012). Note that in this case, the Court made clear that the Free Exercise Clause does not rise and set on the *Smith* framework. Indeed, *Hosanna-Tabor* carved out a huge chunk of *Smith* by allowing for absolute religious protections in the face of neutral and generally applicable laws. The Court expressly rejected the government's argument that *Smith*'s neutrality and general applicability framework ought to apply.

one voice and that the resulting protection is absolute. If the relevant employee in a dispute qualified as a minister, then that ends the inquiry. No matter how important the government interest, it could not justify requiring a religious organization to maintain an employment relationship with a minister the organization wished to fire.

Eight years after *Hosanna-Tabor*, the Court confirmed the exception and broadened the definition of minister in *Our Lady of Guadalupe School v. Morrissey-Berru*,[31] making clear that it will look at whether the religious leader or teacher performs an important religious function—regardless of his or her religious title.[32]

To be sure, these cases might often involve difficult line-drawing questions about when an employee would qualify as a minister, and thus absolute protections raise their own workability issues. But the question whether the religious institution qualifies for the exception in the first place does not then shift the burden to the government to make any additional evidentiary showing that would permit the government action.

C. Broader Church-Autonomy Protections in Employment

Hosanna-Tabor left unanswered the question whether religious institutions have any absolute constitutional protection in employment cases outside the ministerial exception. What if a church has sincere religious reasons for wanting to fire a janitor that is clearly not a minister or religious leader or teacher in any sense?

Some of the language in existing Supreme Court opinions suggests that broader protection in these contexts might still be justified. The Court has made clear that the ministerial exception is part of a broader church-autonomy doctrine and that the First Amendment provides "special solicitude to the rights of religious organizations" to operate according to their faith without government interference.[33] This autonomy sometimes requires courts to "stay out of employment disputes . . . ."[34] In light of that constitutional sensitivity, Congress has long exempted religious employers from federal employment laws that would otherwise interfere with their ability "to define and carry out their religious

31. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

32. *Id.* at 2066.

33. *Hosanna-Tabor*, 565 U.S. at 189.

34. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. at 2060.

missions" by imposing "potential liability" for hiring practices that are based on sincere religious reasons.[35]

Given the history, that makes sense. In 1804, an order of Ursuline Nuns in New Orleans wrote to President Thomas Jefferson, expressing concern that the new owners of the territory would not be as accommodating toward religious practice as the French. Jefferson wrote to reassure the sisters:

> [T]he principles of the constitution and government of the United states are a sure guarantee to you that [your property] will be preserved to you sacred and inviolate, and that *your institution will be permitted to govern itself according to it's* [sic] *own voluntary rules*, without interference from the civil authority.[36]

He assured them "all the protection which [his] office [could] give."[37] This historical incident highlights the strength of legal protection that was viewed as appropriate for a religious organization performing a religious ministry in the Founding Era.

In addition, in 1806, Archbishop John Carroll of Baltimore wrote to then-Secretary of State James Madison, asking for Madison's advice on who Carroll should appoint to oversee operational aspects of the Catholic Church in a new area. Madison wrote back, purporting to speak for President Thomas Jefferson, and stated, "as the case is entirely ecclesiastical," it would go against the "scrupulous policy of the Constitution in guarding against a political interference with religious affairs" for Madison to give his input on the matter.[38] In other words, even if the church *invited* government interference with its ecclesiastic affairs, the need for the religious organization to maintain autonomy was so important that the government would decline.

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35. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335-36 (1987); *see also id.* at 342-43 (Brennan, J., concurring) ("[A] religious organization should be able to require that only members of its community perform those activities" that "constitute part of a religious community's practice").

36. Letter from Thomas Jefferson, President, U.S., to the Ursuline Nuns of New Orleans (July 13, 1804), https://founders.archives.gov/documents/Jefferson/01-44-02-0064 [https://perma.cc/U6UC-TQHL] (emphasis added).

37. *Id.*; *see also* Stephanie H. Barclay, *Spheres of Liberty and Free Exercise: Lessons for* Fulton *from Jefferson's Correspondence with Ursuline Nuns*, REASON (Nov. 2, 2020, 9:00 AM), https://reason.com/volokh/2020/11/02/spheres-of-liberty-and-free-exercise-lessons-for-fulton-from-jeffersons-correspondence-with-ursuline-nuns [https://perma.cc/9BFH-NNT2] (discussing the historical importance of the Ursuline Nuns example).

38. Letter from James Madison, Sec'y of State, U.S., to John Carroll, Archbishop of Balt., Cath. Church (Nov. 20, 1806), https://founders.archives.gov/documents/Madison/99-01-02-1094 [https://perma.cc/8V2J-F2LU].

But while the history in this context doubtless shows sensitivity to church autonomy, it leaves unanswered the question of what doctrinal test should apply in this context. Two Justices have recently signaled an interest in clarifying the legal doctrine that would provide the general protection Jefferson and Madison described. In a recent denial of certiorari in *Seattle's Union Gospel Mission v. Woods*, Justice Alito, joined by Justice Thomas,[39] noted that the Supreme Court has "yet to confront whether freedom for religious employers to hire their co-religionists is constitutionally required, though the courts of appeals have generally protected the autonomy of religious organization to hire personnel who share their beliefs."[40]

Justice Alito noted that the Washington Supreme Court had "presume[d] that the guarantee of church autonomy in the Constitution's Religion Clauses protects only a religious organization's employment decisions regarding formal ministers."[41] But he responded as follows:

> [O]ur precedents suggest that the guarantee of church autonomy is not so narrowly confined . . . . "[C]ivil courts exercise no jurisdiction" over matters involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." That is so because the Constitution protects religious organizations "from secular control or manipulation." The religious organizations protected include churches, religious schools, and religious organizations engaged in charitable practices, like operating homeless shelters, hospitals, soup kitchens, and religious legal-aid clinics . . . among many others.
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> . . . To force religious organizations to hire messengers and other personnel who do not share their religious views would undermine not only the autonomy of many religious organizations but also their continued viability . . . . Driving such organizations from the public square would not

39. Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094 (2022) (mem.) (Alito, J., joined by Thomas, J., concurring).

40. *Id.* at 1094 (citing Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189 (4th Cir. 2011); EEOC v. Miss. Coll., 626 F. 2d 477 (5th Cir. 1980); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618 (6th Cir. 2000); Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997)).

41. *Id.* at 1094.

> just infringe on their rights to freely exercise religion but would greatly impoverish our Nation's civic and religious life.[42]

Were the full Court to adopt this sort of approach, it's conceivable that the Court could extend some sort of absolute protection under the First Amendment for religious decisions affecting employment relationships, allowing religious organizations to ensure that those employed by an organization share its religious beliefs. Perhaps the Court could limit this sort of absolute protection to actions religious institutions take regarding their employment relationships with members of the religious community for sincere religious reasons.[43] Under this approach, when religious individuals or institutions claim that they are motivated by religious belief, courts are not allowed to inquire into the orthodoxy of the belief.[44] In other words, courts could adjudicate the sincerity, but not the accuracy, of religious beliefs.[45] Notably, whether or not a claimed religious belief is sincerely held is not an inquiry unique to these church-autonomy cases.[46]

On the other hand, scholars such as Michael Helfand have argued that the church-autonomy context is better suited to strict scrutiny; in some contexts, he argues that there might be important reasons why government needs to interfere with employment relationships in voluntary religious communities.[47] For

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42. *Id.* at 1096 (internal citations omitted).

43. *See, e.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 657 (10th Cir. 2002) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)) ("The church autonomy doctrine is not without limits, however, and does not apply to purely secular decisions, even when made by churches. Before the church autonomy doctrine is implicated, a threshold inquiry is whether the alleged misconduct is 'rooted in religious belief.'"); *see also* Athanasius G. Sirilla, Note, *The "Nonministerial" Exception*, 99 NOTRE DAME L. REV. 393, 415-17 (2023) (discussing a potential doctrinal test for the church-autonomy doctrine).

44. *See* Thomas v. Rev. Bd., 450 U.S. 707, 716 (1981); *see also* Ramirez v. Collier, 142 S. Ct. 1264, 1298 (2022) (Thomas, J., dissenting) (quoting Follett v. Town of McCormick, 321 U.S. 573, 577 (1944)) ("[T]he protection of the First Amendment[] is not restricted to orthodox religious practices.").

45. *See* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1225 (2017).

46. *See* United States v. Seeger, 380 U.S. 163, 185 (1965) ("[W]e hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case."). As discussed *infra* in Section II.B.1, there is historical support for the process of adjudicating sincerity. The New Jersey Supreme Court recently issued a ruling along these lines. Separate from the ministerial exception, the court interpreted New Jersey law to protect the ability of a religious school to require staff to respect and promote church teaching. It explained, "[t]he religious tenets exception allowed St. Theresa's to require its employees, as a condition of employment, to abide by Catholic law . . . ." Crisitello v. St. Theresa Sch., No. 085213, 2023 WL 5185586, at *12 (N.J. Aug. 14, 2023).

47. *See* Michael Helfand, *Religious Institutionalism, Implied Consent, and the Value of Voluntarism*, 88 S. CAL. L. REV. 539, 542, 579 (2015).

example, if an employer allegedly defamed an employee, would the employee be allowed to sue, or would that constitute impermissible government interference? Helfand also argues that antiestablishment interests are less relevant here.

At the very least, the open question on the doctrinal approach to this area of law highlights some of the complexities in play when the Court determines whether a particular area of religious exercise ought to be entitled to absolute protection.

D. Absolute Protections for All Religious Exercise?

Given that absolute protections for religious exercise make sense in some important contexts, why not use that doctrinal tool for all aspects of religious exercise? Setting aside the historical misunderstanding discussed below in Part II that this approach would rely on, it would also raise significant workability issues. For example, the performance of key religious ceremonies is certainly an important form of religious exercise. But could one make such a protection categorical? What of the religious ceremony of polygamous marriage? Should religious groups be able to participate in that ceremony without any assessment of government reasons for prohibiting that type of conduct? Such a rule seems unlikely, given the Court's decision in *Reynolds v. United States*.[48] It's also difficult to point to an Establishment Clause interest in requiring the government to permit any religious form of worship, no questions asked.[49] Yet it cannot be that the opposite is true: that religious groups or individuals are entitled to *no* protection for their ability to engage in religious worship ceremonies.

In other words, absolute protections can be important for religious exercise in some contexts. But absolute protection is very strong, and it thus lends itself best to clearly defined and limited rights, such that the protection can be narrow and deep. If only absolute protections were recognized for free-exercise rights, there would likely be large swaths of religious activity left unprotected, particularly for minority religious groups in our pluralistic society.[50]

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48. 98 U.S. 145, 168 (1878) (upholding a federal bigamy ban).

49. Note that the opposite is true, in that there is an Establishment Clause interest in ensuring government does not *compel* a religious exercise. *See Kennedy*, 142 S. Ct. at 2429.

50. *See generally* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of Religion*, 39 HASTINGS CONST. L.Q. 357 (2011) (discussing some tradeoffs between expansive definitions of religion and expansive concepts of free exercise); *see also* Mark Strasser, *Definitions, Religion, and Free Exercise Guarantees*, 51 TULSA L. REV. 1 (2015); Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 407 (2018) (noting that some Justices "seem to have clearly understood that no legal system can provide absolute constitutional protections without limiting the scope of the right entitled to such protection"); Lucien J. Dhooge, *The Equivalence of Religion and Conscience*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 253, 255-60 (2017) (discussing

When courts are considering protections for religious adherents, they should assess whether the type of religious exercise at issue is one with a sufficiently strong historical pedigree and overlapping antiestablishment interests that it might warrant absolute constitutional protection. But for reasons discussed below, broader protections can be offered to religious-exercise rights when those protections are only presumptive and leave a safety valve for other important societal considerations.

II. PRESUMPTIVE PROTECTIONS UNDER THE FREE EXERCISE CLAUSE

One presumptive approach the Supreme Court has used to protect aspects of religious exercise is strict scrutiny that would be triggered by a substantial burden on sincere religious exercise, even by neutral and generally applicable laws. Once a plaintiff makes that initial showing, the burden shifts to the government to demonstrate its actions are necessary to advance a compelling government interest. But the Court in *Smith* abandoned strict scrutiny largely based on concerns related to the workability of that legal framework in light of judicial competencies. Since then, other scholars have also critiqued strict scrutiny as being an ahistorical judicial invention that is not supported by the original meaning of the Constitution. As strict scrutiny was sometimes applied in the pre-*Smith* regime,[51] some of these critiques were fair. But this Essay advocates for a version of strict scrutiny that avoids these pitfalls.

A. Problems with Strict Scrutiny Under Sherbert *and* Yoder

Begin with some of the problems the *Smith* Court identified with the *Sherbert*/*Yoder* strict-scrutiny regime.[52] First, strict scrutiny as applied under *Sherbert* sometimes allowed courts to assess how central religious beliefs were to an adherent. This approach came under sustained attack. Justice Scalia explained:

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech

some "hazards" that can arise if absolute protections are extended too far under a too-expansive definition of religion).

51. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

52. While this Section summarizes problems *Smith* pointed to regarding strict scrutiny, it does not endorse all of these concerns as appropriate even in light of the pre-*Smith* strict-scrutiny regime.

> field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims."[53]

In other words, assessing how subjectively important a religious belief is to an adherent generally isn't an inquiry that judges are competent to perform. As a result, this creates an unworkable test that leads to unpredictable results.

Second, the *Smith* Court also expressed concern about the workability of the "balancing test" under *Sherbert*.[54] And, to be fair, the Court had described what it was doing as "balancing" in previous cases. For example, in *Yoder*, the Court purported to undertake a "balancing process," weighing the state's interest in "universal education" against the "traditional interests of parents" regarding the "religious upbringing of their children."[55]

Although it received no briefing on whether balancing is appropriate in general, the *Smith* Court sua sponte worried that balancing might allow judges to interfere too much with the government's ability to "carry out other aspects of public policy."[56] Justice Scalia did not mince words about courts' institutional competence to balance competing interests. He thought it "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[57] In his view, the appropriate balance between the value of religious exercise and value of other societal interests was not something "appropriate[ly] . . . discerned by the courts."[58] More recently, Justice Kavanaugh has objected to strict scrutiny on the grounds that it encourages courts to perform moral reasoning beyond their institutional competence.[59]

Third, both Scalia and scholars such as J. Joel Alicea have argued that strict scrutiny is an ahistorical, postwar judicial invention that lacks a sufficient

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53. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 886-87 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (Stevens, J., concurring)).

54. *Id.* at 883-84.

55. *Yoder*, 406 U.S. at 214.

56. *Smith*, 494 U.S. at 885, 888.

57. *Id.* at 889-90 n.5.

58. *Id.* at 890.

59. Ramirez v. Collier, 142 S. Ct. 1264, 1286-88 (2022) (Kavanaugh, J., concurring). Though I have observed elsewhere with Mark Rienzi that Scalia's sky-is-falling concerns about workability were likely exaggerated. *See, e.g.*, Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or as-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1631-34 (2018).

historical pedigree for originalist purposes.[60] Alicea argues that strict scrutiny did not exist at the Founding and instead was first articulated in the late 1950s and early 1960s.[61] According to this view, asking courts to decide which interests are "compelling" and whether government has chosen the "least restrictive alternative" has no support in Founding Era sources.

In sum, pre-*Smith* strict scrutiny was criticized for allowing problematic assessments of religious centrality, for requiring balancing that was not judicially administrable, and for lacking a sufficient historical basis. The historically grounded version of strict scrutiny discussed below addresses each of these concerns in turn.

B. Proposing an Alternative: A Judicially Administrable and Historically Grounded Version of Strict Scrutiny

I share some of the concerns of the scholars and jurists discussed in the previous Section regarding judicial approaches that require incommensurable balancing of competing interests, or that delve into the "centrality" of religious beliefs. However, I argue that these bugs in the Supreme Court's early strict-scrutiny approach are not endemic to that test, as demonstrated by the way in which many courts have applied strict scrutiny post-*Smith* under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use Institutionalized Persons Act (RLUIPA)—laws Congress passed in response to *Smith*.

Accordingly, in this Section I discuss a version of strict scrutiny that avoids the workability issues *Smith* identified and addresses the sometimes overstated historical concerns scholars have raised. Specifically, the test I defend would operate as follows. Instead of assessing the centrality of religious belief or balancing incommensurable values, this version of strict scrutiny would take an objective approach to the threshold inquiry of the substantial burden test and exclude all government justifications for interfering with religious exercise other than those other than a select category. Those modifications would join the current second prong of strict scrutiny, requiring the government to demonstrate its actions were necessary to advance its permissible interest. This Section also assesses Founding Era sources that provide support (and even further ground) the various elements of this doctrinal test.

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60. City of Boerne v. Flores, 521 U.S. 507, 542-44 (1997) (Scalia, J., concurring in part); Alicea & Ohlendorf, *supra* note 10; *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 173 (2022) (making a similar argument); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 357 (2006).

61. Alicea & Ohlendorf, *supra* note 10, at 75.

1. *Objective Interference with Sincere Religious Belief Rather than Centrality and Subjectivity*

The Supreme Court's modern use of strict scrutiny demonstrates that courts can effectively protect religious exercise, without assessing the centrality of religious beliefs or subjective religious consequences. Under RFRA and RLUIPA, courts are prohibited from assessing how central a particular belief is to an adherent's belief system. Instead, courts must protect "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"[62] when government has imposed a substantial burden on that religious exercise.[63]

Though the precise meaning of substantial burden is debated, the approach employed by modern courts focuses not on the subjective gravity of the spiritual harm but rather on the objective gravity of the government's interference with voluntary religious choice.[64] That is, the court takes the subjective religious exercise as the religious claimant describes it—so long as the court determines it is sincere—and then looks at what the government is objectively doing that interferes with the desired religious exercise.[65] Put differently, courts "assess whether the government is bringing to bear its . . . power in a way that inhibits the important ideal of religious voluntarism—the ability of individuals to voluntarily practice their religious exercise consistent with their own free self-development."[66]

In practice, substantial burdens take two forms. One way of interfering with voluntary choice is by making it more costly—by imposing penalties or denying government benefits. But sometimes the interference is more direct; sometimes government simply makes that voluntary choice impossible, rather than costly. When that occurs, I have argued that the burden imposed by government is even greater than that caused by threatened penalties, which means a substantial burden should be even easier to find.[67] Then-Judge Gorsuch made a similar point when he explained that when government "refuses any access" to religious

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62. 42 U.S.C.A. § 2000cc-5 (West, Westlaw through Pub. L. No. 118-13).

63. 42 U.S.C.A. § 2000bb-1 (West, Westlaw through Pub. L. No. 118-13) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

64. Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771, 1774-75.

65. *Id.*

66. *See* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1300-01 (2021).

67. *Id.* at 1344.

facilities, making a religious exercise physically impossible, "it doesn't take much work to see" that such a refusal imposes a substantial burden.[68]

This objective, centrality-free view of substantial burdens would avoid some of the issues that bedeviled courts prior to *Smith*, as they tried to determine how important a religious belief or exercise was to a religious adherent, or how grave the spiritual consequences would be of forcing a religious adherent to violate that religious exercise.[69] Instead, it would require the plaintiff to show that the objective government action causes "more than an inconvenience."[70] This showing that the government interference is more than de minimis might sometimes involve questions about line drawing. But if one draws on cases like *Yoder*, then a five-dollar criminal penalty is still above that de minimis threshold.[71]

This approach to substantial burdens would not, however, include government actions that some religious adherents view as a sacrilege, but that do not interfere with the voluntary choice of that adherent. For example, in *Bowen v. Roy*,[72] Stephen J. Roy, a member of the Abenaki Tribe, objected to the requirement that his daughter, Little Bird of the Snow, obtain a Social Security number in order to qualify for welfare benefits. Prior to trial the parties agreed that Roy's daughter did not have a Social Security number. The objective burden in that case was initially clear: Roy felt that requiring his daughter to obtain a Social Security number as a condition of obtaining benefits would prevent her future religious power from being fully realized and thus imposed a clear objective burden — the denial of government benefits — on her desired religious exercise.[73]

However, on the final day of the trial, it was discovered that Little Bird of the Snow did in fact have a Social Security number, and the litigants' arguments shifted. On appeal, instead of arguing that requiring the daughter to obtain a Social Security number would directly interfere with her religious practice, Roy argued that the government's use of the already-existing number would constitute a "great evil." This argument essentially amounted to a claim that the government was, itself, engaging in a sacrilege. But the claim did not point to any objective interference with some religious exercise Little Bird of the Snow wished

68. Yellowbear v. Lampert, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.).

69. Barclay & Steele, *supra* note 66, at 1347-48.

70. Dorman v. Aronofsky, 36 F.4th 1306, 1314 (11th Cir. 2022) (quoting Thai Meditation Ass'n of Ala., Inc. v. City of Mobile, 980 F.3d 821, 829-30 (11th Cir. 2020)). The Court's decision in *Yoder* suggests that a five-dollar criminal penalty in the 1970s was still more than an inconvenience. *See* Wisconsin v. Yoder, 406 U.S. 205, 208 (1972).

71. *Yoder*, 406 U.S. at 214. As long as the burden on the claimant is not being relativized to the government interest in some way, then this line drawing question does not require incommensurate balancing.

72. 476 U.S. 693 (1986).

73. Barclay & Steele, *supra* note 66, at 1347-48 (discussing *Bowen*).

to perform.[74] As Chief Justice Burger explained: "Never to our knowledge has the Court interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family."[75]

Regarding the requirement of sincerity, courts have been adjudicating sincerity for a long time, and the rules for doing so are fairly clear.[76] In addition, some Founding Era sources provide support for the substantial burden test described above, focusing on government interference with the voluntary religious choice that an adherent would make regarding his or her sincere religious exercise.

In a famous 1767 speech in the House of Lords, Lord Mansfield, a well-known English jurist, discussed the proper interpretation of the Corporation, Test, and Toleration Acts, as well as a municipal bylaw in London, as applied to religious dissenters.[77] The Corporation and Test Acts barred nonconforming Protestants from serving as sheriff of London (among other things). London then passed a bylaw that fined anyone who refused to serve as sheriff. This created a useful money-making operation for the city, which repeatedly elected dissenting Protestants in order to fine them. Eventually, some of the dissenters refused to pay the fine, and their case went up to the House of Lords. The House of Lords ultimately ruled in favor of the religious dissenters, and Lord Mansfield's speech was in favor of the ruling.[78]

Mansfield emphasized that sincerity is a question of fact, amenable to trial by jury.[79] He noted that "though God alone is an absolute judge of a man's religious profession, and of his conscience, yet there are marks even of sincerity, among which there is none more certain than consistency" between professed beliefs and "overt-acts."[80] Based on these considerations, Mansfield concluded

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74. *Id.*

75. *Bowen*, 476 U.S. at 699 (emphasis omitted).

76. *See* Chapman, *supra* note 43; Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59-60 (2014) ("There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity.").

77. THE SPEECH OF THE RIGHT HONOURABLE LORD MANSFIELD IN THE HOUSE OF LORDS, IN THE CAUSE BETWEEN THE CITY OF LONDON AND THE DISSENTERS 7-25 (Bridge-Street, Belfast, Daniel Blow 1774); *see also* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 240-41 (2004) (describing the importance of this speech and the historical context). For a discussion of some of Mansfield's views on law and religion, and the Founding Era reception of those views, see OLDHAM, *supra*, at 241 n.33.

78. OLDHAM, *supra* note 77, at 241.

79. *Id.* at 259.

80. MURRAY, *supra* note 77, at 20.

that the defendant was "an honest conscientious dissenter."[81] He also argued that "[p]ersecution for a sincere, though erroneous conscience, is not to be deduced from reason or the fitness of things."[82]

As to the burden on this sincere religious exercise, Mansfield pointed out that the defendant was in a position where there was "no escaping" the burden.[83] If the dissenting Protestants accepted the appointment as sheriff but did so without taking communion offered by the Established Church of England, consistent with their religious beliefs, they would be punished. Yet if they declined the appointment, they would also be punished. In other words, the Lords evaluated the objective burden the government imposed on the religious adherent's ability to act in accordance with his sincere religious belief. And putting these religious dissenters in this "wretched dilemma," between violating conscience on one hand and violating the law on the other, required the Lords to look carefully at the government's justifications for its legislative scheme.[84] I return to that portion of Lord Mansfield's inquiry below in Section II.B.2.

In a similar vein, in the two earliest known reported cases that granted religious exemptions in the new Republic—the New York case of *People v. Philips* in 1813[85] and the Virginia case of *Commonwealth v. Cronin* in 1855[86]—the courts' analyses likewise resemble modern substantial-burden analysis in some important respects.[87] Both cases dealt with whether the government could subpoena a Catholic priest and force him to testify (or face punishment for refusing to testify) about a confession the priest had received about a crime.

The *Philips* court noted the burden the government's requirement would impose on the priest's ability to exercise his religion. Requiring the priest to testify would place him "between Scylla and Charybdis" where the priest must "either violate his oath, or proclaim his infamy in the face of day" and be subject to "degradation" as a consequence of committing the crime of not testifying.[88] And in *Cronin*, the court likewise observed that the priest would be forced to "either

81. *Id.* at 19.

82. *Id.* at 12.

83. *Id.* at 23.

84. *Id.* at 23.

85. 1 W.L.J. 109 (1813); WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 52-54 (photo. reprt. 1974) (1813).

86. 1 Q.L.J. 128 (Va. Cir. Ct. 1855).

87. For a more in-depth discussion of these cases, see Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 103-11 (2020).

88. SAMPSON, *supra* note 85, at 99. In other words, if forced to testify, "he violates his ecclesiastical oath—If he prevaricates he violates his judicial oath—Whether he lies, or whether he testifies the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience." *Id.* at 103.

violate the oath administered to him by giving false testimony, or by disclosing what he has received in the confessional, violate the ecclesiastic oath administered at the time of his ordination," or by "silence" find himself in the "contempt" of the court.[89] The priest would thus be "pressed by the whole weight of the penal branch of the law, and be prohibited from the exercise of this essential and indispensable part of [his] religion in confessing all such misdeeds."[90] To the priest, the court noted, this "would be little short of persecution."[91] As with the Mansfield speech discussed above, this interference with religious exercise by the government led the court to look carefully at the government's claimed justifications for doing so. And in all three of these cases, the courts were looking at the objective actions taken by government that would objectively "press" the "weight" of the sovereign power in a way that objectively made it more difficult for religious believers to comply with their consciences.[92]

2. *A Historically Grounded Exclusionary Norm Rather than Incommensurate Balancing*

One of the criticisms leveled at strict scrutiny focuses on how the test allows judges to subjectively determine what counts as compelling or not and then to weigh those government interests against the importance of religious exercise. This criticism goes to both workability and lack of historical support. Justice Kavanaugh recently asked, "what does 'compelling' mean, and how does the Court determine when the State's interest rises to that level?"[93] J. Joel Alicea and John D. 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."[94] They further note that "[t]he tiers-of-scrutiny framework emerged only in the mid-twentieth century—and even then, it was devised not as a faithful implementation of the Constitution's meaning but as a politically-expedient compromise" that allowed the "weighing [of] government interests" to "*evade* the categorical language" of the Constitution.[95] And

89. *Cronin*, 1 Q.L.J. at 139.

90. *Id.* at 138-39.

91. *Id.* at 139 (emphasis added).

92. *Id.* at 138-39.

93. Ramirez v. Collier, 595 U.S. 411, 442 (2022) (Kavanaugh, J., concurring).

94. Alicea & Ohlendorf, *supra* note 10, at 81.

95. Brief of Amicus Curiae J. Joel Alicea in Support of Petitioners and Reversal at 5, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

as noted above, Justice Scalia expressed his own concerns about the idea of judges balancing the incommensurable.[96]

But as I explain elsewhere, the Supreme Court's modern use of strict scrutiny to protect religious exercise demonstrates that strict scrutiny is not most accurately understood as a balancing test—certainly not if balancing means that at some level courts are deciding which value is more important in a contest between a government interest like peace and safety on the one hand and religious exercise on the other. Rather, strict scrutiny is better understood as a type of exclusionary reason (or exclusionary norm) combined with a heavy evidentiary burden.[97]

In the philosophy of practical reasoning, an exclusionary reason is understood as a reason that limits the operation of other reasons; that is, exclusionary reasons prevent an agent from acting on certain other reasons.[98] As Joseph Raz explains, the "very point of exclusionary reasons is to bypass issues of weight by excluding consideration of the excluded reasons regardless of weight."[99]

The compelling interest test in the RFRA and RLUIPA contexts have essentially evolved to exclude any interest (or reason) that would allow the government to defeat the religious right in any case (e.g., an interest in administrative convenience, or an interest in avoiding any marginal cost, no matter how small). As a practical matter, courts also often assume without deciding that the government's interest is compelling, and then simply move on to assessing whether the government satisfied its evidentiary burden.[100]

Understood in this light, strict scrutiny directs courts to exclude all but the permissible reasons for interfering with religious exercise. (Under RFRA, those reasons must be "compelling" ones.) And then it requires the government to demonstrate with clear evidence that the government's actions were necessary to advance the permissible reason that it articulated. This type of analysis, while not without its complications, is not balancing.

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96. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 889 n.5 (1990).

97. Barclay, *supra* note 16.

98. JOSEPH RAZ, PRACTICAL REASON AND NORMS 62 (1999).

99. *Id.* at 190.

100. *See, e.g.*, Ramirez v. Collier, 142 S. Ct. 1264, 1279 (2022) ("We do not doubt that prison officials have a compelling interest in monitoring an execution and responding effectively during any potential emergency . . . . But respondents fail to show that a categorical ban on all audible prayer is the least restrictive means of furthering their compelling interests."); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691-92 (2014) ("Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test.").

As I have explained elsewhere, there is historical support for this version of strict scrutiny in the religious-exercise context.[101] Begin with the text of the First Amendment, which seems to recognize the preexisting nature of religious exercise as a right. That Amendment instructs government not to "prohibit[] *the* free exercise" of "religion." Note the important article: *the*. It suggests that the free exercise right was not created by the Constitution. As George Washington similarly observed in his letter to the Quakers upon being elected President, "The liberty enjoyed by the People of these States, of worshipping Almighty God agreeable to their Consciences, is not only among the choicest of their Blessings, but also of their Rights."[102] Washington, that is, recognized the right to worship in a manner agreeable with conscience that preexisted the First Amendment. And the scope of that right, as explained below, included certain limitations in certain contexts.

The idea that rights were subject to inherent limitations in the public interest was widely accepted at the Founding.[103] "[N]o government . . . can exist," James Wilson stated, "unless private and individual rights are subservient to the public and general happiness of the nation."[104] He also explained, "[i]n a state of natural liberty," meaning a state of nature, "every one is allowed to act according to his own inclination, provided he transgress not those limits, which are assigned to him by the law of nature."[105] In other words, limitations on the ability to exercise one's religion based on certain government reasons were not external to the right; they were built into the scope of the right.

Early state constitutional protections for religious exercise contained provisos enumerating the types of government interests that were effectual to limit religious exercise. Many of these protections were thus limited by the government's ability to maintain "peace" or "safety" in the relevant state and to prevent "licentiousness or immorality."[106] For example, New York's Constitution

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101. Barclay, *supra* note 87, at 113-18.

102. *From George Washington to the Society of Quakers, 13 October 1789*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/05-04-02-0188 [https://perma.cc/X8NF-EP2G].

103. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1435 (2020); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461 (1990); VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANING OF THE FIRST AMENDMENT RELIGION CLAUSES 59 (2022).

104. JAMES WILSON & ALEXANDER DALLAS, THE SUBSTANCE OF A SPEECH DELIVERED BY JAMES WILSON, ESQ. EXPLANATORY OF THE GENERAL PRINCIPLES OF THE PROPOSED FEDERAL CONSTITUTION 8 (Phila., Thomas Bradford 1787).

105. JAMES WILSON, *Of the Natural Rights of Individuals*, *in* 2 COLLECTED WORKS OF JAMES WILSON 1053, 1056 (Kermit L. Hall & Mark David Hall eds., 2007).

106. McConnell, *supra* note 103, at 1461-62.

protected "the free exercise and enjoyment of religious profession and worship" so long as those actions did not "excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."[107] Both Douglas Laycock and Michael W. McConnell argue that the constitutional provisos to "protect public peace and safety" alongside religious liberty suggest that the natural right to religious liberty was understood to include certain limitations internal to the right, many of which were illustrated in these state constitutional provisos; the argument is that this understanding of permissible limitations on religious exercise acted as a precursor to the modern compelling interest test.[108] Justice Alito, joined by Justices Gorsuch and Thomas, made a similar argument in his concurrence in *Fulton*.[109]

But what do we make of the fact that state constitutional provisions were not uniform in the types of limitations they allowed on religious exercise? Vincent Philip Muñoz argues that we would expect uniformity in state constitutional provisions if the Founders understood religious exercise to allow for exemptions from generally applicable laws for the types of reasons outlined in state constitutions.[110] Thus, he claims this undercuts the usefulness of state constitutional provisos as evidence of meaning.

However, this argument overlooks the fact that at the Founding, "Americans used to view the state and federal bills of rights as declaratory of rights that were common across jurisdictions rather than as creating rights specific to that jurisdiction."[111] As Jud Campbell has explained, there was reason to think at the Founding that, as an interpretive matter, independent sovereigns' distinct constitutional guarantees carried the same meaning, notwithstanding variations in language.[112] Sometimes state courts would even cite the constitutional provisions of other states in order to protect a natural right that had not been outlined

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107. *Id.* at 1456 (citing N.Y. CONST. of 1777, art. XXXVIII).

108. Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99, 102-03 (1990) ("peace and safety in their language, compelling interest in ours"); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 185-86 (1992) ("This formulation was a precursor to the compelling-interest test . . . ."); McConnell, *supra* note 103, at 1461-64 ("The wording of the state constitutions also provides some guidance regarding when the government's interest is sufficiently strong to override an admitted free exercise claim.").

109. 141 S. Ct. at 1924 (Alito, J., concurring).

110. MUÑOZ, *supra* note 103, at 64.

111. Campbell, *supra* note 103, at 1434.

112. *Id.* at 1434-35 ("[R]ights mentioned in state declarations and in the federal constitution were often conceptualized as a species of general law, not as a form of enacted law that one would expect to vary from jurisdiction to jurisdiction.").

in the court's home state constitution.[113] The precise articulation of the right in a written instrument was thus of marginal importance for delimiting its scope and even its existence.

The various state constitutions declaring these types of limitations thus provide evidence of what types of government interests were understood as natural limitations to the right of religious exercise. McConnell has observed that "[t]he most common feature of the state provisions was the government's right to protect public peace and safety."[114] Nine of the states limited the free-exercise right to actions that were "peaceable" or that would not disturb the "peace" or "safety" of the state.[115] At the other end of the spectrum, only one referred to acts contrary to "good order"; and only one allowed government to interfere with religious acts that were contrary to the "happiness" of society.[116]

Madison had his own views about which end of the spectrum more accurately captured the types of government interests appropriate for interfering with religious rights: he embraced only the narrowest set of government interests for interfering with religious exercise. In debates over the free-exercise provision of the Virginia Bill of Rights of 1776, Patrick Henry proposed "that all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society."[117] Madison objected both because the text used the word "toleration" and because he thought "happiness" was far too broad a reason to allow government to interfere with religious exercise.[118] Indeed, if that reason were permissible, any public policy would be allowed to limit religious exercise. Madison proposed instead that free exercise be protected "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."[119] The final provision was passed without explicitly addressing the issue, perhaps compromising in its silence. But this debate does indicate that Madison

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113. *See, e.g.*, Nunn v. State, 1 Ga. 243 (1846) (ruling in favor of the right to bear arms by pointing to other state constitutions since no such protection was outlined in the Georgia constitution); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 32-55 (2007) (collecting cases); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 153-57 (1998); WILLIAM DAVENPORT MERCER, DIMINISHING THE BILL OF RIGHTS: *BARRON V. BALTIMORE* AND THE FOUNDATIONS OF AMERICAN LIBERTY 189-99 (2017).

114. McConnell, *supra* note 103, at 1464.

115. *Id.* at 1461. The nine states were New York, New Hampshire, Georgia, Delaware, Maryland, Massachusetts, New Jersey, Rhode Island, and South Carolina.

116. *Id.* at 1462.

117. SANFORD COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491 (1902).

118. *Id.* at 492.

119. *Id.*

thought the government interest must be something quite stringent: only action necessary to protect the equal liberty of others and the very existence of the State.

What to make of all this as a doctrinal matter? At the very least, there is historical support for the idea that mere government preference, convenience, or desire to avoid any marginal costs were not historically recognized as permissible reasons to limit religious exercise. This seems like a common denominator that is arguably supported by the majority of the available historical evidence. And in that sense, the modern compelling-interest test (as implemented under RFRA and RLUIPA) reflects this basic level of original understanding of the right. Thus, the current version of strict scrutiny as applied in those contexts may be the most workable version of strict scrutiny that also has sufficient historical support.

Jurists wishing to construct an even more robust historical basis for strict scrutiny have an additional doctrinal option. Courts could identify specific government interests that were viewed at the Founding as inherent limitations on natural rights related to religious liberty, and only allow those sorts of government interests to limit religious exercise under strict scrutiny's exclusionary norm.[120] Focusing on this more historically grounded set of permissible government interests may result in a smaller and more determinate set of interests than the list of governmental interests that lower courts have deemed compelling. Relying on these historically recognized government interests, rather than whatever a judge deems compelling, could further curtail the political and moral determinations courts make under strict scrutiny, thus addressing concerns like those raised by Justice Kavanaugh. On the other hand, focusing on this set of

120. This Essay focuses on Founding Era meaning to shed light on the understanding of the Free Exercise Clause leading up to, and not long after, the time it was ratified. Depending on whether one views the incorporation of the First Amendment to the states as an important moment for identifying constitutional meaning, historical understandings in that period may also be relevant. Assessing that important history is beyond the scope of this Essay, but it is the subject of other research. *See* Kurt T. Lash & Stephanie H. Barclay, A Crust of Bread: Religious Resistance and the Fourteenth Amendment (unpublished manuscript) (on file with author) (highlighting historical sources leading up to the adoption of the Fourteenth Amendment that support a doctrinal approach resembling strict scrutiny for religious exemptions in the face of neutral and generally applicable laws); *see also* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1130-31 (In the early nineteenth century, "the separationist belief that the overlap of church and state would be so minor as to involve only 'unessential points' became demonstrably untenable . . . [and] would provide the framers of the Fourteenth Amendment with clear examples of why a second adoption of the Free Exercise Clause was necessary."); Campbell, *supra* note 103, at 1435 ("The crucial issue [regarding the Fourteenth Amendment] that emerged after 1868 was not—as we usually assume—identifying which rights the Fourteenth Amendment created (or, to use the modern lingo, 'incorporated') against the states. Those rights already existed. Rather, the central controversy in the late nineteenth century was the extent to which the Fourteenth Amendment added a new way of enforcing these rights.").

government interests may give rise to its own indeterminacy and workability issues, depending on which government interests the court ultimately identifies as most supported by historical evidence.[121]

Finally, at what level of generality should courts assess the permissible government interest? The bottom line is that the historical record alone almost certainly does not definitively answer that question. But some litigation practicalities will drive the answer to that question. First, the remedy sought by plaintiffs will influence the level of generality. Rights claimants will often seek an exemption from a law for a discrete religious exercise (such as opting out of just two years of public education).[122] To deny such an exemption, the government will need to explain how its interests in *two additional years* of public education require denying that remedy, as opposed to why the government has an interest in education in the abstract. Second, evidentiary concerns regarding tailoring between means and ends will put practical pressure on the government regarding the level of abstraction. On one hand, government will need to select a level of generality that is not so abstract that the government's policies will be easily shown as wildly underinclusive in accomplishing that government interest. On the other hand, if the government interest is articulated at an extremely granular level (e.g., avoiding any marginal increase in risk or cost), the government's policy will often be shown not to be evenhanded, and to countenance those types of marginal risks in many other contexts. The government's willingness to accept marginal risks elsewhere will undercut the government's argument that it must avoid such risk only for the religious exemption request before it. All of these questions may involve line drawing and hard cases. But so long as the government interest is not being relativized somehow in "weight" to the religious claimant's interest, then courts need not engage in balancing. This relationship between the government's interest and the evidentiary burden is discussed in greater detail in the subsequent Section.

3. Historical Support for the Less-Restrictive-Means Test

What about the less-restrictive-means and narrow-tailoring aspects of strict scrutiny? Are those parts of the test at least consistent with a historical understanding of the Free Exercise Clause? The short answer is yes.[123]

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121. A handful of state constitutional provisions, for example, would have allowed government limitations of rights to protect morality or prevent licentiousness.

122. *See* Wisconsin v. Yoder, 406 U.S. 205, 222-36 (1972)

123. For a more in-depth discussion of this issue, see Barclay, *supra* note 87, at 113-17 (2020).

Turning back to some of the earliest American cases, in both *People v. Philips*[124] and *Commonwealth v. Cronin*[125] the state court sought to identify the government's stated goals of promoting public safety and decreasing crime after identifying the burden on religious exercise. And both courts demanded evidence that the government was actually advancing its stated goals. The *Philips* court, for example, exhibited skepticism about the government's claim that denying a religious exemption would advance the government's stated interests in public safety and decreasing crime. When the government tried to rely on hypothetical concerns and slippery-slope arguments, the court concluded that "[t]he doctrine contended for, by putting hypothetical cases, in which the concealment of a crime communicated in penance, might have a pernicious effect, is founded on false reasoning."[126] The court went on, "[t]o attempt to establish a general rule, or to lay down a general proposition from accidental circumstances, which occur but rarely, or from extreme cases . . . is totally repugnant to the rules of logic and the maxims of law."[127] The court emphasized that the "question is not" whether hypothetically the religious exercise *could* lead to a "public injury," but whether the government had shown that the specific religious exercise at issue had the "natural tendency" to "produce practices inconsistent with the public safety or tranquility."[128] It would be "stretching [the Constitution] on the rack," the court concluded, to say that the at-issue religious exercise really threatened public safety or tranquility.[129] To hold otherwise "would be to mock the understanding" of religious exercise, and "to render the liberty of conscience a mere illusion."[130]

The *Cronin* court likewise declined to accept the government's assertion that denying a religious exemption was necessary to advance its interest in "promoting the ends of criminal justice."[131] The court noted that "whilst cases may be supposed in which the concealment of a fact communicated in penance might have a pernicious effect, . . . such instances are rare, and furnish no foundation for the rule that [priests] should be required to disclose in all cases."[132] The

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124. Ct. Gen. Sess., City of N.Y. (June 14, 1813). This case was not officially reported, but a record of the arguments and the court's ruling are found in SAMPSON, *supra* note 85, at 52.

125. Commonwealth v. Cronin, 1 Q.L.J. 128 (Va. Cir. Ct. 1855).

126. SAMPSON, *supra* note 85, at 112.

127. *Id.* at 112.

128. *Id.* at 112–13.

129. *Id.* at 113.

130. *Id.* at 113 ("It would be to destroy the enacting clause by the proviso — and to render the exception broader than the rule, to subvert all the principles of sound reasoning . . . .").

131. Commonwealth v. Cronin, 1 Q.L.J. 128, 140 (Va. Cir. Ct. 1855).

132. *Id.*

government instead had to show with specific evidence that the requested religious practice would be "inconsistent with the public safety."[133]

Additionally, the *Cronin* court pointed out that refusing to grant a religious exemption would in fact undermine the government's stated goal. Criminals would stop confessing to priests if they anticipated a leaky confessional seal, and the rule would thus "destroy the source" and "defeat itself."[134] The *Cronin* court also noted the broader legal landscape, in which these sorts of religious exemptions were afforded by legislatures in New York, Missouri, Wisconsin, and Michigan, and in countries such as Scotland.[135] In the court's mind, these legislative exemptions provided additional evidence that an exemption was also required, albeit a judicially enforced one.

Finally, the *Philips* court looked at the question of evenhandedness, considering existing secular exemptions to the general rule. These included exceptions for spousal privilege, attorney-client privilege, self-incrimination, or answers that would disgrace or degrade a person by "affect[ing] the purity of [their] character."[136] The court noted that the similarity of the way in which these exemptions undercut the government's interest meant they had a "very intimate conne[c]tion with the point in question."[137] In other words, analogous secular exemptions that the government provided undermined its claim that it could not provide a religious exemption as well.

These courts were essentially analyzing a principle other Founding Era jurists articulated when describing natural limits on natural rights in general: government "regulations" were permissible "as might be found *necessary* to prevent [the] exercise [of these rights] from operating prejudicially . . . to the general interests of the community."[138] This analysis resembles, in many important respects, the questions modern courts ask under less-restrictive-means analysis. Are the government's actions necessary to meaningfully advance its stated objective?[139] Is the government "prohibit[ing] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar

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133. *Id.*

134. *Id.*

135. *Id.* at 137.

136. SAMPSON, *supra* note 85, at 98-99.

137. *Id.* at 102.

138. State v. Buzzard, 4 Ark. 18, 21 (1842) (emphasis added).

139. *See, e.g.*, Ramirez v. Collier, 142 S. Ct. 1264, 1280 (2022) (finding that the government failed to show that its policy was necessary to accomplish its goal and that some of the government's concerns were based on "conjecture" and "speculation" insufficient to satisfy its burden).

way"?[140] These questions help courts determine whether there is a way that the government could accomplish its goal without interfering with religious exercise. And if so, then its interference is unnecessary and impermissible.

One might wonder why *Philips* and *Cronin* are relevant, given that they are state court cases, rather than a federal case arising under the federal First Amendment. There are multiple reasons, which I have discussed at greater length elsewhere,[141] but I'll note just one here. The framing of this question assumes that there is a substantive difference in the content of state free-exercise rights as compared to federal ones. But again, as Campbell has explained,

> [R]ights mentioned in state declarations and in the federal constitution were often conceptualized as a species of general law, not as a form of enacted law that one would expect to vary from jurisdiction to jurisdiction. State courts could—and often did—refer to the federal constitution and other state constitutional rights as evidence of rights that operated against their governments.[142]

Indeed, the *Cronin* court analyzed not just its state constitutional provision, but also the federal Free Exercise Clause.[143] These courts thus were not pointing to rights that their state constitutions created as a matter of positive law, but to rights that "already existed."[144]

Perhaps because of the understanding that free exercise referred to a preexisting right consistent with a state of nature—and contrary to arbitrary

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140. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1869 (2021). For example, in *Holt v. Hobbs*, 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. 574 U.S. 352, 367 (2015).

141. *See* Barclay, *supra* note 87, at 64-65. Note that there were a few judicial decisions that did not grant exemptions, but one state provided no basis for its decisions, and another state based its reasoning on an objection to judicial review in general, rather than any unique issue in the religious context. *Id.* Given our nation's subsequent constitutional settlement in favor of judicial review, it is not persuasive to use evidence of jurists skeptical of judicial review in a selective way that would only undermine judicial protection of religious-exercise rights. It is also an odd argument to make from defenders of *Smith*, as such commentators still generally approve of a role for judicial protection of religious exercise. They just think that judicial protection should be triggered by discrimination, rather than by substantial burdens. But the cases they rely on would prove too much, and allow for no judicial role in the protection of religion. Further, during an era when judicial decisions were sporadically recorded (or often lost even if recorded), the volume of judicial decisions in any particular direction provides random evidence at best. *Id.* at 70.

142. Campbell, *supra* note 103, at 1435.

143. Commonwealth v. Cronin, 1 Q.L.J. 128, 137-39 (Va. Cir. Ct. 1855).

144. *Id.*

interference by government—we see similar reasoning even in common-law England. Returning to the case discussed above in Section II.B.1, Lord Mansfield observed that religious dissenters faced great pressure from the law to violate their consciences. He then analyzed the government's reasons for interfering with conscience. And Lord Mansfield found those reasons insufficient and lacking credibility. The government's "proffered design" for its appointment of religious dissenters to be sheriffs "was to get fit and able persons to serve the office."[145] If the government "excluded" the dissenters from this requirement (i.e., gave them a religious exemption), the government claimed it would lack "fit and able persons to serve the office."[146] But as Lord Mansfield saw it, the government's evidence did not support its proffered reason. He speculated that the government "did not so much wish for their services, as for their fines."[147] Mansfield arrived at this conclusion because the government had been appointing religious dissenters to office who were "blind" or "bedridden," and thus disabled from serving, irrespective of their religious objection.[148] The government didn't actually "want [these dissenters] to serve the office."[149] In other words, the government's action did not advance its stated interest. Mansfield argued that this needless interference with religious exercise was contrary to the "eternal principles of Natural Religion," which were "part of the Common-law," and he thus concluded that the dissenters should not be subject to penalty.[150]

The historical evidence thus supports a judicial inquiry into whether the government's action is, as an evidentiary matter, necessary to advance the government's stated interest. And that is essentially the question that strict scrutiny's less-restrictive-means analysis directs courts to assess.

C. Other Doctrinal Alternatives

This Section briefly considers some of the benefits and drawbacks of other proposed doctrinal approaches to protecting religious exercise.

1. Why Not a Historical-Analog Test?

Why not replace *Smith* with something like *Bruen*'s historical-analog test across the board, instead of something like strict scrutiny? Under the historical

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145. MURRAY, *supra* note 77, at 24.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 25.

150. *Id.* at 12, 25.

analog approach, courts would simply determine the scope of the right based on the relevant historical analog of government regulation, and then provide categorical or absolute protection within that scope.[151] Put more precisely, for the scope of the right, *Bruen* seems to be looking to history not just for appropriate government interests, but also for the means that the government historically used to advance that interest.[152]

As discussed above in Part I, I agree that some aspects of free-exercise protection lend themselves to (and may even require) absolute protection, particularly where antiestablishment interests are also concerned. The ministerial exemption illustrates some important roles for this sort of reasoning.

But absolute protection based on historical means of protecting a right cannot be the only rubric for religious rights, for a few important reasons. First, this historical-analog approach fundamentally misunderstands the nature of the natural law free-exercise right as originally understood. It substitutes a faux-originalist "what laws existed" approach for the actual content of Free Exercise as the Founders understood it. Appropriate *means* of limiting the right were not frozen in history. If that were so, one might expect the Founders to have seen no problem with religious licensing regimes as, for example, had existed in England. Instead, the Founders understood religious exercise as being limited by the natural law and the social compact, which meant that government could often limit rights when doing so was in the public interest. But whether government is *in fact* acting in the public interest is, well, a factual question. Limitations on natural rights that the public interest required at the Founding may not be the same as limitations the public interest requires today. This is likely why the courts in *Philips* and *Cronin* weren't asking about historical means of limiting religious exercise that had existed leading up to the Founding, including in England. They were asking instead whether government had made a sufficient evidentiary showing that its interference with religious exercise was necessary to advance public safety and decrease crime, based on the specific and current facts and context relevant in the disputes before the court.

Second, there are many types of activity that the government didn't regulate at the Founding, but that is difficult to imagine a court providing a religious exemption for today. Consider a 2016 case involving a mother who asserted a religious-freedom defense to beating her seven-year-old son with a coat

151. Brief of Amicus Curiae J. Joel Alicea in Support of Petitioners and Reversal at 5, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843).

152. 142 S. Ct. at 2131 ("[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.").

hanger.[153] The mother "claimed her discipline method came straight from her evangelical Christian beliefs."[154] Under a historical-analog test, the mother has a powerful argument. There is no strong historical pedigree of child-protection laws at the Founding Era. At least by one account, no state in the United States had laws that specifically protected children from abuse until 1875, and Britain didn't adopt such laws until 1884.[155] Even then, these early laws were aimed at nonfamily members, and something like a parental beating would not have received specific focus until much later.[156] And conversely, one could certainly argue for a strong historical tradition of parental rights, including for religious reasons.[157]

Perhaps an advocate of the historical-analog approach would try to resolve this issue by arguing that the relevant "long, unbroken tradition of restriction"[158] by government need not date to the Founding Era, and so we could point to a long tradition of child-protection laws dating at least to the 1960s. But this leads to the second problem: the historical-analog approach raises difficult questions about which history we should be looking to (i.e., when is the relevant ending

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153. *See* Vic Ryckaert, *Mom Who Cited Religious Freedom Pleads Guilty*, INDYSTAR (Oct. 28, 2016, 8:15 AM), https://www.indystar.com/story/news/crime/2016/10/28/mom-who-cited-religious-freedom-plead-guilty-abuse/92876808 [https://perma.cc/VK39-E2GZ].

154. *Id.*

155. *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449 (2008) (noting that no government agency in the United States was responsible for child protection prior to 1875); Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 243 (1992). R v Hopley [1860] 175 ER 1024, establishes that as of the mid-19th century child discipline was a good defense to battery at common law. Excessive force has been forbidden since before then, but states generally didn't second-guess parents' avowed need for corporal punishment. *See, e.g.*, Johnson v. State, 21 Tenn. 283 (1840); State v. Pendergrass, 19 N.C. 365 (1837). For helpful background, see generally Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History*, 35 SOC. WORK 500 (1990).

156. *See Child Abuse*, BRITANNICA, https://www.britannica.com/topic/child-abuse [https://perma.cc/5DDL-DNBW] ("In 1962, American medical authorities discovered the phenomenon of 'baby battering'—the infliction of physical violence on small children—and both the federal government and states adopted laws to investigate and report such acts."); *History*, N.Y. SOC'Y PREVENTION CRUELTY CHILD., https://nyspcc.org/about-nyspcc/history [https://perma.cc/8MQ2-8QCH].

157. *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (discussing the "enduring American tradition" of parental religious education rights); Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *After 20 Years*, 38 J.L. & EDUC. 83, 95 n.78, 108-10 (2009); Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 373-74 (2012).

158. Haun, *supra* note 10, at 421.

point) and why that history is entitled to special privilege that would be folded into the scope of a constitutional right enacted long before.[159]

If the historical-analog test is open to looking at long historical traditions unmoored from the Founding Era and thus original understanding, it could arguably protect other troubling antireligious practices, including the anti-Catholic sentiments that inspired the wave of Blaine amendments in the nineteenth century. As Justice Frankfurter explained in 1948, "by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was *firmly established* in the consciousness of the nation."[160] Frankfurter was quoting a speech by President Grant advocating for the federal Blaine Amendment, in which Grant condemned the "superstition" of "sectarian, pagan or atheistical dogmas."[161] As the Supreme Court acknowledged in 2000, "it was an open secret that 'sectarian' was code for 'Catholic,'" and Blaine amendments "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general . . . ."[162] The Supreme Court has recently invalidated some of these types of laws as violating the Free Exercise Clause.[163] But a historical-analog approach untethered to original meaning, and dependent only on postratification traditions, could conceivably provide a constitutional justification for that type of discrimination.

If we return to the example of the mother beating her child, perhaps an advocate of the historical-analog approach would try to address this issue by raising the level of generality. There is no doubt that there is a long tradition dating back to the Founding of government regulation to protect public safety. And at that higher level of generality, one could easily argue that preventing child abuse is also protecting public safety. True enough. But at that level of generality, government could tie just about any regulation in any context to public safety. Which level of generality should be appropriate for the historical-analog test? Ironically, defenders of a historical-analog approach have pressed the level-of-

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159. *See generally* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023). *But see* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U.L. REV. 1653, 1661, 1666 (2020) (arguing that enduring practices are "one of the crucial . . . ingredients" of textual meaning and "represent the people's decisions about" their governance, and thus greater weight is given to Founding Era traditions).

160. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211-12 (1948); *id.* at 217 (Frankfurter, J., concurring) (emphasis added).

161. Ulysses S. Grant, U.S. President, President Grant's Des Moines Address (Sept. 29, 1875), *in* 3 ANNALS OF IOWA 138-39 (1897).

162. Mitchell v. Helms, 530 U.S. 793, 828 (2000).

163. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017); Carson v. Makin, 142 S. Ct. 1987 (2022).

generality problem against strict scrutiny.[164] But in fact it is an unavoidable problem that any form of originalism—or for that matter any legal doctrine—must grapple with.[165] And for the reasons discussed above in Section II.B.3, the level of generality problem may be a bigger issue for the historical-analog test, given that the issue is mitigated in the strict-scrutiny context by the practicalities of the less-restrictive-means test.

Furthermore, the key question will often be not whether public safety is a goal worth pursuing, but whether the government's actions denying a religious exemption are *actually* necessary to advance a certain aspect of public safety. If the government is not required to demonstrate, through some sort of evidentiary burden, that its actions are causally linked to its stated goal, government could use a reference to "public safety" as a trump card in any case to defeat a religious exemption, even if its actions weren't improving public safety in any meaningful sense.

Once we start to ask those sorts of evidentiary questions, like "were the government actions here necessary to advance public safety?" the legal analysis becomes virtually indistinguishable from the "least restrictive means" prong of the historically grounded strict-scrutiny analysis I discuss above. Though the tests might wear different labels, if we look from one to another, it would become practically "impossible to say which was which."[166]

These types of concerns may be one reason why *Bruen*'s historical-analog test has faced so much criticism.[167] They may also be why Justice Barrett recently acknowledged that in the First Amendment context, a doctrine requiring judicial

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164. *See* Alicea & Ohlendorf, *supra* note 10, at 81.

165. *See* Barclay, *Faux Strict Scrutiny*, *supra* note 97.

166. GEORGE ORWELL, ANIMAL FARM 118 (1945). As discussed in the preceding section, with strict scrutiny the level-of-generality problem is mitigated by some of the practicalities of the government evidentiary burden.

167. *See* Randy E. Barnett & Nelson Lund, *Implementing* Bruen, LAW & LIBERTY (Feb. 6, 2023), https://lawliberty.org/implementing-bruen [https://perma.cc/3GRY-BQ99]; Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023); Clara Fong, Kelly Percival & Thomas Wolf, *Judges Find Supreme Court's* Bruen *Test Unworkable*, BRENNAN CTR. JUST. (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable [https://perma.cc/3Y57-KZAM]; Matt Ford, *The Supreme Court's New Second Amendment Test Is Off to a Wild Start*, THE NEW REPUBLIC (Nov. 23, 2022), https://newrepublic.com/article/169069/supreme-court-second-amendment-test [https://perma.cc/H8RZ-YCTP]; Joseph Blocher & Darrell A.H. Miller, *A Supreme Court Head-Scratcher: Is a Colonial Musket 'Analogous' to an AR-15?*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/opinion/guns-supreme-court.html [https://perma.cc/UX67-XHMN].

"scrutiny" is "here to stay."[168] While strict scrutiny is not without its difficulties, there is something to be said for the devil one knows over the devil one doesn't.

2. Why Not Intermediate Scrutiny?

In Justice Barrett's *Fulton* concurrence, asking questions about what legal test might replace *Smith*, she compared religious exercise to speech and asked whether the form of scrutiny that replaced *Smith* should be strict or intermediate.[169] And some scholars, such as James M. Oleske, Jr., have advocated for an intermediate-scrutiny approach.[170]

Douglas Laycock and Thomas C. Berg have noted one important reason that intermediate scrutiny would be ill-fitted to the religious-exercise context. They explain that unlike burdens on speech, "burdens on religious practice often leave no adequate alternatives. Most obviously, believers who are prohibited from acting on their belief cannot simply change the belief: if Native Americans are barred from using peyote in worship, they can't switch to wine."[171] In contrast, speakers being regulated with something like time, place, and manner regulations can often speak in a different venue or through a different means.

Perhaps, too, the Supreme Court's jurisprudence in the intermediate-scrutiny arena should be more cautionary tale than exemplary model.[172] As Mark L. Rienzi and I have explained elsewhere, "even when dealing with laws that the Court describes as completely neutral and generally applicable, sometimes the Supreme Court employs exacting scrutiny for speech rights."[173] Christopher C. Lund similarly observes that "when it comes to generally applicable laws that burden freedom of speech, the Court has been all over the place."[174] The

168. Ordain and Establish, A Conversation with Justice Amy Coney Barrett, PROJECT CONST. ORIGINALISM & CATH. INTELL. TRADITION, at 25:23 (Sept. 25, 2023), https://podcasts.apple.com/us/podcast/ordain-and-establish/id1654514316?i=1000629089530 [https://perma.cc/4AXJ-WXD2]. For an article with additional excellent discussion about why strict scrutiny is likely here to stay, see Gabrielle Girgis, A Strict Scrutiny Regime for Free Exercise Post *Smith* (unpublished manuscript) (on file with author).

169. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) ("What forms of scrutiny should apply? Compare *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (assessing whether government's interest is 'compelling'), with *Gillette v. United States*, 401 U.S. 437, 462 (1971) (assessing whether government's interest is 'substantial')").

170. Oleske, *supra* note 9, at 1318, 1355-70.

171. Laycock & Berg, *supra* note 8, at 48; *see also* Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion,* 37 OXFORD J.L. & RELIGION 72-95 (2022).

172. *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 783-84, 786-87.

173. Barclay & Rienzi, *supra* note 59, at 1609.

174. Lund, *supra* note 8, at 2077.

distinctions the Court has made when applying intermediate scrutiny are often difficult to explain or justify as a doctrinal matter.

Finally, if one is looking for a more historically grounded test, the different flavors of scrutiny the Supreme Court has created since the 1960s under its tiered approach are the most liable to the charge of being both unworkable and an ahistorical judicial invention. As Justice Thomas has argued, the Court's doctrine on "tiers of scrutiny" has become "an unworkable morass of special exceptions and arbitrary applications" that treats "some constitutional rights [as] more equal than others."[175] There is historical support, as discussed above, for courts scrutinizing whether the government has demonstrated that its actions are necessary to advance its asserted reasons for interfering with a constitutional interest.[176] But scholars have yet to identify clear Founding Era examples where the judiciary self-consciously decided to moderately scrutinize some rights-curtailing acts and strictly scrutinize others.

3. What About Religious Discrimination?

This Essay articulates a test to replace the aspect of *Smith* that ruled against the use of strict scrutiny in the face of religious burdens caused by neutral and generally applicable laws, assuming the Supreme Court wanted an alternative to that test. It does not address the question of whether some form of religious discrimination should provide an independent route to strict scrutiny. That question lies beyond the scope of this Essay, but it's worth noting that a substantial-burden approach is not incompatible with a legal regime that treats religious discrimination as an alternative path to strict scrutiny. As Nathan Chapman has argued, the Court's current approach to government discrimination has both historical support as well as practical and political upside.[177] And one could easily imagine a world where Free Exercise doctrine allowed both as independent paths to strict scrutiny.

CONCLUSION

This Essay explores both the absolute and presumptive protections that could replace *Smith* and offer a workable and historically grounded method of providing robust protection to religious exercise. It demonstrates that a historical approach to the Free Exercise Clause protections is compatible with a strict-

175. *See* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 641-43 (2016) (Thomas, J., dissenting), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

176. *See supra* Section II.B.3.

177. *See* Chapman, *supra* note 2.

scrutiny approach. Both absolute protections and presumptive protections under a doctrine like strict scrutiny can be offered in ways that are consistent with Founding Era historical evidence of judicial protections of religious exercise.

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