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No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases

By Donald L. Beschle*

Introduction

The Bill of Rights of the United States Constitution contains no express provision calling for courts to balance the right of an individual against the social cost of enforcing that right. This stands in contrast to general twentieth-century constitutional documents adopted by western democracies. The Canadian Charter of Rights and Freedoms,[1] for example, provides that the rights provided are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[2] Rights may be strong, but they are clearly not absolute. The document itself calls for some sort of balancing.

Does the absence of such an express constitutional provision in the United States Constitution mean that rights are to be protected as absolutes, or at the very least, that they may be limited only to the extent necessary to protect other individual rights rather than general social welfare concerns?[3] A century of Supreme Court opinions rejects this conclusion. Instead, the Court has struggled to frame the appropriate balancing test when confronted with a rights claim. Should there be a single master balancing test, appropriate for all rights claims, or a range of tests depending on the right claimed?

If some form of balancing is inevitable, what sort of balancing test or tests is called for? Since the earliest days of

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1. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

2. *Id.* § 1.

3. The position that rights always outweigh general social interests, and may be limited only to further other rights, is most closely identified with Ronald Dworkin. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 90-94 (1978).

individual rights litigation in the United States, the Supreme Court has opted to apply different tests, different "tiers" of analysis, depending on the classification of the right or interest involved. The courts of most other western democracies have opted instead for a single analytical framework, generally labeled "proportionality" analysis.[4] The American multi-tiered approach might be expected to lead to more predictable outcomes, yet, in recent decades, the application of these tests has become progressively less determinative of outcomes. Strict scrutiny seems not quite so strict; low level rational basis analysis is not quite so deferential to government and the creation of a new intermediate scrutiny, not to mention a range of tests for specific First Amendment categories, has only added to the confusion.

This article will explore how the explicit adoption of proportionality analysis as a single analytical tool might lead, not only to a more coherent approach to individual rights cases, but will also bring together aspects of the current multiple analytical tiers in a way that allows full consideration of both the individual rights and the social values present in these cases.

Part I of this article will give a brief overview of the history of the creation and application of the various tiers of analysis used by the United States Supreme Court and explore how the once-sharp difference in those applications have blurred in recent years. Part II will describe the proportionality analysis used by other nations' courts in a wide range of individual rights cases. Part III will focus on how an explicit adoption of proportionality might lead to significant improvement in the analysis of cases presenting issues under the free exercise clause, currently a particularly confusing and contentious source of debate.

4. *See generally* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012).

I. The Three Tiers of Analysis: A Short History

Some form of balancing in the resolution of individual rights claims under the United States Constitution is inevitable. Occasionally, this will be due to the language of the relevant constitutional provision itself, such as the Fourth Amendment's prohibition of "unreasonable" searches and seizures.[5] But more often, it will be due to the severe problems associated with any attempt to declare that a right is absolute. Of course, one might say that the Fourth and Fourteenth Amendments provide an "absolute" right to "due process" of law,[6] and the Eighth Amendment "absolutely" bans "cruel and unusual punishments."[7] But in cases such as these, the balancing will occur in the process of defining, rather than applying, the provision.

There have been occasional defenders of the concept of absolute constitutional rights, at least in specific contexts. Justice Hugo Black famously advocated "absolute" protection of speech under the First Amendment.[8] But he was able to do so only by excluding from his definition of the speech protected absolutely a great deal of communicative behavior that his colleagues brought within the protection of the Amendment.[9] In other words, he was employing his own version of balancing in order to protect his commitment to absolutism. Ronald Dworkin maintained that rights were "trumps" that always outweighed mere societal interests.[10] But that did not eliminate the need to

5. U.S. CONST. amend. IV.

6. U.S. CONST. amends. IV, XIV.

7. U.S. CONST. amend VIII.

8. *See, e.g.*, Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., Black, J., dissenting) (insisting that material considered obscene was still entitled to First Amendment protection); Dennis v. United States, 341 U.S. 494, 580-81 (1951) (Black, J., dissenting) (rejecting any reasonableness test in cases involving advocacy of subversive activity).

9. Justice Black would not have given First Amendment protection to public school students protesting American involvement in the Vietnam War by wearing black armbands. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting). Nor would he give First Amendment protection to a protester wearing a jacket with an offensive word on it in public. Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., joined by Burger, C.J., and Black, J., dissenting).

10. *See generally* DWORKIN, *supra* note 3.

engage in a form of balancing in defining the scope of the right. And, of course, when rights conflict with other rights, a different type of balancing is required.

Balancing, thus, is inevitable in some form. Of course, it still has its critics. Balancing two things of the same kind may yield predictable results, but how does one confidently balance things that are unlike each other?[11] Does that uncertainty give the balancer too much leeway to simply impose his or her own preferences? Does the indeterminacy of balancing delegitimize the entire project? In theory, perhaps, and yet experience shows that some form of balancing in constitutional rights cases is inevitable.

But conceding the inevitability of balancing is just the first step. What kind of balancing to employ? Those suspicious of the indeterminacy of balancing would be expected to try to make it more determinate. And one way to try to minimize indeterminacy is to do your balancing at the wholesale, rather than the retail, level. In other words, declare that categories of individual activity (or government action), after weighing their significance against the competing interest, cut so sharply in favor or against permitting the right to prevail, that a decision in any individual case falling within this category becomes nearly automatic. Against this background, the evolution of "tier" related constitutional analysis can be understood.

The 1905 Supreme Court case of *Lochner v. New York*[12] can be viewed as the starting point for development of what would become at least two of the tiers of modern constitutional rights analysis. The 5-4 decision invalidating New York's statutory limits on the hours worked by those employed as bakers produced three opinions, one for the Court majority, and two in dissent. Justice Peckham, writing for the majority, found that the right to freely contract with regard to labor conditions was well-recognized and subsumed in the Fourteenth Amendment's Due Process Clause.[13] This would require New York to satisfy a

11. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (commenting that attempting to balance incommensurate interests is "like judging whether a particular line is longer than a particular rock is heavy").

12. Lochner v. New York, 198 U.S. 45 (1905).

13. *Id.* at 52-53.

stringent test to justify the regulation. To be valid, it would need to be shown necessary to promote the important state interest in health and safety.[14] Applying what would evolve into the modern strict scrutiny test, Justice Peckham invalidated the statute.[15]

Sharply dissenting, Justice Holmes advocated a highly deferential approach to a legislative choice to regulate when the regulation was challenged under the Due Process Clause.[16] Justice Holmes would invalidate the statute only when it was clear that no rational legislator could have believed the legislation was a reasonable step toward achieving a legitimate goal.[17] The Holmes approach would grow into what would later be designated the low-level rational basis or minimal scrutiny test. For decades, the approaches of Justices Peckham and Holmes would contend for recognition in a variety of constitutional contexts.

As those following Justice Peckham and those following Justice Holmes would contend over the years, the third opinion in *Lochner* seemed to fade into the background, if not disappear entirely from the conversation. Justice Harlan, writing in dissent for himself and two colleagues, rejected Justice Peckham's approach, but would not go quite so far in deference to the legislature as Justice Holmes.[18] Harlan would defer to the state when the state could produce a reasonable amount of evidence in support of the health and safety purpose and effect of the statute, with no further need to weigh that evidence against evidence to the contrary, or to insist on the absolute necessity of the state's act.[19] This middle-ground alternative to strict or minimal scrutiny would receive little attention for quite some time.

14. *Id.* at 58.

15. *Id.* at 64-65.

16. *Id.* at 74-76 (Holmes, J., dissenting).

17. *Id.* at 76.

18. Lochner v. New York, 198 U.S. 45, 65-72 (1905) (Harlan, J., dissenting).

19. *Id.* at 69 ("[T]he court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health"). The court should not interfere merely because the means are "not the wisest or best." *Id.* at 68.

If the virtue of what would become known as strict scrutiny was, at least in part, its predictability, the three decades of the *Lochner* era are somewhat puzzling. Instead of consistently rejecting state law regulating working conditions, the Supreme Court decisions turned on the Court's view of just what types of workers and industries truly required regulation.[20] And so, while bakers working hours could not be regulated, those of miners could;[21] women could receive protection that men could not;[22] and despite the obvious practical connection between workers' wages and hours, states could not regulate wages, even where hours were subject to limitation.[23] Did the Peckham approach clarify the law, or merely install the Supreme Court as a supreme legislature?

Lochner, of course, did not survive. In a series of cases in the 1930s and 1940s, the Court made it clear that state regulation of economic matters would be subject only to the low-level rational basis scrutiny advocated by Justice Holmes in his *Lochner* dissent.[24] But a significant question remained: Was *Lochner* wrong because its early version of strict scrutiny was always inappropriate, or only because that test was applied in the wrong category of cases? The Court began to address this question in the late 1930s.

In *United States v. Carolene Products Co.*,[25] Justice Stone, writing for the Court, included what is usually regarded as the most famous footnote in Supreme Court history. His "footnote 4" suggested that a heightened level of scrutiny would be appropriate where the Court was faced with one of three types

20. *Id.* at 54-59 (recognizing that "the kind of employment" and "the character of the employe[e]s" might make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor).

21. *Id.* at 75 (citing Holden v. Hardy, 169 U.S. 366 (1898) (upholding maximum hour legislation applying to underground miners)).

22. Muller v. Oregon, 208 U.S. 412 (1908) (upholding maximum hour legislation for women workers).

23. Adkins v. Children's Hosp. of D.C., 261 U.S. 525 (1923) (invalidating legislation creating a minimum wage for women workers).

24. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins, 261 U.S. at 525, and upholding the minimum wage statute); Nebbia v. New York, 291 U.S. 502 (1934) (upholding a price regulation of milk aimed at stabilizing output during Great Depression).

25. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

of legislation.[26] The first was a statute in conflict with a specifically enumerated constitutional right. The second included statutes that interfered with the proper functioning of the democratic process. And finally, heightened scrutiny would be called for when a statute disadvantaged a "discrete and insular" minority group.[27]

The 1944 case of *Korematsu v. United States*[28] presented the Court with a clear example of a statute disadvantage, a "discrete and insular" racial minority. The case challenged the World War II practice of removing Japanese-Americans from the West Coast to internment camps for the duration of the war.[29] In language that can be seen as the birth of the modern, post-*Lochner* era, strict scrutiny test, the Court declared that only "[p]ressing public necessity" could justify the practice.[30] But, ironically, the case that revived strict scrutiny also stands as the only Supreme Court decision in modern times that held that a facially racial classification was justified by such necessity.[31] History has largely repudiated the holding of *Korematsu* (and vindicated the dissenting opinions of Justices Jackson, Murphy, and Roberts),[32] but the principle of subjecting racial classification to a test of "pressing public necessity" survives, and demonstrated its power in *Brown v. Board of Education*[33] and subsequent cases invalidating government sponsored racial discrimination.

By the early 1960s the test that could trace its history back to *Lochner* had gained a new name: "strict scrutiny." The "pressing public necessity" standard of *Korematsu* had been unpacked in a two-step requirement. Government, in order to satisfy strict scrutiny, must demonstrate that the statute had a compelling purpose, and was necessary to achieve the purpose

26. *Id.* at 152 n.4.
27. *Id.*
28. *See* Korematsu v. United States, 323 U.S. 214 (1944).
29. *Id.* at 216-17.
30. *Id.* at 216.
31. *Id.* at 223-24.
32. In 1988, Congress enacted legislation acknowledging the "fundamental injustice" of the relocation program and providing restitution to Japanese-Americans forced to leave their homes. Civil Liberties Act of 1988, Pub. L. No. 100-338, 102 Stat. 903 (1988).
33. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

(often referred to as the absence of any less restrictive alternative).[34] Early application of strict scrutiny went beyond the context of equal protection cases involving race, to include First Amendment claims, both involving free speech[35] and free exercise,[36] and cases involving voting rights.[37]

Each of these applications fell within the boundaries of Justice Stone's "footnote 4" suggestion of the proper scope of heightened scrutiny.[38] More controversial, however, was the Court's revival of substantive due process in *Griswold v. Connecticut*.[39] Connecticut's longstanding, but rarely, if ever, enforced, prohibition on the use of contraceptives that extended even to married couples did not implicate an enumerated constitutional right, despite Justice Douglas's contention that the privacy right involved was part of the "penumbra" of Bill of Rights provisions,[40] and Justice Goldberg's reference to the open ended language of the Ninth Amendment.[41] While *Griswold's* narrow holding with respect to the privacy rights of married couples with respect to contraceptive decisions would not by itself change much state or federal law, the recognition of privacy, without a clear definition of the concept's scope, as a fundamental right that triggered strict scrutiny analysis of any government limitation would lead to intense controversy in subsequent years.

By the 1960s, the crucial nature of the Supreme Court's initial decision on rights was evident. Professor Gerald Gunther, perhaps the era's most respected constitutional scholar, famously stated that strict scrutiny was a test "strict in theory, fatal in fact",[42] in other words, essentially calling for per

34. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986).

35. *See, e.g.*, Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994) (holding content-sensitive restrictions subject to strict scrutiny).

36. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (holding the denial of religiously based exemption from statutory duty to accept Saturday work as a condition of receiving state unemployment benefits is subject to strict scrutiny).

37. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 676 (1966) (invalidating poll tax).

38. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

39. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

40. *Id.* at 483.

41. *Id.* at 486-93 (Goldberg, J., concurring).

42. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical*

se invalidation of the state action. On the other hand, low-level rational basis scrutiny, following the lead of Holmes in his *Lochner* dissent, essentially led to a finding of per se validity.

But as the 1960s gave way to the 1970s, the supposed clarity of the two-tier analysis that led to automatic outcomes began to show cracks. Perhaps most obviously, this took place in the Supreme Court's gender discrimination cases. Prior to 1971, the Court had never suggested that a distinction made by the government on the basis of sex was in any way suspect. To the contrary, the Court upheld such distinctions with little analysis.[43] In the 1971 case of *Reed v. Reed*,[44] however, the Court struck down a gender-based classification for the first time. Idaho provided that in appointing an administrator for the estate of a decedent who died without a will the probate court should, when male and female relatives of the decedent were of the same relation to him or her, choose the male relative.[45] The Court struck down the statutory provision, but claimed to be doing so after applying only minimal rational basis scrutiny.[46] The State had defended the statute as in pursuance of efficiency by eliminating the need for a hearing on the qualifications of the male and female relatives, and the presumption that the male would likely have more experience with financial matters.[47] While the stereotyping is obvious today in the latter conclusion, could it be said in 1971 that such a presumption was entirely irrational under the highly deferential sense that Holmes had advocated? Was *Reed* actually a strict scrutiny case that could not bring itself to declare its actual analytical basis?

Analysis of Strict Scrutiny in the Federal Courts, 59 VAND. L. REV. 793, 794 (2006) (referring to an analysis of the extent to which Gunther's quip is still accurate).

43. *See* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding jury selection system that excluded women except those who affirmatively indicated desire to serve); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding Michigan statute prohibiting women who were not wives or daughters of tavern owners from working there as a bartender); Bradwell v. Illinois, 83 U.S. 130 (1873) (upholding Illinois restriction of bar membership for law practice to men).

44. *See* Reed v. Reed, 404 U.S. 71, 77 (1971).

45. *Id.*

46. *Id.* at 76 (holding that a classification must be reasonable, not arbitrary).

47. *Id.* at 74.

Two years later, the Court in *Frontiero v. Richardson*[48] seemed to shift to a strict scrutiny analysis for gender discrimination cases. The Court invalidated the federal statute that created a presumption that the civilian wife of a male member of the military was financially dependent on him, entitling the couple to spousal benefits, while requiring a civilian husband to establish actual dependency on his military wife's income.[49] Justice Brennan, writing for a four-justice plurality, found that this gender-based distinction should be subjected to heightened scrutiny.[50] He was joined by four concurring justices who did not specify the level of scrutiny they thought appropriate.[51] Nevertheless, many thought that *Frontiero* had made strict scrutiny the appropriate test for gender discrimination claims in the future.

But a series of cases over the next few years made that assumption highly questionable. Using language that sounded more like rational basis than strict scrutiny analysis, the Court struck down two statutory distinctions between males and females and upheld two others.[52] Finally, in 1976 the Court resolved the question of the appropriate level of scrutiny in gender discrimination cases. In *Craig v. Boren*,[53] the Court invalidated Oklahoma's different male and female ages for alcohol consumption.[54] In doing so, it turned neither to minimal

48. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

49. *Id.* at 679-80.

50. *Id.* at 688.

51. *Id.* at 691-92 (Powell, J., concurring) ("It is unnecessary for the Court in this case to characterize sex as a suspect classification") Chief Justice Burger and Justice Blackmun joined Justice Powell's concurrence. Justice Stevens wrote a one-sentence concurrence, and Justice Rehnquist dissented. *Id.*

52. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 637-38 (1975) (invalidating a Social Security Act provision enabling widowed mothers, but not widowed fathers, to benefit based on earnings of deceased spouse); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating a regulation requiring school teachers to take maternity leave long before their due date). *But see* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (upholding federal statute allowing women in the Navy a longer period of time in which to earn promotion than men before being discharged); Kahn v. Shevin 416 U.S. 351, 360 (1974) (upholding property tax exemption for widows but not widowers).

53. *See* Craig v. Boren, 429 U.S. 190 (1976).

54. *Id.* at 210.

or strict scrutiny, but settled on a new third tier, less rigorous than strict scrutiny, but more so than low-level rational basis analysis. Logically enough, this test would become known as intermediate scrutiny.[55] To defend a sex-based classification, government would now need to demonstrate an important (rather than either a compelling or merely legitimate) state interest and demonstrate a substantial (rather than either a necessary or minimally rational) reason for recognizing gender differences in addressing the state interest.[56] Unsurprisingly, this new level of scrutiny would lead to less certain outcomes.[57]

As a new tier of analysis was born, developments in cases involving both low-level scrutiny and strict scrutiny were making those tests somewhat less determinative. A series of Supreme Court decisions applying the minimal rational basis test nevertheless invalidated the challenged government action by finding that the asserted government intent was illegitimate. In *United States v. Moreno*,[58] the Court invalidated an amendment to the Food Stamp Act that had the effect of disqualifying low-income unrelated adults who were living together from the program.[59] The Court found that the amendment was motivated by simple hostility to "hippie" lifestyle choices, and not to any legitimate purpose of the Act.[60] In *Cleburne v. Cleburne Living Center*,[61] the Court declined to apply heightened scrutiny to a local zoning decision refusing a special use permit for the operation of a group home for mentally disabled residents. Nevertheless, the Court invalidated the decision under rational basis analysis, finding that the decision was a product of "irrational prejudice" against the mentally

55. *Id.* at 197.

56. *Id.*

57. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding selective service registration requirement imposed only on males); Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464 (1981) (upholding statutory rape statue punishing teenage male but not teenage female rapists). *But see* United States v. Virginia, 518 U.S. 515 (1996) (invalidating state military academy restriction to male cadets); J.E.B. v. Alabama, 511 U.S. 127 (1994) (holding preemptory challenges to jurors based on sex unconstitutional).

58. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

59. *Id.* at 529-30.

60. *Id.* at 534-35.

61. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

disabled.[62]

Two decades later, the Court would invalidate an amendment to the Colorado State Constitution that would prohibit the state or any subdivision from enacting legislation that protected gays and lesbians from discrimination.[63] Noting that a wide range of other groups, not protected as suspect classes under the Equal Protection Clause of the United States Constitution, could freely seek legislative protection from discrimination by their states, the Colorado amendment's closing off any such legislative protection for only a single class of citizens could be seen as resting on nothing more than mere hostility toward that group.[64] Under cases such as *Moreno*, such hostility could not serve as a legitimate purpose.[65]

Romer v. Evans,[66] the Colorado amendment case, would foreshadow subsequent decisions on homosexual rights. *Lawrence v. Texas*[67] struck down the Texas statute that criminalized homosexual activity. In doing so, the Court neither held that sexual orientation was a suspect classification for purposes of the Equal Protection Clause, nor that consensual sexual activity by adults was a fundamental right for purposes of Due Process analysis, but rather applied the rational basis test.[68] Justice Kennedy, writing for the Court, found that the fact that the statute might accurately reflect the moral sentiments of most Texans was inadequate to provide a legitimate state interest for the statute.[69] Unsurprisingly, dissenting justices noted that legislative enforcement of majoritarian views of immorality was hardly uncommon,[70] and had been widely assumed to be valid. The Supreme Court's

62. *Id.* at 450.
63. Romer v. Evans, 517 U.S. 620 (1996).
64. *Id.* at 634-35.
65. See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 528 (1973).
66. *Romer*, 517 U.S. at 634-35.
67. *See* Lawrence v. Texas, 539 U.S. 558 (2003).
68. *Id.* at 578 ("The Texas statute furthers no legitimate state interest").
69. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) ("[T]he fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice").
70. *Id.* at 590 (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. at 196) ("The law . . . is constantly based on notions of morality").

Obergefell[71] decision, striking down state restrictions on same-sex marriage, while often seen as the third case in the Court's gay rights trilogy, could expressly employ strict scrutiny based upon the earlier recognition of marriage as a fundamental right.[72] *Lawrence*, however, claims to be a minimal scrutiny case, expanding the earlier holding that mere hostility to a group cannot serve as a legitimate state interest[73] to include the principle that majority views of immorality, standing alone, are also insufficient to justify a restriction on personal liberty.

Just as minimal rational basis scrutiny can no longer be seen as leading to automatic affirmance of the challenged statute, strict scrutiny can no longer be seen as, in Gunther's formulation, "strict in theory, fatal in fact."[74] This is most evident in the Supreme Court's treatment of race-based affirmative action programs in higher education. In the Court's 1977 *Bakke*[75] decision rejecting the suggestion of dissenting justices that a program using race to compensate racial minorities for their earlier victimization should be subjected to only intermediate scrutiny when challenged under the Equal Protection Clause,[76] the Court held that strict scrutiny would be applied to racial classification regardless of which racial group was disadvantaged.[77] While the affirmative action program was invalidated, dicta in Justice Powell's opinion suggested that some such programs could survive.[78] After decades of debate over the significance of Powell's dicta, more recent cases have shown that selective institutions of higher learning may, in fact, use race as a factor in admissions decisions when it is done in a

71. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

72. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (using strict scrutiny to strike down state refusal to grant marriage license to man in arrears on child support payment); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating prohibition on interracial marriage).

73. *See* Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

74. *See* Winkler, *supra* note 42.

75. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

76. *Id.* at 356-62 (Brennan, J., dissenting).

77. *Id.* at 305.

78. *Id.* at 316-17 (discussing with approval the Harvard College undergraduate admissions program).

narrowly tailored way, despite the rigor of strict scrutiny.[79]

In 1963, the Supreme Court held that strict scrutiny was the appropriate test to use in assessing a state's refusal to grant an exemption to a generally applicate statute where the exemption was sought on the grounds of the free exercise clause of the First Amendment.[80] As will be discussed in more detail below, after a few subsequent cases applying strict scrutiny to insist that the state grant the exemption,[81] the Court began a string of free exercise cases that upheld the government's decision, either by carving out an exception to strict scrutiny or by declaring that the government had satisfied the test.[82] By 1990, free exercise analysis had become so muddled that Justice Scalia, writing for a five justice majority could claim that strict scrutiny never actually was the Court's standard.[83] The Court's *Smith* decision held that strict scrutiny would apply in free exercise claims only where the statute or practice of government was not one generally applicable, but rather singled out religious believers for disadvantage out of hostility toward religion.[84] In other cases, minimal scrutiny would suffice.

The struggle to settle on an appropriate tier of analysis has been obvious in the debate over abortion rights. In 1973, *Roe v. Wade*[85] held that strict scrutiny would be applied to any

79. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016) (upholding affirmative action plan at the University of Texas); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding affirmative action plan at University of Michigan Law School).

80. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

81. *See, e.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (unemployment benefits cannot be denied to pacifist who quit rather than work on building military equipment); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Old Order Amish granted exemption from statute requiring that children remain in formal schooling until age 16).

82. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding prison regulation prohibiting Islamic inmates from holding Friday religious service using reasonableness standard); Goldman v. Weinberger, 475 U.S. 503 (1986) (Orthodox Jewish military officer not entitled to exemption from military uniform regulations).

83. Emp't Div., Dep't of Human Resc. of Or. v. Smith, 494 U.S. 872, 878-79 (1990).

84. *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (ordinance applying only to religious ritualistic animal sacrifice invalidated under strict scrutiny).

85. *See* Roe v. Wade, 410 U.S. 113 (1973).

government attempt to limit first and second-trimester abortions. In *Roe's* wake, strict scrutiny in its traditional rigorous form led to a fairly consistent series of decisions striking down regulations short of criminalization.[86] But as political opposition to abortion rights grew in the 1980s, significant judicial opposition followed. With changes in the composition of the Supreme Court by the end of the decade, many foresaw the Court reversing *Roe* and returning abortion restrictions to analysis under minimal scrutiny.

In 1992, *Planned Parenthood v. Casey*[87] presented the Court with an opportunity to reaffirm *Roe*-like scrutiny or to return abortion restitutions to pre-*Roe* minimal scrutiny. Neither posits could command the votes of a majority. Four justices did call for abandoning *Roe's* strict scrutiny and returning to the rational basis test.[88] Two justices, in contrast, strongly defended strict scrutiny.[89] Justices O'Connor, Souter and Kennedy joined neither approach, and in a joint opinion, put forward a middle ground.[90]

Rather than simply invoking intermediate scrutiny, the joint opinion added an analytical step that divided abortion restrictions into two categories. If a restriction posed an "undue burden" that would stand as a significant obstacle to a woman's pre-viability abortion, strict scrutiny would be applied.[91] If the regulation did not present such a burden, rational basis analysis would be sufficient.[92] The undue burden test clearly makes outcomes less determinate. In *Casey* itself, it led to the invalidation of only one of three challenged Pennsylvania's statutory provisions.[93] And in the two significant Supreme

86. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983) (invalidating requirement that all abortions after the first trimester be performed in hospitals); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (invalidating requirement that a married woman gain consent of her husband for an abortion).

87. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

88. *Id.* at 944-78 (Rehnquist, C.J., concurring in part and dissenting in part); *id*. at 979-1002 (Scalia, J., concurring in part and dissenting in part).

89. *Id.* at 912-22 (Stevens, J., concurring in part and dissenting part); *id.* at 922-943 (Blackmun, J., concurring in part and dissenting in part).

90. *Id.* at 843-911.

91. *Id.* at 874-77.

92. *Id.*

93. Planned Parenthood v. Casey, 505 U.S. 833, 987-88 (1992) (striking

Court decisions involving abortion restrictions since *Casey*, the Court has decided one in favor of the state, and one against. In *Gonzalez v. Carhart*,[94] the Court upheld a federal statute prohibiting a particular method of late-term abortion.[95] Justice Kennedy cast the deciding vote and wrote the Court's opinion, while his co-author of *Casey's* joint opinion, Justice Souter, dissented.[96] More recently, however, Justice Kennedy joined the majority opinion of Justice Breyer in *Whole Women's Health Center v. Hellerstedt*,[97] which struck down a number of Texas statutory regulations on abortion providers.

First Amendment free speech cases have developed their own context-specific tests. While there are a few general principles, for example, that content-sensitive regulation will receive greater scrutiny than content-neutral provisions, it can be stated that a wide range of tests have emerged depending on the category of speech regulated and the nature of the regulation. Some of these resemble strict scrutiny,[98] others suggest a more rational basis analysis.[99] Still, others seem to suggest an intermediate scrutiny, either in their stated standards or their application.[100] Government acts or statutes imposing subsequent punishment on speech,[101] those that impose prior restraints by administrative or judicial action,[102] and those that merely regulate time, place, and manner,[103] are

down spousal notification requirement).

94. *See* Gonzalez v. Carhart, 550 U.S. 124 (2007).

95. *Id.* at 134-136.

96. *Id.* at 169-191 (Ginsburg, J., dissenting).

97. *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

98. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (strong protection for symbolic political speech).

99. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1980) (zoning ordinance limiting "adult motion picture theatres" upheld).

100. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (intermediate test applied to regulation of commercial speech).

101. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003) (hate speech must present "true threat" in order to warrant punishment); Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech must satisfy an incitement standard to validate punishing speech).

102. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (denial of parade permit may not be based on content of the speech); Near v. Minnesota, 283 U.S. 697 (1931) (injunctions against speech held to extremely high standard).

103. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989).

subjected to different levels of scrutiny, even where the category of speech involved is fully within First Amendment protection.

First Amendment claims seeking access to public property for speech activity are subject to different analysis depending on the classification of the property involved as a public forum or not.[104] And a range of speech categories once thought to be beyond the scope of the First Amendment, such as defamation,[105] commercial speech,[106] obscenity,[107] and others, have been given at least limited protection under their own category-specific tests. And as new media emerges, courts must determine whether to create new tests or to fit them into existing categories. While the elements of this myriad of tests overlap to some extent, it is still necessary to recognize their separate identity and their separate aspects. Just recalling the names of the tests, usually derived from the Supreme Court case first or most clearly enunciating them, can be a challenge.

More than a century after *Lochner* had laid down the building blocks of strict scrutiny and minimal rationality as alternative approaches in constitutional rights cases, we have seen the heirs of Justice Peckham and Justice Holmes contend for preeminence, but recent decades have seen, across a number of constitutional contexts, unease with either of those sharply opposed positions. This has led to a number of approaches pushing the strict scrutiny and rational basis tests away from leading to near per se validity or invalidity of statutes, and the creation to new analytical tools standing between the two classic opposites. A new generation of jurists seem to be rediscovering the wisdom of the often forgotten *Lochner* dissent of Justice Harlan, seeking some middle ground,[108] one more deferential than strict scrutiny, but requiring more analysis than Holmes would require.

(regulations aimed at excessive noise upheld).

104. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (airport concourses).

105. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (standards applied in cases of "public figures" and others); New York Times v. Sullivan, 376 U.S. 254 (1964) (alleged defamation of public official).

106. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm., 447 U.S. 557 (1980).

107. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

108. *See* Lochner v. New York, 198 U.S. 45 (1905).

The virtue of the strict scrutiny—minimal scrutiny dyad would seem to lie in its greater degree of predictability. The alternatives are more indeterminate, in the interest of taking account of the context of specific decisions. Each of the tests asks important questions, but is there a way to preserve the value of these questions yet end the judicial quibbling over which the appropriate labelled test is being applied as it should be, or is merely another test in disguise?

II. Proportionality: An Alternative to Current Approaches

Proportionality is hardly a new concept. As a principle that demands that a balance be struck, it can appear in private decision-making, under the guise of cost-benefit analysis. Whether under the label of cost-benefit analysis or otherwise, decisions by legislators and government regulators constantly employ proportionality analysis.[109] While the outcomes of such analysis may be controversial, the use of proportionality balancing is hardly controversial. Indeed, it is inevitable. Whether legislation sets the extent of punishment for particular crimes,[110] the amount of tolerable pollution discharged from factories,[111] the relative rights of landlords and tenants,[112] or innumerable other things, balances must be struck.

When we take proportionality out of the legislative or administrative realm and look at it when used by courts to review the balances struck by the political branches, its legitimacy may be seen as less obvious. Legislators must, after all, balance; they have no choice. Judges, on the other hand, can

109. *See* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 13-26 (2009) (tracing the concept back to early "just war" principles).

110. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (discussing the provision of the Anti-Drug Abuse Act of 1986 and its provisions treating possession and sale of crack cocaine for more seriously than the possession and sale of powder cocaine).

111. *See* Citizens Against Refinery's Effects, Inc. v. U.S. Envtl. Prot. Agency, 643 F.2d 183 (4th Cir. 1981) (discussing Clean Air Act of 1967).

112. *See generally* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2490&context=mlr.

always simply defer rather than do their own balancing.[113] Judicial invocation of proportionality balancing is least controversial, of course, when judges are framing common law doctrine. Here, they are acting as a sort of quasi-legislator, but in a well-accepted context.

And so, the common law principle that contract damages are limited to compensating foreseeable losses, as well as the principle that contract damages must be compensatory rather than punitive, were framed by judges using common law reasoning.[114] In tort law, Judge Learned Hand famously framed a balancing test to apply to the thorny problem of proximate cause.[115] When judges engage in proportionality analysis to review the decisions of other decision makers, however, the results can be more controversial.

In criminal law contexts, whether under the label of "reasonableness," proportionality, or elsewhere, the concept is well represented. Drawing its authority from the constitutional prohibitions on cruel and unusual punishment and excessive fines,[116] as well as the general guarantee of due process,[117] the Supreme Court has placed at least some limits on the severity of criminal punishment, sometimes making explicit reference to the concept of proportionality.[118] While continuing to reject the contention that the death penalty is always a violation of the Eighth Amendment, the Court has set forth limitations on its use based in proportionality review. In *Coker v. Georgia*,[119] the Court held that the death penalty for rape was grossly disproportionate. The Court laid down the following test:

113. CASS R. SUNSTEIN, CONSTITUTIONAL PERSONAE 10-15 (2015) (discussing different roles assumed by judges, specifically the "soldier" role, where judges believe in simply "following orders" in deferring to other branches of government).

114. *See* SULLIVAN & FRASE, *supra* note 109, at 37-49.

115. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

116. U.S. CONST. amend VIII.

117. U.S. CONST. amends. IV, XIV.

118. See SULLIVAN & FRASE, *supra* note 109, at 91-168, for an overview of the use of proportionality in U.S. Supreme Court cases involving criminal justice issues.

119. *See* Coker v. Georgia, 433 U.S. 584 (1977).

> [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.[120]

A punishment is disproportionate when it no longer bears a sufficient relationship to the goals of punishment recognized as legitimate–primarily deterrence and retribution.[121] The "cruel and unusual" language of the Eighth Amendment, then, implicitly includes a prohibition on excessive punishment. And because even the most draconian punishment might achieve some degree of deterrent or retributive effect, the implication is clear that the punishment must be somewhat more effective in securing these ends than an easily identifiable and available lesser punishment. In *Coker*, that was life imprisonment.[122]

The Court has been much more reluctant to recognize a proportionality requirement in reviewing the length of prison terms. In *Solem v. Helm*,[123] the only case in which the Court has found a prison sentence to be unconstitutionally lengthy, Justice Powell's opinion for the Court stated that while legislative judgments on prison terms were entitled to great deference and a reversal of such legislative decisions should be "exceedingly rare," courts were empowered to weigh proportionality in such cases by examining, (1) "the gravity of the offense and the harshness of the penalty,"[124] (2) "the sentences imposed on other criminals in the same jurisdiction,"[125] and (3) "compar[ison of] the sentences imposed for commission of the same crime in other jurisdictions."[126] A few years later, the Court rejected a claim that a mandatory life sentence for a first offense of possession of

120. *Id.* at 592 (citation omitted).

121. *Id.*

122. *Id.* at 594 (the Court noted the strong trend in state legislatures against capital punishment for rape).

123. *See generally* Solem v. Helm, 463 U.S. 277 (1983).

124. *Id.* at 291.

125. *Id.*

126. *Id.* at 291-92.

a significant amount of cocaine was unconstitutional.[127] Justice Scalia, joined by Chief Justice Rehnquist, disputed the contention that the length of a prison term could ever violate the Eighth Amendment.[128]

Three concurring justices recognized the possibility that a prison sentence could be unconstitutionally disproportionate, but found that the "narrow" proportionality principle of *Solem* should be invoked to overturn legislative judgments in such cases where "extreme sentences . . . [were] 'grossly disproportionate' to the crime."[129]

The Supreme Court has yet to find that a fine violated the Excessive Fines Clause due to its disproportion to the offense, but the Court has invoked the Clause to invalidate a civil or criminal forfeiture.[130] To the extent that the forfeiture is designed to punish rather than simply act in a remedial way, the forfeiture could not be "grossly disproportionate" to the gravity and harm caused by the offense.[131]

Shifting attention from the Eighth Amendment to the Fourth, Fifth, and Sixth Amendments, the Court's engagement in some degree of social cost-benefit analysis is obvious, and, to some extent, inevitable. The Fourth Amendment bar on "unreasonable" searches requires balancing of some sort. The Court's frequent return to the scope of the *Miranda*[132] doctrine seems to be a textbook example of cost-benefit analysis, as does the Court's determination of the Sixth Amendment insofar as it requires the state to provide counsel for indigent defendants.[133]

Apart from criminal law issues, the Supreme Court has employed proportionality review in a few contexts not falling into the category of rights cases that traditionally call for the use

127. Harmelin v. Michigan, 501 U.S. 957 (1991).

128. *Id.* at 994-95.

129. *Id.* at 1001 (Kennedy, J., concurring in part) (citation omitted).

130. *See* United States v. Bajakajian, 524 U.S. 321, 334-40 (1998).

131. *Id. See also* Austin v. United States, 509 U.S. 602, 609-10 (1993).

132. *See* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that criminal defendants are entitled to information on their rights to silence).

133. Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent defendants are entitled to appointed counsel); SULLIVAN & FRASE, *supra* note 109, at 95-114 (discussing the explicit and implicit use of proportionality principles in the Supreme Court's definition of the rights of criminal defendants).

of one of the three recognized tiers of review. The first context involves the imposition of punitive damages in civil cases. In 1989, the Court rejected the contention that the Eight Amendment Excessive Fines Clause was relevant in cases not involving government-imposed punitive measures.[134] Subsequent cases, however, found that the Due Process Clause could serve as a basis for limiting punitive damages, as such damages were entitled to a presumption of validity, and rejected the use of the traditional heightened scrutiny tiers of review to such awards.[135]

Finally, in *BMW v. Gore*[136] and *State Farm v. Campbell*,[137] the Court invalidated punitive damage awards as excessive, and established a framework for assessing such awards under the Due Process Clause. First, the trial court should assess the blameworthiness of the defendant's conduct and the actual and potential harm caused by the defendant's wrongful acts.[138] Second, the size of the punitive damage award should be proportionate to the actual harm.[139] Unless the defendant's acts were particularly egregious, the Court suggested that a ratio of more than a single-digit to one of the punitive to compensatory damages would be suspect.[140] Finally, a trial court should consider whether a punitive damage award was necessary to deter future misconduct.[141]

In considering when the imposition of conditions on landowners seeking development permits might violate the Takings Clause of the Fifth and Fourteenth Amendments, the Supreme Court held that a valid condition must be "roughly proportional" in its goals of alleviating the public burdens created by the proposed development.[142] As in the case of punitive damages, the test is relatively easy to state, however it

134. *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

135. *See* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

136. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

137. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

138. *Gore*, 517 U.S. at 575-80.

139. *Id.* at 580-82.

140. *Id.*

141. *Id.* at 583-85.

142. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

may be difficult to calculate in an individual case. Does the condition go beyond simply alleviating the threatened public harm caused by the development?[143]

These discrete references to proportionality in cases calling for a form of cost-benefit analysis show that the Supreme Court has recognized the usefulness of the concept. But how, if at all, can that be applied in cases involving equal protection, substantive due process, or First Amendment issues? Would proportionality threaten the insights developed in the application of the three tiers of analysis currently in use?

Western democracies have developed proportionality tests for the application of rights provisions that, while perhaps differing in detail, employ similar analytical steps.[144] An examination of these steps will reveal their similarity to the analytical steps required in the application of the tier-based analysis used in the United States. The first step is to determine whether the specific claim falls within the scope of the constitutional right.[145] While many cases will fall easily either within or without the scope of the rights, some will not be that clear.[146] And if the determination of the initial question is resolved within a system limiting the treatment of claims to two options, one leading to essentially guaranteeing that the claim will prevail (strict scrutiny) and the other promising almost inevitable rejection of the claim (minimal scrutiny), the resolution of this threshold question is critical.

A clear example in First Amendment speech clause jurisprudence involves the activity usually designated as "symbolic speech," that is, activity not involving the use of words

143. *Id.* at 391.

144. *See generally* BARAK, *supra* note 4 (probably the most comprehensive single volume overview of the use of proportionality in individual rights cases decided by courts in western democracies).

145. *Id.* at 45-83. Barak maintains that a constitutional rights provision should be interpreted "generously." *Id.* at 69 (citing, among other cases, the Supreme Court of Canada's statement in R v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 (Can.) (interpreting freedom of conscience provision of the Canadian Charter of Rights and Freedoms)).

146. The United States Supreme Court has had to wrestle, for example, with the issue of what belief systems qualify as "religions" since the 1960s. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

but conveying a message.[147] Over the years, the Supreme Court has developed a relatively generous test to resolve the question of when wordless activity can qualify for the First Amendment protection.[148] But at the same time, the Court was developing analytical tests that rejected absolute protection in favor of some type of balancing. Justice Black, famous for his advocacy of absolute First Amendment protections, objected to the Court's extension of the protection to forms of wordless activity.[149] Both Black and his judicial adversaries 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.[150]

Similarly, the development of the Due Process privacy right established in *Griswold* have largely turned on the disposition of this initial analytical question. If the consequences of placing something within the scope of the *Griswold* privacy right leads to near absolute protection, we can anticipate a reluctance by the Court to take that step. On the other hand, a narrow scope of the privacy right, to the extent that it deprives the claimant of any chance of success, will be unacceptable to a more rights-sensitive decision-maker. While proportionately requires the same initial step as the current tier-sensitive approach, the stakes of this step are less dramatic. If including a particular claim within the scope of a right does not guarantee that the claimant will prevail, but only opens the door to further analysis, we might expect that the courts will be more open to a broad scope of such rights as privacy or free speech.

At this point, it would also be helpful to assess the weight of the alleged right.[151] Whether framed in terms of a dichotomy

147. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); United States v. O'Brien, 391 U.S. 367 (1968).

148. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Johnson*, 491 U.S. at 404 (alteration in original) (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

149. *See supra* notes 8-9 and accompanying text.

150. *See generally* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357 (2012).

151. The weight of the right will come into play in the final, "balancing"

between rights that are "fundamental" and those less weighty, or on a scale recognizing different levels of significance, the weight of the right will come into play later in the analysis of the state's action for its proportionality.[152] But it is important to note that the absence of a right traditionally labelled "fundamental" does not end the analysis. Only a determination that the claim is outside the scope of the right entirely will do that.

The next step of a proportionality analysis, unsurprisingly, is the identification of the state's interest, or as some courts put it, the "public purpose" of the limitation of the right.[153] American courts do this routinely in an effort to label the state's interest as "compelling," "important," or merely "legitimate." The failure to satisfy the court that the state's interest is "compelling" (or at least important) will essentially invalidate the state action if it conflicts with a right deemed "fundamental."[154] But if the scope of rights that are fundamental is unclear, the lines between compelling, important, and merely legitimate state interests are perhaps even more so. Rather than allowing the categorization of government interests to essentially cut the analysis short, typical proportionality review will ask only whether the interest is proper.[155] The strength of the interest will come into play at a later stage. Only the failure to identify a "proper" interest will end the analysis. This is not significantly different from the outcome of American cases where the state has fallen short of even establishing a legitimate interest.

The third step in the proportionality analysis will be to determine whether there is a rational relationship between the state's proper interest and the steps taken that allegedly violate the asserted right.[156] Of course, such a step could be taken with varying degrees of rigor. As was the case with the two prior tests, it would seem that a more generous view would be appropriate. In short, this step incorporates something very

step of the proportionality test. *See* BARAK, *supra* note 4, at 359-67.

152. *Id.*

153. BARAK, *supra* note 4, at 245-98.

154. See *supra* notes 12-53 and accompanying text, for the discussion of the traditional tiers of review.

155. The proper purpose test is a "threshold" test that entails no need to balance. BARAK, *supra* note 4, at 246-47.

156. *Id.* at 303-16.

similar to the minimum scrutiny applied in American cases lacking a claim of a fundamental right. Only a disconnect so striking as to suggest that the stated purpose of the state action is actually a pretense will fail to satisfy this step.[157]

The fourth step of the proportionality analysis is often framed as an inquiry into whether the state's action is "necessary" to satisfy the state's purpose.[158] To American lawyers, the term will evoke strict scrutiny, and serve as an almost insurmountable obstacle to successfully defining the state action. But typically, judicial systems invoking the proportionality analysis do not apply this test in its rigid form that makes it nearly a per se rule of invalidity.[159] Rather than insist on absolute necessity, or the absence of any conceivable less restrictive alternative, however burdensome that alternative might be, proportionality at this stage asks whether there is a reasonably clear and practical alternative that would satisfy the proper government interest to substantially the same extent that this challenged practice does.[160] Note the difference here between this "necessity" test and the usual application of the test in the American strict scrutiny analysis. Under strict scrutiny, the existence of a less restrictive alternative that would allow the government to pursue the proper purpose, but to a lesser extent, should lead to invalidation of the current restriction. But in the proportionality test, only the presence of an alternative that does not impose costs to government in its pursuit of proper goals stops the analysis at this point and decides in favor of the right claim.[161] But if no such alternative exists, analysis proceeds to the final step, the balancing test that is of the essence of proportionality.

Prior to this point, the analysis of each step skews against an early resolution of the case by requiring less of both the rights

157. The rational basis component "is not a balancing test," ruling out only government acts that entirely fail to advance the proper purpose. *Id.* at 315.

158. *Id.* at 317-39.

159. A law fails the necessity test only where an available alternative "can fulfill the law's purpose at the same level of intensity and efficiency as the means determined by the limiting law." *Id.* at 323.

160. *Id.*

161. The necessity test, like the rational basis test, is a "threshold" test, not an ultimate balancing test. BARAK, *supra* note 4, at 338-39.

of the claimant and the government than would be the case in a regime of heightened scrutiny. But here, the relative weight of the impairment of the right and the strength of the government interest must be placed in balance and the case decided.[162] This, of course, is where the critics of proportionality or any balancing test will object most vigorously. When competing interests are of the same nature, where, for example, each party's loss can be measured in dollars, balancing may be appropriate. But where the competing interests to be balanced are of different kinds, is the process hopelessly indeterminate?[163] But as we have seen, discomfort with the supposedly more determinative strict scrutiny and minimal scrutiny tests has made them significantly indeterminate already, a trend showing little sign of coming to a halt.[164]

Aharon Barak responds to the criticism of proportionality as, at best, no improvement on a simple test asking to balance the importance of the individual right against the importance of the social value sought by government, by explaining that the test of proportionality at this stage is much more limited. "[T]he issue is not the comparison of the general social importance of the purpose (security, public safety, etc.) on the one hand and the general social importance of preventing harm to the constitutional right (equality, freedom of expression, etc.) on the other."[165] Such balancing is clearly subject to criticism that it improperly ignores the relevant facts of each case.[166]

Barak points out that proportionality as employed by European, Canadian, and other courts calls for a test focusing on the "marginal benefit" to social welfare and the "marginal harm" to the right. Barak explains:

> [Proportionality balancing] refers to the comparison between the state of the purpose prior to the law's enactment, compared with that state

162. *Id.* at 340-70.

163. Barak recognizes the practical and theoretical problems with balancing two things at disparate as social purpose and individual rights. *Id.* at 350.

164. *See supra* notes 44-107 and accompanying text.

165. BARAK, *supra* note 4, at 351.

166. BARAK, *supra* note 4, at 351-52.

> afterwards, and the state of the constitutional right prior to the law's enactment compared with its state after enactment. Accordingly, we are comparing the marginal social importance of the benefit gained by the limiting law and the marginal social importance of preventing the harm to the constitutional right caused by the limiting law. The question is whether the weight of the marginal social importance of the benefits is heavier than the weight of the marginal social importance of preventing the harm.[167]

This test does call for a consideration of the general overall importance of both the right and the social interest involved. In terms familiar to American lawyers, it will be important to determine which rights are fundamental, which social interests are compelling, and so on. A small marginal harm to a fundamental right might outweigh a significant marginal harm to a relatively unimportant social interest, or vice versa. But the analysis is more precise than simply weighing the right in its general nature against the general importance of the social value sought by government.[168]

As a further clarification of the final balancing test of proportionality, Barak calls for consideration of whether there are alternative approaches that the government might take that would be proportional under the marginal harms/benefits test and would strike a better balance.[169] At an earlier stage of the proportionality analysis, we asked whether the government action was necessary to achieve the social interest. At that stage, the government action would fail only if there was an easily identifiable alternative that would satisfy the social interest to the full extent that the current practice does.[170] At this balancing stage, however, a more detailed analysis is called for. Perhaps an alternative, although reasonably available, will have some negative impact on the state's ability to achieve its social goals. At this stage of analysis, the degree to which that

167. *Id.*
168. *Id.* at 351-52.
169. *Id.* at 352-57.
170. *Id.* at 321.

is true is considered as part of the balancing of marginal benefits and harms.[171] The existence of a less restrictive alternative is by no means unusual in American constitutional analysis.[172] But here, it is not a question of the existence or non-existence of such an alternative, but rather a more sophisticated inquiry into how the alternative would shift the balance of the rights and interests that is required.

The similarities and differences between the proportionality analysis and the American approach of categorizing rights and giving them, as a category, either exceptionally strong protection or little at all, can be seen in a number of free speech cases decided by the Supreme Court of Canada. In 1982, the Charter of Rights and Freedom was added to the Canadian Constitution.[173] For the first time, the Charter entrenched a list of rights limiting parliamentary supremacy, a doctrine inherited from the United Kingdom. Unlike the language of the Bill of Rights of the United States Constitution, however, the Charter itself eschews any notion that the rights contained are absolute. Section One of the Charter provides that the rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[174] Some degree of balancing, then, is clearly provided for.

In 1986, the Supreme Court of Canada set out the framework for analysis under Section One in *R. v. Oakes*.[175] After determining that a Charter right had been limited and that the government had responded by pointing to an interest "of sufficient importance to warrant overriding a constitutionally protected right,"[176] an interest "pressing and

171. "The issue, therefore, focuses on the constitutionality of the weight of the marginal social importance of the benefit and harm" of the individual right and the government interest in the individual case. *Id.* at 352.

172. The existence of a less restrictive alternative was found to be present and significant in Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), for example.

173. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, §§ 1-33 (U.K.). *See generally* DAVID MILNE, THE NEW CANADIAN CONSTITUTION (1982).

174. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 1 (U.K.).

175. R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).

176. *Id.* at 138 (quoting R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, 352 (Can.)).

substantial in a free and democratic society,"[177] the Court would apply the following test:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."[178]

Some, focusing on the statement that the government must impair the right "as little as possible,"[179] saw the *Oakes* test as something very close to the American strict scrutiny test. However, subsequent cases made it clear that the reference to proportionality calls for something more flexible and less rigorous.[180]

American First Amendment law has largely consisted of recognizing distinct categories of speech, with some entitled to less, or even no constitutional protections.[181] Over the years, these categories have shifted, generally in the direction of greater protection, but the instinct to create and maintain categorical approaches remains. In contrast, Canadian courts will apply the single proportionality test of *Oakes* to any instance of communicative activity.

177. *Id.* at 138-39 (citation omitted).

178. *Id.* at 139.

179. *Id.*

180. Justice Bertha Wilson advocated an approach to the *Oakes* test that was similar to strict scrutiny in American law but concluded that "although the Court continues to pay lip service to the strict *Oakes* test, in many of the judgments it has in fact applied it in a less rigorous fashion." Bertha Wilson, *Constitutional Advocacy*, 24 OTTAWA L. REV. 265, 267-69 (1992).

181. *See generally* Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495 (2015).

The United States Supreme Court, using a categorical approach to free speech cases, has wrestled with the question of just what qualifies as speech as opposed to action. In the 1940's, the Court implicitly found that commercial advertising was simply commercial activity rather than protected speech.[182] Decades later, the Court abandoned that position, and has come close to providing full First Amendment protection for advertising, provided that it is not false or misleading.[183]

Canadian proportionality analysis approaches the question differently. Initially, little or no time need be spent determining whether advertising raises a free speech issue under the Charter. Any activity that "conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee."[184] But that determination merely begins the analysis. In assessing the provision of the Quebec Consumer Protection Act prohibiting most commercial advertising directed at children under the age of thirteen, the Court went on to weigh the interests involved.

The Court found "[t]he protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising" was a "pressing and substantial" objective.[185] While the evidence that children at or close to age thirteen are particularly vulnerable was weaker than that involving children younger than seven, the Court held that the legislature must have some leeway in setting the precise line at which children will be protected.[186]

The Court had no trouble finding "that a ban on advertising directed to children is rationally connected to the objective of protecting children from advertising."[187] On the less obvious question of whether the means chosen impaired the right of expression "as little as possible," the Court chose something less rigorous than an insistence on the least restrictive option.

182. *See* Valentine v. Christensen, 316 U.S. 53 (1942).

183. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

184. Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927, 969 (Can.).

185. *Id.* at 987.

186. *Id.* at 990.

187. *Id.* at 991.

> While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment . . . require legislatures to choose the least ambitious means to protect vulnerable groups.[188]

Taking account of both the expressive elements of the advertising and its ultimate purpose to maximize commercial profit, the Court struck the balance in favor of the regulation, without minimizing either interest present in the case.

The proportionality test need not result in outcomes less protective of commercial speech than American cases. In *Rocket v. Royal College of Dental Surgeons*,[189] the Court considered serious restrictions placed on advertising by dentists pursuant to authority granted to the Royal College by the Health Disciplines Act. The regulation limited advertising to the name, address, telephone number, and office hours of a dentist.[190] It also regulated the "means and manner" of advertising, prohibiting any conduct that would be reasonably seen as "disgraceful, dishonourable or unprofessional."[191] The Court had "no difficulty" in holding that the objectives of maintaining high levels of professionalism and protecting the public from misleading advertising were sufficiently important to justify infringement of the right of free expression.[192] However, the Court found that the regulation was disproportionate to its objectives, particularly in its limitation of the amount of accurate information that a dentist could convey.[193] Again, the Court noted that the motive of the advertising was "primarily

188. *Id.* at 999.

189. *See* Rocket v. Royal Coll. of Dental Surgeons, [1990] 2 S.C.R. 232 (Can.).

190. *Id.* at 237.

191. *Id.* at 237.

192. *Id.* at 250.

193. *Id.* at 247.

economic."[194] But, at the same time, "expression of this kind does serve an important public interest by enhancing the ability of patients to make informed choices."[195] Commenting on the best way to approach commercial speech cases, Justice McLachlin wrote:

> These two opposing factors—that the expression is designed only to increase profit, and that the expression plays an important role in consumer choice—will be present in most if not all cases of commercial expression. Their precise mix, however, will vary greatly, which is why I believe it is inadvisable to create a special and standardized test for restrictions on commercial expression, as has been done in the United States.[196]

The use of a single test for the expression cases allows a full examination of the competing interests by eliminating the temptation to shut analysis down at an early stage by categorization and the application of either too lenient, or too strict a level of scrutiny, depending on the category of expression at issue.

An even more striking example of the contrast between the categorical approach and its various tests, on the one hand, and the proportionality test, on the other, can be found in cases involving pornography and obscenity. In 1957, to little surprise, the United States Supreme Court held that obscenity was unprotected by the First Amendment.[197] The Court explained that the reason for this was that obscene material lacked any social value.[198] While the judicial definition of obscenity changed over the years,[199] along with public tolerance of pornographic

194. *Id.* at 250-51.

195. Rocket v. Royal Coll. of Dental Surgeons, [1990] 2 S.C.R. 232, 247 (Can.).

196. *Id.*

197. *See* Roth v. United States, 354 U.S. 476, 514-15 (1957).

198. *Id.* at 484-85.

199. *See* Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966); *Roth*, 354 U.S. at 484 (holding that in order to prosecute material as obscene, the state

material, the basic premise remains. Obscenity, largely defined by the absence of any significant social value, as well as its level of conflict with community standards,[200] is an unprotected category. While the definitional inquiry into the presence or absence of social value in the work can be seen as presenting a form of balancing, the focus on a definition to determine whether the work fits a category limits a full consideration of the state and individual interests involved.

In its 1992 decision, *Butler v. The Queen*,[201] the Supreme Court of Canada considered a challenge to the provision of the Criminal Code of Canada prohibiting the possession, sale, and public display of obscene material, defined as "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence."[202]

Initially, of course, the Canadian Supreme Court determined that offensiveness could not remove obscenity from the protection of the Charter's speech provision.[203] But once again, this led not to automatic invalidation of the prohibition, but rather to application of the Section One balancing test. While the Court rejected the contention that Parliament could justify infringement of a Charter freedom by merely invoking "legal moralism," (the use of the law to "impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community")[204] it accepted as legitimate the Parliamentary goal of combating violence "degradation, humiliation" and the maintenance of gender inequality.[205] Having found that the prohibition of obscenity was rationally related to such goals, the Court turned to the question of whether it advances them with minimal impairment

must prove it is "utterly without redeeming social importance").

200. *See* Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatres v. Slaton, 413 U.S. 49, 67 (1973). Each case broadened the scope of legally obscene material to include work that lacked "serious" literary, artistic, political or scientific value, rather than the *Memoirs* and *Roth* standard of "utterly" lacking such value.

201. R. v. Butler, [1992] 1 S.C.R. 452 (Can.).

202. Criminal Code, R.S.C. 1985, c C-46, § 163(8) (Can.).

203. R. v. Butler, [1992] 1 S.C.R. 452, 486-89 (Can.).

204. *Id.* at 492.

205. *Id.* at 493.

to free speech right.

The Court concluded that the statute satisfied the test.[206] In doing so, it reviewed the existing tests for determining whether a work is "undue exploitation," and concluded that under a synthesis of the tests, only a minimal amount of material would actually be proscribed.[207] Here, the Court's balancing test employs its own process of categorization, not to determine whether obscenity is entitled to some Charter protection, but rather to determine whether the questioned work falls within a statute reasonably limited to cause minimum impairment of the free speech right. Justice Sopinka stated that "[p]ornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing."[208] Pornography that falls into the first category "will almost always constitute the undue exploitation of sex;"[209] work that falls into the second category "may be undue if the risk of harm is substantial;"[210] material in the third category "is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production."[211] In addition to all of this, the Court noted that "materials which have scientific, artistic or literary merit" do not constitute undue exploitation of sex; "the court must be generous in its application" of this defense.[212]

The balance struck by the Court in *Butler* can be criticized as being either too deferential to the legislature or too protective of pornographic material, but the analysis does attempt to recognize and take seriously both the right of expression and the genuine social concerns presented. The *Butler* approach can be contrasted with *American Booksellers v. Hudnut*,[213] in which the Seventh Circuit Court of Appeals invalidated an Indianapolis

206. *Id.* at 504-09.
207. *Id.* at 484-85.
208. R. v. Butler, [1992] 1 S.C.R. 452, 484 (Can.).
209. *Id.* at 485.
210. *Id.*
211. *Id.*
212. *Id.* at 505.
213. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

ordinance that attempted to create liability for the dissemination of pornography (not limited to obscenity) on the ground that there is a causal relationship between the pornography and gender-based violence or discrimination.[214]

Drawing a sharp categorical distinction between obscene and all other sexually oriented material minimizes the need for courts to seriously evaluate the strength of the contending interests involved. The Indianapolis ordinance may well have failed the *Butler* proportionality approach, but the categorical approach eliminates the need to assess the actual strength of the threats to individual expression and significant social objectives.

The maintenance of separate categories with different levels of scrutiny, as opposed to a single proportionality test, can also limit the ability of courts to use analogical reasoning where appropriate. When considering a California statute limiting the sale of violent video games to minors, the Supreme Court did little more than note that, unlike obscenity, there was no category of violent media that called for limited First Amendment protection and struck the restriction down.[215] Justice Breyer dissented.[216]

Breyer, who has shown some enthusiasm for proportionality analysis in his separate opinions,[217] noted that the restrictions placed minimal burdens on video game companies that already voluntarily labelled violent game as inappropriate for minors, and on minors themselves, who could have access to the games if they were given the games by parents or other adults who made the actual purchases.[218] He further noted that the Court has consistently upheld restrictions that placed age limitations on the sale or purchase of non-obscene sexually oriented material.[219] The balance of interests in each of these cases seems roughly equivalent, yet the use of rigid categories, rather than a

214. *Id.* at 330-32.

215. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 805 (2011).

216. *Id.* at 840-57 (Breyer, J., dissenting).

217. *See, e.g.*, Ewing v. California, 538 U.S. 11, 47-52 (2003) (Breyer, J., dissenting) (holding that a 25-year sentence under "three strikes" law is "overkill").

218. *Brown*, 564 U.S. at 848.

219. *Id.* at 848-49. While Breyer applies strict scrutiny, his stress on the importance of the state interest in protecting children, and the minor intrusion on free speech, closely resembles proportionality analysis.

single proportionality test, forecloses careful consideration of whether similar treatment is appropriate.

A proportionality test might well lead to more careful consideration of legislation by legislators themselves. In *United States v. Stevens*,[220] the Supreme Court invalidated a federal statute that prohibited the sale or distribution of videos of intentional animal cruelty.[221] The specific target of the statute was a genre known as "crush videos," aimed at viewers who derive sexual pleasure from viewing small animals crushed by women in high heels.[222] The Court found the statute significantly overbroad.[223]

The government defended the statute by maintaining that depictions of animal cruelty should become a new category of unprotected speech.[224] The Court rejected the argument.[225] At the same time, Chief Justice Roberts noted that a more narrowly focused statute might survive First Amendment review.[226] The categorical approach, with its all-or-nothing aspects, can easily lead to legislation unconcerned with overbreadth. In contrast, anticipating the use of proportionality by a reviewing court should motivate legislators to more carefully tailor statues at their inception.

There may be no area of constitutional rights litigation in which continued adherence to the language of tier analysis has led to more confusion then the Free Exercise Clause. The next section will explore how the introduction of proportionality might, whether changing outcomes or not, at least make what courts are doing more transparent.

III. Proportionality in Free Exercise Analysis

The Supreme Court has been anything but consistent over the years in its approach to the scope of the Free Exercise Clause of the First Amendment. In 1878, the Court considered the

220. *See* United States v. Stevens, 559 U.S. 460 (2010).
221. *Id.*
222. *Id.* at 465.
223. *Id.* at 472-75.
224. *Id.* at 468-70.
225. *Id.* at 471.
226. United States v. Stevens, 559 U.S. 460, 481 (2010).

claim of a Mormon polygamist that the Free Exercise Clause justified the performance of a religious duty, in this case, plural marriage, despite the federal statute criminalizing polygamy in the territories.[227] The Court upheld the conviction, defining the scope of the Free Exercise Clause in terms that made it not only narrow, but also somewhat duplicative of the First Amendment's protection of speech.[228]

Drawing on a letter written by Thomas Jefferson,[229] the Court made a distinction between the limitation on government's power "to intrude . . . into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency" and the legitimate power of government "to interfere when principles break out into overt acts against peace and good order."[230] In short, the Free Exercise Clause protected belief and advocacy, but actions were only protected by the general constitutional requirements that later generations would refer to as the low-level "rational basis" test.

This remained the standard for free exercise analysis for decades. Believers were successful in a number of cases that presented situations involving speech-related issues. In *Cantwell v. Connecticut*,[231] religious solicitors succeeded in challenging a local licensing system that permitted the administrator excessive discretion to label a cause as nonreligious. In *West Virginia Board of Education v. Barnette*,[232] the Court invalidated a compulsory flag-salute requirement as applied to public school students who objected on religious grounds.

Decisions involving religious advocacy were not always decided in favor of the believers, however. In *Chaplinsky v. New*

227. *See* Reynolds v. United States, 98 U.S. 145 (1878).

228. *Id.* at 163 (holding that Congress could not "intrude his powers into the field of opinion, and . . . restrain the profession or propagation of principles," but could act where "overt acts" threatened "peace and good order.").

229. *Id.* at 164 (citing Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802)).

230. *Id.* at 163 (quoting H.D. 82, 1779 Gen. Assemb., Reg. Sess. (Va. 1779)).

231. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

232. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Hampshire,[233] the Defendant's conviction for hurling "fighting words" at a constable was affirmed with no particular attention given to the religious message being delivered by the street preacher.[234] And in *Prince v. Massachusetts*,[235] the Court rejected a free exercise challenge to a statute prohibiting the use of children in religious solicitations.[236]

Not until 1963 did the Supreme Court find in favor of a petitioner claiming a free exercise exemption from a generally applicable statutory duty where the claim rested entirely on conduct rather than speech or belief alone. In *Sherbert v. Verner*,[237] a Seventh-Day Adventist was unable to qualify for unemployment benefits from South Carolina due to her refusal to accept appropriate employment that would require work on Saturday, which would violate Adventist principles.[238]

The Court noted that South Carolina had forced the applicant "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion."[239] When such a burden is placed on a believer, the Court held it would be necessary for the state to justify it under the strict scrutiny analysis developed in equal protection cases.[240] The state would have to present a compelling state interest and demonstrate that its refusal to accommodate was necessary to satisfy that interest. The Court dismissed as unconvincing the State's suggestion that "fraudulent claims by unscrupulous claimants feigning religious objection," would threaten the unemployment compensation funds.[241]

Sherbert established strict scrutiny as the norm for free exercise analysis, and this was reinforced nine years later in *Wisconsin v. Yoder*.[242] Members of Amish communities had no

233. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

234. *Id.* at 570 (the trial court excluded as irrelevant testimony that the defendant's purpose was "to preach the true facts of the Bible").

235. *See* Prince v. Massachusetts, 321 U.S. 158 (1944).

236. *Id.* at 170-71.

237. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

238. *Id.* at 406-07.

239. *Id.* at 404.

240. *Id.* at 406.

241. *Id.* at 407.

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

objection to sending their children to school through the eighth grade (typically until age fourteen), but objected to the requirement that their children attend public or private school until age sixteen.[243] The Amish maintained that the high schools their children would have to attend until age sixteen would impart values and skills likely to alienate the children from the Amish "church community separate and apart from the world and worldly influence," a concept "central to their faith."[244]

Applying strict scrutiny, the Court found that Wisconsin did have a compelling interest in seeing that young people had sufficient education to become productive members of society.[245] But, taking account of the history of Amish self-sufficiency and peaceful and law-abiding coexistence with the larger non-Amish world, the Court held that Wisconsin had failed to demonstrate that its insistence on two years of high school, with no exception for the Amish, was necessary to further that interest.[246]

While *Yoder* could be viewed as a case presenting several rights claims, including parental rights and speech-related First Amendment rights along with free exercise claim, it was widely viewed as a restatement of the *Sherbert* principle applying strict scrutiny to free exercise cases. In the years following *Yoder*, however, free exercise strict scrutiny appeared to be a far weaker test than most would expect it to be.

Is achieving the optimal pedestrian crowd flow at the Minnesota State Fair really a compelling state interest?[247] Is denying a military psychologist the right to wear a yarmulke on military bases necessary to preserve the government's compelling interest in consistent uniform standards?[248] These and other cases led commentators to note that free exercise strict scrutiny was rather feeble.[249]

243. *Id.* at 210.

244. *Id.*

245. *Id.* at 221.

246. *Id.* at 234-36.

247. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (holding that there was no free exercise exemption from regulation limiting solicitation at fairgrounds to fixed spot).

248. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that there was no free exercise exemption from military uniform requirements).

249. *See* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U.L. REV. 437,

When the Court considered *Employment Division v. Smith*[250] in 1990, few would have expected a serious shift in the articulation or application of the free exercise analytical standards. Claimants were Native American Church members who ingested peyote for sacramental purposes.[251] Their peyote use led to their discharge from employment by a private drug rehabilitation program and their inability to qualify for unemployment compensation because they had been dismissed for misconduct.[252] The Oregon Supreme Court upheld their right to an exemption claim based on the Free Exercise Clause.[253]

As a case involving unemployment compensation, *Smith* could be seen as squarely within the scope of *Sherbert*. But unlike earlier unemployment-related cases, this one presented a "war on drugs" justification for the denial of the exemption. The Court has shown little inclination to interfere with government efforts to fight illegal drug use, whether the issue presented involves the Fourth Amendment,[254] the First Amendment's Free Speech Clause,[255] or federalism.[256] Few would have expected Smith to prevail; most would have anticipated the Court to apply its "feeble" version of free exercise strict scrutiny[257] and reverse the Oregon Supreme Court. But, as discussed above, Justice Scalia writing for a five-justice majority, held that strict scrutiny was inappropriate when the exemption sought was from a statute of general applicability, and did not actually discriminate against religion.[258]

446-47 (1994) (playing on Gunther's phrase, the authors state that post-*Sherbert* strict scrutiny had become "strict in theory but feeble in fact").

250. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

251. *Id.* at 874.

252. *Id.*

253. *See* Smith v. Emp't Div., 763 P.2d 146 (Or. 1988), *rev'd* 494 U.S. 872 (1990).

254. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (holding that a minor traffic violation justifies police stop in "high drug area").

255. *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007) (holding that a school may punish students for speech that is perceived as advocating use of illegal drugs).

256. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (holding that Congress may penalize grower of marijuana for own use under the Commerce Clause).

257. *See* Eisgruber & Sager, *supra* note 249.

258. *See supra* notes 79-83 and accompanying text.

Given Justice Scalia's general hostility toward balancing tests,[259] it would seem likely that he intended to clarify free exercise analysis and make it more predictable. Subsequent developments, however, have seriously undermined this goal. While the academic response to *Smith* was mixed,[260] reaction in the political world was sharply negative. Religious conservatives saw a threat to believers, while religious and secular liberals saw an unfortunate contraction of individual rights. Congress responded to *Smith* with the 1993 enactment of the Religious Freedom Restoration Act,[261] which essentially instructed federal courts to apply pre-*Smith* standards to free exercise claims. In its first encounter with the Act, the Supreme Court held in *City of Boerne v. Flores*,[262] that the Act was unconstitutional, at least insofar as it set a standard for review of state and local government actions.

Congress had based the Act on its power to enforce the Fourteenth Amendment restrictions on state action.[263] Revisiting a longstanding debate concerning the scope of this authority, the Court held that it did not include the authority to define the scope of the right itself, a task entrusted to the courts, but only to provide enforcement of the right as defined by the Court.[264] The scope of the Free Exercise Clause, as defined by the Court, extends no further than to protect against antireligious discrimination.[265] Here, the Court saw the Act as attempting to extend the scope of the right to include protection against application of neutral statutes of general application to religious believers in some circumstances.[266]

But the *City of Boerne* decision only invalidated the Act insofar as it invoked the Fourteenth Amendment to limit the states. Congress may, of course, amend its own statutes, and

259. *See supra* note 11 and accompanying text.

260. *Compare* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (critical of *Smith*), with Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099 (defending *Smith*).

261. 42 U.S.C. § 2000bb (2012).

262. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

263. *Id.* at 529.

264. *Id.* at 529-36.

265. *Id.* at 529.

266. *Id.* at 532.

the Act remains effective where religious exemptions are sought against federal statutes.[267] And Congress, relying on its Article I powers enacted the Religious Land Use and Institutionalized Persons Act.[268] As the title makes clear, the Act dealt with free exercise claims in two different contexts, each at the state or local level.

Where a local land use restriction places a "substantial burden" on religious exercise, it must be both nondiscriminatory toward religious uses, and also be the least restrictive means of achieving a compelling government interest.[269] Similarly, regulations that substantially limit free exercise by prisoners or other institutionalized persons in institutions receiving federal financial support are entitled to an exemption unless the state can meet a similar test.[270]

States are free, of course, to extend rights contained in their own constitutions beyond the scope of the analogous federal right, provided that the decision does not conflict with another federally-guaranteed right. In the wake of Smith, many states took legislative or judicial action to interpret state free exercise guarantees to require *Sherbert*-like strict scrutiny to justify refusals to grant religious exemptions to generally applicable statutes.[271] While one may argue that this creates a potential conflict with the First Amendment Establishment Clause, the Supreme Court has suggested that states have some leeway in balancing free exercise and non-establishment principles.[272]

267. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (strict scrutiny applied to free exercise exemption claim against federal statute).

268. 42 U.S.C. § 2000cc (2012).

269. *Id.*

270. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (applying the Act in a case brought by a prisoner denied access to religious literature and ceremonial items).

271. *See generally* Symposium, *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. 513 (1999).

272. *See* Locke v. Davey, 540 U.S. 712 (2004) (holding that the state may apply its own establishment clause more strictly than called for by the First Amendment Establishment Clause); *but see* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (holding that Missouri's state constitutional establishment clause must yield to free exercise demands of equal treatment of religious institution).

Thus, the appropriate level of scrutiny in free exercise cases will depend on whether the claim is based on the First Amendment, federal statutes, or state law. If the relevant test is the pre-*Smith*, *Sherbert* standard, a more interesting question arises. The language of compelling government interest and least restrictive means suggests a test that will be extremely difficult for government to satisfy. But as we have seen, during the decades between *Sherbert* and *Smith*, the Court found ways to uphold government refusals to grant exemptions while giving lip service to strict scrutiny.[273]

Balancing factors can find the way into cases that on their face call for strict scrutiny. In free exercise cases, an initial inquiry as to the religious nature of the claim itself can derail strict scrutiny. Similarly, when the claim is based on a statute protecting against "substantial" interference with free exercise, the claim can fail at this stage if the court holds that the government interference is less than substantial.[274] And even where the strict scrutiny test is invoked, pre-*Smith* cases demonstrate the extent to which courts may give substantial deference in situations involving prison authorities or military decisions.[275]

Proportionality may or may not lead to different outcomes in free exercise cases, but it would create a simple, and more sensitive approach. *Smith* itself can be compared to a remarkably similar case from the Constitutional Court of South Africa. In *Prince v. President of the Cape Law Society*,[276] the Appellant had been barred from admission to the practice of law because he had been convicted of illegal possession of marijuana and insisted he would continue to use marijuana as required by his Rastafarian religious belief.[277]

273. *See supra* notes 245-244 and accompanying text.

274. *See generally* Karla L. Chaffee & Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437 (2009).

275. *See supra* note 81 and accompanying text.

276. *See Prince v. President of the Cape Law Society* 2002 (2) SA 784 (CC) (S. Afr.).

277. *Id.* ¶ 142.

The Court engaged in an "evaluation of proportionality" as called for by the provision of the South Africa Constitution that provides:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.[278]

Applying this standard, the Court rejected the applicant's claim for a religiously based exemption.[279] In doing so, the majority explicitly rejected the majority view of the United States Supreme Court in *Smith*, endorsing instead the *Smith* minority approach, which the South African Court characterized as a "balancing analysis."[280] That the Court struck the balance in this case in favor of the government is evidence that proportionality does not necessarily result in greatly enhanced protection for the individual. Although he wrote in dissent, Justice Sachs no doubt expressed the view of the South Africa Court as to the value of proportionality:

> Limitations analysis under our Constitution is based not on formal or categorical reasoning but on processes of balancing and proportionality as required by section 36. This Court has accordingly rejected the view of the majority in the United

278. *Id.* ¶ 128 n.49 (quoting S. AFR. CONST., 1996 § 36(1)).
279. *Id.* ¶ 139.
280. *Id.* ¶ 128.

> States Supreme Court that it is an inevitable outcome of democracy that in a multi-faith society minority religions may find themselves without remedy against burdens imposed upon them by formally neutral laws. Equally, on the other hand, it would not accept as an inevitable outcome of constitutionalism that each and every statutory restriction on religious practice must be invalidated. On the contrary, limitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights.[281]

A further example of how the use of proportionality analysis in free exercise cases can lead to a more sensitive consideration of relevant factors is found in the recent decision of the Supreme Court of Canada in *Movement Laique Quebecois v. Saguenay (City)*.[282] Plaintiffs challenged the practice of the Saguenay City Council of beginning each session with a Christian prayer.[283] Only months earlier, the United States Supreme Court had considered a similar factual situation in *Town of Greece v. Galloway*.[284] In *Town of Greece*, the Court classified the case as one presenting an Establishment Clause issue, and decided, primarily on the basis of precedent, that legislative bodies may open their session with formal spoken prayer.[285]

The Canadian Constitution does not contain an equivalent of the First Amendment Establishment Clause. But the Supreme Court of Canada has recognized that government neutrality toward religion can be seen as an aspect of the protection of religious freedom of the individual. And so, in cases

281. *Id.* ¶ 155 (Sachs, J., dissenting) (citations omitted).

282. Mouvement laïque québécois v. Saguenay (City), [2015] 2 S.C.R. 3 (Can.).

283. *Id.* at 14.

284. Town of Greece v. Galloway, 134 S. Ct. 1811 (2014).

285. *Id.* at 1820 (Justice Kennedy relied on *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the practice of the Nebraska State Legislature in opening its sessions with a prayer delivered by a chaplain).

involving such issues as Sunday closing laws[286] and prayer in public schools,[287] the Court has reached results similar to those decided in the United States under the Establishment Clause.[288] Ironically, however, in these legislative prayer cases, the Canadian Court more rigorously protects non-establishment principles, despite the absence of an Establishment Clause, than the United States Court.

In a subtle way, separating the Establishment Clause from the Free Exercise Clause may place too much emphasis, in Establishment Clause cases, on the apparent blameworthiness of government action and too little on the individual right involved. Recognizing government neutrality as a means of assuring freedom of religion shifts the focus to the individual rights claimant.

With the focus on the rights granted to the plaintiff, the Court then summarized the test to be applied:

> [T]he criteria developed by the Court in interpreting s. 1 of the *Canadian Charter* apply to the interpretation of s. 9.1 (*Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, at p. 980; *Ford*, at pp. 769-71). The impugned provision must therefore satisfy the justification test enunciated in *Oakes*, which requires the state to prove on a balance of probabilities (1) that the legislative objective is of sufficient importance, in the sense that it relates to pressing and substantial concerns, and (2) that the means chosen to achieve the objective are proportional. This second requirement has three components: (i) the means chosen must be rationally connected to the objective; (ii) they must impair the right in question as little as possible; and (iii) they must not so severely trench on individual or group

286. *See* R v. Big M Drug Mart, Ltd., [1985] 1 S.C.R. 295 (Can.).

287. *See* Zylberberg v. Sudbury Bd. of Educ. (1988), 65 O.R. 2d 641 (Can. Ont. C.A.).

288. *See* Engel v. Vitale, 370 U.S. 421 (1962) (invalidating required recitation of prayer in public schools); *but see* Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing laws).

> rights that the objective is outweighed by the seriousness of the intrusion.[289]

Applying this test, the Court found that the infringement of the rights of non-believers was substantial, and that little attention needed to be paid to much of the balancing test since the City had failed to present an important government interest in the practice.[290] One important point to note is that the Canadian Charter, like many national and international declarations of individual rights dating to the post-World War II era, expands the freedom to include "conscience" in addition to religion,[291] making the sometimes thorny question of what qualifies as a religion for First Amendment purposes irrelevant.

The use of a single proportionality test will not necessarily lead to outcomes significantly similar or different than the use of separate categorical tests, whether in freedom of religion cases or elsewhere. But it does encourage serious consideration of all of the interests presented. An Establishment Clause case is also about freedom of religion; a case seeking a Free Exercise exception from a general duty calls into question government's obligation of religious neutrality. These overlaps have certainly been noticed, but the tendency to place a case in one or another category, leading to one or another separate analytical test, may lead to overvalue or undervalue one of the competing interest involved.

In 2013, the United States Commission on Civil Rights conducted hearings and issued a report considering the conflicting positions presented by demands for statutory or judicial exemption for religious believers from duties of nondiscrimination imposed upon government, individuals and institutions, both religious and other institutions.[292] In addressing the conflicts between free exercise and nondiscrimination values, the Commission would necessarily

289. Mouvement laïque québécois c. Saguenay (City), [2015] 2 S.C.R. 3, para. 90 (Can.) (citation omitted).

290. *Id.* ¶ 150.

291. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948).

292. *See* U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 1-4 (2016).

need to consider a number of contexts presenting a number of statutory and constitutional sources of law.

If an exemption for a federal statutory duty was denied, the relevant standard was that contained in the federal Religious Freedom Restoration Act.[293] If an exemption from a state statutory duty was denied, the relevant standard might be the *Smith* framework, or a more stringent standard set forth in federal law or state Religious Freedom Acts.[294] And in the background of these statutory attempts to protect religious freedom stands the First Amendment Establishment Clause. The Commission's 2016 report stressed that *Smith* and statutory reactions to it made no changes to the demands of the Establishment Clause.[295] At what point does the grant of exemption to religiously-motivated objectors raise Establishment Clause issues? And in addition to the likely need to consider more than one source of law, a claim of an entitlement to an exemption might be raised by an individual, a church, a non-profit institution with church affiliation, or even a for-profit corporation with no obvious religious purpose.

The Commissioners differed sharply, in the official report and recommendations, with the majority findings and recommendations coming down "resoundingly in favor of nondiscrimination"[296] and generally against accommodations:

> (1) schools must be allowed to insist on inclusive values; 2) throughout history, religious doctrines accepted at one time later become viewed as discriminatory, with religions changing accordingly; 3) without exemptions, groups would not use the pretext of religious doctrines to discriminate; 4) a doctrine that distinguishes between beliefs (which should be protected) and conduct (which should conform to the law) is fairer and easier to apply; 5) third parties, such as employees, should not be forced to live under the religious doctrines of their employers [unless the

293. *See supra* note 264 and accompanying text.

294. *See supra* note 268 and accompanying text.

295. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 292, at 25-26 (findings 4-5).

296. *See id.* at 42 (statement of Commissioner Peter Kirsanow).

employer is allowed to impose such constraints by virtue of the ministerial exception]; 6) a basic [civil] right as important as the freedom to marry should not be subject to religious beliefs; and 7) even a widely accepted doctrine such as the ministerial exemption should be subject to review as to whether church employees have religious duties.

Further, specifically with regard to number (2) above, religious doctrines that were widely accepted at one time came to be deemed highly discriminatory, such as slavery, homosexuality bans, and unequal treatment of women, and that what is considered within the purview of religious autonomy at one time would likely change.

Recommendations

1. Overly-broad religious exemptions unduly burden nondiscrimination laws and policies. Federal and state courts, lawmakers, and policy-makers at every level must tailor religious exceptions to civil liberties and civil rights protections as narrowly as applicable law requires.

2. RFRA protects only religious practitioners' First Amendment free exercise rights, and it does not limit others' freedom from government-imposed religious limitations under the Establishment Clause.

3. In the absence of controlling authority to the contrary such as a state-level, RFRA-type statute, the recognition of religious exemptions to nondiscrimination laws and policies should be made pursuant to the holdings of *Employment Division v. Smith*, which protect religious beliefs rather than conduct.

> 4. Federal legislation should be considered to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions and only to the extent that they do not unduly burden civil liberties and civil rights protections against status-based discrimination.
>
> 5. States with RFRA-style laws should amend those statutes to clarify that RFRA creates First Amendment Free Exercise Clause rights only for individuals and religious institutions. States with laws modeled after RFRA must guarantee that those statutes do not unduly burden civil liberties and civil rights with status-based discrimination.[297]

In contrast, dissenting Commissioners argued just as vigorously for broad recognition of statutory and constitutional protection for religiously-based objectors.[298] The existence of separate analytical tests for free exercise and nondiscrimination claims (not to mention the Establishment Clause) may not be the main reason for the sharp, nearly polar opposite, conclusions of the commissioners. But perhaps a single proportionality analysis might force each side to more seriously consider countervailing values, instead of simply declaring themselves champions of nondiscrimination and nonestablishment, on one side, or religious freedom on the other.

297. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 292, at 26-27 (alteration in original).

298. *See id.* at 42-113 (statement of Commissioner Peter Kirsanow arguing that "[t]he findings and recommendations in this report should serve as an alarm to liberty-loving Americans"). While sharply disagreeing with the majority, Kirsanow voted in favor of the report only in order to allow the report to go forward. *Id.*

IV. Conclusion

The use of different tiers of analysis for different categories of rights claims might be seen, at least in part, as an attempt to achieve a level of predictability and precision that are lacking in a more generally applicable balancing test. Yet the attempt to categorize claims as entitled to either little respect or extremely powerful constitutional protection has hardly succeeded in clarifying constitutional law.

The last several decades have shown that a more open-ended balancing approach is not only desirable, but perhaps inevitable. The creation of intermediate scrutiny and First Amendment tests for categories once considered outside of the protection of the Amendment present the clearest evidence of this. But the persistence of labels such as strict scrutiny or the rational basis test, even in cases where they are applied in ways that would puzzle their creators, may be even more significant. How strict is strict scrutiny if it is clearly not "fatal in fact?"[299] Perhaps nowhere is this confusion more obvious than in current free exercise cases, where courts must puzzle over what *Sherbert*-like strict scrutiny really entails.

The problems with the maintenance of different tiers of constitutional analysis has not gone entirely unnoticed in the Supreme Court. Justice Thurgood Marshall expressed discomfort with the division of equal protection cases into those calling for strict scrutiny and others by noting that there is only one equal protection clause rather than multiple clauses for different classes.[300] More recently, Justice Beyer has occasionally suggested an open-ended proportionality test as an alternative to current analytical approaches.[301]

The use of the proportionality test employed by Canadian, European and other courts to evaluate constitutional rights claims brings together all of the factors currently employed in the various American tests, allowing for full consideration of both the interests of the individual and the government in each

299. *See supra* note 42 and accompanying text.

300. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 478 (1985) (Marshall, J., concurring in part and dissenting in part); Plyler v. Doe, 457 U.S. 202, 230-31 (1982) (Marshall, J. concurring).

301. *See supra* notes 213-217 and accompanying text.

case. In any particular case, it may or may not lead to a different outcome than the currently used tests. But it avoids ignoring significant interests downplayed, if not ignored, by the tests.

Adoption of proportionality as a single balancing approach will likely make many uneasy. Libertarians will fear weakening of the supposed advantages of strict scrutiny; majoritarians will fear extending more protection to those currently protected only by low-level rational bans analysis. But both positions are already eroding, and it may be time to recognize that the insights present in each of the current tiers of analysis can be preserved by building them into a generalized proportionality test.